O-6 ENDANGERED HABITATS LEAGUE (SHUTE MHALY)

Comment Letter O-6

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Via E-Mail and FedEx

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Re: Otay Ranch Village 14 and Planning Areas 16 & 19 Draft Environmental Impact Report

Dear Mr. Mattson:

This firm represents the Endangered Habitats League ("EHL") in connection with the proposed Otay Ranch Village 14 and Planning Areas 16 & 19 (hereinafter "Project") and its associated Draft Environmental Impact Report ("DEIR"). EHL is southern California's only regional conservation organization and a long-term stakeholder in County planning efforts. It and its members have a direct stake in maintaining the health of Southern California's unparalleled biodiversity and the native ecosystems that support it. Our client is deeply concerned about the far-ranging environmental impacts that would result from implementation of the proposed Project. O-6-1

The following organizations have reviewed, and endorse, this letter: California Native Plant Society, San Diego Chapter; Environmental Center of San Diego; Preserve Wild Santee; Preserve Calavera; Sierra Club San Diego Chapter; San Diego Audubon Society; and Escondido Neighbors United. This letter represents the comments of EHL and each of the foregoing organizations. O-6-2

After carefully reviewing the DEIR and associated Project documents, we have concluded that the Project would violate federal and state laws governing implementation of Habitat Conservation Plans ("HCP") and Natural Community Conservation Plans ("NCCP"). The Project would place over 340 new homes on roughly 200 acres O-6-3

(identified as PV-1, PV-2, and PV-3) that have been set aside for conservation for decades. These conservation areas were created as part of the San Diego County Multiple Species Conservation Program ("MSCP") and related Subarea Plan adopted pursuant to HCP and NCCP statutes. Unless the plans are amended at both the federal and state levels to provide suitable replacement habitat for developing preservation areas, approving the Project would violate the County's mandatory legal duties under the MSCP and the Subarea Plan. The DEIR does not even acknowledge the existence of these preserve areas, much less grapple with the legal and environmental consequences of developing conserved land. O-6-4 O-6-5 O-6-6

In numerous other respects, the DEIR also fails to comply with the requirements of the California Environmental Quality Act ("CEQA"), Public Resources Code section 2100 et seq. The EIR is "the heart of CEQA." *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 ("*Laurel Heights I*"; citations omitted). It is "intended 'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.' Because the EIR must be certified or rejected by public officials, it is a document of accountability." *Id.* (internal quotations and citations omitted). O-6-7

The proposed Project is a glaring example of the kind of sprawl development that virtually every state and regional planning effort in California today is seeking to contain. Even more troubling, that sprawl would be placed in one of the most environmentally constrained areas of the County. As a result, the Project would have devastating impacts across the board, including impacts on wildlife habitat and biodiversity, climate change, water supply, water quality and aesthetics. And particularly alarming given the state's recent catastrophic wildfires, the Project would bring over four thousand new residents to a site classified by the California State Fire Marshall as a high hazard fire severity zone—without any adequate means of evacuation. O-6-8 O-6-9 O-6-10

But very few of these impacts or inconsistencies of the Project can be discerned from reading the DEIR. The DEIR fails to provide a legally defensible analysis of and mitigation for the Project's significant impacts. It also fails to identify or analyze a reasonable range of alternatives. As a result, the DEIR fails to meet CEQA's fundamental purpose of providing disclosure to the public of the Project's environmental effects. O-6-11 O-6-12 O-6-13 O-6-14

Where, as here, the environmental review document fails to fully and accurately inform decisionmakers and the public of the environmental consequences of proposed actions, it does not satisfy the basic goals of CEQA. *See* Pub. Res. Code § 21061. As a result of the DEIR's numerous and serious inadequacies, there can be no meaningful public review of the Project. The magnitude of the revisions required to create a legally adequate EIR will require recirculation of a revised DEIR, not just publication of a Final O-6-15 O-6-16

EIR, to give decisionmakers and the public an accurate understanding of the environmental issues at stake. *See* CEQA Guidelines § 5088.5(a)(4). O-6-16 Cont.

This letter, along with the April 15, 2018 biological resources report prepared by Robb Hamilton, Hamilton Biological (Exhibit 1), the April 9, 2018 report on the Quino Checkerspot Butterfly prepared by Ken Osborne and Gregory Ballmer (Exhibit 2), the April 11, 2018 hydrological report prepared by Richard Horner (Exhibit 3), the April 12, 2018 wildland fire report prepared by Dr. Chris Lautenberger, REAX Engineering, (Exhibit 4) and the March 30, 2018 traffic operations evacuation report prepared by Neal Liddicoat, Griffin Cove Transportation Consulting (Exhibit 5) constitute our comments on the DEIR. Please refer to these reports for further detail and discussion of the DEIR's inadequacies. As these reports also constitute comments on the DEIR, we request that the County respond to both the comments in this letter and to each of the comments in the attached reports. O-6-17

I. Approval of the Proposed Project Would Violate the County's Subarea Plan and Federal and State Law.

The applicant's development plan is predicated on a fiction that the County can approve development of the entire Project as proposed. In fact, the applicant plans to build at least 340 new homes in large sections of Village 14 that are not available for development. Rather, these areas within Proctor Valley—identified as PV-1, PV-2, and PV-3—were set aside *for preservation* as part of the County's 1997 Multiple Species Conservation Program, County of San Diego Subarea Plan ("Subarea Plan"). The Subarea Plan is a combined HCP and NCCP adopted pursuant to state and federal law. As such, and as discussed below, the County has a mandatory duty to abide by the terms of the Subarea Plan. O-6-18 O-6-19

Because they have been identified for preservation, any approval that includes development in areas PV-1, PV-2, or PV-3 would blatantly violate the Subarea Plan and therefore be unlawful. It is shocking that the County's DEIR does not acknowledge that these areas have been set aside for preservation and cannot be developed under the Subarea Plan without a major amendment to that plan and concurrence from federal and state wildlife agencies. Thus, before it can proceed with its consideration of the Project application, the County must require that the applicant remove any proposals to develop areas PV-1, PV-2, and PV-3 (or obtain a major amendment of the Subarea Plan) and revise and recirculate the EIR to account for that change. O-6-20 O-6-21 O-6-22

A. Subarea Plan Legal Background

Section 9 of the federal Endangered Species Act ("ESA") and its implementing regulations prohibit any person from "taking" a threatened or endangered species. 16 U.S.C. §1538(a)(1); 50 C.F.R. § 17.31. Congress created two "incidental take" exceptions to section 9's take prohibition. One of these exceptions, section 10 of the ESA, authorizes the Secretary of the Interior to permit activities otherwise prohibited under the ESA's Section 9 "take" provisions under certain very limited circumstances. 16 U.S.C. §1539. The Secretary has largely delegated this authority to the United States Fish and Wildlife Service ("FWS"). Take may be authorized under Section 10 through issuance of an incidental take permit for activities carried out in accord with an approved HCP. 16 U.S.C. §1539(a). Section 10(a)(1)(B) authorizes the FWS to issue private parties and local governmental entities take permits in accordance with an HCP for "any taking otherwise prohibited by section 1538(a)(1)(B) [section 9] of this title if such taking is incidental to and not the purpose of the carrying out of any otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). O-6-23

Before issuing a take permit, the FWS must make certain findings including: (1) the take will be incidental to an otherwise lawful activity; (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impact of such taking; (3) the applicant will insure that adequate funding for the conservation plan will be provided; (4) the taking will not appreciably reduce the likelihood of the survival and recovery in the wild; (5) an [*sic*] all other measures required by FWS have been met; and (6) FWS has received the necessary assurances that the HCP will be implemented. ESA § 10(a)(2)(B), 16 U.S.C. § 1539(a)(2)(B); 50 C.F.R. § 222.22(c)(2). To that end, an HCP must include "objective criteria" against which to assess and enforce it. *Klamath-Siskiyou Wildlands Ctr. v. National Oceanic and Atmospheric Administration* (N.D. Cal. 2015) 99 F.Supp.3d 1033, 1054. And "[a]ny person holding a [take permit] and any person acting under authority of such permit must comply with all conditions of the permit and with all applicable laws and regulations governing the permitted activity." 50 C.F.R. § 13.48; *see also* 50 C.F.R. 17.22(b)(3). O-6-24

The California Endangered Species Act ("CESA") also prohibits "take" of species determined by the Fish and Game Commission to be endangered or threatened. Fish & Game Code § 2080. State law authorizes the California Department of Fish and Wildlife ("DFW") to enter into agreements with any person or public entity to engage in comprehensive natural community conservation planning. *Id.* § 2810. Under this program, NCCPs prepared prior to January 1, 2002 could authorize the take of identified endangered or threatened species. *Id.* § 2830(a). However, NCCPs must be accompanied by implementation agreements that require "specific terms and conditions, which, if violated, would result in the suspension or revocation of the permit [to take species]." *Id.* O-6-25

§ 2820(b)(3). Specifically, take permits must be revoked if a plan participant "approves any plan or project without the concurrence of the wildlife agencies that is inconsistent with the objectives and requirements of the approved plan" or "the level of take exceeds that authorized by the permit." *Id.* § 2820(b)(3)(C)-(D). O-6-26

Here, in addition to these statutory and regulatory obligations, the take permit issued for the County's Subarea Plan expressly provides that "authorization granted by this permit is subject to compliance with . . . County of San Diego Subarea Plan, and Implementing Agreement . . . which are hereby incorporated into the permit." Subarea Plan Take Permit, Condition E. Indeed, the DEIR acknowledges that the Subarea Plan only allows for take of covered species if "the County satisfies the conservation and mitigation goals set forth in the MSCP County Subarea Plan Implementing Agreement." DEIR at 2.4-62. As discussed below, both the Subarea Plan and the Implementing Agreement prohibit the applicant's proposed development in the areas designated PV-1, PV-2, and PV-3. As a result, development in these areas would violate the Subarea Plan, the associated Implementing Agreement, and state and federal law. O-6-27 O-6-28

B. The Subarea Plan and Associated Documents Set Aside for *Preservation* Proposed Development Areas PV-1, PV-2, and PV-3.

The County cannot approve development that includes areas PV-1, PV-2, and PV-3 because the Subarea Plan clearly provides that no take authorization may be issued for those areas. O-6-29

The Otay Ranch development, as originally approved, included development of PV-1, PV-2, and PV-3 but faced the significant risk that FWS and DFW would not approve it for inclusion in the proposed MSCP due to the severe habitat fragmentation that the development would cause. As the DEIR describes, portions of the proposed Project are part of the Otay Ranch General Development Plan/Subregional Plan ("GDP/SRP"), which the County adopted in 1993. DEIR at 2.4-1. That approval identified areas for preserved open space and other areas slated for a series of development "villages" within the existing 23,000 acre Otay Ranch. Following this approval, however, the property owner and the County were required to obtain take authorizations from FWS and DFW before development could proceed as anticipated in the GDP/SRP. The County, City of San Diego, and City of Chula Vista were pursuing approval of the proposed MSCP, a combined HCP/NCCP that would cover large sections of eastern San Diego County, including Otay Ranch. It was proposed that open space identified in the GDP/SRP would be incorporated into the MSCP Preserve for conservation. O-6-30 O-6-31 O-6-32 O-6-33 O-6-34

During the MSCP process, FWS and DFW informed the County that, as approved, the Otay Ranch project would not satisfy the requirements for establishing an HCP and NCCP under the ESA and CESA. In a joint April 14, 1995 letter, FWS and DFW (then the California Department of Fish and Game) informed the County that the previous approvals for development of Otay Ranch were inconsistent with very purposes of the HCP and NCCP programs: O-6-35 O-6-36

> Proposed development on Otay Ranch would fragment [the existing] large habitat block and thus create serious problems for achieving the basic tenets upon which the regional habitat conservation program is based.

