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September 22, 2014

Via Overnight and Electronic Mail

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

Dear Ms. Robinson:

We are writing on behalf of the Monterey County Residents for Responsible Development to provide comments on the Draft Environmental Impact Report (“DEIR”) prepared by the Monterey County Resource Management Agency Planning Department (“County”), pursuant to the California Environmental Quality Act (“CEQA”),¹ for the California Flats Solar Project (“Project”) proposed by California Flats Solar, LLC (the “Applicant”). The Applicant seeks a Combined Development Permit (“CDP”) to develop a 280-megawatt (“MW”) solar facility on approximately 3,000 acres of land in unincorporated Monterey County.

I. INTRODUCTION

The Project is comprised of the solar generating facility area, a utility corridor, and improvements to an existing access road. The solar generating facility area would be located on approximately 3,000 acres, and would include an approximately 2,120 acre solar development area, an approximately 135-acre (2.8 miles) 230 kV

¹ Pub. Resources Code, §§ 21000 et seq.
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overhead transmission line corridor, an approximately 5-acre high-capacity collection system line corridor, two on-site substations each approximately six acres in size, a switching station to be owned and operated by Pacific Gas & Electric Company (“PG&E”) approximately six acres in size, an operations and maintenance (“O&M”) facility, and temporary construction staging areas. In addition, implementation of the proposed solar project would require construction and operation of an approximately 155 acre utility corridor and improvements to an existing private access road within an approximately 60 acre area. The site is bordered by grazing land, some farmland, and several rural residences located in close proximity to the site.

The DEIR for this Project fails to comply with CEQA’s basic requirement to act as an “informational document”: it is devoid of meaningful details upon which to make an adequate assessment of the Project’s significant impacts. The DEIR fails to provide a stable project description; fails to provide adequate environmental baseline information; lacks substantial evidence to support its conclusions regarding the Project’s significant impacts; fails to incorporate all feasible mitigation measures necessary to reduce such impacts to a level of insignificance; fails to adequately identify and analyze the Project’s cumulative impacts; and is not consistent with the Monterey County General Plan. As a result of these shortcomings, the DEIR lacks substantial evidence to properly identify and mitigate the Project’s significant environmental impacts. These defects render the DEIR inadequate as an informational document.

These comments will demonstrate that the DEIR for the Project is fatally flawed. The DEIR is a classic example of bare conclusions without appropriate prior analysis or due consideration. In light of the DEIR’s fundamentally flawed nature, the comments contained in this letter should be viewed as illustrative of the problems with the document, rather than as a comprehensive catalogue of the document’s deficiencies. A number of the conclusions contained in the DEIR are not supported by facts, reasonable assumptions predicated on facts, or expert opinion supported by facts. Based on the findings of this comment letter, a revised DEIR must be written and recirculated before the County may legally approve the Project.

We have reviewed the DEIR and its technical appendices with assistance from technical consultants, whose comments and qualifications are attached as follows: Scott Cashen, with the assistance of Michael Morrison and Vernon Bleich (**Attachment A**), Matt Hagemann and Anders Sutherland (**Attachment B**), and

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Tom Myers (**Attachment C**). The County must respond to these consultants' comments separately and individually.

II. STATEMENT OF INTEREST

Monterey County Residents for Responsible Development is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of the Project. The association includes Monterey County residents, such as Manuel Ramos, Robert Greene, and California Unions for Reliable Energy ("CURE") and its members and their families and other individuals that live and/or work in Monterey County (collectively, "Monterey County Residents"). The association was formed to advocate for responsible and sustainable solar development in Monterey County and nearby surrounding areas in order to protect public health and safety and the environment where the association members and their families live, work and recreate.

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

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

III. THE PROJECT DESCRIPTION IS INADEQUATE

The DEIR does not meet CEQA's requirements because it fails to include a complete and accurate project description, rendering the entire impact analysis unreliable. An accurate and complete project description is necessary to perform an evaluation of the potential environmental effects of a proposed project.² Without a complete project description, the environmental analysis will be impermissibly narrow, thus minimizing the project's impacts and undercutting public review.³ 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]."⁴ "Only through an accurate view of the project may affected outsiders and public decision makers balance the proposal's benefit against its environmental costs."⁵

CEQA Guidelines section 15378 defines "project" to mean "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."⁶ "The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term project does not mean each separate governmental approval."⁷ Courts have explained that a complete project description of a project has to address not only the immediate environmental consequences of going forward with the project, but also all "reasonably foreseeable consequence[s] of the initial project."⁸

A. The DEIR Fails to Provide Sufficient Detail Regarding the Project's Planning and Design Features

The DEIR fails to sufficiently describe the Project in several ways. For instance, it is unclear in the DEIR whether PG&E, rather than the Applicant, is actually constructing the switching station or will take ownership and operate the

² See, e.g., *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.

³ See *id.*

⁴ *County of Inyo v. County of Los Angeles* (1977) 71 Cal.App.3d 185, 193.

⁵ *Id.*, at 192-193.

⁶ 14 Cal.Code Regs, tit. 14, §15378 ("CEQA Guidelines").

⁷ CEQA Guidelines, § 15378(c).

⁸ *Laurel Heights*, 47 Cal.3d 376, emphasis added; see also *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-50.

station after construction.⁹ It is also unclear whether the Project will require the construction of a new well, what kind of construction would be required, and whether there are any potentially significant impacts resulting from the construction. The DEIR references a potential new well in several areas, but is vague in its conclusion as to the Project's need.¹⁰ The extent of the discussion is a brief statement:

“[t]he ultimate locations of the potential new well would depend on final design and operational efficiencies. If the new well is constructed, the applicant would first be required to obtain a well drilling permit from the Monterey County Environmental Health Department, and would be required to comply with applicable County requirements related to the siting and design of new wells.”

This is an insufficient analysis of an important component of the Project description. Mere assurance for compliance with local law *if* there is a need for an additional Project feature, without further analysis regarding that feature and its impacts, “does not adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project.”¹¹ Furthermore, should the Applicant decide to move forward with drilling a new well, that in itself could have potentially significant impacts that must be addressed in this environmental review process. Without more information, “informed decisionmaking cannot occur under CEQA and the final EIR is inadequate as a matter of law.”¹²

Another failure in the Project description can be found in the discussion of park-and-ride facilities for employee shuttles. In one section, the DEIR refers to specific locations for park-and-ride lots, namely Cuesta College North County Campus in Paso Robles, Wild Horse Café in King City and Blackwell's Corner near the intersection of SR 46 and SR 33.¹³ In addition, the DEIR vaguely states that the sites may require temporary fencing and minor surface improvements.¹⁴ However,

⁹ DEIR, p. 2-92 (“PG&E's *construction* of switching station”) (emphasis added); DEIR, p. 2-15 (“the *project proponent would also construct* a new 230kV interconnection switching station that would provide an interconnection to the existing Morro Bay-Gates 230kV transmission line and would be owned and operated by PG&E”) (emphasis added).

¹⁰ DEIR, p. 2-79.

¹¹ *Riverwatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1201.

¹² *Id.*

¹³ DEIR, p. 2-84.

¹⁴ DEIR, p. 2-84.

elsewhere in the DEIR, it is asserted that “[t]he exact location and size of the proposed park and ride facilities are not known at this time” and that the lots “shall be currently improved and have existing stormwater drainage infrastructure in place.”¹⁵ Thus, it is unclear whether the County has actually identified specific locations for the park-and-ride facilities and whether any construction or improvements would be needed.

This is not an isolated example of the DEIR inconsistencies; rather it is demonstrative of a systemic problem plaguing the environmental analysis. The DEIR’s lack of a consistent construction period thwarts an adequate biological resource and air quality analysis, as well as analysis of potential impacts in other areas.¹⁶ In addition, the DEIR is silent as to how many PV panels will be installed for the Project and provides only tentative design features for the PV modules. The DEIR merely states that the Project “would utilize high-efficiency commercially available solar PV modules” and lists potential materials to be included in the design.¹⁷ Finally, the DEIR fails to provide important information on the specific type of stream crossings the Project would require on the site, such as the number and location of crossings. The DEIR merely states that stream crossings would be “determined at the time of project design.”¹⁸

These are examples of the County’s failure to identify relevant information in the DEIR in violation of CEQA’s fundamental purpose to “alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”¹⁹ For the public and policy-makers to be informed of the environmental consequences, they must be presented with reliable and current information.

B. The DEIR Fails to Provide a Complete Description of Decommissioning Phase

A complete project description must also include details as to the “later phases of the project, and any secondary, support, or off-site features necessary for its

¹⁵ DEIR, p. 4.13-3.

¹⁶ DEIR, p. 2-81 (“Construction of the proposed project would take approximately 12 to 24 months...”); DEIR p. 4.4-183 (“...construction is anticipated to occur for up to 18 months...”); DEIR, Appendix M, p. 21 (“...total construction phase duration of approximately 12 to 18 months...”)

¹⁷ DEIR, p. 2-13 – 2-14.

¹⁸ DEIR, p. 2-73.

¹⁹ *Laurel Heights*, 47 Cal. 3d at 392.

implementation.”²⁰ The requirements of CEQA cannot be avoided by chopping a large project into many small parts or by excluding reasonably foreseeable future activities that may become part of the project.²¹ The DEIR must supply enough information so that the decision makers and the public can fully understand the scope of the Project.²² The County, as the lead agency, must fully analyze the whole of a project in a single environmental review document and may not piecemeal or split a project into pieces for purposes of analysis.

The DEIR here fails to describe the full scope of the Project being approved, and thus fails to disclose the full range and severity of the Project’s environmental impacts. In this case, the Project has three distinct phase’s: construction, operation/maintenance and decommissioning. The decommissioning phase consists of dismantling and repurposing, salvaging/recycling, or disposing of the solar energy improvements, and revegetation on the approximately 3,000 acre Project site.²³ These decommissioning activities are a part of the “whole of the project,” and as a matter of common sense they will result in environmental impacts, including impacts to air quality, biological resources, water and solid waste capacity. The DEIR, however, underestimates these potentially significant impacts by failing to adequately investigate and mitigate the impacts in light of their “speculative” nature and alleged inherent similarity to the construction phase.²⁴

The public and decision makers are provided with a one-sentence assessment that the impacts associated with the decommissioning will be “similar” to those associated with construction as “based on current decommissioning practices.”²⁵ The DEIR provides no evidence to support this statement. This is not factual evidence but is speculation and opinion. Also, it is inappropriate for the DEIR to provide only generalized, programmatic-level evaluation of decommissioning impacts in a project-level CEQA review. Without suitable details and impact analysis, proper mitigation measures are precluded and the decommissioning could result in significant unmitigated impacts (impacts will be discussed in detail, in the paragraphs below). The inaccurate and cursory depiction of the decommissioning activities results in an illegal minimization of the entire Project’s environmental impacts in contravention of

²⁰ *Bozung v. Local Agency Formation Com.* (1975), 13 Cal.3d 263, 283-84.

²¹ Pub. Resources Code § 21159.27 (prohibiting piecemealing); *see also, Rio Vista Farm Bureau Center v. County of Solano*, 5 Cal.App.4th 351, 370 (1992).

²² *Dry Creek Citizens Coalition v. County of Tulare*, 70 Cal.App.4th 20, 26 (1999).

²³ DEIR, p. 2-88.

²⁴ DEIR, p. 2-87 – 2-88.

²⁵ DEIR, p. 2-88.

