

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660

FAX: (650) 589-5062

lhorton@adamsbroadwell.com

DANIEL L. CARDOZO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
LAURA E. HORTON
MARC D. JOSEPH
RACHAEL E. KOSS
JAMIE L. MAULDIN
MEGHAN A. QUINN
ADAM J. REGELE
ELLEN L. TRESMOTT

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

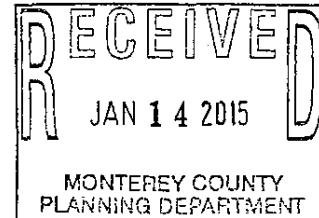
TEL: (916) 444-6201

FAX: (916) 444-6209

January 13, 2015

Via Overnight and Electronic Mail

John Ford
Monterey County Resource Management Agency
Planning Department
168 W. Alisal St., 2nd Floor
Salinas, CA 93901
Phone: (831) 755-5198
E-mail: fordjh@co.monterey.ca.us
ceqacomment@co.monterey.ca.us



Re: Comments on the Final Environmental Impact Report for the California Flats Solar Project (PLN120294; SCH#2013041031)

Dear Mr. Ford:

We are writing on behalf of **Monterey County Residents for Responsible Development** to provide comments on the Final Environmental Impact Report ("FEIR") prepared by Monterey County ("County"), pursuant to the California Environmental Quality Act ("CEQA"),¹ for the California Flats Solar Project ("Project"). The Applicant seeks a Combined Development Permit ("CDP") to develop a 280-megawatt ("MW") solar facility on approximately 3,000 acres of land in unincorporated Monterey County. We previously provided comments on the Draft Environmental Impact Report ("DEIR") for the Project on September 22, 2014.

Based upon our review of the FEIR and the County's responses to comments on the DEIR, we conclude that the FEIR fails to comply with CEQA. We incorporate by reference our earlier comments on the DEIR. The County is required to recirculate the FEIR because it includes significant new information, the previous omission of which deprived the public of a meaningful opportunity to comment on significant impacts or feasible mitigation measures. In addition, the

¹ Pub. Resources Code, §§ 21000 et seq.
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FEIR fails to present a complete project description and improperly piecemeals environmental review. Furthermore, the FEIR does not adequately describe the environmental setting with regard to biological resources and hazards. The FEIR also fails to adequately analyze the Project's impacts related to air quality, biological resources, hazards, and water resources; and fails to propose mitigation measures capable of reducing potentially significant impacts to less than significant levels. Finally, the FEIR fails to adequately respond to several of our comments, in violation of CEQA.

We have reviewed the FEIR and its appendices with assistance from technical consultants, whose comments and qualifications are attached as follows: Scott Cashen (Attachment A),² Matt Hagemann with the assistance of Jessie Jaeger (Attachment B),³ and Tom Myers (Attachment C).⁴ We incorporate by reference all comments included in the expert documents.

I. STATEMENT OF INTEREST

Monterey County Residents for Responsible Development 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. The association includes Monterey County residents, such as Manuel Ramos, Robert Greene, and California Unions for Reliable Energy ("CURE") and its members and their families and other individuals that live and/or work in Monterey County (collectively, "Monterey County Residents"). The association was formed to advocate for responsible and sustainable solar development in Monterey 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.

The individual members of Monterey County Residents and the members of the affiliated labor organizations live, work, recreate and raise their families in Monterey County. They would be directly affected by the Project's environmental

² See Letter from Scott Cashen, to Laura Horton re: Final Environmental Impact Report for the California Flats Solar Project, January 12, 2015 (hereinafter, "Cashen Comments"), Attachment A.

³ See Letter from Matt Hagemann and Jessie Jaeger (SWAPE) to Laura Horton re: Final Environmental Impact Report for the California Flats Solar Project, January 7, 2015 (hereinafter, "Hagemann Comments"), Attachment B.

⁴ See Letter from Tom Myers to Laura Horton re: Final Environmental Impact Report for the California Flats Solar Project, January 8, 2015 (hereinafter, "Myers Comments"), Attachment C.

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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 Monterey County 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 in the region 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 Monterey County Residents therefore have a direct interest in enforcing environmental laws to minimize the adverse impacts of projects that would otherwise degrade the environment.

II. CEQA REQUIRES THE COUNTY TO RECIRCULATE THE EIR

A lead agency is required to recirculate an FEIR when "significant new information" is added to the FEIR after public notice is given of the availability of the DEIR, but before certification.⁵ The CEQA Guidelines define "significant new information" as changes in the project or environmental setting, as well as additional data or other information that deprives the public of a meaningful opportunity to comment on significant impacts or feasible mitigation measures.⁶ Specifically, new information is significant when:

- A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented;
- A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance;
- A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the

⁵ Pub. Resources Code, § 21092.1; Cal. Code Regs. tit. 14, § 15088.5 ("CEQA Guidelines").

⁶ CEQA Guidelines, § 15088.5(a).

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environmental impacts of the project, but the project's proponents decline to adopt it; or

- The draft FEIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment was precluded.⁷

The failure to recirculate an FEIR after significant new information has been added turns the process of environmental evaluation into a "useless ritual" which could jeopardize "responsible decision-making."⁸ One of the purposes of CEQA is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the FEIR "protects not only the environment but also informed self-government."⁹ Both the opportunity to comment and the preparation of written responses to those comments are crucial parts of the FEIR process.

In this case, recirculation is required because the FEIR includes several reports with detailed analyses pertaining to biological resources and hazards that were not previously included in the DEIR. Among the additional information is the Phase I Environmental Site Assessment ("ESA"), as well as survey reports, including the 2014 Special Status Plant Survey Report; the 2012 CRLF Survey Memorandum; the 2013 Raptor Nest Survey Report; the 2014 Baseline Avian Activity Survey Report; the 2012 CTS Site Assessment; the 2013 Wet Season Branchiopod Survey Report; and the 2012 CRLF Site Assessment. These reports contain significant new information requiring recirculation of the EIR.

Matt Hagemann explains in his comments that the previously undisclosed presence of oil and gas wells, which were only disclosed after the County provided public notice of the availability of the DEIR, constitutes significant new information because of the potential health and environmental risks from such wells.¹⁰ Although the presence of these wells was suspected, as discussed in our DEIR comments, it was not until the County included the Phase I ESA in the FEIR that their existence was confirmed. As explained by Mr. Hagemann, "abandoned wells may act as conduits for contamination to move from the surface to underlying soil

⁷ CEQA Guidelines, § 15088.5(a); see also *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1129.

⁸ *Sutter Sensible Planning v. Sutter County Bd.* (1981) 122 Cal.App.3d 813, 822.

⁹ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (citations omitted).

¹⁰ Hagemann Comments, p. 1 – 2.

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and groundwater.”¹¹ Furthermore, “[o]lder abandonments may also allow for seepage of gas to the surface through poorly sealed wells, posing health and safety risks to constr[uction] workers.”¹² The potentially significant impacts from these wells were not addressed at all in the DEIR. Thus, the FEIR’s disclosure of these wells after the public review period reveals new potentially significant environmental impact, triggering the requirement for recirculation under the first category.

In addition, Mr. Cashen states that new 2014 survey data for golden eagles identifies “an additional 18 previously unidentified golden eagle nests and an additional 3 previously unidentified bald eagle nests within 10 miles of the Project site.”¹³ Mr. Cashen explains that the new information is significant under the second category because a substantial increase in the severity of environmental impacts to golden eagles was revealed in the FEIR.¹⁴ Furthermore, the FEIR proposes an additional measure (the Bird and Bat Conservation Strategy, discussed below) to reduce impacts to golden eagles, but that measure falls short as mitigation.¹⁵ The high density of golden eagles and new mitigation should have been disclosed in the DEIR or recirculated for adequate public review. Furthermore, supporting information is missing from the reports. We requested the missing information from the County regarding the eagle surveys and other surveys, but have not yet received a response.¹⁶ Because the County failed to recirculate the FEIR for the required time under CEQA, the public has not had adequate time to procure and review the new information referenced in the FEIR.

