

Letter 12

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VIA EMAIL and OVERNIGHT DELIVERY

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**Re: Comments on the Draft Environmental Impact Report – The
Farm at Alamo Creek Specific Plan Project**

Dear Ms. Feagans:

On behalf of Vacaville Residents for Responsible Development we submit these comments on the City of Vacaville ("City") Draft Environmental Impact Report ("DEIR") for the Farm at Alamo Creek Specific Plan Project ("Project") proposed by Vacaville S2 Investors LLC ("Applicant"). The Project proposes to develop 210 acres on the east side of Vacaville, currently in agricultural use ("Project Site") with a residential development that would include 768 single-family attached and detached residences, 11.2 acres of community park land, 7.2 acres of neighborhood parks, approximately 13.4 acres of open space, a City well site, and various off-site utility or roadway improvements. The Project site is bounded by Leisure Town Road on the west, Hawkins Road on the north, Pacific Gas and Electric (PG&E) towers on the east, and Elmira Road on the south. (APN Nos. 0138-010-010, -020, -030, and -050).

The DEIR states that the Project requires the following discretionary actions of the City: (1) Adoption of The Farm at Alamo Creek Specific Plan; (2) Approval of (Pre) Zoning of the project site, including approval for annexation; (3) Approval of a General Plan Amendment; (4) Approval of a tentative subdivision map creating the subdivision of land; (5) Adoption of the Development Agreement; and (6) approval of Planned Development, Park Design Review, and subsequent residential design review for the project (collectively, "Project Approvals").

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Based upon our review of the DEIR, appendices, and other relevant records, we conclude that the DEIR fails to meet the requirements of CEQA. First, the City unlawfully piecemealed its environmental review of the Project. In addition, the DEIR fails to properly analyze, address and mitigate the Project's impacts on biological resources, air quality and GHG.

12-1

We prepared these comments with the assistance of air quality expert Hadley Nolan and Matt Hagemann, P.G., C.Hg. of Soil / Water / Air Protection Enterprise ("SWAPE"), and of expert biologist Scott Cashen, M.S. Their technical comments and *curricula vitae* are attached hereto as Exhibits A and B and are fully incorporated herein.

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We urge the City to reject the DEIR and direct staff to prepare and recirculate a revised Draft EIR that properly analyzes, addresses and mitigates the Project's potentially significant impacts, as required by CEQA.

12-3

I. STATEMENT OF INTEREST

Vacaville Residents for Responsible Development is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental impacts of the Project. The association includes: City of Vacaville residents Jason Delavega; Jack Paulson; Frank Sampson; Paul Casavant; the International Brotherhood of Electrical Workers Local 180, Plumbers & Steamfitters Local 343, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483 and their members and their families; and other individuals that live and/or work in the City of Vacaville and Solano County.

Individual members of Vacaville Residents and the affiliated labor organizations live, work, recreate and raise their families in Solano County, including the City of Vacaville. They would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. Accordingly, they will be first in line to be exposed to any health and safety hazards that exist onsite. Vacaville Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for

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business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there.

II. THE CITY IMPROPERLY SEGMENTED ENVIRONMENTAL REVIEW

1. The City's General Plan and The December General Plan Amendment

On August 11, 2015, the City approved the City of Vacaville General Plan and certified the General Plan EIR.¹ The EIR includes the Draft EIR and Technical Appendices, the Final EIR, the Additional Analysis for Changes to the Draft General Plan, and the Addendum to the Final EIR.²

The Project site is located inside the City's proposed Sphere of Influence and Urban Growth Boundary (UGB), with 61 acres of the Project site located within an area designated as Urban Reserve (UR) in the City's General Plan.³ The rest of the site has various land use designations, including Residential, Commercial and Public Parks.⁴ In the City's General Plan, the Project site is designated as a future Specific Plan and as a growth area as part of the East of Leisure Town Road Growth Area ("ELTR Growth Area" or "ELTR").⁵

The designation of 61 acres within the Project Site as Urban Reserve was as a result of a change to the draft General Plan. The additional CEQA review that was prepared for the change states that "[t]he Revised General Plan includes 608 acres of "Urban Reserve," which would not be available for development without a General Plan Amendment and further CEQA review."⁶ According to the City:

"[The designation of Urban Reserve] is applied to relatively large, contiguous, and undeveloped geographic areas where comprehensive planning must occur prior to urbanization. The purpose of assigning

¹ The Farm at Alamo Creek Specific Plan Project DEIR, p. 1-1.

² <http://www.ci.vacaville.ca.us/government/community-development/advanced-planning/adopted-plans/general-plan/general-plan-and-energy-and-conservation-action-strategy-eir>

³ The Farm at Alamo Creek Specific Plan Project DEIR, p. 3-1.

⁴ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.5-4

⁵ The Farm at Alamo Creek Specific Plan Project DEIR, p. 3-2.

⁶ Additional CEQA Analysis Memorandum, Placemarks, February 27, 2015, at p. 20.
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the Urban Reserve designation, rather than specific land use designations in the East of Leisure Town Road Growth Area, is to demonstrate that the City eventually expects urban development in these areas, while also allowing flexibility in planning for these uses in the future.”⁷

Goal LU-17 of the General Plan is to “[p]rovide for orderly, well-planned, and balanced growth in the East of Leisure Town Road Growth Area”⁸ (which encompasses the Project’s site⁹). Several policies are aimed at achieving this goal. Two of them, which set a limit on the maximum number of units allowed in the ELTR Growth Area, are especially relevant here.

Before it was amended, as described below, Policy LU-P17.1 had set the following limit on the number of dwelling units within the ELTR:

“Policy LU-P17.1 Limit residential development within the East of Leisure Town Road Growth Area to 2,175 dwelling units with the following general assumptions:

- Brighton Landing Specific Plan Area: 780 dwelling units
 - Properties South of Brighton Landing and North of Fry Road: 785 dwelling units
 - Properties North of Elmira Road: 610 dwelling units
- Require a General Plan Amendment for residential development in excess of this amount.”

Policy LU-P.17.8 then states:

“The General Plan Update Environmental Impact Report (EIR) assumes the following maximum development projections for the year 2035 for the lands located within the East of Leisure Town Road Growth Area, shown in Figure LU-7:

- Residential: 2,340 units

⁷ City of Vacaville General Plan Land Use Element, p. LU-23.

⁸ City of Vacaville General Plan Land Use Element, p. LU-48.

⁹ City of Vacaville General Plan Land Use Element, p. LU-45.

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- Commercial: 160,000 square feet (12 acres)

When approved development in the East of Leisure Town Road Growth Area reaches the maximum number of residential units or commercial square feet projected in the General Plan EIR, the Community Development Director shall require that environmental review conducted for any subsequent development project address growth impacts that would occur due to development exceeding the General Plan EIR's projections (...)"¹⁰

Goal LU-19 of the General Plan is to "Comprehensively plan for future development in the East of Leisure Town Road and Northeast Growth Areas."¹¹ Under this goal, several policies apply to Urban Reserve designation. The most relevant ones are:

- Policy LU-P19.1, which requires a General Plan amendment in order to convert lands designated as Urban Reserve to other land use designations, and require such conversions to follow a process set in the City's Urban Reserve Ordinance the City was required to adopt, and Policy LU-P19.4; and
- LU-P19.5 which limits the frequency and timing of such conversions, essentially prohibiting the City from considering them more often than every five years.¹²

On December 12, 2017, the City Council approved a resolution titled "Resolution of the City of Vacaville Amending the Vacaville General Plan related to the Farm at Alamo Creek Urban Reserve."¹³

The resolution included two major amendments to the General Plan ("The December General Plan Amendment"). The first amended Policy LU-P.17.1 to allow for 2,455 dwelling units in the ELTR Growth Area, with different general assumptions, including changing the third assumption from 610 dwelling units North of Elmira Road to "The Farm at Alamo Creek Specific Plan Area (North of

¹⁰ City of Vacaville General Plan Land Use Element, p. LU-49.

