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September 6, 2016

**Via Email and Overnight Mail**

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AICP, Contract Planner  
Community Development Department  
City of American Canyon  
4381 Broadway, Suite 201  
American Canyon, CA 94503  
**Email:** [JWilbanks@cityofamericancanyon.org](mailto:JWilbanks@cityofamericancanyon.org)

**Re: Comments on the Draft Environmental Impact Report for the  
Watson Ranch Specific Plan Project (SCH# 2015022030)**

Dear Mr. Wilbanks:

On behalf of American Canyon Residents for Responsible Development, we submit these comments on the Draft Environmental Impact Report ("DEIR") prepared by the City of American Canyon ("City") for the Watson Ranch Specific Plan Project ("Project").

The Project involves phased development of: (1) a series of residential neighborhoods of mixed densities and housing types with a total of approximately 1,253 new units; (2) a mixed-use commercial area consisting of civic, retail, entertainment, commercial, visitor serving and residential uses focused around the ruins; and a 200 room hotel; (3) a network of open space, parks, and bicycle and pedestrian corridors and trails linking the uses on the site and connecting to regional trails; (4) a new elementary school; (5) infrastructure to support the development, including new streets and roadways, connections to Rolling Hills Drive, Summerwood Drive, and Watson lane, a potable water system, wastewater system, recycled water system, storm drainage system, and dry utilities; (6) offsite transportation improvements, including extension of Rio Del Mar, construction of a below-grade railroad crossing along Rio Del Mar, extension of Newell Drive to the south, and (7) offsite utilities infrastructure improvements, including installation of

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two new water tanks and new or upsized water, recycled water, sewer, and storm drain lines to serve the Project.<sup>1</sup> The agricultural buildings and two existing ranch houses would be demolished, while the DEIR indicates that existing cement/basalt plant ruins would be rehabilitated and reused.<sup>2</sup>

As these comments will demonstrate, the DEIR fails to comply with the requirements of CEQA and may not be used as the basis for approving the Project. It fails in significant aspects to perform its function as an informational document that is meant “to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment” and “to list ways in which the significant effects of such a project might be minimized.”<sup>3</sup>

Substantial evidence indicates that the Project is likely to cause significant adverse impacts. The DEIR is legally defective due to its failure to adequately identify, evaluate and mitigate these potentially significant impacts. The errors and deficiencies of the DEIR include the following:

- Failure to adequately describe the baseline with regard to biological resources and jurisdictional waters;
- Failure to adequately disclose, analyze, and mitigate significant air quality impacts;
- Failure to adequately disclose, analyze, and mitigate significant health risks;
- Failure to adequately mitigate significant impacts from greenhouse gas emissions;
- Failure to adequately disclose, analyze, and mitigate significant impacts from hazardous materials; and
- Failure to adequately disclose, analyze, and mitigate significant impacts to biological resources.

The DEIR must be withdrawn and revised to address these errors and deficiencies. Because of the substantial omissions in the information disclosed in the DEIR, revisions necessary to comply with CEQA will be, by definition,

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<sup>1</sup> Draft Environmental Impact Report for the Watson Ranch Specific Plan Project (hereinafter “DEIR”), p. 2-1 – 2-3.

<sup>2</sup> *Id.*, at 3-1 – 3-15.

<sup>3</sup> *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391.

significant. In addition, substantial revision will be required to address impacts that were not disclosed in the DEIR. Because these revisions are significant, the revised DEIR will need to be recirculated for additional public comment.

We prepared our comments regarding the DEIR analyses with the assistance of air quality and hazards experts Mr. Matthew Hagemann and Ms. Jessie Jaeger of SWAPE<sup>4</sup> and biological resources expert Scott Cashen.<sup>5</sup> Their comments are attached to this letter along with each expert's curriculum vitae. The City must respond to these expert comments separately and individually.

## I. INTEREST OF COMMENTERS

American Canyon Residents for Responsible Development (“American Canyon Residents”) is an unincorporated association of individuals and labor unions that may be adversely affected by the potential public and worker health and safety hazards, and environmental and public service impacts of the Project. The association includes local residents Joel Hernandez, Pamela Lewis and James Aken, International Brotherhood of Electrical Workers Local 180, Plumbers & Steamfitters Local 343, and Sheet Metal Workers Local 104, their members, their families and other individuals that live and/or work in the City of American Canyon and Napa County.

Individual members of American Canyon Residents and the affiliated unions live, work, recreate and raise their families in the City of American Canyon and Napa County. They would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist onsite. American Canyon Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there.

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<sup>4</sup> See Letter from SWAPE to Laura Horton re: Comments on the Watson Ranch Specific Plan Project, August 15, 2016 (hereinafter, “SWAPE Comments”), **Attachment A**.

<sup>5</sup> See Letter from Scott Cashen to Laura Horton re: Comments on the Draft Environmental Impact Report Prepared for the Watson Ranch Specific Plan Project, August 30, 2016 (hereinafter, “Cashen Comments”), **Attachment B**.

## II. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE ENVIRONMENTAL BASELINE

The DEIR must demonstrate a good faith effort at full disclosure.<sup>6</sup> Under CEQA, an “EIR must demonstrate that the significant environmental impacts of the proposed project were investigated and discussed” and permit project effects “to be considered in the full environmental context.”<sup>7</sup> An EIR must also include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.<sup>8</sup> A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.<sup>9</sup>

Here, the DEIR’s failure to adequately describe the existing setting for biological resources and jurisdictional waters is inconsistent with the fundamental purpose of the environmental review process, which is to determine whether there is a potentially substantial, adverse change compared to the existing setting. CEQA requires that a lead agency include a description of the physical environmental conditions in the vicinity of the Project, as they exist at the time environmental review commences.<sup>10</sup> The Courts have consistently held that the impacts of a project must be measured against the “real conditions on the ground.”<sup>11</sup> The description of the environmental setting constitutes the baseline physical conditions by which a lead agency must measure the significance of a project’s impacts.<sup>12</sup>

The City is under an obligation to describe the existing environmental setting in sufficient detail to enable a proper analysis of project impacts.<sup>13</sup> CEQA Guidelines section 15125 provides, in relevant part, that “[k]nowledge of the

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<sup>6</sup> *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390.

<sup>7</sup> CEQA Guidelines § 15125 subd. (c).

<sup>8</sup> *Association of Irrigated Residents*, 107 Cal.App.4th at 1390.

<sup>9</sup> *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 748.

<sup>10</sup> CEQA Guidelines § 15125, subd. (a); see also *Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 321.

<sup>11</sup> *Save Our Peninsula Com. v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121-22; *City of Carmel-by-the Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 246.

<sup>12</sup> CEQA Guidelines, § 15125, subd. (a).

<sup>13</sup> *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, 1121-22.

regional setting is critical to the assessment of environmental impacts.”<sup>14</sup> This level of detail is necessary to “permit the significant effects of the project to be considered in the full environmental context.”<sup>15</sup> The description of the environmental setting in the DEIR is inadequate because it omits highly relevant information regarding biological resources and jurisdictional waters on the Project site.

## A. Special Status Plants

### 1. *Failure to Conduct Adequate Surveys*

The DEIR concludes that “[n]o special-status plants were determined to have a moderate or high potential to occur on or adjacent to either the study area or OSWA.”<sup>16</sup> However, Mr. Cashen’s analysis demonstrates that the DEIR’s conclusion is unsupported.

The biological consultant for the DEIR, LSA Associates, Inc. (“LSA”), conducted special status plant surveys at the Watson Ranch property on April 10 and October 7, 2013. However, according to Mr. Cashen, these surveys should not be relied upon for several reasons. First, the surveys are outdated and not consistent with California Department of Fish and Wildlife (“CDFW”) protocols. Second, LSA did not visit reference sites to confirm potentially occurring special status plant species were evident and identifiable at the time of the surveys, which is required CDFW guidelines.<sup>17</sup> Third, drought conditions inhibited the emergence of various special status plants, thus Mr. Cashen finds that “[t]he environmental conditions at the time of surveys were not appropriate for detecting many of the special status plant species that could occur on the site.”<sup>18</sup>

Mr. Cashen notes the same problem for the rare plant surveys on the Newell Ranch property, which were conducted in 2014.<sup>19</sup> LSA did not visit reference sites to confirm potentially occurring special status plant species were evident and identifiable at the time of the survey on the Newell Ranch property. In addition, Mr. Cashen states that LSA never conducted a late season survey to determine if

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<sup>14</sup> CEQA Guidelines § 15125, subd. (d).

<sup>15</sup> *Id.*

<sup>16</sup> DEIR, p. 4.3-39.

