

Letter 12

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Re: **Comments on Draft Program Environmental Impact Report for  
Pure Water Project Las Virgenes-Triunfo (SCH No. 2021090157)**

Dear Mr. Schlageter, Mr. Slosser, and Ms. Guzman:

On behalf of **County Line Alliance for Sustainable Projects ("CLASP")**, we submit these comments on the Draft Program Environmental Impact Report ("DPEIR") prepared by Las Virgenes-Triunfo Joint Powers Authority ("JPA") pursuant to the California Environmental Quality Act<sup>1</sup> ("CEQA") for the Pure Water Project Las Virgenes-Triunfo (SCH No. 2021090157) ("Project").<sup>2</sup> The JPA proposes to construct a new advanced water purification facility ("AWPF") to treat recycled water for indirect potable reuse and convey the purified water to the existing Las Virgenes Reservoir, where it will be blended with the existing drinking water supplies.<sup>3</sup> Pipeline construction will be required to extend the existing recycled water system to the AWPF, convey purified water from the AWPF to Las

<sup>1</sup> Pub. Resources Code ("PRC") § 21000 et seq.

<sup>2</sup> Las Virgenes-Triunfo Joint Powers Authority, Pure Water Project Las Virgenes-Triunfo, Public Review Draft Programmatic Environmental Impact Report (August 22, 2022) p. 77, (hereinafter "DPEIR").

<sup>3</sup> DPEIR, p. 2-1.

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Virgenes Reservoir located in Westlake Village, and convey the "reject" waste stream (brine or concentrate) from the AWPF to the Calleguas Salinity Management Pipeline.<sup>4</sup> The Project would require a series of interrelated pipelines including (1) a source water pipeline, (2) a purified water pipeline, (3) a brine pipeline, (4) a sewer pipeline, and (5) a potential source water augmentation pipeline.<sup>5</sup> A portion of the brine pipeline will be constructed in Agoura Hills and Westlake Village, but most of the brine pipeline will extend outside of the JPA's jurisdiction and through the City of Thousand Oaks.<sup>6</sup> Construction of the AWPF is expected to last approximately 15 months, and construction of the various pipelines is estimated to take 30 months.<sup>7</sup>

We reviewed the DPEIR, its technical appendices, and reference documents with assistance of CLASP's expert consultants, whose comments and qualifications are attached. Based on our review, it is clear that the DPEIR fails as an informational document under CEQA and lacks substantial evidence to support its conclusions that the Project's significant impacts would be mitigated to the greatest extent feasible.

There is also substantial evidence demonstrating that the Project's potentially significant environmental impacts are far more extensive than disclosed in the DPEIR. CLASP and our expert consultants identified numerous potentially significant impacts that the DPEIR either mischaracterizes, underestimates, or fails to identify. Moreover, many of the mitigation measures described in the DPEIR will not, in fact, mitigate impacts to the extent claimed.

For example, CLASP's air quality expert, James Clark, Ph.D., concludes that the Project's operational emissions will exceed applicable significance threshold. Dr. Clark also found that the DPEIR underestimates the Project's greenhouse gas ("GHG") emissions during both construction and operation.<sup>8</sup> CLASP's biological resources expert, Shawn Smallwood, Ph.D., concludes that the Project would have potentially significant and unmitigated impacts to wetland and riparian habitat, as well as significant and unmitigated impacts from habitat loss and wildlife

<sup>4</sup> DPEIR, p. 2-1.

<sup>5</sup> *Id.* at 2-14.

<sup>6</sup> *Id.* at 2-17.

<sup>7</sup> *Id.* at 2-23.

<sup>8</sup> See **Exhibit A**, James Clark, Ph.D., Clark and Associates, Comments on Pure Water Project Las Virgenes-Triunfo Project Draft Program Environmental Impact Report (SCH # 2021090157) ("Clark Comments").

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movement.<sup>9</sup> CLASP's hydrology and groundwater expert, Jim Bailey, concludes that the Project may result in potentially significant impacts to groundwater contamination, recharge, and quality.<sup>10</sup>

Dr. Clark, Dr. Smallwood, and Mr. Bailey's comment letters and all attachments hereto are incorporated by reference as if fully set forth herein.<sup>11</sup> The JPA must respond to each expert's comments separately and fully.

#### I. STATEMENT OF INTEREST

CLASP is an unincorporated association of individuals and labor organizations with members who may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of the Project. The association includes Ventura County residents, Los Angeles County residents, Southern California Pipe Trades District Council 16 and its members and their families and other individuals that live, recreate, and/or work in or near Thousand Oaks, Agoura Hills, Westlake Village, and Calabasas.

CLASP supports the development of sustainable projects, including those that improve access to potable water and California's resilience to droughts, where those projects are properly analyzed and carefully planned to minimize impacts on public health and the environment. Sustainable projects should avoid impacts to sensitive species and habitats, water resources, and public health, and should take all feasible steps to ensure unavoidable impacts are mitigated to the maximum extent feasible. Only by maintaining the highest standards can projects be deemed truly sustainable.

The individual members of CLASP and the members of the affiliated labor organizations live, work, recreate, and raise their families 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

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<sup>9</sup> See **Exhibit B**, Shawn Smallwood, Ph.D., Pure Water Project – Las Virgenes-Triunfo (September 28, 2022) ("Smallwood Comments").

<sup>10</sup> See **Exhibit C**, Jim Bailey, Shannon & Wilson, Review Groundwater Conditions Relevant to the Draft Program Environmental Impact Report for Las Virgenes-Triunfo Joint Powers Authority – Proposed Pure Water Project (October 2, 2022) ("Bailey Comments").

<sup>11</sup> CLASP reserves the right to supplement these comments, and to file further comments at any and all future proceedings and hearings related to the Project. 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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itself. They will be the first in line to be exposed to any health and safety hazards which may exist onsite. They each have a personal interest in protecting the Project area from unnecessary, adverse environmental and public health impacts.

CLASP and its members also have 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 CLASP's members. CLASP therefore has a direct interest in enforcing environmental laws to minimize the adverse impacts of projects that would otherwise degrade the environment.

Finally, CLASP and its members are concerned about projects that risk serious environmental harm without providing countervailing economic benefits. CEQA provides a balancing process whereby economic benefits are weighed against significant impacts to the environment.<sup>12</sup> It is in this spirit we offer these comments.

## II. LEGAL BACKGROUND

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR").<sup>13</sup> The EIR is the very heart of CEQA.<sup>14</sup> "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."<sup>15</sup>

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.<sup>16</sup> "Its purpose is to inform the public and its responsible officials of the

<sup>12</sup> PRC § 21081(a)(3); *Citizens for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171.

<sup>13</sup> See e.g., PRC § 21100.

<sup>14</sup> *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.

<sup>15</sup> *Communities for a Better Environment v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 ("CBE v. CRA").

<sup>16</sup> PRC § 21061; 14 Cal. Code Regs. ("CCR") §§ 15002(a)(1); 15003(b)-(e); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 517 ("[T]he basic purpose of an EIR is to provide public agencies and the

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environmental consequences of their decisions before they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'<sup>17</sup> 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.'<sup>18</sup>

Second, CEQA directs public agencies to avoid or reduce environmental damage when "feasible" by requiring consideration of environmentally superior alternatives and adoption of all feasible mitigation measures.<sup>19</sup> 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."<sup>20</sup> If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns."<sup>21</sup>

While the courts review an EIR using an "abuse of discretion" standard, "the reviewing court is not to 'uncritically rely on every study or analysis presented by a project proponent in support of its position. *A clearly inadequate or unsupported study is entitled to no judicial deference.*'"<sup>22</sup> As the courts have explained, "a prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process."<sup>23</sup> Further, "an agency may abuse

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public in general] with detailed information about the effect [that] a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.").

<sup>17</sup> *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

<sup>18</sup> *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1343, 1351 ("Berkeley Jets"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

<sup>19</sup> 14 CCR § 15002(a)(2) and (3); see also *Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.

<sup>20</sup> 14 CCR § 15002(a)(2).

<sup>21</sup> PRC § 21081; 14 CCR § 15002(b)(2)(A)-(B).

<sup>22</sup> *Berkeley Jets*, 91 Cal.App.4th at 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391-409, fn. 12.

