



T 910.856.4200
F 910.816.4206

1088 Harrison Street, Ste 150
Oakland, CA 94612

www.lozeaudrury.com
mlk@lozeaudrury.com

December 13, 2023

Via E-mail

Mary Lanier, Chairperson
Sam Marrinan, Building and Safety Division
Mina Bishara, Public Works
Azzan Jabsheh, Public Works
Robert Sepulveda, Public Works
Robert Lindberg, Water Department
Robert Castro, Water Department
Gracie Johnson, Public Works
Curtis Markloff, Fire Department
Attn: Jennifer Meamber, Secretary
Development and Environmental Review
Committee
City of San Bernardino
201 North E St.
San Bernardino, CA 92401
Meamber_je@sbcity.org

Mike Rosales, Chairperson
Community Development Department
City of San Bernardino
201 North E St
San Bernardino, CA 92401
rosales_mi@sbcity.org

Re: Comment on the Mitigated Negative Declaration (MND) for the Hardt and Brier Business Park Project (SCH No. 2023100916); Development and Environmental Review Committee December 13, 2023 Meeting Agenda Item No. 2

Dear Chairperson Lanier, Honorable Development and Environmental Review Committee Members, Ms. Meamber, and Mr. Rosales:

I am writing on behalf of **Supporters Alliance for Environmental Responsibility ("SAFER")** regarding the Initial Study and Mitigated Negative Declaration ("IS/MND") prepared for the Hardt and Brier Business Park Project (SCH No. 2023100916), including all actions related or referring to the proposed development of five new concrete tilt-up buildings with a combined total of 81,210 sq. ft at Hardt Street and East Brier Drive (APNs 0281-301-17, 0281-311-06, -07, -08, -11, -12, -18, and -19) in the City of San Bernardino ("Project"), to be heard as Agenda Item No. 2 at the December 13, 2023 Development Environmental Review Committee meeting.

After reviewing the IS/MND, we conclude that there is a fair argument that the Project may have adverse environmental impacts that have not been analyzed and mitigated. Therefore,

we request that the City of San Bernardino prepare an environmental impact report (“EIR”) for the Project pursuant to the California Environmental Quality Act (“CEQA”), Public Resources Code (“PRC”) section 21000, et seq.

This comment has been prepared with the assistance of expert wildlife biologist Dr. Shawn Smallwood, Ph.D. Dr. Smallwood’s comment and curriculum vitae are attached as Exhibit A hereto and is incorporated herein by reference in its entirety.

PROJECT DESCRIPTION

The Project proposes the development and establishment of five new speculative business park/service commercial buildings with a total combined footprint of 81,210 square feet (SF) on eight parcels encompassing approximately 5.81 acres adjacent to Hardt Street and East Brier Drive. The site is identified by Assessor’s Parcel Numbers (APNs) 0281-301-17, 0281-311-06, -07, -08, -11, -12, -18, and -19. Four parcels (APNs 0281-301-17, 0281-311-08, -07, -06) are located north of Hardt Street. The remaining four parcels are located south of Hardt Street. APN’s 0281-311-11 and 0281-311-12 are to the east and directly south of Hardt Street and APN’s 0281-311-18 and 0281-311-19 are further to the south, directly north of East Brier Drive. The IS/MND asserts that the Project site is undeveloped and vacant with exposed soil and sparse vegetation.

LEGAL STANDARD

As the California Supreme Court has held, “[i]f 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.” (*Communities for a Better Env’t v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319–20 (“*CBE v. SCAQMD*”) (citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–05).) “Significant environmental effect” is defined very broadly as “a substantial or potentially substantial adverse change in the environment.” (PRC § 21068; *see also* 14 CCR § 15382.) An effect on the environment need not be “momentous” to meet the CEQA test for significance; it is enough that the impacts are “not trivial.” (*No Oil, Inc.*, 13 Cal.3d at 83.) “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” (*Communities for a Better Env’t v. Cal. Res. Agency* (2002) 103 Cal.App.4th 98, 109 (“*CBE v. CRA*”).)

