



The County of San Diego

Planning Commission Hearing Report

Date:	September 17, 2021	Case/File No.:	American Legion Wireless Telecommunication Facility Major Use Permit; PDS2020-MUP-20-008; PDS2020-ER-20-11-001
Place:	County Conference Center 5520 Overland Avenue San Diego, CA 92123	Project:	Wireless Telecommunication Facility
Time:	9:00 a.m.	Location:	4515 Borrego Springs Road, Borrego Springs, CA 92004
Agenda Item:	#1	General Plan:	Rural Commercial
Appeal Status:	Appealable to the Board of Supervisors	Zoning:	General Commercial (C36), Service Commercial (C38), Visitor-Serving Commercial (C42)
Applicant/Owner:	Debbie DePompei on behalf of Insite Towers LLC	Community:	Borrego Springs Community Plan Area
Environmental:	CEQA §15303 Exemption	APN:	200-051-12-00

A. OVERVIEW

The purpose of this report is to provide the Planning Commission with the information necessary to consider the proposed Major Use Permit (MUP), conditions of approval, and environmental findings prepared in accordance with the California Environmental Quality Act (CEQA). Planning & Development Services (PDS) staff recommends approval of the MUP, with the conditions noted in the attached MUP decision (Attachment B).

The American Legion Wireless Telecommunication Facility MUP, submitted in 2020, is a request for InSite Towers (Applicant) to construct, operate, and maintain a new telecommunication facility for AT&T Wireless (Project). The Project includes a 97-foot-tall lattice tower, with 12 panel antennas, one dish antenna, a 15-kilowatt backup generator, 12 back up batteries and other equipment located in an equipment cabinet northwest of the tower. The Project will be located inside a 3,600 square foot leased area surrounded by a six-foot-tall concrete masonry unit wall. The 14.07-acre parcel, located at 4515 Borrego Springs Road within the Borrego Springs Community Plan area, is zoned General Commercial, Service Commercial and Visitor-Serving Commercial and contains an existing building and ground mount solar array owned and operated by the American Legion.

Lattice towers and other non-camouflaged telecommunication facilities over 60 feet in height are allowed in commercial zones upon approval of a MUP.

This report includes a staff recommendation, a Project description, analysis and discussion, and the Borrego Springs Community Sponsor Group recommendation.

B. REQUESTED ACTIONS

This is a request for the Planning Commission to evaluate Project determine if the required findings can be made and, if so, take the following actions:

- a. Adopt the Environmental Findings included in Attachment D, which includes a finding that the Project is exempt from the California Environmental Quality Act (CEQA).
- b. Grant Major Use Permit PDS2020-MUP-20-008, make the findings, and impose the requirements and conditions as set forth in the Form of Decision (Attachment B).

C. DEVELOPMENT PROPOSAL

1. Project Description

InSite Towers LLC (Applicant) requests a MUP to install a new wireless telecommunication facility for AT&T (Project) located at 4515 Borrego Springs Road within the Borrego Springs Community Plan area. The Applicant proposes to install 12 panel antennas and one dish antenna on a new 97-foot-tall lattice tower. The lattice tower can accommodate up to three additional carriers in the future through a modification of this MUP. Associated equipment, including a 15-kilowatt backup generator, and 12 back up batteries, will be located in equipment cabinets and enclosed within a 3,600 square foot lease area surrounded by a six-foot-tall concrete masonry unit wall (Figure 1).

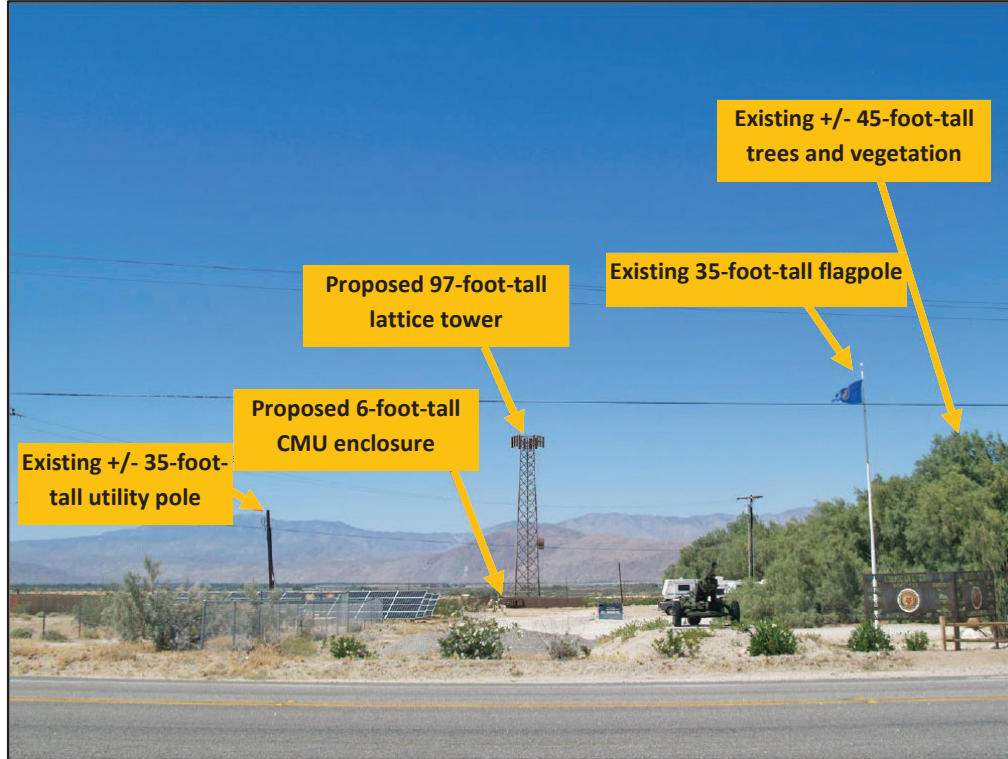


Figure 1: View of proposed 97' lattice tower, looking north from Borrego Springs Road.

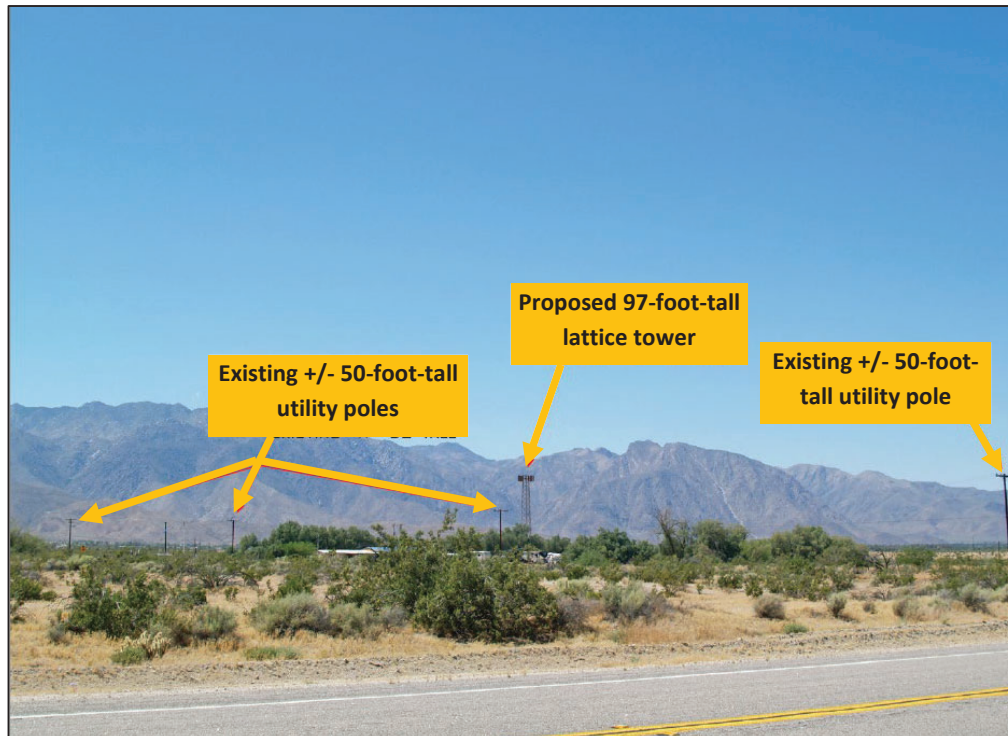


Figure 2: View of proposed 97' lattice tower, looking northwest from Yaqui Pass Road

2. Subject Property and Surrounding Land Uses

The Project is located on a 14.07-acre parcel within the Borrego Springs Community Plan Area (Figure 2). The project site is zoned General Commercial (C36), Service Commercial (C38), and Visitor-Serving Commercial (C42). The wireless facility is proposed within the Visitor-Serving Commercial (C42) zone. The General Plan Regional Category is Village, and the Land Use Designation is Rural Commercial. The project site is developed with an existing 2,919 square foot building and accessory structures for the American Legion and a ground mount solar system (Figure 3). Surrounding land uses are primarily single-family residential uses and vacant land, with La Casa Del Zorro Resort and Spa to the southeast (Table C-1).

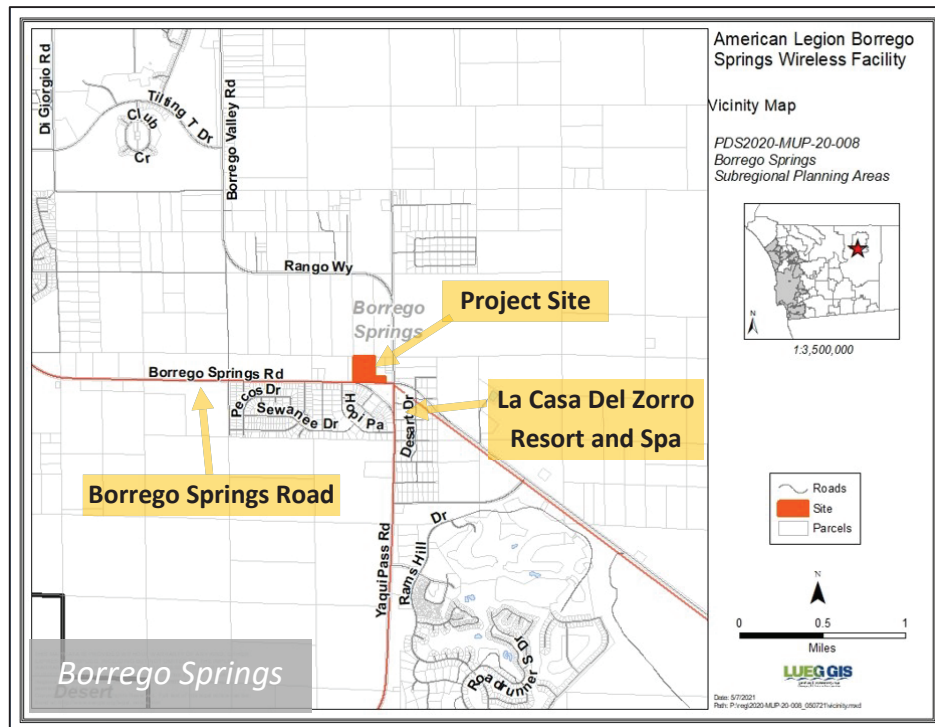


Figure 3: Vicinity map

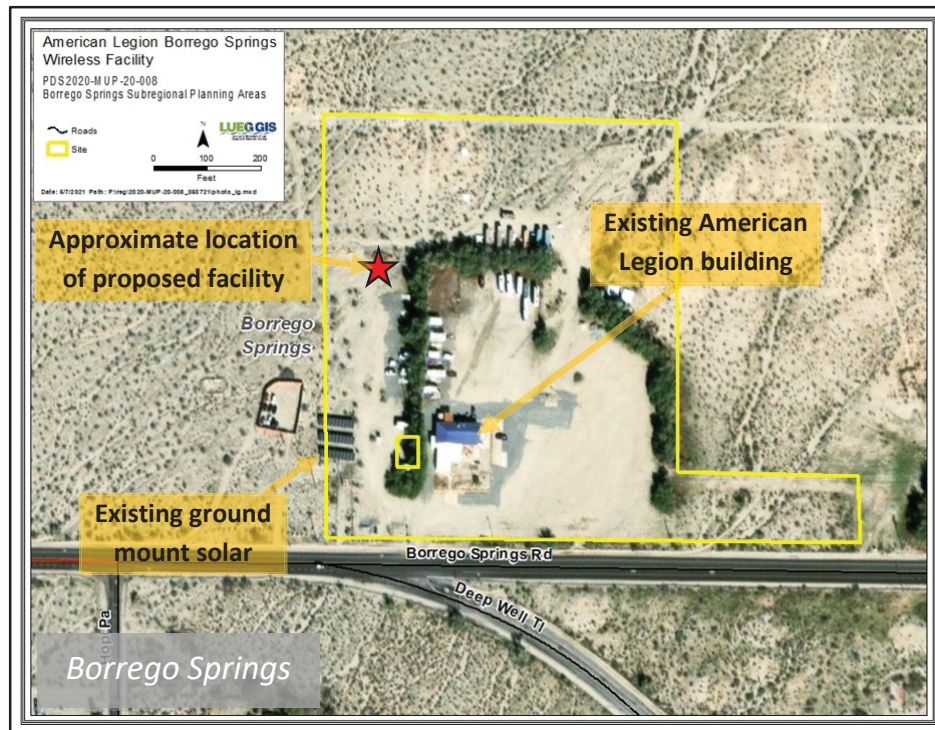


Figure 4: Aerial photograph of project site. Location of proposed facility identified with red star.

Table C-1: Surrounding Zoning and Land Uses

Location	General Plan	Zoning	Adjacent Streets	Description
North	Semi -Rural Residential (SR-10)/ Rural Commercial/ Semi - Rural Residential (SR-1)	General Rural (S92)/ General Commercial (C36)/ Single Family Residential (RS)	Rango Way/ Yaqui Pass Road	Vacant Land
East	General Commercial/ Village Residential (VR-4.3)/ Rural Commercial	General Commercial (C36)/ Single Family Residential (RS)/ Visitor Service Commercial (C42)	Yaqui Pass Road/ Borrego Springs Road	Commercial/ Vacant Land
South	Rural Commercial/ Semi-Rural Residential (SR-1)	Visitor Service Commercial (C42)/ Single Family Residential (RS)	Borrego Spring Road/ Deep Well Trail	Residential/ Vacant Land
West	Semi -Rural Residential (SR-10)	General Rural (S92)	Borrego Springs Road	Vacant Land

D. ANALYSIS AND DISCUSSION

The Project has been reviewed to ensure it conforms to all the relevant ordinances and guidelines, including, but not limited to, the San Diego County General Plan, the Zoning Ordinance, and CEQA. The following items were reviewed during the Project's processing and are detailed below: Amortization, Site Plan Analysis, Community Compatibility/Visual Impacts, and Alternative Site Analysis (ASA).

1. Key Requirements for Requested Actions

- a. Is the Project consistent with the vision, goals, and policies of the General Plan?
- b. Is the Project consistent with the goals and policies of the Borrego Springs Community Plan?
- c. Is the Project consistent with the County's Zoning Ordinance?
- d. Is the Project consistent with the County's Wireless Ordinance?
- e. Does the Project comply with CEQA?

2. Analysis

The Project is located on a property consisting of three zones, General Commercial (C36), Service Commercial (C38), and Visitor-Serving Commercial (C42), which are all preferred zones for wireless telecommunication facilities pursuant to Zoning Ordinance Section 6986A. However, as stated in Section 6985 of the County Zoning Ordinance, the proposed Project requires the approval of a MUP because it includes a non-camouflaged tower greater than the allowed 35-foot height limit. The wireless facility is proposed within the portion of the site subject to the Visitor-Serving Commercial (C42) zone. In addition, an exception to the 35-foot height requirement is requested as part of the proposed MUP to construct the 97-foot-tall facility as required by Section 4610 of the County Zoning Ordinance.

Amortization

Although the site is not subject to amortization because it is not within a residential or rural zone, it still has a term limit pursuant to Zoning Ordinance section 6985c11, which states that projects that are considered high visibility and require use permits are given a maximum term limit based on the valuation of the facility. This Project is considered a high visibility structure and requires a Major Use Permit (MUP). The MUP will therefore have a maximum term of 15 years, as it is valued over \$500,000. This time may be extended for an additional period of time by modifying the permit, if it is found that no smaller or less visible technology is available or feasible to replace the facility at the time of the request for a modification.

Site Planning Analysis

The Project is located on a site that is owned and operated by the American Legion. The proposed 97-foot-tall lattice tower is designed to be compatible with the surrounding land uses and mountain backdrop. The proposed lattice tower will be painted a brown earth tone to blend into the mountain backdrop. The Project will be set back from the road more than 300 feet which will make it appear comparable in height to existing vertical elements for motorists traveling on Borrego Springs Road (see Figure 1). Existing utility poles and an existing flagpole are near the proposed facility, which helps the facility blend in with surrounding vertical elements. Additionally, as opposed to a solid

monopole or water tank, the lattice tower design allows the viewer to see through to the mountain backdrop.

Community Compatibility/Visual Impacts

General Plan Policy COS 11.1 requires protection of scenic highways, corridors, regionally significant vistas, and natural features. The project site is located three miles south of the nearest scenic highway corridor as identified by the County of San Diego General Plan. Due to distance and intervening topography and vegetation, the Project will not be visible from the scenic corridor. The proposed concrete masonry unit wall enclosure and lattice tower will be painted an earth tone color which will blend in with the existing natural environment. The surrounding six-foot-tall concrete masonry unit enclosure will house the proposed backup generator and equipment cabinets. Although the Project will be visible from nearby residences and motorists on Borrego Spring Road, it will be compatible with the surrounding land uses and existing structures based on the height of surrounding power poles, and the proposed earth tone color of the facility (see Figures 1 and 3) to blend with the mountain in the backdrop. The Project will be set back approximately 532 feet from the south property line and the centerline of Borrego Springs Road, which will help lessen the appearance of the height of the facility to motorists and nearby residents. No additional landscaping will be required to screen the Project due to the distance from nearby properties.

The closest residence to the Project is approximately 917 feet to the south. The residents will have limited views of the Project due to the distance from the Project to their property. The lattice tower is visible from surrounding areas but due to distance and intervening properties and public roads, the proposed facility blends in with the rural character of the area. The surrounding area is characterized by the rustic American Legion buildings, signs, and vehicles, as well as flag poles, utility poles, and trees. The proposed lattice tower, as well as the microwave dish and panel antennas, will be an earth tone to match the surrounding vacant land. Additionally, the facility is proposed to host antennas for multiple carriers, eliminating the need for multiple wireless facilities in the area. Therefore, the proposed wireless telecommunication facility will not introduce a negative visual impact to the community.

Alternative Site Analysis

The Project will provide cellular service to the surrounding residents, visitors, and motorists. The site is zoned General Commercial (C36), Service Commercial (C38), and Visitor-Serving Commercial (C42) which are all preferred zones according to Section 6985 of the County Zoning Ordinance. Therefore, an ASA is not required to analyze preferred locations or zones. However, the Applicant provided an ASA to explore the option of co-locating the facility onto existing facilities in the vicinity.

Co-location opportunities onto existing wireless telecommunication facilities in the Project vicinity were reviewed during the processing of the MUP application. Right-of-way power poles were also analyzed. However, all other wireless telecommunication facilities are located outside the Applicant's target coverage area or did not provide the necessary height to connect with other sites within the network. The Applicant demonstrated in the ASA that there are no feasible co-location opportunities as the area is underserved by wireless telecommunication facilities. The nearest existing facility is four miles north of the site. Due to limited co-location opportunities, and specific coverage objectives all other preferred locations and preferred zones were eliminated from consideration. Further information detailing the ASA analysis can be found in Attachment F.

The Geographic Service Area (GSA) maps illustrate coverage in the area, with and without the wireless telecommunication facility. The GSA maps demonstrate that the proposed location is necessary to provide coverage and adequate service to motorists and residents in the area (Figure 5). The height of the facility is necessary to allow the antennas to provide coverage to a portion of the Rams Hill development south of the site and to accommodate additional carriers. The GSA maps for AT&T can also be found in Attachment F.

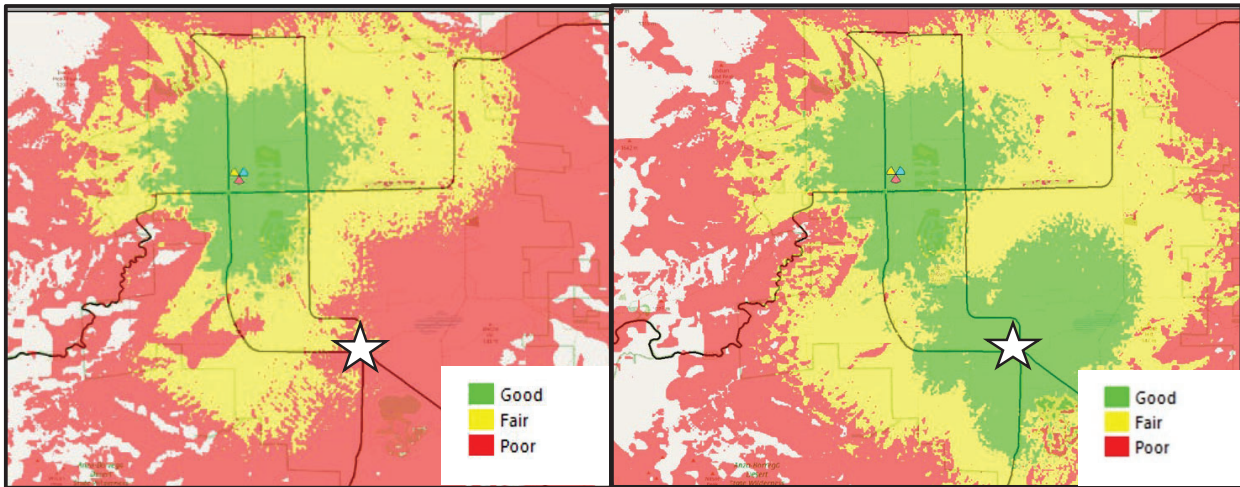


Figure 5: Coverage without Project (left) and coverage with Project (right).

3. General Plan Consistency

The Project is consistent with the following relevant General Plan goals, policies, and actions as described in Table D-1.

Table D-1: General Plan Conformance

General Plan Policy	Explanation of Project Conformance
GOAL S-1 – Public Safety. Enhanced public safety and the protection of public and private property. GOAL S-2 – Emergency Response. Effective emergency response to disasters that minimizes the loss of life and damage to property, while also reducing disruption in the delivery of vital public and private services during and following a disaster.	The Project will provide coverage throughout the area, which is essential in the event of an emergency. The Project also includes a 15-kilowatt (kW) backup generator and 12 backup batteries that will allow the proposed wireless telecommunication facility to operate in the event of a power outage or other emergency situation.
POLICY LU 15.2 – Co-Location of Telecommunication Facilities. Encourage wireless telecommunication services providers to co-locate their facilities whenever appropriate, consistent with the Zoning Ordinance.	The proposed MUP provides co-location opportunities for multiple carriers.

4. Zoning Ordinance Consistency

a. Development Regulations

The Project complies with all applicable zoning requirements of the General Commercial (C36), Service Commercial (C38), and Visitor-Serving Commercial (C42) zones with the incorporation of conditions of approval (See Table D-2).

Table D-2: Zoning Ordinance Development Regulations

CURRENT ZONING REGULATIONS		CONSISTENT?
Use Regulation:	C36/C38/C42	Yes, upon approval of a MUP
Animal Regulation:	-/J	N/A
Density:	-	N/A
Lot Size:	-	N/A
Building Type:	W	N/A
Height:	G	Yes, upon approval of a MUP
Lot Coverage:	-	N/A
Setback:	O	Yes
Open Space:	-	N/A
Special Area Regulations:	-	N/A

Development Standard	Proposed/Provided	Complies?
Section 4600 of the Zoning Ordinance sets the maximum height requirements. This parcel has a designated height of "G" which requires structures to be no more than 35 feet in height.	The proposed lattice tower is 97-feet tall. The Project includes a request to exceed the 35-foot height limit by 62 feet, which is necessary to meet the intended coverage objective.	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Upon approval of MUP
Section 4800 of the Zoning Ordinance requires that the project meet the "O" setback requirements for a 50-foot front yard setback, 0-foot interior side yard setback, 35-foot exterior side yard setback, and a 25-foot rear yard setback.	The proposed location of the lattice tower and associated equipment enclosure are located outside all required setbacks including front, rear, and side yard setbacks.	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>

b. Wireless Ordinance Consistency

By federal law, the County is prohibited from regulating the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency (RF) emissions, if the facilities comply with the FCC's regulations concerning RF emissions. Therefore, County decision makers do not consider comments or information concerning potential health effects or other environmental effects when determining whether to approve permits for cellular facilities. Also, staff does not require information from the Applicant

concerning such effects from RF emissions associated with the Project. Information regarding potential health effects is available from the cellular providers upon request as it is also required from the Federal Communication Commission.

The County is preempted by the Federal Telecommunication Act from considering Electric Magnetic Radiation (EMR) when reviewing the proposed location of cellular facilities. Therefore, staff does not require information from the Applicant on potential health effects from EMR associated with the Project. Generally, this information is available from the cellular providers upon request as it is also required from the Federal Communication Commission.

Table D-3: Wireless Ordinance Consistency

Development Standard	Proposed/Provided	Complies?
Section 6985.C.2 of the Wireless Telecommunication Ordinance requires that the equipment accessory to a facility not exceed 10 feet in height unless a greater height is necessary to maximize architectural integration and the facility is screened by landscaping.	The proposed concrete masonry wall equipment enclosure is six feet in height and the proposed equipment cabinets are 72 inches in height.	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
Section 6985.C.4 of the Wireless Telecommunication Ordinance requires that a minimum 50-foot setback for a telecommunication tower when it is placed adjacent to a residential use.	The proposed 97-foot-tall lattice tower is located over 50 feet from the nearest property line in accordance with Section 6985 of the Zoning Ordinance.	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
Section 6985.C.5 of the Wireless Telecommunication Ordinance prohibits the placement of a telecommunication tower or equipment in the front, rear, or side yard setback.	The proposed lattice tower and equipment enclosure are located outside of all required setbacks including front, rear, and side yard.	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
Section 6985.C.6 of the Wireless Telecommunication Ordinance states that noise from any equipment supporting the facility shall meet the requirements of the County's Noise Ordinance on an average hourly basis.	The project site, as well as surrounding parcels to the east and south, are zoned commercial and are subject to a restrictive sound level requirement of a one-hour average 50 dBA limit at the project property line. The adjacent parcels to the north and west are zoned General Rural (S92), which is subject to the stringent one-hour mean noise level of 47.5 dBA. The primary noise sources associated with the project would be from the proposed 15 kW generator unit. As	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>

Development Standard	Proposed/Provided	Complies?
	a project design feature, the generator unit would be located within a six-foot-tall CMU block wall enclosure. Based on the current layout and design, noise levels would be below the sound level requirement at the property lines. The project as designed demonstrates compliance with the Noise Ordinance and no noise mitigation is required.	
Section 6985.C.11 of the Wireless Telecommunication Ordinance limits the term of a "high visibility" facility, depending on the valuation of the wireless facility.	The Project is considered a "high visibility" facility because the facility is a lattice tower. Projects with a valuation of over \$500,000 are required by the Zoning Ordinance to have a maximum term of 15 years. Since the Project has a valuation of approximately \$535,261, the MUP has been conditioned to have a maximum term of 15 years. This time may be extended for an additional period of time by modifying the permit, if it is found that no smaller or less visible technology is available or feasible to replace the facility at the time of the request for a modification.	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
Section 6987.D of the Wireless Telecommunication Ordinance states that sites visible from a Scenic Highway, as identified in the General Plan, shall be designed in such a manner as to avoid adverse visual impacts and does not permit the use of monopoles, lattice towers, or guyed towers.	The proposed Project consists of a lattice tower that is located and designed to avoid adverse visual impacts through earth-tone colors and proximity to utility poles and trees. The site is not visible from any nearby scenic roads due to the distance and topography.	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>

5. California Environmental Quality Act (CEQA) Compliance

The project has been reviewed for compliance with CEQA and it is recommended that the proposed project qualifies for a categorical exemption under CEQA Section 15303. Section 15303 exempts the installation of small new equipment and facilities in small structures. It has been determined that the project is not in an environmentally sensitive location; will not have a cumulative effect on the environment; is not on a hazardous waste site; will not cause substantial change in the significance of a historical resource; and will not result in damage to a scenic highway.

E. PUBLIC INPUT

The Project was first submitted to PDS in June 2020. Due to a clerical oversight, the public notifications were not sent at application submittal pursuant to Board Policy I-49. Staff discovered this error in July 2021 and corrected the mistake by sending notices to 101 property owners within a 1,500-foot radius of the project site. After the public notifications were sent, staff received responses from nine surrounding property owners. Six were in opposition, two were in support of the facility, and one requested additional information. The comments in opposition included concerns regarding potential health effects from radio frequency (RF) emissions, visual impacts, hazards to the airport and impacts associated with light pollution.

Staff responded to the concerns regarding health effects that by federal law, the County is prohibited from regulating the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency (RF) emissions, if the facilities comply with the Federal Communications Commission's (FCC) regulations concerning RF emissions. Staff addressed comments regarding hazards to the nearby airport with information that the project will be required to file a notification with the Federal Aviation Administration (FAA) prior to building permit to determine if there are any additional requirements for airport safety. The project does not currently propose any lighting, however, should the FAA require additional lighting, it would be installed pursuant to FAA requirements.

Staff responded to comments regarding potential visual impacts explaining how the facility will be setback from property lines, existing trees and structures that will help screen the facility, as well as the earth toned color the structure will be painted to blend with the mountain backdrop. Public comments are found in Attachment E, Public Documents. Notices of the Planning Commission public hearing were sent to property owners and tenants within a minimum radius of 1,500 feet of the project site.

F. BORREGO COMMUNITY SPONSOR GROUP

On September 3, 2020, the Borrego Springs Community Sponsor Group (CSG) reviewed two different design options for this project. The first design option was the lattice tower at 80 feet tall, with a 17-foot windmill feature on top. The second option was to remove the windmill feature and increase the height of the proposed lattice tower to 97 feet. The CSG recommended approval of the MUP with the condition that the American Legion make the decision regarding whether to add the windmill feature at the top of the tower, by a vote of 4-2-1 (4-Yes, 2-No, 1-Abstain). The property owner chose to remove the windmill and raise the height of the tower to 97 feet.

In July 2021 when staff discovered that public notices were not sent out at project intake, staff worked with the Borrego Springs CSG to have them discuss the project again at their July 29, 2021 meeting to allow interested community members to participate. One member of the public attended the July 29, 2021 CSG meeting to express opposition to the project. The CSG voted again to recommend approval of the 97-foot-tall lattice tower without conditions by a vote of 6-0-1 (6-Yes, 0-No, 1-Abstain). The Borrego Springs CSG Meeting Minutes and Project Recommendation forms are found in Attachment E, Public Documentation.

G. RECOMMENDATIONS

Staff recommends that the Planning Commission take the following actions:

1. Adopt the Environmental Findings included in Attachment D which include a finding that the project is exempt from CEQA.

2. Grant MUP PDS2020-MUP-20-008, make the findings, and impose the requirements and conditions as set forth in the Form of Decision in Attachment B.

Report Prepared By:

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Kathleen.Flannery@sdcounty.ca.gov

AUTHORIZED REPRESENTATIVE:

p.p.