<sup>17</sup> Cashen Comments, p. 2.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*, at 3.

the species were present.<sup>20</sup> Mr. Cashen's analysis concludes that many of the special status plant species that have the potential to occur on the site are associated with valley and foothill grassland, which does in fact occur on the site.<sup>21</sup>

Moreover, Mr. Cashen notes that the DEIR concluded 19 special status plant species have the potential to occur in the offsite water improvement area ("OSWA") based on the presence of suitable habitat and the geographic range of known occurrences.<sup>22</sup> The Newell Ranch property has the same habitats, and is in the same geographic range, as the OSWA.<sup>23</sup> Therefore, "if 19 special status plant species have the potential to occur on the OSWA, those 19 species also have the potential to occur on the Newell Ranch property," which is part of the Project area.<sup>24</sup>

Mr. Cashen provides a detailed explanation of the City's failure to adhere to CDFW Protocols for conducting special status plant surveys.<sup>25</sup> In addition, Mr. Cashen demonstrates that the DEIR's conclusions regarding the absence of certain species are unsupported because "the rare plant surveys conducted for the Project were insufficient to infer absence."<sup>26</sup> Mr. Cashen thus concludes that the special status plant surveys "cannot serve as the foundation for the City's impact analyses and proposed mitigation."<sup>27</sup> Furthermore, the City completely failed to conduct botanical surveys at the seven offsite areas that would be affected by implementation of the Project.<sup>28</sup> Therefore, the DEIR fails to disclose an accurate baseline for special status plants in affected areas both on and off the Project site.

## **B. Sensitive Natural Communities**

The DEIR states:

Reconnaissance-level botanical surveys in the OSWA have not identified sensitive natural communities. Focused botanical surveys in spring 2016 will

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<sup>20</sup> DEIR, Appendix C.4, p. 6.

<sup>21</sup> DEIR, Table 4.3-1.

<sup>22</sup> DEIR, p. 4.3-40.

<sup>23</sup> *Id.*, at p. 4.3-5.

<sup>24</sup> Cashen Comments, p. 3.

<sup>25</sup> *Id.*, at 4 – 5.

<sup>26</sup> *Id.*, at 6.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*, at 3.

confirm the earlier findings that sensitive natural communities do not occur in the OSWA. No impacts are anticipated on sensitive natural communities in the OSWA.<sup>29</sup>

However, according to Mr. Cashen, this statement is incorrect.<sup>30</sup> LSA's survey report states that "[t]here are areas near the Zone 1 water tank location that support a dense stand of the native purple needlegrass (*Stipa pulchra*)."<sup>31</sup> Mr. Cashen notes that purple needle grass grassland alliance is considered a sensitive vegetation community by the CDFW and it is "very rare" in Napa County.<sup>32</sup> Thus, the presence of this native vegetation community is evidence that: "(a) rare plants could be present, and (b) previous survey efforts have been insufficient to document sensitive botanical resources within the OSWA."<sup>33</sup> Therefore, the DEIR fails to disclose an accurate baseline for sensitive natural communities in affected areas.

### **C. Western Pond Turtle**

Mr. Cashen finds that the DEIR provides "inconsistent information" on the presence of the western pond turtle at the Project site.<sup>34</sup> According to the California Red-legged Frog Site Assessment prepared by LSA,<sup>35</sup> biologists detected an adult pond turtle at the quarry pond while searching for red-legged frogs.<sup>36</sup> However, the DEIR fails to disclose presence of the species within the Project area, and therefore fails to disclose an accurate baseline for western pond turtle on the Project site.

### **D. Golden Eagle**

Golden eagles are protected under the federal Bald and Golden Eagle Protection Act ("Eagle Act"), which prohibits "take" of a bald or golden eagle unless a permit is first acquired from the FWS, as explained by Mr. Cashen. The FWS thus recommends inventories for golden eagles if nesting, roosting, and foraging habitat are contained within the project boundary and exist within 10 miles of the

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<sup>29</sup> DEIR p. 4.3-53.

<sup>30</sup> Cashen Comments, p. 6.

<sup>31</sup> *Id.*; DEIR, Appendix C.8, p. 3.

<sup>32</sup> Cashen Comments, p. 6.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*, at 7.

<sup>35</sup> *See* DEIR, Appendix C.3

<sup>36</sup> DEIR, Appendix C.3, p. 5.

project boundary.<sup>37</sup> The FWS further recommends “due diligence” surveys to locate potential nest sites within two miles of a proposed construction activity.<sup>38</sup> Mr. Cashen notes that LSA’s surveys were not designed to inventory golden eagle territories and nest sites even though the Project site contains large trees that provide suitable nest sites for golden eagles.<sup>39</sup> According to the DEIR, “eagle nesting has not been observed in these trees during repeated surveys.”<sup>40</sup> However, Mr. Cashen finds that the DEIR “fails to provide information about these ‘repeated surveys.’”<sup>41</sup>

Indeed, the DEIR provides no evidence that golden eagle surveys adhering to FWS protocols have ever been conducted at the Project site and within the surrounding region, according to Mr. Cashen.<sup>42</sup> The failure to conduct focused surveys for golden eagles in the Project area precludes a thorough understanding of existing conditions, and consequently, the potential for the Project to cause “take” of the species. Therefore, Mr. Cashen concludes that the DEIR fails to provide substantial evidence to support its conclusion that impacts to the golden eagle would be less than significant.<sup>43</sup>

### **E. Swainson’s Hawk**

The Swainson’s hawk is a state listed threatened species and has experienced a dramatic population decline due in part to loss of foraging habitat.<sup>44</sup> Mr. Cashen finds that the conditions for foraging habitat, which includes scattered trees and riparian systems adjacent to agricultural fields or pastures, are present in the Project area.<sup>45</sup>

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<sup>37</sup> Pagel JE, DM Whittington, GT Allen. 2010 Feb. Interim Golden Eagle inventory and monitoring protocols; and other recommendations. Division of Migratory Birds, United States Fish and Wildlife Service. p. 11.

<sup>38</sup> Cashen Comments, p. 7.

<sup>39</sup> *Id.*; DEIR, p. 4.3-28.

<sup>40</sup> *Id.*

<sup>41</sup> Cashen Comments, p. 7.

<sup>42</sup> *Id.*, at 8.

<sup>43</sup> *Id.*

<sup>44</sup> California Department of Fish and Game. 1994. Staff report regarding mitigation for impacts to Swainson’s hawks (*Buteo swainsoni*) in the Central Valley of California [internet]. Available at [http://www.madera-county.com/rma/archives/uploads/1188143775\\_Document\\_upload\\_23w.pdf](http://www.madera-county.com/rma/archives/uploads/1188143775_Document_upload_23w.pdf).

<sup>45</sup> Cashen Comments, p. 8.



Mr. Cashen further notes that CDFW protocol surveys for Swainson's hawk nest sites within a 0.5-mile radius of the Project site have not been conducted.<sup>46</sup> In addition, the DEIR fails to provide information on *all* active, previously documented nest sites within 10 miles of the Project site. Therefore, Mr. Cashen concludes that the DEIR fails to provide substantial evidence to support its conclusion that impacts to the Swainson's hawk would be less than significant.<sup>47</sup>

### **F. Short-Eared Owl**

The DEIR indicates nesting habitat for the short-eared owl occurs throughout the Project study area.<sup>48</sup> However, Mr. Cashen notes that the short-eared owl is not listed in DEIR Table 4.3-1 (*Special-Status Species Potentially Occurring in the Project Area*) or any of the biological resource reports attached to the DEIR.<sup>49</sup>

The DEIR's discussion of species that could occur in the OSWA states: "[t]he OSWA grasslands could potentially support ground nesting raptors, including northern harrier, burrowing owl and short-eared owl. Both the northern harrier and burrowing owl are considered California species of special concern..."<sup>50</sup> However, the DEIR neglects to mention that the short-eared owl is a California Species of Special Concern.<sup>51</sup> Therefore, the DEIR has failed to disclose all necessary information regarding the short-eared owl's status and presence on and around the Project site.

### **G. California Red-Legged Frog**

LSA conducted surveys for the California red-legged frog at the Watson Ranch property in 2013.<sup>52</sup> Mr. Cashen concludes that the results of those surveys are now outdated according to FWS survey protocol, and thus, "cannot be used as the basis for the City's impact assessment and proposed mitigation measures."<sup>53</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> DEIR, p. 4.3-45.

<sup>49</sup> Cashen Comments, p. 9.

<sup>50</sup> DEIR, p. 4.3-46.

<sup>51</sup> California Department of Fish and Wildlife. 2016 July. Special Animals List. Available at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=109406>.

<sup>52</sup> DEIR, Appendix C.3, p. 3.

<sup>53</sup> Cashen Comments, p. 9.