See Letter to R. Copper, County of San Diego, April 14, 1995, attached as Exhibit 6. Before they could approve the proposed MSCP, the agencies identified eight proposed development areas that "need[ed] to be resolved." *Id.* at 2. One of these areas was area "F) mid-Proctor Valley," which encompassed the Project site. *See id.* at 2, Figure 2. FWS and DFW therefore recommended that the MSCP "Eliminate development from the middle Proctor Valley area." *Id.* at Table 1. O-6-37

In response to the FWS and DFW concerns, the Baldwin Company (which owned the Otay Ranch entitlements) outlined a proposed agreement between these agencies, the Company, the County, and the City of Chula Vista in a November 10, 1995 letter ("Baldwin Agreement").[1] The cornerstone of that agreement was the proposal to eliminate certain development entitlements in the Otay Ranch GDP/SRP Plan and to "designate such areas as part of the MSCP Preserve." Subarea Plan, Attachment 1 at 1. Among the areas where entitlements were eliminated in favor of a preserve designation were three areas in "Central Proctor Valley" labeled PV-1, PV-2, and PV-3. *Id.* at Attachment 1, Exhibit 1. In exchange for preserving these areas, the Company would add new development areas to the Otay Ranch GDP/SRP that previously were set aside for preservation and the agencies would "remove such areas from the Otay Ranch Preserve." *Id.* at 2-3. O-6-38 O-6-39 O-6-40

On February 22, 1996, DFW and FWS agreed to the proposed exchange of planned development areas for preserve areas and clarified other elements of the Baldwin Company's proposed agreement. *See* Letter K. Kilkenny, The Baldwin Company, O-6-41

[1] As discussed herein, that Baldwin Agreement was incorporated into the adopted Subarea Plan and is reproduced with that document, which is available at https://www.sandiegocounty.gov/content/dam/sdc/pds/mscp/docs/SCMSCP/MSCP_County_Subarea_Plan.pdf.

Feb. 22, 1996, attached as Exhibit 7. The agencies acknowledged that they would "process the application for necessary 'take permits' for the development of the Otay Ranch consistent with the land-use entitlements contained in the Otay Ranch GDP/SRP and *as modified by the Agreement*." *Id.* at 3 (emphasis added). O-6-42

The County's adopted Subarea Plan memorializes this land exchange. The Baldwin Agreement is incorporated into the Plan's chapter governing the South County Segment (or "SCS"), in which the proposed Project is located. The Subarea Plan labels areas PV-1, PV-2, and PV-3 as "No Take Authorized" areas, identified in green in Figure 1-2. Subarea Plan at Fig. 1-2, *see also* Fig. 1-3 (labeling these same areas as "Otay Ranch Areas Where No 'Take Permits' Will Be Issued"). The Plan explains that Figure 1-2 depicts "green 'preserve' areas" where development will not occur. *Id.* at 1-3. The Implementing Agreement adopted as part of the County's approval of the Subarea Plan further confirms that these proposed Project areas are designated preserved land. Like the Subarea Plan, the Implementing Agreement between the County, DFW, and FWS designates preserve areas PV-1, PV-2, and PV-3 as areas "Where No Take Permit Will Be Issued." *See* Implementing Agreement at Exhibit F.[2] O-6-43 O-6-44 O-6-45 O-6-46

After adopting the Subarea Plan and executing the Implementing Agreement, the County has consistently recognized that the Baldwin Agreement resulted in new hardline preserve areas, most significantly here areas PV-1, PV-2, and PV-3. For instance, in a 2001 General Plan Amendment Report prepared for the Board of Supervisors, County staff discussed the Baldwin Agreement's land use changes, stating that those changes were being phased into the County's and Chula Vista's land use plans through General Plan amendments as development applications came forward for the applicable planning areas. *See* April 5, 2001, General Plan Amendment Report, attached as Exhibit 8. The Report recognized that these necessary land use changes included "Reduced development in Central Proctor Valley (Village Fourteen)." *Id.* at 2. It further acknowledged that: O-6-47 O-6-48

> All the component parts of the November 10, 1995 [Baldwin] letter related to the expansion or reduction of developable areas, *are included in the MSCP program as adopted by the County of San Diego* (including those areas not owned by The Otay Ranch Company). O-6-49

[2] The complete Implementing Agreement for the MSCP, including the Subarea Plan, is available at https://www.sandiegocounty.gov/content/dam/sdc/pds/mscp/docs/SCMSCP/implementingagreement.pdf.

Id. at 3 (emphasis added). Similarly, in 2002, the Board of Supervisors amended its 1996 Otay Ranch Phase 2 Resource Management Plan to update the plan for conveying open space into the preserve. Otay Ranch Phase 2 Resource Management Plan Amended 2002 (excerpted), attached as Exhibit 9. The *only* amendment to this plan was to replace the original conveyance plan map with a new map that depicted area PV-3 as "Preserve Conveyance Area" and PV-1 and PV-2 as "Balance of Open Space Preserve." *Id.* at Exhibit 14. That is, the Board of Supervisors amended the conveyance plan to memorialize the land exchange incorporated into the Subarea Plan through the Baldwin Agreement. O-6-50 O-6-51

Indeed, both the City of Chula Vista and the County have implemented the Subarea Plan's development and preservation designations that were set forth in the Baldwin Agreement. The City has approved for development as part of Villages 1, 2, 4, 9, 10, and 11 lands that were originally designated as Otay Ranch Preserve in the GDP/SRP. *See* Email from Glen Laube re Baldwin Agreement Follow-up, attached as Exhibit 10 (obtained in response to public information request); Subarea Plan, Attachment 1 at 2-3. In contrast, the County has designated for preservation areas in Villages 13 and 15 that were originally approved for development as part of the GDP/SRP. *See* Exhibit 8 (2001 General Plan Amendment Report); Subarea Plan, Attachment 1 at 2-3; San Diego County General Plan Amendment 98-03. O-6-52 O-6-53 O-6-54

Like the County, DFW and FWS have continued to acknowledge that the Baldwin Agreement's land exchange remains an integral part of the County's Subarea Plan. A 2013 letter from FWS to the County and the City of Chula Vista addresses the "transfer of dedicated lands to the Otay Ranch Preserve . . . consistent with the Baldwin Company letter dated November 10, 1995, and a response from the Service and Department dated February 22, 1996 (i.e., Baldwin Agreement)." *See* June 6, 2013 Letter to B. Albright and G. Halbert, at 1, attached as Exhibit 12. The letter concludes that FWS will continue to work with the agencies for "implementing the[] respective sub areas plans, including the Baldwin Agreement." *Id.* at 2. O-6-55 O-6-56 O-6-57

Consequently, as shown above, in addition to the clear language of the Subarea Plan, all of the agencies associated with approval of that plan have recognized that the Baldwin Agreement remains an integral piece of the plan, including preservation of areas PV-1, PV-2, and PV-3. O-6-58

C. The County's Biological Mitigation Ordinance Does Not Permit Development of Preserve Areas PV-1, PV-2, and PV-3.

Rather than acknowledge the reality that areas PV-1, PV-2, and PV-3 have been set aside of conservation for over two decades, the DEIR contends that these areas are O-6-59

available for development under the County's section 10 take permit if the County can make the required findings set forth in its Biological Mitigation Ordinance ("BMO"). DEIR at 2.4-110 through 2.4-111. The BMO exists to implement the requirements of the County's Subarea Plan and the MSCP. *See* BMO § 86.501 ("implementation of this Chapter will enable the County of San Diego to achieve the conservation goals set forth in the Subarea Plan for the Multiple Species Conservation Plan ('MSCP'); *see also* Subarea Plan at 1-19 ("Conformance with the Plan will be accomplished in part through the Biological Mitigation Ordinance"); Implementing Agreement at 4 (the BMO "implements, in part, the Subarea Plan"). Thus, the County must apply the BMO in a manner that is consistent with the Subarea Plan.

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The Subarea Plan clearly provides that the BMO does not apply to preserve areas PV-1, PV-2, and PV-3.[3] These areas lie within the South County Segment of the Subarea Plan (*see* Subarea Plan at Fig. 1-3) and are governed by provisions of the Plan that apply to that segment. In explaining the BMO, the Subarea Plan sets forth that "[i]t will apply to the lands in the Metro-Lakeside-Jamul Segment . . . as well as *the major and minor amendment areas* for the Lake Hodges and South County Segments." Subarea Plan at 1-19. The Plan's major and minor amendment areas are labeled in maps for the South County Segment and *do not* include preserve areas PV-1, PV-2, and PV-3. Subarea Plan at Figure 1-2.

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Indeed, the BMO generally does not apply in the South County Segment at all (aside from major or minor amendment areas) because that entire segment is designated as either hardline development or hardline preserve. As the DEIR admits, only "Projects that do not have an agreed upon "hardline" boundary must demonstrate conformance with the BMO." DEIR at 2.4-63. In discussing mitigation requirements for the South County Segment, the Subarea Plan explains that the BMO is simply inapplicable because developed and preserved areas have been hardlined:

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> All lands included within the SCS designated for preserve or development have been the subject of negotiation and agreement with the wildlife agencies and the owners. All biological impacts outside of the preserve but within the SCS are covered in the above discussions and need no further mitigation measures . . . .

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[3] As discussed in the Hamilton Report, even if the BMO were applicable to the Project site, the County cannot make the findings under the ordinance necessary to allow the Project to proceed. Exhibit 1 at 4-7 (Hamilton Report).

> Mitigation *for impacts to land outside of the SCS must meet the requirements of the Biological Mitigation Ordinance*.

O-6-65 Cont.

Subarea Plan at 3-32 (emphasis added). Thus, the Subarea Plan does not allow application of the BMO to areas PV-1, PV-2, and PV-3. O-6-66

The EIR/EIS prepared for the entire MSCP confirms the BMO's limited application in the South County Segment. It explains that only three land categories exist in this segment: (1) areas preserved under the subarea plan, (2) areas identified for development in the plan, which would not require additional mitigation for take authorization, and (3) "land that is not now part of the plan," but "subject to the terms of the [BMO]." *See* MSCP Recirculated Draft Joint EIR/EIS ("MSCP DEIR") at 2-38, excerpts attached as Exhibit 13. This "Category 3" land would only "become part of the Subarea Plan through a Minor or Major Amendment to the Subarea Plan." *Id* at 2-45. It does not encompass areas like PV-1, PV-2, and PV-3 which are already included within the Subarea Plan and the South County Segment. As a result, the EIR concludes that "Measures required by the BMO will be applicable *only within the Metro-Lakeside-Jamul segment and amendment areas* of the County Subarea Plan." MSCP FEIR at 31 (emphasis added).[4] O-6-67 O-6-68 O-6-69 O-6-70

Finally, allowing take, through application of the BMO, in preservation areas PV-1, PV-2, and PV-3 would conflict with other clear provisions in the Subarea Plan. As discussed above, the Plan expressly states that these areas are designated "No Take Authorized" and "Areas Where No 'Take Permits' Will Be Issued." Subarea Plan at Figure 1-2, Figure 1-3. It is nonsensical that the BMO could allow take to occur in areas where the Subarea Plan clearly states that no take can occur. O-6-71 O-6-72 O-6-73

In sum, the BMO is inapplicable to areas PV-1, PV-2, and PV-3 and cannot be applied to permit development and the resulting take in those areas absent a major amendment of the Subarea Plan. O-6-74

[4] The MSCP FEIR is available in two volumes on the County's website, at https://www.sandiegocounty.gov/content/dam/sdc/pds/mscp/docs/SCMSCP/MSCPFEIRVol1.pdf and https://www.sandiegocounty.gov/content/dam/sdc/pds/mscp/docs/SCMSCP/MSCPFinalEIRVol2.pdf.

D. Approval of the Project Would Violate the Subarea Plan and Federal and State Law.

Any approval by the County of development in preserve areas PV-1, PV-2, and PV-3 absent a major amendment to the Subarea Plan would blatantly violate the Subarea Plan and its Implementing Agreement, and would expose the County to a cascade of negative legal consequences. O-6-75

To begin with, federal and state law create a mandatory legal duty for the County to abide by the terms of the Plan, including the habitat preservation obligations created by the Baldwin Agreement. *See* Fish & Game Code § 2820; 50 C.F.R. § 13.48. The County would violate this duty if it approves the Project as proposed. O-6-76

Moreover, the County's ability to approve projects under the Subarea Plan's take permit and Implementing Agreement is predicated on compliance with those documents. O-6-77
Violating the terms of the Subarea Plan would result in revocation of the County's take authorization and would halt approval of any developments that are identified in the Plan. *See* Fish & Game Code § 2820(b)(3)(C)-(D) (requiring permit revocation if a "plan participant "approves any plan or project without the concurrence of the wildlife agencies that is inconsistent with the objectives and requirements of the approved plan" or "the level of take exceeds that authorized by the permit"); 50 C.F.R. § 222.22(c)(2) (mandating that FWS receive assurances that an HCP will be observed and implemented); Subarea Plan Take Permit Condition E (take authorization "subject to compliance with, and implementation of" the Subarea Plan). O-6-78

And finally, and as discussed below, approving development of preservation areas PV-1, PV-2, and PV-3 would result in myriad violations of CEQA. O-6-79

II. The DEIR Fails to Comply with CEQA.

A. The DEIR's Description of the Project Violates CEQA.

In order for an EIR to adequately evaluate the environmental ramifications of a project, it must first provide a comprehensive description of the project itself. "An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR." *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 730 (quoting *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193). Furthermore, "[a]n accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity." *Id.* at 730 (citation omitted). Thus, an inaccurate or incomplete project description renders the analysis of significant environmental impacts inherently O-6-80

unreliable. As a result, courts have found that even if an EIR is adequate in all other respects, the use of a "truncated project concept" violates CEQA and mandates the conclusion that the lead agency did not proceed in the manner required by law. *San Joaquin Raptor*, 27 Cal.App.4th at 729-30.