Furthermore, Mr. Cashen found that the new surveys revealed several new rare plant species that were detected in and around the Project area, thus revealing more severe impacts to those species than previously disclosed.¹⁷ In addition, the small-flowered morning glory, which the DEIR acknowledged is “extremely rare in the Central Coast region,”¹⁸ was found in the new data to be much more abundant in the Project area than the DEIR described, thus impacts to that specific species

¹¹ *Id.*

¹² *Id.*

¹³ Cashen Comments, p. 2.

¹⁴ *Id.*, at 7.

¹⁵ *Id.*, at 1 – 2.

¹⁶ Email from Laura Horton, Adams Broadwell Joseph & Cardozo, to John Ford, Monterey County Resources Management Agency, re: Follow-up Request for Documents under CEQA for the California Flats Solar Energy Facility, December 31, 2014.

¹⁷ Cashen Comments, p. 18.

¹⁸ DEIR, p. 4.4-86.

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could be more severe as well.¹⁹ This information is pertinent to assessing significant impacts to rare plants.

CEQA is clear that "[a] decision not to recirculate an EIR must be supported by substantial evidence in the administrative record."²⁰ The FEIR states that *amendments* to its text "serve as clarifications and amplifications on the content of the EIR" and that "[n]one of the changes would warrant recirculation of the EIR pursuant to CEQA Guidelines section 15088.5."²¹ However, as explained above, the various reports added to the FEIR contain significant new information showing that the Project will result in new or more severe impacts and that new mitigation measures are required to reduce those impacts to less than significant. The new information presented in those reports is not properly reflected in the FEIR amendments. Thus, the County's assessment that recirculation is not triggered because the text amendments are not significant is unsupported. The County must recirculate the FEIR for at least a 30-day public comment period in order to meet CEQA requirements for adequate public review of significant new information.

III. THE FEIR FAILS TO INCLUDE AN ADEQUATE PROJECT DESCRIPTION

The courts have repeatedly held that "an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document]."²² Only through an accurate view of the project may affected outsiders and public decisionmakers balance the proposal's benefit against its environmental costs.²³ Furthermore, the requirements of CEQA cannot be avoided by chopping a large project into many small parts or by excluding reasonably foreseeable future activities that may become part of the project.²⁴ CEQA prohibits such a "piecemeal" approach and requires review of a project's impacts as a whole.²⁵ Before approving a project, a lead agency must assess the environmental impacts of all reasonably

¹⁹ Cashen Comments, p. 20.

²⁰ CEQA Guidelines § 15088.5.

²¹ FEIR, p. 4-1.

²² *County of Inyo v. County of Los Angeles* (1977) 71 Cal.App.3d 185, 193.

²³ *Id.*, at 192-193.

²⁴ Pub. Resources Code § 21159.27 (prohibiting piecemealing); see also, *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370.

²⁵ CEQA Guidelines, § 15378(a); *Burbank- Glendale-Pasadena Airport Authority v. Hensler* (1991)

233 Cal.App.3d 577, 592.

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foreseeable phases of a project.²⁶ "The significance of an accurate project description is manifest where," as here, "environmental impacts may be disguised or minimized by filing numerous, serial applications."²⁷

The California Supreme Court held that an EIR must treat activities as part of the project where the activities at issue are "a reasonably foreseeable consequence of the initial project and the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects."²⁸ Both elements are met here. We previously commented that the Project description in the DEIR was inadequate based on several issues, some of which the FEIR addressed. However, the description and analysis of decommissioning is still severely lacking in the FEIR and is improperly piecemealed in violation of CEQA.

In particular, the FEIR fails to provide a complete description of the decommissioning phase of the Project and states that "decommissioning would be subject to CEQA review prior to implementation [and] potential impacts would be assessed at that time consistent with applicable policies, thresholds and standards in place at the time."²⁹ The decommissioning phase consists of dismantling and repurposing, salvaging/recycling, or disposing of the solar energy improvements, and revegetation on the approximately 3,000 acre Project site. As explained in our DEIR comments, these decommissioning activities are a part of the "whole of the project," and as a matter of common sense they will result in environmental impacts, including impacts to air quality, biological resources, water and solid waste capacity.

The FEIR, however, remains inadequate in its discussion of decommissioning, and underestimates these potentially significant impacts by failing to adequately investigate and mitigate the impacts in light of their "speculative" nature.³⁰ The Conceptual Restoration Plan for Project Decommissioning provided in the DEIR simply describes the steps the Applicant thinks it may take during decommissioning, rather than analyzing the significance

²⁶ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396-397 (EIR held inadequate for failure to assess impacts of second phase of pharmacy school's occupancy of a new medical research facility).

²⁷ *Arvin Enterprises v. South Valley Area Planning Commission* (2002) 101 Cal.App.4th 1333, 1346.

²⁸ *Laurel Heights*, 47 Cal.3d at 396.

²⁹ FEIR, p. 2-325 – 2-326.

³⁰ *Id.*, at 2-325 – 2-326.

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of specific impacts. Given that the County is apparently aware of the specific steps necessary to decommission the Project, it gives no credible reason why it should not assess the impacts of those decommissioning steps now. Any possibility of future changes in "policies, thresholds, and standards"³¹ should not prevent analysis of known future Project activities.

The County must assess all phases of the Project including the decommissioning phase, which is acknowledged as part of the Project, in this project-level CEQA review. The FEIR defers detailed analysis and CEQA review of the decommissioning phase to an unknown future date. Thus, the Project description is inadequate and CEQA review for the Project is improperly piecemealed. This is contrary to CEQA and the FEIR must therefore be revised and recirculated to include a detailed analysis of decommissioning impacts.

IV. THE FEIR FAILS TO ADEQUATELY DESCRIBE THE ENVIRONMENTAL SETTING

CEQA requires lead agencies to include a description of the physical environmental conditions in the vicinity of a project as they exist at the time environmental review commences.³² "This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant."³³ 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."³⁴ "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." "[U]nsubstantiated opinion or narrative [and] evidence which is clearly inaccurate or erroneous . . . is not substantial evidence."³⁵

A. The FEIR Fails to Adequately Describe the Existing Baseline for Biological Resources.

We previously commented that many of the plant and wildlife surveys conducted to establish the EIR's environmental baseline were substantially flawed.

³¹ *Id.*

³² CEQA Guidelines, § 15125(a); see also *CBE v. SCAQMD* (2010) 48 Cal.4th 310, 321.

³³ CEQA Guidelines, § 15125(a).

³⁴ CEQA Guidelines, §15384.

³⁵ Pub. Resources Code, § 21082.2(c).

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In its response to comments, the County maintains that protocol level surveys, which we argued were necessary to establish an accurate biological baseline in this situation, are not required under CEQA.³⁶ The FEIR cites to *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383 to support its position.

In *Association of Irrigated Residents*, the appellant environmental groups argued that protocol level surveys were necessary for detecting the San Joaquin kit fox. The court characterized their argument as being based on the "assumption that CEQA compels compliance with the survey guidelines as a matter of law."³⁷ However, here we are not asserting that protocol level surveys are required as a matter of law, but rather that the surveys conducted for the Project were so flawed that they failed to establish an accurate environmental setting as required under CEQA. Implementing protocol level surveys would likely have cured many of the defects, but the lack of protocol surveys alone is not the basis of our comments.

Mr. Cashen explains in his comments that an accurate environmental setting has not been established for several species including rare plants, California tiger salamander ("CTS"), San Joaquin pocket mouse, and special-status kangaroo rats, among others.³⁸ Even if protocol level surveys are not required under CEQA as a matter of law, Mr. Cashen provides ample scientific information and references to support his expert opinion that in the absence of reliable methods for demonstrating presence or absence of species, the FEIR has failed to meet CEQA requirements for establishing an accurate baseline and certainly lacks any evidence that its description of the environmental setting is sufficient to enable an analysis of the Project's impacts.

B. The FEIR Fails to Adequately Describe the Existing Baseline for Hazards.

We previously commented that the DEIR did not adequately analyze the potential for hazards on the Project site, namely oil and gas wells and pesticides. We further commented that a Phase I ESA was necessary to determine an accurate setting with regard to these hazards. In response, the County provided the results of a Phase I ESA, which did identify oil and gas wells, discussed further below.