The EIR is the very heart of CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214 (“*Bakersfield Citizens*”); *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927.) The EIR is an “environmental ‘alarm bell’ whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return.” (*Bakersfield Citizens*, 124 Cal.App.4th at 1220.) The EIR also functions as a “document of accountability,” intended to “demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered

the ecological implications of its action.” (*Laurel Heights Improvements Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392.) The EIR process “protects not only the environment but also informed self-government.” (*Pocket Protectors*, 124 Cal.App.4th at 927.)

An EIR is required if “there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.” (PRC § 21080(d); *see also Pocket Protectors*, 124 Cal.App.4th at 927.) In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (14 CCR § 15371), only if there is not even a “fair argument” that the project will have a significant environmental effect. (PRC §§ 21100, 21064.) Since “[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process,” by allowing the agency “to dispense with the duty [to prepare an EIR],” negative declarations are allowed only in cases where “the proposed project will not affect the environment at all.” (*Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440.)

Where an initial study shows that the project may have a significant effect on the environment, a mitigated negative declaration may be appropriate. However, a mitigated negative declaration is proper *only* if the project revisions would avoid or mitigate the potentially significant effects identified in the initial study “to a point where clearly no significant effect on the environment would occur, and . . . 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.” (PRC §§ 21064.5, 21080(c)(2); *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 331.) In that context, “may” means a reasonable possibility of a significant effect on the environment. (PRC §§ 21082.2(a), 21100, 21151(a); *Pocket Protectors*, 124 Cal.App.4th at 927; *League for Protection of Oakland’s etc. Historic Res. v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–05.)

Under the “fair argument” standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency’s decision. (14 CCR § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931; *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-51; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.) The “fair argument” standard creates a “low threshold” favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. (*Pocket Protectors*, 124 Cal.App.4th at 928.)

The “fair argument” standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

This ‘fair argument’ standard is very different from the standard normally followed by public agencies in their decision making. Ordinarily, public agencies weigh the evidence in the record and reach a decision based on a preponderance of the evidence. [Citation]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better

argument concerning the likelihood or extent of a potential environmental impact.

(Kostka & Zishcke, *Practice Under the CEQA*, §6.37 (2d ed. Cal. CEB 2021).) The Courts have explained that “it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency’s determination. Review is de novo, with a preference for resolving doubts in favor of environmental review.” (*Pocket Protectors*, 124 Cal.App.4th at 928 (emphasis in original).)

CEQA requires that an environmental document include a description of the project’s environmental setting or “baseline.” (CEQA Guidelines § 15063(d)(2).) The CEQA “baseline” is the set of environmental conditions against which to compare a project’s anticipated impacts. (*CBE v. SCAQMD*, 48 Cal.4th at 321.) CEQA Guidelines section 15125(a) states, in pertinent part, that a lead agency’s environmental review under CEQA:

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

(See *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124–25 (“*Save Our Peninsula*”).) As the court of appeal has explained, “the impacts of the project must be measured against the ‘real conditions on the ground,’” and not against hypothetical permitted levels. (*Id.* at 121–23.)

DISCUSSION

I. THERE IS SUBSTANTIAL EVIDENCE OF A FAIR ARGUMENT THAT THE PROJECT MAY HAVE SIGNIFICANT BIOLOGICAL RESOURCES IMPACTS REQUIRING AN EIR.

After review of the IS/MND, wildlife biologist Dr. Shawn Smallwood, Ph.D., concludes that the Project may have significant impacts on several special status species. An EIR is required to mitigate these impacts.

Dr. Smallwood’s conclusions were informed by the site visit of his associate, wildlife biologist Noriko Smallwood in November 2023. Noriko Smallwood visited the site for 3.18 hours from 06:43 to 09:54 hours on November 23, 2023. (Ex. A, p. 1.) During the site visits, Noriko saw and photographed “California horned lark (Photo 4), California gull (Photo 5), red-tailed hawk (Photos 6-9), lesser goldfinch and house finch (Photos 10 and 11), Nuttall’s woodpecker and northern flicker (Photos 12 and 13), western meadowlark (Photos 14-16), black phoebe and white-crowned sparrow (Photos 17 and 18), northern mockingbird and Cassin’s kingbird (Photos 19 and 20), Anna’s hummingbird and California towhee (Photos 21 and 22), Eurasian collared-dove and Canada goose (Photos 23 and 24), common raven (Photos 25-27), among the other species listed in Table 1. The site also supports pollinating insects (Photos 28

and 29) and many other types of biological organisms.” (*Id.*, pp. 2-11 & Table 1.) She “detected 27 species of vertebrate wildlife at or adjacent to the project site, including 5 species with special status (Table 1).” (*Id.*, p. 2.)

