March 13, 2014

Via email and overnight delivery

Kathy McNeal Pfeifer, Project Planner
Kevin Drude, Deputy Director
County of Santa Barbara
Planning & Development
Energy Division
123 East Anapamu Street
Santa Barbara, CA 93101
kathypm@co.santa-barbara.ca.us

Re: CUYAMA SOLAR FACILITY AND COMPREHENSIVE PLAN/LAND USE DEVELOPMENT CODE AMENDMENTS PROJECT – County EIR No. 11EIR-00000-00005; SCH No. 2011-121-009

Dear Mr. Drude and Ms. Pfeifer:

Thank you for this opportunity to submit the following comments on behalf of Laborers International Union of North America, Local Union 89, and its members living in Santa Barbara County ("Commenters") concerning the Draft Environmental Impact Report ("DEIR") for the Cuyama Solar Facility and Comprehensive Facility and Comprehensive Plan/Land Use Development Code Amendments Project (County EIR No. 11EIR-00000-00005; SCH No. 2011-121-009) ("Proposed Project").

10-1

After reviewing the DEIR together with our team of expert consultants, it is evident that the document contains numerous errors and omissions that preclude accurate analysis of the Project. As a result of these inadequacies, the DEIR fails as an informational document and fails to impose feasible mitigation measures to reduce the Project's impacts.[1] Commenters request the Planning and Development Department, the Board of Supervisors, and your staffs address these shortcomings in a revised draft environmental impact report (RDEIR) and recirculate the RDEIR prior to considering approvals for the Proposed Project.

[1] We reserve the right to supplement these comments at later hearings and proceedings for this Project. *See Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109.

10-1 cont'd

Commenters have submitted expert comments from expert hydrogeologist Matthew Hagemann, C. Hg., who concludes that the DEIR incorrectly omitted an analysis of Diesel Particulate Matter ("DPM") emissions from the Proposed Project, which will significantly impact sensitive receptors. Mr. Hageman also critiques the DEIR's analysis of criteria air pollutant emissions because the emission estimates are inconsistent, and do not compare construction emissions to the San Luis Obispo Air Pollution Control District thresholds, despite being only 1.5 miles from the district boundary.

Regarding Hazardous Substances, Mr. Hageman concludes that the DEIR provides no baseline for potentially significant and unmitigated impacts on resident and worker exposures to pesticide residues likely present at the site. Despite the 60-year history of agricultural use of the Project site, the County did not take a single soil sample to determine if any hazardous residues are in the soil from historic and current pesticide application. By failing to quantify the presence of persistent chemicals in the soil, the DEIR cannot dismiss the impact to worker and public health as insignificant. Mr. Hageman's comments and curriculum vitae are attached hereto as Exhibit 1 and are incorporated by reference in their entirety.

Commenters have submitted comments from expert economist Dr. Michael Kavanaugh, Ph.D, who critiques the vagueness of the financial assurances for funding any decommissioning of the project. Given the uncertainties about the project's future success and the identity or economic health of future owners, Dr. Kavanaugh explains why the financial assurances should be limited to letters of credit. Dr. Kavanaugh also provides that the DEIR should have considered alternatives that reduce the size of the Proposed Project and combine the reduced project with additional distributed generation or energy conservation programs. Dr. Kavanaugh's comments and curriculum vitae are attached hereto as Exhibit 2 and are incorporated by reference in their entirety.

Commenters also submit expert comments from wildlife biologist K. Shawn Smallwood, Ph.D. Dr. Smallwood is very concerned about the significant inadequacy of one wildlife survey conducted at the site by consultant URS, limited to a four hour visit to the site. Dr. Smallwood indicates that a four hour, single-day survey is indefensible for detecting species' presence and the value of the site to special-status species. Dr. Smallwood also describes inaccuracies in the DEIR's environmental baseline for a number of species. Specifically, he notes that conclusions reached in the DEIR about the absence of species at the Project site are not supported by substantial evidence. Dr. Smallwood also critiques the DEIR's failure to address potential bird collisions with the Project, estimating that up to 431 bird fatalities per year would result from the solar array, and 83.5 bird fatalities/year per mile of transmission line and recommends avian mortality monitoring to start closing the scientific data gap surrounding those impacts. Dr. Smallwood also points out errors in the DEIR's dismissive discussion of wildlife

movement disturbances and habitat fragmentation. Dr. Smallwood is also very concerned about the significant inadequacy of the analysis of the proposed project's cumulative impacts to wildlife, noting that the DEIR erroneously portrays the cumulative impacts analysis as only needed when one or more nearby individual projects provided insufficient mitigation for one or more impacts. Dr. Smallwood's comments and curriculum vitae are attached hereto as Exhibit 3 and are incorporated by reference in their entirety.

10-1 cont'd

Each of Mr. Hagemann's, Dr. Kavanaugh's, and Dr. Smallwood's comments requires separate response in the Final EIR. For these reasons, a revised DEIR should be prepared prior to Project approval to analyze all impacts and require implementation of all feasible mitigation measures.

Commenters recognize that the development of renewable energy is critical for the reduction of greenhouse gas emissions. Renewable energy is essential to forestall the worst consequences of climate change and to help the state of California meet its ambitious emission reductions goals. Commenters support the development of renewable energy production, including the development of solar power generation through both appropriately sited solar "farms" and distributed solar power generation. All solar power projects must be properly sited and carefully planned to minimize impacts on the environment. Renewable energy projects should avoid impacts to air quality and sensitive species and habitats. Only by maintaining the highest standards in these and other ways can renewable energy production be truly sustainable. Unfortunately, the Proposed Project falls short in these and other respects. As a consequence, the DEIR will need to be revised and recirculated, as set forth below.

I. BACKGROUND

The Proposed Project consists of three components: (1) the Comprehensive Plan and Land Use Development Code Amendments (CP/LUDC Amendments), (2) a Solar Facility, and (3) Additions to PG&E's substation. DEIR, p. ES-1.

A. CP/LUDC Amendments

The Proposed Project requires approval of amendments to the Santa Barbara County Comprehensive Plan and Land Use Development Code ("CP/LUDC Amendments"). The two CP/LUDC Amendments required for approval of the Proposed Project are:

- Amend the Comprehensive Plan Land Use Element to conditionally allow for Utility-Scale Solar Photovoltaic (PV) facilities within Rural Area of the Cuyama Valley Rural Region, excluding Existing Developed Rural Neighborhoods (EDRN), on up to 600 acres of land designated Agriculture II (A-II) or Agricultural Commercial (AC) and zoned Agricultural II (AG-II), subject to discretionary approval of a Utility-Scale Solar Photovoltaic Facility Overlay

- Amend the LUDC, to allow for Utility-Scale Solar Photovoltaic facilities in the AG-II zone, in the Rural Area of the Cuyama Valley Rural Region, subject to discretionary approval of a Conditional Use Permit (CUP)

DEIR, p. 2-1. The CP/LUDC Amendments are a prerequisite for approval of the Solar facility. *Id.*, p. 2-2.

B. Solar Facility and Substation Additions

The Solar Facility includes: a 40 MW solar PV array (the "Solar Array"); a new 3-mile 70-kilovolt (kV) generation tie-line ("Gen-Tie"); and an approximately 19,600 square foot switchyard, located near the existing PG&E Cuyama Substation. *Id.*, p. ES-3. In addition, to accommodate the solar facility, PG&E plans to expand the substation area by 2,760 sf and install a 90-foot tall telecommunications pole within the substation area. *Id.*, p. 2-4.

The Solar Array would be located on approximately 327 acres of land in northeastern Santa Barbara County, currently actively cultivated by Wm. Bolthouse Farms, Inc., with the primary crops being carrots with rotational crops including onions and potatoes. *Id.*, p. ES-4. The Solar Array site is bisected by Kirschenmann Road forming two parts: west of Kirschenmann Road is the 167 acre Redlands field, and east of Kirschenmann Road is the 160 acre La Salle field. DEIR, p. 2-8. The 167 acre Redlands field is included in a 1,529-acre Williamson Act contract. DEIR, p. 2-8.

The project would require amendments to the Comprehensive Plan and Land Use Development Code and corresponding amendments to the Comprehensive Plan Land Use Element Map. Id., p. ES-4. The project would also require removal of 167 acres of land from a Williamson Act contract, concurrent with entry of a replacement contract and approval of a Conditional Use Permit (CUP) to allow for construction and operation of the Solar Array, Gen-tie including the switchyard, anemometer towers, and telecommunications facility. Id, p. ES-4. In addition, consistency rezones are requested for four parcels currently zoned Unlimited Agriculture (U) under Ord. No. 661 to Agriculture II (AG-II) along with lot-time adjustments, and approval of a Franchise Agreement for construction of the Gen-Tie line within the public right-of-way. *Id.*

10-2

II. STANDING

LIUNA Local 89 has hundreds of members who live in and around Santa Barbara County. These members will suffer the air quality impacts, water quality and quantity impacts, and wildlife impacts of a poorly executed or inadequately mitigated Project, just as would the members of any nearby homeowners association, community group or environmental group. Therefore, Local 89's members have a direct interest in ensuring that the Soitec Project is adequately analyzed and that its environmental and public health impacts are mitigated to the fullest extent feasible. *See Bakersfield Citizens for*

Local Control v. City of Bakersfield (2004) 124 Cal.App.4th 1184, 1198 ("unions have standing to litigate environmental claims").

III. LEGAL STANDARDS

A. The Williamson Act

The California Land Conservation Act of 1965, commonly referred to as the Williamson Act (California Government Code Sections 51200–51297.4), is applicable to specific parcels within the State of California. The Williamson Act enables local governments to enter into contracts with private landowners for the purpose of restricting specific parcels of land to agricultural or related open space uses in return for reduced property tax assessments. Private land within locally designated agricultural preserve areas is also eligible for enrollment under a Williamson Act contract. The Williamson Act program is administered by the Department of Conservation, in conjunction with local governments, which administer the individual contract arrangements with landowners.

