

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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

TEL: (650) 589-1660

FAX: (650) 589-5062

kfederman@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 958144721

TEL: (916) 444-6201

FAX: (916) 444-6209

KEVIN T. CARMICHAEL
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
ANDREW J. GRAF
TANYA A. GULESSERIAN
KENDRA D. HARTMANN*
DARIEN K. KEY
RACHAEL E. KOSS
AIDAN P. MARSHALL
TARA C. RENGIFO
MICHAEL R. SEVILLE

Of Counsel

MARC D. JOSEPH
DANIEL L. CARDOZO

**Not admitted in California.
Licensed in Colorado.*

March 28, 2022

Via Email Submission

David Kwong, Director
Giuseppe Sanfilippo, Associate Planner
Community Development Department
San Joaquin County
1810 East Hazelton Ave
Stockton, CA 95205
dkwong@sjgov.org
gsanfilippo@sjgov.org

James Grunsky
Randy Hamilton
Ms. Jass K Sangha
Sheri Midgley
Donald Ruhstaller
Planning Commission
San Joaquin County
Email: planning@sjgov.org

Re: Appeal of Site Approval No. PA-1700279 for North Central Valley Energy Center Project (APN: 093-100-20 & -24, 24300 E. Flood Rd.) (SCH No. 2018032050)

Dear Mr. Kwong, Mr. Sanfilippo and Honorable Commissioners Ruhstaller,
Grunsky, Hamilton, and Ms. Sangha:

We write on behalf of **Citizens for Responsible Industry** ("Citizens") to appeal the San Joaquin County ("County") Community Development Department's March 17, 2022 approval of the North Central Valley Energy Center Project (Site Approval No. PA-1700279) ("Project"), proposed by William Earl Jr & Marilyn Lucille Van Tassel and North Central Valley Energy Storage, LLC ("Applicant")¹ and any and all other approval actions taken by the County on March 17 with regard to the Project, including the adoption of the Mitigated Negative Declaration ("MND") and Mitigation Monitoring and Reporting Program ("MMRP")² prepared by the County

¹ The County of San Joaquin, Community Development Department, Notice of Determination ("NOD"), Site Approval No. PA-1700279, State Clearinghouse No. 2018032050, available at: https://files.ceganet.opr.ca.gov/239271-3/attachment/b7cwKywQpLEqCKCpHNowoHB3OFYUcvlBPv_5LwkvDn5FYEexNqbZ0vLvMhsjRBT_rY7KkUQ_4Wv297u0t0.

² San Joaquin County Community Development Department, Initial Study / Mitigated Negative Declaration, PA-1700279 (SA) (November 2021) <https://files.ceganet.opr.ca.gov/239271-5567-011acp>

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of San Joaquin (“County”) pursuant to the California Environmental Quality Act (“CEQA”).³⁴

The Project proposes to construct a 132-megawatt (“MW”) battery energy storage system (“BESS”), which will include battery storage containers and associated on-site support facilities including a project collector substation, inverters, collector lines, fencing, access roads, operations and maintenance building, a supervisory control and data acquisition (“SCADA”) system, and other ancillary facilities and equipment. The Project also includes construction of a 115-kilovolt (“kV”) overhead generation transmission line (“gen-tie line”), to connect the BESS to the adjacent PG&E Bellota substation. The Project will include expansion of the Bellota substation footprint to support grid interconnection of the Project. The subject parcels (Assessor Parcel Numbers 093-100-24, 093-100-20, 093-100-04, 093-100-05, and 093-100-16) are located at 24300 and 3670 East Flood Road, Linden, California 95236, on the south side of E. Flood Road and 0.8 miles west of Escalon-Bellota Road in unincorporated San Joaquin County.⁵

On December 13, 2021 we submitted comments on the Project’s MND with the assistance of air quality and hazards expert Dr. Phyllis Fox, Ph.D.; expert conservation biologist and wildlife ecologist Dr. Shawn Smallwood, Ph.D.; and agriculture and forestry expert Greg House.⁶ Their comments provided the County with substantial evidence supporting a fair argument that the Project’s air quality, public health, biological resources, and agricultural impacts are far more extensive than disclosed in the MND and require additional mitigation. The County was required to prepare an environmental impact report (“EIR”) to fully analyze and mitigate these impacts.

Rather than prepare an EIR, on March 17, 2022, the Community Development Department approved the Project and the MND’s MMRP, and adopted Conditions of Approval in reliance on the MND. The approval document fails to

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³ Pub. Resources Code (“PRC”) §§ 21000 *et seq.*

⁴ The NOD states that “Findings were not made pursuant to the provisions of CEQA.”

⁵ San Joaquin County Community Development Department, Mitigated Negative Declaration for Site Approval No. PA-1700279 North Central Valley Energy Center Project (“MND”).

⁶ See Exhibit 1, K. Federman, Comments on the Initial Study / Mitigated Negative Declaration for North Central Valley Energy Center Project (Site Approval No. PA-1700279) (December 13, 2022) and Exhibits A-C.

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attach, acknowledge, or respond to Citizens' MND comments, despite the fact that the comments of other agencies and members of the public were attached. The record therefore lacks any evidence that the County considered Citizens' MND comments before issuing the Project approvals, in violation of CEQA.⁷

The approval document also fails to include any CEQA findings, fails to remedy the deficiencies in the MND, and fails to modify any of the MND's deficient mitigation measures. As a result, the Department's approval violated both CEQA and land use laws, and the Community Development Department lacked substantial evidence to approve the Project and make the findings required for the Site Approval Permit under the County Code.⁸ The Conditions of Approval do not resolve the inadequate analysis and mitigation contained in the MND, and fail to adequately remedy the adverse environmental issues caused by the Project. The Project's potentially significant impacts on air quality, greenhouse gas, health risk, energy, biological, and agricultural resources render the Project inconsistent with the findings required for a Site Approval Permit, and approval of the Project violated CEQA.

This appeal addresses the outstanding deficiencies in the County's environmental analysis and proposed mitigation for the Project, and incorporates by reference our December 13, 2022 comments on the MND, which remain unresolved. This letter accompanies Appellants' requisite appeal filing fee. We urge the Planning Commission to carefully consider these comments and to grant this appeal for the Project for the reasons stated herein. We reserve the right to supplement these comments at a later date, and at any later proceedings related to this Project.⁹

I. STATEMENT OF INTEREST

Citizens is a coalition of labor organizations whose members encourage sustainable development of California's energy and natural resources. The coalition includes San Joaquin County residents and other members and organizations, including **California Unions for Reliable Energy ("CURE")** and its local affiliates,

⁷ 14 CCR § 15074(b) ("Prior to approving a project, the decisionmaking body of the lead agency shall consider the proposed negative declaration or mitigated negative declaration together with any comments received during the public review process.").

⁸ San Joaquin Code § 9-818.6.

⁹ Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield ("Bakersfield")* (2004) 124 Cal.App.4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal.App.4th 1109, 1121.

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and the affiliates' members who live, recreate, work, and raise families in San Joaquin County and in communities near the Project site. Thus, Citizens, its participating organizations, and their members stand to be directly affected by the Project's impacts.

Since its founding in 1997, CURE has been committed to building a strong economy and a healthier environment. CURE's members help solve the State's energy problems by building, maintaining, and operating conventional and renewable energy power plants, energy storage, and transmission facilities. CURE has helped cut smog-forming pollutants in half, reduced toxic emissions, increased the use of recycled water for cooling systems, and pushed for groundbreaking pollution control equipment as the standard for all new power plants, all while helping to ensure that new power plants, energy storage, and transmission facilities are built with highly trained, professional workers who live and raise families in nearby communities.

Individual members of Citizens and its member organizations live, work, recreate, and raise their families in San Joaquin County, in the vicinity of the Project. Accordingly, they will be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be the first in line to be exposed to any health and safety hazards that exist onsite.

Citizens has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for the members that they represent. Environmental degradation destroys cultural and wildlife areas, consumes limited fresh surface and ground water resources, causes water pollution, and imposes other stresses on the environmental carrying capacity of the state. This in turn jeopardizes future development by causing construction moratoriums and otherwise reducing future employment opportunities for Citizens' members. Citizens therefore has a direct interest in enforcing environmental laws to minimize the adverse impacts of projects that would otherwise degrade the environment.

Finally, Citizens' members are concerned about projects that risk serious environmental harm without providing countervailing economic benefits. For these reasons, Citizens' mission includes improving California's economy and the environment by ensuring that new conventional and renewable power plants and

their related transmission facilities use the best practices to protect our clean air, land and water and to minimize their environmental impacts and footprint.

II. LEGAL DISCUSSION

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.¹⁰ The EIR is the very heart of CEQA.¹¹ “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.”¹²

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.¹³ “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.’”¹⁴ 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.”¹⁵

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures.¹⁶ 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.”¹⁷ 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

¹⁰ See, e.g., PRC § 21100.

¹¹ *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.

¹² *Communities. for a Better Env. v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 (“*CBE v. CRA*”).

¹³ 14 Cal. Code Regs. § 15002(a)(1).

¹⁴ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

¹⁵ *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.

¹⁶ 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 p. 564.

¹⁷ 14 Cal. Code Regs. §15002(a)(2).

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that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”¹⁸

CEQA’s purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.¹⁹ CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the “fair argument” standard. Under that standard, a lead agency “shall” prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.²⁰

In contrast, a mitigated negative declaration may be prepared only when, after preparing an initial study, a lead agency determines that a project may have a significant effect on the environment, but:

- (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review *would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur*, and
- (2) there is *no substantial evidence* in light of the whole record before the public agency that the project, as revised, *may* have a significant effect on the environment.²¹

Courts have held that if “no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.”²² The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative

¹⁸ PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

¹⁹ See Pub. Resources Code, § 21100.

²⁰ Pub. Resources Code, §§ 21080, subd. (d), 21082.2, subd. (d); CEQA Guidelines, §§ 15002, subd. (k)(3), 15064, subds. (f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123 (*Laurel Heights II*); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602 (*Quail Botanical*).