CEQA. The information, or rather lack thereof, is inexorably linked to the adequacy of the DEIR's analysis of the Project's environmental effects. The mistake in the Project description is compounded throughout the DEIR because all of the DEIR's analyses (e.g., of air, biological resources, agriculture) rely on an inaccurate level of use.²⁶ The failure to provide an adequate description of the decommissioning activities thwarts the DEIR's environmental analysis because, as this comment letter will show, the DEIR does not properly evaluate significant impacts in several resource areas.

The shifting and ambiguous duration and timing of the decommissioning further frustrates an "accurate, stable, and finite description" which, as highlighted, is as an indispensable prerequisite to an informative and legally sufficient DEIR.²⁷ The public and decision makers are left in the dark as to the specific impacts of decommissioning and are thus unable to fully assess the whole of the Project.

IV. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE ENVIRONMENTAL BASELINE

The DEIR must demonstrate a good faith effort at full disclosure.²⁸ "The EIR must demonstrate that the significant environmental impacts of the proposed project were investigated and discussed" and permit project effects "to be considered in the full environmental context."²⁹ An EIR must also include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.³⁰ A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.³¹

Here, the DEIR's failure to adequately describe the existing setting is inconsistent with the fundamental purpose of the environmental review process, which is to determine whether there is a potentially substantial, adverse change compared to the existing setting. CEQA requires that a lead agency include a

²⁶ See, *Laurel Heights*, 47 C.3d 376 [EIR failed to describe or analyze project accurately].

²⁷ *San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus* (1994), 27 Cal. 4th 713, 730 32 Cal.Rptr.2nd 704.

²⁸ *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390.

²⁹ CEQA Guidelines § 15125 subd. (c).

³⁰ *Association of Irrigated Residents*, 107 Cal.App.4th at 1390.

³¹ *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 748. 2842-017cv

description of the physical environmental conditions in the vicinity of the Project, as they exist at the time environmental review commences.³² The Courts have consistently held that the impacts of a project must be measured against the “real conditions on the ground.”³³ The description of the environmental setting constitutes the baseline physical conditions by which a lead agency must measure the significance of a project’s impacts.³⁴

The County is under an obligation to describe the existing environmental setting in sufficient detail to enable a proper analysis of project impacts.³⁵ CEQA Guidelines section 15125 provides, in relevant part, that “[k]nowledge of the regional setting is critical to the assessment of environmental impacts.”³⁶ This level of detail is necessary to “permit the significant effects of the project to be considered in the full environmental context.”³⁷ The description of the environmental setting in the DEIR is inadequate because it omits highly relevant information regarding biological resources and potential hazards on the Project site.

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

Monterey is the biological center of California; many plant species that find either their northern or southern limits can be found in Monterey County. In addition, a high number of plant species are native only to Monterey County.³⁸ A review of this Project by Biologist Scott Cashen reveals that the description of the existing environmental setting found in the DEIR, and the *Biotic Report* upon which it relies, is incomplete and plagued with errors.³⁹ In its current form, it fails to provide an adequate description of the presence of special-status biological resources on the Project site against which to assess the Project’s significant impacts. For example, Mr. Cashen’s review shows that protocol-level surveys for several plant and

³² CEQA Guidelines § 15125, subd. (a); see also *Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 321.

³³ *Save Our Peninsula Com. v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121-22; *City of Carmel-by-the Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 246.

³⁴ CEQA Guidelines, § 15125, subd. (a).

³⁵ *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, 1121-22.

³⁶ CEQA Guidelines § 15125, subd. (d).

³⁷ *Id.*

³⁸ Monterey County General Plan, Conservation and Open Space Element (2002).

³⁹ See Letter from Scott Cashen, et al., to Laura Horton re: Draft Environmental Impact Report for the California Flats Solar Project, September 22, 2014 (hereinafter, “Cashen Comments”), **Attachment A**. 2842-017cv

animal species were not properly implemented, or implemented at all, across the Project and survey area.⁴⁰ In addition to problematic survey methods, there was inadequate trapping to identify small mammal species.⁴¹

Consequently, the documentation of special status species occurrence on the Project site and biological assessment area is inadequate. Mr. Cashen states that “[t]he DEIR cannot be considered a robust and comprehensive analysis of biological resources until the surveys have been adequately conducted, documented, and vetted by the public and resource agencies.”⁴² Faulty baseline analysis for specific species is as follows.

1. Rare Plants

Mr. Cashen observed many errors in the rare plant surveys referenced in the DEIR.⁴³ For example, he states that because many surveys were conducted in such a poor rainfall year, results should be considered inconclusive and the Biological Study Area (“BSA”) resurveyed.⁴⁴ In addition, Mr. Cashen found that in order for the DEIR to properly assess all potentially significant impacts, and formulate appropriate mitigation, the Project area needs to be resurveyed when the aforementioned plants are evident and identifiable.⁴⁵

According to Mr. Cashen, the DEIR provides inaccurate information regarding the presence of Mason's neststraw (*Stylocline masonii*), stating that the plant has no potential of occurring within the BSA.⁴⁶ The statement conflicts with the *Biotic Report Addendum*, which indicates the species could occur within the Project’s utility corridor.⁴⁷ Furthermore, the DEIR and appendices do not indicate whether protocol-level surveys were conducted for this taxon during a time when it would have been evident and identifiable.⁴⁸ The DEIR is also misleading as to several of the target annual plant species being “absent” from the survey areas.⁴⁹ Mr. Cashen states that

⁴⁰ *Id.*

⁴¹ *Id.*, at 16.

⁴² *Id.*, at 2.

⁴³ *Id.*, at 3-7.

⁴⁴ *Id.*, at 3.

⁴⁵ *Id.*, at 5.

⁴⁶ *Id.*; DEIR, p. 4.4-41.

⁴⁷ DEIR, Appendix E13, p. 7.

⁴⁸ Cashen Comment, p. 5.

⁴⁹ *Id.*; DEIR, Table 4.4-4.

“it is virtually impossible to prove a species’ absence, especially within a survey area that encompassed either 4,361 acres (as reported in Table 4) or over 4,800 acres (as reported on p.31). This is especially true for annual plant species, which may have seed banks present in the soil, but the seeds do not germinate in a given year (e.g., due to drought).”⁵⁰

The DEIR’s survey report also lacks details regarding the number of personnel hours spent checking reference sites and conducting the regional contextual surveys, and as a result, Mr. Cashen believes the DEIR and appendices falsely inflate the amount of time dedicated to Project-specific surveys.⁵¹ All of these deficiencies, plus many more highlighted in Mr. Cashen’s letter, result in a DEIR that fails in establishing an accurate environmental baseline in violation of CEQA.

2. San Joaquin Kit Fox

The DEIR indicates known records of the San Joaquin kit fox, showing frequent occurrence to the south and east of the Project area.⁵² However, according to Mr. Cashen, there is no indication whether surveys were conducted to the north and west of the Project area.⁵³ The DEIR is also inconsistent in its assessment of whether the Project area could be a wildlife corridor for the kit fox, thus according to Mr. Cashen, the DEIR gives completely contradictory information regarding the presence of, and Project impacts to, this special-status species.⁵⁴ The high potential for significant impacts on the kit fox makes establishing an accurate environmental baseline extremely important.

3. San Joaquin Pocket Mouse

The DEIR states that the San Joaquin pocket mouse could occur on site, but implies none were located during kangaroo rat focused trapping.⁵⁵ However, Mr. Cashen found that “adequate trapping was not conducted to determine the presence of this special status species.”⁵⁶ Furthermore, the information was based on the state’s natural diversity database (“CNDDDB”) alone, which only includes records

⁵⁰ Cashen Comments, p. 5.

⁵¹ *Id.*, at 6.

⁵² DEIR, p. 4.4-50.

⁵³ Cashen Comments, p. 14.

⁵⁴ *Id.*, at 15.

⁵⁵ DEIR, p. 4.4-77.

⁵⁶ Cashen Comments, p. 16.

submitted to California Department of Fish and Wildlife (“CDFW”) and is “not a substitute for site-specific surveys.”⁵⁷ The DEIR further states that the Project will “...reduce a relatively small amount of habitat that is regionally abundant for this species; consequently, this permanent habitat conversion would not substantially reduce the number of this species or restrict its range.”⁵⁸ This “fails to acknowledge that if the pocket mice in the Project area represent part of a metapopulation structure, loss of this subpopulation could negatively impact overall species viability and diversity.”⁵⁹

4. California Tiger Salamander

According to Mr. Cashen, the Project area was not adequately surveyed for the California Tiger Salamander (“CTS”) because not all suitable breeding sites were surveyed and it was only surveyed during drought conditions.⁶⁰ As a result, “definitive statements made in the DEIR about baseline conditions for occurrence or habitat suitability at the Project area are not supported.”⁶¹

5. California Red-Legged Frog

Mr. Cashen found that, based on the description of the survey efforts to locate California red-legged frogs (“CRLF”) in the Project area, the survey team did not sample the Project and biological assessment area according to USFWS protocol, which recommends:

“a total of up to eight (8) surveys to determine the presence of [CRLF] at or near a project site. Two (2) day surveys and four (4) night surveys are recommended during the breeding season; one (1) day and one (1) night survey is recommended during the non-breeding season. Each survey must take place at least seven (7) days apart. At least one survey must be conducted prior to August 15th. The survey period must be over a minimum period of 6 weeks (i.e., the time between the first and last survey must be at least 6

⁵⁷ *Id.*

⁵⁸ DEIR, p. 4.4-95.

⁵⁹ Cashen Comments, p. 16.

⁶⁰ *Id.*, at 11.

⁶¹ 11.

weeks). Throughout the species' range, the non-breeding season is defined as between July 1 and September 30."⁶²

It appears that only 3 surveys were conducted and no night surveys were conducted at all. Additionally, the CRLF survey was completed during a suboptimal drought conditions.⁶³ As a result, in Mr. Cashen's expert opinion, the full extent of CRLF occurrences across the Project and survey area was "likely underrepresented and could result in unmitigated impacts to the species."⁶⁴

6. Western Pond Turtle

According to the *Biotic Report*,⁶⁵ protocol surveys for the western pond turtle ("WPT") were not conducted despite the existence of established protocols.⁶⁶ Instead, the detection of this species, along with other amphibian and reptile species, was based on casual observations while conducting CRLF, CTS, or other reconnaissance-level surveys.⁶⁷ As a result, Mr. Cashen concludes that the DEIR fails to establish the abundance and distribution of western pond turtles in the Project area, which could cause "severe consequences" for the conservation of the species.⁶⁸

7. Swainson's Hawk

The DEIR states:

Currently, Swainson's hawk, white-tailed kite, and northern harrier are not known to nest on the Solar Generating Facility Area or in the Access Road. Although the project site contains suitable foraging habitat for these species, none have been detected

⁶² *Id.* at 13; USFWS, *Revised Guidance on Site Assessments and Field Surveys for the California Red-legged Frog* 6 (2005), http://www.fws.gov/sacramento/es/Survey-Protocols-Guidelines/Documents/crf_survey_guidance_aug2005.pdf.

⁶³ Cashen Comments, p. 13; Annual Climatological Summary (2013), National Climatic Data Center National Oceanic & Atmospheric Administration, <http://www.ncdc.noaa.gov/cdo-web/>.

⁶⁴ Cashen Comments, p. 13.

⁶⁵ DEIR, Appendix E1.

⁶⁶ Cashen Comments, p. 3; DEIR, Appendix E.1, Section 2.5. *See also* U. S. Geological Survey. 2006. USGS western pond turtle (*Emys marmorata*) visual survey protocol for the southcoast ecoregion. U. S. Geological Survey protocol. San Diego, CA.