³⁶ FEIR, 3-2.

³⁷ *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1396.

³⁸ See Cashen Comments.

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However, the Phase I ESA did not discuss the potential for pesticides. Response 12.B.4 restates information in the DEIR regarding discussions with the Monterey County Agricultural Commissioner (a simple reference was made to that discussion, without further information).³⁹ The FEIR does not include an evaluation, supported by substantial evidence, of past pesticide use which, as Mr. Hagemann suggests, "may have involved the use of DDT, DDE, or Dieldrin."⁴⁰ Instead the FEIR states,

Based on historical and current land use on the project site, no residual pesticides, herbicides, or other contaminants are anticipated to be found in the soil and/or groundwater. The likelihood that construction workers, operational staff, and/or adjacent sensitive receptors could be exposed to substantial quantities of residual agricultural chemicals in on-site soils is remote.⁴¹

Mr. Hagemann's analysis shows that the County's conclusion is "unsubstantiated by any sampling data."⁴² The County bases its assumption on a conversation with the Monterey County Agricultural Commissioner, which the public cannot review, despite the fact that crops have been and still are grown on and around the Project site. As Mr. Hagemann recommended in our DEIR comments and does so again here, soil sampling must be done in areas known to have been cultivated in order to determine if pesticide residuals exist in soils at concentrations hazardous to health.⁴³ Otherwise, the FEIR fails as an informational document under CEQA.

V. THE FEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE THE PROJECT'S POTENTIALLY SIGNIFICANT IMPACTS RELATED TO AIR QUALITY, BIOLOGICAL RESOURCES, HAZARDS, 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. . ."⁴⁴ Significant impacts must be mitigated to the maximum extent possible. The deferral of formulation of specific mitigation measures is permissible only where the adopted mitigation measure: (1) commits the agency to a

³⁹ FEIR, p. 2-383 – 2-384.

⁴⁰ Hagemann Comments, p. 2.

⁴¹ FEIR, p. 2-384.

⁴² Hagemann Comments, p. 2.

⁴³ *Id.*

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realistic performance standard to ensure that the impact will be reduced; and (2) disallows the occurrence of physical changes to the environment unless the performance standard is or will be satisfied.⁴⁵

A. The FEIR Fails to Adequately Analyze and Mitigate the Project's Potentially Significant Impacts to Air Quality

We previously commented that the DEIR did not adequately analyze significant impacts due to diesel particulate matter ("DPM") emissions. Specifically, we commented that the Project results in a health risk that exceeds CEQA thresholds. Further, we commented that air quality mitigation measures proposed in the DEIR were inadequate and would not reduce air quality impacts to less than significant levels.

In its response to comments, the County maintains that DPM emissions do not result in a health risk that exceeds CEQA thresholds. As one basis for this contention, the County states that the calculations presented by Mr. Hagemann are flawed in several ways, including using incorrect tonnage of total exhaust DPM emissions.⁴⁶ The FEIR concludes that when the flaws in Mr. Hagemann's analysis are corrected, the Project would not pose a significant health risk due to DPM emissions. Furthermore, the County maintains that the Project's air quality impacts have been mitigated to the maximum extent possible. The County's rationale fails as a matter of law and is unsupported by substantial evidence.

1. Health Impacts from DPM Emissions

Mr. Hagemann reviewed the FEIR and in accordance with the County's response to our comments, he recalculated the potential health risk to the sensitive receptors near the Project site. Mr. Hagemann's screening level health risk assessment was based on the mitigated annual exhaust PM10 value of 2.22 tons/year, a figure he obtained from the CalEEMod output tables in Appendix C.1 of the DEIR.⁴⁷ However, the FEIR states that this value is incorrect because it includes off-site PM10 emissions, which would not contribute to health risks at the residential receptors.⁴⁸ The FEIR then determines that "total on-site diesel

⁴⁴ CEQA Guidelines §15282.

⁴⁵ Michael H. Remy et al., Guide to CEQA (2007 11th Ed), at p. 551 (collecting authorities).

⁴⁶ FEIR, p. 2-385.

⁴⁷ Hagemann Comments, p. 3.

⁴⁸ FEIR, p. 2-385.

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emissions are estimated at a maximum of 2.0 tons/year.”⁴⁹ The FEIR further states that Mr. Hagemann’s calculated emission rate of 2.22 tons/year is incorrect because this value is anticipated to occur over a two year period, not one year.⁵⁰

Mr. Hagemann’s revised calculation uses the County’s suggested total of 2.0 tons/year, but his calculations still assume a construction period of 365 days.⁵¹ His assumption of a 12-month construction period was taken directly from the “Construction Period” table in Appendix C.1 of the DEIR.⁵² However, Mr. Hagemann does note that “even if a construction duration of two years (730 days) was utilized, the cancer risk results would remain the same.”⁵³ The revised estimates show, just as with his first health risk analysis, construction emissions of DPM would exceed applicable CEQA thresholds and thus would have a significant and unmitigated impact.⁵⁴ Specifically, Mr. Hagemann found that excess cancer risk to adults, children, and infants during Project construction are 4.01, 23.2, and 77.2 in one million, respectively.⁵⁵ The risk for children and infants exceed Monterey Bay Unified Air Pollution Control District (“MBUAPCD”) and San Luis Obispo County Air Pollution Control District (“SLOAPCD”) significance thresholds of 10 in one million.

The new estimate for children is in fact even higher than Mr. Hagemann’s original assessment. He explains this heightened risk by pointing to new information in the FEIR, which he then incorporated into his health risk assessment. The new information indicates that emissions would not be concentrated over the southern portion of the site as previously thought, but rather, over the middle and northern portions of the site.⁵⁶ This results in a greater concentration of DPM emissions and higher cancer risk to nearby sensitive receptors.

The County has not provided an adequate reason for failing to conduct its own detailed health risk assessment. The FEIR states that the California Air Resources Board’s Air Quality and Land Use Handbook (April 2005) “does not

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Hagemann Comments, p. 4.

⁵² DEIR, Appendix C.1, p. 61.

⁵³ Hagemann Comments, p. 4, FN 3.

⁵⁴ *Id.*, at 3 – 8.

⁵⁵ *Id.*, at 7.

⁵⁶ *Id.*, at 7, FN 10.

include short-term construction activity among the list of sources that may be incompatible with nearby sensitive land uses.”⁵⁷ However, as Mr. Hagemann points out, in 2012 the Office of Environmental Health Hazard Assessment (“OEHHHA”) released a Revised Technical Support Document for Exposure Assessment and Stochastic Analysis, which describes the types of projects that warrant the preparation of a health risk assessment. Construction of the Project will produce emissions of DPM, a human carcinogen, through the exhaust stacks of construction equipment for approximately twelve months. The OEHHHA document recommends that all short-term projects lasting at least two months be evaluated for cancer risks to nearby sensitive receptors.

Therefore, as explained by Mr. Hagemann, “an assessment of health risks to nearby residential receptors from Project construction should be included in a revised CEQA evaluation for the Project.”⁵⁸ Otherwise, the FEIR fails to analyze potentially significant health impacts and thus violates CEQA.

2. *Air Quality Mitigation Measures*

The County also maintains that the DEIR incorporated the maximum feasible mitigation measures recommended by MBUAPCD and SLOAPCD. The County further maintains that the FEIR provides adequate mitigation measures to reduce significant impacts to less than significant levels.⁵⁹ However, Mr. Hagemann’s analysis shows that the FEIR did not incorporate all feasible mitigation measures, as suggested in our DEIR comments, including use of construction equipment with Tier 4 engine technology and sampling to ensure that PM10 levels do not exceed 50 µg/m³.⁶⁰ According to Mr. Hagemann, “Tier 4 engines for construction equipment are commercially available and therefore should be included as mitigation in a revised FEIR.”⁶¹ Furthermore, he states that “[m]onitoring upwind and downwind PM10 emissions, to ensure they do not exceed 50 ug/m³, is a common requirement and should be added to the mitigation measures that are included in a revised FEIR.”⁶²

⁵⁷ FEIR, p. 2-387.