¹¹ City of Vacaville General Plan Land Use Element, p. LU-52.

¹² City of Vacaville General Plan Land Use Element, p. LU-52.

¹³ City of Vacaville, Resolution No. 2017-127.

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Elmira Road and South of the Hawkins Road (...): 768 dwelling units (...)." The amendment also allowed for 122 more dwelling units north of Hawkins road.¹⁴

When approving the December General Plan Amendment, the City Council adopted findings, as required by the City Municipal Code.¹⁵ The Code required the City to find, among other things, "[t]hat the activity is within the scope of the project covered by the previous EIR, negative declaration, or mitigated negative declaration;"¹⁶ "[t]hat no new significant effects would occur or no new mitigation measures would be required;"¹⁷ and "[t]hat no new environmental document would be required."¹⁸

The City Council answered all the questions in the affirmative, stating in its findings that the General Plan EIR "considered the environmental impacts of development projected to occur within the Vacaville Urban Growth Boundary, including within the areas designated as Urban Reserve. *The proposal by itself does not authorize any new land development or other physical change, nor does it change the land use designation of any property. General Plan policies set a maximum amount of development that may occur in the East of Leisure Town Road area before additional environmental review may be required, and this amendment does not change those maximums.*"¹⁹ (Italics added). On the same date, the City also adopted the Urban Reserve Ordinance which sets the process for converting Urban Reserve lands to other uses.²⁰

2. The DEIR and the Urban Reserve Analysis

As explained above, under the Urban Reserve designation, 61 acres that the Applicant proposes to designate as "Residential Low Density" could not even be *considered* for conversion from "Urban Reserve" to any other land use, before five years have passed from the adoption of the General Plan (which will only be in August 2020). Such consideration would have to follow the procedure set in the

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¹⁴ City of Vacaville, Resolution No. 2017-127.

¹⁵ Vacaville Municipal Code, Section 14.03.025.030

¹⁶ Vacaville Municipal Code, Section 14.03.025.030.A.1

¹⁷ Vacaville Municipal Code, Section 14.03.025.030.A.2

¹⁸ Vacaville Municipal Code, Section 14.03.025.030.A.5

¹⁹ City of Vacaville, Resolution No. 2017-127, p. 1

²⁰ Ordinance No. 1922 – Ordinance of the City of Vacaville Adding Chapter 14.04.038, Urban Reserve, to the Vacaville Municipal Code.

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Urban Reserve Ordinance. However, the December General Plan Amendment allowed land designated as Urban Reserve in the ELTR to be *considered* for conversion, leaving the analysis to the stage of authorizing a new land use development. The city, however, failed to perform such analysis.

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Cont.

In the Land Use and Planning Section of the DEIR for the Project, the City admits that the proposed residential use in the Urban Reserve area *conflicts* with the General Plan, stating “[t]he proposed project’s land uses and development assumptions are consistent with the City’s General Plan with the exception of the eastern approximately 60-acre portion of the site designated UR.”²¹ *However, the City fails to properly analyze the conflict or the impact of converting the land from UR to Residential use*, stating merely that:

“[t]he EIR Study Area included the portion of the project site designated UR and evaluated a maximum of 2,340 residential units in the East of Leisure Town Growth Area. The General Plan EIR assumed low density residential uses would be developed in the UR portion of the project site.”

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The DEIR then refers back to the December General Plan Amendment:

“General Plan Policies LU-17.1 and LU-17.4 contemplate the development of the project site with a total of 768 dwelling units (LU-17.1) and to permit a general plan amendment and specific plan for development of the project site without being subject to the City’s Urban Reserve conversion processes described in Policies LU-P19.1, LU-P19.4, and LU-P19.5 (LU-17.4). The General Plan limits development from occurring within lands designated UR for a period of 5 years from when the General Plan was adopted (August 2015). However, Policy LU-17.4 allows grading activities and the extension of utilities to occur prior to August 11, 2020.”²²

3. The DEIR Violates CEQA’s Prohibition on Piecemeal Environmental Review

A public agency may not segment a large project into two or more smaller projects in order to mask serious environmental consequences. CEQA prohibits

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²¹ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.5-23.

²² The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.5-23.

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such a “piecemeal” approach and requires review of a project’s impacts as a whole.²³ CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences.”²⁴ Before approving a project, a lead agency must assess the environmental impacts of all reasonably foreseeable phases of a project.²⁵

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Cont.

By segmenting the process into two separate actions (the December General Plan Amendment and the current DEIR) that each avoided such review, the City engaged in piecemealing. The City never analyzed the environmental impacts of the General plan amendment, arguing it “does not authorize any new land development or other physical change.”²⁶ However, now, when the City considers a project that *does* authorize such physical change, it again fails to analyze it, referring back to the General Plan amendment that exempted the Project from the process set in the Urban Reserve Ordinance and from the limitations on the intervals of such conversion.

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While it is true that the Project is exempt from *some* of the requirements set in the General Plan, and that, before it was designated for UR, it was designated for Residential Low Density, the Project nevertheless now proposes to convert land that was meant to be reserved for *future* uses, into residential uses. The City failed to analyze not only this change and its impacts but also the impact of the December amendment. The City improperly piecemealed its environmental review.

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As shown above, the December General Plan amendment authorized without environmental review not only the conversion of land from UR to residential development, but also a change in the *number of units* allowed within the ELTR Growth Area. Before the December amendment, Policy LU-p.17.1 allowed only for a maximum of 2,175 units within the ELTR. The amendment authorized 2,455 dwelling units. The new unit number is 115 more units *beyond* the maximum

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²³ 14 CCR § 15378(a); *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.

²⁴ *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 283-84; *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452.

²⁵ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396-397 (EIR held inadequate for failure to assess impacts of second phase of pharmacy school’s occupancy of a new medical research facility).

²⁶ City of Vacaville, Resolution No. 2017-127, p. 1.
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number that was analyzed by the General Plan EIR.²⁷ Nevertheless, the DEIR fails to acknowledge this discrepancy or analyze it.

The City is clearly engaged in piecemealing – evading environmental review of the change in the scope of allowed development when considering the General Plan amendment, by arguing it does not authorize any actual physical change, and evading it again in the DEIR for the actual Project by assuming the change is compatible with the (amended) General Plan.

The City may argue that even with the number of units allowed in the Project, the total number of dwelling units approved is below the maximum of 2,340 units allowed by the General Plan and analyzed in the General Plan EIR, and that it is the *next* project that would trigger review of the change in land use. However, minimizing the impact now and delaying review would further piecemeal the environmental review. Moreover, in any case, the City is required to analyze the *cumulative* impacts from this Project combined with the foreseeable development of the remaining 122 units north of the Hawkins road allowed under the amended General Plan.²⁸ The City has not conducted this required analysis.

