

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

kcarmichael@adamsbroadwell.com

SO. SAN FRANCISCO OFFICE

601 GATEWAY BLVD., SUITE 1000
SO. SAN FRANCISCO, CA 94080

TEL: (650) 589-1660
FAX: (650) 589-5062

ARIANA ABEDIFARD
KEVIN T. CARMICHAEL
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
RICHARD M. FRANCO
ANDREW J. GRAF
TANYA A. GULESSERIAN
DARION N. JOHNSON
RACHAEL E. KOSS
AIDAN P. MARSHALL
TARA C. RENGIFO

Of Counsel

MARC D. JOSEPH
DANIEL L. CARDOZO

August 21, 2023

Planning Commission
Agenda Item R6

Via Email and Overnight Mail

Lio Salazar, Planning Manager
Shasta County, Department of Resource Management
1855 Placer Street, Suite 103
Redding, CA 96001
Email: scplanning@co.shasta.ca.us

Planning Commissioners
Shasta County, Planning Commission
1855 Placer Street
Redding, CA 96001
Email: scplanning@co.shasta.ca.us

Re: Comments on the Mitigated Negative Declaration for Burney Bioenergy Project - Zone Amendment 22-0008 and Use Permit 22-0003; SCH No. 2023070441

Dear Mr. Salazar, Planning Commissioners:

We write on behalf of **Citizens for Responsible Industry** (“Citizens”) to provide comments on the Initial Study and Mitigated Negative Declaration (“MND”) prepared for the Burney Bioenergy Project (Zone Amendment 22-0008 and Use Permit 22-0003) (SCH No. 2023070441)¹ (“Project”) proposed by Bar Over Heart Enterprises, LLC (“Applicant”) and prepared by the County of Shasta (“County”) pursuant to the California Environmental Quality Act (“CEQA”).² The Project appears as Agenda Item No. R6 on the August 24, 2023 Planning Commission agenda.

¹ Shasta County, Initial Study/Mitigated Negative Declaration, Zone Amendment 22-0008 and Use Permit 22-0003, SCH No. 2023070441 (July 21, 2023) available at <https://ceqanet.opr.ca.gov/2023070441>.

² Pub. Resources Code, §§ 21000 et seq.; 14 Cal. Code Regs. (“C.C.R”) §§ 15000 et seq. (“CEQA Guidelines”). 3983-006j

The Project proposes the development of a 5-megawatt bioenergy facility, sawmill, dry kins, chipping and grinding operation, firewood sales, outdoor storage, office, and associated infrastructure and improvements.³ Project Construction is anticipated to last 18 to 24 months.⁴ Upon completion of construction, the Project will operate 24-hours a day, seven-days a week.⁵

The 65-acre Project site is located in unincorporated Shata County between the unincorporated communities of Burney and Johnson Park, north of State Route (“SR”) 299 and east of Black Ranch Road (Assessor’s Parcel Numbers 030-390-066, 028-370-028 and 030-390-070).⁶ The Project real property is currently zoned Light-Industrial combined with Design Review district (M-L-DR).⁷ The Project requires County approval of a Zone Amendment to reclassify the Project site as General Industrial combined with Design Review district (M-DR) zone district. Additionally, the Project requires County approval of a Use Permit.

I. INTRODUCTION

Based upon our review of the MND and supporting documentation, we conclude that the MND fails to comply with the requirements of CEQA. The MND fails to accurately describe the Project’s environmental setting. Additionally, the MND relies on hidden studies and inaccurate information; and fails to identify the Project’s potentially significant environmental impacts. The MND’s deficiencies result in the failure to propose enforceable measures that can reduce those impacts to a less than significant level, as required by CEQA.

As explained herein, the MND lacks the requisite analysis and substantial evidence to support the County’s conclusions that the Project’s air quality, greenhouse gas (“GHG”) emissions, noise, wildfire, and biological resources impacts would be less than significant with the mitigation measures proposed in the MND. There is also substantial evidence supporting a fair argument that Project construction and operation may result in potentially significant, unmitigated impacts. CEQA prohibits incomplete or deferred analysis of a project’s impacts, and requires the lead agency to prepare an environmental impact report (“EIR”) whenever substantial evidence in the record before the agency supports a fair

³ MND, p. 1.