KATHLEEN A. FLANNERY, ACTING DIRECTOR

ATTACHMENTS:

Attachment A – Planning Documentation

Attachment B – Form of Decision Approving PDS2020-MUP-20-008

Attachment C – Environmental Documentation

Attachment D – Environmental Findings

Attachment E – Public Documentation

Attachment F – Photos, Geographic Service Area Maps and Alternative Site Analysis

Attachment G – Ownership Disclosure

Attachment A – Planning Documentation

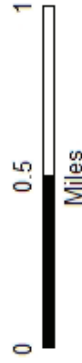
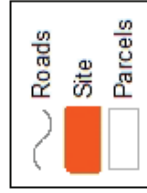
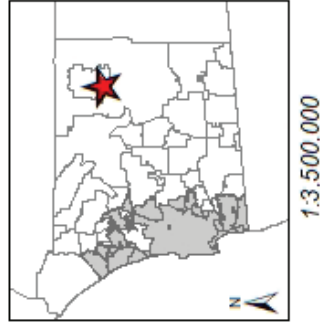
American Legion Borrego Springs Wireless Facility

Vicinity Map

PDS2020-MUP-20-008

Borrego Springs

Subregional Planning Areas



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American Legion Borrego Springs Wireless Facility

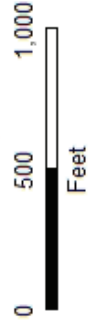
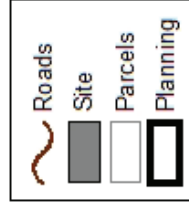
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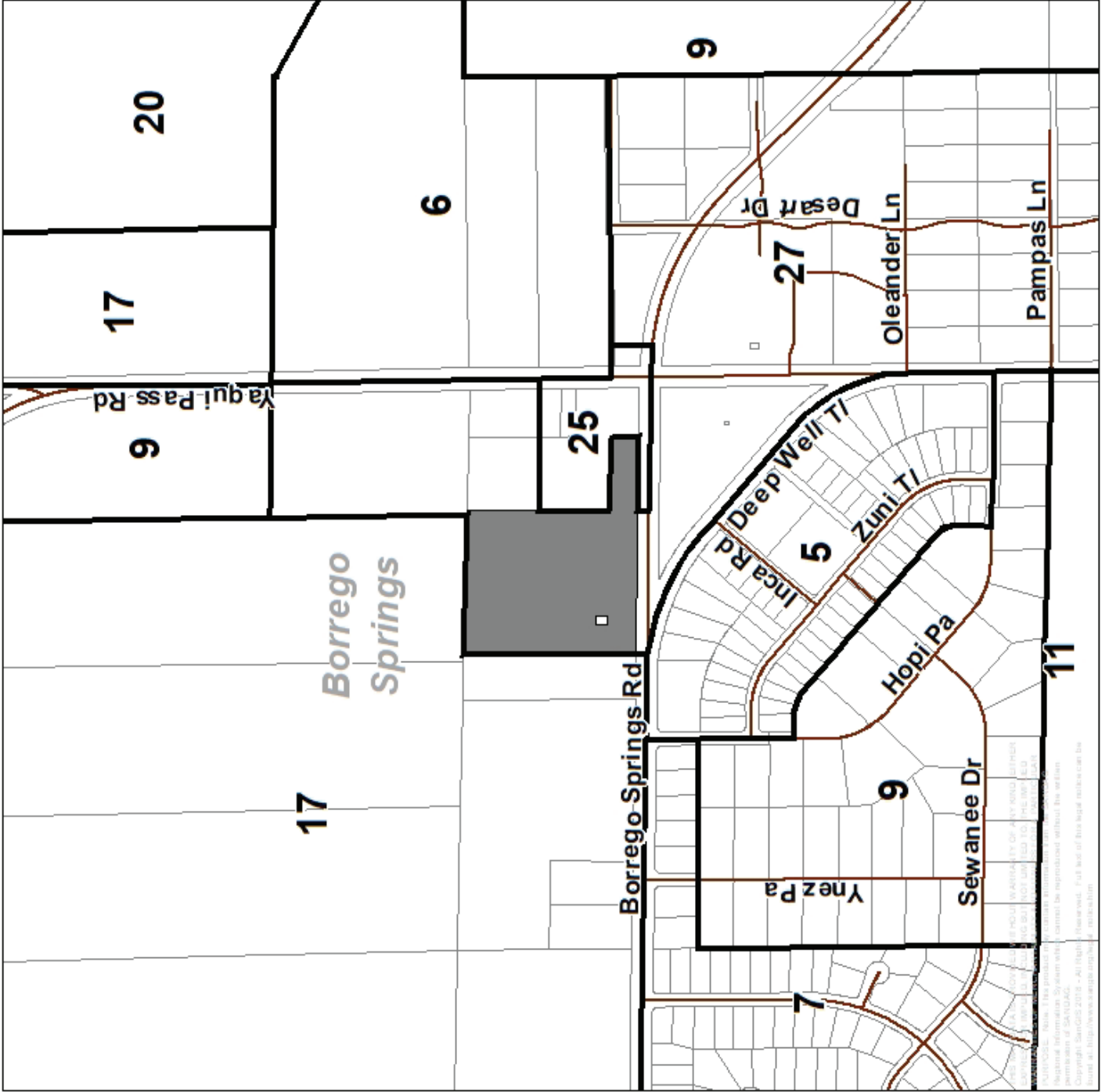
Borrego Springs

Subregional Planning Areas

- (5) Village Residential (VR-7.3)
- (6) Village Residential (VR-4.3)
- (7) Village Residential (VR-2.9)
- (9) Semi-Rural Residential (SR-1)
- (11) Semi-Rural Residential (SR-2)
- (17) Semi-Rural Residential (SR-10)
- (20) Rural Lands (RL-80)
- (25) General Commercial
- (27) Rural Commercial



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NOTES: 1. This project is a preliminary map and is not intended to be used for legal purposes. 2. The map is based on the best available information and is not a guarantee of accuracy. 3. The map is not a substitute for a professional survey. 4. The map is not a substitute for a professional engineering or architectural drawing. 5. The map is not a substitute for a professional legal opinion. 6. The map is not a substitute for a professional environmental impact statement. 7. The map is not a substitute for a professional feasibility study. 8. The map is not a substitute for a professional business plan. 9. The map is not a substitute for a professional marketing plan. 10. The map is not a substitute for a professional financial plan. 11. The map is not a substitute for a professional risk management plan. 12. The map is not a substitute for a professional crisis management plan. 13. The map is not a substitute for a professional disaster recovery plan. 14. 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American Legion Borrego Springs Wireless Facility

Zoning

PDS2020-MUP-20-008

Borrego Springs

Subregional Planning Areas

C36 - General Commercial

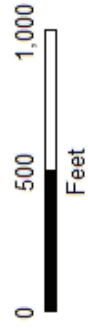
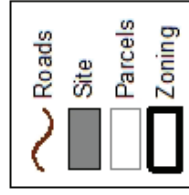
C38 - Service Commercial

C42 - Visitor Serving Commercial

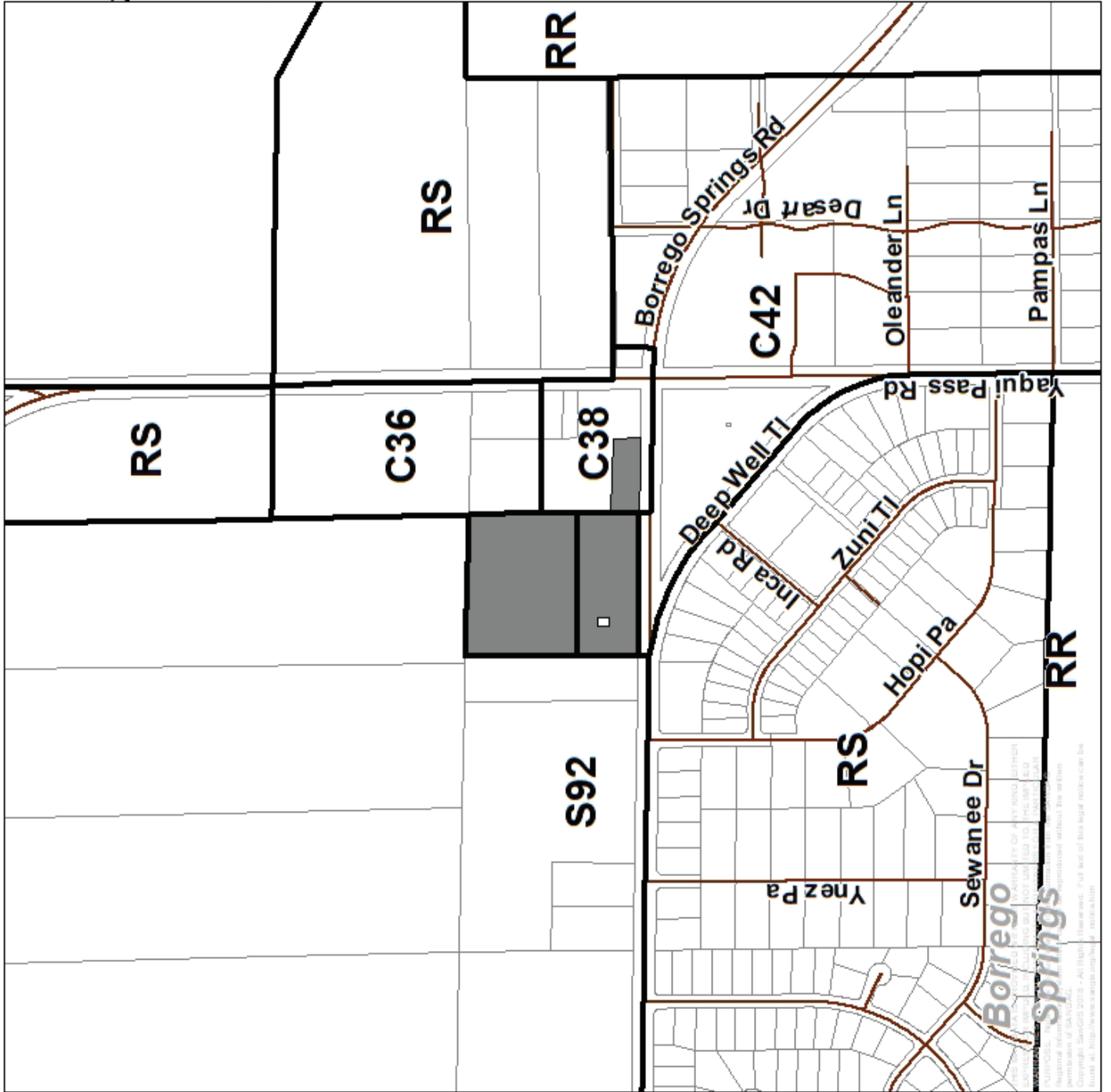
RR - Rural Residential

RS - Single Family Residential

S92 - General Rural



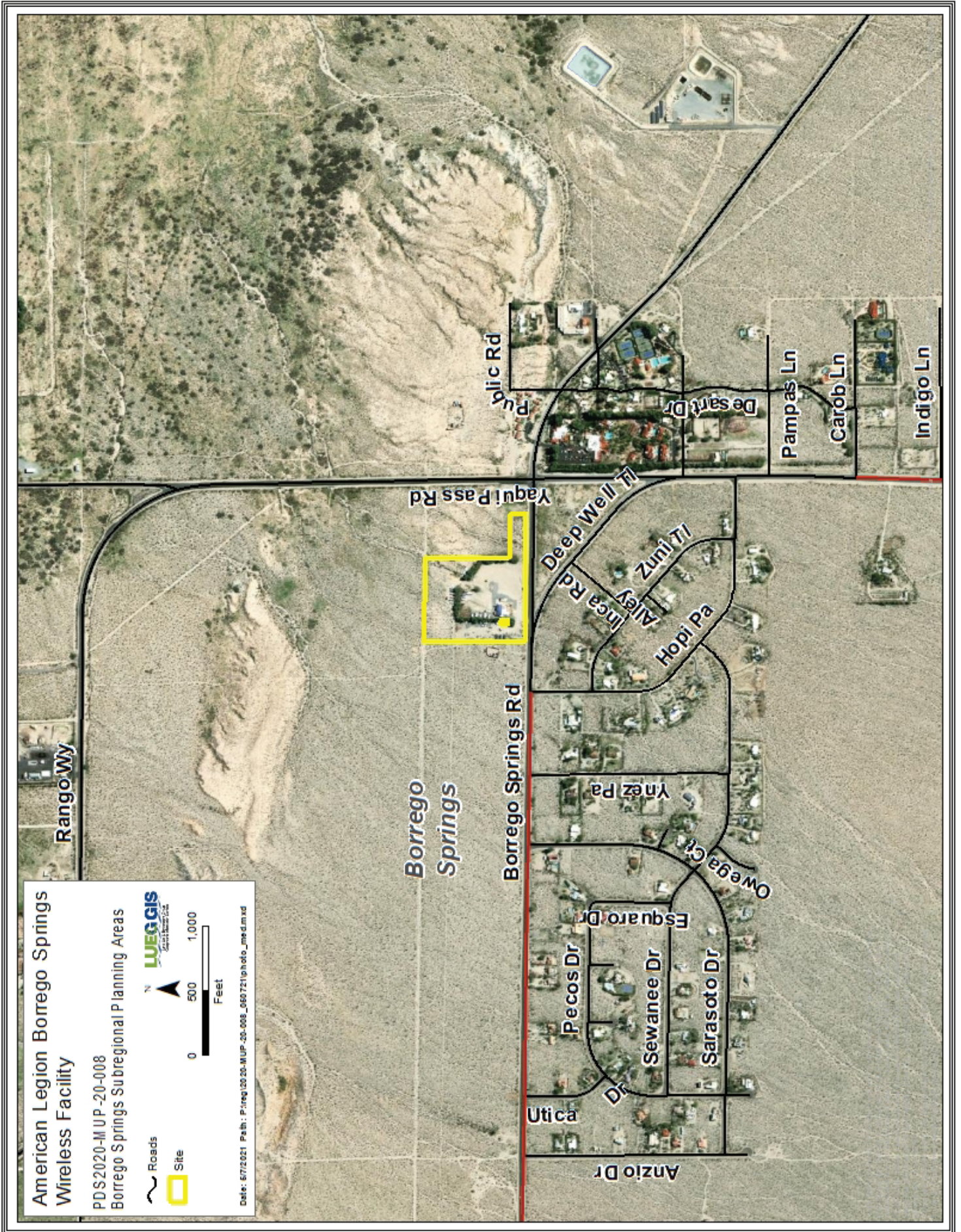
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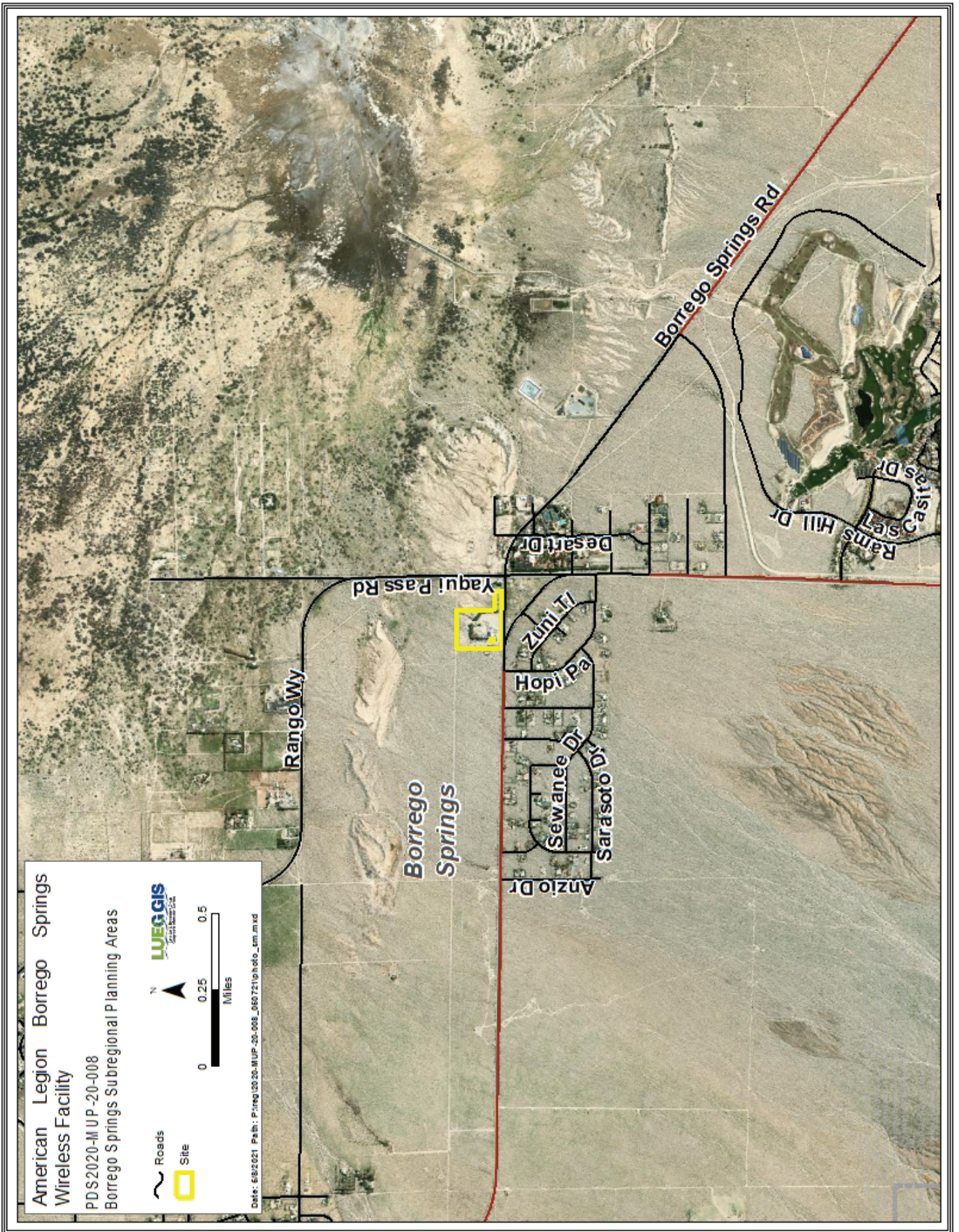


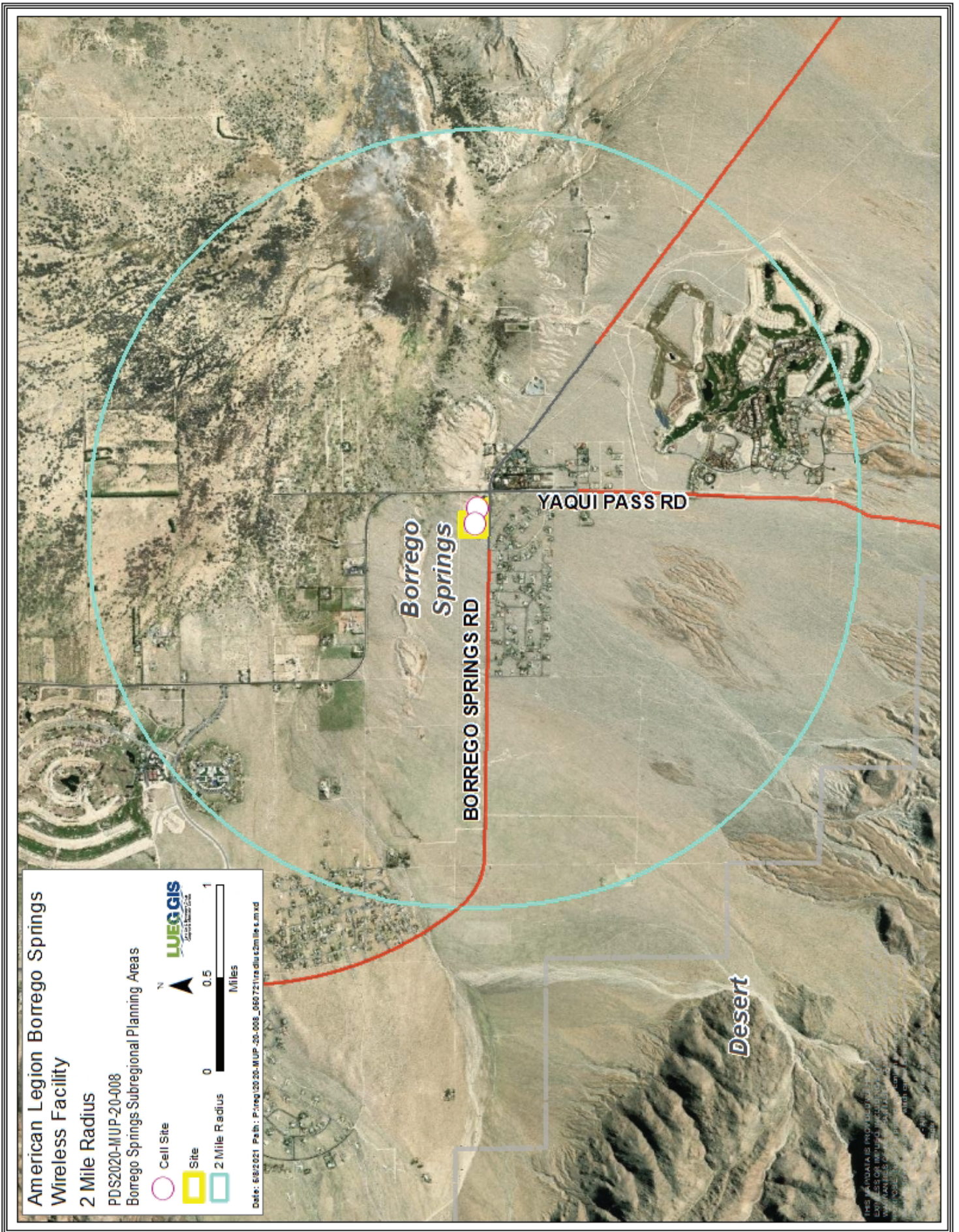
Borrego Springs

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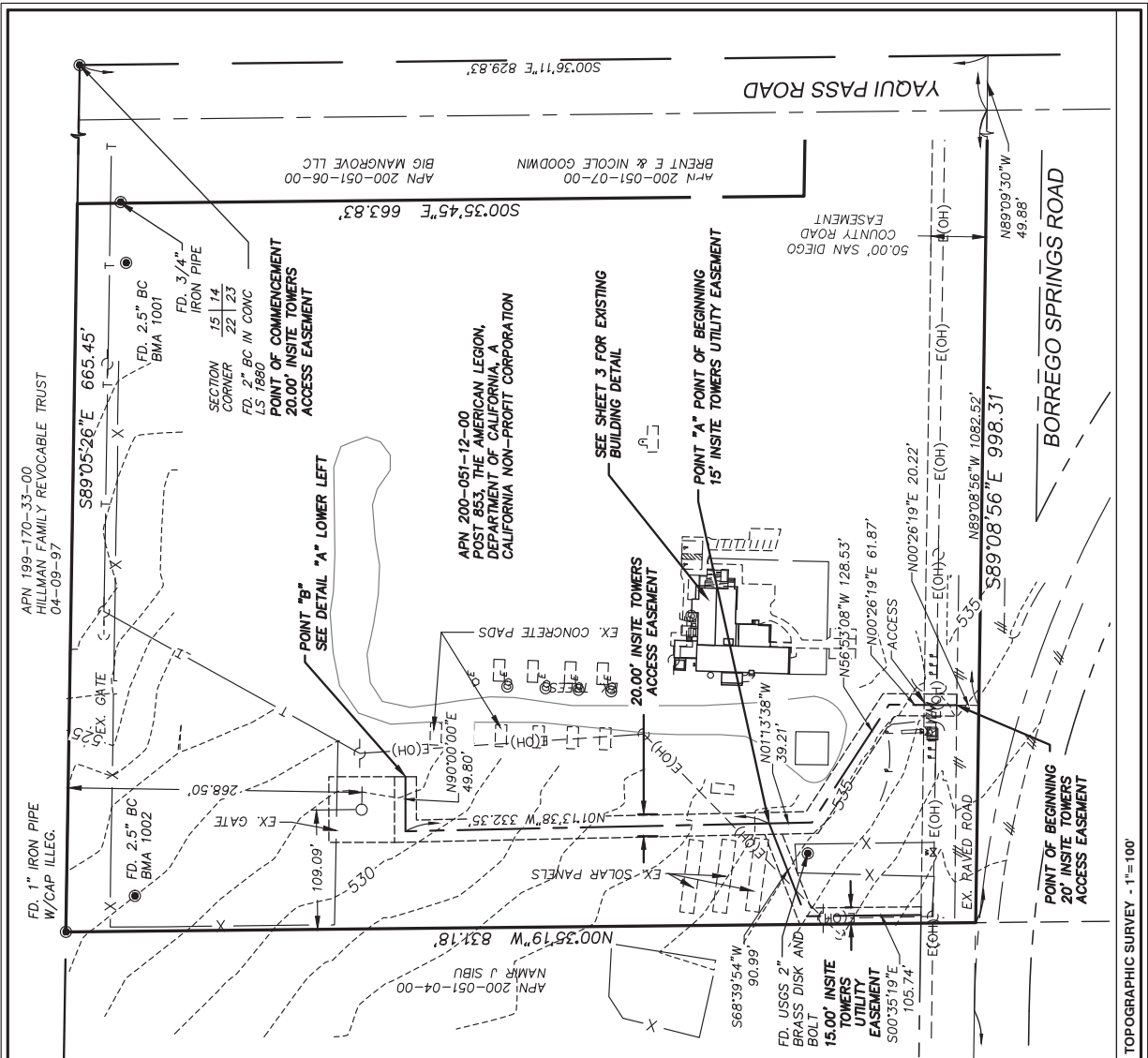






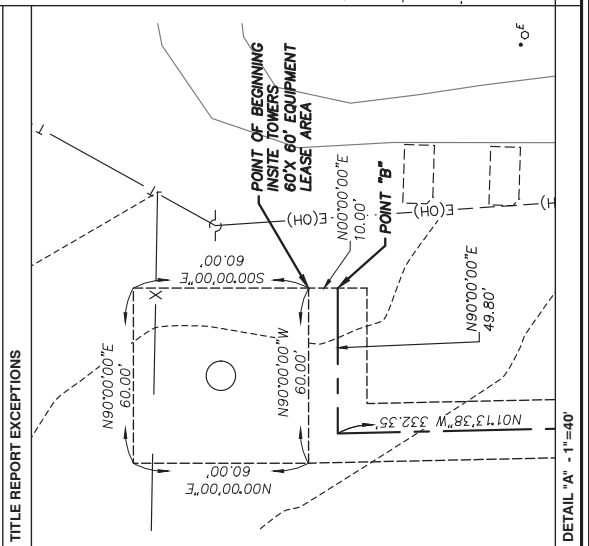


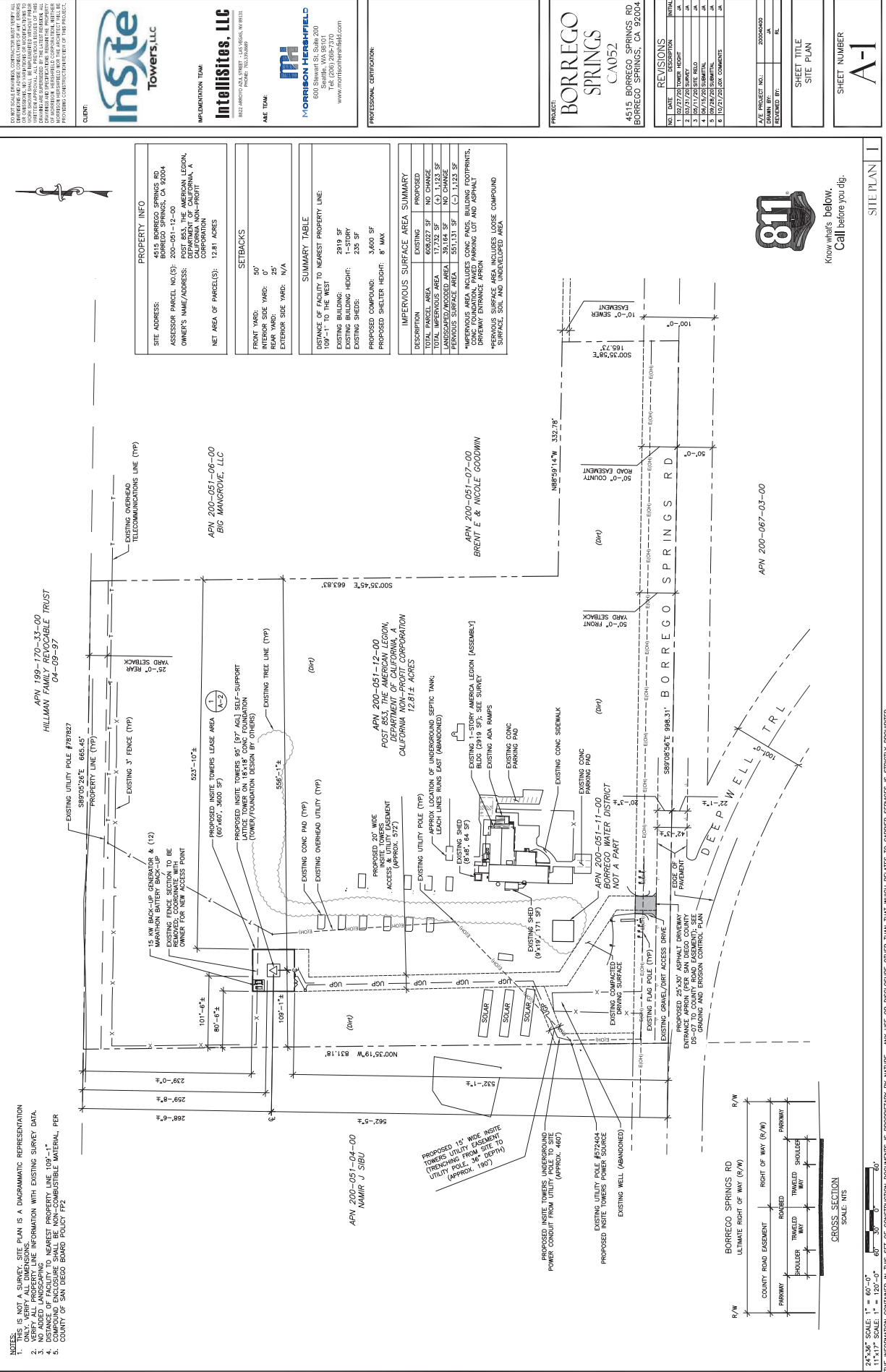
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TOPOGRAPHIC SURVEY - 1"=100'

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Client:

IntelliSites, LLC

1852 BENTLEY AVE, SUITE 100, SAN ANTONIO, TX 78204

Project:

BORREGO SPRINGS

CA 92004

Architect:

MORRISON HERSHFIELD

5000 W. 10TH AVE, SUITE 200, DENVER, CO 80202

Engineer:

IntelliSites, LLC

1852 BENTLEY AVE, SUITE 100, SAN ANTONIO, TX 78204

Contract:

CA 92004

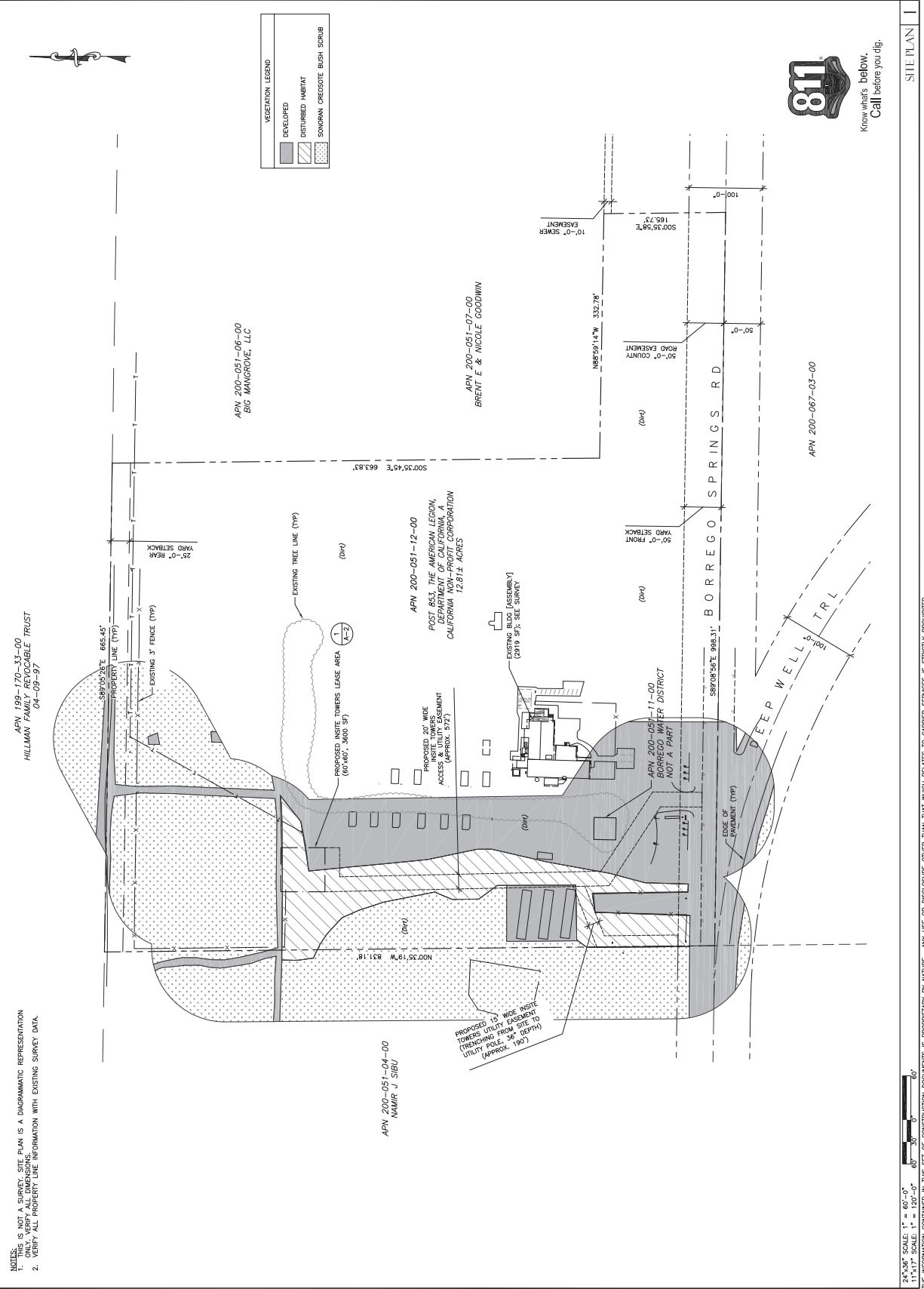
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3	10/27/22	FIELD	JM
4	10/27/22	SUBMITTAL	JM
5	10/27/22	COMMENTS	JM

