

SAN BENITO COUNTY APPEAL FORM  
(File 2 copies)

THIS APPEAL IS HEREBY MADE FROM:

[II An administrative decision made on the day of 1! \_ 20 7,7 .6? I

By:

[XI The decision of the San Benito County Planning Commission made on the 25" day of

April , 20 15 , granting or denying one of the following:

USE PERMIT, No:

VARIANCE, Date of Application:

REZONING, Date of Application:

UUIIEEUBDIVISION, OR CONDITION(S) IMPOSED THEREIN:

E] MINOR SUBDIVISION No.:

EI MAJOR SUBDIVISION No.:

to permit:

EI OTHER (specify final Supplemental EIR, Conditional Use Permit No. UP 1023-09 Amended, and any and all related approvals.

PROPERTY INFORMATION:

ASSESSOR'S PARCEL NUMBER(S): 0272790120. Bl al-

ADDRESS: Multiple parcels, north of Panoche Road/Little Panoche Road intersection, Panoche Valley

GENERAL PLAN DESIGNATION: AQFI'GUIfIFaI Rangelafd

ZONING: Agricultural Rangeland V '

ALLEGED ERROR: Attach additional sheets if necessary. Appellant should be specific as to all alleged errors and provide as much detail and supporting documentation as possibly. By signing this form, appellant indicates that appellant understands and agrees that the failure to state a basis of error constitutes a waiver of that ground and will prohibit the appellant from later raising that particular basis of error.

The grounds for this appeal are set forth in San Benito Residents for Responsible Development's February 10, 2015 and

April 24, 2015 comments on the Panoche Valley Solar Project, which are fully incorporated herein.

"Note - The Use Permit Application and EIR are attached to this appeal on discs, as requested by County Counsel.

APPELLANT: [Redacted], clo Laura Horton, Adams Broadwell Joseph & Cardozo

Name  
601 Gateway Blvd. Suite 1000 South San Francisco CA 94080  
Address City State Zip Code  
his (650) 589-1660  
Home Phone # Business Phone ll

APPLICANT: (If different from appellant):

Panoche Valley Solar, LLC 845 Oak Grove Ave, Suite 202. Menlo Park. CA 94025

Name Address -

h M sin/1; We  
ellant's'SiéiiatM rDate Clerk's Signature Date

DEPOSIT FEE FOR FILING AN APPEAL IS \$575.00. (Ordinance No. 833 dated 1/6/09)-  
Additional Planning Fees @ \$100 per hour may be assessed and collected by the Planning  
Department.

ADAMS BROADWELL JOSEPH 81 CARDOZO

DANIEL L. CARDOZO SACRAMENTO OFFICE  
THOMAS A. ENSLOW

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April 24, 2015

By Email and Hand Delivered

Byron Turner, Interim Director Michael Krausie  
Planning 8: Building Inspection Associate Planner  
Services 010 Aspen Environmental Group  
San Benito County 235 Montgomery Street  
2301 Technology Parkway Suite 935  
Hollister, CA 95023 San Francisco, CA 94104  
Email: bturnemecosbms Email: panochesolagaspenegngm

Re: Comments on the Final Supplemental Environmental Impact  
Report for the Panoche Valley Solar Project CUP No. UP 102\_3;  
Q9-A ISCHE 20 1003 mos!

Dear Mr. Turner and Mr. Krausie:

We write on behalf of [REDACTED]  
[REDACTED] to provide comments on the Final Supplemental  
Environmental Impact Report ("FSEIR") prepared by San Benito County  
("County"), pursuant to the California Environmental Quality Act ("CEQA"),<sup>1</sup> for  
the Panoche Valley Solar Project ("Project") proposed by Panoche Valley Solar, LLC  
("Applicant").<sup>2</sup> The Applicant seeks modification of a 20.10 Conditional Use Permit  
to develop a 247 megawatt photovoltaic solar power plant on approximately 2,506  
acres of land in San Benito County. We previously provided comments on the Draft  
Supplemental Environmental Impact Report ("DSEIR") for the Project on February  
10, 2015.

<sup>1</sup> Pub. Resources Code, §§ 21000 et seq.

<sup>2</sup> Aspen Environmental Group, Final Supplemental Environmental Impact Report Panoche Valley  
Solar Project, County of San Benito Department of Planning and Building Inspection Services (April  
2016) (hereinafter FSEIR).  
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**Based** upon our review of the FSEIR and the responses to comments on the  
DSEIR, we conclude that the FSEIR fails to comply with CEQA. We incorporate by  
reference our earlier comments on the DSEIR. Specifically, the FSEIR does not  
adequately describe the environmental setting with regard to biological and water  
resources. Furthermore, the FSEIR fails to adequately analyze the Project's  
impacts related to biological and water resources, and fails to propose mitigation  
measures capable of reducing potentially significant impacts to less than significant  
levels. In addition, neither the County nor the Applicant have demonstrated that  
the Applicant will be able to secure all necessary state and federal permits, which  
are required before commencing construction.

We have reviewed the FSEIR and its appendices with assistance from

technical consultants, whose comments and qualifications are attached as follows: Scott Cashen (Attachment A)<sup>3</sup> and Dr. Tom Myers (Attachment B).<sup>4</sup> We incorporate by reference all comments included in the expert documents.

