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VIA EMAIL AND U.S. MAIL

Mr. Doug Libby, AICP
Principal Planner
Sutter County Community Services Department
1130 Civic Center Boulevard
Yuba City, CA 95993
Email: dglibby@co.sutter.ca.us

Re: Comments on the Draft Environmental Impact Report for the Sutter Pointe Specific Plan

Dear Mr. Libby:

We are writing on behalf of the Sutter Coalition for Responsible Development[1] ("Coalition") to provide comments on the December 19, 2008 Draft Environmental Impact Report ("DEIR") for the Sutter Pointe Specific Plan ("Specific Plan" or "Project"). The Project is a massive undertaking involving the construction of 17,500 residential units and nearly 50 million square feet of non-residential use on 7,528 acres of agricultural lands, in addition to the construction of off-site infrastructure improvements. As explained in detail below, the DEIR for the Project fails to comply with the requirements of the California Environmental Quality Act ("CEQA"). The County may not approve the Project until the errors in the DEIR are corrected and a revised document is recirculated for public review and comment. 1

[1] The Sutter Coalition for Responsible Development is comprised of Sutter County residents including John Coots, Danny Fennel, Ian Trotti, Jerrick Upton, Derek West, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry ("UA") Local 228, UA Local 447, International Brotherhood of Electrical Workers Local 340, Sheet Metal Workers International Association Local 162 and their members and their families, and other individuals that live and/or work in Sutter County.

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The members of the Coalition have a strong interest in enforcing environmental laws such as CEQA. The Coalition's members reside and work in Sutter County, and the creation of a city with over 40,000 residents in this area will radically transform their lives. Many of the individual members of the Coalition will work on the various phases of the Project. The individual members who work on the Project will be the first in line to be exposed to any contaminated soils that have not been adequately tested, identified and remediated, and will also be directly exposed to any other unmitigated safety hazards that may exist on the site.

The individual Coalition members who live, work and raise their families in Sutter County will be exposed to construction emissions and public health and safety hazards identified in these comments, and will be directly affected by increased traffic impacts in an area that is already dangerously congested. Coalition members also live in and use areas that have suffered the cumulative impacts of other environmentally detrimental and poorly planned projects in this rapidly developing region. For all these reasons, Coalition members will be directly and disproportionally affected by the environmental impacts of the Project.

1 Cont'd

The Coalition supports environmentally sustainable land use and development in Sutter County. The scope and manner of development in the proposed Specific Plan area will result in significant impacts on public health, safety and the environment which must be carefully considered. Environmentally unsound development will 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 here. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities. In particular, poor air quality has already harmed the economy of the region. Finally, Coalition members are concerned about projects that carry serious environmental risks and public service infrastructure demands without providing countervailing employment and economic benefits to local workers and communities.

The Notice of Availability for the Specific Plan DEIR ("DEIR Notice") specifies a February 3, 2009 comment deadline. The California Environmental Quality Act ("CEQA") requires that copies of the DEIR and "*all documents referenced in the draft environmental impact report*" be available for public review when the DEIR notice is issued. (Pub. Res. Code § 21092 (emphasis added); 14 Cal. Code Regs. "CEQA Guidelines" § 15087.) However, because a considerable volume

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of documents that were referenced in the DEIR were not made available to us until January 23, 2009, we requested a reasonable extension of the comment period on that date. Our request for an extension was granted and a February 6, 2009 deadline imposed. However, we reserve the right to supplement these comments on the DEIR. (CEQA Guidelines § 15105.) 1 Cont'd

We reviewed the DEIR with the help of technical expert Dr. Petra Pless. Dr. Pless' comments and qualifications are attached as Exhibit A. Please note that Dr. Pless' comments are in addition to the comments summarized below and must be addressed separately.

I. INTRODUCTION

A notice of preparation ("NOP") for the Specific Plan DEIR was issued on March 29, 2007. The NOP described the Project as consisting of the "proposed specific plan development [and] construction of an on and offsite sewer interceptor and a variety of other off-site infrastructure improvements."[2] The Project described in the NOP included the Sacramento Regional County Sanitation District's ("Sanitation District") "approval and construction of the sewer interceptor, service, and ultimate connection to the Sacramento Regional Wastewater Treatment Plant."[3]

The DEIR Notice for the Project was issued on December 19, 2008. It describes the Project as anticipated to cause significant environmental impacts in the following 17 areas: 2

Land Use;
Population, Employment and Housing;
Transportation and Circulation;
Air Quality;
Noise;
Geology, Soils, and Mineral Resources;
Hydrology and Water Quality;
Public Services;
Water Supply;
Public Utilities;

[2] NOP, p. 1.
[3] *Id.*
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Agricultural Resources;
Public Health and Hazards;
Biological Resources;
Parks and Open Space;
Cultural Resources;
Visual Resources; and
Climate Change.[4]

The DEIR itself describes only 10 of these 17 areas as significant impacts. Although the DEIR Notice states that the respective categories of Land Use and Population are significant impacts, the DEIR concludes that these impacts are not significant and do not require mitigation.[5] Of the remaining 15 significant impacts delineated in the DEIR Notice, the DEIR concludes that 5 of these impacts will not, in fact, be significant with mitigation, and that each of the remaining 10 significant impacts will be mitigated to the maximum extent feasible.[6] However, as these comments will demonstrate, these conclusions in the DEIR are not supported by substantial evidence and are in violation of CEQA.

2 Cont'd

CEQA requires that a DEIR "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 "list ways in which the significant effects of such a project might be minimized." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 ("*Laurel Heights*").) As explained in more detail below, the DEIR for the Specific Plan wholly fails to meet this standard.

The DEIR fails to meet the information and disclosure requirements of CEQA, fails to adequately describe the Project, and fails to provide an accurate description of the environmental baseline for the area the Specific Plan will impact. It fails to accurately identify and analyze the significant environmental impacts of the Project, fails to impose all feasible mitigation measures, and fails to define or mitigate cumulative impacts to the extent feasible. The DEIR's analysis of feasible Project alternatives is results-oriented and unsupported by the evidence. The County may not approve the Specific Plan until these errors in the DEIR are

[4] DEIR Notice, p. 1.
[5] DEIR, pp. ES-10 – ES-13.
[6] *Id.* at ES-13 – ES-102.
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corrected and a revised document is recirculated for public review and comment. (Pub. Res. Code § 21091.1; CEQA Guidelines § 15088.5.)

II. THE DEIR FAILS TO MEET THE INFORMATION AND DISCLOSURE REQUIREMENTS OF CEQA

CEQA has two basic purposes. First, CEQA is designed to inform decisionmakers and the public about the potential, significant environmental effects of a project. (CEQA Guidelines § 15002(a)(1).) The "primary means" by which the legislative goals of CEQA are achieved is the preparation of an EIR. (*Laurel Heights*, *supra*, 47 Cal.3d at 392; Pub. Res. Code §§ 21080(d), 21100, 21151; CEQA Guidelines §15080.) The EIR is an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes *before* they have reached ecological points of no return." (*County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810 ("*County of Inyo*") (emphasis added).) An EIR is intended to serve as "an environmental full disclosure statement." (*Rural Land Owners Assn. v. City Council of Lodi* (1983) 143 Cal.App.3d 1013, 1020 ("*Rural Land Owners*").) Thus, an EIR "protects not only the environment but also informed self-government." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 ("*Goleta Valley*").) 3

An EIR's purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. "Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental costs…" (*County of Inyo, supra,* 71 Cal.App.3d at 192-193.) However, under the guise of a self-described program or tiered environmental review,[7] the DEIR obfuscates which environmental impacts are actually being decided in this analysis, and which specific impacts will subsequently be reviewed at the project level. Moreover, because the DEIR addresses only a small part of a larger infrastructure project, it is impossible for the public to discern precisely what is under environmental review here, and what is under review in other, ongoing EIRs and federal environmental impact statements ("EISs") that address the environmental impacts of this larger infrastructure project.

Such a piecemeal analysis submerges larger environmental considerations by "chopping a large project into many little ones" and is prohibited under CEQA.

[7] DEIR, p. ES-1.

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(*City of Antioch, supra,* 187 Cal.App.3d at 1333.) A "project" is defined under CEQA as the "whole of an action;" the term "refers to the activity which….may be subject to several discretionary approvals by governmental agencies [and] *does not mean each separate governmental approval*." (CEQA Guidelines §§ 15378(a)(c)(emphasis added).) Despite CEQA's mandate that all discretionary approvals and the "whole of an action" be reviewed, the DEIR wrongly analyzes only those larger infrastructure pieces which are subject to review by one agency – Sutter County.

CEQA's full disclosure directive also prohibits deferring the analysis of specific impacts under the guise of "tiering." CEQA requires an analysis of a project's impacts at the "*earliest possible stage*, even though more detailed environmental review may be necessary later." (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1147 ("*McQueen*") (emphasis added).) This requirement holds regardless of any intention to undertake site-specific environmental review for future project phases. (*Stanislaus Nat'l Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 199 ("*Stanislaus*").) The DEIR improperly tiers its analysis of impacts for Phase I-A of the Project, even though construction of this phase is planned to begin in only *one year*.[8] The "earliest possible stage" for analyzing project specific Phase I-A impacts has long since passed; any further deferral of these impacts is prohibited under CEQA.

3 Cont'd

The second purpose of CEQA is to require public agencies to "regulate such activities so that major consideration is given to preventing environmental damage." (*Laurel Heights, supra,* 47 Cal.3d at 390; Pub. Res. Code § 21000(g).) Agencies must avoid or reduce environmental damage to the extent possible by imposing all feasible mitigation measures and considering environmentally superior alternatives. (CEQA Guidelines § 15002(a)(2-3); *see also, Berkeley Keep Jets Over the Bay Committee v. Bd. of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1354; *Laurel Heights, supra,* 47 Cal.3d at 400.) Where an EIR identifies significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts. (Pub. Res. Code §§ 21002.1(a), 21100(b)(3).) This analysis of feasible mitigation measures and a reasonable range of alternatives is crucial to CEQA's substantive mandate that significant environmental damage be substantially lessened or avoided where feasible. (Pub. Res. Code §§ 21002, 21081, 21100; CEQA Guidelines § 15002(a)(2) and (3).)

[8] DEIR, p. 2-56.
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The DEIR fails to meet the second of these two fundamental purposes of CEQA. The DEIR fails to disclose and evaluate all of the Project's potentially significant environmental impacts. It concludes, without adequate analysis, that mitigation will reduce several significant impacts to less than significant levels. For those impacts that the DEIR describes as significant, it fails to define and analyze numerous feasible mitigation measures that would reduce these impacts. Additionally, many of the mitigation measures that are proposed are improperly deferred and deprive the public of the opportunity to understand the environmental consequences of decisions *before* they are made. (*County of Inyo, supra,* 71 Cal.App.3d at 192-193.) 3

As is explained below in detail, the DEIR fails to satisfy either of CEQA's overriding purposes. In its role as lead agency, the Sutter County Community Services Department ("Sutter County") has failed to inform either itself or the public as to the significant environmental effects of the Project. Far from meeting CEQA's full disclosure requirements, the DEIR is improperly piecemealed, inappropriately tiered, and devoid of any meaningful analysis aimed at preventing the considerable environmental damage the Project will create.

III. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE PROJECT

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]." (*County of Inyo, supra,* 71 Cal.App.3d at 193 (*"County of Inyo"*).) CEQA requires that a project be described with enough particularity that its impacts can be assessed. (*Id.* at 192.) It is impossible for the public to make informed comments on a project of unknown or ever-changing proportions. "A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental costs . . . ." (*Id.* at 192-193.) "A curtailed, enigmatic or unstable project description draws a red herring across the path of public input." (*Id.* at 197-198.) Without a complete project description, the environmental analysis under CEQA is impermissibly narrow, thus minimizing the project's impacts and undercutting public review. (*See, e.g., Laurel Heights, supra,* 47 Cal.3d at 376.) 4

This deferral of information and analysis completely deprives both the public and governmental decisionmakers of their right to review the environmental

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impacts of the Project. Environmental problems should be considered at a point in the planning process "where genuine flexibility remains." (*Mount Sutro Defense Committee v. Regents of University of California* (1978) (*"Mount Sutro"*) 77 Cal.App.3d 20, 34 [143 Cal.Rptr. 365].) "A study conducted after approval of a project will inevitably have a diminished influence on decision making. Even if the study is subject to administrative approval, it is analogous to the sort of *post hoc* rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." (*Sundstrom*, *supra,* 202 Cal.App.3d at 307 [248 Cal.Rptr. at 358].) Thus, Sutter County must provide a complete description and evaluation of the Project during the environmental review process. The DEIR fails to meet this legal standard. 4 Cont'd

The DEIR contains an inadequate and truncated project description that is piecemealed from the larger action under environmental review. Further, it improperly defers analysis of environmental impacts under the guise of tiering and unsupported claims that mitigation measures are unavailable at this stage. All environmental impacts of a project are required to be considered before a decision with environmental consequences is made. (*County of Inyo, supra,* 71 Cal.App.3d at 192-193.) Sutter County's failure to adequately describe the project is not minor; the project description is so curtailed that it stultifies the objectives of the reporting process. (*Id.* at 192-193, 197-198.)

