

On September 17, 2021, Citizens for Responsible Solar (CRS) filed an appeal of the San Bernardino County Planning Commission's (Planning Commission) approval of two conditional use permits for Resurgence Solar I, LLC and Resurgence Solar II, LLC (Applicant's) solar repower project (Project) to the San Bernardino County Board of Supervisors. The Project entails decommissioning an existing 150-megawatt (MW) concentrated thermal solar facility (SEGS III through VII) and redeveloping in its place a 150-MW photovoltaic (PV) solar facility, including a 150-MW battery energy storage system (BESS) and associated infrastructure, with no expansion of the site or capacity.

CRS submitted comments to the Planning Commission asserting that the County should evaluate the Project pursuant to an environmental impact report (EIR). Their comments are provided below, edited slightly for clarity. Staff has prepared responses to comments in connection with CRS' appeal to the Board of Supervisors of the Planning Commission's approval of the Project.

**CRS Appeal Comment I:** *Statement of Interest. These comments are submitted on behalf of Citizens for Responsible Solar.*

**County Response to Appeal Comment I:** Noted.

**CRS Appeal Comment II:** *The Staff Report and supporting Project documents fails to comply with CEQA's basic informational requirements, fails to disclose the Project's key differences from the existing solar facility, lacks details in key areas which the public and decision-makers rely upon to assess the Project's significant environmental impacts, and fails to disclose the Project's potentially significant individual and cumulative impacts. The Staff Report fails to include all feasible mitigation measures in order to mitigate the significant impacts of the decommissioning. The County lacks substantial evidence that a categorical exemption from CEQA review applies.*

**County Response to Appeal Comment II:** The Staff Report explains that the Project entails replacing a solar thermal power facility with a PV solar facility, which will involve "redevelop[ing] the site with a new PV solar facility (Resurgence Solar I and II), with up to a total maximum 150 MW of PV/ BESS, including associated infrastructure on the existing footprint with no future expansion of capacity." Extensive details are included in the application for the Project's Conditional Use Permits (CUPs), which are included in the administrative record. Thus, the Staff Report and Project documents adequately describe the Project under review and are substantial evidence supporting the County's determination that the Project meets the requirements for the California Environmental Quality Act (CEQA) Class 2 exemption. (14 Cal. Code Regs § 15302, subd. (c).)

**CRS Appeal Comment III:** *The Project Application and Staff Report explain that, after decommissioning and demolition of the SEGS III-VII solar thermal facility, the Project would redevelop the site for a new PV solar facility that would generate the same amount of energy as the solar thermal facility. The SEGS III-VII Decommissioning Plan provides substantial evidence that the decommissioning of the SEGS facility has potentially significant impacts and includes mitigation measures to reduce project impacts to less than significant.*

*Despite the clear relationship between decommissioning the SEGS facility and constructing the Project, the Staff Report fails to discuss or analyze the impacts of decommissioning as part of the Project. Had the Project's environmental review not been fragmented from the SEGS III-VII decommissioning, these impacts and mitigation measures, as one component part of the larger Project, would have necessitated environmental review and precluded reliance on a CEQA categorical exemption. This amounts to an*

*impermissible chopping up of a larger project with potentially more significant impacts which would require mitigation into smaller projects in an attempt to circumvent the CEQA requirements.*

*The actions of decommissioning the SEGS facility and reconstruction of the solar PV Project have a potential to result in direct physical changes on the environment and reasonably foreseeable indirect physical change to the environment as well. The decommissioning of SEGS and the construction of the Project are not separate and independent actions, therefore piecemealing of the Project violates CEQA and misinforms the Public and decision makers of the true impacts. Therefore, the County must withdraw the Staff Report and require the preparation of an EIR.*

**County Response to Appeal Comment III:** CRS incorrectly asserts that the County did not consider decommissioning the SEGS III-VII facility in its evaluation of the Project. The Staff Report provides that the Applicant proposes to decommission an existing 150-MW concentrated solar thermal facility and redevelop the site with a new PV solar facility with up to a total maximum 150 MW of PV solar array and BESS, including associated infrastructure on the existing footprint with no future expansion of capacity.

The construction, operation, and decommissioning of the solar thermal facility SEGS III-VII is under the jurisdiction of the California Energy Commission (CEC). Pursuant to the CEC Conditions of Certification for SEGS III-VII, NextEra Energy Resources-Operating Services, as agent for LUZ Solar Partners III-VII Ltd., filed a Facility Decommissioning Plan with the CEC for the facility. The Decommissioning Plan requires the Applicant to obtain a demolition permit from the County and submit a copy to the CEC for review. On June 9, 2021, the CEC adopted Order 21-0609-04<sup>1</sup>, which found that “the activities proposed in the Facility Decommissioning Plan would not have a significant effect on the environment or on an environmental justice population and would be consistent with applicable laws, ordinances, regulations and standards.” The CEC filed a Notice of Decision with the California Resources Agency on June 11<sup>th</sup> that made the same finding. The Staff Report and decommissioning Plan and related documents are included in the administrative record and are substantial evidence that the County did not piece-meal its review of the Project, or its determination that the Project is exempt from CEQA.