Additionally, based on database reviews and site visits, Dr. Smallwood found that 134 special-status species of wildlife are known to occur near enough to the site to warrant analysis of occurrence potential (Ex. A, p. 17; *see also id.*, pp. 19-23 (Table 2).) Of these 134 species, 5 (4%) were recorded on or adjacent to the project site through Noriko Smallwood’s survey, “and another 34 (25%) species have been documented within 1.5 miles of the site (‘Very close’), another 24 (18%) within 1.5 and 4 miles (‘Nearby’), and another 61 (46%) within 4 to 30 miles (‘In region’). Nearly half (47%) of the species in Table 2 have been reportedly seen within 4 miles of the project site.” (*Id.*)

Dr. Smallwood concludes that the project site “supports multiple special-status species of wildlife and carries the potential for supporting many more special-status species of wildlife based on proximity of recorded occurrences.” (*Id.*, p. 17.) As a result, “[t]he site is far richer in special-status species than is characterized in the IS/MND.” (*Id.*)

A. The IS/MND Fails to Adequately Document Baseline Conditions.

Dr. Smallwood reviewed the IS/MND and the General Biological Assessment it relies on (“GBA”) and found the following issues related to the wildlife baseline that the IS/MND and GBA relied upon:

- The GBA relies on the reconnaissance survey performed by Hernandez Environmental Services on November 5, 2021. According to Dr. Smallwood, the survey provides “no methodological details,” other than the fact that “[t]wo biologists from Hernandez Environmental Services walked transects separated by 50 feet” Dr. Smallwood notes that “[t]here is no report of what time the survey began, nor how long the survey lasted. No checklist is shared of habitat elements that the biologists might have used during their survey. No explanation is provided of whether or how animal behavior data or other evidence contributed to the biologist’s assessment of the site for its importance to animal movement. It is therefore difficult to assess survey outcomes relative to survey effort and methods.” (Ex. A, p. 15.)
- Hernandez Environmental Services reported detecting only two species of vertebrate wildlife on the project site, including rock pigeon and song sparrow. Dr. Smallwood explains that while “Noriko did not detect the song sparrows on site, ... she did detect 26 species that Hernandez Environmental Services did not. Noriko detected 13.5 times the number of vertebrate wildlife species detected by Hernandez Environmental Services, and she did it at the same time of year and over only 3.18 hours of survey. In fact, within only the first minute of her survey, Noriko detected twice the number of species reportedly detected by Hernandez Environmental Services. Furthermore,