O-6-80 Cont.

Here, the DEIR does not come close to meeting this standard. Most significantly, as discussed above, the Project proposes to develop nearly 200 acres of open space that have been set aside as preserved land for over two decades. Nowhere does the DEIR acknowledge this fact, much less analyze the impact of such a substantial loss of preserved habitat.

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Indeed, absent a major amendment to the Subarea Plan, which the applicant is not presently seeking, the Project cannot legally develop in areas PV-1, PV-2, and PV-3. Thus, at least 340 of the applicant's proposed units cannot be built. *See* Ikeda Maps at pdf p. 1, attached as Exhibit 14. The County must not only revise the DEIR to remove these development areas from the project description, but must revise every part of the DEIR that assumed the Project could include development in those areas. For example, to the extent the DEIR assumed those areas would support Project-related infrastructure or mitigation requiring improvements or ground disturbance (e.g., utilities, drainage facilities, etc.), the analysis must be revised. The alternatives analysis must also be revised. Because the applicant cannot actually build 1,119 homes like the DEIR claims, it is improper to compare alternatives to this oversized version of the Project. Rather, the DEIR must state what amount of development is legally permissible and use that smaller development for purposes of analyzing the Project's impacts, a reasonable range of alternatives, and the feasibility of those alternatives.

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B. The DEIR's Analyses of and Mitigation for the Project's Environmental Impacts Are Legally Inadequate.

1. The DEIR Lacks an Adequate Analysis of Land Use Impacts.

CEQA requires that agencies analyze a project's consistency with applicable land use plans. *See Napa Citizens for Honest Govt. v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 386-87; CEQA Guidelines Appendix G, § X. Inconsistencies with plans that were enacted to protect the environment are significant impacts in themselves and can also be evidence of other significant impacts. *See id.*; *Pocket Protectors v. City of Sacramento* (2005) 124 Cal.App.4th 903, 929. In addition to other planning conflicts, agencies must consider whether a project will "[c]onflict with any applicable habitat conservation plan or natural community conservation plan" like the Subarea Plan. CEQA Guidelines Appendix G, § X(c).

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As discussed above, the Project is irreconcilable with the Subarea Plan adopted by the DFW and FWS. The Project proposes to develop three areas that the Subarea Plan clearly designates as preserved land. The DEIR does not acknowledge this designation and the resulting irreconcilable conflict between the Project and the Subarea Plan. It therefore fails to consider the environmental impacts that would follow the habitat fragmentation and loss of mitigation from developing PV-1, PV-2, and PV-3 contrary to the Subarea Plan.[5]

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Rather than recognize and evaluate impacts associated with this land use conflict, the DEIR misleadingly claims that "the Proposed Project is in conformance with regional and subregional planning documents, including the applicable MSCP Subarea Plans." DEIR at 3.1.3; *see also id.* at 2.4-62 through 2.4-63 (discussing Subarea Plan without acknowledging that areas PV-1, PV-2, and PV-3 are mapped preserve areas). This demonstrably false statement undermines the DEIR as an informational document and violates CEQA. *See Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 322.

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2. The DEIR Lacks an Adequate Analysis of and Mitigation for the Project's Impacts to Biological Resources.

(a) The DEIR Fails to Account for Impacts Related to Developing PV-1, PV-2, PV-3, Which Are Mitigation Lands.

O-6-93

As discussed above, by prohibiting take authorization and adopting the Baldwin Agreement exchange, the Subarea Plan incorporated areas PV-1, PV-2, and PV-3 into the MSCP Preserve. The preserve's purpose is to offset the environmental impacts of development under the MSCP, in accordance with the ESA, the CESA, and CEQA. Thus, the entire MSCP Preserve designated in the Subarea Plan and MSCP, including areas PV-1, PV-2, and PV-3, is mitigation for permitted development under the MSCP. *See* MSCP DEIR (Exhibit 13) at 4.3-180 (significant impacts to covered species "mitigated through the following measures . . . Design and configuration of MHPA preserve (*Figure 2-1*)"),

O-6-94

[5] Additionally, the Subarea Plan and related documents obligate the County to amend its General Plan to recognize the land use exchange set forth in the Baldwin Agreement. As shown above, the County and the City of Chula Vista have implemented these amendments as part of approving development of the planning areas discussed in the Baldwin Agreement. As part of the General Plan amendment for Village 14, the County must amend it General Plan to recognize that areas PV-1, PV-2, and PV-3 are part of the MSCP Preserve.

4.3-183, Figure 2-1; Ikeda Maps at pdf p. 2 (Exhibit 14) (depicting PV-1, PV-2, and PV-3 within preserve mapped in MSCP DEIR Figure 2-1). O-6-94 Cont.

The DEIR proposes to mitigate the loss of PV-1, PV-2, and PV-3 in the same manner as it as mitigates unpreserved areas of Village 14, creating "mitigation" that is entirely illusory. Land that is already preserved cannot be mitigated by merely replacing the same acreage elsewhere. This type of "mitigation" necessarily and logically results in the same net loss of habitat that would occur without any mitigation at all. The project is built and habitat is lost, yet the net amount of preserved land does not increase at all. For this reason, where already-preserved land will be lost, replacing it with equivalent habitat quantity and biological functions and values is only the first step. Additional habitat must then be preserved to attain the net gain in preserved lands needed to claim mitigation. O-6-95 O-6-96 O-6-97 O-6-98

The problem is highlighted by the fact that PV-1, PV-2, and PV-3 were set aside for conservation for the very purpose of allowing development in *other* open space that had originally slated for preservation and has since been approved for development (Villages 1, 2, 4, 9, 10, and 11). Allowing development of PV-1, PV-2, and PV-3 *in addition to* development on these former preservation areas would create a net loss of preserved land from what was originally conceived of in the Otay Ranch GDP/SRP, as well as what was later required in the MSCP Subarea Plan. O-6-99 O-6-100

Moreover, as the County knows well, CEQA forbids deleting or modifying previously-adopted mitigation measures like the MSCP Preserve "without a showing that it is infeasible." *Napa Citizens for Honest Government*, 91 Cal.App.4th at 359; *see also Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1167 ("mitigation measures cannot be defeated by ignoring them"); *Katzeff v. California Dept. of Forestry and Fire Protection* (2010) 181 Cal.App.4th 601, 611 (mitigation measures are not "nullified by the passage of time"). Additionally, if an agency pursues modification of mitigation, it must conduct additional environmental review to evaluate the environmental impacts of changing its mitigation. *Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1509; 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (2d ed. 2015) § 14.35, pp. 14-44 to 14-45 ("reasons for deleting the mitigation measure . . . must be addressed in a supplemental EIR or other CEQA document such as an addendum"). O-6-101 O-6-102

State law similarly requires that all mitigation adopted when approving an NCCP be incorporated into any later project permitted through the NCCP: O-6-103

> [I]f the impacts on one or more covered species and its habitat are analyzed and mitigated pursuant to a program environmental impact report for a plan adopted pursuant to

> this chapter, a plan participant that is a lead agency or a responsible agency . . . shall incorporate in the review of any subsequent project in the plan area the feasible mitigation measures and alternatives related to the biological impacts on covered species and their habitat developed in the program environmental impact report.

O-6-103 Cont.

Fish & Game Code § 2820(e). Here, the DEIR violates these requirements. It never mentions that PV-1, PV-2, and PV-3 are part of a previously adopted mitigation program much less considers the environmental impacts of losing those mitigation areas. O-6-104

(b) The DEIR Cannot Rely on the MSCP or Other Land Conservation to Mitigate Impacts to Biological Resources. O-6-105

For numerous special-status species, the DEIR relies on purported consistency with the MSCP to mitigate impacts to these species. *See* DEIR at 2.4-3 (claiming the Project "does not jeopardize the continued survival of the 85 Covered Species within the dedicated MCSP County Subarea Plan Preserve"). But as discussed previously, development of PV-1, PV-2, and PV-3 would violate the MSCP. Because the project is inconsistent with the MSCP, the DEIR cannot rely on that plan and its environmental analysis and mitigation to disregard impacts to special status species that the Project would impact. O-6-106 O-6-107

Even if the Project were reconceived to be consistent with the MSCP and the Subarea Plan, it would still be inappropriate to rely on a 21-year-old environmental analysis to conclude that the Project would not significantly impact species and habitat covered under the Plan. Since adoption of the MSCP EIR in 1997, substantial changes have occurred in the MSCP Preserve surrounding the Project site. Most notably, in 2007, the then second-largest recorded wildfire complex in California history burned much of San Diego County including the immediate vicinity of the Project site. It burned vast areas of coastal sage scrub and chaparral habitats, which provide important habitat for special-status species like the California gnatcatcher, cactus wren, and Quino Checkerspot Butterfly. *See* USGS, Response and Recovery of Animals and Plants to San Diego County Wildfires, attached as Exhibit 15. The DEIR must account for this loss of habitat in the preserve and evaluate whether the preserve remains adequate to mitigate the Project's impacts to special status species. O-6-108 O-6-109 O-6-110

Finally, multiple sections of the DEIR's biological resources analysis purport to rely on land conservation to mitigate biological impacts. But because the Project would actually develop previously-established mitigation land, there is no basis for assuming that land identified for future mitigation through conservation is actually adequate O-6-111

mitigation. If the County allows this Project to develop mitigation land, it is unclear what will prevent the next project from developing mitigation proposed as part of this Project. Thus, the DEIR lacks the evidentiary support necessary to show that habit conservation can mitigate biological impacts to less-than-significant levels. O-6-112 O-6-113

(c) The DEIR Fails to Adequately Analyze and Mitigate Impacts to the Western Spadefoot Toad. O-6-114

Biological consultants for the Project located the presence of the Western Spadefoot Toad in 16 separate breeding pools in and around the Project development footprint. DEIR at 2.4-176. Although a state species of special concern, it is not covered by the MSCP or the Subarea Plan. Thus, the DEIR proposes to mitigate the Project's significant impacts to this species by purporting to preserve eight of the 16 identified pools. *Id.* O-6-115

This mitigation is wholly inadequate. First, the DEIR proposes to preserve *only* known breeding pools and ignores the entire habitat area necessary for the Western Spadefoot Toad to survive. This species requires habitat for travel between breeding pools and upland estivation sites, which can be located hundreds of meters away. Exhibit 1 at 18 (Hamilton Report). As a result, USGS has recommended establishing 300-400 meter buffers between developments and breeding pools. *Id.* In contrast, the DEIR proposes *no* buffer to preserve aestivation areas and other habitat—it incorrectly assumes that preserving breeding pools alone would be adequately mitigate the Project's impacts to the Western Spadefoot Toad. O-6-116 O-6-117 O-6-118

Even more surprising, the DEIR's mapping of these breeding pools shows that five of the eight pools proposed for mitigation *actually sit within the development footprint*. *Id.* at 19-20 (citing DEIR at 2.4-445, Figure 2.4-9). As a result, these proposed mitigation pools would also be destroyed by the Project. The three remaining pools are only 10 to 20 meters from the development and would be impacted by numerous "edge effects" from the Project, including runoff and invasive species associated with residential development. *Id.* at 7-13. Thus, even using the DEIR's ill-conceived mitigation proposal, the DEIR fails to mitigate significant impacts to the Western Spadefoot Toad. O-6-119 O-6-120 O-6-121 O-6-122

(d) The DEIR Fails to Adequately Analyze and Mitigate Impacts to the Quino Checkerspot Butterfly. O-6-123

Like the Western Spadefoot Toad, the Quino Checkerspot Butterfly is a federally-endangered species that was not covered in the MSCP. While the DEIR acknowledges the Project's potential to impact this species, it downplays the severity of any such impact O-6-124

by stating that the majority of the Project site provides only "low density" habitat for the species. DEIR at 2.-48. O-6-124 Cont.