A. The DEIR Notice Ambiguously Describes the Project's Scope and Misidentifies the Project's Significant Impacts

When the NOP for the DEIR was issued in 2007, the Project was described under the heading of "Project Description" as the "proposed specific plan development [and] construction of an on and offsite sewer interceptor and a variety of other off-site infrastructure improvements."[9] Specifically, this included the Sanitation District's "approval and construction of the [6.1-mile] sewer interceptor, service, and ultimate connection to the Sacramento Regional Wastewater Treatment Plant."[10] The December 19, 2008 DEIR Notice, in contrast, states: 5

> "[The] applicant, the Measure M Group, is seeking approval of the Sutter Pointe Specific Plan….Project development would also include off-site infrastructure improvements, such as a sewer interceptor

[9] NOP, p. 1.
[10] *Id.*
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> connection to Sacramento Regional County Sanitation District's Upper Northwest Interceptor in Rio Linda, and drainage, potable water, and dry utilities improvements."[11]

The DEIR Notice makes it altogether unclear whether the Project now under environmental review is the same as the project specified in the NOP. The sewer interceptor and other off-site infrastructure improvements were clearly part of the project specified in the NOP, but the DEIR Notice does not specify whether the Project analyzed by the DEIR includes "project development" of the sewer interceptor and other, unspecified "off-site infrastructure improvements." The public is simply left to guess. Such an enigmatic project description stymies the public's ability to obtain accurate notice of the project under review and is prohibited by CEQA. (*County of Inyo, supra,* 71 Cal.App.3d at 192-193.)

What's worse, whatever guess a member of the public might have made as to whether the environmental impacts of "project development" described in the DEIR Notice are analyzed in the DEIR would have been mistaken. An examination of the DEIR reveals that *some* infrastructure improvements denoted in the DEIR Notice by the phrase "project development" *are* under review in this DEIR, while other infrastructure improvements, such as the sewer interceptor, are not. As the DEIR describes,

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> "[o]ff-site roadway and infrastructure facilities are proposed to serve project development and *are addressed* in this DEIR. These facilities include road widening, extension, and improvements; sewer force mains, pump stations, and monitoring stations; water transmission pipelines, distribution facilities, and pump stations; drainage facilities and pump stations; and electrical, communications facilities/infrastructure, and natural gas transmission lines and extensions."[12]

It is simply impossible for the public to discern from the DEIR Notice just what infrastructure elements are reviewed in the DEIR. For this reason alone, CEQA requires that the ambiguous DEIR Notice be corrected and recirculated.

[11] DEIR Notice, p. 1.
[12] DEIR, p. 1-2 (emphasis added).
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The DEIR Notice describes 17 categories of significant environmental impacts from the Project.[13] Yet, as described above, the DEIR flatly contradicts this statement in the DEIR Notice. The DEIR describes 10 – not 17 – significant impacts.[14] Although the DEIR Notice states that the respective categories of Land Use and Population are significant impacts, the DEIR concludes that these impacts are not significant and do not require any mitigation.[15] Of the remaining 15 significant impacts delineated in the DEIR Notice, the DEIR concludes that 5 of these impacts will not, in fact, be significant with mitigation, and that each of the remaining 10 significant impacts will be mitigated to the maximum extent feasible.[16] 5 Cont'd

By misrepresenting the DEIR's conclusions as to the significant impacts of the Project, the DEIR Notice is in violation of CEQA. Far from sounding an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before" decisions have been made, the DEIR Notice quells the "alarm" by representing that certain environmental effects are analyzed in the DEIR as significant – when they are not. (*County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810 (*County of Inyo*, supra, 32 Cal.App.3d at 810.)

Not only is the DEIR Notice's description of the Project's scope ambiguous and its listing of environmental impacts inaccurate, but its delineation of the entitlements needed for the Project is incomplete. The DEIR Notice describes the Project as requiring the following entitlements:

> "[A]pproval of the specific plan, approval of a general plan amendment, approval of zoning code and map amendments, adoption of an urban services plan, adoption of a public facilities/infrastructure financing plan, adoption of a public facilities/infrastructure phasing plan, and adoption of a development agreement, *among others*.[17] 6

What "among other" entitlements means is, apparently, for the public to guess. But the public could not have even ventured such a guess, given the project description's lack of clarity as to which infrastructure improvements are analyzed in the DEIR.

[13] DEIR Notice, p. 1.
[14] DEIR, pp. ES-13 – ES-102.
[15] DEIR, pp. ES-10 – ES-13.
[16] *Id.* at ES-13 – ES-102.
[17] DEIR Notice, p. 1.
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Moreover, the DEIR Notice lists only those entitlements that will be issued by Sutter County. No other entitlements are mentioned, even though a "project" is defined under CEQA as the "whole of an action….subject to several discretionary approvals by [several] governmental agencies." (CEQA Guidelines §§ 15378(a)(c).) A project description should not be mere fodder for guessing games as to what environmental impacts the DEIR actually analyzes. 6 Cont'd

B. This "Program" DEIR is Improperly Piecemealed from the Larger Infrastructure Project

The DEIR Notice fails to describe the DEIR as either a program EIR or a tiered EIR. This oversight is not surprising: the DEIR cannot decide what kind of environmental review document it is. As the DEIR states, it can be "characterized either as a 'Program EIR'….or as a 'First Tier EIR'."[18] The DEIR then asserts that "[t]hese labels are complementary, not mutually exclusive….[r]egardless of the title."[19] Contrary to the DEIR's claim, titles do matter; the CEQA Guidelines specify the limited circumstances in which a program EIR is permissible, and the DEIR for the Project does not meet these criteria.

The CEQA Guidelines for the preparation of a program EIR state:

> Where individual projects are, or a phased project is, to be undertaken and where the total undertaking comprises a project with significant environmental effect, the Lead Agency shall prepare a *single program EIR* for the ultimate project as described in Section 15168. 7

(CEQA Guidelines § 15165 (emphasis added).) The Specific Plan is a phased project that, with other "individual projects," is a component of a "total undertaking compris[ing] a project with significant environmental effect." Thus, a *single EIR* for the "ultimate project" is required. However, the DEIR is merely one of many EIRs for the "total undertaking" comprising the larger project. It is therefore in violation of CEQA.

The CEQA Guidelines permit multiple program EIRs only when a project is one of "several similar projects" that are "not deemed a part of a larger undertaking or a larger project." (CEQA Guidelines § 15165.) Even then, the CEQA Guidelines

[18] DEIR, p. ES-1.
[19] *Id.*
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encourage the lead agency to prepare "one EIR for all projects." (*Id.*) In all cases, where there is *one* "total undertaking" or "project," it must be reviewed in a *single* program EIR. A "project" is defined as the "whole of [the] action….subject to several discretionary approvals by governmental agencies." (CEQA Guidelines §§ 15378(a)(c)(emphasis added).)

Here, the "whole of the action" is nothing short of the building of an entire city with a resident population that will exceed 40,000, and all of the infrastructure approvals that are prerequisite for that city to be built. While this "total undertaking" or "project" may well lend itself to a program EIR, it must be a *single* program EIR followed by project-specific, phased development within that larger framework. The DEIR's fails to meet this standard and, in so doing, violates CEQA's prohibition against piecemealing a project's environmental review.

CEQA prohibits piecemeal analysis because it submerges larger environmental considerations by "chopping a large project into many little ones." (*City of Antioch, supra,* 187 Cal.App.3d at 1333.) The project at issue here – the building of an entire city and its support infrastructure – has been piecemealed into several discrete environmental reviews, any of which calls the entire Specific Plan into question. Among the environmental reviews for this "total undertaking" are: 7 Cont'd

1) The Highway 99/70 interchange;
2) Levy improvement;
3) Construction of a natural gas pipeline;
4) The Public Utility Commission's ("PUC") Golden State Water Company proceeding;
5) Construction of a natural gas pipeline;
6) Expansion of the Sanitation District's wastewater treatment plant ("WWTP");
7) Construction of a sewer main, including Sutter County and the Sanitation District's entry into a wastewater services agreement, Sutter and Sacramento County LAFCO approvals, and RWQCB approval;
8) Sutter County General Plan update;
9) Sacramento International Airport Land Use Commission ("ALUC") finding of consistency with its land use plan, or a 2/3 override from the County;
10) Placer Parkway; and
11) State Water Resources Control Board ("SWRCB") approval for groundwater "change of use."

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This list of environmental reviews, albeit incomplete, alone demonstrates why CEQA requires that a *single* program EIR be prepared for the "total undertaking" comprising the larger project. (CEQA Guidelines § 15165.) All of these environmental reviews are associated with the larger project of building a city and providing it with necessary infrastructure; they cannot subsequently be reviewed in concert with the development phases provided for in the Specific Plan.

Remarkably, this program DEIR does not even encompass all *Sutter County approvals* required for adoption of the Specific Plan. Sutter County's entry into a wastewater services agreement with the Sanitation District, and the related construction of a sewer line, have been improperly excluded from the DEIR's analysis of environmental impacts – even though this action was part of the NOP's original project description.[20] Sutter County is also required to obtain a finding of consistency from ALUC for the Specific Plan and, if a consistency finding is not granted, must override an inconsistency finding with a 2/3 vote.[21] This override vote would be subject to yet another environmental review under CEQA, serving to further muddy the waters of an already piecemeal-shredded environmental impact analysis.

7 Cont'd

Several ongoing environmental reviews for the larger city-building project have already been tainted by Sutter County's truncated project description and piecemeal analysis of the Specific Plan. As just one example, Caltrans, acting through its delegated National Environmental Policy Act ("NEPA") authority, last month issued a categorical exclusion ("CE") for its construction of the Highway 99/70 interchange. However, as the proposed Sutter Pointe Specific Plan ("SPSP") describes, Phase I-A of the Project is "centered around a proposed interchange at Riego Road and SR 99/70."[22] The Federal Highway Administration's NEPA regulations, which Caltrans is charged with implementing, prohibit issuance of a CE for any project that "induce[s] significant impacts to planned growth or land use for the area."[23] Under the delegated NEPA program, the State of California has waived its sovereign immunity and Caltrans is subject to suit in federal court.[24] Should such a federal lawsuit be brought, Caltrans' improper issuance of a CE for the interchange would almost certainly be overturned. (*West v. Sec. of the Dept. of*

[20] NOP, p. 1.
[21] Pub. Util. Code § 21675.1(d).
[22] SPSP, p. 1-10.
[23] 23 CFR § 771.117.
[24] Assembly Bill 2650 (2008).
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Transportation, 206 F.3d 920 (9th Cir. 2000) (overturning CE for interchange on grounds of induced growth).)

The Specific Plan could never be implemented without the 99/70 interchange. Nor could it ever be implemented without a "change of use" designation from the SWRCB that would allow groundwater for irrigation to be used for residential purposes; the building of a natural gas pipeline; the building of a sewer main; the expansion of the Sanitation District's WWTP; or the improvement of levees in this severely flood-prone area. Where, as here, a project analyzed in an environmental review document has no "independent utility" absent the granting of other discretionary approvals, illegal piecemealing under CEQA has occurred. (*Del Mar Terrace Conservancy, Inc. v. City Council of the City of San Diego* (1992) 10 Cal.App. 4th 712, 732-733 ("*Del Mar*").) 7 Cont'd

The DEIR's inadequate, piecemeal review of this larger infrastructure project is fatally flawed. Sutter County should withdraw the DEIR, coordinate with other agencies with discretionary approval authority over the "total undertaking" comprising the larger project, and issue a combined DEIR/DEIS that appropriately addresses all environmental impacts related to the "whole of the action."

C. CEQA Requires that Phase I-A of the Specific Plan be Analyzed in this DEIR

The DEIR improperly tiers its analysis of impacts for Phase I-A of the Project, and defers consideration of these impacts to a future, project-level environmental review. This deferral of consideration of Phase I-A environmental impacts is an impermissible use of tiering under CEQA. An analysis of any project's environmental impacts must occur at the "*earliest possible stage*, even though more detailed environmental review may be necessary later." (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1147 ("*McQueen*") (emphasis added).) This requirement of CEQA holds regardless of any intention to undertake site-specific environmental review for future project phases. (*Stanislaus, supra,* 48 Cal.App.4th at 199.) The DEIR states that construction of Phase I-A of the Specific Plan is scheduled to begin in only *one year*.[25] Accordingly, it is axiomatic that the "earliest possible stage" for analyzing project specific Phase I-A impacts has long since passed. 8

[25] DEIR, p. 2-56.

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Moreover, "in preparing an EIR for a specific plan with several phases of development, an environmental impact issue is *ripe for consideration when there is sufficient reliable data* to permit preparation of a meaningful and accurate report on the impact." (*Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1028 ("*Los Angeles Unified*"); *citing Laurel Heights, supra,* 47 Cal3d at 395 (emphasis added).) The DEIR for the multi-phased Specific Plan repeatedly refers to data and studies concerning the environmental impact of Phase I-A of the Project. This apparent availability of "sufficient reliable data" demonstrates that the environmental impacts of Phase I-A of the Project are "ripe for consideration," must be included in the project description, and must be analyzed in this environmental review document.

8 Cont'd

A lead agency's failure to analyze specific plan impacts for which sufficient data exists is particularly egregious where, as in this case, the lead agency has prepared the environmental review document for its *own project*. (*Id.*) When this occurs, there is a danger that the lead agency will use tiering to generate "bureaucratic and financial momentum [and] provid[e] a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project." (*Id.*) An EIR's purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. (*County of Inyo, supra,* 71 Cal.App.3d at 192-193.) The DEIR's failure to analyze the project-level environmental impacts of Phase I-A, when this phase of the Specific Plan is scheduled to commence construction in only *one year*, is in blatant violation of CEQA's mandate.

D. The DEIR Fails to Adequately Describe and Analyze "Measure M"

The "Project Description" chapter of the DEIR describes the Project as the implementation of "voter-approved Measure M, an *advisory initiative*…."[26] Despite this acknowledgement that Measure M is merely *advisory*, throughout the DEIR Measure M is treated as a directive for which compliance is mandated. The DEIR states that the Project is "designed….under the *restrictions* of Measure M."[27] Similarly, the SPSP itself states that "[t]he Sutter Pointe Specific Plan and associated entitlements are the planning tools that respond to the *requirements* set

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[26] DEIR, p. 2-1 (emphasis added).
[27] DEIR, p. 2-8 (emphasis added).
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forth by Measure M."[28] However, no such "restrictions" or "requirements" of Measure M exist. This misguided treatment of Measure M as a mandate taints Sutter County's entire analysis of environmental impacts and project alternatives throughout the DEIR.

