



T 510.836.4200
F 510.836.4205

1939 Harrison Street, Ste. 150
Oakland, CA 94612

www.lozeaudrury.com
kylah@lozeaudrury.com

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Via Email

Christopher Walker, Chairperson
Lucille Kring, Vice Chairperson
Jeanne Tran-Martin, Commissioner
Michelle Lieberman, Commissioner
Luis Andres Perez, Commissioner
Amelia Castro, Commissioner
Deirdre Kelly, Commissioner
City of Anaheim Planning Commission
200 South Anaheim Boulevard
Anaheim, CA 92805
planningcommission@anaheim.net

Nicholas Taylor
Principal Planner
Planning and Building Department
City of Anaheim
200 South Anaheim Boulevard, Suite 162
Anaheim, CA 92805
njtaylor@anaheim.net

**Re: Comment on Hills Preserve Project Environmental Impact Report
(SCH No. 2023080600)**

Dear Chair Walker, Vice Chair Kring, Honorable Commissioners, and Mr. Taylor:

The following comments are submitted on behalf of **Supporters Alliance for Environmental Responsibility (“SAFER”)** regarding the Hills Preserve Project (“Project”) and the Environmental Impact Report (“EIR”) prepared for the Project. The Project will require a General Plan amendment, Specific Plan, Zoning reclassification, Zoning Code amendment, Tentative Tract Map, Final Plan, Discretionary Tree Removal Permit, and Development Agreement to build six single-family detached residential lots, 498 wrap-style apartment units, and 80,000 square feet of commercial space. The Project sits on an approximately 76-acre site with East Santa Ana Canyon Road and Highway 91 to the north, South Eucalyptus Drive to the west, and Festival Drive to the east in the City of Anaheim.

In support of its comments, SAFER has retained expert wildlife ecologist Dr. Shawn Smallwood, Ph.D to review the Project’s impacts to biological resources. Dr. Smallwood’s comments and CV are attached at Exhibit A.

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LEGAL STANDARD

I. CEQA and Environmental Impact Report

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CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. (14 CCR § 15002(a)(1).) “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.’” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures. (14 CCR § 15002(a)(2) and (3); see also *Berkeley Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1349,1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.)

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an Environmental Impact Report (EIR) except in certain limited circumstances. (See, e.g., Pub. Resources Code, § 21100.) The EIR is the very heart of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. 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 for Local Control v. City of Bakersfield* (2004), 124 Cal.App.4th 1184, 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 serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.” (14 CCR § 15002(a)(2).) Critical to this purpose, the EIR must contain an “accurate and stable project description.” (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185 at 192-93 (“An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.”) The project description must contain (a) the precise location and boundaries of the proposed project, (b) a statement of the project objectives, and (c) a general description of the project's technical, economic, and environmental characteristics. (14 CCR § 15124.)

II. Standard of Review

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The California Supreme Court has emphasized that:

When reviewing whether a discussion is sufficient to satisfy CEQA, a court must be satisfied that the EIR (1) includes sufficient detail to enable those who did not

participate in its preparation to understand and to consider meaningfully the issues the proposed project raises [citation omitted] . . .

(*Sierra Club v. Cty. of Fresno* (2018) 6 Cal.5th 502, 510 (2018) [citing *Laurel Heights Improvement Assn.*, 47 Cal.3d at 405].) The Court in *Sierra Club v. Cty. of Fresno* also emphasized that another primary consideration of sufficiency is whether the EIR “makes a reasonable effort to substantively connect a project’s air quality impacts to likely health consequences.” (*Id.* at 510.) “Whether or not the alleged inadequacy is the complete omission of a required discussion or a patently inadequate one-paragraph discussion devoid of analysis, the reviewing court must decide whether the EIR serves its purpose as an informational document.” (*Id.* at 516.)

Although an agency has discretion to decide the manner of discussing potentially significant effects in an EIR, “a reviewing court must determine whether the discussion of a potentially significant effect is sufficient or insufficient, i.e., whether the EIR comports with its intended function of including ‘detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’” (*Sierra Club*, 6 Cal.5th at 516 [citing *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1197].) “The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency’s factual conclusions.” (*Id.* at 516.) As the Court emphasized:

[W]hether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence.