⁵⁸ Hagemann Comments, p. 5.

⁵⁹ FEIR, p. 2-384.

⁶⁰ Hagemann Comments, p. 9.

⁶¹ *Id.*

⁶² *Id.*

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Mr. Hagemann proposes additional mitigation specifically to address the significant impacts resulting from DPM emissions. These include:

- Institute a Heavy-Duty Off-Road Vehicle Plan (C-4). The Project Applicant should provide a detailed plan that discusses a construction vehicle inventory tracking system to ensure compliance with construction mitigation measures. The system should include strategies such as requiring hour meters on equipment, documenting the serial number, horsepower, manufacture age, fuel, etc. of all onsite equipment and daily logging of the operating hours of the equipment.
- Implement a construction vehicle inventory tracking system (C-5). The Project Applicant should provide a detailed plan that discusses a construction vehicle inventory tracking system to ensure compliances with construction mitigation measures. The system should include strategies such as requiring engine run time meters on equipment, documenting the serial number, horsepower, manufacture age, fuel, etc., of all onsite equipment and daily logging of the operating hours of the equipment.⁶³

Mr. Hagemann's analysis demonstrates that the Project still presents a significant and unmitigated health risk from construction DPM emissions. In addition, the DEIR and FEIR did not incorporate maximum feasible mitigation to further reduce the significant and unavoidable air quality impacts and did not incorporate any mitigation specific to DPM emission impacts. The County must revise the FEIR to include an adequate analysis of the Project's significant air quality impacts and recirculate it for public review. If the County refuses to do so, the County is in violation of CEQA.

B. The FEIR Fails to Adequately Analyze and Mitigate the Project's Impacts to Biological Resources

We previously commented that the County lacked substantial evidence to support its findings in the DEIR regarding the Project's impacts on biological resources. As explained above, we specifically commented that the County failed to adequately describe the environmental setting, against which impacts are measured under CEQA. We demonstrated, with analysis from Mr. Cashen, Dr.

⁶³ *Id.*, at 8.
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Morrison, and Dr. Vernon Bleich, that the DEIR failed to disclose and analyze potentially significant impacts to species including golden eagles, CTS, western pond turtle, San Joaquin pocket mouse, and rare plants, among other species. Further, we commented that proposed mitigation measures for significant impacts to sensitive species were insufficient, vague, and improperly deferred in many aspects.

In its response to comments, the County argues that the FEIR proposes adequate mitigation to reduce any significant impacts to biological resources to less than significant levels. The FEIR also states for the first time that the Applicant will prepare a Bird and Bat Conservation Strategy ("BBCS") "to reduce risk to eagles and other raptors, among other avian and bat species."⁶⁴ As Mr. Cashen's analysis shows, the County still fails to support its contentions with substantial evidence. Thus, the FEIR remains inadequate under CEQA.

1. *Eagles*

Impacts to golden and bald eagles resulting from the Project will be much more significant than described in the DEIR and FEIR. The FEIR states that "analyses of eagle activity on and adjacent to the project site indicates a low level of eagle take risk."⁶⁵ However, Mr. Cashen provides substantial evidence that "[t]his statement contradicts scientific information and the evidence in the record."⁶⁶ Moreover, the County "did not examine cumulative impacts to golden eagles" and the DEIR and FEIR do not provide adequate mitigation for impacts to golden eagles.⁶⁷

The FEIR reveals, for the first time, the Applicant's proposed BBCS, suggesting that the BBCS would describe and outline management measures and monitoring protocols that would be implemented on the Project site. The FEIR states:

⁶⁴ FEIR, p. 2-534.

⁶⁵ *Id.*, at 2-354.

⁶⁶ Cashen Comments, p. 5 (citing DEIR, Table 4.4-4, pp. 4.4-73, -98, and -99; DEIR, Appendix E.2, pp. 57 and 58. See also FEIR, Appendix E.17, pp. ii, 6, 17 through 19, and 32; FEIR, Appendix E.18, pp. iii, 19, and 34; Marzluff JM, ST Knick, MS Vekasy, LS Schueck, TJ Zarriello. 1997. Spatial use and habitat selection of golden eagles in southwestern Idaho. *The Auk* 114(4):673-687; Thelander CG, California Department of Fish and Game. 1974. Nesting territory utilization by golden eagles (*Aquila chrysaetos*) in California during 1974. Wildlife Management Branch Administrative Report No. 74-7 (November 1974). 22 pp.)

⁶⁷ Cashen Comments, p. 6 - 7.

[T]he applicant has incorporated a new Applicant Proposed Measure to monitor avian use of the site, conduct post-construction avian mortality monitoring and identify conservation measures to minimize impacts. These efforts would be memorialized in a Bird and Bat Conservation Strategy (BBCS) prepared in collaboration with [U.S. Fish and Wildlife Service] and would include an Avian Mortality Monitoring Program (AMMP) to monitor operational effects of the project on avian species. The development of a BBCS would further reduce potential operational impacts to avian species by providing additional data and additional conservation measures in response to that data.⁶⁸

The BBCS is not an enforceable mitigation measure.⁶⁹ Yet, the FEIR does clearly state that the BBCS will "address any potential impacts to golden eagles,"⁷⁰ indicating that the County relies on the BBCS to reduce significant impacts to golden eagles. Given the critical role of the BBCS in reducing significant impacts, Mr. Cashen explains that the BBCS is severely lacking in any information and evidence that the BBCS would reduce impacts. According to Mr. Cashen, the FEIR fails to provide essential information in the BBCS.⁷¹ Mr. Cashen further states that "[a]t a minimum, the County must establish the existence of 'management measures' that could feasibly be implemented to reduce the risk to eagles,"⁷² which the BBCS does not do.

The information that is missing from the BBCS, and thus evades public review, includes:

- (a) goals of the BBCS and the performance standards for evaluating its success;

⁶⁸ FEIR, p. 2-598.

⁶⁹ CEQA Guidelines § 15126.4(a)(2) (mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments); Pub. Res. Code § 21081.6(b); CEQA Guidelines § 15091(d); *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261 (where the court concluded there was "no substantial evidence in the record to support a finding that the mitigation measures have been 'required in, or incorporated into' the project"); *see also*, Cashen Comments, p. 1.

⁷⁰ FEIR, p. 2-353.

⁷¹ Cashen Comments, p. 2.

⁷² *Id.*, at 5.

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- (b) monitoring regime, including sampling techniques, frequency, and duration;
- (c) methods that will be used to account for observer bias and carcass removal;
- (d) statistical methods that will be used to analyze the data;
- (e) contingency or remedial action measures that would be triggered if performance standards are not achieved; and,
- (f) enforcement mechanism that ensures performance standards are met.⁷³

Mr. Cashen further states that “[p]erhaps most importantly, the FEIR fails to establish that ‘additional’ conservation measures’ even exist, and that they could feasibly be implemented to reduce operational impacts in response to the monitoring data.”⁷⁴

The Applicant acknowledges that the loss of foraging habitat can cause take and/or the abandonment of nesting territories, and “it is highly likely that the foraging home ranges of several breeding pairs overlap the Project site and access road/Hwy 41 improvement areas.”⁷⁵ The Applicant further acknowledges that the Cholame Hills west of the Project site are unsuitable for foraging eagles (due to vegetation density), as are the agricultural croplands in the Cholame Valley.⁷⁶ As a result, Mr. Cashen explains that “[d]evelopment of the Project would greatly reduce the amount of foraging habitat available to the eagles,” which is “likely to be especially severe to the eagles that nest west of the Project site because those eagles already have limited foraging locations.”⁷⁷

Furthermore, the Applicant’s consultant concluded a *minimum* of 20 pairs of golden eagles resided within a 10-mile radius of the Project site during the 2013 breeding season.⁷⁸ As Mr. Cashen notes, the number of eagles surveyed suggests that “the Project could directly or indirectly impact approximately 8.5% of the estimated 235 breeding pairs of golden eagles that occur in Bird Conservation Region 32, and an even greater proportion of the population within the ‘Central

⁷³ *Id.*, at 2.