The change in the scope of the allowed development has environmental impacts that the City must analyze under CEQA. For example, adding more dwelling units necessarily creates an impact on air quality by adding more construction and operation emissions from the added units and residents. The City failed to analyze this impact in the DEIR.

In the discussion of “Cumulative Impacts” under the Air Quality section of the DEIR, the City states that the cumulative context for Ozone precursors “would be existing and future development within the entire SVAB.”²⁹ (Sacramento Valley Air Basin). The City then states that with regard to emissions of NO_x and PM₁₀ the relevant thresholds would be exceeded even after mitigation, thus concluding that the Project cumulative impact would be significant and unavoidable.³⁰ The City fails to discuss the fact that 115 more units are proposed in the ELTR than what

²⁷ City of Vacaville General Plan Land Use Element, p. LU-49, Policy LU-P17.8. This Policy states the General Plan EIR assumes a maximum of 2,340 residential units. See also Additional CEQA Analysis Memorandum, Placeworks, February 27, 2015, at p. 21.

²⁸ City of Vacaville, Resolution No. 2017-127, p. 2.

²⁹ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.1-30.

³⁰ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.1-31.

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was analyzed under the General Plan and General Plan EIR. Here, the City again does not quantify or compare the emissions of the new number of units compared to the environmental setting, as required by CEQA.

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The fact that the City concludes that the impact is significant and unavoidable does not cure this flaw. CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.³¹ "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."³² 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."³³ By failing to analyze air quality impacts from the new number of units compared to the existing setting, the City violated CEQA.

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The fact that the area is already in non-attainment with regard to Ozone precursors³⁴ only exacerbates the lack of analysis. The courts have recognized that even a project with relatively small air quality impacts can have a cumulatively significant impact if there is already a serious pollution problem in the area:

"The relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin."³⁵

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The City admits that "existing O₃ levels in the SVAB are at unhealthy levels during certain periods,"³⁶ but fails to analyze the impact on air quality and public health from the total cumulative number of dwelling units, and to determine the Project's

³¹ 14 CCR § 15002(a)(1).

³² *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

³³ *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.

³⁴ The Farm at Alamo Creek Specific Plan Project DEIR, P. 4.1-27

³⁵ *Kings City, Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692, 719, 270 Cal. Rptr. 650 (Ct. App. 1990), reh'g denied and opinion modified (July 20, 1990)

³⁶ The Farm at Alamo Creek Specific Plan Project DEIR, P. 4.1-27

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contribution to this already severe problem.

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The City failed to properly analyze the Project and cumulative impacts from converting the Urban Designation into residential use, as required by CEQA.

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III. THE DEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE SIGNIFICANT IMPACTS ON AIR QUALITY, GHG AND BIOLOGICAL RESOURCES

Legal Background

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).³⁷ The EIR is the very heart of CEQA.³⁸ "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."³⁹

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.⁴⁰ "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.'"⁴¹ 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."⁴²

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Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and

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³⁷ See, e.g., PRC § 21100.

³⁸ *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.

³⁹ *Comtys. for a Better Env' v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 ("CBE v. CRA").

⁴⁰ 14 CCR § 15002(a)(1).

⁴¹ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

⁴² *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.

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all feasible mitigation measures.⁴³ 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.”⁴⁴ 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.”⁴⁵

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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.*”⁴⁶ As the courts have explained, “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.’”⁴⁷

1. The DEIR Failed to Adequately Disclose, Analyze and Mitigate the Project’s Significant Cancer Risk from Construction and Operational Emissions

A. The City must prepare a HRA to Assess the Project’s Impacts on Public Health

The DEIR fails to include a health risk analysis (“HRA”) to disclose the adverse health impacts that will be caused by exposure to toxic air contaminants

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⁴³ 14 CCR § 15002(a)(2) and (3); see also *Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.

⁴⁴ 14 CCR § 15002(a)(2).

⁴⁵ PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

⁴⁶ *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.

⁴⁷ *Berkeley Jets*, 91 Cal.App.4th at 1355; *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.

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("TACs") from the Project's construction and operational emissions. As a result, the DEIR fails to disclose the potentially significant cancer risk posed to nearby residents and children from TACs, and fails to mitigate it. Because the DEIR fails to support its conclusion that the Project will not have significant health impacts from diesel particulate matter ("DPM") emissions with the necessary analysis, this finding is not supported by substantial evidence:

One of the primary emissions of concern regarding health effects for land development projects is DPM, which can be released during Project construction and operation.⁴⁸ The DEIR states that "[d]uring project construction, DPM emissions would be emitted from heavy-duty construction equipment and heavy-duty trucks."⁴⁹ However, the DEIR fails to perform any HRA for the DPM emissions, merely stating that:

"Since the proposed project involves phased construction activities in several areas across the site, the project would not require the extensive use of heavy-duty construction equipment or diesel trucks in any one location over the duration of development, which would limit the exposure of any proximate individual sensitive receptor to TACs. In addition, due to the relatively short period of exposure at any individual sensitive receptor (less than six years) and minimal particulate emissions generated on-site, TACs generated during construction would not be expected to result in concentrations that could cause significant health risks"⁵⁰

With regard to operational emissions, the DEIR again fails to prepare an HRA, stating that "the proposed project does not include stationary sources that would emit air pollutants or TACs (...) or result in a substantial increase in diesel vehicles (...)"

As explained by SWAPE, this reasoning is flawed for several reasons. First, the assertion that receptors near the Project would only experience a "relatively short period of exposure" to construction-related diesel particulate matter (DPM), which would therefore not "result in concentrations that could cause a significant

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⁴⁸ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.1-29.

⁴⁹ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.1-29.

⁵⁰ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.1-29.

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health risk" is erroneous and not supported by any factual data or supporting evidence.

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Second, the DEIR's assertion that "the project would not require the extensive use of heavy-duty construction equipment" is contradicted by the Project's CalEEMod output files, which demonstrate that the Project proposes to use excavators, rubber tired dozers, paving equipment, and several other pieces of heavy equipment throughout Project construction.⁵¹

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The failure to perform an HRA also contradicts the Bay Area Air Quality Management District ("BAAQMD") recommendation. BAAQMD guidance sets a numerical significance threshold for cancer risk of 10/million and recommends that agencies conduct an analysis of the health risk impacts from short-term projects, in addition to long-term projects:

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To ensure that short-term projects do not result in unanticipated higher cancer impacts due to short-duration high-exposure rates, the Air District recommends that the cancer risk be evaluated assuming that the average daily dose for short-term exposure lasts a minimum of three years for projects lasting three years or less.⁵²

The Office of Environmental Health Hazard Assessment ("OEHHA") similarly recommends that all short-term projects lasting at least two months be evaluated for cancer risks to nearby sensitive receptors.⁵³ Grading and construction activities for the proposed Project will produce emissions of DPM through the exhaust stacks of construction equipment over an approximate 6-year construction period.⁵⁴ Therefore, a HRA is required. Regarding the Project's operational emissions, OEHHA recommends that exposure from projects lasting more than 6 months should be evaluated for the duration of the project and recommends that an exposure duration of 30 years be used to estimate individual cancer risk for the

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⁵¹ Exhibit A: SWAPE comments, p. 2.

⁵² See http://www.baaqmd.gov/~media/files/planning-and-research/permit-modeling/hra_guidelines_12_7_2016_clean.pdf.pdf.

