

### O-16 Sierra Club

Comment Letter O-16

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August 14, 2017

By e-mail:

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Planning and Development Services  
County of San Diego  
Attn: Ashley Smith, Darin Neufeld  
5510 Overland Avenue  
San Diego, CA 92123

**Re: Comments on Newland Sierra Draft Environmental Impact Report**

Dear Ms. Smith and Mr. Neufeld:

The law firm of Chatten-Brown & Carstens represents the Sierra Club on matters relating to the proposal by Newland Sierra LLC to build the Newland Sierra Project ("Project"). At the Sierra Club's request, we have reviewed portions of the Draft Environmental Impact Report ("Draft EIR") and accompanying studies. George Courser and Mary Clarke, Co-Chairs of the Sierra Club Conservation Committee, have also reviewed the Draft EIR and have provided extensive comments regarding the Project, and these comments are incorporated herein.

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We have found numerous flaws, inconsistencies, and omissions such that the Draft EIR fails to comply with the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 et seq., and the CEQA Guidelines, California Code of Regulations, Title 14, section 15000 et seq. These problems relate to the analysis of greenhouse gases (GHGs), biological impacts, traffic impacts, fire safety impacts, and impacts to Native American resources. Additionally, we strongly believe that the EIR should not be finalized until the Climate Action Plan (CAP) is adopted and no project requiring amendment to the 2011 General Plan should be approved until the County is on target to meet the GHG emission reduction goals it set.

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Once sufficient analysis has been performed, enforceable and effective mitigation measures and a reasonable range of potentially feasible alternatives must be set forth in a Revised Draft EIR. The Draft EIR must then be recirculated so that the public and public

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agencies may comment on this information, as required by CEQA. Although prepared by Newland and its consultants, the EIR is ultimately the responsibility of the County and it cannot be lawfully certified nor the project approved until substantial revisions to it are completed.

**I. Greenhouse Gas Emissions Analysis.**

**a. The Project's Ability to Use Offsets From Outside the County of San Diego Is Inconsistent with the County General Plan's Requirement to Achieve Specified Greenhouse Gas Emissions Reductions in the County.**

Mitigation Measure CC-1.2 of the County's General Plan Update requires the County to:

Prepare a County Climate Change Action Plan with an update[d] baseline inventory of greenhouse gas emissions from all sources, more detailed greenhouse gas emissions reductions targets and deadlines; and a comprehensive and enforceable GHG emissions reduction measures that will achieve a 17% reduction in emissions from County operations from 2006 by 2020 and a 9% reduction in community emissions between 2006 and 2020. Once prepared, the plan's implementation will be monitored and progress reported on a regular basis.

The Project authorizes the use of offsets from outside the County of San Diego. The Draft EIR identifies the County's "priority" list for consideration of GHG reduction features as follows:

1) project design features/on-site reduction measures; 2) off-site within the unincorporated areas of the County of San Diego; 3) off-site within the County of San Diego; 4) off-site within the State of California; 5) off-site within the United States; and 6) off-site internationally.

(DEIR, 2.7-48.)

However, the use of offsets is inconsistent with the County's Mitigation Measure CC-1.2 to reduce GHG emissions within the County of San Diego by specified reduction amounts.

**b. The County Should Explain the Relationship Between the Project's Efficiency Metric and the Unlawful County Efficiency Metric.**

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In its Second Supplemental Petition for Writ of Mandate, the Sierra Club (along with the Golden Door) challenged the County's publication of the "County Efficiency Metric," contained within the overturn the County's "2016 Document for Determining Significance of Greenhouse Gases." The Superior Court ordered the County to set aside the 2016 Document for Determining Significance of Greenhouse Gases and enjoined use of the County Efficiency Metric in the County's environmental review. The County should analyze whether the Project's Efficiency Metric violates the Superior Court's order enjoining the County from using the "County Efficiency Metric."