Under the Williamson Act, a landowner commits a parcel to agricultural production for a 10-year period, during which time no conversion out of agricultural use is permitted. In return, the land is taxed at a rate that is based on actual use (i.e., agricultural production), as opposed to its unrestricted market value. Each year, the contract automatically renews unless a notice of nonrenewal or cancellation is filed. However, the application to cancel must be consistent with the criteria of the California Land Conservation Act as well as the criteria of the affected county or city. Nonrenewal or contract cancellation does not change a property's zoning. Participation in the Williamson Act program, which is voluntary for landowners, is dependent on a county's willingness to adopt and implement the program.

The Board of Supervisors may cancel a Williamson Act contract, but only if it has evidence to make one of the following findings: "(1) That the cancellation is consistent with the purposes of this chapter [,or] (2) That cancellation is in the public interest." Gov. Code § 51282(a).

The first of two ways in which the Board of Supervisors may cancel a Williamson Act contract is if the Board has evidence to make the finding that "the cancellation is consistent with the purposes of [the Williamson Act.]" Gov. Code, § 51282(a). Government Code section 51282, subsection (b) provides that "[f]or purposes of paragraph (1) of subdivision (a) cancellation of a contract shall be consistent with the purposes of this chapter only if the board or council makes all of the following findings:

> (1) That the cancellation is for land on which a notice of nonrenewal has been served pursuant to Section 51245.

> (2) That cancellation is not likely to result in the removal of adjacent lands from agricultural use.
>
> (3) That cancellation is for an alternative use which is consistent with the applicable provisions of the city or county general plan.
>
> (4) That cancellation will not result in discontiguous patterns of urban development.
>
> (5) That there is no proximate noncontracted land which is both available and suitable for the use to which it is proposed the contracted land be put, or, that development of the contracted land would provide more contiguous patterns of urban development than development of proximate noncontracted land.
>
> As used in this subdivision "proximate, noncontracted land" means land not restricted by contract pursuant to this chapter, which is sufficiently close to land which is so restricted that it can serve as a practical alternative for the use which is proposed for the restricted land.

Gov. Code, § 51282(b) (emph. added).

Alternatively, the Board may cancel a Williamson Act contract if the Board has evidence to make the finding that the cancellation is in the public interest pursuant to Government Code section 51282(a)(2). The Act delimits certain minimum findings justifying the public interest determination:

> [C]ancellation of a contract shall be in the public interest only if the council or board makes the following findings: (1) that other public concerns substantially outweigh the objectives of this chapter; and (2) that there is no proximate noncontracted land which is both available and suitable for the use to which it is proposed the contracted land be put, or that development of the contracted land would provide more contiguous patterns of urban development than development of proximate noncontracted land.

Gov. Code, § 51282(c). The cancellation provisions are construed narrowly. *Sierra Club v. Hayward* (1981) 28 Cal.3d 840, 864. "'[P]roximate, noncontracted land' means land not restricted by [a Williamson Act] contract…, which is sufficiently close to land which is so restricted that it can serve as a practical alternative for the use which is proposed for the restricted land." *Id*. at 86 ("'proximate' property means property close enough to the restricted parcel to serve as a practical alternative for the proposed use"). "Suitable for the use" means:

> that the salient features of the proposed use can be served by land not restricted by contract pursuant to this chapter. Such nonrestricted land may be a single parcel or may be a combination of contiguous or discontiguous parcels.

Id. The Court of Appeal has emphasized the limited role a developer's preferred size project *i.e.* use, plays in considering the mandatory findings for canceling a Williamson Act contract:

> Although the landowner's characterization of the proposed use may be considered, we conclude that the public agency must be responsible for determining in each case the salient features of that use, and for deciding if another parcel, or a combination of contiguous or discontiguous parcels, could serve a substantially similar use. The size of the proposed development should not be a significant factor in the agency's search for alternative sites, unless by its very nature the developed use requires for its success a minimum amount of land. Otherwise, landowners will be encouraged to propose larger developments for which suitable alternative sites are less likely. The policies of curbing unnecessary development and of preserving open space dictate sparing larger undeveloped parcels when smaller ones will do, and militate against creating an irresistible incentive for developers to think big.

Id. at 862. Where "land now stands in the way of orderly development serving public needs, and if its value for agricultural production is now negligible, it could be consistent with the purposes of the act to cancel the contract. Or, even if the land is still valuable for agriculture, it may be urgently needed for a use no other land can serve." *Id*. at 864.

B. CEQA

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances). *See*, *e.g.*, Pub. Res. Code § 21100. The EIR is the very heart of CEQA. *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. 14 Cal. Code Regs. ("CEQA Guidelines") § 15002(a)(1). "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'" *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52

Cal.3d 553, 564. 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." *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs*. (2001) 91 Cal. App. 4th 1344, 1354 ("Berkeley Jets"); *County of Inyo v. Yorty* (1973) 32 Cal. App. 3d 795, 810.

Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures. CEQA Guidelines § 15002(a)(2) and (3). *See, Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564. The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced." CEQA Guidelines §15002(a)(2). If the project will have a significant effect on the environment, the agency may approve the project only if it finds 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." Pub. Res. Code § 21081; CEQA Guidelines § 15092(b)(2)(A) and (B).

While the courts review an EIR using an "abuse of discretion" standard, "the reviewing court is not to 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A 'clearly inadequate or unsupported study is entitled to no judicial deference.'" *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal.3d 376, 391, 409, fn. 12 (1988). As the court stated in *Berkeley Jets*, 91 Cal. App. 4th at 1355:

> A prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process."

San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994) 27 Cal. App. 4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist*. (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946.

IV. THE PROPOSED PROJECT VIOLATES THE WILLIAMSON ACT

The main goal of the Williamson Act is for the "preservation of a maximum amount of agricultural land by discouraging the premature and unnecessary conversion of agricultural land for urban purposes." Gov. Code, § 15220. Additionally, the Williamson Act strives to promote food production security, encourage agricultural support industries, curb urban sprawl, avoid costly public facilities and services, and

promote environmental quality.[2] To advance these goals, the Act only allows local governments to cancel existing Williamson Act contracts in narrow circumstances where the necessary statutory criteria can be met.

10-3

All of the project site land west of Kirschenmann Road, totally 167-acres, is part of a 1,529-acre Williamson Act contract. DEIR, p. 2-8. Over the years, the Williamson Act contract that covers a portion of the Project site has helped preserve valuable agricultural resources. The implementation of the Proposed Project requires the Board of Supervisors' approval of cancellation of the Williamson Act contract, and concurrent reinstatement of the contract for the remaining 1,362 acres of Agricultural Preserve to allow for the construction and operation of the proposed solar facility. The Board, however, must meet the necessary statutory criteria prior to removing the Project site from Williamson Act protection.

The Board of Supervisors may cancel a Williamson Act contract, but ***only if it has evidence to make one of the following findings***: "(1) That the cancellation is consistent with the purposes of this chapter [, or] (2) That cancellation is in the public interest." Gov. Code, § 51282(a) (emph. added).

Generally, under the Williamson Act, the existence of an opportunity for another use of the land involved is insufficient reason for the cancellation of a contract. If Williamson Act contracts were allowed to be cancelled on a whim, the purpose and intent of the Act would be eviscerated.

In this instance, there is no substantial evidence in the DEIR for the Board of Supervisors to make either of these findings. Evidence in the DEIR makes clear that the Board can not make the necessary finding that cancelation is consistent with the Williamson Act because there is no evidence that "cancelation will not result in discontiguous patterns of urban development." Gov. Code § 51282(b). In fact, available evidence supports the converse finding that the proposed cancelation will result in discontiguous patterns of urban development, since the Proposed Project site is otherwise surrounded by agricultural use.

10-4

In addition, there is no evidence that there is no proximate noncontracted land both available and suitable for the part of the Project proposed to be built on Williamson Act contract land. The DEIR only evaluates alternative proximate noncontracted land for the entire solar project; it does not evaluate proximate noncontracted land for just the portion of the project site that is under Williamson Act contract. This analysis must be done for the Board to make any finding sufficient to cancel the contract.

[2] Peter Detwiler, The Williamson Act: Past, Present, Future?: Hearing Before the Senate Local Gov.t Comm., at p. 4 (2010).

V. THE COUNTY HAS NOT COMPLIED WITH CEQA

A. The DEIR Improperly Omits Description of Decommissioning and Restoration Activities.

CEQA requires agencies to describe the "whole of an action" which is being approved, including all components and future activities that are reasonably anticipated to be part of the project. *See* CEQA Guidelines § 15378(a). *See City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452-1453. This includes, but is not limited to "later phases of the project, and any secondary, support, or off-site features necessary for its implementation." *See* CEQA Guidelines, App. G. Courts have held that a decommissioning plan is "simply the final phase of the overall usage of the land" and must be considered with the construction and operational phases. *Nelson v. County of Kern* (2010) 190 Cal. App. 4th 252, 272.

10-5

A complete project description, including decommissioning, is necessary to ensure informed decision making and meaningful public comments. A future decommissioning plan to be worked out with the County long after the Project is approved and built, does not inform the public of the reasonable details of that project component, including the waste and emissions generated, water requirements, and amount of soil disturbances, among other things. Decommissioning activities may cause foreseeable significant impacts to agricultural resources, biological resources, and public health that have not been disclosed, analyzed, or mitigated. Furthermore, by deferring development of the decommissioning plan until after Project approval, the County improperly defers the development of mitigation measures, in violation of CEQA. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92.

10-6

Just as concerning as the lack of a substantive decommissioning plan is the lack of information about financial assurances of decommissioning and restoration. The DEIR improperly omits a discussion about what type of financial assurances would be required. As expert economist Mike Kavanaugh notes: financial assurances are extremely important to protect public interests and prevent public nuisances. Kavanaugh Comment, p. 11. Mr. Kavanaugh notes that financial assurances are important, in part, because decommissioning and restoration may be needed well before the power purchase agreement ends, or before the end of the useful life of the panels. Kavanaugh Comment, p. 12.