⁵³ "Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments." OEHHA, February 2015, available at:

http://oehha.ca.gov/air/hot_spots/2015/2015GuidanceManual.pdf, p. 8-18

⁵⁴ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.1-17.
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maximally exposed individual resident (MEIR).⁵⁵ As explained by SWAPE, once construction is complete, Project operation will generate truck trips, which will generate additional exhaust emissions, thus continuing to expose nearby sensitive receptors to DPM emissions.⁵⁶ A HRA is therefore required to analyze the Project's operational emissions.

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The DEIR ignores these basic health risk assessment parameters, which clearly obligate the City to perform an HRA for the Project. Therefore, the DEIR conclusion of a less than significant impact on public health is not supported by substantial evidence.

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B. The Project Will Result in a Significant Lifetime Cancer Risk from Exposure to Contaminants Generated by Project Construction and Operation

SWAPE performed a screening level health risk assessment of the Project's construction DPM emissions using the AERSCREEN model.⁵⁷ AERSCREEN is recommended by OEHHA and the California Air Pollution Control Officers Associated (CAPCOA) guidance as the appropriate air dispersion model for Level 2 health risk screening assessments ("HRSAs").⁵⁸ SWAPE evaluated the Project's construction-related impacts to sensitive receptors using the annual PM₁₀ exhaust estimates from the DEIR's CalEEMod model. Consistent with recommendations set forth by OEHHA, SWAPE used a residential exposure duration of 30 years, starting from the infantile stage of life.⁵⁹

12-24

Using the DEIR's air modeling input value factors SWAPE found that unmitigated DPM emissions released during Project construction and operation would result in an excess cancer risk beyond BAAQMD's significance threshold. The excess cancer risk to adults, children, and infants at the MEIR located approximately 25 meters away, over the course of Project construction and operation are approximately 3.9, 19, and 12 in one million, respectively.

⁵⁵ "Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments." OEHHA, February 2015, available at: <https://oehha.ca.gov/media/downloads/cnr/2015guidancemanual.pdf>, p. 8-6, 8-15

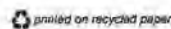
⁵⁶ Exhibit A: SWAPE comments, p. 3.

⁵⁷ Exhibit A: SWAPE comments, p. 4.

⁵⁸ Exhibit A: SWAPE comments, p. 4.

⁵⁹ Exhibit A: SWAPE comments, p. 4.

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Furthermore, the excess cancer risk over the course of a residential lifetime (30 years) at the MEIR is approximately 35 in one million.⁶⁰ This risk is above the BAAQMD significance threshold for cancer of ten in one million, and is therefore a significant impact requiring mitigation.⁶¹ As noted by SWAPE, a screening-level HRA is known to be more conservative, and is aimed at health protection, but its purpose is to determine if a more refined HRA needs to be conducted. Here, a more refined HRA should be conducted by the City to properly analyze the Project's significant impacts.

12-24
Cont.

C. The DEIR Fails to Include Mitigation Measures Available to Reduce Construction Emissions

SWAPE's analysis demonstrates that the Project's construction-related DPM emissions may present a potentially significant impact. Therefore, additional mitigation measures must be identified and incorporated in a revised DEIR to reduce these emissions to a less than significant level.

SWAPE proposes that the Project employ additional measures which are found in CAPCOA's "*Quantifying Greenhouse Gas Mitigation Measures*" and can be used to reduce both GHG levels and criteria air pollutants such as particulate matter.⁶² In addition, SWAPE provides various mitigation measures recommended by The Northeast Diesel Collaborative ("NEDC") to reduce diesel emissions and protect public health. These measures include implementation of diesel control measures, repowering or replacing older construction equipment engines; installing retrofit devices on existing construction equipment, using electric and hybrid construction equipment; instituting a heavy-duty off-road vehicle plan and implementing a construction vehicle inventory tracking system.⁶³

12-25

As SWAPE explains, "[t]hese measures offer a cost-effective, feasible way to incorporate lower-emitting equipment into the Project's construction fleet, which subsequently reduces DPM emissions released during Project construction. A revised DEIR must be prepared to include additional mitigation measures, as well

⁶⁰ Exhibit A: SWAPE comments, p. 7.

⁶¹ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.B-23; See also *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (EIR must disclose an impact as significant when it exceeds a duly adopted CEQA significance threshold).

⁶² Exhibit A: SWAPE comments, p. 8.

⁶³ Exhibit A: SWAPE comments, p. 8- 13.

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as an updated air quality assessment to ensure that the necessary mitigation measures would reduce construction emissions.”⁶⁴

12-25
Cont.

2. The DEIR Lacks Substantial Evidence To Support A Finding Of Overriding Considerations for Significant and Unavoidable Greenhouse Gas Impacts

The DEIR fails to adopt all feasible mitigation measures to reduce the Project’s significant greenhouse gas (“GHG”) impacts to less than significant levels before declaring the impacts “significant and unavoidable.” This violates CEQA’s requirement that the City mitigate all significant environmental impacts to the greatest extent feasible.

12-26

Before it can approve the Project, the City must certify the Project’s Final EIR and make mandatory CEQA findings. Those findings must include (1) that the Final EIR complies with CEQA, (2) that the City has mitigated all significant environmental impacts to the greatest extent feasible, and (3) that any remaining significant environmental impacts are acceptable due to overriding considerations.⁶⁵ Where, as here, the Project will have a significant effect on the environment, the City may not approve the Project unless 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.”⁶⁶

12-27

The Initial Study (IS) that was prepared for the Project states that the General Plan EIR found that buildout of the General Plan, with inclusion of measures listed in the City’s Energy Conservation Action Strategy (ECAS) would conflict with the state of California’s goal to reduce emissions by 80% below 1990 levels, resulting in a significant impact. Additionally, the IS states:

12-28

“[i]t is assumed that a majority of the reductions needed to reach the 2050 goals would come from State measures. All feasible GHG emission reduction measures considered during the ECAS process have already been included in the ECAS. Since no additional mitigation is

⁶⁴ Exhibit A: SWAPE comments, p. 13.

⁶⁵ 14 CCR § 15090 & 15091.

⁶⁶ PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

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available, the General Plan EIR determined this impact to be significant and unavoidable.”

Since the Project will allegedly comply with General Plan policies, ECAS policies, and federal and State regulations, the IS concludes that it “would not result in a significant impact not already identified in the General Plan EIR.”⁶⁷

There are two problems with the City’s reliance on the significant and unavoidable impact conclusion in the General Plan EIR. First, SWAPE reviewed the Project’s proposed GHG mitigation measures, and concluded that the DEIR fails to require all feasible mitigation available to reduce the Project’s GHG impacts. SWAPE stated that, in their expert opinion, additional, feasible mitigation is available to further reduce the Project’s GHG emissions, including, *inter alia*, the following:

- Use passive solar design, such as:^{68,69}
 - Orient buildings and incorporate landscaping to maximize passive solar, heating during cool seasons, and minimize solar heat gain during hot seasons.
- Reduce unnecessary outdoor lighting by utilizing design features such as limiting the hours of operation of outdoor lighting.
- Develop and follow a “green streets guide” that requires:
 - Use of minimal amounts of concrete and asphalt;
 - Installation of permeable pavement to allow for storm water infiltration; and
 - Use of groundcovers rather than pavement to reduce heat reflection.⁷⁰
- Implement Project design features such as:
 - Shade HVAC equipment from direct sunlight;
 - Install high-albedo white thermoplastic polyolefin roof membrane;
 - Install high-efficiency HVAC with hot-gas reheat;
 - Install formaldehyde-free insulation; and
 - Use recycled-content gypsum board.