## I. STATEMENT OF INTEREST

San Benito Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of the Project. [REDACTED]

[REDACTED]

The association was formed to advocate for responsible and sustainable solar development in San Benito County and nearby surrounding areas in order to protect public health and safety and the environment where the association members and their families live, work and recreate.

<sup>9</sup> See Letter from Scott Cashen, to Laura Horton re: Final Supplemental Environmental Impact Report for the Panoche Valley Solar Project, April 23, 2015 (hereinafter, "Cashen Comments"), Attachment A.

<sup>4</sup> See Letter from Tom Myers to Laura Horton re: Final Supplemental Environmental Impact Report for the Panoche Valley Solar Project, April 23, 2015 (hereinafter, "Myers Comments"), Attachment B.

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**The individual members of San Benito Residents and the members of the affiliated labor organizations live, work, recreate and raise their families in the San Benito County. They would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work constructing the Project itself. They will be first in line to be exposed to any health and safety hazards that may be present on the Project site. They each have a personal interest in protecting the Project area from unnecessary, adverse environmental and public health impacts.**

**The organizational members of San Benito Residents also have an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for the union organization's members that they represent. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for businesses to locate and people to live there. This in turn jeopardizes future development by causing construction moratoriums and otherwise reducing future employment opportunities for construction workers. The labor organization members of San Benito Residents therefore have a direct interest in enforcing environmental laws to minimize the adverse impacts of projects that would otherwise degrade the environment.**

## **11.: THE FSEIR FAILS To ADEQUATELY DESCRIBE THE ENVIRONMENTAL SETTING FOR BIOLOGICAL AND WATER RESOURCES**

**CEQA requires that lead agencies include a description of the physical**

environmental conditions in the vicinity of a project, as they exist at the time environmental review commences.<sup>5</sup> Under CEQA, “[t]his environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.”<sup>6</sup> Baseline calculations must be supported by substantial evidence, which the CEQA Guidelines define as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion.”<sup>7</sup> “Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion

<sup>5</sup> CEQA Guidelines, § 15125(a); see also *Communities for A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 321; see also, 40 C.F.R. § 1602.15.

<sup>6</sup> CEQA Guidelines, § 15125(a).

<sup>7</sup> CEQA Guidelines, §15384.

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supported by facts.” “[U]nsubstantiated opinion or narrative [and] evidence which is clearly inaccurate or erroneous . . . is not substantial evidence.”<sup>8</sup>

#### **A. Vernal Pool Fairy Shrimp**

We previously commented that the County failed to adequately establish the baseline for vernal pool fairy shrimp (“VPFS”). In response, the County simply reiterated that “[p]rotocol level surveys for vernal pool fairy shrimp have been completed for the Project.”<sup>9</sup> Mr. Cashen discusses two ways in which the County “failed to accurately establish existing conditions pertaining to vernal pool fairy shrimp and other federally listed branchiopods at the Project site.”<sup>10</sup>

First, as noted by Mr. Cashen, the County failed to provide consistent information regarding the number of pools occupied by VPFS. In one section, the FSEIR states that “[f]ield surveys have identified the presence of Vernal pool fairy shrimp in three ephemeral pools, all of which occur within the Revised Project footprint. Potentially suitable habitat (ephemeral and vernal pools) was identified throughout much of the project site.”<sup>11</sup> However, the FSEIR later states that VPFS “were detected in only one pond location.”<sup>12</sup> Another FSEIR section indicates that “[a]t least one bermed stock pond within the Revised Project footprint serves as habitat for vernal pool fairy shrimp.”<sup>13</sup> As explained by Mr. Cashen, “[t]his uncertainty is problematic because the County revised Mitigation Measure BR-8.2 such that it now only requires avoiding disturbance of ephemeral pools occupied by vernal pool fairy shrimp to the maximum extent practicable and mitigating for unavoidable impacts (the previous measure applied to all ephemeral pools).”<sup>14</sup>

Second, the FSEIR does not account for the potential changes in the distribution of listed branchiopods since the 2010 Final EIR was approved.<sup>15</sup> Because the FSEIR did not address Mr. Cashen’s related comment on the DSEIR, he contacted the Ventura office of the United States Fish and Wildlife Service (“USFWS”) and was informed that “the USFWS considers branchiopod

<sup>8</sup> Pub. Resources Code, § 21082.2(c).

<sup>9</sup> FSEIR, p. RTC B-II.

<sup>10</sup> Cashen Comments, p. 5.

<sup>11</sup> FSEIR, pp. RTC B-11,-12 [emphasis added].

<sup>12</sup> Id., at RTC 3-16.

<sup>13</sup> Id., at 0.6-27. [emphasis added].

<sup>14</sup> Cashen Comments, p. 5 (citing FSEIR, p. 0.6-35).

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survey results valid for three to five years, and that the Applicant's survey results would no longer be considered valid."16 The **USFWS** also supported Mr. Oashen's concern that "a 100-foot construction buffer would not necessarily mitigate indirect impacts to pools occupied by vernal pool fairy shrimp?"