There are several reasons the project may fail at an early stage, including, among other reasons, bankruptcy, forces of nature (wind storms, seismic activity), and market forces if superior technology is developed. *Id.*, p. 12. Additionally, financial assurances are important because businesses fail. Kavanaugh Comment, p. 13. There is only a 17% chance that a firm survives to the 26th year. *Id*. According to Mr. Kavanaugh, "data show that in 40 years, it is highly unlikely that the business entity that agreed to decommission the project will be available to implement the plan." *Id.*

10-6 cont'd

Mr. Kavanaugh provides that the "practical consequence is that the decommissioning and restoration plan must be in place at the beginning of the project and be financially assured for the full amount of decommissioning and restoration at the start of the project." Kavanaugh Comment, p. 13. The "financial assurance instruments that are needed must be able to withstand a bankruptcy or other financial trouble from the start of the project and throughout the life of the solar project. These assurances must be sufficient to provide the funds needed to decommission the farm and restore the land at any time so that those who benefited from the activity pay the full costs of their enterprise." Kavanaugh Comment, p. 14.

As Dr. Kavanaugh explains, not all financial instruments are capable of providing adequate financial assurances. *Id.*, pp. 14-15. Generally, the instrument should:

- Attach to all transfers of site ownership;
- Make all responsible parties jointly liable;
- Be assured by an entity at arm's length from the site owner;
- Be able to withstand a responsible party's bankruptcy;
- Be clear about what signals the start of restoration, (e.g., a date certain; output falls below a threshold);
- Be payable to an entity capable of managing the restoration; and
- Provide in cash the purchasing power needed to restore the site.

Kavanaugh Comment, pp. 14-15. Dr. Kavanaugh concludes that, in, his opinion, "[o]nly a letter of credit is an efficient way to provide assurances while at the same time being able to withstand bankruptcy of the responsible parties." *Id*., p. 15.

The DEIR must identify the actual method of assurance required of the applicant, and should require "stand-by, evergreen letter of credit … to assure restoration." *Id*., p. 15. Without this clarity and an opportunity for the public to comment on the actual decommissioning plan and financial assurances, the DEIR is incomplete. The DEIR must fully describe the decommissioning plan, including financial assurances, so that the public and decision makers will be informed of the nature and feasibility of decommissioning activities, and can properly assess the Project's environmental impacts and require mitigation to ensure that all impacts are reduced to less than significant. As proposed, the County's failure to describe the decommissioning, restoration and financial assurances for both in the DEIR violates CEQA.

10-7

B. The DEIR's Environmental Setting and Baseline for Wildlife at the Site and Potentially Hazardous Chemical Levels are Undeveloped and Inadequate.

The DEIR skirts several potentially significant impacts that may result from the project by failing to look for them and establish a baseline supported by substantial

10-7 cont'd

evidence. The DEIR fails to look for certain plant and animal species, as well as pesticide residues and other contaminants in soils at the site.

The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. *Communities for a Better Environment v. So. Coast Air Qual. Mgmnt. Dist*. (2010) 48 Cal. 4th 310, 321. Section 15125(a) of the CEQA Guidelines states in pertinent part that a lead agency's environmental review under CEQA:

> must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time [environmental analysis] is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant.

CEQA Guidelines § 15125(a); *see Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124-125 ("*Save Our Peninsula*"). As the court of appeal has explained, "the impacts of the project must be measured against the 'real conditions on the ground,'" and not against hypothetical conditions. *Save Our Peninsula*, 87 Cal.App.4th 99, 121-123. As the court has explained, using such a skewed baseline "mislead(s) the public" and "draws a red herring across the path of public input." *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 656; *Woodward Park Homeowners v. City of Fresno* (2007) 150 Cal.App.4th 683, 708-711. Reasonable hazardous risks and wildlife baselines are not determined by failing to look. The DEIR should be held in abeyance until the Applicant completes necessary soil sampling and wildlife surveys at the site and appropriate additions and modifications to the DEIR prepared for public review.

1. The DEIR fails to provide a baseline derived from substantial evidence regarding the presence of biological resources.

10-8

Expert wildlife biologist Shawn Smallwood points out several serious flaws in the DEIR's baseline wildlife conditions and resulting impact analysis. Dr. Smallwood describes the incomplete and ill-timed biological survey done on only part of the site:

> On 29 September 2009 (I am assuming 2009, as no year was provided), two URS biologists spent 4 hours walking around the 327 acre site (URS 2010:1). This level of effort amounted to 82 acres per hour on a single day of one season in one year. Given this extremely minimal effort to assess potential biological impacts of the proposed project, I would have expected liberal application of the precautionary principle in risk assessment; that is, frequent assumption of species presence and of value to the site to special-status species. Instead, I repeatedly read the opposite type of conclusion in URS (2010). Biologists who are so ready to dismiss the potential occurrences of special-status species ought to spend a defensible amount of time on site looking for the species

Smallwood Comment, p. 2. *See* DEIR, App. F, Biological Resources Assessment URS 2010 ("URS 2010"), p. 1.

10-8 cont'd

In addition to the cursory nature of the survey, Dr. Smallwood raises serious questions about the qualifications of URS biologists:

> URS (2010:5) also demonstrated a lack of qualification for making a site assessment for wildlife when it wrote, "*Canine tracks (either domestic dog and/or coyote) were observed along the dirt roads around the perimeter of the site, indicating that these animals were using roads as travel ways at least some of the time*." Coyote tracks are easily distinguished from domestic dog tracks by lack of claw indentations, because coyotes wear their claws down. Other traits distinguishing coyote tracks from dog tracks include size, shape of pads, and gait pattern. Biologists unable to identify coyote tracks probably should not be assessing potential project impacts.

Smallwood Comment, p. 2. *See* DEIR, App. F, URS 2010, p. 5. Althouse and Meade seem to make a more substantial effort to visit the project site on multiple days, however the time spent on the visits is not reported. Smallwood Comment, p. 2. The increased time spent on site, Dr. Smallwood notes, was expressed by a much greater number of wildlife species' detections on site compared to the URS report detections. Smallwood Comment, p. 2.

In addition to the inadequacy of the URS Survey, conclusions reached about the absence of species at the Project site are not based on substantial evidence.

i. Southwestern pond turtle

10-9

The DEIR concluded that no suitable habitat exists on the project site, including in the irrigation pond on site based on two CNDDB records that exist of southwestern pond turtles 12.5 miles south of the site. DEIR, p. 3.4-9. But no water bodies exist 1.5 miles south of the project site, and the only water bodies within 1.5 miles of the site include the irrigation pond on site, and another irrigation pond a third of a mile south of the project site. Smallwood Comment, p. 4. Dr. Smallwood's expert opinion is that the conclusion is that the DEIR misapplied the error buffers typically added by CNDDB to protect the locations of special-status species. Smallwood Comment, p. 4. According to Dr. Smallwood, it is possible that the two CNDDB records were form the project site.

ii. Laggerhead shrike

10-10

Despite characterizing the loggerhead shrike as present at the Project site, the DEIR inaccurately downplayed the likelihood of loggerhead shrikes foraging at the site because carrots were too dense and tall to permit suitable foraging. Dr. Smallwood has recorded loggerhead shrikes many times, including within and along the edges of dense

stands of tall vegetation. Smallwood Comment, p. 5. Dr. Smallwood also notes that the field in question is not always planted with carrots, and carrots that are planted are not always tall and dense in cover. *Id.*

iii. Northern Harrier

10-11

The DEIR found that northern harriers were unlikely to nest on the Project site because the species is not known to next in Cuyama Valley. DEIR, p. 3.4-11. Dr. Smallwood's expert opinion is that a lack of nesting records likely reflects a lack of surveys more than a lack of actual nesting. Smallwood Comment, p. 5. He also notes that breeding range extends to northeast Santa Barbara County, according to the current official source of bird species of special concern (Shuford and Gardali 2008), which neither environmental consultant relied on in preparing the DEIR. *Id*.

iv. Tricolored Blackbird

10-12

Tricolored blackbirds were seen foraging on site, according to the DEIR, but in the same sentence, the DEIR concluded that the Project site is not expected to be used by the tricolored blackbird in a "substantial manner critical to its daily needs." DEIR, p. 3.4-13. Dr. Smallwood finds it "absurd to say that a species was seen foraging on site, but then to argue that this foraging wasn't important to the animals doing the foraging." Smallwood Comment, p. 5.

v. Effect of Tilled Land

10-13

The DEIR ruled out or downplayed the nesting and foraging onsite by burrowing owls, ferruginous hawks, golden eagles, American badger, and the San Joaquin kit fox because the agricultural fields onsite are routinely tilled maintaining the absence of prey species. DEIR, p. 3.4-9. These conclusions are not based on substantial evidence.

Dr. Smallwood found good reason to expect burrowing owls to next onsite sometimes because burrowing owls usually do not attempt to nest within crops, but rather along borders and because ground squirrel burrows were observed onsite. Smallwood Comment, p. 4.

10-14

While the DEIR concluded that tilling maintains absence of prey species (DEIR, p. 3.4-9), Dr. Smallwood found that tilling may actually benefit ferruginous hawks. *Id.* Access to prey due to exposure from tilling can be just as important, if not more important, as the presence of prey. *Id*. Additionally, URS reported seeing rabbits, pocket gopher mounds, ground squirrel burrows, and kangaroo rat signs on site, all of which are prey of the ferruginous hawk. *Id*. Ferruginous hawks, golden eagles, American badgers, and the San Joaquin kit fox were also ruled out as not foraging onsite because of a supposed lack of prey on site. But, as Dr. Smallwood points out, this argument is at odds with the observations of URS, which reported identified prey of

these species onsite including rabbits, ground squirrels, multiple species of bird, pocket gophers, and kangaroo rats. Smallwood Comment, pp. 4-5.