⁶⁷ IS, Appendix B, p. 33.

⁶⁸ Santa Barbara Air Pollution Control District, Scope and Content of Air Quality Sections in Environmental Documents, September 1997.

⁶⁹ Butte County Air Quality Management District, Indirect Source Review Guidelines, March 1997.

⁷⁰ See Cool Houston Plan;

http://www.harcresearch.org/sites/default/files/documents/projects/CoolHoustonPlan_0.pdf

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- Provide education on energy efficiency to residents, customers, and/or tenants. Provide information on energy management services for large energy users. 12-33
- Meet "reach" goals for building energy efficiency and renewable energy use. 12-34
- Require all buildings to become "LEED" certified. 12-35
- Limit the use of outdoor lighting to only that needed for safety and security purposes. 12-36
- Require use of electric or alternatively fueled sweepers with HEPA filters. 12-37
- Include energy storage where appropriate to optimize renewable energy generation systems and avoid peak energy use. 12-38
- Plant low-VOC emitting shade trees, e.g., in parking lots to reduce evaporative emissions from parked vehicles. 12-39
- Use CARB-certified or electric landscaping equipment in project and tenant operations; and introduce electric lawn, and garden equipment exchange program. 12-40
- Maximize use of solar energy including solar panels; installing the maximum possible number of solar energy arrays on the building roofs and/or the Project side to generate solar energy for the facility.⁷¹ 12-41

The DEIR must be revised to consider these GHG mitigation measures and incorporate all feasible measures identified by SWAPE as binding mitigation for the Project. Only if the Project's GHG impacts remain significant after requiring all such feasible mitigation can the City consider declaring the Project's GHG impacts to be significant and unavoidable. 12-42

Second, the City improperly relies on the significant and unavoidable impact conclusion in the General Plan EIR and fails to make the required findings and statement for this Project. In *Communities for a Better Environment v. California Resources Agency*, the court invalidated former CEQA Guideline section 15152(f)(3)(C) because it impermissibly allowed "an agency, in approving a later project that has significant unavoidable impacts, to forego making a statement of overriding considerations *specifically tied to that project*."⁷² Under CEQA, an 12-43

⁷¹ SCAQMD Comment Letter in Response to MND for the Waterman Logistic Center, January 2018, available at: <http://www.aqmd.gov/docs/default-source/ceqa/comment-letters/2015/january/mndwaterman.pdf>

⁷² *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 124 (emphasis in original) (hereafter *Communities for a Better Environment*).
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agency must make specific findings in a statement of overriding considerations before approving a project that has a significant effect on the environment.⁷³ This requirement is "central to CEQA's role as a public accountability statute."⁷⁴ The court found that the guideline would allow an agency to adopt one statement of overriding considerations for a prior, more general EIR, and then avoid future political accountability by approving later, more specific projects with significant unavoidable impacts pursuant to the prior EIR and its statement of overriding considerations.⁷⁵ Most relevant here, the court concluded that even if a prior EIR's analysis of impacts may be incorporated in an EIR for a later specific project, for that later project, "the responsible public officials must still go on the record and explain specifically why they are approving the later project despite *its* significant unavoidable impacts."⁷⁶ Therefore, the court found that the guideline section was inconsistent with CEQA and invalid.

12-43
Cont.

As described above, the City concluded in its General Plan that impacts from GHG are significant and unavoidable. Based on this determination, the City concludes in the IS: "The project applicant will comply with General Plan policies, ECAS policies, and federal and State regulations. Therefore, the impact has been adequately addressed and would not result in a significant impact not already identified in the General Plan EIR."

12-44

This conclusion, however, contradicts the court's clear instructions in *Communities for a Better Environment v. California Resources Agency*. Even if the City finds that the Project's impact are significant and unavoidable despite the availability of more mitigation measures as described above, the City should explain in the DEIR why it approves the later project despite *its specific* significant unavoidable impacts. By failing to do so, the City violated CEQA.

3. The DEIR Fails to Adequately Analyze, Quantify and Mitigate Significant Impacts on Biological Resources

According to the Draft Solano Multispecies Habitat Conservation Plan (HCP), the Project site is within areas designated as an Irrigated Agriculture Conservation Area, which in general is a target area for conservation for both Swainson's hawk

12-45

⁷³ Pub. Resources Code, § 21081; CEQA Guidelines, §§ 15091, 15092, 15093.

⁷⁴ *Communities for a Better Environment*, *supra*, 103 Cal.App.4th at p. 124.

⁷⁵ *Ibid.*

⁷⁶ *Id.* at p. 124-25.

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and burrowing owl.⁷⁷ Also, as acknowledged by the DEIR, it includes the riparian corridor of the Old Alamo Creek and provides habitat to a number of special-status plants and wildlife. Despite that, as described below, the DEIR fails to properly address the Project's impacts on many of the biological resources within the Project Site and vicinity: the DEIR failed to properly establish the existing setting for some of the resources, and failed to adequately disclose and analyze the impacts on other resources. With regard to mitigation, many of the proposed mitigation measures fail to mitigate the impact to a less than significant level, and some biological resources mitigation is completely missing from the DEIR.

12-45
Cont.

A. The DEIR Fails to Adequately Establish the Existing Setting for Biological Resources

The existing environmental setting is the starting point from which the lead agency must measure whether a proposed project may cause a significant environmental impact.⁷⁸ CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.⁷⁹ Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The courts have clearly stated that, "[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined."⁸⁰

12-46

The DEIR, however, fails to properly describe the environmental setting for two special-status species: the Swainson's Hawk and the Burrowing Owl. As explained by Mr. Cashen in his comment letter, the survey protocols prepared by the California Department of Fish and Wildlife ("CDFW") and California Burrowing Owl Consortium call for nine surveys, preformed at specific times during the year,

⁷⁷ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.2-46.

⁷⁸ See, e.g., *Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278 ("*Fat*"), citing Remy, et al., Guide to the Calif. Environmental Quality Act (1999) p. 165.

⁷⁹ CEQA Guidelines §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 ("*Riverwatch*").

⁸⁰ *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.
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to locate Swainson's hawk nest sites. For the Burrowing Owl the protocol calls for four visits, also specifically timed to account for its presence.

12-46
Cont.

According to the DEIR biology report, the biologist for the Project conducted only one site visit to assess wildlife uses. Not only does this fall far short of the protocol requirements, but in this one visit the biologist also conducted surveys for special status plants and delineation of aquatic resources. As explained by Mr. Cashen, "[t]he failure to conduct protocol-level surveys precludes knowledge of Swainson's hawk and burrowing owl nest sites at (or near) the Project site, and thus, the Project's compliance with Mitigation Measures SH 4 and BO 2 in the Draft Solano HCP (i.e., mitigation for impacts to nest sites).⁸¹⁸² As further explained by Mr. Cashen and below, the preconstruction survey requirements incorporated into the DEIR do not resolve this issue.

12-47

B. The DEIR Fails to Adequately Disclose and Analyze Impacts on Biological Resources

An EIR must fully disclose all potentially significant impacts of a Project, and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.⁸³ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁸⁴ As explained by Mr. Cashen in his comments,⁸⁵ the DEIR fails to comply with this duty regarding a number of biology resources, including:

12-48

Riparian Woodland

The Project includes trails, a new road, and two access bridges that would directly and indirectly impact Old Alamo Creek and the associated riparian woodland.⁸⁶ The DEIR fails to disclose, describe, or quantify these impacts. This

12-49

⁸¹ Draft Solano HCP, pp. 6-69 and -71.

