Comment Set B3 – San Benito Residents for Responsible Development

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Via Overnight and Electronic Mail

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Re: Comments on the Draft Supplemental Environmental Impact Report for the Panoche Valley Solar Project CUP No. UP 1023-09-A (SCH# 2010031008)

Dear Mr. Turner and Mr. Krausie:

We write on behalf of San Benito Residents for Responsible Development ("San Benito Residents") to provide comments on the Draft Supplemental Environmental Impact Report ("DSEIR") prepared by San Benito County ("County"), pursuant to the California Environmental Quality Act ("CEQA"),[1] for the Panoche Valley Solar Project ("Project") proposed by Panoche Valley Solar, LLC ("Applicant").[2] The Applicant seeks modification of a 2010 Conditional Use Permit ("CUP") to develop a 247 megawatt ("MW") photovoltaic ("PV") solar power plant on approximately 2,506 acres of land in San Benito County.

[1] Pub. Resources Code, §§ 21000 et seq.
[2] Aspen Environmental Group, Draft Supplemental Environmental Impact Report Panoche Valley Solar Project, County of San Benito Department of Planning and Building Inspection Services (December 2014) (*hereinafter* DSEIR).
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I. INTRODUCTION

The Project is comprised of the construction of a 247-MW solar array field, an on-site electrical substation, telecommunications upgrades, including the construction of three microwave towers, upgrades to 17 miles of transmission lines, and an access road, which will traverse multiple waters of the United States and of the State. The Project would be constructed on approximately 2,506 acres of resource-rich land in unincorporated San Benito County, including land under the jurisdictions of San Benito County, Fresno County and the Bureau of Land Management ("BLM").[3] B3-1

The County claims that the revised Project, which has been reduced in size from 399 MW to 247 MW will address the concerns raised by environmental groups and concerned citizens.[4] However, the County is incorrect. The Project is proposed on thousands of acres of land that is home to multiple endangered, threatened and special status species. For example, the Project would be constructed on the last remaining, undisturbed core recovery area for the Federally and State endangered San Joaquin Kit Fox.[5] Initially, three core recovery areas were designated by the United States Fish and Wildlife Service (USFWS), as essential for recovery of the species; however, multiple solar projects and other leap frog developments have encroached upon these areas, leaving only the Panoche Valley as the last refuge for a species facing increasing environmental strain. B3-2

The purpose of a supplemental environmental impact report is to inform the public of and address changes in a project, changes in circumstances and the availability of new information, which may result in previously unidentified, and unmitigated significant impacts, among other information.[6] However, the DSEIR omits much of this information and fails to serve its purpose under CEQA. For example, information, which was not available at the time of the Final Environmental Impact Report ("EIR's") certification, is now available regarding solar PV projects' significant impacts on sensitive mammals and bat and avian species. Furthermore, changes in circumstances related to drought conditions in California have made clear that the development of solar projects has the potential B3-3 B3-4

[3] DSEIR, p. B-27.
[4] DSEIR, p. C.6-1.
[5] Endangered Species Recovery Program: Recovery Plan for Upland Species of the San Joaquin Valley, California (last visited Jan. 31, 2015) *available at* http://esrp.csustan.edu/publications/pubhtml.php?doc=sjvrp&file=chapter02L00.html.
[6] Pub. Res. Code § 21166.
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to substantially deplete groundwater supplies or interfere substantially with groundwater recharge. In addition, over the past four years, construction of power plants and other developments throughout the state have substantially interfered with habitat connectivity throughout the range of various endangered and threatened species, and many projects, such as this one, pose substantial adverse effects directly on threatened and endangered species. However, data and analysis regarding this new information and changed circumstances has been omitted from the DSEIR. As a result, the DSEIR fails to comply with CEQA. B3-4 cont. B3-5

As explained more fully below, the DSEIR (1) fails to set forth a stable and finite project description; (2) fails to set forth the environmental baseline for hazardous materials and biological and hydrological resources, among other resources; (3) lacks substantial evidence to support its conclusions regarding the Project's significant impacts; (4) fails to identify, analyze and mitigate to the extent feasible Project impacts on public health and the state's limited hydrological, biological and other resources; (5) improperly defers formulation of mitigation measures to post approval studies; and (6) fails to adequately identify and analyze the Project's cumulative impacts. As a result of these shortcomings, the DSEIR lacks substantial evidence to support its conclusions and fails to properly mitigate the Project's significant environmental impacts. The DSEIR's numerous defects render it inadequate as an informational document. B3-6

These comments will demonstrate that the DSEIR for the Project is fatally flawed. The DSEIR is a classic example of bare conclusions without appropriate prior analysis or due consideration. In light of the DSEIR'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 DSEIR 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 DSEIR must be written and recirculated before the County may legally approve the Project.

We have reviewed the DSEIR 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 (**Attachment A**); Petra Pless (**Attachment B**); and Tom Myers **(Attachment C)**. The County must respond to these consultants' comments separately and individually.

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II. STATEMENT OF INTEREST

B3-7

San Benito 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 San Benito County residents, such as John Barber, Wallace Barnes, James Brown, Miguel Bustos, Bryan Daniel, L. Earl Davis, Randall Dike, Heath Guaracha, Richard Hodges, Valentin Ivanov, Andres Laureano, Steven Luiz, Jose Martinez, Robert Rovella, Gilbert Sanchez, Charles Schlesinger, Jaime Urzua, and California Unions for Reliable Energy ("CURE") and its members and their families and other individuals that live, recreate and/or work in San Benito County (collectively, "San Benito Residents"). The association was formed to advocate for responsible and sustainable solar development in San Benito 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 San Benito Residents and the members of the affiliated labor organizations live, work, recreate and raise their families in the San Benito 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 San Benito 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 San Benito Residents therefore have a direct interest in enforcing environmental laws to minimize the adverse impacts of projects that would otherwise degrade the environment.

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III. THE PROJECT DESCRIPTION IS INADEQUATE

B3-8

The DSEIR 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.[7] Without a complete project description, the environmental analysis will be impermissibly narrow, thus minimizing the project's impacts and undercutting public review.[8] 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]."[9] "Only through an accurate view of the project may affected outsiders and public decision makers balance the proposal's benefit against its environmental costs."[10]

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."[11] Courts have explained that for a project description to be complete, it must address not only the immediate environmental consequences of going forward with the project, but also all "*reasonably foreseeable* consequence[s] of the initial project."[12] "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."[13] Accordingly, CEQA requires that the project description contain a brief statement of the intended uses of an EIR, including a list of agencies which will use the EIR, along with the permits and approvals required for implementation of a proposed project.[14]

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[7] *See, e.g., Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.
[8] *See id.*
[9] *County of Inyo v. County of Los Angeles* (1977) 71 Cal.App.3d 185, 193.
[10] *Id.*, at 192-193.
[11] 14 Cal.Code Regs, tit. 14, §15378 ("CEQA Guidelines").
[12] *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.
[13] CEQA Guidelines, § 15378(c).
[14] CEQA Guidelines § 15124(d).
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A. The DSEIR Fails To Provide an Accurate List of the Intended Uses of the DSEIR.

B3-9

The DSEIR's project description fails to list the agencies that are expected to use the EIR in their decisionmaking and all the permits and approvals required to implement the Project.[15] The DSEIR fails in this regard for two reasons.

First, the DSEIR fails to include Fresno County as a responsible agency. "'Responsible agency' means a public agency, other than the lead agency, which has responsibility for carrying out or approving a project."[16] Fresno County is a responsible agency because its approval is required for two actions necessary for carrying out the Project. The DSEIR's failure to list Fresno County as a responsible agency violates CEQA and fails to inform the public regarding the extent of approvals required for the Project.

B3-10

Second, the DSEIR fails to identify the two Fresno County approvals required for Project implementation. According to the Fresno County Zoning Code, construction of communications equipment facilities and microwave relay structures in the Exclusive Agricultural District requires "Director Review and Approval,"[17] and private use airports, heliports and crop dusting strips require a CUP.[18] According to the DSEIR, the PG&E upgrades necessitate the construction of up to three telecommunications towers.[19] Furthermore, the Applicant is proposing the construction of multiple helipads for the construction of the Pacific Gas & Electric Company ("PG&E") upgrades.[20] Accordingly, Fresno County must consider two discretionary approvals required for implementation of the Project. The DSEIR's failure to list the required approvals violates CEQA and fails to inform the public regarding the extent of approvals required for the Project.

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[16] Pub. Res. Code § 21069.
[17] Fresno County Zoning Ordinance, § 816.2 subd. C.
[18] *Id.* § 816.3 subd. K.
[19] DSEIR, p. B-29.
[20] DSEIR, p. B-28.
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B. The Project Description Fails to Adequately Describe the Extent of Grading and Trenching Required for Project Construction

B3-11

The DSEIR fails to provide a sufficiently detailed account of the extent of grading and trenching required for Project construction. This information is necessary to fully assess Project impacts on vernal and ephemeral pools, as these features are known breeding grounds for Vernal Pool Fairy Shrimp and California Tiger Salamanders, which have been documented at the Project site.[21] According to the DSEIR, the Project requires only "limited grading;" however, the DSEIR goes on to clarify, that 392 acres will be graded to accommodate the solar panels.[22] This extent of grading is by no means "limited." In fact, the area to be graded is nearly double that of the previously-approved project.[23] The DSEIR's description of grading and trenching is inadequate for two reasons.

B3-12

First, the DSEIR's statement that grading will be minimal due to the nearly flat terrain at the Project site is inaccurate and misleading.[24] The Project actually requires trenching for the installation of underground electrical lines and 185,000 support post foundations.[25] The DSEIR does not clarify the depth of the grading and trenching required for installation of the Project components. Furthermore, while the DSEIR states that each of the posts has an approximately 4.5 inch circumference, the DSEIR fails to provide the length of the posts or the depth that they will be installed into the ground. Given the numerous hydrological and biological features on the Project site, more information is required so Project impacts can be assessed and mitigated.

B3-13

Second, it is unclear what Project components are included in the estimated 392 acres of grading. For example, the DSEIR sets forth several Project features, such as support post foundations, concrete foundations associated with inverters and MV transformers, and switchgear foundations.[26] These features will

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[21] *See* Letter from Jeffrey R. Single, Regional Manager California Department of Fish and Wildlife, to Kate Kelly, Kelly Group Consulting, Re: Inquiry Regarding Permitting Status of the Panoche Solar Project (October 10, 2014). **Attachment D.**
[22] DSEIR, p. B-8.
[23] *Id.*
[24] DSEIR, p. B-8.
[25] *See* p. B-8.
[26] DESIR, pp. B-8, 9.
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collectively impact approximately 105,000 square feet.[27] The DSEIR goes on to state that each of the areas impacted by these components is included in Table B-3. Table B-3 includes multiple Project components and concludes that the total *disturbance area* of these components is 857 acres.[28] However, no information is provided regarding the relationship between the 857 acres to be "disturbed" and the area that will be graded. This clarification is necessary, as grading and trenching are required for the installation of concrete foundations and steel support beams, respectively. The DSEIR's description is unnecessarily confusing and misleading. Without information that clarifies the relationship between the disturbance areas, project components that require trenching and foundation installation, and the calculated area for grading the public and decision makers cannot fully determine and assess Project impacts on the environment.

B3-13 cont.