**c. List of Additional Concerns Regarding the Draft EIR's Greenhouse Gas Emissions Analysis.**

In reviewing the Draft EIR, we share the following concerns identified by Dr. Phyllis Fox, PhD, PE in her August 14, 2017 correspondence entitled, "Comments on the Draft Environmental Impact Report for the Newland Sierra Project":

- The DEIR underestimated emissions from construction and vegetation. The information is not presented consistently in the DEIR, but emissions from construction and vegetation could be as much as 30 times higher than disclosed. (See Dr. Fox's August 14, 2017 letter, Section 2.1.)
- The DEIR underestimates emission from vegetation, because it characterizes 100% of removed vegetation as "scrub," when in fact, most of the vegetation on site is chaparral. (See Section 2.2.)
- Emissions for construction equipment are underestimated, because the analysis assumes Tier 4 engines that are not required by the Project's mitigation measures. (See Section 2.4.)
- Emissions from construction of off-site road and utility improvements do not appear to have been included. (See Sections 2.5 and 2.6.)
- Emissions from induced VMT by surface road improvements were not considered. Also, congestion leads to inefficient auto use, which increases emissions. These emissions were not included either. (See Section 2.9.2.)
- The DEIR gives too much emissions reduction credit for weak transportation demand management measures. (See Section 2.9.3.)
- The DEIR did not account for emissions from increased freeway congestion. (See Section 2.9.4.)

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- Emissions from moving upstream water supply were not properly accounted for. (See Section 2.10.)
- The DEIR omits emissions from residential electricity use because it does not provide enough evidence that its residential solar and EV charging proposals will offset 100% of all residential electricity demand. (See Section 2.12.)
- The DEIR fails to address increased emissions resulting from climate change. (See Section 2.14.)
- Mitigation measures are inadequate because emissions were underestimated, the “priority” system should be mandatory, and the DEIR’s “true up” provision enables the County to allow the developer to decrease the amount of emissions required to be offset without any further CEQA review. (See Section 2.15.)

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## II. The Draft EIR Fails to Adequately Analyze the Project’s Biological Impacts.

### a. Background.

In the early 2000’s, the San Diego Chapter of the Sierra Club established a North County Multiple Species Conservation Program (MSCP) / Multiple Habitat Conservation Program (MHCP) Task Force to help plan, develop, and implement the two Habitat Conservation Plans (HCPs) / Natural Community Conservation Plans (NCCPs) in North San Diego County. The Newland Sierra project is in the Planning Area of the County’s North County MSCP (NC-MSCP). The County has been developing the NC-MSCP for many years. On February 19, 2009, the County released a Preliminary Public Review Draft MSCP North County Plan. The Sierra Club’s Task Force reviewed and commented on that Plan.

Since 2009, the County has been working to finalize the NC-MSCP; however, to our knowledge, no public documents have been forthcoming since 2009. Sierra Club has been advised that the County intends to circulate a public review draft later this year. In the meantime, we will refer our analysis of the Newland DEIR to the 2009 Preliminary Public Review Draft, North County Plan (2009 Draft Plan) and to the 2017 Draft North County Plan (2017 Draft MSCP Plan). [Note: In the DEIR, Section 2.4, page 2.4-1, there is a reference to a 2016 North County MSCP. We have been advised by a County representative that this is an error and there is no 2016 North County MSCP document. If so, please remove or correct this reference.]

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The Newland project is sited in a large, core area of natural habitat designated as a Pre-Approved Mitigation Area in the NC-MSCP. This area, the Merriam Mountains, is

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one of the largest remaining blocks of natural habitat west of Interstate 15 in the Pre-Approved Mitigation Area. The quality of the habitat on the site is rated in the NC-MSCP as moderate to very high. The site is mountainous, with steep, rocky slopes. Gopher Canyon Creek runs through the site. The South Fork of Moosa Canyon also runs from the northern to the northeastern area of the project site.

The project site supports a huge variety of native wildlife, from large mammals such as mountain lions and mule deer to reptiles and amphibians, and numerous bird species, including the federally listed Coastal California gnatcatcher. Flora on the site include large blocks of Southern Mixed Chaparral with interspersed patches of Diegan Coastal Sage Scrub, Coast Live Oak Woodlands, and Southern Willow Scrub.

**b. Inclusion of the Newland Project in the 2017 Draft North County MSCP as a Private Hardline Project Is Improper.**

As part of its process in preparing a public review draft NC-MSCP, the County has developed a "Working Draft of the North County Plan," dated May 23, 2017. The 2017 Draft MSCP Plan includes Section D.4, Private Hardline Preserves, with a notation, "(Pending Board Approval/Pending Concurrence from Wildlife Agencies)." Hardline areas are those in which landowners have negotiated with the Wildlife Agencies and the County for areas that will be set aside as preserve lands in perpetuity. The Newland project is included in the list of "Private Hardline Preserves" in Section D.4.1.