The **FSEIR** failed to address issues raised by Mr. Cashen in his previous comments pertaining to the "viability of vernal pool fairy shrimp habitat remaining after Project deVelopment, including the viability of: (a) dispersal mechanisms for cysts; (b) hydrologic processes that support suitable habitat; and (c) fragmented habitat (i.e., pool complexes)."1B According to Mr. Cashen, the **FSEIR** also "failed to address the fact that the **DSEIR** provided no evidence that the **USFWS** approved the results of the 2009/2010 Vernal Pool Fairy Shrimp (**VPFS**) surveys, even though **USFWS** approval is a requirement of the protocol."19

The County's responses in the **FSEIR** suggest that **VPFS** are limited to "vernal pools," which they are not, as explained by Mr. Cashen.20 Mr. Cashen explains that **VPFS** "occur in many types of vernal pool-like habitats."21 As discussed further below, the **FSEIR** acknowledges that the Project will permanently impact many vernal and ephemeral pools on the Project site, and only provide protection for the pool(s) which were found to contain **VPFS** over five years ago.

In the **FSEIR**, the County failed to adequately establish the existing setting for **VPFS**, which is the baseline upon which the County is required to analyzs the Project's significant impacts on the species and its habitat. Therefore, Mr. Cashen concludes that "the County must conduct further surveys for **VPFS** and provide accurate information regarding the location of **VPFS** in a revised **SEIR**.... [0]therwise, the Project will result in potentially significant and unmitigated impacts on **VPFS**."22

14 Cashen Comments, p. 5 (citing Personal communication with Julie Vanderwier on 2015 Apr 23.).

17 Id.

15 Id., at 6.

19 Id.

20 Id.

21 Id.

22 Id.

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## B. Groundwater

We previously commented that the DSEIR failed to adequately analyze the existing groundwater resources at the Project site, particularly in the context of the California drought conditions that have developed since 2010. The **DSEIR** barely mentioned the drought, acknowledging that “the current drought in California has reduced recharge to the Panoche Valley Groundwater Basin and caused the water level in several wells to drop over the last several years”<sup>23</sup> and that “continuation of current drought conditions would extend the recovery time for Panoche Valley Groundwater Basin levels after drawdown caused by construction water use for the Revised Project”<sup>24</sup> However, as we commented, the **DSEIR** did not provide any further analysis of drought conditions.

The County responded to our comments in the DSEIR, stating that “over the past 10 years groundwater levels have declined at some wells and have increased at others despite the drought. The average change in groundwater level for 43 wells during this period is a decrease of just 1.6 feet.”<sup>25</sup> However, the County does not explain where the estimation of 1.6 feet originated. In other words, the County lacks substantial evidence to support its assumption.

In addition, as Dr. Myers explains, “the document used for the [DSEIS], Geologica 2014, does not appear to support the statement.”<sup>26</sup> He further explains that the analysis is flawed because:

The actual decrease in water level depends on the exact dates used for the analysis, but Table 2 in Geologica (2014) shows that over the past five to ten years there has been a general drop in water levels... it is important to note that the choice of time period for consideration of water level changes appears to coincide simply with the period during which the California Department of Water Resources expanded its data collection efforts rather than coinciding with high pumpage in the local area or any specific local use of groundwater-<sup>27</sup>

<sup>25</sup> FSEIR, p. (115-1.

<sup>24</sup> Id., at 0.15-6.

<sup>25</sup> Id., at 3-22.

<sup>26</sup> Myers Comments, p. 12.

<sup>21</sup> Id.

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**In other words, “the data collection was not part of a specific groundwater monitoring plan”<sup>28</sup> Furthermore, he explains that the “only way to estimate trends is to have data over all seasons, meaning a minimum of one year,” but the data referred to for baseline information “does not meet these requirements because the water levels are not measured on a monthly basis and because there has been no suggestion that any of those wells will be used for monitoring.”<sup>29</sup>**

**In addition, the County does not provide any further information about the drought conditions and how this can be expected to exacerbate Project impacts. The**

FSEIR merely states that “[a] continued drought would directly affect the amount of drawdown experienced over the long term, because the amount of recharge to the

aquifer system is reduced compared to normal rainfall. This might result in greater drawdown.”<sup>30</sup> However, Dr. Myers concludes that the baseline must consider

existing drought conditions and how the drought has impacted drawdown.<sup>31</sup> Thus, in the FSEIR, the County failed to adequately establish the existing 'setting for groundwater resources, which is the baseline upon which the County is required to analyze the Project’s significant impacts on groundWater.

According to CEQA, “[t]he EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context.”<sup>32</sup> However, the County did not adequately investigate baseline conditions for both biological and water resources, resulting in inadequate analysis of impacts. Therefore, the County has not adequately established the existing environmental setting against which to measure impacts, in violation of CEQA.<sup>1</sup>

BB Id.

29 Id., at 18.

3° FSEIR, p. RTC 13-22.

31 Myers Comments, p. 19; Groundwater withdrawals during drought years are over double that of a normal year. See Janny Choy and Geoff McGhee, *Groundwater: Ignore It and It Might Go Away*, Attachment C; United States Geological Survey, *The California Drought, Drought Impacts*, Attachment 1).