<sup>23</sup> *Berkeley Jets*, 91 Cal.App.4th at 1355; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.

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its discretion under CEQA by either failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence.”<sup>24</sup>

Substantial evidence means “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.”<sup>25</sup> Substantial evidence “shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts,”<sup>26</sup> but it does not include “[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment.”<sup>27</sup>

The failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.<sup>28</sup> Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.<sup>29</sup> In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will “determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements.”<sup>30</sup>

A PEIR may be prepared for a series of actions that can be characterized as one large project and are related:

- (1) Geographically;
- (2) As logical parts in the chain of contemplated actions;
- (3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program; or

<sup>24</sup> PRC § 21168.5.

<sup>25</sup> 14 CCR § 15384(a).

<sup>26</sup> *Id.* § 15384(b).

<sup>27</sup> *Id.* § 15384(a).

<sup>28</sup> *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

<sup>29</sup> *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

<sup>30</sup> *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

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- (4) As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways.<sup>31</sup>

A PEIR designed to allow approval of activities within the program without the need for further CEQA review must provide a description of the activities that would implement the program and a specific and comprehensive evaluation of the program's foreseeable environmental impacts.<sup>32</sup> As with any EIR, a PEIR must provide decision-makers with "sufficient analysis to intelligently consider the environmental consequences of the project,"<sup>33</sup> and "[d]esignating an EIR as a program EIR also does not by itself decrease the level of analysis otherwise required in the EIR."<sup>34</sup> A lead agency preparing a PEIR must disclose what it reasonably can, and any determinations that it is not feasible to provide specific information must be supported by substantial evidence.<sup>35</sup>

### III. THE DPEIR FAILS TO PROVIDE A COMPLETE AND ACCURATE PROJECT DESCRIPTION

The DPEIR does not meet CEQA's requirements because it fails to include an accurate, complete, and stable description of the Project, rendering the entire analysis inadequate. CEQA requires that an EIR "set forth a project description that is sufficient to allow an adequate evaluation and review of the environmental impact."<sup>36</sup> An accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity.<sup>37</sup> "An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR."<sup>38</sup> Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate project description.<sup>39</sup>

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<sup>31</sup> 14 CCR § 15168(a).

<sup>32</sup> *Id.* § 15168(c)(1)-(2), (5); *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 237.

<sup>33</sup> *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts* (2017) 17 Cal.App.5th 413, 426.

<sup>34</sup> *Friends of Mammoth*, 82 CA 4th at 533.

<sup>35</sup> *Cleveland Nat'l Forest Found.*, 17 Cal.App.5th at 440.

<sup>36</sup> *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654 (citing 14 C.C.R. § 15124).

<sup>37</sup> *McQueen v. Board of Directors* (1988) 202 Cal. App. 3d 1136, 1143.

<sup>38</sup> *Santiago County Water Dist. v. County of Orange* 118 Cal. App. 3d 818, 829-830.

<sup>39</sup> *Sundstrom v. County of Mendocino* ("Sundstrom") (1988) 202 Cal.App.3d 296, 311.



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CEQA forbids piecemeal review of the significant environmental impacts of a project.<sup>40</sup> Agencies cannot allow “environmental considerations [to] become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.”<sup>41</sup> “A narrow view of a project could result in the fallacy of division ... , that is, overlooking its cumulative impact by separately focusing on isolated parts of the whole.”<sup>42</sup> “Where an individual project is a necessary precedent for action on a larger project, or commits the Lead Agency to a larger project, with significant environmental effect, an EIR must address itself to the scope of the larger project.”<sup>43</sup>

The DPEIR impermissibly piecemeals the review of the Project by failing to analyze the “whole of [the] action”.<sup>44</sup> The whole of the action, here, includes the Summer Flow Augmentation Project (“SFAP”). The SFAP is a new pipeline being constructed to augment summertime streamflow in Malibu Creek with the required volumes of water meeting the nutrient discharge limits for nitrogen and phosphorus as defined in the NPDES permit for the Tapia Water Reclamation Facility (“Tapia WRF”).<sup>45</sup> The SFAP “would help maintain minimum instream flows in Malibu Creek during the summer and would support maintaining instream flow requirements once the Pure Water Project is in operation.”<sup>46</sup> Because the SFAP is a necessary precedent for action on the larger project, and is necessary to further the objectives of the proposed Project, it should be fully analyzed in the DPEIR.<sup>47</sup>

The DPEIR omits information regarding the SFAP’s impacts on “Water Quality Standards and WDRs during Construction,” “Water Quality Standards and WDRs during Operation,” and “Drainage and Flood Risk.”<sup>48</sup> These sections of the DPEIR are left blank.<sup>49</sup> The omission of these impact analyses results in impermissible piecemealing of the Project analysis. The DPEIR must be revised

<sup>40</sup> 14 CCR § 15165; *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1222; *Berkeley Jets*, 91 Cal.App.4th at 1358.

<sup>41</sup> *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284.

<sup>42</sup> *McQueen*, 202 Cal.App.3d at 1144.

<sup>43</sup> 14 CCR § 15165.

<sup>44</sup> *Id.* § 15378(a).

<sup>45</sup> Las Virgenes-Tirunfo Joint Powers Authority, CEQA Initial Study and Mitigated Negative Declaration: Summer Flow Augmentation of Malibu Creek (Jan. 2019) p. 1-2. Available at <https://www.lvmwd.com/home/showpublisheddocument/11594/636832337955670000>.

<sup>46</sup> DPEIR, pp. 5-27 to 5-28.

<sup>47</sup> 14 CCR § 15165.

<sup>48</sup> DPEIR, p. 11-15.

<sup>49</sup> *Id.*



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and recirculated to adequately address the potentially significant impacts from the SFAP on water quality standards during construction and operation and drainage and flood risk associated with the SFAP.

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**IV. THE DPEIR'S DESCRIPTION OF THE ENVIRONMENTAL SETTING IS INADEQUATE**

The DPEIR fails to adequately describe the environmental setting against which the Project's environmental impacts are to be measured for several critical aspects of the Project. This contravenes the fundamental purpose of the environmental review process, which is to determine whether there is a potentially substantial, adverse change compared to the existing setting. CEQA requires that a lead agency include a description of the physical environmental conditions, or "baseline," in the vicinity of the project as they exist at the time environmental review commences.<sup>50</sup> As the courts have repeatedly held, the impacts of a project must be measured against the "real conditions on the ground."<sup>51</sup> The description of the environmental setting constitutes the "baseline" physical conditions against which the lead agency assesses the significance of a project's impacts.<sup>52</sup>

**A. The DPEIR Fails to Accurately Describe the Project's Environmental Setting Related to Biological Resources**

The DPEIR does not contain any analysis supported by detection surveys for special status species.<sup>53</sup> The JPA did not conduct detection surveys for the Bell's vireo or any other special status species that may occur onsite.<sup>54</sup> Although general biological surveys were completed between January 14 and January 15, 2022 to assess the habitat suitability for special-status species,<sup>55</sup> the DPEIR lacks essential methodological details needed to assess their validity. For example, the DPEIR does not identify who performed general biological surveys, when they were conducted, or how long they lasted.<sup>56</sup> Further, the JPA did not provide any records to substantiate the general biological surveys despite members of CLASP

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<sup>50</sup> 14 CCR § 15125(a); *Communities for a Better Environment*, 48 Cal. 4th at 321.

<sup>51</sup> *Communities for a Better Environment*, 48 Cal. 4th at 321; *Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121-22; *City of Carmel-by-the-Sea v. Board of Supervisors of Monterey County* (1986) 183 Cal.App.3d 229, 246.

<sup>52</sup> 14 CCR § 15125(a); *Communities for a Better Environment*, 48 Cal. 4th at 321.

<sup>53</sup> Smallwood Comments, p. 20.

<sup>54</sup> *Id.*

<sup>55</sup> DPEIR, p. 5-5 to 5-6.

<sup>56</sup> *Id.*

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requesting all records referenced and relied upon in the DPEIR,<sup>57</sup> and more targeted requests for the underlying data.<sup>58</sup>

As Dr. Smallwood explains, the DPEIR “inadequately discloses the methodological details of one the most important steps toward characterization of the existing environmental setting, which is one of CEQA’s important objectives.”<sup>59</sup> Absent the methodological data supporting the general biological surveys, the DPEIR’s analysis of the existing environmental setting for special-status species is not supported by substantial evidence.

