

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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

TEL: (650) 589-1660

FAX: (650) 589-5062

ccaro@adamsbroadwell.com

DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
LAURA E. HORTON
MARC D. JOSEPH
RACHAEL E. KOSS
JAMIE L. MAULDIN
ELLEN L. WEHR

SACRAMENTO OFFICE

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

TEL: (916) 444-6201

FAX: (916) 444-6209

June 6, 2016

Via EMAIL and HAND DELIVERY

Chair Riley Jones and
Honorable Members of the Kings County Planning
Commission
Board of Supervisors Chambers, Administration
Building No. 1, Kings County Government Center,
1400 W. Lacey Boulevard, Hanford, California 93230
Email: terri.yarbrough@countyofkings.com

VIA EMAIL and U.S. MAIL

Sandy Roper, Principal Planner
Kings County Community Development Agency
1400 W. Lacey Blvd., Building #6
Hanford, CA 93230
Email: Sandy.Roper@co.kings.ca.us

**Re: Agenda Item No. 1: Amendment to Conditional Use Permit
No. 10-05 (American Kings Solar, LLC)**

Dear Chair Riley Jones, Honorable Members of the Kings County Planning
Commission, Mr. Roper:

These comments are submitted on behalf of **Kings County Citizens for Responsible Development** ("Citizens") regarding Agenda Item No. 1: Amendment to Conditional Use Permit No. 10-05 (American Kings Solar, LLC) ("Project" or "American Kings Project"). As currently proposed, the Project proposes to construct a 125 megawatt ("MW") solar photovoltaic ("PV") facility on approximately 966 acres of land located east of 25th Avenue, south of State Route 198, and west of Avenal Cutoff Road in Lemoore, California. The current version of the Project adds approximately 9.61 acres to the originally proposed development, changes the Project layout, modifies

June 6, 2016

Page 2

previously approved mitigation measures and conditions of approval, and extends the original conditional use permit ("CUP") by three years.¹

Citizens has reviewed the Staff Report for Agenda Item No. 1 ("Staff Report") in conjunction with its technical consultants, and concludes that the County failed to correct the significant informational and analytical deficiencies in the *Addendum to the Mitigated Negative Declaration for the GWF Henrietta Solar Photovoltaic Plant Project* ("Addendum") that were identified in Citizens' March 7, 2016 comments to the Planning Commission ("Commission"). The Staff Report also fails to meaningfully respond to those comments.²

We prepared these comments with the assistance of air quality experts Jessie Jaeger and Paul Rosenfeld, PhD. of SWAPE;³ expert conservation biologist and wildlife ecologist Scott Cashen, M.S.;⁴ and traffic engineer Daniel T. Smith Jr., P.E.⁵ Their comment letters and all attachments thereto are incorporated by reference as if fully set forth herein.⁶

As discussed below, after reviewing the Staff Report and Staff responses to comments on the Addendum ("Responses"), it is clear that the Commission will abuse its discretion if it allows the Project to be approved in reliance on a deficient CEQA document and in violation of County mandates. The County may not approve the Project until a legally adequate environmental impact report ("EIR") is prepared for the Project pursuant to the California Environmental Quality Act ("CEQA"),⁷ and until the Project complies with all local County codes, plans, and policies.

¹ The Project was originally approved as the GWF Henrietta Solar Project in 2010 ("Original Project"). The Original Project proposed the construction and operation of a 125 MW solar PV facility on 957 acres of land at the current location. The Original Project was proposed by applicant GWF Energy LLC ("Original Applicant") and approved by Kings County ("County") on December 6, 2010 (CUP 10-05). On January 7, 2013, the County approved a 3-year extension of CUP 10-05. The Original Project was never built. In February 2015, a new applicant, American Kings Solar, LLC c/o First Solar, ("Applicant"), filed an application with the County to modify the Original Project and extend CUP 10-05 by an additional 3 years. The current Project proposes substantial changes from the Original Project

² Citizens incorporates by reference in its entirety its March 7, 2016 comments and all attachments thereto as if fully set forth herein.

³ SWAPE's technical comments and curriculum vitae are attached hereto as Exhibit A.

⁴ Mr. Cashen's technical comments and curriculum vitae are attached hereto as Exhibit B.

⁵ Mr. Smith's technical comments and curriculum vitae are attached hereto as Exhibit C.

⁶ Citizens reserves the right to supplement these comments, and to file further comments at any and all future proceedings and hearings related to the Project. *See Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1117.

⁷ Pub. Res. Code ("PRC") §§ 21000 et seq.; 14 Cal. Code Regs. ("CCR") §§ 15000 et seq.

I. STATEMENT OF INTEREST

Citizens is an unincorporated association of individuals and labor organizations that are concerned about environmental and public health impacts from industrial development in the region where the association's members and their families live, work and recreate. The association includes Kings County residents Howard Hite, Brandon Perez, Tikiyie Brooks, Deborah Parrent, Edgardo Orapa and Phonie Orapa, and **California Unions for Reliable Energy ("CURE")** and its local affiliates, and the affiliates' members and their families, as well as other individuals who live, work and recreate in Kings County. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members of CURE's affiliates may also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants or other health and safety hazards that exist onsite.

CURE is a coalition of labor organizations whose members construct, operate, and maintain conventional and renewable energy power plants throughout California. Since its founding in 1997, CURE has been committed to building a strong economy and a healthier environment. CURE has helped cut smog-forming pollutants in half, reduced toxic emissions, increased the use of recycled water for cooling systems and pushed for groundbreaking pollution control equipment as the standard for all new power plants, all while ensuring new power plants are built with highly trained, professional workers who live and raise families in nearby communities.

In addition, CURE has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. Indeed, continued degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. THE ADDENDUM AND STAFF REPORT FAIL TO ADEQUATELY DISCLOSE AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS OF THE MODIFIED PROJECT

The Staff Report contends that the Addendum's impact analysis demonstrates that the modified Project will have "no new impacts," and that, "all impacts remain

less than significant” with mitigation.⁸ This conclusion is wholly unsupported for several new significant Project impacts that will result from the modifications proposed for the Project, including in particular air quality, biological resources, and traffic impacts. In each of these areas, the Addendum either failed to analyze the impact entirely, or omitted key factual information from its analysis that renders the analysis incomplete and inaccurate. These errors render the Addendum inadequate as a matter of law.

CEQA places the burden of environmental investigation on the public agency. Where, as here, an agency fails to evaluate a project’s environmental consequences, it cannot support a decision to adopt a negative declaration and addendum by asserting that the record contains no substantial evidence of a significant adverse environmental impact.⁹ The courts have held that an agency’s finding that a project will have no significant environmental impacts will be set aside if there is no support in the record for it, because an agency “should not be allowed to hide behind its own failure to gather relevant data.”¹⁰

The Staff Report acknowledges that the County must support its impact analysis for the modified Project with substantial evidence.¹¹ As discussed below, the Addendum relies on artificially minimized impact data and deferred future analysis that failed to meet this threshold requirement.