32 CEQA Guidelines, § 15125(c).

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### III. THE FSEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE THE PROJECT’S POTENTIALLY SIGNIFICANT IMPACTS RELATED TO BIOLOGICAL RESOURCES AND WATER RESOURCES

Under CEQA, a significant impact is “a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project. . . .”<sup>33</sup> CEQA directs public agencies to avoid or reduce significant impacts by requiring alternatives or mitigation measures.<sup>34</sup> The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to “identify ways that environmental damage can be avoided or significantly reduced.”<sup>35</sup> If a project has a significant effect on the environment, the agency may approve the project only upon a finding that it has “eliminated or substantially lessened all significant effects on the environment where feasible.”<sup>36</sup>

Courts have also imposed several parameters for the adequacy of mitigation measures. First, the lead agency may not defer the formulation of mitigation measures until a future time, unless the EIR also specifies the specific performance standards capable of mitigating the project’s impacts to a less than significant level.<sup>37</sup> Second, a public agency may not rely on mitigation measures of uncertain efficacy or feasibility.<sup>38</sup> Third, “[m]itigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments.”<sup>39</sup>

Fourth, mitigation measures that are vague or so undefined that it is impossible to evaluate their effectiveness are legally inadequate.<sup>40</sup> Here, the FSEIR fails to adequately disclose, analyze, and provide specific and enforceable mitigation for impacts related to biological and water resources, in violation of CEQA.

<sup>53</sup> CEQA Guidelines § 15282.

<sup>54</sup> CEQA Guidelines § 15002(a)(2)-(3); Berkeley Keep Jets Over the Bay 00:11., 91 Cal.App.4th at 1354.

<sup>35</sup> CEQA Guidelines § 15002 subd. (a)(2).

<sup>6</sup> CEQA Guidelines § 15092, subd. (b)(2)(A)-(B).

<sup>3</sup> CEQA Guidelines, § 15126.4(a)(1)(B); Endangered Habitats League 0. County of Orange (2005) 131 (Jalafipprith 777, 793434; Defend the Bay 0. City of Irvine (2004) 119 Cal.App.4th 1261, 1275.

88 Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).

<sup>3</sup> CEQA Guidelines § 15126.4(a)(2).

<sup>40</sup> San Franciscans for Reasonable Growth 1). City & County of San Francisco (1984) 151 Cal.App.3d 61,79.

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#### **A. The FSEIR Fails to Adequately Disclose, Analyze, and Mitigate the Project's Impacts to Avian Species**

We previously commented that the Project's impacts on birds were not adequately analyzed or mitigated in the DSEIR. Specifically, we commented that the DSEIR failed to consider new information and analysis regarding avian mortality at solar sites, resulting in potentially significant unmitigated impacts due to collisions. The County responded generally that its monitoring and adaptive management program in the Avian Conservation Strategy ("ACS"), along with other measures that are not applicable to collision issues, would reduce impacts to less than significant levels.<sup>41</sup> Regarding polarized-light pollution and "lake effect," which cause collisions at solar facilities, the County responded that "evidence indicating that PV solar panels attract birds is lacking and no standard for analysis of this issue has been established?" However, Mr. Cashen explains that "[b]oth aspects of this statement are misleading."<sup>43</sup>

According to Mr. Cashen, "there is considerable evidence that glass panels that reflect trees, the sky, or other attractive habitat are involved in a higher number of bird collisions."<sup>44</sup> The County's assertion that the Kagan et al. (2014) report "does not present clear, widespread evidence for this [polarized light and lake effect] phenomenon" is not supported by the evidence, according to Mr. Cashen.<sup>45</sup> The report cites "numerous studies that support their inference that collisions occur because birds mistake the broad reflective surfaces of solar arrays for water, trees, and other attractive habitat."<sup>46</sup> Furthermore, "[d]ue to limitations in their visual system, birds are simply not capable of perceiving glass as a physical obstacle, or in distinguishing the illusion of habitat from what really is habitat."<sup>47</sup> Mr. Cashen also notes that there is indeed substantial evidence that "PV solar panels produce polarized light pollution that attracts insects, which in turn attract insect-eating

<sup>41</sup> FSEIR, pp. ETC-12 - BTU-15.

<sup>42</sup> FSEIR, p. RTC-12.

<sup>43</sup> Cashen Comments, p. 1.

<sup>44</sup> Id. (citing Kagan RA, TC Viner, PW Trail, E0 Espinoza. 2014. Avian Mortality at Solar Energy Facilities in Southern California: A Preliminary Analysis. National Fish and Wildlife Forensics Laboratory. 28 pp. See also Kiem D J r., CJ Farmer, N Delacretaz, Y Gelb, PG Saenger. 2009. Architectural and Landscape Risk Factors Associated with Bird-Glass Collisions in an Urban Environment. The Wilson Journal of Ornithology 12(1):1-26-134-. See also Klem D Jr. 2009. Preventing Bird-Window Collisions. The Wilson Journal of Ornithology 121(2):314-321.).



