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May 13, 2024

Via Overnight Mail and Email

Matt Ringel, Planner II
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**Re: Preliminary Comments on the Mitigated Negative Declaration
– Dynamo Solar Commercial Floating Solar Use Permit Project
(P22-00340-UP), Zone Change (P23-00181-ZC) and Variance
(P23-00268-VAR) (SCH 2024040604)**

Dear Mr. Ringel:

On behalf of **Citizens for Responsible Industry** (“Citizens”), we submit these preliminary comments on the Mitigated Negative Declaration (“MND”) prepared pursuant to the California Environmental Quality Act (“CEQA”)¹ by the County of Napa (“County”) for the Dynamo Solar Commercial Floating Solar Use Permit Project (P22-00340-UP), Zone Change (P23-00181-ZC) and Variance (P23-00268-VAR) (SCH 2024040604) (“Project”) proposed by Laketricity USA Inc. DBA Dynamo Solar, LLC (“Applicant”).²

¹ Pub. Resources Code § 21000 *et seq.*; 14 C.C.R. §§ 15000 *et seq.*

² County of Napa, Mitigated Negative Declaration, Dynamo Solar Commercial Floating Solar Use Permit (P22-00340-UP), Zone Change (P23-00181-ZC), and Variance (P23-00268-VAR) (SCH 2024040604) (hereinafter “MND”) (April 12, 2024) available at <https://ceqanet.opr.ca.gov/2024040604>. See also, County of Napa, Planning Commission, Agenda Item 7.A., Eva Pauly / Laketricity (DBA Dynamo Solar) Commercial Floating Solar Facility, Zone Change, and Variance / App Nos. P22-00340-UP, P23-00181-ZC, AND P23-00268-VAR (File No. 24.878) (May 15, 2024) available at [https://napa.legistar.com/MeetingDetail.aspx?ID=1196633&GUID=062B653D-BD07-4321-901D-967A79D15290&Options=&Search=](https://napa.legistar.com/MeetingDetail.aspx?ID=1196633&GUID=062B653D-BD07-4321-901D-967A79D15290&Options=&Search=7180-007j)

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The Project proposes the construction of approximately 56-acres of floating solar panels, creation of an approximately 0.13-acre interconnection electrical substation, approximately 2-miles of electrical transmission lines, and a 0.9-acre expansion of an existing PG&E electrical substation.³ Access to the floating solar array parcels is located off of Soscol Ferry Road, approximately 0.1 miles due south of the boundaries of the City of Napa and approximately 1.5 miles due north of the City of American Canyon.⁴ The proposed transmission route and PG&E electrical substation expansion is approximately 0.15 miles due east of the boundaries of the City of Napa.⁵ The approximately 56-acre floating solar panel array is proposed to be installed atop existing wastewater settling ponds located at the Napa Sanitation District facility on APNs 057-010-010-00 and 057-050-003-00 which are approximately 327.0 and 163.59-acres in size respectively, and include a wastewater treatment facility and associated infrastructure.⁶

Citizens conducted a preliminary review of the MND and its technical appendices⁷ with the assistance of biological resources expert Shawn Smallwood PhD. Dr. Smallwood's technical comments and curricula vitae are attached hereto as **Attachment A**.⁸ We reserve the right to supplement these comments at later hearings and proceedings on the Project.⁹

Based upon Citizens' review of the MND and supporting documentation, Citizens and its experts conclude that the MND fails to comply with the requirements of CEQA. The MND fails to provide an adequate environmental baseline upon which to measure the Project's reasonably foreseeable impacts. The MND also lacks substantial evidence to support its conclusions and fails to properly mitigate the Project's potentially significant impacts to biological resources, and from wildfire risk. Instead, substantial evidence supports a fair argument that the Project will result in significant and unmitigated impacts in these areas. The County cannot approve the Project until the errors in the MND are remedied and substantial evidence supporting its conclusions is provided in an environmental impact report ("EIR").

³ MND, p. 1.

⁴ MND, p. 2.

⁵ MND, p. 2.

⁶ MND, p. 2.

⁷ The County refused to provide access to the reference documents supporting the MND's technical analysis and appendices.

⁸ **Attachment A**: Shawn Smallwood, Ph.D., Dynamo Solar Project Comments (May 13, 2024) (hereinafter "Smallwood Comments").

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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I. STATEMENT OF INTEREST

Citizens is a coalition of individuals and labor organizations whose members encourage sustainable development of California's energy and natural resources. The coalition includes Napa County residents and other members and organizations, including California Unions for Reliable Energy ("CURE") and its local affiliates, and the affiliates' members who live, recreate, work, and raise families in Napa 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.

CURE supports the development of renewable energy and the critical role it plays in the effort to reduce greenhouse gas emissions. Since its founding in 1997, CURE has been committed to building a strong economy and healthier environment and it works to construct, operate, and maintain renewable energy power plants and other facilities throughout California. CURE supports the development of clean, renewable energy technology, including solar power generation, where properly analyzed and carefully planned to minimize impacts on public health and the environment. Development of all projects subject to CEQA should take all feasible steps to ensure unavoidable impacts are mitigated to the maximum extent feasible. Only by maintaining the highest standards can energy produced from the development of new solar installations truly be sustainable.