A. The Project Will Have Significant Air Quality Impacts and Public Health Impacts from Construction Emissions that the Addendum Fails to Disclose and Mitigate.

Under CEQA, a project has significant impacts if it “[v]iolate[s] any air quality standard or contribute[s] substantially to an existing or projected air quality violation” or “[e]xpose[s] sensitive receptors to substantial pollutant concentrations.”¹² The San Joaquin Valley Air Pollution Control District (“SJVAPCD”) maintains thresholds of significance for construction air pollutants that are to be used in determining the significance of a project’s air quality impacts under CEQA.¹³ The Addendum

⁸ Responses, p. 8.

⁹ *Sundstrom v. County of Mendocino* (1974) 202 Cal.App.3d 296, 311.

¹⁰ *Id.*; *City of Redlands v. County of San Bernardino* (2002) 96 Cal. App. 4th 398.

¹¹ Responses, p. 8, citing *Lincoln Place Tenants Ass’n v. City of Los Angeles* (2005) 130 Cal. App. 4th 1491.

¹² CEQA Appendix G.

¹³ See SJVAPCD Guidance for Assessing and Mitigating Air Quality Impacts (“GAMAQI” or “CEQA Thresholds”), available at http://www.valleyair.org/transportation/GAMAQI_3-19-15.pdf.

The Project Construction Trip Generation Summary describes the estimated number of worker, vendor (deliveries), and hauling (aggregate base) trips that are anticipated to occur during Project construction in “one-way” terms.²⁴ The “Vehicle ADT” column of Table A depicts the average daily traffic, or the number of one-way trips per day for each type of vehicle for each phase of construction. Since construction vehicles that enter the Project site will also exit the site, the lengths each of these one-way trips should have been doubled to create roundtrips.

For example, the “Building Construction-System Installation” phase was modeled assuming 2,400 daily worker trips and 6 daily vendor trips. As explained by SWAPE, based on the information provided in Table A, these values represent one-way trips ($[1,200 \times 2] = 2,400$; $[3 \times 2] = 6$). The Addendum Air Model similarly relied upon one-way trips for the “Trenching-Underground Work,” “Building Construction-Substation,” “Building Construction-Tie line,” and “Building Construction-Testing/Cleanup/Restoration” phases of the Project construction period. Based on the Vehicle ADT descriptions in Table A, the mileage for these trips should have been doubled to create roundtrips, not left as one-way trips. SWAPE concludes that this error resulted in an emissions calculation which underestimated the Project's construction emissions from numerous vehicle trips by 50%.²⁵

d) The Addendum Assumes, Without Support, that the Applicant Will Use Tier 3 and Level 3 DPF Off-Road Equipment.

The Addendum Air Model next assumes the presence of mitigating emissions factors that lack factual foundation elsewhere in the Addendum. As explained by SWAPE, construction emissions were modeled assuming that all off-road equipment would be equipped with Tier 3 engines and Level 3 diesel particulate filters (“DPF”). This assumption, however, is not reflected anywhere else in the Addendum, and is therefore unsubstantiated. As a result, the Addendum artificially reduced construction-related emissions by assuming that the Project would implement mitigation measures that have not been incorporated into either the COAs or mitigation, monitoring and reporting plan (“MMRP”).²⁶

The Addendum Air Model attempts to justify the model's reliance on Tier 3 and Level 3 off-road equipment by relying on the Applicant's commitment to comply with

²⁴ See Addendum Trip Generation Analysis, Table A.

²⁵ *Id.* at p. 5.

²⁶ See *Lotus v. Dept of Forestry* (2014) 223 Cal. App. 4th 645, 650-52.

SJVAPCD Rules.²⁷ However, neither the applicable SJVAPCD Rules, nor the Addendum mitigation measures or proposed Conditions of Approval, require the Project's fleet to consist solely of Tier 3 engines and Level 3 DPFs. The Addendum states that the Project has committed to using a "Clean Fleet," which under SJVAPCD Rule 9510, requires that construction emissions be reduced by 20 percent for NO_x and 45 percent for PM₁₀, but does not require that a project proponent use Tier 3 or Level 3 equipment.²⁸ Indeed, the use of Tier 3 engines is not the only way to achieve the emission reductions required by Rule 9510. PM₁₀ reductions, for example, can be achieved by reducing the speed on unpaved roads, and watering graded surfaces three times daily. Therefore, there is no credible basis on which to assume, based solely on the Addendum's statement that the Applicant will be required to comply with Rule 9510, that the Project's entire construction fleet will be equipped with Tier 3 engines and Level 3 DPFs. This unsubstantiated assumption resulted in an underestimation of the Project's construction emissions.

e) Incorrect Construction Schedule.

The construction schedule used in the Addendum Air Model is inconsistent with the construction schedule described in the Addendum itself. The Addendum states that, "[s]ince the construction dates are unknown, the air quality impacts were modeled in a worst-case scenario assuming 12 months of construction in a single calendar year."²⁹ SWAPE's review of the Addendum Air Model's CalEEMod output files, however, discloses that the model actually spread construction emissions over a 15-month period, from September 1, 2015 to December 23, 2016.³⁰ SWAPE concludes that this unsubstantiated expansion of the Project's construction timeline in the Addendum Air Model resulted in an artificial reduction of the levels of significance of the emissions disclosed in the Addendum.³¹

²⁷ See Addendum, Appendix A, Revised IS/MND, p. 215) ("Assume Clean Fleet per SJVAPCD Rules (Tier III or better engines) and standard dust control measures").

²⁸ See SJVAPCD Rule 9510.

²⁹ See Addendum, Appendix A, Revised IS/MND, p. 78.

³⁰ SWAPE Comments, p. 7.

³¹ *Id.* at p. 8.

Total Project Construction Emissions (Tons/Year)				
	ROG	NO _x	PM ₁₀	PM _{2.5}
IS/MND Model-Mitigated	1.0	6.1	2.0	0.6
SWAPE Model	2.4	16.5	3.6	1.4
SJVAPCD Threshold of Significance	10	10	15	15
<i>Exceeds Threshold?</i>	<i>No</i>	<i>Yes</i>	<i>No</i>	<i>No</i>
SJVAPCD ISR Threshold	-	2	2	-
<i>Exceeds Threshold?</i>	<i>No</i>	<i>Yes</i>	<i>Yes</i>	<i>No</i>

SWAPE's findings are substantial evidence that the Project will have air quality impacts that are significant and inadequately unmitigated, and that the Addendum lacks substantial evidence to support its conclusions. The only mitigation measure proposed by the Addendum is compliance with Rule 9510, which requires that the Project reduce its NO_x emissions by 20 percent and its PM₁₀ emissions by 45 percent. Even assuming that this reduction is achieved, SWAPE concludes that reducing emissions by 20 percent will still result in an annual NO_x emission value of 13.21 tons/year, thus continuing to exceed the SJVAPCD CEQA threshold of significance of 10 tons/year. The Project's NO_x emissions will therefore remain a significant, unmitigated impact after implementation of the measures proposed in the Addendum.