⁴ MND, p. 8.

⁵ MND, p. 8.

⁶ MND, p. 1.

⁷ MND, p. 2.

argument that a project may have a significant effect on the environment.⁸ The County must prepare an EIR that adequately analyzes the Project's potentially significant impacts and incorporates all feasible mitigation measures to avoid or minimize these impacts prior to any proposed approval recommendation or action to approve the Project's proposed Zone Amendment and Use Permit.

Finally, the County impermissibly failed to extend the MND comment deadline after failing to provide timely access to the documents referenced and relied upon in the MND, as required by CEQA. On August 15, 2023, after reviewing the County's website and the State Clearinghouse CEQANet website and determining that the MND's appendices and supporting studies were not available online, Citizens submitted a letter via email and U.S. mail to the County ("Reference Request"), pursuant to CEQA section 21092(b)(1) and CEQA Guidelines section 5072(g)(4), requesting "immediate access to any and all documents referenced" in the MND. The County subsequently provided access to an incomplete set of the MND's appendices. However, the County has not yet released all of the studies and reports relied upon in the MND, including the entirety of the biological resources assessment prepared for the Project.

The County's failure to provide the appendices and reference documents relied upon in the MND during the CEQA public comment period results in a failure to comply with one of the fundamental tenets of CEQA. Without access to all reference documents during the entire public comment period, Citizens and other members of the public are deprived of the opportunity to conduct a meaningful review of the Project and provide comments on the MND. Accordingly, Citizens reserve the right to supplement these comments at a later date, and at any later proceedings related to this Project.⁹

II. 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 Shasta County residents and other members and organizations, including **California Unions for Reliable Energy ("CURE")** and its

⁸ Pub. Res. Code §§21080(d), 21082.2(d); 14 Cal. Code Reg. §§ 15002(k)(3), 15064(f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *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.

⁹ Gov. Code § 65009(b); § 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.

local affiliates, and the affiliates' members who live, recreate, work, and raise families in Shasta 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 Shasta 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.

III. 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

¹⁰ See Pub. Resources Code, § 21000; CEQA Guidelines, § 15002.3983-006j

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
- (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

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

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.

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.

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

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).

²⁰ §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.*

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.

IV. THE MND FAILS TO ADEQUATELY ESTABLISH THE EXISTING BASELINE

CEQA requires that a lead agency include a description of the physical environmental conditions in the vicinity of the Project as they exist at the time environmental review commences.²⁶ As numerous courts have held, the impacts of a project must be measured against the "real conditions on the ground."²⁷ The description of the environmental setting constitutes the baseline physical conditions by which a lead agency may assess the significance of a project's impacts.²⁸ Use of the proper baseline is critical to a meaningful assessment of a project's environmental impacts.²⁹ An agency's failure to adequately describe the existing setting 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.

²⁴ *Ibid.*

²⁵ § 21064.5.

²⁶ CEQA Guidelines, § 15125, subd. (a).

²⁷ *Save Our Peninsula Com. v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121-22; *City of Carmel-by-the Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 246.

²⁸ CEQA Guidelines, § 15125, subd. (a).

²⁹ *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Ca.4th 310, 320.

Baseline information on which a lead agency relies must be supported by substantial evidence.³⁰ The CEQA Guidelines define “substantial evidence” as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion.”³¹ “Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts ... [U]nsubstantiated opinion or narrative [and] evidence which is clearly inaccurate or erroneous ... is not substantial evidence.”³²

The MND 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, including biological resources, noise, health risk, and hazardous materials impacts. 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.³³ 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.³⁴ As the courts have repeatedly held, the impacts of a project must be measured against the “real conditions on the ground.”³⁵ The description of the environmental setting constitutes the “baseline” physical conditions against which the lead agency assesses the significance of a project’s impacts.³⁶ 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.”³⁷

A. The MND Fails to Adequately Describe the Existing Biological Baseline

The MND fails to establish the existing biological conditions for special-status species at the Project site because no protocol (focused) surveys were

³⁰ *CBE v. SCAQMD*, *supra*, 48 Cal.4th at 321 (stating “an agency enjoys the discretion to decide [...] exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence”); *see Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

³¹ CEQA Guidelines §15384.