Furthermore, Mr. Cashen explains that the DEIR incorrectly states that breeding habitat is not present within the study area, when in fact features in the study area, such as the quarry pond, meet the FWS definition of the frog's breeding habitat.<sup>54</sup> Therefore, Mr. Cashen concludes that the DEIR fails to provide substantial evidence to support its conclusions pertaining to the California red-legged frog.

### **H. Vernal Pool Fairy Shrimp**

The DEIR concludes that the federally threatened vernal pool fairy shrimp is *absent* from the Project site.<sup>55</sup> The DEIR's rationale is that the species is "[k]nown only from one location in Napa County at the airport, outside the study area. Next nearest occurrence is in Solano County."<sup>56</sup> However, Mr. Cashen explains that this rationale "cannot be used to eliminate the potential that the vernal pool fairy shrimp occurs on the Project site."<sup>57</sup>

The vernal pool fairy shrimp occupies a variety of different vernal pool and vernal pool-like habitats, including what can be considered degraded or otherwise poor quality habitats.<sup>58</sup> The Project site contains multiple seasonal wetlands and ditches that provide potentially suitable habitat for the vernal pool fairy shrimp, according to Mr. Cashen.<sup>59</sup> Therefore, the species cannot be excluded on the basis of habitat. Furthermore, Mr. Cashen notes that the potential for the vernal pool fairy shrimp to occur at the Project site also cannot be eliminated due to soil conditions. Indeed, one of the ways that vernal pool fairy shrimp disperse is through the movement of birds and other animals, which Mr. Cashen notes could easily happen here between the known occurrence of the species and the Project site.<sup>60</sup>

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<sup>54</sup> *Id.*, at 9 – 10.

<sup>55</sup> DEIR, 4.3-10.

<sup>56</sup> DEIR, Table 4.3-1.

<sup>57</sup> Cashen Comments, p. 10.

<sup>58</sup> *Id.*

<sup>59</sup> DEIR, Figure 4.3-2.

<sup>60</sup> Cashen Comments, p. 10; U.S. Fish and Wildlife Service. 2007. Vernal Pool Fairy Shrimp (*Branchinecta lynchi*), Five-Year Review: Summary and Evaluation. p. 4.

The City failed to conduct the protocol-level surveys needed to determine the presence of vernal pool fairy shrimp on the Project site.<sup>61</sup> Until protocol-level surveys have been conducted, Mr. Cashen concludes that “direct and indirect effects to the site’s seasonal wetlands and ditches represent an unexamined, potentially significant impact to the vernal pool fairy shrimp.”<sup>62</sup>

### **I. Pallid Bat Roosts**

The DEIR indicates roosting and breeding habitat for the pallid bat does not occur within the Project study area “due to the absence of rocky areas.”<sup>63</sup> However, according to Mr. Cashen, the pallid bat is not limited to rocky areas. Indeed, the Project site contains trees and various human structures that could serve as roost sites for the pallid bat. As a result, Mr. Cashen concludes that the DEIR fails to establish a scientific basis for eliminating the potential for pallid bat roosts to occur at the Project site.<sup>64</sup>

### **J. Jurisdictional Waters**

LSA completed preliminary wetland delineations for the Watson Ranch and Newell Ranch properties in April 2015, which have not yet been verified by the U.S. Army Corps of Engineers. As the DEIR acknowledges, the wetland delineation for the OSWA has expired.<sup>65</sup> The DEIR provides no information on the status of jurisdictional waters within the other offsite areas that would be affected by construction and implementation of the Project.<sup>66</sup> Mr. Cashen concludes that this precludes a complete understanding of existing conditions, Project impacts, and the adequacy of the City’s proposed mitigation.<sup>67</sup>

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<sup>61</sup> United States Fish and Wildlife Service. 1996. Interim survey guidelines to permittees for recovery permits under Section 10(a)(1)(A) of the Endangered Species Act for the listed vernal pool Branchiopods [internet]. Sacramento (CA): United States Fish and Wildlife Service, Sacramento Fish and Wildlife Office. Available at [http://www.fws.gov/sacramento/es/Survey-Protocols-Guidelines/Documents/Interim\\_VP\\_Survey\\_Guidelines\\_to\\_Permittees\\_4-96.pdf](http://www.fws.gov/sacramento/es/Survey-Protocols-Guidelines/Documents/Interim_VP_Survey_Guidelines_to_Permittees_4-96.pdf).

<sup>62</sup> Cashen Comments, p. 11.

<sup>63</sup> DEIR, Table 4.3-1.

<sup>64</sup> Cashen Comments, p. 11 – 12.

<sup>65</sup> DEIR, p. 4.3-8.

<sup>66</sup> See DEIR, Figure 3-4.

<sup>67</sup> Cashen Comments, p. 12.

### III. THE CITY LACKS SUBSTANTIAL EVIDENCE TO SUPPORT ITS CONCLUSIONS IN THE DEIR REGARDING THE PROJECT'S SIGNIFICANT IMPACTS AND FAILS TO INCORPORATE ALL FEASIBLE MITIGATION

CEQA has two basic purposes. First, CEQA is designed to inform decisionmakers and the public about the potential, significant environmental effects of a project.<sup>68</sup> Except in certain limited circumstances, CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report (“EIR”).<sup>69</sup> An EIR’s purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, an EIR “protects not only the environment but also informed self-government.”<sup>70</sup>

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”<sup>71</sup> CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.<sup>72</sup> In addition, an adequate EIR must contain the facts and analysis necessary to support its conclusions.<sup>73</sup>

The second purpose of CEQA is to require public agencies to avoid or reduce environmental damage when possible by requiring appropriate mitigation measures and through the consideration of environmentally superior alternatives.<sup>74</sup> If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.<sup>75</sup> CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible

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<sup>68</sup> CEQA Guidelines, 14 Cal. Code Regs. § 15002(a)(1).

<sup>69</sup> See, e.g., Pub. Resources Code § 21100.

<sup>70</sup> *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

<sup>71</sup> CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

<sup>72</sup> Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

<sup>73</sup> See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

<sup>74</sup> CEQA Guidelines § 15002(a)(2)-(3); see also, *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, 400.

<sup>75</sup> Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

project alternatives or mitigation measures.<sup>76</sup> Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Furthermore, under CEQA, it is improper to defer the formulation of mitigation measures.<sup>77</sup> Courts have 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>78</sup> Deferral is impermissible where an agency "simply requires a project applicant to obtain a ... report and then comply with any recommendations that may be made in the report."<sup>79</sup> Second, a public agency may not rely on mitigation measures of uncertain efficacy or feasibility.<sup>80</sup> Third, "[m]itigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments."<sup>81</sup> Fourth, mitigation measures that are vague or so undefined that it is impossible to evaluate their effectiveness are legally inadequate.<sup>82</sup>

As discussed in detail below, the DEIR fails to meet either of these two key goals of CEQA. The DEIR fails to disclose and evaluate all potentially significant environmental impacts of the Project. In addition, it proposes mitigation measures that are inadequate, unenforceable, deferred, or so undefined that it is impossible to evaluate their effectiveness. Therefore, the City must revise and recirculate a new DEIR to adequately address these deficiencies.

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<sup>76</sup> Pub. Resources Code §§ 21002-21002.1.

<sup>77</sup> CEQA Guidelines § 15126.4(a)(1)(B);

<sup>78</sup> *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-94; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

<sup>79</sup> *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

<sup>80</sup> *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>81</sup> CEQA Guidelines § 15126.4(a)(2).

<sup>82</sup> *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 79.

## **A. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Air Quality Impacts**

### *1. Failure to Disclose Significant NOx Impact*

SWAPE explains that the DEIR relies on the California Emissions Estimator Model Version CalEEMod.2013.2.2 (“CalEEMod”) to estimate emissions generated by the Project during construction.<sup>83</sup> The Project’s construction-related emissions are summarized in the “Criteria Pollutant CalEEMod Summary Tables” in Appendix B of the DEIR.<sup>84</sup> SWAPE’s review of this summary table demonstrates that the DEIR “relied upon an incorrect construction schedule and duration to convert the Project’s annual construction emissions to an average daily rate.”<sup>85</sup> As a result, SWAPE concludes that the Project’s average daily construction-related emissions are artificially reduced and the DEIR “fails to disclose a significant NOx impact,”<sup>86</sup> as explained in detail in their comments.

SWAPE prepared an updated analysis to determine what the Project’s average daily construction emissions would be when *correct* values are used.<sup>87</sup> SWAPE used the total number of work days for all individual phases as well as for the total construction duration, which is a accurate averaging period and will result in a more conservative analysis, as required under CEQA. SWAPE also utilized the correct construction schedule in an effort to remain consistent with the schedule used within the CalEEMod model as well as information provided in the DEIR.