The County must disclose these impacts as significant, and prepare an EIR which includes an updated air quality analysis and identifies mitigation measures to reduce these emissions to less than significant levels.³⁶

3. *There is Substantial Evidence that Project Construction Will Cause a Significant Cancer Risk from Construction Emissions that the Addendum Impermissibly Fails to Identify and Mitigate.*

The Addendum fails to analyze the health risks associated with exposure to TACs during Project construction. The Addendum concludes, without conducting a health risk assessment or comparing emissions to applicable significance thresholds,³⁷ that the health risk posed to nearby sensitive receptors from exposure to DPM emissions released during Project construction would be less than significant.³⁸ This violates CEQA's basic requirements that a CEQA document analyze whether a project

³⁶ See SWAPE Comments, pp. 9-15 for descriptions of feasible mitigation measures.

³⁷ As used herein, "HRA" refers to the health risk analysis or health risk assessment required under CEQA to compare emissions to applicable significance thresholds.

³⁸ Addendum, Appendix, Revised IS/MND, p. 14.

for cancer risks to nearby sensitive receptors.⁴⁹ The Project's 12-month construction phase is 6 times the length of the shortest construction period triggering the requirement for an HRA under the OEHHA Guidelines, and therefore requires preparation of an HRA according to the OEHHA Guidelines. The Addendum fails to mention the OEHHA Guidance or this key recommendation.

Furthermore, the SJVAPCD Guidance for Assessing and Mitigating Air Quality Impacts ("GAMAQI") have expressly adopted the OEHHA Guideline into the District's CEQA risk assessment methodology, rendering the OEHHA Guidelines binding on the County's assessment of this Project. The GAMAQI state "the District concludes that use of its risk management policy and the OEHHA Risk Assessment Guidelines is appropriate in determining significance within the environmental review process. Revisions to the OEHHA Risk Assessment Guidelines and/or the District's risk management policy will serve as revisions to the District CEQA risk assessment methodology."⁵⁰ OEHHA's short-term project HRA requirement is therefore SJVAPCD's own health risk assessment policy. As such, the County has an obligation to prepare an HRA for this Project.

CEQA similarly requires lead agencies to prepare risk assessments to evaluate the nature and extent of the health hazards posed by exposure to toxic materials released by a project. CEQA Guidelines section 15126.2(a) expressly requires a CEQA document to discuss the "health and safety problems caused by the physical changes" that a project will precipitate.⁵¹ Numerous cases have held that CEQA must analyze human health impacts. For example, in *Communities for a Better Environment v. South Coast Air Quality Management Dist.*,⁵² the Supreme Court held that an MND for a refinery was inadequate for failure to analyze nitrogen oxide emissions, pollutants known to have significant effects on human health.⁵³

The Court of Appeal has repeatedly held that a CEQA document must analyze impacts of projects on human health. In *CBE v. Richmond*, the court held that a CEQA document is inadequate where it "does not address the public health or other environmental consequences of processing heavier crude [thereby emitting TACs], let

⁴⁹ "Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments." OEHHA, February 2015, available at: http://oehha.ca.gov/air/hot_spots/2015/2015GuidanceManual.pdf, p. 8-18

⁵⁰ See http://www.valleyair.org/transportation/GAMAQI_3-19-15.pdf, p. 101.

⁵¹ 14 CCR § 15126.2(a).

⁵² (2010) 48 Cal. 4th 310, 317.

⁵³ 48 Cal.4th at 317.

alone analyze, quantify, or propose measures to mitigate those impacts.”⁵⁴ In *Bakersfield*,⁵⁵ the court held that an EIR for a commercial shopping center was inadequate because it failed to correlate adverse air quality impacts to resulting adverse health impacts on surrounding communities. The court explained:

[The] City’s failure to...correlate the adverse air quality impacts to resulting adverse health consequences, cannot be dismissed as harmless or insignificant defects. As a result of these omissions, meaningful assessment of the true scope of numerous potentially serious adverse environmental effects was thwarted. No discrete or severable aspects of the projects are unaffected by the omitted analyses; the defects relate to the shopping centers in their entirety, not just to one specific retailer. These deficiencies precluded informed public participation and decision making.⁵⁶

In *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.*,⁵⁷ the court held that an EIR must include a “human health risk assessment.”⁵⁸ In *Berkeley Jets*, the Port of Oakland approved a development plan for the Oakland International Airport. The EIR in *Berkeley Jets* admitted that the Project would result in an increase in the release of TACs, which were known to cause both carcinogenic and adverse noncarcinogenic health effects.⁵⁹ The EIR had adopted mitigation measures to reduce TAC emissions, but failed to perform a health risk assessment to quantify the Project’s impacts on human health. The court held that the mitigations alone were insufficient, and that the Port had a duty to analyze the health risks associated with exposure to TACs:

The Port has not cited us to any reasonably conscientious effort it took either to collect additional data or to make further inquiries of environmental or regulatory agencies having expertise in the matter. These failures flout the requirement that the lead agency

⁵⁴ *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82 (“*CBE v. Richmond*”). See also *Californians for Alternatives to Toxics v. Cal. Dep’t of Food & Agric.* (2006) 136 Cal.App.4th 1, 16, (EIR on statewide application of pesticide was inadequate when it failed to independently evaluate risks of toxic exposure).

⁵⁵ 124 Cal.App.4th at 1219-20 (“on remand, the health impacts resulting from the adverse air quality impacts must be identified and analyzed in the new EIR’s.”).

⁵⁶ *Id.* at 1220-21.

⁵⁷ *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (“*Berkeley Jets*”) (2001) 91 Cal.App.4th 1344.

⁵⁸ *Id.* at 1369.

⁵⁹ *Id.* at 1364.

consult "with all responsible agencies and with any other public agency which has jurisdiction by law over natural resources affected by the project" (§ 21080.3, subd. (a).) At the very least, the documents submitted by the public raised substantial questions about the project's effects on the environment and the unknown health risks to the area's residents...the Port has not offered any justification why more definitive information could not have been provided....The EIR's approach of simply labeling the effect "significant" without accompanying analysis of the project's impact on the health of the Airport's employees and nearby residents is inadequate to meet the environmental assessment requirements of CEQA. *Id.* at 1370-71.