The DEIR Notice fails to describe the Project as the implementation of Measure M, and, for that matter, fails to describe Measure M at all. It references only the "Measure M Group" as the "applicant," wrongly implying that comprehensive planning, including specific plans and general plan amendments, stems from an application reflecting a developer's wish list.[29] Contrary to the DEIR Notice, this is Sutter County's own project; it belongs to no "applicant." Once Measure M is recognized as the advisory measure that it is, and once it is recognized that the Project under review can be defined neither by Measure M nor a particular applicant, the DEIR's project description must be redefined to reflect Sutter County's apparent goal of fostering environmentally sustainable development throughout the larger 9,500-acre Sutter County Industrial-Commercial Reserve ("I-C Reserve") – not the portion of that area controlled by development interests with the self-appellation of the "Measure M Group." 9 Cont'd

Not only does the DEIR wrongly treat Measure M as a mandate throughout its environmental analysis, but it wrongly describes the Project as consistent with this advisory measure. Measure M states that planning within the existing I-C Reserve can begin "*if* the following planning standards are met."[30] Among these planning standards are that residential construction must be "protected, at a minimum, from a 100-year flood event."[31] Thus, 100-year flood protection must be provided for *before* planning consistent with Measure M can even commence. 10

Only last month, the Project area was designated by FEMA as an AE zone, which provides for only *30-year* flood protection.[32] The AE zone requires that all new construction must be elevated *above* mapped flood levels.[33] Yet, the DEIR concedes that 100-year flood protection will not be provided for the Project area until significant levy improvements are completed.[34] Measure M's "planning

[28] SPSP, p. 1-7.
[29] DEIR Notice, p. 1.
[30] Measure M Sample Ballot, p. 2.
[31] Measure M Sample Ballot, p. 2.
[32] DEIR, p. 3.7-13.
[33] *Id.*
[34] *Id.* at 3.7-56.
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standards" for this flood protection have not remotely been met: the levy construction has not even been approved. In fact, levy improvements planned by the Sacramento Area Flood Control Agency ("SAFCA") are still undergoing environmental review.[35] 10 Cont'd

Furthermore, Sutter County is required to comply with AB 162's newly imposed requirements for flood hazard planning *before* the General Plan is amended by the Specific Plan. Before any substantial amendments to a general plan are adopted, AB 162 states that the planning agency "shall refer the proposed action" to the Central Valley Flood Protection Board ("CVFPD") for review and comment.[36] Despite this legal mandate, the DEIR makes no mention of AB 162, and this required referral to the CVFPD has not been made. Meanwhile, while the Specific Plan is a substantial amendment to Sutter County's 1996 General Plan, Sutter County is simultaneously undergoing an update to that same General Plan – from which the Specific Plan DEIR is improperly piecemealed. AB 162 requires updated general plans to "identify and annually review those areas covered by the plan that are subject to flooding identified by flood plain mapping prepared by [FEMA]."[37] It also states that the "conservation element shall identify rivers, creeks, streams, flood corridors, riparian habitats, and land that may accommodate floodwater for purposes of groundwater recharge and stormwater management."[38] Thus, the piecemealing of the Specific Plan from the simultaneously occurring General Plan update is a transparent circumvention of AB 162's most stringent flood planning requirements and their environmental review under CEQA. 11

E. The DEIR Fails to Place the Public on Notice that Thousands of Acres of Agricultural Lands and Wetlands will be Destroyed

Neither the DEIR Notice nor the extensive "Project Description" chapter in the EIR once mention the term "wetlands." Given that the Project site contains 66 *linear* acres of federally-constructed canals and *6,000 acres* of rice fields, all of which are converted wetlands, this oversight is remarkable.[39] No wetland delineation was even conducted for the "off-site improvement areas" that are included in the project description.[40] The public has not been placed on notice that, at minimum, hundreds 12

[35] DEIR, p. 3.7-23.
[36] AB 162, § 4 (amending Government Code).
[37] *Id.* at § 1.5.
[38] *Id.*
[39] DEIR, p. 3.13-33.
[40] *Id.*
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– and potentially *thousands* – of wetland acres will be filled by the Project. What's worse, the public is left to simply guess what the environmental impact on wetlands will be. To this date, it is unknown whether dozens, hundreds, or even thousands of federal wetland acres occupy the Project site. It is not the public's responsibility under CEQA to engage in a guessing game of wetlands impacts.

This guessing game could easily have been avoided by seeking an "approved jurisdictional determination" ("approved JD") from the United States Army Corps of Engineers ("Army Corps") as to the extent of federal wetlands on the site.[41] The DEIR contains no evidence that such an approved JD was sought, presumably out of fear as to what the answer might be. Instead, the DEIR states that a consultant's wetlands delineation was sent to the Army Corps two years ago, in 2007, but that no "verification" of that delineation has been obtained.[42] However, this statement in the DEIR falls nothing short of prevarication. The Measure M Group had the option of obtaining from the Army Corps either a "preliminary jurisdictional determination" ("preliminary JD"), which is a purely advisory document that states whether there "may be" wetlands on a parcel, or an approved JD, which would require federal wetlands permits for the area to be developed.[43] As the Army Corps' regulatory guidance for jurisdictional determinations states, its goal is to "process both preliminary JDs and approved JDs *within 60 days*."[44] Given this typical 60-day time frame, it is apparent that obtaining an approved JD for the Project area would have been feasible.

12 Cont'd

Irrespective of the Measure M Group's failure to obtain an approved JD that would potentially reveal hundreds of acres of federal wetlands on the Project site, an approved JD must be obtained from the Army Corps before the Project's environmental impacts can be assessed. To be sure, should an approved JD reveal the existence of several hundred jurisdictional wetland acres on site, the entire Specific Plan would necessarily be called into doubt. But that is the precise reason why CEQA prohibits Sutter County from piecemealing federal wetlands impacts from its environmental review of the Specific Plan. (*Del Mar, supra*, 10 Cal.App. at 732-733.)

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[41] 33 CFR § 331.2.
[42] DEIR, p. 3.13-33.
[43] 33 CFR § 331.2.
[44] Army Corps, Regulatory Guidance Letter 08-02, p. 3 (emphasis added).
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The DEIR Notice also fails to inform the public that nearly 2,000 acres of Prime Farmland and over 5,000 additional acres of Farmland of Statewide importance will be destroyed by the Project.[45] This flouting of CEQA's fundamental disclosure requirements deprives the opportunity for the public to meaningfully comment on this environmental impact. (*County of Inyo, supra,* 71 Cal.App.3d at 192-193.) It can nowhere be gleaned from the DEIR Notice that the Project will be developed on an existing agricultural greenfield; such a truncated project description violates the public disclosure mandate of CEQA. (*Rural Land Owners, supra,* 143 Cal.App.3d at 1020.) 14

F. The DEIR Fails to Place the Public on Notice that the Project is Inconsistent with the Habitat Conservation Plan

The DEIR Notice makes no mention that the Project is located within the area of the Natomas Basin Habitat Conservation Plan ("HCP"). This fails to put members of the public on notice that the Project is located within a sensitive wildlife area, and fails to alert those individuals who have an interest in overseeing the HCP's ongoing implementation. The DEIR fails to identify which components of the Project are within the HCP area, and which Project components are not within the HCP area. 15 16

The 7,528 acres planned for development under the Specific Plan do not include "off-site infrastructure improvements to support project development."[46] However, nowhere does the DEIR specify just how many acres of development these off-site improvements will require, and what portion of that development will be within the HCP area. The DEIR only states that most "off-site infrastructure improvements are not within the area covered" by the HCP, and will therefore require an incidental take permit under the Endangered Species Act ("ESA").[47] 17

Absent any description of the off-site acreage to be developed by the Project, it is impossible to discern the environmental impact of the Project on wildlife species, and it is impossible to discern the extent to which this development is inconsistent with the HCP. The portion of the HCP within Sutter County provides a general ESA permit for up to 7,467 acres of development that is consistent with

[45] DEIR, p. 5-26.
[46] DEIR, p. 1-6.
[47] DEIR, p. 3-13.1.
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the HCP's mitigation measures.[48] However, the United States Fish and Wildlife Service's ("FWS") Findings Statement for approving the HCP states that these 7,467 acres include "infrastructure improvements in Sacramento County."[49] RD 1000 drainage channel improvements south of the Sutter-Sacramento County line are "*considered part of Sutter's 7,467 acres of authorized development.*"[50] The Project includes these same RD 1000 improvements to the "East Drainage Canal and Montna Canal."[51] Thus, although the DEIR makes it impossible to discern how many hundreds of acres the Project exceeds the maximum acreage allotment under the HCP, there can be no question that the Specific Plan exceeds this 7,647 acre allotment. 17 Cont'd

The consequences of Sutter County's approval of development that exceeds the HCP's 7,647 acre limit are significant. As the HCP states,

> "approval by Sutter County of development within the Natomas Basin beyond the authorized 7,467 acres or outside of the Sutter County Permit Area would constitute a significant departure from the Plan's OCP and would *trigger a reevaluation of the Plan, a new effects analysis, potential amendments and/or revisions to the Plan and Permits, a separate conservation strategy and issuance of Incidental Take Permits to the permittee for that additional urban development, and/or possible suspension or revocation of the County's Permits* in the event the County were to violate such limitations without having completed the required reevaluation, amendments or revisions."[52] 18

The DEIR wholly fails to analyze the Project's inconsistency with the HCP, even though the Project would, by the HCP's own terms, "trigger a reevaluation of the plan" and require a new environmental review under both NEPA and CEQA; HCP amendments and revisions; and the "suspension or revocation" of Sutter County's permits.

While wholly failing to address the off-site infrastructure improvements that must be counted towards the HCP's 7,467 acre allotment, the DEIR claims that the Project's 7,528 acre area exceeds this allotment by 61 acres due to pre-existing 19

[48] HCP, p. I-7.
[49] FWS Findings Statement, p. 8.
[50] *Id.* (emphasis added).
[51] DEIR, p. 3-13.1.
[52] HCP, p. I-3 (emphasis added).
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development that is not subject to the HCP.[53] This is incorrect. The HCP explicitly incorporates the "SYSCO warehouse facility that occupies approximately 50 acres" within its 7,467 acre allotment.[54] 19 Cont'd

Moreover, as the HCP explains, there exist only 8,573 acres within Sutter County's I-C Reserve that lie outside of the Swainson's Hawk Zone.[55] Inexplicably, the Specific Plan area does not encompass all of these 8,573 acres. However, the remaining approximately 1,000 acres within the I-C Reserve and within the HCP area must be included in the project description and analyzed in the DEIR. Sutter County is prohibited from piecemealing the Specific Plan area from the larger I-C Reserve, and *de facto* allotting all HCP development rights to the Specific Plan area. If the remaining 1,000 acres within the I-C Reserve will not be developed as a result of the Specific Plan, the DEIR must assess this impact. 20

G. The DEIR Fails to Place the Public on Notice that the Project is within the ALUC Planning Area

The DEIR Notice makes no reference to the Project's proximity to the Sacramento International Airport ("Sacramento Airport"), even though the Project is located within the ALUC planning area and Sutter County is required to obtain a determination of consistency with ALUC's comprehensive land use plan ("CLUP"). ALUC's consistency determination must be obtained before the environmental review for the Project is completed. If ALUC finds the Specific Plan to be incompatible with the CLUP, Sutter County can only override this determination with a 2/3 vote "*if* it makes specific findings."[56] Specifically, the County would have to demonstrate, subject to judicial review, that the "public's exposure to excessive noise and safety hazards within areas around public airports" is "minimized."[57] "At least 45 days" before Sutter County were to undertake such an override vote, it would be required to provide ALUC and the State Aeronautics Division with a proposed decision, and allow 30 days for these agencies to provide comments; these comments would then be included in the record of the decision.[58] 21

[53] DEIR, p. 6-3.
[54] HCP, p. III-16.
[55] *Id.*
[56] Pub. Util. Code § 21675.1(d)(emphasis added).
[57] *Id.* at 21670(a)(2).
[58] *Id.* at 21676(b).
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ALUC's review of the Specific Plan cannot be piecemealed from this environmental review; the environmental impacts associated with the CLUP must be considered at the "*earliest possible stage*" in the environmental review process. (*McQueen, supra,* 202 Cal.App.3d at 1147 (emphasis added).) The DEIR acknowledges that the Project requires an ALUC consistency determination, but conclusively presumes that it "would not conflict with the Sacramento International Airport CLUP."[59] However, this is a determination for ALUC to make – not the Measure M Group's consultant. Once that determination is made, it will inform the environmental review of the Specific Plan and may result in changed mitigation measures or an otherwise altered project. For that reason, CEQA requires that the environmental impact of the Project on the CLUP be analyzed *before* a decision is made. (*County of Inyo, supra,* 32 Cal.App.3d at 810.) 21 Cont'd

Moreover, independent of the requirement that the Project comply with the CLUP, Sutter County is under an independent obligation to ensure that land use within the vicinity of the Sacramento Airport is compatible with the area's predominant aviation use. The Federal Aviation Administration ("FAA") imposes grant assurances on all recipients of airport funding; Grant Assurance 21, "Compatible Land Use," requires

> the airport sponsor to "take appropriate action, to the extent reasonable, including the adoption of zoning laws, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft."[60]

22

The DEIR contains no discussion whatsoever of Sutter County's grant assurance obligation, or what the implications may be of potentially losing FAA airport funding. However, Sutter County's approval of a megadevelopment for over 40,000 residents could hardly be construed as taking "appropriate action….to restrict the use of land" in the airport's vicinity.[61]

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[59] DEIR, p. 3.1-29.
[60] Airport Sponsor Assurances, available at http://www.faa.gov/airports_airtraffic/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf
[61] *Id.*
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IV. THE DEIR FAILS TO PROVIDE AN ACCURATE DESCRIPTION OF THE ENVIRONMENTAL BASELINE

The importance of having a stable, finite, and fixed environmental baseline for purposes of an environmental impact analysis was recognized decades ago. (*County of Inyo, supra,* 71 Cal.App.3d 185.) "Environment" means the physical conditions which exist within the area which will be affected by a proposed project. (Pub. Res. Code § 21060.5.) "Significant effect on the environment" means a substantial, or potentially substantial, adverse change in the environment. (Pub. Res. Code § 21068.) Thus, without an accurate baseline description of the "environment," it is impossible to determine whether the Project's impacts on that environment will be significant. (CEQA Guidelines § 15125(a).)