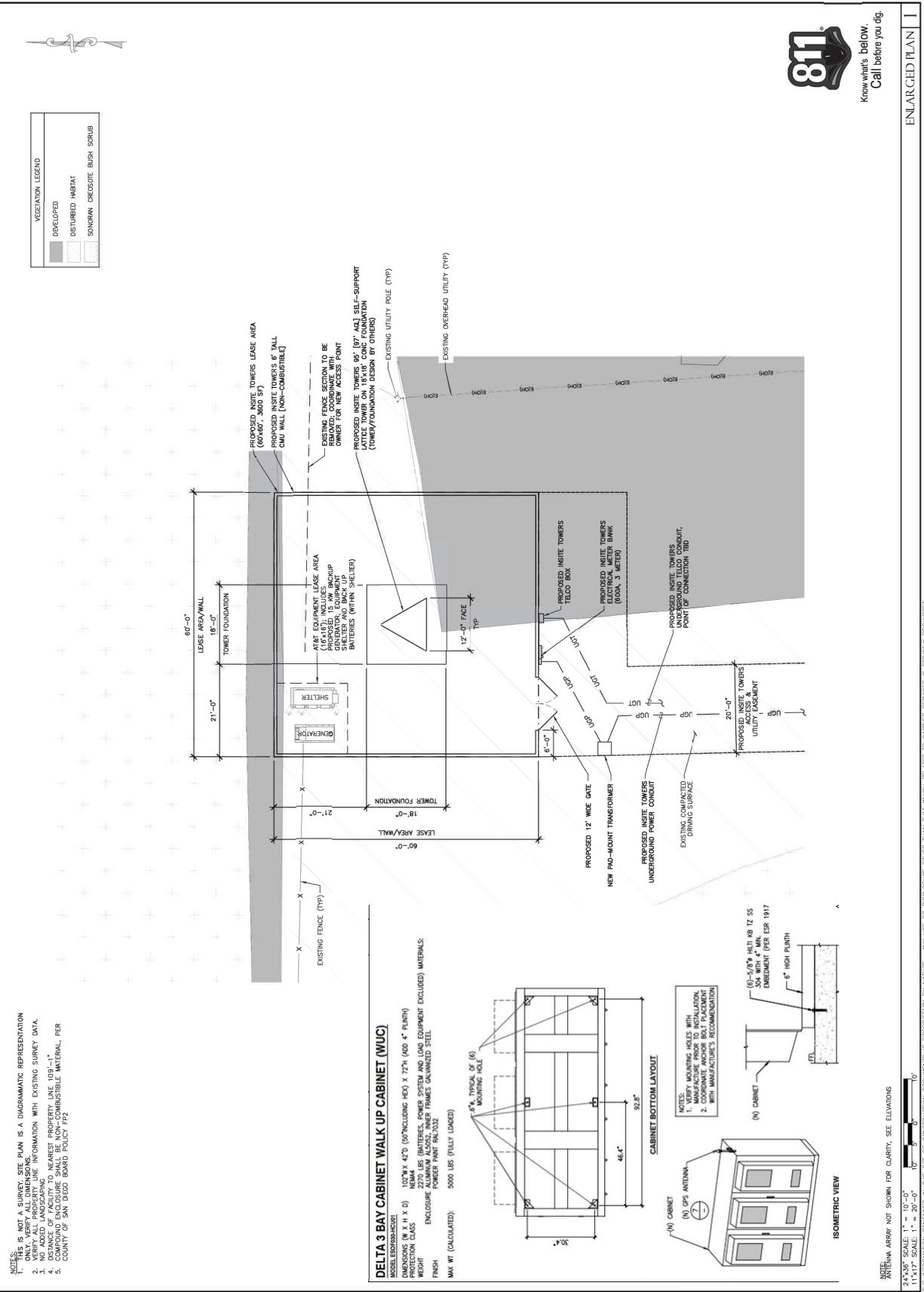
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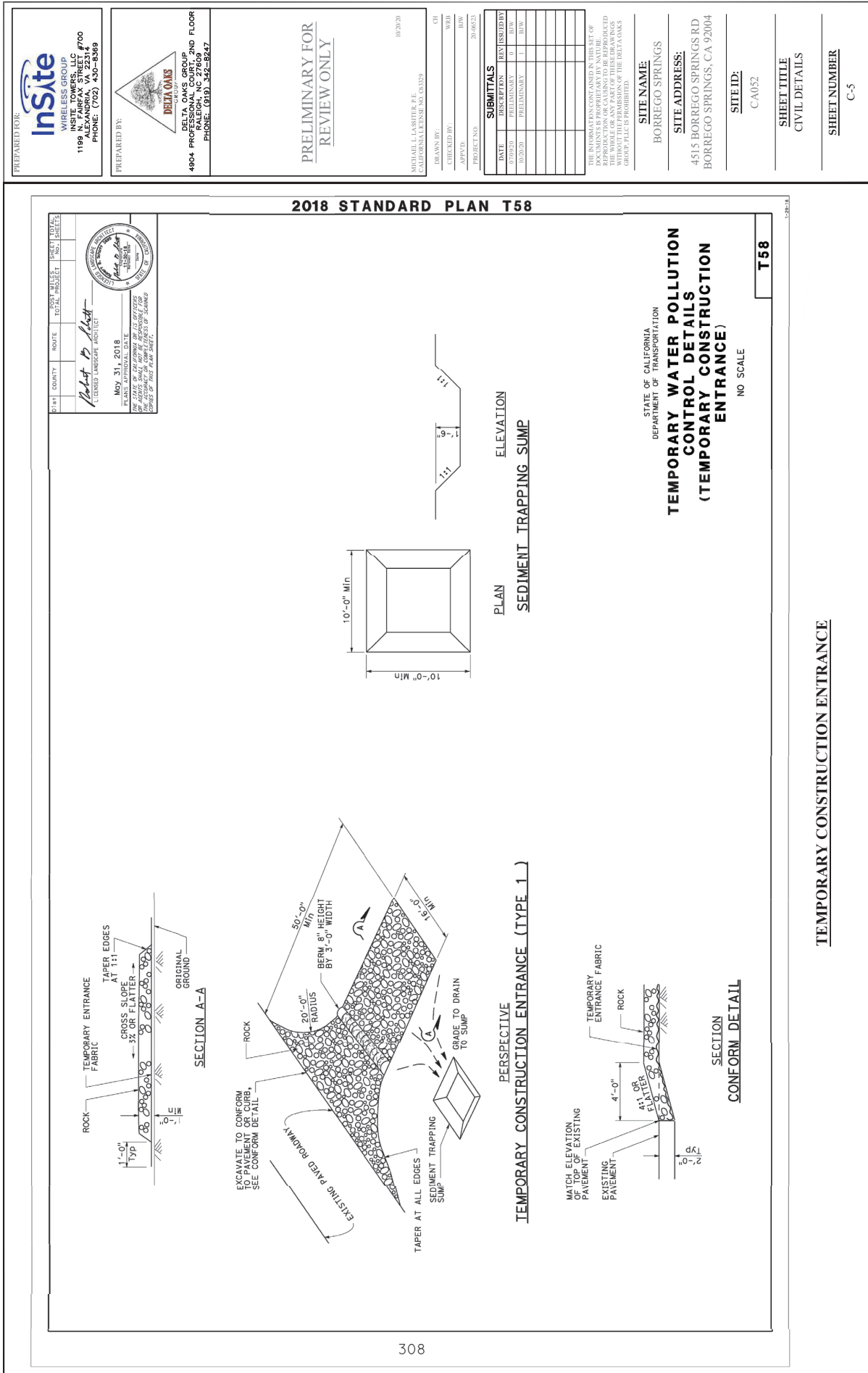
REVISION BY: JL



SHEET TITLE: VEGETATION PLAN

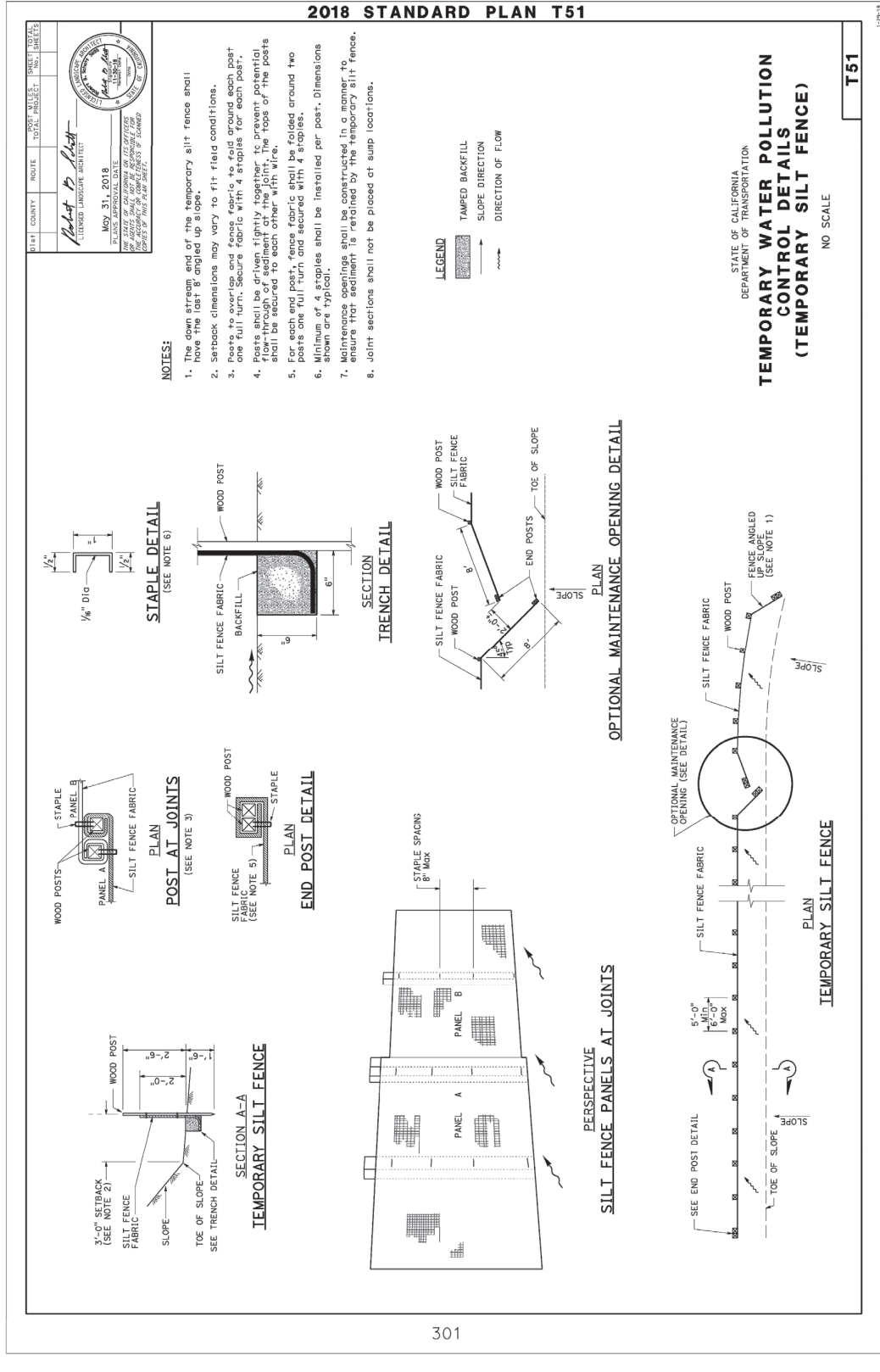
SHEET NUMBER: A-1.1







PREPARED FOR: <div style="text-align: center;">  InSite WIRELESS GROUP INSITE TOWERS, LLC 1199 WEST 10TH AVE ALEXANDRIA, VA 22304 PHONE: (702) 430-8369 </div>	PREPARED BY: <div style="text-align: center;">  DELTA OAKS GROUP 4904 PROFESSIONAL CENTER 2ND FLOOR RALEIGH, NC 27609 PHONE: (919) 342-8847 </div>	<div style="text-align: center;"> <h2 style="margin: 0;">PRELIMINARY FOR REVIEW ONLY</h2> </div> <div style="margin-top: 20px;"> <p style="font-size: small; margin: 0;">MICHAEL J. LASHETER, P.E. LICENSED PROFESSIONAL ENGINEER</p> <p style="font-size: x-small; margin: 0;">DRAWN BY: _____ DATE: 10/20/20</p> <p style="font-size: x-small; margin: 0;">CHECKED BY: _____ WRB</p> <p style="font-size: x-small; margin: 0;">APP'D: _____ DWB</p> <p style="font-size: x-small; margin: 0;">PROJECT NO.: 20-06023</p> </div> <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 10px;"> <thead> <tr> <th style="width: 15%;">DATE</th> <th style="width: 35%;">SUBMITTALS</th> <th style="width: 35%;">DESCRIPTION</th> <th style="width: 15%;">REV/ISSUED BY</th> </tr> </thead> <tbody> <tr> <td>03/06/20</td> <td>PRELIMINARY</td> <td>0</td> <td>DWB</td> </tr> <tr> <td>10/20/20</td> <td>PRELIMINARY</td> <td>1</td> <td>DWB</td> </tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> </tbody> </table> <p style="font-size: x-small; margin-top: 10px;">THE INFORMATION CONTAINED IN THIS SET OF DOCUMENTS IS PROPRIETARY BY NATURE. IT IS TO BE KEPT IN CONFIDENTIALITY AND THE WHOLE OR ANY PART OF THESE DRAWINGS IS NOT TO BE REPRODUCED, COPIED, EITHER WHOLLY OR IN PART, OR TRANSMITTED IN ANY FORM OR BY ANY MEANS, WITHOUT THE PERMISSION OF THE DELTA OAKS GROUP.</p>	DATE	SUBMITTALS	DESCRIPTION	REV/ISSUED BY	03/06/20	PRELIMINARY	0	DWB	10/20/20	PRELIMINARY	1	DWB																								
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<div style="display: flex; justify-content: space-around;"> <div style="text-align: center;"> SITE NAME: BORREGO SPRINGS </div> <div style="text-align: center;"> SITE ADDRESS: 4515 BORREGO SPRINGS RD BORREGO SPRINGS, CA 92004 </div> </div>																																						
SITE ID: CA052																																						
SHEET TITLE CIVIL DETAILS																																						
SHEET NUMBER C-6																																						



PREPARED FOR:

InSite

WIRELESS GROUP
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NEW YORK, NY 10017
PHONE: (702) 430-8369

PREPARED BY:

DELTA OAKS GROUP

DELTA OAKS GROUP
4804 PROGRESS ROAD, SECOND FLOOR
RALEIGH, NC 27609
PHONE: (919) 352-9247

PRELIMINARY FOR REVIEW ONLY

DATE: 10/20/20

DRAWN BY: MICHAEL L. LASTER P.E.
CALIFORNIA LICENSE NO. C3329

CHECKED BY: [Blank]

APPROVED: [Blank]

PROJECT NO: 20-0652

SUBMITTALS

DATE	DESCRIPTION	REVISION/DISPOSITION
07/09/20	PRELIMINARY	0 R/W
10/20/20	PRELIMINARY	1 R/W

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SITE NAME: BORRERO SPRINGS

SITE ADDRESS: 4515 BORRERO SPRINGS RD
BORRERO SPRINGS, CA 92004

SITE ID: CA052

SHEET TITLE: CIVIL DETAILS

SHEET NUMBER: C-7

2018 STANDARD PLAN T59

STATE OF CALIFORNIA
DEPARTMENT OF TRANSPORTATION

**TEMPORARY WATER POLLUTION CONTROL DETAILS
(TEMPORARY CONCRETE WASHOUT FACILITY)**

NO SCALE

T59

NOTES:

- The concrete washout sign shall be installed within 50 feet of the temporary concrete washout facility.
- Plastic liner shall be anchored with gravel-filled bags for below grade concrete washout facility.

CONCRETE WASHOUT SIGN DETAIL

SECTION A-A

SECTION B-B

SECTION C-C

PLAN

**Attachment B – Form of Decision Approving
PDS2020-MUP-20-008**



County of San Diego
PLANNING & DEVELOPMENT SERVICES

KATHLEEN A. FLANNERY
Acting Director

VINCE NICOLETTI
Acting Assistant Director

5510 OVERLAND AVENUE, SUITE 110, SAN DIEGO, CALIFORNIA 92123
INFORMATION (858) 694-2960
TOLL FREE (800) 411-0017
www.sdcounty.ca.gov/pds

COMMISSIONERS

Michael Edwards (Chair)
David Pallinger (Vice Chair)
Douglas Barnhart
Ginger Hitzke
Ronald Ashman
Tommy Hough
Yolanda Calvo

September 17, 2021

PERMITEE: INSITE TOWERS, LLC
MAJOR USE PERMIT: PDS2020-MUP-20-008
E.R. NUMBER: PDS2020-ER-20-11-001
PROPERTY: 4515 BORREGO SPRINGS ROAD
APN(S): 200-051-12

DECISION OF THE PLANNING COMMISSION

Grant, as per plot plan, floor plans and elevations date November 20, 2020, consisting of 14 sheets approved concurrently herewith, a Major Use Permit, for the construction, operation, and maintenance of an unmanned wireless telecommunication facility pursuant to Section 6985 of the Zoning Ordinance. This permit authorizes construction of a 97-foot-tall lattice tower with 12 panel antennas, one dish antenna, a 15-kilowatt backup generator, backup batteries, and other associated equipment located within an equipment cabinet surrounded by a 3,600 square foot, 6-foot-tall masonry unit wall enclosure.

Also grant, pursuant to Section 4620(g) of the Zoning Ordinance, an exception to the 35-foot height limit to allow construction of a 97-foot-tall lattice tower.

The wireless telecommunication facility is considered a "high visibility" facility; therefore pursuant to Section 6985(c)(11) of the Zoning Ordinance, this Major Use Permit shall have a maximum term of 15 years (September 17, 2036). This may be extended for an additional period of time by modifying the permit if it is found that no smaller or less visible technology is available or feasible to replace the facility at that time.

MAJOR USE PERMIT EXPIRATION: This Major Use Permit shall expire on **September 17, 2023** at 4:00 p.m. (or such longer period as may be approved pursuant to Section 7376 of The Zoning Ordinance of the County of San Diego prior to said expiration date) unless construction or use in reliance on this Major Use Permit has commenced prior to said expiration date.

.....

SPECIFIC CONDITIONS: Compliance with the following Specific Conditions shall be established before the property can be used in reliance upon this Major Use Permit Modification. Where specifically indicated, actions are required prior to approval of any grading, improvement, building plan and issuance of grading, construction, building, or other permits as specified:

ANY PERMIT: *(Prior to the approval of any plan, issuance of any permit, and prior to occupancy or use of the premises in reliance of this permit).*

1. **GEN#1–COST RECOVERY: [PDS, DPW, DEH, DPR], [GP, CP, BP, UO] INTENT:** In order to comply with Section 362 of Article XX of the San Diego County Administrative Code, Schedule B.5, existing deficit accounts associated with processing this permit shall be paid. **DESCRIPTION OF REQUIREMENT:** The applicant shall pay off all existing deficit accounts associated with processing this permit. **DOCUMENTATION:** The applicant shall provide a receipt to Planning & Development Services, Zoning Counter, which shows that all discretionary deposit accounts have been paid. No permit can be issued if there are deficit deposit accounts. **TIMING:** Prior to the approval of any plan and prior to the issuance of any permit and prior to use in reliance of this permit, all fees and discretionary deposit accounts shall be paid. **MONITORING:** The PDS Zoning Counter shall review the receipts and verify that all PDS, DPW, DEH, and DPR deposit accounts have been paid.

2. **GEN#2–RECORDATION OF DECISION: [PDS], [GP, CP, BP, UO]**
INTENT: In order to comply with Section 7019 of the Zoning Ordinance, the Permit Decision shall be recorded to provide constructive notice to all purchasers, transferees, or other successors to the interests of the owners named, of the rights and obligations created by this permit. **DESCRIPTION OF REQUIREMENT:** The applicant shall sign, notarize with an 'all-purpose acknowledgement' and return the original Recordation Form to PDS. **DOCUMENTATION:** Signed and notarized original Recordation Form. **TIMING:** Prior to the approval of any plan and prior to the issuance of any permit and prior to use in reliance of this permit, a signed and notarized copy of the Decision shall be recorded by PDS at the County Recorder's Office. **MONITORING:** The PDS Zoning Counter shall verify that the Decision was recorded and that a copy of the recorded document is on file at PDS.

3. **GEN#3-FILING OF NOE:**
INTENT: In order to comply with CEQA and State law, the permit NOE shall be filed at the County Recorder's Office. **DESCRIPTION OF REQUIREMENT:** The applicant shall take the original NOE and required fees to the San Diego County Recorder's Office and file the document within five (5) days of permit approval and return a copy of the filed document to PDS. **DOCUMENTATION:** The filed NOE form. **TIMING:** Within the first five (5) days of the appeal period, the applicant/owner shall take the original NOE form and required filing fees to the San Diego County Recorder's Office and file the document. **MONITORING:** The PDS Zoning Counter shall verify that the NOE was filed and that a copy of the document is on file at PDS.

4. **CULT#1 - ARCHAEOLOGICAL MONITORING**
INTENT: In order to mitigate for potential impacts to undiscovered buried archaeological resources and human remains, an Archaeological Monitoring Program and potential Data Recovery Program shall be implemented pursuant to the County of San Diego Guidelines for Determining Significance for Cultural Resources and the California Environmental Quality Act (CEQA). **DESCRIPTION OF REQUIREMENT:** A County Approved Principal Investigator (PI) known as the "Project Archaeologist," shall be contracted to perform archaeological monitoring and a potential data recovery program during all grading,

clearing, grubbing, trenching, and construction activities. The archaeological monitoring program shall include the following:

- a. The Project Archaeologist shall perform the monitoring duties before, during and after construction pursuant to the most current version of the County of San Diego Guidelines for Determining Significance and Report Format and Requirements for Cultural Resources. The Project Archaeologist and Kumeyaay Native American monitor shall also evaluate fill soils to determine that they are clean of cultural resources. The contract or letter of acceptance provided to the County shall include an agreement that the archaeological monitoring will be completed, and a Memorandum of Understanding (MOU) between the Project Archaeologist and the County of San Diego shall be executed. The contract or letter of acceptance shall include a cost estimate for the monitoring work and reporting.
- b. The Project Archeologist shall provide evidence that a Kumeyaay Native American has been contracted to perform Native American Monitoring for the project.
- c. The cost of the monitoring shall be added to the grading bonds or bonded separately.

DOCUMENTATION: The applicant shall provide a copy of the Archaeological Monitoring Contract or letter of acceptance, cost estimate, and MOU to [PDS, PPD]. Additionally, the cost amount of the monitoring work shall be added to the grading bond cost estimate.

TIMING: Prior to approval of any grading and or improvement plans and issuance of any Grading or Construction Permits. **MONITORING:** [PDS, PPD] shall review the contract or letter of acceptance, MOU and cost estimate or separate bonds for compliance with this condition. The cost estimate should be forwarded to [PDS, PPD] for inclusion in the grading bond cost estimate, and grading bonds and the grading monitoring requirement shall be made a condition of the issuance of the grading or construction permit.

BUILDING PERMIT: *(Prior to approval of any building plan and the issuance of any building permit):*

5. PLN#1-FAA NOTIFICATION

INTENT: In order to comply with the Borrego Valley Airport Land Use Compatibility Plan, FAA Notification is required at least 45 days prior to construction. **DESCRIPTION OF REQUIREMENT:** The following condition shall be implemented and indicated on the building plans and made conditions of its issuance. The applicant must submit a 7460-1 form to the Federal Aviation Administration at least 45 days prior to construction or alteration. **DOCUMENTATION:** The applicant shall place this condition on the building plans and submit the plans to [PDS, BPPR] for review and approval. **TIMING:** Prior to issuance of any building permit, this condition shall be incorporated into the building plans. **MONITORING:** The [PDS, BPPR] shall verify that the specific notes has been placed on all sets of the building plans and made conditions of its issuance.

OCCUPANCY: *(Prior to any occupancy, final grading release, or use of the premises in reliance of this permit).*

6. GEN#4-INSPECTION FEE

INTENT: In order to comply with Zoning Ordinance Section 7362.e the inspection fee shall be paid. **DESCRIPTION OF REQUIREMENT:** Pay the inspection fee at the [PDS, ZC] to cover the cost of inspection(s) of the property to monitor ongoing conditions associated with this permit. In addition, submit a letter indicating who should be contacted to schedule the inspection. **DOCUMENTATION:** The applicant shall provide a receipt showing that the inspection fee has been paid along with updated contact information [PDS, PCC]. **TIMING:** Prior to any occupancy, final grading release, or use of the premises in reliance of this permit. **MONITORING:** The [PDS, ZC] shall process an invoice and collect the fee. PDS will schedule an inspection within one year from the date that occupancy or use of the site was established.

7. **PLN#2–PHOTOSIMULATIONS (WIRELESS): [PDS, PCC] [UP, FG] [PDS, FEE].**

INTENT: In order to verify that the site complies with the [County Zoning Ordinance Section 6980 through 6991 \(Wireless Telecommunications Section\)](#), the site shall substantially comply with the approved plot plans and photo simulations. **DESCRIPTION OF REQUIREMENT:** The site shall be built to substantially comply with the approved photo simulations dated 11-20-20 to ensure that the site was built to the approved design. **DOCUMENTATION:** The applicant shall build the site to comply with the approved plans and the photo simulations. Upon completion, the applicant shall provide the photographic evidence to the [PDS, PCC] for review. **TIMING:** Prior to any occupancy, final grading release, or use of the premises in reliance of this permit, the site shall be built to match the approval. **MONITORING:** The [PDS, PCC] shall review the provided photos for compliance with this condition and compliance with the photos.

8. **PLN#3–SITE CONFORMANCE (WIRELESS)**

INTENT: In order to verify that the site complies with the County Zoning Ordinance Section 6980 through 6991 (Wireless Telecommunications Section), the site shall substantially comply with the approved plot plans. **DESCRIPTION OF REQUIREMENT:** The site shall be built to substantially comply with the approved plot plans. **DOCUMENTATION:** The applicant shall build the site to comply with the approved plans. Upon completion, the applicant shall provide the photographic evidence to the [PDS, PCC] for review. **TIMING:** Prior to any occupancy, final grading release, or use of the premises in reliance of this permit, the site shall be built to match the approval. **MONITORING:** The [PDS, PCC] shall review the provided photos for compliance with this condition and compliance with the approved plot plans.

9. **PLN#4–SITE PLAN IMPLEMENTATION: [PDS, BI] [UO] [DPR, TC, PP].**

INTENT: In order to comply with the approved project design indicated on the approved plot plan, the project shall be constructed as indicated on the approved building and construction plans. **DESCRIPTION OF REQUIREMENT:** The site shall conform to the approved plot plan and the building plans. This includes, but is not limited to: installing all required design features, painting all structures with the approved colors, and all temporary construction facilities have been removed from the site. **DOCUMENTATION:** The applicant shall ensure that the site conforms to the approved plot plan and building plans. Any interior changes to approved telecommunications equipment that are located entirely within an approved enclosed equipment shelter, with equipment that cannot be seen by an adjacent residence, parcel or roadway, shall not require Modification or Deviation of the permit, to the satisfaction of the Director of Planning and Development

Services (expansion of the existing approved equipment shelter and/or addition of noise generating equipment would require either Modification or Deviation of the permit).

TIMING: Prior to any occupancy, final grading release, or use of the premises in reliance of this permit, the site shall conform to the approved plans. **MONITORING:** The [PDS, Building Inspector] and DPR [TC, PP] shall inspect the site for compliance with the approved Building Plans.

10. **HAZ#1-HEALTH AND SAFETY PLAN**

INTENT: In order to protect workers from hazardous chemicals and to notify the public of potential hazardous chemicals and substances and to comply with the California Health and Safety Code, Chapter 6.95, the applicant shall receive approval from the Department of Environmental Health. **DESCRIPTION OF REQUIREMENT:** The applicant of the facility shall obtain all necessary permits for the storage, handling, and disposal of the hazardous materials as required by the Department of Environmental Health-Hazardous Materials Division. The plan shall be approved by [DEH, HMD]. The Hazardous Materials Division, Plan Check section contact is Joan Swanson, (858) 505-6880 or by email at joan.swanson@sdcounty.ca.gov. **TIMING:** Prior to occupancy of the first structure built in association with this permit, the Health and Safety Plan, and Hazardous Materials Business Plan shall be prepared, approved and implemented. **MONITORING:** [DEH, HMD] shall verify and approve all compliance with this condition.

11. **CULT#2 - CULTURAL RESOURCES MONITORING REPORT**

INTENT: In order to ensure that the Archaeological Monitoring occurred during the earth-disturbing activities, a final report shall be prepared. **DESCRIPTION OF REQUIREMENT:** A final Archaeological Monitoring and Data Recovery Report that documents the results, analysis, and conclusions of all phases of the Archaeological Monitoring Program shall be prepared. The report shall include the following items:

- a. DPR Primary and Archaeological Site forms.
- b. Daily Monitoring Logs
- c. Evidence that all cultural materials collected during the survey, testing, and archaeological monitoring program have been conveyed as follows:
 - (1) All prehistoric cultural materials shall be curated at a San Diego curation facility or a culturally affiliated Tribal curation facility that meets federal standards per 36 CFR Part 79, and, therefore, would be professionally curated and made available to other archaeologists/researchers for further study. The collections and associated records, including title, shall be transferred to the San Diego curation facility or culturally affiliated Tribal curation facility and shall be accompanied by payment of the fees necessary for permanent curation. Evidence shall be in the form of a letter from the curation facility stating that the prehistoric archaeological materials have been received and that all fees have been paid.

or

Evidence that all prehistoric materials collected during the archaeological monitoring program have been returned to a Native American group of appropriate tribal affinity. Evidence shall be in the form of a letter from the Native American tribe to whom the cultural resources have been repatriated identifying that the archaeological materials have been received.

- (2) Historic materials shall be curated at a San Diego curation facility as described above and shall not be curated at a Tribal curation facility or repatriated. The collections and associated records, including title, shall be transferred to the San Diego curation facility and shall be accompanied by payment of the fees necessary for permanent curation. Evidence shall be in the form of a letter from the curation facility stating that the historic materials have been received and that all fees have been paid.

- d. If no cultural resources are discovered, a Negative Monitoring Report must be submitted stating that the grading monitoring activities have been completed. Grading Monitoring Logs must be submitted with the negative monitoring report.

DOCUMENTATION: The applicant's archaeologist shall prepare the final report and submit it to the [PDS, PPD] for approval. Once approved, a final copy of the report shall be submitted to the South Coastal Information Center (SCIC) and any culturally-affiliated Tribe who requests a copy. **TIMING:** Prior to any occupancy, final grading release, or use of the premises in reliance of this permit, the final report shall be prepared. **MONITORING:** The [PDS, PPD] shall review the final report for compliance this condition and the report format guidelines. Upon acceptance of the report, [PDS, PPD] shall inform [PDS, LDR] and [DPW, PDCI], that the requirement is complete and the bond amount can be relinquished. If the monitoring was bonded separately, then [PDS, PPD] shall inform [PDS or DPW FISCAL] to release the bond back to the applicant.

ONGOING: *(The following conditions shall apply during the term of this permit).*

12. PLN#5—SITE CONFORMANCE: [PDS, PCO] [OG] [DPR, TC, PP].

INTENT: In order to comply with Zoning Ordinance Section 7703, the site shall substantially comply with the approved plot plans and all deviations thereof, specific conditions and approved building plans. **DESCRIPTION OF REQUIREMENT:** The project shall conform to the approved landscape plan(s), building plans, and plot plan(s). This includes, but is not limited to maintaining the following: painting all necessary aesthetics design features, and all lighting wall/fencing. Failure to conform to the approved plot plan(s); is an unlawful use of the land, and will result in enforcement action pursuant to Zoning Ordinance Section 7703. **Documentation:** The property owner and permittee shall conform to the approved plot plan. If the permittee or property owner chooses to change the site design in any way, they must obtain approval from the County for a deviation or a modification pursuant to the County of San Diego Zoning Ordinance. Any interior changes to approved telecommunications equipment that are located entirely within an approved enclosed equipment shelter that cannot be seen by an adjacent residence, parcel or roadway, shall not require modification or deviation of the permit. Expansion of the existing approved equipment shelter and/or addition of noise generating equipment would require a modification or deviation. **Timing:** Upon

establishment of the use, this condition shall apply for the duration of the term of this permit. **Monitoring:** The [PDS, Code Enforcement Division] is responsible for enforcement of this permit.

13. PLN#6–SITE CONFORMANCE (WIRELESS): [PDS, PCO] [OG].

INTENT: In order to comply with the [County Zoning Ordinance Section 6980 through 6991 \(Wireless Telecommunications Section\)](#), the site shall substantially comply with the requirements of this condition. **DESCRIPTION OF REQUIREMENT:** The project shall conform to the following requirements. This includes, but is not limited to maintaining the following:

- a. Maintain the appearance of the facility, and associated equipment enclosure, as depicted in the approved site photo simulations dated 11-20-20. Any interior changes to approved telecommunications equipment that are located entirely within an approved enclosed equipment shelter, with equipment that cannot be seen by an adjacent residence, parcel or roadway, shall not require Modification or Deviation of the permit, to the satisfaction of the Director of Planning and Development Services (expansion of the existing approved equipment shelter and/or addition of noise generating equipment would require either Modification or Deviation of the permit).
- b. All graffiti on any components of the facility shall be removed promptly in accordance with County regulations. Graffiti on any facility in the public right-of-way must be removed within 48 hours of notification.
- c. All wireless telecommunications sites including antennae and cabinets shall be kept clean and free of litter, display a legible operator's contact number for reporting maintenance problems, and be secured to prohibit unauthorized access.
- d. Wireless telecommunications facilities with use discontinued shall be considered abandoned 90 days following the final day of use. All abandoned facilities shall be physically removed by the facility owner no more than 90 days following the final day of use or determination that the facility has been abandoned, whichever occurs first. All wireless carriers who intend to abandon or discontinue the use of any wireless telecommunications facility shall notify the County of such intention no less than 60 days before the final day of use. The County reserves the right to remove any facilities that are abandoned for more than 90 days at the expense of the facility owner. Any abandoned site shall be restored to its natural or former condition. Grading and landscaping in good condition may remain.

DOCUMENTATION: The property owner and applicant shall conform to the ongoing requirements of this condition. Failure to conform to the approved plot plan(s); is an unlawful use of the land, and will result in enforcement action pursuant to Zoning Ordinance Section 7703. **TIMING:** Upon establishment of the use, this condition shall apply for the duration of the term of this permit. **MONITORING:** The [PDS, Code Enforcement Division] is responsible for enforcement of this permit.

14. NOISE#1–ON-GOING SOUND LEVEL COMPLIANCE: [PDS, CODES] [OG]

INTENT: In order to comply with the applicable sections of Title 3, Division 6, Chapter 4 ([County of San Diego Noise Ordinance](#)), the site shall comply with the requirements of this condition. **DESCRIPTION OF REQUIREMENT:** The project shall conform to the following requirements: Major Use Permit associated activities shall comply with the one-hour average sound level limit property line requirement pursuant to the County Noise Ordinance, Section 36.404. This includes (but not limited to) generator and air conditioner units. **DOCUMENTATION:** The property owner(s) and applicant shall conform to the ongoing requirements of this condition. Failure to conform to this condition may result in disturbing, excessive or offensive noise interfering with a person's right to enjoy life and property and is detrimental to the public health and safety pursuant to the applicable sections of Chapter 4. **TIMING:** Upon establishment of the use, this condition shall apply for the duration of the term of this permit. **MONITORING:** The [PDS, CODES] is responsible for enforcement of this permit.

15. **ROADS#1–SIGHT DISTANCE**

INTENT: In order to provide an unobstructed view for safety while exiting the property and accessing a public road from the site, and to comply with the Design Standards of Section 6.1.(E) of the [County of San Diego Public Road Standards](#), an unobstructed sight distance shall be maintained for the life of this permit. **DESCRIPTION OF REQUIREMENT:** There shall be a minimum unobstructed sight distance of 400 feet in both directions along **Borrego Springs Road** from the proposed driveway for the life of this permit. **DOCUMENTATION:** A minimum unobstructed sight shall be maintained. The sight distance of adjacent driveways and street openings shall not be adversely affected by this project at any time. **TIMING:** Upon establishment of the use, this condition shall apply for the duration of the term of this permit. **MONITORING:** The [PDS, Code Compliance Division] is responsible for compliance of this permit.