Here, as in *Berkeley Jets*, there is no dispute that the Project will generate TAC emissions during construction, and that the County failed to prepare an HRA to analyze the health risks associated with that exposure. The Addendum explains that "construction of the project has the potential to emit TACs in exhaust emissions, such as diesel PM."⁶⁰ The Addendum further explains that Project construction will take 12-18 months.⁶¹ Thus, under the OEHHA Guidelines and the SJVAPCD GAMAQI, the County had an obligation to prepare an HRA for the Project's construction emissions.

d) Sensitive Receptors.

The Addendum's air quality section incorrectly states that the nearest sensitive receptor to the Project site for purposes of the Project's air quality analysis is 1.6 miles from the nearest school.⁶² However, the Addendum discloses other sensitive receptors that are located much closer to the Project site.

The Addendum states that "the nearest sensitive receptors are motorists traveling along SR-198 north of the project boundary and the residential units on NAS Lemoore north of SR-198"⁶³ As explained by SWAPE, the distance between the Project's northern boundary and these residential units measures to approximately 315 feet.⁶⁴ These receptors should have been taken into consideration in the County's assessment of health risks from TACs like DPM. The Addendum's air quality analysis therefore impermissibly failed to account for sensitive receptors that are located just a

⁶⁰ Addendum, Revised IS/MND, p. 14.

⁶¹ Addendum, p. 17.

⁶² Addendum, Revised IS/MND, p. 14.

⁶³ *Id.* at p. 52.

⁶⁴ SWAPE Comments, p. 16.

recommends the use of Age Sensitivity Factors ("ASFs") to account for the heightened susceptibility of young children to the carcinogenic toxicity of air pollution.⁷⁰

According to the OEHHA Guidance, quantified cancer risk should be multiplied by a factor of ten during the first two years of life (infant), and by a factor of three for the subsequent fourteen years of life (child aged two until sixteen). Furthermore, in accordance with guidance of both SJVAPCD and OEHHA, SWAPE used 95th percentile breathing rates for infants and 80th percentile breathing rates for children and adults,⁷¹ a cancer potency factor of 1.1 (mg/kg-day)⁻¹, and an averaging time of 25,550 days.⁷²

The results of SWAPE's calculations are shown below.

Parameter	Description	Units	Adult Exposure	Child	Infant
C _{air}	Concentration	ug/m ³	0.4303	0.4303	0.4303
DBR	Daily breathing rate	L/kg-day	230	640	1090
EF	Exposure Frequency	days/year	350	350	350
ED	Exposure Duration	years	1	1	1
AT	Averaging Time	days	25550	25550	25550
	Inhaled Dose	(mg/kg-day)	1.4E-06	3.8E-06	6.4E-06
CPF	Cancer Potency Factor	1/(mgfsupp/kg-day)	1.1	1.1	1.1
ASF	Age Sensitivity Factor	-	1	3	10
	Cancer Risk		1.49E-06	1.24E-05	7.07E-05

The results of SWAPE's calculations found an excess cancer risk to adults, children, and infants during Project construction for sensitive receptors 100 meters away to be 1.49, 12.4, and 70.7 in one million, respectively.⁷³ The child and infantile exposures substantially exceed the SJVAPCD threshold of 10 in one million for cancer risk. This is a significant impact, and a significant health risk, that the Addendum failed to disclose and mitigate. An EIR must be prepared for the Project that includes

⁷⁰ See OEHHA Guidance.

⁷¹ *Id.* FN45, "Supplemental Guidelines for Preparing Risk Assessments for the Air Toxics 'Hot Spots' Information and Assessment Act," SCAQMD, June 5, 2015, available at: <http://www.aqmd.gov/docs/default-source/planning/risk-assessment/ab2588-risk-assessment-guidelines.pdf?sfvrsn=6>, p. 19.

⁷² SWAPE Comments, p. 18.

⁷³ *Id.*

therefore has no evidence, let alone substantial evidence, to support its proposed decision to modify PDF BIO-1.

1. *The County Failed to Perform a Quantitative Analysis of the Impacts of Eliminating the Swainson's Hawk Conservation Easement and Replacing it With a Proposed Mitigation to Retain Foraging Habitat Between Solar Panels at the Project Site.*

The County failed to meet its burden to produce substantial evidence to support its proposal to modify PDF BIO-1 because the County failed to produce any evidence which demonstrates that narrow sheep grazing spaces proposed to be between densely arranged solar arrays will provide foraging habitat for Swainson's hawk that is comparable to the previously required 498-acre conservation easement.

The 2010 Project approvals adopted the prior version of PDF BIO-1 as a Condition of Approval and binding mitigation measure. PDF BIO-1 originally required the Applicant to purchase a 498-acre conservation easement to mitigate the significant loss of foraging habitat from the Project's conversion of the Project site's existing farmland to industrial solar use. As revised, PDF BIO-1 now proposes to strike the conservation easement requirement, and replace it with reliance on the proposed sheep grazing operation described in PDF AG-3 to provide Swainson's hawk foraging habitat.⁷⁷

The County did not perform an updated baseline studies for Swainson's hawk for the majority of the modified Project site,⁷⁸ and did not perform any quantitative analysis of whether a solar field can provide suitable foraging habitat for the hawk. Instead, the County relies on a 2012 study, the Estep Report, prepared by a different developer for a different set of Kings County solar projects, to conclude that the conservation easement is no longer necessary mitigation for the Project site.⁷⁹ The Estep Report analyzed impacts on Swainson's hawk at three solar project sites located west of the Project site, and concluded that little or no mitigation was required for the loss of Swainson's hawk foraging habitat at those project sites.⁸⁰ However, the Estep Report is four years old, was prepared for a different project, and did not analyze the effectiveness of Swainson's hawk foraging activity directly on solar PV arrays. Mr. Cashen further explains that the Estep Report contains fundamental flaws in its

⁷⁷ Staff Report, pp. 6-7.

⁷⁸ The Addendum prepared an updated baseline survey for only the new 9-acre portion of the 966-acre Project site.

⁷⁹ Staff Report, p. 58.

⁸⁰ *Id.*

analysis that preclude reliance on the Report as substantial evidence of impacts to Swainson's hawk from the Project, including surveys conducted at the wrong time of year.⁸¹

As revised, PDF BIO-1 proposes to defer the County's analysis of Project impacts on Swainson's hawk to post-Project approval, then to later determine whether, and to what extent, mitigation is required.⁸² The Staff Report explains the deferred approach:

the proposed mitigation is to use the methodology established in the referenced Estep study to conduct a new, Project-specific study of Swainson's hawk foraging habitat. If a significant impact to Swainson's hawk foraging habitat is identified on either a Project or cumulative level, based on site-specific analysis, mitigation consistent with the original approval is incorporated.⁸³

The County relies on *Panoche Valley* to argue that the deferred "site-specific analysis" is actually deferred mitigation, but its reliance is misplaced. In *Panoche*, the lead agency *had already studied* the impacts to the endangered blunt-nosed leopard lizard and disclosed the impact as significant in an EIR. The only issue remaining was the selection of appropriate and effective mitigation measures to address those admittedly significant impacts.