²¹ Pub. Resources Code, § 21064.5 (emphasis added).

²² See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

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declaration.²³ An agency's decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.²⁴

"Substantial evidence" required to support a fair argument is defined 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."²⁵

Under CEQA, mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.²⁶ A CEQA lead agency is precluded from making the required CEQA findings to approve a project unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved. For this reason, an agency may not rely on mitigation measures of uncertain efficacy or feasibility.²⁷ This approach helps "ensure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."²⁸ The MND failed to adequately analyze Project impacts as shown below.

A. The MND Failed to Provide a Complete Project Description

CEQA requires that an Initial Study include a description of the project and an identification of the environmental setting.²⁹ "An accurate and complete project description is necessary for an intelligent evaluation of the potential environmental impacts of the agency's action."³⁰ Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate project description.³¹ Further, "[a]n accurate and complete project description is necessary for an intelligent evaluation

²³ *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

²⁴ *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (*Friends of B Street*) ("If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact").

²⁵ CEQA Guidelines, § 15384, subd. (a).

²⁶ CEQA Guidelines, § 15126.4, subd. (a)(2).

²⁷ *Kings County Farm Bureau v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

²⁸ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

²⁹ CEQA Guidelines, § 15063, subd. (d).

³⁰ *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193.

³¹ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311 ("*Sundstrom*").
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of the potential environmental impacts of the agency's action... Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal ... and weigh other alternatives in the balance."³² Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project's impacts and undermining meaningful public review.³³

The Project will include expansion of the Bellota substation footprint to support grid interconnection of the Project. The MND relied on an inadequate Project Description because it did not sufficiently address the Bellota Substation Expansion, nor describe the proposed BESS. As a result of these deficiencies, the Project description in the MND mislead the public and the Community Development Department by failing to describe the scope of the Project and its impacts. Without this information, the County lacked adequate information to determine whether an MND was applicable to the Project in the first place. As explained below, when properly described, the true scope of the Project demonstrates that there is substantial evidence to support a fair argument that an EIR must be prepared.

i. The MND's Project Description Failed to Provide an Adequate Description of the Bellota Substation Expansion

CEQA requires that a project description include all relevant parts of a project, including future expansions or later phases of the project that will foreseeably result from project approval. A project description must include an analysis of the environmental effects of future expansion if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.

The MND did not provide any substantive information about the expansion of the Bellota Substation. Citizens' expert Dr. Fox reviewed the MND and determined that the document failed to detail how many transformers the substation will have, and at what voltage they will operate. This information is critical to determine the electricity demand the Project will require and the resultant emissions to generate

³² *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193.

³³ *See, e.g., Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376. 5567-011acp

the electricity. The Department's approval document and new Conditions of Approval do nothing to elucidate what the expansion of the Bellota Substation will entail, in accordance with CEQA. An EIR must be prepared which adequately discloses the Project description including the foreseeable expansion of the Bellota Substation.

ii. The MND's Project Description Failed to Describe the Battery Storage System

The MND failed to provide basic information regarding the type of lithium-ion battery or battery chemistry that will be used for the BESS. This information is critically important for worker safety and on-site and off-site impacts in the event of an accident.³⁴ Absent this information, the opportunity for meaningful public review was drastically limited. In particular, Dr. Fox concluded that the MND failed to provide the Material Safety Data Sheet ("MSDS") for the batteries or otherwise characterize their chemical composition, a "*sine qua non* for assessing the fire, explosion, health, and other risks of the battery storage facility."³⁵

The Site Approval Application filed by the Applicant provided that the "BESS would utilize lithium-ion batteries housed in Conex containers."³⁶ But this information was notably absent from the MND, failing to allow for meaningful public review and opportunity to comment. An EIR must be prepared which adequately discloses the full Project Description including the above-described elements.

Further, the MND failed to provide information regarding the design of the BESS, including battery layout. The MND also failed to describe the type of cooling system the BESS will contain.³⁷ The MND failed to disclose the type of fire detection and fire suppression systems in place in the BESS and substation components. The Conditions of Approval do nothing to clarify, or remedy the MND's failure to adequately describe the BESS infrastructure. Dr. Fox concluded that this information is critical to determine environmental impacts of the BESS

³⁴ *Id.* at 6.

³⁵ *Id.*

³⁶ San Joaquin County, Application – Site Approval, North Central Valley Energy Storage, LLC, p. 2 of 9.

³⁷ Fox Comments, p. 6.
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component.³⁸ An EIR must be prepared which fully discloses all components of the Project.

B. The MND Failed to Provide an Adequate Description of the Environmental Setting

The MND does not provide an adequate baseline analysis. Absent the baseline analysis, the public and the County cannot fully determine “the conditions of the environment that preceded the project [as] the baseline against which to measure the adverse environmental change.”³⁹ Absent an adequate environmental setting analysis, the MND is inadequate as a matter of law, for failure to provide a baseline against which to measure project impacts. An EIR must be prepared which adequately analyzes the Project’s baseline.

i. The MND Failed to Describe the Existing Setting for Wetlands

The MND failed to provide a complete and accurate description of the Project’s environmental setting related to wetlands, and thus, the MND’s impact assessment and propose mitigation for impacts to wetlands are inadequate.

Dr. Shawn Smallwood conducted a site visit and viewed the Project site from the roadside on November 26, 2021 and December 1, 2021. On both visits Dr. Smallwood saw the Project site contained wetland features, which were dry at the time of his visits. Dr. Smallwood concluded, based on the information obtained during site visits, that Vernal pools and swales remain.

Further, Dr. Smallwood concluded that the wetland features of the Project constitute an important habitat corridor for wildlife movement in the area, counter to the MND’s argument that the surrounding vineyard and PG&E’s substation diminish the Project site’s value as habitat. Dr. Smallwood explained that the MND failed to adequately detail the importance of the wetland features to the “[m]any animals moving through the region [who] may perceive the grassland/wetland complex of the project site as an island of opportunity for stopover during migration, dispersal and home range patrol.” Contrary to the MND’s unsupported studies, Dr. Smallwood observed thousands of birds landing on the Project site at the time of his

³⁸ *Id.* at 7.

³⁹ *Fat v. County of Sacramento* (2002) 97 Cal.App4th 1270, 1279, quoting *Lewis v. Seventeenth Dist. Agricultural Assn.* (1985) 165 Cal.App.3d 823, 836.
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site visits. The Project site's wetland features serve as a critical host to the species that pass through and inhabit the Project area.

The only information in the Project Description regarding wetlands is the Site Plan Figure 4, which shows that the PG&E Bellota Substation Expansion Area and the Transmission Line Right-of-Way. The MND provided that the Project "will result in the permanent loss of waters and wetlands within the proposed substation expansion area." The MND failed to fully disclose the environmental setting with respect to wetlands, and the County therefore failed to proceed in the manner required by law. The Conditions of Approval do not remedy the failure to analyze existence of wetlands nor mitigate the Project's impacts to wetlands, as shown further below.

ii. The MND Failed to Describe the Existing Setting for Sandhill Crane

The MND, the Conditions of Approval, and Biological Resource Assessment in Appendix D to the MND are silent as to the presence of Sandhill Crane on the Project site. Dr. Smallwood detected Sandhill Crane on the Project site on his site visit November 26, 2021.⁴⁰ Dr. Smallwood's observations provided substantial evidence supporting a fair argument that the species is present on the Project site, and that the site provides habitat for it.

The Greater Sandhill Crane is listed as threatened under the California Endangered Species Act, primarily because of the loss of suitable breeding habitat, human disturbance, predation on the local breeding population in northeastern California, and the continued loss of winter foraging habitat.⁴¹ The Greater Sandhill Crane is featured in a Pacific Flyway Management Plan.⁴² "Power line collisions are presently believed to be the primary mortality factor for all age classes of post-fledged cranes."⁴³ The presence of Sandhill Cranes was not analyzed as part of the environmental setting of the Project. Therefore, the MND's biological resource impact analysis and mitigation is inadequate. An EIR must be prepared with an updated Environmental Setting with respect to Sandhill Crane to satisfy CEQA.

⁴⁰ Smallwood Comments, p. 3.

⁴¹ California Department of Fish and Game, Wildlife Management Division, Nongame Bird and Mammal Program, 5-Year Status Review: Greater Sandhill Crane (*Grus canadensis tabida*) Reported to: California Fish and Game Commission (1994) <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=3521> p. 1.

⁴² *Id.*

⁴³ *Id.* at 3.

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iii. The MND Failed to Describe the Existing Setting for Peregrine Falcon

The MND did not provide sufficient baseline information regarding the presence of Peregrine falcon on the Project site. Dr. Smallwood detected a Peregrine Falcon on his site visit on November 26, 2021.⁴⁴ Dr. Smallwood's observations provided substantial evidence supporting a fair argument that the species is present on the Project site, and that the site provides habitat for it.

The Peregrine Falcon was delisted from the California Endangered Species Act but remains a fully protected species in California.⁴⁵ The most frequent known cause of peregrine injury and mortality is collision with obstacles, such as powerlines, antennas and guy wires, chain-link and wire fences, and windows.⁴⁶ Project impacts have the potential to be severe on peregrine falcons due to their susceptibility with, and electrocution from, power lines. Additional information is required to determine impacts of the Project on Peregrine falcons. An EIR must be prepared which adequately analyzes the environmental setting around Peregrine Falcons, in order to determine the appropriate mitigation measures.

iv. The MND Failed to Describe the Existing Setting for Red-Tailed Hawk

The MND, the Conditions of Approval, and the Biological Resources Assessment are silent as to the potential presence of Red-tailed Hawk and potential Project impacts on the species. Red-tailed Hawk are protected under the Migratory Bird Treaty.⁴⁷ Habitat loss, electrocution on powerlines, and collisions at wind farms are threats to this hawk's survival.⁴⁸ Dr. Smallwood detected Red-tailed Hawk on the Project site during his December 1, 2021 site visit and his November 26, 2021 site visit. Dr. Smallwood's observations provided substantial evidence supporting a fair argument that the species is present on the Project site, and that the site provides habitat for it. The Project may impact habitat and result in

⁴⁴ Smallwood Comments, p. 3.