The individual members of Citizens would be directly affected by the Project and may also work constructing the Project itself. They would therefore be first in line to be exposed to any health and safety hazards that may be present on the Project site. The coalition includes members who live, recreate, work, and raise families in Napa County and in communities near the Project site. They each have a personal stake in protecting the Project area from unnecessary, adverse environmental and public health and safety impacts. Citizens, its participating organizations, and their members stand to be directly affected by the Project's impacts.

Finally, the organizational members of Citizens are concerned with projects that can result in serious environmental harm without providing countervailing economic benefits. CEQA provides a balancing process whereby economic benefits are weighed against significant impacts to the environment. It is in this spirit we offer these comments.

II. LEGAL BACKGROUND

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.¹⁰ “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.”¹¹ 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.”¹²

CEQA’s purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.¹³ 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.¹⁴

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

¹⁰ See Pub. Resources Code, § 21000; CEQA Guidelines, § 15002.

¹¹ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (*Goletta Valley*), internal citations omitted.

¹² *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹³ See Pub. Resources Code, § 21100.

¹⁴ 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*).

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(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.¹⁵

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.”¹⁶ The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.¹⁷ An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.¹⁸

“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.”¹⁹

According to the CEQA Guidelines, when determining whether an EIR is required, the lead agency is required to apply the principles set forth in Section 15064, subdivision (f):

[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.

¹⁵ Pub. Resources Code, § 21064.5 (emphasis added).

¹⁶ See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

¹⁷ *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

¹⁸ *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”).

¹⁹ CEQA Guidelines, § 15384, subd. (a).

Furthermore, CEQA documents, including EIRs and MNDs, must mitigate significant impacts through measures that are “fully enforceable through permit conditions, agreements, or other measures.”²⁰ Deferring formulation of mitigation measures to post-approval studies is generally impermissible.²¹ Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.²² 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.²³ 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.²⁴

With respect to this Project, the MND fails to satisfy the basic purposes of CEQA. The MND fails to adequately disclose, investigate, and analyze the Project’s potentially significant impacts, and fails to provide substantial evidence to conclude that impacts will be mitigated to a less than significant level. Because the MND lacks basic information regarding the Project’s potentially significant impacts, the MND’s conclusion that the Project will have a less than significant impact on the environment is unsupported.²⁵ The County failed to gather the relevant data to support its finding of no significant impacts, and substantial evidence shows that the Project may result in potentially significant impacts. Therefore, a fair argument can be made that the Project may cause significant impacts requiring the preparation of an EIR.

III. THE MND FAILS TO PROVIDE AN ADEQUATE DESCRIPTION OF THE ENVIRONMENTAL SETTING FOR BIOLOGICAL RESOURCES

The MND fails to adequately describe the environmental setting against which the Project’s environmental impacts are to be measured for several critical

²⁰ PRC §21081.6(b).

²¹ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code, § 21061.

²² *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical, supra*, 29 Cal.App.4th at p. 1604, fn. 5.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ PRC § 21064.5.

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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.²⁶ 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.²⁷ As the courts have repeatedly held, the impacts of a project must be measured against the “real conditions on the ground.”²⁸ The description of the environmental setting constitutes the “baseline” physical conditions against which the lead agency assesses the significance of a project’s impacts.²⁹ An Environmental Setting is required “to give the public and decision makers the most accurate and understandable picture practically possible of the project’s likely near-term and long-term impacts.”³⁰

A. The MND Fails to Accurately Establish Existing Baseline Conditions for Biological Resources at the Project Site

The Biological Resources Report prepared for the MND relies on field surveys performed Sol Ecology on June 19, 2020, and September 6, 2022.³¹ According to the Biological Report, the purpose of the surveys was “to determine the presence of: (1) plant communities both sensitive and non-sensitive, (2) special status plant and wildlife species, (3) presence of essential habitat elements for any special status plant or wildlife species, and (4) the presence and extent of wetland and non-wetland waters.”³² However, despite these stated objectives, the Biological Report fails to adequately describe the existing environmental setting of the Project. According to Dr. Smallwood, the field surveys were insufficient for evaluating the existing baseline for several reasons.

²⁶ CEQA Guidelines, § 15063, subd. (d).

²⁷ CEQA Guidelines, § 15125(a); *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal. 4th 310, 321 (“*CBE v. SCAQMD*”).

²⁸ *CBE v. SCAQMD*, 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. Bd. of Supervisors of Monterey County* (1986) 183 Cal.App.3d 229, 246.

²⁹ CEQA Guidelines § 15125(a); *CBE v. SCAQMD*, 48 Cal. 4th at 321.

³⁰ CEQA Guidelines § 15125(a).

³¹ County of Napa, Biological Resources Report, Napa Sanitation Floating Solar Power Generating Facility Project, 1515 Soscol Ferry Rd, Napa, CA (hereinafter “Biological Report”) (December 22, 2022) available at <https://ceqanet.opr.ca.gov/2024040604>.

³² Biological Report, p. 4.

First, Dr. Smallwood explains that the scope of the surveys was too broad to be completed in only two site surveys. Additionally, the Biological Report fails to explain the methodology observed during the surveys, merely describing the surveys as “on foot” and does not include the times the surveys began, nor how long the surveys lasted.³³ As a result, Dr. Smallwood is unable to assess the usefulness of the surveys.