PRE-CONSTRUCTION GRADING AND/OR IMPROVEMENTS: *(Prior to any clearing, grubbing, trenching, grading, or any land disturbances.)*

(CULTURAL RESOURCES)

1. **CULT#GR-1 - ARCHAEOLOGICAL MONITORING – PRECONSTRUCTION MEETING**

INTENT: In order to comply with the County of San Diego Guidelines for Significance – Cultural Resources, an Archaeological Monitoring Program shall be implemented. **DESCRIPTION OF REQUIREMENT:** The County approved Project Archaeologist and Kumeyaay Native American Monitor shall attend the pre-construction meeting with the contractors to explain and coordinate the requirements of the archaeological monitoring program. The Project Archaeologist and Kumeyaay Native American Monitor shall monitor the original cutting of previously undisturbed deposits in all areas identified for development including off-site improvements. The Project Archaeologist and Kumeyaay Native American monitor shall also evaluate fill soils to determine that they are clean of cultural resources. The archaeological monitoring program shall comply with the County of San Diego Guidelines for Determining Significance and Report Format and Content Requirements for Cultural Resources. **DOCUMENTATION:** The applicant shall have the contracted Project Archeologist and Kumeyaay Native American attend the preconstruction meeting to explain the monitoring requirements. **TIMING:** Prior to any clearing, grubbing, trenching, grading, or any land disturbances this condition shall be

completed. **MONITORING:** The [DPW, PDCI] shall confirm the attendance of the approved Project Archaeologist.

DURING CONSTRUCTION: (The following actions shall occur throughout the duration of the grading construction).

(CULTURAL RESOURCES)

2. CULT#GR-2 - ARCHAEOLOGICAL MONITORING – DURING CONSTRUCTION

INTENT: In order to comply with the County of San Diego Guidelines for Determining Significance and Report Format and Content Requirements for Cultural Resources, a Cultural Resource Grading Monitoring Program shall be implemented. **DESCRIPTION OF REQUIREMENT:** The Project Archaeologist and Kumeyaay Native American Monitor shall monitor the original cutting of previously undisturbed deposits in all areas identified for development including off-site improvements. The archaeological monitoring program shall comply with the following requirements during earth-disturbing activities:

- a. **Monitoring.** During the original cutting of previously undisturbed deposits, the Project Archaeologist and Kumeyaay Native American Monitor shall be onsite as determined necessary by the Project Archaeologist. Inspections will vary based on the rate of excavation, the materials excavated, and the presence and abundance of artifacts and features. The frequency and location of inspections will be determined by the Project Archaeologist in consultation with the Kumeyaay Native American Monitor. Monitoring of the cutting of previously disturbed deposits will be determined by the Project Archaeologist in consultation with the Kumeyaay Native American Monitor.
- b. **Inadvertent Discoveries.** In the event that previously unidentified potentially significant cultural resources are discovered:
 1. The Project Archaeologist or the Kumeyaay Native American monitor shall have the authority to divert or temporarily halt ground disturbance operations in the area of discovery to allow evaluation of potentially significant cultural resources.
 2. At the time of discovery, the Project Archaeologist shall contact the PDS Staff Archaeologist.
 3. The Project Archaeologist, in consultation with the PDS Staff Archaeologist and the Kumeyaay Native American Monitor, shall determine the significance of the discovered resources.
 4. Construction activities will be allowed to resume in the affected area only after the PDS Staff Archaeologist has concurred with the evaluation.
 5. Isolates and clearly non-significant deposits shall be minimally documented in the field. Should the isolates and/or non-significant deposits not be collected by the Project Archaeologist, then the Kumeyaay Native American monitor may collect the cultural material for transfer to a Tribal Curation facility or repatriation program.
 6. If cultural resources are determined to be significant, a Research Design and Data Recovery Program (Program) shall be prepared by the Project Archaeologist in consultation with the Kumeyaay Native American Monitor. The County Archaeologist shall review and approve the Program, which shall be carried out using professional archaeological methods. The Program shall include (1)

reasonable efforts to preserve (avoidance) “unique” cultural resources or Sacred Sites; (2) the capping of identified Sacred Sites or unique cultural resources and placement of development over the cap, if avoidance is infeasible; and (3) data recovery for non-unique cultural resources. The preferred option is preservation (avoidance).

c. **Human Remains.** If any human remains are discovered:

1. The Property Owner or their representative shall contact the County Coroner and the PDS Staff Archaeologist.
2. Upon identification of human remains, no further disturbance shall occur in the area of the find until the County Coroner has made the necessary findings as to origin. If the human remains are to be taken offsite for evaluation, they shall be accompanied by the Kumeyaay Native American monitor.
3. If the remains are determined to be of Native American origin, the NAHC shall immediately contact the Most Likely Descendant (MLD).
4. The immediate vicinity where the Native American human remains are located is not to be damaged or disturbed by further development activity until consultation with the MLD regarding their recommendations as required by Public Resources Code Section 5097.98 has been conducted.
5. The MLD may with the permission of the landowner, or their authorized representative, inspect the site of the discovery of the Native American human remains and may recommend to the owner or the person responsible for the excavation work means for treatment or disposition, with appropriate dignity, of the human remains and any associated grave goods. The descendants shall complete their inspection and make recommendations or preferences for treatment within 48 hours of being granted access to the site.
6. Public Resources Code §5097.98, CEQA §15064.5 and Health & Safety Code §7050.5 shall be followed in the event that human remains are discovered.

d. **Fill Soils.** The Project Archaeologist and Kumeyaay Native American monitor shall evaluate fill soils to determine that they are clean of cultural resources.

DOCUMENTATION: The applicant shall implement the Archaeological Monitoring Program pursuant to this condition. **TIMING:** The following actions shall occur throughout the duration of the earth disturbing activities. **MONITORING:** The [DPW, PDCI] shall make sure that the Project Archeologist is on-site performing the monitoring duties of this condition. The [DPW, PDCI] shall contact the [PDS, PPD] if the Project Archeologist or applicant fails to comply with this condition.

ROUGH GRADING: (Prior to rough grading approval and issuance of any building permit).

(CULTURAL RESOURCES)

3. **CULT#GR-3 - ARCHAEOLOGICAL MONITORING – ROUGH GRADING**

INTENT: In order to comply with the County of San Diego Guidelines for Determining Significance and Report Format and Content Requirements for Cultural Resources, an Archaeological Monitoring Program shall be implemented. **DESCRIPTION OF**

REQUIREMENT: The Project Archaeologist shall prepare one of the following reports upon completion of the earth-disturbing activities that require monitoring:

- a. **No Archaeological Resources Encountered.** If no archaeological resources are encountered during earth-disturbing activities, then submit a final Negative Monitoring Report substantiating that earth-disturbing activities are completed and no cultural resources were encountered. Archaeological monitoring logs showing the date and time that the monitor was on site and any comments from the Native American Monitor must be included in the Negative Monitoring Report.
- b. **Archaeological Resources Encountered.** If archaeological resources were encountered during the earth disturbing activities, the Project Archaeologist shall provide an Archaeological Monitoring Report stating that the field monitoring activities have been completed, and that resources have been encountered. The report shall detail all cultural artifacts and deposits discovered during monitoring and the anticipated time schedule for completion of the curation and/or repatriation phase of the monitoring.

DOCUMENTATION: The applicant shall submit the Archaeological Monitoring Report to [PDS, PPD] for review and approval. Once approved, a final copy of the report shall be submitted to the South Coastal Information Center and any culturally-affiliated Tribe who requests a copy. **TIMING:** Upon completion of all earth-disturbing activities, and prior to Rough Grading Final Inspection (Grading Ordinance SEC 87.421.a.2), the report shall be completed. **MONITORING:** [PDS, PPD] shall review the report or field monitoring memo for compliance with the project MMRP, and inform [DPW, PDCI] that the requirement is completed.

FINAL GRADING RELEASE: *(Prior to any occupancy, final grading release, or use of the premises in reliance of this permit).*

(CULTURAL RESOURCES)

4. CULT#GR-4 - ARCHAEOLOGICAL MONITORING – FINAL GRADING

INTENT: In order to comply with the County of San Diego Guidelines for Determining Significance and Report Format and Content Requirements for Cultural Resources, an Archaeological Monitoring Program shall be implemented. **DESCRIPTION OF**

REQUIREMENT: The Project Archaeologist shall prepare a final report that documents the results, analysis, and conclusions of all phases of the Archaeological Monitoring Program if cultural resources were encountered during earth-disturbing activities. The report shall include the following, if applicable:

- a. Department of Parks and Recreation Primary and Archaeological Site forms.
- b. Daily Monitoring Logs
- c. Evidence that all cultural materials have been conveyed as follows:

- (1) Evidence that all prehistoric materials collected during the archaeological monitoring program have been submitted to a San Diego curation facility or a culturally affiliated Native American Tribal curation facility that meets federal standards per 36 CFR Part 79, and, therefore, would be professionally curated and made available to other archaeologists/researchers for further study. The collections and associated records, including title, shall be transferred to the San Diego curation facility or culturally affiliated Native American Tribal curation facility and shall be accompanied by payment of the fees necessary for permanent curation. Evidence shall be in the form of a letter from the curation facility stating that the prehistoric archaeological materials have been received and that all fees have been paid.

or

Evidence that all prehistoric materials collected during the grading monitoring program have been repatriated to a Native American group of appropriate tribal affinity and shall be accompanied by payment of the fees necessary, if required. Evidence shall be in the form of a letter from the Native American tribe to whom the cultural resources have been repatriated identifying that the archaeological materials have been received.

- (2) Historic materials shall be curated at a San Diego curation facility and shall not be curated at a Tribal curation facility or repatriated. The collections and associated records, including title, shall be transferred to the San Diego curation facility and shall be accompanied by payment of the fees necessary for permanent curation. Evidence shall be in the form of a letter from the curation facility stating that the historic materials have been received and that all fees have been paid.
- d. If no cultural resources are discovered, a Negative Monitoring Report must be submitted stating that the archaeological monitoring activities have been completed. Grading Monitoring Logs must be submitted with the negative monitoring report.

DOCUMENTATION: The applicant's archaeologist shall prepare the final report and submit it to [PDS, PPD] for approval. Once approved, a final copy of the report shall be submitted to the South Coastal Information Center (SCIC) and any culturally-affiliated Tribe who requests a copy. **TIMING:** Prior to any occupancy, final grading release, or use of the premises in reliance of this permit, the final report shall be prepared. **MONITORING:** [PDS, PPD] shall review the final report for compliance with this condition and the report format guidelines. Upon acceptance of the report, [PDS, PPD] shall inform [PDS, LDR] and [DPW, PDCI], that the requirement is complete and the bond amount can be relinquished. If the monitoring was bonded separately, then [PDS, PPD] shall inform [PDS or DPW FISCAL] to release the bond back to the applicant.

DURING CONSTRUCTION: (The following actions shall occur throughout the duration of the grading construction).

(PALEONTOLOGICAL RESOURCES)

5. PALEO#GR-1 - PALEONTOLOGICAL MONITORING

INTENT: In order to comply with the County of San Diego Significance and Report Format Guidelines for Paleontological Resources, a Paleontological Monitoring Program shall be implemented. **DESCRIPTION OF REQUIREMENT:** This project site has marginal levels of sensitive Paleontological resources. All grading activities are subject to the [County of San Diego Grading Ordinance Section 87.430](#), if any significant resources (Fossils) are encountered during grading activities.

- a. The grading contractor is responsible to monitor for paleontological resources during all grading activities. If any fossils are found greater than 12 inches in any dimension, stop all grading activities and contact PDS before continuing grading operations.
- b. If any paleontological resources are discovered and salvaged, the monitoring, recovery, and subsequent work determined necessary shall be completed by or under the supervision of a Qualified Paleontologist pursuant to the [San Diego County Guidelines for Determining Significance for Paleontological Resources](#).

TIMING: The following actions shall occur throughout the duration of the grading construction. **MONITORING:** The [DPW, PDCI] shall make sure that the grading contractor is on-site performing the Monitoring duties of this condition. The [DPW, PDCI] shall contact PDS if the grading contractor or applicant fails to comply with this condition.

ROUGH GRADING: *(Prior to rough grading approval and issuance of any building permit).*

(PALEONTOLOGICAL RESOURCES)**6. PALEO#GR-2 - PALEONTOLOGICAL MONITORING**

INTENT: In order to comply with the County of San Diego Significance and Report Format Guidelines for Paleontological Resources, a Paleontological Monitoring Program shall be implemented. **DESCRIPTION OF REQUIREMENT:** One of the following letters shall be performed upon completion of the grading activities that require monitoring:

- a. If no paleontological resources were discovered, submit a "No Fossils Found" letter from the grading contractor to PDS stating that the monitoring has been completed and that no fossils were discovered, and including the names and signatures from the fossil monitors. The letter shall be in the format of Attachment E of the [County of San Diego Guidelines for Determining Significance for Paleontological Resources](#).
- b. If paleontological resources were encountered during grading, a letter shall be prepared stating that the field grading monitoring activities have been completed, and that resources have been encountered. The letter shall detail the anticipated time schedule for completion of the curation phase of the monitoring.

DOCUMENTATION: The applicant shall submit the letter report to PDS for review and approval. **TIMING:** Upon completion of all grading activities, and prior to Rough Grading Final Inspection ([Grading Ordinance SEC 87.421.a.2](#)), the letter report shall be completed. **MONITORING:** PDS shall review the final negative letter report or field

monitoring memo for compliance with the project MMRP, and inform [DPW, PDC] that the requirement is completed.

MAJOR USE PERMIT FINDINGS

Pursuant to Section 7358 (see Section 7359 for findings required for permits filed pursuant to Regional Land Use Element 3.8) of The Zoning Ordinance, the following findings in support of the granting of the Major Use Permit are made:

- (a) The location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures with consideration given to

1. Harmony in scale, bulk, coverage, and density

The project is a Major Use Permit construction, operation and maintenance of wireless telecommunication facility consisting of a 97-foot-tall lattice tower with 12 panel antennas, one dish antenna, a 15-kilowatt backup generator, 12 back up batteries and other equipment located in an equipment cabinet northwest of the tower. The Project will be located inside a 3,600 square foot leased area surrounded by a six-foot-tall concrete masonry unit wall. The tower, equipment, and enclosures have been designed to blend with the surrounding setting by utilizing a rural design and earth tone colors.

Scale and Bulk:

The project area can be characterized as rural residential and commercial. The area immediately surrounding the site consists of vacant land, resort uses, and single-family residences. The nearest residence is located more than 917 feet from the proposed telecommunication facility. Due to intervening topography and distance from the site, the facility would not screen or block any views, and would blend with the mountain backdrop. The lattice tower would appear in the viewshed of the public; however, due to distance from nearby uses and existing vertical elements, it would not appear as tall as constructed.

The photosimulations illustrate that the proposed 97-foot-tall lattice tower with antennas and associated equipment enclosure would be in harmony with the scale and bulk of the surrounding area and therefore would be unobtrusive to the surrounding viewshed. The view from the surrounding area would be minimized as the wireless facility would be set among existing vertical elements (utility poles, trees, and buildings), and is constructed as a lattice tower, allowing viewers to see through to the landscape behind. The equipment enclosure would not be visible from the roadway, or to adjacent property owners, and would be painted to blend with the surrounding buildings and vacant land. The panel antennas would be painted to match the lattice tower and earth-tone mountain backdrop. For the reasons stated above, the project would be in harmony with surrounding land uses in terms of scale and bulk and would not result in a negative impact to the surrounding area.

Coverage:

The subject site is approximately 14.07 acres. Surrounding land uses include primarily single-family residential uses and vacant land, with La Casa Del Zorro Resort and Spa to the southeast. Parcels range in size from approximately 1 acre to over 50 acres. The project is located on a parcel that contains a 2,919 square foot building and accessory structures, as well as a ground mount solar system. The proposed equipment enclosure would be approximately 3,600 square feet in size, covering approximately 0.5% of the parcel. Due to the small scale of the facility, the addition of the telecommunication facility would maintain similar coverage with surrounding parcels.

Density:

No residential structures are proposed. The Project is a wireless telecommunication facility and does not have a residential component subject to density.

2. The availability of public facilities, services, and utilities

The project is located within the jurisdiction of the Borrego Springs Fire Protection District. Fire code requirements for the proposed project are met by enclosing the equipment within a non-combustible shelter with metal doors. The project was found to comply with cell site policy FP-2. The project would not require water or sewer services. Electrical and telephone services are available on-site. All required utilities are therefore available for the project.

3. The harmful effect, if any, upon desirable neighborhood character

The project is an unmanned wireless telecommunication facility which would consist of a 97-foot-tall lattice tower with associated antennas, equipment, and an emergency backup generator. The prefabricated equipment enclosure and concrete block wall would both be designed to mimic the surrounding structures and would be painted to match. The location of the proposed lattice tower and equipment enclosures would be toward the northwestern portion of the property. This location provides an increased setback to drivers using the surrounding roads, particularly Borrego Springs Road, while still maintaining adequate elevation to provide the minimum coverage to surrounding roads and businesses.

The project would not adversely affect the desirable neighborhood character because the project is located within a preferred zone. Photo simulations illustrate that the line, form, and color of the new facility would be largely consistent with other elements that make up the visual setting of the area. As seen in the photo simulations, the proposed facility is located adjacent to other vertical elements including existing utility poles and trees of varying height, and is surrounded by a mountain backdrop, which will help the lattice tower appear as part of the existing landscape. The equipment enclosures cannot be seen by nearby residences, businesses, or adjacent roads. The project was also reviewed for compliance with the County Noise Ordinance. Based on design measures such as the concrete

block wall surrounding the generator, the project would not cause any negative aesthetic or noise effect to the surrounding area and roadways. Therefore the project would not have a harmful effect on the desirable neighborhood character.

4. The generation of traffic and the capacity and physical character of surrounding streets

The proposed project will be accessed via Borrego Springs Road which is a publicly maintained road. The parcel contains an existing parking lot. The number of maintenance trips of 1-2 per month will not substantially alter the expected traffic or physical character of the surrounding streets and is compatible with adjacent uses. Therefore, the project will not generate a significant amount of traffic.

5. The suitability of the site for the type and intensity of use or development which is proposed

The applicant proposes a MUP for the authorization of an unmanned wireless telecommunication facility. The subject property is 14.07 acres and is developed with access and utility services adequate to serve the proposed use. The installation of the telecommunication facility would not require significant alteration to the landform as the enclosures and lattice tower would be placed on a relatively level area of the site. The project is located within a preferred zone; therefore, it is suitable for this site and the type and intensity of uses and development. For reasons stated above, the proposed project would be compatible with adjacent land uses.

6. Any other relevant impact of the proposed use

No other relevant impacts have been identified.

- (b) The impacts, as described in Findings (a) above, and the location of the proposed use will be consistent with the San Diego County General Plan

The project is subject to the Regional Category Village, Land Use Designation Rural Commercial. The project is consistent with Goal S-1 (Public Safety) and S-2 (Emergency Response) of the Public Safety Element of the County General Plan because it encourages enhanced public safety and effective emergency response to natural or human-induced disasters, while also reducing disruptions in the delivery of vital public and private services during and following a disaster. Furthermore, the project complies with the General Plan Policy LU 15.1 – telecommunication facilities compatible with setting because it would support the surrounding community, has been designed and sited to minimize visual impacts, would not result in adverse impacts to the natural environment and would be compatible with existing nearby development and community character. Lastly, the project complies with the General Plan Policy COS 11.1 and 11.3 because the project would not negatively impact a scenic highway and detract the visual settings from a scenic vista. Therefore, the project is consistent with the San Diego County General Plan.

- (c) That the requirements under the California Environmental Act have been complied with

A Notice of Exemption, dated September 17, 2021, was prepared by the County of San Diego. Pursuant to Section 15303 of the State California Environmental Quality Act Guidelines, the project is exempt from CEQA because it is an unmanned wireless telecommunication facility that involves the installation of small, new equipment and facilities and structures. It has been determined that the project is not in an environmentally sensitive location; would not have a cumulative effect on the environment; is not on a hazardous waste site, would not cause substantial change in the significance of a historical resource, and would not result in visual impacts to a scenic highway.

ORDINANCE COMPLIANCE AND NOTICES: The project is subject to, but not limited to the following County of San Diego, State of California, and US Federal Government, Ordinances, Permits, and Requirements:

NOISE ORDINANCE COMPLIANCE: In order to comply with the [County Noise Ordinance 36.401](#) et seq. and the Noise Standards pursuant to the General Plan Noise Element (Table N-1 & N-2), the property and all of its uses shall comply with the approved plot plans, specific permit conditions and approved building plans associated with this permit. No noise generating equipment and project related noise sources shall produce noise levels in violation of the County Noise Ordinance. The property owner and permittee shall conform to the approved plot plan(s), specific permit conditions, and approved building plans associated with this permit as they pertain to noise generating devices or activities. If the permittee or property owner chooses to change the site design in any way, they must obtain approval from the County for a Minor Deviation or a Modification pursuant to the County of San Diego Zoning Ordinance.

COMPLIANCE INSPECTION

In order to comply with Zoning Ordinance Section 7362.e the County shall inspect the Use Permit property for compliance with the terms of this Use Permit. The County Permit Compliance Officer will perform a site inspection and review the on-going conditions associated with this permit. The inspection shall be scheduled no later than the six months subsequent to establishing the intended use of the permit. If the County determines the applicant is not complying with the Major Use Permit terms and conditions the applicant shall allow the County to conduct follow up inspections more frequently than once every twelve months until the County determines the applicant is in compliance. The Property Owner/Permittee shall allow the County to inspect the property for which the Major Use Permit has been granted, at least once every twelve months, to determine if the Property Owner/Permittee is complying with all terms and conditions of the Use Permit. This requirement shall apply during the term of this permit.

STORMWATER ORDINANCE COMPLIANCE: In order to Comply with all applicable stormwater regulations the activities proposed under this application are subject to enforcement under permits from the [San Diego Regional Water Quality Control Board \(RWQCB\)](#) and the County of San Diego Watershed Protection, Stormwater Management, and Discharge Control [Ordinance No. 10410](#) and all other applicable ordinances and standards for the life of this permit. The project site shall be in compliance with all applicable stormwater regulations referenced

above and all other applicable ordinances and standards. This includes compliance with the approved Stormwater Management Plan, all requirements for Low Impact Development (LID), Hydromodification, materials and wastes control, erosion control, and sediment control on the project site. Projects that involve areas 1 acre or greater require that during construction the property owner keeps the Storm Water Pollution Prevention Plan (SWPPP) onsite and update it as needed. The property owner and permittee shall comply with the requirements of the stormwater regulations referenced above.

LOW IMPACT DEVELOPMENT NOTICE: The San Diego Regional Water Quality Control Board (SDRWQCB) issued a new Municipal Stormwater Permit under the National Pollutant Discharge Elimination System (NPDES). The requirements of the Municipal Permit were implemented beginning in May 2013. *Project design shall be in compliance with the new Municipal Permit regulations.* The Low Impact Development (LID) Best Management Practices (BMP) Requirements of the Municipal Permit can be found at the following link:

http://www.sandiegocounty.gov/content/dam/sdc/dpw/WATERSHED_PROTECTION_PROGRAM/susmppdf/lid_handbook_2014sm.pdf

The County has provided a LID Handbook as a source for LID information and is to be utilized by County staff and outside consultants for implementing LID in our region. See link below: <http://www.sdcountry.ca.gov/dplu/docs/LID-Handbook.pdf>

LIGHTING ORDINANCE COMPLIANCE: In order to comply with the County Lighting Ordinance 59.101 et seq. and Zoning Ordinance Sections 6322, 6324, and 6326, the onsite lighting shall comply with the approved plot plan(s), specific permit conditions and approved building plans associated with this permit. All light fixtures shall be designed and adjusted to reflect light downward, away from any road or street, and away from adjoining premises, and shall otherwise conform to the County Lighting Ordinance 59.101 et seq. and Zoning Ordinance Sections 6322, and 6324. The property owner and permittee shall conform to the approved plot plan(s), specific permit conditions, and approved building plans associated with this permit as they pertain to lighting. No additional lighting is permitted. If the permittee or property owner chooses to change the site design in any way, they must obtain approval from the County for a Minor Deviation or a Modification pursuant to the County of San Diego Zoning Ordinance.

NOTICE: THE ISSUANCE OF THIS PERMIT BY THE COUNTY OF SAN DIEGO DOES NOT AUTHORIZE THE APPLICANT FOR SAID PERMIT TO VIOLATE ANY FEDERAL, STATE, OR COUNTY LAWS, ORDINANCES, REGULATIONS, OR POLICIES INCLUDING, BUT NOT LIMITED TO, THE FEDERAL ENDANGERED SPECIES ACT AND ANY AMENDMENTS THERETO.

TRANSPORTATION IMPACT FEE

The project is subject to County of San Diego Transportation Impact Fee (TIF) pursuant to [County TIF Ordinance number 77.201 – 77.223](#). The Transportation Impact Fee (TIF) shall be paid. The fee is required for the entire project, or it can be paid at building permit issuance for each phase of the project. The fee is calculated pursuant to the ordinance at the time of building permit issuance. The applicant shall pay the TIF at the *[PDS, Land Development Counter]* and provide a copy of the receipt to the *[PDS, Building Division Technician]* at time of permit issuance.

NOTICE: To comply with State law, the applicant/owner must file the Notice of Exemption (NOE) signed by the lead agency and remit required fees to the County Clerk's Office within five (5) working days of the date of project approval. Payment or sufficient proof of prior payment to the County Clerk is required at the time of filing. The filing of a NOE reduces the period of time the CEQA document can be challenged to **35 days**. However, if the NOE is not filed, this period is extended to **180 days**. The CDFW adjusts fees annually based on inflation. You must pay the amount effective January 1 of the year of the project decision.

EXPLANATION OF COUNTY DEPARTMENT AND DIVISION ACRONYMS			
Planning & Development Services (PDS)			
Project Planning Division	PPD	Land Development Project Review Teams	LDR
Permit Compliance Coordinator	PCC	Project Manager	PM
Building Plan Process Review	BPPR	Plan Checker	PC
Building Division	BD	Map Checker	MC
Building Inspector	BI	Landscape Architect	LA
Zoning Counter	ZO		
Department of Public Works (DPW)			
Private Development Construction Inspection	PDCI	Environmental Services Unit Division	ESU
Department of Environmental Health (DEH)			
Land and Water Quality Division	LWQ	Local Enforcement Agency	LEA
Vector Control	VCT	Hazmat Division	HMD
Department of Parks and Recreation (DPR)			
Trails Coordinator	TC	Group Program Manager	GPM
Parks Planner	PP		
Department of General Service (DGS)			
Real Property Division	RP		

APPEAL PROCEDURE: Within ten calendar days after the date of this Decision of the Planning Commission, the decision may be appealed to the Board of Supervisors in accordance with [Section 7366 of the County Zoning Ordinance](#). An appeal shall be filed with the Director of Planning & Development Services or by mail with the Secretary of the Planning Commission within TEN CALENDAR DAYS of the date of this notice AND MUST BE ACCOMPANIED BY THE DEPOSIT OR FEE AS PRESCRIBED IN THE DEPARTMENT'S FEE SCHEDULE, PDS FORM #369, pursuant to Section 362 of the San Diego County Administrative Code. If the tenth day falls on a weekend or County holiday, an appeal will be accepted until 4:00 p.m. on the following day the County is open for business. Filing of an appeal will stay the decision of the

PDS2020-MUP-20-008

September 17, 2021

Director until a hearing on your application is held and action is taken by the Planning Commission. Furthermore, the 90-day period in which the applicant may file a protest of the fees, dedications or exactions begins on the date of approval of this Decision.

COUNTY OF SAN DIEGO PLANNING COMMISSION
KATHLEEN A. FLANNERY, ACTING DIRECTOR

BY:

Ashley Smith, Chief
Project Planning Division
Planning & Development Services

cc: Post 853, The American Legion, 4515 Borrego Springs Road, Borrego Springs, CA
92004
InSite Towers, LLC c/o IntelliSites, LLC, 1199 N. Fairfax St, Suite #700, Alexandria, VA
22314
Debbie DePompei, IntelliSites, LLC, 8432 Justine Court, Las Vegas, NV 89128

email cc:

Ed Sinsay, Team Leader, Land Development/Engineering, PDS
Denise Russell, Planning Manager, Project Planning, PDS

Attachment C – Environmental Documentation

NOTICE OF EXEMPTION

TO: Recorder/County Clerk
Attn: James Scott
1600 Pacific Highway, M.S. A33
San Diego, CA 92101

FROM: County of San Diego
Planning & Development Services, M.S. O650
Attn: Project Planning Division Section Secretary

SUBJECT: FILING OF NOTICE OF EXEMPTION IN COMPLIANCE WITH PUBLIC RESOURCES CODE SECTION 21108 OR 21152

Project Name: American Legion Wireless Telecommunication Facility MUP; PDS2020-MUP-20-008, PDS2020-ER-20-11-001

Project Location: 4515 Borrego Springs Road, Borrego Springs, CA in the Borrego Springs Community Plan Area, in the unincorporated area of San Diego County. APN: 200-051-12

Project Applicant: Debbie DePompei on behalf of Insite Towers LLC, 1199 N. Fairfax St. Suite #700, Alexandria, VA 22314 (Phone: 702-501-0882)

Project Description: The project is a Major Use Permit for a new wireless telecommunication facility and related equipment. The project is subject to the General Plan Regional Category Village, Land Use Designation Rural Commercial, and is zoned General Commercial (C36), Service Commercial (C38), and Visitor-Serving Commercial (C42). The proposed facility includes a 97-foot-tall lattice tower, with 12 panel antennas, one dish antenna, a 15-kilowatt backup generator, back up batteries and other equipment located in an equipment shelter northwest of the tower. The entire facility is located inside a 3,600 square foot, 6-foot-tall concrete masonry unit wall enclosure. Access would be provided by a private driveway that connects to Borrego Springs Road, a public road.

Agency Approving Project: County of San Diego

County Contact Person: Lauren Yzaguirre; 619-323-7021

Date Form Completed: September 17, 2021

This is to advise that the County of San Diego Planning Commission has approved the above-described project on September 17, 2021 and found the project to be exempt from the CEQA under the following criteria:

1. Exempt status and applicable section of the CEQA ("C") and/or State CEQA Guidelines ("G"): (check only one)
 - ☐ Declared Emergency [C 21080(b)(3); G 15269(a)]
 - ☐ Emergency Project [C 21080(b)(4); G 15269(b)(c)]
 - ☐ Statutory Exemption. C Section:
 - ☒ Categorical Exemption. G Section: 15303
 - ☐ G 15061(b)(3) - It can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment and the activity is not subject to the CEQA.
 - ☐ G 15182 – Residential Projects Pursuant to a Specific Plan
 - ☐ G 15183 – Projects Consistent with a Community Plan, General Plan, or Zoning
 - ☐ Activity is exempt from the CEQA because it is not a project as defined in Section 15378.
2. Mitigation measures ☐ were ☒ were not made a condition of the approval of the project.
3. A Mitigation reporting or monitoring plan ☐ was ☒ was not adopted for this project.

Statement of reasons why project is exempt:

Categorical Exemption: Section 15303 – Small New Structures

Section 15303 of the CEQA Guidelines, New Construction or Conversion of Small Structures, details the exemption that falls under Class 3. According to Section 15303, Class 3 consists of construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another.

This exemption is appropriate for the proposed project, as it entails the installation of small new equipment and facilities in small structures. The proposed project would consist of 3,600 square feet of lease area, with equipment structures at a maximum of 324 square feet. The base of the lattice tower would take up a minimal amount of space on the ground. The height of the lattice tower would be a maximum of 97 feet, which is consistent with other vertical elements in the surrounding area. The presence of utility poles and other lattice towers within the Borrego Springs community justifies the use of a lattice

tower design. The vast vacant land and mountain backdrop behind the proposed lattice tower provides additional protection of the view. The lattice tower would not introduce a new vertical element into an area void of vertical elements and would match the natural and rural characteristics of the surrounding landscape. As such, the proposed project qualifies as exempt from CEQA pursuant to Section 15303 of the CEQA Guidelines due to the type and scope of the project.

Section 15300.2 Exceptions

The proposed project was reviewed for the exceptions outlined in the CEQA Guidelines, Section 15300.2, for those reasons a project may not be considered categorically exempt under any of the following classes of projects (Section 15300 et al.). The following summarizes the reasons that the project would not trigger any of the exceptions, and the above categorical exemption would apply to the project.

The CEQA categorical exemption identified for the proposed project would be Class 3 (Section 15303, Small New Structures). Although this exemption could trigger the review necessary for location under Section 15300.2(a), which identifies further consideration for classes 3, 4, 5, 6, and 11, the proposed project is not located in an environmentally sensitive area, precluding it from this exception.

A categorical exemption may not be used where a project would have a cumulative impact as defined in Section 15300.2(b). The proposed project has been reviewed for not only direct impacts, but also cumulative impacts. Based on review of the surrounding area, the construction of the new facility would not have an impact from other projects of the same type in the same place concurrent under construction. No known construction projects are proposed or occurring immediately adjacent to the proposed project. Further there are no known significant impacts presently occurring or identified within the project area for issues under CEQA. Therefore, the cumulative contribution to known environment impacts would be less than significant.

As stated above, and as required by the exception Section 15300.2(c), the proposed project was reviewed for potential significant impacts under Appendix G of the CEQA Guidelines. Given the consistency of the operational characteristics with current operations onsite, it was determined that there would be no significant impacts to agriculture and forestry resources, air quality, biological resources, cultural resources, geology and soils, greenhouse gas emissions, hazards and hazardous materials, hydrology and water quality, land use and planning, mineral resources, noise, population and housing, public services, recreation, transportation and traffic, and utilities and services systems. It has been determined that the proposed project is not visible from a County designated scenic highway. Therefore, there would be no significant impacts to aesthetics.

A project which may result in damage to scenic resources, within a highway officially designated by the State, would be excluded from reliance on a categorical exemption as detailed in Section 15300.2(d). There are no designated state scenic resources in the project vicinity. Therefore, the project may rely on the categorical exemptions for the reasons documented above.

Therefore, for the reasons stated above, the proposed project is not excluded from reliance on the categorical exemption Section 15303 as detailed in the CEQA Guidelines.

The following is to be filled in only upon formal project approval by the appropriate County of San Diego decision-making body.

Signature: _____ Telephone: (619) 323-7021

Name (Print): Lauren Yzaguirre Title: Land Use/Environmental Planner

This Notice of Exemption has been signed and filed by the County of San Diego.

This notice must be filed with the Recorder/County Clerk as soon as possible after project approval by the decision-making body. The Recorder/County Clerk must post this notice within 24 hours of receipt and for a period of not less than 30 days. At the termination of the posting period, the Recorder/County Clerk must return this notice to the Department address listed above along with evidence of the posting period. The originating Department must then retain the returned notice for a period of not less than twelve months. Reference: CEQA Guidelines Section 15062.