⁴⁵ See, Fish and Game Code, §3511.

⁴⁶ Ronald M. Jurek, State of California, the Resources Agency, Department of Fish and Game, Wildlife Management Division, Nongame Bird and Mammal Section, "Five-Year Status Report American Peregrine Falcon" (1989) <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=26083> p. 4.

⁴⁷ 16 U.S. Code § 703.

⁴⁸ The Peregrine Fund, Red-tailed Hawk *Buteo jamaincensis*, (2021) <https://www.peregrinefund.org/explore-raptors-species/hawks/red-tailed-hawk>. 5567-011acp

collisions with Project features, further threatening the species. An accurate analysis of the Project's impacts to this species is therefore critical.

The MND is legally inadequate for failure to analyze the environmental setting with respect to Red-tailed Hawk. The Planning Commission should remand the Project to Staff to prepare an EIR which adequately analyzes the environmental setting in order to determine the significance of Project impacts on Red-tailed Hawk and appropriate mitigation.

v. The MND Failed to Describe the Existing Setting for Red-Shouldered Hawk

The MND and the Conditions of Approval are silent as to the presence of Red-shouldered Hawk on the Project site. Dr. Smallwood encountered Red-shouldered Hawk on his November 26, 2021 and December 1, 2021 site visits.⁴⁹ Dr. Smallwood's observations provide substantial evidence supporting a fair argument that the species is present on the Project site, and that the site provides habitat for it.

Red-shouldered Hawk are protected under the Migratory Bird Treaty.⁵⁰ The MND does not provide an adequate baseline analysis with respect to Red-shouldered Hawk. Absent the baseline analysis, the Public cannot fully determine "the conditions of the environment that preceded the project [as] the baseline against which to measure the adverse environmental change."⁵¹ Absent an adequate environmental setting analysis, the MND is inadequate as a matter of law, for failure to provide a baseline against which to measure project impacts on the Red-shouldered Hawk. Thus, the Project should not have been approved without an EIR, absent substantial evidence that impacts will be mitigated to a less than significant level.

vi. The MND Failed to Describe the Existing Setting for American Kestrel

The MND failed to provide an adequate baseline against which to measure the adverse environmental change to American Kestrel habitat on the Project site.

⁴⁹ Smallwood Comments, p. 3.

⁵⁰ 16 U.S. Code § 703.

⁵¹ *Fat v. County of Sacramento* (2002) 97 Cal.App4th 1270, 1279, quoting *Lewis v. Seventeenth Dist. Agricultural Assn.* (1985) 165 Cal.App.3d 823, 836.

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Dr. Smallwood detected American Kestrel on his site visits on November 26, 2021 and December 1, 2021.⁵² Dr. Smallwood's observations provided substantial evidence supporting a fair argument that the species is present on the Project site, and that the site provides habitat for it.

This species was not listed in the MND or Biological Resources Assessment. As such, the MND did not provide an adequate baseline analysis with respect to American Kestrel, and the Conditions of Approval do not remedy this failure. Absent the baseline analysis, the Public cannot fully determine "the conditions of the environment that preceded the project [as] the baseline against which to measure the adverse environmental change."⁵³ Absent an adequate environmental setting analysis, the MND is inadequate as a matter of law, for failure to provide a baseline against which to measure project impacts to American Kestrel populations. The Planning Commission should grant this appeal and direct Staff to prepare an EIR to adequately analyze the existing baseline for American Kestrel, before the Project can be lawfully approved.

vii. The MND Failed to Describe the Existing Setting for Swainson's Hawk

The MND and the Conditions of Approval failed to analyze the potential presence of Swainson's Hawk which is listed as threatened under the California Endangered Species Act. This is a major omission in the MND's impact analysis. Studies have shown that Swainson's hawks may travel up to 18 miles from the nest to forage.⁵⁴ To reverse the decline of Swainson's hawk populations, it is CDFW's policy that new development projects that adversely modify nesting or foraging habitat within 10 miles of an active nest should mitigate the project's impacts by providing compensatory mitigation.⁵⁵ According to CDFW, the 10-mile foraging radius recognizes the need to strike a balance between the biological needs of reproducing pairs (including eggs and nestlings) and the economic benefit of development(s) consistent with Fish and Game Code Section 2053.⁵⁶

⁵² Smallwood Comments, p. 3.

⁵³ *Fat v. County of Sacramento* (2002) 97 Cal.App4th 1270, 1279, quoting *Lewis v. Seventeenth Dist. Agricultural Assn.* (1985) 165 Cal.App.3d 823, 836.

⁵⁴ California Department of Fish and Game. 1994. Staff report regarding mitigation for impacts to Swainson's hawks (*Buteo swainsoni*) in the Central Valley of California.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* p. 2.

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Dr. Smallwood explained that, although the Project site does not provide nesting habitat for Swainson's hawks, it provides foraging habitat for Swainson's hawks that nest in the area. Loss of foraging habitat is one of the primary threats to Swainson's hawks in California.⁵⁷ In addition to generating a potentially significant impact under CEQA, the loss of foraging habitat from the Project site may result in the take (killing) of Swainson's hawks, which would be a violation of Section 2080 of California Fish and Game Code.⁵⁸ Because the MND did not incorporate mitigation for the loss of foraging habitat from the Project site, Project impacts on the Swainson's hawk remain potentially significant. The Planning Commission must direct staff to prepare an EIR which adequately analyzes the environmental setting, impacts to Swainson's hawks, and sufficiently mitigates significant impacts, to comply with CEQA.

viii. The MND Failed to Describe the Existing Setting for Burrowing Owl

The MND and Conditions of Approval did not adequately analyze the potential presence of Burrowing Owl on the Project site. Burrowing Owl is a California Species of Special Concern.⁵⁹ The overriding characteristics of burrowing owl habitat are burrows for roosting and nesting, and relatively short vegetation with only sparse shrubs or taller vegetation.⁶⁰ Burrowing owls have been observed nesting along the within a mile of the Project site and the Project site provides suitable nesting and foraging habitat for burrowing owls. Dr. Smallwood observed a Burrowing Owl on the Project site, and thus presented substantial evidence to support a fair argument that Burrowing Owl have a high likelihood of being present on the Project site.

The County's consultant did not conduct any "detection surveys" for burrowing owls. Dr. Smallwood explained that, because burrowing owls that nest at higher elevations migrate to lower elevations in winter, it is unlikely the

⁵⁷ California Department of Fish and Wildlife. 2016. Status Review: Swainson's Hawk (*Buteo swainsoni*) in California.

⁵⁸ California Department of Fish and Game. 1994. Staff report regarding mitigation for impacts to Swainson's hawks (*Buteo swainsoni*) in the Central Valley of California.

⁵⁹ *Id.*

⁶⁰ Gervais JA, DK Rosenberg, LA Comrack. 2008. Burrowing Owl (*Athene cunicularia*). Pages 218-226 *In*: Shuford WD, T Gardali, editors. California Bird Species of Special Concern: A ranked assessment of species, subspecies, and distinct populations of birds of immediate conservation concern in California. Studies of Western Birds 1. Western Field Ornithologists, Camarillo, California, and California Department of Fish and Game, Sacramento.

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consultant would have incidentally detected burrowing owls during their biological reconnaissance surveys. As a result, the County lacks the information needed to properly disclose and evaluate Project impacts to burrowing owls, and perhaps more importantly, to ensure effective mitigation.⁶¹ The environmental setting analysis is therefore not supported by substantial evidence. An EIR must be prepared that fully and adequately analyzes the environmental setting with respect to Burrowing Owls.

ix. The MND Failed to Describe the Existing Setting for California Tiger Salamanders, Western Spadefoot, Vernal Pool Tadpole Shrimp, and Vernal Pool Fairy Shrimp

The MND did not adequately analyze the baseline data for protected species living in the wetlands on the Project site. This omission is not corrected by the MMRP or Conditions of Approval. Dr. Smallwood concluded that the MND provided inadequate baseline data because “[n]o detection surveys have been performed on site for California tiger salamanders, western spadefoot, vernal pool fairy shrimp, and vernal pool tadpole shrimp.”⁶² Absent such detection surveys for these species, which are likely to occur at the Project site, Dr. Smallwood explained the MND’s environmental setting analysis and baseline is not supported by substantial evidence. Without an adequate baseline analysis, the Public cannot fully determine “the conditions of the environment that preceded the project [as] the baseline against which to measure the adverse environmental change.”⁶³ Thus, the MND is inadequate as a matter of law, for failure to provide a baseline against which to measure project impacts to California Tiger Salamanders, Western Spadefoot, Vernal Pool Tadpole Shrimp, and Vernal Pool Fairy Shrimp populations.

C. An EIR is Required Because There is Substantial Evidence Supporting a Fair Argument that Project Has Significant Unmitigated Air Quality, Public Health, and Greenhouse Gas Impacts

The MMRP and Conditions of Approval do not remedy the MND’s failure to adequately analyze and mitigate the Project’s air quality and health risk impacts.

⁶¹ *Id.* at pp. 5, 6 and 29.

⁶² Smallwood Comments, p. 3.

⁶³ *Fat v. County of Sacramento* (2002) 97 Cal.App4th 1270, 1279, quoting *Lewis v. Seventeenth Dist. Agricultural Assn.* (1985) 165 Cal.App.3d 823, 836.