**B. Substantial Evidence Shows the Existing Setting is More Biologically Sensitive than Disclosed and Analyzed in the DPEIR**

The DPEIR defines special-status species as those plants and animals listed, proposed for listing, or candidates for listing as threatened or endangered by the U.S. Fish and Wildlife Service (“USFWS”) under the Federal Endangered Species Act (“ESA”); those listed or proposed for listing as rare, threatened, or endangered by the California Department of Fish and Wildlife (“CDFW”) under the California Endangered Species Act (“CESA”); plants occurring on lists 1B and 2 of the California Native Plant Society’s Inventory of Rare and Endangered Vascular Plants of California (CNPS 2001); and animals designated as “Species of Special Concern”.<sup>60</sup> However, the DPEIR erroneously excludes Birds of Conservation Concern (“BCC”) from categorization as special-status wildlife.

The BCC is an effort by the USFWS to “identify species, subspecies, and populations of all migratory nongame birds that, without additional conservation actions, are likely to become candidates for listing under the Endangered Species

<sup>57</sup> Letter from Adams Broadwell Joseph & Cardozo to Las Virgenes Municipal Water District, Request for Immediate Access to Documents Referenced in the Draft Programmatic Environmental Impact Report - Pure Water Project (SCH No. 2021000157) (Aug. 31, 2022) (requesting “any and all documents referenced, incorporated by reference, and relied upon in the Draft Programmatic Environmental Impact Report prepared for the Pure Water Project – Las Virgenes Triunfo”).

<sup>58</sup> Email from Oliver Slosser, Las Virgenes Municipal Water District to Adams Broadwell Joseph & Cardozo, RE: Public Records Act Request - Pure Water Project - Las Virgenes-Triunfo (SCH No. 2021000157) (Sept. 19, 2022) (responding to ABJC request for “Reports generated related to the general biological surveys conducted on January 13 and 14, 2022.” Mr. Slosser responded: “No reports were generated related to the general biological surveys conducted on January 13 and 14, 2022.”).

<sup>59</sup> Smallwood Comments, p. 21.

<sup>60</sup> DPEIR, p. 5-2.

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Act.”<sup>61</sup> Species identified as BCC qualify for special-status under CEQA Guidelines § 15380(b)(2)(B), which permits a species to be designated as “rare” if the “species is likely to become endangered within the foreseeable portion throughout all or a significant portion of its range and may be consider ‘threatened’ as that term is used in the ESA.”<sup>62</sup> Therefore, the DPEIR should have disclosed species designated as BCC with the potential to occur in the Project vicinity. However, the DPEIR entirely omits discussion of BCC-designated species identified in violation of CEQA. Dr. Smallwood observed numerous BCC-designated species at the Agoura Road and Reservoir sites,<sup>63</sup> but the DPEIR omits analysis of BCC-designated species.

Moreover, the DPEIR asserts that “[n]o special-status wildlife were observed during the general wildlife surveys,” which is clearly erroneous given the general biological surveys identified BCC-designated species.<sup>64</sup> For example, the DPEIR discloses that a Nuttall’s woodpecker was observed during the general biological survey.<sup>65</sup> Because the Nuttall’s woodpecker is a BCC-designated species, the DPEIR’s assertion is not supported by the substantial evidence presented in the DPEIR itself.

Additionally, the DPEIR notes that gulls (*Larus sp*) were observed onsite during the general biological survey.<sup>66</sup> The DPEIR’s description of this species is unclear and cannot be verified. During Dr. Smallwood’s survey of the Project site, he observed Western gulls (a BCC-designated species) near the Project site. As discussed above, BCC-designated are special-status species under CEQA and, therefore, the DPEIR’s analysis of this species is incomplete and unsupported by substantial evidence.

Further, the DPEIR’s baseline discussion relies on the lack of any positive identification of a species in CDFW’s California Natural Diversity Database (“CNDDB”) to assert that the Project site does not contain special-status species. But the absence of special-status species in the CNDDB does not necessarily indicate absence of special-status species from the Project area. As Dr. Smallwood explains, the DPEIR makes inappropriate use of CNDDB to assess habitat of special-status species at the AWPf sites.<sup>67</sup>

<sup>61</sup> 16 U.S.C § 2912(a)(3).

<sup>62</sup> 14 § 15380(b)(2)(B).

<sup>63</sup> Smallwood Comments, pp. 25-29.

<sup>64</sup> DPEIR, p. 5-6.

<sup>65</sup> Smallwood Comments, p. 22.

<sup>66</sup> DPEIR, p. 5-8.

<sup>67</sup> Smallwood Comments, p. 23.



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The DPEIR screens out species from further consideration if CNDDDB occurrence records do not exist within 5 miles of the Project, which includes the AWPf alternatives and the various pipeline routes.<sup>68</sup> By relying on CNDDDB records to determine species' absences, the DPEIR misapplies the database, because CNDDDB was not designed to support absence determinations or to screen out species from characterization of a site's wildlife community.<sup>69</sup> As CDFW notes in the database guidelines, "[t]he CNDDDB is a positive sighting database. It does not predict where something may be found. [CDFW] map occurrences only where we have documentation that the species was found at the site. There are many areas of the state where no surveys have been conducted and therefore there is nothing on the map. That does not mean that there are no special status species present."<sup>70</sup>

Because the Western gull, the California thrasher and multiple other species were not assigned special status until 2021, these species would have lacked many records in CNDDDB when the Notice of Preparation was issued.<sup>71</sup> The lack of CNDDDB records has nothing to do with true geographic distributions of the species at issue.<sup>72</sup> And because negative findings are not reported to CNDDDB, it cannot serve the basis for establishing the likelihood of a species to occur in the Project area (such as low occurrence likelihood).<sup>73</sup> Therefore, the DPEIR's reliance on the CNDDDB to assert the absence of special status species in the environmental setting discussion is not supported by substantial evidence.

Dr. Smallwood observed a bat flying at the Project site, but the DPEIR fails to mention the occurrence of bats, or the use of the Project site as a wildlife corridor for bats to forage, den, or roost, or seek out water.<sup>74</sup> Dr. Smallwood opines that the bat observed onsite was a *Myotis*,<sup>75</sup> many of which are species that are "imperiled or at high risk of imperilment" according to the Western Bat Working Group,<sup>76</sup> or listed as special status by the U.S. Forest Service and Bureau of Land

<sup>68</sup> Smallwood Comments, p. 23.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*; State of California Department of Fish and Game, California Natural Diversity Database, CNDDDB Data Use Guidelines, p. 12. Available at: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27285&inline>.

<sup>71</sup> Smallwood Comments, p. 23.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 41.

<sup>75</sup> *Id.* at 40.

<sup>76</sup> Western Bat Working Group, Species Matrix. Available at: <http://wbwg.org/matrices/species-matrix/>.

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Management.<sup>77</sup> In fact, all five of the species of *Myotis* in the Project area are ranked by the Western Bat Working Group as either moderate or high priority for conservation.<sup>78</sup> But, analysis of special-status bats was omitted from the DPEIR despite the presence of special-status bats in the Project area, as evidenced by Dr. Smallwood's observations. The DPEIR's failure to identify and analyze all special-status wildlife that could potentially be impacted by construction and operation of the Project renders the DPEIR inadequate as a matter of law, and renders the conclusion that impacts to special-status wildlife are less than significant unsupported by substantial evidence.

Dr. Smallwood surveyed the AWPf sites and observed 120 special-status species of vertebrate wildlife, and another 2 species of invertebrate wildlife.<sup>79</sup> The DPEIR's failure to disclose the existence of all special-status species on the Project site prevents meaningful analysis of the Project's environmental impacts, and is a failure to proceed in the manner required by law. Moreover, the DPEIR's discussion of the baseline conditions is not supported by substantial evidence. The DPEIR must be revised and recirculated to accurately disclose the existing environmental setting of the Project.

**V. THE DPEIR FAILS TO ACCURATELY ANALYZE, QUANTIFY, AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS TO AIR QUALITY**

An EIR must fully disclose all potentially significant impacts of a Project and implement all feasible mitigation to reduce those impacts to less than significant levels.<sup>80</sup> The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.<sup>81</sup> An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.<sup>82</sup> Here, the DPEIR fails to adequately analyze the Project's construction and operational emissions, in violation of CEQA.