The hardline Preserve configuration in the proposed Newland project has not been agreed upon by the Wildlife Agencies, nor has it been approved by the County Board of Supervisors. The Sierra Club's understanding is that there are no entitlements pertaining to the site. Section D.4 states, "[A]t the applicant's request, this project is being presented in this chapter of the North County MSCP..." To include a project that has no approvals in the Hardline Projects section of the NC-MSCP "at the applicant's request" is inappropriate, and we request that it be removed.

Also, in Chapter 5 of the 2017 Draft North County Plan, Figure 5-11 shows the Newland project site as a "Private Hardline Area." We submit that this designation is not correct, as explained above, and request that figure 5-11 be corrected to show the Newland project site in its current condition. There may be other references to the Newland project site as a Hardline Area in the 2017 Draft North County Plan. If so, we request that they be corrected or eliminated.

**c. Mitigation for Project Impacts to Environmental Resources Should Be On-Site.**

The conservation objective for MSCP lands has always been that 75% of the lands be conserved, with up to 25% developed. In their March 12, 2015, comment letter on the

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Newland project Notice of Preparation (NOP), the California Department of Fish and Wildlife (DFW) stated:

Based on past meetings with the County, the Department has provided the following tenets that will guide any hardlined agreement negotiations for the Project:

d) The project should achieve a 25 percent development and 75 percent preservation ratio on-site to the maximum extent practicable; initial proposals only showed an approximate 60:40 ratio. For any portion of the 75 percent conservation that cannot be achieved on-site, the balance should be met by contributing land that adds value to the Merriam Mountains connection, preferably in the same NC-MSCP planning unit.

(DFW Comment Letter, page E-4.)

The project proposes off-site mitigation of 211.8 acres east of Ramona. Although the proposed mitigation site appears to be in the NC-MSCP Planning Area and contains Diegan coastal sage scrub, it does not contribute value to the Merriam Mountains connection. Please confirm whether or not the proposed mitigation site is in the NC-MSCP Planning Area.

The conservation should be on-site, not at a distant location. And the conservation achieved should be 75%. The project should be redesigned to achieve a 75% conservation level on-site.

**d. The Newland Project Will Fragment a Core Area of Habitat for Wildlife Contrary to the 2017 Draft MSCP Plan.**

**i. The Project Is Inconsistent with the Goal of the 2017 Draft MSCP Plan to Preserve Large Blocks of Habitat.**

One goal identified in the 2017 Draft MSCP Plan is to “[p]reserve with large blocks of contiguous natural vegetation communities to support populations of covered species, which are linked to each other and areas of protected habitat adjacent to the Plan area.” (2017 Draft MSCP Plan, Chapter 5, p. 3.)

The Newland development is proposed for the southern half to two-thirds of the project site. It will cover most of that portion of the site, with the exception of two blocks of open space (DEIR, p. 747, Map of Wildlife Connectivity [identifying Blocks 2 and 3]) and several corridors linking the blocks internally and to the open space on the exterior of the project site. By significantly reducing the existing habitat, the Newland project violates the above-stated Goal for the 2017 Draft MSCP Plan.

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Instead, the Project should implement the list of “Conservation Actions” identified in the 2017 Draft MSCP Plan, which would help to protect this core area of valuable habitat as a NC-MSCP Preserve.

### **ii. The Project’s Wildlife Corridors Are Inadequate.**

The Draft EIR’s Wildlife Connectivity map (DEIR, p. 747) shows Corridors A through D, which are proposed to link the remaining open space areas throughout the project and to open spaces areas outside the project. However, there are problems with these corridors, as some of them cross roadways, which is hazardous for wildlife and vehicles. The DEIR should incorporate the guidelines for wildlife crossing structures and wildlife fencing, natural vegetation, and natural lighting identified in the 2017 Draft MSCP Plan. (See 2017 Draft MSCP Plan, p. 5-85, “Wildlife Crossings and Covered Transportation Projects”; see also 5-86 and 5-87 [Table 5-10 lists “Impact Minimization Measures to Facilitate Movement Across Roadways”].) All the information is available for the planning of wildlife crossings that would help wildlife move safely under and over roadways. These guidelines and measures should be applied to Camino Mayor, which crosses extensively through “Block 1,” the large remaining block of open space at the north end of the Newland project site. Special attention should be given to providing adequate undercrossing(s) of Mesa Rock Road, which crosses the link between open space Blocks 2 and 3.