C. The Project Description Fails to Provide Information Regarding the Timing of PG&E Upgrade Construction

B3-14

The DSEIR fails to set forth when the PG&E upgrades will be constructed and whether their construction will overlap with construction of the solar array. This information is required to assess Project impacts on air quality. The PG&E upgrades will require the installation of up to twelve new tubular steel poles and their foundations, four new workstations, up to three telecommunications towers, the installation of new optical ground wire ("OPGW"), and 12 temporary pull/reel and splice sites, which will each require a work area along the 17 mile transmission line corridor.[29] The DSEIR states that the installation of the OPGW can be completed in approximately 12 – 16 weeks.[30] Helicopters, which will require helipads, will be used for the delivery of materials, and the transportation of workers, given the remote location of the upgrades.[31] Project impacts cannot be properly assessed without information regarding the timing of the PG&E upgrades. A DSEIR that provides adequate information regarding when the PG&E upgrades will be constructed is required so that Project impacts on air quality may be fully identified and mitigated.

[27] *Id.*
[28] DSEIR, p. B-9 (*emphasis added*).
[29] DSEIR, pp. B-26 – 27.
[30] DSEIR, p. B-28.
[31] *Id.*
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IV. THE DSEIR FAILS TO ADEQUATELY AND ACCURATELY SET FORTH THE ENVIRONMENTAL BASELINE AGAINST WHICH ENVIRONMENTAL IMPACTS SHOULD BE MEASURED

B3-15

The DSEIR describes the existing environmental setting inaccurately and incompletely, thereby skewing the entire impact analysis. The existing environmental setting is the starting point from which the lead agency must measure whether a proposed project may cause a significant environmental impact.[32] CEQA requires lead agencies to include a description of the physical environmental conditions in the vicinity of a project, as they exist at the time environmental review commences.[33] CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.[34]

Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The importance of having a stable, finite, fixed environmental setting for purposes of an environmental analysis was recognized decades ago.[35] Today, the courts are clear that, "[b]efore the impacts of a Project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined."[36] In fact, it is:

> a central concept of CEQA, widely accepted by the courts, that the significance of a Project's impacts cannot be measured unless the DEIR first establishes the actual physical conditions on the property. In

[32] *See, e.g., Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278 ("*Fat*"), *citing* Remy, et al., Guide to the Calif. Environmental Quality Act (1999) p. 165.
[33] CEQA Guidelines, § 15125(a); *see also Communities for A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 321.
[34] CEQA Guidelines §15125(a) (*emphasis added*); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 ("*Riverwatch*").
[35] *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.
[36] *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.
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other words, baseline determination is the first rather than the last step in the environmental review process.[37]

B3-15 cont.

The DSEIR must also describe the existing environmental setting in sufficient detail to enable a proper analysis of Project impacts.[38] Section 15125 of the CEQA Guidelines provides that "[k]nowledge of the regional setting is critical to the assessment of environmental impacts."[39] This level of detail is necessary to "permit the significant effects of the Project to be considered in the full environmental context."[40]

The description of the environmental setting in the DSEIR is inadequate because it omits highly relevant new information and changed circumstances regarding biological resources, air quality and ground water resources. The County must gather the relevant data and provide an adequate description of the existing environmental setting in a revised and recirculated DSEIR.

B3-16

A. The DSEIR Fails to Adequately and Accurately Set Forth the Existing Environmental Setting Against Which Impacts to Biological Resources Must be Measured

B3-17

The DSEIR provides an inaccurate description of the existing environmental setting for multiple plant and animal species on the Project site. According to biological expert Scott Cashen, there is conflicting information in the DSEIR appendices and reports that must be resolved. The baseline for impacts to biological resources is inaccurate for at least five reasons.

i. The DSEIR Fails to Provide the Existing Environmental Setting for Biological Resources at Panoche Mountain

B3-18

The Project includes the construction of up to three microwave towers, with one tower potentially located at Panoche Mountain. However, the DSEIR fails entirely to describe the biological resources present. Instead, the DSEIR describes Panoche Mountain as having "developed habitat."[41] However, the information in the DSEIR conflicts with the information presented in the Water Resources chapter,

[37] *Save our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.
[38] *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1121-22.
[39] CEQA Guidelines § 15125(d).
[40] *Id.*
[41] DSEIR, p. C.6-13.
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which states:

> "Panoche Mountain (at approximately 2,100 feet of elevation), northeast of the project site, consists of uninhabited grassland and shrubland open space. Panoche Mountain currently has at least two existing microwave communication towers, and a new tower (up to 300 feet tall) is proposed within the developed site of one existing tower. The site is located at the summit of Panoche Mountain and is surrounded by steeply sloped ridges and valleys. The headwaters of several unnamed streams begin in the valleys that descend from the summit of Panoche Mountain. The nearest headwaters are located approximately 500 feet from the proposed tower site."[42]

B3-18 cont.

Mr. Cashen clarifies, "the disturbed habitat at Panoche Mountain is limited to approximately 20,000 ft^{2}."[43] This area of disturbance is confined to the area beneath existing microwave towers. The DSEIR goes on to conclude that "[t]he construction of the new microwave tower [at Panoche Mountain] would be in an area that is already disturbed with similar equipment. Impacts to sensitive species are not anticipated from planned work in this existing disturbed area."[44] The DSEIR's conclusion is not supported by substantial evidence.

The biological resources at the site of the proposed microwave tower were never assessed. However, there is information available that indicates the Project may substantially deplete habitat for special status plant and animal species. According to Mr. Cashen, "[t]he California Natural Diversity Database ("CNDDB") has a record of the blunt-nosed leopard lizard occurring at the site (i.e., the "Panoche Mtn Telephone Co Repeater Site). In addition to the blunt-nosed leopard lizard, there are other special-status wildlife, and special-status plant species, that may be affected by construction of the new tower."[45] Therefore, the DSEIR has omitted information regarding the incremental changes in the environmental setting for biological resources related to the changed project description.[46] A new DSEIR that provides information regarding the environmental baseline at Panoche

B3-19

[42] SEIR, p. C.15-3.
[43] Cashen, p. 6
[44] Cashen, p. 7; *see also* Energy Renewal Partners, LLC, *Panoche Valley Solar Project Telecommunications Upgrades Modifications to PG&E Planned Disturbance Areas* (Oct. 2014).
[45] Cashen, p. 7 (*internal citation omitted*).
[46] *See Benton v. Bd. of Supervisors* (1991) 226 Cal. App. 3d 1467.
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Mountain must be circulated so the public and decision makers can fully understand the Project's potential impacts on endangered species, such as the blunt-nosed leopard lizard ("BNLL"). B3-19 cont.

ii. *The DSER Fails to Provide a Consistent Description of the Existing Environmental Setting for Plants on the Project Site* B3-20

The DSEIR's description of the environmental setting for special status plants is inadequate for three reasons. First, biological expert Scott Cashen points out, "[f]ocused botanical surveys were conducted for the Project during the fall of 2009 and the spring of 2010. The results of those surveys are now outdated."[47] USFWS requires that project sites that have inventories older than three years need additional surveys.[48] Mr. Cashen explains the reason USFWS requires new surveys is that "[a]dditional special-status plant species may have colonized the Revised Project site."[49] Five years have lapsed since surveys for rare plants on the Project site were conducted; therefore, additional surveys are required in order to establish the existing environmental baseline.

Second, the DSEIR fails to provide any data or analysis to substantiate its conclusion that suitable habitat for special plant species is unlikely to occur within disturbance limits associated with the PG&E upgrades.[50] Indeed, Mr. Cashen's independent review of the Project, and evidence in the DSEIR's Transmission Line Natural Resource Assessment ("TLNRA") indicate that there is potential habitat for special status plant species on the Project site. However, the appendix referred to in the TLNRA was improperly omitted from the DSEIR, preventing the public and decisionmakers from completing an independent review of the information that the DSEIR relied upon to reach its conclusion. B3-21

Mr. Cashen explains that, "there is evidence that at least some special-status plant species have a higher potential of occurring in the Revised Project area than what is suggested in the SEIR."[51] Indeed, "the Consortium of California Herbaria database contains numerous records of gray bushmallow occurring along Panoche Road in close proximity to the Revised Project area. The SEIR provides a similar unjustified conclusion regarding the potential for Hall's tarplant (*Deinandra*

[47] Cashen, p. 2.
[48] *Id.*
[49] *Id.*
[50] Cashen, p. 2.
[51] Cashen, p. 3.
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halliana)."[52] The DSEIR must be revised to provide accurate information, and disclose the studies upon which it relied, to determine the setting for special status plants along the proposed transmission line updgrades. B3-21 cont.

Third, the DSEIR fails to disclose the presence of California jewelflower on the Project site. According to the TLNRA, "California jewelflower (*Caulanthus californicus*) was detected in 'Study Area 1,' which is within the Revised Project site boundary and immediately adjacent to the solar field."[53] According to Mr. Cashen, not only is the California jewelflower listed as endangered, but the species is "critically imperiled," and has "a very high risk of extinction due to extreme rarity."[54] Accordingly, "[a]ny impact, either direct or indirect, to such a critically endangered species would jeopardize its continued existence." The DSEIR must address and remedy these inconsistencies regarding the occurrences of rare plants on the Project site. This information is critical for determining the Project's adverse impacts on special plant species. B3-22

iii. *The DSER Fails to Provide a Consistent Description of the Existing Environmental Setting for the Endangered California Condor* B3-23

The DSEIR provides conflicting reports regarding the presence of California condors on the Project site. The DSEIR states, "[i]mpacts to foraging habitat for California condors, Swainson's hawk, and white-tailed kite would also be potentially significant absent mitigation; however, these raptors *have not been observed* on site during the approximately 25,000 survey hours logged."[55] However, Mr. Cashen explains that this information is inaccurate.[56] According to the data included in the avian surveys, a California condor was seen when golden eagle nest surveys were being conducted.[57]

The DSEIR's description of the existing setting for condors is wrong. Accurate information is crucial because the elimination of the Project site as foraging habitat, as well as impacts associated with lake effect, and collisions with transmission lines and telecommunications structures, have the potential to impact

[52] *Id.*
[53] Cashen, p. 3.
[54] Cashen, pp. 3 – 4.
[55] DSEIR, p. C.6-38 (*emphasis added*).
[56] Cashen, p. 4.
[57] Avian Conservation Strategy, p. 24.
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California condors.[58] However, this potentially significant impact was omitted from the DSEIR because it concluded that no condors were sighted. The information in the DSEIR directly conflicts with information in the avian surveys conducted at the Project site. By skewing the existing environmental setting for California condors, the DSEIR obscures the Project's impacts in violation of CEQA. Because a condor was sighted, a species-specific survey must be conducted so that the public and decision makers are fully informed as to what impacts the Project will have on California condors.