Second, although the Biological Report claims that it mapped vegetation communities at the Project site, Dr. Smallwood found several errors in the characterization of the site, including describing an area of wetland as “agriculture” and describing the riparian vegetation along Soscol Creek as “sparse” when he observed the area to be comprised of dense vegetation.³⁴

1. Dr. Smallwood’s Site Survey Detected Abundant Wildlife at the Project Site

In a site visit conducted by Dr. Smallwood on May 9, 2024, he documented 51 species of wildlife at the Project site over a period of approximately four hours.³⁵ Based on his limited survey, Dr. Smallwood calculates that a detailed survey of the Project site would likely detect 194 distinct species of which approximately 30 would be special-status species of vertebrate wildlife.³⁶ The MND, on the other hand, fails to include any information on species observed at the Project site during two surveys conducted for the Biological Report in 2022. Given the abundant wildlife detected by Dr. Smallwood in his survey, and the substantial errors in the MND’s surveys identified by Dr. Smallwood, the MND’s conclusion that there is no special-status wildlife at the Project site is both unsupported and directly contradicted by the evidence presented by Dr. Smallwood.

During his survey of the site, Dr. Smallwood also observed that the transmission lines proposed by the Project will traverse the areas that are mischaracterized in the Biological Report.³⁷ The MND’s failure to accurately describe the Project site in the Biological Report further compounds the errors in

³³ Biological Report, p. 4.

³⁴ Smallwood Comments, p. 22.

³⁵ Smallwood Comments, p. 19.

³⁶ Smallwood Comments, p. 17.

³⁷ Smallwood Comments, p. 22.

the County's baseline analysis and is likely to result in impacts being underestimated. Based on Dr. Smallwood's survey of the site, it is clear that the MND fails to comply with CEQA as it fails to give the public and decisionmakers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts.³⁸

B. The Desktop Review Completed for the Biological Resources Report Fails to Establish the Existing Baseline

In addition to the limited field surveys described above, the Biological Report relies on a search of the California Natural Diversity Data Base ("CNDDDB") which was used to determine the pool of special-status species that may be observed during the field surveys.³⁹ However, the Biological Report's reliance on the CNDDDB is supported by substantial evidence because the CNDDDB is misapplied in the Project's analysis. According to the CNDDDB Data Use Guidelines:

The CNDDDB is a positive sighting database. It does not predict where something may be found. We 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.⁴⁰

The above disclaimer explains that the CNDDDB is not designed to support absence determinations or to screen out species from characterization of a site's wildlife community. As a result, the surveys of special-status species conducted for the Biological Report based on a survey of the CNDDDB were not properly informed. Dr. Smallwood explains that as a result of the Biological Report's reliance on the CNDDDB, the Report downplays the likelihood of occurrence of the 45 special-status species that it purports to analyze.⁴¹

By contrast, Dr. Smallwood reviewed relevant biological data about the Project site and found that 116 special-status species are known to occur at or near the Project site which establish some potential to occur at the site.⁴² Based on his review, Dr. Smallwood found that of the 116 species, 49 (42%) were recorded on the

³⁸ CEQA Guidelines § 15125(a).

³⁹ Biological Report, pdf. p. 76

⁴⁰ California Natural Diversity Database, CNDDDB Data Use Guidelines (2011) p. 12. available at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27285&inline>

⁴¹ Smallwood Comments, p. 24.

⁴² Smallwood Comments, p. 23.

Project site, and another 13 (11%) species have been documented within 1.5 miles of the site ('Very close'), another 13 (11%) within 1.5 and 4 miles ('Nearby'), and another 37 (32%) within 4 to 30 miles ('In region').⁴³

The MND fails to disclose the likelihood of occurrence of approximately 71 special-status species and, as a result, does not provide adequate baseline information from which to accurately analyze the extent of the Project's impacts. As a result, the public and decisionmakers cannot fully determine "the conditions of the environment that preceded the project [as] the baseline against which to measure the adverse environmental change."⁴⁴ Absent an adequate environmental setting analysis, the MND is inadequate as a matter of law and the County lacks substantial evidence to support its conclusions that the Project's biological resources impacts would be less than significant with the mitigation proposed in the MND. An EIR must be prepared which adequately discloses the Project's baseline.

IV. THE MND FAILS TO ANALYZE, DISCLOSE, OR MITIGATE POTENTIALLY SIGNIFICANT WILDFIRE RISKS

A. The MND Fails to Analyze the Project's Wildfire Risks

The CEQA Guidelines require analysis of whether the Project would "[e]xpose people or structures, either directly or indirectly, to a significant risk of loss, injury or death involving wildland fires."⁴⁵ The MND's discussion of this impact acknowledges that a portion of the Project's proposed transmission lines will traverse lands designated by the California Department of Forestry and Fire Protection ("CalFire") as a Moderate Fire Hazard Severity Zone ("FHSZ"). Per the MND, "[f]our electrical transmission towers and the proposed PG&E electrical substation expansion is located within a moderate fire hazard severity zone and in the State Responsibility (SRA) district."⁴⁶

The MND relies on conclusory statements asserting that the scope of wildfire risk is limited to whether the Project's transmission lines would alter wind patterns or expose nearby residents to pollutant concentrations from wildfires. The MND

⁴³ Smallwood Comments, p. 23.