³² Pub. Resources Code § 21082.2(c).

³³ CEQA Guidelines, § 15063, subd. (d).

³⁴ 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*”).

³⁵ *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.

³⁶ CEQA Guidelines § 15125(a); *CBE v. SCAQMD*, 48 Cal. 4th at 321.

³⁷ CEQA Guidelines § 15125(a).

conducted for special-status plants and animals that have the potential to occur at the Project site. Instead, the MND states that a general biological survey and review of the Project site was conducted in April 2021.³⁸ The surveys until after completion of the CEQA review process—as proposed in the MND—precludes proper understanding of the magnitude and severity of the Project’s impacts.

The MND states that the biological resources assessment completed for the Project is based on a search of the California Natural Diversity Data Base (“CNDDDB”) for special-status species occurrence records in the Project area and a site visit conducted in 2021 and concludes that impacts on special-status species would be less than significant with mitigation. However, the MND’s conclusion is not supported by substantial evidence because the CNDDDB is misused in the MND’s discussion. 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.³⁹

CNDDDB’s own guidelines confirm that a survey of special-status species sightings recorded in the CNDDDB database does not provide substantial evidence to conclude that the proposed mitigation measures are adequate to reduce impacts to special-status species present at the Project site.

The MND also fails to disclose any details related to the survey methodology used during the 2021 site visit. This violates the requirement that a CEQA document disclose “the analytic route the agency traveled from evidence to action.”⁴⁰ Based on this survey, the MND concludes that the Project will not result in significant impacts to biological resources with the implementation of mitigation measures BIO-1 through BIO-6.⁴¹ The MND’s reliance on a general survey conducted during a single site visit with undisclosed survey protocols does not provide substantial evidence demonstrating that special-status species will not be adversely impacted by Project construction and operation.

³⁸ MND, p. 24.

³⁹ California Natural Diversity Database, CNDDDB Data Use Guidelines (2011) p. 12. available at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27285&inline>

⁴⁰ *Sierra Club*, 6 Cal. 5th at 518, quoting *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.

⁴¹ MND, pp. 37-38.
3983-006j

B. The MND Fails to Adequately Describe the Existing Noise Baseline

The CEQA Guidelines require an EIR to consider “whether a project would result in...[g]eneration of a substantial temporary or periodic increase in ambient noise levels in the vicinity of the project . . .”⁴² The MND’s noise analysis fails to contain the baseline ambient noise data necessary to assess the significance of the Project’s operation and construction noise on sensitive receptors and wildlife in the vicinity of the Project site. The MND therefore fails to include the requisite analysis of the existing noise environment to evaluate the extent to which Project construction and operation will increase ambient noise levels.

Without baseline ambient noise measurements, the public and decisionmakers are unable to measure the relative increase in ambient noise levels at nearby receptors during the construction and operation of the Project. An EIR should be prepared to correct these deficiencies.

C. The MND Fails to Accurately Identify Nearby Sensitive Receptors

The MND fails to accurately disclose the proximity of sensitive receptors that may be adversely impacted by the Project’s air emissions, noise, and other construction and operational impacts. The Air Quality and Health Risk Assessment (“AQ Report”) for the Project states that the nearest sensitive receptors to the Project site are approximately 3,000 feet to the south and 4,300 feet to the north of the project site.⁴³ However, the Project site is much closer to sensitive receptors than stated in the AQ Report, a fact which is highlighted in the MND’s noise impact analysis which shows that there are several sensitive receptors within 1,000-feet of the Project site.⁴⁴ Thus, the MND’s description of the sensitive receptors in the vicinity of the Project site is inconsistent. Additionally, based on the AQ Report, the MND concludes that the Project will not result in significant air quality impacts to sensitive receptors.

Failure to determine whether sensitive receptors are in the vicinity of the Project is a clear failure to determine the “real conditions on the ground”⁴⁵ and to accurately assess the air quality impacts of the Project on nearby residents. An EIR

⁴² CEQA Guidelines, Appendix G, Sec. XII(d).

⁴³ MND, Air Quality Technical Report, p. 9.