(*Id.* at 514.) Additionally, “in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project.” (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App. 4th 1099, 1109.)

DISCUSSION

III. The EIR’s Analysis of the Project’s Impacts on Biological Resources is Not Supported By Substantial Evidence.

Dr. Smallwood reviewed and analyzed the EIR’s analysis of the Project’s impacts to biological resources prepared by Psomas Environmental Consulting (“Psomas”) and found that Psomas failed adequately analyze significant impacts to wildlife including habitat loss,

interference with wildlife movement, vehicle collisions, bird-window collisions, and cumulative impacts. As a result, the Project’s analysis of impacts to biological resources is insufficient and not supported by substantial evidence.

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A. Wildlife detected on the Project Site.

Dr. Smallwood’s associate, Noriko Smallwood, conducted a 3.3-hour site visit on September 19, 2024, and a 1.17-hour evening site visit to conduct a nocturnal survey. During her surveys, Ms. Smallwood detected 46 species of vertebrate wildlife. (Ex. A, p. 1-13.) Psomas detected 28 species of vertebrate wildlife that Ms. Smallwood did not detect, resulting in a combined 74 species detected in total. (*Id.* at p. 17.) During her survey, Ms. Smallwood observed 11 special-status species, including Allen’s hummingbird, turkey vulture, Cooper’s hawk, red-shouldered hawk, red-tailed hawk, western screech-owl, Nuttall’s woodpecker, American kestrel, oak titmouse, wrenit, California gnatcatcher, and California thrasher. (*Id.* at p. 12-13.) Allen’s hummingbird, Nuttall’s woodpecker, oak titmouse, wrenit, and California thrasher are listed by the U.S. Fish and Wildlife Service as a Bird of Conservation Concern, meaning that these species have been identified as a priority for conservation action. The turkey vulture, red-tailed hawk, red-shouldered hawk, western-screech owl, and American kestrel are naturally rare because of their position at the top of the food chain. The California gnatcatcher is listed as threatened under the Endangered Species Act and as a Species of Special Concern by the California Department of Fish and Wildlife.

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B. Significant impacts to wildlife.

Dr. Smallwood concluded that the Project would result in significant impacts to wildlife including habitat loss, interference with wildlife movement, vehicle collisions, and bird-window collisions.

i. Habitat loss

Dr. Smallwood found that Psomas made “no attempt” to assess the impact of the Project on habitat loss and loss of numerical or productive capacities of any of the wildlife species potentially affected by the Project. (Ex. A, p. 32.) Instead, Psomas merely “speculates the ‘loss of wildlife habitat would be considered limited in relation to the total amount of wildlife habitat available in the BSA region.’” (*Id.*) However, Dr. Smallwood was able to calculate the loss of numerical and productive capacities for birds as a result of habitat lost as a result of the Project. He determined that the Project would result in the loss of 191 nest sites and 265 nest attempts per year. (*Id.* at p. 33.) Furthermore, Dr. Smallwood determined that reproductive capacity of the Project site would be lost, resulting in 845 birds per year denied to California. (*Id.*) Dr. Smallwood concluded that the loss of 845 birds per year would be substantial and “[m]any of these birds would be special-status species such as Cooper’s hawks, California thrashers, and some would be threatened or endangered species such as California gnatcatcher. (*Id.*) This is a significant impact that must be analyzed and mitigated in the EIR.

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ii. Interference with wildlife movement

Dr. Smallwood determined that Psomas improperly concluded that the Project would not interfere with wildlife movement. (Ex. A, p. 34.) As Dr. Smallwood explains:

Psomas [] concludes that the project site does occur within a movement corridor, but downplays the project's interference with wildlife movement within the corridor by claiming 'The Project's impact area is located at the terminus of the continuous open space . . . therefore, it would not disrupt wildlife movement along the corridor, but would truncate the open space.' Lost in this analysis is the result that wildlife would not longer be capable of moving within the truncated space. In other words, the [P]roject would interfere with wildlife movement in the region.