Two leading experts on the Quino Checkerspot Butterfly, Ken Osborne and Greg Ballmer, found Project site contains core habitat for this species, which has been historically occupied by the Quino Checkerspot Butterfly "metapopulation." Exhibit 2 at 2 (Osborne and Ballmer Report); *see also* DEIR at 2.4-46 (acknowledging critical habitat designation). The DEIR fails to fully account for the butterfly's use of the area because its analysis is based on surveys that suffered from multiple methodological problems. Most significantly, the surveys were conducted during periods of extreme and extended drought, which is known to reduce Quino Checkerspot Butterfly reproduction and, as a result, its presence in an area. Exhibit 2 at 2 (Osborne and Ballmer). In contrast, a few hours of observation in 2017 (following a wet winter) yielded multiple sightings of this butterfly in the Project area. *Id.* The validity of the survey results was also impaired because the surveying improperly excluded areas of the Project site that actual represent potential habitat for the Quino Checkerspot Butterfly. *Id.* at 4-5. O-6-125 O-6-126 O-6-127

The DEIR also overlooks foreseeable significant impacts to the Quino Checkerspot Butterfly. Most significantly, the Project's sprawl would be placed between two core habitat areas—San Miguel Mountain and Otay Mountain—and would sever the linkage between these areas. *Id.* at 3-4. This would effectively isolate core butterfly habitat and significantly diminish the viability of both of these important parts of the metapopulation. *Id.* O-6-128

Additionally, the DEIR understates the Project's impacts because it only assumes that only critical habitat within the development footprint could be impacted. DEIR at 2.4-77. In reality, the Project's "edge effects" would impact the species thousands of feet away from the development sites, effectively creating a large bubble of impact area that the DEIR ignores. Exhibit 2 at 4 (Osborne and Ballmer Report). Not only does the DEIR fail to account for this impact, but its proposed mitigation areas include open space within the development, and areas immediately adjacent to the development. The Project would also impact these areas. *Id.* Consequently, they cannot be relied upon for mitigation, but instead must be viewed as additional impacted habitat. O-6-129 O-6-130

(e) The DEIR Fails to Adequately Analyze and Mitigate the Impacts to the Golden Eagle. O-6-131

Historical and recent observations, as well as USGS tracking data, show that the federally-listed Golden Eagle frequently travels through Proctor Valley, and forages in the Project site. Exhibit 1 at 21, 29-30 (Hamilton Report). Rather than acknowledge this fact, the DEIR attempts to downplay Project area's importance for the eagle by stating O-6-132 O-6-133

that the DEIR consultant did not "locate any active golden eagle nests or observe any golden eagle courtship or nesting behavior" in the Project area. DEIR at 2.4-13. The value of on-site chaparral as foraging habitat for the eagle was also incorrectly discounted, leading to underestimation of impacts from destroying chaparral. This failure to consider the full range of eagle uses for the site, including foraging and as a habitat corridor between San Miguel Mountain and Otay Mountain, prevents the DEIR from considering the full range of potential Project impacts to the eagle. O-6-133 Cont.

Indeed, the DEIR bases its impact analysis for the Golden Eagle entirely upon metrics contained in the MSCP Plan (which is now two decades old) and neglects available information on the aversion of eagles to developed areas. This information indicates that development within Village 14 would almost certainly result in the loss of the San Miguel Mountain/Rancho San Diego eagle territory as well as deprive numerous eagles of foraging opportunities in and west of Proctor Valley, with direct and negative effects on regional eagle populations. Exhibit 1 at 36 (Hamilton Report); Bloom Biological Report re Ranch San Diego Golden Eagles, page 12, attached as Exhibit 11. Because the DEIR fails to consider these foreseeable significant impacts to the Golden Eagle population that currently use the Project site, it likewise fails to consider what measures would be necessary to mitigate those impacts. O-6-134

(f) The DEIR Fails to Adequately Mitigate the Development's Indirect Impacts on Biological Resources. O-6-135

The DEIR acknowledges that by placing development in the middle of a preservation area, the Project could have temporary and permanent indirect impacts to special-status plant and wildlife species, aquatic resources, and sensitive vegetation communities. DEIR at 2.4-130—133. While it acknowledges these potential impacts generally, the DEIR fails to fully describe the biological impacts that can occur by placing new development in the middle of important conservation habitat. The "edge effects" that would result from a development like the propose Project are multifaceted and can cause significant habitat disturbance in lands outside of the development. Just some of the potential impacts include: O-6-136 O-6-137

- Introduction/expansion of invasive exotic vegetation carried in from vehicles, people, animals or spread from backyards or fuel modification zones adjacent to wildlands. O-6-138
- Higher frequency and/or severity of fire as compared to natural fire cycles or intensities. O-6-139

- Companion animals (pets) . . . act as predators of, and/or competitors with, native wildlife. O-6-140
- Creation and use of undesignated trails that often significantly degrade the reserve ecosystems through such changes as increases in vegetation damage and noise. O-6-141
- Introduction of or increased use by exotic animals which compete with or prey on native animals. O-6-142
- Influence on earth systems and ecosystem processes, such as solar radiation, soil richness and erosion, wind damage, hydrologic cycle, and water pollution that can affect the natural environment. O-6-143

Exhibit 1 at 8 (Hamilton Report).

In response to the severe threat of these indirect impacts, the DEIR proposes mitigation that is wholly inadequate. For example, there is no proposed mitigation to prevent stormwater and related pollution from impacting to surrounding habitat. Instead, mitigation measure M-BI-15 ("Erosion and Runoff Control") improperly defers developing drainage facilities that would be relied on to reduce impacts without listing any performance standards to ensure that offsite impacts will actually be mitigated. *See* DEIR at 2.4-149 (Impact BI-10), 2.4-155 (measure merely states that "Design of drainage facilities shall incorporate long-term control of pollutants and stormwater flow to minimize pollution and hydrologic changes"). As explained below and in the attached Horner Report, the little information that the County has provided regarding proposed stormwater infrastructure reveals a large proportion of the Project's runoff would be uncaptured and untreated. Exhibit 3 at 9 (Horner Report). O-6-144 O-6-145 O-6-146

Additionally, the multiple DEIR mitigation measures site the Preserve Edge Plan as mitigating invasive species and other potential impacts on native habitat and sensitive species. *See* DEIR at 2.4-145. But review of that plan shows that it has numerous deficiencies that would not prevent, and in some cases would exacerbate, potentially significant impacts: O-6-147

- The plan specifies that some fuel modification zones along the development edge would occupy the entire 100-foot-wide edge zone, with irrigation provided up to the edge of natural habitat. Irrigation is known to facilitate the spread of harmful Argentine Ants into nearby natural areas.

- The plan states that landscaping along edges would be "preferably native," but does not guarantee that it will be native. O-6-148

- The plan's Approved Plant List includes Rhus lentii, a species native to Cedros Island in Mexico. These species are known to hybridize freely resulting in potential adverse effects on natural resources near the development edge. O-6-149

Exhibit 1 at 12 (Hamilton Report).

Thus, the DEIR does not provide adequate mitigation for the Project's foreseeable indirect impacts to the valuable habitat that would surround this new development. The DEIR must correct these errors and be recirculated. O-6-150

3. The DEIR Lacks an Adequate Analysis of and Mitigation for the Project's Climate Change Impacts. O-6-151

Analysis of greenhouse gas ("GHG") emissions is particularly important with regard to climate change because we have already exceeded the capacity of the atmosphere to absorb additional GHG emissions without risking catastrophic and irreversible consequences. Therefore, even seemingly small additions of GHG emissions into the atmosphere must be considered cumulatively considerable. *See Communities for Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 120 ("the greater the existing environmental problems are, the lower the threshold for treating a project's contribution to cumulative impacts as significant"); *see also Center for Biological Diversity v. National Highway Traffic Safety Admin*. (9th Cir. 2007) 508 F.3d 508, 550 ("we cannot afford to ignore even modest contributions to global warming"). O-6-152

The DEIR concludes that the Project would result in potentially significant impacts related to climate change but that those impacts would be reduced to less-than-significant levels with proposed mitigation measures. DEIR at 2.7-36. The DEIR's impact analysis is fundamentally flawed, however, because it underestimates the Project's GHG emissions. The document also fails to sufficiently mitigate for the Project's climate change impacts by permitting sprawl development while relying on an undefined off-site and out-of-County offsets program. Finally, the DEIR fails to properly analyze the Project's consistency with plans, policies, and regulations adopted for the purpose of reducing GHG emissions and erroneously concludes that the Project would be consistent with these plans. Each of these flaws is discussed below. O-6-153 O-6-154 O-6-155

(a) The DEIR Underestimates the Project's GHG Emissions.

The DEIR fails to accurately account for all project-related GHG emissions and therefore underestimates the Project's impact on climate change. For example, the DEIR fails to include GHG emissions from explosive detonation. Although the DEIR's Project Description does not acknowledge it, the Project would involve extensive blasting to break up bedrock close to the ground surface. The DEIR's noise chapter estimates that approximately 5,354,227 cubic yards of rock would be blasted during the early stages of excavation and mass grading for Phase 1 (January 2018 through December 2024) and that approximately 1,778,632 cubic yards of rock would be blasted during the early stages of excavation and mass grading for Phase 2 (December 2020 through November 2027). DEIR at 2.8-19, 2.8-22.

The DEIR concedes that it did not include GHG emissions from blasting because the U.S. Environmental Protection Agency does not have emission factors for explosive ammonium nitrate fuel oil. DEIR at 2.7-23; DEIR Appendix 2.7-1 at 70. The DEIR may not rely on the lack of emission factors to avoid calculating the GHG emissions that would be generated from the Project's blasting operations. In *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344 1370 the court noted that the lead agency Port "has not cited us to any reasonably conscientious effort it took either to collect additional data or to make further inquiries of environmental or regulatory agencies having expertise in the matter." The fact that an approach for a health risk analysis from the airport expansion was not readily available did not excuse the Port, but instead "require[d] the Port to do the necessary work to educate itself about the different methodologies that are available." *Id*. The DEIR commits the same error here.

O-6-156

The DEIR further underestimates the Project's operational emissions because it relies on inaccurate modeling assumptions. For example, the modeling used to calculate GHG emissions assumes that the proposed Project is located in an "urban" environment despite the fact that the Project site is clearly in a rural location. *See* DEIR Appendix 2.7-1 at pdf page 274 (describing the land use setting as "urban"). Vehicular emissions are based on factors including trip length. *Id.* at 74 (pdf page 88). A "rural" environment results in higher emissions from vehicle combustion exhaust due to longer trips to work, shopping and schools.

O-6-157

Moreover, the DEIR also underestimates the Project's operational GHG emissions because it assumes a 4.3 percent reduction in vehicle miles travelled ("VMT") due to the Project's transportation demand management ("TDM") program. *See* DEIR Appendix 2.7-1 at 75. The problem, however, is that the DEIR fails to provide any evidentiary support that the measures included in the TDM program would achieve any meaningful reduction in vehicular trips. To conclude, as the DEIR does, that the TDM program

O-6-158

O-6-159

would achieve a specified reduction in VMT, the DEIR must include substantial evidence demonstrating its effectiveness. Substantial evidence consists of "facts, a reasonable presumption predicated on fact, or expert opinion supported by fact," not "argument, speculation, unsubstantiated opinion or narrative." Pub. Resources Code § 21080(e)(1)-(2). Here, however, the measures included in the TDM program are vague, voluntary and unenforceable. Because the TDM measures are so undefined as to make it impossible to evaluate their effectiveness, the DEIR cannot rely on this program to assume that VMT and GHG emissions will be reduced.

O-6-159 Cont.

O-6-160

For example, the TDM program calls for coordination with the San Diego Association of Governments ("SANDAG") for "rideshare programs" and "future siting of transit stops." DEIR Appendix 2.7-1 at 18, 19. A measure calling for coordination with an agency is vague and nonbinding and offers no assurance that such an effort would cause a measurable increase in ridesharing or a measureable reduction in vehicle trips. Moreover, the DEIR does not require that the applicant take any substantive action. So, while the TDM program calls for the applicant to coordinate with SANDAG about the future siting of transit stops, the program does not actually require that transit stops (or even a single transit stop) be built. And even if a transit stop is ultimately constructed, there is no indication that it would result in a meaningful reduction in vehicle trips. To be effective, transit service must: (1) be geographically accessible, i.e., no more than ½ mile walk from the user's origin, e.g., their residence; (2) have appropriate destinations, i.e., major employment and shopping centers; (3) be safe and reliable; (4) depart and arrive at appropriate frequencies, i.e., 15 minute headways during am and pm peak hours; (5) have efficient connections to other transit lines, i.e., no more than a five minute wait; and (6) be reasonably priced. As these factors make clear, a mitigation measure that simply calls for coordination between two agencies about transit stops is excessively vague and offers no assurance that transit will be implemented, let alone be effective at reducing vehicular trips.

O-6-161

These errors, each of which results in an underestimation of the Project's GHG emissions, must be corrected. The GHG analysis must then be recirculated in a revised EIR.

O-6-162

(b) The DEIR Lacks Evidentiary Support that the Project's GHG Impacts Would Be Mitigated to a Level of Less-Than-Significant.