SWAPE’s updated analysis demonstrates that when the Project’s construction emissions are correctly averaged, the Project’s unmitigated average daily NO<sub>x</sub> emissions from construction will be 70.2 pounds per day, well in exceedance of the BAAQMD threshold of 54 pounds per day.<sup>88</sup> Furthermore, even the mitigated average daily NO<sub>x</sub> emissions from construction, which include mitigation from Tier 3 engines, still exceed the BAAQMD threshold at 57.1 pounds per day.<sup>89</sup>

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<sup>83</sup> CalEEMod website, available at: <http://www.caleemod.com/>

<sup>84</sup> DEIR, Appendix B, p. 15.

<sup>85</sup> SWAPE Comments, p. 3.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*, at 5.

<sup>88</sup> *Id.*, at 6.

<sup>89</sup> *Id.*

Therefore, SWAPE's analysis demonstrates that when analyzed correctly, "the Project's construction emissions, both mitigated and unmitigated, would result in a significant impact."<sup>90</sup> As a result, SWAPE concludes that a revised and recirculated DEIR should be prepared to include an air quality analysis that uses the correct averaging period and construction schedule to determine the significance of the Project's construction emissions, and should include additional mitigation measures to reduce the significant NO<sub>x</sub> impact.

## *2. Mitigation Measures to Reduce NO<sub>x</sub> Emissions*

SWAPE's analysis demonstrates that when annual emissions are averaged correctly, construction-related NO<sub>x</sub> emissions would result in a significant impact. Therefore, additional mitigation measures must be identified and incorporated in a revised DEIR to reduce these emissions to a less than significant level.

Potential mitigation measures can be found in CAPCOA's *Quantifying Greenhouse Gas Mitigation Measures*, which attempt to reduce Greenhouse Gas (GHG) levels, as well as reduce criteria air pollutants such as NO<sub>x</sub>.<sup>91</sup> SWAPE notes that NO<sub>x</sub> is a byproduct of fuel combustion, and is emitted by on-road vehicles and by off-road construction equipment. In order to reduce NO<sub>x</sub> construction emissions to below BAAQMD thresholds, the City should consider as mitigation the following measures, which SWAPE provides further details on in their letter:<sup>92</sup>

- Limit Construction Equipment Idling Beyond Regulation Requirements
- Require Implementation of Diesel Control Measures
- Repower or Replace Older Construction Equipment Engines
- Install Retrofit Devices on Existing Construction Equipment
- Use Electric and Hybrid Construction Equipment
- Institute a Heavy-Duty Off-Road Vehicle Plan
- Implement a Construction Vehicle Inventory Tracking System
- "Enhanced Exhaust Control Practices" recommended by the Sacramento Metropolitan Air Quality Management District

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<sup>90</sup> *Id.*

<sup>91</sup> <http://www.capcoa.org/wp-content/uploads/2010/11/CAPCOA-Quantification-Report-9-14-Final.pdf>

<sup>92</sup> SWAPE Comments, p. 6 – 12.

### *3. Failure to Implement All Feasible Operational Mitigation Measures*

The DEIR concludes that long-term operational emissions will exceed the BAAQMD's daily and annual thresholds for ROG (also referred to as VOC) and NO<sub>x</sub>, and incorporates Mitigation Measure 4.2-2, which requires the development of a Transportation Demand Management ("TDM") Program to reduce operational criteria air pollutants.<sup>93</sup> The DEIR then concludes that impacts from operational criteria air pollutant emissions, mostly due to mobile sources, would be "significant and unavoidable."<sup>94</sup>

However, SWAPE finds that the DEIR's conclusion is "incorrect," as the primary source of operational ROG emissions comes from area sources, such as architectural coating activities, not mobile sources, as is suggested by the DEIR.<sup>95</sup> An impact can only be deemed as significant and unavoidable after all available and feasible mitigation measures have been incorporated, and since Mitigation Measure 4.2-2 reduces emissions from mobile sources, which is not a primary source of ROG, additional mitigation should be implemented. Therefore, SWAPE concludes that the determination that this impact is significant and unavoidable is incorrect, as there are many additional, commonly used measures available to further reduce the Project's operational ROG emissions from area sources.<sup>96</sup>

A revised and recirculated DEIR should be prepared to incorporate all feasible mitigation measures, including, but not limited to, the measures listed below.<sup>97</sup>

- *Use of Zero-VOC Emissions Paint*
- *Use of Material that do Not Require Paint*
- *Use of Spray Equipment with Greater Transfer Efficiencies*

When combined together, SWAPE concludes that these measures could feasibly and effectively reduce the Project's operation-related ROG emissions to a less than significant level.<sup>98</sup> As such, these mitigation measures should be

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<sup>93</sup> DEIR, p. 4.3-31.

<sup>94</sup> DEIR, p. 4.2-32

<sup>95</sup> DEIR Appendix B, pp. 39, 101, 159, 213.

<sup>96</sup> SWAPE Comments, p. 13.

<sup>97</sup> *Id.*, at 13 – 14.

<sup>98</sup> *Id.*



considered in a revised DEIR to reduce these emissions to a less than significant level.

### **B. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Health Risks**

A health risk assessment (“HRA”) was conducted for the Project using AERSCREEN to determine the construction health risk posed by diesel particulate matter (“DPM”) emissions at existing sensitive receptors.<sup>99</sup> The DEIR concludes that the health risk at the nearest sensitive receptor is 1.02 per million, which is below the BAAQMD threshold of 10 in one million. As a result, the DEIR concludes that the Project would have a less than significant health risk impact.<sup>100</sup>

However, SWAPE’s review of the AERSCREEN model demonstrates that the emission rate utilized in the HRA is incorrect. As a result, the Project’s health risk impacts are underestimated and the DEIR fails to disclose and mitigate the Project’s significant health risks.

SWAPE conducted a simple analysis to demonstrate what the emission rate would be when the correct units are used.<sup>101</sup> Assuming a DPM concentration of 2.30 lbs/day and ten hours of operation per day, consistent with the DEIR, SWAPE calculated the correct DPM emission rate and found that the actual DPM emission rate is over six orders of magnitude greater than the emission rate used in the DEIR.<sup>102</sup> Therefore, SWAPE concludes that “it is abundantly clear that the use of an incorrect emission rate significantly underestimates the construction health risk estimated in the DEIR.”

In light of the deficient HRA, SWAPE prepared an updated screening level HRA using the correct DPM emission rate.<sup>103</sup> SWAPE ran an updated AERSCREEN model but, with the exception the emission rate, all of the AERSCREEN input parameters reflect the parameters used by the DEIR. SWAPE

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<sup>99</sup> *Id.*, at 14.

<sup>100</sup> DEIR, p. 4.2-36.

<sup>101</sup> SWAPE Comments, p. 14 – 15.

<sup>102</sup> *Id.*, at 15.

<sup>103</sup> *Id.*

estimated the excess cancer risk for adults, children, infants, and 3rd trimester fetuses.<sup>104</sup>

SWAPE's revised HRA demonstrates that the excess cancer risk to adults, children, infants, and third trimester fetuses during Project construction for the sensitive receptors located 75 meters away are 0, 20.4, 42.4, and 0.54 in one million, respectively. Furthermore, the lifetime cancer risk from Project construction is estimated to be 63.34 in one million. Consistent with OEHHA guidance and with the DEIR, exposure was assumed to begin in the infantile stage of life to provide the most conservative estimates of air quality hazards.

SWAPE concludes that the child, infantile, and lifetime exposure for the sensitive receptors will all exceed the BAAQMD threshold of 10 in one million when the correct emission rate is used, thus presenting a significant health risk impact.<sup>105</sup> As a result, a refined health risk assessment must be prepared and included in a revised and recirculated DEIR to examine air quality impacts generated by Project construction using site-specific meteorology and specific equipment usage schedules. The mitigation measures recommended in the previous section to reduce the Project's construction NO<sub>x</sub> emissions would also effectively reduce the Project's diesel exhaust emissions. Therefore, those measures should also be considered in a revised and recirculated DEIR in order to reduce the Project's health risk impact during construction to a less than significant level.

### **C. The DEIR Fails to Adequately Mitigate Significant Impacts from Greenhouse Gas Emissions**

The DEIR states that the proposed Project's greenhouse gas ("GHG") emissions are significant and unavoidable.<sup>106</sup> However, an impact can only be deemed as significant and unavoidable after all available and feasible mitigation measures have been incorporated. Therefore, SWAPE concludes that the determination that this impact is significant and unavoidable is incorrect, as there are many additional, commonly used measures available to further reduce the Project's operational GHG emissions.<sup>107</sup>

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<sup>104</sup> DEIR Appendix B, pp. 20.

<sup>105</sup> SWAPE Comments, p. 16.

<sup>106</sup> DEIR, p. 4.2-44.

<sup>107</sup> SWAPE Comments, p. 16.