B3-23 cont.

iv. *The DSEIR's Fails to Provide an Adequate Account of the Existing Environmental Setting for Golden Eagles*

B3-24

The DSEIR provides conflicting and misleading information regarding the importance of the Project site as golden eagle habitat for two reasons. First, the surveys relied upon in the DSEIR are inadequate. The DSEIR claims that the DSEIR point count surveys were conducted during the summer, fall and winter of 2013-2014.[59] However, Mr. Cashen explains that based on the information provided in the DSEIR appendices, the surveys were conducted from September 3, 2013 through January 24, 2014.[60] Accordingly, surveys were not conducted during the summer, as claimed in the DSEIR. The DSEIR attempts to resolve this inconsistency by stating, "any miscellaneous observations information gathered during the 2013 PVS giant kangaroo rat and blunt-nosed leopard lizard surveys, conducted in March through September, 2013, was also used to supplement the point count/UDA data."[61] However, Mr. Cashen explains that surveying for BNLL and giant kangaroo rat ("GKR") specifically involves watching the ground, whereas surveying for golden eagles involves focusing on the air and cliffs.[62] Therefore, it is impossible for the surveyors to have adequately and accurately conducted surveys for these species, simultaneously.[63] The DSEIR's information regarding the sufficiency of golden eagle surveys is inaccurate.

Second, the DSEIR provides a misleading account of the area's importance to golden eagles. The Eagle Conservation Plan states, "[t]he overall activity levels within the Project Footprint appear low with a majority of the activity taking place

B3-25

[58] DSEIR, p. C.6-38; *see also generally* Cashen.
[59] Eagle Report, p. 7.
[60] *Id.*
[61] *Id.* at 8.
[62] Cashen, p. 5.
[63] *Id.*
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on adjacent conservation lands."[64] However, Mr. Cashen "disagree[s] with the Applicant's conclusion that the Revised Project site is not an important eagle use area, and that the majority of eagle activity occurs on adjacent conservation lands."[65] Despite the locations of the point count stations, a number of which included land outside the Project footprint,[66] a substantial number of golden eagle sitings were within the Project footprint. "The results of the point count surveys included a total of 61 observations of [golden eagles] GOEA. This total includes 23 individual observations of GOEA seen within the point count plot boundaries and 38 observations outside the plot boundaries."[67] Indeed, Mr. Cashen points out that figure 8 of the Point Count Survey Report, which depicts the golden eagle observations, demonstrates substantial golden eagle use of the Project site.[68] However, by including more land outside the Project footprint than the Project footprint itself for the point count surveys, the baseline for golden eagles has been skewed. A DSEIR that remedies this discrepancy in the description of golden eagle use patterns must be recirculated so the public and decision makers can fully assess impacts to golden eagles.

B3-25 cont.

v. *The DSEIR Omits New Information Regarding the Existing Environmental Setting for San Joaquin Kit Fox*

B3-26

The DSEIR omits information regarding the USFWS-designated core recovery areas for the Federally and State listed San Joaquin kit fox.[69] Where an EIR fails to disclose and analyze laws and policies directly applicable to the Project under review it "falls far short of 'demonstrat[ing] to an apprehensive citizenry that the agency has, in fact analyzed and considered the ecological implications of its actions.'"[70] A lack of specific statutory targets or thresholds does not relieve a lead agency of its duty to ensure that an EIR perform a meaningful consistency analysis.[71] Accordingly, the DSEIR's analysis must reflect impacts to the San Joaquin kit fox, which is endangered throughout its range, and impacts on kit fox

[64] Eagle Conservation Plan, p. 17.
[65] Cashen, p. 5.
[66] *See* Panoch Valley Solar Point Count Survey Study Report, p.7 and Figres 4, 5, 6 (April 2014).
[67] Eagle Report, p. 10.
[68] Cashen, p. 5.
[69] *See* United States Fish and Wildlife Service Sacramento Fish and Wildlife Office, *San Joaquin Kit Fox Five Year Review: Summary and Evaluation,* pp. 12 – 16 (Feb. 16, 2010) *available at* http://ecos.fws.gov/docs/five_year_review/doc3222.pdf.
[70] *Cleveland Nat'l Forest Found. v. San Diego Association of Gov't* (2014) 231 Cal.App.4th 1506, 1073 *citing Laurel Heights,* 47 Cal.3d at 392, 253.
[71] *Id.* at 1072.
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habitat and population.[72] The USFWS has designated three core population areas, which are essential to the Kit Fox's recovery.[73] The species' recovery hinges on the protection of three core populations in: (1) the Carrizo Plain Natural Area in San Luis Obispo County; (2) Natural lands of western Kern County (i.e., Elk Hills, Buena Vista Hill, and the Buena Vista Valley, Lokern Natural Area and adjacent natural land) inhabited by kit foxes; and (3) the Ciervo-Panoche Natural Area of western Fresno and eastern San Benito Counties.[74] However, two of the core recovery areas have been developed in recent years. For example, the Carrizo Plain has been developed with the Topaz Solar Farm and the California Valley Solar Ranch. Whereas the core population in western Kern County is being impacted by the development of oil and gas wells.[75] Panoche Valley is the last remaining undeveloped refuge, which is vital to species recovery. The development of the other two recovery areas is new information, which is essential to evaluating cumulative Project impacts on San Joaquin Kit Fox, and therefore, must be disclosed and analyzed in the DSEIR. The DSEIR must be updated and recirculated to remedy this significant informational defect.

B3-26 cont.

B. The DSEIR Fails to Adequately Set Forth the Baseline For Air Quality

B3-27

The DSEIR presents an inaccurate account of air quality in the Project region. The Project site is under the jurisdiction of two air districts: the San Joaquin Valley Air Pollution Control District ("SJVAPCD") and the Monterey Bay Unified Air Pollution Control District ("MBUAPCD"). Geographically, the Project is in the San Joaquin Valley Air Basin ("SJVAB") and the North Central Coast Air Basin ("NCCAB"). According to the DSEIR, "ambient levels for [NOx and ROG][76] in the San Joaquin Valley APCD are well below State and Federal ambient air quality standards."[77] However, Dr. Pless points out, "[t]his is wide off the mark."[78]

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[72] Endangered Species Reovery Program: Recovery Plan for Upland Species of the San Joaquin Valley, California (last visited Jan. 31, 2015) *available at* http://esrp.csustan.edu/publications/pubhtml.php?doc=sjvrp&file=chapter02L00.html.
[73] *Id.*
[74] *Id.*
[75] Bryan L Cyper, Scott E. Phillips and Patrick A. Kelly, "Research Report: Quantity and distribution of suitable habitat for endangered San Joaquin kit foxes: conservation implications", *Canid Biology & Conservation*, p. 26 (2013) *available at* http://www.canids.org/CBC/16/san_joaquin_kit_fox_habitat_suitability.pdf.
[76] These pollutants are ozone precursors. Emissions of these two pollutants from combustion engines exacerbates non-attainment in federal and state ambient air quality standards for ozone levels.
[77] Pless, pp. 3-4.
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According to Dr. Pless, "[a]mbient levels for ozone and particulate matter in the San Joaquin Valley APCD are frequently (and far) above State and Federal ambient air quality standards."[79] B3-27 cont.

> During 2011 through 2013, the ambient levels of ozone in the San Joaquin Valley Air Basin exceeded the federal and state 8-hour ambient air quality standard for ozone on 131, 113, and 112 days respectively...Likewise, during 2011 through 2013 PM10 ambient levels in the SJVAB exceeded the state 24-hour ambient air quality standard for PM10 on 113, 55, and 60 days, respectively.[80]

The SJVAPCD is designated non-attainment for state air quality standards for PM10, and federal PM2.5, and is in extreme non-attainment for federal ambient air quality standards for ozone and nonattainment of state ambient quality standards for ozone. The DSEIR's analysis of potential impacts must be compared to this baseline. Accordingly, an updated DSEIR that accurately and adequately reflects air quality in the SJVAB must be circulated for review so that the public and decision makers may assess the Project's impacts.

C. The DSEIR Fails to Clearly Set Forth Drainages and Jurisdictional Waters on the Project Site

B3-28

The DSEIR fails to adequately describe the washes on the Project site, thereby obscuring the existing setting against which impacts related to drainage and erosion should be identified, assessed and mitigated.

According to the DSEIR, "[t]he 2010 Final EIR identified approximately 18,700 linear [feet] ft of the ephemeral drainage channels within the Panoche Creek drainage, and approximately 7,025 linear ft of Las Aguilas Creek within the project site subject to the jurisdiction of the [United States Army Corps of Engineers] USACE and/or [California Department of Fish and Wildlife] CDFW."[81] According to Dr. Myers, this depiction is flawed because "[i]t is not clear whether the 18,700 linear ft is all of the channels in the entire drainage, with Las Aguilas Creek being part of Panoche Creek."[82] Dr. Myers explains that clarification on this point is

[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] DSEIR, p. C.6-51.
[82] Myers, p. 12.
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required because Las Aguilas Creek may be considered part of the Panoche Creek Drainage as they both derive from the Panoche Creek Groundwater Basin.[83] Accordingly, more information is required as to the relationship between the two measurements of linear impacts.

B3-28 cont.

Dr. Myers further explains that it is unclear what portions of the creeks are jurisdictional waters regulated by the USACE, which would require a Clean Water Act ("CWA") section 404 permit for dredge and fill.[84] The USACE sent the Applicant and County a revised jurisdictional delineation after the publication of the 2010 Final EIR.[85] According to the USACE letter, the USACE "re-examined the conditions of the project site" and "determined that the waters present on this project site are jurisdictional waters of the United States."[86] The letter rescinded a former jurisdictional delineation, and found that a CWA section 404 permit would be required. Information regarding jurisdictional waters on the Project site is new information not addressed in the 2010 Final EIR, nor adequately described in the DSEIR. The DSEIR states, "some of the previously identified ephemeral drainages, specifically 5,951 linear ft of such drainages on the eastern side of the Revised Project site, have been deemed waters of the U.S. or federal jurisdictional waters."[87] However, it is unclear whether and to what extent this determination changed the Final EIR's conclusion that 18,700 linear feet would be impacted by the Project, and whether the 5,951 linear feet discussed in the DSEIR are included in that number, or whether they are part of the 7,025 linear feet of Las Aguilas Creek. The DSEIR must clarify the extent, location and designation of the waters on and around the Project site to ensure that the public and decision makers are able to assess the Project's impacts on drainage and erosion. As proposed, the DSEIR fails to comply with CEQA's requirement to set forth an adequate description of the existing environmental setting upon which to measure impacts.

[83] *Id.*
[84] *Id.*
[85] Letter from Jane M Hicks, Chief, Regulatory Division, Department of the Army, to Kevin Lincoln, Power Engineers, Inc. Re: File No. 2009-00443S (October 18, 2010). (FEIR was published on Sept. 30, 2010).
[86] *Id.*
[87] DSEIR, p. C.6-25.
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D. The DSEIR Fails to Set Forth an Adequate Baseline Against Which Impacts on Groundwater Should be Measured

B3-29

The DSEIR provides an inconsistent, inadequate and misleading account of existing groundwater resources at the Project site. The Project proposes to pump 385.15 acre-feet per year ("af/y") of groundwater for Project construction.[88] Without sufficient information, it is impossible to determine the impact groundwater withdrawals will have on the aquifer underlying the Project site. As discussed above, the DSEIR completely fails to mention or address the current drought conditions in the State of California that have developed since the approval of the 2010 Final EIR. This information, as well as an adequate and accurate portrayal of groundwater recharge and potential drawdown is necessary for the public and decision makers to assess Project impacts on the environment. The DSEIR fails to adequately set forth existing groundwater conditions for five reasons.