REVIEW FOR APPLICABILITY OF/COMPLIANCE WITH ORDINANCES/POLICIES

FOR PURPOSES OF CONSIDERATION OF
American Legion Telecommunication Facility Major Use Permit
PDS2020-MUP-20-008; PDS2020-ER-20-11-001

September 17, 2021

I. HABITAT LOSS PERMIT ORDINANCE – Does the proposed project conform to the Habitat Loss Permit/Coastal Sage Scrub Ordinance findings?

YES
☐

NO
☐

NOT APPLICABLE/EXEMPT
☒

Discussion:

While the proposed project and off-site improvements are located outside of the boundaries of the Multiple Species Conservation Program, the project site, and locations of any off-site improvements do not contain habitats subject to the Habitat Loss Permit/Coastal Sage Scrub Ordinance. Therefore, conformance to the Habitat Loss Permit/Coastal Sage Scrub Ordinance findings is not required.

II. MSCP/BMO - Does the proposed project conform to the Multiple Species Conservation Program and Biological Mitigation Ordinance?

YES
☐

NO
☐

NOT APPLICABLE/EXEMPT
☒

Discussion:

The proposed project and any off-site improvements related to the proposed project are located outside of the boundaries of the Multiple Species Conservation Program. Therefore, conformance with the Multiple Species Conservation Program and the Biological Mitigation Ordinance is not required.

III. GROUNDWATER ORDINANCE - Does the project comply with the requirements of the San Diego County Groundwater Ordinance?

YES
☐

NO
☐

NOT APPLICABLE/EXEMPT
☒

Discussion:

The project is an unmanned wireless telecommunication facility and does not propose the addition of any landscaping. Therefore, the project will not rely on groundwater.

IV. RESOURCE PROTECTION ORDINANCE - Does the project comply with:

The wetland and wetland buffer regulations (Sections 86.604(a) and (b)) of the Resource Protection Ordinance?	YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	NOT APPLICABLE/EXEMPT <input type="checkbox"/>
The Floodways and Floodplain Fringe section (Sections 86.604(c) and (d)) of the Resource Protection Ordinance?	YES <input type="checkbox"/>	NO <input type="checkbox"/>	NOT APPLICABLE/EXEMPT <input checked="" type="checkbox"/>
The Steep Slope section (Section 86.604(e))?	YES <input type="checkbox"/>	NO <input type="checkbox"/>	NOT APPLICABLE/EXEMPT <input checked="" type="checkbox"/>
The Sensitive Habitat Lands section (Section 86.604(f)) of the Resource Protection Ordinance?	YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	NOT APPLICABLE/EXEMPT <input type="checkbox"/>
The Significant Prehistoric and Historic Sites section (Section 86.604(g)) of the Resource Protection Ordinance?	YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	NOT APPLICABLE/EXEMPT <input type="checkbox"/>

Discussion:

Wetland and Wetland Buffers:

The site contains no wetland habitats as defined by the San Diego County Resource Protection Ordinance. The site does not have a substratum of predominately undrained hydric soils, the land does not support, even periodically, hydric plants, nor does the site have a substratum that is non soil and is saturated with water or covered by water at some time during the growing season of each year. Therefore, it has been found that the proposed project complies with Sections 86.604(a) and (b) of the Resource Protection Ordinance.

Floodways and Floodplain Fringe:

The project is not located near any floodway or floodplain fringe area as defined in the resource protection ordinance, nor is it near a watercourse plotted on any official County floodway or floodplain map.

Steep Slopes:

There are no steep slopes on the property. Therefore, it has been found that the proposed project complies with Sections 86.604(e) of the RPO.

Sensitive Habitat Lands:

Sensitive habitat lands include unique vegetation communities and/or habitat that is either necessary to support a viable population of sensitive species, is critical to the proper functioning of a balanced natural ecosystem, or which serves as a functioning wildlife corridor. No sensitive habitat lands were identified on the site. Therefore, it has been found that the proposed project complies with Section 86.604(f) of the RPO.

Significant Prehistoric and Historic Sites:

County records, as well as the database from the South Coastal Information Center has been reviewed and it has been determined that the project site has not been surveyed. However, the area has been graded and disturbed. As such, no cultural study will be required, but an archaeological monitoring program will be implemented. As such, the project complies with the RPO.

V. STORMWATER ORDINANCE (WPO) - Does the project comply with the County of San Diego Watershed Protection, Stormwater Management and Discharge Control Ordinance (WPO)?

YES

☒

NO

☐

NOT APPLICABLE

☐

Discussion:

The project Storm Water Management Plan has been reviewed and is found to be complete and in compliance with the WPO.

VI. NOISE ORDINANCE – Does the project comply with the County of San Diego Noise Element of the General Plan and the County of San Diego Noise Ordinance?

YES

☒

NO

☐

NOT APPLICABLE

☐

Discussion:

The proposal would not expose people to nor generate potentially significant noise levels which exceed the allowable limits of the County of San Diego Noise Element of the General Plan, County of San Diego Noise Ordinance, and other applicable local, State, and Federal noise control regulations.

Staff has reviewed the plot plans and documentations for PDS2020-MUP-20-008. Documentation is considered acceptable, and project would comply with County noise standards; no further information or mitigation is required. The project is comprised of exterior mechanical equipment and equipment cabinets within a fully enclosed equipment shelter. The project is zoned Commercial as well as surrounding parcels the east and south and is subject to a restrictive sound level requirement of a one-hour average 50 dBA limit at the project property line. The adjacent parcels to the north and west are zoned S92, which is subject to the stringent one-hour arithmetic mean noise level of 47.5 dBA. The primary noise sources associated with the project would be from the proposed 15 kW generator unit. Based on Polar Power manufacturer sound information Model 8220-603-D-15, the generator would produce a sound pressure level of 66 dBA at a reference distance of 23 feet (7 meters). Based on the information provided, the proposed generator separation distance to the nearest property line is approximately 109 feet from the nearest property line (worst-case). As a project design feature, the generator unit would be located within a six (6') foot high CMU block wall enclosure. All other equipment cabinets are considered low noise producing equipment and are considered less than significant.

Based on the current layout and design, noise attenuation by distance, and 6' CMU wall enclosure would reduce the noise levels to 47.5 dBA and below at the western and northern property lines. Staff does not anticipate the proposed generator unit to exceed the 45 dBA sound level limit requirement at the project property line. The project as design demonstrates Noise Ordinance (N.O.) compliance and no noise mitigation is required.

Attachment D – Environmental Findings

**AMERICAN LEGION WIRELESS TELECOMMUNICATION FACILITY
MAJOR USE PERMIT
PERMIT NO.: PDS2020-MUP-20-008
ENVIRONMENTAL LOG: PDS2020-ER-20-11-001**

ENVIRONMENTAL FINDINGS

September 17, 2021

1. Find that the proposed project is exempt from the California Environmental Quality Act (CEQA) pursuant to State CEQA Guidelines Section 15303 for the reasons stated in the Notice of Exemption.
2. Find that the proposed project is consistent with the Resource Protection Ordinance (RPO) (County Code, Section 86.601 et seq.).
3. Find that plans and documentation have been prepared for the proposed project that demonstrate that the project complies with the Watershed Protection, Stormwater Management and Discharge Control Ordinance (County Code, section 67.801 et seq.).

Attachment E – Public Documentation

COUNTY OF SAN DIEGO, BORREGO SPRINGS COMMUNITY SPONSOR GROUP*****MEETING MINUTES*****

Thursday, September 3, 2020 4:30 p.m.

A. CALL TO ORDER/ROLL CALL

Chair Rebecca Falk, Secretary Judy Haldeman, Bill Haneline, David Farley, Clint Brandin, Linda Haddock. Vice-Chair Bonnie Petrach absent.

B. APPROVAL OF MINUTES FOR THE MEETING OF 6/4/2020 and the SPECIAL MEETING OF 8/13/2020

MOTION: Approval of the Minutes of June 4, 2020. Farley M, Haneline S. Unanimous approval.

MOTION: Approval of the Minutes of the Special Meeting of August 13, 2020. Farley M, Haneline S. Unanimous approval.

C. PUBLIC COMMUNICATION (may be limited to 3 min): Opportunity for members of the public to speak to the Group on any subject matter within the Group's jurisdiction that is not on the posted agenda.

Farley commented that there are properties with no legal access that are being sold and owners are using private roads. He has talked with the county but had not received any results. Falk stated that she would check with the county.

D. ACTION ITEMS:

1. CA052 American Legion Borrego Springs Wireless Major Use Permit, PDS2020-MUP-20-008, 4515 Borrego Springs Rd, APN: 200-051-12. The project includes the installation of an 80' foot lattice tower with 17' windmill feature on top within a 60' x 60' CMU block walled equipment compound. The project will consist of multi carriers' antennas on a 97' foot faux windmill. See attachments sent with the agenda packet. Presentation by Debbie DePompei or other representative of IntelliSites.

DePompei stated that a formal application had been made with the county with the only change to the original presentation to relocate the tower just south of the original location. Discussion followed regarding the use of the windmill at the top of the tower. While all 6 members present were in favor of the project, there were two motions that specified project conditions. **MOTION:** To approve this Major Use Permit with the condition that the American Legion make the decision regarding whether to add the windmill feature at the top of the tower. Farley M, Brandin S. **MOTION:** To amend the motion to remove the windmill from the tower. Haddock M, Haneline S. This last motion failed. The vote was 3 for (Falk, Haddock and Haneline) and 3 against (Brandin, Farley and Haldeman). Vote on original motion. Farley, Brandin, Haldeman and Haddock voted aye. Falk and Haneline voted nay.

2. Request for a letter of support for the Stewardship Council's application to the Department of Conservation for a grant to support outreach and community visioning work in preparation for the Community Plan update process. See letter in the agenda packet. David Garmon and others presenting for the Stewardship Council.

Garmon stated that the Stewardship Council had already received some letters of support from the community and were requesting a letter of support from the Borrego Springs Community Sponsor Group. This grant will provide up to \$150,000 to support an outreach effort to create the widest tent possible to receive input for the updated Borrego Springs Community Plan process over the next two years. **MOTION:** To write a letter of support for this grant application. Haldeman M, Haneline S. Falk, Brandin, Haneline and Haldeman voted aye. Haddock nay. (Farley was temporarily off ZOOM for this vote.

3. Request for Sponsor Group signature of support on a letter to SDGE from the Borrego Minister's Association, asking for financial relief for Borregans who are experiencing economic hardship under COVID-19. See letter in agenda packet. Judy Haldeman presenting.

Haddock and Haneline did not think this fell under the purview of the Borrego Springs Community Sponsor Group. MOTION: To add the name of the Borrego Springs Community Sponsor Group to the letter to SDG&E. Haldeman M, Brandin S. Falk, Brandin, Farley and Haldeman voted aye. Haddock and Haneline voted nay.

4. Discussion and vote on increasing the number of Sponsor Group seats from seven to nine, as long as there are sufficient applicants by the November meeting that the Group would like to recommend. If so, Chair is to formally request this of Supervisor Desmond/San Diego County Board of Supervisors. MOTION: To increase the membership from seven to nine members. Farley M, Haldeman S. Falk, Brandin, Haneline, Farley and Haldeman voted aye. Haddock nay.

E. GROUP BUSINESS:

1. **Announcements & Correspondence Received:** Update on any Sponsor Group applications received Falk will get an announcement of Borrego Springs Community Sponsor Group vacancies into the Borrego Sun. Falk announced that there were PLDO funds available for the Borrego Springs Park and suggested that the park subcommittee convene to suggest priorities for the use of this money in the park.

2. **Discussion Items:**

3. **Subcommittee Reports:** Code Compliance

4. **Meeting Updates:**

F. ADJOURNMENT

MOTION: To adjourn this meeting. Farley M, Haneline S. Unanimous approval. Meeting adjourned at 6:15 p.m.

The next regular meeting will be held October 1, 2020, 4:30 pm via teleconferencing or, if County and State directives allow it, at the Borrego Springs Library Community Room, 2850 Country Club Rd, Borrego Springs, California

COUNTY OF SAN DIEGO, BORREGO SPRINGS COMMUNITY SPONSOR GROUP

*****SPECIAL MEETING AGENDA*****

Thursday July 29, 2021 4:30 p.m.

DUE TO RESTRICTIONS ON PUBLIC MEETINGS AS A RESULT OF THE NOVEL CORONAVIRUS, WE WILL MEET VIA A SCHEDULED ZOOM MEETING.

Join Zoom Meeting

<https://us02web.zoom.us/j/84132375216?pwd=YjFvdFZBcEJYdS9XcmsyMHVxbzBaZz09>

or call 669 900 6833

Meeting ID: 841 3237 5216

Passcode: 905696

THE PUBLIC IS ALWAYS WELCOME TO OUR MEETINGS

WE REPRESENT YOU WHEN ADVISING THE COUNTY OF SAN DIEGO ON LAND USE ISSUES

A. CALL TO ORDER/ROLL CALL

B. PUBLIC COMMUNICATION: Opportunity for members of the public to speak to the Group on any subject matter within the Group's jurisdiction that is not on the posted agenda.

C. ACTION ITEMS:

1. Reconsideration of the InSite Towers Communication Tower @ 4515 Borrego Springs Rd. (American Legion Post 853) - PDS2020-MUP-20-008. This project was heard and approved by the BSCSG in September of 2020 but the County recently discovered it had not sent out public notices as required (although the BSCSG was sent the notice at the time), so it will be heard again. The project applicant has requested that it be heard prior to the Sponsor Group next regular scheduled meeting September 1, in order to accommodate the San Diego County Planning Commission Hearing schedule. The project did remove the windmill from the design, as requested by the Sponsor Group and voted on by the American Legion. Public notices were sent out July 16th by San Diego County. Previous project documentation and any updates received can be found at this link: [July 29 2021 special meeting agenda packet](#) . Please note: the previous images included a windmill decorative feature, which is no longer part of the design.

2. Jacumba Solar Project. The Jacumba Hot Springs Community Sponsor Group has asked other County community groups to support it in expressing disapproval of the JVR Solar Project that would overwhelm its small town. For a full County Staff report on this to the Planning Commission, see item 3 at this link: [JVR Solar Project Jacumba](#). This will go before the Board of Supervisors soon. Shall we send a letter to the BOS as requested or one we draft?

D. GROUP BUSINESS: Announcements & Correspondence Received

E. ADJOURNMENT

The next regular meeting will be held September 1, 2021, 4:30 pm via Zoom/teleconferencing. How future meetings are conducted (in-person, by Zoom, or via a hybrid meeting, will be discussed at the next meeting.

If this Agenda for the Special Meeting is revised, a revised copy will be posted 24 or more hours prior to the meeting. The final Agenda may include additional Administrative or Non-Action items. For further information contact the Chair at rebfalk7@gmail.com. Address U.S. mail to: Community Sponsor Group, P.O. Box 1371, Borrego Springs, CA 92004-1371.

Public Disclosure We strive to protect personally identifiable information by collecting only information necessary to deliver our services. All information that may be collected becomes public record that may be subject to inspection and copying by the public, unless an exemption in law exists. In the event of a conflict between this Privacy Notice and any County ordinance or other law governing the County's disclosure of records, the County ordinance or other applicable law will control.

Access and Correction of Personal Information You can review any personal information collected about you. You may recommend changes to your personal information you believe is in error by submitting a written request that credibly shows the error. If you believe that your personal information is being used for a purpose other than what was intended when submitted, you may contact us. In all cases, we will take reasonable steps to verify your identity before granting access or making corrections.

From: [mike ford](#)
To: [Russell, Denise](#); [mikeford](#)
Subject: [External] pds2020-mup-20-008
Date: Tuesday, July 27, 2021 5:24:46 PM
Attachments: [zuni cell tower yes please.pdf](#)

ms. russell

please see below my written comments evidencing my strong desire to see the tower built as rapidly as is possible.

it will be a much needed solution to dangerously weak cell reception and service in my end of the valley.

please reply as received or reply to alert me to where i might direct my expression of extreme delight at the prospect of improved cell service.

without putting too fine a point on it...that end of town is **severely** lacking in service.

that tower cannot go in soon enough

aloha
mike ford

Michael Ford
1678 Zuni Trail
Borrego Springs CA 92004

7/27/21

To whom it concerns

Regarding the proposed radio towers at the 4515 Borrego Springs Rd.

RECORD ID PDS2020-MUP-20-008

I AM STRONGLY IN FAVOR OF THE TOWER and would hope that all the cell operators would be granted access for facilities.

The proposed tower is **DIRECTLY VISIBLE** in an unobstructed sight-line from my back yard where we spend evenings. I am certain I will look at it and breathe a sigh of relief that should I, or a neighbor, need a reliable lifeline and reliable cell service it will be there when we do.

I take a **SELFISH** personal interest in the towers as a **PUBLIC HEALTH AND SAFETY ASSET**. In March of 2020 while riding in the area I went down on my motorcycle and was badly injured. I was riding alone on a weekday morning. My T-Mobile service did not have coverage and I was forced to walk out of the desert with what turned out to be 8 broken ribs and a broken collarbone. Had I been more badly injured, or had I punctured a lung, I might not have been able to make my way to help.

For over 25 years I have been riding in the area I have come across at least a dozen stranded parties and stuck vehicles or punctured tires. Invariably they remark about lack of cell service and their helplessness is revealed. Some were genuinely afraid. I sometimes am able to extricate their vehicle with my off-road skills or help swap out a flat, but equally as often I ride back to my house and drive my truck out to drag them out or to fetch fuel.

Given the frequency of my time nearby, and the experiences I've had, I have been researching cell providers and find that **the entire valley is VERY poorly served** with just one tower for my vendor, T-Mobile, located on the other side of the valley on the other side of the airport.

My family and I hike and ride bikes and motorcycles and are eager to have this additional layer of comfort. This one sounds like a no-brainer.

Please approve the tower and the sooner the better I say.

For purposes of correspondence please use the address:

101 Leucadia Blvd.
Encinitas CA 92024

Best regards,

Michael Ford
760-840-9448

From: [Fred Kimball](#)
To: [Russell, Denise](#)
Subject: [External] ca052 Borrego Springs Communication tower
Date: Tuesday, August 10, 2021 2:34:41 PM

To Whom it May Concern:

I am writing in support of the proposed cell tower to be located behind the American Legion Post 853 property in Borrego Springs, Ca (PDS2020-MUP-20-008). I have a residence at 1669 Zuni Trail, Borrego Springs, Ca 92004 in the Deep Well neighborhood near the proposed project. Cell phone reception in the Borrego Valley is marginal in places and improving the reception would certainly improve the communication network for the valley residents and visitors.

Thank you for considering my support of this project.

Fred Kimball
1669 Zuni Trail
Borrego Springs, Ca
92004
360-301-0279
fredk@olympus.net

From: [Russell, Denise](#)
To: [Yzaguirre, Lauren](#)
Subject: FW: [External] Oppose building of Cell Tower Borrego Springs
Date: Wednesday, July 28, 2021 9:38:08 AM

Thank you,

Denise Russell

Planning Manager, Project Planning
619.694.9349

From: Mitzi Merino <merinomitzi1@gmail.com>
Sent: Wednesday, July 28, 2021 8:58 AM
To: Russell, Denise <Denise.Russell@sdcounty.ca.gov>
Subject: [External] Oppose building of Cell Tower Borrego Springs

Dear Denise,

As a property owner in the Deep Wells community I strongly oppose the building of the 97 foot radio tower for the following reasons:

1. It is unhealthy and unsafe to live near a radio station . We purchased our home to be away from the environmental impacts in the city. My family ages 4 weeks-82 deserve to be safe from the environmental impacts of this tower. Please see current research on the impacts.
2. The 97 foot tower exceeds the 35 foot height limit and does not fit with the character of the neighborhood .
3. The tower will block our beautiful view of the mountains.

I oppose the building of the tower.

Mitzi Merino
Area 5 Superintendent
SDUSD
619-302-0475

From: [Russell, Denise](#)
To: [Yzaguirre, Lauren](#)
Subject: FW: [External] Record ID: PDS2020-MUP-20-008
Date: Monday, July 26, 2021 8:23:06 AM

Pls save for the record

Thank you,

Denise Russell

Planning Manager, Project Planning
619.694.9349

From: Mishelle Merino-Caswall <caswall@cox.net>
Sent: Friday, July 23, 2021 1:31 PM
To: Russell, Denise <Denise.Russell@sdcounty.ca.gov>
Cc: Mishelle Merino-Caswall <caswall@cox.net>
Subject: [External] Record ID: PDS2020-MUP-20-008

Dear Ms. Russell,

It has come to our attention via a notice from the San Diego Planning and Development Services that the American Legion Post in Borrego Springs is trying to build a 97 foot communications tower on Borrego Springs Road. We own a home in this area and the tower would be one block from the Deep Wells residential community where our home is located. Additionally, the tower would be one block from Casa Del Zorro Resort & Spa located on Yaqui Pass Road.

There are many concerns with locating a cell tower this close to a residential neighborhood and resort property. Some of the areas of concern are:

- Property devaluation - our home and neighboring properties would be negatively impacted
- Health concerns - there are no long term studies of health impacts of having a communications tower in residential neighborhoods
- Fire Safety
- Public Safety
- Character of the surrounding area would be negatively impacted
- Borrego Springs is a designated Dark Sky Community and lights from this tower would impact this at night
- A 97 foot tower would impede our current views of the mountains and surrounding Borrego Springs Valley

There are many more suitable areas that are unpopulated in Borrego Springs that would not have the concerns that we have regarding a communications tower one block from our home. We strongly oppose putting a tower in this location and request that you note our opposition to the project.

Thank you,

Mishelle Merino-Caswall
Jon Caswall

From: [Russell, Denise](#)
To: [Yzaguirre, Lauren](#)
Subject: FW: [External] Fw: Proposed construction of a 97 foot radio tower at the American Legion property
Date: Tuesday, July 20, 2021 1:01:36 PM

FYI – the only one I’ve received so far. Can you save it in the files? I’ll get back to him.

Thank you,

Denise Russell

Planning Manager, Project Planning
619.694.9349

From: Richard Merino <merino.r@sbcglobal.net>
Sent: Tuesday, July 20, 2021 12:22 PM
To: Russell, Denise <Denise.Russell@sdcounty.ca.gov>
Subject: [External] Fw: Proposed construction of a 97 foot radio tower at the American Legion property

Record ID: PDS2020-MUP-20-008

Dear Denise,

I received a notice from the San Diego Planning and Development services that the American Legion Post is trying to build a 97 foot radio tower one block from Deep Wells residential community and one block from Casa Del Zoro.

My concerns are:

1. Borrego Springs is A Designated Dark Sky Community.
2. A 97 foot tower one block from Deep Wells community where the height limit as I understand it is a 35 foot height limit.
3. This tower will block our view of the surrounding mountains, desert and the stars at night.
4. Any lights that they place on the tower will diminish the quality of our star gazing at night.
5. A 9-10 story tower one block from deep Wells and Casa Del Zoro, will certainly lower our property values
6. Clearly this 97 foot structure is not in character with our neighborhood.

I would appreciate you noting that I oppose this project

Sincerely,
Richard Merino
Phone # 858-230-6681

From: [Russell, Denise](#)
To: [Yzaguirre, Lauren](#)
Subject: FW: Special meeting of the BSCG concerning the radio tower on Borrego Springs rd
Date: Wednesday, July 28, 2021 11:26:13 AM

Hi Lauren,

Just FYI, Richard send the below email to Rebecca and she's asking for responses. I will put together a response and send it to her.

Thank you,

Denise Russell

Planning Manager, Project Planning
619.694.9349

From: Rebecca Falk <rebalk7@gmail.com>

Sent: Wednesday, July 28, 2021 11:19 AM

To: Russell, Denise <Denise.Russell@sdcounty.ca.gov>

Subject: Fwd: Special meeting of the BSCG concerning the radio tower on Borrego Springs rd
Denise,

This letter just came in from Richard Merino. He sent an earlier one, shorter, that was part of what Lauren sent me already. He makes two points I'd like the county to address rather than me addressing it. 1. He wants an explanation about why there is no environmental review 2. He says there is supposed to be 30 days to respond and we're not providing that. Because you asked us to meet prior to the Sept 1st regular meeting and because the county failed to send out notices earlier to residents, this is true. It is also true that this was noticed publicly by the Sponsor Group on our agenda in September of 2020. So I don't know how to respond. Can you respond to these points now or at the meeting and copy me on your response?

Thank you,

Rebecca Falk, Chair

BSCSG

760-331-7526

----- Forwarded message -----

From: **Richard Merino** <merino.r@sbcglobal.net>

Date: Wed, Jul 28, 2021 at 10:19 AM

Subject: Special meeting of the BSCG concerning the radio tower on Borrego Springs rd

To: <rebalk7@gmail.com>, Executive Director <borregochamberdirector@gmail.com>

7-28-2021

Rebecca Falk

Chair of the Borrego Springs Community Group

Dear Rebecca,

My name is Richard Merino and I have a house in the Deep Wells area of Borrego Springs. Our residence is about 2 blocks from the proposed 9 story radio tower structure on Borrego Springs rd. I was just notified last week of the plan to construct this 90+ foot tower in our neighborhood.

My concerns are the filling:

1. The tower will be 80-90 feet high where the height limit is 35 feet.

2. The tower will block our view of the surrounding mountains and desert.
 3. Borrego Springs is a designated Dark Sky Community and a 8-9 story structure and any lights would interfere with star gazing.
 4. I will be able to see this type of structure from my front yard , side yard and back yard , so this will significantly lower out property values.
 5. A 97 foot radio tower does not fit or comply with character of our neighborhood.
 6. I received notice about this project for the first time on 7-20-2021 and the notice was sent by the planning department on 7-16-2021. Now the special meeting is to take place on 7-29-2021.
 7. We are supposed to have 30 days to give input about this project, but clearly we have not had the proper time to study the impact that this project will have have on our residential community.
 8. Last but not least, I have told that this project is going to be exempt from a environmental impact review. However, no one can tell me why it is exempt from a review.
- I studied medicine at UCSD School of Medicine for 4 years and trained at the University of Denver School of Medicine for 3 years and I practiced Internal Medicine for over 40 years. I reviewed research Publications on a daily basis in order to treat my patients
 - I reviewed multiple research articles about the health risks of Cell Towers from around the world and it has been established that health concerns should be reviewed and discussed with the residents at risk.
 - Cell towers emit radio frequency radiation and electromagnetic fields.
 - wireless radiation has been classified as Group 2b which is possible carcinogenic.
 - residents in Deep Wells, and workers and clients at Casa Del Zoro will be exposed.
 - the highest exposure will will be the workers and visitors of the American Legion Post.
- I plan on attending the zoom meeting to discuss these issues.

Thank you,

Richard Merino MD

1-858-232-8538

[Sent from AT&T Yahoo Mail for iPad](#)

From: [Richard Merino](#)
To: [Russell, Denise](#)
Subject: [External] Court of appeals case. Environmental Health Trust et al v. FCC . Decision 8-13-2021
Date: Monday, August 23, 2021 1:19:14 PM
Attachments: [chd-v-fcc-we-won-decision.pdf](#)

Please file in the record for PDS2020-MUP-20-008

Thank you,

R Merino

<https://childrenshealthdefense.org/wp-content/uploads/chd-v-fcc-we-won-decision.pdf>

[Sent from AT&T Yahoo Mail for iPad](#)

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 25, 2021

Decided August 13, 2021

No. 20-1025

ENVIRONMENTAL HEALTH TRUST, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED
STATES OF AMERICA,
RESPONDENTS

Consolidated with 20-1138

On Petitions for Review of an Order
of the Federal Communications Commission

W. Scott McCollough argued the cause for petitioners.
With him on the joint briefs were *Edward B. Myers* and *Robert F. Kennedy, Jr.*

Sharon Buccino was on the brief for *amici curiae* Natural
Resources Defense Council and Local Elected Officials in
support of petitioners.

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Dan Kleiber and *Catherine Kleiber*, pro se, were on the brief for *amici curiae* Dan and Catherine Kleiber in support of petitioners.

James S. Turner was on the brief for *amicus curiae* Building Biology Institute in support of petitioners.

Stephen L. Goodman was on the brief for *amicus curiae* Joseph Sandri in support of petitioners.

Ashley S. Boizelle, Deputy General Counsel, Federal Communications Commission, argued the cause for respondents. With her on the brief were *Jonathan D. Brightbill*, Principal Deputy Assistant Attorney General at the time the brief was filed, U.S. Department of Justice, *Eric Grant*, Deputy Assistant Attorney General at the time the brief was filed, *Jeffrey Beelaert* and *Justin Heminger*, Attorneys, *Thomas M. Johnson, Jr.*, General Counsel at the time the brief was filed, Federal Communications Commission, *Jacob M. Lewis*, Associate General Counsel, and *William J. Scher* and *Rachel Proctor May*, Counsel. *Richard K. Welch*, Deputy Associate General Counsel, entered an appearance.

Before: HENDERSON, MILLETT and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

Opinion dissenting in part filed by *Circuit Judge* HENDERSON.

WILKINS, *Circuit Judge*: Environmental Health Trust and several other groups and individuals petition for review of an order of the Federal Communications Commission (“the Commission”) terminating a notice of inquiry regarding the

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adequacy of the Commission's guidelines for exposure to radiofrequency radiation. The notice of inquiry requested comment on whether the Commission should initiate a rulemaking to modify its guidelines. The Commission concluded that no rulemaking was necessary. Petitioners argue that the Commission violated the requirements of the Administrative Procedure Act by failing to respond to significant comments. Petitioners also argue that the National Environmental Policy Act required the Commission to issue an environmental assessment or environmental impact statement regarding its decision to terminate its notice of inquiry.

We grant the petitions in part and remand to the Commission. The Commission failed to provide a reasoned explanation for its determination that its guidelines adequately protect against the harmful effects of exposure to radiofrequency radiation unrelated to cancer.

I.

The Federal Communications Commission regulates various facilities and devices that transmit radio waves and microwaves, including cell phones and facilities for radio, TV, and cell phone communications. 47 U.S.C. §§ 301, 302a(a); *see EMR Network v. FCC*, 391 F.3d 269, 271 (D.C. Cir. 2004). Radio waves and microwaves are forms of electromagnetic energy that are collectively described by the term "radiofrequency" ("RF"). Office of Eng'g & Tech., Fed. Commc'ns Comm'n, *OET Bulletin No. 56, Questions and Answers about Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields* 1 (4th ed. Aug. 1999). The phenomenon of radio waves and microwaves moving through space is described as "RF radiation." *Id.*

We often associate the term "radiation" with the term "radioactivity." "Radioactivity," however, refers only to the

emission of radiation with enough energy to strip electrons from atoms. *Id.* at 5. That kind of radiation is called “ionizing radiation.” *Id.* It can produce molecular changes and damage biological tissue and DNA. *Id.* Fortunately, RF radiation is “non-ionizing,” meaning that it is not sufficiently energetic to strip electrons from atoms. *Id.* It can, however, heat certain kinds of materials, like food in your microwave oven or, at sufficiently high levels, human body tissue. *Id.* at 6–7. Biological effects that result from the heating of body tissue by RF energy are referred to as “thermal” effects, and are known to be harmful. *Id.* Exposure to lower levels of RF radiation might also cause other, “non-thermal” biological effects. *Id.* at 8. Whether it does, and whether such effects are harmful, are subjects of debate. *Id.*

The National Environmental Policy Act (“NEPA”) and its implementing regulations require federal agencies to “establish procedures to account for the environmental effects of [their] proposed actions.” *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1032 (D.C. Cir. 2008) (per curiam). If an agency proposes a “major Federal action[]” that stands to “significantly affect[] the quality of the human environment,” the agency must prepare an environmental impact statement (“EIS”) that examines the adverse environmental effects of the proposed action and potential alternatives. 42 U.S.C. § 4332(C). Not every agency action, however, requires the preparation of a full EIS. *Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010). If it is unclear whether a proposed action will “significantly affect[] the quality of the human environment,” 42 U.S.C. § 4332(C), the responsible agency may prepare a more limited environmental assessment (“EA”). *See* 40 C.F.R. § 1501.5(a). An EA serves to “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact.” 40 C.F.R. § 1501.5(c)(1).

Additionally, an agency may use “categorical exclusions” to “define categories of actions that normally do not have a significant effect on the human environment and therefore do not require preparation of an environmental impact statement.” 40 C.F.R. § 1500.4(a); *see also* 40 C.F.R. § 1501.4(a).

To fulfill its obligations under NEPA, the Commission has promulgated guidelines for human exposure to RF radiation. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 87 (2d Cir. 2000). The guidelines set limits for RF exposure. Before the Commission authorizes the construction or use of any wireless facility or device, the applicant for authorization must determine whether the facility or device is likely to expose people to RF radiation in excess of the limits set by the guidelines. 47 C.F.R. § 1.1307(b). If the answer is yes, the applicant must prepare an EA regarding the likely effects of the Commission’s authorization of the facility or device. *Id.* Depending on the contents of the EA, the Commission may require the preparation of an EIS, and may subject approval of the application to a full vote by the Commission. Office of Eng’g & Tech., Fed. Comm’n Comm’n, *OET Bulletin No. 65, Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields* 6 (ed. 97-01, Aug. 1997). If the answer is no, the applicant is generally not required to prepare an EA. 47 C.F.R. § 1.1306(a).

The Commission last updated its limits for RF exposure in 1996. *Resolution of Notice of Inquiry, Second Report and Order, Notice of Proposed Rulemaking, and Memorandum Opinion and Order*, 34 FCC Rcd. 11,687, 11,689–90 (2019) (“2019 Order”); *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(b), 110 Stat. 56, 152 (directing the Commission to “prescribe and make effective rules regarding the environmental effects of radio frequency emissions” within 180 days). The limits are based on standards for RF exposure

issued by the American National Standards Institute Committee (“ANSI”), the Institute of Electrical and Electronic Engineers, Inc. (“IEEE”), and the National Council on Radiation Protection and Measurements (“NCRP”). *In re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 FCC Rcd. 15,123, 15,134–35, 15,146–47 (1996). The limits are designed to protect against “thermal effects” of exposure to RF radiation, but not “non-thermal” effects. *EMR Network*, 391 F.3d at 271.

In March 2013, the Commission issued a notice of inquiry regarding the adequacy of its 1996 guidelines. *See Reassessment of Radiofrequency Exposure Limits & Policies, Notice of Inquiry*, 28 FCC Rcd. 3,498 (2013) (“2013 Notice of Inquiry”). The Commission divided its notice of inquiry into five sections. In the first section, it sought comment on the propriety of its exposure limits for RF radiation, particularly as they relate to device use by children. *Id.* at 3,575–80. In the second section, the Commission sought comment on how to better provide information to consumers and the public about exposure to RF radiation and methods for reducing exposure. *Id.* at 3,580–82. In the third section, the Commission sought comment on whether it should impose additional precautionary restrictions on devices and facilities that are unlikely to expose people to RF radiation in excess of the limits set by the Commission’s guidelines. *Id.* at 3,582–85. In the fourth and fifth sections, the Commission sought comment on whether it should change its methods for determining whether devices and facilities comply with the Commission’s guidelines. *Id.* at 3,585–89.