In their discussion regarding criteria pollutants, SWAPE identified several additional mitigation measures that the DEIR failed to incorporate, which would also further reduce the Project's operational GHG emissions, potentially to a less-than-significant level. Additional mitigation measures that could be implemented to reduce GHG emissions include:<sup>108</sup>

- Install Programmable Thermostat Timers
- Obtain Third-party HVAC Commissioning and Verification of Energy Savings
- Install Higher Efficacy Public Street and Area Lighting
- Limit Outdoor Lighting Requirements
- Establish Onsite Renewable Energy Systems- Solar Power
- Use Reclaimed Water/Gray Water
- Institute or Extend Recycling and Composting Services
- Additional measures from the California Attorney General's Office

SWAPE provides more detailed descriptions of these measures in its letter. These measures are more stringent and prescriptive than those measures identified in the DEIR. When combined together, these measures offer a feasible way to incorporate lower-emitting design features into the proposed Project, which subsequently, reduces operational GHG. SWAPE concludes that a revised and recirculated DEIR must be prepared to include additional mitigation measures and an updated GHG analysis to ensure that the necessary mitigation measures are implemented to reduce operational emissions to below thresholds.<sup>109</sup>

#### **D. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Impacts from Hazardous Materials**

The Project's Phase I Environmental Site Assessment ("ESA"), which was prepared to support the DEIR, identified a number of areas of potential soil contamination. The Phase I recommended sampling to determine the extent of contamination, including:<sup>110</sup>

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<sup>108</sup> *Id.*, at 16 – 18.

<sup>109</sup> SWAPE Comments, p. 1.

<sup>110</sup> Phase I ESA, p. 24

- Sampling a former underground storage tank in the area known as the Jaeger Property, identified as a recognized environmental condition in the Phase I;
- Removal of several above-ground storage tanks and subsequent sampling;
- Sampling areas of stained soil in the northeast part of the Project area and in an area adjacent to a PG&E gas pipeline;
- Sampling for lead paint in areas where buildings currently exist or formerly existed; and
- Sampling for agricultural chemicals in an area where a vineyard was located.

However, SWAPE notes that the DEIR is mute on these Phase I recommendations and fails to include any sampling results for these areas.<sup>111</sup> Instead, the DEIR defers sampling until the time soil is excavated for project construction and only if contamination is seen or smelled during earthmoving activities (Mitigation Measure 4.6-2a and Mitigation Measure 4.6-2b).<sup>112</sup> SWAPE concludes that because contaminants often cannot be seen or smelled, “construction workers would be at risk when they come into contact with contaminated soils, through touch or when inhaling dust or vapors. . . Future residents would also be put at risk because of undetected contamination.”<sup>113</sup> The DEIR fails to disclose or mitigate this risk.

The Phase I also recommended further evaluation of the following:

- Additional risk evaluations if development is planned overlying a former 140,000-gallon bunker fuel UST location;
- Evaluation of soil stockpiles on the Ghilotti property, adjacent to a greenhouse, near the brick ruins, and in a round barn, along with the evaluation of a partially buried soil-filled drum;
- Documentation of regulatory oversight and approval for the reported removal of a 1000-gallon underground storage tank used for gasoline; and
- Evaluation of two septic systems.

According to SWAPE, the DEIR fails to provide any documentation that further evaluation of these areas was undertaken.<sup>114</sup> SWAPE explains that

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<sup>111</sup> SWAPE Comments, p. 2.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

deferral of sampling until construction, and only then if it is seen or smelled, is not acceptable for a site with known or suspected sources of contamination. Not only would the health of construction workers and future residents be jeopardized, but Project construction may be delayed by discovery of contamination upon commencement of grading and trenching activities.<sup>115</sup> According to SWAPE, the health effects of suspected or potential contaminants include:

- Total petroleum hydrocarbons, as a component of bunker fuel: central nervous system effects and effects on the blood, immune system, lungs, skin, and eyes<sup>116</sup>;
- Benzene, as a component of gasoline: known human carcinogen<sup>117</sup>;
- Pesticides, to include organochlorine pesticides such as DDT and DDE;<sup>118</sup> probable human carcinogens; and
- Lead, as a component of paint: central nervous system effects, brain and kidney damage, miscarriage risks<sup>119</sup>

Removal of “contaminated” soil or groundwater is provided for in Mitigation Measure 4.6-2b, but only if detected by sight or smell. Contaminated soil and groundwater are to be removed “if found to be present,” and if “identified constituents exceed human health risk levels”; however, the DEIR fails to explain what would constitute “contaminated” soil or groundwater under this mitigation measure.<sup>120</sup> Therefore, the DEIR is legally deficient for failing to fully disclose, analyze, and mitigate impacts from site contamination.

SWAPE concludes that sampling should be conducted, as recommended by the Phase I, and the results should be included in a revised and recirculated DEIR.<sup>121</sup> The DEIR should include a comparison of soil and groundwater sample results to the San Francisco Regional Water Quality Control Board’s Environmental Screening Levels for both construction worker and residential exposure scenarios. Further evaluation of the areas identified in the Phase I should also be undertaken for inclusion in a revised DEIR.

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<sup>115</sup> *Id.*

<sup>116</sup> <http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=423&tid=75>

<sup>117</sup> <http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=38&tid=14>

<sup>118</sup> <http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=80&tid=20>

<sup>119</sup> <http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=93&tid=22>

<sup>120</sup> SWAPE Comments, p. 2 – 3.

<sup>121</sup> *Id.*

Groundwater results should also be evaluated, in a revised DEIR, against regulatory requirements for dewatering. SWAPE notes that the provisions made in Mitigation Measure 4.7-2 for handling water generated during dewatering activities are too general and do not compare levels of any groundwater contaminants, obtained through sampling as SWAPE recommends, against requirements in the San Francisco Bay Regional Water Quality Control Board Order No. R2-2012-0060.

### **E. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Impacts to Biological Resources**

#### *1. Failure Analyze Impacts According to the Criteria Established in the DEIR*

The DEIR asserts that the City analyzed “potential Project impacts to biological resources from Project construction and operation and the resulting modification or loss of habitat.”<sup>122</sup> It further states the significance of Project impacts was determined by considering three principal components:

- Magnitude and duration of the impact (e.g., substantial/not substantial)
- Uniqueness of the affected resource (rarity)
- Susceptibility of the affected resource to disturbance.<sup>123</sup>

However, Mr. Cashen explains that these statements are not reflected in the impacts analysis section of the DEIR.<sup>124</sup> For example, the City’s analysis of impacts to migratory birds is limited to the potential for the Project to affect active nests. The DEIR provides no analysis of habitat loss and degradation, and the significance of those impacts to special status bird species that occur (or could occur) in the Project area. Contrary to the DEIR’s claim, it does not analyze the “uniqueness of the affected resource (rarity)” and the “susceptibility of the affected resource to disturbance.” Instead, it simply jumps to the conclusion that avoidance of bird nests during construction would make impacts to all migratory birds less than significant, according to Mr. Cashen.<sup>125</sup>

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<sup>122</sup> DEIR, p. 4.3-37.

<sup>123</sup> DEIR, pp. 4.3-37 and -38.

<sup>124</sup> Cashen Comments, p. 12.

<sup>125</sup> DEIR, p. 4.3-47.

One example of the DEIR's flawed analysis is the tricolored blackbird, an extremely rare species that was recently afforded emergency listing status under the California Endangered Species Act.<sup>126</sup> The DEIR acknowledges the presence of potential nesting habitat for the tricolored blackbird on the Project site.<sup>127</sup> However, it does not quantify the amount of habitat that is present, or how much of that habitat would be directly or indirectly affected by the Project. Similarly, it does not consider the uniqueness of tricolored blackbird nesting habitat, nor does it describe the susceptibility of tricolored blackbird nesting habitat to disturbance. Mr. Cashen notes that if the Project site supports a tricolored blackbird colony, the loss of habitat that supports that colony would be a "severe."<sup>128</sup> Therefore, he concludes that "based on the criteria established in the DEIR, Project impacts to the tricolored blackbird are potentially significant."<sup>129</sup>

Mr. Cashen finds that the DEIR's mitigation of timing construction activities to avoid active nests does not reduce impacts to an insignificant level because it does not mitigate the loss of nesting habitat and the corresponding loss in recruitment.<sup>130</sup> There are many other examples of the DEIR's failure to fully disclose and analyze Project impacts, and consequently, incorporate appropriate mitigation. A revised a recirculated DEIR must be prepared that quantifies impacts to habitat for special status species to allow the public and decision makers to independently evaluate whether the Project would: "[h]ave a substantial adverse effect, either directly or *through habitat modifications*, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Wildlife or the U.S. Fish and Wildlife Service," as stated in the DEIR.<sup>131</sup>

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<sup>126</sup> See [https://www.biologicaldiversity.org/news/press\\_releases/2015/tricolored-blackbird-12-10-2015.html](https://www.biologicaldiversity.org/news/press_releases/2015/tricolored-blackbird-12-10-2015.html).