<sup>77</sup> Western Bat Working Group, Western Bat Species. Available at: <http://wbwg.org/western-bat-species/>.

<sup>78</sup> Smallwood Comments, p. 40; see also Western Bat Working Group, Species Matrix, <http://wbwg.org/matrices/species-matrix/> (last visited Oct. 7, 2022).

<sup>79</sup> Smallwood Comments, p. 40.

<sup>80</sup> 14 CCR § 15121.

<sup>81</sup> *Id.* § 15064(b).

<sup>82</sup> *Kings County Farm Bureau v. Hanford* (1990) 221 Cal.App.3d 692, 732.

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**A. The DPEIR Fails to Analyze the Project's Potentially Significant Impacts from Construction and Operation Emissions**

**1. *The DPEIR Fails to Analyze the Impact of Diesel Particulate Matter Emissions from Construction of Agoura Road AWP***

The DPEIR recognizes diesel exhaust as a toxic air contaminant ("TAC") that may pose a threat to human health.<sup>83</sup> TACs refer to a diverse group of air pollutants that can cause chronic and acute adverse effects on human health. The DPEIR provides an extremely brief, conclusory discussion of potential health impacts associated with diesel particulate matter ("DPM") produced from construction activities.<sup>84</sup> It states:

Exhaust emissions from construction equipment would also contain TACs, such as diesel particulate matter, that have potential cancer and noncancer chronic health effects. Although some of the project's construction activities may be near residential areas, construction activities would be short term and limited to a relatively small area where only a few pieces of construction equipment would be operating at a time. [¶] Exposures from the construction activity TAC emissions would be short term in nature, and long-term exposure to diesel particulate matter from construction would not occur. In addition, project construction is required to implement BMPs and follow the emission control measures described in the South Coast AQMD and Ventura County APCD CEQA guidelines, including minimizing idling times and maintaining equipment in good condition. These measures would help minimize exposure of nearby sensitive receptors to construction-related pollutants.<sup>85</sup>

Even though the DPEIR acknowledges potential cancer and non-cancer chronic health effects associated with construction activities, the DPEIR concludes the impact would be less than significant.<sup>86</sup>

"[A] sufficient discussion of significant impacts requires not merely a determination of whether an impact is significant, but some effort to explain the

<sup>83</sup> DPEIR, p. 4-5.

<sup>84</sup> *Id.* at 4-13.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 4-9, 4-13.



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nature and magnitude of the impact.”<sup>87</sup> The DPEIR lacks substantial evidence to support its significance conclusion because it failed to analyze the potentially significant health impacts to sensitive receptors located 360 feet away from the proposed Agoura Road AWPFF who would be exposed to DPM emissions during construction.<sup>88</sup>

The Office of Environmental Health Hazard Assessment (“OEHHHA”) has developed guidelines for preparation of a health risk assessment (“HRA”).<sup>89</sup> OEHHHA recommends that a HRA be performed for projects lasting longer than 2 months.<sup>90</sup> For projects lasting more than 6 months, OEHHHA recommends that exposure be evaluated for the duration of the project.<sup>91</sup> Here, construction of the Agoura AWPFF would last 15 months (August 2015 to November 2027).<sup>92</sup> Moreover, as Dr. Clark notes, other lead agencies have required a quantitative analysis of TACs from diesel exhaust in CEQA documents.<sup>93</sup> Further, Dr. Clark concludes that the JPA’s analysis ignores the presence of TACs being emitted with diesel exhaust during the construction and operational phases of the project without making any attempt to quantify the impacts.<sup>94</sup>

The South Coast Air Quality Management District (“SCAQMD”) has established significant thresholds for TACs.<sup>95</sup> The significance threshold for cancer risk is 10 in one million.<sup>96</sup> The significance threshold for cancer burden is 0.5 excess cancer cases (in areas greater than or equal to one in one million).<sup>97</sup> And the significance threshold for chronic and acute hazard index is greater than or equal to 1 (project increment).<sup>98</sup> None of these significance thresholds are disclosed in the DPEIR section discussing the SCAQMD’s CEQA air quality significance thresholds

<sup>87</sup> *Sierra Club*, 6 Cal.5th at 519.

<sup>88</sup> Clark Comments, p. 7.

<sup>89</sup> Office of Environmental Health Hazard Assessment, Air Toxics Hot Spots Program Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments (Feb. 2015), Available at: <https://oehha.ca.gov/media/downloads/crrr/2015guidancemanual.pdf>.

<sup>90</sup> *Id.* at p. 8-18.

<sup>91</sup> *Id.*

<sup>92</sup> DPEIR, p. 2-21.

<sup>93</sup> Clark Comments at p. 6.

<sup>94</sup> *Id.*

<sup>95</sup> South Coast Air Quality Management District, South Coast AQMD Air Quality Significance Thresholds (last revised April 2019). Available at: <http://www.aqmd.gov/docs/default-source/ceqa/handbook/scaqmd-air-quality-significance-thresholds.pdf?sfvrsn=2>.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

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(Section 4.3.1.1).<sup>99</sup> The DPEIR must analyze the significance of DPM impacts from construction of the Agoura Road AWP, and should utilize the SCAQMD thresholds for TACs given that it utilized the air district's thresholds to analyze the impact of criteria pollutants.

The DPEIR is legally inadequate for the same reasons identified by the California Supreme Court in *Sierra Club v. County of Fresno*. In that case, the Supreme Court found "the EIR insufficient because [the lead agency] failed to explain why it was not feasible to provide an analysis that connected the air quality effects to human health consequences."<sup>100</sup> "Without such information, the general public and its responsible officials cannot make an informed decision on whether to approve the project."<sup>101</sup> The DPEIR should be revised and recirculated to include a quantified health risk assessment to connect the Project's impacts with human health consequences and, if health risk is found to be significant, to implement all feasible mitigation to reduce impacts to less than significant levels.

2. *The DPEIR Underestimates DPM Emissions Caused by Operation of Diesel-Powered Emergency Generators at the Agoura Road AWP*

The DPEIR proposes to utilize two diesel-powered emergency generators at the AWP.<sup>102</sup> The DPEIR includes discussion of air quality and greenhouse gas ("GHG") impacts associated with routine maintenance and testing of the emergency generators.<sup>103</sup> It claims that exposure to DPM emissions from emergency generators would be minimal because emergency testing would not occur daily and typically last less than an hour.<sup>104</sup> As a result, the DPEIR concludes impacts would be less than significant.<sup>105</sup>

However, the DPEIR excludes an analysis of air quality and GHG impacts associated with operation of the generators during emergencies. SCAQMD regulations allow emergency generators to operate up to 200 hours per year, including testing and maintenance activities.<sup>106</sup>

<sup>99</sup> DPEIR, p. 4-7.

<sup>100</sup> *Sierra Club*, 6 Cal.5th at 525.

<sup>101</sup> *Santa Clarita Organization for Planning the Environment* 106 Cal.App.4th 715, 724.

<sup>102</sup> DPEIR, pp. 2-3, 4-8; see also *id.*, Appendix A, p. 2 (Number of Generators: 2).

<sup>103</sup> DPEIR, p. 4-11 to 4-12.

<sup>104</sup> *Id.*, at 4-12.

<sup>105</sup> *Id.*

<sup>106</sup> Clark Comments at p. 4; South Coast Air Quality Management District, Rule 1470; Requirements for Stationary Diesel-Fueled Internal Combustion and Other Compression Engines (last amended

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Emergency operation of the diesel-powered generators is likely, especially given the recent increase in Public Safety Power Shutoffs ("PSPS") and extreme heat events ("EHEs"). EHEs are defined as periods where in the temperatures throughout California exceed 100 degrees Fahrenheit. The number of EHEs is likely to increase in California with the continuing change in climate the State is currently undergoing. In 2021, the Governor of California declared that during extreme heat events the use of stationary generators shall be deemed an emergency use under 17 CCR § 93115.4(a)(30)(A)(2).