**CRS Appeal Comment IV:** *The Staff Report’s vague and imprecise descriptions of Project activities, objectives, and operations fail to meet CEQA’s requirement that a project description be complete and accurate, rendering the County’s reliance on a Class 2 categorical exemption unsupported. The Project description fails to sufficiently explain how or where or if the BESS will be connected to the solar array or directly to the energy grid, the process by which the BESS will collect and store energy, the efficiency of the Project’s batteries, the amount of energy generation required to charge the batteries and amount of lost prior to discharging the batteries, and the methods used to conduct biological surveys to detect the presence of special status species. As a result, the Project is not clearly defined and the County lacks substantial evidence to support the proposed finding that a Class 2 categorical exemption should be considered for the Project.*

**County Response to Appeal Comment IV:** The Class 2 categorical exemption “consists of replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same capacity as the structure replaced[.]” The Staff Report explains that the Project consists of replacing an existing 150-MW solar energy generating facility with a 150-MW PV solar facility and BESS on the same site. The Staff Report and

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<sup>1</sup> Order No. 21-0609-04 on Docket 87-AFC-01C available at [California Energy Commission : Docket Log](#).

administrative record constitute substantial evidence supporting the County's determination that the Class 2 categorical exemption applies. The Project Description adequately explains that the Project will be located on the same site and have substantially the same purpose and capacity (i.e., production and delivery of up to 150 MW of energy to the electrical grid) as the existing facility, in accordance with the requirements for the Class 2 exemption. (14 Cal. Code Regs § 15302, subd. (c).)

CRS submitted similar comments in opposition to the Lockhart Solar Facility Project, which involved replacing a 160-MW concentrated thermal solar facility with a 160-MW PV solar facility and BESS. As described in the County's January 2020 response to CRS' appeal to the Board of Supervisors, how or where the BESS will connect to the electrical grid, the efficiency of the BESS, the generation required to charge the BESS, the expected generation of the Project, and what kind of energy will charge the BESS are all irrelevant to the purpose and capacity of the Project and whether the Class 2 exemption applies. Regardless of the source of the charging energy for the BESS, whether from the Applicant's solar repower Project or from conventional sources, energy storage is GHG-neutral. That is, the Project will not generate any additional GHG emissions from outside sources, but rather provide a means of storage for energy that will already be generated regardless of the Project. Further, most of this energy is solar that needs to be shifted to later in the evening using storage systems. The same is true with respect to this Project.

Further, an agency's determination that a project is subject to a categorical exemption includes an implied finding that none of the exceptions to the exemption applies. (*San Francisco Beautiful v. City & County of San Francisco* (2014) 226 Cal.App.4th 1012, 1022–23.) This includes an implied finding that the project will not have a significant effect on the environment. (*Association for Protection of Env't'l Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 731–32 (citing *Centinela Hosp. Ass'n v. City of Inglewood* (1990) 225 Cal.App.3d 1586, 1601).) Thus, in determining that the Applicant's Project is subject to the Class 2 exemption, the County was not required to make express findings that unusual circumstances are not present. Regardless, the County did make express findings. The Applicant also submitted information substantiating that an exception does not apply due to cumulative impacts or unusual circumstances.

**CRS Appeal Comment IV.A:** *The Staff Report is vague and possibly misleading and disingenuous. There are only three short sentences that offer a description of the BESS, including an ambiguous statement that the BESS "would be used to either control electric frequency or store energy from the solar project."*

*The discussion of the BESS assumes that the solar PV facility would be connected to the BESS, rather than directly to the energy grid. This assumption contradicts evidence elsewhere in the Staff Report that the Project would continue to utilize the existing 115 kV interconnection to the Kramer Junction Substation. The assumption contradicts the readily available energy guidance which defines large-scale/utility-scale BESS systems as "Being directly connected to the electricity grid" or having a power capacity greater than 1 MW.*

*The Staff Report lacks any details about the BESS specifications, energy flow within the Project facilities, or any binding conditions that guarantee that the BESS will not absorb energy for the energy grid. Therefore the County lacks substantial evidence to support a conclusion that the BESS will store energy directly for the solar PV facility. Thus leaving the public with no meaningful way to evaluate the Project's impacts.*

**County Response to Appeal Comment IV.A:** CRS claims the Staff Report lacks sufficient detail about the BESS. The BESS is described in detail in the materials the Applicant submitted in support of its application for a CUP. The comment does not present evidence contradicting the conclusion that the Project involves replacing one solar facility for another on the same site, consistent with the Class 2 categorical exemption. Moreover, as discussed above the how or where the BESS will connect to the electrical grid, the efficiency of the BESS, the generation required to charge the BESS, the expected generation of the Project, and what kind of energy will charge the BESS are all irrelevant to the purpose and capacity of the Project and whether the Class 2 exemption applies. Regardless of the source of the charging energy for the BESS, whether from the Applicant's solar repower Project or from conventional sources, energy storage is GHG-neutral. That is, the Project will not generate any additional GHG emissions from outside sources, but rather provide a means of storage for energy that will already be generated regardless of the Project. Further, most of this energy is solar that needs to be shifted to later in the evening using storage systems. The Staff Report, CUP application and related documents are included in the administrative record and are substantial evidence that the Project, which includes the BESS component, qualifies as a Class 2 categorical exemption.