Here, PDF BIO-1 proposes to defer the threshold analysis of impacts to Swainson's hawk foraging habitat by stating "*If a significant impact to Swainson's hawk foraging habitat is identified...mitigation is incorporated.*"⁸⁴ Thus, not only does PDF BIO-1 propose to defer the selection of mitigation measures to a future determination, the measure also proposes to defer the study to determine whether mitigation is needed in the first place. Unlike the deferral of mitigation discussed in *Panoche* and that line of cases, deferral of the threshold impact analysis is not permitted under any CEQA cases or other authority.⁸⁵ Under *Panoche* and the other

⁸¹ Cashen Comments, pp. 9-11.

⁸² Staff Report, pp. 8-9; Conditions of Approval, pp. 7-8.

⁸³ Staff Report, p. 8.

⁸⁴ *Id.*

⁸⁵ Similarly, in *Lotus v. 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.⁸⁵ 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, the project would not result in significant impacts.⁸⁵ However, the 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."⁸⁵ The Court continued, stating "[a]bsent a determination

A. The County Failed to Conduct a Traffic Impact Study to Disclose and Mitigate the Project's Potentially Significant Traffic Impacts.

The County failed to prepare a traffic impacts study ("TIS") to analyze the modified Project's impacts on local traffic conditions during Project construction, as required by Caltrans. As a result, the Addendum fails to disclose potentially significant traffic impacts and fails to mitigate them.

The Staff Report provides updated 2014 traffic counts for the intersections surrounding the Project site. However, all the traffic volume to capacity ("V/C") and level of service ("LOS") consequences have been evaluated solely based on annual average daily traffic volumes.⁸⁸ Mr. Smith opines that, because the modified Project creates a jump from 110 to 1200 workers during the construction period, with all their trips concentrated in the same approach and departure pattern and virtually all in the AM and PM peak periods, it is highly probable that the Project would have significant traffic impacts at the interchange and intersection of State Route ("SR") 198 and 25th Avenue.⁸⁹

The County's traffic analysis also fails to conform to Guidelines For The Preparation of Traffic Impact Studies ("Caltrans Guidelines").⁹⁰ Chapter 2A of the Caltrans Guidelines requires that a traffic impact study ("TIS") be prepared where, as here, a project will generate over 100 peak hour trips on a State highway. The Guidelines state:

The following criterion is a starting point in determining when a TIS is needed. When a project: 1. Generates over 100 peak hour trips assigned to a State highway facility...⁹¹

The modified Project will generate over 1200 trips on SR 198 in the AM and PM peaks. A TIS is therefore required under the Caltrans Guidelines and must be performed under the technical specifications of those Guidelines (which require peak hour analysis of the performance of interchange ramps, ramp terminus intersections and surface intersections) before the County can approve the Project. The Addendum is defective for omitting this analysis.

Mr. Smith further concludes that, because the intersection of SR 198 with 25th Avenue occurs at a point where westbound 198 is merging down from two lanes to one, and the westbound left turn storage lane has a capacity of less than 20 vehicles

⁸⁸ See Smith Comments, p. 1.

⁸⁹ *Id.*

⁹⁰ Available at http://www.dot.ca.gov/hq/tpp/offices/ocp/igr_ceqa_files/tisguide.pdf/

⁹¹ *Id.* at p. 2.

(because on a State highway some of the left turn lane length must be reserved for deceleration inside the left turn lane), the addition of up to 1200 westbound vehicles in the AM peak hours is likely to have significant adverse safety impacts.⁹²

Mr. Smith reviewed scale aerial photography, including Google Earth and the Caltrans Highway design manual, which provides relevant details regarding the SR 198 - 25th Avenue intersection. He explains that the westbound left turn bay at the SR 198 – 25th Avenue intersection is 725 feet long including the bay taper. The westbound roadway is transitioning from 65 mph speed limit to 55 at this point as well as merging from 2 through lanes to one (making it imperative that all the left turning vehicles deceleration take place inside the left turn bay).⁹³ Under those speed conditions, Mr. Smith explains that, per Highway Design Manual (“HDM”) Section 405.2(d) and Table 405.2B, 530 feet of the left turn bay would be required for deceleration. This leaves only 195 feet for left turn vehicle storage or space for about 8 vehicles. Mr. Smith concludes that, pursuant to HDM 405.2(e), the bay should have storage space for the number of cars that would approach during an average 2 minutes in the peak period. If just half the approximately 1200 vehicles that would approach the project on 198 westbound in the AM peak used this intersection (presuming the other half used Avenal Cutoff), an average 2 minute period would involve 20 vehicles in the lane. Mr. Smith concludes that, as proposed, the capacity of the left turn lane would be exceeded and a seriously adverse public safety defect would result.

A new CEQA document must be prepared and circulated for public comment to remedy these glaring deficiencies in the County’s impacts analysis.

B. The County Refuses to Acknowledge and Mitigate the Project’s Potentially Significant Impacts from Avian Collisions.

The Staff Report contends that the threat solar PV projects pose to birds is not “new information” because, before the original Project was approved in December 2010, it was already established knowledge that birds may collide with various types of structures in the built environment (such as buildings, electrical lines, fences, and fossil-fuel power plants).⁹⁴ As explained by Mr. Cashen this is a spurious argument because the structures referenced in the County’s argument are not comparable to a 125-MW PV solar facility on 966 acres of open space land.

⁹² *Id.* at p. 2.

⁹³ *Id.*

⁹⁴ Staff Report, pp. 16-17.

Mr. Cashen explains that the features described in the County's Responses do not, in fact, attract birds.⁹⁵ Rather, avian collisions with buildings, electrical lines, fences, and fossil-fuel power plants occur during routine flight activities when the bird does not see the object until collision is imminent. Mr. Cashen clarifies that it is only in the last 4-5 years that evidence has begun to surface which indicates that solar PV facilities may attract birds, which then 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.⁹⁶

Mr. Cashen emphasizes that many resource agencies have expressed concern over avian collisions with solar facilities in recent years, which concern stems from mounting evidence that only become available after multiple solar projects became operational. Very few solar projects (especially PV projects) were operating in 2010 when the original Project was approved.⁹⁷ Indeed, in 2016, the Bureau of Land Management ("BLM"), in conjunction with other federal and state agencies, established a multiagency Avian-Solar Collaborative Working Group ("CWG"), which has publicly stated in May 2016 that "avian-solar concerns have emerged over the past 2-3 years."⁹⁸

This recent evidence confirms Mr. Cashen's original opinion and contradicts the County's argument that avian collisions at PV solar facilities is not new information which could not have been known with the exercise of reasonable diligence at the time the original MND was adopted.