PSPS events are also becoming more frequent. According to the California Public Utilities Commission's 2019 PSPS report, utilities implemented over 800 PSPS events that impacted almost 973,000 customers (~7.5% of households in California), of which 854,000 were residential customers.<sup>107</sup> In 2019, the total duration of the PSPS events lasted between 141 hours to 154 hours.<sup>108</sup>

CARB's data also indicated that on average each of these customers had about 43 hours of power outage in October 2019.<sup>109</sup> Using the actual emission factors for each diesel BUG engine in the air district's stationary backup generator database, CARB staff calculated that the 1,810 additional stationary generators (like those proposed for the Project) running during a PSPS in October 2019 generated 126 tons of NO<sub>x</sub>, 8.3 tons of particulate matter, and 8.3 tons of DPM.<sup>110</sup> For every PSPS or EHE triggered during the operational phase of the project, significant concentrations of DPM will be released.

The DPEIR should evaluate operational DPM impact from diesel-fired emergency generators based on the maximum number of hours the generators are allowed to operate under SCAQMD rules. At a minimum, the DPEIR should evaluate impacts based on 100 hours of emergency operation in addition to testing and maintenance. Such an analysis would be consistent with the guidance issued by the Bay Area Air Quality Management District ("BAAQMD").<sup>111</sup> BAAQMD

Oct. 1, 2021). Available at: <http://www.aqmd.gov/docs/default-source/rule-book/reg-xiv/rule-1470.pdf?sfvrsn=4>.

<sup>107</sup> California Air Resources Board, Potential Emissions Impacts of Public Safety Power Shutoff (PSPS) (January 30, 2020). Available at: [https://www2.arb.ca.gov/sites/default/files/2020-01/Emissions Inventory Generator Demand%20Usage During Power Outage 01\\_30\\_20.pdf](https://www2.arb.ca.gov/sites/default/files/2020-01/Emissions%20Inventory%20Generator%20Demand%20Usage%20During%20Power%20Outage%2001_30_20.pdf).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Bay Area Air Quality Management District, Policy: Calculating Potential to Emit for Emergency Backup Power Generators (June 3, 2019). Available at:

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found that "100 hours represents a reasonable worst-case assumption regarding the amount of time during any given year that a facility could have to operate without outside power, which would necessitate emergency operation of the facility's backup generator(s).<sup>112</sup> The presumption of 100 hours per year is consistent with the U.S. Environmental Protection Agency's approach to calculating the potential to emit of emergency generators.<sup>113</sup>

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The JPA must recirculate an adequate DEIR which includes an analysis of the operation of the emergency generators that will occur at the Project site that is not accounted for in the current air quality and GHG analyses.

#### **VI. THE DPEIR FAILS TO ADEQUATELY ANALYZE IMPACTS TO BIOLOGICAL RESOURCES**

The DPEIR fails to adequately analyze the Project's potentially significant impacts to biological resources. First, the DPEIR fails to analyze potentially significant impacts to special-status fish in the Malibu Creek. Dr. Smallwood found that the DPEIR's conclusion that the Project's impacts to special-status fish species are less than significant is not supported by substantial evidence, as shown below. Second, the DPEIR fails to accurately analyze and mitigate potentially significant impacts from habitat loss and habitat fragmentation. Third, the DPEIR fails to analyze the Project's value as a habitat corridor, and the Project's significant interference with the movement of resident migratory fish and wildlife. These impacts must be analyzed and mitigated in a revised and recirculated DPEIR.

##### **A. The DPEIR Fails to Accurately Analyze Potentially Significant Impacts to Special-Status Fish in Malibu Creek**

Discharges from the Tapia WRF make up a considerable portion of flow during dry periods.<sup>114</sup> The DPEIR concludes that the Project would cause reduction in discharges from Tapia WRF between November 15 and April 15 because the current NPDES permit prohibits discharges between April 15 and November 15.<sup>115</sup> But the DPEIR claims that construction of the SFAP would help maintain

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[https://www.baaqmd.gov/~media/files/engineering/policy\\_and\\_procedures/banking-and-offsets/calculating-pte-for-emergency-generators-06032019-pdf.pdf?la=en](https://www.baaqmd.gov/~media/files/engineering/policy_and_procedures/banking-and-offsets/calculating-pte-for-emergency-generators-06032019-pdf.pdf?la=en).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> DPEIR, p. 5-9.

<sup>115</sup> *Id.* at 5-27.

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minimum instream flows in Malibu Creek during the summer and would support the instream flow requirements once the Project is operation.<sup>116</sup> As a result, the DPEIR concludes the Project would have less than significant impact special-status fish species which rely upon Malibu Creek.<sup>117</sup>

The DPEIR's conclusion that the Project's impacts to special-status fish species are less than significant is not supported by substantial evidence. As Dr. Smallwood explains, the four special-status fish species identified in the DPEIR "appear on the precipice of extirpation from Malibu Creek, which has been disturbed in multiple ways and which faces a new source of stress from the proposed project."<sup>118</sup> In fact, according to the DPEIR, summer and fall flows in Malibu Creek have only barely met the instream flow requirements of 2.5 cubic feet per second ("cfs") established by Tapia WRF's NPDES permit to sustain endangered species habitat during dry periods.<sup>119</sup> Given current conditions, there is no margin for error.<sup>120</sup>

The JPA disregards CDFW's recommendation that the DPEIR "disclose whether the Project would reduce flows below 2.5 cfs or eliminate flows entirely, both during the summer and/or winter season. If the Project proposes to modify flow release, the PEIR should provide a clear explanation of when those flow reductions would occur and how much flow would be reduced based on the time of year."<sup>121</sup> The DPEIR does not disclose when the flows may be reduced below 2.5 cfs, nor does the DPEIR analyze impacts to fishes based on the additional recommended factors in the CDFW letter, including "water availability; water flows; water quality; benthic invertebrates and microorganisms; and habitat requirements (e.g., pools, slower moving waters, water temperature, substrate, vegetation)."<sup>122</sup> Absent

<sup>116</sup> DPEIR, p. 5-27 to 5-28.

<sup>117</sup> *Id.* at 5-28.

<sup>118</sup> Smallwood Comments, p. 31.

<sup>119</sup> *Id.* at p. 32 (citing DPEIR, p. 11-7 (Figure 11-4: Tapia Discharge Contribution to Low Flows), p. 11-19 (Figure 11-5: Streamflow Conditions in Malibu Creek During Low-flow Conditions)).

<sup>120</sup> Smallwood comments, p. 32.

<sup>121</sup> Letter from California Department of Fish and Wildlife to Las Virgenes-Triunfo Joint Powers Authority, Notice of Preparation of a Programmatic Environmental Impact Report for the Pure Water Project Las Virgenes-Triunfo, SCH #2021090157, Los Angeles and Ventura County (Oct. 11, 2021) p. 4. Available at: [https://files.ceqanet.opr.ca.gov/272736-1/attachment/20SWBLAAZkANeKg1VXoXv\\_MHv9wVX8zzjWzFqBcEaEREcpu4N1\\_5piR5xnRwp0wAGZitVaYGP3gXonZE0](https://files.ceqanet.opr.ca.gov/272736-1/attachment/20SWBLAAZkANeKg1VXoXv_MHv9wVX8zzjWzFqBcEaEREcpu4N1_5piR5xnRwp0wAGZitVaYGP3gXonZE0) ("CDFW Letter").

<sup>122</sup> *Id.* at 5.

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this information, the DPEIR lacks substantial evidence to conclude that impacts to fish in Malibu Creek will be less than significant.<sup>123</sup>

Further, the DPEIR concludes that “the existing suboptimal physical habitat conditions are expected to continue in Malibu Creek.”<sup>124</sup> Based on this, the DPEIR illogically concludes that the Project would have less than significant impacts on Southern California steelhead and its critical habitat.<sup>125</sup> Not only will the Project continue to result in suboptimal conditions for steelhead, but may exacerbate the habitat conditions for steelhead resulting in a significant and unmitigated impact to the endangered Southern California steelhead.<sup>126</sup> The DPEIR must be revised to accurately analyze the potentially significant impact to Southern California steelhead.