The DEIR relies largely on a carbon offset program to mitigate the Project's GHG impacts. The document lacks evidentiary support, however, that this offset program would achieve emission reductions sufficient to reduce impacts to a less-than-significant level. When a lead agency relies on mitigation measures to find that project impacts will

O-6-163

be reduced to a level of insignificance, there must be substantial evidence in the record demonstrating that the measures are feasible and will be effective. *Sacramento Old City Assn. v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1027; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 690, 726-29.

O-6-163 Cont.

Moreover, a mitigation measure requiring the purchase of offset credits operates as a kind of mitigation fee. CEQA does not allow mitigation fees unless there is substantial evidence of a functioning, enforceable, and effective implementation program. Courts have found mitigation fees inadequate where the amount to be paid for traffic mitigation was unspecified and not "part of a reasonable, enforceable program" (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1189); where a proposed urban decay mitigation fee contained no cost estimate and no description of how it would be implemented (*Cal. Clean Energy Com. v. City of Woodland* (2014) 225 Cal.App.4th 173, 198); and where there was no specific traffic mitigation plan in place that would be funded by mitigation fees (*Gray v. County of Madera* (2008) 167 Cal.app.4th 1099, 1122). As discussed below, the DEIR provides no evidence that the offset program would be enforceable, let alone effective.

O-6-164

Mitigation M-GHG-1 (for construction GHG emissions) and M-GHG-2 (for operational GHG emissions) require the applicant to purchase and retire carbon offsets. For the Project's construction-related GHG emissions, M-GHG-1 calls for offsetting 100% offset of emissions. DEIR at 2.7-31, 2.7-32. As for the Project's operational emissions, M-GHG-2 calls for offsetting emissions for the "project life" which the DEIR determines is a 30-year period. *Id.* at 2.7-33.

O-6-165

Both measures M-GHG-1 and M-GHG-2 call for the County planning department to consider a geographic approach to achieving GHG emission reductions. The DEIR explains that the geographic priorities would focus first on local reduction, i.e., project design features/on-site reduction measures to meet their GHG reduction goals. DEIR at 2.7-32, 2.7-35. The DEIR makes clear, however, that the applicant need only pursue offset projects and programs locally to the extent such offset projects and programs are financially competitive in the global offset market. *Id.* If local offsets projects are not available, or if they are determined to not be financially competitive in the global offset market, the mitigation measures allow for offsets to be acquired off-site in the County, in California, in the U.S., or even internationally. *Id.*

O-6-166

Other than the Project Design Features ("PDF") that are already part of the Project (and which are already included in the Project's GHG emissions inventory), the DEIR does not identify any other PDFs that would be implemented to reduce GHG emissions. Furthermore, although M-GHG-1 and M-GHG-2 allow the applicant to forego local PDFs (or other local projects and programs) if they are not financially competitive in the

O-6-167

O-6-168

local market, the DEIR omits any criteria for determining whether a local PDF project would be financially competitive. The DEIR also does not identify the County oversight process that would be undertaken should the applicant make an inappropriate determination regarding a local project's financial competitiveness. Consequently, even if other PDFs exist and they are not financially competitive or are otherwise insufficient to achieve the required GHG emissions reductions, then there would be no way to reduce emissions without offsets. For the following additional reasons, the DEIR's approach of mitigating the Project's GHG emissions with offsets is severely flawed.

O-6-168 Cont.

First, M-GHG-1 and M-GHG-2 fail to comply with CEQA's rule that proposed offsets must be "not otherwise required." Guidelines §15126.4(c)(3). This rule makes clear that only "additional" emission reductions-that is, reductions not otherwise required by law or likely to occur anyway-may be used to generate offsets for CEQA mitigation. Put another way, offset credits resulting from activities that are legally required by other laws, regulations, or programs, or that would occur anyway for economic or other reasons, do not represent "additional" reductions necessary to counterbalance a project's new GHG emissions. The DEIR lacks evidence that there exist any offset programs capable of ensuring that offsets are "additional." This is a particular concern given the DEIR's allowance of international offsets, which are especially challenging to verify. Consequently, the DEIR lacks the standards sufficient to ensure that offsets are real, enforceable, additional, and otherwise consistent with CEQA's mitigation requirements. *See Sacramento Old City*, 229 Cal.App.3d at 1027 (record must include substantial evidence that mitigation is effective and enforceable).

O-6-169

Second, the DEIR provides no indication whether there are a sufficient amount of GHG offset credits available from existing, functioning programs to mitigate the Project's emissions. There are only a limited number of offset projects that can demonstrate additionality, as discussed above. The proposed Project will require approximately 17,000 MT CO2e (carbon dioxide equivalent) in offsets total. DEIR Appendix 2.7-1, Table 25 at 94. But as discussed above, the Project does not exist in a vacuum. The San Diego Union Tribune recently noted that "more than a dozen" projects that rely on offsets were awaiting County approval as of March 19, 2018. *See* San Diego Union Tribune, "Sierra Club, others sue San Diego County to block carbon credit plan for new development," March 19, 2018, attached as Exhibit 16. The County's recently adopted Climate Action Plan endorses the use of offsets, ensuring that demand for offset credits will grow rapidly in the near future.

O-6-170

Despite this growing demand, as of January 2018 there were no credits from carbon offset projects located in San Diego County that were available on any of the three offset registries approved by the California Air Resources Board ("CARB"). And at a much broader level, 324,069,019 MT CO2e were subject to the state's cap-and trade

program in 2016, over 25 million (up to eight percent) could come from offsets. The sheer volume of emissions creates a large and growing demand for offsets and thus casts serious doubt on the availability of sufficient credits. The lack of evidence that sufficient credits exist renders measures M-GHG-1 and M-GHG-2 invalid. *See Kings County*, 221 Cal.App.3d at 728.

O-6-170 Cont.

Third, in practice, even the most sophisticated offset programs have failed. A 2016 report prepared for the EU Directorate General for Climate Action concluded that nearly 75% of potential certified offset projects had a low likelihood of actually contributing additive GHG reductions, and less than 10% of such projects had a high likelihood of additive reductions. *See* How additional is the Clean Development Mechanism? Analysis of the application of current tools and proposed alternatives, Institute of Applied Ecology, March, 2016 at 11, attached as Exhibit 17; *see also* Carbon Credits Likely Worthless in Reducing Emissions, Study Says, Inside Climate News, April 19, 2017, attached as Exhibit 18.

O-6-171

The three registries identified in the DEIR allow the developer to purchase offsets from several different categories of offset programs. Only some of these offset programs meet the minimum standards that CARB sets for "compliance offsets," which are the offsets that are eligible for use in the state's cap and trade program. Other products, such as voluntary offsets, are unregulated and provide no evidence of their effectiveness or additionality.

O-6-172

Because of these known problems with enforcement and efficacy, agencies typically permit offsets to constitute only a very small part of an overall emission reduction program. For example, California's cap and trade program allows no more than eight percent of GHG reductions to come from offsets, which will drop to four percent in 2021, at which point at least half of the offsets used "provide direct environmental benefits in state." Health & Safety Code § 38562(c)(2)(E). CARB's 2017 Scoping Plan also prioritizes onsite measures: "[t]o the degree a project relies on GHG mitigation measures, CARB recommends that lead agencies prioritize on-site design features that reduce emissions, especially from VMT, and direct investments in GHG reductions within the project's region that contribute potential air quality, health, and economic co-benefits locally." Climate Action Reserve, Voluntary Offsets. Scoping Plan at 102 (emphasis added). The County General Plan concurs; the 2011 General Plan Update EIR contains a mitigation measure (CC-1.2) that expressly requires reductions in GHG emissions from County and community emissions. Contrary to each of these approaches, the DEIR relies on offsets to mitigate all VMT-related emissions. Yet there is simply no evidence that the undefined, unenforceable offsets proposed by the DEIR will cause any meaningful reduction to mitigate the permanent increase in GHG resulting from the Project's sprawl development.

O-6-173

O-6-174

O-6-175

Fourth, the DEIR fails to ensure that offsets will mitigate GHG emissions, because M-GHG-1 and M-GHG-2 do not require the purchase of offsets until issuance of a building permit - in other words, until after the County has made its discretionary decisions on the Project, including any decisions as to whether the project's significant effects have been mitigated in accordance with CEQA. O-6-176

Fifth, the DEIR allows for impermissible decreases in mitigation after the Project is approved, contrary to CEQA. M-GHG-1 and M-GHG-2 allow County staff to decrease the amount of carbon offsets required if the Project's assumed carbon emissions are reduced by future measures or regulatory changes, without any corresponding requirement to increase offsets if future events prove that the DEIR's emissions assumptions are too low. DEIR at 2.7-34. This lopsided standard could further reduce the already inadequate offsets, even where later information or changed circumstances demonstrate that the Project's actual GHGs are greater than the DEIR anticipated. O-6-177

Moreover, the process for approving this reduction in mitigation would be subject only to County oversight, conducted outside of CEQA, with no public review. The revised EIR must provide assurance that any change in GHG emissions' offsets must be subject to CEQA. The mitigation measures should also be broadened to require offsetting increases in future operational GHG emissions beyond those estimated in the DEIR, as increases are equally likely because future emissions depend upon many factors that cannot be currently predicted-including the feasibility of proposed PDFs, political will, increasing ambient temperatures, and reductions in water supply due to climate change-which could increase GHG emissions beyond those estimated in the EIR. This one-way provision that allows the County to ratchet mitigation down moves the County in the wrong direction. O-6-178

Sixth, M-GHG-1 and M-GHG-2's approach of meeting the Project's GHG reduction requirements with the use of out-of-County offsets simply allows the County to perpetuate sprawling land use development patterns. Projects such as the proposed Project, Otay Ranch Village 13, PSR GPA, Harmony Grove, Lilac Hills Ranch, Warner Ranch, Warner Springs Ranch Resort, Newland Sierra, many of which will require general plan amendments, all increase sprawl, VMT, and GHG emissions. The DEIR's approach to mitigation, which allows in-County emissions to multiply while out-sourcing reductions to unreliable international offsets, violates both the letter and the spirit of CEQA (as well as the County's General Plan). O-6-179

Finally, the DEIR fails to acknowledge, let alone evaluate, the precedent-setting nature of this offset program. If the County adopts these mitigation measures, it would facilitate future land use projects to increase GHG emissions within the County, in exchange for the purchase of carbon offset credits applicable to another location in O-6-180

California, the United States, or the world. The DEIR, however, fails to evaluate the environmental effects of such actions. For example, SANDAG's Regional Transportation Plan/Sustainable Communities Strategy ("RTP/SCS") relies on VMT reduction to achieve its GHG goals mandated by CARB. If the County adopts these mitigation measures, it will encourage other land use development projects in remote areas within the County, thereby undermining the viability of the RTP/SCS to achieve its GHG reduction goals. O-6-180 Cont. O-6-181

In sum, the DEIR lacks the evidentiary support that mitigation measures M-GHG-1 and M-GHG-2 would achieve emission reductions sufficient to reduce the Project's GHG emissions to a less-than-significant level. Moreover, the DEIR fails to evaluate the precedent-setting nature of the proposed mitigation measures. O-6-182

(c) The DEIR Fails to Adequately Analyze or Mitigate Impacts Relating to the Project's Consistency with Plans, Policies and Regulations Adopted for the Purpose of Reducing GHG Emissions.

The DEIR provides an inadequate analysis of the Project's consistency with plans and policies adopted for the purpose of reducing GHG emissions. The document's conclusion that the Project would support the goals of SANDAG's RTP/SCS lacks evidentiary support. Moreover, although the DEIR concludes that the Project would be inconsistent with Executive Orders ("EO") EO S-3-05 and SB-32, it fails to disclose the severity and extent of this impact as it never explains just how far the Project would set the area off course from state-wide reduction goals. O-6-183

(i) The DEIR Lacks the Evidentiary Basis to Conclude that the Project Is Consistent with SANDAG's RTP/SCS.