In addition to the roadways that cross wildlife corridors, the proposed project would significantly increase the volume of traffic on nearby roads. Deer Springs Road would be reconstructed to accommodate the increased traffic. Wildlife crossings should be designed and built as part of the Deer Springs Road project that would help wildlife move safely across the busy road. No wildlife undercrossings are proposed for Sarver Lane, which would no doubt carry significant traffic through open space areas.

Other existing roads that would be impacted by the traffic from the Newland project include Twin Oaks Valley Road and Buena Creek Road. The Draft EIR should consider how wildlife undercrossings can be developed on these roads to allow animals to safely cross the roads.

I-15 is a major barrier to wildlife movement and habitat connectivity. There is currently an undercrossing of I-15 at Deer Springs Road that some animals may use. The Newland project proposes that there would be future improvements to the I-15/Deer Springs Road interchange. However, it is not clear when those improvements would occur or who would be responsible for them. Is Caltrans the agency responsible for planning, financing and constructing the interchange? How can viable wildlife undercrossings be included as part of the interchange improvement project?

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Another problem with the proposed wildlife corridors is that many of them are adjacent to the housing developments. Edge effects can reduce the effectiveness of the corridor for wildlife use. Also, it appears there may be extensive grading that would impact the corridors. In fact, Corridor D appears to be completely graded. Corridor D is also very long and narrow, which reduces the effectiveness of the corridor for wildlife movement. The graded areas would require re-planting, presumably with fire-resistant vegetation. Also, there would be fuel modification areas around the development that require thinning and/or replacement of natural vegetation. For many species of animals, in order to function effectively, a corridor needs to have a good vegetation cover.

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The Draft EIR should explain to what extent the "Conservation Actions" specified in the 2017 Draft MSCP Plan (2017 Draft, p. 5-84), which were developed to insure effective wildlife corridors, have been incorporated into the Newland project plan.

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The Newland Project does not follow the goals, guidelines, and recommended actions of the 2017 Draft MSCP Plan. Since the project site is such an important core and linkage area in the NC-MSCP, any project approvals should be deferred until the NC-MSCP is released to the public, so that the public can review the project vis-à-vis the NC-MSCP.

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### iii. The Project's Trails Should Not Cross Preserve Areas.

It is a tenet of Wildlife Preserve design that human activities should be sited outside the Preserve areas to avoid disturbance of wildlife activities and damage to habitat. The California Department of Fish and Wildlife letter stated, "Based on our past meetings with the County, the Department has provided the following tenets that will guide any hardlined agreement negotiations for the Project: h) Proposed trails need to be compatible with habitat preservation for wildlife." (DFW March 12, 2015 Comment Letter, p. 4.)

The 2017 Draft MSCP Plan, "Conservation Actions," states:

6) Ensure any public passive recreational access within conserved lands is compatible with and will not adversely affect, conservation goals and objectives.

7) Minimize threats and stressors to covered species and natural vegetation communities.

(2017 Draft MSCP Plan, Section 5, p. 3.)

The Newland project proposes trails in Block 1 of the Preserve. (See DEIR, Project Description, p. 761). These trails include a 3-mile loop trail and an equestrian

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trail. These trails should not be located in the Preserve as they would impact wildlife activity patterns and habitat. In addition, they are sited in a particularly important part of the Preserve – where it links to Pre-Approved Mitigation Area lands to the west and north.

Siting trails in this Preserve area would greatly increase human activities (including horses and dogs) and should be avoided. We request the EIR identify non-Preserve areas where trails and equestrian activities would be appropriate.

**e. The DEIR Should Analyze Why the Project Does Not Conform to the Resource Protection Ordinance.**

The Project does not appear conform to the Resource Protection Ordinance (RPO). The DEIR states the Project plan proposes to amend the RPO to allow an exemption for this project. (DEIR, Appendix H-2, p. 7.) However, the DEIR fails to explain why the project does not conform to the RPO. Please provide an explanation.