**CRS Appeal Comment IV.B:** *The Staff Report contains no information regarding the kind of lithium-ion batteries to be used in the Project, nor does it include information regarding the number of batteries, chemical components of each individual battery, or the proposed layout of battery units, other than to say they will be "distributed throughout the project boundary adjacent to each power block, pending final design." The Report also fails to include a description of the efficiency of the batteries and the generation required to charge the batteries, or how many megawatt hours of generation would be required to charge the batteries. The Project's BESS would use some of the energy generated on site for its own operation to store energy. Therefore the BESS would discharge less energy back to the grid than it normally absorbs, resulting in imperfect round-trip efficiency. The absent information makes it impossible to accurately analyze the Project's environmental effects and establishing a finding of no significant impact.*

**County Response to Appeal Comment IV.B:** CRS is incorrect that the County must make a finding of no significant impact because the County determined that the Project meets the criteria for the Class 2 categorical exemption. There is substantial evidence in the record supporting the County's determination that the exemption applies because the Project involves repowering a solar facility at the same site. The issues CRS raise do not alter this analysis.

CRS submitted similar comments in opposition to the Lockhart Solar Facility Project. The County's response to CRS' appeal explained that how or where the BESS will connect to the electrical grid, the efficiency of the BESS, the generation required to charge the BESS, the expected generation by the Project, and what kind of energy will charge the BESS are irrelevant to the determination whether the Class 2 exemption applies. The same is true with respect to this project. See County Responses to Comments IV and IV.A.

**CRS Appeal Comment IV.C:** *Nowhere in the Staff Report does it give a clear description of decommissioning activities, leaving the public and decisionmakers to guess what parameters were used in the emissions modeling, and to hope that they were performed accurately. The Staff Report fails to provide any evidence in support of its conclusion that emissions associated with decommissioning would not exceed applicable MDAQMD thresholds.*

**County Response to Appeal Comment IV.C:** Decommissioning activities are discussed in detail in the CEC-approved Decommissioning Plan, which was relied upon in making the CEQA exemption determination. The plan evaluates air quality and greenhouse gas emissions, including Mojave Desert Air Quality Management District (MDAQMD) thresholds. The Decommissioning Plan is included in the administrative record and is substantial evidence in support of the County's determination that the Project is categorically exempt from CEQA. See also, County Responses to Comments III.

**CRS Appeal Comment IV.C (continued):** *Any mention of future decommissioning of the Project is omitted entirely. SWAPE points out that "the industry standard life span of solar panels is 25 to 30 years. Therefore, some years after operation of the Project commences, the solar panels and associated structures will need to be removed, impacted soils will need to be restored, and debris will need to be hauled off-site" The AQ Technical Report fails to include any analysis of the emissions associated with decommissioning, thus fails to provide any evidence in support of its conclusions.*

*Without this critical information, the Staff Report has not provided enough information to satisfy CEQA's requirement to provide a complete project description. Therefore, the County fails to meet its burden to provide substantial evidence supporting its conclusion that the Project qualifies for an exemption.*

**County Response to Appeal Comment IV.C (continued):** As discussed in the Staff Report, decommissioning of the solar PV site will occur in compliance with Development Code Section 84.29.060. The Development Code requires that "following the operational life of the project, the project owner shall perform site closure activities to meet federal, state, and local requirements for the rehabilitation and revegetation of the project site after decommissioning. The project owner shall prepare a Closure, Revegetation, and Rehabilitation Plan and submit it to the Planning Division for review and approval prior to building permit issuance," and that, "project decommissioning shall be performed in accordance with all other plans, permits, and mitigation measures that would assure the project conforms to applicable requirements and would avoid significant adverse impacts."

CRS' assertion that emissions from decommissioning the Project in 25 or 30 years could cause significant impacts is speculative, conclusory, and does not constitute substantial evidence. Nor is it relevant to whether the Class 2 categorical exemption applies. The Staff Report and administrative record include substantial evidence that the exemption for the replacement or reconstruction of existing facilities applies to the Project. See also, County Responses to Comments III.

**CRS Appeal Comment V.A:** *Insisting that the Project will have the "same solar utility purpose and capacity" as the existing facility, the County claims that the Project is exempt using a Class 2 exemption, asserting that the BESS "will not constitute an expansion of capacity since the use of BESS technology will be used in making the same end product as the existing utility system, viz., energy. Nor will the uses of the BESS technology increase the daily total MW production into the grid." The Staff report claims, without supporting evidence that no exceptions exist that would render the exemption inapplicable and that the Project will have no significant environmental impacts.*

**County Response to Appeal Comment V.A.:** The Class 2 categorical exemption applies to the replacement of existing structures and facilities, including existing utility systems, that will have substantially the same purpose and capacity. The BESS does not represent a substantial increase in the purpose or capacity of the SEGS III-VII facility. The Project will have the same capacity to generate 150

MW. The BESS will allow the Project to efficiently produce the energy for beneficial use because the solar array will produce power in the day while peak demand will be in the evening.