An environmental review document must focus on impacts to the *existing* environment, not on future environmental conditions. (*County of Amador vs. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 954.) "[T]he impacts of the project must be measured against the 'real conditions on the ground.'" (*Save Our Peninsula Committee v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121 ("*Save Our Peninsula*"), *citing*, *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246). A lead agency's failure to accurately describe the environmental baseline "precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Berkeley Keep Jets Over the Bay Committee v. Bd. of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1355 [111 Cal.Rptr.2d 598].) 23

The DEIR fails to define or accurately describe the existing environmental baseline for the Project with respect to several environmental impacts. Meanwhile, the DEIR does not use the *existing* environmental baseline as the basis of its significance determinations. Rather, it describes some future world where infrastructure improvements that have not been approved – or even undergone environmental review – have somehow been built. Ironically, these are the same infrastructure projects that have been improperly piecemealed from this environmental review. Not only does the DEIR avoid analyzing these impacts, but it assumes they could not be significant by defining them as the environmental baseline for the Project. However, CEQA requires that the environmental baseline be the *existing* environment; the impact of these future projects and the Specific Plan on the existing environmental baseline must be assessed in this environmental review. (*Save Our Peninsula, supra,* 87 Cal.App.4th at 121.)

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A. The DEIR Fails to Adequately Describe and Analyze the Existing Environment

An "inadequate description of the environmental setting for the project [makes] a proper analysis of project impacts….impossible." (*Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1122.) Yet the DEIR's description of existing environmental conditions is either incomplete, vague, or outright inaccurate. Moreover, the DEIR does not even specify the area for which an environmental baseline must be described. While "[o]ff-site roadway and infrastructure facilities are proposed to serve project development and are addressed in this DEIR,"[62] a description of the environmental baseline for all of these off-site infrastructure areas in nowhere to be found. 24

The DEIR fails to describe whether federal jurisdictional wetlands are located in the Project site. The "wetlands delineation" to which the DEIR refers is merely one, preliminary step in the Army Corps' process of determining the size and location of jurisdictional wetlands.[63] An actual, approved JD will map the location and extent of wetlands that are located within or are otherwise hydrologically connected to the Project site.[64] No such map exists. A lead agency is not "allowed to hide behind its own failure to gather relevant data….CEQA places the burden of environmental investigation on government rather than the public." (*Gentry v. City of Murietta* (1995) 36 Cal.App.4th 1359, 1378-1379 ("*Gentry*"), *citing, Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.) 25

As the DEIR describes, the Project site is within a FEMA-designated AE flood zone.[65] The Natomas Levee Improvement Project Environmental Impact Statement ("NLIP EIS") for Sutter County's levee improvements was issued by the Army Corps in December 2008. The NLIP EIS describes the severe implications of an AE zone classification: 26

> "FEMA defines AE zones as areas with a 1% annual chance of flooding. The designation would result in the requirement that the bottom floor of all new buildings be constructed at or above the base flood elevation—as little as 3 feet in some of Natomas but up to 20 feet above the ground level in much of the basin. It is therefore anticipated

[62] DEIR, p. 1-2.
[63] DEIR, p. 3.13-33.
[64] 33 CFR § 331.2.
[65] DEIR, p. 3.7-13.
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> that this designation *would effectively stop any projects that are not issued building permits by the time the new Flood Insurance Rate Map takes effect*."[66]

Because the AE flood is now in effect, the *existing* environmental baseline for flood control in the Project area effectively prohibits any development. "[T]he impacts of the project must be measured against the 'real conditions on the ground.'" (*Save Our Peninsula, supra,* 87 Cal.App.4th at 121.) Given this existing environmental baseline, the Specific Plan's provision for a city with over 40,000 residents obviously would present a potential for significant environmental effects that must be assessed in the DEIR. 26 Cont'd

Although the Specific Plan calls for the development of a city with over 40,000 inhabitants, the DEIR fails to identify the existing environmental baseline for population growth. As the DEIR describes,

> "population estimates from the County's General Plan extend only to 2015. Because planned residential growth figures between 2015 and the proposed project's expected buildout of 15–20 years are not available, *it cannot be determined if the proposed project would generate population growth that exceeds estimates for the County as identified in the General Plan*, and the project could potentially result in unplanned population growth in the area."[67]

The Specific Plan and amendments to the General Plan are supposed to be under review in *this* DEIR. Despite this, the DEIR relies on an outdated, pre-amendment population projection from the *existing* General Plan as the reason why no population projection exists for this proposed General Plan amendment. However, the only reason the DEIR states that projected population growth "cannot be determined" is because Sutter County has failed to obtain updated population data. It is axiomatic that an environmental review for a Specific Plan involving the construction of a city with over 40,000 inhabitants requires a baseline for projected population growth, and any failure to obtain that information is a *per se* violation of CEQA. Sutter County cannot "hide behind its own failure to gather relevant data," particularly when the very premise of the Specific Plan is to accommodate population growth within the region. (*Gentry, supra,* 36 Cal.App.4th at 1378-1379.) 27

[66] Natomas Levee Improvement Project, Final EIS, Dec. 2008 ("NLIP EIS"), p. ES-6 – ES-7 (emphasis added).
[67] DEIR, p. 5-12.
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The DEIR provides only a partial environmental baseline for hazardous materials in the Specific Plan area. While several Phase I environmental assessments were conducted for properties within the Project area, no Phase Is were conducted for the areas of greatest potential hazard: the Holt manufacturing facility and the Farm Service Flying Service site.[68] Thus, over 1,300 of the potentially *most contaminated* acres within the Specific Plan area have undergone no environmental assessment whatsoever.[69] As "mitigation," the DEIR proposes that Phase I environmental assessments be conducted before construction begins within this uninvestigated, 1,300 acre potentially contaminated area.[70] However, such a deferral of environmental impact analysis to post-approval studies is impermissible under CEQA. (CEQA Guidelines § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308 ("*Sundstrom*").) 28

Of the 7 Phase Is that were conducted for the less contaminated areas, 2 of these found a recognized environmental condition requiring a Phase II environmental assessment. The first of these, by the consulting firm Geomatrix, concluded that historic pesticide use in the area required a Phase II environmental assessment. Apparently dissatisfied with Geomatrix's conclusion that historic pesticide use required further testing within the Specific Plan area, another consulting firm, WKA, was hired to "reinterpret" Geomatrix's results. Not surprisingly, "WKA did not recommend additional environmental investigation."[71] Notably, Geomatrix's 2003 Phase I environmental assessment was the first conducted for the entire Project area.[72] Geomatrix was not given the chance to conduct any other Phase I assessments; almost all remaining assessments were conducted by WKA, the same firm that "corrected" Geomatrix's earlier results.[73] 29

The DEIR's conclusion that there exists no need for a Phase II environmental assessment to investigate decades of pesticide use throughout the project area is not supported by substantial evidence. WKA's environmental assessments and its reinterpretation of Geomatrix's conclusion are results-oriented and based on pure speculation. The DEIR states that "agricultural chemicals….are not *believed* to 30

[68] DEIR, p. 3.12-11.
[69] DEIR, p. 3.12-12.
[70] DEIR, p. 3.12-25.
[71] DEIR, p. 3.12-14.
[72] DEIR, p. 3.12-18.
[73] *Id.*
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persist in site soils."[74] Belief is not enough here. No testing of arsenic levels in any of these soils has actually been conducted; this testing is required under CEQA to reconcile the conflicting "beliefs" of experts and to accurately analyze the "real conditions on the ground." (*Save Our Peninsula, supra,* 87 Cal.App.4th at 121.) 30 Cont'd

The second recommended Phase II for the Project site concerns Area G. A portion of Area G contains "stained surface soils….on an 'island' in rice fields on the property," and another portion contains stained soils "beneath a diesel aboveground storage tank."[75] Inexplicably, WKA did not recommend that a Phase II be conducted to analyze these soils. Rather, a Phase II was recommended only for that small portion of Area G where a former slaughterhouse and hog farming operation was located, and which contained "at least eight ASTs, dozens of 55-gallon drums, and several burn areas."[76] The recommended Phase II has not been conducted. However, CEQA requires that both the recommended Phase II, and a Phase II that contains an analysis of the stained soil areas, be conducted *before* environmental review is completed – at the "earliest possible stage" in the decision-making process. (*McQueen, supra,* 202 Cal.App.3d at 1147.) 31

The DEIR either fails to define the environmental baseline – or misstates what the environmental baseline is – for several other environmental conditions. The environmental baseline for noise is not adequately described for the Specific Plan area, even though its immediate proximity to the Sacramento Airport, and its location within a Sacramento Airport noise contour,[77] necessitate a detailed and intensive investigation of the Project's impact on background noise levels. The DEIR concedes that a portion of the Project site is within the 60-65 decibel ("dB") noise contour established by the Sacramento Airport's Comprehensive Land Use Plan.[78] The DEIR claims that the "large-scale industrial campuses, technological parks….and higher intensity industrial manufacturing uses planned for this area" are compatible with this noise contour.[79] However, these noise contours were established in 1994; they do not represent *existing* background noise levels. The DEIR itself states that the CLUP is "more than 11 years old; in the time since publication of the CLUP, the level of growth in the region and expansion of 32 33

[74] DEIR, p. 3.12-21 (emphasis added).
[75] DEIR, p. 3.12-12.
[76] *Id.*
[77] DEIR, p. 3.1-29.
[78] DEIR, p. 3.1-29.
[79] *Id.*
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operations at the airport has indicated the need for an update to the plan."[80] 33 Cont'd

CEQA requires that the DEIR examine environmental impacts based on present conditions. (*Save Our Peninsula, supra,* 87 Cal.App.4th at 121.) The very limited acoustical survey conducted for this environmental review does not describe with sufficient detail what those conditions are. Nonetheless, it does make clear that the background noise levels may be far worse than described in the CLUP. Based on a sample size of only 6 aircraft at each of 3 locations, this brief survey concluded that the average, single-event dB levels at 2 of these locations exceeded 85 dB, and exceeded 65 dB at the other location; this indicates that background noise levels may be much higher than indicated in the CLUP.[81] Despite the results of this limited study, the DEIR based its significance determination wholly on the background noise levels provided in the CLUP, which the DEIR itself categorizes as outdated.[82] A more detailed, updated noise study is needed to determine existing background noise levels from aircraft within the Project area. Absent such an accurate baseline of background noise conditions, it is impossible to determine the significance of the Project's impact on noise. (CEQA Guidelines § 15125(a).) 34

The DEIR misstates or omits information necessary to determine the respective environmental baseline for wildlife and waste disposal. The recent conversion of buffer lands located north of Sacramento Airport from rice cultivation to fallow land is not incorporated in the DEIR's description of the environmental baseline for wildlife.[83] These lands provided important habitat for wildlife, but the threat of bird strikes to airplanes necessitated their removal from cultivation.

In its environmental review for the levee improvement project, SAFCA prepared a supplemental DEIR to address the "change in the baseline at Sacramento International Airport north bufferlands from active rice cultivation to idle conditions."[84] Given that the habitat from the former airport rice fields must now be replaced under the Natomas HCP, and given that the destruction of over 6,000 acres of active rice cultivation is the hallmark of the Specific Plan, the DEIR's failure to properly identify this environmental baseline is a clear violation of CEQA. 35

[80] DEIR, p. 3.1-6.
[81] DEIR, p. 3.5-21.
[82] *Id.*
[83] *See, e.g.*, Natomas Joint Vision Area, Existing Conditions, November 12, 2008, p. 22, available at http://www.cityofsacramento.org/planning/projects/natomas-joint-vision/documents/NJV_Background_Report.pdf
[84] NLIP, Phase II supplemental DEIR, p. ES-1.
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With respect to waste disposal, the DEIR provides inaccurate information concerning the amount of tonnage allowed under the landfill's current waste disposal permit. The DEIR states that

> "[u]nrecyclable solid waste would be disposed of at the Ostrom Road Sanitary Landfill, which is permitted to accept 3,000 maximum tpd of solid waste. The estimated 330.6 tpd of solid waste generated by the proposed project would be approximately 11% of the 3,000 maximum tpd that could be received at the landfill. Therefore, this landfill has sufficient permitted capacity to accommodate solid-waste disposal needs for the proposed project.[85]

36

In fact, the tonnage limit under the Ostrom Road Sanitary Landfill's permit is a maximum average of 1,900 per day.[86] Thus, any given day in which 3,000 tons of waste are disposed at the landfill must be counterbalanced by a day in which only 800 tons are disposed. The DEIR's analysis of waste permit capacity must be revised to reflect this actual condition of the permit.

B. The DEIR's Formulation of a Hypothetical Environmental Baseline Violates CEQA

37

An environmental review document must focus on impacts to the existing environment, not on hypothetical scenarios. (*County of Amador, supra,* 76 Cal.App.4th at 954.) Yet, despite CEQA's mandate that the environmental baseline be based on "real conditions on the ground," the DEIR analyzes the environmental baseline of some future projected conditions. (*Save Our Peninsula, supra,* 87 Cal.App.4th at 121.)