⁸² Exhibit B: Cashen comments, p. 3.

⁸³ 14 CCR § 15064(b).

⁸⁴ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

⁸⁵ Exhibit B: Cashen comments, p. 3.

⁸⁶ The Farm at Alamo Creek Specific Plan Project DEIR, p. 3-16 and Figure 3-5. See also Appendix D: Draft Biological Resources Assessment, p. 26.

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precludes a proper understanding of Project impacts and the ability of the public and resource agencies to comment on it.

12-49
Cont.

Short-eared Owl, Ferruginous Hawk, and Mountain Plover

The Project site provides potential habitat for the short-eared owl, ferruginous hawk, and mountain plover.⁸⁷ The DEIR, however, fails to provide *any* analysis of potentially significant Project impacts to these three special-status species.

12-50

Burrowing Owl

The burrowing owl is a California Species of Special Concern. However, the DEIR does not properly account for the impact on its habitat. As explained by Mr. Cashen,⁸⁸ the DEIR claims to leave approximately 13.4 acres of the project site in open space that provides nesting and foraging opportunities for this species. However, except for a 4.3-acre agricultural buffer, which may provide habitat for burrowing owls, the remaining open space does not provide potential habitat for the species because burrowing owls do not occur in woodlands (or on lands immediately adjacent to woodlands).

12-51

Also, Mitigation Measure BIO-1d is based on the amount of burrowing owl habitat that would be impacted by the Project. Therefore, by failing to properly account for the impact, the DEIR also fails to properly mitigate it.

12-52

In addition, the DEIR fails to disclose or analyze potentially significant impacts associated with the eviction of burrowing owls from the Project site, in what is described in the DEIR as "passive relocation."⁸⁹ As explained by Mr. Cashen,⁹⁰ consistent with CDFW guidelines, passive relocation is a potentially significant impact under CEQA that must be analyzed.⁹¹ CEQA guidelines require that if a mitigation measure would cause a significant effect, its effects shall be

12-53

⁸⁷ The Farm at Alamo Creek Specific Plan Project DEIR, Table 4.2-2 and p. 4.2-33.

⁸⁸ Exhibit B: Cashen comments, p. 4.

⁸⁹ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.2-37.

⁹⁰ Exhibit B: Cashen comments, p. 4.

⁹¹ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, p. 10. 1222-001acp

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discussed.⁹² By failing to discuss the impact of passive relocation of burrowing owls, the DEIR violates CEQA.

↑
12-53
Cont.

C. The Mitigation Measures Proposed in the DEIR Fail to Adequately Mitigate Impacts on Biological Resources

An EIR must identify and describe any feasible measure that can be implemented to reduce or avoid each potentially significant environmental effect of the project.⁹³ The DEIR proposes a list of mitigation measures, concluding that “[c]ompliance with these mitigation measures would reduce project impacts to less than significant.”⁹⁴ As explained below, however, the mitigation measures proposed in the DEIR fail to properly mitigate the Project’s potentially significant impacts with regard to a number of special-status species.

Western Pond Turtle (BIO 1b)

Mitigation Measure BIO-1b states: “[i]f a western pond turtle nest is observed within the proposed impact area, the nest shall be fenced off and avoided if possible. If avoidance is not possible, the project applicant and the biologist shall consult with City staff to determine appropriate mitigation.” As explained by Mr. Cashen, the DEIR does not identify any feasible strategies for mitigating impacts to pond turtle nests if avoidance is not possible, and does not establish any performance standards.⁹⁵ Thus, the DEIR improperly defers mitigation of the impact.⁹⁶

12-54

Burrowing Owl (BIO 1c and 1d)

According to the DEIR, mitigation measures BIO 1c and 1d will reduce the impact on the burrowing owl to a less than significant level.⁹⁷ However, as explained by Mr. Cashen in his comment letter, these measures are insufficient to mitigate the impacts as required by CEQA.

12-55

⁹² 14 CCR § 15126.4(a)(1)(D).

⁹³ PRC §21100(b)(3), 14 CCR §15126.4(a)(1).

⁹⁴ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.2-35.

⁹⁵ Exhibit B: Cashen comments, p. 6.

⁹⁶ 14 CCR §15126.4(a)(1)(B).

⁹⁷ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.2-35.

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First, the DEIR requires preconstruction surveys to be conducted by a "qualified biologist" to identify burrowing owls or their nesting areas.⁹⁸ The measure, however, fails to define who would qualify as a "qualified biologist." In addition, the measure refers to the Solano HCP for a survey protocol; however, the Solano HCP does not provide a protocol which defines the required number and method of surveys. Moreover, the surveys proposed in the DEIR are based on the timing of construction, rather than the timing needed to establish the ecological value of the site to burrowing owls. This precludes the ability to identify impacts to nest sites, and thus, the ability to comply with Mitigation Measure BO 2 in the Draft Solano HCP.⁹⁹

12-56

Second, the DEIR requires 160-foot exclusion zones around burrows occupied by burrowing owls during the non-breeding season, and 250-foot exclusion zones around burrows occupied during the breeding season. As explained by Mr. Cashen, although these buffer distances are consistent with the mitigation proposed in the Draft Solano HCP, subsequent scientific information indicates larger buffers are needed to ensure protection of burrowing owls.¹⁰⁰ CEQA requires that an agency base its significance determination, to the extent possible, on scientific and factual data.¹⁰¹ As shown by Mr. Cashen, available scientific data does not support the City's conclusion of less than significant impact.

12-57

Third, with regard to compensatory habitat, Mr. Cashen points to a number of critical flaws: First, Mitigation Measure BIO-1d requires compensatory mitigation for the permanent loss of burrowing owl foraging habitat. However, it fails to require any mitigation for the loss of nesting habitat if nesting owls are detected at the site, which is a critical omission because the loss of nesting habitat is the primary reason for the decline of California's burrowing owl population. This omission also conflicts with Mitigation Measure BO 2 in the Draft Solano HCP and

12-58

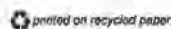
⁹⁸ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.2-37.

⁹⁹ Exhibit B: Cashen comments, p. 6. BO 2 states: "Covered Activities resulting in the take of a known or active burrowing owl nest site shall preserve an active nest site. Preservation of an active nest site may be achieved through purchase of occupied nest credits from an HCP-certified mitigation bank or approved project-specific reserve. If preserved active nest sites are unavailable, project proponents will provide funding (\$12,000 per nest at 2011 costs) to the SCWA Interim Nest Protection Program." See Draft Solano HCP, p. 6-71.

¹⁰⁰ Exhibit B: Cashen comments, p. 7.

¹⁰¹ 14 CCR § 15064(b).

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Mitigation Measure BIO-13 in the General Plan EIR, which require accounting for loss of nesting habitat under certain conditions.¹⁰²

12-58
Cont.