In *Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d, 827, 849, the court held that “[t]he requirement for a project to have ‘substantially the same purpose and capacity’ speaks only to the productive purpose and capacity of the old and new plants. It does not demand minute scrutiny of each of the individual components, some of which may incorporate advanced technology into the plant’s operations, resulting in the production of the same amount of [end product] in a more efficient manner.” The Class 2 categorical exemption applies to the Project for the same reasons. See County Responses to Comments II and IV regarding exceptions to the categorical exemption for the replacement or reconstruction of existing facilities.

**CRS Appeal Comment V.A:** *The record demonstrates that neither the County nor the Applicant have provided substantial evidence showing that the Project qualifies for the Class 2 exemption. To the contrary, there is substantial evidence that demonstrates unusual circumstances and cumulative impacts are present which precludes reliance on the class 2 exemption. There is also substantial evidence that the Project will result in substantial, unmitigated impacts to air quality, biological resources, and risks to human health. Therefore, preparation of an initial study and an EIR are needed and preclude the application of categorical exemptions.*

**County Response to Appeal Comment V.A:** The Findings conclude that the Class 2 Categorical Exemption applies, unusual circumstances are not present, and that the Project is consistent with the Development Code. The Staff Report explains the basis for concluding the Project is categorically exempt and consistent with the Renewable Energy and Conservation Element of the General Plan. These findings are supported by substantial evidence in the record. See, also, County Response to Appeal Comments V.A.ii.a, V.A.ii.b, VI, VI.B.i, and VI.B.ii regarding air quality, biological resources, unusual circumstances, and cumulative impacts.

CRS submitted similar comments in opposition to the Lockhart Solar Project. The County explained in January 2020 in response to CRS’ appeal to the Board of Supervisors that an agency’s determination that a project is subject to a categorical exemption includes an implied finding that none of the exceptions to the exemption applies. (*San Francisco Beautiful v. City & County of San Francisco* (2014) 226 Cal.App.4th 1012, 1022–23.) This includes an implied finding that the project will not have a significant effect on the environment. (*Association for Protection of Env’t Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 731–32 (citing *Centinela Hosp. Ass’n v. City of Inglewood* (1990) 225 Cal.App.3d 1586, 1601).) Regardless, the County did make express findings that unusual circumstances are not present in this case. The Applicant also submitted information substantiating that an exception does not apply due to cumulative impacts or unusual circumstances.

**CRS Appeal Comment V.A.i:** *Dehne v. County of Santa Clara determined that the "same purpose and capacity" requirement applies to productive purpose and capacity. The Project's purpose is significantly different from the existing solar thermal facility because battery storage does not provide "substantially the same purpose" as solar energy generation. Furthermore, the additional of 150 MW of energy storage capacity from the BESS to the 150 MW energy generation capacity of the solar PV facility will double the total capacity of the Project to discharge energy onto the grid.*

*The addition of the BESS fundamentally changes the Project's utility purpose, as it allows from storage rather than only generation at the Project site. Solar plants generate renewable electricity to transmit to the grid, while BESS does not generate electricity, which rather it receives energy from the gride where it stores it and then transmits the energy back to the grid at a later time. BESS are not renewable energy storage, but neutral energy sources.*

*BESS provide storage capacity for the grid to store whatever energy is the cheapest and displaces whatever is the most expensive, with not concern for emissions. BESS's must buy electricity supplied by other generator to recharge and cover the round-trip efficiency losses experienced during cycles of charging and discharging. The Project documents and Air Quality Technical Report fail to address these impacts.*

*Though the Project Description states that the BESS will store energy from the solar project, nowhere in any of the Planning documents or Staff Report does the Applicant or County provide assurances that the BESS will not absorb energy from any other sources. In changing the facility from solely generation to combined generation and storage, the Project would facilitate the need for additional generation from non-renewable sources, such as natural gas.*

**County Response to Appeal Comment V.A.i:** The Project is exempt from CEQA pursuant to the Class 2 categorical exemption for the replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site and will have substantially the same purpose and capacity as the structure replaced. The CEQA Guidelines include as an example of a project that is categorically exempt the replacement or reconstruction of existing utility systems and/or facilities involving negligible expansion of capacity. The Project meets these criteria because it will be located on the same site, serve the same purpose, and have the same capacity to produce energy as the solar thermal facility.

In *Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d, 827, 849, the court held that “[t]he requirement for a project to have ‘substantially the same purpose and capacity’ speaks only to the productive purpose and capacity of the old and new plants. It does not demand minute scrutiny of each of the individual components, some of which may incorporate advanced technology into the plant’s operations, resulting in the production of the same amount of [end product] in a more efficient manner.”

Here, the Project will serve the same purpose as the SEGS III-VII project – to produce energy for beneficial use and have the same productive capacity. The BESS permits the use of energy in a more efficient manner because power generated during the day can be stored for beneficial use in the evening. The BESS is consistent with the County General Plan’s Renewable Energy Policy 2.2, which encourages on-site energy storage with renewable energy projects.