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Dr. Fox provided the County with substantial evidence demonstrating that Project construction emissions will exceed applicable significance thresholds, that Greenhouse Gas (“GHG”) emissions from Project construction and operation are underestimated, and that potentially significant GHG and energy impacts from the Project’s BESS were not adequately analyzed or mitigated. Dr. Fox found that health impacts associated with Valley Fever were not adequately analyzed or mitigated. Dr. Fox also determined that the risk of wildfire is significant and unmitigated. The MND failed to accurately disclose the severity of these impacts and failed to effectively mitigate them. Dr. Fox presented substantial evidence supporting a fair argument that the Project has potentially significant impacts on air quality, GHG, health risk, and wildfire.

The MMRP and Conditions of Approval provided no new measures with respect to air quality, or health risk, beyond what was proposed in the MND. This is inadequate as a matter of law, because the Project has unmitigated air quality and health risk impacts that must be analyzed and mitigated in an EIR prior to Project approval.

iii. The County Failed to Conduct a Health Risk Analysis

The County failed to analyze the health impacts of construction to on-site workers or nearby sensitive receptors. CEQA requires lead agencies to disclose the health risks posed by hazardous air pollutants (“HAPs”) released during construction. Construction workers are at the greatest risk. The MND indicated that 8 to 42 workers would be required to construct the various phases of the Project.⁶⁴ Additionally, there are nearby sensitive receptors that would be exposed to construction emissions. The nearest homes are about 350 feet away and agricultural works are adjacent to the facility boundaries.⁶⁵ These workers and residents are sensitive receptors which would be exposed to DPM emissions during Project construction.

CEQA requires that a project’s health risks “must be ‘clearly identified’ and the discussion must include ‘relevant specifics’ about the environmental changes attributable to the Project and their associated health outcomes.”⁶⁶ Courts have held that an environmental review document must disclose a project’s potential

⁶⁴ MND, Appendix A, Table 1, p. 5, pdf 7.

⁶⁵ MND, Appendix A, Section 3.1, p. 5.

⁶⁶ MND, p. 518.

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health risks to a degree of specificity that would allow the public to make the correlation between the project's impacts and adverse effects to human health.⁶⁷ Instructively, the Office of Environmental Health Hazard Assessment's ("OEHHA") risk assessment guidelines⁶⁸ recommend a formal health risk analysis ("HRA") for short-term construction exposures lasting longer than 2 months and exposures from projects lasting more than 6 months should be evaluated for the duration of the project.⁶⁹

The construction of this Project will last for 17 months. The construction of the substation (5 months), collector substation (4 months), BESS (7 months), and decommissioning (7 months) all last longer than 2 months.⁷⁰ CEQA requires that the health risk from each of these construction phases be quantified and disclosed. And under the OEHHA risk assessment guidelines, which are used throughout California for assessing health risks under CEQA, the Project should be subject to a quantified HRA.

A quantified HRA is commonly conducted to determine if a Project's construction HAP emissions would cause a significant health impact.⁷¹ HRAs are based on pollutants other than conventional air quality pollutants; that is, ROG, NO_x, PM₁₀, PM_{2.5}, CO, and SO₂. Construction equipment emits DPM, which is a HAP and potent carcinogen.⁷² Construction workers, workers at nearby dairies and farming operations and nearby residents will be exposed to DPM emissions during

⁶⁷ *Id.* at 518–520; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184.

⁶⁸ MND, Appendix B1, pdf 34.

⁶⁹ Office of Environmental Health Hazard Assessment (OEHHA), Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments, February 2015 (OEHHA 2015), Section 8.2.10: Cancer Risk Evaluation of Short Term Projects, pp. 8-17/18; <https://oehha.ca.gov/air/crn/notice-adoption-air-toxics-hot-spots-program-guidance-manual-preparation-health-risk-0>.

⁷⁰ MND, Appendix A, p. 2 pdf 4.

⁷¹ Office of Environmental Health Hazard Assessment (OEHHA), Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessment, February 2015; may be requested at <https://oehha.ca.gov/media/downloads/crn/2015guidancemanual.pdf>.

⁷² Cal/EPA OEHHA and American Lung Association of California, Health Effects of Diesel Exhaust; <https://oehha.ca.gov/media/downloads/calenviroscreen/indicators/diesel4-02.pdf>. See also OEHHA, Appendix A: Hot Spots Unit Risk and Cancer Potency Values, p. 1 (DPM unit risk = 3 E-4); <https://oehha.ca.gov/media/CPFs042909.pdf> and OEHHA, Diesel Exhaust Particulate; [https://oehha.ca.gov/chemicals/diesel-exhaust-particulate#:~:text=Cancer%20Potency%20Information&text=Listed%20as%20Particulate%20Emissions%20from,\(ug%2Fm3\)%2D1](https://oehha.ca.gov/chemicals/diesel-exhaust-particulate#:~:text=Cancer%20Potency%20Information&text=Listed%20as%20Particulate%20Emissions%20from,(ug%2Fm3)%2D1).

construction. An EIR must be prepared which adequately links the Project's air quality effects to human health consequences.⁷³

i. Project Health Impacts Are Significant and Unmitigated

Dr. Fox concluded that acute health impacts from exposure to diesel particulate matter ("DPM") during Project construction are likely be significant and unmitigated for construction workers and offsite receptors, including those at nearby residences and in adjacent agricultural fields.⁷⁴ An EIR must be prepared to include an acute health risk assessment for both Project construction and operation quantify the extent of the Project's health risk, and to incorporate mitigation measures to reduce health risk to less than significant levels.

iv. The County Failed to Analyze and Mitigate Project Impacts from Valley Fever

The MND stated that Valley Fever is considered endemic in San Joaquin County.⁷⁵ Between 2013 and 2017, the number of Valley Fever cases tripled in San Joaquin County.⁷⁶ California Labor Code section 6709 recognized that San Joaquin County contains work areas where Valley Fever is highly endemic.⁷⁷ Highly endemic means that the annual incidence rate of Valley Fever is greater than 20 cases per 100,000 persons per year.⁷⁸ In fact, the San Joaquin County Public Health Services Department reported 269 cases of Valley Fever in 2018.⁷⁹ But, the Conditions of Approval do not go far enough to protect worker safety from the impacts of Valley Fever.

⁷³ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 519; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 134 Cal.App.4th 1184, 1220 ("After reading the EIRs, the public would have no idea of the health consequences that result when more pollutants are added to a nonattainment basin. On remand, the health impacts resulting from the adverse air quality impacts must be identified and analyzed in the new EIRs.").

⁷⁴ Fox Comments, p. 49.

⁷⁵ IS, p. 6.

⁷⁶ San Joaquin County Public Health Services, *What you need to know about Valley Fever in San Joaquin County & California*, (June 2018)

http://www.sjcphs.org/assets/20180620_HS_What%20You%20Need%20to%20know%20VF%20Brochure_Eng.pdf

⁷⁷ Cal. Lab. Code § 6709(a).

⁷⁸ *Id.*

⁷⁹ IS, p. 6.

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Dr. Fox explained that conventional dust control measures, such as those recommended in the MND,⁸⁰ are not effective at controlling Valley Fever⁸¹ because they largely focus on visible dust or larger dust particles—the PM10 fraction—not the very fine particles where the Valley Fever spores are found.⁸² The MND provided that “Mitigation Measure (MM-) AQ-1 and MM-AQ-2 would be implemented to further reduce the risk of Valley Fever exposure... with the implementation of MM-AQ-1 and MM-AQ-2, impacts to construction workers and nearby sensitive receptors, would less than significant with mitigation.”⁸³ This statement is not supported by substantial evidence. Rather, substantial evidence supports a fair argument that an EIR is required because there may be a significant impact from Valley Fever that was not analyzed in the MND, and is not adequately mitigated by the measures included in the MMRP and Conditions of Approval.

The California Department of Public Health provides that “Employers can reduce worker exposure by incorporating the following elements into the company’s Injury and Illness Prevention Program and project-specific health and safety plans:

1. Determine if the worksite is in an area where Valley Fever is endemic...
2. Train workers and supervisors on the location of Valley Fever endemic areas, how to recognize symptoms of illness, and ways to minimize exposure. Encourage workers to report respiratory symptoms that last more than a week to a crew leader, foreman, or supervisor.
3. Limit workers’ exposure to outdoor dust in disease-endemic areas. For example, suspend work during heavy wind or dust storms and minimize amount of soil disturbed.
4. When soil will be disturbed by heavy equipment or vehicles, wet the soil before disturbing it and continuously wet it while digging to keep dust levels down.
5. Heavy equipment, trucks, and other vehicles generate heavy dust. Provide vehicles with enclosed, air-conditioned cabs and make sure workers keep the windows closed. Heavy equipment cabs should be equipped with high efficiency particulate air (HEPA) filters. Two-way radios can be used for

⁸⁰ MND, Appendix C, p. 21, pdf 23.

⁸¹ See, e.g., Cummings and others, 2010, p. 509; Schneider et al., 1997, p. 908 (“Primary prevention strategies (e.g., dust-control measures) for coccidioidomycosis in endemic areas have limited effectiveness.”).

⁸² Fox Comments, p. 40.

⁸³ IS, p. 6.
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communication so that the windows can remain closed but allow communication with other workers.

6. Consult the local Air Pollution Control District regarding effective measures to control dust during construction. Measures may include seeding and using soil binders or paving and laying building pads as soon as possible after grading.
7. When digging a trench or fire line or performing other soil-disturbing tasks, position workers upwind when possible.
8. Place overnight camps, especially sleeping quarters and dining halls, away from sources of dust such as roadways.
9. When exposure to dust is unavoidable, provide NIOSH-approved respiratory protection with particulate filters rated as N95, N99, N100, P100, or HEPA. Household materials such as washcloths, bandanas, and handkerchiefs do not protect workers from breathing in dust and spores.”⁸⁴

Dr. Fox recommended that the County implement each of these measures as additional mitigation measures in an EIR. The MMRP and Conditions of Approval fail to include these measures, and fail to include any information that the County even considered Dr. Fox’s comments on this issue.