38

Although the environmental review for the Sanitation District's expansion of the WWTP has been overturned in court, the DEIR assumes a future scenario in which this decision has been reversed on appeal. In making this assumption, the DEIR explains that the "legal effect of the pending appeal is to stay the Superior Court's determination of legal deficiency."[87] However, this is a blatant mischaracterization of the law: the decision overturning the environmental review for the WWTP expansion had immediate legal effect, and the fact that the decision

[85] DEIR, p. 3.10-20.
[86] Permit information available at http://www.ciwmb.ca.gov/SWIS/58-AA-0011/Detail/
[87] DEIR, p. 3.10-16 – 3.10-17.
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may now be under appeal is immaterial. Thus, the environmental baseline the DEIR is required to analyze is the WWTP's *existing* capacity – a capacity that will not be sufficient to accommodate the Project in concert with other planned growth in the region. Given this lack of existing wastewater treatment capacity, mitigation of this significant environmental impact to the extent feasible would require the construction of a new WWTP within the Specific Plan area. However, the DEIR contains no discussion of this need for a new WWTP. 38 Cont'd

The DEIR treats an A99 FEMA flood zone designation as the environmental baseline for the Project, even though the site is within an existing AE flood zone. Contrary to the DEIR's assumption, a change of flood zone designation from AE to A99 is not automatic and cannot be assumed.[88] An A99 designation may only be obtained

> "where it can be shown that an area with a 1% annual chance of flooding will be protected by a Federal flood control system where construction has reached specified legal requirements. The main requirements are that 100% of the cost of the flood protection system restoration project must be authorized, 60% must be appropriated, 50% must be expended, and 'critical features' must be under construction and 50% completed."[89]

Furthermore, as FEMA concluded in its September 27, 2007 letter denying A99 zone classification for the Natomas area, more than 50% of the construction of increased levee heights and more than 50% of the construction to protect against underseepage must be completed before A99 status can even be considered.[90] 39

Moreover, while the EIS for SAFCA's planned levy improvements addresses the 2008 construction phase in detail, it addresses the "2009 and 2010 construction phases addressed at a more general, programmatic level."[91] These later construction phases involve those same construction activities that must be more than 50% completed before FEMA would even consider granting A99 status.[92] They will be subject to subsequent project-level environmental review, the hypothetical outcome of which cannot be assumed as part of the environmental baseline for the

[88] DEIR, p. 3.7-22.
[89] NLIP EIS, p. 3-9.
[90] Letter Denying A99 Designation, FEMA, September 17, 2007, p. 2.
[91] NLIP EIS, p. 2-9.
[92] NLIP EIS, p. ES-2.
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Project. (*County of Amador, supra,* 76 Cal.App.4th at 954.) Likewise, FEMA's future decision whether to exercise its discretion to grant A99 or any other flood zone status cannot be assumed under CEQA. 39 Cont'd

The DEIR wrongly treats several other infrastructure improvements as the existing environmental baseline. This laundry list includes RD 1000 drainage improvements, and an accompanying drainage improvement agreement with Sutter County; construction of the Placer Parkway; construction of the 99/70 interchange, despite obvious deficiencies in Caltrans' environmental review of the project; construction of a sewer line to the Sanitation District's WWTP, and entry into an accompanying wastewater services agreement; the California Lands Commission's approval for the construction of a natural gas pipeline; the highly speculative construction of light rail to the Sacramento Airport, and then to the Specific Plan area; PUC's approval of Golden State Water Company's application to provide water to the Project area, without the imposition of any environmental conditions; and SWRCB's entirely speculative grant of a change of use designation that will allow irrigation water to be used for domestic purposes. 40 41 42 43 44 45 46

These infrastructure improvements and approvals may or may not occur in the future. Any determination as to what infrastructure will be built, or as to what approval will be granted, will necessarily be a product of environmental review under CEQA. The environmental review of the Specific Plan should have been conducted in concert with the environmental review of several of these projects. Sutter County's improper peacemealing of its environmental review does not entitle it to assume a future environmental baseline where these projects have undergone environmental review and been approved. 37 Cont'd

V. THE DEIR FAILS TO ACCURATELY IDENTIFY AND ADEQUATELY ANALYZE ALL POTENTIALLY SIGNIFICANT ENVIRONMENTAL IMPACTS OF THE PROJECT

An EIR must identify and analyze all direct and indirect potentially significant environmental impacts of a project. (Pub. Res. Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).) A significant environmental effect is "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." (CEQA Guidelines § 15382.) In preparing an EIR, a lead agency is required to 47

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> "analyze the relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution, population concentration, the human uses of land (including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resource base such as water, historical resources, scenic quality and public services. The EIR [must] also analyze any significant environmental effects the project might cause by bringing development and people into the area affected."

47 Cont'd

(*Id.* at § 15126.2(a).) The CEQA statute, its Guidelines, and the cases interpreting them are crystal clear: although a lead agency need not engage in blind speculation regarding impacts, it must nevertheless undertake a "thorough investigation" in a good faith effort to identify all of the reasonably foreseeable direct and indirect environmental impacts which might result from a project. "[A]n agency must use its best efforts to find out and disclose all that it reasonably can." (CEQA Guidelines § 15144.)

The primary function of an EIR is to "inform the public and responsible officials of the environmental consequences of their decisions before they are made." (*Laurel Heights, supra,* 6 Cal.4th at1123.) To fulfill this function, an EIR must be detailed, complete, and must "reflect a good faith effort at full disclosure." (CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.) An adequate EIR must also contain facts and analysis, not just an agency's conclusions. (*Goleta Valley, supra,* 52 Cal.3d at 568.) However, the DEIR fails to meet this overriding purpose of CEQA through its improper use of a program and tiered environmental review mechanism for the Project.

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As explained above, when a phased project is under environmental review that, with other "individual projects," is a component of a "total undertaking compris[ing] a project with significant environmental effect," the lead agency "shall prepare a *single program EIR* for the ultimate project." (CEQA Guidelines § 15165 (emphasis added).) Moreover, the environmental review for a multi-phased project can only be tiered if all of a project's environmental impacts are described at the "*earliest possible stage*." (*McQueen, supra,* 202 Cal.App.3d at 1147 (emphasis added).) In "preparing an EIR for a specific plan with several phases of

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development," this earliest possible stage occurs *"when there is sufficient reliable data* to permit preparation of a meaningful and accurate report on the impact." (*Los Angeles Unified, supra,* 58 Cal.App.4th at 1028 (emphasis added).)

48 Cont'd

Far from representing a single program EIR, the Specific Plan is a piecemeal review of a larger infrastructure project. Meanwhile, under the guise of tiering, the DEIR avoids any project-level review of Phase I-A of the Project, even though construction of this phase is scheduled to commence in only one year and there exists more than sufficient reliable data to analyze its environmental impact. Sutter County's improper use of these program and tiered environmental review mechanisms skews its entire analysis of significant environmental impacts in the DEIR. As explained in detail below, the DEIR fails to accurately identify and adequately analyze many of the significant environmental impacts that will be caused by the Project. These legal deficiencies must be addressed and corrected in a revised DEIR that is recirculated for public review and comment.

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A. The DEIR Fails to Adequately Describe and Analyze the Project's Significant Air Quality Impacts

The DEIR concludes that construction air emissions from the Project will be significant. While this significance determination is undoubtedly correct for a project this scale, the DEIR's description of the construction emission impacts from the several off-site infrastructure improvements that are defined as part of the Project is both inadequate and misleading.

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Dr. Pless summarizes the DEIR's analysis of air impacts as "superficial at best." (Exhibit A, p. 3.) No project-level analysis of Phase I-A air impacts is provided in the DEIR, even though sufficient data is already available for evaluating these impacts. Even the data underlying the limited analysis of air impacts that does appear in the DEIR is not properly disclosed. The DEIR models a "representative" year for construction air emissions, but does not provide the URBEMIS modeling runs that would allow for an independent evaluation of these results. (Exhibit A, p. 3.)

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The DEIR's analysis of the air impacts from off-site infrastructure improvements is entirely based on its assessment of an off-site infrastructure project that is not even included in the Specific Plan. As the DEIR explains,

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> "[t]o determine the approximate level of impact that could result from development of the off-site infrastructure, the proposed sewer force main that would connect the project site to the [Sanitation District] system was chosen for modeling purposes."[93]

The DEIR models the construction emissions of one off-site infrastructure project impact, and uses this as a proxy for calculating all off-site infrastructure impacts of the Project. However, this analysis has one, glaring problem: *the sewer interceptor is not a part of the Project.*[94] Ironically, the DEIR has improperly piecemealed the sewer interceptor from the project description, only to import environmental data on this sewer interceptor when necessary to fill a gap in the DEIR's analysis. This gap can only be filled by modeling an off-site infrastructure improvement that is actually a part of the Project, and using those results to inform the significance determination of this impact. Sutter County will "not be allowed to hide behind its own failure to gather relevant data….CEQA places the burden of environmental investigation on government rather than the public." (*Gentry, supra,* 36 Cal.App.4th at 1378-1379.) 52

The DEIR wrongly concludes that mobile source emissions from Project operation will not have a significant environmental impact on the achievement of ambient air quality standards.[95] This conclusion is premised on the DEIR's use of a traffic measure, Level of Service ("LOS"), as the significance threshold for determining air traffic impacts. According to the DEIR,

> "several signalized intersections would operate at an unacceptable LOS with and without project implementation…. [b]ecause these intersections would operate at an unacceptable LOS with or without the proposed project, it is not anticipated that the additional vehicles associated with the proposed project would result in or substantially contribute to a violation of the [ambient air quality standards] at these locations."[96] 53

Stated differently, because traffic conditions in the Specific Plan area would be terrible even without the Project, the additional traffic delay the Project will cause cannot cause a significant *air impact*. This argument defies logic: the fact that

[93] DEIR, p. 3.4-26.
[94] DEIR, p. 1-2.
[95] DEIR, p. 3.4-35.
[96] DEIR, p. 3.4-36.
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traffic engineers have yet to come up with a "worse than terrible" classification has nothing to do with the increased air emission impacts caused by increased traffic delay at these intersections. 53

Moreover, "the fact that a particular environmental effect meets a particular threshold cannot be used as an automatic determinant that the effect is or is not significant." *(Protect The Historic Amador Waterways v. Amador Water District* (2004), 116 Cal.App.4th 1099, 1109 ("*Historic Amador*").) CEQA requires that *any* worsening of already environmentally degraded conditions must be analyzed in detail. (*Los Angeles Unified*, *supra*, 58 Cal.App.4th at 1024.) The DEIR contains no analysis of how much the Project will worsen these already degraded environmental conditions. 54

The DEIR engages in no impact analysis whatsoever of potentially hazardous air emissions from the Sacramento Airport. According to the DEIR, "any conclusions regarding health risks associated with the airport would be speculative."[97] However, EPA Region 9 ("Region 9"), which has jurisdiction over Sutter County, flatly rejects this same argument. As Region 9 states in a 2006 regulatory letter commenting on a federal EIS for an airport, it

> "*does not agree*....with statements in the FEIS regarding the inability to quantify potential impacts from HAPs [hazardous air pollutants] in a meaningful way, given the limitations of existing modeling tools and critical input data, including HAP speciation profiles for commercial jet aircraft engines."[98] 55

Like Region 9, CEQA requires a health assessment of potentially toxic emissions from the Sacramento Airport. Because such an analysis would provide meaningful and critical data on airport emissions impacts, Sutter County is not "allowed to hide behind its own failure to gather [this] relevant data." (*Gentry, supra,* 36 Cal.App.4th at 1378-1379.) Under CEQA, a lead agency "must use its best efforts to find out and disclose all that it reasonably can." (CEQA Guidelines § 15144.)

The DEIR's significance analysis of greenhouse gas ("GHG") emissions is also deficient under CEQA. While the DEIR finds GHG impacts to be cumulatively significant and calculates the GHG emissions that Phase I-A of the Project will 56

[97] DEIR, p. 3.4-39.
[98] EPA, Comment on FEIS for Phoenix Sky Harbor International Airport, March 13, 2006 (emphasis added), available at http://www.epa.gov/region09/nepa/letters/sky-harbor-feis.pdf
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create, it does so only for the purposes of description – not for engaging in meaningful impact analysis. As explained by Dr. Pless in her comments, even this descriptive calculation of GHG impacts for Phase I-A is flawed because it fails to include stationary source emissions. (Exhibit A, p. 3.) Had stationary sources been included in the DEIR's analysis, the average GHG "rate would be considerably higher." (Exhibit A, p. 9.) 56 Cont'd

The DEIR quantifies GHG impacts for Phase I-A of the Project only; refuses to quantify the impact of subsequent project phases; and claims that the exorbitant numbers for Phase I-A, while undoubtedly significant, cannot be further evaluated because there exists no significance threshold by which such an analysis could be informed.[99] This analysis of GHG impacts lacks validity and unlawfully abdicates Sutter County's responsibilities under CEQA. 57

Nothing in CEQA or its regulations requires the establishment of a regulatory threshold in order to assess the significance of an environmental impact. As the Attorney General has clearly stated in comments and filings, the "lack of a threshold does *not* mean lack of significance. An agency may argue lack of significance for any project, but that argument would have to be carried forth on a case-by-case, project specific basis."[100] In its technical advisory, *CEQA and Climate Change*, the Governor's Office of Planning and Research states that, 58

> "[a]s with any environmental impact, lead agencies must determine what constitutes a significant impact. In the absence of regulatory standards for GHG emissions....individual lead agencies may undertake a project-by-project analysis, consistent with available guidance and current CEQA practice.[101]

Thus, if there are no established thresholds of significance, one is developed by the lead agency during the course of environmental review; any standard of significance for which a reasonable basis exists may be used. In short, the lead agency makes a

[99] DEIR, p. 3.17-9.
[100] California Air Pollution Control Officers Association ("CAPCOA"), CEQA and Climate Change: Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act, January 2008, p. 24 ("CEQA and Climate Change") (emphasis in original).
[101] Governor's Office of Planning and Research, Technical Advisory, *CEQA and Climate Change* June 19, 2008, p. 6.
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policy judgment drawing the line between substantial and less than substantial environmental impacts. (CEQA Guidelines § 15064(b).)