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birds,”<sup>48</sup> which then “become susceptible to injury or death because they cannot distinguish insects on a PV panel that reflects attractive habitat from insects that really .are on (or in) attractive habitat.”<sup>49</sup>

The **FSEIR** further states that “[e]vidence that birds collide with PV panels more often than non-reflective stationary infrastructure is also lacking, as is evidence that collisions with **PV** panels at solar facilities are a significant source of mortality.”<sup>50</sup> According to Mr. Cashen, these arguments are unsupported and illogical. Mr. Cashen demonstrates, “there is a growing trend of bird collisions at 7 solar plants” that has been scientifically demonstrated.<sup>51</sup> The USFWS concluded in its analysis of another solar facility that given the large size of existing and proposed **PV** facilities, and the lack of opportunity for effective adaptive management measures, **PV** facilities could have significant effects to migratory birds.<sup>52</sup> Mr. Cashen concurs with the USFWS’ conclusion and states that the FSEIR “fail[s] to acknowledge or adequately analyze the potentially significant cumulative effects of bird fatalities at utility-scale solar facilities.”<sup>53</sup>

The County stated in the **FSEIR** that “no standard” has been established for analysis of bird collisions with solar panels, which as Mr. Cashen correctly states does not justify dismissing the risk under CEQA.<sup>54</sup> However, the County does dismiss the risk by concluding that impacts stemming from polarized-light pollution are less than significant without in-depth analysis and without providing adequate mitigation.<sup>55</sup> Therefore, the County lacks substantial evidence to support its conclusion. Furthermore, Mr. Cashen provided substantial evidence that impacts from polarized-light pollution are significant and must be mitigated. -

Despite the County failing to adequately disclose and analyze impacts to avian species, the County states that an ACS will mitigate impacts to bird to less than significant levels.<sup>56</sup> However, Mr. Cashen eXplains that the ACS, “which

<sup>4</sup> Id.

<sup>49</sup> Id.

<sup>50</sup> **FSEIR**, p. R'IC-12.

<sup>51</sup> Cashen Comments, p. 2.

<sup>52</sup> U.S. Fish and Wildlife Service. 2014 Aug 4. Comments on the Draft Environmental Impact Report (EIR 529) for the Blythe Mesa Solar Project (CUP 2685), Riverside County, California. Attachment E

<sup>59</sup>-Cashen Comments, p. 2.

<sup>54</sup> FSEIR, p. ETC-12; Cashen Comments, p. 2.

<sup>55</sup> FSEIR, p. 0.6-56; Cashen Comments, p. 2.

\*<sup>6</sup> FSEIR, p. 0.6-32', 33, 38, 40, 89.

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includes a severely flawed monitoring and adaptive management plan,”<sup>57</sup> does not provide adequate mitigation for significant impacts to birds. Addressing the uncertainty of a potentially significant threat “requires an adaptive management strategy capable of addressing unforeseen circumstances (or predictions).”<sup>58</sup> Accordingly, Mr. Cashen notes that “[t]he FSEIR’s requirement for one year of post-construction mortality monitoring precludes a successful adaptive management strategy.”<sup>59</sup>

The USFWS recommends a minimum of three years of post-construction monitoring,<sup>60</sup> and Kagen et al. (2014) recommend daily surveys for at least two years. According to Mr. Cashen, “[t]he FSEIR fails to justify why the County’s requirement for one year of monitoring should override the three years recommended by the USFWS, which is the federal agency responsible for regulating take of migratory birds.”<sup>61</sup> In addition, the FSEIR requires the Applicant’s study design to be approved by the County of San Benito “in consultation with the [California Department of Fish and Wildlife (“CDFW”)] and USFWS,”<sup>62</sup> and as Mr. Cashen notes, “it provides no evidence that the County has consulted with the , CDFW and USFWS, nor does it provide assurances that any recommendations i resulting from future consultation would be implemented. Wis \_ i

To compound the issue of the County’s flawed mitigation, the FSEIR indicates that avian mortality thresholds are ultimately within the County’s authority to determine at a later date. The FSEIR states, ‘

If the County determines that either (1) bird mortality caused by solar facilities is substantial and is having potentially adverse impacts on special- 1 status bird populations, or that (2) the attraction of polarized light from solar i panels is causing reproductive failure of aquatic insect populations at high enough levels to adversely affect insectivorous special-status birds, the Applicant shall be required to implement some or all of the mitigation

<sup>57</sup> Cashen Comments, p. 2. ‘

<sup>58</sup> Id. ‘

<sup>59</sup> Id, at 2-3’ (emphasis added). <sup>60</sup> US. Fish and Wildlife Service, Pacific Southwest Region. 2010 Sep. Region 8 Interim Guidelines for the Development of a Project-Specific

Related Transmission Facilities. p. 10.

<sup>61</sup> Cashen Comments, p. 3.

<sup>62</sup> FSEIR, p. RTC-IZ.

<sup>63</sup> Cashen Comments, p. 3.

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measures below.WM

However, as Mr. Cashen states, “the County does not define what is ‘substantial’ mortality, or what are ‘high enough levels’ to adversely affect birds.”<sup>65</sup> Furthermore, the FSEIR fails to provide adequate **measures** should **the** nonexistent thresholds be met. The FSEIR states:

Mitigation Measure BR-14.2 is intended to provide a non-inclusive list of

potential corrective or remediation measures based on the findings of the ACS. In addition to this list, a more comprehensive list of proposed avoidance, minimization and mortality reduction measures are provided in the draft ACS (See Section 5.0 beginning on p. 33).<sup>66</sup>

Mr. Cashen notes that this is misleading because the “‘comprehensive list’ is limited to two potential corrective measures.”<sup>67</sup> The only specific measure identified in Mitigation Measure Bit-14.2 is the installation of additional bird flight diverters, which as Mr. Cashen demonstrates “do not prevent avian mortality?” Simply using flight diverters would still result in unmitigated avian mortality. According to Mr. Cashen, the ACS “does not identify any measures that might remediate avian mortality once the Project is operational.”<sup>69</sup> The ACS merely provides that corrective actions “may include up to [sic] the installation of nonpolarizing white borders or white grids that break up the polarizing black surface of solar panels as noted in the [2010 FEIR].”<sup>70</sup> As Mr. Cashen notes, white borders or grids are inconsistent with “measures recommended for birds by Kagan et al. (2014) and Klem (2009).”<sup>71</sup>

The FSEIR’s failure to provide actual mortality thresholds and specific and effective measures when adaptive management is triggered results in vague and ineffective mitigation. The County must analyze the avian collision hazard associated with PV solar facilities as a potentially significant impact and it must

<sup>64</sup> FSEIR, p. (3.6-90).