Labor Code section 6709 requires employers in counties in which Valley Fever is highly endemic to provide training on Valley Fever “before an employee begins work that is reasonably anticipated to cause exposures to substantial dust disturbance.” The training required by Labor Code section 6709 includes “[p]ersonal and environmental exposure prevention methods that may include, but are not limited to, water-based dust suppression, good hygiene when skin and clothing is soiled by dust, limiting contamination of drinks and food, working upwind from dusty areas when feasible, wet cleaning dusty equipment when feasible, and *wearing a respirator when exposure to dust cannot be avoided*.”⁸⁵ The MND failed to mention wearing a respirator, or any type of respiratory protection while on the construction site, a condition required by other laws applicable to the Project.⁸⁶

⁸⁴ CDPH Preventing Work-Related Coccidioidomycosis (Valley Fever) Preventing Valley Fever Exposure, available at: [http://elcosh.org/document/3684/d001224/preventing+work-related+coccidioidomycosis+\(valley+fever\).html](http://elcosh.org/document/3684/d001224/preventing+work-related+coccidioidomycosis+(valley+fever).html).

⁸⁵ *Id.*

⁸⁶ See PRC § 21002.1(c) (project with significant and unavoidable impacts may not be approved unless otherwise permissible under applicable laws and regulations).
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The United States Department of Labor Occupational Safety and Health Administration (“OSHA”) requires that a respirator “shall be provided to each employee when such equipment is necessary to protect the health of such employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program, which shall include the requirements outlined in paragraph (c) of this section. The program shall cover each employee required by this section to use a respirator.”⁸⁷

Dr. Fox recommended that the Project implement a mandatory respiratory protection program that requires National Institute for Occupational Safety and Health (“NIOSH”)-approved respirators be worn while performing or in the near vicinity of job activities that create airborne dust.⁸⁸ NIOSH approved respirators are necessary because “Household materials such as washcloths, bandanas, and handkerchiefs do not protect workers from breathing in dust and spores.”⁸⁹

The SJVAPCD-approved dust control plan was not made available for public review. Thus, the County lacks substantial evidence to support the MND’s conclusion that Valley Fever impacts would be reduced to less than significant levels based on compliance with the plan. A CEQA document may not rely on hidden studies or documents that are not provided to the public.⁹⁰ If the SJVAPCD-approved dust control plan has not yet been developed, then this constitutes impermissibly deferred mitigation. Deferring formulation of mitigation measures to post-approval studies is generally impermissible.⁹¹

Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.⁹² If identification of specific mitigation measures is impractical until a later stage in the

⁸⁷ 29 C.F.R. § 1910.134(a)(2) (2006).

⁸⁸ Phyllis Fox Comment Letter

⁸⁹ CDPH Preventing Work-Related Coccidioidomycosis (Valley Fever) Preventing Valley Fever Exposure, available at: [http://elcosh.org/document/3684/d001224/preventing+work-related+coccidioidomycosis+\(valley+fever\).html](http://elcosh.org/document/3684/d001224/preventing+work-related+coccidioidomycosis+(valley+fever).html).

⁹⁰ *Santiago Cty. Water Dist. v. Cty. of Orange* (1981) 118 Cal.App.3d 818, 831 (“Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.”).

⁹¹ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code, § 21061.

⁹² *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical*, *supra*, 29 Cal.App.4th at p. 1604, fn. 5.

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Project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.⁹³ Courts have held that simply requiring a project applicant to obtain a future report and then comply with the report's recommendations is insufficient to meet the standard for properly deferred mitigation.⁹⁴ If the SJVAPCD has not been developed, then there are no performance criteria for the Public to weigh to determine whether the Valley Fever mitigation is adequate. An EIR should be circulated to include adequate and enforceable mitigation measures to reduce Valley Fever impacts to less than significant levels.

D. An EIR is Required Because There is Substantial Evidence Supporting a Fair Argument that Project Still Has Significant Energy Impacts

The MMRP and Conditions of Approval provide no measures to mitigate the Project's significant energy impacts addressed in Citizens' prior comments. The MND's energy impact section consists of 1 page including, with no supporting analysis, that "due to the inherent nature of the project as a BESS, the Project would not result in a wasteful use of energy. Impacts would be less than significant."⁹⁵ The MND concluded, without substantial evidence, that the Project's energy impacts are less than significant.⁹⁶ Dr. Fox concluded that, "[b]ecause of the laws of thermodynamics, no battery can be 100 percent efficient."⁹⁷ Further, Dr. Fox explained that "charging energy input to the battery will always have to be greater than electricity generated by discharging the battery. Thus, batteries are always net consumers of energy and, absent offsetting factors, will result in increased GHG emissions due to their net electricity consumption. The MND failed to estimate these emissions."⁹⁸ An EIR is required to address this dispute between the County's unsupported conclusions and the well-supported expert opinion of Dr. Fox.⁹⁹

The MND also failed to meet CEQA's requirement that environmental documents circulated for public review include a discussion of the potential energy

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Id.*

⁹⁶ MND, p. 16.

⁹⁷ Fox Comments, p. 28.

⁹⁸ *Id.*

⁹⁹ See *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903. 5567-011acp

impacts of proposed projects and a detailed statement of mitigation measures designed to “minimize significant effects on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy.” Pub. Res. Code § 21100(b)(3); CEQA Guidelines, Appendix F, Energy Conservation (“Appendix F”), § I.

Energy impacts may include:

1. The project’s energy requirements and its energy use efficiencies by amount and fuel type for each stage of the project including construction, operation, maintenance and/or removal. If appropriate, the energy intensiveness of materials maybe discussed.
2. The effects of the project on local and regional energy supplies and on requirements for additional capacity.
3. The effects of the project on peak and base period demands for electricity and other forms of energy.
4. The degree to which the project complies with existing energy standards.
5. The effects of the project on energy resources.
6. The project’s projected transportation energy use requirements and its overall use of efficient transportation alternatives.

Appendix F, Section II(C). “If analysis of the project’s energy use reveals that the project may result in significant environmental effects due to wasteful, inefficient, or unnecessary use of energy, or wasteful use of energy resources, the EIR shall mitigate that energy use.”¹⁰⁰ Appendix F of the CEQA Guidelines declares as goals of the energy analysis: promoting conservation of energy and increasing reliance on renewable energy sources.¹⁰¹ Finally, Appendix F lists potential mitigation measures to be considered, such as measures to “reduce wasteful, inefficient and unnecessary consumption of energy during construction, operation, maintenance and/or removal,” and other measures to reduce peak energy demand and promote energy conservation.¹⁰² Recent cases interpreting Appendix F hold that, to comply with CEQA, the lead agency must not only describe a project’s energy impacts, it must also quantify them.¹⁰³

¹⁰⁰ CEQA Guidelines § 15126.2(b).

¹⁰¹ Appendix F § I.

¹⁰² CEQA Guidelines, Appendix F § II.D.

¹⁰³ *Ukiah Citizens for Safety First v. City of Ukiah* (“*Ukiah Citizens*”) (2016) 248 Cal.App.4th 256, 264-65 (energy impact analysis requires clarification and technical information regarding project-related energy usage and conservation features); *Spring Valley Lake Association v. City of Victorville* 5567-011acp

The Project's BESS is an energy storage device. Its sole purpose is to receive, store and return up to 132 MW of electric energy to the electric grid. In addition to storing energy, the Project will consume some of the energy it absorbs due to battery inefficiency. Yet, the MND failed to include any analysis of the Project's direct energy consumption impacts from battery inefficiency, indirect energy impacts on grid electricity demand, or energy conservation measures, as required by Appendix F. Instead, the MND concluded, with no supporting evidence, that the Project's energy impacts would be less than significant.

The MND failed as an informational document and is deficient as a matter of law because it failed to disclose or quantify the energy impacts of the Project, failed to include any conditions restricting battery charging to use of renewable energy, and failed to describe potential energy mitigation measures, as required by CEQA.¹⁰⁴ An EIR is required to correct this deficiency.

E. An EIR is Required Because There is Substantial Evidence Supporting a Fair Argument that the Project Still Has Significant and Unmitigated Greenhouse Gas Emissions Impacts

The MMRP and Conditions of Approval do not remedy the MND's failure to adequately analyze the potentially significant GHG emissions of the Project. Dr. Fox concluded that the modeling in the MND is flawed.¹⁰⁵ The MND only analyzed the GHG impacts associated with running the air condition in the BESS. Dr. Fox found that GHG emissions associated with charging the BESS would be an additional 7,728 metric tons per year of CO₂ equivalents from the 132 MW battery storage system combined with the 140.7 metric tons of CO₂ equivalents from Project construction and operation and decommissioning and the associated PG&E substation.¹⁰⁶ The combined total of 7,868.7 metric tons per year is 8.7 times greater

(*"Spring Valley"*) (2016) 248 Cal.App.4th 91, 103 (EIR must show factual basis of its assumptions that both energy use and greenhouse gas emissions will be reduced); *California Clean Energy Committee v. City of Woodland* ("CCEC") (2014) 225 Cal.App.4th 173, 210 ("CEQA EIR requirements are not satisfied by saying an environmental impact is something less than some previously unknown amount"). This is consistent with longstanding precedent which holds that unsupported conclusions are entitled to no judicial deference. *Comtys. for a Better Env't v. City of Richmond* ("CBE v. Richmond") (2010) 184 Cal.App.4th 70, 85; *Topanga*, 11 Cal.3d at 515 (EIR must provide reader with analytic bridge between ultimate findings and the facts in the record).

¹⁰⁴ *People v. County of Kern* (1976) 62 Cal.App.3d 761, 774–775.

¹⁰⁵ Fox Comments, p. 29.

¹⁰⁶ *Id.*

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than the significance threshold of 900 metric tons per year stated in the MND.¹⁰⁷ Thus, Dr. Fox concluded that GHG emissions are significant and unmitigated.