⁶⁷ Cashen Comments, p. 13.

⁶⁸ *Id.*, at 14.

nesting or foraging on the project site. If any of the species occur on the site, it would be infrequently.⁶⁹

Mr. Cashen found these statements to be misleading because, as stated above, no protocol-level surveys were conducted for Swainson's hawk nest sites, "which can be very difficult to locate."⁷⁰ The CDFW even sent a letter to the County indicating the need for protocol-level surveys in the Project area.⁷¹ In fact, the *Biotic Report* recognized the existence of CDFW promulgated standards for locating nest sites, and it acknowledged surveys adhering to those standards have not been conducted for the Project.⁷² This is an utter failure to establish accurate baseline information regarding the Swainson's hawk.

8. Mountain Plover

The DEIR states that "there are no CNDDDB records for mountain plover within 20 miles of the BSA, but small flocks have been reported in the Cholame Valley as close as four miles south of the project site."⁷³ However, as Mr. Cashen points out, "the mountain plover is indicted to occur on the 1-mile radius line on the southern side of the Project area, as documented in Fig. 4.4-6 (CNDDDB records) of the DEIR."⁷⁴

9. Northern Harrier

The DEIR states that "there are no CNDDDB records of northern harriers within 20 miles of the BSA, but they have been observed foraging within the project site. Due to ongoing grazing activities, the Project site and Access Road provide suitable foraging habitat, but suitable nesting habitat is absent."⁷⁵ However, Mr. Cashen states in his review, that "the Applicant's consultant did not conduct surveys for northern harrier nests on and around the Project area, nor where nest searches

⁶⁹ DEIR, 4.4-103.

⁷⁰ Cashen Comments, p. 69; CDFG. 2000 May 31. Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in California's Central Valley. Swainson's Hawk Technical Advisory Committee.

⁷¹ See DEIR, Appendix A.

⁷² DEIR, Appendix E1, pp. 90, 91.

⁷³ DEIR, p. 4.4-74.

⁷⁴ Cashen Comments, p. 10.

⁷⁵ DEIR, p. 4.4-74.

conducted for any other species except the golden eagle.”⁷⁶ In addition, “[a]ccording to the Biotic Report, harriers are known to nest in Cholame Valley.”⁷⁷

10. Pronghorn

Mr. Cashen explains that “the past presence and abundance of pronghorn (*Antilocapra americana*) in Monterey County, California have long been established.”⁷⁸ The DEIR states: “pronghorn and Tule elk have not been observed with the project site.”⁷⁹ However, as Mr. Cashen points out, that statement appears to conflict with information on the Applicant’s website, which states: “A herd of approximately 100 antelope have flourished on the [Jack] ranch, since their original introduction by Fish and Game on neighboring land.”⁸⁰ Moreover, he states that “pronghorn have been observed within the access road corridor and reportedly in the southern end of the Project site.”⁸¹ Therefore, the DEIR is inaccurate and does not properly establish baseline conditions regarding the presence of pronghorn on the Project site.

B. The DEIR Fails to Adequately Describe the Existing Baseline to Determine the Potential for Hazards

The DEIR failed to accurately establish the existing environmental setting for hazards because it failed to rely on a Phase I Environmental Site Assessment (“ESA”) at the Project site. According to Matt Hagemann and Anders Sutherland of SWAPE Consulting, a Phase I ESA is the customary due diligence investigation used by developers to establish the baseline setting for potential hazards at a project site.⁸² However, instead of abiding by this industry standard, the DEIR makes assumptions that are not substantiated by the facts.⁸³ This failure resulted in the oversight of several potentially significant impacts.

⁷⁶ Cashen Comments, p. 10-11.

⁷⁷ *Id.*; DEIR, Appendix E1, p. 97.

⁷⁸ Cashen Comments, p. 16.

⁷⁹ DEIR, p. 4.4-81.

⁸⁰ Hearst Ranch Website, <http://www.hearstranch.com/about>.

⁸¹ Cashen Comments, p. 17.

⁸² Letter from Matt Hagemann and Anders Sutherland to Laura Horton re: Draft Environmental Impact Report for the California Flats Solar Project, September 19, 2014 p. 1 (hereinafter, “Hagemann Comments”), **Attachment B**.

⁸³ *See* DEIR, Sec. 4.8.

First, as Mr. Hagemann and Mr. Sutherland found in their review of the DEIR, there are two oil and gas wells on the Project site.⁸⁴ The DEIR does not contain enough information to determine the methods by which these wells were abandoned. Mr. Hagemann and Mr. Sutherland explained that “poorly abandoned wells may act as conduits for contamination to move from the surface to deeper levels in the subsurface, including movement of surface contaminants to groundwater.”⁸⁵ Construction near the wells could damage and expose the wells, creating hazards to the environment and people. Further research must be done to determine the exact location of these wells in relation to proposed construction and whether the wells were abandoned in conformance with current regulations. If the abandonment techniques cannot be determined or if the techniques used are outdated and unsafe, Mr. Hagemann and Mr. Sutherland recommend that the wells “should be re-abandoned to meet modern [] requirements.”⁸⁶

In addition to failing to identify oil and gas wells on the site, the DEIR does not adequately analyze the potential for pesticides in Project site soils or groundwater. The DEIR references Monterey County Agricultural Commissioner records but as Mr. Hagemann and Mr. Sutherland point out, the analysis is lacking sufficient detail to make a determination as to whether pesticides were used at the site.⁸⁷ This is especially important because approximately 38.7 acres of irrigated cropland are present at the site. According to Mr. Hagemann and Mr. Sutherland, the potential exists for worker exposure to hazardous pesticides “through inhalation and dermal contact with soil and dust that may be contaminated.”⁸⁸ Mr. Hagemann and Mr. Sutherland conclude that the DEIR should be revised to include soil sampling and analysis for organochlorine pesticides and arsenic.⁸⁹

In order to enable an analysis of the environmental setting and thus whether potentially significant impacts could exist, a Phase I ESA is necessary.⁹⁰ The County must determine if past uses on the Project site resulted in hazards that are actually present before approving the Project. Failure to assess the real conditions on the Project site may result in unanalyzed and unmitigated impacts to worker health and the environment.

⁸⁴ Hagemann Comments, pp. 2-3.

⁸⁵ *Id.*, at 3.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*, at 4.

⁸⁹ *Id.*

⁹⁰ *Id.*, at 2.

V. THE DEIR LACKS SUBSTANTIAL EVIDENCE TO SUPPORT ITS CONCLUSIONS REGARDING THE PROJECT'S SIGNIFICANT IMPACTS AND FAILS TO INCORPORATE ALL FEASIBLE MITIGATION MEASURES NECESSARY TO REDUCE SUCH IMPACTS TO A LEVEL OF INSIGNIFICANCE

CEQA has two basic purposes, neither of which the DEIR satisfies. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.⁹¹ CEQA requires that an agency analyze potentially significant environmental impacts in an EIR.⁹² The EIR should not rely on scientifically outdated information to assess the significance of impacts, and should result from “extensive research and information gathering,” including consultation with state and federal agencies, local officials, and the interested public.⁹³ To be adequate, the EIR should evidence the lead agency’s good faith effort at full disclosure.⁹⁴ Its purpose is to inform the public and responsible officials of the environmental consequences of their decisions before they are made. For this reason, the EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”⁹⁵ Thus, the EIR protects not only the environment but also informed self-government.”⁹⁶

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.⁹⁷ The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to “identify ways that environmental damage can be avoided or significantly reduced.”⁹⁸ If a project has a significant effect on the environment, the agency may approve the project only upon a finding that it has “eliminated or substantially lessened all significant effects on the environment where feasible,” and that any unavoidable

⁹¹ Cal. Code Regs., tit. 14, § 15002, subd. (a)(1) (hereinafter, “CEQA Guidelines”).

⁹² See Pub. Resources Code § 21000; CEQA Guidelines § 15002.

⁹³ *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm.* (2001) 91 Cal. App.4th 1344, 1367 and *Schaeffer Land Trust v. San Jose City Council*, 215 Cal.App.3d 612, 620.

⁹⁴ CEQA Guidelines § 15151; see also *Laurel Heights I* (1998) 47 Cal.3d 376, 406.

⁹⁵ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁹⁶ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (citations omitted).

⁹⁷ CEQA Guidelines § 15002(a)(2)-(3); *Berkeley Keep Jets Over the Bay Com.*, 91 Cal.App.4th at 1354.

⁹⁸ CEQA Guidelines § 15002 subd. (a)(2).

significant effects on the environment are “acceptable due to overriding concerns” specified in CEQA section 21081.⁹⁹

The DEIR fails to provide substantial evidence to support its conclusions regarding the Project’s significant impacts. The DEIR also fails to propose feasible measures to reduce significant impacts that are identified in the DEIR, including the Project’s significant impacts on air quality and biological resources. As a result, the DEIR fails to inform decision makers and the public of the Project’s potentially significant environmental effects and to reduce damage to the environment before they occur. An EIR may conclude that impacts are insignificant only after providing an adequate analysis of the magnitude of the impacts and the degree to which they will be mitigated. Thus, if the lead agency, here Monterey County, fails to investigate a potential impact, its finding of insignificance simply will not withstand legal scrutiny.¹⁰⁰

A. The DEIR Fails to Adequately Analyze and Mitigate the Project’s Impacts on Biological Resources

The DEIR’s treatment of potential significant impacts to biological resources falls exceptionally short of complying with CEQA’s mandate to analyze the Project’s impacts on the environment.¹⁰¹ The County lacks substantial evidence to support a finding regarding the Project’s impacts on biological resources. The DEIR relies on the *Biotic Report, Biological Resources Impact Analysis* and Addendum, and other documents prepared by the Applicant’s consultants H.T. Harvey & Associates.¹⁰² However, there are several deficiencies in the Applicant’s reports and the DEIR’s assessment of the Project’s impacts on biological resources, and in Mr. Cashen’s expert opinion, “the DEIR fails to disclose, analyze, and mitigate potentially significant impacts to all special-status wildlife species.”¹⁰³ Because Mr. Cashen based his opinion on facts specific to the proposed Project, his opinion constitutes substantial evidence that the Project may cause unmitigated significant impacts to biological resources.¹⁰⁴

⁹⁹ CEQA Guidelines § 15092, subd. (b)(2)(A)-(B).

¹⁰⁰ Pub. Res. Code § 21081.6(b); Guidelines § 15126.4(a)(2).

¹⁰¹ See Pub. Res. Code § 21061.

¹⁰² DEIR, p. 4.4-1.

¹⁰³ Cashen Comments, p. 2.

¹⁰⁴ CEQA Guidelines, §15384, subd.(b).

Complete surveys of the current Project area are essential and must be conducted before the Project's potentially significant impacts to biological resources can be assessed. The limited surveys that were conducted by the Applicant's consultants, as discussed above, do not constitute substantial evidence. Substantial evidence is defined to include "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts."¹⁰⁵ The Applicant's technical documentation excludes information, including details regarding the survey methods, that is vital for the public to make an informed assessment.¹⁰⁶ This basic information is fundamental and necessary to ascertain the validity of the Applicant's documentation. In addition, as Mr. Cashen stated in his comments, the DEIR is deficient because it completely ignores several of the species on CDFW's *Special Animals* list, including, but not limited to: Cooper's hawk, ferruginous hawk, horned lark, prairie falcon, Lewis's woodpecker, yellow-billed magpie, and Lawrence's goldfinch.¹⁰⁷ Mr. Cashen identified many impacts on biological resources in his comments, some of which are discussed below. Any remaining issues detailed in Mr. Cashen's comments are incorporated herein by reference.