The Commission explained that it was issuing the notice of inquiry in response to changes in the ubiquity of wireless devices and in scientific standards and research since 1996. *Id.* at 3,570. Specifically, the Commission noted that the IEEE had

“published a major revision to its RF exposure standard in 2006.” *Id.* at 3,572. The Commission also noted that the International Commission on Non-Ionizing Radiation Protection had published RF exposure guidelines in 1998 that differed somewhat from the Commission’s 1996 guidelines, and was likely to release a revision of those guidelines “in the near future.” *Id.* at 3,573. And the Commission noted that the International Agency for Research on Cancer (“IARC”) had classified RF radiation as possibly carcinogenic to humans, and was likely to release a detailed monograph regarding that classification prior to the resolution of the notice of inquiry. *Id.* at 3,575 & n.385. The Commission invited public comment on all of these developments, but underscored that it would “work closely with and rely heavily—but not exclusively—on the guidance of other federal agencies with expertise in the health field.” *Id.* at 3,571.

In December 2019, the Commission issued a final order resolving its 2013 notice of inquiry by declining to undertake any of the changes contemplated in the notice of inquiry. *See 2019 Order*, 34 FCC Rcd. at 11,692–97.

In January 2020, Petitioners Environmental Health Trust, Consumers for Safe Cell Phones, Elizabeth Barris, and Theodora Scarato timely petitioned this Court for review of the Commission’s 2019 final order. In February 2020, Petitioners Children’s Health Defense, Michele Hertz, Petra Brokken, Dr. David O. Carpenter, Dr. Paul Dart, Dr. Toril H. Jelter, Dr. Ann Lee, Virginia Farver, Jennifer Baran, and Paul Stanley, M.Ed., timely petitioned the Ninth Circuit for review of the same order, and the Ninth Circuit transferred their petition to this Court pursuant to 28 U.S.C. § 2112. This Court consolidated the petitions. We have jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

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II.

Petitioners challenge the 2019 final order under NEPA and the Administrative Procedure Act (“APA”). We begin with the APA.

A.

Petitioners argue that the order is arbitrary and capricious and therefore must be set aside under 5 U.S.C. § 706(2)(A) for the following reasons: (1) the order fails to acknowledge evidence of negative health effects caused by exposure to RF radiation at levels below the limits set by the Commission’s 1996 guidelines, including evidence of cancer, radiation sickness, and adverse effects on sleep, memory, learning, perception, motor abilities, prenatal and reproductive health, and children’s health; (2) the order fails to respond to comments concerning environmental harm caused by RF radiation; (3) the order fails to discuss the implications of long-term exposure to RF radiation, exposure to RF pulsation or modulation (two methods of imbuing radio waves with information), and the implications of technological developments that have occurred since 1996, including the ubiquity of wireless devices and Wi-Fi, and the emergence of “5G” technology; (4) the order fails to adequately explain the Commission’s refusal to modify its procedures for determining whether cell phones comply with its RF limits; and (5) the order fails to respond to various “additional legal considerations,” Pet’rs’ Br. at 84.

Before discussing these arguments, and the Commission’s responses to them, we clarify our standard of review. The arbitrary and capricious standard of the Administrative Procedure Act “encompasses a range of levels of deference to the agency.” *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987). We completely agree with the dissenting

opinion that the Commission's order is entitled to a high degree of deference, both because it is akin to a refusal to initiate a rulemaking, *see id.* at 4–5, and because it concerns highly technical determinations of the kind courts are ill-equipped to second-guess, *see Am. Radio Relay League, Inc., v. FCC*, 524 F.3d 227, 233 (D.C. Cir. 2008). So as to the governing law, the dissenting opinion and we are on the same page. Nevertheless, the Commission's decision to terminate its notice of inquiry must be "reasoned" if it is to survive arbitrary and capricious review. *See Am. Horse*, 812 F.2d at 5; *Am. Radio*, 524 F.3d at 241. As with other agency decisions not to engage in rulemaking, we will overturn the Commission's decision if there is "compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency[.]" *Flyers Rights Educ. Fund, Inc. v. Fed. Aviation Admin.*, 864 F.3d 738, 743 (D.C. Cir. 2017) (quoting *WildEarth Guardians v. EPA*, 751 F.3d 649, 653 (D.C. Cir. 2014)). When an agency in the Commission's position is confronted with evidence that its current regulations are inadequate or the factual premises underlying its prior judgment have eroded, it must offer more to justify its decision to retain its regulations than mere conclusory statements. *See Am. Horse*, 812 F.2d at 6; *Am. Radio*, 524 F.3d at 241. Rather, the agency must provide "assurance that [it] considered the relevant factors," and it must provide analysis that follows "a discernable path to which the court may defer." *Am. Radio*, 524 F.3d at 241.

i.

Under this highly deferential standard of review, we find the Commission's order arbitrary and capricious in its failure to respond to record evidence that exposure to RF radiation at levels below the Commission's current limits may cause negative health effects unrelated to cancer. (As we explain

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below, we find that the Commission offered an adequate explanation for its determination that exposure to RF radiation at levels below the Commission's current limits does not cause cancer.) That failure undermines the Commission's conclusions regarding the adequacy of its testing procedures, particularly as they relate to children, and its conclusions regarding the implications of long-term exposure to RF radiation, exposure to RF pulsation or modulation, and the implications of technological developments that have occurred since 1996, all of which depend on the premise that exposure to RF radiation at levels below its current limits causes no negative health effects. Accordingly, we find those conclusions arbitrary and capricious as well. Finally, we find the Commission's order arbitrary and capricious in its complete failure to respond to comments concerning environmental harm caused by RF radiation.

Petitioners point to multiple studies and reports, which were published after 1996 and are in the administrative record, purporting to show that RF radiation at levels below the Commission's current limits causes negative health effects unrelated to cancer, such as reproductive problems and neurological problems that span from effects on memory to motor abilities. *See, e.g.*, J.A. 3,068 (BIOINITIATIVE WORKING GROUP, BIOINITIATIVE REPORT (Cindy Sage & David O. Carpenter eds., 2012) (describing evidence that human sperm and their DNA are damaged by low levels of RF radiation)); J.A. 5,243 (Igor Yakymenko et al., *Oxidative Mechanisms of Biological Activity of Low-Intensity Radiofrequency Radiation*, ELECTROMAGNETIC BIOLOGY & MED., EARLY ONLINE, 1–16 (2015)); J.A. 5,259–69 (Henrietta Nittby et al., *Increased Blood-Brain Barrier Permeability in Mammalian Brain 7 Days After Exposure to the Radiation from a GSM-900 Mobile Phone*, 16 PATHOPHYSIOLOGY 103 (2009)); J.A. 5,320–68 (Henry Lai, *A Summary of Recent Literature on*

Neurobiological Effects of Radiofrequency Radiation, in MOBILE COMMUNICATIONS AND PUBLIC HEALTH 187–222 (M. Markov ed., 2018)); J.A. 5,994–6,007 (Milena Foerster et al., *A Prospective Cohort Study of Adolescents’ Memory Performance and Individual Brain Dose of Microwave Radiation from Wireless Communication*, 126 ENV’T HEALTH PERSPS. 077007 (July 2018)). Petitioners also point to approximately 200 comments submitted by individuals who advised the Commission that either they or their family members suffer from radiation sickness, “a constellation of mainly neurological symptoms that manifest as a result of RF[] exposure.” Pet’rs’ Br. at 30–31, 30 n.99.

The Commission argues that its order adequately responded to this evidence by citing the Food and Drug Administration (“FDA”)’s determination that exposure to RF radiation at levels below the Commission’s current limits does not cause negative health effects. The order cites three statements from the FDA. First, the order cites an FDA webpage titled “Do cell phones pose a health hazard?” that, as of December 4, 2017, stated that “[t]he weight of scientific evidence has not linked cell phones with any health problems.” *2019 Order*, 34 FCC Rcd. at 11,692–93, 11,693 n.31. Second, the order cites a February 2018 statement from the Director of the FDA’s Center for Devices and Radiological Health advising the public that

As part of our commitment to protecting the public health, the FDA has reviewed, and will continue to review, many sources of scientific and medical evidence related to the possibility of adverse health effects from radiofrequency energy exposure in both humans and animals and will continue to do so as new scientific data are published. Based on our ongoing evaluation

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of the issue, the totality of the available scientific evidence continues to not support adverse health effects in humans caused by exposures at or under the current radiofrequency energy exposure limits.

Id. at 11,695 n.42. Third, the order cites an April 2019 letter from the Director of the FDA’s Center for Devices and Radiological Health that does not discuss non-cancer-related health effects but instead addresses a 2018 study by the National Toxicology Program that found that exposure to RF radiation emitted by cell phones may cause cancer in rodents. *2019 Order*, 34 FCC Rcd. at 11,692 & n.28. The letter explains that “[a]s a part of our ongoing monitoring activities, we have reviewed the results and conclusions of the recently published rodent study from the National Toxicology Program in the context of all available scientific information, including epidemiological studies, and concluded that no changes to the current standards are warranted at this time.” Letter from Jeffrey Shuren, M.D., J.D., Dir., Ctr. for Devices & Radiological Health, Food & Drug Admin., Dep’t of Health & Hum. Servs., to Julius Knapp, Chief, Off. Of Eng’g & Tech., FCC (April 24, 2019).

We do not agree that these statements provide a reasoned explanation for the Commission’s decision to terminate its notice of inquiry. Rather, we find them to be of the conclusory variety that we have previously rejected as insufficient to sustain an agency’s refusal to initiate a rulemaking. In *American Horse*, this Court considered whether the Secretary of Agriculture had offered a satisfactory explanation under the APA of his refusal to institute rulemaking proceedings regarding the practice of deliberately injuring show horses by fastening heavy chains or similar equipment—referred to as “action devices”—to the horses’ front limbs. 812 F.2d at 2. In

response to the argument that a certain study presented facts that merited a new rulemaking, the Secretary offered the following two-sentence explanation:

6. I have reviewed studies and other materials, relating to action devices, presented by humane groups, Walking Horse industry groups, and independent institutions, including the study referred to in the Complaint.

7. On the basis of this information, I believe that the most effective method of enforcing the Act is to continue the current regulations.

Id. at 5. This Court found these “two conclusory sentences . . . insufficient to assure a reviewing court that the agency’s refusal to act was the product of reasoned decisionmaking.” *Id.* at 6. *American Horse* explained that the study at issue “may or may not remove a ‘significant factual predicate’ of the original rules’ gaps[,]” and remanded to the Secretary to make that determination. *Id.* at 7.

Similarly, in *American Radio*, this Court considered whether the Commission had offered a satisfactory explanation for its decision to retain in its regulations a particular “extrapolation factor”—an estimate of the projected rate at which radio frequency strength decreases from a radiation-emitting source—despite studies submitted in a petition for reconsideration indicating that a different extrapolation factor would be more appropriate. 524 F.3d at 240–41. The Commission explained its decision by asserting that “[n]o new information has been submitted that would provide a convincing argument for modifying the extrapolation factor . . . at this time.” *Id.* (internal alterations omitted). We rejected that explanation as conclusory and unreasoned. *Id.*

The statements from the FDA on which the Commission's order relies are practically identical to the Secretary's statement in *American Horse* and the Commission's statement in *American Radio*. They explain that the FDA has reviewed certain information—here, “all,” “the weight,” or “the totality” of “scientific evidence.” And they state the FDA's conclusion that, in light of that information, exposure to RF radiation at levels below the Commission's current limits does not cause harmful health effects. But they offer “no articulation of the factual . . . bases” for the FDA's conclusion. *Am. Horse*, 812 F.2d at 6 (internal quotation marks omitted). In other words, they do not explain why the FDA determined, despite the studies and comments that Petitioners cite, that exposure to RF radiation at levels below the Commission's current limits does not cause harmful health effects. Such conclusory statements “cannot substitute for a reasoned explanation,” for they provide “neither assurance that the [FDA] considered the relevant factors nor [do they reveal] a discernable path to which the court may defer.” *Am. Radio*, 524 F.3d at 241. They instead represent a failure by the FDA to address the implication of Petitioners' studies: The factual premise—the non-existence of non-thermal biological effects—underlying the current RF guidelines may no longer be accurate.

When repeated by the Commission, the FDA's conclusory statements still do not substitute for the reasoned explanation that the APA requires. It is the Commission's responsibility to regulate radio communications, 47 U.S.C. § 301, and devices that emit RF radiation and interfere with radio communications, *id.* § 302a(a), and to do so in the public interest, including in regard to public health, *Banzhaf v. FCC*, 405 F.2d 1082, 1096 (D.C. Cir. 1968). Even the Commission itself recognizes this. *See 2019 Order*, 34 FCC Rcd. at 11,689 (“The Commission has the responsibility to set standards for RF emissions”); *2013 Notice of Inquiry*, 28 FCC Rcd. at 3,571

(explaining that the Commission opened the notice of inquiry “to ensure [it] [was] meeting [its] regulatory responsibilities” and that it would “work closely with and rely heavily—*but not exclusively*—on the guidance of other federal agencies with expertise in the health field” in order to “fully discharge[] [its] regulatory responsibility”) (emphasis added). And the APA requires that Commission’s decisions concerning the regulation of radio communications and devices be reasoned. The Commission’s purported reasoning in this case is that it chose to rely on the FDA’s evaluation of the studies in the record. Absent explanation from the FDA as to how and why it reached its conclusions regarding those studies, however, we have no basis on which to review the reasonableness of the Commission’s decision to adopt the FDA’s conclusions. Ultimately, the Commission’s order remains bereft of any explanation as to *why*, in light of the studies in the record, its guidelines remain adequate. The Commission may turn to the FDA to provide such an explanation, but if the FDA fails to do so, as it did in this case, the Commission must turn elsewhere or provide its own explanation. Were the APA to require less, our very deferential review would become nothing more than a rubber stamp.

The Commission also argues that its order provided a reasoned explanation for its decision to terminate the notice of inquiry, despite Petitioners’ evidence, by observing that “no expert health agency expressed concern about the Commission’s RF exposure limits,” and that “no evidence has moved our sister health and safety agencies to issue substantive policy recommendations for strengthening RF exposure regulation.” *2019 Order*, 34 FCC Rcd. at 11,692. The silence of other expert agencies, however, does not constitute a reasoned explanation for the Commission’s decision to terminate its notice of inquiry for the same reason that the FDA’s conclusory statements do not constitute a reasoned

explanation: silence does not indicate why the expert agencies determined, in light of evidence suggesting to the contrary, that exposure to RF radiation at levels below the Commission's current limits does not cause negative health effects unrelated to cancer. Silence does not even indicate whether the expert agencies made any such determination, or whether they considered any of the evidence in the record.

Our decision in *EMR Network* is not to the contrary. There, we rejected the argument that the Commission improperly delegated its NEPA duties by relying on input from other government agencies and non-governmental expert organizations in deciding whether to initiate a rulemaking to modify its RF radiation guidelines. 391 F.3d at 273. We found the Commission “not to have abdicated its responsibilities, but rather to have properly credited outside experts,” and noted that “the FCC’s decision not to leap in, at a time when the EPA (and other agencies) saw no compelling case for action, appears to represent the sort of priority-setting in the use of agency resources that is least subject to second-guessing by courts.” *Id.* (citing *Am. Horse*, 812 F.2d at 4). We agree with the dissenting opinion that the Commission may credit outside experts in deciding whether to initiate a rulemaking to modify its RF radiation guidelines. To be sure, “[a]gencies can be expected to respect the views of such other agencies as to those problems for which those other agencies are more directly responsible and more competent.” *City of Boston Delegation v. FERC*, 897 F.3d 241, 255 (D.C. Cir. 2018) (internal alteration and quotation marks omitted). What the Commission may not do, however, is rely on an outside expert’s silence or conclusory statements in lieu of some reasoned explanation for its decision. And while it is certainly true that an agency’s decision not to initiate a rulemaking at a time when other agencies see no compelling case for action may represent “the sort of priority-setting in the use of agency

resources that is least subject to second-guessing by courts,” *EMR Network*, 391 F.3d at 273, the same is true of most agency decisions not to initiate a rulemaking, *see Am. Horse*, 812 F.2d at 4–5. Nevertheless, an agency’s decision not to initiate a rulemaking must have some reasoned basis, and an agency cannot simply ignore evidence suggesting that a major factual predicate of its position may no longer be accurate. *Id.* at 5.

Nor does *Cellular Phone Taskforce* help the Commission. There, the Second Circuit rejected the argument that the Commission was required to consult with the Environmental Protection Agency (“EPA”) or other outside agencies before declining to modify its RF radiation guidelines in the face of new evidence regarding non-thermal effects caused by RF radiation. 205 F.3d at 90–91. In so holding, the Second Circuit found that “[i]t was fully reasonable for the FCC to expect the agency with primacy in evaluating environmental impacts to monitor all relevant scientific input into the FCC’s reconsideration, particularly because the EPA had been assigned the lead role in RF radiation health effects since 1970,” and that the Commission was not required to “supply the new evidence to the other federal agencies with expertise in the area.” *Id.* at 91. But the Second Circuit did not hold that the Commission could rely solely on the silence or unexplained conclusions of other federal agencies to justify its own inaction. It merely held that the Commission was not required to consult with outside agencies before declining to modify its RF radiation guidelines. No party before us today questions the propriety of that holding.

Finally, the Commission argues that the Commission itself addressed the major studies in the record in its order terminating the notice of inquiry. Specifically, the Commission points to its statement that “[t]he vast majority of filings were unscientific.” *2019 Order*, 34 FCC Rcd. at 11,694.

Elsewhere, however, the order acknowledges that “the record include[d] some research information” and “filings that sought to present scientific evidence.” *Id.* The order dismisses that research and evidence as “fail[ing] to make a persuasive case for revisiting our existing RF limits,” *id.*, but again, such a conclusory statement cannot substitute for the minimal reasoning required at this stage, *Am. Radio*, 524 F.3d at 241. And while “[a]n agency is not obliged to respond to every comment, only those that can be thought to challenge a fundamental premise,” *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000), the studies in the record to which Petitioners point *do* challenge a fundamental premise of the Commission’s decision to terminate its notice of inquiry—namely, the premise that exposure to RF radiation at levels below the Commission’s current limits does not cause negative health effects. But the Commission said nothing at all in its order about any specific health effects unrelated to cancer.

The Commission also points to its statement that “the record [does not] include actionable alternatives or modifications to the current RF limits supported by scientifically rigorous data or analysis.” *2019 Order*, 34 FCC Rcd. at 11,692; *see also id.* at 11,694. Had the notice of inquiry focused exclusively on whether the Commission should modify its RF exposure limits, we might agree that the failure of any commenter to propose actionable modifications to the RF limits would have justified the Commission’s decision to terminate the notice of inquiry. But the notice of inquiry did not focus exclusively on whether the Commission should modify its RF exposure limits. Instead, it also sought comment on how to better provide information to consumers and the public about exposure to RF radiation and methods for reducing exposure, and whether the Commission should impose additional precautionary restrictions on devices and facilities that are unlikely to expose people to RF radiation in

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excess of the Commission's limits. The Commission needed no actionable alternative to its current limits in order to provide additional information to the public or to impose precautionary restrictions in addition to its current limits. The failure of any commenter to propose actionable modifications to the Commission's RF exposure limits therefore does not justify the Commission's decision to terminate the notice of inquiry.

ii.

The Commission's failure to provide a reasoned explanation for its determination that exposure to RF radiation at levels below its current limits does not cause negative health effects unrelated to cancer renders the order arbitrary and capricious in three additional respects. First, it undermines the Commission's explanation for retaining its procedures for determining whether cell phones and other portable electronic devices comply with its RF limits. These procedures consist of testing the device against the head of a specialized mannequin, *2013 Notice of Inquiry*, 28 FCC Rcd. at 3,586 n.434, and no more than 2.5 centimeters away from the body of the mannequin, *id.* at 3,588 n.447. Petitioners claim that the testing is inaccurate because of the space between the device and the mannequin's body. On this point, the Commission's order cites the "large safety margin" incorporated in its existing RF exposure limits as a justification for its refusal to modify these procedures to include testing against the body. *2019 Order*, 34 FCC Rcd. at 11,696. Because the Commission's existing RF limits are overprotective, the order explains, the Commission need not worry about whether its testing procedures accurately detect devices that are likely to expose people to RF emissions in excess of the Commission's limits. *See id.* ("[E]ven if certified or otherwise authorized devices produce RF exposure levels in excess of Commission limits under normal use, such exposure would still be well below levels considered to be

dangerous, and therefore phones legally sold in the United States pose no health risks.”). As the Commission itself recognizes, this explanation depends on the premise that RF radiation does not cause harmful effects at levels below its current limits. *See id.* at 11,696 n.49 (“We note that any claim as to the adequacy of the FCC required testing, certification, and authorization regime is no different than a challenge to the adequacy of the federal RF exposure limits themselves. Both types of claims would undermine the FCC’s substantive policy determinations.”). The Commission’s failure to provide a reasoned explanation for its determination that exposure to RF radiation at levels below its current limits does not cause negative health effects therefore renders inadequate the Commission’s explanation for its refusal to modify its testing procedures.

Second, the Commission equally failed to provide a reasoned explanation for brushing off record evidence addressing non-cancer-related health effects arising from the impact of RF radiation on children. Many commenters, including the American Academy of Pediatrics, urged the Commission to adopt limits that account for the use of RF-emitting devices by vulnerable children and pregnant women. *See, e.g.,* J.A. 4,533–34. In dismissing those concerns, the Commission again relied on a conclusory statement from the FDA that “[t]he scientific evidence does not show a danger to any users of cell phones from RF exposure, including children and teenagers.” *2019 Order*, 34 FCC Rcd. at 11,696. But, as we have already explained, such a conclusory and unexplained statement is not the “reasoned” explanation required by the APA. In addition, the Commission noted that the testing to determine compliance with its limits “represents a conservative case” for both adults and children. *Id.* at 11,696 n.50. Whether the testing of compliance with existing limits was conservative is not the point. The unanswered question remains whether low

levels of RF radiation allowed by those existing limits cause negative health effects. So once again, the Commission's failure to provide a reasoned or even relevant explanation of its position that RF radiation below the current limits does not cause health problems unrelated to cancer renders its explanation as to the effect of RF radiation on children arbitrary and capricious.

Third, the Commission's failure to provide a reasoned explanation for its determination that exposure to RF radiation at levels below its current limits does not cause negative health effects unrelated to cancer renders inadequate the Commission's explanation for its failure to discuss the implications of long-term exposure to RF radiation, exposure to RF pulsation or modulation, or the implications of technological developments that have occurred since 1996, including the ubiquity of wireless devices and Wi-Fi, and the emergence of "5G" technology. In its brief, the Commission responds that it was not required to address these topics in its order because it "rationally concluded that the weight of scientific evidence does not support the existence of adverse health effects from radiofrequency exposure below the FCC's limits, regardless of the service or equipment at issue." Resp't's Br. at 45–46. (The Commission points out that "5G" cell towers, unlike traditional cell towers, are subject to its RF exposure limits.) Again, this explanation depends on the premise that RF radiation does not cause harmful health effects at levels below the Commission's current limits, and will not suffice absent a reasoned explanation for the Commission's determination that that premise is correct.

iii.

In addition to the Commission's inadequate response to the non-cancer-related effects of RF radiation on human health,

the Commission also completely failed even to acknowledge, let alone respond to, comments concerning the impact of RF radiation on the environment. That utter lack of a response does not meet the Commission's obligation to provide a reasoned explanation for terminating the notice of inquiry. The record contains substantive evidence of potential environmental harms. Most relevantly, the record included a letter from the Department of the Interior voicing concern about the impact of RF radiation from communication towers on migratory birds, *see* J.A. 8,379, 8,383–86. In the Department of the Interior's expert view, the Commission's RF radiation limits "continue to be based on thermal heating, a criterion now nearly 30 years out of date and inapplicable today." J.A. 8,383. "The [current environmental] problem," according to the Department of the Interior, "appears to focus on very low-level, non-thermal electromagnetic radiation." *Id.* Although the Commission has repeatedly claimed that it considered "inputs from [its] sister federal agencies[.]" *2019 Order*, 34 FCC Rcd. at 11,689, the Commission entirely failed to address the environmental harm concerns raised by the Department of the Interior. To be sure, the Commission could conclude that the link between RF radiation and environmental harms is too weak to warrant an amendment to its RF radiation limits. All we hold now is that the Commission should have said something about its sister agency's view rather than ignore it altogether. That lack of any reasoned explanation as to environmental harms does not satisfy the requirements of the APA.

iv.

The dissenting opinion portrays this case as about the Commission's disregard of just five articles and one Department of Interior letter. Not so. The record contained substantial information and material from, for example, the

American Academy of Pediatrics, J.A. 4,533; the Council of Europe, J.A. 4,242–44, 4,247–57; the Cities of Boston and Philadelphia, J.A. 4,592–99; medical associations, *see, e.g.*, J.A. 4,536–40 (California Medical Association); thousands of physicians and scientists from around the world, *see, e.g.*, J.A. 4,197–4,206 (letter to United Nations); J.A. 4,208–17 (letter to European Union); J.A. 5,173–86 (Frieburger Appeal by over one thousand German physicians); and hundreds of people who were themselves or who had loved ones suffering from the alleged effects of RF radiation, *see, e.g.*, J.A. 8,774–9,940; *see also* J.A. 4,218–39 (collecting statements from physicians and health organizations expressing concern about health effects of RF radiation).

The dissenting opinion then offers its own explanation as to why those select sources were not worth being addressed by the agency. This in-the-weeds assessment of scientific studies and assessments falls “outside our bailiwick[,]” Dissenting Op. at 10. More to the point, the Commission said none of what the dissenting opinion does. If it had and if those six sources fairly represented the credible record evidence seeking a change in Commission policy, that discussion likely would have sufficed. But just as *post hoc* rationales offered by counsel cannot fill in the holes left by an agency in its decision, neither can a dissenting opinion. *See Grace v. Barr*, 965 F.3d 883, 903 (D.C. Cir. 2020) (“[W]hen ‘assessing the reasonableness of [an agency’s action], we look only to what the agency said at the time of the [action]—not to its lawyers’ post-hoc rationalizations.’”) (second and third alterations in original) (quoting *Good Fortune Shipping SA v. Commissioner*, 897 F.3d 256, 263 (D.C. Cir. 2018)).

Instead, the Commission chose to hitch its wagon to the FDA’s unexplained disinterest in some similar information. Importantly, the dissenting opinion does not dispute that the

FDA's conclusory dismissal of that evidence ran afoul of our precedent in *American Horse* and *American Radio*. It just says that the deficiency in the FDA's analysis cannot be imputed to a second agency, and so the dissenting opinion would hold dispositive "the fact that the Commission and the FDA are, to state the obvious, distinct agencies." Dissenting Op. at 5.

They certainly are. But that does not amount to a legal difference here. While imitation may be the highest form of flattery, it does not meet even the low threshold of reasoned analysis required by the APA under the deferential standard of review that governs here. One agency's unexplained adoption of an unreasoned analysis just compounds rather than vitiates the analytical void. Said another way, two wrongs do not make a right. Compare *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006) ("[T]he action agency must not blindly adopt the conclusions of the consultant agency, citing that agency's expertise. Rather, the ultimate responsibility for compliance with the [Endangered Species Act] falls on the action agency."), and *Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600, 612 (4th Cir. 2018) ("Although the EPA is statutorily required to consider the [Department of Energy]'s recommendation, it may not turn a blind eye to errors and omissions apparent on the face of the report, which [petitioner] pointed out and the EPA did not address in any meaningful way. In doing so, the EPA 'ignore[d] important aspects of the problem.'") (internal citations omitted), with *Bellion Spirits, LLC v. United States*, No. 19-5252, slip op. at 13–14 (D.C. Cir. Aug. 6, 2021) (approving consultation by the Alcohol and Tobacco Tax and Trade Bureau ("TTB") with the FDA where the TTB "did not rubberstamp FDA's analysis of the scientific evidence or delegate final decisionmaking authority to FDA," but instead "systematically evaluated and explained its reasons for agreeing with FDA's analysis of each scientific study" and "then made its own determinations" about the claims at hand).

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B.

Petitioners' remaining challenges under the APA are unavailing.

Petitioners first argue that the Commission failed to respond to record evidence that exposure to RF radiation at levels below the Commission's current limits may cause cancer. Specifically, Petitioners argue the Commission failed to mention the IARC's classification of RF radiation as possibly carcinogenic to humans, and its 2013 monograph regarding that classification, on which the Commission's notice of inquiry specifically sought comment. Petitioners also argue that the Commission failed to adequately respond to two 2018 studies—the National Toxicology Program (“NTP”) study and the Ramazzini Institute study—that found increases in the incidences of certain types of cancer in rodents exposed to RF radiation. Had these 2018 studies been available prior to the IARC's publication of its monograph, Petitioners assert, the IARC would have likely classified RF radiation as “probably carcinogenic,” rather than “possibly carcinogenic.” This is so, according to Petitioners, because the IARC will classify an agent as “possibly carcinogenic” if there is “limited evidence” that it causes cancer in humans and animals, and as “probably carcinogenic” if there is “limited evidence” that it causes cancer in humans and “sufficient evidence” that it causes cancer in animals. In its 2013 monograph, the IARC found “limited evidence” that RF radiation causes cancer in humans and animals, and therefore classified RF radiation as “possibly carcinogenic.” Int'l Agency for Rsch. on Cancer, *Non-Ionizing Radiation, Part 2: Radiofrequency Electromagnetic Fields*, 102 IARC MONOGRAPHS ON THE EVALUATION OF CARCINOGENIC RISKS TO HUMANS 419 (2013) (emphases omitted). Petitioners assert that the NTP and Ramazzini Institute studies provide “sufficient evidence” that RF radiation

causes cancer in animals. Therefore, according to Petitioners, had those studies been available prior to the IARC's publication of its monograph, the IARC would have found "limited evidence" that RF radiation causes cancer in humans and "sufficient evidence" that it causes cancer in animals, and would have accordingly classified RF radiation as "probably carcinogenic."

Although the Commission's failure to make any mention of the IARC monograph does not epitomize reasoned decision making, we find that the Commission's order adequately responds to the record evidence that exposure to RF radiation at levels below the Commission's current limits may cause cancer. In contrast to its silence regarding non-cancerous effects, the order provides a reasoned response to the NTP and Ramazzini Institute studies. It explains that the results of the NTP study "cannot be extrapolated to humans because (1) the rats and mice received RF radiation across their whole bodies; (2) the exposure levels were higher than what people receive under the current rules; (3) the duration of exposure was longer than what people receive; and (4) the studies were based on 2G and 3G phones and did not study WiFi or 5G." *2019 Order*, 34 FCC Rcd. at 11,693 n.33. And the order cites a response to both studies published by the International Commission on Non-Ionizing Radiation Protection that provides a detailed explanation of various inconsistencies and limitations in the studies and concludes that "consideration of their findings does not provide evidence that radiofrequency EMF is carcinogenic." INT'L COMM'N ON NON-IONIZING RADIATION PROT., ICNIRP NOTE ON RECENT ANIMAL CARCINOGENESIS STUDIES 6 (2018), <https://www.icnirp.org/cms/upload/publications/ICNIRPnote2018.pdf>; *see also 2019 Order*, 34 FCC Rcd. at 11,693 n.34. Petitioners' contention that the IARC would have classified RF radiation as "probably carcinogenic" had the NTP and Ramazzini Institute studies

been published earlier is speculative, particularly in light of the International Commission on Non-Ionizing Radiation Protection's evaluation of those studies. And the IARC monograph's classification of RF radiation as "possibly carcinogenic" is not so contrary to the Commission's determination that exposure to RF radiation at levels below its current limits does not cause cancer as to render that determination arbitrary or capricious.

Petitioners also argue that the Commission's order impermissibly fails to respond to various "additional legal considerations." Specifically, Petitioners argue that the order (i) ignores "express invocations of constitutional, statutory and common law based individual rights," including property rights and the rights of "bodily autonomy and informed consent"; (ii) fails to explain whether FCC regulation preempts rights and remedies under the Americans with Disabilities Act and the Fair Housing Act; (iii) does not assess the costs and benefits associated with maintaining the Commission's current limits; (iv) does not resolve the question of whether "those advocating more protective limits have to prove the existing limits are inadequate," or whether the Commission carries the burden of proving that its existing limits are adequate; and (v) overlooks that the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), "flatly requires that the Commission allow for some remedy for those who suffer from exposure." Pet'rs' Br. at 84–101.

These arguments are not properly before us. The Communications Act provides that a petition for reconsideration is a "condition precedent to judicial review" of "questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass." 47 U.S.C. § 405(a). We will accordingly only consider a question raised before us if "a reasonable Commission *necessarily* would have seen the

question . . . as part of the case presented to it.” *NTCH, Inc. v. FCC*, 841 F.3d 497, 508 (D.C. Cir. 2016) (quoting *Time Warner Ent. Co. v. FCC*, 144 F.3d 75, 81 (D.C. Cir. 1998)). Petitioners did not submit a petition for reconsideration to the Commission, and they point to no comments raising their “additional legal considerations” in such a manner as to necessarily indicate to the Commission that they were part of the case presented to it.

Although Petitioners assert that the “Cities of Boston and Philadelphia specifically flagged [the issue of whether FCC regulation preempts rights and remedies under the Americans with Disabilities Act and the Fair Housing Act] and sought clarification,” Pet’rs’ Br. at 86, they are incorrect. The Cities of Boston and Philadelphia merely observed that the Second Circuit’s decision in *Cellular Phone Taskforce* did not address whether “‘electrosensitivity’ [is] a cognizable disability under the Americans with Disabilities Act,” J.A. 4,598. And the Cities noted that “the FCC and its sister regulatory agencies share responsibility for adherence to the ADA,” J.A. 4,598–99, and urged the Commission to “lead in advice to electrosensitive persons about prudent avoidance,” J.A. 4,599. This did not put the Commission on notice that the question whether FCC regulation preempts rights and remedies under the Americans with Disabilities Act and the Fair Housing Act was part of the case presented to it. Nor did a comment asserting that “[t]he telecommunications Act should not be interpreted to injure an identifiable segment of the population, exile them from their homes and their city, leave them no place where they can survive, and allow them no remedy under City, State or Federal laws or constitutions.” J.A. 10,190. And Petitioners point to no comments that did a better job of flagging their other “additional legal considerations” for the Commission. The Commission therefore did not have an opportunity to pass on

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these arguments, so we may not review them. 47 U.S.C. § 405(a).