Sutter County has failed to make the policy judgment required under CEQA to establish a significance threshold for GHG impacts. The basis of the DEIR's determination that GHG impacts will be significant is not any significance threshold established by Sutter County or by any other agency. Rather, it stems from a recognition that categorizing GHG impacts as anything other than substantial, for a project involving the creation of an entirely new city on agricultural land, does not pass the straight face test in this post-AB 32 world. 58

The DEIR must be revised to reflect an actual significance threshold for GHG impacts by which the Project can be meaningfully evaluated. Moreover, Sutter County must evaluate and calculate the GHG impacts of *all* Project phases – not merely the first phase. A lead agency "must use its best efforts to find out and disclose *all that it reasonably can*;" Sutter County can easily obtain and provide a calculation of the GHG impacts for all subsequent Project phases. (CEQA Guidelines § 15144 (emphasis added).) 57 Cont'd

B. The DEIR Fails to Adequately Describe and Analyze the Project's Significant Impact on Farmland

The Project involves the destruction of nearly *7,000 acres* of Prime Farmland and Farmland of Statewide Importance.[102] This does not even include the potential loss of farmland from off-site infrastructure improvement areas. Since these off-site areas are not even disclosed, it is impossible to scrutinize the DEIR's claim that the construction of these improvements "within road rights-of-way and along existing property boundaries" will not cause *any* "temporary or long-term impacts on agricultural resources."[103] Elsewhere in the DEIR, it is contradictorily revealed that off-site detention basins may require the disturbance of another 800 acres of Important Farmland[104] – for a total disturbance of nearly 8,000 acres, or *12.5 square miles of critical farmland*, within the State's prime agricultural region. The DEIR must be revised to correct these inconsistencies in the description and analysis of the Project's off-site infrastructure impacts on farmland. 59

[102] DEIR, p. 3.11-6.
[103] DEIR, p. 3.11-9.
[104] DEIR, p. 3.11-11.
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Moreover, the DEIR concedes, as it must, that the Project's impact on farmland is significant, but its analysis obfuscates and minimizes the shocking extent of this impact. The DEIR dismisses the import of this impact by stating that the Project would "convert approximately 1.1% of Prime Farmland and 4.7% of Farmland of Statewide Importance in Sutter County."[105] According to the American Farmland Trust, since the Gold Rush nearly 700,000 acres of the Central Valley have been developed for urban use; almost one hundred thousand acres of this were paved over in the 1990's alone.[106] Within just the next generation, close to a million more acres of farmland could vanish, putting additional pressure on the ability of the region's farmers to continue producing food for the State, the nation and the world.[107] The DEIR wholly fails to evaluate the significance of the Project's bulldozing of 8,000 acres of critical agricultural resources in this pivotal context. 60

C. The DEIR Fails to Adequately Describe and Analyze the Project's Significant Impact on Wetlands

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No wetland delineation was ever conducted for the Project's unspecified off-site improvement areas, and it is therefore impossible to evaluate the DEIR's significance determination for the evaluation of larger wetlands impacts.[108] Likewise, the wetlands delineation that was conducted for the Specific Plan area cannot serve as the basis for Sutter County's significance determination as to the extent of federal jurisdictional wetlands on the property. An approved jurisdictional determination to inform this environmental review could easily have been obtained from the Army Corps.[109] As lead agency, Sutter County is not "allowed to hide behind its own failure to gather [this] relevant data." (*Gentry, supra,* 36 Cal.App.4th at 1378-1379.) 62

CEQA requires an approved jurisdictional determination from the Army Corps for the Specific Plan area, and all off-site improvement areas, because the Project site alone contains 66 acres of federally-constructed canals and over 6,000 acres of rice fields, all of which are converted wetlands.[110] The Specific Plan area contains 15 *miles* of canals and 22 *miles* of "larger canals and ditches," and an 63

[105] DEIR, p. 3.11-10.
[106] American Farmland Trust, "The Future is Now: Central Valley Farmland at the Tipping Point?" (2006), available at http://www.farmland.org/programs/states/futureisnow/default.asp
[107] *Id.*
[108] *Id.*
[109] 33 CFR § 331.2.
[110] DEIR, p. 3.13-33.
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unspecified acreage of smaller ditches.[111] The wetland delineation conducted for the Project site concludes that *none* of the 66 acres of irrigation canals or their buffers contain jurisdictional wetlands; it also concludes that *none* of the "5,203 acres of active rice fields and the 863 acres of fallow rice fields….meet the [Army Corps] criteria for jurisdictional wetlands."[112] This wetlands delineation is pure fancy. 63 Cont'd

The Army Corps strives to issue approved JDs within 60 days;[113] two years have now passed and, for obvious reasons, the Measure M Group has not sought an approved JD for the Specific Plan based on this fanciful wetlands delineation.[114] 64

D. The DEIR Fails to Adequately Describe and Analyze the Project's Significant Impact on Water Supply

The DEIR's significance evaluation of water supply does not meet the requirements of CEQA. These requirements were clearly articulated by the California Supreme Court in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412 ("*Vineyard*"). The Court in *Vineyard* addressed "what level of uncertainty regarding the availability of water supplies can be tolerated in an EIR for a land use plan." (*Id.* at 428.) As the Court held, an "EIR for a land use project must address the impacts of *likely* future water sources, and the EIR's discussion must include a reasoned analysis of the circumstances affecting the likelihood of the waters availability." (*Id.* at 432 (emphasis in original).) Thus, if "it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies." (*Id.*) However, it is impermissible for such a discussion to include a mitigation provision that a "project's future phases will not be built" in the event that water becomes unavailable. (*Id.* at 429.) 65 66

The DEIR's entire analysis is premised on obtaining surface water from the Natomas-Central Mutual Water Company ("NCMWC") for approximately 50% of the Project's water supply. NCMWC provides water within the Specific Plan area *only for irrigation purposes*; for it to provide water for residential purposes, a 67

[111] DEIR, p. 3.13-15.
[112] DEIR, p. 3.13-33.
[113] Army Corps, Regulatory Guidance Letter 08-02, p. 3.
[114] DEIR, p. 3.13-33.
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"change of use" designation must be obtained from the State Water Resource Control Board ("SWRCB"). SWRCB's granting a change of use designation to NCMWC cannot be considered "likely" under the legal standard articulated in *Vineyard*. The Water Code requires a full adjudicative process for SWRCB to grant a petition for a change of purpose of use; this includes a likely hearing, extensive public review period, and several substantive evidentiary requirements, including a demonstration that no other water users will be impacted by the petitioned change of use.[115] Thus, under the legal standard of *Vineyard*, it cannot be "confidently determined" that SWRCB will grant a change of use permit to supply all necessary surface water for an entire city that will exceed 40,000 in population, contain a high concentration of water intensive industrial use, and be constructed on prime irrigated agricultural land. 67 Cont'd

No real alternative for obtaining surface water supply from another source is discussed in the DEIR – let alone the environmental impacts of that alternative. A water supply analysis that fails to meaningfully examine replacement water sources can only meet the requirements of CEQA if the future water source is *likely* and can be confidently determined. (*Vineyard, supra*, 40 Cal.4th at 432 (emphasis added).) Moreover, the EIR must include a "reasoned analysis of the circumstances affecting [this] likelihood." (*Id.*) The only real discussion of water supply alternatives contained in the DEIR is a description of three water supply programs that are "identified as options for providing water to the project site."[116] These alternatives involve varying seasonal uses of groundwater and surface water for different Project phases. However, *all* of these alternatives require that water be obtained from NCMWC and that SWRCB grant a change of use designation. 68

Another section of the DEIR purports to examine three dubious "alternatives" for surface water provision: obtaining all water supply needs from groundwater; obtaining all water from the Project from the Placer County Water Agency; and obtaining all water from the City of Sacramento. However, in its description of each of these respective "alternatives," the DEIR concedes, in almost identical statements, that these are not really alternatives: 69

> "It cannot be determined without additional groundwater modeling if the increase in groundwater pumping under this alternative would be adequate to serve the needs of the proposed project at buildout

[115] Water Code, §§ 1700 *et. seq.*
[116] DEIR, p. 3.9-18.
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without adversely affecting the North American Subbasin in the future."[117] [Alternative 1]

"It cannot be determined without additional study if these water supplies would be adequate to serve the needs of the proposed project."[118] [Alternative 2]

"It cannot be determined without additional study if these water supplies would be adequate to serve the needs of the project."[119] [Alternative 3]

69 Cont'd

Moreover, even if these were actual alternatives under CEQA, which they clearly are not, *Vineyard* requires a discussion of their "environmental consequences." (*Vineyard, supra*, 40 Cal.4th at 432.) Similarly, even if obtaining a change of use permit from SWRCB could be considered likely, which it could not, *Vineyard* requires the DEIR to include a discussion and reasoned analysis examining the circumstances of this likelihood. (*Vineyard, supra*, 40 Cal.4th at 432.) The DEIR contains neither of these two necessary elements required by *Vineyard* for an environmental review.

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Assuming that NCMWC ever obtains approval from SWRCB to provide surface water for the Project, retail water service will be provided either by Golden State Water Company ("Golden State") or by Sutter County itself, through an agreement with NCMWC. Golden State already has an agreement with NCMWC, and has applied to the Public Utilities Commission for a permit to construct and operate a water system within the Specific Plan area.[120] The DEIR claims that,

"[r]egardless of the entity that provides the service, though, the same sources of water supply would be used, therefore the analysis of the physical water availability would not change depending on which entity prevails."[121]

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The DEIR's statement that the pending proceeding before the PUC has no bearing on this environmental review is simply incorrect. The PUC has already rejected

[117] DEIR, p. 3.9-28.
[118] DEIR, p. 3.9-29.
[119] DEIR, p. 3.9-31.
[120] Application for a CPCN to Construct and Operate a Water System in Sutter County, A.08-08-022, Filed August 29, 2008.
[121] DEIR, p. 3.9-4.
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this same argument that Sutter County makes in the DEIR, namely, that Golden State's application presents no environmental impacts to be reviewed under CEQA. The PUC *dismissed* Golden State's original application because of its failure to analyze the environmental impacts of its construction and operation of a water system.[122]

Under CEQA, the PUC has the authority to impose environmental mitigation on Golden State's application, conditions which may necessitate a change in the Specific Plan. Absent the construction of the necessary water infrastructure within the Specific Plan area, the Project could not go forward. Because the Project has no independent utility absent this water infrastructure, CEQA prohibits the piecemealing of the environmental review for the Specific Plan from this ongoing PUC proceeding. (*Del Mar, supra,* 10 Cal.App. 4th at 732-733.) The DEIR must be withdrawn and Sutter County's environmental review for the Project coordinated with the PUC's ongoing environmental assessment. 71 Cont'd

E. The DEIR Fails to Adequately Describe and Analyze the Project's Significant Impact on Wildlife

Recent news events have increased public awareness of the dire safety threat posed by airplane bird strikes nationally, and the even more elevated threat posed by bird strikes in the vicinity of Sacramento Airport. The Sacramento Airport – "which lies directly in the Pacific Flyway bird migration path – has *the most bird strikes of any airport in the West*, and sixth most in the country."[123] The magnitude of this threat cannot be overstated: eleven bird strikes occurred at Sacramento Airport during the first week of December 2008 alone.[124] Accordingly, the Sacramento Airport Wildlife Hazard Management Plan ("WHMP") was adopted in 1996 to "address a recurring pattern of wildlife strikes"[125] and to "avoid creating wildlife attractants within five miles of the airport."[126] Because rice fields are such an attractant, the Sacramento Airport has removed all buffer lands north of the 72

[122] Administrative Law Judge's Ruling Delaying Filing of Protests until a Proponent's Environmental Assessment is Filed, A.06-05-034, Filed May 31, 2006.
[123] Sacramento Bee, "Sacramento Airport Seeks Bird-Kill Law for Air Safety," January 16, 2009, p. 13A.
[124] *Id.*
[125] WHMP Draft, March 2007, p. 1-1.
[126] *Id.* at 3-6.
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airport from rice cultivation.[127] Detention ponds are another wildlife attractant that are inconsistent with the WHMP.[128]

The Project proposes to construct several detention ponds in the immediate vicinity of the Sacramento airport. The DEIR's evaluation of the significance of wildlife hazard impacts concludes that the environmental impact of these detention ponds will not, with mitigation, be significant.[129] The DEIR's significance determination is based on its conclusion that, while detention ponds are a wildlife attractant, so are the rice fields the Project will replace. Thus, the Project will not "introduce a new hazard."[130] However, in making this argument, the DEIR fails to apply a significance threshold that is mandated by CEQA. 72 Cont'd

The Project's inconsistency with the WHMP and the Natomas HCP must be applied as a significance threshold. None of these plans differentiate between new and old impacts: any wildlife attractant is inconsistent with these plans.[131] The existing rice fields in the Sacramento Airport's vicinity are incompatible with these plans, and so are the detention ponds in this area that are proposed for the Project. Whether a wildlife attractant in the airport's vicinity is new or old has nothing to do with the tremendous safety threat that bird strikes create. To be consistent with these plans, the Project is prohibited from constructing a wildlife attractant in the Sacramento Airport's vicinity. The WHMP was adopted to "*avoid creating* wildlife attractants within five miles of the airport."[132] 73