First, the DSEIR omits new information regarding the multi-year drought in California, and the resulting decrease in Central Valley Water Project allocations to farming communities and subsequent increases in groundwater withdrawals.[89] This information is vital to understanding existing stresses on groundwater resources and the Project's potentially significant and more severe impacts on those resources. However, other than one cursory sentence acknowledging that California is in a drought, the DSEIR provides no information regarding the drought or its duration, severity or impacts on water supply throughout the state.[90]

The current drought has significantly changed existing conditions on the ground. During 2014, BLM water allocations were reduced to 10% of requests.[91] Although December 2014 storm systems initially increased optimism (BLM increased the allocations to 15% of requests), January 2015 is set to be the driest month on record since record keeping began in 1877. Accordingly, BLM may

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[88] DSEIR, C.15-5.
[89] Groundwater withdrawals during drought years are over double that of a normal year. *See* Janny Choy and Geoff McGhee, *Groundwater: Ignore It and It Might Go Away* (last visited Jan. 31, 2014) *available at* http://waterinthewest.stanford.edu/groundwater/overview/index.html.
[90] DSEIR, p. C.15-1.
[91] Elly Allshouse, "Bureau of Reclamation Provides Update on Central Valley Project Water Supply Conditions," *Association of California Water Agencies* (January 26, 2015 at 10:39 a.m.) *available at* http://www.acwa.com/news/water-supply-challenges/bureau-reclamation-provides-update-central-valley-project-water-supply-.
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further reduce allocations.[92] The California Department of Water Resources ("DWR") has also set allocations at 10% of requests, and may further reduce allocations to meet critical human health and safety needs.[93] Indeed, "DWR experts estimate that it will take roughly 150 percent of average precipitation for California to recover from drought."[94] According to a DWR news release,

> [t]he 29 public water agencies that receive SWP water (State Water Project Contractors) requested 4,172,686 acre-feet of water for 2015. Under today's initial allocation, they will receive 418,520 acre-feet. For most agencies, that amounts to 10 percent of the supplies for which they contract with DWR.[95]

B3-29 cont.

This omitted information is essential to determining Project impacts on groundwater resources, especially given the prevalence of farming in San Benito and Fresno Counties. However, these changed circumstances, which could result in a significant impact, are not mentioned anywhere in the DSEIR. The DSEIR must be updated to reflect this information so that it can serve its purpose as an informational document.

Second, according to the Technical Groundwater Memorandum ("Groundwater Memo") appended to the DSEIR, little to no information regarding the aquifer underlying the Project site is available.[96] However, the Water Supply Assessment, which was included with the Approved Project Final EIR, released in 2010, provides significantly more information regarding groundwater availability, multi-year drought impacts on the aquifer and current aquifer use.[97] According to CEQA, "[t]he EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental

B3-30

[92] *Id.*
[93] Ted Thomas, California Department of Water Resources, *Initial State Water Project Allocation Set at 10 Percent May be Reduced to Meet Critical Health and Safety Needs* (Dec. 1, 2014) *available at* http://www.water.ca.gov/news/newsreleases/2014/120114swp.pdf.
[94] *Id.*
[95] *Id.*
[96] "Little information is available to evaluate the potential utility of using wells 3, 17, 18, 22, 43, or 44 on the property." Geologica, Memorandum Re: Panoche Valley Solar Project Groundwater Extraction Impact Evaluation Panoche Valley, CA, December 15, 2014, pp. 6-8 (*hereinafter* Geologica(b)).
[97] Geologica Inc., Water Supply Assessment: Solargen Panoche Valley Solar Farm, Panoche Valley, California, pp. 17-18 (Sept. 23, 2010).
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context."[98] The DSEIR fails to demonstrate that the existing groundwater conditions were adequately established in order to evaluate more severe significant impacts, in light of changed circumstances, related to the current drought that has reduced California's groundwater supply.[99]

B3-30 cont.

Third, the DSEIR provides an inaccurate estimate of the groundwater recharge rate based on rainfall in Panoche Valley. According to the Groundwater Memo appended to the DSEIR, all modeling prepared for the Project assumes a recharge rate of one inch per year ("in/y").[100] However, according to expert hydrogeologist, Dr. Tom Myers, "[t]he recharge estimate used for this project, one inch/year over the project site, is extremely high."[101] Dr. Myers goes on to explain that, "[s]ome researchers have set estimates of average recharge precipitation less than 8 in/y as equal to zero."[102] According to the information in the Groundwater Memo, Panoche Valley has varied rain fall throughout its area, with approximately "10 -12 inches on the west edge to as little as 5-6 inches on the north and east, with an average at the Panoche Valley water station equal to 9.69 in/y."[103] However, it is Dr. Myers' opinion that the impacts of the Project on groundwater supply have been obscured because the DSEIR assumes the entire aquifer receives one in/y of recharge, which is inaccurate.

B3-31

Fourth, the DSEIR's groundwater modeling is not based on substantial evidence. Indeed, the groundwater model cannot predict site-specific impacts without a site-specific estimate of outflow. Dr. Myers explains that, based on the Groundwater Memo's one in/y assumption, Geologica uses a recharge rate of 2690 acre feet per year ("af/y") water balance calculation. However, an "independent estimate of outflow" is required for use of the modeling that is relied on in the DSEIR. Despite the necessity of this study to ensure accurate modeling, the consultants performing the modeling failed to estimate outflow from the aquifer to accurately model conditions at the Project site.[104] Accordingly, the modeling assumptions, i.e., simulated baseline conditions, that are assumed for Project groundwater recharge are not based on substantial evidence, preventing the public

B3-32

[98] CEQA Guidelines, § 15125(c).
[99] Janny Choy and Geoff McGhee, *Groundwater: Ignore It and It Might Go Away* (last visited Jan. 31, 2014) *available at* http://waterinthewest.stanford.edu/groundwater/overview/index.html.
[100] Myers, p. 5.
[101] *Id.*
[102] *Id.*
[103] Myers, p. 6.
[104] *Id.*
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and decision makers from assessing the Project's potentially significant impacts on water supply.

B3-32 cont.

Finally, the baseline model developed for the DSEIR incorrectly relies on recharge rates for irrigated lands, rather than recharge rates for upland habitat. Panoche Valley is comprised of natural upland habitat; therefore, the use of irrigated habitat resulted in false modeling assumptions. According to Dr. Myers, the differences in these two types of habitat yield varied recharge rates due to evaportraspiration ("ET") from plants and grass, and from soil permeability.[105] Dr. Myers concluded, "the [DSEIR's] estimate of ET is grossly inaccurate."[106] Myers explains, "[m]ost small showers just wet the surface of the soil and maybe that top inch or so and evaporates...Shrubs easily intercept more than a couple tenths of an inch from small storms so that most precipitation evaporates."[107] Indeed, the findings regarding "precipitation infiltrat[ion in] an irrigated area is irrelevant for a natural unirrigated, grassland."[108] Accordingly, the DSEIR lacks substantial evidence to support its description of the existing baseline for groundwater resources.

B3-33

For these five reasons, and given the variability in groundwater levels at the Project site,[109] an updated DSEIR must be revised to include substantial evidence to support its description of the existing setting for groundwater resources.

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

B3-34

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.[110] CEQA requires that an agency analyze potentially significant environmental impacts in an EIR.[111] The EIR should

[105] *Id.*
[106] Myers, p. 7
[107] *Id.*
[108] Myers, p. 8.
[109] Myers, p. 3.
[110] CEQA Guidlines, § 15002, subd. (a)(1).
[111] *See* Pub. Resources Code § 21000; CEQA Guidelines § 15002.
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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.[112] To be adequate, the EIR should evidence the lead agency's good faith effort at full disclosure.[113] 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.[114] Thus, the EIR protects not only the environment but also informed self-government."[115]

B3-34 cont.

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.[116] 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."[117] 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 significant effects on the environment are "acceptable due to overriding concerns" specified in CEQA section 21081.[118]

B3-35

In this case, the DSEIR fails to satisfy the basic purposes of CEQA. The DSEIR's conclusions regarding impacts to biological and hydrological resources, public health impacts and cumulative impacts are not supported by substantial evidence. In preparing the DSEIR, the County: (1) failed to provide sufficient information to inform the public and decision-makers about potential environmental impacts; (2) failed to accurately identify and adequately analyze all potentially significant environmental impacts; (3) failed to incorporate adequate measures to mitigate environmental impacts to a less than significant level; and (4)

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[112] *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm.* (2001) 91 Cal. App.4th 1344, 1367; *Schaeffer Land Trust v. San Jose City Council*, 215 Cal.App.3d 612, 620.
[113] CEQA Guidelines § 15151; *see also Laurel Heights I* (1998) 47 Cal.3d 376, 406.
[114] *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[115] *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (citations omitted).
[116] CEQA Guidelines § 15002(a)(2)-(3); *Berkeley Keep Jets Over the Bay Com.*, 91 Cal.App.4th at 1354.
[117] CEQA Guidelines § 15002, subd. (a)(2).
[118] CEQA Guidelines § 15092, subd. (b)(2)(A)-(B).
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deferred the formulation of mitigation measures. As a result, the DSEIR 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 San Benito County, fails to investigate a potential impact, its finding of insignificance simply will not withstand legal scrutiny.[119] The County must address these shortcomings and recirculate a revised DSEIR for public review and comment.

B3-35 cont.

A. The DSEIR Lacks Substantial Evidence to Support its Conclusions Regarding the Project's Significant Impacts on Biological Resources

B3-36

i. *The DSEIR Lacks Substantial Evidence to Support its Claim that the PG&E Upgrades Have Less than Significant Impacts on Avian Mortality*

The DSEIR's conclusions regarding the PG&E upgrades are not supported by substantial evidence for two reasons. First, the DSEIR incorrectly claims that the microwave tower at Panoche Mountain will not result in a significant increase in avian mortality. Mr. Cashen explains, "data from 38 different tower studies ...concluded that towers in the United States and Canada kill over 6.8 million birds per year."[120] Furthermore, "[a]vian collisions increase exponentially with tower height."[121] "The new microwave tower proposed for Panoche Mountain would be 300 feet tall, and thus it would pose a substantially greater collision hazard to birds than the existing towers."[122] However, the DSEIR downplays the significance of this potential impact, stating, "[t]he new microwave tower ... would be similar to existing infrastructure already constructed."[123] The DSEIR further elaborates, "microwave towers may result in net increases of collisions compared with baseline conditions."[124] However, the DSEIR stops there. Substantial evidence shows that the DSEIR fails to identify impacts associated with the increase in microwave tower height.

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[119] Pub. Res. Code § 21081.6(b); CEQA Guidelines § 15126.4(a)(2).
[120] Cashen, p. 9.
[121] *Id.*
[122] Cashen, p. 9.
[123] DSEIR, p. C.6-106.
[124] *Id.*
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Second, the DSEIR fails to propose sufficient mitigation to mitigate impacts associated with the microwave towers. According to the DSEIR, the implementation of the Avian Protection Plan and the Avian Power Line Interconnection Committee ("APLIC") guidelines is sufficient to reduce impacts associated with the microwave towers below a level of significance.[125] However, B3-37

> "[t]he County has no basis for this conclusion because neither measure (i.e., APLIC guidelines or PG&E's APP) is applicable to microwave towers. As a result, construction of new microwave towers for the Revised Project would have a potentially significant and unmitigated impact on birds."[126]

The DSEIR must propose and implement all feasible mitigation to reduce this potentially significant impact.