⁴⁴ MND, Figure 10: Noise Sensitive Receptors, pdf. p. 123.

⁴⁵ *Save Our Peninsula Com. v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121-22; *City of Carmel-by-the Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 246.
3983-006j

must be prepared to include baseline analyses which reflect the conditions existing at the Project site at the commencement of environmental review, and to revise any impact analyses that utilized the erroneous baseline.

A. The MND Fails to Provide Sufficient Baseline Information on Hazards and Hazardous Materials

The MND fails to provide a complete and accurate description of the Project's environmental setting related to hazards and hazardous materials, and thus, the MND's hazard and hazardous materials impact assessment is inadequate.

The MND states that the County reviewed the California Department of Toxic Substances' ("DTSC") EnviroStor database which lists hazardous waste facilities subject to corrective action as part of the Health and Safety Code.⁴⁶ However, the County did not perform a site-specific Phase I Environmental Site Assessment ("ESA") or any site-specific sampling related to hazardous contamination. A review of the online regulatory databases to determine hazards and hazardous materials is an insufficient basis for determining the presence of onsite hazards, as there may be unreported hazardous materials at the Project site from prior uses.

The MND states that that Project site's past uses include a rail yard of the McCloud River Railroad and as a storage yard for various projects.⁴⁷ However, the MND does not analyze whether these former uses left any hazardous materials on the Project site. According to the United States Environmental Protection Agency ("EPA"), "[r]esidual contamination including herbicides, petroleum products and byproducts, metals, and creosote, is often present as a result of the former railroad operations and associated industrial activities".⁴⁸

Absent an ESA, the County lacks substantial evidence, and the public lacks certainty, to conclude that no existing release, a past release, or a threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, groundwater, or surface water may pose potentially significant hazards impacts during Project construction or operation. At present, the County

⁴⁶ MND, p. 49.

⁴⁷ MND, p. 54.

⁴⁸ USEPA, Office of Solid Waste and Emergency Response Successful Rail Property Cleanup and Redevelopment (August 2005) available at https://www.epa.gov/sites/default/files/2015-09/documents/05_railfields.pdf 3983-006j

has not provided substantial evidence to support its environmental setting analysis with respect to hazards and hazardous materials on the Project site. A Phase I ESA must be completed for the Project, and the results presented in an EIR for the Project.

V. THERE IS A FAIR ARGUMENT THAT THE PROJECT MAY CAUSE SIGNIFICANT IMPACTS THAT REQUIRE THE COUNTY TO PREPARE AN EIR

The MND for the Project 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.⁴⁹ Moreover, substantial evidence in the record shows that the Project may result in potentially significant impacts which the mitigation measures in the MND may not adequately mitigate. Therefore, a fair argument can be made that the Project may cause significant impacts requiring the preparation of an EIR.

A. Substantial Evidence Supports a Fair Argument that the Project May Have Potentially Significant Hazard Impacts from Wildfire

The MND states that the Project includes potential fire sources including the bioenergy facility, equipment operation, and storage of feedstock and lumber that could act as fuels.⁵⁰ Additionally, the MND recognizes that the Project site is directly adjacent to forest stands and has the potential to increase risk of wildland fires in the area.⁵¹ The MND states that the Project will include zoned sprinkler system and practice feedstock management in compliance with the California Fire Code and concludes that "Compliance with the California Fire Code requirements and Shasta County Fire Safety Standards, including the installation of fire hydrants to serve the facility, will ensure impacts related to wildland fires will be less-than-significant."⁵²

⁴⁹ Pub. Resources Code, § 21064.5.

⁵⁰ MND, p. 50.

⁵¹ MND, p. 50.

⁵² MND, p. 50.