CRS speculates the BESS will induce non-renewable sources to generate energy. The BESS, however, is intended to store energy *from* the Project. CRS speculates further that the energy generation the BESS will supposedly induce from non-renewable sources will have significant air quality impacts. Speculation is not substantial evidence. Regardless, there is substantial evidence in the record supporting the County’s determination that the Project is categorically exempt for the replacement or reconstruction of existing facilities.

**CRS Appeal Comment V.A.ii:** *The County is lacking substantial evidence that is not flawed or erroneous, cannot support its findings that the Project will not result in significant adverse impacts. As a result of these impacts, the Project would be unable satisfy all the findings for approval of a commercial solar energy facility pursuant to San Bernardino Development Code Section 84.29.035.*

**County Response to Appeal Comment V.A.ii:** The County determined that substantial evidence supports a finding that the Project is categorically exempt from CEQA. The County also determined that there is substantial evidence in the record supporting a finding that an exception to the exemption does not apply. The County made express findings that the Project satisfies the requirements in the San Bernardino Development Code. CRS' comment is contrary to the law and facts.

CRS made similar comments in its opposition to the Lockhart Solar Project. See County Response to Comment V.A. See, also, County Responses to Comments V.A.ii.b, VI, VI.B.i, and VI.B.ii regarding air quality, biological resources, unusual circumstances, and cumulative impacts.

**CRS Appeal Comment V.A.ii.a:** *The Air Quality Technical Report's calculations of air quality impacts from Project construction and operation contain numerous errors and inaccuracies. Construction mitigation measures, for example, some of which are vague and unenforceable, are inappropriately applied to the analysis of emissions. Additionally, variables for land use size were significantly underestimated, rendering the estimated calculations unreliable and erroneous. SWAPE's estimates, using the correct figures and variables, demonstrate the actual emissions numbers are significantly higher.*

**County Response to Appeal Comment V.A.ii.a:** CRS' comment presumes the County must find the Project will not cause significant impacts before it may consider whether a categorical exemption applies. CRS is wrong, as discussed in response to comments II and IV. There is substantial evidence in the record supporting the County's conclusion that the Project is categorically exempt.

The County is not attempting to mitigate effects into an exemption. Instead, the Applicant submitted the Air Quality and Greenhouse Gas (AQGHG) Technical Report to provide additional substantial evidence to support the conclusion that there are no unusual circumstances associated with the Project. The AQGHG Technical Report provides information about the quantities and types of equipment that will be used during Project construction, including the use of Tier IV-compliant engine equipment. The report's description of Project equipment provides the basis for its calculations, not for the purpose of establishing mitigation measures. The report correctly explains that the Project consists of 1,019 acres within the existing facility and the undeveloped areas outside of the existing fence lines would be left undisturbed. The undeveloped areas plus areas of Project disturbance total 1,172 acres, as described on page 1 of the report.

**CRS Appeal Comment V.A.ii.b:** *There is evidence supporting a conclusion that the significant risk to avian mortality posed by solar PV facilities, combined with the Project's location, size, and technology, is substantial.*

*Mr. Cashen describes the increased risks to biological resources as a result of the Project's location near the intersection of two major avian migration routes, its relatively large size, and the use of PV technology, which appears to be especially hazardous to birds. The Biological Report prepared for the Project states that the Project site has been "mostly disturbed by the existing thermal solar use and activities" and indicated that a biological survey had been conducted to document "all biological*



resources identified within” the Project site area. These statements, however, are misleading. As explained by Mr. Cashen:

*A Tetra Tech biologist surveyed the Project site on December 10, 2020. Although no special-status species were detected during the survey, the timing of the survey was not conducive to detection of many of the special-status species that, according to the Biological Report, have the potential to occur at or adjacent to the Project site. The survey was not conducted when desert tortoises are active aboveground, and most of the special-status plants that have the potential occur at or adjacent to the Project site are annual plants that are not detectable in December.*

*The Biological Report acknowledged that “larger mammals have been accessing the interior of the site on occasion and could potentially be present within the site, which may include the desert kit fox.” As Mr. Cashen pointed out, no additional efforts were made to determine the presence of desert kit foxes, suggesting that any conclusions drawn by the Report regarding the absence of special-status species at the site were unsubstantiated and questionable.*

*Even more egregiously, the Biological Report states that no Joshua trees were observed in the Project site during the survey. Mr. Cashen indicated that Google Earth imagery from March 2021 “depicts one, possibly two, Joshua trees within the Project site.” This glaring inaccuracy “draws into question the accuracy of the information provided in the Biological Report, and the County’s subsequent conclusion that the Project would not impact any special special-status species because none are present within the Project site.”*

**County Response to Appeal Comment V.A.ii.b:** CRS’ comment presumes the County must find the Project will not cause significant impacts before it may consider whether a categorical exemption applies. CRS is wrong, as discussed in County Response to Appeal Comments II and IV. There is substantial evidence in the record supporting the County’s conclusion that the Project is categorically exempt.