1. *Proposed Mitigation Measures for Significant Impacts to Sensitive Species are Insufficient and Vague*

According to Mr. Cashen, the proposed mitigation measures for sensitive species are inadequate, and thus "the County has not ensured Project impacts to sensitive biological resource would be reduced to a less-than-significant level."¹⁰⁸

Two main components of the County's proposed mitigation are: (1) Nested Compensatory Mitigation; and (2) a Habitat Mitigation and Monitoring Plan ("HMMP"). Mr. Cashen suggests that "the County fails to identify critical components of the compensatory mitigation package and HMMP" and "[i]nstead, it defers that responsibility back onto itself (as the body responsible for approving anything proposed by the Applicant)—after the CEQA review process terminates."¹⁰⁹ This precludes the public, resource agencies, and scientific community from being able to submit informed comments on the adequacy of the actual mitigation.

Mr. Cashen states that these mitigation measures fail to establish:

¹⁰⁵ CEQA Guidelines § 15384.

¹⁰⁶ See Cashen Comments.

¹⁰⁷ *Id.*, at 3.

¹⁰⁸ *Id.*, at 31.

¹⁰⁹ *Id.*, at 31.

(a) the location of potential mitigation sites, the status of the target species at those sites, and the feasibility of acquiring sites in the vicinity of the Project; (b) success standards for the proposed mitigation measures, and a definitive enforcement mechanism that ensures those standards are met; (c) the contingency or remedial action measures that will triggered if success standards are not achieved; (d) the measures that will be implemented to ensure the long-term protection and management of the target species at the mitigation sites; and (e) the required monitoring program, including the monitoring techniques, effort, and frequency.¹¹⁰

Because the DEIR lacks these fundamental details, Mr. Cashen concludes that the County has not ensured Project impacts to sensitive biological resource would be reduced to a less-than-significant level.¹¹¹

Regarding the CTS and CRLF relocation sites,¹¹² measure B-1(w), it is unclear from the DEIR if these relocation sites have or will have sufficient acreage and habitat quality and/or are available for relocation. Consequently, it is not possible to determine if this vague mitigation measure would be effective for CTS and CRLF.¹¹³ Additionally, in the discussion on CTS daily pre-activity surveys, measure B-1(bb), the DEIR states that “any individual detected during these pre-activity surveys shall be moved to a designated relocation sites identified under B-1(p).”¹¹⁴ However, B-1(p) does not specifically identify and document the actual location(s) and habitat quality of designated relocation sites, but instead discusses wildlife-friendly fence design.¹¹⁵ Similarly, measure B-1(y), Construction Timing, Preconstruction Surveys and Avoidance Measures for California Red-Legged Frog, states that “any individual detected during these pre-activity surveys shall be moved to a designated relocation sites identified under B-1(p).”¹¹⁶ Again, B-1(p) does not specifically identify and document the actual location and habitat quality of designated relocation sites, but

¹¹⁰ *Id.*, at 31.

¹¹¹ *Id.*, at 31.

¹¹² DEIR, 4.4-144.

¹¹³ Cashen Comments, p. 37.

¹¹⁴ DEIR, p. 4.4-148.

¹¹⁵ DEIR, p. 4.4-138.

¹¹⁶ DEIR, p. 4.4-145.

instead discusses wildlife-friendly fence design. The County must revise the DEIR to address these errors and recirculate the DEIR for public review. Therefore, proposed mitigation measures to reduce significant impacts to sensitive species are insufficient and vague.

2. *Potential Significant Impacts on Burrowing Owls were Not Properly Identified and Mitigated*

The DEIR states that “[i]f suitable burrows for burrowing owls are identified during preconstruction surveys, mitigation measure B-1(m) shall be implemented.”¹¹⁷ The Avoidance and Mitigation Efforts in B-1(m) are discussed as, “[t]he appropriateness of using reduced buffer distances or burrow-specific buffer distances shall be established on a case-by-case basis by a qualified ornithologist who may consult with CDFW...If no suitable alternative natural burrows are available for the owls, then, for each owl that is evicted, at least two artificial burrows shall be installed in suitable nearby habitat areas.”¹¹⁸

Mr. Cashen found that there was no discussion on long-term maintenance of the artificial burrows and that the DEIR did not “provide measures to indicate that successful occupation of the artificial burrows by owls will be determined or is required. These mitigation efforts, therefore, are incomplete and do not qualify as acceptable measures to mitigate Project impacts on this special-status bird.”¹¹⁹

3. *Failure to Adequately Mitigate Impacts to the San Joaquin Kit Fox*

The DEIR states that the San Joaquin kit fox was detected on the Project site.¹²⁰ In discussing the use of the Project area as a wildlife movement corridor for these species, it states that “[g]iven the remote location of the project site, the low level of development in the vicinity, the relatively low degree of disturbance on the site and the presence of natural habitats on and adjacent to the project site, it is highly likely that wildlife move freely through the site; however the site is unlikely to serve as a distinct or important movement corridor or habitat linkage for any

¹¹⁷ DEIR, p. 4.4-134.

¹¹⁸ DEIR, p. 4.4-136.

¹¹⁹ Cashen Comments, p. 36.

¹²⁰ DEIR, p. 4.4-76.

protected or managed species.”¹²¹ However, Mr. Cashen’s review suggests that there is no substantial evidence to support this conclusion.¹²² Given that the Project area “represents the northern target zone for kit fox connectivity through the Carrizo Plain” and that the kit fox occurs in and around the Project area, a conservative conclusion offered by Mr. Cashen would be that the Project area is included within an established population of the kit fox; and/or the Project area is serving as a frequently used movement corridor.¹²³ In this case, wildlife corridor modeling is essential for an adequate evaluation of the Project’s significant impacts on wildlife movement through the 3,000-acre Project area.

In addition, kit fox den avoidance measures described in the DEIR are inadequate.¹²⁴ Mr. Cashen states that “[o]ne of the stated prescriptions is the implementation of buffers of 100-200 feet to avoid dens including natal dens, with up to 500 feet for natal dens during construction. However, these buffers are severely inadequate because, even during the pup-rearing season, nightly movements average greater than 6 miles.”¹²⁵

4. *Failure to Adequately Analyze and Mitigate Impacts to Avian Species*

Avian species impacted by the Project include the golden eagle and the Swainson’s hawk. The golden eagle is protected under both state and federal law and the Project site provides nesting and foraging habitat for golden eagles.¹²⁶ The DEIR provides the following conclusion pertaining to Project impacts to golden eagles:

- “[p]roject development would permanently affect up to 2,188 acres of golden eagle foraging habitat within the project site...This could potentially result in reduced reproductive output and success, increased competition between territories, or abandonment of territories or nests if available foraging habitat in the region proved limiting.”¹²⁷
- “[o]ther construction-related disturbances could result, including activities and noise associated with earth moving, grading, vegetation removal, and

¹²¹ DEIR, p. 4.4-81.

¹²² Cashen Comments, pp. 14, 38.

¹²³ *Id.*, at 14.

¹²⁴ *Id.* at 38; DEIR, p. 4.4-126-133.

¹²⁵ Cashen Comments, p. 38.

¹²⁶ *Id.*, at 9.

¹²⁷ DEIR, p. 4.4-98.

installation of Project infrastructure. These disturbances may alter foraging behavior of golden eagles nesting near the site, which could lead to reduced productivity and nestling survival.”¹²⁸

- “[a]lso, the increased traffic may disrupt eagle foraging and movement at the project site, again potentially reducing eagle productivity and survival.”¹²⁹

Each of these impacts would constitute a take, as defined by the Federal Bald and Golden Eagle Protection Act (“Eagle Act”). As a result, the Project will require an incidental take permit from the USFWS. Mr. Cashen concludes that the DEIR fails to assess the Project’s compliance with the Eagle Act, or establish a mechanism that ensures the Applicant consults with the USFWS regarding the need for an eagle take permit.¹³⁰ As a result, “the Project would have a significant and unmitigated impact to golden eagles.”¹³¹ In addition, as explained above, the DEIR does not require protocol-level surveys for the Swainson’s hawk prior to Project construction, and as a result, Mr. Cashen believes that Project impacts to the Swainson’s hawk remain potentially significant and unmitigated.¹³²

In addition to direct impacts to special status species, the DEIR fails to adequately address the potential for avian collisions. Mr. Cashen states that at PV facilities, birds appear to mistake the broad reflective surfaces of the solar arrays for water, trees, and other attractive habitat.¹³³ When this occurs, Mr. Cashen states that “the birds become susceptible to mortality by: (a) colliding with the solar arrays; or (b) becoming stranded (often injured) on a substrate from which they cannot take flight, thereby becoming susceptible to predation and starvation.”¹³⁴

The DEIR’s analysis of the collision risk to birds is limited to the following:

Solar facilities also present risk for bird collisions with solar panels. Birds migrating at night or moving between the perennial and ephemeral streams on the project site or the adjacent stock ponds would also be at an increased risk of collision with the solar panels as

¹²⁸ DEIR, p. 4.4-98.

¹²⁹ DEIR, p. 4.4-99.

¹³⁰ Cashen Comments, p. 9.

¹³¹ *Id.*

¹³² *Id.*, at 10.

¹³³ *Id.*, at 30; *See Attachment D.*

¹³⁴ *Id.*

the panels might be mistaken for open sky or water. Based on the known distribution of the species in the project area, observations made during surveys, and fatality results emerging from other solar sites in California (Western EcoSystems Technology, Inc. 2014), some collision mortality is anticipated to occur.¹³⁵

As Mr. Cashen points out, “the collision risk posed by the Project’s solar arrays *is not* limited to birds migrating at night or birds moving between water features.”¹³⁶ A recent study completed by the National Fish and Wildlife Forensics Laboratory (2014) reported:

“solar facilities appear to represent ‘equal-opportunity’ hazards for the bird species that encounter them. The remains of 71 species were identified [at three solar facilities], representing a broad range of ecological types. In body size, these ranged from hummingbirds to pelicans; in ecological type from strictly aerial feeders (swallows) to strictly aquatic feeders (grebes) to ground feeders (roadrunners) to raptors (hawks and owls). The species identified were equally divided among resident and non-resident species, and nocturnal as well as diurnal species were represented.”¹³⁷

Mr. Cashen believes that the level of bird mortality due to collisions cannot be accurately estimated because the “Applicant’s consultant did not conduct any surveys to assess avian abundance in the Project area.”¹³⁸ Without a defensible, quantitative estimate of likely mortality, the County does not have the basis to defend its conclusion that avian mortalities would be mitigated to a less-than-significant level.¹³⁹ Moreover, the DEIR does not contain any specific measures to mitigate avian collisions with the Project’s solar arrays. As a result, Mr. Cashen concludes that “the Project would have an unmitigated significant impact to special-status bird species, including species protected by Fish and Game Code and/or the Migratory Bird Treaty Act.”¹⁴⁰ Therefore, the analysis and mitigation proposals in the DEIR are

¹³⁵ DEIR, p. 4.4-106.

¹³⁶ *Id.*, at 30.

¹³⁷ Kagan RA, TC Viner, PW Trail, EO Espinoza. 2014. *Avian Mortality at Solar Energy Facilities in Southern California: A Preliminary Analysis*. National Fish and Wildlife Forensics Laboratory. 28.

¹³⁸ DEIR, Appendix E1, p. 17.

¹³⁹ DEIR, p. 4.4-106.