The DEIR largely relies on the Project's TDM program, and other project components such as a walking and bicycle trail system that would apparently connect the Project's residential neighborhoods, to conclude that the Project would be consistent with the RTP/SCS. The DEIR's conclusion, however, is belied by factual information that the document completely ignores. O-6-184

According to the DEIR, the Project will generate about 6,600 vehicular trips every day. DEIR at 2.9-148 (Table 2.9-46). These vehicle trips will equate to more than 112,000 VMT every day which equates to more than 50 million VMT each year. DEIR Appendix 2.7-1 at 75. This astonishing increase in VMT is caused by the Project's remote location. The fact that the Project would increase dwelling units in this remote

location is not a trivial detail. Rather than growing "out," the RTP/SCS anticipated that more than 80 percent of all housing would be developed within the urbanized areas in the western part of the County. *Id.* Moreover, SANDAG's plan assumed that the 17 percent of growth to occur in the unincorporated areas would be focused in existing villages such as Lakeside, Valley Center, Ramona, and Alpine. Accordingly, the RTP/SCS called for achieving GHG emission reduction goals using land in a way that makes development more compact, conserving open space and reducing VMT throughout the region. *Id.* Yet, the Project's remote location will ensure that the majority of residents will be forced to rely on automobiles for virtually all of their transportation needs. In fact, more than 82 percent of the Project's annual operating GHG emissions will be generated by vehicle trips. DEIR Appendix 2.7-1 at 93 (Table 23). O-6-184

Not only does the DEIR not acknowledge these clear facts, but it also fails to objectively analyze the Project's inconsistency with the policy objectives and strategies set forth in the RTP/SCS. One of these strategies, for example, calls for growth to be focused in areas that are already urbanized. *See* DEIR Appendix 2.7-1 at 101. The DEIR concludes that the Project is consistent with this strategy because it would be located near major urban and employment centers, including the City of Chula Vista. *Id.* Chula Vista cannot be considered a major employment center by any stretch of the imagination. According to the Chula Vista General Plan, even Chula Vista's residents commute out of the City for employment. The City of San Diego would be considered a major employment center, yet San Diego is almost 30 miles away from the proposed Project. The DEIR's assertion that the Project is consistent with this RTP/SCS strategy is disingenuous at best. O-6-185

The DEIR also finds the Project consistent with the RTP/SCS objective calling for an investment in a transportation network that gives people transportation choices and reduces GHG emissions. DEIR Appendix 2.7-1 at 103. Here, the DEIR asserts that the Project would encourage non-vehicular modes of transportation because it would include a walking and bicycling network. *Id.* It seem highly unlikely that SANDAG envisioned low density sprawl development-that allows residents the opportunity to walk or bike around their subdivisions-as a legitimate means to reduce GHG emissions. Clearly, when SANDAG's objective called for a transportation network that gives people transportation choices, the agency's goal was implementation of high quality transit service. Of course, high quality transit service can really only be effective in urbanized locations, not in remote locations that are developed with decentralized low density subdivisions. O-6-186

The DEIR's failure to accurately and objectively analyze the Project's inconsistency with the RTP/SCS is a fatal flaw. Moreover, this inconsistency constitutes a significant impact warranting recirculation of the DEIR. O-6-187

(ii) The DEIR Fails to Identify the Project's GHG Emissions Beyond 2028 and Fails to Disclose the Project's Consistency with SB 32 and S-3-05.

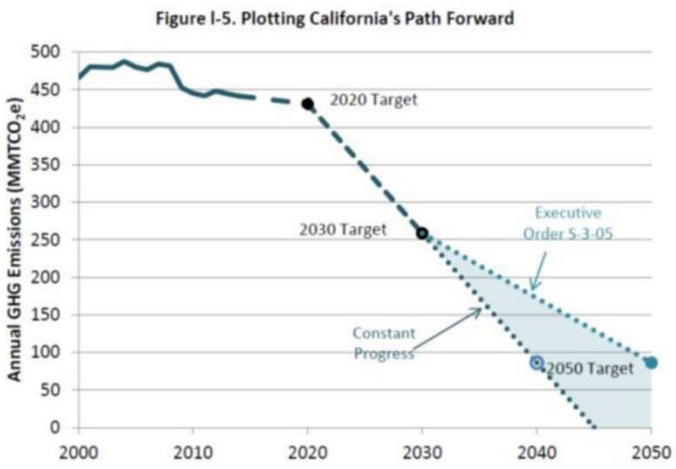
EO S-3-05 establishes the following goals: GHG emissions should be reduced to 2000 levels by 2010, to 1990 levels by 2020, and to 80% below 1990 levels by 2050. Senate Bill ("SB") 32 establishes a reduction target to reduce statewide GHG emissions to at least 40% below 1990 levels by 2030. Consistent with these goals, Governor Brown signed EO B-30-15 in April 2015, establishing a GHG reduction target of 40 percent below 1990 levels by 2030.

The DEIR asserts that it evaluates whether the GHG emissions trajectory after the proposed Project's completion would impede the attainment of the 2030 and 2050 GHG reduction goals identified in SB 32 and EO S-3-05. Yet, it does no such thing. Rather, the DEIR simply asserts that the GHG emissions from the Project may interfere with the implementation of GHG reduction goals for 2030 and 2050 and concludes that any impacts relating to this interference would be potentially significant. DEIR at 2.7-30. This approach is contrary to CEQA's clear requirements as meaningful analysis of impacts effectuates one of CEQA's fundamental purposes: to "inform the public and responsible officials of the environmental consequences of their decisions before they are made." *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123 ("*Laurel Heights II*"). To accomplish this purpose, an EIR must contain facts and analysis, not just an agency's bare conclusions. *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 568. An EIR's conclusions must be supported by substantial evidence. *Laurel Heights I*, 47 Cal.3d at 409. Here, the DEIR fails to identify, analyze, or support with substantial evidence its conclusions regarding the Project's significant environmental impacts.

O-6-188

CARB projects that average annual GHG emissions must decline by 5.2 percent each year to achieve target reductions for year 2050. These reductions are portrayed graphically in the following figure:

O-6-189



As the California Supreme Court recognized in *Newhall Ranch*, it is especially important to obtain the greatest possible reductions in emissions from new construction, with its associated opportunities to design for energy efficiency and minimal emissions from the outset. 62 Cal.4th at 226. Thus, even accepting the DEIR's flawed approach to GHG mitigation, and assuming new development does not need to shoulder a greater burden for reducing emissions than other sources, the Project still would need to secure an additional 5.2 percent offset each year up to 2050 to keep up with these reduction targets.

We can find no logical explanation as to why the DEIR does not evaluate the Project's potential to interfere with GHG reduction goals set forth in the Executive Orders. Other agencies have undertaken this analysis. For example, SANDAG utilized the following threshold of significance in the EIR for its RTP/SCS: "GHG-4: Be inconsistent with the State's ability to achieve the Executive Order B-30-15 and S-3-05 goals of reducing California's GHG emissions to 40 percent below 1990 levels by 2030 and 80 percent below 1990 levels by 2050." *See* San Diego Forward RTP/SCS EIR GHG Analysis, attached as Exhibit 19.

The SANDAG RTP/SCS EIR evaluated the project's impacts by calculating a 40 percent and 80 percent reduction from the region's 1990 emissions and utilizing that as a target reference point for the RTP. It then compared the region's expected GHG emissions in the years 2035 and 2050 to the emissions that would be necessary to meet

O-6-189 Cont.

O-6-190

O-6-191

the EO trajectories. It included charts showing that the Plan will not come close to meeting the EO goals. It concluded: "Because the total emissions in the San Diego region of 25.5 MMT CO2e [million metric tons] in 2035 would exceed the regional 2035 GHG reduction reference point of 14.5 MMT CO2e (which is based on EO-B-30-15 and EO-S-3-05), the proposed Plan's 2035 GHG emissions would be inconsistent with state's ability to achieve the Executive Orders' GHG reduction goals. Therefore, this impact (GHG-4) in the year 2035 is significant." Exhibit 19 at 4.8-35. It has a similar conclusion for the year 2050 goal. This analysis is easily adaptable to the proposed Project's emissions.

O-6-191 Cont.

The DEIR's failure to compare the Project's emissions-which would continue for decades if not in perpetuity-against long-term GHG emission reduction policies such as those in EO S-3-05 and B-30-15 is unlawful. As Figure 1-5 shows, the state-wide reduction goals are well established. The DEIR should reveal the severity of the impacts of adopting a development project that contravenes these reduction goals. In other words, the public should understand just how far the Project would set the area off course from state-wide reduction goals.

O-6-192

(d) The DEIR Fails to Incorporate Feasible Mitigation Measures.

The DEIR ignores many other feasible mitigation measures available to lessen the Project's climate impacts. Because the proposed Project will result in significant climate impacts, the County must adopt mitigation measures and/or alternatives to the Project that will substantially reduce the severity of those impacts unless such mitigation is infeasible. To the extent they are not already incorporated into the Project design or proposed as mitigation, the County must consider and adopt the following feasible measures. If the County opts to reject any of the following measures, it must support its decision with substantial evidence.

O-6-193

(i) Transportation and Motor Vehicles

- Create car sharing programs. Accommodations for such programs include providing parking spaces for the car share vehicles at convenient locations accessible by public transportation.
- Create local "light vehicle" networks, such as neighborhood electric vehicle (NEV) systems.
- Build or fund a transportation center where various public transportation modes intersect.

- Provide public transit incentives such as free or low-cost monthly transit passes.

(ii) Energy Efficiency

- Site buildings to take advantage of shade, prevailing winds, landscaping and sun screens to reduce energy use.
- Install efficient lighting and lighting control systems. Use daylight as an integral part of lighting systems in buildings.
- Install light colored "cool" roofs, cool pavements, and strategically placed shade trees.
- Provide information on energy management services for large energy users.
- Install energy efficient heating and cooling systems, appliances and equipment, and control systems.
- Install light emitting diodes ("LEDs") for traffic, street and other outdoor lighting.
- Limit the hours of operation of outdoor lighting.
- Provide education on energy efficiency.

(iii) Renewable Energy

- Install energy-efficient heating ventilation and air conditioning. Educate consumers about existing incentives.
- Use combined heat and power in appropriate applications.

(iv) Water Conservation and Efficiency

- Install water-efficient irrigation systems and devices, such as soil moisture-based irrigation controls.
- Design buildings to be water-efficient. Install water-efficient fixtures and appliances.

O-6-193
Cont.

- Restrict the use of water for cleaning outdoor surfaces and vehicles.
- Implement low-impact development practices that maintain the existing hydrologic character of the site to manage storm water and protect the environment. (Retaining storm water runoff on- site can drastically reduce the need for energy-intensive imported water at the site.)

O-6-193 Cont.

4. The DEIR Lacks an Adequate Analysis of the Project's Impacts Relating to Wildfire Hazards and Emergency Evacuation.

O-6-194

Along with Dr. Christopher W. Lautenberger, PhD, PE, REAX Engineering, and Neal Liddicoat, traffic engineer, we have reviewed the DEIR wildfire hazard analysis and the associated Fire Protection Plan ("FPP") included as Appendix 3.1.1-2 and the Wildland Fire Evacuation Plan included in Appendix 3.1.1-3.[6] *See* REAX Report (Exhibit 4) and Liddicoat Report (Exhibit 5).

O-6-195

The fire hazards caused by developing a new community in this area of the County cannot be overstated. As the fires in northern and southern California last year demonstrated, wildfires dramatically alter the environment in California, pose a tremendous risk of injury and death, and cause billions of dollars of damage to buildings and infrastructure. The Project area has burned regularly: 17 fires greater than 50 acres have occurred over the last 100 years. DEIR at 3.1.1-7 and Table 3.1.1-1. The most notable fire, the Harris Fire, occurred in October 2007 and burned approximately 90,440 acres in the southwestern portion of San Diego County, including a large portion of the Project Area. *See* FPP at 2. Wildland fire hazard mapping efforts undertaken by the California Department of Forestry and Fire Protection ("CAL FIRE") and the California Public Utilities Commission classify the areas planned for the proposed Project as having the *highest* wildland fire hazards/threats/risks in California. Exhibit 4 (REAX Report at

O-6-196

[6] This letter also incorporates by reference a report prepared by Dr. Joseph B. Zicherman, Berkeley Engineering and Research Inc. in connection with the Safari Highlands Project in the City of Escondido. *See* Review of Safari Highlands Ranch EIR of October 2017, prepared by Dr. Joseph B. Zicherman, Berkeley Engineering and Research Inc., December 20, 2017, attached as Exhibit 20 and referred to as "Zicherman Report". The Safari Highlands Project has many similarities with the proposed Project. Like the Safari Highlands Project, the proposed Project would add thousands of new residents to currently undeveloped land within the WUI and within a Very High Fire Hazard Severity Zone.

O-6-197

2). Further, the threat of wildfire is increasing. In the coming decades, climate change will alter temperatures, winds, precipitation, and species, with potentially substantial fire hazard impacts. Exhibit 20 at 4-5 (Zicherman Report). O-6-197 Cont.