The CLUP has designated a safety zone to minimize the threat to human life posed by airline crashes from bird strikes and other causes. This overflight safety zone is roughly consistent with the CLUP's noise contour, and includes a similar portion of the Project site. The DEIR fails to identify or describe the inconsistency of its proposed land use within this safety zone. The CLUP prohibits uses within the overflight zone that result in a "large concentration of people," which is "defined as…..an average density of greater than 25 persons per acre per hour during any 24 74

[127] *See, e.g.*, Natomas Joint Vision Area, Existing Conditions, November 12, 2008, p. 22, available at http://www.cityofsacramento.org/planning/projects/natomas-joint-vision/documents/NJV_Background_Report.pdf
[128] WHMP Draft, March 2007, p. 2-2.
[129] DEIR, p. 3.12-30.
[130] DEIR, p. 2-2.
[131] *See* WHMP Draft, March 2007, p. 3-6; HCP, p. 3-10.
[132] WHMP Draft, March 2007, p. 3-6 (emphasis added).
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hour period."[133] For this area, the Specific Plan proposes "large-scale industrial campuses, technological parks….and higher intensity industrial manufacturing uses."[134] These uses are wholly incompatible with the 25 person per acre density required for this safety zone. The DEIR has failed to properly evaluate this significant impact. 74 Cont'd

The DEIR uses compliance with the HCP as a significance threshold, but wrongly concludes that the environmental impact of the Project is less than significant.[135] Contrary to Sutter County's conclusion in the DEIR, the Project is inconsistent with the HCP and requires that it be amended. The HCP was premised on the Sacramento Airport buffer lands remaining in cultivation; that is no longer the case, and an equivalent habitat area must now be created within the HCP. As the HCP states,

> Although the Permittees are not relying on the Airport buffer lands as mitigation for effects within the Natomas Basin, retaining these lands in agricultural uses will contribute to the overall success of [HCS] conservation strategies for the Covered Species."[136]

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Thus, any "[d]evelopment of these buffer lands….will be considered a significant change in the HCP."[137] The HCP also requires amendment because, as explained above, the HCP does not permit greater than 7,467 acres of development within the Specific Plan Area.[138] The Project's 7,528 acres of development, coupled with the off-site RD 1000 infrastructure improvements included in Sutter County's portion of the HCP, far exceed this 7,467 allotment.[139] This is true irrespective of the very limited portion of the Project site that was not included in the HCP. Sutter County's approval of development beyond the 7,467 acre allotment would be a "significant departure" from the HCP and "trigger [its] reevalauation, a new effects analysis [and] potential amendments."[140]

Moreover, the DEIR does not specify the size or location of the acreage the Project will disturb for the construction of off-site infrastructure improvements. 76

[133] CLUP, p. 36.
[134] *Id.*
[135] DEIR, p. 3.13-52.
[136] HCP, p. III-11.
[137] *Id.*
[138] HCP, p. I-7.
[139] FWS Findings Statement, p. 8.
[140] HCP, p. I-3 (emphasis added).
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This distorts Sutter County's significance evaluation and makes it impossible to independently analyze these unspecified environmental impacts. All of these deficiencies in Sutter County's review of wildlife impacts must be corrected and a revised DEIR recirculated for public comment. 76 Cont'd

F. The DEIR Fails to Adequately Describe and Analyze the Project's Significant Impact on Wastewater

The sewer interceptor necessary to connect the Project to the Sanitation District's WWTP, which was part of the NOP's original project description,[141] was improperly piecemealed from the environmental review of the Specific Plan in the DEIR. The DEIR's significance evaluation of wastewater impacts is premised on the existence of this sewer line, and premised on the assumption that the capacity of the WWTP will be expanded. These faulty assumptions taint the DEIR's entire significance evaluation of wastewater impacts. 77

The Sanitation District's plans for the expansion of WWTP capacity have, as explained above, been overturned in court. Without engaging in any meaningful analysis, the DEIR states that the WWTP "could *potentially treat more future development* within its existing permitted capacity than what was originally anticipated."[142] However, the DEIR's assertion that the WWTP could "potentially treat more development" without expanding its capacity flies in the face of the obvious reality that the Sanitation District has sought an expansion of its treatment capacity because it has determined that the WWTP *needs to expand*. Moreover, even if the WWTP could accommodate *some* more development, that does not mean it can or will accommodate the Project's plans for an entirely new city with over 40,000 residents. The DEIR's vague statement implying that no WWTP expansion is "potentially" needed for the Project is hopelessly optimistic and unsupported by substantial evidence in the record. 78

For the Project to obtain service from the Sanitation District, a sewer line must be constructed; Sutter County must enter into a wastewater services agreement with the Sanitation District; approval must be also obtained from the Sutter County as well as Sanitation District annexation approval from the Sacramento County Local Agency Formation Commission ("LAFCO"); and the 77 Cont'd

[141] NOP, p. 1.
[142] DEIR, p. 3.10-5 (emphasis added).
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Sanitation District must obtain approval for an annexation.[143] Because the Project has no independent utility absent this wastewater service, the DEIR's piecemeal review of the Specific Plan apart from these approvals is prohibited under CEQA. (*Del Mar, supra,* 10 Cal.App. 4th at 732-733.) 77 Cont'd

VI. THE DEIR IMPROPERLY DEFERS OR IMPOSES INADEQUATE MITIGATION MEASURES

CEQA requires that "[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." (Pub. Res. Code § 21002.1(b).) An EIR must propose and describe mitigation measures sufficient to minimize the significant environmental impacts it has identified. (Pub. Res. Code §§ 21002.1(a), 21100(b)(3); CEQA Guidelines § 15126.4.) Where several mitigation measures are available to mitigate an impact, each must be discussed and the basis for selecting a particular measure must be provided. (CEQA Guidelines § 15126.4(a)(1)(B).) All mitigation measures must be designed to minimize, reduce or avoid an identified environmental impact or to rectify or compensate for that impact. (CEQA Guidelines § 15370.)

A lead agency is prohibited from making CEQA findings that rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727-728.) Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments. (CEQA Guidelines § 15126.4(a)(2).) This approach helps "insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug." (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) Cal.3d 929, 935.) 79

Deferral of the formulation of mitigation measures to some future time is generally impermissible under CEQA. (*Sundstrom, supra,* 202 Cal.App.3d at 308-309; CEQA Guidelines § 15126.4(a)(1)(B).) Environmental problems must be considered at a point in the planning process "where genuine flexibility remains." (*Mount Sutro, supra,* 77 Cal.App.3d at 34.) An agency may only defer the formulation of mitigation measures when it "recognizes the significance of the potential environmental effect, commits itself to mitigating its impact, and articulates specific performance criteria for the future mitigation." (*Gentry*, *supra*,

[143] DEIR, p. 3.10-4.
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36 Cal.App.4th at 1411.) "A study conducted after approval of a project will inevitably have a diminished influence on decision making. Even if the study is subject to administrative approval, it is analogous to the sort of *post hoc* rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." (*Sundstrom*, *supra*, 202 Cal.App.3d at 307.)

The DEIR improperly defers the identification of specific mitigation measures until future studies are completed and future actions are undertaken by Sutter County and other government agencies. The DEIR relies on these and other inadequate mitigation measures to reclassify significant Project impacts as less than significant with mitigation. Of those impacts which the DEIR concludes remain significant, the DEIR has failed mitigate these impacts to the extent feasible. 79 Cont'd

A. The DEIR Improperly Defers the Identification of Mitigation Measures

A lead agency must identify mitigation measures for significant impacts *before* it issues a draft EIR for public review. (Pub. Res. Code § 21061.) Despite this requirement, the DEIR proposes deferring the development of mitigation measures for a number of environmental impacts. However, CEQA prohibits Sutter County from using a program environmental review as a mechanism to avoid identifying all feasible mitigation measures. (*Stanislaus, supra,* 48 Cal.App.4th at 199.) Moreover, the DEIR is improperly tiered: Phase I-A of the Project is required to be analyzed in this environmental review document because it is scheduled to begin construction in only *one year*, and extensive data on this phase of the Specific Plan is already available. CEQA requires an analysis of a impacts at the "earliest possible stage, even though more detailed environmental review may be necessary later." (*McQueen, supra,* 202 Cal.App.3d at 1147.) 80

The DEIR defers almost all meaningful analysis of the Project's air impacts. Project-level review for Phase I-A air impacts is improperly excluded from the DEIR; all project phases are deferred to future studies and analyses. As the DEIR states, 81

> "An individual air quality mitigation plan (AQMP) shall be developed for each development phase of the proposed project, as prescribed by the Sutter Pointe Master AQMP prepared in June 2008 (as stated in HDR 2008), which offers a programmatic review of emission reduction

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> measures. Each individual AQMP shall prescribe a percent reduction target for emissions of ozone precursors and PM10 as *determined by Sutter County* in consultation with FRAQMD. Individual AQMPs shall outline specific measures that reduce emissions of ozone precursors and PM10 to less-than-significant levels *where feasible*."[144]

The mitigation measures contained in these future air quality management plans will be "determined by Sutter County" and its assessment of what is "feasible." Meanwhile, the program nature of the DEIR is intended to foreclose future environmental review of air and other impacts by means of compliance with a "checklist."[145] Thus, by sleight of hand, individual air impacts have not been analyzed in this DEIR, nor will they be analyzed in subsequent project phases to the extent that the checklist derived from the DEIR has been complied with. For air impacts, compliance with this checklist would require preparation of an air quality management plan, the contents of which would be decided by Sutter County *at that future time.*

This deferral of mitigation impacts is wholly incompatible with CEQA because no detailed review of air impacts will *ever* occur. As Dr. Pless describes in her comments,

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> The Draft EIR should be either revised to include a project-level analysis for Phase I and Phase A with a project-level mitigation monitoring and reporting plan or require a separate project-level analysis for public review before construction begins in 2011. This analysis must analyze all sources and require all feasible mitigation, including the most stringent emission standards for stationary sources. In addition, the Draft EIR should specifically require a project-level analysis for all future Project phases or subphases (if sufficient detail is not available for analysis for the entire Project phase). *This should be required to avoid that future environmental documents simply refer to the program-level EIR* and claim that all impacts were appropriately analyzed and that no additional mitigation measures are required beyond those required in the Draft EIR."

(Exhibit A, p. 4 (emphasis added).)

[144] DEIR, p. 3.4-32 (emphasis added).
[145] DEIR, p. 1-7.
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The DEIR improperly defers the analysis of mitigation measures for several other impacts. Had an approved jurisdictional determination been obtained from the Army Corps for the Specific Plan, it would be known whether dozens, hundreds, or even *thousands* of federal jurisdictional wetlands are located within the Specific Plan area. The DEIR misclassifies its provision for Army Corps permits to be obtained during the development of the Project as a mitigation measure[146]; it is instead a *legal requirement*. The mitigation for wetlands impacts that is actually required for the Project must be analyzed and identified now. Indeed, without such an identification of mitigation measures, it is impossible to determine whether mitigation in the form of a major revision of the Specific Plan is necessary under CEQA. 82

As a mitigation measure, the DEIR proposes to complete all Phase I assessments for those portions of the Specific Plan area that have not been previously assessed, and proposes to complete one Phase II for the area.[147] However, all of these assessments should already have been completed and scrutinized in this DEIR. 83

The DEIR also fails to analyze the toxic air contaminants caused by traffic for an area that the Specific Plan designates for residential use. As mitigation, the DEIR proposes that a health risk assessment be conducted before construction commences.[148] 84

Similarly, even though the Project will require an amendment to the HCP and is inconsistent with the Sacramento Airport's Wildlife Hazard Management Plan, the DEIR proposes to mitigate wildlife impacts by requiring a management plan for all water features within the Specific Plan Area.[149] 85

This repeated deferral of mitigation measures throughout the DEIR is in violation of CEQA; it denies the public the opportunity to comment on a project that has already been modified to mitigate impacts to the maximum extent feasible. (*Gentry, supra,* 36 Cal.App.4th at 1393.) 79 Cont'd

B. The DEIR Relies on Inadequate Mitigation Measures to Reduce Significant Impacts to a Less Than Significant Level

CEQA requires that environmental impacts be analyzed at the earliest possible time. Despite this mandate, the DEIR unduly defers meaningful impact analysis and relies on future mitigation to make speculative and overly optimistic significance determinations with respect to impacts on flooding, wetlands, and 86

[146] DEIR, p. 3.13-34.
[147] DEIR, p. 3.12-22.
[148] DEIR, p. 3.4-45.
[149] DEIR, p. 3.12-29.
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hazardous materials. According to the DEIR, the Project's environmental impact in these areas will, with mitigation, be less than significant. The DEIR has improperly made these significance determinations by presupposing the outcome of future studies or analyses on these same impacts – an outcome that remains unknown. 86 Cont'd

Having assumed a future in which unapproved levee improvements will be constructed, and having assumed a future in which FEMA will designate the Project site an A99 flood zone, the DEIR concludes that the Project's impact on flood protection will be less than significant with mitigation.[150] However, the DEIR's assumptions are pure speculation; such mitigation cannot be assumed and the Project's impact on flooding remains significant. 87

With respect to wetlands, the acreage of federal wetlands on within the Specific Plan area – and the extent to which these wetlands will be filled by the Project – remains completely unknown. On this tenuous basis, the DEIR concludes that the Project's impacts on wetlands will be less than significant.[151] The DEIR similarly assumes the outcome of Phase I and Phase II environmental assessments for the Project's most contaminated areas. Based on these future studies, the DEIR optimistically concludes that the Project's impact on these listed hazardous waste sites will not be significant.[152] The Specific Plan's impacts on both wetlands and hazardous waste remain significant, however, and the DEIR's reliance on the outcome of unknown future events is improper. 88 89

C. The DEIR Wrongly Concludes that No Further Mitigation Exists for the Project's Significant Environmental Impacts

Sutter County is required to consider all feasible mitigation and alternatives that would lessen or eliminate the Project's significant impacts. (Pub. Res. Code § 21002; CEQA Guidelines §§ 15126.4(a), 15126.6 (b).) The DEIR fails to meet this mandate of CEQA. First, a project of reduced scale would be feasible and mitigate all of the Specific Plan's significant impacts. Second, the DEIR has failed to adopt several feasible mitigation measures for reducing the Specific Plan's significant impacts on air quality. 90 91

[150] DEIR, p. 3.7-56.
[151] DEIR, p. 3.13-35.
[152] DEIR, p. 3.12-24.
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1) The DEIR Wrongly Fails to Consider a Smaller Project as a Feasible Mitigation Measure

Before finding any impact to be significant and unavoidable, Sutter County must implement all feasible mitigation measures. (Pub. Res. Code § 21002; *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 41.) The overriding mitigation measure that should have been imposed for all significant impacts identified in the DEIR is a reduction in the Project's scale. All of the significant environmental impacts the Project will cause would be lessened if the mammoth scale of the Specific Plan were simply reduced. Not as many wetlands would be filled, not as much traffic congestion would be generated, less farmland would be lost, less habitat would be harmed, and less air pollution caused. However, the DEIR did not seriously consider this obvious mitigation measure, nor, as explained in the discussion of alternatives below, did it seriously consider any reduced-scale alternative.