⁴⁴ *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.

⁴⁵ CEQA Guidelines, Appendix G, subd. IX.

⁴⁶ MND, p. 33.
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fails entirely to address the potential for the Project to **cause** wildfires, simply stating “[t]he proposed improvements would not result in a physical modification altering prevailing winds, or alter other factors that would likely exacerbate wildfire risks and thereby expose project occupants to pollutant concentrations from a wildfire or the uncontrolled spread of a wildfire” and concluding based on this assertion that wildfire “[i]mpacts of the project would be less than significant.”⁴⁷

The MND’s analysis is flawed because it does not consider or identify any of the Project’s features potentially contributing to wildfire risk including the overhead transmission lines located in a FHSZ. The MND thus fails as an informational document and lacks substantial evidence to conclude that the Project’s potential impacts from wildfire are less than significant.

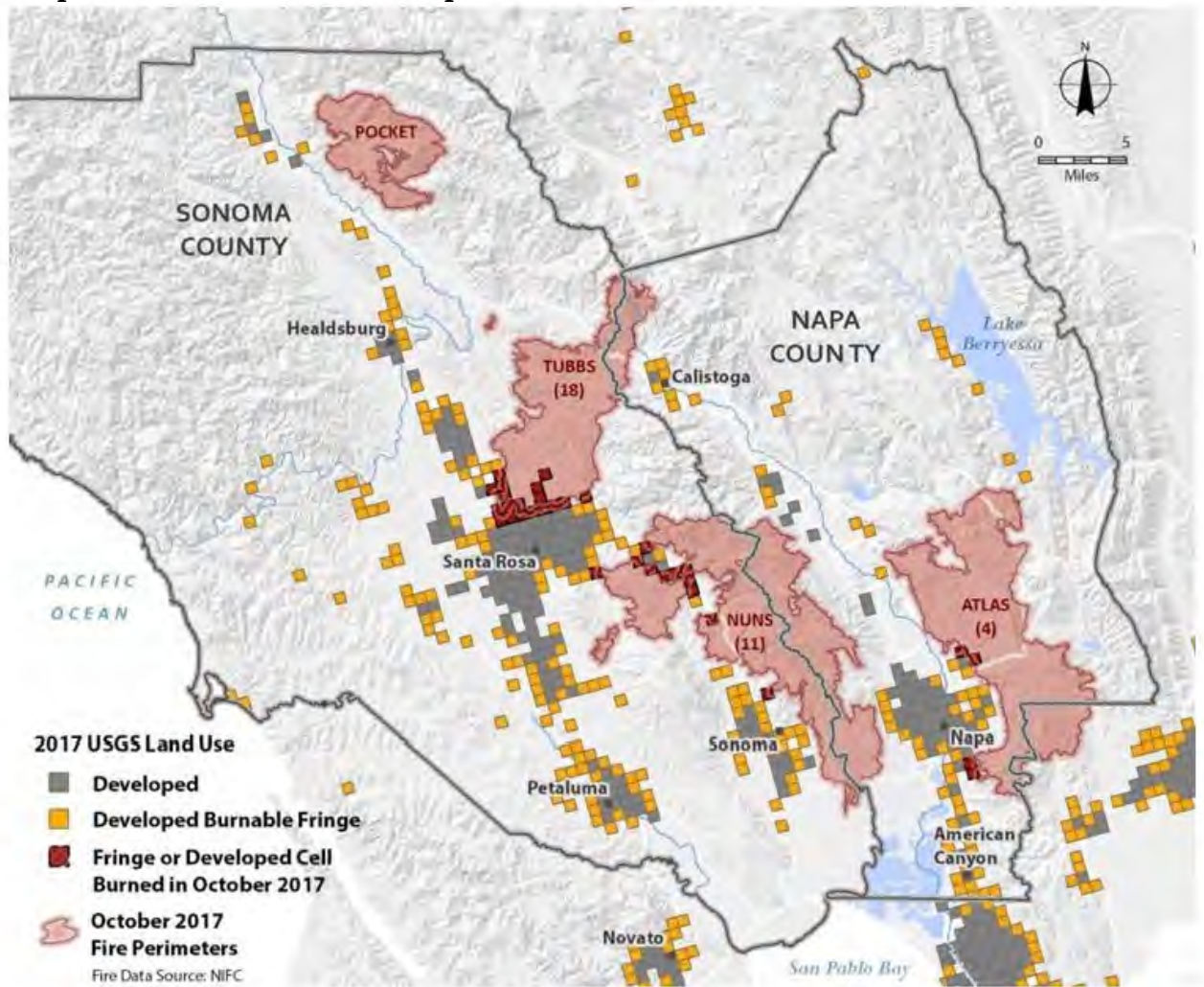
B. The MND Fails to Disclose and Mitigate Potentially Significant Wildfire Risks

The MND does not discuss the extent to which transmission lines in designated FHSZs can result in devastating wildfires. The map below shows recent wildfires in the vicinity of the Project site including the Atlas Fire which occurred approximately 1-mile east of the Project site and burned 51,624-acres of land, destroying 783 structures, and causing 6 fatalities.⁴⁸

⁴⁷ MND, p. 33.