The Project would add thousands of new residents to the wildland urban interface ("WUI"). The environmental destruction wrought by wildfires is exacerbated by development in the WUI, which increases ignition risk, and unwisely places people and structures directly in the line of fire. *See* Voice of San Diego, December 12, 2017, attached as Exhibit 21. As the REAX Report explains, O-6-198

> Most wildland fires are caused by humans as opposed to natural causes such as lightning. Common anthropogenic causes of fire include arson/incendiary, equipment use, debris burning, smoking, vehicles, fireworks, electricity, and outdoor cooking (barbecuing). Structure fires sometimes spread and initiate wildland fires. For these reasons, it should be apparent that the presence of development in the wildland urban interface – which adds roads, structures, vehicles, and people to previously undeveloped areas – results in increased probability of fire starts. Exhibit 4 at 11(REAX Report). O-6-199

Myriad scientific studies confirm the REAX Report findings; developing housing in locations in California that currently have low or no density, as is the case here, dramatically increases the number of fires and the amount of area burned. *See Fire history of the San Francisco East Bay region and implications for landscape patterns,* J. Keeley, International Journal of Wildland Fire, 14:285–296, 2005 (attached as Exhibit 22); *see also Land Use Planning and Wildfire: Development Policies Influence Future Probability of Housing Loss,* Syphard AD, Bar Massada A, Butsic V, Keeley JE, 2013, attached as Exhibit 23; *see also Human Influence on California Fire Regimes,* Syphard, A. D., V. C. Radeloff, J. E. Keeley, T. J. Hawbaker, M. K. Clayton, S. I. Stewart, and R. B. Hammer, Ecological Application 17:1388–1402, 2007, stating that ninety-five percent of California's fires are caused by human activity, attached as Exhibit 24. O-6-200

In light of these facts, one would expect the DEIR to have objectively evaluated whether the Project would expose people and structures to a significant risk of loss, injury or death involving wildland fires. *See* CEQA Guidelines Appendix G VII (h)). O-6-201

Rather than provide this objective analysis, as discussed below, the DEIR appears to have been set up to arrive at preordained result: The Project *would improve fire safety in the Project Area and for adjacent downwind communities*. *See e.g.*, DEIR Appendix 3.1.1-2 (FPP) at 41. This bold claim—that a Project developed in a location known to have the highest wildland fire risk in the state would improve fire safety—is belied by common O-6-202 O-6-203

sense and, as mentioned above, scientific studies. It is fatuous to suggest that disturbing a sizable open space parcel and adding homes and a range of non-native vegetation will in some way be more fire safe than an area left undisturbed. Exhibit 20 at 5 (Zicherman Report). As we explain below, the DEIR's analysis of the Project's potential to result in increased wildland fire events and its associated impacts to emergency evacuation is riddled with flaws.

O-6-203 Cont.

O-6-204

(a) The DEIR Relies on Inappropriate Thresholds of Significance and Therefore Erroneously Concludes the Project Would Not Have Significant Impacts Relating to Wildfire Hazards.

O-6-205

CEQA's most basic purpose is to inform governmental decisionmakers and the public about the potential significant environmental effects of a proposed project. Guidelines § 15002(a)(1). Determining whether a project may result in a significant adverse environmental effect is one of the key aspects of CEQA. *Id.* § 15064(a) (determination of significant effects "plays a critical role in the CEQA process"). CEQA specifically anticipates that agencies will use thresholds of significance as an analytical tool for judging the significance of a Project's impacts. *Id.* § 15064.7. The determination of significance "is critical, because once 'significant effects' have been identified in the EIR, an agency must explore implementing feasible mitigation measures or alternatives to avoid or reduce the effect." *Berkeley Keep Jets*, 91 Cal.App.4th at 1373.

O-6-206

Although the County has some discretion in selecting thresholds of significance, courts have long recognized that agencies violate CEQA by choosing thresholds that obscure rather than elucidate impacts of concern. *See, e.g.*, *id.* at 1381-82 (EIR improperly relied on a daily average threshold for noise impacts that failed to provide critical information about nighttime noise events); *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 ("notwithstanding compliance with a pertinent threshold of significance, the agency must still consider any fair argument that a certain environmental effect may be significant").

O-6-207

Here, there is ample evidence that a project that would bring thousands of new residents to a location known to have the highest fire risk in the state would dramatically increase the risk of wildfire ignitions in that location and expose people and structures to a significant risk of loss, injury or death involving wildland fires. Yet, because the DEIR selected thresholds that do not take into account the dangerous location where the Project would be built, the DEIR incorrectly concludes that the Project's impacts relating to wildfire hazards would be less than significant.

O-6-208

O-6-209

The Supreme Court recently invalidated an EIR for similar errors. *Banning Ranch* holds that an EIR may not ignore a project's environmental setting and must identify its conflicts with other agencies' plans to protect unique resources. 2 Cal.5th at 936-41. There, a city's EIR for a massive development project in the coastal zone failed to evaluate whether the project contained or would significantly impact environmentally sensitive habitat areas ("ESHA"), which are protected by the California Coastal Commission, and thus failed to evaluate any project alternatives or mitigation measures to lessen or avoid impacts to ESHA. *Id.* The Court rejected this approach as "untenable," holding that the city could not "ignore the fact that Banning Ranch is in the coastal zone." *Id.* at 936. "Given the ample evidence that ESHA are present on Banning Ranch, the decision to forego discussions of these topics cannot be considered reasonable." *Id.* at 937. Similarly here, the DEIR thresholds of significance ignore the fact that the Project site is located within an extremely dangerous location from a wildland fire perspective. O-6-210

The DEIR includes the following threshold of significance: "A comprehensive Fire Protection Plan has been accepted, and the project is inconsistent with its recommendations." DEIR at 3.1.1-24. There are two fundamental problems with this threshold. First, it fails to account for the Project's geographic location. Second, because it relies on the Project's consistency with a FPP prepared for the Project itself, it focuses almost exclusively on protecting the structures in the Project itself. *See* DEIR at 3.1.1-25 (stating that the purpose of a project's FPP is to establish standards "aimed to reduce wildland fire risk within *the Project Area*" (emphasis added)). Thus, because the FPP calls for certain measures intended to reduce the flammability of the Project's vegetation and structures, and because the Project includes these measures, the DEIR determines the Project's impacts would be less than significant. The DEIR's circular reasoning results in a meaningless impact analysis. In short, the threat this Project poses is not to the new structures themselves (as they would incorporate fire-resistant building features) but the increase in ignitions that will accompany this Project. As discussed below, it is this increase in ignitions—again, in a location known to have extreme wildfire risk—that will pose a severe threat to surrounding residential communities and to those trying to evacuate from a wildfire. O-6-211 O-6-212 O-6-213 O-6-214 O-6-215

(b) The DEIR's Conclusion that the Project Will Not Increase Fire Hazards Is Unsupported. O-6-216

(i) The DEIR Underestimates the Risk of Wildfire Because It Relies on Faulty Modeling Assumptions and Methodology. O-6-217

The FPP underpinning the DEIR's findings relies on fire behavior modeling to document the type and intensity of fire that would be expected in the Project area. FPP at O-6-218

37. However, the FPP underestimates the potential intensity of wildland fires in the Project area because it relies on unrealistic assumptions. For example, the FPP fails to take into account appropriate fuel conditions. Two major wildfires have burned the Project site and surrounding area in the last 15 years. DEIR Table 3.1.1-1. These relatively recent burns mean that vegetation in the Project area has not yet reached its climax fuel condition. Exhibit 4 at 4 (REAX Report). Assuming there are no fires or other disturbance in the area, regrowth of fuels would be expected to reach their climax condition in about 30-years. The DEIR errs, however, because its fuel assumptions are not representative of climax fuel conditions.

Second, the FPP only maps fuels within the Project's parcels; it does not assess fuels adjacent to the Project footprint. When assessing potential fire/life safety impacts of a planned development, it is critical to assess fuels adjacent to the Project because fires may spread from adjacent areas into the project footprint or vice versa. Exhibit 4 at 4 (REAX Report). Thus, while the fire station that would be constructed by the Project might be adequate to address individual structural fires and non-fire emergency response, it will be essentially irrelevant in suppressing wildfires entering the Project site from neighboring properties driven by downhill Santa Ana winds. Exhibit 20 at 4 (Zicherman Report). According to Dr. Zicherman,

> From a risk perspective there is a 100% probability that a wind driven wildfire will affect the project, particularly one originating outside of the project boundaries where conditions are not under the control of the project developer. Such fires can develop in existing wildland not subject to fuel modification practices which have demonstrably affected earlier fires in the area. No manner of fuel modification at the project site can be expected to impact these adjoining unmodified areas which include terrain that will foreseeably impact the project site.

Exhibit 20 at 26-27 (Zicherman Report).

Third, the FPP modeled wind speeds that are not consistent with winds in the Project area because it relied on data from a weather station that does not share the topography of the Project site. In the Project area, the primary driver of risk from a fire weather perspective is Santa Ana wind events. Exhibit 4 at 4 (REAX Report). And wind speed is the most critical factor affecting fire behavior. *Id.*

The FPP model relied on wind data from the San Miguel Remote Automated Weather Station. This station is in a relatively flat area where wind speeds are likely to be

O-6-218 Cont.
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O-6-227 Cont.

considerably lower than ridge-top wind speeds near the Project site. Exhibit 4 at 4 (REAX Report). The topography of the Otay Mountain weather station is more representative of the topography at the Project site. In the May 2014 Santa Ana event, peak wind gusts measured at the San Miguel weather station were 30 mph, whereas they were almost double that speed (58 mph) at the Otay Mountain weather station. *Id.* Historically documented fires near the Project site illustrate the importance of accurately considering higher wind speeds especially because high winds are becoming more common due to ongoing climate change and effects of drought conditions.[7]

O-6-227 Cont.
O-6-228
O-6-229

Fifth, the FPP's modeling fails to take into account the increased ignitions that would accompany the Project. As discussed above, developing housing in the WUI greatly increase the probability of ignition within the Project's footprint. Unlike the DEIR (which incorrectly asserts that ignitions would not increase with the Project), the FPP acknowledges the Project would increase ignition sources. DEIR at 3.1.1-25; FPP at 33. The FPP errs however when it asserts that any increase in ignition sources would be mitigated with irrigated areas and fuel modification zones. *Id.* Any ignitions caused by the Project could certainly harm adjacent communities. As the REAX report explains, a fire ignited in Planning Areas 16/19 under Santa Ana winds would spread southwest toward population centers through complex steep terrain vegetated by chaparral and coastal scrub at rates of several miles per hour and would be largely unimpeded by fuel modification zones, irrigated areas, etc. Exhibit 4 at 11.

O-6-230
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O-6-232

In short, a Project built in a location known to have extreme wildfire risk cannot compensate for this hazard simply through a "fire-resistant" design. The only way to protect human life and structures is to not build in these locations in the first place. The DEIR's failure to accurately model these risks is a fatal flaw.

O-6-233

(ii) The DEIR Fails to Provide the Required Assurance that the Project's Evacuation Plan Would Protect People from a Significant Risk of Injury or Death Involving Wildfires.

O-6-234

The DEIR provides *no* analysis of the Project's impact on evacuation in the event of a wildfire. Rather it refers to a Wildland Fire Evacuation Plan ("WFEP") included in the DEIR's technical appendix. As an initial matter, this is a wholly unacceptable way of presenting decisionmakers and the public with essential information, and it renders the

O-6-235
O-6-236

[7] Notably, the FPP's fire safety modeling fails to take into account climate change at all. Climate change is expected to effect WUI habitats through higher temperatures, drought effects, and higher Santa Ana wind effects. Exhibit 20 at 26 (Zicherman Report).

EIR legally inadequate. Whatever is required to be in the text of the EIR must be in the EIR itself, not buried in some appendix. *See Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715, 722-23; *San Joaquin Raptor*, 27 Cal.App.4th at 727. O-6-236 Cont.