¹⁴⁰ Cashen Comments, p. 31.

inadequate to address predicted impacts to avian species, and the DEIR must be revised.

5. *Failure to Provide a Discussion of the Impacts Associated with Soil Stabilization on Biological Resources.*

The DEIR refers to the use of soil stabilizers, including chemicals, in several areas.¹⁴¹ These chemicals have the potential to cause adverse impacts to biological resources. The soil stabilizers are applied over the ground surface, and vegetation or fauna on the site will come into direct contact with the chemical stabilizers. The DEIR is silent as to any of the potentially significant environmental impacts from the use of chemicals on the site. Absent additional information, including the concentration, and range of frequency of use of the soil stabilizers, comprehensive impacts analysis is barred and the DEIR is legally indefensible.

B. The DEIR Fails to Properly Evaluate Significant Impacts on Water Resources and the Project Violates the County Code

CEQA requires that an EIR include, among other things, a detailed statement setting forth “[a]ll significant effects on the environment of the proposed project” and “[m]itigation measures proposed to minimize significant effects on the environment.”¹⁴² “For each significant effect, the EIR must identify specific mitigation measures; where several potential mitigation measures are available, each should be discussed separately, and the reasons for choosing one over the others should be stated.”¹⁴³

The DEIR fails to properly evaluate the significance of impacts on water resources, namely potential flooding and erosion in the Project area. The DEIR identifies several “flood avoidance measures” including:

- No modules shall be placed in areas where the product of the flow depth and flow velocity is greater than 9 feet per second (corresponding to a hazard level 3, as defined in the *Preliminary Drainage Report*) during a

¹⁴¹ DEIR, pp. 4.3-3, 4.3-7, 4.3-33, 4.3-34.

¹⁴² Pub. Resources Code, § 21100, subd. (b); see also Guidelines, § 15126 [“Significant Environmental Effects of the Proposed Project” and “The Mitigation Measures Proposed to Minimize the Significant Effects” shall be discussed “preferably in separate sections or paragraphs of the EIR.”].

¹⁴³ *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027; *Lotus v. Department of Transportation, et al.* (2014) 223 Cal.App.4th 645,653.

- 100-year, 24-hour storm event, based on the results of a design-level drainage analysis;
- No transformers, substations, or inverters shall be placed in areas where the flow depth exceeds 2 feet (corresponding to a hazard level 3, as defined in the *Preliminary Drainage Report*) during a 100-year, 24-hour storm event; and
 - Solar modules, transformers, substations, or inverters constructed in areas where any inundation is expected to occur should be placed a minimum of 1 foot above the 100- year water surface elevation.¹⁴⁴

The DEIR states that a design-level drainage analysis would be prepared by the Applicant, based on the *Preliminary Drainage Report*,¹⁴⁵ and would incorporate the above measures and further recommendations, ensuring that “proposed facilities avoid higher flow rates.”¹⁴⁶ The DEIR further implies that following the those measures and recommendations in the future drainage analysis would also ensure compliance with Chapter 16.16 of the Monterey County Code, which prohibits development within 50 feet from the top of the bank of a watercourse.¹⁴⁷ The County clearly admits that there will be “some improvements constructed within 50 feet from the top of the bank of [] drainages.”¹⁴⁸ The County insists that the Project meet the criteria for the exception in the law which requires that:

1. The proposed development will not significantly reduce the capacity of existing rivers or watercourses or otherwise adversely affect any other properties by increasing stream velocities or depths, or diverting the flow; and
2. The proposed new development will be safe from flow related erosion and will not cause flow related erosion hazards or otherwise aggravate flow related erosion hazards.¹⁴⁹

There are several problems with the DEIR’s analysis. First, the DEIR identifies this impact as less than significant based on its assurances that it will incorporate those measures and other unknown recommendations.¹⁵⁰ In *Lotus v.*

¹⁴⁴ DEIR, p. 4.9-26.

¹⁴⁵ DEIR, Appendix J1.

¹⁴⁶ DEIR, p. 4.9-3.

¹⁴⁷ MCC 16.16.050 (K).

¹⁴⁸ DEIR, p. 4.9-26.

¹⁴⁹ MCC 16.16.050 (K).

¹⁵⁰ DEIR, p. 4.9-27.

Department of Transportation, an EIR approved by CalTrans contained several measures “[t]o help minimize potential stress on the redwood trees” during construction of a highway.¹⁵¹ Although those measures were clearly separate mitigation, the project proponents considered them “part of the project,” and the EIR concluded that because of the planned implementation of those measures, no significant impacts were expected.¹⁵² However, the Appellate Court found that because the EIR had “compress[ed] the analysis of impacts and mitigation measures into a single issue, the EIR disregard[ed] the requirements of CEQA.”¹⁵³ The Court continued, stating “[a]bsent a determination regarding the significance of the impacts... it is impossible to determine whether mitigation measures are required or to evaluate whether other more effective measures than those proposed should be considered.”¹⁵⁴

Similarly, the DEIR for this Project states that “[c]ompliance with the recommendations contained in the design-level analysis would ensure that impacts are less than significant.” Those recommendations, including specific “flood risk avoidance measures” outlined in the DEIR, are comparable to the risk avoidance measures at issue in *Lotus*.¹⁵⁵ The DEIR must separately identify and analyze the significance of the impacts to water resources before proposing mitigation measures. The clear violation of MCC 16.16 by developing with 50 feet of the top of a watercourse must be evaluated as a potential significant impact to be avoided or mitigated. If the County’s analysis includes mitigation that relies solely on compliance with those measures, then it should characterize such compliance as mitigation for the significant impact, rather than treating the impact as less than significant and claiming “[n]o mitigation is required.”¹⁵⁶

Nevertheless, even if the County treats those measures and compliance with MCC 16.16 as mitigation, those measures fail to reduce potential impacts to less than significant levels. According to hydrology expert Dr. Tom Myers, the flow estimates relied upon in the *Preliminary Drainage Report* and DEIR are inaccurate and

¹⁵¹ *Lotus*, 223 Cal.App.4th at 650.

¹⁵² *Id.*, at 651.

¹⁵³ *Id.*, at 656.

¹⁵⁴ *Id.*

¹⁵⁵ DEIR, p. 4.9-26.

¹⁵⁶ *Id.*

flooding and erosion potential is “significantly underestimate[d].”¹⁵⁷ Therefore, the County has failed to show the impact is less than significant or could be reduced to a less than significant level using the measures outlined in the DEIR.

Dr. Myers concludes that because flow velocities and potential erosion may have been “significantly underestimated,” the DEIR fails to provide substantial evidence that Impact HYD-5 is less than significant.¹⁵⁸ Indeed the DEIR should be revised to evaluate a potentially significant impact based on accurate calculations, and to implement proper mitigation measures. As Dr. Myers points out, the “flood avoidance measures”¹⁵⁹ discussed in the DEIR are not based on accurate calculations and therefore do provide substantial evidence that they would reduce the impact.¹⁶⁰ As it stands now, the analysis in the DEIR “completely neglects that ephemeral streams with occasional high flows have significant erosion potential.”¹⁶¹ In addition, the level of mapping used in the DEIR makes it “simply impossible to define these zones with sufficient accuracy to keep the modules out of them.”¹⁶² Updated calculations and sufficient information could “significantly change the area available for development,” which would require new hazard mapping for determining appropriate areas for placing the modules.¹⁶³ The DEIR has not provided substantial evidence that Impact HYD-5 is less than significant and has failed to provide accurate calculations for the public to make an informed assessment.

C. The DEIR Fails to Adequately Analyze and Mitigate Significant Air Quality Impacts

An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.¹⁶⁴ A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.¹⁶⁵ The air quality section of the DEIR is generally inadequate because it fails to disclose

¹⁵⁷ Letter from Dr. Tom Myers to Laura Horton re: Draft Environmental Impact Report for the California Flats Solar Project, September 16, 2014 p. 3-4 (hereinafter, “Myers Comments”), **Attachment C.**

¹⁵⁸ *Id.*, at 4.

¹⁵⁹ DEIR, p. 4.9-26.

¹⁶⁰ Myers Comments, p. 4.

¹⁶¹ *Id.*, at 6.

¹⁶² *Id.*, at 6.

¹⁶³ *Id.*, at 4, 6.

¹⁶⁴ *Association of Irrigated Residents*, 107 Cal.App.4th at 1390.

¹⁶⁵ *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 748. 2842-017cv

information necessary to evaluate the significance of the Project's construction emissions.

1. *Inadequate Air Quality Mitigation Measures*

NOX and PM10 emissions during construction will exceed significance thresholds for air quality. The DEIR concludes that even with implementation of proposed mitigation measures, the Project's construction emissions would still result in significant impacts to air quality, but that "[n]o other feasible measures are available..."¹⁶⁶ This conclusion is patently wrong and unsubstantiated. A project must mitigate impacts to the greatest extent feasible under CEQA and proposed mitigation measures must be "fully enforceable."¹⁶⁷ The DEIR's attempt to scrape by on the bare minimum violates CEQA's mitigation requirements¹⁶⁸ and produces a document that is inadequate and misleading. The County must analyze these impacts and propose all feasible mitigation measures to reduce the Project's significant air quality and public health impacts in a revised DEIR.

In their review of proposed mitigation measures, Mr. Hagemann and Mr. Sutherland provide recommendations for several additional measures that should be included in a revised DEIR. For example, mitigation for NOx that has been proposed in other recent CEQA documents¹⁶⁹ may include reduction of exhaust emissions during construction through "the use of diesel haul trucks (e.g., material delivery trucks and soil import/export) that meet U.S. Environmental Protection Agency 2007 model year NOx emissions requirements."¹⁷⁰ In addition, Mr. Hagemann points out that off-road construction equipment for the Project will meet Tier 3 engine technology.¹⁷¹ However, Tier 4 standards, which EPA is currently phasing in, require that "emissions of PM and NOx be further reduced by about 90% through the use of control technologies including advanced exhaust gas after treatment."¹⁷²

¹⁶⁶ DEIR, p. 4.3-1.

¹⁶⁷ Pub. Res. Code § 21081.6(b); Guidelines § 15126.4(a)(2).

¹⁶⁸ See CEQA Guidelines, § 15126.4.

¹⁶⁹ September 2013 Draft Environmental Impact Report Fremont Valley Preservation Project, http://www.co.kern.ca.us/planning/pdfs/eirs/fremont_solar/fremont_solar_deir_vol1.pdf, p. 4.3-33.

¹⁷⁰ Hagemann comments, p. 5.

¹⁷¹ *Id.*, at 5.

¹⁷² *Id.*, at 6.

Mr. Hagemann and Mr. Sutherland also identify further mitigation measures for reduction of PM10, in addition to using Tier 4 technology, that have been incorporated into renewable energy projects in other air districts.¹⁷³ These include:

- Prohibit visible dust from leaving the Project site property line during all construction activities, including trenching and pile-driving;
- Conduct simultaneous sampling (upwind and downwind of construction activities) with air sampling equipment to ensure that PM10 levels do not exceed 50 micrograms per cubic meter. This measure would be consistent with other California air district's rule (see for example, South Coast Air Quality Management District¹⁷⁴ and El Dorado County Air Pollution Control District;
- Prevent "track-out" of soil from construction equipment more than 25 feet onto paved roads; and
- Apply water once per hour to unpaved roads during high wind conditions.¹⁷⁵

Contrary to the DEIR's assertions, additional mitigation for air quality impacts is available and must be evaluated. The DEIR failed to identify these mitigation measures and thus failed to fulfill CEQA's requirement that significant impacts be mitigated to the greatest extent possible, particularly when an impact has been identified as unavoidable.