⁴⁸ California Department of Forestry and Fire Protection (“CalFire”), Incident Report: Atlas Fire (Southern LNU Complex) (Updated October 24, 2022) available at <https://www.fire.ca.gov/incidents/2017/10/9/atlas-fire-southern-lnu-complex>.

Map of 2017 Wildfires in Napa and Sonoma Counties⁴⁹



Climate change and drought have caused California wildfires to increase in frequency and severity, with a higher number of deaths and acres burned than normal.⁵⁰ According to the California Public Utilities Commission (“CPUC”) fires attributed to above-ground power lines consist of roughly half of the most destructive fires in California history.⁵¹ In an effort to track the rates of fires

⁴⁹ California Energy Commission, Assessing The Impact Of Wildfires On The California Electricity Grid (August 2018) available at https://www.energy.ca.gov/sites/default/files/2019-12/Forests_CCCA4-CEC-2018-002_ada.pdf

⁵⁰ United States Environmental Protection Agency, Climate Change Indicators: Wildfires (February 2, 2024) available at <https://www.epa.gov/climate-indicators/climate-change-indicators-wildfires>

⁵¹ California Public Utilities Commission, Wildfire and Wildfire Safety (Accessed May 11, 2024) available at <https://www.cpuc.ca.gov/industries-and-topics/wildfires>. 7180-007j

caused by utilities infrastructure, the CPUC requires utility companies to report ignitions of fires involving their equipment. According to PG&E's most recent fire incident data reported to the CPUC, 375 fires were caused by their equipment in 2023 alone.⁵²

The proposed project includes approximately 2-miles of electrical transmission lines, with portions constructed above ground.⁵³ Like other above-ground electrical transmission infrastructure, the Project's above-ground transmission infrastructure carries substantial risk of causing wildfires. Despite readily available evidence of potential risks posed by wildfire, and the County's recent experiences with the devastation caused by such events, the MND does not analyze the potential risks from the Project's transmission lines, nor does it identify mitigation measures to reduce the potentially significant impacts from wildfire. An EIR must be prepared to analyze the Project's risk of contributing to wildfire. An EIR must mitigate the impact to a less-than-significant level.

V. THE MND LACKS SUBSTANTIAL EVIDENCE TO CONCLUDE THAT THE PROJECT'S AIR QUALITY IMPACTS ARE LESS THAN SIGNIFICANT

The MND lacks a quantitative analysis of the Project's emissions, yet concludes that the Project's construction air quality impacts would be less than significant with mitigation. This is a violation of CEQA's requirement to disclose the severity of a Project's impacts prior to mitigation. The lack of analysis also results in unsupported significance conclusions.

CEQA requires disclosure of the severity of a project's impacts and the probability of their occurrence before a project can be approved,⁵⁴ and prohibits the lead agency from compressing its impact analysis and mitigation into a single step.⁵⁵ In *Lotus*, a forest project was found by the reviewing agency not to involve any significant effect on the environment, but only after mitigation measures were

⁵² California Public Utilities Commission, Fire Ignition Data, PG&E (2023) available at https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/safety-and-enforcement-division/reports/fire-incidents/2023_pge-fire-incident-data-collection-report.xlsx

⁵³ MND, p. 1.

⁵⁴ 14 CCR §§ 15143, 15162.2(a); *Cal. Build. Indust. Ass'n v. BAAQMD* (2015) 62 Cal.4th 369, 388-90 (disturbance of toxic soil contamination at project site is potentially significant impact requiring CEQA review and mitigation); *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal. App. 4th 48, 82; *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1370-71; CEQA Guidelines, Appendix G.

⁵⁵ *Lotus v. Dep't of Transp.* (2014) 223 Cal. App. 4th 645, 651-52.
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made a condition of project approval.⁵⁶ The court held that actions such as restorative planting, removal of invasive plants, and the use of an arborist and specialized equipment were “plainly mitigation measures and not part of the project itself,” resulting in the improper compression of environmental impacts and mitigation measures into a single issue in the EIR.⁵⁷

The MND makes the same error by concluding that the Project’s construction emissions would be less than significant with implementation of Air District construction emission reduction measures and standard conditions of approval, and without disclosing the extent of unmitigated (or mitigated) emissions. The MND explains that potential air quality impacts from Project construction would result from earthmoving and construction activities required for Project construction, consisting of “dust generated during grading and other construction activities, exhaust emissions from construction related equipment and vehicles, and [] emissions from paints and other architectural coatings.”⁵⁸ However, no modeling data or air quality studies are included with the MND, and the MND fails to compare the Project’s emissions to applicable thresholds of significance. The MND therefore lacks any evidence disclosing the severity of the Project’s construction air quality impacts.

The MND then concludes that “If the proposed project adheres to [] relevant best management practices identified by the Air District and the County’s standard conditions of project approval, construction-related impacts are considered less than significant.”⁵⁹ This conclusion is not supported by any quantitative evidence, and compresses the County’s discussion of air quality impacts by offering only a discussion of mitigated emissions, with no disclosure of unmitigated emissions.

The County must comply with CEQA by conducting a quantitative analysis of the Project’s air emissions, and disclosing the results of this modeling for public review in an EIR.

⁵⁶ *Id.* at 648–649.

⁵⁷ *Id.* at 656, fn. 8.

⁵⁸ MND, p. 10.