The DEIR should be revised based to include substantial evidence, including the evidence of Dr. Smallwood's expert comments.

2. The DEIR fails to provide a meaningful baseline for potential health risks from exposure to pesticide residues likely to be present at the site.

10-15

Despite the likely application of agricultural pesticides and herbicides at the site for approximately 60-years, the County did not take any soil samples to determine if any hazardous residues are in the soil. DEIR, App. K, p. 6-7. The analysis of potential hazardous waste conditions in the DEIR was based on the preparation of a November 2011 Preliminary Hazardous Assessment (PHMA) (Appendix K). As Mr. Hageman notes in his comment, submitted herewith, the PHMA failed to adequately evaluate and disclose the potential for pesticide residuals in the soil to pose a health risk to construction workers and nearby residents. Hageman Comment, p. 1. By failing to quantify the presence of persistent chemicals in the soil, the DEIR fails to identify any baseline supported by substantial evidence from which to assess the significance of potential impacts of workers' exposure to disturbed soils potentially contaminated with pesticides.

The Project site is currently being used as an active agricultural field, and has been used for agricultural purposes since between 1940 and 1954. DEIR, App. K, p. 6-7. The County admits that "pesticides, herbicides, and associated metals may be present in near-surface soils at residual concentrations" (DEIR, p. 3.7-3) and that "older pesticides can linger in the soil for many years" (*Id.*, p. 3.7-4). According to the DEIR, three types of pesticides were applied to the Solar Array site in 2011, including 9,720 gallons of K-PAM HL used on the Redland field. DEIR, p. 3.7-3. K-PAM HL is considered hazardous to humans if it is inhaled or comes into contact with skin or eyes, and it can cause corrosive skin damage or an allergic reaction through skin contact. *Id.*, p. 3.7-4. The purchase and use of K-PAM HL are restricted by the EPA and the Department of Pesticide Regulation, and farm worker applicant protections and measures to prevent pesticide drift are required. *Id.*

Additionally, as Mr. Hageman explains:

> Organochlorine pesticides, such as DDT, DDE, Chlordane, and Dieldrin, were commonly applied to agricultural land in the 1940s until they were banned in the early 1970s. Residual concentrations of organochlorine pesticides may be found in soil on land farmed during that time frame along with elevated levels of arsenic and lead which were also used in pesticides prior to the 1950s. [¶] The presence of these pesticides may persist in the soil for hundreds of years despite being banned in the 1970s. The U.S. EPA has determined organochlorine pesticides,

such as Dieldrin, 4,4'-DDE, and 4,4'-DDT, to be probable human carcinogens. DDT is also known to affect the nervous system.

Hageman Comment, p. 2.

10-15 cont'd

The County ignores all of this evidence, and instead makes conclusions about the environmental baseline unsupported by substantial evidence. Despite the PHMA finding that the site has been in agricultural use since 1954 at the latest, it concludes that "no significant levels of residual pesticides or herbicides are anticipated to exist on the Project site as a result of historic agricultural operations" DEIR, App. K, p. 6-7. The County makes the conclusion based on a Mitigated Negative Declaration for an unrelated project that found that "prior to the 1960s, agricultural practices in the Cuyama Valley were limited to dry farming, which involved few fertilizers or pesticides." *Id*. Similarly, looking at more recent agricultural use, the County concludes that "potential soil contamination as a result of these agricultural activities is considered to be unlikely" because Cal-EPA's department of pesticide regulations establishes regulations regarding agricultural chemical use, which are designed to prevent pesticides from being used in such a way as to jeopardize or cause injury to others. *Id*., App. K, p. 6-8.

The County's conclusions are not based on substantial evidence. Hageman Comment, p. 2. "Substantial evidence" is defined in the CEQA Guidelines as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." CEQA Guidelines, § 15384(a). Substantial evidence does not include speculation or unsubstantiated opinion. *Id.* Substantial evidence includes "facts, reasonable assumptions predicated on facts, and expert opinions supported by facts." CEQA Guidelines, § 15384(b).

To begin, the conclusions reached by the County are irrelevant to the CEQA analysis: whether or not the County "anticipates" significant levels of residual pesticides or herbicides, or whether the County considers soil contamination "unlikely" says nothing about whether or not significant levels of contamination actually exist. An EIR must contain facts and analysis, not just an agency's bare conclusions or opinions. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

The County has provided no facts from which reasonable assumptions about the project site can be made. For example, a broad statement about the general agricultural practices in the whole of the Cuyama Valley says nothing about whether pesticides or herbicides were historically used at the Project site, and does not constitute substantial evidence about the presence or absence of historical contamination. Similarly, it is not reasonable to make a conclusion about the lack of soil contamination at the Project site because pesticide and herbicide application and handling are regulated by Cal-EPA.

By failing to conduct soil sampling and analysis at the site, the DEIR fails to identify any baseline supported by substantial evidence from which to assess the significance of potential exposure to workers who may be exposed to contamination by touching the soil or breathing the dust.

Rejecting an EIR for failing to include a health risk assessment addressing toxic air contaminants from a proposed airport expansion, the Court of Appeal explained that "The [agency] must meaningfully attempt to quantify the amount of mobile-source emissions that would be emitted from normal operations conducted as part of the [development plan], and whether these emissions will result in any significant health impacts. If so, the EIR must discuss what mitigation measures are necessary to ensure the project's conformance with all applicable laws, ordinances, standards, and regulations related to public health protection. *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1371. The County, likewise, cannot simply ignore the general risk identified by the Phase I ESA. The County, like the airport in *Berkeley Jets*, must gather in relevant information, analyze and report on the risks of exposures to soil contamination at the Project site.

10-15 cont'd

In order to gather in substantial evidence of the pesticide residual baseline at the site, the Project must proceed to a Phase II environmental site assessment ("ESA") that includes the collection of samples for the analysis of organochlorine pesticides, arsenic and lead at the project site, including along the gen-tie route and switchyard. Hageman Comment, pp. 3. If sample results exceed the screening thresholds, a human health risk assessment should be conducted to quantitatively estimate health impacts. *Id.*, p. 4. By failing to quantify the presence of persistent organochlorines including DDT and DDE, as well as more recent pesticides applied at the site, the DEIR fails to identify any baseline supported by substantial evidence from which to assess the significance of potential impacts the workers and the public from exposure to disturbed soils contaminated with pesticides.

The need for soil sampling under a Phase II Environmental Site Assessment ("ESA") is critical because the DEIR does not identify any mitigation to prevent health impacts from pesticide residues. Hageman Comment, p. 3. The DEIR notes that the nearest residence is located 502 feet from the Project's eastern border (DEIR, p. 2-11), in a direction that is downwind of the prevailing northwest wind direction (DEIR, p. 3.3-1). Mr. Hageman notes that people in the residence, who may include sensitive individuals like small children or the elderly, may face risks from inhalation of dust generated during construction activities that may be laden with pesticides that are undisclosed in the DEIR. Hageman Comment, p. 3. In addition, there is a high potential for construction worker exposure to soils that may be contaminated with hazardous pesticides through inhalation and dermal contact with soil and dust. *Id*., p. 4.

The DEIR identifies dust control measures associated with preventing impacts to adjacent agricultural operations (Standard Mitigation Measures AIR-01, DEIR, p. 3.2-22), but Mr. Hageman provides that these are inadequate to project public health

10-15 cont'd

because they do not address potential toxins associated with the dust. *Id*. Additionally, since the County did not conduct soil sampling and calculate the risk from inhalation of dust, there is no analysis of the potential for mitigation measures to reduce impacts to health. Additionally, the DEIR provides for only a Development Standard and Mitigation Measure to Prepare for Unknown Contingencies (SPEC-HAZ-1) that states:

> If unknown wastes or suspect materials are discovered by the contractor during grading/construction activities, which he/she believes may involve hazardous waste/materials, the contractor will take the following actions.
>
> - Immediately stop work in the vicinity of the suspected contaminant, removing workers and the public from the area.
> - Notify the County Planning & Development's Compliance Planner.
> - Secure the areas as directed by the County's project engineer.
> - Notify the Santa Barbara County Fire Department's Hazardous Waste/Materials Coordinator.

DEIR, p. 3.7-28. But Mr. Hageman explains that these measures are inadequate:

> Pesticide residuals in soil that may be harmful to human health cannot be seen or smelled and organochlorine pesticides, arsenic and lead can be harmful to health at part per million concentrations. Therefore, plans to take action if "unknown wastes or suspect materials" are discovered are inadequate. Only soil sampling will reveal if pesticides are present in soil. Failure to sample for pesticides, and to include the results in the DEIR, constitutes inadequate disclosure of baseline conditions at the Project site.

Hageman Comment, p. 3.

Soil sampling and a Phase II ESA report should be prepared for the site and the DEIR revised to include a proper baseline of hazardous materials and exposure risks at the site, and if needed, appropriate mitigation measures must be included.

C. The DEIR Fails to Disclose, Analyze and Mitigate All Potentially Significant Impacts.

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in the EIR. *See*, *e.g.*, Pub. Res. Code § 21100. The EIR is the very heart of CEQA. *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109. A prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals

of the EIR process." *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 722]; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946.

The comments of expert wildlife biologist Shawn Smallwood, Ph.D, expert hydrogeologist Matthew Hagemann, C. Hg., and expert economist Michael Kavanaugh, Ph.D., submitted herewith, demonstrate that the Project will have numerous impacts on workers at the site, air quality, wildlife, and other impacts that have either been ignored entirely or analyzed inadequately. A revised EIR is required to analyze and mitigate these impacts.

1. The impact of diesel particulate matter emissions from project construction were not analyzed and constitute a significant impact that must be mitigated.