Dr. Fox proposed the following mitigation:

- (1) Project design features/on-site reduction measures;
- (2) GHG offsets off-site within San Joaquin County;
- (3) GHG offsets off-site within the State of California;
- (4) GHG offsets off-site within the United States;
- (5) GHG offsets off-site internationally;
- (6) Charging restrictions that constrain battery charging to hours when CAISO renewable resources would otherwise be curtailed, but the curtailment would be demonstrably avoided by using otherwise curtailed generation as battery-charging energy, or if such demonstrations are not feasible; and
- (7) Charging restrictions that constrain battery charging to hours when solar generation is potentially being curtailed, which would at a minimum mean no charging during nighttime hours.

The MMRP and Conditions of Approval failed to incorporate any of these measures, and lack any discussion of the issues raised by Dr. Fox. Dr. Fox's analysis and conclusions presented substantial evidence supporting a fair argument that there are significant and unmitigated impacts for which an EIR must be prepared for this Project before the County can approve the Project. The County cannot rely on the existing MND, MMRP, or Conditions of Approval to provide the substantial evidence necessary to approve the Project.

F. An EIR is Required Because There is Substantial Evidence Supporting a Fair Argument that the Project Still Has Significant Hazardous Materials Impacts

The MND failed to analyze the risks and impacts of battery accidents and failed to mitigate them.¹⁰⁸ The MMRP and Conditions of Approval do not remedy these failures.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 10.
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As Dr. Fox explained, thermal runaway may occur due to this Project's BESS Components. Thermal runaway events are one of the most catastrophic failure modes of lithium-ion batteries.¹⁰⁹ In a thermal runaway, multiple cells fail due to a failure starting in one cell. They can occur due to an internal battery failure, exposure to excessive temperatures, external short circuits due to faulty wiring, or internal shorts due to cell defects. Thermal runaways vent toxic and highly flammable gases and release significant energy in the form of heat. If ignited, these gases can cause enclosed areas to over pressurize, resulting in an explosion and severe damage to the battery and surrounding equipment and people. In a large battery pack, as proposed for the Project, heat generated by one failed cell can heat up neighboring cells and lead to a thermal cascade through the battery pack.¹¹⁰ The MND and Conditions of Approval are silent on these types of events, thus omitting critical information which Dr. Fox explained is necessary to accurately assess hazards impacts.

The nearest fire station to the Project site is in Linden, 4.5 miles west of the Project site.¹¹¹ The MND is silent on whether this station is equipped to handle a major fire at the BESS. As Linden is a small town, Dr. Fox opines that it likely is not. The next nearest community is Stockton, about 15 miles east of the Project. A major accident at the BESS would likely require Stockton assistance, which would delay fire response, aggravating impacts.

Firefighters are also a significant at-risk population because batteries may rupture when exposed to extreme heat/fire, leaking corrosive materials, and/or emit toxic fumes, regardless of the specific battery technology. Burning batteries may emit acrid smoke, irritating fumes, and toxic fumes of fluoride, resulting in acute and chronic health effects in responding firefighters (and any nearby workers and residents). Acute health hazards include chemical inhalation burns and damage to lungs, eyes, and skin. Cobalt, present in lithium-ion batteries, is a suspected human carcinogen.¹¹²

¹⁰⁹ *Id.* at Figure 2.

¹¹⁰ IMIA Conference, October 2019. See also: Nicolas Ponchaut, Kevin Marr, Francesco Colella, Vijay Somandepalli, and Quinn Horn, Thermal Runaway and Safety of Large Lithium-Ion Battery Systems; <https://docplayer.net/32905291-Thermal-runaway-and-safety-of-large-lithium-ion-battery-systems-quinn-horn-ph-d-p-e-principal-engineer-exponent-inc.html>.

¹¹¹ MND, p. 31.

¹¹² Fox Comments, p. 23.
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Dr. Fox proposed the following mitigation measures to minimize fire risk, including:¹¹³

- Adequate separation of battery containers and other major equipment;
- Concrete fire walls between containers (not disclosed in the MND);
- Use of noncombustible materials within the insulation of battery containers and the ventilation and suppression systems;
- An adequate on-site water supply for firefighting;
- Fire brigade site visits to identify and plan to prevent any ignition scenarios and thermal runaway;
- Remote and continuous on-line monitoring and early detection sensors;
- Venting to avoid the buildup of gas; and
- Automatic fire suppression system in compliance with NFPA 855.

Her comments explained that these additional measures are necessary to reduce the Project's hazardous materials impacts to less than significant levels. The MMRP and Conditions of Approval fail to include any of these measures, and the Department's approval fails to acknowledge or discuss the issues raised by Dr. Fox. These are violations of CEQA's basic requirements that the County consider all comments submitted on the MND and incorporate all feasible mitigation measures to reduce impacts to less than significant levels.

Further, the MND failed to analyze the potentially significant irreversible environmental change that would be caused by the Project, through environmental accidents associated with the Project.¹¹⁴ Dr. Fox concluded that accidents during handling and transportation could result in injuries to and deaths of workers, motorists, and residents. The MND was silent on how the batteries would be transported to the site and the risks this transportation poses to adjacent populations and facilities.¹¹⁵ Substantial evidence supports a fair argument that hazards impacts associated with Project operation and construction are significant and unmitigated, and must be analyzed in an EIR prior to Project approval.

¹¹³ *Id.*

¹¹⁴ CEQA Guidelines § 15126.2.

¹¹⁵ Fox Comments, p. 26.

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G. An EIR is Required Because There is Substantial Evidence Supporting a Fair Argument that the Project Still Has Significant Unmitigated Impacts to Agricultural Resources

The MND's conclusion that impacts to farmland are less than significant was not based on substantial evidence. To the contrary, Citizens' MND comments presented the County with substantial evidence supporting a fair argument that the Project will have significant impacts on agricultural resources onsite, such that an EIR must be prepared. The Department's approval fails to mention these comments, and fails to respond to them.

San Joaquin County's local policy LU-7.2, Agricultural Support Uses states that new agricultural support development and non-farming activities shall be compatible with surrounding operations and shall not have a detrimental impact on the operation or use of surrounding agricultural properties.¹¹⁶ Mr. House concluded that this Project may have detrimental impacts on the operation and use of surrounding agricultural properties, specifically the neighboring Linden Hills Vineyard which is Certified Sustainable, Certified Green. Mr. House explained that the Project may cause runoff of contamination into the neighboring site,¹¹⁷ and that the Project may also adversely impact the neighboring Linden Hills Vineyard through air pollutants from construction, resulting in significant impacts. Ozone has been found to be particularly damaging to grape leaves, grapevines, and yield and quality of the fruits.¹¹⁸

There is substantial evidence supporting a fair argument that the Project will have potentially significant and detrimental impact on the neighboring Linden Hills Vineyard. The County must prepare an EIR to adequately analyze and mitigate agricultural resource impacts.

The MND, MMRP, and the Conditions of Approval do not provide any mitigation for impacts to agricultural resources. Thus, the County failed to adequately mitigate the Project's significant impacts on agricultural resources prior to approving the Project. These impacts remain significant and unmitigated. An

¹¹⁶ MND p. 4.

¹¹⁷ House Comments, p. 1.

¹¹⁸ L.H. Weinstein, Effects of Air Pollution on Grapevines, Boyce Thompson Institute for Plant Research, Cornell University, Ithaca, N.Y., U.S.A. p. 276,

<https://ojs.openagrar.de/index.php/VITIS/article/view/6066/5745>.

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EIR must be prepared which adequately analyzes and mitigates Project impacts on agricultural resources in order to comply with CEQA.

Further, the San Joaquin General Plan provides that “[a]s the agriculture center of California, San Joaquin’s farmland and agricultural heritage are preserved.”¹¹⁹ The Project directly contravenes this goal laid out in the General Plan, due to the conversion of agricultural land to nonagricultural use. Further, the General Plan prioritizes “minimizing growth impacts on agricultural land.”¹²⁰ The Project flies in the face of this priority by converting agricultural land to non-agricultural use. The General Plan goes on to provide that it is the Policy of the County that “[t]he County’s communities will continue to grow and develop while natural resource lands (agriculture and open space) will be preserved.”¹²¹ This Project does not provide for the preservation of agricultural and open space, and in fact, will destroy the utility of the agricultural land and biological habitat corridors on the Project site.

The Project also contravenes the General Plan’s Guiding Principle 3.1 Efficient Growth and Development, which states that the County will “Maintain clear boundaries (e.g., agricultural and open space separators and wildlife corridors) among cities and unincorporated communities.”¹²² With this Project, the County will allow for utility to be immediately adjacent to residential, and agricultural land uses. This Project directly contravenes the Guiding Principles laid out in the General Plan.

The Environmental Setting and Land Use sections of a CEQA document are required to “discuss any inconsistencies between the proposed project and applicable general plans, specific plans, and regional plans.”¹²³ The MND’s failure to detail the inconsistency with the General Plan is an additional CEQA violation. An EIR must be prepared to adequately analyze and mitigate the potentially significant impacts from Project’s inconsistency with the General Plan.

¹¹⁹ General Plan, p. 2-2.

¹²⁰ *Id.* at 2-17.

¹²¹ *Id.* at 3.1-1.

¹²² General Plan at 3.1-2.

¹²³ CEQA Guidelines § 15125(d); CEQA Guidelines, Appendix G, Section XI. 5567-011acp

H. An EIR is Required Because There is Substantial Evidence Supporting a Fair Argument that the Project Still Has Significant Unmitigated Impacts to Hydrology and Water Quality

The Conditions of Approval provide that:

Parallel to any wetland or vernal pool feature, a natural open space area for riparian habitat and waterway protection shall be maintained to provide nesting and foraging habitat and the protection of wetland or vernal pool feature quality. The minimum width of said open space shall be 100 feet, measured from the mean high water level of the natural bank or 50 feet back from the existing riparian habitat, whichever is greater.