⁵⁹ MND, p. 10.

VI. AN EIR IS REQUIRED FOR THE PROJECT BECAUSE THERE IS SUBSTANTIAL EVIDENCE SUPPORTING A FAIR ARGUMENT THAT THE PROJECT MAY HAVE SIGNIFICANT IMPACTS TO BIOLOGICAL RESOURCES

The MND failed to analyze potential Project impacts to wildlife from interference with wildlife movement and collision mortality resulting from avian strikes to the Project's solar PV panels and transmission lines. In his review, Dr. Smallwood found that the Project is likely to cause significant biological impacts which require additional mitigation. As a result, the MND fails to address potentially significant impacts to biological resources which must be addressed in an EIR for the Project.

A. Substantial Evidence Supports a Fair Argument that the Project May Have Potentially Significant, Unmitigated Impacts on Special Status Species

1. Wildlife Movement

The MND states, without reference to substantial evidence, that “no evidence of wildlife corridors, raptor nests, wildlife dens, burrows or other unique or sensitive biological habitats or resources were observed as a result of the field surveys”⁶⁰ However, as discussed above, Dr. Smallwood found that the Biological Report lacked any protocols or methods by which this determination could be made.⁶¹ Additionally, as described above, the Biological Report lacks any information regarding wildlife observed at the site. As a result, the conclusion that the Project will not impact wildlife movement is not based on substantial evidence.

The MND also fails to consider whether the ponds at the Project site are already used for stopover opportunities by birds and bats, or for staging opportunities during dispersal, migration, or home range patrol. Dr. Smallwood's investigation found that many species of wildlife are likely use the site of the proposed Project for movement across the region, but this movement is not acknowledged in the MND because no analysis of wildlife movement at the site was conducted.⁶²

⁶⁰ MND, p. 15.

⁶¹ Smallwood Comments, p. 24.

⁶² Smallwood Comments, p. 24.

Dr. Smallwood's comments provide substantial evidence supporting a fair argument that impacts to wildlife movement are likely to be significant and unmitigated. An EIR must be prepared which adequately analyzes and mitigates these potentially significant impacts.

2. Collision Mortality

Dr. Smallwood explains that many migratory birds are lured down from their migration altitudes by the Lake Effect, which makes solar panels appear to be bodies of water, thereby causing such birds to strike them in an attempt to approach a water body or to unnecessarily expend energy to return to their migration altitude.⁶³ Dr. Smallwood explains that the Project's 56-acres of solar panels will necessarily result in impacts to wildlife movement which the MND fails to analyze. Dr. Smallwood concludes that the Project is likely to have a significant impact on avian species due to collisions with the Projects solar PV panels and transmission lines.

Dr. Smallwood calculates that bird strikes on the Project's 34.7 MW of solar PV panels would kill approximately 403 birds per year.⁶⁴ This estimate is based on studies conducted in desert and grassland environments and does account for the potential for increased collisions by wildlife that currently use the ponds on which the floating solar panels will be placed. Dr. Smallwood explains that the impacts from collision mortality may be greater due to the placement of solar PV panels on existing bodies of water.⁶⁵ The impacts from collision mortality analyzed by Dr. Smallwood constitutes a significant and unmitigated impact which the MND fails to analyze.

Additionally, the MND does not disclose or analyze the avian collision and electrocution hazard associated with the Project's transmission lines, nor does it require implementation of the bird-friendly design strategies recommended by Avian Power Line Interaction Committee ("APLIC").⁶⁶ Dr. Smallwood found that

⁶³ Smallwood Comments, p. 30.

⁶⁴ Smallwood Comments, p. 31.

⁶⁵ Smallwood Comments, p. 31.

⁶⁶ 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.

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the Project's power lines could result in an additional 262 avian deaths per year.⁶⁷ Mortality from the Project's utility lines represents an unexamined, potentially significant impact to wildlife.

In total, Dr. Smallwood found that the Project may result in up to 665 avian deaths per year, some of which could be special-status avian species.⁶⁸ Dr. Smallwood's predictions regarding the level of avian mortality are based on substantial evidence and support a fair argument that the Project will result in a significant unmitigated impact from avian collisions that the MND fails to consider. An EIR must be prepared which adequately analyzes and mitigates avian mortality from collision with Project elements.

B. The Mitigation Measures Proposed in the MND Do Not Adequately Mitigate Impacts to Biological Resources

Dr. Smallwood concludes that, 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.

Mitigation Measure BIO-1 states that, in order to reduce potential impact to White-Tailed Kite, Swainson's Hawk, and other Raptors:

If construction activities occur between February 1 and August 31 [...] a qualified biologist [...] shall conduct a preconstruction survey for nesting birds within all suitable habitat on the project site, and where there is potential for impacts [...] within 0.25-miles of project activities). The preconstruction survey shall be completed in accordance with the Swainson's Hawk Technical Advisory Committee 2000 guidelines (SHTAC 2000), or current guidance.⁶⁹

Dr. Smallwood notes that the proposed measure MM BIO-1 has not been shown to be effective in the past.⁷⁰ Additionally, he states that the mitigation measure does not address the collision mortality impacts posed by the Project and are not sufficient to reduce the Project's impacts to wildlife.

⁶⁷ Smallwood Comments, p. 31.