**III. The Draft EIR Fails to Adequately Analyze the Project's Fire Safety Impacts.**

The Sierra Club closely identifies the risks to the NC-MSCP and associated Pre-Approved Mitigation Area wildlands with the presence of human activities and associated increased risks of wildfires. The Newland project is extraordinary in that the proposed Merriam Mountains site would increase from a present population of zero to a population of more than 6,000. With that population expansion comes enormous increases in activities in the Wildlands urban interface fire zone.

The primary concern of wildfires is heightened by Newland's location in the highest risk fire zone category in the entire County of San Diego - the "Very High Fire Hazard Severity Zone." The Draft EIR provides the following explanation of this fire risk:

The proposed project is situated in an area that, due to its steep terrain, heavy fuels, adjacent ignition sources, and fire history, is subject to periodic wildfire. The project Site and the nearby communities of Castle Creek, Hidden Meadows, and Lawrence Welk Resort are all located in a Very High Fire Hazard Severity Zone, as designated by CAL FIRE (EIR, Appendix N). Wildland fires are a common natural hazard in most of San Diego County and southern California.

(DEIR, Section 2.8, p. 17.)

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The Sierra Club believes the risks to human life and natural resources from steep slopes, Santa Ana winds, and old growth chaparral as far too severe to consider for development.

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**a. Questions Regarding Newland's Wildland Fire Evacuation Plan.**

Newland's Fire Evacuation plan's first sentences begin with disturbing and dangerous assumptions for future residents.

NOTE: Pages 1 through 6 are to be the focus of the homeowner evacuation educational outreach efforts. These pages will be available on the community's HOA Website.

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The Wildfire Evacuation Plan's assumption of residents having access to their electronics while evacuating is not realistic for residents.

Please describe in detail the following:

- What considerations of Santa Ana wind conditions and the accompanying high probability of disabled electrical supplies and telephone service have been given by the County with this online evacuation plan?
- Has the County staffs' considered evaluations of the 2003 and 2007 wildfires in relation to functional, non-overloaded cell towers or landline phone service lines been applied to these Newland Sierra evacuation circumstances in the Fire Protection Plan?
- How does County Staff explain to concerned taxpayers as to why the experiences of the 2003 Cedar Fire and 2007 Witch Fire as far as cell phone and land line service failures are being ignored in the DEIR in relation to instructions to residents?
- What motivated the County Planning and Development Service to select Dudek to construct the Wildland Fire Evacuation Plan for the Deer Springs Fire Protection District, while simultaneously having Dudek acting as Newland Sierra's DEIR consultant? Is such an arrangement not a conflict of interest for the County of San Diego?
- Did the Deer Springs Fire District Board of Directors evaluate, vote or in any manner verify and approve the Wildland Fire Evacuation Plan by Dudek, Newland's preparer of the Draft EIR? The following quote from the Wildland Fire Evacuation Plan suggests there has been no actual verification or approval of

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this Wildland Fire Evacuation Plan by the Deer Springs Fire Protection District Board.

- “The only published evacuation information specific to the project vicinity, and including the Newland Sierra project site, was prepared by the Deer Springs Fire Safe Council in cooperation with the Deer Springs Fire Protection District.”

(Wildland Fire Evacuation Plan, p. page 7.)

- What safeguards are in place for citizens to be assured the most comprehensive, conservative and safety minded fire protection plans are achieved?
- Did the County of San Diego Planning and Development Services utilize the extensive expertise of the San Diego County Office of Emergency Services in evaluating the Newland Project and evacuation plan?
- Were there reports, meeting commentary, exchanges of information or professional critiques regarding the Newland Wildland Fire Evacuation Plan by the San Diego County Office of Emergency Services?
- Was there any professional approval of the Dudek Wildland Fire Evacuation Plan by the San Diego County Office of Emergency Services?
- What, if any, was the date of any public agenda, public comment, discussion and vote on the Fire Protection Plan?