⁷⁴ *Id.*

⁷⁵ *Id.*, at 6; FEIR, Appendix E.17, p. 3 and DEIR, Appendix E.1, p. 95.

⁷⁶ Cashen Comments, p. 6.

⁷⁷ *Id.*

⁷⁸ DEIR, Appendix E.1, p. 95.

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Coast Ranges' portion of that region."⁷⁹ Data shows that the Central Coast Ranges region, which encompasses the Project site, has the highest abundance of golden eagle nesting territories in the State of California.⁸⁰ Further data provided by the Applicant indicate the Project area has one of the highest densities of nesting golden eagles in the State.⁸¹ Clearly, this Project will have significant implications on eagle conservation that are unaddressed by the County's FEIR.

According to Mr. Cashen, the County provides no scientific basis for the conclusion that nested compensatory mitigation would help reduce impacts to a less-than-significant level.⁸² The County or Applicant have not conducted a Habitat Equivalency Analysis, nor has it ensured "that the nested compensatory mitigation would offset impacts to the specific territories (or pairs) affected by the Project."⁸³ In addition, the County intends to "address any potential impacts to golden eagles"⁸⁴ by preparing the BBCS, which is inadequate mitigation as explained above. Furthermore, as we discussed in our previous comments, the compensatory mitigation and habitat monitoring plan lack basic information for public review and do not contain specific performance criteria to measure the adequacy of the mitigation.

Mr. Cashen notes several additional defects in the eagle nest survey report submitted by the Applicant.⁸⁵ He concludes that given the clear evidence in the record, impacts to golden eagles are much more significant than indicated in the DEIR or FEIR, and the County has failed to propose adequate measures to mitigate those impacts to less than significant levels.

2. *Avian Collisions*

We previously commented on several flaws with the County's analysis of the collision risk that the Project's solar arrays posed to birds. The County responded

⁷⁹ Cashen Comments, p. 6.

⁸⁰ *Id.*, at 6 – 7 (citing Thelander CG, California Department of Fish and Game. 1974. Nesting territory utilization by golden eagles (*Aquila chrysaetos*) in California during 1974. Wildlife Management Branch Administrative Report No. 74-7 (November 1974). 22 pp; DEIR, Appendix E.1, p. 93.).

⁸¹ Western EcoSystems Technology, Inc. 2014. California Flats Solar Project: 2014 Eagle Nest Survey Report. FEIR, pp. 2-555 and -556.

⁸² Cashen Comments, p. 7.

⁸³ *Id.*

⁸⁴ FEIR, p. 2-353 – 354.

⁸⁵ Cashen Comments, p. 3 – 5.

that “[t]he DEIR and supporting biological technical reports assessed the potential for impacts to listed and special status avian species, raptors, and other nesting birds protected under the MBTA. These analyses were based on standard protocol for establishing existing environmental conditions and assessing potential impacts to these species.”⁸⁶ As explained by Mr. Cashen, “[t]he County’s response contradicts evidence in the administrative record.”⁸⁷ In particular, neither the County nor the Applicant conducted a Potential Impact Index, Habitat Equivalency Analysis, or Risk Assessment, which are all necessary for assessing impacts to avian species.⁸⁸ The County and the Applicant did not even prepare substantially equivalent analyses. Thus, the County’s analysis of the collision risk that the Project’s solar arrays posed to birds is unsupported by substantial evidence.

The mitigation measures proposed in the DEIR and FEIR for avian impacts are directed at minimizing impacts associated with construction of the Project. However, no measures mitigate the potentially significant impacts associated with *operation* of the Project, according to Mr. Cashen.⁸⁹ The FEIR attempts to justify this omission by stating that “little evidence is available to indicate that PV solar panels actually attract birds, no standard for analysis of this issue has been established, and no regulatory agency guidance has been published on this issue.”⁹⁰ However, Mr. Cashen explains that the U.S. Fish and Wildlife Service (“USFWS”) has issued guidelines for evaluating the impacts of solar facilities and has also issued guidelines on the approach that should be implemented to monitor migratory bird take at solar power facilities.⁹¹ Mr. Cashen also provides references and evidence for bird injury and mortality at solar facilities at least partially due to birds mistaking PV solar panels as water.⁹² There is additional evidence that solar facilities attract insects, which in turn attract insect-eating birds that collide with solar panels and other infrastructure.⁹³ Therefore, the FEIR’s claim that there is little evidence and no standards is rebutted by the information that has been provided to the County.

⁸⁶ FEIR, p. 2-370.

⁸⁷ Cashen Comments, p. 7.

⁸⁸ *Id.*, at 8.

⁸⁹ *Id.*

⁹⁰ FEIR, p. 2-370.

⁹¹ U.S. Fish and Wildlife Service. 2011. Monitoring Migratory Bird Take at Solar Power Facilities: An Experimental Approach. 9 pp.

⁹² Cashen Comments, p. 8.

⁹³ *Id.*

In addition, the County misinterpreted information we provided on bird mortality at solar sites, and ignored other information regarding bird deaths at similar project sites.⁹⁴ The County also failed to disclose or analyze Project impacts to two species on the California Department of Fish and Wildlife Watch List ("CDFW"): the long-billed curlew and the California horned lark.⁹⁵ Mr. Cashen has demonstrated through scientific information, some of which was ignored or misinterpreted by the County, that the Project's significant impacts to avian species have not been adequately analyzed or mitigated, in violation of CEQA.

3. *Other Avian Species*

Regarding the burrowing owl, the Project will require the "passive relocation" of burrowing owls off the Project site.⁹⁶ As we discussed in our previous comment letter, CDFW guidelines indicate passive relocation is a potentially significant impact that must be disclosed and analyzed in CEQA documents.⁹⁷ Specifically, Mr. Cashen states that "passive relocation can result in mortality, reduced reproductive output, territory abandonment, and ultimately a decline in the population."⁹⁸ Mr. Cashen explains that the preparation of a Burrowing Owl Exclusion Plan does not relieve the County from this obligation, which remains unresolved by the FEIR.⁹⁹ Mr. Cashen concludes that "[t]he FEIR not only allows impacts to occur prior to the acquisition of mitigation lands, but it also fails to ensure the mitigation lands are managed for the benefit of burrowing owls according to Department-approved management, monitoring and reporting plans."¹⁰⁰

Regarding the tricolored blackbird, the California Fish and Game Commission recently approved an emergency listing of the tricolored blackbird under the California Endangered Species Act. Tricolored blackbirds have been observed on the Project site, and they have the potential to nest there.¹⁰¹ The DEIR and FEIR failed to provide any analysis specific to this species, which could be

⁹⁴ *Id.*

⁹⁵ *Id.*, at 10.

⁹⁶ DEIR, p. 4.4-136 and Figure 4.4-8.

⁹⁷ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, p. 10.

⁹⁸ Cashen Comments, p. 15.

⁹⁹ *Id.*

¹⁰⁰ *Id.*, at 16.

¹⁰¹ DEIR, p. 4.4-73 and Appendix E.1, p. 105.

significantly impacted by habitat loss, fragmentation, and heightened depredation due to the Project.¹⁰²

4. *California Tiger Salamander*

We previously commented on the flawed methods that were used to establish existing conditions pertaining to the CTS. The FEIR does not justify the reliability of the data on the CTS, but instead states that "[t]his information is only necessary to support a negative finding for CTS on a project site."¹⁰³ However, as Mr. Cashen points out, "the County *has made* a negative finding."¹⁰⁴ The FEIR states: "[i]n this case, the project has excluded the potential for CTS breeding on the project site based on the lack of breeding habitat."¹⁰⁵ That is, unless the County provides the information needed to justify the reliability of the data collected during years with <70% of the average rainfall, the County cannot conclude there is no breeding habitat for CTS based on that data. As Mr. Cashen explains, the issue is "confounded"¹⁰⁶ because the CTS site assessment, which was excluded from the DEIR but included with the FEIR, states:

The possible pond at the northwest corner of the proposed Solar Generation Facility may provide breeding habitat for CTS if it contains standing water. However, because this possible pond was dry during the site visits, its suitability as CTS breeding habitat could not be assessed at this time and depends on if and to what extent it contains standing water during a year of normal rainfall.¹⁰⁷

The photo of the pond shows a pier, which is evidence that it contained water, and presumably may continue to contain water during wet years, according to Mr. Cashen.¹⁰⁸ Mr. Cashen further notes that although the County has asserted that protocol level surveys are not required under CEQA, "the absence of standardized field survey methods (i.e., adherence to the USFWS and CDFW survey protocol) impairs adequate and consistent impact assessment during regulatory review processes, which in turn reduces the possibility of effective mitigation, as is the case

¹⁰² Cashen Comments, p. 16.