**B. The DPEIR Fails to Accurately Analyze and Mitigate Potentially Significant Impacts from Habitat Loss and Habitat Fragmentation**

The DPEIR identifies four individual species and “[o]ther migratory birds” as special-status species with the potential to occur in the Project area.<sup>127</sup> The DPEIR claims that habitat loss from the development of the Project is not anticipated to significantly impact special-status wildlife due to relatively low acreage, proximity to existing development, and the amount of remaining suitable habitat in the surrounding area.<sup>128</sup> As a result, the DPEIR concludes less than significant with implementation of MM 5-2, which requires preconstruction surveys for special-status wildlife that potentially occur within the construction area.<sup>129</sup> The DPEIR’s conclusory discussion of habitat loss lacks any substantive discussion or analysis, in violation of CEQA.

As Dr. Smallwood explains, the habitat loss associated with Project construction and operation will be severe, significant, and remains unmitigated. Dr. Smallwood calculated that construction and operation of the Agoura Road AWPf would result in an estimated loss of 114 bird nests, while construction and

<sup>123</sup> DPEIR, p. 5-28.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Smallwood Comments, p. 32.

<sup>127</sup> DPEIR, p. 5-26 to 5-27 (Coastal California gnatcatcher, Coastal whiptail, Southern California legless lizard, and Western Pond turtle).

<sup>128</sup> DPEIR, pp. 5-26 to 5-27.

<sup>129</sup> *Id.*



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operation of the AWPP would result in an estimated loss of 350 bird nests.<sup>130</sup> Dr. Smallwood concludes that construction of the proposed building at either alternative site would result in the average of at least a 93% reduction in the abundance of each of the special-status species detected by Dr. Smallwood's team, as well as of each of the special-status species not detected due to insufficient survey effort.<sup>131</sup>

Regrettably, Dr. Smallwood concluded that few if any oak titmouse (a BCC-designated species) would survive construction of the Project or remain on the Project site.<sup>132</sup> The same would be true for California thrasher, Southern California rufous-crowned sparrow, Nuttall's woodpecker and all of the other special-status species.<sup>133</sup> Although the DPEIR acknowledges that the Southern California rufous-crowned sparrow is a special-status species and has potential to occur within the Project area,<sup>134</sup> it does not discuss this species in the impact analysis.<sup>135</sup>

The DPEIR also fails to analyze impacts caused by habitat fragmentation. Habitat fragmentation occurs when large expanse of habitat is transformed into a number of smaller patches of smaller total area isolated from each other by a matrix of habits unlike the original.<sup>136</sup> As Dr. Smallwood explains, the Project area is undergoing severe habitat fragmentation, which poses the greatest threat to wildlife conservation.<sup>137</sup> He found that the project would contribute further to habitat fragmentation in an environmental setting in which wildlife would be devastated by further habitat fragmentation.<sup>138</sup>

The DPEIR fails to adequately analyze and mitigate the Project's impacts associated with habitat loss and habitat fragmentation, awarding only three conclusory sentences to the habitat loss, and no discussion or analysis of habitat fragmentation. The DPEIR must be revised and recirculated to adequately analyze

<sup>130</sup> Smallwood Comments, p. 33.

<sup>131</sup> *Id.* at 35.

<sup>132</sup> *Id.* at 33.

<sup>133</sup> *Id.*

<sup>134</sup> DPEIR, p. 5-2, p. 5-3.

<sup>135</sup> *Id.* at 5-26 to 5-27.

<sup>136</sup> Jordan E. Rogan, et.al., Impacts of Habitat Loss and Fragmentation on Terrestrial Biodiversity (2018) Reference Module in Earth Systems and Environmental Sciences, Available at: [https://www.sciencedirect.com/topics/earth-and-planetary-sciences/habitat-fragmentation#:~:text=Habitat%20fragmentation%20is%20defined%20as,original%20\(Fahrig%2C%202003\).](https://www.sciencedirect.com/topics/earth-and-planetary-sciences/habitat-fragmentation#:~:text=Habitat%20fragmentation%20is%20defined%20as,original%20(Fahrig%2C%202003).)

<sup>137</sup> Smallwood Comments, p. 32.

<sup>138</sup> *Id.*

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the Project's impacts to habitat loss and habitat fragmentation, as required by CEQA.<sup>139</sup>

### C. The DPEIR Fails to Analyze the Project Significant Impacts to Wildlife Movement

The DPEIR concludes impacts to wildlife corridors would be less than significant because the Project would not produce new bottlenecks to wildlife movement in the area and its proximity to existing barriers and development.<sup>140</sup> However, the DPEIR fails to adequately analyze the Project impacts associated with the interference with the movement of native resident or migratory fish or wildlife species or migratory wildlife corridors, or impede the use of native wildlife nursery sites, as required by CEQA Guidelines Appendix G.

As Dr. Smallwood explains, the project would cut wildlife off from stopover and staging opportunities, forcing volant wildlife to travel even farther between remaining stopover sites.<sup>141</sup> This results in a significant impact due to increased risk of starvation, exhaustion, and disorientation from longer duration between stopover sites.<sup>142</sup> The DPEIR does not include an analysis of volant wildlife movement, instead referring only to linear features which would occur only during construction.<sup>143</sup> Therefore, the analysis ignores the impacts from the loss of wildlife movement opportunities over the estimated 30-year lifetime of the Project. This impact must be analyzed in a revised and recirculated DPEIR before the Project can be approved.

## VII. THE DPEIR FAILS TO ADEQUATELY MITIGATE IMPACTS TO BIOLOGICAL RESOURCES

CEQA requires that "an EIR must identify ways to mitigate or avoid the significant effects that a project may have on the environment."<sup>144</sup> Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.<sup>145</sup> Failure to include enforceable mitigation measures

<sup>139</sup> CEQA Guidelines Appendix G.

<sup>140</sup> DPEIR, p. 5-30.

<sup>141</sup> Smallwood Comments, p. 36.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> PRC § 21002.1.

<sup>145</sup> 14 CCR § 15126.4(n)(2).

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is considered a failure to proceed in the manner required by CEQA.<sup>146</sup> In order to meet this requirement, mitigation measures must be incorporated directly into the EIR to be enforceable.<sup>147</sup> "An EIR is inadequate if '[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR."<sup>148</sup>

Formulation of mitigation measures shall not be deferred until "some future time."<sup>149</sup> Deferring formulation of mitigation measures to post-approval studies is generally impermissible.<sup>150</sup> Mitigation measures adopted after project approval deny the public the opportunity to comment on the project as modified to mitigate impacts.<sup>151</sup> "By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process."<sup>152</sup>

The specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project's environmental review provided that the agency: (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will [be] considered, analyzed, and potentially incorporated in the mitigation measure.<sup>153</sup> 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.<sup>154</sup>

MM 5-4 requires the preparation and implementation of a mitigation plan for oak trees and oak tree natural communities.<sup>155</sup> MM 5-4 improperly defers

<sup>146</sup> *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 672.

<sup>147</sup> *Lotus v. Dept of Transportation* (2014) 223 Cal. App. 4th 645, 651-52.

<sup>148</sup> *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, quoting *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92, quoting *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 670.

<sup>149</sup> *Id.* at § 15126.4(a)(1)(B).

<sup>150</sup> *Sundstrom*, 202 Cal.App.3d at 308-09; PRC § 21061.

<sup>151</sup> *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical*, 36 Cal.App.4th at p. 1604, fn. 5.

<sup>152</sup> *Sundstrom*, 202 Cal.App.3d at 305.

<sup>153</sup> 14 CCR § 15126.4(a)(1)(B).

<sup>154</sup> *Ibid.*

<sup>155</sup> DPEIR, p. 5-33.



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mitigation by requiring that the future plan establish success criteria, instead of expressly identifying the success criteria in measure.<sup>156</sup> The DPEIR does not state why specifying the performance standards is impractical or infeasible.

The DPEIR's failure is similar to *Preserve Wild Santee v. City of Santee*. In that case, a city impermissibly deferred mitigation where the EIR did not state why specifying performance standards for mitigation measures "was impractical or infeasible at the time the EIR was certified."<sup>157</sup> The court determined that although the city must ultimately approve the mitigation standards, this does not cure these informational defects in the EIR.<sup>158</sup> Here, the DPEIR's failure to specify performance standards for the MM 5-2 results in impermissibly deferred mitigation, in violation of CEQA. The DPEIR must be revised and recirculated to adequately mitigate impacts to oak trees and oak tree natural communities.