(*Id.*) Thus, Psomas findings that the Project would prevent wildlife from moving throughout the "truncated space" created by the Project is not consistent with its determination that the Project would not interfere with wildlife movement. Furthermore, Psomas failed to provide any support for its conclusions regarding the Project's interference with wildlife movement and "[b]ased on what [was] reported, Psomas did not record or measure wildlife movement in any way." (*Id.*) However, Dr. Smallwood determined that "[t]he [P]roject would in fact eliminate a sizeable portion of the existing riparian environment . . . [which] are one of the few widely-recognized corridors in natural settings, forming a backbone of wildlife movement in the area." (*Id.*)

iii. Wildlife-vehicle collisions

Dr. Smallwood also found that the EIR fails to account for significant impacts to wildlife from road collision mortality from increased traffic generated by the Project. 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. (*Id.*) Dr. Smallwood provides several studies demonstrating significant animal deaths due to collisions in the thousands annually per 100 km of road. (*Id.*) The DEIR has failed to analyze whether increased traffic generated by the Project would result in significant local impacts to wildlife.

Based on the Project's annual VMT, Dr. Smallwood was able to predict that the Project would result in 13,925 vertebrate wildlife fatalities per year. (Ex. A, p. 36.) Yet, Psomas failed to analyze this significant impact (*Id.*) The EIR must be revised to analyze, disclose, and mitigate this significant impact.

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iv. Bird-window collisions

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Dr. Smallwood also found the EIR fails to analyze potentially significant impacts to avian species from window collision mortality. Dr. Smallwood determined that the Project will result in approximately 1,359 to 1,518 annual bird deaths due to window collisions. (Ex. A at p. 39.) Dr. Smallwood also notes that “[t]he vast majority of these predicted deaths would be birds protected under the Migratory Bird Treaty Act and under the California Migratory Bird Protection Act, thus causing significant unmitigated impacts even with the implementation of established mitigation measure.” (*Id.* at 40.) “Given the predicted level of bird-window collision mortality . . . the [] [P]roject would result in potentially significant adverse biological impacts, including the take of both terrestrial and aerial habitat of birds and other sensitive species.” (*Id.*) The EIR must be revised to analyze and mitigate this significant impact.

i. Cumulative impacts

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Lastly, Psomas failed to properly analyze the Project’s cumulative impacts. Psomas claims that “[c]umulative impacts are related to site-specific impacts to biological resource and thus would be mitigated, as necessary, on a project-by-project basis,” and therefore assumes that “cumulative impacts are really just residual impacts left over by inadequate mitigation of project-level impacts, and that project-specific environmental reviews prevent these residual impacts.” (Ex. A, p. 41.) Psomas’ interpretation of what constitutes a cumulative impact is incorrect and inconsistent with CEQA, which defines cumulative impacts as “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.” (14 CCR § 15355.) Under this definition, “[t]he individual effects may be changes resulting from a single project,” such as here, “or a number of separate projects.” (*Id.*)

Given Psomas misunderstanding of what constitutes a cumulative impact, Psomas conclusion that the Project “would not make a cumulatively considerable contribution to the already less than significant cumulative impacts related to biological resources” is unsupported. (Ex. A, p. 41.) As Dr. Smallwood explains:

An aerial view of the landscape around the project site reveals very little wildlife habitat remains. If the project goes forward, the landscape would lose an additional 44 acres of wildlife habitat as well as some capacity for wildlife to move between the few isolated patches of habitat that remain. The environmental reviews of past projects did not avoid cumulative impacts, not with their analyses and not with the mitigation measures they implemented.

(*Id.*)

CONCLUSION

For the forgoing reasons, SAFER respectfully requests that Project’s environmental impact report be revised to adequately analyze and mitigate significant impacts and to ensure compliance with CEQA. SAFER reserves its right to supplement these comments during review of the EIR for the Project. *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1120 (“any party may bring an action pursuant to section 21167 if it has raised an objection to the adequacy of an EIR prior to certification”). A revised EIR should be prepared and recirculated to address these comments.

Thank you for your attention to these comments.

Sincerely,



Kylah Staley
Lozeau | Drury LLP