C.

Petitioners also argue that NEPA required the Commission to issue an EA or EIS regarding its decision to terminate its notice of inquiry.

Petitioners are wrong. The Commission was not required to issue an EA or EIS because there was no ongoing federal action regarding its RF limits. The Commission already published an assessment of its existing RF limits that “‘functionally’ satisfied NEPA’s requirements ‘in form and substance.’” *EMR Network*, 391 F.3d at 272 (quoting *Cellular Phone Taskforce*, 205 F.3d at 94–95). NEPA obligations attach only to “proposals” for major federal action. *See* 42 U.S.C. § 4332(c); *see also* 40 C.F.R. § 1502.5. Once an agency has satisfied NEPA’s requirements, it is only required to issue a supplemental assessment when “there remains major federal action to occur.” *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1242 (D.C. Cir. 2018) (internal quotation marks omitted) (quoting *Marsh v. Ore. Nat’l Res. Council*, 490 U.S. 360, 374 (1989)). An agency’s promulgation of regulations constitutes a final agency action that is not ongoing. *Id.* at 1243. Once an agency promulgates a regulation and complies with NEPA’s requirements regarding that regulation, it is not required to conduct any supplemental environmental assessment, *even if* its original assessment is outdated. *Id.* at 1242. Such is the case here. As we explained in *EMR Network* in response to the argument that new data required the Commission to issue a supplemental environmental assessment of its RF guidelines under NEPA, “the regulations having been adopted, there is at the moment no ongoing federal action, and no duty to

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supplement the agency's prior environmental inquiries." 391 F.3d at 272 (internal quotation marks and citation omitted).

That the Commission voluntarily initiated an inquiry to "determine whether there is a need for reassessment of the Commission radiofrequency (RF) exposure limits and policies" does not change the analysis. *2013 Notice of Inquiry*, 28 FCC Rcd. at 3,501. As the Supreme Court explained long ago, "the mere contemplation of certain action is not sufficient to require an impact statement" under NEPA, *Kleppe v. Sierra Club*, 427 U.S. 390, 404 (1976) (internal quotation marks omitted), because, as in this case, "the contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for major federal action," *id.* at 406. *See also Pub. Citizen v. Off. of U.S. Trade Representatives*, 970 F.2d 916, 920 (D.C. Cir. 1992) ("In accord with *Kleppe*, courts routinely dismiss NEPA claims in cases where agencies are merely contemplating a particular course of action but have not actually taken any final action at the time of suit.") (collecting cases). Were the Commission to propose revising its RF exposure guidelines, it might be required to prepare NEPA documentation. But since the Commission for now has not proposed to alter its guidelines, it need not yet conduct any new environmental review.

III.

For the reasons given above, we grant the petitions in part and remand to the Commission to provide a reasoned explanation for its determination that its guidelines adequately protect against harmful effects of exposure to radiofrequency radiation unrelated to cancer. It must, in particular, (i) provide a reasoned explanation for its decision to retain its testing procedures for determining whether cell phones and other portable electronic devices comply with its guidelines, (ii)

address the impacts of RF radiation on children, the health implications of long-term exposure to RF radiation, the ubiquity of wireless devices, and other technological developments that have occurred since the Commission last updated its guidelines, and (iii) address the impacts of RF radiation on the environment. To be clear, we take no position in the scientific debate regarding the health and environmental effects of RF radiation—we merely conclude that the Commission’s cursory analysis of material record evidence was insufficient as a matter of law. As the dissenting opinion indicates, there may be good reasons why the various studies in the record, only some of which we have cited here, do not warrant changes to the Commission’s guidelines. But we cannot supply reasoning in the agency’s stead, *see SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943), and here the Commission has failed to provide any reasoning to which we may defer.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting in part: “[A] court is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). We thus must “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). I believe my colleagues’ limited remand contravenes these first principles of administrative law. Because I would deny the petitions in full, I respectfully dissent from Part II.A.i.–iv. and Part III of the majority opinion.

I.

It is important to emphasize how deferential our standard of review is here—where, first, an agency’s decision to terminate a notice of inquiry without initiating a rulemaking occurred after the agency opened the inquiry on its own and, second, the inquiry involves a highly technical subject matter at the frontier of science. As the majority recognizes, “[t]he arbitrary and capricious standard of the Administrative Procedure Act ‘encompasses a range of levels of deference to the agency.’” Maj. Op. 8 (quoting *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987)). The majority further acknowledges that the Federal Communications Commission’s (Commission or FCC) “order is entitled to a high degree of deference.” *Id.* at 9. And our precedent also makes plain that “[i]t is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking.” *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981); *see also Cellnet Commc’n, Inc. v. FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992) (“an agency’s refusal to initiate a rulemaking is evaluated with a deference so broad as to make the process akin to non-reviewability”). For the reasons that follow, I believe the Commission’s order does not fit those rarest and most compelling circumstances.

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A.

We have held that research articles containing tentative conclusions do not provide a basis for disturbing an agency's decision not to initiate rulemaking. *See EMR Network v. FCC*, 391 F.3d 269, 274 (D.C. Cir. 2004). Nevertheless, the majority rejects reaching the same conclusion here regarding the petitioners' assertion that radiofrequency (RF) radiation exposure below the Commission's limits can cause negative health effects unrelated to cancer. To do so, it relies on five research articles in an over 10,500-page record. *See* Maj. Op. at 10–11.¹

A close inspection of the five research articles confirms that they also “are nothing if not tentative.” *EMR Network*, 391 F.3d at 274. The Foerster article concludes “[o]ur findings *do not provide conclusive evidence* of causal effects and should be *interpreted with caution* until confirmed in other populations.” Joint Appendix (J.A.) 6,006 (Milena Foerster et al., *A Prospective Cohort Study of Adolescents' Memory Performance and Individual Brain Dose of Microwave Radiation from Wireless Communication*, 126 ENV'T HEALTH PERSPS. 077007 (July 2018)) (emphases added).² The Lai

¹ “The record in an informal rulemaking proceeding is ‘a less than fertile ground for judicial review’ and has been described as a ‘sump in which the parties have deposited a sundry mass of materials.’” *Pro. Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1220–21 (D.C. Cir. 1983) (quoting *Nat'l Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1052 (D.C. Cir. 1979)).

² *See also* J.A. 5,995 (“[T]he health effects of [exposure to radiofrequency electromagnetic fields (RF-EMFs)] are still unknown. . . . [T]o date studies addressing this topic have produced inconsistent results.”); J.A. 6,005 (“Although we found decreases in figural memory, some experimental and epidemiological studies on

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article provides a similarly murky picture of the current science. *See* J.A. 5,320–68 (Henry Lai, *A Summary of Recent Literature (2007–2017) on Neurological Effects of Radiofrequency Radiation*, in MOBILE COMM’NS & PUB. HEALTH 187–222 (M. Markov ed., 2018)). In summarizing the results of human studies on the behavioral effects of RF radiation, the Lai article lists 31 studies that showed *no significant* behavioral effects compared to 20 studies that showed behavioral effects. *See* J.A. 5,327–32. Moreover, of the 20 studies that showed a behavioral effect, at least four found behavioral *improvements*, not negative health effects.

Even the Yakymenko article, which asserts that 93 of 100 peer-reviewed studies found low-intensity RF radiation induces oxidative effects in biological systems, fails to address the critical issue—whether RF radiation below the Commission’s current limits can cause negative health effects. *See* J.A. 5,243–58 (Igor Yakymenko et al., *Oxidative Mechanisms of Biological Activity of Low-Intensity Radiofrequency Radiation*, ELECTROMAGNETIC BIOLOGY & MED., EARLY ONLINE, 1–16 (2015)). Specifically, the Yakymenko article discusses the International Commission on Non-Ionizing Radiation Protection’s (ICNIRP) recommended RF exposure limit—a specific absorption rate of 2 W/kg. *See* J.A. 5,243–44. But the ICNIRP’s recommended RF exposure limit is significantly higher than the Commission’s current limit—0.08 W/kg averaged over the whole body and a peak spatial-average of 1.6 W/kg over any 1 gram of tissue. *See* 47 C.F.R. § 1.1310(c). Accordingly, it is uncertain how many, if

RF-EMF found *improvements* in working memory performance.”) (emphasis added).

any, of the referenced peer-reviewed studies were conducted at RF radiation levels below the Commission's current limits.³

Given this record, I believe we should have arrived at the same conclusion we did in *EMR Network*—"nothing in th[e]se studies so strongly evidenc[es] risk as to call into question the Commission's decision to maintain a stance of what appears to be watchful waiting." *EMR Network*, 391 F.3d at 274. "An agency is not obliged to respond to every comment, only those that can be thought to challenge a fundamental premise." *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000). A review of the five articles on which the majority opinion relies makes plain that the articles do not challenge a fundamental premise of the Commission's order. Instead, it "cherry-pick[s] the factual record to reach [its] conclusion." *Ortiz-Diaz v. U.S. Dep't of Hous. & Urb. Dev.*, 867 F.3d 70, 79 (D.C. Cir. 2017) (Henderson, J., concurring in the judgment).

My colleagues assert that "[t]he dissenting opinion portrays this case as about the Commission's disregard of just five articles." Maj. Op. 22. But their attempt to "turn the tables" plainly fails. It is they who chose the five articles, *see* Maj. Op. 10–11, to rely on as the basis for their remand, *see id.* at 15 ("the Commission's order remains bereft of any explanation as to why, *in light of the studies in the record*, its guidelines remain adequate") (emphasis altered); *id.* at 18 ("*the studies in the record* to which Petitioners point *do* challenge a fundamental premise of the Commission's decision to terminate its notice of inquiry") (first emphasis added). I discuss the five articles *only* to demonstrate that the studies "are nothing if not tentative." *EMR Network*, 391 F.3d at 274. Because the studies on which the majority relies plainly are

³ The BioInitiative Report the majority opinion cites is hardly worth discussing because the self-published report has been widely discredited as a biased review of the science.

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tentative, they do not challenge a fundamental premise of the Commission's decision and therefore cannot provide the basis for the majority's limited remand under our precedent.⁴

B.

I reach the same conclusion regarding the majority's remand of the petitioners' environmental harm argument. *See* Maj. Op. 21–22. The majority relies on a 2014 letter from the U.S. Department of the Interior (Interior) to the U.S. Department of Commerce about, *inter alia*, the impact of communications towers on migratory birds. But the Interior letter itself concedes that “[t]o date, no independent, third-party field studies have been conducted in North America on impacts of tower electromagnetic radiation on migratory birds.” J.A. 8,383.

Moreover, the petitioners did not raise the Interior letter in the environmental harm section of their briefs. “We apply forfeiture to unarticulated [legal and] evidentiary theories not only because judges are not like pigs, hunting for truffles buried in briefs or the record, but also because such a rule ensures fairness to both parties.” *Jones v. Kirchner*, 835 F.3d 74, 83 (D.C. Cir. 2016) (alteration in original) (citation omitted). And finally, the environmental harm studies on which

⁴ The majority's hand wave to other record information, *see* Maj. Op. 22–23, does not carry the day. Rather than provide “substantial information,” *id.* at 22, the cited material consists primarily of letters expressing generalized concerns about RF limits worldwide.

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the petitioners *did* rely “are nothing if not tentative.” *EMR Network*, 391 F.3d at 274.⁵

C.

More importantly, the majority’s limited remand runs afoul of our precedent on this precise subject matter. In *EMR Network*, the petitioner asked “the Commission to initiate an inquiry on the need to revise [its] regulations to address the non-thermal effects” of RF radiation. 391 F.3d at 271. In denying the petition, we concluded “the [Commission]’s decision not to leap in, at a time when the [Environmental Protection Agency (EPA)] (and other agencies) saw no compelling case for action, appears to represent the sort of priority-setting in the use of agency resources that is least subject to second-guessing by courts.” *Id.* at 273.

This time around, the majority faults the Commission for the U.S. Food and Drug Administration’s (FDA) allegedly “conclusory statements” in response to the Commission’s 2013 notice of inquiry. *See* Maj. Op. 14. The crux of the majority’s position is that “[t]he statements from the FDA on which the Commission’s order relies are practically identical to the Secretary’s statement in *American Horse* and the

⁵ *See, e.g.*, J.A. 5,231 (Albert Manville, II, *A Briefing Memorandum: What We Know, Can Infer, and Don’t Yet Know about Impacts from Thermal and Non-Thermal Non-Ionizing Radiation to Birds and Other Wildlife* 2 (2016)) (“the direct relationship between electromagnetic radiation and wildlife health continues to be complicated and in cases involving non-thermal effects, still unclear”); J.A. 6,174 (Ministry of Env’t & Forest, Gov’t of India, *Report on Possible Impacts of Communication Towers on Wildlife Including Birds and Bees* 4 (2011)) (“exact correlation between radiation of communication towers and wildlife, are not yet very well established”).

Commission's statement in *American Radio*." *Id.*⁶ But the analogy to *American Horse* and *American Radio* does not hold water. The majority's Achilles' heel is the fact that the Commission and the FDA are, to state the obvious, distinct agencies.

In *American Horse*, the appellant relied on the results of a study commissioned by the U.S. Department of Agriculture (Agriculture) to support its request for revised Agriculture regulations. *Am. Horse*, 812 F.2d at 2–3. The study found that devices Agriculture had declined to prohibit caused effects falling within the statutory definition of the condition known as “sore”;⁷ and the Congress had charged Agriculture to eliminate the practice of soring show horses. *Am. Horse*, 812 F.2d at 2–3. Against this backdrop, we found the Agriculture Secretary's “two conclusory sentences [dismissing the need to revise agency regulations] . . . insufficient to assure a reviewing court that the agency's refusal to act was the product of reasoned decisionmaking.” *Id.* at 6. But an agency head's terse dismissal of his own agency's study is not the case here. First, as noted *supra*, there is no conclusive study in the record, much less one commissioned by the agency whose regulations are being considered for revision. Instead, the record contains dozens of highly technical studies from various sources—the credibility and findings of which we are ill-equipped to evaluate. And crucially, unlike in *American Horse*, the Commission requested the opinion of the FDA—the agency charged with “establish[ing] and carry[ing] out an electronic

⁶ See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008).

⁷ See 15 U.S.C. § 1821(3) (“The term ‘sore’ when used to describe a horse means that [as a result of any substance or device used on a horse's limb] such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving . . .”).

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product radiation control program,” 21 U.S.C. § 360ii(a)—studied that opinion and explained why it relied thereon in making its decision.

Similarly, in *American Radio*, the studies summarily dismissed by the FCC were studies the FCC sought to evaluate *itself*; we remanded for the FCC to explain why it failed to do so. *See Am. Radio*, 524 F.3d at 241. Moreover, *American Radio* addressed the reasoning underlying the FCC’s *promulgation* of a rule, an action subjected to far less deference than an agency’s decision not to initiate a rulemaking.⁸

I believe the Commission reasonably relied on the conclusions of the FDA, the agency statutorily charged with protecting the public from RF radiation. *See* 21 U.S.C. § 360ii(a) (FDA “shall establish and carry out an electronic product radiation control program designed to protect the public health and safety from electronic product radiation”).⁹ Our precedent is well-settled that “[a]gencies can be expected to ‘respect [the] views of such other agencies as to those

⁸ *See, e.g., ITT World Commc’ns, Inc. v. FCC*, 699 F.2d 1219, 1245–46 (D.C. Cir. 1983), *rev’d on other grounds*, 466 U.S. 463 (1984) (“Where an agency promulgates rules, our standard of review is diffident and deferential, but nevertheless requires a searching and careful examination of the administrative record to ensure that the agency has fairly considered the issues and arrived at a rational result. Where, as here, an agency chooses *not* to engage in rulemaking, our level of scrutiny is even more deferential . . .” (emphasis in original) (footnotes and internal quotations omitted)).

⁹ *See also In re Guidelines for Evaluating the Env’t Effects of Radiofrequency Radiation*, 11 FCC Rcd. 15,123, 15,130 ¶ 18 (1996) (“The FDA has general jurisdiction for protecting the public from potentially harmful radiation from consumer and industrial devices and in that capacity is expert in RF exposures that would result from consumer or industrial use of hand-held devices such as cellular telephones.”).

problems’ for which those ‘other agencies are more directly responsible and more competent.’” *City of Bos. Delegation v. FERC*, 897 F.3d 241, 255 (D.C. Cir. 2018) (second alteration in original) (quoting *City of Pittsburgh v. Fed. Power Comm’n*, 237 F.2d 741, 754 (D.C. Cir. 1956)). That is precisely what the Commission did here.

The Commission’s 2013 *Notice of Inquiry* explained that the Commission intended to rely on, *inter alia*, the FDA to determine whether to reassess its own RF exposure limits. See *In re Reassessment of Fed. Commc’ns Comm’n Radiofrequency Exposure Limits & Policies*, 28 FCC Rcd. 3,498, 3,501 ¶ 6 (2013) (2013 *Notice of Inquiry*) (“Since the Commission is not a health and safety agency, we defer to other organizations and agencies with respect to interpreting the biological research necessary to determine what [RF radiation] levels are safe.”). And the Commission has consistently deferred to expert health and safety agencies in this context. See *id.* at 3,572 ¶ 211 (RF exposure limits adopted in 1996 “followed recommendations received from the [EPA], the [FDA], and other federal health and safety agencies”).¹⁰

The Commission was true to its word. On March 22, 2019, it asked the FDA if changes to the RF exposure limits were

¹⁰ See also *In re Guidelines for Evaluating the Env’t Effects of Radiofrequency Radiation*, 12 FCC Rcd. 13,494, 13,505 ¶ 31 (1997) (“It would be impracticable for us to independently evaluate the significance of studies purporting to show biological effects, determine if such effects constitute a safety hazard, and then adopt stricter standards that [sic] those advocated by federal health and safety agencies. This is especially true for such controversial issues as non-thermal effects and whether certain individuals might be ‘hypersensitive’ or ‘electrosensitive.’”).

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warranted by the current scientific research.¹¹ On April 24, 2019, the FDA responded:

FDA is responsible for the collection and analysis of scientific information that may relate to the safety of cellphones and other electronic products. . . . As we have stated publicly, . . . the available scientific evidence to date does not support adverse health effects in humans due to exposures at or under the current limits, and . . . the FDA is committed to protecting public health and continues its review of the many sources of scientific literature on this topic.

J.A. 8,187 (Letter from Jeffrey Shuren, M.D., J.D., Dir., Ctr. for Devices and Radiological Health, U.S. Food & Drug Admin., Dep't of Health & Hum. Servs., to Julius Knapp, Chief, Off. of Eng'g & Tech., U.S. Fed. Commc'ns Comm'n (April 24, 2019)).¹² In my view, the Commission, relying on

¹¹ See J.A. 8,184 (Letter from Julius Knapp, Chief, Off. of Eng'g & Tech., U.S. Fed. Commc'ns Comm'n, to Jeffrey Shuren, M.D., J.D., Dir., Ctr. for Devices and Radiological Health, U.S. Food & Drug Admin. (March 22, 2019)) ("Given that existing studies are continually being evaluated as new research is published, and that the work of key organizations such as [the Institute of Electrical and Electronics Engineers] and ICNIRP is continuing, we ask FDA's guidance as to whether any changes to the standards are appropriate at this time.").

¹² See also *Statement from Jeffrey Shuren, M.D., J.D., director of the FDA's Center for Devices and Radiological Health on the recent National Toxicology Program draft report on radiofrequency energy exposure*, FOOD & DRUG ADMIN. (Feb. 2, 2018), <https://www.fda.gov/news-events/press-announcements/statement-jeffrey-shuren-md-jd-director-fdas-center-devices-and-radiological-health-recent-national> (Since 1999, "there have been hundreds of

the FDA, reasonably concluded no changes to the current RF exposure limits were warranted at the time. *See In re Reassessment of Fed. Commc'ns Comm'n Radiofrequency Exposure Limits & Policies*, 34 FCC Rcd. 11,687, 11,691 ¶ 10 (2019) (2019 Order).

Simply put, the Commission's reliance on the FDA is reasonable "[i]n the face of conflicting evidence at the frontiers of science." *See Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (2d Cir. 2000). The majority takes issue with what it categorizes as "conclusory statements." Maj. Op. 14. But the Supreme Court's "*State Farm* [decision] does not require a word count; a short explanation can be a reasoned explanation." *Am. Radio*, 524 F.3d at 247 (Kavanaugh, J., dissenting in part). Brevity is even more understandable if the agency whose rationale is challenged relies on the agency the Congress has charged with regulating the matter.

Granted, "[w]hen an agency in the Commission's position is confronted with evidence that its current regulations are inadequate or the factual premises underlying its prior judgment have eroded, it must offer more to justify its decision to retain its regulations than mere conclusory statements." Maj.

studies from which to draw a wealth of information about these technologies which have come to play an important role in our everyday lives. Taken together, all of this research provides a more complete picture regarding radiofrequency energy exposure that has informed the FDA's assessment of this important public health issue, and given us the confidence that the current safety limits for cell phone radiation remain acceptable for protecting the public health. . . . I want to underscore that based on our ongoing evaluation of this issue and taking into account all available scientific evidence we have received, we have not found sufficient evidence that there are adverse health effects in humans caused by exposures at or under the current radiofrequency energy exposure limits.").

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Op. 9. But the majority opinion rests on an inaccurate premise—the Commission was not confronted with evidence that its regulations are inadequate nor have the factual premises underlying its RF exposure limits eroded. Sifting through the record’s technical complexity is outside our bailiwick. If the record here establishes one point, however, it is that there is no scientific consensus regarding the “non-thermal” effects, if any, of RF radiation on humans. More importantly, the FDA, not the Commission, made the allegedly “conclusory statements” with which the majority takes issue and I believe the Commission adequately explained why it relied on the FDA’s expertise.¹³

¹³ The majority asserts that “[o]ne agency’s unexplained adoption of an unreasoned analysis just compounds rather than vitiates the analytical void.” Maj. Op. 24. As set out *supra*, however, the Commission adequately explained its reliance—for the past 25 years—on the FDA’s RF exposure expertise. Plus, after a review of “hundreds of studies,” the FDA’s conclusion is far from unreasoned. *See supra* note 12. And the two cases to which the majority points are inapposite. *See* Maj. Op. 24 (citing *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006), and *Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600, 612 (4th Cir. 2018)). Importantly, unlike these petitions, neither case involves a decision not to initiate a rulemaking. As noted, inaction is reviewed under an especially deferential standard. It would be inappropriate to apply precedent using a less deferential standard to modify the standard applicable here. And finally, the Commission did not “blindly adopt the conclusions” of the FDA. *See City of Tacoma*, 460 F.3d at 76. Nor did it “turn a blind eye to errors and omissions apparent on the face of” the FDA’s conclusions. *See Ergon-West Virginia*, 896 F.3d at 612.

The majority’s citation to *Bellion Spirits, LLC v. United States*, No. 19-5252 (D.C. Cir. Aug. 6, 2021), is even further afield. First, *Bellion Spirits* addressed a “statutory authority” question—it did not apply arbitrary and capricious review, much less the especially

As in *EMR Network*, the record does not “call into question the Commission’s decision to maintain a stance of what appears to be watchful waiting.” 391 F.3d at 274. To hold otherwise begs the question: what was the Commission supposed to do? It has no authority over the level of detail the FDA provides in response to the Commission’s inquiry. It admits that it does not have the expertise “to interpret[] the biological research necessary to determine what [RF radiation] levels are safe.” 2013 *Notice of Inquiry*, 28 FCC Rcd. at 3,501 ¶ 6. The Commission opened the 2013 *Notice of Inquiry* “as a matter of good government” despite its “continue[d] . . . confidence in the current [RF] exposure limits.” *Id.* at 3,570 ¶ 205. If it *had* reached a conclusion contrary to the FDA’s, it most likely would have been attacked as *ultra vires*. For us to require the Commission to, in effect, “nudge” the FDA stretches both our jurisdiction as well as its authority beyond recognized limits.

Accordingly, I respectfully dissent from the limited remand set forth in Part II.A.i.–iv. and Part III of the majority opinion.¹⁴

deferential standard applicable to a decision not to initiate a rulemaking. *See Bellion Spirits*, slip op. at 13. Second, to the extent *Bellion Spirits* is remotely relevant, I believe it supports my position. There, the Alcohol and Tobacco Tax and Trade Bureau “consulted with [the] FDA on a matter implicating [the] FDA’s expertise and then considered that expertise in reaching its own final decision.” *Id.* at 14. Again, in my view, the Commission did the same thing.

¹⁴ Although I join Part II.B. of the majority opinion, I do not agree with the majority’s aside, contrasting the Commission’s purported silence regarding non-cancerous effects and its otherwise reasoned response. *See* Maj. Op. 26. As explained *supra*, I believe the Commission reasonably relied on the FDA’s conclusion that RF radiation exposure below the Commission’s limits does not cause negative health effects—cancerous or non-cancerous.



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

FEB - 7 2014



In Reply Refer To: (ER 14/0001) (ER 14/0004).

Mr. Eli Veenendaal
National Telecommunications and Information
Administration
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Mr. Veenendaal:

The Department of the Interior (Department) has reviewed the above referenced proposal and submits the following comments and attachment for consideration. Because the First Responder Network Authority (FirstNet) is a newly created entity, we commend the U.S. Department of Commerce for its timely proposals for NEPA implementing procedures.

The Department believes that some of the proposed procedures are not consistent with Executive Order 13186 Responsibilities of Federal Agencies to Protect Migratory Birds, which specifically requires federal agencies to develop and use principles, standards, and practices that will lessen the amount of unintentional take reasonably attributed to agency actions. The Department, through the Fish and Wildlife Service (FWS), finds that the proposals lack provisions necessary to conserve migratory bird resources, including eagles. The proposals also do not reflect current information regarding the effects of communication towers to birds. Our comments are intended to further clarify specific issues and address provisions in the proposals.

The Department recommends revisions to the proposed procedures to better reflect the impacts to resources under our jurisdiction from communication towers. The placement and operation of communication towers, including un-guyed, unlit, monopole or lattice-designed structures, impact protected migratory birds in two significant ways. The first is by injury, crippling loss, and death from collisions with towers and their supporting guy-wire infrastructure, where present. The second significant issue associated with communication towers involves impacts from non-ionizing electromagnetic radiation emitted by them (See Attachment).

In addition to the 147 Birds of Conservation Concern (BCC) species, the FWS has listed an additional 92 species as endangered or threatened under the Endangered Species Act. Together with the bald and golden eagle, this represents 241 species of birds whose populations are in trouble or otherwise merit special protection, according to the varying criteria of these lists. The Department suggests that FirstNet consider preparing a programmatic environmental impact statement (see attachment) to determine and address cumulative impacts from authorizing FirstNet projects on those 241 species for which the incremental impact of tower mortality, when

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added to other past, present, and reasonably foreseeable future actions, is most likely significant, given their overall imperiled status. Notwithstanding the proposed implementing procedures, a programmatic NEPA document might be the most effective and efficient method for establishing best management practices for individual projects, reducing the burden to individual applicants, and addressing cumulative impacts.

Categorical Exclusions

The Department has identified 13 of the proposed categorical exclusions (A-6, A-7, A-8, A-9, A-10, A-11, A-12, A-13, A-14 A-15, A-16, A-17, and A-19) as having the potential to significantly affect wildlife and the biological environment. Given this potential, we want to underscore the importance of our comments on FirstNet's procedural guidance under Environmental Review and Consultation Requirements for NEPA Reviews and its list of extraordinary circumstances in Appendix D.

Environmental Review and Consultation Requirements for NEPA Reviews

To ensure there are no potentially significant impacts on birds from projects that may otherwise be categorically excluded, the Department recommends including the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act to the list of requirements in this section.

Extraordinary Circumstances

To avoid potentially significant impacts on birds from projects that may otherwise be categorically excluded, the Department recommends including species covered under the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act to the list of environmentally sensitive resources. Additionally, adding important resources to migratory birds such as sites in the Western Hemisphere Shorebird Reserve Network and Audubon Important Bird Areas to the paragraph on areas having special designation or recognition would help ensure their consideration when contemplating use of a categorical exclusion.

Developing the Purpose and Need

The Department recommends inclusion of language that would ensure consideration of all other authorities to which NEPA is supplemental as opposed to simply the FirstNet mission. As currently written, the procedures are limited to ensuring the purpose and need considers the FirstNet mission. If strictly applied, this approach would severely limit the range of reasonable alternatives, and likely preclude consideration of more environmentally benign locations or construction practices.

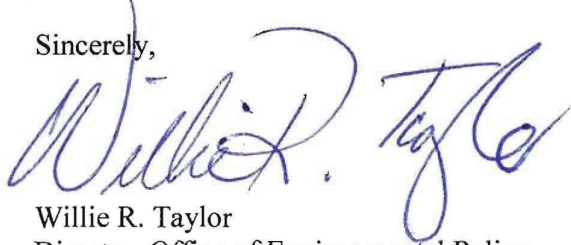
Environmental Review Process, Apply NEPA Early in the Process, Where Action is by Non-Federal Entity

The Department recommends that FirstNet be required to coordinate with federal agencies having jurisdiction by law or special expertise on construction and lighting of its network of towers.

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Thank you for the opportunity to comment on the draft document. If you have any questions concerning the comments, please contact Diana Whittington, NEPA Migratory Bird lead, at (703) 358-2010. If you have any questions regarding Departmental NEPA procedures, contact Lisa Treichel, Office of Environmental Policy and Compliance at (202) 208-7116.

Sincerely,

A handwritten signature in blue ink, appearing to read "Willie R. Taylor". The signature is fluid and cursive, with the first name "Willie" being the most prominent part.

Willie R. Taylor
Director, Office of Environmental Policy
and Compliance

Enclosure

Literature Cited

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- U.S. Fish and Wildlife Service. 2008. Birds of Conservation Concern, 2008. United States Department of Interior, Fish and Wildlife Service, Division of Migratory Bird Management, Arlington, VA. 85 pages. <http://www.fws.gov/migratorybirds>.

Enclosure A

Background

The placement and operation of communication towers, including un-guyed, unlit, monopole or lattice-designed structures, impact protected migratory birds in two significant ways.

The first is by injury, crippling loss, and death from collisions with towers and their supporting guy-wire infrastructure, where present. Mass mortality events tend to occur during periods of peak spring and fall songbird migration when inclement weather events coincide with migration, and frequently where lights (either on the towers and/or on adjacent outbuildings) are also present. This situation has been well documented in the U.S. since 1948 in the published literature (Aronoff 1949, see Manville 2007a for a critique). The tallest communication towers tend to be the most problematic (Gehring *et al.* 2011). However, mid-range (~400-ft) towers as proposed by the First Responder Network Authority (FirstNet, a newly created entity under the Department of Commerce) can also significantly impact protected migratory birds, as can un-guyed and unlit lattice and monopole towers (Gehring *et al.* 2009, Manville 2007a, 2009, 2013a). Mass mortalities (more than several hundred birds per night) at unguyed, unlit monopole and lattice towers were documented in fall 2005 and 2011 in the Northeast and North Central U.S. (e.g., Manville 2007a). It has been argued that communication towers including “short” towers do not impact migratory birds, including at the population level (e.g., Arnold and Zink 2011), but recent findings have contradicted that assertion (Manville 2007a, 2013a, Longcore *et al.* 2012, 2013).

The second significant issue associated with communication towers involves impacts from non-ionizing electromagnetic radiation emitted by these structures. Radiation studies at cellular communication towers were begun circa 2000 in Europe and continue today on wild nesting birds. Study results have documented nest and site abandonment, plumage deterioration, locomotion problems, reduced survivorship, and death (e.g., Balmori 2005, Balmori and Hallberg 2007, and Everaert and Bauwens 2007). Nesting migratory birds and their offspring have apparently been affected by the radiation from cellular phone towers in the 900 and 1800 MHz frequency ranges – 915 MHz is the standard cellular phone frequency used in the United States. However, the electromagnetic radiation standards used by the Federal Communications Commission (FCC) continue to be based on thermal heating, a criterion now nearly 30 years out of date and inapplicable today. This is primarily due to the lower levels of radiation output from microwave-powered communication devices such as cellular telephones and other sources of point-to-point communications; levels typically lower than from microwave ovens. The problem, however, appears to focus on very low levels of non-ionizing electromagnetic radiation. For example, in laboratory studies, T. Litovitz (personal communication) and DiCarlo *et al.* (2002) raised concerns about impacts of low-level, non-thermal electromagnetic radiation from the standard 915 MHz cell phone frequency on domestic chicken embryos – with some lethal results (Manville 2009, 2013a). Radiation at extremely low levels (0.0001 the level emitted by the average digital cellular telephone) caused heart attacks and the deaths of some chicken embryos subjected to hypoxic conditions in the laboratory while controls subjected to hypoxia were unaffected (DiCarlo *et al.* 2002). To date, no independent, third-party field studies have been conducted in North America on impacts of tower electromagnetic radiation on migratory birds. With the European field and U.S. laboratory evidence already available,

independent, third-party peer-reviewed studies need to be conducted in the U.S. to begin examining the effects from radiation on migratory birds and other trust species.

Discussion

Collision Deaths and Categorical Exclusions

Attempts to estimate bird-collision mortality at communication towers in the U.S. resulted in figures of 4-5 million bird deaths per year (Manville 2005, 2009). A meta-review of the published literature now suggests, based on statistically determined parameters, that mortality may be 6.8 million birds per year in Canada and the U.S.; the vast majority in the United States (Longcore *et al.* 2012). Up to 350 species of birds have been killed at communication towers (Manville 2007a, 2009). The Service's Division of Migratory Bird Management has updated its voluntary, 2000 communication tower guidelines to reflect some of the more recent research findings (Manville 2013b). However, the level of estimated mortality alone suggests at a minimum that FirstNet prepare an environmental assessment to estimate and assess the cumulative effects of tower mortality to protected migratory birds.

A second meta-review of the published mortality data from scientific studies conducted in the U.S. and Canada (Longcore *et al.* 2013) strongly correlates population effects to at least 13 species of Birds of Conservation Concern (BCC, USFWS 2008). These are mortalities to BCC species based solely on documented collisions with communication towers in the U.S. and Canada, ranging from estimated annual levels of mortality of 1 to 9% of their estimated total population. Among these where mortality at communication towers was estimated at over 2% annually are the Yellow Rail, Swainson's Warbler, Pied-billed Grebe, Bay-breasted Warbler, Golden-winged Warbler, Prairie Warbler, and Ovenbird. Longcore *et al.* (2013) emphasized that avian mortality associated with anthropogenic sources is almost always reported in the aggregate, *i.e.*, "number of birds killed," which cannot detect species-level effects necessary to make effective and meaningful conservation assessments, including determining cumulative effects. These new findings strongly suggest the need for at least an environmental assessment by FirstNet, or more likely, an environmental impact statement.