2. *Failure to Evaluate Impacts from Emissions of Diesel Particulate Matter*

As discussed in these comments, the Project will result in significant emissions of harmful air pollutants, including diesel particulate matter emissions, during Project construction and decommissioning. The majority of the Project site is located within the North Central Coast Air Basin ("NCCAB"), which includes Monterey County, San Benito County, and Santa Cruz County. The NCCAB is under the jurisdiction of the Monterey Bay Unified Air Pollution Control District ("MBUAPC"). The southern portion of the private access road is in the South Central Coast Air Basin ("SCCAB"), which includes San Luis Obispo County, Santa Barbara County,

¹⁷³ *Id.*; AVAQMD Rule 403(D), *Dust Control Plan*, <http://www.avaqmd.ca.gov/Modules/ShowDocument.aspx?documentid=867>.

¹⁷⁴ Rule 403. Fugitive Dust, p.6, <http://www.aqmd.gov/docs/default-source/rule-book/rule-iv/rule-403.pdf?sfvrsn=4>, p. 6

¹⁷⁵ AVAQMD Rule 403(C), *see* footnote 11, *supra*.
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and Ventura County. The SCCAB is under the jurisdiction of the San Luis Obispo County Air Pollution Control District (“SLOAPCD”). The NCCAB and SCCAB are in “nonattainment” for state ozone and particulate matter less than 10 microns (“PM10”) standards.¹⁷⁶

During construction, numerous diesel-powered trucks are required to deliver supplies. Emissions from construction related activities, specifically PM10, are associated with adverse health impacts, such as cancer due to the increased intensity of emissions (during both construction and decommissioning) of diesel particulate matter, a known carcinogen.¹⁷⁷ According to Mr. Hagemann and Mr. Sutherland, the DEIR failed to adequately evaluate the potential for significant air quality impacts resulting from diesel particulate matter (“DPM”) emissions and fails to fulfill the CEQA requirements set forth by MBUAPCD and the SLOCAPCD with regards to DPM.¹⁷⁸

As explained by Mr. Hagemann and Mr. Sutherland, the estimated DPM for Project construction, averaging to about 0.56 tons/quarter, exceeds the SLOCAPCD Tier 2 threshold.¹⁷⁹ This is a significant impact that was not disclosed or mitigated in the DEIR. Furthermore, Mr. Hagemann and Mr. Sutherland expressed concerns over the County’s failure to adequately examine off-site concentrations of DPM “that will be generated by Project construction, despite claiming that the CEQA guidelines for both air districts were adhered to in preparing the DEIR and supplemental air quality appendices.”¹⁸⁰ Mr. Hagemann and Mr. Sutherland highlight the MBUAPCD guidelines, which state that, “impact analyses for sources of [Toxic Air Contaminants (“TACs)] should include project level and cumulative impacts,”¹⁸¹ and he suggests that a “revised DEIR and supplemental air quality assessment should include a Project-level analysis of DPM that is expected to be generated by construction and any necessary mitigation measures.”¹⁸² Absent this information, the County cannot conclude that the Project’s public health impacts have been fully assessed and properly mitigated.

¹⁷⁶ DEIR, p. 4.3-12 – 4.3-13.

¹⁷⁷ Hagemann Comments, p. 11.

¹⁷⁸ *Id.*, at 7.

¹⁷⁹ *Id.*, at 8.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

Mr. Hagemann and Mr. Sutherland provide their own screening-level health risk assessment for a child living 1,000 feet away from the Project boundary during construction. The experts conclude that “air quality impacts from construction-related DPM have not been adequately or appropriately evaluated or mitigated” in the DEIR. “DPM associated with Project construction may present an significant impact on air quality and warrants further investigation prior to the Project’s approval.”¹⁸³ Therefore, the DEIR is wholly inadequate and must be revised and recirculated based on accurate calculations and more in-depth analysis, or the County risks ignoring significant air quality impacts.

3. *Failure to Consider Impacts from Continuous Application of Dust Suppressants*

The DEIR utterly fails to analyze the impacts of dust suppressants. Chemical properties, particularly toxic contaminants, can vary significantly depending on the type of stabilizer (and manufacturer). United States Environmental Protection Agency (“EPA”) experts have found that the use of dust suppressants can

“affect air quality characteristics’ in a number of ways. In arid areas, for example, the use of water may add moisture to air fostering the proliferation of microorganisms. Dust suppressants that adhere to soil particles can be re-entrained into the air with strong winds, potentially adding contaminants to the air in addition to particulate matter. It is noteworthy that dust suppressants have little efficacy at suppressing small respirable dust that have the potential to be inhaled directly into lung parenchyma and cause lung disease.”¹⁸⁴

Furthermore, EPA found that dust suppressants “could be potentially harmful since smaller dust particles (less than 10mm) can be inhaled” and that they may contain “volatile organic compounds in the products that may be dispersed into the air when the product is applied.”¹⁸⁵

¹⁸³ *Id.*, at 11.

¹⁸⁴ Environmental Protection Agency, *Potential Environmental Impacts of Dust Suppressants: “Avoiding Another Times Beach”* 16 (2004).

¹⁸⁵ *Id.*

With the knowledge that dust suppressants carry known impacts to air quality and human health, the DEIR neglects to make available any details related to potentially existing soil contamination, and the method of application, type of chemical stabilizer, concentration, combination, range or frequency of the proposed use of soil stabilizers. The failure to provide specifics is notable because each type of stabilizer has different effects on the environment; the effectiveness of the DEIR's proposed mitigation is thereby thwarted.

The County must also assess potentially significant impacts associated with the use of dust suppressants and soil stabilizers, such as from the change in volume, rate, and timing of runoff from the Project site. The DEIR should use a range including a reasonably foreseeable worst-case scenario alternative to evaluate the actual impacts of the soil stabilization. The exclusion of such an assessment prohibits the DEIR from implementing necessary mitigation measures to reduce significant impacts. The County must cure this lack of analysis in a revised DEIR.

D. The DEIR Fails to Adequately Analyze the Project's Impacts on Agricultural Resources

For the purpose of a significance determination under CEQA, the lead agency is required to consider a project's direct and reasonably foreseeable indirect environmental impacts.¹⁸⁶ In particular, CEQA Guidelines sections 15064(d)(2)-(3) provide:

An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project. If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment.

An indirect physical change is to be considered only if that change is a reasonably foreseeable impact, which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable.

According to the DEIR, the solar generating facility area, the northern half of the Project access road, and the majority of the utility corridor are comprised of

¹⁸⁶CEQA Guidelines § 15064 subd. (d).
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Grazing Land; the utility corridor contains both Prime Farmland and Unique Farmland, and a portion of the existing private access road traverses through an area designated as Other Land.¹⁸⁷ The Project site will “temporarily” convert 38.6 acres of Prime Farmland and 0.1 acres of Unique Farmland.¹⁸⁸ The County admits that the Project will result in two types of impacts: direct impacts in the form of temporary loss of land within the project sites’ boundaries for agricultural use, as well as indirect impacts on adjacent agricultural use “due to temporary construction-related effects.”¹⁸⁹

However, the DEIR concludes that both impacts will be less than significant, in part because of the temporary nature of the impacts.¹⁹⁰ The DEIR states that “[t]emporary construction-related impacts would not permanently impact existing agricultural use of the site” and that the “property owner could resume agricultural production on the site consistent with existing operations once the construction of utility improvements is complete. All impacts would be temporary in nature and no permanent loss of agricultural production would occur.”¹⁹¹ The DEIR also claims that measures included as part of the Project enable the County to find that impacts are less than significant. The DEIR is legally insufficient for three reasons.

First, temporary impacts alone can be significant. The conclusion that impacts to agricultural lands will be insignificant or temporary cannot be squared with the Monterey County General Plan’s prohibition on “land uses that would interfere with routine and on-going agricultural operations on Farmlands designated Prime Farmland, Unique Farmland.”¹⁹² There is no support for the claim that because a significant impact and clear violation of local law is temporary, that it should be ignored.

Second, the DEIR vaguely states that other improvements within the utility corridor, apart from the agricultural plot, “would be permanent” but that use of the agricultural portion could resume after construction.¹⁹³ The DEIR acknowledges that construction impacts could “potentially result in temporary disturbances to adjacent

¹⁸⁷ DEIR, p. 4.2-3.

¹⁸⁸ DEIR, p. 4.2-8.

¹⁸⁹ DEIR, p. 4.2-1.

¹⁹⁰ *Id.*

¹⁹¹ DEIR, p. 4.2-8.

¹⁹² DEIR, p. 4.2-5.

¹⁹³ DEIR, p. 4.2-8.

grazing activities.”¹⁹⁴ However, the DEIR does not evaluate permanent indirect impacts in relation to the surrounding agricultural use.

Third, the DEIR’s conclusion regarding agricultural resources suffers from the same legal deficiency as its conclusion regarding water resources. The DEIR does not properly evaluate significant impacts to adjacent agricultural lands because it relies on mitigation measures that are mischaracterized as being “part of the project.”¹⁹⁵ The DEIR lists potential measures to “minimize the extent” of those impacts, which includes other mitigation measures found throughout the DEIR.¹⁹⁶ Those measures include “the implementation of Best Management Practices (BMPs) during project construction, including installing mud shakers and/or rumble strips to limit the transport of invasive species, implementing applicable SWPPP and erosion control measures, implementing a dust control plan to minimize fugitive dust emissions, developing a hazardous materials response plan, and implementing a post-construction restoration and revegetation plan.” As with the faulty evaluation of flooding and erosion discussed above, the DEIR concludes that clear agricultural impacts are less than significant because of the incorporation of these measures, without analyzing the measures as mitigation specifically crafted for the impact on agricultural resources.

The DEIR disregards potential significant impacts to agricultural lands within the Project site because of misguided reliance on the “temporary” aspect of construction. In addition, the DEIR does not properly evaluate significant impacts to adjacent agricultural lands because it relies on mitigation measures that are mischaracterized as being “part of the project”¹⁹⁷ or are mitigation measures intended for other significant impacts. For these reasons, the conclusions in the DEIR lack necessary substantial evidence and the County’s analysis of the Project’s impacts on agricultural resources must be revised.

E. The DEIR Fails to Adequately Analyze and Mitigate Significant Impacts Related to Traffic

As the California Supreme Court has observed, “[t]he EIR’s function is to ensure that government officials who decide to build or approve a project do so with a

¹⁹⁴ DEIR, p. 4.2-10.

¹⁹⁵ *Lotus*, 223 Cal.App.4th at 656.

¹⁹⁶ DEIR, p. 4.2-10.

¹⁹⁷ *Lotus*, 233 Cal.App.4th at 656.

full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account.”¹⁹⁸ In order for an EIR to meet those goals, it must “present information in such a manner that the foreseeable impacts of pursuing the project can actually be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made.¹⁹⁹ Furthermore, California courts have found that an EIR is inadequate if “[t]he success or failure of mitigation efforts . . . may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.”²⁰⁰

Here, the DEIR did not properly evaluate significant impacts related to traffic nor did it formulate clear and enforceable mitigation measures to reduce those impacts. For example, the Project will admittedly create significant and unavoidable impacts due to the amount of traffic to be generated during construction and the resulting hazards that will be created.²⁰¹ The areas in question already operate at an unacceptable level for traffic and accident rates are currently more than two times the statewide average.²⁰² Project generated traffic during the operational phase would add an additional 20 trips per day to this roadway segment, resulting in a significant impact to roadway operations based on Caltrans significance thresholds. The County admits that the impacts will remain significant and unavoidable until the completion of a Caltrans road widening project in the area. However, there is no clear timeline for the completion of that project, and it will likely not be completed until well after the construction phase is over, according to the little information provided in the DEIR.²⁰³ There is no indication that the County has attempted to mitigate these impacts through alternative means.