10-16

The DEIR discusses the air quality thresholds of significance on page 3.3-13. According to the County's Environmental Thresholds and Guidance Manual (County of Santa Barbara 2008) a project will have a significant impact if it individually or cumulatively results in any of the following:

- Produces emissions which may affect sensitive receptors (e.g. children, elderly or acutely ill).

- Produces toxic or hazardous air pollutants in amounts which may increase cancer risk for the affected population.

Diesel Particulate Matter is the primary toxic air pollutant associated with construction of the Proposed Project that may affect nearby sensitive receptors. Hageman Comment, p. 9. The DEIR notes a residential receptor "approximately 502 feet [153 meters] from the Solar Array's eastern border; with three additional ranchettes located approximately 1,300 to 2,000 feet from the site." DEIR, p. 3.9-16. However, impacts on these residents from DPM emissions during Project construction were not considered in the DEIR. Mr. Hageman reviewed the Proposed Project and conducted a screening analysis that indicates emission of diesel particulate matter ("DPM") generated by the Proposed Project will exceed applicable thresholds of significance. Hageman Comment, p. 9.

Mr. Hageman's analysis determined that a Health Risk Assessment ("HRA") was warranted based on emissions of DPM generated during construction and the proximity of sensitive receptors. Hageman Comment, p. 9. According to the 2012 SBCAPCD *Modeling Guidelines for Health Risk Assessments*, a cancer risk of 10 in one million is the risk notification level. The document states, "if any of the above significant risk thresholds are met or exceeded, the District will require public notification and risk reduction. If the HRA was submitted for a new project, the project will be denied or be

10-16 cont'd

required to be revised to include measures that reduce the risk below the significance thresholds."[3]

Mr. Hageman's modeling estimates show that the Santa Barbara County Threshold of 10 in 1 million cancer risk would be exceeded for both Child and adult sensitive receptors. Hageman Comment, p. 12. Mr. Hageman's modeling estimates show that cancer risks for adult exposure are greater than 1.4 in 100,000, and for children exposure cancer risks exceed 2.7 in 100,000. *Id.* Based on the SBCAPCD Guidelines, Mr. Hageman's preliminary dispersion modeling results indicate that the Proposed Project would be denied, and revisions to the project would be required to reduce the risk below the threshold and prevent unacceptable residential exposure to carcinogenic air pollutants. Hageman Comment, pp. 9-12. The DEIR must be revised to include an analysis and mitigation of impacts from DPM.

2. The DEIR's analysis of criteria pollutants is incomplete.

10-17

The DEIR and its supporting technical appendices provide inconsistent estimates of the amount of criteria air pollutants emitted by construction of the Proposed Project. Hageman Comment, p. 4. Estimates of the amount of quantities of cut and fill to be required by Project grading vary widely in the technical appendices and in the DEIR, and as a result, estimates of emissions also vary widely. *Id.*, p. 6. An October 2012 Air Quality/Greenhouse Gas Assessment (Appendix C), prepared in support of the DEIR, estimates mitigated PM_{10} emissions to be 18.84 tons per year and mitigated NO_X emissions to be 24.22 tons per year. These estimates were based on a volume of 554,500 cubic yards of cut/fill to be balanced on-site. DEIR, App. C, p. 38. These emission rates were revised in a December 18, 2013 Update Memorandum ("2013 Update") letter report, which estimated PM_{10} emissions of 2.57 tons per year and NO_X emissions of 19.41 tons per year . App. C, 2013 Update, p. 5. Mr. Hageman calculated the grading volumes assumed in the December 18, 2013 letter report to be a total of 207,500 cubic yards of material as itemized in Phase 2 through Phase 5 construction activities (unnumbered pages and tables in App. C letter) compared to the October 2012 estimate of 554,500 cubic yards of cut and fill to be balanced on-site. Hageman Comment, p. 6; DEIR, App. C, p. 38. The DEIR estimates an entirely different number for grading quantities necessary for construction of the Proposed Project: 155,000 cubic yards (cy) of cut and 124,000 cy of fill. DEIR, p. 2-28.

The DEIR should be revised to clarify emission estimates of PM_{10} and other criteria pollutants that will be generated during construction. Hageman Comment, p. 6. "An accurate estimate is critical for understanding the impact the construction of the Project will have on air quality in the Santa Barbara and the San Luis Obispo air districts." Hageman Comment, p. 6.

[3] SBCAPCD, 2012. Modeling Guidelines for Health Risk Assessments. Santa Barbara County Air Pollution Control District. August 2012. Section 3.5, p. 11.

10-18

In addition to inconsistent emissions estimates, the DEIR's air quality analysis is incomplete because it fails to recognize the impact of the Proposed Project on the air quality of the San Luis Obispo Air Pollution Control District (SLO APCD), located just over a mile to the east of the Proposed Project. *Id.*, p. 4. The Santa Barbara County Air Pollution Control District ("SBCAPCD") has not established short-term construction related thresholds for PM_{10} or NO_X and ROGs. DEIR, p. 3.3-10. The DEIR, therefore, finds project emissions to be less than significant. *Id*.

Mr. Hageman points out that if the DEIR looked at impacts to air quality under the jurisdiction of the San Louis Obispo Air Quality Management District, construction emissions may be found to be significant. Hageman Comment, p. 6. SLO APCD thresholds should be considered because the district has established thresholds for emissions from construction, and the district is located just 1.5 miles west/southwest of the Project in a downwind direction. *Id.*, pp. 6-7. Taken together, these deficiencies fail to support an analysis that conclusively determines the impact of Project construction on air quality. *Id.*, p. 4. The SLO APCD threshold should be considered in a revised DEIR that includes a singular, consistent estimate of the cut and fill volumes to be required by Project construction and an estimate of construction emissions based on this estimate. *Id.*, p. 7. Any exceedances of the thresholds should be mitigated in accordance with SLO APCD guidelines, including the preparation of a construction activity management plan.[4] *Id.* If thresholds are exceeded, the mitigation measures provided in Mr. Hageman's comments should be included. *See* Hageman Comment, pp. 7-8.

3. The DEIR's dismissive discussion of wildlife movement disturbances and habitat fragmentation is not supported by substantial evidence.

10-19

The DEIR mentions only to dismiss any impact of the Project on wildlife movement or habitat fragmentation. In effect, the DEIR does not address these impacts and, as a result, errs as a matter of law.

Flaws in the DEIR's analysis of habitat fragmentation are clear based on the statement that "…although construction of the proposed Solar Facility and the PG&E Cuyama Substation Additions would result in the loss of foraging habitat for wildlife, hundreds of acres of suitable foraging habitat would remain available within 1 mile of the Project site. Therefore, this impact would be less than significant and no mitigation is required (Class III)." DEIR, 3.4-25. Again, the County provides no evidence in support of this conclusion, instead merely assuming that areas next to the project are uninhabited by the special-status species. Smallwood Comment, p. 3. According to Dr. Smallwood, often when wildlife attempt to relocate because of loss of habitat, they find

[4] http://www.slocleanair.org/images/cms/upload/files/CEQA_Handbook_2012_v1.pdf, p. 2-2

10-19 cont'd

that other suitable habitat is already occupied by other members of the species, which results in conflict between the animals. Id. "No doubt, a few animals do manage to move over without encountering conflict, but most often there will be contests and ultimately there will be a numerical reduction of the population to the same degree as would have happened had the developers killed the residents." Id. This cursory analysis of habitat fragmentation is insufficient under CEQA and must be revised to include evidence on which it bases its conclusions.

10-20

Additionally, The DEIR mentions only to dismiss any impact of the Project on wildlife movement. The Biological Resources Assessment states that the "project site and areas immediately adjacent possess no features that would be characteristic of a wildlife movement corridor." DEIR, App. C, URS 2010, p. 4. As Dr. Smallwood explains, the DEIR's effort to limit its wildlife movement discussion to the presence of a "corridor" as well as the assumption that a discernible "corridor" is central to a project's environmental impacts on wildlife movement is a "red herring because the CEQA standard is not whether a project will interfere with a wildlife movement corridor, but rather whether it will interfere with wildlife movement in the area." Smallwood Comment, p. 9.

10-21

In addition to inadequate impact assessment, the County completely omitted any analysis of the Proposed Project's impacts on stop-over habitat of birds, including migrating songbirds. Smallwood Comment, p. 3.

4. The DEIR fails to fully disclose, analyze, and mitigate potentially significant impacts associated with avian collisions.

10-22

The DEIR does not adequately analyze or mitigate impacts to avian species from collisions with the Project's solar panels and transmission lines. Although the collision risk posed by utility-scale solar projects to birds is not entirely understood, it is known to occur. Smallwood Comment, p. 6. The DEIR dismissed the possibility that the PV panels would pose a collision risk to birds arguing that the impact applies only to water fowl. DEIR, p. 3.4-28. As Dr. Smallwood notes, however, waterfowl are not the only birds that run into PV arrays. Smallwood Comment, p. 5. The DEIR fails to assess or mitigate the likely impacts of avian collisions with the Project's panels and support structures.

10-23

In his comment, Dr. Smallwood carefully analyzes the available collision study for a solar project. *Id.*, pp. 6-8. Adjusting that study's methods to reflect more recent science, Dr. Smallwood predicts that the Project may result in 431 bird fatalities per year. Smallwood Comment, pp. 5-8. The DEIR should be supplemented and recirculated to address this potential impact.