- Noriko reported that the site was very active with wildlife throughout her survey. She observed large flocks of house finch, western meadowlark, California horned lark, and American pipit, as well as four red-tailed hawks on site, one of which was on site for the entirety of her survey. There were also numerous common ravens on site throughout her survey. Based on Noriko's survey, the existing environmental setting of the project site is entirely different from the setting characterized by Hernandez Environmental Services." (Ex. A, pp. 15-16.)
- Dr. Smallwood states that "[t]he IS/MND ... reports, 'no special-status wildlife species were observed onsite during the field investigation conducted on November 5, 2021.' However, whereas this report could be factual, it is misleading to the readers of the IS/MND. Reconnaissance surveys for wildlife are not designed to detect special-status species. Special-status species can be detected during such surveys, as Noriko demonstrated at the project site, but these surveys are not formulated to detect[] them, nor are there minimum standards to be met in these surveys to support absence determinations. For the latter purpose, protocol-level detection surveys have been formulated by species experts. Hernandez Environmental Services ... did not perform any detection surveys. Based on Hernandez Environmental Services..., the IS/MND's characterization of the existing environmental setting is therefore incomplete and inaccurate." (Ex. A, p. 16 (citing IS/MND, p. 61).)
 - Dr. Smallwood explains that "[o]nly 43 (32%) of the species in Table 2 are analyzed for occurrence potential in the IS/MND. Of these, the IS/MND concludes that all are 'not present,' which is another way of saying they are absent. Except for species whose habitat is compellingly absent from the site, absence determinations are inappropriate based on the evidence gathered by Hernandez Environmental Services []. Absence determinations are supportable only after species-specific protocol-level detection surveys have been completed to the standards of the protocols, and the species were nevertheless not detected. No such surveys have been completed. It is inappropriate to conclude that a species is absent simply by looking at a site, and it is especially inappropriate to do so for 43 species of wildlife. The findings of Hernandez Environmental Services are not supportable." (Ex. A, p. 17.)
 - Additionally, Dr. Smallwood notes that "[o]f the special-status species that Hernandez Environmental Services ... claim to be absent from the project site, two – Cooper's hawk and California horned lark – were found by Noriko either on site or immediately adjacent to the site. Occurrence records of another 11 supposedly absent special-status species have been reported within only 1.5 miles of the site, and another 9 have been reported within 1.5 and 4 miles of the project site, and another 17 have been reported within 4 and 30

miles of the project site. The findings of Hernandez Environmental Services are not credible.” (Ex. A, p. 17.)

- Dr. Smallwood also points out that “Hernandez Environmental Services ... concludes all special-status plant species are absent, except for smooth tarplant, which is reportedly present. However, the IS/MND reports that Hernandez Environmental Services ... found no special-status plant species during its reconnaissance survey in 2021. The discovery of a CNDDDB occurrence record of smooth tarplant on the project site from 2003 prompted a follow-up survey on 20 May 2023, when Hernandez Environmental Services (2023) found 300 individuals of smooth tarplant. ... As an annual that blooms in spring and summer, the 5 November 2021 reconnaissance survey was the wrong time of year to survey for smooth tarplant, as the follow-up survey demonstrated with the finding of 300 individual plants. ... However, not even the follow-up survey of 20 May 2023 met the minimum standards of the CDFW (2018) reconnaissance survey guidelines for plants. Hernandez Environmental Services (2023) did not perform multiple surveys in the blooming season, nor did it survey a reference site or summarize the qualifications of its survey personnel. ... The minimum standards of the CDFW (2018) survey guidelines for plants have not been met. The IS/MND is incomplete and likely inaccurate.” (Ex. A, pp. 17-18.)
- Lastly, Dr. Smallwood notes that “[t]he IS/MND ... next asserts that ‘removal of the onsite smooth tarplant during Project construction would not constitute as a significant direct or indirect impact through habitat modifications, on any species identified as a candidate, sensitive, or special status, and no mitigation would be required.’ This assertion pretends that smooth tarplant is not a special-status species, and that its removal would qualify as take only if it is regarded as habitat to some other special-status species. But smooth tarplant is a special-status species. Destroying 300 individuals of a rare plant species would easily qualify as a significant impact.” (Ex. A, p. 18 (citing IS/MND, p. 60.)

In conclusion, the IS/MND’s insufficient baseline fails to adequately evaluate the significance of the impacts to special-status species of wildlife. As a result, Noriko Smallwood and Dr. Smallwood’s expert observations are substantial evidence of a fair argument that wildlife impacts may occur as a result of the Project. Thus, the Project requires an EIR to properly mitigate wildlife impacts of the Project.

B. The Project will have a potentially significant impact on special-status species as a result of lost habitat and lost breeding capacity.

These are significant impacts that have not been analyzed in the IS/MND. While habitat loss results in the immediate numerical decline of birds and other animals, it also results in a permanent loss of productive capacity. (*Id.*) Dr. Smallwood found that Project-related habitat

loss and lost breeding capacity will have a potentially significant impact on special-status species.