The Applicant submitted the Biological Report to provide additional substantial evidence there are no unusual circumstances associated with the Project. CRS asserts the report incorrectly describes risks to birds based on its speculation that the Project “could influence avian mortality risk” due to the “lake effect,” citing a 2016 preliminary assessment of avian mortality and solar facilities. A subsequent literature review of avian mortality risks and solar facilities concluded that “no empirical research has been conducted to evaluate the attraction of PV facilities to migrating waterfowl or songbirds.”<sup>2</sup> CRS’ comment regarding the Project and lake effect is speculative and does not qualify as substantial evidence of an environmental impact. Even if it did, there is substantial evidence in the record supporting the County’s determination that the Project satisfies the criteria for the class 2 categorical exemption for the replacement or reconstruction of existing facilities.

The Biological Report identified special-status species with the potential to occur in the vicinity of the Project and on the Project site, including resident and migratory avian species. As described in the Biological Report, the Project site consists of five fenced areas (totaling 1,019 acres) which were previously developed for the solar thermal facility and in which soils are highly compacted with no

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<sup>2</sup> See, <https://www.energy.gov/sites/prod/files/2019/03/f61/Hathcock%202018.pdf>, p. 2.

native habitats present. As shown in Figure 3 of the Biological Report, three Joshua trees were identified during surveys of the Project and a 500-foot buffer area around the Project site. Each Joshua tree is located outside of the fenced areas where the Project will operate. No Joshua trees occur on the Project site. The Biological Report did not identify unusual circumstances associated with the Project, further substantiating that the categorical exemption applies for reconstructing or replacing existing facilities.

**CRS Appeal Comment V.A.ii.c:** *To receive approval for a commercial solar energy facility, a project must meet the Required Findings for Approval of a Commercial Solar Energy Facility pursuant to San Bernardino Development Code Section 84.29.035, in addition to meeting the general requirements for all use permits found in Section 85.06.040*

*Section 84.29.035(c) includes 31 findings that must be met before approval may be granted. As discussed, findings (9) and (10), regarding a proposed solar energy facility's impacts to biological resources, cannot be met.*

*Section 84.29.035(c)(9) states that a proposed facility "will be sited so as to avoid or minimize impacts to the habitat of special status species, including threatened, endangered, or rare species, Critical Habitat Areas as designated by USFWS, important habitat/wildlife linkages or areas of connectivity designated by County, State, Federal agencies, and area of Habitat Conservation Plans or Natural Community Conservation Plans that discourage or preclude development."*

*Substantial evidence has been made demonstrating that the Project will not meet these two criteria. Therefore, the Project does not meet the County's own criteria required for approval of a commercial solar energy facility.*

**County Response to Appeal Comment V.A.ii.c:** The County made extensive findings that the Project is consistent with Development Code Section 85.06.05. Substantial evidence supports the County's finding that the Project will be sited to avoid or minimize impacts to special-status species because it is replacing an existing facility on already disturbed land, consistent with Section 84.29.035(c)(9). Substantial evidence supports the County's finding that adequate provisions have been made to maintain and promote native vegetation and avoid the proliferation of invasive weeds because the Project includes measures for this purpose, consistent with Section 84.29.035(c)(10). These findings are supported by the Staff Report as well as the Biological Report and related information the Applicant submitted substantiating that the Project is categorically exempt.

**CRS Appeal Comment VI:** *There is substantial evidence supporting a fair argument that the Project will have significant environmental effects due to cumulative impacts and unusual circumstances that have not been adequately disclosed or mitigated, and which preclude reliance on the County's claimed categorical exemption.*

**County Response to Appeal Comment VI:** There is substantial evidence in the record supporting the County's conclusion that the Project meets the Class 2 categorical exemption to replace or reconstruct existing facilities. CRS has not met its burden of proof that an exception to the categorical exemption applies as there is nothing unusual about the replacement and reconstruction of the existing solar facility. See County Response to Appeal Comments II, IV, and VI.A.

**CRS Appeal Comment VI.A:** *A Class 2 categorical exemption is inapplicable when a project has significant cumulative impacts. Cumulative impacts can result from individually minor but collectively*

*significant projects taking place over a period of time. San Bernardino County currently has a significant number of solar projects planned and under construction, many of which are also planning to add battery storage capacity along with the solar arrays. The County failed to consider the impacts of these cumulative projects in reaching its determination that the Project is categorically exempt and that no exception apply.*

**County Response to Appeal Comments VI and VI.A:** The cumulative impacts exception applies to "successive projects of the same type in the same place." (14 Cal Code Regs §15300.2(b).) CRS has the burden of proof that the Project will cause significant cumulative impacts. See, *Berkeley Hillside Preservation v City of Berkeley* (2015) 60 Cal.4th 1086, 1104–05. CRS has not met its burden.

Here, the Project is the repowering of an existing solar generation project. CRS' appeal refers to "cumulative impacts from the numerous solar projects planned in San Bernardino County." This generic statement is not substantial evidence that successive solar repower projects in the same place will have a significant effect. See County Responses to Appeal Comment IV.B for additional details.