<sup>127</sup> DEIR, p. 4.3-46.

<sup>128</sup> Cashen Comments, p. 13.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See DEIR, p. 4.3-35.

## *2. Failure to Adequately Analyze Special Status Species on Site*

### *i. Special Status Plants*

The DEIR states:

Development of the Project site could result in the direct loss of special-status plants or loss of habitat within the OSWA for these species, which would be significant. Direct impacts through earth-grading, trenching, staging equipment, foot and vehicle traffic, or other ground disturbing activities within the OSWA footprint could remove or crush individual plants and damage habitat, and dust covering plants as a result of construction could impair photosynthesis and decrease survivorship. Implementation of Mitigation Measures 4.3-1a and 4.3-1b would reduce potential impacts on special-status plants to a less-than-significant level by requiring surveys to identify and protect individual plants or develop suitable compensation for plants taken during site development.

Mr. Cashen explains that Napa County contains “remarkably high” levels of plant diversity as well as high concentrations of special status taxa as compared to other areas within the California Floristic Province, the State of California as a whole, and other regions within global biodiversity hotspots characterized by Mediterranean climates.<sup>132</sup> Nevertheless, the DEIR does not analyze potentially significant impacts to special status plants at the Project site. It simply states:

Recent rare plants surveys were conducted in 2013 for the Project site and did not identify any special-status plants or suitable habitat conditions to support special-status plants within the study area. Development and construction of the proposed Project is not expected to impact special-status plants within the study area and no further mitigation is required.<sup>133</sup>

As discussed above: (1) the Project site provides suitable habitat for several special-status plant species; (2) the survey results are outdated; and (3) the surveys were insufficient to document the presence or absence of special-status plant species within the Project area. As a result, Mr. Cashen concludes that “the City has no

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<sup>132</sup> Cashen Comments, p. 13.

<sup>133</sup> DEIR, p. 4.3-39.



basis for omitting analysis of potentially significant impacts to special-status plant species that could occur on the Project site.”<sup>134</sup>

ii. Callippe Silverspot Butterfly

The DEIR’s analysis of impacts to the callippe silverspot butterfly is limited to the statement that: “[p]roject-related activities associated with the offsite water improvement tanks and water pipeline could directly impact callippe silverspot butterflies and their habitat if present.”<sup>135</sup> Mr. Cashen concludes that the DEIR “fails to disclose or analyze the numerous indirect effects of the Project that could significantly impact the species and its habitat.”<sup>136</sup> These include road mortalities, human interface activities (e.g., inadvertent trampling of eggs and larvae by hikers), invasive plants, non-native predators, and repercussions of the Project (e.g., altered hydrology) that affect the butterfly’s larval food plant and nectar plants.<sup>137</sup>

iii. Golden Eagle

The DEIR acknowledges a golden eagle nest was detected approximately 0.8-mile northeast of the OSWA in 2016.<sup>138</sup> The DEIR subsequently reports: “[g]iven the distance between the golden eagle nest and the offsite improvements and the intervening topography that blocks direct views of the nest grove, impacts to the golden eagle nest are not anticipated.”<sup>139</sup> This rationale fails consider that most golden eagle territories have up to 6 nests, and that the nest site used by the breeding pair may vary annually, according to Mr. Cashen.<sup>140</sup> This is important because the pair associated with the nest northeast of the OSWA likely has additional nest sites, some of which may be located closer to, and in direct view of, Project activities. Because the DEIR ignores golden eagle nesting ecology and only considers the nest site detected in 2016, Mr. Cashen concludes that the City cannot

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<sup>134</sup> Cashen Comments, p. 14.

<sup>135</sup> DEIR, p. 4.3-40.

<sup>136</sup> Cashen Comments, p. 14.

<sup>137</sup> U.S. Fish and Wildlife Service. 2009. Callippe Silverspot Butterfly (*Speyeria callippe callippe*), 5-Year Review: Summary and Evaluation. U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office. Sacramento, California. 29 pp.

<sup>138</sup> DEIR, p. 4.3-46.

<sup>139</sup> *Id.*

<sup>140</sup> Cashen Comments, p. 15.

assume impacts to the nesting pair would be less than significant.<sup>141</sup> Mr. Cashen further demonstrates that the Project's effect on golden eagle foraging habitat constitutes a potentially significant impact that was not disclosed or analyzed in the DEIR.<sup>142</sup>

### *3. Failure to Analyze Translocation Impacts*

The Project may require the translocation (or relocation) of California red-legged frogs, western pond turtles, American badgers, burrowing owls, and potentially other wildlife species.<sup>143</sup> Mr. Cashen provides substantial evidence that translocation can cause various adverse effects to translocated individuals.<sup>144</sup> For example, the CDFW actually identifies passive relocation of burrowing owls as a potentially significant impact under CEQA that must be analyzed.<sup>145</sup>

Therefore, Mr. Cashen concludes that the "translocation of wildlife out of the Project area constitutes a potentially significant impact that has not been disclosed, analyzed, or mitigated in the DEIR."<sup>146</sup>

### *4. Failure to Mitigate Impacts Associated with Habitat Loss and Degradation*

The DEIR concludes that all potentially significant impacts to sensitive biological resources would be less than significant after implementation of the proposed mitigation measures. According to Mr. Cashen, this conclusion is not justified because most of the species-specific measures proposed in the DEIR do not mitigate the habitat loss and degradation that would occur due to construction and implementation of the Project.<sup>147</sup> Habitat loss, degradation, and fragmentation is the greatest threat to most, possibly all, of the special-status species addressed in the DEIR.<sup>148</sup>

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> DEIR, pp. 4.3-44, -45, -49, and -52.

<sup>144</sup> Cashen Comments, p. 17.

<sup>145</sup> California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, p. 10.

<sup>146</sup> Cashen Comments, p. 17.

<sup>147</sup> *Id.*, at 17 – 18.

<sup>148</sup> *Id.*

Mr. Cashen concludes that the Project would eliminate, degrade, and fragment habitat despite the avoidance and minimization measures listed in the DEIR.<sup>149</sup> As a result, the City must incorporate habitat compensation measures for each species that would be significantly affected by habitat loss before it can conclude Project impacts would be less than significant.

##### 5. *Failure to Mitigate Impacts to Special Status Plants*

Mitigation Measure 4.3-1b(b) pertains to the avoidance of special-status plant species.<sup>150</sup> However, the DEIR provides no information on the buffer distance required to ensure avoidance. This issue is exacerbated because the DEIR fails to establish a monitoring program to verify impacts are indeed avoided, nor does it incorporate remedial actions that would be required if avoidance measures are unsuccessful.

Mr. Cashen notes that the Project could indirectly impact special-status plants in various ways during Project implementation; however, the DEIR fails to require any additional mitigation for special-status plant species that may not be successfully “avoided” during this time.<sup>151</sup> Mr. Cashen therefore concludes that this approach fails to ensure impacts would be less than significant unless the City incorporates: (1) minimum setback distances that are supported by scientific evidence; (2) success criteria for the protected plants; (3) the contingency or remedial action measures that would be triggered if the success criteria are not achieved; and (4) the monitoring and enforcement mechanisms that would be implemented to demonstrate compliance.<sup>152</sup>

In addition, the DEIR states: “[i]f special-status plant populations are present and cannot be avoided, consultations with the [CDFW] and/or [FWS] shall be required. A mitigation plan to compensate for the loss of special-status plant species *could* be required.”<sup>153</sup> However, the DEIR fails to *require* a mitigation plan as an enforceable measure. Similarly, it fails to require the Applicant to implement mitigation recommended by the CDFW and FWS during consultations; it simply indicates a mitigation plan that is approved by the City *could be required* prior to

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<sup>149</sup> *Id.*

<sup>150</sup> DEIR, p. 4.3-41.

<sup>151</sup> *Id.*

<sup>152</sup> Cashen Comments, p. 18.

<sup>153</sup> DEIR, p. 4.3-41. [emphasis added].

the issuance of permits that would affect the special-status plant population(s). As a result, Mr. Cashen notes that implementation of mitigation would be at the sole discretion of City, and there is no mechanism in place that ensures whatever mitigation the City chooses to implement would mitigate impacts to a less than significant level.<sup>154</sup>

Mr. Cashen further demonstrates that the DEIR's plan for locating mitigation sites, potentially on or near the Project site or within the pipeline disturbance corridor, is flawed in several ways. First, the DEIR makes the false assumption that impacted plant species can be re-established elsewhere. Second, the pipeline would be located adjacent to a new roadway proposed in the DEIR, which could create numerous edge effects that are detrimental to most special-status plant species.<sup>155</sup> Third, a portion of the pipeline disturbance corridor is located within the NVUSD Open Space area, which was established as a California red-legged frog reserve.<sup>156</sup> Because the reserve was dedicated to the CDFW as mitigation for the American Canyon High School Project, the City cannot use it as mitigation for impacts from the proposed Project.