Fires resulting from bioenergy plants are a known hazard, “[b]iomass is an inherently dangerous category of substances, especially in bulk and has significant fire and explosion hazards. In particular, the tendency for self-heating and the difficulties in early fire detection and firefighting present a number of unique challenges.”⁵³ Reports of fires resulting from the storage of wood chips and combustible materials at bioenergy plants are not uncommon.⁵⁴ In 2013, ignition of sawdust or wood chips resulted in an explosion and ensuing fire at a bioenergy plant in Shakopee, Minnesota.⁵⁵ Based on the lessons learned from the 2013 fire, the plant operator, Koda Energy, invested seven million dollars into operational safety, reliability and emissions reduction upgrades, including infrared detectors to help identify a potential ignition source before it could spread through the plant.⁵⁶

An EIR for a similar biomass project explains that the storage of woody biomass poses a potentially significant risk for wildfire. Ascent Environmental prepared an EIR for the Cabin Creek Biomass Project in 2012.⁵⁷ The Cabin Creek project was located in Placer County, in a “very high” Fire Hazard Severity Zone (“FHSZ”).⁵⁸ Similar to the instant Project, the Cabin Creek project proposed to convert woody biomass into “syngas” via a gasification system.⁵⁹ Similarly to this Project, the primary source of biomass was expected to be U.S. Forest Service fuels reduction sites.⁶⁰ In Impact 16-4, the Cabin Creek EIR identified storage of woody biomass as a potentially significant impact:

Because the proposed facility would store potentially combustible woody biomass fuels, the facility operator would be required to incorporate applicable fire protection measures into the project design and operation

⁵³ Tony Ennis, Fire and Explosion Hazards in the Biomass Industries, (Hazards 26, Symposium Series No 161, 2016) available at <https://www.icheme.org/media/11801/hazards-26-paper-64-fire-and-explosion-hazards-in-the-biomass-industries.pdf>

⁵⁴ Valley News, Big Response to Fire in Woodchip Silo at Springfield Power (April 12, 2017) available at <https://www.vnews.com/Fire-in-Springfield-9234812> see also Energy Central News, Two-alarm Fire Sparks in Biomass One Power Plant (December 15, 2016) available at <https://energycentral.com/news/two-alarm-fire-sparks-biomass-one-power-plant> see also Post Independent, Gypsum biomass power plant still off-line after December fire (March 25, 2015) available at <https://www.postindependent.com/news/local/gypsum-biomass-power-plant-still-off-line-after-december-fire/>

⁵⁵ Minnesota Public Radio, Shakopee Biomass Plant Fire Contained (April 26, 2013) available at <https://www.mprnews.org/story/2013/04/26/shakopee-biomass-plant-fire-contained>

⁵⁶ Southwest News Media, Koda Energy reopens plant damaged by fire after \$7 million redesign (February 13, 2014) available at https://www.swnewsmedia.com/shakopee_valley_news/news/business/koda-energy-reopens-plant-damaged-by-fire-after-7-million-redesign/article_9e30cee4-4d69-5d67-b1f0-8b3c4b45d56d.html

⁵⁷ Placer County, Community Development Resource Agency Draft Environmental Impact Report for the Cabin Creek Biomass Project (July 27, 2012) SCH 2011122032 available at <https://ceqanet.opr.ca.gov/2011122032/>

⁵⁸ *Id.*, pg. 16-2.

⁵⁹ *Id.* pg. 2-1.

⁶⁰ *Id.*

procedures consistent with [local rules]. However, as a result of the extensive storage of woody biomass fuel on the site, there is an increased risk for wildfire and exposure of people or structures to fire from this source. Therefore, this impact would be potentially significant.⁶¹

The Cabin Creek EIR further explained:

Operation of the proposed facility would result in the storage of potentially combustible woody biomass materials that could result in or be combustible during a wildland fire. During the winter months primarily, there would be extensive storage of woody biomass fuel on the site. Biomass stored in piles could be subject to biodegradation internal to the piles creating heat build-up, spontaneous combustion, and risk of fire. In addition, the operation of the facility equipment, including the turbine, the boiler, the baghouse, and the fuel feed system and storage area could contribute to this fire risk due to the potential for an explosion or electrical fire.⁶²

The same factors that made the storage of woody biomass a potentially significant impact for the Cabin Creek Biomass Project is present for the instant Project: large amounts of woody biomass would be brought to the Project site and stored until the biomass is processed and hauled offsite. Additionally, the Project site is located in an FHSZ area.⁶³ Further, the Project would operate equipment onsite that could contribute to this fire risk. Therefore, the risks of combustion discussed in the Cabin Creek EIR are potentially significant here.