<sup>65</sup> Cashen Comments, p. 3.

<sup>66</sup> FSEIR, p. RTC~12.

<sup>67</sup> Cashen Comments, p. 4.

<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> Draft AGS, p. 20 [emphasis added].

<sup>71</sup> Cashen Comments, p. 4.

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provide adequate mitigation that reduces impacts below a level of significance.”<sup>72</sup> Otherwise, the County is in violation of CEQA.

**B. The FSEIR Fails to Adequately Disclose, Analyze, and Mitigate the Project’s Impacts to Water Resources**

**1. Groundwater Impacts**

We previously commented that the **DSEIR** failed to adequately analyze and mitigate significant groundwater impacts. We also commented that the County failed to incorporate analysis on the ongoing historic drought and its influence on groundwater drawdown and the proposed mitigation. The County then commissioned a memorandum from Dr. Jim Finegan at Kleinfelder (hereinafter “Kleinfelder”) to respond directly to our comments.

Dr. Myers provides detailed responses to the Kleinfelder letter, and demonstrates that the letter does not alter his initial conclusions, which are supported by substantial evidence, that the “[a]dditional pumping required by the revised [P]roject will increase the drawdown beyond that analyzed in the original 2010 FEIR.”<sup>73</sup> Furthermore, Dr. Myers states that even now the County “grossly

overestimate recharge and incorrectly calculate the drawdown at the well,"

Although the Kleinfelder letter asserts that the various methods used to analyze impacts in the **FSEIR** are "standard," Dr. Myers explains that they are in fact "substandard in hydrogeologic practice and actually the wrong methods for the analysis?" Dr. Myers provides various resources "explaining why the responses are incorrect and conclusions reached in the **FSEIR** are faulty."<sup>76</sup> Thus, the County's responses and the Kleinfelder letter do not adequately address the **FSEIR**'s severely flawed groundwater analysis.

The County's analysis is not supported by substantial evidence, and the evidence the County does provide is irrelevant or is misconstrued. For example, the

"<sup>72</sup> Id., at 2.

<sup>73</sup> Myers Comments, p. 1.

<sup>74</sup> Id.

"<sup>71</sup> Id., at 2.

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County's consultant, Geologica, used a study in an "alpine grassland environment"<sup>77</sup> from the Austrian Alps, an area that, as Dr. Myers explains, "could hardly be more different climatically and geologically from Panoche Valley, to justify their runoff coefficients?"<sup>78</sup> In addition, the County references a study that dealt with irrigated areas, which are "nothing like the grassland found at the study site"<sup>79</sup> Kleinfelder suggested that the abstract of the study did not support Dr. Myers' critique of the study, because there was no proof in the abstract that the study was limited to irrigated areas. However, Dr. Myers has since obtained the entire study, "which makes clear that all 98 areas are irrigated,"<sup>80</sup> thus affirming Dr. Myers' conclusion that the study did not support the County's analysis. Indeed, that study was referenced to support the County's recharge estimates and was defended by Kleinfelder, but it "actually refutes [the County's] recharge estimates and supports Dr. Myers' arguments!"<sup>81</sup>

Dr. Myers provides a detailed explanation of why overestimating recharge, which the County did in its analysis, "causes the model to underestimate drawdown at the pumping well."<sup>82</sup> Therefore, the Project's groundwater impacts are significantly underestimated and the current mitigation plan does not reduce these impacts to less than significant levels. Dr. Myers provided general recommendations for monitoring wells "based on a premiere water monitoring and environmental characterization treatise" and consistent with industry standards,<sup>83</sup> but these recommendations were ignored by the County. Dr. Myers recommended that the County incorporate a system "that will allow monitoring of water pressure at different depths in the aquifer to assess vertical gradients and differential drawdown impacts... because the connections among vertical layers are heterogeneous and the project pumping could affect different layers differently."<sup>84</sup> By ignoring Dr. Myers' recommendations for the groundwater mitigation plan, the **FSEIR** fails to incorporate all feasible mitigation measures for groundwater impacts.

<sup>77</sup> Geologica 2010, p 12.

<sup>75</sup> Myers Comments, p. 4.