**CRS Appeal Comment VI.A.i:** *The AQ Report states that "[a]lthough the Project site is located in a region that is in non-attainment for O<sub>3</sub>, PM<sub>10</sub>, and PM<sub>2.5</sub>, the cumulative emissions associated with the Project would not be considerable as emissions would fall below MDAQMD thresholds." Cumulative impacts can result for individually minor but collectively significant projects taking place over a period of time.*

*SWAPE's recalculated emissions estimates for the Project establish that Project impacted will in fact be much more significant than proposed by the Staff Report or the AQ Technical Report. Additional GHG and criteria pollutant emissions as a result of battery storage projects associated with solar energy projects in the area are likely to result in cumulatively significant impacts.*

*An EIR must be prepared to determine the extent of the Project's cumulative impacts and to require mitigation to reduce any potentially significant cumulative impacts to less than significant levels.*

**County Response to Appeal Comment VI.A.i:** The AQGHG report is substantial evidence that Project emissions will fall below MDAQMD thresholds and will not create cumulatively considerable air quality impacts. As discussed in the Staff Report, the proposed facility will reduce environmental effects compared to the existing use, including but not limited to GHG emissions, because the Project will decommission and replace gas-fired equipment with a PV solar array.

CRS merely asserts that "additional GHG and criteria pollutant emissions as a result of battery storage projects associated with solar energy projects in the area are likely to result in cumulatively significant impacts" without providing any supporting evidence that the Project will cause cumulatively considerable air quality impacts. This is not substantial evidence of cumulative impacts, and CRS has not met its burden to show that the cumulative impacts exception applies to the Project.

**CRS Appeal Comment VI.A.ii:** *The Project may have significant and unmitigated cumulative impacts to biological resources, regardless of whether the Project's individual impacts on bird populations are less than significant. As of August 31, 2021, there are 7 conditionally approved, 11 active, and 41 completed solar projects in San Bernardino County. Mr. Cashen points out that even though there are small populations, a small number of fatalities could have significant impacts at a population level. Special-status species could be potentially affected by cumulative impacts from the Project and other similar*

*projects in the region through habitat destruction during construction activities and other activities that cause habitat abandonment or loss of reproduction effort.*

**County Response to Appeal Comment VI.A.i and VI.A.ii:** Approximately 50 percent of the projects Mr. Cashen speculates will allegedly create cumulative impacts have been placed on hold by the applicant, are under appeal, have not received permits, were issued permits that have expired, or was refiled (as the Resurgence Project).<sup>3</sup> Mr. Cashen also does not account for San Bernardino County being the largest county in the United States.

Speculation that significant cumulative impacts will occur simply because there are or will be other solar projects in the County is insufficient to trigger the cumulative impact exception to the Class 2 exemption. Listing other projects is not substantial evidence that a proposed project will cause cumulatively considerable impacts. (*Hines v. California Coastal Comm'n* (2010) 186 Cal.App.4th 830, 857.) CRS merely speculates that “[a]ll these species could potentially be adversely affected by cumulative impacts from the Project and other similar projects taking place in the region[.]” CRS has not met its burden of proof with substantial evidence by alleging that something “could” happen.

Though not required, the Applicant submitted a Biological Report that provides additional substantial evidence the Project will not cause cumulatively considerable biological impacts. The Biological Report appropriately identified special-status species with the potential to occur in the vicinity of the Project and on the Project site, including resident and migratory avian species. No special-status plant or wildlife species or vegetation communities were observed within the Project site. There is substantial evidence in the record supporting the County’s determination that the cumulative impacts exception to the categorical exemption does not apply.

**CRS Appeal Comment VI.B:** *There is substantial evidence supporting a fair argument that the exception applies due to the unusual circumstances of a "replacement" energy generation facility proposing energy storage rather than simply energy generation. The addition of the BESS is likely to result in significant environmental effects that would cause GHG emissions from the BESS energy storage and operation, as well as impacts resulting from the Project's unique size and location.*

**County Response to Comment VI.B:** A project opponent has the burden of proof that an exception applies to a project a lead agency has determined is categorically exempt from CEQA. *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal. 4th 1086, 1104-05. The unusual circumstances exception only applies if there is a reasonable possibility that a project will have significant environmental effects *due to unusual circumstances*.

CRS has presented no evidence that there is any aspect of the Project that is unusual. CRS makes the conclusory statement that the BESS renders the Project unusual. A statement without supporting evidence is not substantial evidence. Battery energy storage systems are frequently combined with PV

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<sup>3</sup> Twenty-nine of the 59 projects include three active projects that include the Resurgence Project and 2 have been put on hold by the applicant’s request, 2 conditionally approved projects are under appeal, or no permits have been issued, and 24 of the completed projects have been withdrawn, abandoned, or denied, or the permits have expired or were not issued, and another was refiled as a project under review. See [https://www.sbcounty.gov/uploads/LUS/Renewable/SolarProjectList2020\\_Maps.pdf](https://www.sbcounty.gov/uploads/LUS/Renewable/SolarProjectList2020_Maps.pdf).

solar facilities. The Lockhart PV solar facility that CRS appealed to the Board of Supervisors but did not challenge further includes a BESS.

Battery energy storage is GHG-neutral. As CRS itself acknowledges, BESS's are "neutral energy sources" because they store energy that has already been generated. The BESS has the same storage capacity as the Project's solar array and is intended to store the energy the solar array generates for use when demand is high. The Project will generate most of the energy during the day while peak demand is in the evening. The BESS increases the availability of renewable energy for beneficial use. CRS has not presented substantial evidence that an element of a renewable energy project that is intended to promote the use of renewable energy is an unusual circumstance.