Third, the DSEIR fails to provide adequate mitigation to prevent avian collision with the transmission lines that are part of the PG&E upgrades. The DSEIR incorrectly claims, "the largest birds with a reasonable likelihood of coming in contact with the high voltage transmission lines in the vicinity of the route would be the golden eagle."[127] This information is false. As previously discussed in this comment letter, a condor was sighted during the golden eagle surveys preformed for the Project. Because condors are known to be in and around the area, the "Transmission Line Guidelines for Condors" must be used. According to Mr. Cashen, "[c]ollision and electrocution mortality from power lines is considered biologically significant to the California condor due to its small population size."[128] Currently, the DSEIR proposes the construction of transmission lines that only account for golden eagle use.[129] However, given the California condor's greater wingspan, the design guidelines must be updated to accommodate larger birds of prey. B3-38

[125] *Id.*
[126] Cahsen, p. 9.
[127] DSEIR, p. C.6-106.
[128] Cashen, pp. 17 – 18.
[129] Avian Power Line Interaction Committee (APLIC). 2006. *Suggested Practices for Avian Protection on Power Lines: The State of the Art in 2006.* Edison Electric Institute, APLIC, and the California Energy Commission. Washington, D.C and Sacramento, CA. pp. 16,56.
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For these three reasons, the DSEIR lacks substantial evidence to show that PG&E upgrade impacts related to avian mortality rates would be reduced to a level of insignificance with the incorporation of the proposed mitigation. Instead, substantial evidence shows that the DSEIR underestimates the significant impacts a 300-foot microwave structure would have on avian species and that the proposed mitigation measures either do not address impacts at all, or provide insufficient mitigation to reduce impacts on avian species frequenting the Project site. Accordingly, an updated DSEIR that identifies all Project impacts on avian species must be recirculated so that the public and decisionmakers are fully informed of the Project's adverse and unmitigated impacts on biological resources.

B3-38 cont.

ii. *The DSEIR Lacks Substantial Evidence to Support its Conclusion that Project Impacts on Golden Eagles Will Be Insignificant*

B3-39

The DSEIR's conclusions regarding Project impacts to golden eagles are inaccurate for three reasons. First, the DSEIR claims that "[t]he Project's risk to nesting and breeding Golden Eagles is low to none."[130] Mr. Cashen explains, "[t]his statement conflicts with the Applicant's survey data, published scientific literature, and risk assessment guidance issued by the USFWS."[131] According to guidance published by USFWS, risk assessment should evaluate two components, which are not considered in the DSEIR: (1) cumulative impacts, and (2) site-specific threats.[132] Accordingly, Mr. Cashen concludes that the DSEIR's , "limited level of analysis is inappropriate for golden eagles. Guidance issued by the USFWS indicates cumulative effects analysis should occur at the natal dispersal distance of the species (140 miles)."[133] Furthermore, the USFWS's site-specific risk assessment recommends assessing a Project's potential to result in take, based on:

a. Burning from concentrated light at solar arrays.

b. Transmission line, power line, meteorological tower, or guy line collision.

c. Electrocution potential.

[130] Eagle Conservation Plan, p. 19.
[131] Cashen, p. 11.
[132] 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.
[133] Cashen, p. 9.
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d. Territory abandonment.

e. Nest and roost site disturbances.

f. Habitat loss and fragmentation.

g. Disturbance due to ongoing human presence at the facility.[134]

B3-39 cont.

According to Mr. Cahsen, "[t]he Revised Project poses all of the aforementioned threats except burning from concentrated light at solar arrays. Ultimately, it is inconceivable that the loss of over 1,888 acres of foraging habitat in relatively close proximity to approximately 30 nesting territories would result in low to no risk to those territories, as suggested in the ECP."

B3-40

Second, the DSEIR fails to adequately assess Project impacts associated with the elimination of foraging habitat. According to the DSEIR, 15 active golden eagle nests were detected within a 10 mile radius of the Project site during the 2010 surveys.[135] The most recent surveys from 2013 – 2014, "resulted in the documentation of 46 golden eagle nests and an estimated 30 golden eagle territories, with nine of them active."[136] Indeed, seven golden eagles were seen feeding on the carcass of an animal during one of the reconnaissance surveys.[137] Because the Project would eliminate foraging habitat for golden eagles, it has the potential to result in take of golden eagles currently using the site as foraging habitat as they may be unable to find enough food to feed their young once the Project site is eliminated as foraging ground.[138] The DSEIR recognizes that development of the Project may result in the loss of foraging habitat for golden eagles, but does not disclose the severity of this impact.[139] According to field biologist, Scott Cashen, "during the breeding season many eagles concentrate their foraging activities in 'core areas' that are several orders of magnitude smaller than the home range. Eagles will travel far from their nests to access those core foraging areas."[140] Without information regarding prey abundance on the Project site, its

[134] 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.
[135] DSEIR, pp. C.6-37, 38.
[136] DSEIR, pp. C.6-37, 38.
[137] Draft Eagle Conservation Plan, p. 12 *available at* http://cosb.us/panoche-valley-solar-farm-project/#.VMkz8tLF_M.
[138] Cashen, p. 4.
[139] DSEIR, p. C.6-37.
[140] Cashen, p. 4
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importance as an "eagle use area" cannot be determined.[141] However, Mr. Cashen explains that the golden eagle "survey report clearly shows there is substantial golden eagle use of the Revised Project site."[142]

B3-40 cont.

Third, the DSEIR's statement that impacts to Golden Eagles will be mitigated below a level of significance due to the quality of the habitat on the conservation lands is an example of a bare conclusion not supported by data. Mr. Cashen clarifies, "A conclusion of this nature requires demonstrating the Revised Project would alleviate existing threats or increase carrying capacity, such that there is a net zero (or positive) benefit to eagles."[143] According to the USFWS's Eagle Conservation Guidance,

B3-41

> [c]ompensatory mitigation can address any pre-existing mortality source affecting the species-specific eagle management unit impacted by the project... However, there needs to be a credible analysis that supports the conclusion that implementing the compensatory mitigation action will achieve the desired beneficial offset in mortality or carrying capacity.[144]

Mr. Cahsen explains that, "[s]imply putting a conservation easement on foraging habitat that already exists does not alleviate the loss of 1,888 acres of foraging habitat, fragmentation of the landscape, increased collision potential, and other potentially adverse effects of the Revised Project to eagles."[145] Furthermore, Cashen colludes that the Eagle Conservation Plan, "provides no value as a mitigation measure without triggers for adaptive management based on the survey results. It is already well established in the scientific literature that eagles avoid anthropogenic disturbance and developed landscapes, including solar facilities."[146] To properly mitigate Project impacts on golden eagles, Mr. Cashen recommends:

[141] Cashen, p. 5.
[142] Cashen, p. 5.
[143] Cashen, p. 18.
[144] U.S. Fish and Wildlife Service. 2013. Eagle Conservation Plan Guidance: Module 1-Land Based Wind Energy-Version 2. USFWS Division of Migratory Bird Management. April 2013. p. 21.
[145] Cashen, p. 18.
[146] Cashen, p. 19.
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a before-after/control-impact ("BACI") study.[147] The study should incorporate rigorous data collected across all seasons. Specifically, I recommend the installation of transmitters on a small subset of the 30 eagle pairs nesting closest to the Revised Project site. This would eliminate speculation about eagle mortality, reduced nesting success, or abandoned territories due to the Revised Project.[148]

B3-41 cont.

The DSEIR fails to include substantial evidence to support its conclusions (1) that the Project site is not an important eagle use area, (2) the extent and (3) severity of Project impacts to eagles and the adequacy of mitigation measures. Accordingly, the DSEIR must be updated to reflect the prevalence of eagle use of the Project site, the Project's potential to result in take of golden eagles and must include adequate mitigation measures for impacts to golden eagles.

iii. *The DSEIR Fails to Identify and Assess Project Impacts Related to Lake Effect*

B3-42

The DSEIR omits new information and analysis regarding avian mortality at solar sites. Indeed, "[a] substantial amount of new information regarding avian mortality at solar facilities has been released since the County issued the Final EIR for the Approved Project."[149] The DSEIR calls this new information speculative, and, therefore concludes that, "impacts are considered to be less than significant (Class III) and no additional mitigation is required."[150] However, the DSEIR's conclusion is inaccurate. Studies of solar PV project impacts on avian species have revealed a phenomenon commonly referred to as lake effect.[151] Lake effect refers to birds mistaking vast solar farms for water bodies, due to solar panel reflectivity, which mimics water. The birds' mistake usually leads to collision, and ultimately, avian mortality.[152] Because this phenomenon is associated with utility scale solar developments, the Project has the potential to result in avian mortality. Indeed, Mr. Cashen echoes the certainty of this impact, "[w]hereas the extent of the threat remains unknown, the presence of dead and injured birds at solar facilities

[147] Morrison ML, WM Block, MD Strickland, WL Kendall. 2001. Wildlife Study Design. Springer-Verlag, New York (NY).

[148] Cashen, p. 19.

[149] Cashen, p. 10.

[150] DSEIR, p. C.6-54.

[151] *See e.g.* John Upton and Climate Central, "Solar Farms Threaten Birds," *The Scientific American* (Aug. 27, 2014 *available at* http://www.scientificamerican.com/article/solar-farms-threaten-birds/.

[152] Cashen, p. 10.

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operating (or under construction) in California demonstrates the facilities present a collision hazard to birds. The potential for the Revised Project to impact birds is not speculative, as the County claims."[153] Substantial evidence shows that the Project, as a utility scale solar power plant, poses significant and unmitigated impacts related to avian mortality. CEQA requires that the DSEIR be updated to address and analyze this new information related to a new and previously unaddressed significant impact, and that the DSEIR include all feasible mitigation.

B3-42 cont.

iv. *The DSEIR's Conclusion that Project Impacts on Rare Plants Have Been Mitigated is Not Based on Substantial Evidence in the Record*

B3-43

There is no basis in the DSEIR to conclude that Project impacts to rare plants would be less than significant after the implementation of mitigation.[154] The DSEIR's conclusions and analysis are flawed for three reasons.

First, to ensure that adequate mitigation has been provided for plant species, the DSEIR must assess whether and what rare plant habitat exists on the Project site. However, the DSEIR acknowledges "special-status plants were unlikely to be identified during the survey because of the time of year."[155] Accordingly, the DSEIR requires pre-construction surveys to supplement the already-performed surveys. However, this is insufficient because "[t]he SEIR lacks an enforcement mechanism that ensures the surveys are properly conducted and reported prior to ground disturbance activities."[156]

Second, the DSEIR concludes that impacts to special status plants would be mitigated by the conservation lands. However, according to Mr. Cashen, the "SEIR lacks the basis for this conclusion because it does not provide any evidence that the species that would be impacted by the Revised Project (i.e., gypsum loving larkspur, recurved larkspur, and serpentine linanthus) occur on the proposed conservation lands."[157] Without this information it is impossible to claim that Project impacts have been reduced to a level of insignificance.