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Regarding the drought, the County responds to various commenters, stating that “[a] continued drought would directly affect the amount of drawdown experienced over the long term, because the amount of recharge to the aquifer system is reduced compared to normal rainfall... [t]his might result in greater drawdown.”<sup>85</sup> However, the County then dismisses any further exacerbation of impacts that are likely to occur. Instead, the County states that “Mitigation Measure-WR-1.1 consists of a groundwater monitoring and reporting plan. According to the County, implementation of this plan is unlikely to be impacted by drought (i.e., low-water) conditions. The County further stated that although shallow wells may go dry during drought conditions, most appear to be sufficiently deep that this is not expected to occur, and replacement wells will be incorporated into the program if any of the monitored wells are compromised.”<sup>86</sup> Mitigation WR-1.1 calls for monitoring of Project and nearby wells, and states that “[i]f results of the monthly trend analyses indicate that the project pumping has resulted in water level decline of 5 feet or more below the baseline trend at nearby private wells, the applicant shall be prohibited from using the well(s) as a water source for the project, or shall reduce groundwater pumping until water levels stabilize or recover.”<sup>87</sup>

The County’s Mitigation WR-1.1 is vague and would be ineffective at reducing individual and cumulative groundwater impacts for several reasons. First, the measure does not adequately describe the County’s determination of the baseline trend, according to Dr. Myers.<sup>88</sup> He states that “[a] complication is that project pumping, existing pumping in the area, and a potential continuation of drought conditions will all affect future water level conditions”<sup>89</sup> Furthermore, he states that “[u]ncertainty in the understanding of the aquifer properties will also affect the accuracy of the estimated water levels. The discussion for MM WR-1.1 does not describe how these differential effects will be parsed.”<sup>Em</sup>

Second, Dr. Myers states that “the **FSEIR** does not provide a plan for assessing drawdown caused by this project”<sup>91</sup> compared to the drought. He continues that “[o]ngoing drought could cause drawdown and could also make recovering from drawdown take longer [and]... the pumping wells less able to

<sup>85</sup> FSEIR, p. RTC B-B1.

<sup>86</sup> Id.

<sup>87</sup> FSEIR, p. C.15- 10.

<sup>88</sup> Myers Comments, p. 7.

<sup>89</sup> Id.

<sup>90</sup> Id.

<sup>91</sup> Id.

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provide the project requirements.”<sup>92</sup> Dr. Myers concludes that “[t]his results in a vague and ineffective mitigation measure because if the threshold is 5 feet below the baseline trend, and the trend is significantly lowered because of the drought, 5 feet below baseline trend could contribute to severe loss of groundwater that is unmitigated,” thus, “[t]he County does not account for this potential effect, both individually and cumulatively.”<sup>93</sup>

Third, the measure states that if the 5 foot threshold is met, the Project can no longer use that well, or has to reduce pumping.<sup>94</sup> However, the County does not provide information regarding alternative water sources for the Project to meet its water needs, should the pumping need to stop in accordance with the measure. When questioned about this lack of information, the County merely responded that “replacement wells will be incorporated into the program if any of the monitored wells are compromised”<sup>95</sup> without further explanation or analysis. Dr. Myers states that “simply adding more wells to the same groundwater source does not mitigate the problem.”<sup>96</sup>

Therefore, the County’s analysis of groundwater impacts is not supported by substantial evidence in the record, and mitigation of groundwater impacts are vague and ineffective, in violation of CEQA. -‘

## 2. Flooding and Erosion

We previously commented that the DSEIR failed to discuss the flooding and erosion that could result from grading the vernal pools, drainage features and watercourses on the Project site.

The County responded that “[e]rosion controls have been included in the engineering design of the project.”<sup>97</sup> However, as Dr. Myers concludes, “[t]he revised project substantially increases the grading beyond that proposed in [the] original project. This will significantly increase various runoff and erosion impacts 1 and remote ephemeral and vernal pools.”<sup>98</sup> The total graded area for the revised 7

<sup>92</sup> Id., at 8.

<sup>93</sup> Id.

<sup>94</sup> FSEIR, p. (115-110).

<sup>95</sup> Id., at RTC B-81.

<sup>96</sup> Myers Comments, 10. 8.

<sup>97</sup> FSEIR, p. RTC B32.

<sup>98</sup> Myers Comments, p. 1 (emphasis added).  
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Project would increase from 200 in 2010 to 392 acres-‘19 The **FSEIR** states that “changes in drainage patterns, creating flooding on- or off-site” would not occur, without presenting any analysis other than to say the Project site is relatively flat. However, according to Dr. Myers, “[t]his cannot be stated without a detailed

grading plan” which is not provided in the FSEIR or the Project files; thus, “[i]t is merely an unsubstantiated claim.”<sup>100</sup>

The Project area contains up to 15 vernal pools totaling 0.26 acres and numerous ephemeral pools. As explained by Dr. Myers, a “vernal pool tends to have wetland vegetation and hydric soil indicating a substantial period of saturation” and “[a]n ephemeral pool does not have wetland vegetation.” However, hydrologically, “both types are important because they capture runoff thereby reducing runoff from the area.”<sup>101</sup> In addition, “[t]he pools may be sources of recharge in addition to providing volume to store flood runoff.”<sup>102</sup> Dr. Myers explains that the FSEIR’s analysis of impacts on ephemeral and vernal pools is inadequate because it “has not estimated the volume of flood waters retained in these ponds nor the amount of recharge that may percolate through the bottom of the ponds.”<sup>103</sup> Instead, “the FSEIR will allow grading plans to remove the ponds without even estimating the hydrologic impact of doing so, which includes lost flood storage and recharge.”<sup>104</sup>

Regarding runoff, the FSEIR added new information regarding four detention basins to mitigate stormwater flows. However, as explained by Dr. Myers, “the discussion does not specify how large they will be or discuss the design flows and volumes, so the public has no way to assess whether they are sufficient.”<sup>105</sup>

The Project will permanently impact many pools on the Project site, but fails to specify exactly how many, fails to provide detailed information regarding grading, fails to adequately analyze the removal of these pools and subsequent impacts on erosion, flooding, and recharge rate, and fails to provide important details about construction of four new detention basins.