Based on this potential impact, the DEIR's mitigation measures should be supplemented to include collision and mortality monitoring. As Santa Barbara and other

counties plunge ahead to approve more and more industrial scale solar facilities, they do so with little consideration and no data regarding these projects' direct or cumulative impacts on avian species from collisions with the solar panels. Given the similarity in glare for a large solar project and a body of water, it is understandable how solar facilities may be having serious impacts on avian species. Dr. Smallwood has offered his expert opinion based on the available monitoring data. Smallwood Comment, pp. 14-15. However, overall, Dr. Smallwood explains that "[v]ery little is known of the types or magnitudes of impacts on wildlife caused by industrial solar projects." *Id*., p. 14. Because Dr. Smallwood's expert comments are evidence of the likely significant impact the Project will have on sensitive and protected bird species, the Project should include mitigation to monitor the actual impacts of the Project should it be constructed. Dr. Smallwood outlines an appropriate monitoring scheme for avian collisions with the Project:

10-24

> Qualified biologists should be funded to search the ground between solar panel arrays on a monthly basis for at least one year to determine whether collision fatalities are an issue. Searches should be done on foot. I suggest searching randomly or systematically selected arrays of solar panels to the extent that equals 20 person-days per month. If collision fatalities are deemed to be an issue, then I suggest extending the fatality monitoring for another two years and adding searcher detection trials to facilitate the accurate estimation of fatality rates. Furthermore, I would suggest performing an analysis of the pattern of fatalities to identify spatial or other trends that can inform mitigation measures to reduce fatality rates. Basic methods for fatality monitoring at a solar energy plant can be found in McCrary et al. (1986), and updated methodology can be found in Smallwood (2007, 2009, 2013), Smallwood and Karas (2009), Smallwood et al. (2013).

Smallwood Comment, p. 14. Without such monitoring, the County will continue to approve solar utilities naive to the actual impacts on migratory and protected bird species. Likewise, without such monitoring, the County will not be able to know whether the applicant is complying with any mitigations derived from its yet-to-occur assessment of this impact.

10-25

Similarly, the DEIR does not analyze or provide mitigation measures for avian impacts from transmission line strikes. A study of bird collisions with a transmission line in Mare Island, California reported 85.3 bird fatalities per mile of transmission line per year along the portion of line overlaying hayfields, and the rate was eleven times greater along portions that overlaid salt ponds (Hartman et al. 1992). Smallwood Comment, pp. 8-9. In Dr. Smallwood's expert opinion, "A collision-caused fatality rate can and should be predicted for the three miles of generation tie-lines … and a worst-case fatality rate must be predicted so that the public and decision-makers can make rational decisions about the project." *Id.*, p. 8.

10-25 cont'd

By failing to address these likely impacts, the DEIR is deficient as a matter of law. The DEIR should be revised to include an analysis of avian collisions with panels and transmission lines, and mitigation should be proposed to minimize, reduce, rectify, or compensate for avian collisions. Relatedly, the mitigation measures should be supplemented to include avian behavior surveys in advance of construction, in order to characterize avian flight paths and the types of behaviors of endemic species that could contribute to collision risk (Smallwood et al. 2009, 2010). *Id.*, pp. 11-14.

10-26

Additionally, the DEIR should include discussion of other mitigation measures and mitigation monitoring. Dr. Smallwood suggests the following feasible mitigation measures that would avoid, minimize, and mitigate the Project's impacts to sensitive biological resources, which were not considered in the DEIR:

- **Measure to rectify Impacts:** The project owner provides compensatory mitigation in the form of donations to local wildlife rehabilitators. The project will cause injuries to wildlife, so the owner should be responsible for contributing to the care and release to the wild of injured animals. Rehabilitation facilities typically operate on very small budgets, so struggle to maintain appropriate staff levels and facilities. More reliable funding is needed, and this funding should come from those causing the impacts. Smallwood Comment, p. 16.

- **Line Marker:** The DEIR should require the use of line markers to help birds see and avoid gen-tie lines. The largest impact on birds from the gen-tie lines will be from collisions, not electrocutions. The DEIR must include a discussion of collision impacts and measures to mitigate these impacts. Smallwood Comment, p. 10.

- **Fencing:** Cyclone fencing can entangle and kill wildlife. Care should be taken when planning and installing fencing. More details about fence construction should be provided in the environmental review documentation. Smallwood Comment, p. 10.

- **Mitigation Monitoring:** There should be consequences for not achieving mitigation objectives or performance standards. The project proponents should be required to provide a performance bond in an amount that is sufficient for an independent party to achieve the mitigation objectives originally promised, and in this case, the promises should be much more substantial. A fund is needed to support named individuals or an organization to track the implementation of mitigation measures. Report deadlines should be listed, and who will be the recipients of the reports.

Id., pp. 10, 16. In Dr. Smallwood's expert opinion, the DEIR's "lack of specific mitigation monitoring details renders it inadequate and uncertain, and makes it impossible to gauge whether or to what extent any mitigation measures will lessen potentially significant impacts on species. If these measures are not clearly laid out in the EIR,

then there will be no basis to determine that impacts will be less than significant once implemented. Furthermore, without adequate funding allocated in advance, there is no certainty that any proposed mitigation monitoring will actually take place." *Id.*, p. 16.

5. Conversion of prime farmland to solar "farms" may lead to urban decay.

10-27

Economist Dr. Michael Kavanaugh, Ph.D. has submitted expert comments concluding that the conversion of prime farmland to an industrial solar "farm" may lead to urban decay and urban blight since solar farms generate almost no ongoing employment, while agriculture creates large numbers of jobs for the local economy. Thus, the conversion of prime farmland to industrial solar farms may lead to unemployment in the County and region. The DEIR is inadequate because it fails to analyze this impact entirely.

Dr. Kavanaugh states:

The changes to the Land Use Development Code and the construction of solar arrays will reduce land available for agriculture and thereby will reduce agricultural output, employment, and earnings. These initial reductions will put downward pressure on total regional agricultural output, employment and earnings by a multiple of the initial reduction (e.g. reduction of one agricultural worker may lead to an indirect and induced loss of three workers in the region). These reductions in output, employment and earnings may result in deterioration in residential and commercial structures.

This pathway is in addition to the effect of disamenities on structures. Since no cumulative effect of these land use changes on residential and commercial structures is conducted in the environmental assessment, designing mitigation measures is made more difficult.

. . .

The proposed code changes that allow for solar arrays to take six hundred acres of agricultural land in the Cuyama Valley signal that an economic change is contemplated for this regional economy. This economic change is foreclosing, probably permanently, some of the direct, indirect, and induced output, employment and earning opportunities related to agriculture. And the PV projects that are replacing agriculture are unlikely to replace the employment and earnings losses with permanent PV employment opportunities.

. . .

As land use for PV arrays expands in this region it creates the potential to put downward pressure on local employment and earnings. Unlike labor, which can move to another location, structures -- both residential and commercial -- are

10-27 cont'd

> immobile. The job losses may be permanent especially if they occur in weak labor markets. . . While declines in income may be met with a variety of responses, income reductions generally result in reduction in spending and draw downs of savings. The reduction in spending may take many forms including but not limited to: reductions in home maintenance and delinquencies on mortgages. These are known to lead to deterioration of residential and commercial structures. Structures, if left vacant or not maintained, will deteriorate. Vacant, abandoned or deteriorating structures, in turn, may lead to social problems (blight) that are costly and difficult to solve.

Kavanaugh Comment, pp. 4-5.

The courts of appeal have held that when there is substantial evidence that a project may result in urban decay, then the EIR must analyze this impact and propose feasible mitigation measures and alternatives. Dr. Kavanaugh's expert comments constitute substantial evidence that the Project may result in urban decay. Yet, the EIR fails to analyze this impact entirely, rendering the EIR inadequate as an informational document.

In *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) (124 Cal.App.4th 1184) (Bakersfield Citizens), the court expressly held that an EIR must analyze a project's potential to cause urban decay if there is substantial evidence showing that the project may lead to such impacts. The court pointed out that CEQA requires the project proponent to discuss the project's economic and social impacts where "[a]n EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes caused in turn by the economic and social changes." CEQA Guidelines §§ 15131(a) and 15064(f); *Citizens Assoc. for Sensible Dev. of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 170 171 (shopping mall threatens downtown businesses and urban decay); *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 445-446 (shopping mall may cause "business closures" in downtown area); *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1019 (insufficient evidence that Borders bookstore may threaten local bookstores); *see also*, *Anderson First Coalition v. City of Anderson* (2005) 30 Cal.Rptr.3d 738 (shopping center); *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1074 (urban decay impacts of supercenter must be analyzed); *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 920 (EIR adequately analyzed urban decay impacts of supercenter). Since the EIR fails entirely to analyze urban decay impacts of the proposed Project a supplemental EIR is required to analyze and mitigate this impact.

6. **Impacts to Prime Farmland and farmland of Statewide Importance are not mitigated by the proposed unenforceable, vague, and deferred mitigation measures.**

10-28

The County found that the Proposed Project's conversion of 250 acres of Prime Farmland and 75 acres of Farmland of Statewide Importance to non-agricultural use would be significant and unavailable. DEIR, p. 3.2-17. The County, therefore, may not conclude that an impact is significant and unavoidable without requiring the implementation of all feasible mitigation measures to reduce the impacts of a project to less than significant levels. CEQA Guidelines §§ 15126.4, 15091. "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors. CEQA Guidelines § 15364. The DEIR is inadequate because impacts to farmland are not mitigated by the proposed mitigation measures.

10-29

CEQA disallows deferring the formulation of mitigation measures to post-approval studies. CEQA Guidelines § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309. Feasible mitigation measures for significant environmental effects must be set forth in an EIR for consideration by the lead agency's decision makers and the public before certification of the EIR and approval of a project.[5]

The formulation of mitigation measures generally cannot be deferred until after certification of the EIR and approval of a project. CEQA Guidelines Section 15126.4(a)(1)(B) states: "…[f]ormulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way." An agency may only defer the formulation of mitigation measures when it possesses "'meaningful information' reasonably justifying an expectation of compliance." *Sundstrom* at 308; see also *Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-29 (mitigation measures may be deferred only "for kinds of impacts for which mitigation is known to be feasible").

A lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been

[5] "Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. [Citation.] On the other hand, an agency goes too far when it simply requires a project applicant to obtain a biological [or other] report and then comply with any recommendations that may be made in the report." Defend the Bay v. City of Irvine (2004) 119 Cal.App.4th 1261, 1275. "If mitigation is feasible but impractical at the time of a general plan or zoning amendment, it is sufficient to articulate specific performance criteria and make further approvals contingent on finding a way to meet them."(Endangered Habitats League, Inc. v. County of Orange (2005) 131 Cal.App.4th 777, 793.

resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation because there was no evidence that replacement water was available). This approach helps "insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug." *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn*. (1986) 42 Cal.3d 929, 935.

10-29 cont'd

However, a lead agency's adoption of an EIR's proposed mitigation measure for a significant environmental effect that merely states a "generalized goal" to mitigate a significant effect without committing to any specific criteria or standard of performance violates CEQA by improperly deferring the formulation and adoption of enforceable mitigation measures. *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 93 ("EIR merely proposes a generalized goal of no net increase in greenhouse gas emissions and then sets out a handful of cursorily described mitigation measures for future consideration that might serve to mitigate the [project's significant environmental effects.")

Here, the DEIR's reliance on tentative plans for agricultural mitigation undermines the purpose of CEQA and deprive the public and decision makers of the information necessary to assess the project. The mitigation measures for the CP/LUDC Amendments and the Solar Project are essentially identical, and are inadequate for the same reasons. Other than submittal of a demolition and reclamation plan (SPEC-AG-2) and financial assurances of the demolition and reclamation plan (SPEC-AG-3), which do nothing to mitigate the conversion of Prime Farmland and Farmland of Statewide Importance to non-agricultural uses, the DEIR provides only the following mitigation measure to address impacts to farmland from the Proposed Project:

SPEC-AG-1. Preservation of Off-Site Agricultural Land

Prior to issuance of a Final Building Inspection Clearance, the Applicant shall provide written evidence of completion of one or more of the following measures, within Santa Barbara County, to mitigate the loss of agricultural land (includes State defined Prime Farmland and Farmland of Statewide Importance) at a ratio of 1:1 for net acreage before conversion. Net acreage is to be calculated by excluding existing roads and areas already developed with structures. A plot plan shall be submitted substantiating the net acreage calculation along with written evidence of compliance.

1. Funding and purchase of agricultural conservation easements;
2. Purchase of credits from an established agricultural farmland mitigation bank;

3. Contribution of agricultural land or equivalent funding to an organization that provides for the preservation of farmland;

4. Participation in any agricultural land mitigation program that provides equal or more effective mitigation than the measures listed above; or

5. Evidence that all of the foregoing measures are infeasible.

10-29 cont'd

Mitigation includes land that meets the definition of Prime Farmland or Farmland of Statewide Importance established by the State Department of Conservation. Completion of the selected measure(s) can be on qualifying land within the Cuyama Valley Rural Region or outside the region (but within Santa Barbara County) with written evidence that the same or equivalent crops can be produced on the mitigation land.

DEIR, p. 3.2-21. Each of these five options constitutes impermissible, deferred mitigation.

10-30

First, mitigation through easements, credits, or land contributions do not replace the loss of farmland. These measures merely require the protection of land that is already in agricultural production. Consequently, these measures cannot in any way be thought of as off-setting agricultural losses due to the project. Kavanaugh Comment, p. 7. In other words, the easements, credits, and land contributions do nothing to increase the amount of agricultural land compared to the actual existing "baseline" environment. Indeed, since SPEC-AG-1 allows for mitigation of Prime Farmland with Prime Farmland or Farmland of Statewide Importance, the easements would not even be required to protect the agricultural land of the same high quality as that being converted.

10-31

Second, option four, which allows for "participation in any agricultural land mitigation program that provides equal or more effective mitigation" than the first three options is inadequate because it is vague and does not identify any set performance standards. The applicant's "participation" in "any agricultural land mitigation program" tells the public nothing about what the applicant will actually do, or what specific mitigation measures will be undertaken. It is too vague and undefined to be considered an adequate and enforceable mitigation measure. The DEIR must establish specific performance standards that the mitigation measure will be required to meet. Without doing so, option 4 of Mitigation Measure SPEC-AG-1 remains vague, unenforceable and deferred mitigation.

10-32

Third, "funding" to an organization that provides for the preservation of farmland" is an improper mitigation fee. The DEIR says nothing about how much the fee will be or what the fee will be used for. Fees paid for mitigation that do not ensure implementation of the mitigating action are invalid. *Napa Citizens for Honest. Gov. v. Bd. of Supervisors* (20001) 91 Cal.App.4th 342 (rejecting fee payment plan where there is no evidence that impacts will be mitigated simply through payment of a fee); *Anderson First Coal. v. City*

of Anderson (2005) 130 Cal.App.4th 1173 (finding traffic mitigation fee is inadequate because it does not ensure that mitigation measure will be implemented). Contribution of a funding does not obligate the "organization that provides for the preservation of farmland" to actually take any action to mitigate the impact at issue.

10-33

Finally, option five nullifies the entire mitigation measure because the applicant is not required to do anything if it provides evidence that the first four options are "infeasible." Indeed, CEQA disallows deferring the formulation of mitigation measures to post-approval studies. CEQA Guidelines § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309. Feasible mitigation measures for significant environmental effects must be set forth in an EIR for consideration by the lead agency's decision makers and the public before certification of the EIR and approval of a project. Determination of the feasibility of the mitigation measures must be considered now, at the EIR stage where its adequacy can be considered by the public and decisionmakers. SPEC-AG-1 defers this determination until after the project is approved, and improperly shifts this responsibility to the applicant to determine which mitigation options are feasible. CEQA does not allow this.

The DEIR acknowledges that its proposed mitigation is inadequate to avoid a significant impact to the cumulative impacts to prime farmland, noting that "mitigation measures would reduce adverse impacts to agricultural resources, but not to a less-than-significant level given prime agricultural lands on the Solar Array site would nonetheless be converted from present agricultural use." DEIR, p. 3.2-18. Rather than explore true mitigation of prime farmland, the DEIR simply throws up its hands.

10-34

The obvious mitigation to at least come closer to mitigating this cumulative impact is to require that more prime farmland be protected by the applicant. As Dr. Kavanaugh explains:

> Mitigation measures could be made more effective by requiring that the offsets be obtained on a greater than one-for-one basis. A strong mitigation measure would require three to one offsets for prime farmland. Imperial County has proposed similar measures.

Kavanaugh Comments, pp. 7-8. *See also* DEIR, FRV Orion Solar Project (PP12232), p. 2-7 (Ruben Arroyo, Kern County Department of Agriculture and Measurement Standards, April 19, 2012 ("The Kern County Department of Agriculture and Measurement Standards … cannot support the project as it would result in the net loss of 265 acres of farmland and that farmland cannot be mitigated at a 1:1 ratio unless farmland can be newly created from previously unusable land").

A revised DEIR should do the following:

10-34 cont'd

- Eliminate the optional nature of SPEC-AG-1 by removing the fifth option under SPEC-AG-1, which allows the mitigation measure to be satisfied by providing evidence that all of the other options are infeasible;
- Establish specific performance standards that will be required to be met and provide evidence that such standards will mitigate the project's significant effect;
- Discuss mitigation of farmland at a ratio greater than 1:1;
- Require applicant to mitigate conversion of the 250 acres of Prime Farmland with off-site Prime Farmland, rather than Prime Farmland or Farmland of Statewide Importance.

D. The DEIR's Cumulative Impact Analysis Is Conclusory and Devoid of Substantial Evidence.

10-35

The DEIR conclusory cumulative impact analysis is devoid of substantial evidence and errs as a matter of law and commonsense. Lacking any substantial evidence, the DEIR fails to provide sufficient information for the public to evaluate cumulative impacts that may result from approval of the Proposed Project. The amount of information provided for each of the listed projects does not provide the reviewing public or decisionmakers sufficient information about the projects to assess the validity of the cumulative impacts conclusions included in the DEIR. Indeed, the DEIR provides no specific information about any environmental impact that any of the listed cumulative projects will have. As one proceeds through each specific cumulative impact section, it becomes clear that the cumulative impacts "analysis" is nothing more than bare conclusions and wishful thinking, unsupported by any evidence.

An EIR must discuss significant cumulative impacts. CEQA Guidelines section 15130(a). This requirement flows from CEQA section 21083, which requires a finding that a project may have a significant effect on the environment if "the possible effects of a project are individually limited but cumulatively considerable. . . . 'Cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."

"Cumulative impacts" are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." CEQA Guidelines section 15355(a). "[I]ndividual effects may be changes resulting from a single project or a number of separate projects." CEQA Guidelines section 15355(a). "The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." Communities for a Better Environment v. Cal. Resources Agency ("CBE v.

10-35 cont'd

CRA"), (2002) 103 Cal.App.4th 98, 117. A legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable probable future projects whose impacts might compound or interrelate with those of the project at hand. "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." CEQA Guidelines § 15355(b).

A cumulative impact analysis, like the rest of the EIR, must provide specificity, and must be more than a conclusion "devoid of any reasoned analysis." *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397, 411. "[I]t is vitally important that an EIR avoid minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them. (Pub. Res. Code, § 21061.)" *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79. *See also Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 723.

1. Solar Facility and Substation Addition

10-36

The analysis of cumulative impacts from the solar array totals 1 to 3 paragraphs for any given environmental impact. DEIR, Chapter 4. Each analysis consists of nothing more than baseless conclusions. For example, with no explanation, facts, or reasoning provided, the DEIR concludes that "Implementation of the cumulative projects identified in Table 4-2 above would not result in the significant conversion of prime agricultural land. Therefore, these projects would not contribute to a cumulative effect on agricultural resources." DEIR, p. 4-9. Similarly, in the cumulative analysis of impacts to air quality, the DEIR finds that the Proposed Project would generate construction emissions of ROG and NO_X, and that the cumulative projects identified would generate adverse air emissions, but then concludes that the "Solar Facility and PG&E Cuyama Substation Additions would result in minimal air quality impacts, and when combined with the cumulative projects, would not rise to a cumulatively considerable level." DEIR, p. 4-10, 4-11.