Dr. Smallwood analyzed the lost breeding capacity likely to result from the Project. He started by evaluating two studies that show bird nesting densities between 32.8 and 35.8 bird nests per acre, for an average of 34.3 bird nests per acre. (*Id.* (citing Young (1948) and Yahner (1982), respectively.) To acquire a total nest density closer to conditions of the Project site, Dr. Smallwood surveyed a fragmented 12.74-acre site surrounded on three sides by residential developments in Rancho Cordova 30 times from March through the first half of August. (*Id.*) According to Dr. Smallwood, the “[t]otal nest density of birds on this site was 2.12 nests per acre on the portion of the study area that was composed of annual grassland with a scattering of trees and after omitting all the nests that were in trees (leaving only ground nests).” (*Id.*) Additionally, “[o]n 4.29 acres of grassland in the San Jacinto Wildlife Area, Noriko tabulated 2.79 bird nests/acre last spring. Applying the mean total nest density between [Dr. Smallwood and Noriko’s] two survey efforts to the 5.81 acres of the project site, [Dr. Smallwood] predict[s] the project site supports 14.3 bird nests/year.” (Ex. A, p. 24.) As such, Dr. Smallwood concludes that “[t]he loss of 14.3 nest sites of birds would qualify as a significant project impact that has not been quantitatively addressed in the IS/MND.” (*Id.*)

Based on an average of 2.9 fledglings per nest and an average bird generation time of 5 years, the Project would prevent the production of 47.5 birds per year. (*Id.*, pp. 24-25 (citing Young (1948) and Smallwood (2022), respectively).) Neither the IS/MND nor the GBA assess the lost breeding capacity of birds that would result from the Project. (*See* Ex. A, pp. 24-25.) The potential loss of 47.5 birds in California annually following construction of this Project easily qualifies as a significant and substantial impact to special-status species that has not been analyzed.

An EIR is required to fully analyze the Project’s impact on lost breeding capacity, and to mitigate that impact.

C. The Project will have a potentially significant impact on wildlife movement.

Dr. Smallwood explains in his comments that why the Project will have a significant impact on wildlife movement:

The project, due to its elimination of at least 5.81 acres of vegetation cover and due to its insertion of 5 new buildings into the aerospace used by birds, bats and butterflies[,] would cut wildlife off from one of the last remaining stopover and staging opportunities in the project area, forcing volant wildlife to travel even farther between remaining stopover sites. This impact would be significant, and as the project is currently proposed, it would be unmitigated.

(Ex. A, p. 25.)

Dr. Smallwood's expert comments are substantial evidence of a significant impact that has not been mitigated, requiring preparation of an EIR.

The IS/MND improperly dismisses the Project's potential to significantly impact wildlife movement by improperly focusing on wildlife corridors, reasoning that:

Usually, mountain canyons or riparian corridors are used by wildlife as corridors. The project site is flat and surrounded by urban development. No wildlife movement corridors were found to be present on the project site. (IS/MND, Appendix B, p. 10.)

However, as Dr. Smallwood points out, "these conclusions lack supporting evidence," because Hernandez Environmental Services ... reports no survey methodology designed to determine whether wildlife rely on the site for movement in the region," and "[t]here was no sampling regime and there was no program of observation to record wildlife movement patterns, nor to quantify them or to qualitatively assess them. Based on what is reported, Hernandez Environmental Services ... did not record or measure wildlife movement in any way." (Ex. A, p. 25.) As such, Dr. Smallwood states that "[t]he conclusions of the [GBA] and the IS/MND regarding wildlife movement on the project site are speculative and conclusory." (*Id.*)

Additionally, the IS/MND's conclusions regarding effects on wildlife movement rely on a false CEQA standard. (*Id.*) As Dr. Smallwood states, "[t]he primary phrase of the CEQA standard goes to wildlife movement regardless of whether the movement is channeled by a corridor. In fact, a site such as the project site is critically important for wildlife movement because it composes an increasingly diminishing area of open space within a growing expanse of anthropogenic uses, forcing more species of volant wildlife to use the site for stopover and staging during migration, dispersal, and home range patrol." (*Id.*; *see also* CEQA Guidelines, App. G, pp. 333-34 (stating that the CEQA significance threshold is whether, among other things, a project will "[i]nterfere substantially with the movement of any native resident or migratory fish or wildlife species...").) Impacts to wildlife movement may occur with or without the presence of a wildlife corridor.