The DEIR also allows preservation through mitigation or conservation banks for the Swainson's hawk to satisfy the requirements for BIO-1d if additional measures are implemented on the mitigation lands. As explained by Mr. Cashen, this "stacking" of mitigation measures has two main flaws: "First, neither of the banks mentioned in the DEIR are feasible options for mitigating the Project's significant impacts on burrowing owls. Specifically, neither bank provides breeding habitat for burrowing owls, and owl use of those sites has been limited to a few individuals during the winter. In addition, the Burke Ranch Conservation Bank does not have sufficient credits to satisfy the Project's mitigation requirement. Second, the DEIR does not establish performance standards for the mitigation lands, nor does it require a mitigation monitoring and reporting program. As a result, it provides no assurances that the mitigation lands would mitigate Project impacts to burrowing owls to less-than-significant levels."¹⁰³

12-59

12-60

Finally, Mr. Cashen notes that while Mitigation Measure BIO-1d states: "[a]dequate funding shall be provided to manage the owl mitigation area in perpetuity," the DEIR fails to identify the amount of funding or the process that will be implemented to ensure funding is "adequate," and no management plan is proposed." As a result," explains Mr. Cashen, "the DEIR provides no assurance that funding would be sufficient to manage the mitigation area(s) for burrowing owl conservation in perpetuity."¹⁰⁴

12-61

Swainson's Hawk (BIO-1e and 1f)

The Swainson's hawk is listed as a threatened species under the California Endangered Species Act ("CESA"). However, while the DEIR concludes that: "noise, light, and other activities associated with construction could result in nest failure if active nests are present within 0.5 mile of the project site at the time of construction,"¹⁰⁵ it only requires preconstruction surveys and exclusion buffers

12-62

¹⁰² Exhibit B: Cashen comments, p. 7.

¹⁰³ Exhibit B: Cashen comments, p. 7-8, FN omitted.

¹⁰⁴ Exhibit B: Cashen comments, p. 8.

¹⁰⁵ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.2-34.

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within 0.25 mile of the Project site.¹⁰⁶ As explained by Mr. Cashen: “[b]ecause the mitigation proposed in the DEIR (i.e., 0.25 mile) is not commensurate with the impact identified in the DEIR (i.e., 0.5 mile), potentially significant impacts to the Swainson’s hawk remain unmitigated.”¹⁰⁷

12-62
Cont.

Mitigation Measure BIO-1e requires preconstruction surveys to be conducted by a qualified biologist if construction occurs during the nesting season for Swainson’s hawk, no more than 15 days prior to construction.¹⁰⁸ Furthermore, in addition to the fact that the DEIR again fails to establish qualifications for the “qualified biologist” or identify the methods to be used, Mr. Cashen points out that the currently accepted protocol for such surveys states that meeting the minimum level of protection for the species requires surveys during at least the two survey periods immediately prior to a project’s initiation, and that surveys should not be initiated between April 21 to June 10 (period IV).¹⁰⁹ Therefore, “[i]t would be impossible for the Applicant to adhere to the survey protocol if surveys are confined to the 15 days prior to construction. As a result, the preconstruction surveys proposed in the DEIR would not provide reliable information on Swainson’s hawk nest sites that may be impacted by the Project.”¹¹⁰

12-63

In addition, the DEIR requires mitigation for the loss of Swainson’s hawk *foraging* habitat by preserving a minimum of 1:1 land/area ratio of similar habitat. However, contrary to the provisions of General Plan and Draft Solano HCP, the DEIR does not require mitigation for the loss of any *nesting* territories at the site,¹¹¹ nor does it require the mitigation lands to be located in the Irrigated Agriculture Reserve Area, establish performance standards for the mitigation lands or require a mitigation monitoring and reporting program. This, explains Mr. Cashen, results in the DEIR failing “to ensure the proposed mitigation would mitigate Project impacts to Swainson’s hawks to less-than-significant levels.”¹¹²

12-64

Conflict with the HCP is not resolved by the proposed mitigation measures

¹⁰⁶ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.2-38.

¹⁰⁷ Exhibit B: Cashen comments, p. 5.

¹⁰⁸ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.2-38.

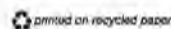
¹⁰⁹ Swainson’s Hawk Technical Advisory Committee. 2000 May 31. Recommended Timing and Methodology for Swainson’s Hawk Nesting Surveys in California’s Central Valley. pp. 5.

¹¹⁰ Exhibit B: Cashen comments, p. 8.

¹¹¹ General Plan measures BIO-10 and -11. See also Draft Solano HCP, measures SH 1 and SH 4.

¹¹² Exhibit B: Cashen comments, p. 9.

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The DEIR acknowledges that the conversion of approximately 200 acres of irrigated agricultural lands, located within the Irrigated Agriculture Conservation Area (which conserves Swainson's hawk and burrowing owl habitat), to a developed environment would not be compatible with the draft Solano HCP goal for conservation of such lands.¹¹³ However, the DEIR concludes that Mitigation Measures BIO-1d and BIO-1f (i.e., compensatory mitigation for the loss of burrowing owl and Swainson's hawk foraging habitat) are consistent with the Draft HCP, and thus: "[c]ompliance with these mitigation measures would ensure consistency with the Draft HCP and would reduce the impact to less than significant."¹¹⁴ However, in addition to the flaws in the mitigation measures discussed above, this conclusion is not supported by substantial evidence, as explained by Mr. Cashen:

12-65

The HCP incorporates a landscape-level approach to conservation encompassing approximately 585,000 acres. The meaning of this is that the HCP looks at the area as a whole and establishes thoroughly vetted conservation reserve areas that are subjected to strict oversight and numerous binding conditions to assure that the conservation targets are met. The DEIR, on the other hand, does not even require the Applicant's habitat mitigation to be located within a reserve designated in the HCP, and it provides no assurances that the proposed mitigation would facilitate landscape-level conservation, or even that it would have any actual value to burrowing owls and Swainson's hawks. Therefore, no substantial evidence supports the conclusion that simply by providing some kind of mitigation habitat, the potentially significant impact due to conflicts with the Draft Solano HCP would be mitigated to a less than significant level.

Tricolored Blackbird, Northern Harrier, White-tailed Kite, and Loggerhead Shrike (BIO-1g)

Similar to the burrowing owl mitigation, this mitigation measure allows the irrigated agriculture preserve mitigation provided for Swainson's hawk to satisfy the compensatory habitat requirements for these special-status species if "lands are maintained, to the extent feasible, to be compatible with use [by those species]".¹¹⁵ As explained by Mr. Cashen, this measure "provides no assurances that the

12-66

¹¹³ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.2-45 and -46.

¹¹⁴ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.2-45 and -46.

¹¹⁵ The Farm at Alamo Creek Specific Plan Project DEIR, pp. 4.2-40.

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mitigation lands would have any actual value [for those species] because the mitigation is contingent on an undefined level of feasibility, and because it does not: (a) require the mitigation lands to be occupied by any of these species, (b) establish performance standards for the mitigation lands, and (c) incorporate a monitoring and reporting program (or other oversight mechanism) that ensures proper implementation of the Habitat Maintenance Plan."¹¹⁶

12-66
Cont.

Special-Status Bats (BIO-1h)

As explained by Mr. Cashen, the proposed mitigation for these bats, which requires pre-construction roosting bat surveys conducted by a qualified bat biologist, does not ensure Project impacts are mitigated to a less-than-significant level.