In addition, the County failed to adequately address and mitigate significant impacts in relation to Impact T-7.²⁰⁴ The County attempts to reduce traffic by developing park-and-ride lots away from the Project site and using employee shuttles

¹⁹⁸ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-450 (*Vineyard Area Citizens*; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 80.

¹⁹⁹ *Id.*

²⁰⁰ *San Joaquin Raptor*, 149 Cal.App.4th at 670; *Communities*, 184 Cal.App.4th at 92.

²⁰¹ DEIR, p. 4.13-2 – 4.13-2.

²⁰² *Id.*

²⁰³ DEIR, p. 4.13-20 (“...the segment from West Center Drive through SR 41 and the segment immediately east of SR 41 are not anticipated to be constructed *until 2018...*”) (emphasis added).

²⁰⁴ DEIR, p. 4.13-25.

for 95% of the workers.²⁰⁵ However, the DEIR does not provide an analysis of the potential impacts resulting from the development of the park-and-ride lots, even though it acknowledges that “there is the potential for adverse impacts to occur in several issue areas including but not limited to aesthetics, biological resources, water quality and hydrology, noise and transportation and traffic” and that “impacts would therefore be potentially significant.”²⁰⁶ The mitigation for this impact provided in the DEIR is vague and unenforceable. It states:

Any proposed park and ride facilities shall be sited in already developed parking lots designed to accommodate large numbers of vehicles (e.g. shopping center locations). All vehicles shall be required to park in designated parking spaces. These lots shall be currently improved and have existing stormwater drainage infrastructure in place. No permanent new lighting shall be installed. The location of the park and ride facilities within these existing parking lots shall be sited in an area located away from residences and other sensitive receptors to limit nighttime disturbance from noise.

However, the DEIR does not identify suitable lots, account for the possibility that suitable areas fitting that description may not be easily found, or consider that new lots would have to be developed. The entire traffic analysis is dependent on the existence of these lots; therefore a detailed plan must be provided for the siting and potential development of the lots. A loose assumption that the facilities already exist and just need to be located fails to comply with the requirements of CEQA. The potential impacts from the development of the park-and-ride lots could have significant impacts in several areas, as acknowledged in the DEIR. Vague mitigation measures without detailed analysis or enforceable criteria are unlawful. Finally, concluding that the impact is significant and unavoidable without attempting to identify feasible mitigation violates CEQA.

²⁰⁵ DEIR, p. 4.13-3.

²⁰⁶ DEIR, p. 4.3-25.

F. The DEIR Relies on Uncertain Mitigation for Significant Impacts on Public Services

The DEIR concludes that potential insufficient emergency access for fire or emergency medical services and subsequent slower response times constitutes a significant impact.²⁰⁷ The mitigation offered for this impact includes “measures to assure sufficient fire protection services in accordance with existing standards [that] shall be subject to the review and approval of Cal Fire.”²⁰⁸ That measure includes a future agreement with Cal Fire to “provide sufficient fire protection services during the non-peak fire season for the duration of project construction via provision of sufficient funding and other measures...”²⁰⁹ The DEIR further states that “year round staffing at the local Cal Fire station during the construction phase would address response times to the site,” reducing the impact to a less than significant level.²¹⁰ It is clear that additional funding for Cal Fire is essential to mitigate the impact.

However, what is unclear is how or from whom Cal Fire will acquire this funding. Infeasible and uncertain mitigation is not mitigation at all. The County has a duty to propose and analyze a reasonable range of mitigation measures for each significant impact, including identifying a source or alternative sources of funding. The County has not met this burden, providing only vague assurances that an agreement with Cal Fire will be completed and funding secured. Therefore, the impact on public services remains significant until the DEIR provides a detailed plan for the implementation of this mitigation.

G. The DEIR Fails to Adequately Analyze Potentially Significant Impacts Caused by Decommissioning Activities.

At the end of the Project’s “useful life,” anticipated in the DEIR to be 30 to 40 years, the Project will be decommissioned.²¹¹ As explained above, the decommissioning phase of the Project is part of the whole of the Project. The description and analysis provided by the DEIR regarding the decommissioning activities are insufficient to achieve CEQA’s mandate for an information document. Moreover, as a project-level EIR, no further environmental review would be necessary

²⁰⁷ DEIR, p. 4.12-1.

²⁰⁸ DEIR, p. 4.12-1 – 4.12-2, 4.12-10.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ DEIR, p. 2-87.

to carry out the Project; therefore, the same level of detail the EIR provides on the Project's construction and operation impacts must be provided for decommissioning.

The DEIR frames the Project as a “temporary” displacement of agricultural resources. Concrete assurances are needed to guarantee that the impacts are indeed temporary, hence the need for a well defined and detailed restoration plan. There are documented impacts from non-operational power generation facilities with equipment that have been left to deteriorate on agricultural land. The impacts are not confined to the boundaries of the Project.

Project materials include PV panels, an electrical collection and inverter system, two on-site substations, a switching station, an operations and maintenance (O&M) facility, a perimeter security fence, and related infrastructure.²¹² During Project decommissioning these materials would have to be removed. The County must provide a complete description of the decommissioning activities necessary to assess all of the Project's impacts. The decommissioning of solar energy facilities and reclamation of solar energy facility sites has been associated with noise, air quality, biological resources, hazardous materials and waste management, human health and safety, soils and geologic resources, transportation, water resources, water quality and flow alteration impacts.²¹³ This is particularly true when multiple proposed solar projects in the area will be decommissioned at approximately the same time. The public and decision makers cannot engage in a meaningful assessment of these potential impacts, without a proper description and analysis of impacts.

The DEIR provides minimally useful information in Conceptual Restoration Plan for Project Decommissioning,²¹⁴ along with a statement that “[n]o less than eighteen (18) months prior to the expiration of the CDP, the Applicant (or successor in interest) shall submit a proposed Decommissioning and Restoration Plan (Decommissioning Plan) to the County of Monterey.”²¹⁵ The DEIR attempts to dispel its requirement for full disclosure and analysis of potential impacts by stating that decommissioning “is similar to constructing the project” and providing only a minimal and generalized evaluation of potential steps to be taken at decommissioning.²¹⁶ As

²¹² DEIR, pp. 2-13, 2-73.

²¹³ Tribal Energy and Environmental Clearinghouse, Solar Energy Decommissioning/Site Reclamation Impacts, available at: <http://teeic.anl.gov/er/solar/impact/decom/index.cfm>.

²¹⁴ DEIR, Appendix E.4.

²¹⁵ DEIR, p. 2-89.

²¹⁶ DEIR, Appendix E.4, p. 3.

explained above, under CEQA, if a project description and evaluation is not complete, then environmental review for the project has not been fully conducted.

Furthermore, the County has enough information, such as the type of equipment to be utilized and range of activities to be performed, as well as baseline knowledge of impacts resulting from the Project's construction and operation, to make a reasonable assessment of impacts the decommission and restoration phase might yield. The courts may not look for "perfection" but would expect "adequacy, completeness, and a good faith effort at full disclosure,"²¹⁷ which is not achieved through unsubstantiated claims, as is the case here. Moreover the County is open to a "prejudicial abuse of discretion ... if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process."²¹⁸

For example, the DEIR fails to adequately investigate and mitigate air quality impacts related to decommissioning, assuming that "air quality emissions generated during future decommissioning would be similar to air quality emissions generated during the construction phase of the proposed project."²¹⁹ The County's insistence that describing specific activities and resulting impacts would be "too speculative" indicates nothing more than an unwillingness to provide a detailed analysis of the whole Project.²²⁰ Aside from the inherent uncertainty, the DEIR provides no evidentiary support that the impacts associated decommissioning will be similar or less than those associated with construction of the Project. The construction phase already produces emissions beyond an acceptable threshold, and while the DEIR does acknowledge that the impacts of decommissioning would be significant and unavoidable, it is unclear whether the mitigation measures for construction would be required during decommissioning. The DEIR states merely that the measures for construction, "or equivalent measures based on available technology at the time of project decommissioning, would be required during project decommissioning, *if proposed*."²²¹ Furthermore, as discussed above, there are other feasible mitigation measures that can and should be required to mitigate significant air quality impacts before the County can legally conclude that the impacts are unavoidable.

²¹⁷ CEQA Guidelines, section 15151.

²¹⁸ *Laurel Heights Improvement Assn. v. Regents of University of California* 47 Cal.3d at pp. 403-405, 253 Cal.Rptr. 426, 764 P.2d 278.

²¹⁹ DEIR, p. 4.3-21.

²²⁰ *Id.*

²²¹ DEIR, p. 4.3-36 – 4.3-37 (*emphasis added*).

The assumption that impacts related to decommissioning are similar to construction is unsubstantiated, as decommissioning activities are completely dissimilar. Unlike construction where the solar panel infrastructure was driven into the ground, decommissioning would require excavation and ripping the steel framework from the earth. The simple action of ripping versus driving an object into the ground is logically associated with increased dust and particulate matter into the air. The concentration build up of the dust suppressant in the soil mixed with the increased ground disturbance could create an impact to air quality that is more significant than those associated with construction. The continual application of soil stabilizers over a 30-40 year period could result in the manifestation of additional challenges in achieving restoration to pre-existing conditions. The DEIR is silent as to what lasting impacts the soil stabilizers would have on future restoration, in part because, as discussed above, the DEIR omits specificity with regard the management of dust suppression.

If decommissioning activities are left to languish, conceivably well beyond the 12-24 month construction period, the impacts to the air quality could potentially increase as the area, its residences and biological resources would incur significant long-term exposure to decommissioning construction-related activities, including increased intensity of diesel emissions, which as Mr. Hagemann and Mr. Sutherland highlight in their comments are known to produce a significant health impact.²²²

To properly disclose the Project's impacts from decommissioning the County must revise the DEIR to include the type (i.e., direct, indirect, or cumulative), the duration (i.e., temporary or permanent), the nature (i.e., source), and extent (i.e. scale) of the associated potential impacts. The County must then engage in the development of mitigation measures that are certain, enforceable, and linked to measurable performance standards. Absent additional information, the County cannot conclude that the Project's decommissioning impacts have been fully assessed and properly mitigated.

H. The DEIR Fails to Adequately Disclose, Analyze and Mitigate the Project's Odor Impacts

The DEIR states:

²²² Hagemann Comments, p. 10-11.
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Odor emissions from the project would be limited to odors associated with vehicle and engine exhaust and fueling during construction... Construction-related odors would be short-term, and would cease upon completion. There are two residences located within 1,000 feet of the project site, and due to the size of the project site, these residences would only be exposed to construction activity for a relatively short portion of the total construction schedule. Therefore, short-term fueling odors during construction would not impact a substantial number of people.²²³

This “analysis” is entirely inadequate and the DEIR’s conclusion regarding the significance of odor impacts is unsupported.