Because the Project would interfere with wildlife movement in the region, an EIR needs to be prepared to address and mitigate the Project's impacts on wildlife movement in the region.

D. The Project's traffic will significantly impact special-status species.

Dr. Smallwood identifies the serious impacts that increased traffic has on wildlife. (Ex. A, pp. 25-29.) Analyzing the potential impact on wildlife due to vehicle collisions is especially important because "traffic impacts have taken devastating tolls on wildlife," across North America. (*Id.*, p. 26 (citing Forman et al. 2003).) In the United States alone, estimates for "avian mortality on roads is 2,200 to 8,405 deaths per 100 km per year, or 89 million to 340 million total per year." (*Id.* (citing Loss et al. 2014).) As Dr. Smallwood explains:

Vehicle collisions have accounted for the deaths of many thousands of amphibian, reptile, mammal, bird, and arthropod fauna, and the impacts have often been found to be significant at the population level (Forman et al. 2003).

(Ex. A, pp. 25-26.) Furthermore, a recent study conducted on traffic-caused wildlife mortality found “1,275 carcasses of 49 species of mammals, birds, amphibians and reptiles over 15 months of searches” “along a 2.5 mile stretch of Vasco Road in Contra Costa County, California.” (*Id.*, p. 26 (citing Mendelsohn et al. 2009).)

Dr. Smallwood conducted an analysis to determine how the increased traffic generated by the Project would impacts to local wildlife and special-status species. (*Id.*)

Dr. Smallwood’s estimated that the Project will result in 1,670,490 annual VMT, which would cause “915 vertebrate wildlife fatalities per year,” which “would cause substantial, significant impacts to wildlife.” (Ex. A, pp. 27-28.) Therefore, he concludes that “[a] fair argument can be made for the need to prepare an EIR to appropriately analyze the potential impacts of project-generated automobile traffic on wildlife.” (*Id.*, p. 28.)

Additionally, Dr. Smallwood notes that “[m]itigation measures to improve wildlife safety along roads are available and are feasible,” and therefore, “need exploration for their suitability with the proposed project.” (*Id.*) Specifically, Dr. Smallwood suggests compensatory mitigation in the form of “funding research to identify fatality patterns and effective impact reduction measures such as reduced speed limits and wildlife under-crossings or overcrossings of particularly dangerous road segments,” and “donations to wildlife rehabilitation facilities.” (*Id.*, p. 30.)

The IS/MND fails to recognize at all this potential significant impact of the Project. Because Dr. Smallwood’s comments constitute substantial evidence of a fair argument that the Project may have a significant impact on wildlife in the vicinity, an EIR must be prepared to assess this impact and identify appropriate mitigation.

E. The Project will have a potentially significant cumulative impacts on wildlife.

The IS/MND fails to adequately analyze the cumulative impacts to wildlife from the Project by improperly implying that cumulative impacts are in reality only residual impacts as a result of incomplete mitigation from project-level impacts. (Ex. A, pp. 28-29.) For example, the Dr. Smallwood notes that “[t]he IS/MND asserts that ‘... potential Project-related impacts are either less than significant or would be less than significant with mitigation incorporated.’ And, ‘Given that the potential Project-related impacts would be mitigated to a less than significant level, implementation of the proposed Project would not result in impacts that are cumulatively considerable when evaluated with the impacts of other current projects, or the effects of probable future projects.’” (*Id.*, p. 28.) However, the IS/MND’s implied standard is not the standard of cumulative effects required under CEQA. (*Id.*) CEQA defines cumulative impacts, and it outlines two general approaches for performing the required cumulative analysis. (*See* 14 CCR § 15130; PRC § 21083(b)(2).)