**b. Questions Regarding the Project’s Consistency with San Diego County’s Office of Emergency Services.**

The Office of Emergency Services (OES) coordinates the overall county response to disasters. OES is responsible for alerting and notifying appropriate agencies when disaster strikes; coordinating all agencies that respond; ensuring resources are available and mobilized in times of disaster; developing plans and procedures for response to and recovery from disasters; and developing and providing preparedness materials for the public.

The Draft EIR lauds the OES expertise in developing a comprehensive emergency management system. The Draft EIR states:

The Operational Area Emergency Plan describes a comprehensive emergency management system, which provides for a planned response to

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disaster situations associated with natural disasters, technological incidents, terrorism, and nuclear-related incidents. It delineates concepts relating to various emergency situations, identifies components of a comprehensive emergency management system, and describes the overall responsibilities for protecting life and property and assuming the overall well-being of the population.

(Draft EIR, Section 2.8, p. 12.)

Despite these statements, the following questions appear to be unanswered in the Draft EIR:

- Where and how does the Fire Protection Plan demonstrate consistency with the San Diego County OES, the ultimate authority on County emergencies?
- Where is the demonstrated coordination, and or approval, of the Fire Protection Plan with OES or to the United Disaster Council, the joint powers authority comprised of the 18 cities and San Diego County?
- Has the City of Escondido fire department been appraised of, and involved with the Newland fire protection plan?
- How is it appropriate for the Planning and Development Services to rely upon proponent-employed consultants instead of seeking counsel from the trained professionals at OES who administer the CERT training for emergencies?

**c. Questions Regarding the Community Emergency Response Team Program.**

During the first few hours and days after a disaster strikes, emergency services could be overwhelmed, leaving families, neighborhoods and businesses on their own for hours or days. After the devastating Cedar fire of October 2003, the City of San Diego sought new solutions to meet this vital need. A new community based program called Community Emergency Response Team (CERT) was developed by the San Diego Fire-Rescue Department.

San Diego Fire-Rescue personnel train and empower citizens in safe, effective neighborhood CERT teams. CERT San Diego instructors teach citizens to take life-saving action to help families, neighbors, businesses and communities get through the first few hours or days when emergency services are overwhelmed. More information regarding the CERT program can be found on the City of San Diego's webpage on CERT San Diego: <https://www.sandiego.gov/fire/services/cert>.

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We have the following concerns regarding the project's emergency response program:

- Why has the San Diego County CERT training not been included as part of the "evacuation educational outreach efforts" in the Wildland Fire Evacuation plan?
- Why was the emergency safety training of the County's CERT program specific to Deer Springs not mentioned in the Wildland Fire Evacuation Plan?
- On August 11, 2017, one of the Co-Chairs of the Sierra Club Conservation Committee spoke with the local representative for CERT training specific to the Deer Springs area, Mr. Marc Weissman. Mr. Weissman's contact information was located on the following link: [http://www.sandiegocounty.gov/oes/community/oes\\_jl\\_CERT.html](http://www.sandiegocounty.gov/oes/community/oes_jl_CERT.html), which also provides additional information regarding the CERT program. Mr. Weissman validated the Sierra Club's concerns regarding resident safety. Mr. Weissman also stated that he had not been coordinated with, or even contacted, regarding the Project's Wildland Fire Evacuation Plan or the Fire Protection Plan. Has there been any coordination with the CERT program?

Coordination between the applicant, the applicant's consultants, the San Diego County Office of Emergency Services, and the acclaimed CERT safety program is imperative to ensure that the evaluations and recommendations of the regional and local fire emergency experts are incorporated into the Project analysis.

Wildland fire may be a common natural hazard in San Diego County. But, construction in a Very High Fire Hazard Severity Zone is a senseless gamble with over 6,000 potential residents. Due to that fatal flaw, the project fails the test of common sense safety and must be rejected.

#### **IV. Questions Regarding Consultation with Native American Tribes.**

The Governor's Office of Planning and Research published a May 2015 planning guide entitled, "Fire Hazard Planning: General Plan Technical Advice Series."

The Planning Guide explains:

State planning law requires consultation with California Native American Tribes during the local planning process for the purpose of protecting Traditional Tribal Cultural Places. Tribes may have unique knowledge that

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allows for the protection of cultural places while also allowing for fire mitigation and suppression.