These conclusions do not constitute an analysis. [I]t is vitally important that an EIR avoid minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them. (CEQA, § 21061.)" *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79. *See also Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 723. The DEIR's vague and conclusory cumulative impacts analysis provides no such information. Without even the most basic information about any of the cumulative projects or their environmental impacts, the DEIR's general cumulative impact conclusions are not supported by substantial evidence.

10-37

In addition to being conclusory, the cumulative biological resources "analysis" is also based on flawed logic. The DEIR first admits that cumulative impacts could result, noting that "[w]hen combined with other development in the Project area, the incremental loss and/or fragmentation of suitable foraging habitat could result in a cumulative impact." DEIR, p. 4-11. But the possibility of a cumulative impact is then dismissed based on the County's unsupported conclusion that "Each of the cumulative projects is subject to discretionary review, and would include respective mitigation to address the project-specific impacts." DEIR, p. 4-11.

As Dr. Smallwood notes:

> this argument erroneously portrays cumulative impacts analysis under CEQA as both relevant and needed only when one or more nearby individual projects provided insufficient mitigation for one or more impacts. If this argument was true, then cumulative impacts assessments would merely be an exercise in evaluating the environmental reviews of other projects to ascertain whether their mitigation was sufficient. This exercise is not a scientifically valid cumulative impacts analysis.

Smallwood Comment, p. 4. The DEIR relies on the same flawed reasoning in its discussion of cumulative impacts to hazards, hydrology and water quality, and land use and planning.

The DEIR relies on the exact argument CEQA's cumulative impact analysis is meant to protect against. The entire purpose of a cumulative impact analysis is to prevent the situation where mitigation occurs to address project-specific impacts, without looking at the bigger picture. This argument, applied over and over again, has resulted in major environmental damage, and is a major reason why CEQA was enacted. As the court recently stated in *CBE v. CRA,* 103 Cal. App. 4th at 114:

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

(Citations omitted).

10-38

Another deficiency in the analysis is that the list of cumulative projects does not include the development of 300 acres of additional solar on agricultural land in the County, as the CP/LUDC Amendments provide. It is foreseeable and probable that a project will be developed on agricultural land, and the DEIR must therefore include its impacts in the cumulative impact analysis.

2. CP/LUDC Amendments

For each environmental impact, the DEIR concludes that the CP/LUDC Amendments would not result in cumulatively significant impacts. DEIR, Chapter 4. Each conclusion is based on improper reasoning, and an analysis that is not in compliance with CEQA.

Each cumulative impact analysis states that the projects identified in the list of cumulative projects for the CP/LUDC Amendments would not contribute to a cumulative impact because "they represent regulatory changes that do not directly result in physical development. Future permit requests enabled by these ordinance amendments and planning programs must be found consistent with adopted County policies and current ordinances and development standards to be approved." DEIR, p. 4-9. This conclusory statement does not constitute an adequate analysis under CEQA.

10-39

The analysis should have considered all of the projects considered in the cumulative analysis of the Solar Facility, listed in table 4-2. All of the projects considered in the analysis of the Solar Facility are current and probable future projects, whose impacts must be considered together with the Amendments. Additionally, regulatory changes that do not directly result in physical development may still have environmental impacts, and should have been analyzed to the extent feasible.

An analysis of the impacts of future actions should be undertaken when the future actions are sufficiently well defined that it is feasible to evaluate the potential impacts. *Environmental Protection Info. Ctr v. Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 503. EIRs can and should make reasonable forecasts. *See San Francisco Ecology Ctr. v. City & County of San Francisco* (1975) 48 Cal.App.3d 584, 595. Lead agencies must use their best efforts to find out and disclose all they reasonably can. CEQA Guidelines § 15144. If a precise technical analysis of an environmental impact is not practical, the agency must make a reasonable effort to pursue a less exacting analysis. *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 432.

The County made no effort to evaluate the cumulative impacts of the Amendments. While the County may not know where exactly the additional 300 acres of solar development will occur, it can still evaluate cumulative impacts generally, for example based on the loss of hundreds of additional acres of farm land. The analysis is incomplete and must be revised.

3. The geographic scope of the DEIR's cumulative impacts analysis is arbitrary.

10-40

An EIR is required to discuss significant impacts that the proposed project will cause *in the area that is affected by the project*." *Bakersfield Citizens*, 124 Cal.App.4th at 1216 (emph. added); *See* CEQA Guidelines, § 15126.2(a). The Guidelines

10-40 cont'd

specifically require the County to "define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used." CEQA Guidelines, § 15130(b)(3); *Bakersfield Citizens*, 124 Cal.App.4th at 1216 (EIR contained no explanation of the criteria for determining geographic area of impact analysis that ignored similar concurrent project located 3.6 miles away); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 721 (air pollution analysis held inadequate for failure to include entire San Joaquin Valley air basin).

The DEIR's cumulative impacts analysis does not comply with this requirement. The DEIR provides not explanation whatsoever for the geographic limitation it used in analyzing cumulative impacts. Part of the problem is that the County never actually states the scope of the cumulative impacts analysis. While not specifically stated, the County appears to have limited the cumulative impacts analysis to only those projects within the Cuyama Valley, and within Santa Barbara County. See DEIR, Figure 4-1. With no explanation for the limited scope of the analysis, the DEIR is inadequate. A revised DEIR must clarify the geographic scope of the cumulative impacts analysis, and must provide a reasonable explanation supported by evidence for that scope.

E. The County Has Not Considered An Adequate Range of Alternatives in the DEIR.

CEQA requires that an EIR provide a discussion of project alternatives that allows meaningful analysis. *Laurel Heights I,* supra, 47 Cal.3d at 403. An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. CEQA Guidelines § 15125.6. The purpose of the discussion of alternatives is both to support the decision makers and to inform public participation. "Since the purpose of an alternatives analysis is to allow the decision maker to determine whether there is an environmentally superior alternative that will meet most of the project's objectives, the key to the selection of the range of alternatives is to identify alternatives that meet most of the project's objectives but have a reduced level of environmental impacts." *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089. In *Watsonville Pilots*, the Court of Appeal made clear that it was incumbent under CEQA for the City:

10-41

> to include within its alternatives analysis a reduced development alternative that would have satisfied the 10 objectives of the project that did not require the level of development contemplated by the project. Analysis of such an alternative would have provided the decision makers with information about how most of the project's objectives could be satisfied without the level of environmental impacts that would flow from the project.

Id. Here, the DEIR considered eighteen alternatives of various sizes and locations, but it did not consider alternatives that could either reduce energy use or provide a way to

10-41 cont'd

generate electricity without using agricultural land, thereby allowing a smaller solar array with less adverse impacts. Kavanaugh Comment, p. 8. Dr. Kavanaugh provides that conservation assistance and distributed generation should both be considered in alternatives because both can:

- Provide some of the energy that the solar project is proposed to provide. This allows the project to be reduced in size and still contribute to the project objectives but with reduced environmental impacts.
- Assist in achieving or exceeding renewable standards; and
- Increase regional income and provide well-paid local jobs.

Kavanaugh Comment, p. 8. "[B]y reducing the size of the utility-scale solar array, [these alternatives] help to moderate the significant and unmitigated environmental impacts including the loss of amenities and agricultural production that may threaten adverse impacts to structures and blight." Kavanaugh Comment, p. 10. A full discussion of these alternatives is necessary in a revised DEIR to provide the decision makers with information about these reasonable alternatives that would feasibly attain most of the basic objectives of the project and would avoid or less significant environmental impacts.

VI. THE COUNTY SHOULD PREPARE AND RECIRCULATE A REVISED DEIR.

10-42

Recirculation of an EIR prior to certification is required "when the new information added to an EIR discloses: (1) a new substantial environmental impact resulting from the project or from a new mitigation measure proposed to be implemented; (2) a substantial increase in the severity of an environmental impact unless mitigation measures are adopted that reduce the impact to a level of insignificance; (3) a feasible project alternative or mitigation measure that clearly would lessen the environmental impacts of the project, but which the project's proponents decline to adopt; or (4) that the draft EIR was so fundamentally and basically inadequate and conclusory in nature that public comment on the draft was in effect meaningless." *Mountain Lion Coalition v. Fish & Game Com*. (1989) 214 Cal. App. 3d 1043; CEQA Guidelines § 15088.5(a).

Recirculation is required where "significant new information" has been added to an EIR. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 447. New information is "significant" where it results in a change to the EIR's analysis or mitigation of a substantial adverse environmental effect. *Id*. Here, the DEIR must be revised to address the many deficiencies identified above.

Unless the DEIR is revised to address these deficiencies and unless that DEIR is recirculated for further public review, the public and decision makers will be deprived of an opportunity for full input and informed decision making.

VII. CONCLUSION

10-43

LIUNA Local Union No. 89 believes the Cuyama Solar Facility and CP/LUDC Amendment DEIR is wholly inadequate and requires significant revision, recirculation and review. Moreover, LIUNA believes that the Project as proposed would result in too many unmitigated adverse impacts on the environment to be justified. Given the ongoing "solar gold rush" occurring in southern California, and given the fact that the state's RPS goals will be met without this project, LIUNA believes the proposed Project should be reconsidered. Distributed generation of renewable electricity represents the "low hanging fruit" of solar electricity generation and should be pursued throughout already disturbed areas. All of these considerations weigh against approval of the project as proposed.

Please include this letter and all accompanying expert comments and enclosures hereto in the record of proceedings for this project. Both these comments and the enclosed expert comments include documents available from the Internet. Where possible, the comments have included a citation to a specific Web page containing the cited document.

Thank you for your attention to these comments.

Sincerely,

Richard Drury
Rebecca L. Davis
Lozeau Drury LLP