B3-44

[153] Cashen, p. 10.
[154] *See* DSEIR, p. C.6-28.
[155] DSEIR, p. C.6-102.
[156] Cashen, p. 13.
[157] Cashen, p. 13.
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Third, according to Mr. Cashen there is insufficient evidence in the DSEIR to justify its claim that a 50-foot buffer would adequately mitigate impacts to species on the Project site.[158] This is because San Joaquin wollythreads habitat is present on the Project site.[159] According to the USFWS, "habitat can be protected in blocks of at least 160 acres and buffer zones of 500 feet or more are protected beyond the occurrence margins of *Monolopia congdonii* [San Joaquin woollythreads] to reduce external influences and to allow for plant population expansion."[160] Accordingly, Cashen concludes that a 50-foot buffer would not be adequate to protect this rare plant.[161] B3-45

The DSEIR lacks substantial evidence to support its claim that impacts to rare plants would be reduced to a level of insignificance. The DSEIR must be updated to include information regarding the viability of the conservation lands to support special status plants on the Project site and must include all feasible mitigation to ensure that plants on the Project site are adequately protected as required by the USFWS.

v. *The Project Will Have Unidentified, Unmitigated Impacts on Vernal Pool Habitat and Vernal Pool Fairy Shrimp* B3-46

The DSEIR fails to evaluate indirect impacts from the Project on vernal pool habitat, and ultimately vernal pool fairy shrimp. CEQA requires that a DSEIR examine indirect impacts resulting from a Project.[162] The Project may pose indirect unmitigated impacts to vernal pool habitat and Vernal Pool Fairy Shrimp for two reasons.

First, grading and the addition of impervious surfaces associated with the Project may lead to the modification of the drainage regime at the Project site, which may compromise vernal pool habitat. According to hydrogeologist, Tom Myers, the Project has the potential to result in downstream impacts such as erosion and sedimentation.[163] Vernal Pool habitat is usually fed by the types of

[158] Cashen, p. 17.
[159] DSEIR, p. C.6-9.
[160] U.S. Fish and Wildlife Service. 2010. *Monolopia* (=*Lembertia*) *congdonii* (San Joaquin woolly-threads). 5-Year Review: Summary and Evaluation. Sacramento Fish and Wildlife Office. pp. 24 and 25.
[161] Cashen, p. 17.
[162] CEQA Guidelines § 15126.2.
[163] Myers, p. 14.
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streams that will be impacted by the Project.[164] Furthermore, "genetic evidence, indicate that *vernal pool fairy shrimp populations are defined by entire vernal pool complexes, rather than individual pools.*"[165] According to Mr. Cashen, modification of vernal pools and the addition of solar paneling to the Project site will prevent dispersal of fairy shrimp, as the movement of wildlife and flooding is essential to maintaining habitat connectivity.[166] By filling the drainages that connect the vernal pools on the Project site, and adding impervious surfaces, the Project compromises the viability of vernal pool fairy shrimp habitat.[167]

B3-46 cont.

Second, the mitigation measures proposed in the DSEIR will lead to habitat fragmentation, which is one of the single largest threats facing vernal pool fairy shrimp.[168] Biologist Scott Cashen explains that "[s]pecies experts have noted the importance of pool complexes versus isolated pools in supporting various species of large branchiopods."[169] Indeed, "there is evidence that protecting small patches of vernal pool habitat, as proposed in the SEIR, is not a successful conservation strategy for vernal pool fairy shrimp."[170] Accordingly, the DSEIR's proposed mitigation further fragments the vernal pool habitat on the Project site; therefore, the proposed mitigation will not address Project impacts to vernal pool habitat and vernal pool fairy shrimp, but rather, will exacerbate them.

B3-47

Substantial evidence shows that the Project may result in unidentified and unanalyzed indirect impacts on vernal pool habitat and vernal pool fairy shrimp, which will be exacerbated by the incorporation of proposed mitigation. A DSEIR that fully quantifies and proposes suitable mitigation measures for impacts to vernal pool fairy shrimp must be recirculated.

vi. *The Avian Conservation Strategy Does not Constitute Adequate Mitigation*

B3-48

The Avian Conservation Strategy ("ACS") fails to effectively mitigate Project impacts on avian species. According to Mr. Cashen this study is not, but needs to

[164] Environmental Protection Agency, *Water: Wetlands: Vernal Pools* (last visited Jan. 23, 2014) *available at* http://water.epa.gov/type/wetlands/vernal.cfm.
[165]
[166] Cashen, p. 14.
[167] *Ibid.* p. 4. [emphasis added].
[168] Cashen, pp. 14 – 15.
[169] Cashen, p. 15.
[170] Cashen, p. 14.
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be, long term and, the ACS fails to include any triggers for mitigation by deferring the formulation of mortality thresholds. [171] The DSEIR states,

B3-48 cont.

> If the County determines that either (1) bird mortality caused by solar facilities is substantial and is having potentially adverse impacts on special-status bird populations, or that (2) the attraction of polarized light from solar panels is causing reproductive failure of aquatic insect populations at high enough levels to adversely affect insectivorous special-status birds, the Applicant shall be required to implement some or all of the mitigation measures below.[172]

This mitigation measure is insufficient to support the DSEIR's conclusion that Project impacts related to avian mortality would be reduced to a level of insignificance. Mr. Cashen explains that the measure is insufficient because the DSEIR fails to discuss what the County considers to be excessive mortality.[173] The DSEIR's lack of information, and inconsistent description of the monitoring period,[174] "precludes the public from understanding the amount of mortality that could occur before any corrective actions are attempted."[175]

B3-49

Furthermore, the ACS fails to satisfy the definition of an adaptive management plan. "The U.S. Department of the Interior defines adaptive management as 'a decision process that promotes flexible decision making that can be adjusted in the face of uncertainties as outcomes from management actions and other events become better understood.'" Cashen points out that adaptive management is not: 1) a trial-and-error approach nor 2) an attempt to fix a problem after implementation of a Project.[176] However, according to Mr. Cashen, the ACS does exactly this, by:

> 1) proposing a trial-and-error approach; (2) allowing little flexibility in modifying land-use activities in response to monitoring results; (3) assuming the problem (avian mortality) could be fixed after Project implementation; and (4) failing to establish clear goals with respect to avian mortality.

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[171] Cashen, p. 21.
[172] DSEIR, pp. C.6-87-88.
[173] Cashen, p. 21.
[174] Cashen, pp. 19-20.
[175] Cashen, p. 21.
[176] Cashen, p. 22.
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Substantial evidence shows that the DSEIR's mitigation measures do not constitute adaptive management, but rather, defer thresholds of mortality, rely on inadequate surveys, and fail to establish clear goals. Accordingly, the mitigation proposed in the DSEIR must be updated to include adequate mitigation measures that will address Project impacts related to avian mortality.

B3-49 cont.

B. The DSEIR Lacks Substantial Evidence to Support its Conclusion that Project Impacts on Groundwater Would Be Reduced Below a Level of Significance

B3-50

The DSEIR provides a faulty analysis of the Project's impacts on groundwater and lacks substantial evidence to support its conclusion that the Project's impacts on groundwater levels will be reduced to a level of insignificance with the implementation of mitigation measures. According to the DSEIR, the Project's truncated construction period will result in higher ground water pumping during construction, which has the potential to substantially deplete groundwater in the Project area. Indeed, the amount of groundwater required for the Project will put the aquifer from which water is withdrawn into a state of overdraft for several years.[177] However, the DSEIR fails to set forth the actual rate of drawdown, underestimates drawdown based on the model used, reaches a conclusion that is not supported by substantial evidence and fails to adequately mitigate significant impacts. The DSEIR's analysis and conclusions are inaccurate and flawed for five reasons.

First, the DSEIR's conclusions are based on undisclosed assumptions, preventing the public and decision makers from reviewing the analysis used to assess Project impacts.[178] The groundwater model used in the DSEIR is based on new information made available by the United States Geological Survey in their new MODFLOW model.[179] However, MODFLOW is based on the size of modeling cells used and the location of the constant head boundary ("CHB"), which is a natural discharge point of an aquifer.[180] The DSEIR uses MODFLOW, but fails to describe the size of the cells and the location of the CHB. According to Dr. Myers, "the DSEIR utilizes an analysis that the public cannot review because it is inadequately described."[181]

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[177] Geologica(b), p. 10.
[178] Myers, p. 9.
[179] *Id.*
[180] *Id.*
[181] *Id.*
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Second, Dr. Myers explains that the use of MODFLOW is inappropriate, and is one of several reasons that, "[t]he method used to estimate drawdown with the model will ***underestimate drawdown*** near the pumping well."[182] Dr. Myers explains,

> The Well package for MODFLOW assumes that pumped water is drawn from the entire model cell, so that pumping drawdown is spread over the model cell. A cell is much larger than the well area, so the predicted drawdown is always much less than actually occurs at the well. Usually, a model is developed with model cells that become smaller, or telescope down in size, around a well so that the simulated drawdown is more realistic.[183]

However, the DSEIR's analysis failed to simulate withdrawal from a specific well, or reduce the cell area to simulate the use of a single well. According to the Groundwater Memo for the Project, the Applicant will likely use well zero for the Project.[184] The DSEIR names several wells that may be used.[185] Regardless of which of these wells is ultimately selected for groundwater withdrawals, a model as described by Dr. Myers is required instead of MODFLOW, which uses the entire cell volume for its analysis rather than focusing on a single well. Accordingly, a realistic estimate of aquifer drawdown was not calculated and, in Dr. Myer's opinion, this caused impacts associated with the Project to be "grossly underestimated."[186] Because the DSEIR fails to adequately discuss Project impacts to groundwater, its conclusion that Project impacts are less than significant with the incorporation of mitigation is not supported by substantial evidence.

B3-51

Third, the DSEIR underestimates drawdown because it fails to adequately assess impacts that would result from withdrawing water from an aquifer with multiple layers. Dr. Myers explains that the aquifer from which the Project will draw its water supply has multiple water-bearing zones, with varying layers of horizontal water flow.[187] This varied horizontal water flow, referred to as

B3-52

[182] *Id.* (*emphasis added*).
[183] Myers, p. 10.
[184] Geologica(b), p. 7
[185] *See* DSEIR, p. C.15-5.
[186] Myers, p. 10.
[187] Dr. Myers states that the aquifer has varied transmissitivity. Transmissivity is defined as the rate which groundwater flows horizontally through an aquifer.
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transmissivity, was not simulated in the DSEIR's appendices. According to Dr. Myers, the DSEIR's appendices

> did not specify the thickness [of the aquifer layers] but simulated the entire domain with a single transmissivity. By using just one layer for the model, the simulation assumes that the entire aquifer thickness provides water to the well when the reality is that only aquifer layers screened by the well provides water [*sic*]. This causes the model to underestimate the drawdown at the well.[188]

By using a theoretical model that fails to accurately reflect conditions at the Project site, the DSEIR underestimates the Project's impacts. Indeed, Dr. Myers concludes, "[t]he DSEIR simply does not adequately describe the hydrogeology of the wells to be pumped for the project or the wells that could be affected by the project."[189] Because the DSEIR bases its conclusion that Project impacts will be less than significant on a theoretical aquifer that fails to reflect existing conditions, its conclusions are not based on substantial evidence. Accordingly, the DSEIR must be updated to address impacts that will result from pumping the aquifer being used for the Project.

B3-52 cont.