⁶⁸ Smallwood Comments, p. 32

⁶⁹ MND, p. 16.

⁷⁰ Smallwood Comments, p. 33

Similarly, MM BIO-2 and BIO-3 require pre-construction surveys for Burrowing Owl and roosting bats. Dr. Smallwood found that the measures proposed by MM BIO-2 and BIO-3 have not been shown to be effective at other project sites and do not address the impacts from collision mortality and habitat loss at this Project site.

Finally, in response to comments on the MND received by the County from the California Department of Fish and Wildlife⁷¹, the County has included additional mitigation measures in the Project's MMRP, including specific measures designed to avoid impacts to Swainson's hawk (MM BIO-4), California Ridgway's rail or black rail (MM BIO-5), tricolored blackbird (MM BIO-6) and impacts to Suscol Creek, the ephemeral stream, or any other streams on the Project site (MM BIO-7).⁷² However, despite the addition of these mitigation measures, the surveys called for by the MND are insufficient to address the scope of avian mortality posed by the Project.⁷³ Additional binding mitigation measures are required to reduce the significant impacts to wildlife identified by Dr. Smallwood.

C. Additional Mitigation Measures Are Necessary to Reduce the Project's Potentially Significant Impacts

Dr. Smallwood concludes that the Project will result in significant impacts to wildlife which are not mitigated by the measures included in the MND. Dr. Smallwood recommends additional mitigation measures that would reduce the Project's significant impacts including:

Underground all of the Transmission Lines: Collision mortality with the transmission lines would be eliminated by undergrounding the lines.

Fund Wildlife Rehabilitation Facilities: Compensatory mitigation ought also to include funding contributions to wildlife rehabilitation facilities to cover the costs of injured animals that will be delivered to these facilities for

⁷¹ Napa County Planning Commission, File No. 24-878, Attachment K – Public Comment (Received Prior to 5-9-24) pdf. pp. 7-18 available at <https://napa.legistar.com/View.ashx?M=F&ID=12916868&GUID=ADDE4F8E-E3E9-481B-A2C7-CD3EB957765F>.

⁷² Napa County Planning Commission, File No. 24-878, Attachment B – Recommended Conditions of Approval (May 15, 2024) available at <https://napa.legistar.com/View.ashx?M=F&ID=12916869&GUID=DC70F80F-25CB-452E-8FBD-6C546DA9725E>.

⁷³ Smallwood Comments, pp. 33-34.
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care. Many animals would likely be injured by collisions with project infrastructure. Wildlife rehabilitators should not be stuck with the cost burden for care of wildlife that are injured by the project.⁷⁴

Post-construction Impacts Monitoring: An EIR needs to be prepared for the project, and it needs to include detailed methods for scientific measurement of collision mortality to birds and bats. There is a large scientific literature on how to measure impacts.⁷⁵

These proposed mitigation measures are feasible means to effectively reduce the Project's significant impacts to wildlife and must be considered for inclusion as mitigation measures for the Project in an EIR.

Substantial evidence 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.

VII. ADDITIONAL MITIGATION MEASURES ARE NECESSARY TO REDUCE THE PROJECT'S POTENTIALLY SIGNIFICANT IMPACTS

A. The MND Fails to Adequately Analyze Undergrounding the Entire Transmission Line as a Feasible Mitigation Measure

CEQA provides that public agencies should not approve a project if there are feasible mitigation measures that would substantially lessen the significant environmental effects of the project.⁷⁶ An agency may reject a mitigation measure if it finds it to be infeasible.⁷⁷ A feasible mitigation measure is one that is capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, legal, and technological factors.⁷⁸

The MND failed to explain why only a portion of the line was considered for undergrounding when, in fact, undergrounding the whole line is a feasible alternative which would reduce one or more significant impacts to less than

⁷⁴ Smallwood Comments, p. 16.

⁷⁵ Smallwood Comments, p. 34.

⁷⁶ PRC § 21002.

⁷⁷ PRC § 21081.

⁷⁸ PRC §21061.1; 14 CCR § 15364.

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significant levels. The MND states that the Project will underground an 1,800-foot section of the two-mile transmission line in order to preserve scenic vistas in the Project vicinity.⁷⁹

The MND does not explain why undergrounding the entire transmission line was not analyzed as an alternative. While an agency need not “adopt every nickel and dime mitigation scheme brought to its attention or proposed in the project EIR,” it must incorporate “feasible mitigation measures” “when such measures would ‘substantially lessen’ a significant environmental effect.”⁸⁰ Here, undergrounding the entire transmission line would substantially lessen significant impacts to biological resources and fire risk.

CEQA Guidelines Section 15126.6(b) requires consideration of alternatives capable of eliminating or reducing significant environmental effects even though they may “impede to some degree the attainment of the project objectives, or would be more costly”.⁸¹ The Court of Appeals determined in *Citizens of Goleta Valley v. Board of Supervisors*, “[t]he fact that an alternative may be more expensive or less profitable is not sufficient to show that the [] alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.”⁸²

The MND fails to consider the feasible alternative of undergrounding the entire transmission line. There is no discussion or evidence in the MND to establish that undergrounding the entire transmission line would not be a feasible mitigation measure. An EIR must contain a sufficient degree of analysis to enable the decisionmakers to make an intelligent and informed decision.⁸³ The MND made no attempt to explain why undergrounding the entire line was not feasible.