The mean high water level and the edge of the wetland or vernal pool feature shall be shown on the Site Plan. The open space buffer required above shall be shown on the Site Plan with the following note:

Pursuant to Section 9-1510.5 of the San Joaquin County Development Title, this area is designated as a natural open space for riparian habitat and waterway protection. No development shall be permitted in this space.

This measure was initially included in the MND as a project design feature and does not constitute adequate mitigation. Project design features are not mitigation measures. The MND's analysis essentially compressed the analysis of impacts and mitigation measures into a single issue, which disregarded the requirements of CEQA.¹²⁴ The Department's decision to incorporate the measure as a condition of approval does not remedy the MND's failure to disclose the severity of the Project's wetland impact before mitigation, or to meaningfully evaluate whether this measure would reduce potentially significant impacts on wetlands and vernal pools to less than significant levels. An EIR must be prepared which adequately analyzes and mitigates potentially significant impacts to wetlands.

Even with this Condition of Approval, the record contains substantial evidence supporting a fair argument that impacts remain significant and unmitigated. Dr. Smallwood concluded that, although the project would be constructed west of the ephemeral drainages, vernal pools and swales that have been mapped on the project site, the project nevertheless risks potentially

¹²⁴ *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 656.
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significant impacts to these wetlands. Based on the schematics of the project provided in the MND and in the Biological Resources Assessment, construction grading for the energy storage facilities would extend to within only 28 m of wetland features, and the expansion of the PG&E substation would destroy a reach of ephemeral drainage.¹²⁵ Project construction would alter hydrological flows into the wetlands would risk loading the wetlands with silt.¹²⁶ It is not uncommon for gully and rill erosion to initiate from the edge of construction grading, and for the eroded material to load downslope wetland features.¹²⁷ Pools loaded with silt become shallower and less suitable for breeding by California tiger salamanders (Smallwood and Morrison 2008). By altering hydrological flows into the wetlands and by loading wetlands with silt from nearby graded areas, Dr. Smallwood concluded that the Project would potentially cause significant impacts to the wetlands on site and to California tiger salamander.¹²⁸ The MMRP and Conditions of Approval do not address or mitigate these risks.

Additionally, Mr. House concluded that the Project may cause runoff of contamination into the neighboring site or wetlands.¹²⁹ There is a fair argument that the effects anticipated from the Project will inflict significant impacts on these fragile ecosystems from even the slightest alterations. A more detailed analysis of hydrological and biological impacts in a full EIR is necessary to identify the extent of wetlands and to develop specific criteria which may be used to measure the success of mitigation.

I. An EIR is Required Because There is Substantial Evidence Supporting a Fair Argument that the Project Will Result in Significant Impacts to Biological Resources

i. California Tiger Salamander

The MND provides that “the Project would avoid wetlands on-site and no direct or indirect effects to breeding habitat would occur.”¹³⁰ This statement is not supported by substantial evidence. Project construction would result in disturbance

¹²⁵ Smallwood Comments, p. 21.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ House Comments, p. 1.

¹³⁰ Biological Resources Assessment, p. 37.

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and direct removal of habitat for California tiger salamander.¹³¹ The MND acknowledges that Project construction could also potentially cause injury or mortality of individual California tiger salamanders that could occupy upland refugia onsite.¹³² The MND does not adequately analyze or mitigate the impacts to California tiger salamander. Substantial evidence supports a fair argument that the Project will have a potentially significant and unmitigated impact on California tiger salamanders.

The Project proposes destruction of the California tiger salamander habitat on the Project site. Dr. Smallwood concluded that the planned construction would destroy the fossorial mammal burrows and other subterranean cavities that occur within the construction footprint.¹³³ In fact, most of the ground squirrel burrow complexes he saw at the site are located within the planned construction footprint.¹³⁴ Construction for the Project would destroy these burrows along with the pocket gopher burrows and any soil cracks within the construction footprint that could also be used by California tiger salamanders for aestivation.¹³⁵ Dr. Smallwood explained that construction would destroy many, if not most, of the California tiger salamanders that normally would breed in the vernal pools and other wetland pools on the site.¹³⁶ An EIR must be prepared which adequately analyzes and mitigates the impacts to California tiger salamanders.

ii. Northern Harrier

The MND, MMRP, and the Conditions of Approval do not adequately analyze or mitigate potentially significant impacts to Northern Harrier. Dr. Smallwood explained that the County must conduct additional site surveys to determine whether Northern Harrier nests on the Project site are occupied before construction or ground-disturbing activities may begin. Absent such surveys, Dr. Smallwood concluded that impacts to Northern Harrier populations on the Project site may be significant and unmitigated. Given that the MND does not require such mitigation, there is substantial evidence to support a fair argument that the Project may have significant adverse impacts on Northern Harrier.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Smallwood Comments, p. 20.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

iii. Habitat Loss

As discussed in Citizens' prior comments, the Project would result in habitat loss to Killdeer, Horned Larks, Mourning Doves, Bats, and numerous other special status species on the Project site. Dr. Smallwood calculated that the loss of the habitat on the Project site would cause California to have 95,020 fewer birds over the next century due solely to loss of terrestrial habitat, resulting in a potentially significant impact.¹³⁷ The Project site's destruction of habitat would cause a loss of 950 birds per year.¹³⁸ This constitutes a significant impact that was not adequately analyzed nor mitigated in the MND.

The Project would also encompass on-site structures and trees, which likely provide bats with roosting opportunities. Dr. Smallwood explained that the bats in these roosts, and those coming from offsite, likely forage over the Project site. He concluded that the Project would destroy their foraging opportunities at the site, and would therefore reduce the numerical capacities of bats in the region.¹³⁹ This constitutes a potentially significant impact that was not analyzed or mitigated in the MND

Substantial evidence supports a fair argument that the Project will result in significant and unmitigated impacts. An EIR must be prepared which adequately analyzes and mitigates the Project's impacts on loss of habitat on birds and bats.

iv. Wildlife Movement

The MND stated, without reference to substantial evidence, that "it is likely that site-specific conditions such as adjacent land uses, fencing, and the existing PG&E Bellota substation limit the value of the Project Site as a habitat linkage. Therefore, mitigation for impacts to wildlife movement corridors and habitat linkages is not warranted."¹⁴⁰ Dr. Smallwood concluded that the Project's impacts to wildlife movement corridors and habitat linkages are significant and require mitigation.¹⁴¹ Dr. Smallwood explained that the Project will "[i]nterfere substantially with the movement of any native resident or migratory fish or wildlife

¹³⁷ Smallwood Comments, p. 23.

¹³⁸ *Id.*

¹³⁹ Smallwood Comments, p. 23.

¹⁴⁰ Biological Resources Assessment, p. 40.

¹⁴¹ Smallwood Comments, p. 24.

species or with established native resident or migratory wildlife corridors...”¹⁴² Dr. Smallwood asserted that wildlife movement must include stopover opportunities for birds and bats, and staging habitat during dispersal, migration or home range patrol.¹⁴³ Many species of wildlife likely use the site of the proposed project for movement across the region. The project would cut wildlife off from stopover and staging opportunities, and would lengthen the distances that wildlife must travel before finding alternate stopover habitat.¹⁴⁴ He therefore concluded that the Project would interfere with wildlife movement in the region.

Further, Dr. Smallwood found that many animals moving through the region perceive the grassland/wetland complex of the Project site as an island of opportunity for stopover during migration, dispersal and home range patrol. In fact, this is what he observed of the site during his surveys (e.g., see Photo 1). Thousands of birds landed on the site while he watched, and raptors perched on the transmission towers and transmission lines next to and over the site.¹⁴⁵ Dr. Smallwood concluded, based on these direct observations, that the site remains of high value to wildlife movement in the region, and its neighboring land uses likely enhance the importance of the site to wildlife movement.¹⁴⁶

Due to the MND’s failure to analyze the presence of special status species on the Project site, the mitigation proposed is inadequate to reduce impacts to less than significant levels. Dr. Smallwood concluded that the SJMSCP fails to mitigate the Project’s impacts to multiple special-status species.¹⁴⁷ The Preserves acquired by mitigation fees in the SJMSCP are not supportive of most of the covered species, and for those species occurring in these Preserves, they are numbering many fewer than had the Preserves provided suitable habitat. In exchange for destruction of occupied habitat at project sites, the SJMSCP is generally conserving unoccupied lands as mostly vacant Preserves. Furthermore, the SJMSCP appears to be falling far short of its detection survey and monitoring requirements per the implementation agreement. Dr. Smallwood concluded that the SJMSCP measures (shown in the figure below) provide inadequate mitigation for projects such as the proposed Project.¹⁴⁸

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Smallwood Comments, p. 24.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 36.

¹⁴⁸ *Id.* at 35.

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Further, the MND and MMRP provides inadequate mitigation through MM-BIO-2 which provides:

Rare Plant Salvage and Translocation Plan. If avoidance of special-status plant species is not feasible, a qualified botanist shall prepare a rare plant salvage and translocation plan prior to Project implementation. The rare plant salvage and translocation plan shall include the following, at a minimum: identification of occupied habitat to be preserved and occupied habitat to be removed; identification of on-site or off-site preservation, restoration, or enhancement locations; methods for preservation, restoration, enhancement, and/or translocation; goals and objectives for preservation, restoration, enhancement, and/or translocation; replacement ratio; a monitoring program to ensure mitigation success; adaptive management and remedial measures in the event that the performance standards are not achieved; and financial assurances for conservation of mitigation lands; and a mechanism for conservation of any mitigation lands required in perpetuity.

MM-BIO-2 impermissibly defers mitigation until after Project approval. Deferring formulation of mitigation measures to post-approval studies is generally impermissible.¹⁴⁹ Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.¹⁵⁰ If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.¹⁵¹ Courts have held that simply requiring a project applicant to obtain a future report and then comply with the report's recommendations is insufficient to meet the standard for properly deferred mitigation.¹⁵²

The MND states that "North Central Valley Energy Storage, LLC intends to avoid impacts to nesting raptors and migratory birds to the maximum extent feasible through careful project design."¹⁵³ This is an aspirational statement, which does not bind the Applicant to actually mitigate project impacts to nesting raptors

¹⁴⁹ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code, § 21061.