There is substantial evidence supporting a fair argument that the Project may result in potentially significant impacts due to wildfire. Here, however, despite the well documented hazards posed by the Project's proposed operations, the MND fails to include any enforceable mitigation measures and instead improperly relies on compliance with the Fire Code to determine that the Project will not result in a significant impact. The Cabin Creek EIR proposed the following mitigation measure, which should serve as a starting point for the County to formulate an adequate mitigation measure:

Mitigation Measure 16-4. The Applicant shall regularly compact the fuel piles to minimize fire risk in storage piles. The Applicant shall also prepare detailed written procedures for the management of biomass piles to prevent

⁶¹ *Id.*, pg. 16-14.

⁶² *Id.*

⁶³ MND, p. 78.
3983-006j

inadvertent combustion and fires, and that minimize vectors, odors, litter, and human contact with, inhalation, ingestion, and transportation of dust, particulates, and pathogenic organisms. The written procedures shall outline the specific measures that would be implemented to reduce the total pile storage area, and to prevent potential pile fires due to spontaneous combustion. The written procedures shall be subject to review and input by the County LEA that oversees the SWFP for the site and the Truckee Fire Protection District prior to initiating operations at the site. These measures shall include at a minimum the following:

- a) A schedule for periodic and random load checks of incoming biomass truckloads;
- b) Restricted public access to the facility (e.g., fencing);
- c) Fire prevention, protection, and control measures, including, but not limited to temperature monitoring of piles at least weekly, adequate water supply for fire suppression, and the isolation of potential ignition source from the biomass piles;
- d) Fire lanes between piles shall be provided to allow fire control equipment access to all operational areas; e) Daily visual inspections of the storage piles to observe whether temperature-related effects are occurring (e.g., steam); and
- f) Leachate shall be controlled to prevent contact with the public. As necessary, measures such as moisture management (e.g., wetting), pile aeration, tarping, among others could be implemented to optimally manage the storage piles.

Given the County's recent experiences with the Carr Fire, and other major fire incidents, it is incumbent on the County to conduct a thorough analysis of the hazards presented by the Project in an EIR and require feasible and enforceable mitigation measures, including measures like those included in the Cabin Creek EIR, to reduce the Project's potentially significant hazards impacts.

B. The MND Lacks Substantial Evidence to Support a Conclusion that the Project Would Not Have Potentially Significant Impacts to Biological Resources

CEQA requires that the lead agency disclose the severity of a project's impacts and the probability of their occurrence *before* a project can be approved.⁶⁴ As explained above, the MND failed to conduct protocol level surveys of the Project site, and the only real site-specific analysis that the MND contemplates are deferred until after project approval. Mitigation measures BIO-1, BIO-2 and BIO-3 state that, because the Project site provide suitable habitat for long-eared myotis, nesting migratory birds and/or raptors, and special-status plants; pre-construction surveys will be performed after project approval.⁶⁵ By acknowledging that the Project will have potentially significant impacts on special-status species, yet deciding not to analyze those impacts until after the Project is approved, the MND unlawfully defers analysis.

Additionally, the MND lacks substantial evidence to conclude that the proposed mitigation measures are adequate to reduce the Project's potentially significant biological resources impacts. As detailed above, the MND did not conduct adequate baseline surveys to determine the likelihood of presence of protected species in the first place. The extent and severity of impacts to these species therefore has not been determined, leaving the County and the public in the dark about the extent of mitigation needed to reduce impacts to less than significant levels.

C. The MND Lacks Substantial Evidence to Support a Conclusion that the Project Would Not Have Potentially Significant Noise Impacts

1. The MND Improperly Defers Analysis of Potentially Significant Noise Impacts

As described above, the MND fails to include an assessment of the existing noise environment in the vicinity of the Project. Despite the lack of baseline data, the MND concludes that the Project could result in significant noise impacts which

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

⁶⁵ MND, pp. 37-38.
3983-006j

will be mitigated through the implementation of mitigation measure NOI-2 which provides the following:⁶⁶

An acoustical analysis will be conducted prior to issuance of the first building permit for construction of the bioenergy facility to establish existing ambient baseline noise levels in the vicinity of the project site. The bioenergy plant building will be constructed to provide the attenuation required to meet the Shasta County noise standards for non-transportation noise sources [...] at the property line of the closest noise-sensitive land use to the bioenergy facility estimated to be 950 feet due north of the project site boundary.