**CRS Appeal Comment VI.B.i:** *The AQ Technical Report concludes that the Project's construction and operational emissions would not exceed the MDAQMD' threshold of 100,000 tons of CO<sub>2</sub>e/year. These conclusions can only be reached by including in the calculation blatant errors and omissions. Substantial evidence clearly demonstrates that the Project will almost certainly result in potentially significant GHG impacts in excess of the threshold from indirect emissions and increase facility capacity that the County failed to disclose and mitigate.*

*The Project's GHG emissions are inaccurate and omits an analysis of GHG emissions caused by BESS charging and roundtrip inefficiency. As a result the County significantly underestimates the GHG emissions, where there is substantial evidence that shows they are nearly certain to exceed the air district thresholds. Additionally, the analysis of the Project emissions failed to account for the direct energy usage associated with operation of the BESS.*

*Evidence showing that a project will have a significant environmental impact, as here, can serve to establish the presence of an unusual circumstance for the purposes of determining if an exception applies.*

**County Response to Appeal Comment VI.B.i:** CRS has submitted no evidence that the Project presents unusual circumstances, the threshold issue for establishing whether the unusual circumstances exception applies. See County Response to Appeal Comment VI.B.

CRS submitted similar comments to the County that the BESS in the Lockhart Solar Facility replacement project created unusual circumstances. As described in the County's January 2020 response to CRS' appeal, how or where the BESS will connect to the electrical grid, the efficiency of the BESS, the generation required to charge the BESS, the expected generation of the Project, and what kind of energy will charge the BESS are all irrelevant to the purpose and capacity of the Project and whether the Class 2 exemption applies. The same is true for this Project. See County Response to Appeal Comment IV and IV.A.

The Project will not generate any additional GHG emissions from outside sources, but rather provide a means of storing energy that has already been generated. As noted above, solar energy is generated during the day, but peak demand is in the evening. Increasing the availability of renewable energy for beneficial use when demand is high does not present an unusual circumstance.

**CRS Appeal Comment VI.B.ii:** *The Project is located near the intersection of two major migration routes including one used by land birds, and the other used by waterbirds. Due to the size of the Project site, the*

*Project poses an increased risk in avian mortality. The potential impacts to birds, especially on those with low population numbers, could be significant at a population level.*

*The Project is uniquely situated so that it has the potential to facilitate the spread of existing invasive weed species and introduce new non-native species due to construction and operative activities.*

*The County's mitigation measures that are designed to minimize these adverse effect are ineffective, unenforceable, and vague. They will not mitigate impacts from invasive non-native species to less than significant levels.*

**County Response to Comment VI.B.ii:** See County Response to Appeal Comments IV.A and V.A to the extent CRS is asserting that cumulative impacts create unusual circumstances. The County made express findings that the Project does not present unusual circumstances. See County Response to Appeal Comments V.A.ii.a, V.A.ii.b, VI, and VI.B.i. See County Response to Appeal Comment VI.A.ii regarding avian mortality. See County Response to Appeal Comment V.A.ii.c regarding invasive weeds.

**CRS Appeal Comment VI.B.iii:** *The risk of fire caused by lithium-ion batteries is undoubtedly an unusual circumstance to the class of facilities covered by a Class 2 exemption. Unique to a facility of this nature, in which batteries used to store energy present a significant risk of harm, fires, and accidents at these facilities have been the subject of recent events, including a fire at a Tesla battery storage facility in Australia in August 2021. The Staff Report omits from any discussion of potential Project impacts the issue of a lithium-ion battery fire.*

**County Response to Appeal Comment VI.B.iii:** CRS has not met its burden of proof that lithium-ion batteries are “undoubtedly” an unusual circumstance. The BESS is consistent with County General Plan Renewable Energy Policy 2.2, which encourages on-site energy storage with renewable energy development. The BESS is designed to meet and/or exceed the requirements defined in National Fire Protection Association (NFPA) 855 Standard for the Installation of Stationary Energy Storage Systems Scope. Features to minimize fire danger and ensure safe operations must follow the California Fire Code and will be reviewed and approved by the San Bernardino County Fire Marshal. There is substantial evidence in the record that lithium-ion batteries do not present unusual circumstance.

**CRS Appeal Comment VI.B.iii (continued):** *The Staff Report fails to consider the need for battery replacement and disposal throughout the lifespan and during the decommissioning of the Project. The unique challenges presented by the use of lithium-ion batteries calls for adequate environmental review so that the potential risks and impacts can be analyzed and mitigated.*

**County Response to Appeal Comment VI.B.iii (continued):** CRS has not met its burden of proof that battery replacement and disposal in the future presents an unusual circumstance. California law includes strict provisions that apply to the generation, storage, transportation, and disposal of waste. The Project will be subject to these requirements when batteries must be sent off-site for disposal. CRS' generic reference to “unique challenges” is conclusory and speculative and does not constitute substantial evidence.