A case study from northwestern California similarly illustrates why oaks have difficulty regenerating on sites where oaks were removed.<sup>159</sup> The study authors determined that deciduous oaks, particularly blue oak, required artificial plantings given shade and protection from browsing for successful restoration.<sup>160</sup> Restoration of a site on the Sierra Foothill Range and Field Station where blue oaks had been completely removed in the 1960s was finally successful after 2 attempts were thwarted by grasshopper and rodent browsing.<sup>161</sup> The oak tree mitigation plan should only include replanting if it also includes measures to ensure the trees are given shade and protection from browsing for successful restoration.

Moreover, MM 5-1 and MM 5-2 does not mitigate impacts to special-status species caused by habitat fragmentation. MM 5-2 only requires preconstruction surveys for the Coastal California Gnatcatcher, special-status reptiles, and nesting birds.<sup>162</sup> While MM 5-2 may reduce the Project's construction-related impacts, it does not reduce the habitat fragmentation impacts caused by operation of the

<sup>156</sup> DPEIR, p. 5-33.

<sup>157</sup> *Preserve Wild Santee*, 210 Cal.App.4th at 281.

<sup>158</sup> *Id.*

<sup>159</sup> Brooks, Colin N.; Merenlender, Adina M. 2001 *Determining the pattern of oak woodland regeneration for a cleared watershed in northwest California: a necessary first step for restoration*. Restoration Ecology, 9(1): 1-12.

<sup>160</sup> *Id.*

<sup>161</sup> Fryer, Janet L. 2007. *Quercus douglasii* Fire Effects Information System, U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station, Fire Sciences Laboratory. Available at: <https://www.fs.fed.us/database/feis/plants/tree/quedou/all.html>.

<sup>162</sup> DPEIR, pp. 5-32 to 5-33.

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Project.<sup>163</sup> Dr. Smallwood concluded that significant numbers of animals would be lost as a direct result of construction and as the indirect result of denial of reproductive productivity due to habitat fragmentation and habitat loss.<sup>164</sup>

Additionally, Dr. Smallwood noted that MM 5-1 and MM 5-2 are inadequate absent a “qualified bat biologist...completing a protocol-level detection survey for bats” to determine whether bats roost in the area and whether bats forage onsite.<sup>165</sup> Absent such analysis, these mitigation measures are inadequate. The DPEIR must be revised and recirculated to adequately mitigate significant impacts to species at the Project site.

#### VIII. THE DPEIR FAILS TO ADEQUATELY ANALYZE IMPACTS TO HYDROLOGY AND WATER QUALITY

The DPEIR failed to adequately analyze the Project’s potentially significant impacts to hydrology and water quality. First, the DPEIR failed to analyze potentially significant impacts associated with groundwater recharge. Second, the DPEIR fails to analyze potentially significant impacts to water quality from PFAS contamination. These impacts must be analyzed and mitigated in a revised and recirculated DPEIR.

##### A. The DPEIR Failed to Adequately Analyze Groundwater Impacts from Source Water Augmentation

The DPEIR concludes source water augmentation using groundwater from the Los Robles well would result in less than significant impacts because the annual volume of groundwater production from the well would not exceed the estimated sustainable yield of the groundwater basin.<sup>166</sup> While the DPEIR estimates that the annual volume production for the well is between 400 and 700 AFY,<sup>167</sup> the DPEIR does not disclose the sustainable yield for the groundwater basin. The DPEIR’s analysis of groundwater impacts is inadequate because it does not connect the groundwater extraction rate to the sustainable yield. Such a discussion would allow the public to make an informed decision, as CEQA requires.<sup>168</sup>

<sup>163</sup> Smallwood Comments, p. 35.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*, at 40.

<sup>166</sup> DPEIR, p. 11-21.

<sup>167</sup> *Id.*

<sup>168</sup> *Sierra Club, 6 Cal.5th at 521.*

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The DPEIR also fails to support its conclusion that groundwater impacts are less than significant with substantial evidence. A study on extended pumping at the Los Robles well performed by the City of Thousand Oaks demonstrates that “700 AFY production would require additional average annual recharge from average rainfall conditions to maintain a sustainable yield.”<sup>169</sup> Because the DPEIR does not include any mitigation measures limiting the amount of groundwater that can be utilized by the Project for source water augmentation, the DPEIR’s conclusion that the impact is less than significant is unsupported by substantial evidence.

Mr. Bailey confirms that the results of the long-term pumping test described in the Kennedy Jenks Report establish that exceeding a withdrawal rate greater than 600 AFY in the Los Robles could have a significant impact on the aquifer.<sup>170</sup> The DPEIR must consider adding mitigation measures to ensure impacts to groundwater recharge are reduced to less than significant.<sup>171</sup>

#### **B. The DPEIR Failed to Adequately Analyze Groundwater Contamination**

Additionally, the DPEIR fails to adequately analyze potentially significant groundwater impacts to the Los Robles well from the TFX Aviation site. Mr. Bailey concludes that absent assurance of whether the DPEIR evaluated both shallow and deeper groundwater systems and if numerical modeling was used to estimate potential impacts, the public cannot determine whether the JPA’s analysis is supported by substantial evidence.<sup>172</sup> In fact, substantial evidence supports the assertion that the Project will result in potentially significant and unmitigated impacts to groundwater contamination at the TFX Aviation site.<sup>173</sup>

The DPEIR recognizes that DTSC expressed concerns that additional pumping could destabilize the groundwater contamination plume at the TFX Aviation site.<sup>174</sup> The DPEIR asserts that source water augmentation system impacts are potentially significant but would be reduced to a less than significant

<sup>169</sup> City of Thousand Oaks, Thousand Oaks Extended Pumping at Los Robles Golf Course Well, Kennedy Jenks (Nov. 9, 2021) p. 4-8, 7-1.

<sup>170</sup> Bailey Comments, p. 5; City of Thousand Oaks, Thousand Oaks Extended Pumping at Los Robles Golf Course Well, Kennedy Jenks (Nov. 9, 2021) p. 4-8, 7-1.

<sup>171</sup> Bailey Comments, p. 5.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> DPEIR, p. 10-12.



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level with the implementation monitoring program required by MM 10-2.<sup>175</sup> However, Mr. Bailey found that MM 10-2 is inadequate because the JPA has provided the public no certainty that the monitoring program would adequately address the potentially significant impacts because it only provides an early warning mechanism if impacts are occurring.<sup>176</sup> The DPEIR must be revised and recirculated to provide binding mitigation to mitigate groundwater and water quality impacts.

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**IX. THE DPEIR FAILS TO ADEQUATELY MITIGATE IMPACTS TO HYDROLOGY AND WATER QUALITY**

MM 10 10-2 establishes a monitoring program for the Los Robles Well.<sup>177</sup> The monitoring program requires a quarterly review groundwater level changes and migration of the groundwater plumes.<sup>178</sup> It also requires an assessment of changes in hydraulic control of the TFX Aviation groundwater plume.<sup>179</sup> The monitoring program begins after pumping resumes at the Los Robles well. Monitoring may be reduced to semiannually or annual if there is no destabilization of the groundwater plume (with the time frame provided in a sampling plan submitted to DTSC prior to well operation).<sup>180</sup> If monitoring indicates that the hydraulic control of the groundwater plume is being affected, the JPA must reassess the project impact on plume migration in the next quarter.<sup>181</sup>

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MM 10-2 constitutes impermissibly deferred mitigation because it lacks performance standards. As Mr. Bailey explains, the monitoring program only acts as early warning system.<sup>182</sup> If the groundwater plume is being affected, MM 10-2 does not require any action to correct the impact. Rather, MM 10-2 simply requires that the JPA reanalyze the project's impact on the groundwater plume in the next quarter.<sup>183</sup> "Since a groundwater monitoring and sampling plan has not yet been developed, it is not possible to determine if it will ensure that any groundwater contamination impacts are less than significant."<sup>184</sup> The DPEIR must be revised

<sup>175</sup> DPEIR, p. 10-12.

<sup>176</sup> Bailey Comments at p. 5.

<sup>177</sup> DPEIR, p. 10-12.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Bailey Comments at p. 5.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

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and recirculated to adequately mitigate impacts to hydrology and groundwater from Project components.