The misguided assumptions and flawed methodology used to prepare the FPP cascade into the WFEP's evacuation findings. One need only consider last year's fires in northern and southern California and the attempts to evacuate from these fires to understand that evacuation outcomes and associated fire suppression resources available for fast- moving wildfires do not necessarily mobilize in time to be effective. O-6-237

The WFEP provides two evacuation scenarios, both of which require traveling along Proctor Valley Road, the only road that provides access to the Project site. WFEP at 17, 18. Under one scenario, the WFEP estimates it could take about two and one-half hours to evacuate the occupants of the proposed Project. *Id.* The WFEP asserts that a 3-hour evacuation time is considered acceptable for this type of community. WFEP at 18. The document provides no evidentiary basis for the assumption that a 3-hour evacuation would not expose people to a significant risk of injury or death during a wildfire event. Moreover, as discussed below, this 3-hour period is highly optimistic as it assumes an *orderly*, pre-planned evacuation process well before fire threatens and that residents and others are familiar with the evacuation protocol. The WFEP also acknowledges that this 3-hour period does not include the necessary allowances for the time needed to detect and report a fire; for fire response and on-site intelligence; for phone, patrols, and aerial based notifications; and for notifying special needs citizens. WFEP at 2, 25. O-6-238 O-6-239 O-6-240

Evacuation is much more challenging than presented in the WFEPs idealized scenarios, beginning with lack of warning. As the WFEP itself acknowledges, "threats, including wildfires igniting nearby, may occur with little or no notice and certain evacuation response operations would not be feasible." WFEP at 10. Last years' severe fires bear testimony to this fact. In the October 2017 deadly Tubbs fire in Santa Rosa, efforts to warn residents of approaching flames were successful only 50% of the time. The entire warning system was fraught with multiple levels of malfunction and incompleteness. *See* "*Alarming failures left many in path of California wildfires vulnerable and without warning*," *Los Angeles Times*, Dec. 29, 2017, attached as Exhibit 26. In contrast, the WFEP assumes a fully functioning warning and evacuation system, based upon measures such as "potential activation of Emergency Operations Center" and a residential "Ready, Set, Go!" evacuation plan. WFEP at 7, 25. By assuming unrealistic, idealized scenarios, the WFEP underestimates the true risks created by the Project. O-6-241 O-6-242 O-6-243 O-6-244

Largely because the WFEP appears to rely on overly optimistic evacuation scenarios, EHL retained Neal Liddicoat, a traffic engineer to review the scenarios' traffic O-6-245

operations assumptions and methodology. *See* Exhibit 5 (Liddicoat Report). Mr. Liddicoat identified a number of problems in the evacuation analysis that undermine the WFEP's assertion that the Project would not pose a public safety threat. For example, the evacuation time estimates presented in the analysis assumed that the fire will initially be located some distance from the proposed Project site. This approach, however, ignores the potential impacts of a fire that starts in the vicinity of the Project site. In fact, the WFEP acknowledges this. *See* WFEP at 13 ("If a wildfire ignited closer to the Proposed Area during weather that facilitates fire spread and where multiple hours are not available for evacuation, *a different evacuation approach would need to be explored.*") (emphasis added). Notably, we could find no indication that the WFEP ever conducted a different evacuation approach. Because the Project area has burned at least twice in the last 15 years, the WFEP's failure to evaluate *any* evacuation scenario where a fire ignites on or near the Project site is a fatal flaw.

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Second, the WFEP overestimates the capacity of Proctor Valley Road (the only access road to the Project site) and therefore underestimates the Project's evacuation times. A key element of the WFEP is the ability of Proctor Valley Road to accommodate the volume of traffic that would occur during an evacuation. In this regard, the WFEP specifically notes,

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> As evidenced by mass evacuations in San Diego County and elsewhere, even with roadways that are designed to the code requirements, it may not be possible or necessary to move large numbers of persons at the same time. Road infrastructure throughout the United States, including San Diego County, is not designed to accommodate a short-notice, mass evacuation. WFEP at 13.

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The WFEP assumes that the directional capacity of Proctor Valley Road will be either 1,800 or 1,900 vehicles per hour ("VPH") after project-related improvements are made. Yet, according to the Liddicoat Report—who relied on roadway capacity statistics identified in the *Highway Capacity Manual*—the capacity of Proctor Valley Road is only 1,700 VPH. Exhibit 5 at 2 (Liddicoat Report).

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Moreover, the WFEP ignores several additional factors that directly affect roadway capacity, including:

- The possibility that the road will be obscured by smoke or that other fire-related factors (such as visible flames) will exist that will have the effect of reducing roadway capacity;

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- The effects of trucks or recreational vehicles in the evacuating traffic stream. Because those vehicles have lower operating characteristics (i.e., slower acceleration and longer stopping distances) than passenger cars, they reduce the effective capacity of the road; and

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- The emotional state of the evacuees, which could lead to irrational or unpredictable behavior by drivers. Exhibit 5 at 2, 3 (Liddicoat Report).

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Third, the WFEP fails to take into account that traffic not generated by the proposed Project would also be using Proctor Valley Road during an evacuation. Thus, if a fire starts from the north, northeast, or east (which is the most common type of fire anticipated in the Project area), the residents in Jamul community would also likely use Proctor Valley Road to evacuate. *See* DEIR at 3.1.1-24 ("The most common type of fire anticipated in the vicinity of the Project Area is a wind-driven fire from the north/northeast, moving downslope or northeast to southwest through Proctor Valley through the chamise–chaparral and sage scrub shrubs found on the foothills of the Jamul Mountains.") Such a scenario would be particularly problematic, especially because traffic on Proctor Valley Road is already degraded even on a typical day, when no emergency is occurring. *See* Exhibit 5 at 3 (Liddicoat Report).

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Fourth, the WFEP implicitly assumes that traffic evacuating the proposed Project would be evenly distributed over the course of an hour. According to the Liddicoat Report, it is highly unrealistic to assume that traffic will be evenly distributed in the event of an evacuation; instead, there will be variable pulses in traffic demand, just as there are in everyday traffic flows. *Id.* at 4. Liddicoat recalculated the evacuation time estimates relying on guidance from the *Highway Capacity Manual* and determined that the evacuation times would be substantially higher than —and even double—the estimates assumed in the WFEP. *Id.*

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Finally, and most alarming, Proctor Valley Road runs approximately northeast/southwest and is therefore essentially aligned with wind direction under Santa Ana wind conditions. Consequently, a fire traveling toward the Project footprint from the northeast, or starting within the north part of the Project footprint, may block large stretches of Proctor Valley Road altogether trapping motorists as they attempt to flee the wildfire.[8] Exhibit 4 at 12 (REAX Report). The WFEP does not disclose this possibility, let alone evaluate its implications.

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[8] The Study Area's topography is generally in alignment with the extreme Santa Ana wind events, which can influence fire spread by creating wind-driven fires,

In sum, the WFEP's failure to take fundamental factors into account such as: (1) increased ignition sources caused by the Project; (2) fire dynamics in dry, hilly and brushy areas under extreme high wind conditions; (3) a wildfire starting close to the Project site; (4) the fact that smoke may block the sole escape route (Proctor Valley Road); (5) malfunctions in the emergency response systems; and (6) human behavior in the event of a catastrophic wildfire, the document has no basis to conclude that evacuation procedures would be sufficient to protect the public's safety. O-6-262

5. The DEIR Lacks an Adequate Analysis of the Project's Impacts on Water Supply Resources. O-6-263

The Project would unquestionably require significant amounts of water to serve construction and operational needs. Indeed, the DEIR estimates that the Project's average water consumption would be at least 753,357 gallons per day. DEIR at 3.1.8-33. While the DEIR acknowledges this need, it fails to properly account for the impacts associated with providing water for the project. O-6-264

(a) Project-Specific Impacts

CEQA requires that an EIR present decisionmakers "with sufficient facts to evaluate the pros and cons of supplying the amount of water that the [project] will need." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 430-31. This includes identifying and analyzing water supplies that "bear a likelihood of actually proving available; speculative sources and unrealistic allocations ('paper water') are insufficient bases for decisionmaking under CEQA." *Id.* at 432. The long-term nature of the Project does not excuse an adequate water supply analysis. O-6-265

The ultimate question under CEQA . . . is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable *impacts* of supplying water to the project. If uncertainties inherent in long-term land use and water planning make it impossible to confidently identify the future water sources, an EIR may satisfy CEQA if it acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable alternatives—including alternative water sources and the option of curtailing the development if sufficient water is not available for later phases— O-6-266

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especially when moving upslope. A wildfire emergency that would be most likely to include an evacuation of the Project is a wind-driven fire from the north/northeast, burning in the chamise chaparral and sage scrub fuel beds on the slopes of the Jamul Mountain range into the Proctor Valley. FPP at 41; WFEP at 13.

and discloses the significant foreseeable environmental effects of each alternative, as well as mitigation measures to minimize each adverse impact. *Id.* at 434. O-6-266 Cont.

The DEIR's water supply analysis does not comply with this mandate. Instead, it falters from the outset because it fails to consider potential impacts from securing a *long term* water supply for the Project. The Project would develop large-scale residential and commercial uses that would require water indefinitely. But the DEIR does not consider the Project's long term water supply need. Instead it ends its water supply analysis at 2040, which likely represents less than two decades of Project operations. The DEIR apparently takes this approach because the most-recent Urban Water Management Plans from Metropolitan Water District, the San Diego County Water Authority ("SDCWA") and the Otay Water District ("OWD") only include supply projections through 2040. While it is appropriate to incorporate these documents into the County's environmental review, the DEIR may not rely on them to artificially truncate its analysis of water supply impacts. This foreshortened review window is inconsistent with CEQA's requirement to consider long term water supply impacts and the County's analysis elsewhere in the DEIR. *See e.g.,* DEIR at 2.7-23, 2.7-51 (employing a 30-year window for analyzing the Project's GHG impacts). O-6-267 O-6-268 O-6-269 O-6-270 O-6-271

Limiting the water supply analysis to projections through 2040 is especially problematic given the growing evidence that climate change will cause severe droughts. Droughts like the one that occurred from 2014-2016 are expected to become increasingly common in the future. Even though there have been multi-year droughts in the past, none approach the magnitude of California's recent mega-drought, which was induced by climate change. *See* California's Most Significant Droughts, attached as Exhibit 27; California Water Year 2014 Among Driest Years on Record, attached as Exhibit 28; Assessing the Risk of Persistent Drought Using Climate Model Simulations and Paleoclimate Data, attached as Exhibit 29. A study of California droughts concluded that anthropogenic climate change will continue to cause the co-occurrence of warm and dry periods in California, which in turn will exacerbate water shortages in the state. *See* Anthropogenic Warming Has Increased Drought Risk in California, attached as Exhibit 30. Indeed, scientists have determined that climate change likely intensified the recent mega-drought by 15 to 20 percent, and droughts are expected to become more severe in the coming decades. *See* Contribution of Anthropogenic Warming to California drought, attached as Exhibit 31. Ignoring such evidence violates CEQA because it denies decisionmakers and the public the information necessary to "evaluate the pros and cons of supplying the amount of water that the [project] will need." *Vineyard Area Citizens for Responsible Growth*, 40 Cal.4th at 431 (citation omitted; brackets original). The DEIR must acknowledge these projections for long-term drought-induced deficits in California's water supply, identify concrete measures that could supplement the water O-6-272 O-6-273 O-6-274 O-6-275 O-6-276 O-6-277

supply for the Project, and evaluate the environmental impacts of obtaining that new water supply. In light of this mounting evidence, the DEIR's short-term water supply assessment is inadequate.

Even with this truncated review window, the DEIR reveals that projections from the area's water agencies (Metropolitan Water District, SDCWA, and OWD) anticipate water supply deficits in future years. For instance, projections from SDCWA reveal that single-dry years will result in 12,448 acre feet per year ("afy") supply deficits beginning in 2025, and that those deficits will grow to 91,902 afy by 2040. DEIR at 3.1.8-51. But the DEIR does not account for these projected deficits and the additional water supplies needed to meet future water needs. Instead, it misleadingly claims that "SDCWA has available water to meet all of the region's anticipated demand, including development of the Proposed Project, in average/normal and dry water years." DEIR 3.1.8-34. This statement is flatly contradicted by the projections from SDCWA and serves only to confuse the public and decisionmakers, undermining CEQA's fundamental purpose. *See Communities for a Better Environment*, 48 Cal.4th at 322.

Moreover, SDCWA's water supply projections likely overstate the amount of water supply that the agency will have in future years. For instance, the DEIR asserts that the Carlsbad Desalination Plant will provide SDCWA 56,000 afy of water regardless of drought conditions, which is roughly equivalent to SDCWA's contractual entitlement from the plant. DEIR at 3.1.8-5. But multiple operational difficulties have plagued the Carlsbad plant and prevented it from operating anywhere near its maximum output. For instance, in contract year 2016/2017, the desalination plant was only able to deliver 40,419 af to SDCWA, roughly 72% of the water supply that the DEIR assumes will be available. SDCWA Report on Carlsbad Desalination Plant Operations for Fiscal Year 2017, attached as Exhibit 32. The DEIR must acknowledge such uncertainties surrounding its assumed water supply and identify what additional water supplies would be needed in the event of supply shortages.

Elsewhere the DEIR suggests that the Project could respond to water supply deficits from a severe drought by "contributing to the cost of or actually constructing off-site improvements." DEIR at 3.1.8-37. But DEIR does not identify any particular off-site improvement, and there is no evidence that off-site improvements would be available fast enough or provide sufficient quantity to meet the Project's water needs during drought years. Moreover, the DEIR does not require funding or constructing off-site improvements as enforceable mitigation measures, much less analyze the potential environmental impacts associated with such improvements as CEQA requires. *See Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 8360-31 (An EIR must disclose not only amount of water a project would use but also the impacts on water service elsewhere of supplying that amount of water to the project). The DEIR

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