¹⁵⁰ *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical*, *supra*, 29 Cal.App.4th at p. 1604, fn. 5.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ Biological Resources Assessment, p. 38.
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and migratory birds. CEQA requires mitigation measures be fully enforceable through permit conditions, agreements or other legally binding instruments.¹⁵⁴ Failure to include enforceable mitigation measures is considered a failure to proceed in the manner required by CEQA.¹⁵⁵ The MND and the Conditions of Approval are thus inadequate under CEQA.

There is substantial evidence supporting a fair argument that impacts to wildlife movement are significant and unmitigated. An EIR must be prepared which adequately analyzes and mitigates these potentially significant impacts.



Photo 6. *Thousands of European starlings use the project site, including this flock with the PG&E substation in the background, 1 December 2021.*

v. Collision Mortality

The Project is likely to have a significant impact on avian species due to collisions with the Projects power lines and fencing that the MND failed to adequately disclose and mitigate. The Project's gen-tie line connecting the battery energy storage facility to the Bellota Substation are especially hazardous to birds. Dr. Smallwood calculates that the Project's gen-tie line, as proposed, would kill 3,450 birds.¹⁵⁶ This constitutes a significant and unmitigated impact.¹⁵⁷

¹⁵⁴ CEQA Guidelines at §15126.4(a)(2).

¹⁵⁵ *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 672.

¹⁵⁶ Smallwood Comments, p. 25.

¹⁵⁷ *Id.*

The MND does not disclose or analyze the avian collision and electrocution hazard associated with the Project's gen-tie line, nor does it require implementation of the bird-friendly design strategies recommended by Avian Power Line Interaction Committee ("APLIC").¹⁵⁸ As a result, installation of the new gen-tie line represents an unexamined, potentially significant impact to birds (especially raptors and waterfowl).

Dr. Smallwood calculates that if the Project's proposed fencing were in place for 100 years, the Project's fencing would kill 7,600 birds. Dr. Smallwood's predictions regarding the level of avian mortality is based on substantial evidence, and demonstrates a significant unmitigated impact that the MND failed to consider.

Substantial evidence supports a fair argument that the Project would have significant, unmitigated cumulative impacts to biological resources. As Dr. Smallwood explained, "[g]iven that North America has lost nearly a third of its birds over the past half century, an appropriate cumulative effects analysis is warranted. An EIR should be prepared, and it should include an appropriate, serious analysis of cumulative impacts. It needs to address cumulative impacts from habitat loss and habitat fragmentation, and from collision mortality."¹⁵⁹

The substantial evidence discussed above and contained in Dr. Smallwood's comments supports a fair argument that the Project's impacts to biological resources are significant and unmitigated. An EIR must be prepared which adequately analyzes and mitigates significant impacts to biological resources.

¹⁵⁸ Avian Power Line Interaction Committee (APLIC). 2006. Suggested Practices for Avian Protection on Power Lines: The State of the Art in 2006. Edison Electric Institute and APLIC. Washington, D.C. Available at: <[https://www.aplic.org/uploads/files/2613/SuggestedPractices2006\(LR-2watermark\).pdf](https://www.aplic.org/uploads/files/2613/SuggestedPractices2006(LR-2watermark).pdf)>. See also Avian Power Line Interaction Committee (APLIC). 2012. Reducing Avian Collisions with Power Lines: The State of the Art in 2012. Edison Electric Institute and APLIC. Washington, D.C. Available at: <https://www.aplic.org/uploads/files/15518/Reducing_Avian_Collisions_2012watermarkLR.pdf>.

¹⁵⁹ Smallwood Comments, p. 26.

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J. An EIR is Required Because There is Substantial Evidence Supporting a Fair Argument that the Project Will Result in Potentially Significant Noise Impacts

The MND concluded, without substantial evidence, that the Project's noise impacts are less than significant. But, the MND failed to adequately analyze the proximity of and impact to nearby sensitive receptors, living in the residences immediately adjacent to the Project site. The MND provided that "The Project Site surrounds two existing rural residences located in the western portion of the site"¹⁶⁰ But the impacts to these residences and the sensitive receptors residing in them are notably absent from the noise impact section of the MND. The Conditions of Approval state that "Approximately (17) of the proposed inverters would include screening barriers for the purpose of attenuating inverter noise, should all inverters operate at maximum capacity."¹⁶¹ But, the MND, MMRP, and the Conditions of Approval do not clarify how frequently and at what times the inverters will operate at maximum capacity, nor whether the inverter noise exceeds the applicable threshold. An EIR must be prepared which adequately analyzes and mitigates potentially significant noise impacts to the residences encompassed within the Project site.

K. An EIR is Required Because There is Substantial Evidence Supporting a Fair Argument that the Project Will Result in Cumulatively Significant Impacts

i. Cumulative Biological Impacts

The MND failed to adequately analyze the cumulative loss of habitat in San Joaquin County and the surrounding community, and failed to mitigate these potentially significant impacts. An EIR must be prepared, and must include an appropriate, serious analysis of cumulative biological impacts. The Planning Commission must direct Staff to prepare an EIR which, among other things, addresses cumulative impacts from habitat loss and habitat fragmentation, and from collision mortality.

¹⁶⁰ MND, p. 26.

¹⁶¹ Conditions of Approval, p. 5.
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ii. Cumulative Air Quality and GHG Emissions

The MND failed to analyze the potentially significant cumulative air quality and GHG impact of the Project in conjunction with other projects in the vicinity. CEQA requires the analysis of cumulatively considerable impacts of the Project. “Cumulatively considerable” under CEQA means that “the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.”¹⁶² When the incremental effect of a project is cumulatively considerable, the lead agency must evaluate cumulative impacts in an EIR.¹⁶³ The MND failed as an informational documents under CEQA for failing to analyze the cumulative impacts of “probable future projects” combined with the Project’s impacts.

The San Joaquin County website identifies 86 planned projects including two in Linden and 37 in nearby Stockton.¹⁶⁴ Dr. Fox concluded that all of these Projects would increase emissions of criteria pollutants and GHGs, further deteriorating ambient air quality in the San Joaquin Valley air basin where the Project is located. Thus, these projects combined with the proposed Project could result in cumulatively significant impacts that were not evaluated or mitigated in the MND nor in the Conditions of Approval. The Planning Commission must direct Staff to prepare an EIR to adequately analyze and mitigate cumulative impacts.

III. CONCLUSION

For the reasons stated herein, San Joaquin Residents urges the Planning Commission to uphold this appeal of the Project and overturn the Department’s approval of the Project. The County must remedy all substantial defects in the MND, and prepare an EIR to adequately analyze and mitigate the Project’s significant impacts before the Project can be lawfully approved.

¹⁶² CEQA Guidelines §15064(h)(1).

¹⁶³ CEQA Guidelines §15064.

¹⁶⁴ San Joaquin County, List of Active Planning Applications; <https://www.sjgov.org/commdev/cgi-bin/cdyn.exe?grp=planning&htm=actlist&typ=apd.5567-011acp>

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Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in dark ink, appearing to read "Kelilah D. Federman".

Kelilah D. Federman

Attachments

KDF:acp

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printed on recycled paper



APPEAL OF STAFF ACTION

SAN JOAQUIN COUNTY COMMUNITY DEVELOPMENT DEPARTMENT
1810 E. HAZELTON AVENUE, STOCKTON CA 95205

BUSINESS PHONE: (209) 468-3121

Business Hours: 8:00 a.m. to 5:00 p.m. (Monday through Friday)

APPLICATION PROCESSING STEPS

STEP 1 CHECK WITH STAFF - Development Services Staff will explain the requirements and procedures to you and give you the deadline for filing the appeal. Generally an appeal must be filed within 10 days of the Staff's action.

STEP 2 SUBMIT YOUR APPLICATION - When you apply, file all of the following:

- **FEE** The staff will let you know the current cost of filing an application. Make checks payable to the San Joaquin County Treasurer.
- **FORM** One (1) copy of the completed application information forms (attached) which all owners must sign.
- **APPLICATION COMPLETE** Staff will check your application. (Your application cannot be processed until it is complete.)

STEP 3 APPLICATION PROCESSING

- **ACTION** A public hearing will be scheduled before the Planning Commission. At the conclusion of the hearing the Commission will take action to deny, uphold or partially uphold the appeal. The action of the Planning Commission is final unless it is appealed to the Board of Supervisors.
- **FINAL ACTION** If not appealed, the Planning Commission's action is final. The staff will send you the final action.
- **ADDITIONAL ACTION** The filing of an appeal prevents the staff from approving any additional permits for the project until final action is effective on the appeal.



APPLICATION – APPEAL OF STAFF ACTION

SAN JOAQUIN COUNTY COMMUNITY DEVELOPMENT DEPARTMENT

FILE NUMBER: - PA-1700279

TO BE COMPLETED BY THE APPLICANT PRIOR TO FILING THE APPLICATION

APPLICANT INFORMATION

Name: Citizens for Responsible Industry c/o Kelilah Federman, Adams Broadwell Joseph & Cardozo

Address: 601 Gateway Boulevard, Suite 1000

South San Francisco CA 94080

Phone: (650)589-1660

BASIS FOR APPEAL

Action being appealed: Site Approval No. PA-1700279

Date of Staff action: March 17, 2022

State the basis of the appeal. List any findings of fact made by the staff which you feel were wrong and your reasons:

Please see attached letter.

List any condition(s) and or findings being appealed and give reasons why you think it should be modified or removed:

Please see attached letter.

SIGNATURE

Signature:

Kelilah Federman

Date: March 28, 2022

STAFF USE ONLY

Remarks:

Date appeal filed: 3/28/2022

Fee:

\$ 685

Receipt No:

R 223822

Appeal Accepted by:

G-S