90 Cont'd

The reason given in the DEIR for not seriously considering reduced-scale mitigation is that it would not be "feasible." CEQA defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors." (CEQA Guidelines § 15364.) The DEIR has not explained its reasoning why a reduced-scale alternative might not be economically feasible, and Measure M is advisory only and not a legal mandate. Nor has the DEIR discussed any social and technological factors that would otherwise make reduced-scale mitigation infeasible. CEQA requires that the basis for any conclusions in the DEIR be provided; it is not the public's duty to guess those reasons. (*County of Inyo, supra,* 71 Cal.App.3d at 192-193.) Because a reduced scale project is feasible on its face, and because no explanation is provided as to how a reduced scale project is not feasible, the DEIR's failure to impose reduced-scale mitigation is a violation of CEQA.

2) The DEIR Fails to Impose All Feasible Mitigation Measures for Significant Air Impacts

The DEIR is required to minimize the Specific Plan's impacts on air pollution to the maximum extent feasible. (Pub. Res. Code § 21002; CEQA Guidelines §§ 15126.4(a), 15126.6 (b).) As explained in greater detail in Dr. Pless' comments, the DEIR falls far short of meeting this standard. There are several feasible

91 Cont'd

mitigation measures that would reduce the Project's impact on air emissions which the DEIR has failed to impose. 91 Cont'd

With respect to air emissions from construction, emissions for each project phase should be addressed in a separate CEQA document and analyzed using the Feather River Air Quality Management District's ("FRAQMD") "most recent thresholds of significance at the time of determination." (Exhibit A, p. 5.) Furthermore, the DEIR should require an "off-site mitigation plan," based on FRAQMD's listing of approved off-site mitigation projects. (*Id.*) Alternately, the DEIR may impose a fee to fund off-site mitigation projects to countervail the Project's significant environmental impact. (*Id.*) When NOx emissions cannot be mitigated on-site to less than significant levels, the Sacramento Municipal Air Quality Management District imposes such an off-site mitigation fee. (*Id.*) Accordingly, the DEIR should require either a fee or off-site mitigation for the Project. 92

Furthermore, there exist several other feasible mitigation measures to reduce on-site construction emissions. While the DEIR addresses best management practices, "these plans should require implementation of the most stringent emissions control technologies for construction equipment engine exhaust available at the time to reduce emissions of diesel particulate matter." (Exhibit A, p. 7.) Dr. Pless has provided an Attachment to her comments that lists the extensive mitigation measures that are currently available for reducing diesel particulate matter; these mitigation measures are feasible and should be required by the DEIR. (*Id.*) 93

As mitigation for operational emissions, the Project proposes an individual air quality mitigation plan for each project phase and provides examples of mitigation that "may" or "could" be implemented.[153] These air quality management plans should not be optional; the DEIR should require FRAQMD's review and approval of these plans for each Project phase. (Exhibit A, p. 8.) Moreover, as is the case with construction emissions, the DEIR should impose off-site mitigation measures if on-site emissions cannot be reduced to a less than significant level. These may include funding of projects such as "solar panels, LED lights, cogeneration projects [and] retrofits." (*Id.*) 94

[153] DEIR, p. 3.4-27.
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With respect to GHG emissions, the DEIR requires a 30% reduction of GHGs from what it describes as business-as-usual levels, but only if it is "feasible to do so.[154] The determination of feasibility is left to Sutter County and, as Dr. Pless describes, is "entirely inadequate to adequately reduce the Project's future contribution to global climate change." (Exhibit A, p. 9.) Moreover, there is no question that any effort to reduce greenhouse gas emissions must address residential and commercial development. As the California Air Resources Board states in its Scoping Plan, 95

> Collectively, energy use and related activities by buildings are the second largest contributor to California's greenhouse gas emissions. Almost one-quarter of California's greenhouse gas emissions can be attributed to buildings. As the Governor recognized in his Green Building Initiative (Executive Order S-20-04), significant reductions in greenhouse gas emissions can be achieved through the design and construction of new green buildings as well as the sustainable operation, retrofitting, and renovation of existing buildings.[155] 96

The DEIR should require the highest standards for environmentally sustainable buildings, including the Leadership in Energy and Environmental Design ("LEED") Green Building Rating System, and the "Build It Green" system.[156] (Exhibit A, p. 10.)

As Dr. Pless' comments demonstrate, the DEIR should be revised to include these and other feasible mitigation measures for air emissions and recirculated for public review. 97

VII. THE DEIR FAILS TO DESCRIBE OR MITIGATE CUMULATIVE IMPACTS TO THE EXTENT FEASIBLE

An EIR must discuss significant "cumulative impacts." (CEQA Guidelines § 15130(a).) This requirement flows from CEQA section 21083, which requires a finding that a project may have a significant effect on the environment if 98

> the possible effects of a project are individually limited but cumulatively considerable.…'Cumulatively considerable' means that

[154] DEIR, p. 3.17-16.
[155] CARB, *Climate Change Proposed Scoping Plan* (Oct. 2008) at p. 57.
[156] *See* Build it Green, www.builditgreen.org/greenpointrated.

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> the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.

(Pub. Res. Code § 21083.) Cumulative impacts are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (CEQA Guidelines § 15355(a).) "[I]ndividual effects may be changes resulting from a single project or a number of separate projects." (*Id.*)

"The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." (*Communities for a Better Environment,* 103 Cal.App.4th 98, 117.) A legally adequate "cumulative impacts analysis" views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable probable future projects whose impacts might compound or interrelate with those of the project at hand. "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." (CEQA Guidelines § 15355(b).) 98 Cont'd

As the court stated in *Communities for a Better Environment, supra,* 103 Cal.App.4th 98, 114:

> Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

An EIR must discuss a cumulative impact if the project's incremental effect combined with the effects of other projects is "cumulatively considerable." (CEQA Guidelines § 15130(a).) This determination should be based on an assessment of the project's incremental effects "viewed in connection with the effects of past

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projects, the effects of other current projects, and the effects of probable future projects." (*Id.* at § 15065(c).) The purpose of the cumulative impacts analysis is to avoid considering projects in a vacuum, because piecemeal approval of several projects with related impacts could lead to severe environmental harm. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 720.) The California Supreme Court has described the cumulative impacts analysis of a project's regional impacts as a "vital provision" of CEQA. (*Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283.) 98 Cont'd

In this case, the DEIR has failed to identify and analyze several cumulative impacts. It contains no consideration of the impact of the approximately 1,000 acres within the I-C Reserve and within the HCP area that are not part of the Specific Plan.[157] Because the Project itself exceeds the amount of acreage that can be developed under the HCP, for which an amendment to the HCP will be required, it will be extremely difficult to develop the remaining 1,000 acres within the I-C zone under the constraints of the ESA. The DEIR contains no discussion whatsoever of this cumulative impact. 99

The DEIR also fails to analyze the Project's cumulative wildlife impact in concert with the Sacramento Airport's recent conversion of northern buffer lands from rice cultivation to fallow land.[158] This alone requires an amendment to the HCP and undermines the DEIR's conclusion that the Project will not cause any significant wildlife impacts. 100

The DEIR fails to address or discuss the cumulative impacts of the Project on federal funding for the Sacramento Airport. The ongoing Sacramento Airport expansion, the need for a required amendment to the HCP, and the Project's incompatibility with the CLUP may jeopardize both Sutter County and Sacramento County's grant assurance obligation to ensure compatible land use in the vicinity of Sacramento Airport and other regional airfields."[159] This would have a potentially devastating impact on the regional economy. 101

The DEIR wholly fails to discuss the Project's cumulative environmental impact in concert with the several other ongoing infrastructure projects in the area, 102

[157] *Id.*
[158] *See, e.g.*, Natomas Joint Vision Area, Existing Conditions, November 12, 2008, p. 22, available at http://www.cityofsacramento.org/planning/projects/natomas-joint-vision/documents/NJV_Background_Report.pdf
[159] Airport Sponsor Assurances, available at http://www.faa.gov/airports_airtraffic/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf
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many of which are now undergoing their own, discrete environmental review. A program EIR is intended to incorporate this same cumulative impact analysis into *one* document. (CEQA Guidelines § 15165.) Instead, the building of an entire city and its support infrastructure has been piecemealed into several discrete environmental reviews, any of which calls the entire Specific Plan into question. Meanwhile, for purposes of cumulative impact analysis, the DEIR treats these infrastructure projects as if they did not exist. 102 Cont'd

The DEIR's analysis of cumulative impacts on schools is also severely flawed. No evidence in the record supports the conclusion that the Project will support 3,000 senior units;[160] no housing demand analysis was conducted for the DEIR. Absent such an analysis, no substantial evidence exists to conclude that the Project has provided for sufficient school capacity. Based on its unsupported analysis that the housing mix for the Project will include 3,000 senior units – and no schoolchildren – the DEIR estimates that the Project will generate the need for "6,228 new elementary school students (grades K–8) and an estimated 1,887 new high school students (grades 9–12)."[161] The *one* high school proposed for the Specific Plan has a capacity of only 2,000 students.[162] A lower proportion of senior units, in concert with the cumulative impact of other area development, will require that an additional high school be constructed. Nowhere in the DEIR is this potentially significant cumulative impact analyzed. 103

All of these cumulative impact deficiencies in the DEIR must be corrected and a revised DEIR recirculated for public review and comment. 104

VIII. THE DEIR FAILS TO ADEQUATELY ANALYZE FEASIBLE ALTERNATIVES

Under CEQA, a DEIR must analyze "a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives," focusing on alternatives that would "avoid or substantially lessen any significant effects of the project, *even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly*." (CEQA 105

[160] DEIR, p. 3.8-15.
[161] *Id.*
[162] *Id.*
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Guidelines § 15126.6(a-b)(emphasis added); *Citizens for Quality Growth v. City of Mount Shasta*, 198 Cal.App.3d 433, 443-445 (1988).) A "feasible" alternative is one that is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors." (CEQA Guidelines § 15364.) A determination that an alternative is not economically feasible must be supported by evidence and analysis showing that it cannot reasonably be implemented due to economic constraints. (*King County Farm Bureau v. City of Hanford* (1990) 221 CalApp.3d 692, 737.) "The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible."[163]

105 Cont'd

Here, just as with its analysis of feasible mitigation measures, the DEIR fails to analyze a range of reasonable alternatives that includes any meaningful and accurate analysis of a reduced-scale project. The DEIR's self-described "reduced-scale" alternative is a artificial alternative involving a "25% reduction in proposed development *on the same footprint*."[164] This is not a reduced-scale alternative: scale refers to *both* the intensity and the footprint of the development.
The only somewhat reduced-scale project that the DEIR analyzes is the Sacramento Council of Governments' Blueprint Plan ("Blueprint Plan"), the environmental impact analysis of which the DEIR severely distorts.

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Although the DEIR does not classify it as such, the Blueprint Plan is the environmentally superior built alternative. The DEIR's selects the "Sankey" alternative as the environmentally superior alternative, but this alternative is nothing but a "straw man" because it contains no residential component whatsoever.[165] The Blueprint Plan involves the construction of approximately one-half the housing as the Specific Plan, but with a similar amount of industrial-commercial space on a significantly reduced footprint.[166] The DEIR dismisses the Blueprint Plan on grounds that it does not meet the housing element of Measure M and because a portion of the Blueprint Plan is not within the HCP territory.[167] Both of these grounds for rejecting the Blueprint Plan are baseless. Measure M, like the Blueprint Plan, is *advisory*. Meanwhile, the Specific Plan is incompatible with the HCP and will require its amendment – and the Blueprint Plan will not.

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[163] *Id.*
[164] DEIR, p. 4-28 (emphasis added).
[165] DEIR, p. 4-42.
[166] DEIR, p. 4-19.
[167] DEIR, p. 4-42.
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Remarkably, the DEIR also analyzes *this Project* as an alternative, based on the tiny differences between the Project analyzed in the DEIR and that originally described in the NOP.[168] An alternatives analysis requires an assessment of the environmental impacts of different projects. If the project originally described in the NOP is indeed a different project,[169] then *this* DEIR has failed to comply with the notice requirements of CEQA.

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IX. CONCLUSION

For all of the above reasons, the DEIR fails to adequately identify and analyze the environmental impacts of the Specific Plan, the deficiencies in the DEIR must be corrected, and a revised DEIR must be recirculated for public review and comment.

Sincerely,

/s/

Paul F. Foley

PFF:bh
Attachments

[168] DEIR, p. 4-7.
[169] NOP, p. 1.
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