⁹⁵ Cashen Comments, pp. 2-3.

⁹⁶ *Id.*, citing Walston et al. (2015) ("It has been hypothesized that solar-energy-related fatalities for some avian guilds result from bird attraction to the project site (e.g., Kagan et al. 2014). Projects that include evaporative cooling ponds may provide artificial habitat to birds and their prey (e.g., insects). Such projects may attract more birds to the site and result in a greater risk of collision with project structures (Lovich and Ennen 2011; BLM and DOE 2012). Glare and polarized light emitted by solar projects may also attract insects, which, in turn, could attract foraging birds. For example, insects may perceive polarized light as water bodies and may be attracted to such sources (Horváth et al. 2009). Lastly, it has also been hypothesized that utility-scale PV facilities may attract migrating waterfowl and shorebirds through what has been called the "lake effect" (Kagan et al. 2014), whereby migrating birds perceive the reflective surfaces of PV panels as bodies of water and collide with project structures as they attempt to land on the panels.").

⁹⁷ *Id.*

⁹⁸ *Id.*, citing Helseth G [Bureau of Land Management]. 2016. Information About the Multiagency Avian-Solar Collaborative Working Group (CWG). Multiagency CWG Stakeholder Workshop. Sacramento, CA. May 10-11, 2016.

1. *There is Substantial Evidence that Avian Collisions with Solar PV Arrays is a Potentially Significant Impact Requiring Mitigation.*

Contrary to the County's contentions, there is substantial evidence available in the scientific and biological regulatory community which demonstrates that avian collision with solar PV panels is potentially significant impact that requires mitigation.

The Staff Report contends that it is too speculative to conclude that solar PV facilities have had significant effects on avian populations from collisions with solar panels, and that the Project will therefore have less than significant impacts in this regard. In support of this conclusion, the County cites to a single study which purportedly concluded that there is a "paucity of information" documenting collision impacts.⁹⁹ However, contrary to the County's contention, the Walston study does not suggest that it is speculative to conclude that solar PV facilities have had significant effects on avian populations. Rather, the authors stated the opposite, namely that "utility-scale solar energy development has the potential to impact, directly and indirectly, birds and bird communities [i.e., populations] in a number of ways, such as by habitat degradation, habitat loss, habitat fragmentation, and **direct fatality**."¹⁰⁰

Mr. Cashen identifies other recent evidence which confirms that solar PV facilities cause avian fatalities, including avian fatality monitoring data collected for seven solar energy facilities that were also discussed in the Walston report, and empirical data from the 250 MW California Valley Solar Ranch ("CVSR") Project in San Luis Obispo County (a PV project that is similar to the Project), which documented 197 dead birds at the project site in a six month period from August 16, 2012 and February 15, 2013 (6 months).¹⁰¹ Mr. Cashen concludes that these studies demonstrate that the Project is likely to have similar significant impacts from avian collisions.

Mr. Cashen further concludes that the Project's location will exacerbate these impacts. He explains that the Project site is located in the Pacific Flyway, and would be constructed immediately adjacent to the Naval Air Station ("NAS") Lemoore wastewater treatment pond area, which supports over 124 species of animals,

⁹⁹ Staff Report, p. 17, citing Walston LJ Jr, KE Rollins, KP Smith, KR LaGory. 2015. A Review of Avian Monitoring and Mitigation Information at Existing Utility-Scale Solar Facilities. United States. doi:10.2172/1176921.

¹⁰⁰ *Id.*

¹⁰¹ Cashen Comments, p. 4.

including several federally listed birds.¹⁰² Mr. Cashen explains that there is evidence that solar facilities near bodies of water may present an increased collision risk to birds.¹⁰³ Therefore, he concludes that “the location of the proposed facility also heightens the potential for impacts to birds and their populations.”¹⁰⁴

2. *The Addendum and Proposed Conditions of Approval Fail to Require Feasible Mitigation Proposed By Regulatory Agencies and Adopted by the Applicant at Other Project Sites to Monitor and Mitigate Potentially Significant Impacts from Avian Collisions at the Project Site.*

In May 2014, the Law Enforcement Division of the U.S. Fish and Wildlife Service (“USFWS”) sent a letter to all solar developers in California and Nevada (including Applicant First Solar),¹⁰⁵ stating: “recent information collected at solar facilities by Service personnel indicates that wildlife, particularly avian species, can be negatively affected by solar energy development.”¹⁰⁶ The letter identified mitigation measures and warned that unmitigated solar projects could result in unpermitted “take” of species protected under the Endangered Species Act and the Migratory Bird Treaty Act. Consequently, First Solar is aware of the USFWS’s concern, and the fact that its projects must comply with the Migratory Bird Treaty Act and regulations that protect threatened, endangered, and sensitive species.

USFWS recommends solar project developers prepare a project-specific Avian and Bat Protection Plan, Bird and Bat Conservation Strategy, or similar avian monitoring plan (hereafter, all such plans are referred to as “BBCSs”).¹⁰⁷ The BBCS outlines an approach for assessing the risks for impacts to birds and bats, designing the facility to avoid and minimize risks, and monitoring avian activity and fatalities in the vicinity. Mr. Cashen explains that Applicant First Solar has prepared BBCSs for several of its other solar projects (e.g., Topaz Solar Farm, California Flats, and Desert

¹⁰² GWF Energy, LLC. 2001. Henrietta Peaker Project AFC Supplement. Attachment 2.3-3.

¹⁰³ 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 pp. See also McCrary MD, RT McKernan, RW Schreiber, WD Wagner, TC Sciarrotta. 1986. Avian Mortality at a Solar Energy Power Plant. Journal of Field Ornithology 57(2):135-141.

¹⁰⁴ Cashen Comments, p. 4.

¹⁰⁵ Personal communication with H. Beeler, USFWS on 2016 June 2.

¹⁰⁶ Available at: <<http://www.fws.gov/cno/images/Solar%20Letter%20template.pdf>>. [emphasis added].

¹⁰⁷ U.S. Fish and Wildlife Service, Pacific Southwest Region. 2010 Sep. Region 8 Interim Guidelines for the Development of a Project-Specific Avian and Bat Protection Plan for Solar Energy Plants and Related Transmission Facilities. p. 10.

Sunlight among others), including projects with smaller generating capacities (e.g., Silver State North [50 MW], Campo Verde [139 MW]).¹⁰⁸ The U.S. Geological Survey ("USGS") also recently released recommended methods for mortality monitoring at solar facilities.¹⁰⁹ Nevertheless, neither First Solar nor the County has provided any evidence to justify why a BBCS is not needed or feasible for the proposed Project.