Here, the IS/MND's cumulative "analysis" is based on flawed logic. The conclusion that the Project will have no cumulative impact because each individual impact has been reduced to a less-than-significant level relies on the exact argument CEQA's cumulative impact analysis is meant to protect against. The entire purpose of the cumulative impact analysis is to prevent the situation where mitigation occurs to address project-specific impacts, without looking at the bigger picture. This argument, applied over and over again, has resulted in major environmental damage, and is a major reason why CEQA was enacted. As the Court stated in *CBE v. CRA*:

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

(*CBE v. CRA*, 103 Cal.App.4th at 114 (citations omitted).) As such, the IS/MND misrepresented the standard and failed to perform an appropriate analysis.

Dr. Smallwood's comments include at Table 3 an example of how a cumulative analysis can begin. According to Dr. Smallwood:

Table 3 includes a recently proposed project in [the] City of San Bernardino – the Amazing 34 project, which I predicted would result in 500 wildlife-vehicle collision fatalities annually. Several other currently proposed similar projects are listed, as well. The City's web site includes 28 industrial/commercial projects in the planning phase, all of which should contribute to an expanded version of Table 3. But even considering only the four projects in Table 3, 15,519 annual wildlife fatalities are predictable based on the volumes of traffic that would be generated by these projects. This is an example of cumulative impacts to wildlife that has not been addressed in the IS/MND.

(Ex. A, pp. 28-29 & Table 3.) Therefore, Dr. Smallwood concludes:

At least a fair argument can be made for the need to prepare a new EIR to appropriately analyze potential project contributions to cumulative impacts to wildlife in the City. To do this, ongoing development in the City needs to be examined for its contributions to habitat fragmentation and how this fragmentation is affecting wildlife movement in the region. It also needs to examine City-wide annual VMT and to what degree this VMT is contributing to wildlife-vehicle collision mortality.

(*Id.*, p. 29.) Thus, an EIR must be prepared to include an adequate, serious analysis of the Project's cumulative impacts on wildlife.

F. The pre-construction survey mitigation measures are not sufficient to address potential impacts to birds that may be present at the site.

Dr. Smallwood has reviewed the proposed wildlife impact mitigation identified in the IS/MND related to pre-construction surveys for nesting birds and nesting bird buffers (i.e. **Mitigation Measures BIO-1 and BIO-2**). (See Ex. A, pp. 29-30.) He concludes the mitigation is not sufficient to reduce impacts to a less-than-significant level.

Although Dr. Smallwood agrees with the need for pre-construction surveys and buffers for birds at the Project site, he states:

Whereas I concur that preconstruction, take-avoidance surveys should be completed, in my experience, the majority of bird nests would not be found by biologists assigned to the survey. For instance, I surveyed for grassland nesters, including as part of an intensive survey effort that I performed from March through mid-August 2023 on another Central Valley site. I surveyed the site 30 times. I found that the nests of grassland birds are the most difficult to locate. Cavity nesters can more effectively defend their nests against predators, whereas ground nesters are highly vulnerable to predation, and thus the most cryptic of nesters. Ground nesters, which include bird species that occur at the project site, are highly adept at concealing their nests both physically and behaviorally. Based on my experience, it is highly likely that preconstruction survey would fail to find any of the nests of ground-nesting birds that truly occur on the project site. The IS/MND's implication that preconstruction survey would reduce potential impacts to nesting birds to less-than-significant is unsubstantiated by evidence in the IS/MND. It would help to cite examples of the success of this measure applied elsewhere. (*Id.*, p. 29.)

This mitigation language allows a single individual to make a subjective decision, outside the public's view, to determine the buffer area for any given species. This measure lacks objective criteria, and is unenforceable. (*Id.*, pp. 29-30.)

In addition to pre-construction surveys, Dr. Smallwood recommends several other mitigation measures to help reduce impacts to biological resources on the project site. (See *id.*, p. 30.) In addition to the need for additional mitigation measures, an EIR should be prepared detailing how the results of preconstruction surveys will be reported.

CONCLUSION

For the foregoing reasons, the IS/MND for the Project should be withdrawn, an EIR should be prepared, and the draft EIR should be circulated for public review and comment in accordance with CEQA. Thank you for considering these comments.

Sincerely,

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A handwritten signature in cursive script, appearing to read "Victoria Yundt". The signature is written in dark ink on a light background.

Victoria Yundt
LOZEAU | DRURY LLP