<sup>9</sup> FSEIR, p 0.15-7.

<sup>10</sup> Myers Comments, p. 8.

<sup>101</sup> Id. A

<sup>102</sup> Id., at 8-9.

<sup>103</sup> Id., at 9.

<sup>104</sup> pp

<sup>105</sup> Id., at 11.

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**Dr. Myers concludes that the Project will “cause increased runoff resulting in flooding and increased downstream erosion” 106 that has not been adequately addressed or mitigated in the FSEIR. Therefore, the County’s conclusions regarding erosion, flooding, and runoff impacts are not supported by substantial evidence in the record, in violation of CEQA.**

#### **IV. THE PROJECT MUST NOT BEGIN CONSTRUCTION UNTIL ALL APPLICABLE PERMITS ARE ISSUED**

**Previous public and agency comments on the Project call into question the Applicant’s ability to begin construction in 2015 and to meet the Project objective of qualifying for the Investment Tax Credit by 2016. The Applicant, as acknowledged in the DSEIR and FSEIR, is in the process of applying for various required permits for the Project, including state and federal Incidental Take Permits (“ITP”), a Clean Water Act Section (“CWA”) 401 Water Quality Certification from the Regional Water Quality Control Board, a CWA section 404 permit from the U.S. Army Corps of Engineers (“Corps”) and related Endangered Species Act (“ESA”) Section 7 Consultation, as well as a Lake and Streambed Alteration Agreement from CDFW.**

The federal agencies must also prepare an Environmental Impact Statement pursuant to the National Environmental Policy Act (NEPA). These processes are lengthy and complex, and the Applicant is not even close to receiving all the permits and approvals it needs to move forward with construction.

The County responded in the FSEIR, stating that “[t]he Revised Project is on track to begin construction in mid-2015 and receive the ITC” and that “[r]egulatory permit approvals are in process.”<sup>107</sup> The statement that the Project is on track for construction within the next few months is deeply concerning for two reasons.

First, the statement is misleading particularly given the timeline provided by the County, which lists the dates on which the Applicant submitted various permit applications. The permit applications were submitted all within the last year and most were within the last 5 months.<sup>108</sup> Most of the major state and federal permits and approvals for the Project involve lengthy public review and comment periods, and can take months, if not years, to secure. The County also states that “[t]he EIS is currently in Administrative Draft form and is expected to be issued for public

<sup>107</sup> Id., at 19.

<sup>108</sup> FQEIR, p. RTC 3-65.

<sup>108</sup> Id.

<sup>23</sup> 3-015ch ,

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review in March 2015.”<sup>9</sup> However, the Corps published a notice of intent to prepare a draft Environmental Impact Statement (“EIS”) under NEPA on July 19, 2012, and to date has not issued the EIS. Neither the County nor the Applicant has provided any evidence that any of the permits are close to being issued, other than the statement that “the Applicant is actively engaged with the various regulatory agencies to facilitate prompt processing of the various permits, and is confident that the project will be in operation by the end of December 2016.”<sup>110</sup> In fact, evidence cited below shows otherwise.

There is substantial evidence that the Applicant will have difficulty securing at least two of the permits. The CDFW has stated that “the Project would impact species listed under the California Endangered Species Act”<sup>111</sup> and has urged the County and Applicant, during both the previous 2010 EIR process and the SEIR process, to adjust buffer areas for the blunt nosed leopard lizard (“BNLL”). The BNLL is fully protected and the CDFW cannot issue an ITP<sup>1</sup> for the species, but the Applicant seeks an ITP for other species on the Project site. The CDFW has stated directly that the SEIR’s “52-acre BNLL avoidance buffer is not sufficient to ensure that take will be avoided”<sup>112</sup> and that a minimum 395-acre buffer is necessary to reduce impacts to the BNLL.<sup>113</sup> Furthermore, CDFW stated in comments to the County that the buffer requirements are “ambiguous and therefore ineffective at avoiding and minimizing impacts to BNLL” and not adequate “for ensuring take avoidance.”<sup>114</sup> However, the County and Applicant have repeatedly ignored CDFW’s comments regarding BNLL buffers. Regardless of what the court found in the appellate case related to this Project<sup>115</sup> (which the County cites to repeatedly), CDFW has authority over state protected species and the court’s analysis regarding appropriate buffers is not applicable to CDFW policies. It is unlikely that the CDFW would issue an ITP for other species until the Applicant demonstrates compliance with the state’s no-take law covering the BNLL. The CDFW’s comments therefore call into question the Applicant’s ability to secure a state ITP.



**109 Id.**

110 Id.,

**111 CDFW Panoche DSEIR Letter, Feb 2 2015.**

**112 Id\_**

**119 Id.; CDFW Panache FEIR Letter, July 8, 2010.**

**114 ODFW Panache DSEIR Letter, Feb 2 2015.**

**“5 Save Panache Valley 0. County of San Benito (2013) 217 Oa1.App.4th 503.**

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