¹⁰³ FEIR, p. 2-356.

¹⁰⁴ Cashen Comments, p. 11.

¹⁰⁵ FEIR, p. 2-356.

¹⁰⁶ Cashen Comments, p. 11.

¹⁰⁷ FEIR, Appendix E.19, p. 7.

¹⁰⁸ *Id.*, at 11, Photo 7; Cashen Comments p. 12.

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with this Project.”¹⁰⁹ Therefore, the FEIR has not adequately analyzed and mitigated significant impacts to the CTS.

5. *Western Pond Turtle*

According to Mr. Cashen, “[t]he Project area supports a relatively abundant population of western pond turtles.”¹¹⁰ The DEIR stated that “[i]ndirect impacts to western pond turtles include long-term decline in population viability within the project site over the life of the project.”¹¹¹ The DEIR further concluded that the Project would have a significant impact on the species through increased mortality and the loss of aquatic and upland nesting habitats.¹¹²

We maintain from our previous comments that this level of impact would have relatively severe consequences for the species.¹¹³ The County’s only response to this concern was that “Mitigation Measure B-1(t) in Section 4.4, *Biological Resources*, provides avoidance and mitigation for western pond turtle.”¹¹⁴ Mr. Cashen explains that the referenced mitigation measure “is limited to preconstruction clearance surveys of pond turtles within 200 feet of suitable aquatic habitat sometime prior to initiation of construction activities.”¹¹⁵ He further states that the “EIR does not specify the timing of the preconstruction surveys, nor does it account for the turtles that may occur more than 200 feet from aquatic habitat (the DEIR acknowledges pond turtles may nest more than 0.25 mile away from aquatic habitat).”¹¹⁶ Whereas the mitigation measure may be useful in salvaging some turtles, Mr. Cashen states that “it does not mitigate the decline in population viability, the loss of habitat, or the increased mortality that is likely to occur due to increased traffic levels.”¹¹⁷ As a result, the adverse effects that the Project would have to western pond turtles remain unmitigated.

¹⁰⁹ Cashen Comments, p. 12.

¹¹⁰ *Id.*

¹¹¹ DEIR, p. 4.4-115.

¹¹² *Id.*, at 4.4-116.

¹¹³ California Natural Diversity Database (CNDDB). 2015. RareFind 5 [Internet]. California Department of Fish and Wildlife (“CDFW”) [2015 January 6]. See also Jennings MR, MP Hayes. 1994. Amphibian and Reptile Species of Special Concern in California. Final Report to the California Department of Fish and Game. 260 pp.

¹¹⁴ FEIR, p. 2-359.

¹¹⁵ Cashen Comments, p. 12.

¹¹⁶ *Id.*; DEIR, p. 4.4-115.

¹¹⁷ Cashen Comments, p. 13.

6. *San Joaquin Pocket Mouse*

We previously commented that adequate trapping was not conducted to determine the presence of the San Joaquin pocket mouse. We further commented that the DEIR failed to acknowledge that if the pocket mice in the Project area represent part of a metapopulation structure, loss of the subpopulation could negatively impact overall species viability and diversity. The FEIR responded to our comments by stating the species is not known from BSA or the Cholame Valley, and that pocket mouse burrows were not detected during the full-coverage ground surveys.¹¹⁸ Mr. Cashen notes that these statements conflict with the DEIR, which states:

[D]uring small mammal trapping efforts on 6 August 2013, a single San Joaquin pocket mouse was observed foraging above ground. The area in which the pocket mouse was observed contained several quarter-sized burrows, indicating that several individuals were occupying the area. The project site contains suitable habitat for this species; however, the San Joaquin pocket mouse occurrence is likely limited to those areas with friable soils, and they are likely absent from areas with very heavy clay or serpentine soils. As such, the population of San Joaquin pocket mice in the BSA is expected to be small.¹¹⁹

The FEIR further states that “[i]mpacts at the metapopulations level are possible for all species, not just San Joaquin pocket mouse; however, a metapopulation analysis of non-listed special status species is far outside of the standard and accepted analyses required to evaluate potential impacts to special status species under CEQA.”¹²⁰ However, CEQA requires that *all* species be assessed for the significance of the project impacts on their survival, not just listed species.¹²¹ Furthermore, according to Mr. Cashen, without metapopulation or other additional analysis, the County has no basis for its conclusion that the Project would “reduce a relatively small amount of habitat that is regionally abundant for

¹¹⁸ FEIR, p. 2-362.

¹¹⁹ DEIR, p. 4.4-95.

¹²⁰ FEIR, p. 2-362.

¹²¹ CEQA Guidelines § 15065(a) (“A lead agency shall find that a project may have a significant effect on the environment . . . where there is substantial evidence, in light of the whole record, that . . . [t]he project has the potential to substantially degrade the quality of the environment; substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels; threaten to eliminate a plant or animal community . . .”).

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this species" or for its conclusion that "consequently, this permanent habitat conversion would not substantially reduce the number of this species or restrict its range."¹²² Indeed, Mr. Cashen states that "neither the DEIR nor the FEIR provides any evidence to justify that conclusion."¹²³

Based on the available evidence, Mr. Cashen concludes that the Project could still "cause the extirpation of the San Joaquin pocket mouse from the Project site."¹²⁴ This constitutes a significant impact that was not adequately disclosed, analyzed, or mitigated in the DEIR and FEIR.

7. *Special-Status Kangaroo Rat Species*

Our previous comment letter highlighted flaws with the Applicant's small mammal trapping efforts, including the failure to adhere to the USFWS protocol. The County responded by stating that "[p]rotocol-level surveys for kangaroo rats are not required to evaluate potential impacts to special status kangaroo rat species and the surveys completed were robust and appropriate for establishing baseline environmental conditions and evaluating potential impacts with regards to kangaroo rats."¹²⁵ However, Mr. Cashen explains that "[t]his is a spurious argument, because the County never evaluated potential impacts to special-status kangaroo rat species. Instead, it simply concluded their absence."¹²⁶

The giant kangaroo rat (federally and state listed as endangered), Tipton kangaroo rat (federally and state listed as endangered), and short-nosed kangaroo rat (California Species of Special Concern) have been documented in the vicinity of the Project site, according to Mr. Cashen.¹²⁷ The FEIR suggests that the full-coverage ground surveys, spotlight surveys, and camera surveys provided additional evidence that special-status kangaroo rat species are absent from the Project site.¹²⁸ Mr. Cashen notes that these types of surveys are not reliable means for establishing the absence of special-status kangaroo rat species. The Applicant's Biotic Report itself supports Mr. Cashen's conclusions, stating that "[a] large number of burrows

¹²² DEIR, pp. 4.4-95 and -96.

¹²³ Cashen Comments, p. 13.

¹²⁴ *Id.*, at 14.

¹²⁵ FEIR, p. 2-365.

¹²⁶ Cashen Comments, p. 14.

¹²⁷ DEIR, Figure 4.4-6 and Appendix E.8, p. i.

¹²⁸ FEIR, p. 2-365.

were identified as those of an *unconfirmed species* of kangaroo rat...¹²⁹ Indeed, the USFWS survey protocol indicates that "[l]ive-trapping is the only method for reliable identification of kangaroo rats in the San Joaquin Valley."¹³⁰ The County here ignores data that suggests the presence of kangaroo rats, and fails to properly assess the presence of the species and potential impacts. The County therefore fails to support its findings regarding kangaroo rats with substantial evidence.