The DEIR states: “[i]f onsite options are not available, offsite areas may be considered.”<sup>157</sup> However, Mr. Cashen finds that this measure is too vague.<sup>158</sup> The City must establish criteria for the offsite mitigation area(s) and provide evidence that sites possessing those criteria are available for acquisition.

The DEIR indicates the Project Applicant shall establish, maintain, and monitor the mitigation area for five years following the completion of construction and restoration activities.<sup>159</sup> However, according to Mr. Cashen, the DEIR fails to establish a mechanism (e.g., conservation easement) that would ensure the mitigation area would benefit the focal species in perpetuity. In addition, the DEIR fails to establish a funding mechanism (e.g., endowment) that ensures long-term monitoring, protection, and management of the mitigation land.<sup>160</sup>

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<sup>154</sup> Cashen Comments, p. 19.

<sup>155</sup> *Id.*

<sup>156</sup> DEIR, p. 3-50.

<sup>157</sup> DEIR, p. 4.3-41.

<sup>158</sup> Cashen Comments, p. 20.

<sup>159</sup> DEIR, p. 4.3-41.

<sup>160</sup> Cashen Comments, p. 20.

Project construction would be completed before mitigation is fully implemented (i.e., before habitat restoration efforts can be deemed successful). As a result, the City must establish a mechanism that guarantees the mitigation commitment in a revised DEIR. Without these assurances and measures, the DEIR fails to adequately mitigate impacts to special status plants.

#### *6. Failure to Mitigate Impacts to Sensitive Natural Communities*

The DEIR concludes that implementation of Mitigation Measure 4.3-2 would reduce impacts to sensitive natural communities to a less than significant level.<sup>161</sup> Mitigation Measure 4.3-2 is limited to wetlands and riparian habitats, and thus Mr. Cashen concludes that “it would not mitigate impacts to the purple needle grass community reported near the water tank in Zone 1.”<sup>162</sup>

#### *7. Failure to Mitigate Impacts to California Red-Legged Frog*

The DEIR requires an approved biologist to monitor all construction activities within designated critical habitat for the California red-legged frog.<sup>163</sup> Mr. Cashen concludes that the DEIR fails to justify limiting monitoring to critical habitat. California red-legged frogs have the potential to occur in almost every part of the Project area, according to Mr. Cashen. As a result, the proposed measure should apply to all construction activities, not just those that occur in critical habitat.

The DEIR also proposes habitat compensation at a 1:1 ratio for permanent impacts to designated critical habitat only.<sup>164</sup> This would result in 2.8 acres of habitat compensation for impacts to at least 200 acres of California red-legged frog habitat.<sup>165</sup> Mr. Cashen concludes that this minimal amount of habitat compensation, particularly in light of higher ratios required by other nearby projects such as the American Canyon High School Project, is “insufficient to mitigate impacts to a less than significant level.”<sup>166</sup>

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<sup>161</sup> DEIR, p. 4.3-53.

<sup>162</sup> Cashen Comments, p. 20.

<sup>163</sup> DEIR, p. 4.3-44.

<sup>164</sup> DEIR, p. 4.3-44.

<sup>165</sup> Cashen Comments, p. 21.

<sup>166</sup> *Id.*

### *8. Failure to Mitigate Impacts to Callippe Silverspot Butterfly*

The DEIR requires compensatory mitigation at a 1:1 ratio for direct impacts to habitat occupied by the callippe silverspot butterfly.<sup>167</sup> The DEIR allows the compensatory mitigation site to be located within the pipeline disturbance corridor, or in close proximity to the Project site. If onsite options are not available, offsite areas may be considered. According to the DEIR, the success criteria and monitoring requirements for the callippe silverspot butterfly mitigation areas “shall be as described in Mitigation Measure 4.3-1b, part c.” However, Mr. Cashen demonstrates that the City’s proposed mitigation fails to ensure impacts to the callippe silverspot butterfly would be mitigated to a less than significant level for several reasons.<sup>168</sup>

First, the proposed mitigation measures do not correspond to the impact requiring mitigation. Second, the success criteria and monitoring requirements established in Mitigation Measure 4.3-1b, part c are not appropriate because they apply to plants, not butterflies. Third, the DEIR fails to require that the mitigation site contain features essential to callippe silverspot butterfly habitat. Fourth, the DEIR fails to require the Applicant to mitigate or monitor indirect impacts to the callippe silverspot butterfly and its habitat, which have the potential to be as severe or more severe than direct impacts, especially due to their potential to cause a population sink, according to Mr. Cashen.<sup>169</sup> Therefore, the DEIR fails to fully mitigate impacts to the callippe silverspot butterfly.

### *9. Failure to Mitigate Impacts to Swainson’s Hawk*

The DEIR proposes the following mitigation for potentially significant impacts to Swainson’s hawk nest sites: “[s]urveys will be conducted by a qualified raptor biologist for a 0.25-mile radius around all Project activities and shall be completed for at least two survey periods as is prescribed in the TAC’s survey guidelines (TAC, 2000).”<sup>170</sup> Then, if a qualified raptor biologist determines that the Project could impact a nest site, a suitably-sized avoidance buffer would be established in coordination with CDFW.<sup>171</sup>

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<sup>167</sup> DEIR, p. 4.3-51.

<sup>168</sup> Cashen Comments, p. 21 – 22.

<sup>169</sup> *Id.*

<sup>170</sup> DEIR, p. 4.3-47.

<sup>171</sup> *Id.*

Mr. Cashen finds that the mitigation proposed in the DEIR is not consistent with the Swainson's Hawk Technical Advisory Committee ("TAC") guidelines. According to the guidelines, to meet CDFW's recommendations for mitigation and protection of Swainson's hawks: (a) surveys should be conducted within a 0.5-mile radius around all project activities (i.e., *not 0.25 mile radius*); and (b) if active nesting is identified within the 0.5-mile radius, consultation with the CDFW is required (i.e., *not at the discretion of the Applicant's biologist*).<sup>172</sup>

As explained above, the Project site provides suitable foraging habitat for Swainson's hawks.<sup>173</sup> Three active Swainson's hawk nest sites are located approximately 3.5 miles from the Project site.<sup>174</sup> Therefore, the City should follow the CDFW guidelines for mitigating the loss of foraging habitat. The DEIR fails to demonstrate that the Applicant will follow CDFW guidelines and provide compensation for impacts to Swainson's hawk foraging habitat and, potentially, nest sites. Mr. Cashen concludes that "unless CDFW mitigation guidelines are followed, destruction of the site's grasslands would cause a significant adverse impact on locally occurring Swainson's hawks."<sup>175</sup>

#### *10. Failure to Mitigate Impacts to Golden Eagle*

The DEIR requires pre-construction bird surveys for construction activities that occur between February 1 and August 31.<sup>176</sup> Surveys for golden eagles "will additionally consider areas up to 1/2-mile from construction work areas."<sup>177</sup> Mr. Cashen finds that the mitigation proposed in the DEIR is "insufficient to avoid the potential for incidental take of golden eagles" for several reasons.<sup>178</sup>

First, golden eagles are most sensitive to human activity during the courtship and nest-building phase, which begins as early as December.<sup>179</sup> As a result, the

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<sup>172</sup> Swainson's Hawk Technical Advisory Committee. 2000 May 31. Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in California's Central Valley. p. 1.

<sup>173</sup> DEIR, Appendix C.4, p. 6.

<sup>174</sup> Cashen Comments, p. 23.

<sup>175</sup> *Id.*, at 24.

<sup>176</sup> DEIR, p. 4.3-47.

<sup>177</sup> *Id.*

<sup>178</sup> Cashen Comments, p. 24.

<sup>179</sup> Legal Protections for the Golden Eagle. 24 Jun 2015 email communication to Scott Cashen from Heather Beeler, Eagle Permit Coordinator, USFWS.

City's proposal to limit surveys to construction activities that occur between February 1 and August 31 is insufficient to avoid incidental take.

Second, the City's proposal to "consider areas up to 1/2-mile from construction work areas" is inconsistent with FWS guidelines. The FWS indicates surveys should be conducted within two miles of a construction activity to locate any potential golden eagle nests.<sup>180</sup>

Third, the only standard the DEIR establishes for the golden eagle surveys is that they should be conducted "by a qualified biologist familiar with bird behavior and knowledge of nest types."<sup>181</sup> This is inconsistent with FWS guidelines, which indicate surveyors should have the equivalent of two seasons of intensive experience conducting survey and monitoring of golden eagle and/or cliff dwelling raptors.<sup>182</sup> The DEIR fails to establish any other standards for the surveys, including: (a) the survey techniques; (b) acceptable weather conditions; (c) time of day; (d) time of year; and (e) duration.