With implementation of NOI-2, the MND concludes that the “[b]iomass plant noise will be less-than-significant with mitigation.”⁶⁷

The MND violates CEQA by deferring the County’s acoustical analysis until after Project approval, thereby failing to disclose the severity of the Project’s impacts and the probability of their occurrence *before* the project is approved, as required by CEQA.⁶⁸ The County must conduct the necessary analysis to establish the existing ambient baseline noise levels in the vicinity of the Project site and provide the analysis in an EIR for public review.

2. The MND Lacks Substantial Evidence to Conclude that the Project will not Result in Significant Noise Impacts

CEQA does not set a numeric threshold for determining the significance of ambient noise increases. Lead agencies may select their own thresholds. However, the agency’s selection of a threshold of significance must be supported by substantial evidence.⁶⁹

The MND relies on an unsupported threshold, the Noise-Level Performance Standards established in the Shasta County General Plan Noise Element, as the MND’s threshold of significance for noise (55 dB Leq between 7:00 a.m. and 10:00 p.m. and 50 dB Leq between 10:00 p.m. and 7:00 a.m.).⁷⁰ Reliance on the

⁶⁶ MND, p. 66.

⁶⁷ MND, p. 62.

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

⁶⁹ 14 CCR § 15064(b); *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 884.

⁷⁰ MND, p. 60.
3983-006j

performance standard as the threshold for determining the severity of noise impacts is unsupported and violates CEQA because it fails to consider whether the magnitude of changes in noise levels is significant.⁷¹

In *Keep our Mountains Quiet v. County of Santa Clara*,⁷² neighbors of a wedding venue sued over the County of Santa Clara's failure to prepare an EIR for a proposed project to allow use permits for wedding and other party events at a residential property abutting an open space preserve. The owner of the open space preserve, Midpeninsula, expressed concerns about noise impacts on wildlife.⁷³ Similar to the MND in this case, Santa Clara's MND relied on the noise standards set forth in its noise ordinance as its threshold for significant noise exposure from the project, deeming any increase to be insignificant so long as the absolute noise level did not exceed those standards.⁷⁴

The Court examined a long line of CEQA cases which have uniformly held that conformity with land use regulations is not conclusive of whether or not a project has significant noise impacts.⁷⁵ In particular, citing *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.*, the Court explained that "the fact that residential uses are considered compatible with a [County noise ordinance maximum] noise level of 65 decibels for purposes of land use planning is not determinative in setting a threshold of significance under CEQA."⁷⁶ The Court further explained that, as required by CEQA Guidelines Appendix G, § XII, subd. (d), the CEQA lead agency is required to "consider both the increase in noise level and the absolute noise level associated with a project" in evaluating whether a project has significant noise impacts.

Similarly, the County relies on the Project's purported compliance with single numeric limits of 55 dB Leq between 7:00 a.m. and 10:00 p.m. and 50 dB Leq between 10:00 p.m. and 7:00 a.m. from the County's General Plan to conclude that the Project will not result in significant operations and construction noise impacts.

⁷¹ *King & Gardiner Farms*, at 865.

⁷² *Keep our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714.

⁷³ *Id.* at 734.

⁷⁴ *Id.* at 732.

⁷⁵ *Id.*, citing *Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1338; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881–882; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1416 (project's effects can be significant even if "they are not greater than those deemed acceptable in a general plan"); *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354, ("CEQA nowhere calls for evaluation of the impacts of a proposed project on an existing general plan").

⁷⁶ *Id.*, citing (2001) 91 Cal.App.4th 1344, 1381, 111 Cal.Rptr.2d 598 ("*Berkeley Jets*").
3983-006j

As in *Keep Our Mountains Quiet*, the County's reliance on noise regulations does not provide substantial evidence to support the MND's conclusion that the Project will not have significant noise impacts.

An EIR must be prepared to analyze the Project's construction and operation noise impacts against a meaningful significance threshold.

VI. 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,



Kevin Carmichael

KTC:ljl