Radiation Impacts and Categorical Exclusions

There is a growing level of anecdotal evidence linking effects of non-thermal, non-ionizing electromagnetic radiation from communication towers on nesting and roosting wild birds and other wildlife in the U.S. Independent, third-party studies have yet to be conducted in the U.S. or Canada, although a peer-reviewed research protocol developed for the U.S. Forest Service by the Service's Division of Migratory Bird Management is available to study both collision and radiation impacts (Manville 2002).

As previously mentioned, Balmori (2005) found strong negative correlations between levels of tower-emitted microwave radiation and bird breeding, nesting, and roosting in the vicinity of electromagnetic fields in Spain. He documented nest and site abandonment, plumage deterioration, locomotion problems, reduced survivorship, and death in House Sparrows, White Storks, Rock Doves, Magpies, Collared Doves, and other species. Though these species had historically been documented to roost and nest in these areas, Balmori (2005) did not observe these symptoms prior to construction and operation of the cellular phone towers. Balmori and Hallberg (2007) and Everaert and Bauwens (2007) found similar strong negative correlations

among male House Sparrows. Under laboratory conditions, DiCarlo *et al.* (2002) raised troubling concerns about impacts of low-level, non-thermal electromagnetic radiation from the standard 915 MHz cell phone frequency on domestic chicken embryos – with some lethal results (Manville 2009). Given the findings of the studies mentioned above, field studies should be conducted in North America to validate potential impacts of communication tower radiation – both direct and indirect – to migratory birds and other trust wildlife species.

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From: Shannon Smith
To: [Lauren Yzaguirre](#)
Cc: [Shannon Smith](#); [Denise Russell](#); [Catherine Hillary](#) ([mailto:chillary@rams-hill.com](#))
Subject: [Forwarded] RE: Notice of Major Use Permit- American Legion (MUP-20-008)
Date: Tuesday, July 20, 2021 6:01:04 PM
Attachments: [image001.png](#)
[image002.png](#)

Dear Lauren,

I returned your call and look forward to speaking about the project. Generally, we are supportive of improved services to Borrego and I best recall that the American Legion location was a preferred location.

I will try you again tomorrow.

Best,
Shannon

Shannon Smith
Chief Executive Officer
RAMS HILL GOLF CLUB
1881 Rams Hill Road
Borrego Springs, CA 92004
O: 760/767-3500
M: 727/515-3475
www.ramshill.com



From: Yzaguirre, Lauren <Lauren.Yzaguirre@sdcounty.ca.gov>
Sent: Tuesday, July 20, 2021 12:58 PM
To: Shannon Smith <shannon@ramshill.com>
Cc: Russell, Denise <Denise.Russell@sdcounty.ca.gov>
Subject: Notice of Major Use Permit- American Legion (MUP-20-008)

Good Morning,

My name is Lauren Yzaguirre, and I am a County of San Diego Land Use/ Environmental Planner. I am reaching out to inform you of a project near the Rams Hill Development.

The project is a cell site for Insite Towers located at 4515 Borrego Springs Road (APN 200-051-12). The project proposes to construct, operate, and maintain a 97-foot-tall lattice tower with 12 panel antennas, one dish antenna, a 15-Kilowatt backup generator, 12 back up batteries and other equipment located in an equipment cabinet. The facility will be located inside a 3,600 square foot lease area surrounded by a six-foot-tall concrete masonry unit wall. The facility will be utilized by AT&T but can also support additional carriers in the future. The parcel in which the project is located contains an existing building and ground mount solar array which is owned and operated by American Legion.

Please let me know if you have any questions, comments or concerns.



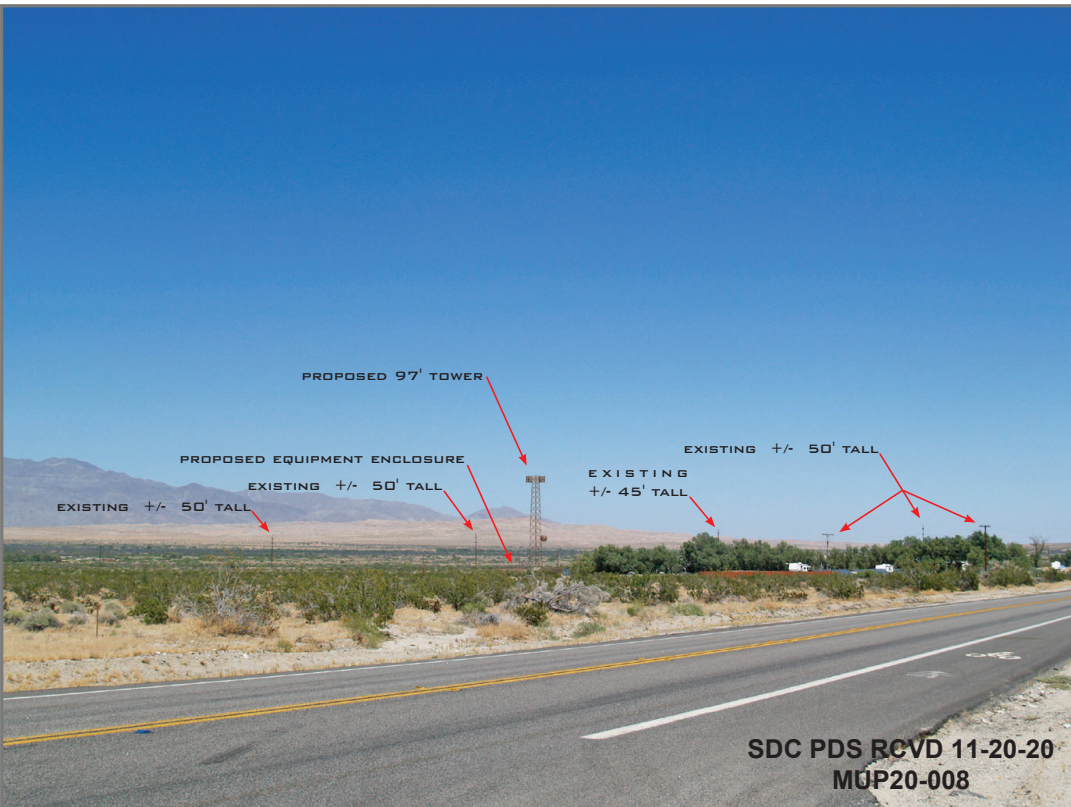
Kind Regards,
Lauren Yzaguirre she/her
Lauren Yzaguirre, Land Use/Environmental Planner
County of San Diego
Department of Planning and Development Services
5510 Overland Ave, Suite 110 San Diego, CA 92123
☎ 619-323-7021 | ✉ Lauren.Yzaguirre@sdcounty.ca.gov

**Attachment F – Photos, Geographic Service Maps
and Alternative Site Analysis**

VIEW 1

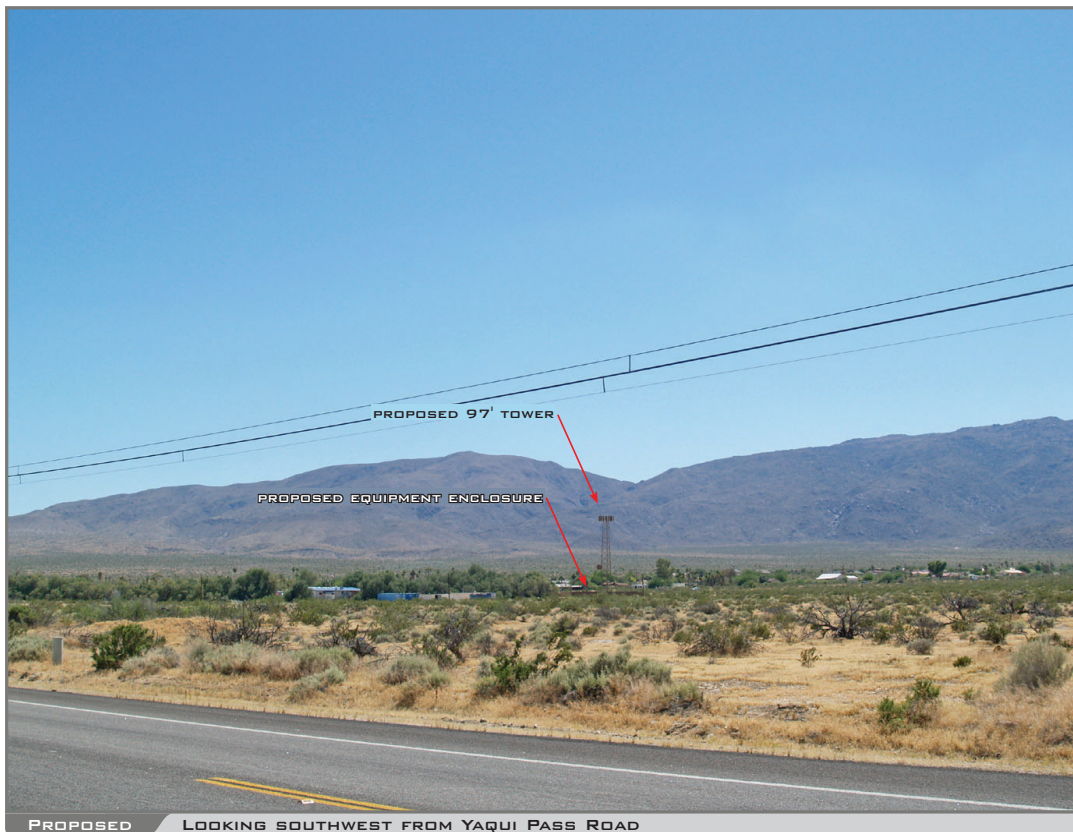


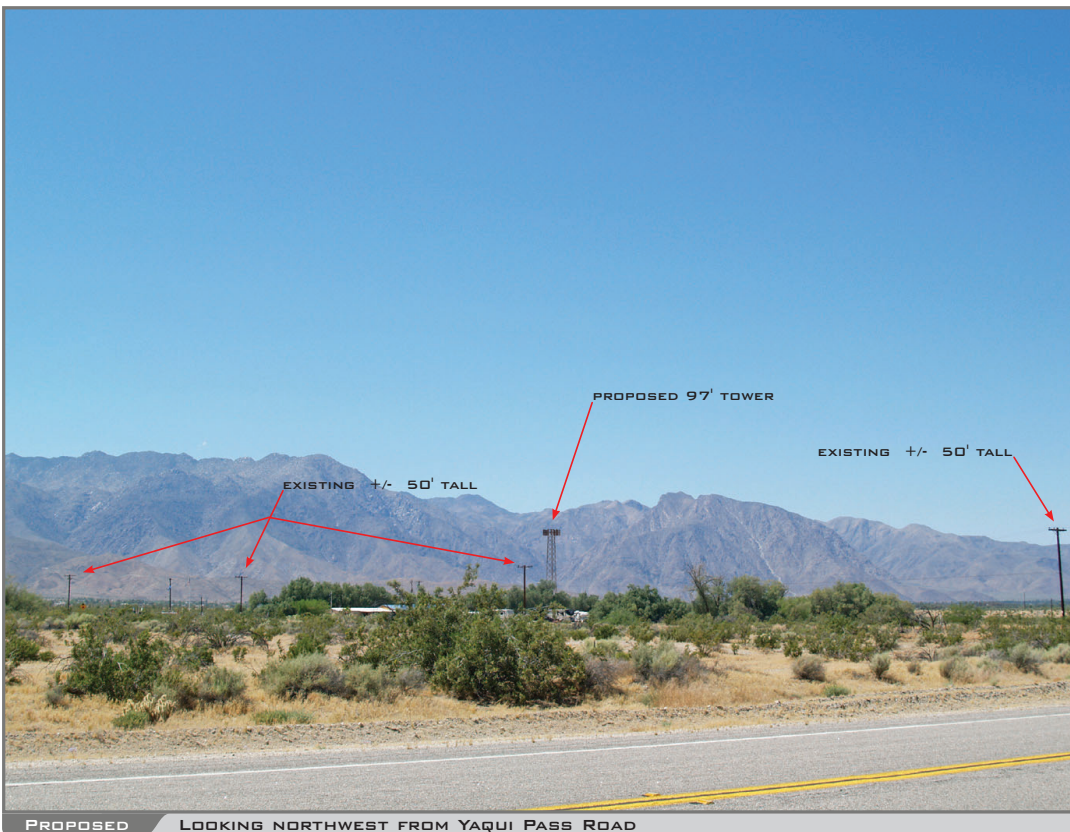
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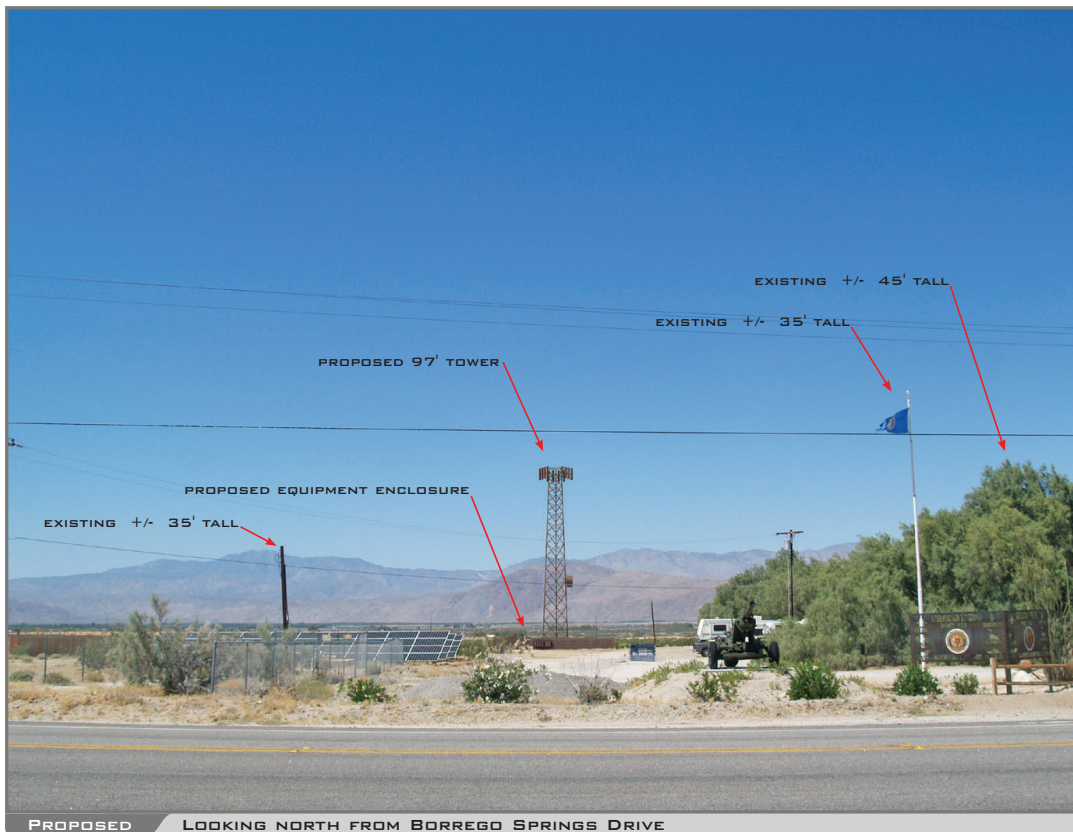


SDC PDS RCVD 11-20-20
MUP20-008

PROPOSED LOOKING NORTHEAST FROM BORREGO SPRINGS DRIVE AT YNEZ TRAIL







CAL01827

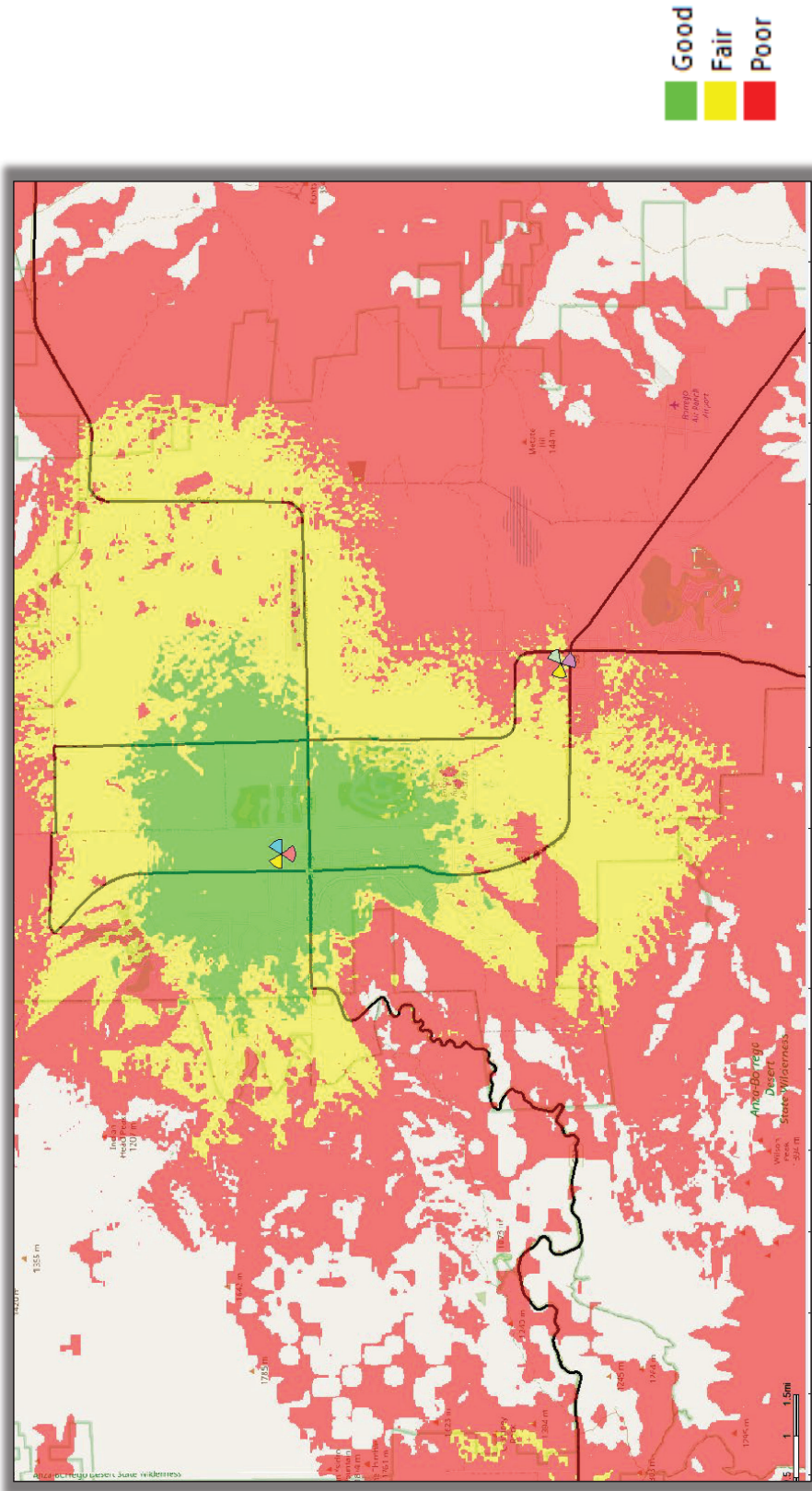
1 - 138

Coverage Plots

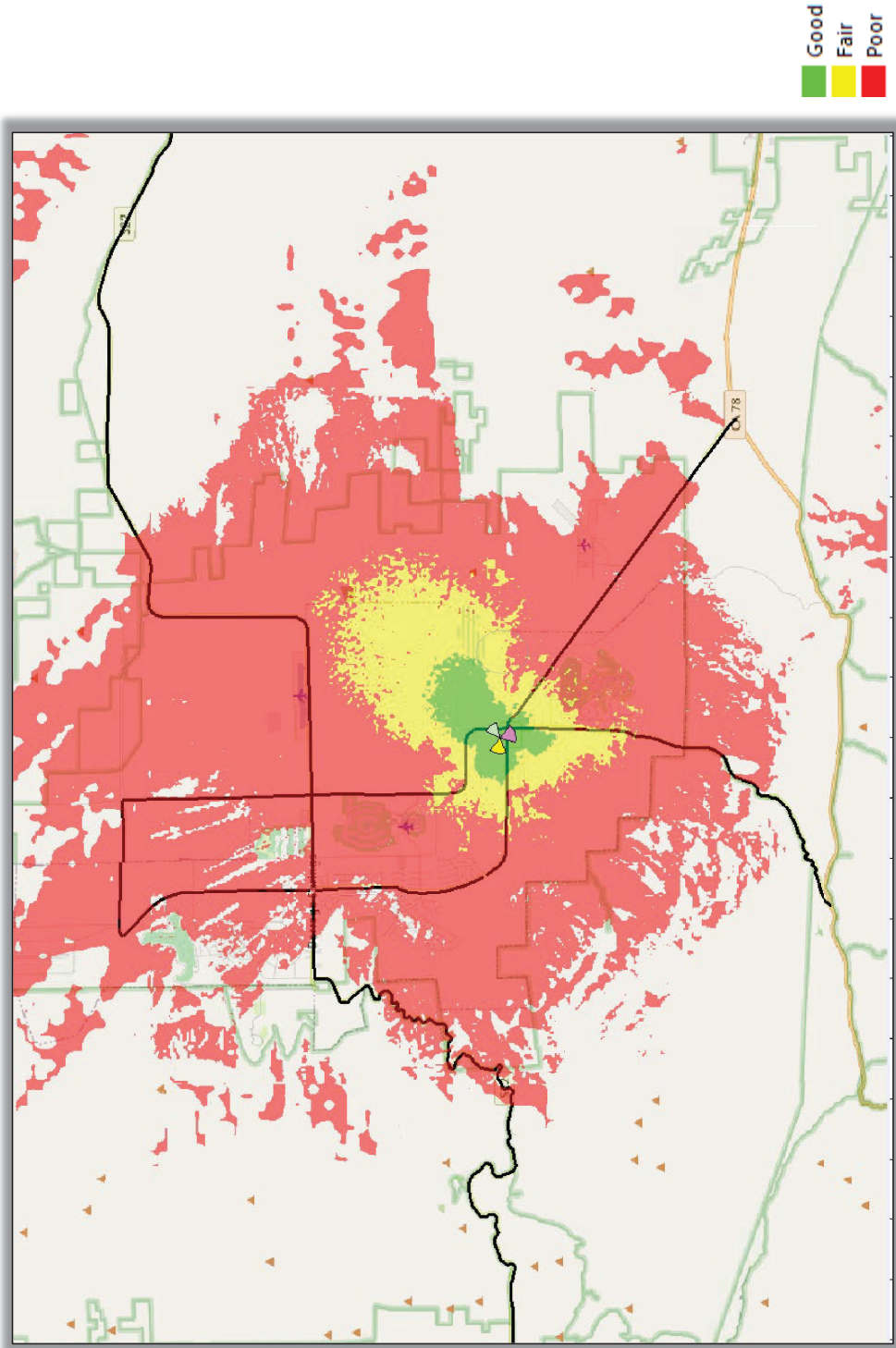
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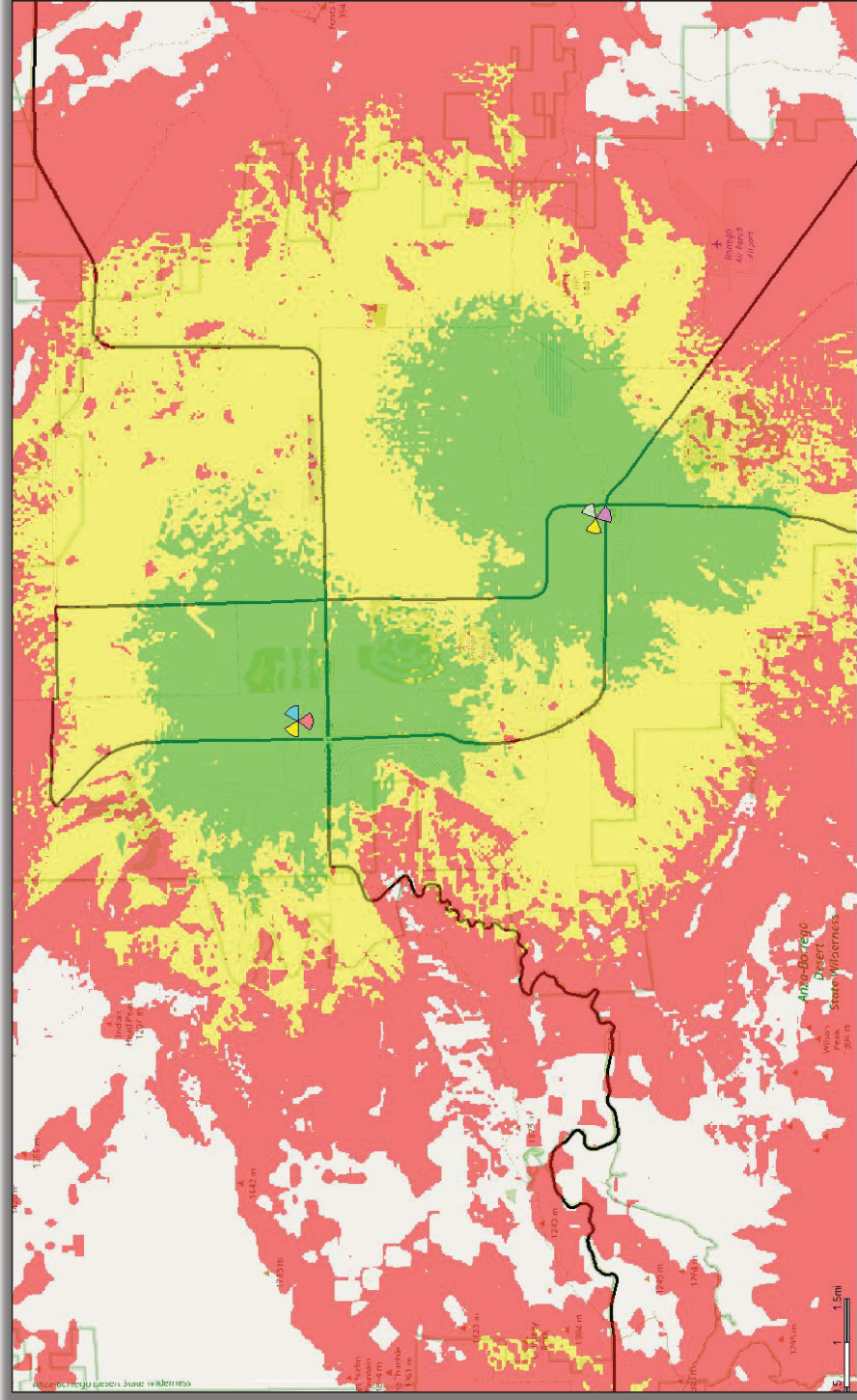
CAL01827 Coverage Without New Site



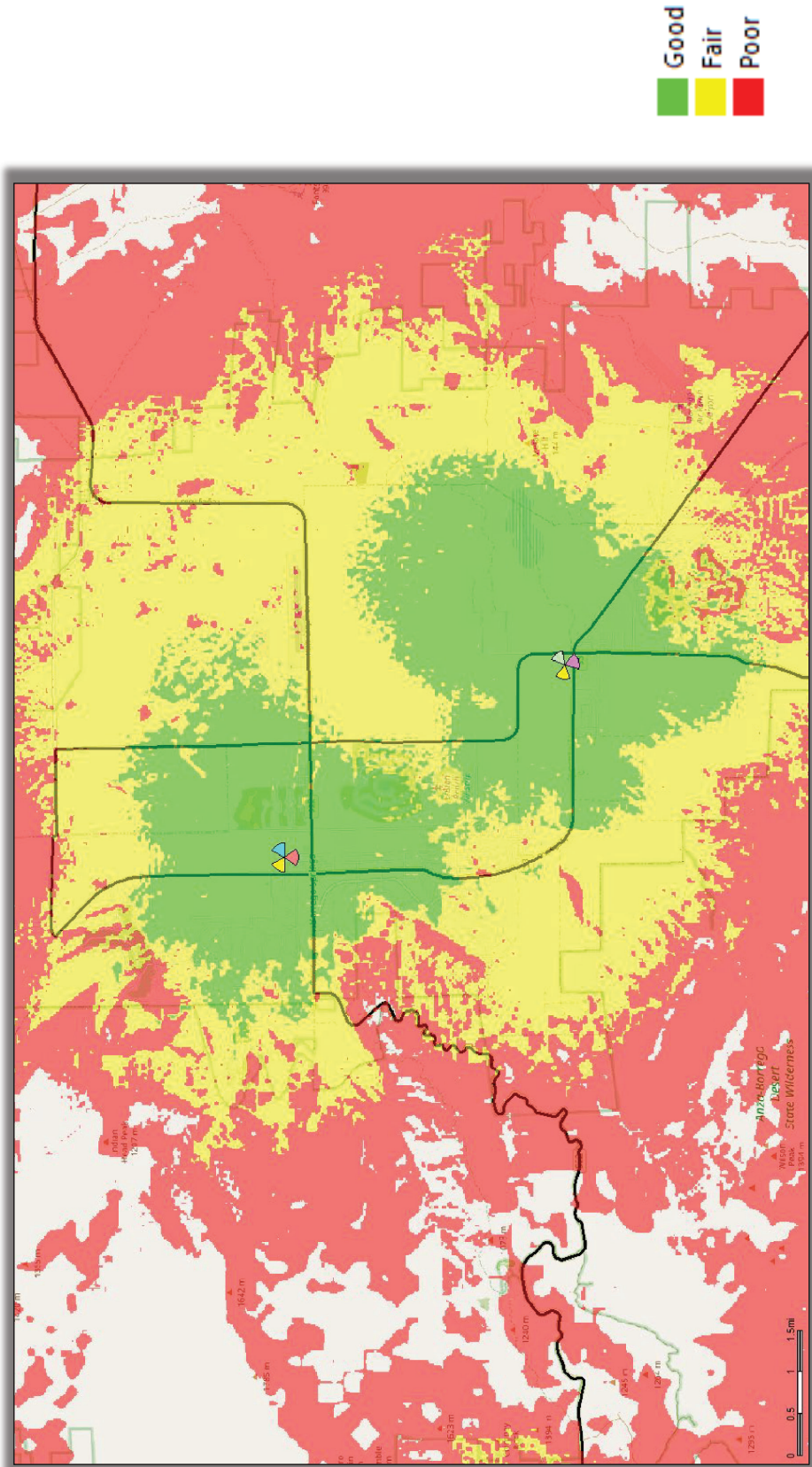
CAL01827 Coverage With New Site @35'



Good
Fair
Poor



CAL01827 Coverage With New Site @97'



Alternate Site Analysis – ITEM NO. 5-1 & 5-6 (Resolved 8/5/20)

InSite Towers seeks to minimize the visual impact to the immediate area when searching for suitable candidates for its' telecommunication towers. This project was pursued because there were no existing structures or buildings in the area with the available heights necessary for the wireless carrier's communication grid, the lack of existing tower structures available that will meet the desired coverage and capacity objectives in the area, landlord interest, site location (within a preferred location and preferred zone), and the ability to locate a new facility while minimizing the impact to the surrounding area. The following outlines the research that was conducted on the availability of existing infrastructure in the area:



1. Borrego Springs Fire Protection District: Existing 70' Lattice Tower that is 4.0 miles from the project site that supports local fire department antenna systems, AT&T Wireless, Verizon Wireless and T-Mobile.
2. AT&T Wireline: Existing AT&T Lattice Tower that is located 3.5 miles north of the project site that was built in the 1980's to support the microwave infrastructure to connect the east to the west for wireline communications. This tower only supports microwave.
3. County of San Diego: Existing County Lattice Tower 2.5 miles south of the project site that was built for the County of San Diego public employees' radio system and consists of a sub-standard lattice tower that will not support AT&T's application.
4. Mobilitie: There was a Major Use Permit application submitted by Mobilitie on behalf of Verizon Wireless (PDS2010-3300-10-033) that was approved on the adjacent property to the east, but it was never constructed, and the application has since expired.
5. Right-of-Way Power Pole Attachment: During a recent site visit to the property, we noted a new antenna attachment to an existing right-of-way pole being installed .75 miles to the west along Borrego Springs Rd. This is not a viable site option for AT&T because it limits the number and size of antennas, which would not be able to facilitate AT&T's coverage objectives to meet its requirements for FirstNet.

Attachment G – Ownership Disclosure



County of San Diego, Planning & Development Services
**APPLICANT'S DISCLOSURE OF OWNERSHIP
 INTERESTS ON APPLICATION FOR ZONING
 PERMITS/ APPROVALS**
 ZONING DIVISION

PDS2020-MUP-20-008

Record ID(s)

Assessor's Parcel Number(s) 200-051-12-00

Ordinance No. 4544 (N.S.) requires that the following information must be disclosed at the time of filing of this discretionary permit. The application shall be signed by all owners of the property subject to the application or the authorized agent(s) of the owner(s), pursuant to Section 7017 of the Zoning Ordinance. **NOTE:** Attach additional pages if necessary.

A. List the names of all persons having any *ownership interest* in the property involved.

Post 853, The American Legion, Department of California

B. If any person identified pursuant to (A) above is a corporation or partnership, list the names of all individuals owning more than 10% of the shares in the corporation or owning any partnership interest in the partnership.

N/A

C. If any person identified pursuant to (A) above is a non-profit organization or a trust, list the names of any persons serving as director of the non-profit organization or as trustee or beneficiary or trustor of the trust.

Ed Cate

Bob Scribner

Tim Kight

Harley Hartman

NOTE: Section 1127 of The Zoning Ordinance defines Person as: "Any individual, firm, copartnership, joint venture, association, social club, fraternal organization, corporation, estate, trust, receiver syndicate, this and any other county, city and county, city, municipality, district or other political subdivision, or any other group or combination acting as a unit."

Debbie DePompei
 Signature of Applicant

Debbie DePompei

Print Name

03/26/2020

Date

----- OFFICIAL USE ONLY -----

**SDC PDS RCVD 06-26-20
 MUP20-008**

5510 OVERLAND AVE, SUITE 110, SAN DIEGO, CA 92123 • (858) 565-5981 • (888) 267-8770

<http://www.sdcountry.ca.gov/pds>