Finally, the DEIR fails to incorporate any mitigation for the loss of golden eagle foraging habitat. Habitat loss in proximity to a golden eagle nest can result in decreased productivity or territory abandonment, which constitute "take" under the Eagle Act, according to Mr. Cashen.<sup>183</sup>

Therefore, Mr. Cashen concludes that "the Project would have a potentially significant, unmitigated impact on golden eagles."<sup>184</sup>

### *11. Failure to Mitigate Impacts to Other Migratory Birds*

The DEIR allows the Applicant to conduct construction activities during the avian nesting season as long as it conducts a pre-construction survey for nests. However, Mr. Cashen notes that nest finding is labor intensive and extremely difficult due to the tendency of many species to construct well-concealed or

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Cashen Comments, p. 24.

<sup>183</sup> *Id.*, at 25.

<sup>184</sup> *Id.*



camouflaged nests.<sup>185</sup> Consequently, FWS guidelines indicate that any actions that may result in take of migratory birds should be conducted outside of the nesting season, and provide further specific instructions for nest finding.<sup>186</sup>

The DEIR's mitigation for migratory bird impacts is not consistent with these guidelines, and the nest buffer guidelines have also been ignored in the DEIR. Therefore, Mr. Cashen concludes that unless these guidelines are followed, the Project would have an unmitigated, significant impact on nesting birds.<sup>187</sup>

### *12. Failure to Mitigate Impacts to Burrowing Owl*

The DEIR requires "take avoidance" surveys according to the methods described in CDFW's Staff Report on Burrowing Owl Mitigation. If no owls are found during those surveys, no further mitigation is required. However, if owls are found, the DEIR requires no-disturbance buffer zones around the occupied burrows, and potentially eviction of the owls from their burrows.<sup>188</sup> Mr. Cashen finds that the City's proposed mitigation fails to ensure Project impacts to burrowing owls would be less than significant for two reasons.

First, the DEIR fails to require habitat compensation even if owls are detected during the take avoidance surveys. Second, under CDFW guidelines, "take avoidance" surveys are not a substitute for the "detection" surveys required to assess Project impacts and formulate appropriate mitigation. As a result, Mr. Cashen concludes that the single pre-construction survey proposed in the DEIR is "insufficient to avoid and minimize potentially significant impacts to burrowing owls."<sup>189</sup>

In addition, the DEIR states that "[o]ccupied burrows shall not be disturbed during the nesting season, from February 1 through August 31, unless verified that the birds have not begun egg-laying."<sup>190</sup> Mr. Cashen finds this measure to be

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<sup>185</sup> DeSante DF, GR Geupel. 1987. Landbird productivity in central coastal California: the relationship to annual rainfall and a reproductive failure in 1986. *Condor*. 89:636-653.

<sup>186</sup> U.S. Fish and Wildlife Service, Migratory Bird Management. 2010. Suggested Priority of Migratory Bird Conservation Actions for Projects. p. 1.

<sup>187</sup> Cashen Comments, p. 26.

<sup>188</sup> DEIR, pp. 4.3-48 and -49.

<sup>189</sup> Cashen Comments, p. 26 – 27.

<sup>190</sup> DEIR, p. 4.3-48.

outdated because CDFW's guidelines no longer include the clause that occupied burrows can be disturbed if the birds have not begun egg-laying.<sup>191</sup> Furthermore, Mr. Cashen concludes that the proposed setbacks from occupied burrows are insufficient.<sup>192</sup> Therefore, the DEIR fails to adequately analyze and mitigate impacts to burrowing owls.

### *13. Failure to Mitigate Impacts to Bats*

The DEIR requires only one survey for bat roosts, and according to the DEIR, that survey would be conducted within 24 hours prior to any structure demolition or modification.<sup>193</sup> The DEIR further states that removal of structures would occur only during certain important times of the year such as maternity or winter roosting, *to the extent feasible*.<sup>194</sup> If removal of structures during the periods when bats are active is not feasible, the Applicant would be required to develop a bat exclusion plan to exclude bats from occupied roost prior to demolition. Mr. Cashen's analysis demonstrates that this is not an effective strategy for avoiding and minimizing potentially significant impacts to bats for several reasons.

First, the DEIR fails to define the circumstances under which impacts to a maternity or winter roost would be unavoidable. This leaves the public and decision makers with no ability to assess the likelihood that impacts would occur, and is not acceptable mitigation under CEQA. Second, the City has failed to disclose and analyze the ecological consequences of allowing the Applicant to evict bats from their winter roost(s). This issue is exacerbated because the DEIR does not require the Applicant to provide new roost sites to replace the roosts that are demolished, according to Mr. Cashen.<sup>195</sup> Third, the DEIR fails to incorporate any mitigation measures to offset the loss of roost sites at the Project site.

Mr. Cashen notes that these issues are exacerbated because the DEIR fails to incorporate accountability, reporting, and enforcement mechanisms into the proposed mitigation measures.<sup>196</sup> Therefore, Mr. Cashen concludes that the City

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<sup>191</sup> Cashen Comments, p. 27.

<sup>192</sup> *Id.*

<sup>193</sup> DEIR, p. 4.3-58.

<sup>194</sup> DEIR, p. 4.3-59. [emphasis added].

<sup>195</sup> Cashen Comments, p. 28 – 29.

<sup>196</sup> *Id.*

does not have the basis for its conclusion that impacts to special-status bats and bat roosts would be mitigated to a less than significant level.<sup>197</sup>

#### IV. CONCLUSION

It is essential that the City's EIR adequately identify and analyze the Project's foreseeable direct, indirect and cumulative impacts. It is also imperative that any and all feasible mitigation measures be presented and discussed. Indeed, CEQA requires nothing less. As discussed above, the Project will result in significant impacts in a number of areas, including air quality, worker and public health, and biological resources. The DEIR continues to mischaracterize, underestimate, or fail to identify many of these impacts. Furthermore, many of the mitigation measures relied upon by the DEIR will not in fact mitigate impacts to the extent claimed, and in certain cases will cause other significant impacts that are not properly analyzed.

A Draft EIR must be recirculated if: (1) it reveals new substantial environmental impacts not disclosed in the draft EIR; (2) it reveals a substantial increase in the severity of impacts (unless mitigated); (3) comments have been received that identify new feasible mitigation measures, but the feasible mitigation measures are not adopted; or (4) it is so fundamentally and basically inadequate and conclusory in nature that public comment on the draft EIR was essentially meaningless.<sup>198</sup>

The courts have held that the failure to recirculate an EIR turns the process of environmental evaluation into a "useless ritual" which could jeopardize "responsible decision-making."<sup>199</sup> Both the opportunity to comment and the preparation of written responses to those comments are crucial parts of the EIR process.

These comments have identified substantial environmental impacts that were again not discussed at all in the DEIR or were not meaningfully considered. These include direct and cumulative impacts on air quality, biological resources,

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<sup>197</sup> *Id.*

<sup>198</sup> CEQA Guidelines § 15088.5, subd. (a).

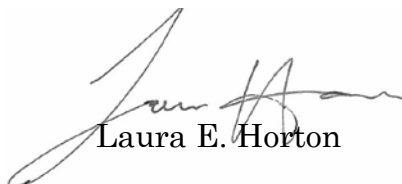
<sup>199</sup> *Sutter Sensible Planning v. Sutter County Board*, (1981) 122 Cal.App.3d 813, 822.

and hazardous materials. The DEIR must be withdrawn, revised and recirculated to properly evaluate these impacts.<sup>200</sup>

These comments have also identified feasible mitigation measures for significant, unmitigated impacts that have not been evaluated or proposed for adoption by the DEIR. Under CEQA Guidelines, a Draft EIR must be revised and recirculated to allow for public comment on these unadopted, feasible mitigation measures.<sup>201</sup> These deficiencies result in a DEIR “so fundamentally inadequate and conclusory in nature that public comment on the draft was in effect meaningless.”<sup>202</sup>

The DEIR must be revised to correct its errors, fully disclose and evaluate all Project impacts and to identify feasible mitigation that is enforceable and effective. Once those corrections are made, recirculation for public comment and review of these revisions is required. The DEIR must be revised again in order to resolve its inadequacies and must be recirculated for public review and comment.

Sincerely,



Laura E. Horton

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<sup>200</sup> CEQA Guidelines § 15088.5, subd. (a).

<sup>201</sup> *Id.*

<sup>202</sup> *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4<sup>th</sup> 1112, 1130.