Fourth, the DSEIR completely fails to analyze significant cumulative impacts from pumping groundwater in combination with other proposed and existing projects. Failure to consider the pumping of other wells is a failure to consider the overall impacts of this project on the site.[190] "Current groundwater pumping estimates are that about 180 af/y is pumped primarily for domestic, stockwatering, and a very small amount of irrigation."[191] However, Dr. Myers has concluded that the reports prepared for the Project, "failed to consider pumping other wells in the area, which would also discharge from the domain [i.e., aquifer]."[192] Indeed, "the [DSEIR's] study provides no consideration of cumulative effects with other wells pumping in the area."[193] However, once the Project begins to withdraw water for construction, "about 384 af will be pumped so the cumulative effect on the valley from pumping will be more than doubled for 18 months."[194] CEQA requires that an

B3-53

[188] Myers, p. 11.
[189] *Id.*
[190] Myers, p. 16.
[191] Myers, p. 4.
[192] Myers, p. 10.
[193] *Id.*
[194] *Id.*
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EIR disclose cumulative impacts on the environment. However, as explained by Dr. Myers, the DSEIR fails in this regard. Given current drought conditions and resulting increases in groundwater withdrawals, cumulative impacts must be considered to properly assess Project impacts on the environment.

B3-53 cont.

Fifth, the DSEIR fails to account for reduced recharge to the wells that will result from the addition of impervious surface area and from grading the Project site.[195] According to Dr. Myers, "[m]ore precipitation will runoff from [the solar panel] areas than predicted by the modeling reviewed above. The hydrology studies have not estimated the effects of this additional impervious area on recharge."[196] The addition of impervious area will prevent the vernal pools on the Project site from recharging the underlying aquifer.[197] However, "the DSEIR does not disclose this impact or attempt to mitigate it."[198] Dr. Myers explains that, "[t]he panels will cover up to 413 acres. If all of that newly-impervious land prevents percolation, up to 34 acre-ft of recharge will be lost to the groundwater reservoir. The DSEIR fails to discuss this lost recharge."199 The DSEIR fails to account for reduced recharge to the groundwater aquifer. Accordingly, the DSEIR's conclusions are not based on substantial evidence in the record and the County must recirculate a DSEIR that discloses and mitigates the indirect impacts to groundwater levels associated with grading the vernal pools and increasing the impervious surface area on the Project site.

B3-54

C. The DSEIR Fails to Mitigate Impacts on Groundwater to a Level of Insignificance

B3-55

The DSEIR fails to require feasible mitigation to reduce Project impacts on groundwater resources below a level of significance.[200] The DSEIR requires the Applicant to submit a Groundwater Monitoring and Reporting Plan.[201] However, the DSEIR's proposed mitigation is flawed for two reasons.

First, the description of the monitoring plan provides the Applicant with essentially no guidance.[202] According to Dr. Myers, the groundwater monitoring

[195] Myers, p. 11.
[196] *Id.*
[197] Myers, p. 12
[198] *Id.*
[199] Myers, p. 15.
[200] Myers, p. 17.
[201] DSEIR, p. C.15-8.
[202] Myers, p. 17.
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plan is insufficient because, "[a] groundwater monitoring plan should be based on the conceptual model of flow at the site and monitoring wells should be placed in locations from which drawdown will be detected before it reaches the points of concern, in this project the near-off-site wells used by others."[203] By omitting information specific to the wells being used for monitoring, the DSEIR simply provides no guidance, and falls far short of the type of mitigation necessary to ensure that water withdrawals for the Project do not exceed five feet – the threshold of significance set by the DSEIR.

B3-55 cont.

Second, the plan's goal to prevent more than a five foot draw down will not be successfully achieved using the DSEIR's plan.[204] According to Dr. Myers, in order to detect overdraft conditions associated with the pumping, "monitoring wells should be established on a pathway between the project pumping and the private well. The threshold for detecting impacts should be specified for the monitoring well to prevent the five ft of drawdown at the private well."[205] However, the Groundwater Plan contains no such guidance, and generally fails to set forth any guidance that would prevent a drawdown of over five feet, as required by the DSEIR.

B3-56

Instead of the monitoring established by the Groundwater Plan, the County should require the incorporation of feasible mitigation that includes performance standards, as required by CEQA.[206] Dr. Myers recommends that the "groundwater modeling reports [] be rewritten to adequately describe what they actually do. Calibration in steady state and with transient conditions could be accomplished and presented in the report."[207] In Dr. Myers' opinion, in order to remedy the Groundwater Mitigation Plan's deficiencies, "[the] monitoring plan requires the project proponent to locate all wells within a potentially impacted zone, defined as predicted drawdown exceeding five ft, for monitoring []; the monitoring plan [should] also require[] the project proponent to monitor three wells in the zone with less than one foot of predicted drawdown to judge the accuracy of the predictive model []."[208]

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[203] *Id.*
[204] *Id.*
[205] Myers, p. 18.
[206] *Endangered Habitats League v. County of Orange* (4th Dist. 2005), 131 Cal.App.4th 777, 793-94.
[207] Myers, p. 19.
[208] Myers, p. 20 (*internal citations omitted*).
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Substantial evidence shows that the Groundwater Monitoring Plan fails to ensure that no more than five feet of drawdown will result from Project pumping. To ensure compliance with CEQA's requirements, the County must revise the the DSEIR to include feasible mitigation with performance standards that will ensure withdrawals of groundwater will remain insignificant, such as the methods recommended by Dr. Myers. B3-56 cont.

D. The DSEIR Lacks Substantial Evidence to Support its Conclusions That the Project's Impacts on Waters of the State and Jurisdictional Waters on the Project Site Are Less Than Significant B3-57

i. The DSEIR's Analysis of Project Impacts on Watercourses is Flawed

The DSEIR's analysis and discussion of impacts on watercourses on the Project site is inadequate for four reasons. First, the DSEIR fails to disclose the extent of Project impacts on drainages at the Project site.[209] According to the DSEIR, the perimeter road, which will be constructed for site access, will cross over several drainages under the jurisdiction of the USACE and ephemeral waters regulated by CDFW. However, as Dr. Myers points out,

> [t]he DSEIR does not provide the linear stream footage or area that each of these crossings would impact. The DSEIR also does not provide design drawings or even photographs of the site so that a reviewer can assess whether there are impacts. The failure to provide details on the crossings is a failure to disclose adequately the effects of the project.[210]

Second, the DSEIR fails to discuss the flooding and erosion that could result from grading the vernal pools, drainage features and watercourses on the Project site. The DSEIR explains the importance of these features, and their role at the Project site: "[e]phemeral Drainages play an important role in conveying surface flows during the rainfall season to other habitats located down slope that support special-status plants and animals."[211] Dr. Myers echoes the importance of vernal B3-58

[209] Myers, p. 13.
[210] *Id.*
[211] DSEIR, C.6-26.
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pools and ephemeral drainages, noting they also recharge the aquifer from which the Project will withdraw water.[212] However, the DSEIR fails to address impacts to watercourses from drainage and erosion that will result if culverts and armoring are added to the ephemeral streams.[213] If these ephemeral waters are altered, the flow, which will be channelized, may exceed the culvert openings added by the Project design.[214] If the flow exceeds the capacity of the now-armored channel, "water will pond and sediment will settle to the stream bottom."[215]

B3-58 cont.

Third, the DSEIR fails to consider the cumulative impacts that the construction of road crossings constructed at the Project site may have on drainage and erosion.[216] Dr. Myers concludes that the cumulative impacts of the 27 planned stream crossings, "could have the largest effect on the east side of the project area where many small drainages emerge from mountains and begin to flow across the alluvial fans."[217] The culverts proposed to stabilize the channels may have the unintended effect of changing the drainage patters, leading to high velocity flows that result in high sedimentation and erosion rates. According to Dr. Myers, "[i]f one or more culverts causes the channels to shift, it is possible for channels to combine during floods and create larger flows and more erosion. The DSEIR has failed to consider these potential cumulative impacts of stream crossing construction."[218]

B3-59

Finally, the County's modification of the mitigation measures approved for the 2010 Final EIR will result in additional, unanalyzed impacts on drainage. Bio-8 required that the Project avoid any and all waters, washes and drains at the Project site.[219] However, the Applicant has eliminated this mitigation measure in the most recent version of the Project.[220] Furthermore, the DSEIR concludes that the removal of this mitigation measure will not result in additional impacts.[221] This conclusion is completely misleading and inaccurate.

B3-60

[212] Myers, p. 11.
[213] *See id.*
[214] Myers, p. 14.
[215] *Id.*
[216] Myers, p. 16.
[217] *Id.*
[218] *Id.*
[219] DSEIR, p. B.21.
[220] *Id.*
[221] DSEIR, p. C.6-56.
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The DSEIR lacks substantial evidence to support is conclusion that Project construction and operation will not result in significant impacts to watercourses. Instead, substantial evidence shows that the construction of culverts in the drainages at the Project site will result in the constriction of water flow, leading to downstream impacts, such as flooding, erosion, sedimentation and gullying.[222] The DSEIR must be updated to address and mitigate these unidentified and unmitigated significant impacts.

B3-60 cont.

ii. *The DSEIR Fails to Identify and Incorporate All Feasible Mitigation for Impacts to Drainages at the Project site*

B3-61

According to the DSEIR, the Project's compliance with laws and regulations are sufficient to mitigate Project impacts on drainage to a level of insignificance.[223] However, compliance with a regulation is not an indication of the sufficiency of mitigation measures where there is substantial evidence that the project may result in significant impacts.[224] Indeed, "[i]f there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project."[225] However, according to the DSEIR, complying with the requirements of a streambed alteration agreement from CDFW and a 404 Permit from USACE, neither of which has been prepared to date, is sufficient to ensure that impacts on ephemeral waters will be reduced below a level of significance. However, as previously discussed in this letter there is substantial evidence that the Project's stream-crossings will have significant impacts both up-and down-stream of the proposed stream alterations.[226] Accordingly, the design of the stream crossings has the potential to significantly impact drainage patterns and result in erosion.

B3-62

Furthermore, the Project design does not comply with the requirements of CWA section 404. Section 404 permits require that the Applicant demonstrate the design is the Least Environmentally Damaging Practicable Alternative ("LEDPA").[227] However, both Dr. Myers and the CDFW believe that there are less damaging alternatives or other design alternatives which could be implemented to

[222] Myers, p. 14.
[223] DSEIR, C.6-108.
[224] *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453.
[225] CEQA Guidelines § 15064.4.
[226] Myers, p. 14.
[227] 33 U.S.C. § 1344(b)(1) (2012).
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reduce overall Project impacts on drainage and erosion.[228] Dr. Myers recommends that the "bridges that span the crossings on the west [of the Project site] have abutments above the top of the terraces, [so] they would impinge very little on most flood events that pass the bridges thereby having little effect."[229] CDFW issued several letters recommending that the Project use the already-constructed Little Panoche Road to service the Project, thereby preventing any additional construction or stream-crossings.[230] By omitting any LEPDA analysis or evaluating other less damaging alternatives to the proposed culverts, the Applicant has failed to address impacts per the requirements of the CWA. Based on the recommendations of both Dr. Myers and the CDFW, the stream crossing design set forth in the DSEIR is not the LEDPA. Indeed, substantial evidence shows that the Applicant's proposed watercourse modifications are environmentally degrading, and that it is practicable to use other alternatives, which are more protective of the watercourses on the Project site. Accordingly, a DSEIR containing the LEDPA analysis and design must be recirculated so the public and decisionmakers can fully understand the impacts that will result from the Project.

B3-62 cont.