12-67

First, the mitigation measure does not identify the survey techniques, which are critical for proper detection of different species and hence for proper mitigation. Second, the surveys are limited to the breeding season, thus ignoring impacts to wintering (hibernation) roosts that may be significant. Third, the measure proposes exclusionary measures which might result in mortality of pups during the breeding season. Finally, this measure does not require the Applicant to provide replacement roosts as compensation for impacts to potential roosts at the Project, which may result in the elimination of the local bats population.¹¹⁷

Impacts on Jurisdictional Waters

With regard to development of the Old Alamo Creek and the irrigation canals and ditches, the DEIR acknowledges that "[c]onversion of these aquatic features to a developed environment would constitute a potentially significant impact to potential waters of the U.S. and State."¹¹⁸ The DEIR, however, fails to properly mitigate this impact. The proposed mitigation measures state that "(...) the loss of waters of the U.S. and State be replaced at a 1:1 ratio." And then describes the potential permits and requirements that may be applicable to the project, stating the Applicant will comply with them as required.¹¹⁹ In other words, the DEIR purports to mitigate the impact on the aquatic ecosystems within the Project by

12-68

¹¹⁶ Exhibit B: Cashen comments, p. 9.

¹¹⁷ Exhibit B: Cashen comments, p. 10-11.

¹¹⁸ The Farm at Alamo Creek Specific Plan Project DEIR, pp. 4.2-44.

¹¹⁹ The Farm at Alamo Creek Specific Plan Project DEIR, pp. 4.2-44.

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either requiring compensatory mitigation of land in a 1:1 ratio, or by complying with the required permits (or, where applicable, by both). As explained by Mr. Cashen in his letter, neither of these options will mitigate the impact to a less than significant level.

12-68
Cont.

First, the 1:1 ratio is generally insufficient to properly mitigate the impact, and the DEIR fails to provide any scientific evidence to the contrary. In his comment letter, Mr. Cashen explains why a ratio greater than 1:1 is usually required to mitigate impacts in similar situations: First, 1:1 ratio does not achieve the nation's standard for "no net loss" of wetland area. Second, such mitigation is by nature both uncertain and takes a long time to accomplish, hence a greater ratio is needed to compensate for those deficiencies. Finally, greater ratios are needed to account for buffer zones, for impacts on rare species and resources, to compensate for the distance from the impacted habitat and to account for the project's indirect and cumulative impacts. As explained by Mr. Cashen, "[p]rojects possessing any one of these circumstances have required a compensatory mitigation ratio of 2:1, 3:1, or even greater (especially when a threatened or endangered species was impacted.)"¹²⁰

12-69

Second, compliance with regulatory permits alone does not provide substantial evidence to support the conclusion of a less than significant impact. As shown in detail by Mr. Cashen, "numerous studies have demonstrated that many compensatory mitigation projects permitted under Sections 401 and 404 of the Clean Water Act are not achieving the goal of "no overall net loss" of wetland acres and functions."¹²¹ The City therefore must conduct an analysis of impacts, based on the Project's specific features, and identify proper, enforceable mitigation.

12-70

D. The DEIR Fails to Provide Any Mitigation for Some of the Project's Impacts on Biological resources

With regard to some of the impacts the Project will have on biological resources, the DEIR, while at least briefly acknowledging the impacts, fails completely to provide any required mitigation measures. These include impacts on nesting birds, riparian woodland, Western Pond Turtle, Tricolored Blackbird,

12-71

¹²⁰ Exhibit B: Cashen comments, p. 11-13.

¹²¹ Exhibit B: Cashen comments, p. 13.

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Northern Harrier, White-tailed Kite, and Loggerhead Shrike, as well as funding for mitigation of impervious surfaces impacts:

12-71
Cont.

Nesting Birds

Although the Biological Resources Assessment for the DEIR recommended measures to avoid impacts to nesting birds, the DEIR fails to incorporate those measures (except for Swainson's hawk and burrowing owl). As explained by Mr. Cashen, most bird species that occur in California are protected under the Migratory Bird Treaty Act ("MBTA"), and given the size of the Project, there is no doubt that nesting site exist within the site. Therefore, to comply with the MBTA and California Fish and Game Code, the City must incorporate mitigation measures that: (a) limit activities that could impact nesting birds to the non-breeding season, and (b) require pre-construction surveys and nest buffers for activities that cannot be avoided. Because the DEIR provides no mitigation, potentially significant impacts to nesting birds remain unmitigated.¹²²

12-72

Riparian Woodland

As explained by Mr. Cashen, the Project would directly and indirectly impact the riparian woodland along Old Alamo Creek. The DEIR provides no mitigation for these significant impacts. This conflicts with the General Plan and Draft Solano HCP, which require a Riparian Restoration Plan that incorporates in-kind habitat mitigation, invasive species control programs, and direct replacement of native vegetation. Because the DEIR does not incorporate mitigation, Project impacts to the riparian woodland remain potentially significant.¹²³

12-73

Impacts from Increased Impervious Surfaces

Although the DEIR states it treats the draft HCP as an "accepted plan for the purposes of analyzing and mitigating potential impacts,"¹²⁴ it fails to include an important mitigation measure required by the HCP. Mitigation Measure VPG 5 in the Draft Solano HCP requires that projects which create or increase impervious surfaces will provide funding to contribute to a grant funding program to contribute

12-74

¹²² Exhibit B: Cashen comments, p. 10.

¹²³ Exhibit B: Cashen comments, p. 11.

¹²⁴ The Farm at Alamo Creek Specific Plan Project DEIR, p.4.2-45.

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to certain HCP goals and objectives. Although the Project would significantly increase impervious surfaces and stormwater drainage to Old Alamo Creek, it fails to require compliance with HCP Mitigation Measure VPG 5.¹²⁵

12-74
Cont.

Western Pond Turtle

The western pond turtle is a California Species of Special Concern. The DEIR acknowledges that human presence and habitation in the project area could result in potentially significant impacts to the species¹²⁶, but fails to incorporate any mitigation for these impacts.

12-75

Tricolored Blackbird, Northern Harrier, White-tailed Kite, and Loggerhead Shrike

Regarding these special-status species, the DEIR concludes that: "noise, light, and other activities associated with construction could result in nest failure if active nests [of these species] are present within 0.5 mile of the project site at the time of construction."¹²⁷ Although this constitutes a significant impact, the DEIR fails to incorporate mitigation to avoid this impact. Moreover, as explained by Mr. Cashen, due to highly colonial nesting habits of the Tricolored blackbirds, impacts to its nesting colony can have a substantial effect on the population. Although the DEIR acknowledges the blackberry thickets along Old Alamo Creek provide potential nesting habitat for the tricolored blackbird,¹²⁸ "it fails to incorporate any mitigation to avoid impacts to tricolored blackbird nests. It also fails to require the Applicant to preserve and manage one active tricolored breeding colony for each active or known breeding colony affected by the Project. As a result, the Project does not comply with Mitigation Measures RSM 7 and RSM 14 in the Draft Solano HCP."¹²⁹

12-76

IV. CONCLUSION

The DEIR is inadequate as an environmental document because the City piecemealed its environmental review, and because the DEIR fails to properly disclose, analyze and mitigate the Project's significant impacts on air quality, GHG

12-77

¹²⁵ Exhibit B: Cashen comments, p. 14.

¹²⁶ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.2-33.

¹²⁷ The Farm at Alamo Creek Specific Plan Project DEIR, p. 4.2-34.

¹²⁸ The Farm at Alamo Creek Specific Plan Project DEIR, Table 4.2-2.

¹²⁹ Exhibit B: Cashen comments, p. 5.

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and biological resources. The City cannot approve the Project until it prepares a revised DEIR that resolves these issues and complies with CEQA's requirements.

↑ 12-77
Cont.

Thank you for your consideration of these comments.

Sincerely,



Tanya A. Gulesserian
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