Based on Dr. Smallwood’s recommendation, undergrounding the Project’s transmission lines would reduce impacts to special-status birds by reducing the potential for avian collision and electrocutions. Additionally, undergrounding would reduce the risks of wildfire discussed above. The County must prepare an EIR to determine whether undergrounding the entire transmission line is a feasible

⁷⁹ MND, p. 6.

⁸⁰ *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502, 1519.

⁸¹ 14 CCR § 15126.6(b).

⁸² *Citizens of Goleta Valley v. Board of Supervisors* 197 Cal.App.3d 1167, 1181; see also *Kings County Farm Bureau v. City of Hanford* 221 Cal.App.3d 692, 736.

⁸³ 14 CCR § 15151.

alternative, and if not, to include substantial evidence supporting a conclusion that undergrounding is not a feasible alternative to reduce the Project's potentially significant impacts.

VIII. THE COUNTY CANNOT MAKE THE FINDINGS TO APPROVE A USE PERMIT FOR THE PROJECT

Napa County Code §18.124.070 requires the Board of Supervisors to make several findings in order to approve the Use Permit for the Project. Pursuant to the County Code, the Board is required to find “[t]hat grant of the use permit, as conditioned, will not adversely affect the public health, safety or welfare of the county.”⁸⁴ Additionally, the Board must find “[t]hat the proposed use complies with the applicable provisions of this code and is consistent with the policies and standards of the general plan and any applicable specific plan.”⁸⁵

The MND fails to provide the substantial evidence necessary for the Board to make the above findings. With regard to the first finding above, the MND fails to demonstrate that the Project will not result in wildfire impacts that would adversely affect the public health, safety or welfare of the county. With regard to the second finding above, the MND fails to demonstrate compliance with General Plan policies related to public safety and the preservation of biological resources.

Here, the County's General Plan includes the following provision regarding the wildfire impacts:

Policy SAF-16: Consistent with building and fire codes, development in high wildland fire hazard areas shall be designed to minimize hazards to life and property.⁸⁶

As discussed above, the MND does not make any effort to analyze the potential wildfire risks associated with the Project. As a result, the MND fails to demonstrate compliance with the General Plan's Safety Element.

⁸⁴ Napa County Code § 18.124.070 (C).

⁸⁵ Napa County Code § 18.124.070 (D).

⁸⁶ Napa County General Plan (2009) p. SAF-19, available at <https://www.countyofnapa.org/DocumentCenter/View/3334/Napa-County-General-Plan---Complete-Documnt-PDF>

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Additionally, the General Plan includes the following provision regarding protection and preservation of biological resources in the County:

Policy CON-13: The County shall require that all discretionary residential, commercial, industrial, recreational, agricultural, and water development projects consider and address impacts to wildlife habitat and avoid impacts to fisheries and habitat supporting special-status species to the extent feasible. Where impacts to wildlife and special-status species cannot be avoided, projects shall include effective mitigation measures and management plans[.]⁸⁷

The MND fails to acknowledge the existence of Policy CON-13. As detailed above, the MND also fails to analyze the Project's impacts to wildlife and fails to minimize these impacts through feasible and enforceable mitigation measures. The MND's failure to analyze and mitigate the Project's biological resources impacts results in inconsistency with the above General Plan policy that requires limitation and modification of development in areas that contain sensitive habitat for special status species. An EIR must be prepared to adequately disclose and mitigate the Project's significant land use impacts resulting from failure to comply with the General Plan.

Finally, where a local or regional policy of general applicability, such as an ordinance, is adopted in order to avoid or mitigate environmental effects, a conflict with that policy constitutes a significant land use impact and, in itself, indicates a potentially significant impact on the environment.⁸⁸ Any inconsistencies between a proposed project and applicable plans must be discussed in the Project's CEQA document.⁸⁹ A project's inconsistencies with local plans and policies also constitute significant impacts under CEQA.⁹⁰

The County must prepare an EIR for the Project which fully analyzes and mitigates the Projects environmental impacts prior to consideration for approval.

⁸⁷ Napa County General Plan (2009) p. CON-26.

⁸⁸ See *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903.

⁸⁹ CEQA Guidelines § 15125(d); *City of Long Beach v. Los Angeles Unif. School Dist.* (2009) 176 Cal. App. 4th 889, 918; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 874 (EIR inadequate when Lead Agency failed to identify relationship of project to relevant local plans).

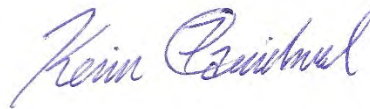
⁹⁰ *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4, 32 Cal.Rptr.3d 177; see also, *County of El Dorado v. Dept. of Transp.* (2005) 133 Cal.App.4th 1376. 7180-007j

IX. CONCLUSION

For the reasons discussed above, the MND for the Project is wholly inadequate under CEQA. An EIR must be circulated to provide legally adequate analysis of, and mitigation for, all of the Project's potentially significant impacts. Until an EIR has been issued and circulated, as described herein, the County may not lawfully approve the Project.

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

Sincerely,

A handwritten signature in blue ink that reads "Kevin Carmichael". The signature is written in a cursive, flowing style.

Kevin Carmichael

KTC:ljl