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#### **X. THE DPEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE CUMULATIVE IMPACTS**

An EIR must discuss a cumulative impact if the project's incremental effect combined with the effects of other projects is "cumulatively considerable."<sup>185</sup> This determination is based on an assessment of the project's incremental effects "viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."<sup>186</sup> "Cumulative impacts" are defined as "two or more individual effects, which, when considered together, are considerable or which compound or increase other environmental impacts."<sup>187</sup> The purpose of this requirement is to avoid "piecemeal" approval of projects without consideration of the total environmental effects the project would have when taken together.<sup>188</sup>

"The analysis should not be so general that the potential combined impacts of the project and a key nearby project are not disclosed."<sup>189</sup> Even though CEQA does not require a quantified analyses on a subject, an EIR's qualitative discussion must not omit meaningful information on a subject from the cumulative impacts analysis.<sup>190</sup> The adequacy of an EIR's discussion of cumulative impacts is determined by a standard of practicality and reasonableness.<sup>191</sup>

##### **A. The DPEIR Erroneously Excludes Relevant Past, Present and Future Projects from the Cumulative Impact Analysis**

The CEQA Guidelines set forth two methods for satisfying the cumulative impacts analysis requirement: the list-of-projects approach and the summary-of-projections approach.<sup>192</sup> Under either method, an EIR must summarize the

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<sup>185</sup> 14 CCR § 15130(a).

<sup>186</sup> *Id.* § 15035(a)(3); *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1228; see also 14 CCR § 15355(b).

<sup>187</sup> 14 CCR § 15355.

<sup>188</sup> Cecily Talbert Barclay and Matthew S. Gray, *California Land Use and Planning Law* (Solano Press, 37th ed. 2020) p. 180.

<sup>189</sup> *Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 525; 14 CCR § 15130(b).

<sup>190</sup> *City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465, 490.

<sup>191</sup> *Environmental Protection & Information Center*, 44 Cal.4th at 525; 14 CCR § 15130(b).

<sup>192</sup> 14 CCR § 15355.

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expected environmental impacts of the project and related projects, provide a reasonable analysis of cumulative impacts, and examine reasonable options for mitigating or avoiding the project's contribution to any significant cumulative impacts.<sup>193</sup> It should also provide a specific reference to additional information stating where it is available.<sup>194</sup>

Here, the cumulative impacts analysis is inadequate because it is too general. "The analysis should not be so general that the potential combined impacts of the project and a key nearby project are not disclosed."<sup>195</sup> In *City of Long Beach v. City of Los Angeles*, the court held that the fact that "CEQA does not require quantified analysis does not mean that all meaningful information on a subject can be omitted from an EIR's cumulative impacts analysis."<sup>196</sup> The DEIR is inadequate because it omits meaningful information to determine the cumulative impact on agricultural resources.

The DPEIR utilizes the list of projects approach for its cumulative analysis.<sup>197</sup> However, the DPEIR improperly limits the scope of review by identifying only projects "that compare in scale to the Pure Water Project."<sup>198</sup> CEQA does not mandate the list include only projects of the same scale as the proposed project, but rather it requires lead agencies to analyze related or cumulative impacts. Therefore, the DPEIR's cumulative impact analysis fails to comply with CEQA.

The DPEIR fails to analyze "past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency."<sup>199</sup> CEQA Guidelines section 15130 require that an adequate cumulative impact analysis include a list of the projects producing related or cumulative impacts, a summary of the expected environmental impacts from those projects and a reasonable analysis of the cumulative impacts of the relevant projects.<sup>200</sup> But, the DPEIR fails to analyze the dozens of commercial

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<sup>193</sup> 14 CCR § 15130(b)(1)(A), 15130(b)(4)-(5).

<sup>194</sup> *Id.* § 15130(b)(4).

<sup>195</sup> *City of Long Beach*, 19 Cal.App.5th at 490.

<sup>196</sup> *Id.*

<sup>197</sup> DPEIR, p. 18-2.

<sup>198</sup> *Id.*

<sup>199</sup> 14 CCR § 15130(b); DPEIR, p. 18-1.

<sup>200</sup> *Kings County Farm Bureau*, 221 Cal.App.3d at 729.



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projects pending and under construction in the Project vicinity in Thousand Oaks.<sup>201</sup> Ventura County,<sup>202</sup> and Los Angeles County.

When using a list approach, the EIR should define the relevant area affected and provide a reasonable explanation for the geographic limitation used.<sup>203</sup> The DPEIR fails to provide a reasonable explanation of the geographic limitation used in the DPEIR, and states that the cumulative impact analysis focuses only "on construction of Pure Water Project features because construction impacts are the most common and widespread impacts expected to occur over the long project implementation period."<sup>204</sup> This analysis does not satisfy the purpose of the CEQA requirement to include an analysis of cumulative impacts. An analysis of Project elements is required to be included in the DPEIR, but the CEQA Guidelines also requires analysis of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency.<sup>205</sup> The DPEIR omits this analysis in violation of CEQA. The DPEIR must be revised and recirculated to adequately analyze the cumulative impacts associated with the Project.

#### **B. The DPEIR Fails to Adequately Analyze Cumulative Biological Impacts**

The DPEIR concludes there would be a significant cumulative effect to biological resources, but then finds that the Project's cumulative contribution to biological resources impacts would be reduced to less than cumulatively considerable level with implementation of MM 5-1 through 5-4.<sup>206</sup> The DPEIR improperly limited the scope of the cumulative impact analysis by failing to smaller projects with similar impacts on biological resources. For example, as discussed in Section III(A)(1), the DPEIR erroneously piecemeals the SFAP from the DPEIR which prevents a meaningful analysis of impacts on special-status fish. As a result, the Project's cumulative impacts on special-status fish remain significant and unmitigated.

<sup>201</sup> City of Thousand Oaks, Development Activity Report (October 2022). Available at: <https://www.loaks.org/home/showpublisheddocument/27570/638003892154270000>.

<sup>202</sup> County of Ventura, Pending Projects as of October 4, 2022. Available at:

[https://verma.org/docs/images/pdf/planning/pending/2022-10-04\\_pending\\_projects.pdf](https://verma.org/docs/images/pdf/planning/pending/2022-10-04_pending_projects.pdf).

<sup>203</sup> Cecily Talbert Barclay and Matthew S. Gray, *California Land Use and Planning Law* (Solano Press, 37th ed, 2020) p. 181.

<sup>204</sup> DPEIR, p. 18-2.

<sup>205</sup> 14 CCR § 15130.

<sup>206</sup> DPEIR, p. 18-3.

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The DPEIR also concludes the Project would contribute to cumulative benefits to biological resources.<sup>207</sup> However, the DPEIR does not cite any evidence in support of this conclusory statement. And Dr. Smallwood provided substantial evidence that the Project would, in fact, not benefit wildlife at either of the AWP sites.<sup>208</sup>

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**C. The DPEIR Fails to Analyze How the Biological Resources Mitigation Measures Reduce the Project's Cumulatively Considerable Impact**

The DPEIR asserts that the Project's cumulative contribution to biological resources would be reduced to less than cumulative considerable with implementation of MM 5-1 through MM 5-4.<sup>209</sup> However, the DPEIR lacks any discussion how these mitigation measures would reduce the Project's cumulative contribution to less than significant. An EIR must discuss a project's cumulative impacts when they are cumulatively considerable,<sup>210</sup> and must also examine reasonable options for mitigating or avoiding the project's contribution to significant cumulative impacts.<sup>211</sup> Here, the DPEIR fails to provide any analysis or substantial evidence that these measures would adequately mitigate the Project's cumulative contribution to significant biological resources impacts.

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**XI. CONCLUSION**

For the reasons discussed above, the DPEIR for the Project remains wholly inadequate under CEQA. It must be thoroughly revised to provide legally adequate analysis of, and mitigation for, all the Project's potentially significant impacts. These revisions will necessarily require that the DPEIR be recirculated for public review. Until the DPEIR has been revised and recirculated, as described herein, the JPA may not lawfully approve the Project.

<sup>207</sup> *Id.* at 18-3 to 18-4.

<sup>208</sup> Smallwood Comments, p. 38.

<sup>209</sup> DPEIR, p. 18-3.

<sup>210</sup> PRC § 21083(b)(3); 14 CCR § 15130.

<sup>211</sup> 14 CCR § 15130(b)(3).

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Thank you for your attention to these comments. Please include them in the record of proceedings for the Project.

Sincerely,



Kelilah D. Federman

Attachments  
KDF:acp

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