For purposes of consultation with tribes, as required by Government Code Sections 65352.3 and 65562.5, the Native American Heritage Commission (NAHC) maintains a list of California Native American Tribes with whom local governments must consult. The NAHC's "California Tribal Consultation List" provides the name, address, and contact name for each of these tribes; and telephone, fax and email information if available. The tribal contact list is developed and maintained by the NAHC, under authority granted in Government Code Sections 65092, 65352 and 65352.3. Prior to initiating consultation with a Tribe, the city/county must contact the NAHC for a list of Tribes to consult with. For questions about the list, please contact the NAHC at [www.nahc.ca.gov](http://www.nahc.ca.gov). OPR developed Tribal Consultation Guidelines to provide information on how and when to conduct consultation with California Native American Tribes.

(Fire Hazard Planning: General Plan Technical Advice Series, p. 14, accessed via [https://www.opr.ca.gov/docs/Final\\_6.26.15.pdf](https://www.opr.ca.gov/docs/Final_6.26.15.pdf).)

In light of the important resource that tribal consultations serve, the Sierra Club has the following questions:

- How many Tribal members, and from what Tribal Bands, were consulted regarding Government Code Sections 65352.3 and 65562.5?
- What was the duration of total hours and number of days of the Tribal consultations?
- Were there physical evaluations of the entire project areas?
- Were the results of the project consultation identical to those of the Merriam Mountains predecessor project?
- Was the same consultation report information from the Merriam Mountains project utilized for the Newland Sierra project?
- Were there any alterations of the Newland Sierra plans made to allow for further fire protection of cultural places?

The Planning Guide also explains:

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Local governments must adhere to Government Code Section 65352.3 and the provisions of Senate Bill 18 (2004), requiring local governments to consult with Tribal Governments prior to amending the General Plan and to provide notice to tribes at certain key points in the planning process. These consultation and notice requirements apply to adoption and amendment of both general plans (defined in Government Code §65300 et seq.) and specific plans (defined in Government Code §65450 et seq.). Many activities related to fire hazard mitigation can impact tribal cultural sites and close coordination with Tribal Governments is imperative to protect such sites from permanent damage. In addition, Tribal Governments may have insight into fire mitigation practices that can be shared with local governments and fire professionals.

(Fire Hazard Planning: General Plan Technical Advice Series, p. 12.)

In light of these requirements, the Sierra Club has the following questions:

- What date were tribal members contacted regarding amendments to the General Plan for Newland Sierra?
- How were tribal members made aware of the intense land use changes proposed by the project's General Plan amendments?
- How many Tribal members participated in the consultations concerning the general plan amendment's impacts to their culture, history and spiritual sites?
- At what key points in the planning process were Tribal Members again consulted?
- Were Tribal Members alerted that developer plans are entirely discretionary actions subject to review by the Planning Commission and County Board of Supervisors?
- Were the Tribal members allowed to survey the entire Newland Sierra site?
- Were sites subject to fire mitigation inspected and approved by tribal members to insure protection of cultural items and sacred shrines?
- How many sites were inspected and by how many Tribal Members?

California Native American Cultural Places SB 18 refers to Public Resources Code §5097.9 and 5097.995 to define cultural places. Public Resources Code §5097.9 refers to Native American sanctified cemeteries, places of worship, religious or

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ceremonial sites, or sacred shrines. Public Resources Code §5097.995 refers to Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources pursuant to Section 5024.1, including any historic or prehistoric ruins, any burial ground, and any archaeological or historic site.

- Were the applicable provisions and safeguards of Senate Bill 18 an integral part of the discussion with tribal members as it applies to cemeteries, places of worship, ceremonial and sacred sites?
- Were specific, previously identified sites brought to the attention of the Tribal members selected to help preserve them?
- Were all streams, pools and ponding sites identified, described and physically inspected by Tribal Members?

**V. The County's Refusal To Disclose Underlying Data Violates the Public Records Act and is Not Permissible Under CEQA.**

On July 27, 2017, the County of San Diego improperly refused to disclose the Excel spreadsheets supporting the emission calculations in Appendices G and K of the Project's Draft EIR. In relevant part, the County claims:

[T]hese documents are not public records as defined in the California Public Records Act because they do not contain information prepared, owned, used, or retained by the County pursuant to Government Code section 6252(e). Instead, these documents are prepared, owned, used, or retained exclusively by Dudek, the County's environmental consultant for the Newland Sierra draft EIR. Furthermore, ... [t]he County does not possess the unlocked Excel spreadsheets ... and the County may not require Dudek to disclose these files.