8. *Rare Plants*

We previously commented, and explained above, that surveys to detect rare plants in the Project site were severely lacking. Furthermore, impacts to several plant species, including the small-flowered morning glory, were not adequately analyzed or mitigated. Mr. Cashen's comments demonstrate that the 2014 plant surveys, which were released after the close of the public comment period on the DEIR, provide new information regarding the presence and abundance of certain species that was not previously identified in the DEIR.

In addition, Mr. Cashen shows that the County failed to establish an accurate environmental setting for rare plants because the survey methods used were severely lacking. Finally, Mr. Cashen's analysis shows that the new information reveals even more potentially significant impacts to rare plants than previously admitted in the DEIR.¹³¹ Therefore, the FEIR has not adequately identified, analyzed, or mitigated the Project's significant impacts on rare plants.

C. **The FEIR Fails to Adequately Analyze and Mitigate the Project's Impacts From Hazards.**

We previously commented that the DEIR failed to adequately describe the existing setting regarding the presence of hazards on the Project site. Specifically, we commented that a Phase I ESA should be completed to identify any hazards on the site. Mr. Hagemann, through his own analysis of the Project site, found that the DEIR had overlooked two hazards. First, he found that the Project site likely contained several oil and gas wells. Second, he found that the Project site could contain pesticides, given agricultural activity on and around the site, that were not analyzed in the DEIR.

¹²⁹ DEIR, Appendix E.1, p. 16. [emphasis added].

¹³⁰ USFWS. 2013. Survey protocol for determining presence of San Joaquin kangaroo rats. U.S. Fish and Wildlife Service ("USFWS"), Sacramento Field Office. March 2013. p. 2.

¹³¹ Cashen Comments, p. 17 – 22.

In its response to comments, the County provides a Phase I ESA that was previously undisclosed in the DEIR, even though it had been completed in February of 2014.¹³² The Phase I ESA confirmed Mr. Hagemann's findings regarding the oil and gas wells. The FEIR states that "three petroleum wells have been drilled on the site; however, all three wells have been plugged and abandoned" and therefore would not be an environmental impact.¹³³ However, as Mr. Hagemann points out, "[t]he Responses provide no information about the date of the abandonment of the three petroleum well and no information about the manner of the well abandonment is disclosed."¹³⁴

According to Mr. Hagemann, well abandonment practices have not historically been as protective as current practices. Thus, "abandoned wells may act as conduits for contamination to move from the surface to underlying soil and groundwater. Older abandonments may also allow for seepage of gas to the surface through poorly sealed wells, posing health and safety risks to constr[uction] workers."¹³⁵ Given these issues, the presence of the oil and gas wells could result in a potentially significant impact that was not adequately analyzed in either the DEIR or FEIR.¹³⁶

Mr. Hagemann proposes several steps to mitigate significant impacts from abandoned well to ensure the wells are safe and impacts to public health and the environment are mitigated to a less than significant level. These steps include "(1) locating the wells in the field; (2) documenting the abandonment techniques and the dates of abandonment; and (3) re-abandoning the wells, if necessary, to prevent risks to worker health and safety and to seal off a potential route for contamination to travel from the surface to deeper levels in the subsurface."¹³⁷

Finally, as discussed above, the Phase I ESA did not disclose pesticide use on the Project site. Therefore, the FEIR fails to adequately analyze and mitigate potentially significant impacts resulting from not only the oil and gas wells but the presence of pesticides as well. The County must revise the FEIR to address these significant impacts from hazards and recirculate the EIR for public review. Otherwise, the County is in violation of CEQA.

¹³² FEIR, p. 2-383.

¹³³ *Id.*

¹³⁴ Hagemann Comments, p. 2.

¹³⁵ *Id.*, at 2.

¹³⁶ *Id.*

¹³⁷ *Id.*

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D. The FEIR Fails to Adequately Analyze and Mitigate the Project's Impacts to Water Resources

We previously commented that the DEIR failed to adequately evaluate the significance of the Project's impacts on water resources, specifically potential flooding and erosion impacts in the Project area. Dr. Myers highlighted several flaws in the DEIR's hydrology calculations. Dr. Myers also demonstrated that the County's finding of less than significant impacts was not supported by substantial evidence. We also commented that the County improperly incorporated mitigation measures as part of the Project, finding that the measures would reduce impacts to less than significant levels, without actually analyzing the significance of the impacts. This is inconsistent with the holding in *Lotus v. Department of Transportation* (2014) 223 Cal. App. 4th 645. Further, we commented that the Project proposes development within 50 feet of the top of a watercourse, in clear violation of Monterey County Code ("MCC") 16.16. Our comments showed that the Project could not meet the criteria for the exception in the law based on Dr. Myers' analysis.

In its response to comments, the County maintains that impacts HYD-4 and HYD-5 are less than significant and "disagrees with the contention that calculations were inaccurate."¹³⁸ As one basis for this contention, the County provides a brief updated hydrology report prepared by the Wallace Group.¹³⁹ Furthermore the County discusses an Applicant Proposed Measure ("APM") to address flooding and erosion impacts and states that it will comply with Sections 16.12.060 and 16.12.070 of the Monterey County Code, which require a final drainage report.¹⁴⁰ The FEIR states that the Monterey County Water Resources Agency ("MCWRA") "will review and approve the design-level drainage analysis, thus ensuring that the drainage analysis incorporates the required [flood-risk and erosion avoidance measures]."¹⁴¹ The FEIR goes on to state that "[b]ecause this is an existing requirement, and because meeting this requirement would ensure that impacts remain less than significant, additional mitigation is not required to reduce the impact."¹⁴² The County's rationale fails as a matter of law and is unsupported by substantial evidence.

¹³⁸ FEIR, p. 2-337.

¹³⁹ FEIR, Appendix Q.

¹⁴⁰ FEIR, p. 2-336.

¹⁴¹ *Id.*

¹⁴² *Id.*

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1. *Hydrology Calculations*

Dr. Myers' review of the FEIR finds that the County "simply failed to respond to issues regarding the accuracy of the roughness coefficient estimate (Comment 12.C.4), the initial abstraction (12.C.5), and the resulting effect on erosion (12.C.6 and .7)."¹⁴³ Thus, Dr. Myers' comments in the DEIR regarding flaws and shortcomings in the original analysis still apply. Dr. Myers demonstrates in his FEIR comments that the County still does not provide substantial evidence to support its flow estimates and generally fails to provide adequate responses to his comments.¹⁴⁴ For example, he states that the County "not only fails to respond to the comment [12.C.5], but makes scientifically incorrect statements regarding the process of runoff."¹⁴⁵ Regarding the Wallace Group report in Appendix Q, Dr. Myers states that "Appendix Q is fraught with simple errors and cannot be used [to] claim the DEIR estimates were correct. Additionally, it provides no references to the methods used."¹⁴⁶ Dr. Myers' analysis further shows that flooding and erosion potential is still underestimated and presents a potentially significant impact that is not adequately addressed or mitigated.¹⁴⁷

2. *Minimization/Mitigation of HYD-4 and HYD-5*

The County's assertion that APM 11 and compliance with County Code will ensure that impacts are less than significant is still not acceptable under the *Lotus* case. The FEIR states,

The project description has been revised to incorporate Applicant Proposed Measure (APM) 11, which states that the applicant will prepare a design level drainage analysis that will ensure that project facilities are not placed in areas where they would be subject to significant flood or erosion hazards or affect the existing capacity of affected watercourses.¹⁴⁸

¹⁴³ Myers Comments, p. 2.

¹⁴⁴ See Myers Comments.

¹⁴⁵ *Id.*, at 3.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*, at 2.

¹⁴⁸ FEIR, p. 2-336.

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This is simply the same requirement that was included as a mitigation measure in the DEIR; repackaged as an APM. The APM includes the same flood-risk and erosion avoidance measures discussed in the DEIR and is still lacking information necessary for adequate public review. The FEIR relies on the future design level drainage analysis and the measures therein to ensure flooding and erosion impacts remain less than significant, without adequately analyzing the impacts as significant in the first place. As explained in our previous comments, this violates CEQA, as held by the Court in *Lotus*. In addition, as Dr. Myers points out, the drainage information provided in the DEIR and FEIR is inadequate and does not allow full public review of the Project's hydrology impacts.¹⁴⁹ APM 11 unnecessarily defers the development of the final drainage plan, which will include "further modeling based on project-level detail"¹⁵⁰ and will be submitted to the County for review and approval.¹⁵¹ Furthermore, as currently proposed, the measures do not adequately reduce the impacts to less than significant levels.