Diesel exhaust odor can be objectionable to people, and EPA has found that, at high intensities, diesel exhaust may produce sufficient physiological and psychological effects to warrant concern for public health.²²⁴ The DEIR effectively admits to potential odor impacts but downplays those impacts by focusing on the “short-term” nature of construction phase and the direction of prevailing wind away from nearby residences.²²⁵ However, the construction phase could last up to 24 months, which might not be considered “short-term” to those living in nearby residences. In addition, the Air Quality Analysis²²⁶ concluded that a detailed odor analysis was not warranted because the number of odor sources sensitive receptors was sparse.²²⁷ Regardless of whether the impacts are temporary, or how many neighbors are affected, a potential significant impact exists and the DEIR’s analysis of those potentially significant odor impacts is inadequate. Construction will require a significant amount of heavy duty equipment and many daily vehicle trips around the Project site.²²⁸ The DEIR’s conclusion that the Project would not cause significant odor impacts is unsupported. Substantial evidence shows that the Project may cause significant odor impacts. The DEIR must be revised to adequately disclose, analyze and mitigate the Project’s potentially significant odor impacts.

²²³ DEIR, p. 4.31-32.

²²⁴ Environmental Protection Agency, *Health Assessment Document for Diesel Engine Exhaust*, 5-4 (2002) <http://www.epa.gov/ttn/atw/dieselfinal.pdf>.

²²⁵ DEIR, p. 4.3-31.

²²⁶ DEIR, Appendix C1.

²²⁷ DEIR, Appendix C1, p. 37.

²²⁸ DEIR, p. 4.3-23, 4.3-39; DEIR, Appendix C1 [Appendix A: Air Quality Data].

VI. THE DEIR FAILS TO ADEQUATELY IDENTIFY AND ANALYZE THE PROJECT'S CUMULATIVE IMPACTS

CEQA requires consideration of the incremental impacts caused by a project, together with other past, present, and reasonably foreseeable future projects, including projects outside of the lead agency's jurisdiction.²²⁹ As defined by the CEQA Guidelines, a cumulative impact is one "which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts."²³⁰ The potentially significant impacts of the proposed Project must be considered in conjunction with the impacts from these other projects.

[T]he statutory injunction to assess "the incremental effects of an individual project ... in connection with the effects of *past projects*, the effects of other current projects, and the effects of probable future projects" (Pub. Resources Code, § 21083, subd. (b)(2), italics added) signifies an obligation to consider the present project in the context of a realistic historical account of relevant prior activities that have had significant environmental impacts.²³¹

Thus, 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.²³² A lead agency's cumulative impact analysis is invalid under CEQA if it fails to adequately reflect the severity and significance of a

²²⁹ CEQA Guidelines, § 15064(h)(1); *see also* 15355, subd. (b) ["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."]; *see also Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1024-1025.

²³⁰ CEQA Guidelines § 15130 subd. (a)(1).

²³¹ *Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 524 (emphasis in original).

²³² *See* CEQA Guidelines, § 15355 subd. (b) ("Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time"); *see also Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 117.

project's cumulative impacts.²³³ “The disparity between what was considered and what was known is the basis upon which . . . [a court] will find abuse of discretion.”²³⁴

As discussed in this comment letter, the Project may have significant impacts on agriculture, air quality, water resources, protected and sensitive biological resources, traffic, odor and public health. These significant impacts may become even more significant when viewed in connection with past, current and reasonably foreseeable future projects. When these projects are considered with the County's other pending industrial, commercial and residential projects in the same region, the impacts may be even greater.²³⁵ While the DEIR does identify the size and location of other renewable energy projects in the region, it does not isolate those projects that would be constructed concurrently with the Project.²³⁶ The DEIR states that “the cumulative analysis assumes that all projects in the cumulative scenario are built and operating during the operating lifetime of the proposed California Flats Solar Project”²³⁷ but it is not clear whether the DEIR considers overlap of actual construction, which is when the most significant environmental impacts will occur.

Despite the number of past, present and foreseeable projects in the same region, the County does not address potential significant impacts, but merely states that “[s]ignificant adverse impacts of the cumulative projects would be required to be reduced, avoided, or minimized through the application and implementation of mitigation measures” and that the “net effect of these mitigation measures is assumed to be a general lessening of the potential for a contribution to cumulative impacts.”²³⁸ This improperly assumes that the other projects in the region will adequately mitigate all impacts, including cumulative. Furthermore, this analysis does not include any detailed discussion of any of the proposed mitigation measures at other regional projects. It also fails to provide adequate context for projects in the area. The DEIR only provides the location of other solar projects and thus does not allow for a full understanding of the location and environmental context of any of the other projects listed.²³⁹

²³³ See CEQA Guidelines § 15130 subd. (b); see also *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 72-73.

²³⁴ *Id.*

²³⁵ This letter incorporates all reasonably foreseeable projects in Monterey County.

²³⁶ DEIR, p. 5-2 – 5-7.

²³⁷ DEIR, p. 5-11.

²³⁸ DEIR, p. 5-1.

²³⁹ DEIR, p. 5-9 – 5-11.

The DEIR misleads the public by stating that “the majority of the projects identified in Table 5-1 would include only minor construction and renovation if any...”²⁴⁰ In fact, many of the projects will require major construction including a 57-mile underground oil pipeline, 92 acre residential development plus future expansion plans for additional facilities, the division of an existing 160 acre parcel into 4 smaller parcels for development, several gas or oil drilling projects, and several projects to convert General Agriculture into Highway Commercial zoning.²⁴¹ Furthermore, even if a *majority* of the projects listed were minor, that still leaves several projects that even the County would consider major. However, the DEIR still severely lacks a detailed cumulative impacts analysis of those major projects.

The DEIR grossly underestimated the Project’s direct and indirect significant impacts in several areas. The County must conduct an adequate cumulative impacts analysis, which would include a detailed list of past, current and reasonably foreseeable future projects with actual evaluation of their potential impacts in combination with this Project. The DEIR failed to provide such an analysis and therefore must be revised.

VII. THE PROJECT IS INCONSISTENT WITH THE MONTEREY COUNTY GENERAL PLAN AND LAND USE LAWS

For over three decades, the courts have consistently required that use permits must comply with a County’s General Plan. The Court of Appeal opined on this issue in *Neighborhood Action Group v. County of Calaveras*, when it held that the requirement that use permits be consistent with the County General Plan “is necessarily to be implied from the hierarchical relationship of the land use laws. To view them in order: a use permit is stuck from the mold of the zoning law ([Government Code] § 65901); the zoning law must comply with the adopted general plan; the adopted general plan must conform to state law (§§ 65300, 65302).²⁴² Furthermore, the “validity of the permit process derives from compliance with this hierarchy of planning laws. These laws delimit the authority of the permit issuing agency to act and establish the measures of a valid permit...a permit action taken without compliance with the hierarchy of land of land use law is ultra vires as to any defect implicated by the uses sought by the permit.”²⁴³

²⁴⁰ DEIR, p. 5-11.

²⁴¹ DEIR, p. 5-2 – 5-7.

²⁴² *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1184.

²⁴³ *Id.*

The DEIR concludes that the proposed Project uses are consistent with the General Plan thus eliminating any need for mitigation.²⁴⁴ The conclusion reached is incorrect. Monterey County's 2010 General Plan consists of eight elements, including all of the mandatory elements [land use, circulation, housing, conservation and open space, and safety (includes noise)], plus agriculture, economic development and public services elements.²⁴⁵ The DEIR concludes that with the implementation of mitigation measures found throughout the document, "the proposed project would be consistent with applicable policies of Monterey County's 2010 General Plan and the County of San Luis Obispo General Plan."²⁴⁶ However, there are several policies with which the Project is inconsistent.

For example, the "disturbances to adjacent grazing activities" resulting from Project construction, regardless of the DEIR's insistence that the impacts would be "temporary," conflicts with the General Plan policy that "[l]and uses shall be designated to achieve compatibility with adjacent uses."²⁴⁷ The County does not evaluate this impact as significant based on the nonsensical argument of impermanence, insisting that mitigation measures designed specifically for this impact are not necessary, and points to other mitigation measures found throughout the document without further analysis.²⁴⁸

Another General Plan policy calls for the use of Best Management Practices ("BMPs") to prevent and repair erosion damage.²⁴⁹ Although the DEIR acknowledges that the Project would "alter the existing drainage pattern of the project area [and] may therefore increase runoff, resulting in flooding or increased erosion downstream," the County claims consistency with the General Plan based on its hydrology analysis and an intended erosion control plan.²⁵⁰ However, as Dr. Myers concluded in his expert review, the DEIR substantially underestimates erosion potential, completely neglecting "that ephemeral streams with occasional high flows have significant erosion potential."²⁵¹ Given Dr. Myers' opinion that the DEIR's calculations as to the Project area's erosion potential are flawed, it would be difficult

²⁴⁴ DEIR, p. 4.10-1.

²⁴⁵ DEIR, p. 4.10-3.

²⁴⁶ DEIR, p. 4.10-7.

²⁴⁷ DEIR, pp. 4.10-8, 4.2-10.

²⁴⁸ DEIR, p. 4.2-10 – 4.2-11.

²⁴⁹ DEIR, p. 4.10-10.

²⁵⁰ DEIR, pp. 4.9-1, 4.10-10.

²⁵¹ Myers Comments, p. 4.

to implement BMPs until the DEIR evaluates this potential impact based on accurate calculations.

General Plan policies related to biological impacts include protection of federal and state listed species, conservation and maintenance of critical habitat, and avoidance, minimization, and mitigation of impacts to listed species, critical habitat, and migratory birds, among others.²⁵² As explained in this comment letter, the DEIR falls short in its analysis on biological resources impacts, and it is clear that those impacts are significant and not adequately mitigated. The Project will cause unmitigated harm to several federal and state-listed species and will impact critical habitat; therefore it is not consistent with the General Plan policies intended to protect those resources.

The General Plan requires that all developments “implement applicable Monterey Bay Unified Air Pollution Control District control measures” and that all projects “incorporate feasible measures that assure that health-based standards for diesel particulate emissions are met” and do not exceed construction-related PM10 and NOx emissions thresholds.²⁵³ The DEIR concludes that because the Project is implementing “all feasible mitigation measures,” the Project is consistent with the General Plan.²⁵⁴ However, as Mr. Hagemann and Mr. Sutherland found in their review of the DEIR, there are several additional measures that the Project could incorporate to address significant air quality impacts, including clear exceedances of the PM10 and NOx thresholds.²⁵⁵ In addition, in Mr. Hagemann and Mr. Sutherland’s opinions, the DEIR is severely lacking in its DPM assessment and does not assure health-based standards are met, in violation of the General Plan.²⁵⁶

²⁵² DEIR, p. 4.10-11 – 4.10-14.

²⁵³ DEIR, p. 4.10-17.

²⁵⁴ *Id.*

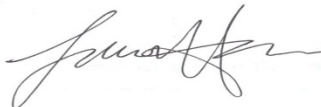
²⁵⁵ *See* Hagemann Comments.

²⁵⁶ *Id.*

VIII. CONCLUSION

For all of the reasons discussed above, the DEIR for the Project is wholly inadequate under CEQA. It must be thoroughly revised to include an adequate description of the Project and environmental baseline and provide analysis of, and mitigation for, all of the Project's impacts. This revision will necessarily require that the DEIR be recirculated for public review. Until the DEIR has been revised and recirculated, the County may not lawfully approve the Project.

Sincerely,



Laura E. Horton

LEH:clv

Attachments	
Attachment A	Comments and Attachments, Scott Cashen
Attachment B	Comments and Attachments, SWAPE Consulting
Attachment C	Comments and Attachments, Tom Myers
Attachment C	Comments and Attachments, Tom Myers
Attachment D	Study: Avian Mortalities at Solar Energy Facilities