Mortality monitoring that adheres to the methods recommended by the USGS is feasible, and it should be incorporated as required mitigation for the Project.

III. THE PROJECT MEETS THE CRITERIA FOR A SUBSEQUENT CEQA DOCUMENT¹¹⁰

After an MND has been adopted, a subsequent or supplemental MND or EIR is required to be prepared in any of the following instances: (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report; (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.¹¹¹

As discussed above, the Applicant proposes substantial changes to the Original Project which more than satisfy Section 15162(a) criteria for changes in a project triggering the need for a subsequent EIR due to the involvement or new or increased significant effects.¹¹² First, the removal of the requirement to set aside a 498-acre

¹⁰⁸ Cashen Comments, p. 6, citing Walston LJ Jr, KE Rollins, KP Smith, KR LaGory. 2015. A Review of Avian Monitoring and Mitigation Information at Existing Utility-Scale Solar Facilities. United States. doi:10.2172/1176921. Table 4.

¹⁰⁹ Huso, Manuela, Dietsch, Thomas, and Nicolai, Chris, 2016, Mortality monitoring design for utility-scale solar power facilities: U.S. Geological Survey Open-File Report 2016-1087, 44 p., <http://dx.doi.org/10.3133/ofr20161087>.

¹¹⁰ As discussed in our March 7, 2016 comments, the fair argument standard applies in situations such as this one where an applicant proposes substantial changes to a project that amount to a "new" project, but the agency fails to prepare an MND or EIR to analyze the project changes. *Lishman*, 140 Cal. App. 4th at 1296-97. *Sierra Club*, 6 Cal. App. 4th at 1317-19; *Burbank Airport*, 233 Cal. App. 3d at 594. However, changes to the Project, new and more severe Project impacts, and the informational deficiencies in the Addendum discussed herein are so significant that they equally meet the standards requiring preparation of a subsequent CEQA document under PRC § 21166 and 14 CCR § 15162.

¹¹¹ PRC § 21166; 14 CCR §§ 15162(a), (b).

¹¹² Each of these changes in the Project also independently meet the criteria requiring subsequent CEQA review due to substantial changes in the circumstances under which the Project is undertaken, and new information regarding significant effects that are more severe than previously analyzed, were

conservation easement for Swainson's hawk is a substantial change in the Project that will result in new significant impacts to Swainson's hawk that was not analyzed in the MND for the Original Project. Indeed, it does not appear that the County, or any other agency, has performed a scientific analysis of whether a solar array with intermittent grazing areas between the solar panels can provide adequate foraging habitat for Swainson's hawk. As discussed above, available evidence demonstrates that it cannot, for the same reasons that an orchard is unsuitable Swainson's hawk habitat.

The shortening of the Project's construction phase from 35 months to just 15-18 months is also a substantial change in the Project which will create new significant impacts on air quality and traffic. As discussed above, the Addendum's air quality analysis substantially underestimated the Project's construction emissions. SWAPE remodeled the emissions using correct input parameters and concludes that construction emissions will be significant and inadequately mitigated by the measure proposed in the Addendum. Similarly, the Project's condensed construction schedule will result in new and significant traffic impacts due to increased truck and worker traffic that were not known, and therefore not analyzed, at the time the original Project was approved. These new significant impacts must be addressed in a legally adequate EIR.¹¹³

IV. THE ADDENDUM IS NOT THE FUNCTIONAL EQUIVALENT OF AN EIR OR REVISED MND

The Staff Report contends that the Addendum accomplishes the same purpose as an EIR, and that an EIR is therefore not required for the Project, because the Addendum includes hundreds of pages of new analysis and responded to public comments. The County's approach is a legally indefensible attempt to imitate form without substance.

CEQA addendums are authorized only where an applicant proposes "minor technical changes" to a project with no new or significant environmental impacts, and do not provide a public comment period.¹¹⁴ By CEQA's terms, addendums are not

not discussed in the MND for the original Project, or, as with avian collisions, the County declines to adopt feasible and effective mitigation. 14 CCR § 15162(a)(2)-(3).

¹¹³ The Staff Report also failed to meaningfully respond to Citizens' prior comments regarding substantial changes in the circumstances surrounding the Project site from newly approved facilities, increased traffic, and new information about biological resources impacts which the Addendum failed to address, and which require preparation of a subsequent EIR. Citizens re-incorporates those prior comments here.

¹¹⁴ 14 CCR § 15164(b).

permitted for project changes, like those proposed here, that will result in significant impacts. For that reason, the CEQA Guidelines provide a limited set of circumstances in which a subsequent EIR will be required when an addendum would otherwise be sufficient.¹¹⁵ As discussed in Citizens prior comments and herein, the changes proposed by the Project exceed the scope of “minor technical changes” that would allow the County to rely on an addendum in the first instance.

The Staff Report justifies its continued reliance on an addendum based on the assertion that the Addendum analyzed the new impacts posed by the modified Project, and that the new analysis demonstrates that there are “no new impacts, and with mitigation, all impacts remain less than significant.”¹¹⁶ However, this argument is circular because, since the County relied on an addendum, the County failed to perform a new Initial Study of all impact areas required under Appendix G. The Addendum therefore only analyzed the changes proposed by the modified Project, and did not look at the Project as a whole.¹¹⁷ Thus, its conclusion that the Project has “no new impacts” is misleading because it is based on a telescopic analysis of selected impacts only.¹¹⁸ If the County had prepared a revised MND or EIR for the Project, as it should have done from the outset, it is likely that a new Initial Study would disclose potentially significant impacts that the County failed to look for in preparing the Addendum.

Furthermore, because the County failed to update its baseline studies, the Addendum’s analysis was based on outdated baseline information regarding site conditions that existed at the time the original Project was approved in 2010, or, in some instances, based on a hypothetical “baseline” that imagines the Project has already been constructed.¹¹⁹ This is not the baseline approach required by CEQA.¹²⁰ Thus, the “existing conditions” against which the Addendum purported to analyze the Project’s new impacts were not existing conditions at all, but rather outdated or hypothetical conditions that reduced the significance of the impact that was ultimately

¹¹⁵ *Id.*; 14 CCR § 15162(a).

¹¹⁶ Staff Report, p. 8.

¹¹⁷ See e.g. Staff Report, p. 10, Response 1/8 (“Where a prior CEQA document has been prepared and certified or adopted by the lead agency, it is proper to focus subsequent environmental review only on the increment of change from the previously approved project. See, e.g., *Benton v. Board of Supervisors*, 226 Cal. App. 3d 1467, 1487 (1991).”).

¹¹⁸ As discussed above, Citizens has submitted substantial evidence demonstrating that the Project’s new impacts will also be significant.

¹¹⁹ See Staff Report, pp. 10-11 discussing *Benton*.