E. The DSEIR Completely Fails to Identify the Project's Significant Impacts on Water Quality

B3-63

The DSEIR completely fails to "analyze the potential for construction activity to degrade water quality."[231] According to the DSEIR, construction activity and excavation have the potential to degrade water quality.[232] However, no analysis as to how this conclusion was reached is provided. The DSEIR only states, "[c]ompliance with existing regulations, including implementation of a Storm Water Pollution Prevention Plan ("SWPPP"), and implementation of BPMs...would ensure that potential impacts remain less than significant."[233] However, this conclusion is not backed by substantial evidence. In addition, Dr. Myers states, "[t]he project will have significant cut and fill, especially where the perimeter roads cross washes,

[228] Myers, p. 14; letter from Jeffrey R. Single, Regional Manager California Department of Fish and Wildlife, to Chief O'Connor, Chief Hollister Fire Department. Re: Fire Code Requirements and Access to the Proposed Panoche Valley Solar Farm (September 22, 2014). **Attachment E.**
[229] Myers, p. 14.
[230] Letter from Jeffrey R. Single, Regional Manager California Department of Fish and Wildlife, to Chief O'Connor, Chief Hollister Fire Department. Re: Fire Code Requirements and Access to the Proposed Panoche Valley Solar Farm (September 22, 2014).
[231] Myers, p. 15.
[232] DSEIR, p. C.15-4.
[233] DSEIR, p. C.15-7.
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whether they are jurisdictional or not."[234] The disturbance in the 27 water crossings[235] could pick up and transport sediment, which will impact down stream water quality.[236]

> The DSEIR fails to estimate how much degradation could occur, to discuss even qualitatively how it could occur, or prescribe measures to avoid degradation to downstream water quality. By failing to consider these issues, the DSEIR fails to adequately disclose the potential impacts of the construction of the project.[237]

Substantial evidence shows that the Project, as proposed, has the potential to substantially impair water quality in the area. CEQA requires that the DSEIR be recirculated with more information, which would allow the public and decision makers to determine the extent of impacts on water quality. Furthermore, feasible mitigation, made enforceable through terms and conditions that address impacts to water quality must be incorporated.

B3-63 cont.

F. The DSEIR Fails to Incorporate all Feasible Mitigation for Public Health Impacts Associated with Valley Fever

B3-64

Since publication of the 2010 Final EIR, new information regarding the severity of public health impacts related to Valley Fever has become available. [238] Indeed, since the certification of the Final EIR, Valley Fever contraction has soared, with several instances of outbreaks associated with the construction of solar Projects in endemic areas.

> Valley Fever, also called desert fever, San Joaquin Valley fever, desert rheumatism, or coccidioidomycosis (short cocci), is an infectious disease caused by inhaling the spores of Coccidioides immitis, a soil-dwelling fungus. Spores, or arthroconidia, are released into the air when infected soils are disturbed, e.g., by construction activities, agricultural operations, dust storms, or during earthquakes. The disease is endemic (native and common) in the semiarid regions of the southwestern United States.[239]

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[234] Myers, p. 15.
[235] *See* Figure C.6-7.
[236] Myers, p. 15.
[237] *Id.*
[238] DSEIR, p. C.9-1.
[239] Pless, p. 6.

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The DSEIR does suggest some mitigation; however, CEQA requires that all feasible mitigation required to reduce the impacts of the Project to a less than significant levelbe implemented.

B3-64 cont.

> According to Dr. Pless, the Applicant's proposed measures are
>
> a step in the right direction, [but] are not as comprehensive as the recommendations to limit exposure to Valley Fever developed by the County of San Luis Obispo's Public Health Department in conjunction with the California Department of Public Health in response to an outbreak of Valley Fever in construction workers at a construction site for a solar facility.[240]

Furthermore, the "[t]he U.S. Geological Survey ("USGS") has developed recommendations to protect geological field workers in endemic areas. An occupational study of Valley Fever in California workers also developed recommendations to protect those working and living in endemic areas."[241] Because the measures recommended by Dr. Pless, USGS, and the County of San Luis Obispo are required to mitigate impacts to less than significant and are feasible to implement,[242] the DSEIR must be revised to include these protections in an enhanced dust control plan.

B3-65

G. The DSEIR Lacks Substantial Evidence to Support its Conclusion that Construction Air Quality Impacts have Been Mitigated to a Level of Insignificance and Fails to Incorporate All Feasible Mitigation for Construction Impacts on Air Quality

The DSEIR's conclusions regarding air quality are not supported by substantial evidence in the record. According to air quality expert, Dr. Petra Pless, there are numerous problems with the DSEIR's analysis and the mitigation measures used to model Project impacts were not incorporated into the DSEIR. According to Dr. Pless, the problems with the DSEIR's conclusions and analysis are three-fold.

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[240] Pless, pp. 6 – 7.
[241] Pless, pp. 9 – 10.
[242] *Id.*
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First, the Applicant was required, but failed, to consult with the MBUAPCD regarding construction equipment required for Project development. The DSEIR inaccurately portrays the MBUAPCD guidelines applicable to the Project by omitting the last sentence of the guidelines related to regulation of construction equipment. The DSEIR states, "construction projects using typical construction equipment that temporarily emit ozone precursors are accommodated in the emissions inventory for State and Federally required air management plans and would not have a significant impact on ozone concentrations."[243] Dr. Pless points out that "[t]he DSEIR omits one crucial sentence from MBUAPCD's guidance: 'The District should be consulted regarding emissions from non-typical equipment, e.g., grinders, and portable equipment.'"[244] The MBUAPCD defines typical equipment as "dump trucks, scrappers [*sic*], bulldozers, compactors and front-end loaders that temporarily emit precursors of ozone."[245] However, the Project requires construction equipment that falls outside this definition, triggering the requirement for consultation. According to Dr. Pless,

> construction of the Revised Solar Project requires a number of non-typical equipment, including multiple pile drivers and generators, which have very high emissions compared to 'typical' construction equipment, one or more truck-mounted cranes, and several welders which are portable equipment; PG&E Upgrades require one or more crawler cranes, crawler drill rigs, and jet-fuel powered helicopters.[246]

Accordingly, further information is required regarding consultation with MBUAPCD.

B3-65 cont.

Second, the DSEIR incorrectly claims that emissions associated with PG&E upgrades "would not occur at significant levels due to the short construction period, the limited extent of equipment use, and the small footprint of the proposed upgrades."[247] However, the duration of construction does not alleviate the requirement that these impacts be assessed and analyzed. Accordingly, more information is needed regarding hours of use per day, horsepower, load factors, etc. that would support its claim that impacts associated with the upgrades are

B3-66

[243] DSEIR, p. C.4-4.
[244] Pless, p. 3 *quoting* MBUAPCD, CEQA Air Quality Guidelines, p.5-3 (2008).
[245] *Id.*
[246] Pless, p. 3.
[247] DSEIR, p. C.4-12.
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insignificant.[248] Without this information, construction emissions associated with PG&E upgrades cannot be calculated. The DSEIR, by omitting this information and any analysis, fails to provide substantial evidence to support its conclusions. A revised DSEIR that supplies this information and sets forth the analysis used to reach the DSEIR's conclusions must be circulated.

B3-66 cont.

Third, the DSEIR fails to incorporate the modeling assumptions used to determine the maximum emissions from construction. According to the DSEIR, the Project's PM10 emissions will not exceed MBUAPCD's threshold of significance.[249] According to Dr. Pless,

> [t]he DSEIR's modeling analysis determined that PM10 emissions from a maximum area disturbed of 50 acres per day combined with 35 haul truck trips importing 1,200 tons fill soil per day would not exceed the MBUAPCD's CEQA threshold of significance for PM10 assuming the site is watered three times per day and construction equipment is Tier 2 certified.[250]

Although the DSEIR incorporates the watering and maximum disturbance requirements, "the number of haul trucks per day (35) and the quantity of soil imported (1200 tons/day) are not reflected in the DSEIR's mitigation measures."[251] Because the DSEIR's significance determination rests on the incorporation of these assumptions, they must be included as enforceable mitigation. By failing to include these assumptions, the DSEIR's conclusion regarding Project impacts on air quality is not based on substantial evidence in the record.

B3-67

H. The DSEIR Defers The Formulation of Mitigation Measures in Violation of CEQA

B3-68

The Habitat Mitigation Plan in the DSEIR defers the formulation and adoption of specific enforceable mitigation measures to an uncertain future date. CEQA prohibits a lead agency from deferring the formulation of mitigation measures to some future time.[252] The DSEIR's approach to Habitat Mitigation Plan violates CEQA for two reasons.

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[248] *See* Pless, p. 4.
[249] DSEIR, pp. C.4-4 -5.
[250] Pless, p. 6.
[251] *Id.*
[252] CEQA Guidelines, § 15126.4(a)(1)(B).
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First, the Habitat Mitigation Plan provides a vague outline of tentative plans for the deferred formulation of mitigation measures. For instance, the plan requires a "[d]iscussion of measures to be undertaken to enhance…the on-site preserved habitat and off-site mitigation lands for listed and special-status species."[253] "Numerous cases illustrate that reliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decision-making; and consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment."[254] Indeed, in *Communities for a Better Environment v. City of Richmond*, the Court determined that the EIR "merely propose[d] a generalized goal … and then set[] out a handful of cursorily described mitigation measures for future consideration that might serve to mitigate … emissions resulting from the Project."[255] Similarly, here, the DSEIR sets forth cursorily described measures, none of which include performance goals or criteria. Indeed, biologist Scott Cashen points out that success of the plan cannot be ensured without the identification of key components and success criteria.

B3-68 cont.

Second, the approach taken in the DSEIR stultifies public participation, as the lack of proposed concrete measures prevents the public and decision makers from evaluating the mitigation measures for their effectiveness. "The development of mitigation measures, as envisioned by CEQA, is not meant to be a bilateral negotiation between a project proponent and the lead agency after project approval, but rather, an open process that also involves other interested agencies and the public."[256] Indeed, "[a] study conducted after approval of a project will inevitably have a diminished influence on decision making. Even if the study is subjected to administrative approval, it is analogous to the sort of post hoc rationalization of agency action that has been repeatedly condemned in decisions constructing CEQA."[257]

B3-69

The DSEIR proposes only a "generalized goal" of habitat and species monitoring, and then defers discussion, description and development of monitoring and preservation measures. This deferred mitigation effectively omits the public

[253] DSEIR, p. C.6-76.
[254] *Citizens for a Better Env't v. City of Richmond* (2010) 184 CalApp.4th 70, 93.
[255] *Id.*
[256] *Id.*
[257] *Sundstrom,* 202 Cal.App.3d at 307.
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from the decision making process and violates CEQA. The County must remedy this inadequacy in an updated and recirculated DSEIR. B3-69 cont.

VI. CONCLUSION

B3-70

The Project presents significant environmental issues that must be addressed prior to approval of the Project. The DSEIR's project description is improperly truncated. The DSEIR fails to adequately establish the existing setting against which to measure Project impacts on biological, groundwater and hydrological resources. The DSEIR also fails to include an adequate analysis of and mitigation measures for the Project's potentially significant impacts. The County failed to include a reasonable discussion of alternatives and improperly deferred the formulation of mitigation measures to post-approval studies for impacts associated with biological resource impacts. Due to these significant deficiencies the DSEIR violates the requirements of CEQA. The County must prepare a revised DSEIR that addresses these inadequacies and recirculate the revised DSEIR for public review.

Sincerely,

Meghan A. Quinn

MAQ:clv

Attachments

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