The County further responds to our comment on the Project's MCC 16.16 violation by referring to a letter from the MCWRA.¹⁵² As a preliminary matter, the letter was not included in the FEIR or Appendices and the County did not respond to our request for access to the letter.¹⁵³ Furthermore, the MCWRA is a County agency, governed by the same County Board of Supervisors as the Resource Management Agency.¹⁵⁴ Thus, the County is attempting to substantiate its claims in the DEIR with a letter from itself. This is not an adequate response to our comments. The FEIR states that "MCWRA contends that the DEIR adequately evaluates development within 50 feet of the top of a watercourse by providing accurate hydraulic analysis for the project and requiring substantial compliance with MCC 16.16." In addition, the FEIR states that "MCWRA will not approve development within 50 feet of the top of bank of a watercourse unless it can be proven the development would be safe from flow-related hazards and not

¹⁴⁹ Myers Comments, p. 5.

¹⁵⁰ FEIR, p. 2-388.

¹⁵¹ *Id.*, at 2-476.

¹⁵² The FEIR cites to: Chardavoyne, David E., Monterey County Water Resources Agency. California Solar Flats (PLN 120294) DEIR response to comments on flooding hazards. October 2, 2014.

¹⁵³ See Letter from Laura Horton, Adams Broadwell Joseph & Cardozo, to John Ford, Monterey County Resources Management Agency, re: Request for Documents under CEQA for the California Flats Solar Energy Facility, December 24, 2014, **Attachment D**. We also sent a follow-up request via email to Mr. Ford for further documents and information on December 31, 2014. Neither Mr. Ford nor any other County staff responded to these communications.

¹⁵⁴ Monterey County Water Resources Agency Act, Section 15(a), *available at* <http://www.mcwra.co.monterey.ca.us/about/documents/MCWRA%20Agency%20Act.pdf>.
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significantly reduce the capacity of the drainage or watercourse.”¹⁵⁵ Therefore, the FEIR concludes that “compliance with MCC 16.16 *would reduce the impacts to a less than significant level* by establishing otherwise unknown watercourse velocities and depths for development and requiring compliance with local floodplain recommendations.”¹⁵⁶

The County is relying on a future demonstration of compliance with an exception in a local law as mitigation for an impact that it did not properly evaluate as significant, which is inconsistent with *Lotus* and other case law.¹⁵⁷ In addition, the County uses the MCWRA’s letter, which is not disclosed to the public, as a basis for its response to our comments. The County’s statement that a County agency will ensure that environmental impacts will not occur in the future does not meet the requirements of CEQA. Furthermore, Dr. Myers demonstrates that the County’s findings regarding erosion and flooding are not supported by evidence in the record. Therefore, the County cannot show that the Project as proposed in this CEQA review would even meet the criteria for an exception to MCC 16.16, which requires that:

1. The proposed development will not significantly reduce the capacity of existing rivers or watercourses or otherwise adversely affect any other properties by increasing stream velocities or depths, or diverting the flow; *and*
2. The proposed new development will be safe from flow related erosion and will not cause flow related erosion hazards or otherwise aggravate flow related erosion hazards.¹⁵⁸

Thus, the County improperly relies on measures incorporated into the Project description, as well as on discretionary exceptions in the County Code, to claim that the Project will result in less than significant impacts to water resources. The County also improperly assumes that the County itself, behind closed doors, will ensure compliance with the law. Not only are the County’s assertions counter to the

¹⁵⁵ FEIR, p. 2-336.

¹⁵⁶ *Id.*

¹⁵⁷ Cases discussing compliance with other laws as mitigation include *Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360 and *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884. In both cases, compliance with other laws was incorporated as a mitigation measure for impacts *after* the impacts had already been identified and analyzed as significant.

¹⁵⁸ MCC 16.16.050 (K).
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purpose of CEQA, but compliance with MCC 16.16 cannot be shown based on the calculations and analysis in the DEIR and FEIR.

VI. THE COUNTY FAILED TO ADEQUATELY RESPOND TO COMMENTS

"The evaluation and response to public comments is an essential part of the CEQA process."¹⁵⁹ CEQA requires the lead agency to evaluate and respond to all environmental comments it receives on draft EIRs within the public review period.¹⁶⁰ The lead agency's written responses must specifically explain its reasons for rejecting suggestions received in comments. "There must be a good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice."¹⁶¹ The County violated CEQA by failing to adequately respond to various comments made in our letter and expert attachments. These comments include:

- Comments 12.A.37 and 12.A.38 disputed the methodology for evaluating whether some special status plants species should be considered significant core populations. They also explained that the DEIR does not address how the presence of the various special-status plants in the Project area relates to the statewide (or nationwide) range of each species. The County's responses fail to address our concerns, particularly with regard to how impacts on such large populations would affect each species in terms of its overall abundance (i.e., whether impacts resulting from the Project put species survival in jeopardy of extinction as it relates to its overall distribution).
- Comment 12.B.2 was concerned with several issues regarding hazards including the nondisclosure in the DEIR of oil and gas wells on the Project site, and their potential impacts. The FEIR merely discloses that "three petroleum wells have been drilled on the site; however, all three wells have been plugged and abandoned." As Mr. Hagemann states, the County's response provides "no information about the date of the abandonment of the three petroleum well and no information about the manner of the

¹⁵⁹ CEQA Guidelines § 15088.

¹⁶⁰ See Pub. Resources Code § 21091(d)(2)(A).

¹⁶¹ CEQA Guidelines § 15088(c).

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well abandonment is disclosed.”¹⁶² Thus, the County failed to provide an adequate response to the specific concerns over potential impacts from the wells.

- Comment 12.B.4 asked for additional information to support the conclusion that no residual pesticides or herbicides are anticipated to be found in the soil and/or groundwater. The County’s response merely reiterated the same information in the DEIR, and failed to provide an adequate response to concerns over the lack of pesticide sampling.¹⁶³
- Comment 12.C.4 was primarily concerned with the roughness coefficient used in the DEIR in estimating the time of concentration for flow from a watershed. Dr. Myers states that the FEIR “does not address most of the specific points made in the original comment.”¹⁶⁴ Specifically, “[t]he response did not discuss the adequacy of the choice of “n” or provide photographs to justify the values that had been used” in the DEIR, among other issues.¹⁶⁵
- Comment 12.C.5 indicated that the DEIR used an incorrect initial abstraction value based on the curve number. Dr. Myers states that the FEIR “does not address the comment or whether the value used was correct but simply suggests that it does not matter. . .” and also fails to address other specific points he raised in his comment.¹⁶⁶ Furthermore, the FEIR references the Wallace Group study, which Dr. Myers states is “fraught with simple errors” and difficult to review, thus an inadequate responsive document. Dr. Myers asserts that additional responses to comments are similarly lacking.¹⁶⁷

VII. CONCLUSION

The Project presents significant environmental issues that must be addressed prior to Project approval. The FEIR should have been recirculated for a full public review period, based on the release of significant new information, as required by CEQA. The FEIR’s description and analysis of the decommissioning phase is

¹⁶² Hagemann Comments, p. 2.

¹⁶³ *Id.*

¹⁶⁴ Myers Comments, p. 2.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*, at 3.

¹⁶⁷ *Id.*, at 3 – 4.

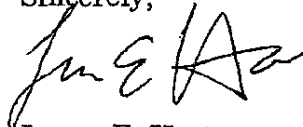
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inadequate and improperly piecemealed. The FEIR fails to adequately establish the existing baseline upon which to measure impacts related to biological resources and hazards. The FEIR also fails to identify, analyze, and mitigate potentially significant impacts associated with air quality, biological resources, hazards, and water resources. Finally, the FEIR failed to adequately respond to several of our comments. Therefore, the FEIR fails to comply with the requirements of CEQA.

Sincerely,



Laura E. Horton

LEH:clv

Attachments