¹²⁰ *Communities for a Better Environment v. So Coast Air Qual. Mgmt. Dist.* (“*CBE v. SCAQMD*”) (2010) 48 Cal. 4th 310, 321 (CEQA baseline for project must be the actual level of operations at the time of current CUP application).

identified in the County's analysis.¹²¹

Last, the Staff Report argues that, because the Staff Report responds to the comments that were filed with the County at the March 7, 2016 Planning Commission hearing, the Addendum provided the functional equivalent of a public comment period and there was no infringement on public participation in the CEQA process and no informational harm. This assertion is also false. CEQA requires noticed public comment periods for all negative declarations, MND, and EIRs.¹²² The purpose of the public comment period is to ensure that the lead agency provides the public with the opportunity for an informed environmental decision-making process and an opportunity for meaningful public participation prior to project construction.¹²³ Public comment periods range from 20-45 days, and require publication in local newspapers of general circulation and often publication on the State Clearinghouse website.¹²⁴ Thus, a CEQA document released for a noticed public comment period is likely to reach a far broader public audience for a longer period of time than a mere agenda for a local Planning Commission hearing which requires only 3 days prior notice to the public. Similarly, CEQA documents that are circulated for public comment must also be circulated to responsible agencies for review.¹²⁵

Addendums contain no such requirements. An addendum "need not be circulated for public review" and is not required to provide an input period for responsible agencies.¹²⁶ The only requirement for approval of an addendum is that the decision making body must consider it with the original EIR or previously adopted negative declaration prior to making a decision on the project.¹²⁷ The fact that two members of the public and no responsible agencies, appeared at the March 7 Commission hearing and commented on the Addendum is therefore not determinative of the extent of public, and importantly, agency, comment that may have been received if the County had prepared and released a revised MND or EIR for formal public review.

¹²¹ The Staff Report attempts to correct this error by updating its baseline information regarding air quality and traffic.

¹²² PRC § 21091.

¹²³ PRC § 21005(a).

¹²⁴ PRC § 21091(a), (b).

¹²⁵ PRC § 21153; 14 CCR § 15096.

¹²⁶ See 14 CCR § 15164(c).

¹²⁷ *Id.* at subs. (d).

For these reasons, and the other reasons described in Citizens' comments, the County should remedy these failures by preparing an EIR or revised MND for the Project before it is considered for approval by the Commission.

V. THE STAFF REPORT FAILS TO RESOLVE THE PROJECT'S INCONSISTENCIES WITH COUNTY CODE REQUIREMENTS

Citizens previously commented that, pursuant to the County Development Code, the Applicant's proposed revisions to the Project's existing Conditions of Approval would create de facto CUP amendments that must be processed as a new CUP application by the County, rather than a CUP extension.¹²⁸ The Staff Report responded to this comment by asserting that the County is processing the Project modifications as a "CUP Addendum" rather than a CUP extension or Amendment.¹²⁹ However, the Staff Report does not cite to any authority in the County Code that describes a "CUP Addendum," nor does there appear to be any.

Neither the County Development Code nor any other County Code chapter mention the word "addendum." By contrast, the Development Code makes clear that changes to conditions of approval and substantial changes to a site plan for a project, such as those proposed here, require an amendment to the CUP or a new CUP entirely. They cannot be processed as an extension or an "addendum."¹³⁰ The CUP approval process is designed to afford proposed conditional uses "special consideration so that they may be located properly with respect to their effects on surrounding properties and the environment."¹³¹ By contrast, a CUP extension gives the applicant additional time to complete implementation of a project that has been previously considered and approved by the County.¹³² In either case, however, the Planning Commission must make nine express findings before it can approve a new, extended, or amended, CUP application. Those findings include:

1. The proposed use is consistent with the General Plan.
2. The approval of the conditional use permit for the proposed use is in compliance with the requirements of the California Environmental Quality Act (CEQA).

¹²⁸ See Citizens' March 7, 2015 comments, pp. 7-8; County Dev. Code §§ 1701, 1715.

¹²⁹ Staff Report, p. 1.

¹³⁰ Staff Report, p. 29, Condition of Approval No. 2 (any expansion of use that is a substantial change from the conceptually approved site plan "will require either an amendment to the approved Conditional Use Permit or a new zoning permit."); Dev. Code § 1701.

¹³¹ Dev. Code § 1701.

¹³² *Id.* at § 1715(B), (C).

3. There will be no potential significant negative effects upon environmental quality and natural resources that could not be eliminated or avoided through mitigation or monitoring or (b) there will not be potential significant negative effects upon environmental quality and natural resources that could not be mitigated to the extent feasible, and a Statement of Overriding Considerations is adopted explaining why the benefits of the project outweigh the impacts that cannot be mitigated to a less than significant level.
4. The proposed conditional use complies with all applicable standards and provisions of this Development Code and the purposes of the district in which the site is located.
5. The design, location, size and operating characteristics of the proposed conditional use and the conditions under which it would be operated or maintained will not create significant noise, traffic, or other conditions or situations that may be objectionable or detrimental to the public health, safety, or welfare, or materially injurious to other permitted uses, properties, or improvements in the vicinity.
6. That no process, equipment or materials shall be used which, are found by the Planning Commission, to be substantially injurious to persons, property, crops, or livestock in the vicinity by reasons of odor, fumes, dust, smoke, cinders, dirt, refuse, water carried wastes, noise, vibration, illumination, glare or unsightliness or to involve any undue risk of fire or explosion.
7. That no waste material shall be discharged into a public or private sewage disposal system except in compliance with the regulations of the owner of the system.
8. That all uses shall comply with the emission standards of the San Joaquin Valley Air Pollution Control District.
9. The site plan includes all applicable information as described in Article 16, Section 1602.A.5 (of the Development Code).¹³³

Draft Resolution 16-05 proposed for Commission approval at the June 6, 2016 Commission hearing fails to include these proposed findings, nor is the County able to make the findings based on the CEQA and land use violations described herein.

¹³³ Dev. Code §§ 1707, 1715(C).

June 6, 2016

Page 34

Without the requisite CUP findings, the Commission is unable to approve the Project's proposed CUP application, extension, or amendment.

VI. CONCLUSION

For the reasons set forth above, the County may not approve an extension of CUP 10-05 for the modified Project until it prepares a legally adequate CEQA document that fully analyzes the Project's potentially significant impacts, and new or more severe significant impacts, and identifies and incorporates all feasible mitigation measures to minimize these impacts.

We urge the Planning Commission to deny the CUP extension, recommend that the previously approved CUP be set aside, and direct that a subsequent CEQA analysis be prepared for the revised Project. Thank you for your attention to these comments. Please include them in the record of proceedings for the Project.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Christina M. Caro', written in a cursive style.

Christina M. Caro

CMC:

Attachments