**a. The County's Refusal to Disclose Consultant's Files Violates the Public Records Act.**

First, the County's claim that the Excel spreadsheets with the data supporting the Draft EIR's emission calculations are not "used ... by the County" is false. The County's Draft EIR uses these spreadsheets to arrive at its conclusions regarding the project's air quality and greenhouse gas emissions impacts.

The California Supreme Court has previously rejected attempts by agencies to argue that an agency does not possess records if they are not in the agency's physical possession.

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Obviously, an agency engaged in the conduct of public business will use and retain a variety of writings related to that business, including those prepared by people outside the agency .... Appellate courts have generally concluded records related to public business are subject to disclosure if they are in an agency's actual or constructive possession. (See, e.g., *Board of Pilot Comrs. for the Bays of San Francisco, San Pablo and Suisun v. Superior Court* (2013) 218 Cal.App.4th 577, 598; *Consolidated Irrigation Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, 710.) “[A]n agency has constructive possession of records if it has the right to control the records, either directly or through another person.” (*Consolidated Irrigation*, at p. 710.)

(*City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608, 622-623.)

The Supreme Court also noted that federal courts have remarked that an agency's public records “do not lose their agency character just because the official who possesses them takes them out the door.” (*Id.* at 623, citing *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy* (D.C. Cir. 2016) 827 F.3d 145, 149.) Furthermore, a state or local agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter. (Cal. Gov't Code § 6253.3.)

The Supreme Court rejected the argument now advanced by the County:

[T]he City argues that public records are only those an agency is able to access “directly.” But this strained interpretation sets legislative intent on its head. The statute's clear purpose is to prevent an agency from evading its disclosure duty by transferring custody of a record to a private holder and then arguing the record falls outside CPRA because it is no longer in the agency's possession. Furthermore, section 6270 does not purport to excuse agencies from obtaining public records in the possession of their own employees. It simply prohibits agencies from attempting to evade CPRA by transferring public records to an intermediary not bound by the Act's disclosure requirements.

(*City of San Jose*, *supra*, 2 Cal. 5th at 623–24.)

Courts have found that agencies violate the California Public Records Act when they fail to disclose consultant's records, including the underlying material on which consultant relied. (See, e.g., *Cnty. Youth Athletic Ctr. v. City of Nat'l City* (2013) 220 Cal. App. 4th 1385 [court concluded the records were public records, and city had an ownership interest in the field survey material and it had the right to possess and control it].)

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**b. The County's Refusal to Disclose Consultant's Files Violates CEQA.**

"A draft environmental impact report, environmental impact report, negative declaration, or mitigated negative declaration prepared pursuant to the requirements of this division shall be prepared directly by, or under contract to, a public agency." (Cal. Pub. Res. Code § 21082.1.) An agency may comply with CEQA by adopting EIR materials drafted by the applicant's consultant, but only if the agency independently reviews, evaluates, and exercises judgment over that documentation and issues it raises and addresses. (*Friends of La Vina v. Cty. of Los Angeles* (1991) 232 Cal. App. 3d 1446.)

"Before using a draft prepared by another person, the lead agency shall subject the draft to the agency's own review and analysis. The draft EIR which is sent out for public review must reflect the independent judgment of the lead agency. The lead agency is responsible for the adequacy and objectivity of the draft EIR." (14 Cal. Code Reg. § 15084, subd. (e).)

Here, the County argues that it need not disclose the excel spreadsheets supporting the emission calculations because "these specific documents were not reviewed by the County as part of the California Environmental Quality Act (CEQA) review for this project." This argument runs directly counter to the requirement under CEQA that the Draft EIR must reflect the lead agency's independent judgment. Since the County is responsible for verifying this data is accurate, the County must disclose the data that purportedly supports the consultant's conclusions.

**CONCLUSION**

The Draft EIR must be revised with this new information and then recirculated for public comment. (CEQA Guidelines section 15088.5.) Pursuant to Public Resources Code section 21092.2, we request all notifications regarding this Project.

Thank you for your consideration.

Sincerely,



Josh Chatten-Brown

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