

April 16, 2020

Via E-Mail

San Diego County Planning Commission
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Re: Otay Ranch Resort Village 13 and Draft Final Environmental Impact Report

Dear Commissioners:

This firm represents the Endangered Habitats League (“EHL”) in connection with the Otay Ranch Resort Village 13 (“Project”) and its associated Environmental Impact Report (“EIR”). Our client is deeply concerned about the far-ranging environmental impacts that would result from the proposed Project.

Given the unprecedented public health crisis currently affecting humanity, EHL respectfully urges the County to postpone consideration of the proposed Project. Tragically, the coronavirus is infecting and killing countless Americans. Those who are healthy are required to shelter-in-place and are caring for and/or otherwise homeschooling their children. The County should not be pushing forward with a major land use decision that demands significant public review and input while the public is facing a life-threatening pandemic. Given that the proposed Project has been in the planning stages for at least the last six years, there is simply no reason to rush this Project through its final stages of approval during this extreme public health emergency.

I. INTRODUCTION

After carefully reviewing the Draft Final EIR (“FEIR”), we have concluded that it fails to comply with the requirements of the California Environmental Quality Act (“CEQA”), Public Resources Code section 21000 *et seq.* The FEIR follows a similarly inadequate Recirculated Draft Environmental Impact Report (“DEIR”). Our letter of May

28, 2019 on the DEIR is by this reference incorporated herein in its entirety, including all attachments. In that letter we described many substantive flaws in the DEIR's analysis.

The FEIR neither adequately responds to comments previously raised nor cures the legal inadequacies identified by those comments. Rather than revise the EIR to comprehensively analyze, for example, the Project's impacts on biological resources, climate change, wildfire and emergency response, water supply, energy and air quality, the FEIR merely seeks to defend the erroneous assertions and conclusions of the prior document. Where the EIR does add analysis or make changes to the Project, it fails to acknowledge the significance of the changes or recirculate the document.

In addition to the EIR's CEQA violations, as we explained in our prior letter, the Project demonstrates a disturbing disregard for the San Diego County General Plan. The General Plan requires all large-scale residential projects requiring a general plan amendment to provide an affordable housing component, which continues to be absent from the Project. Thus, because the Project conflicts with fundamental planning provisions so as to result in significant environmental impacts, and because the County has failed to adequately identify these conflicts in the EIR, approval of the Project would violate not just CEQA, but also the California Planning and Zoning Law, Government Code § 65000 et seq., and the Subdivision Map Act, Government Code §§ 66473.5, 66474 et seq.

At a more fundamental level, the proposed Project represents a reckless disregard for the environment. In addition to EHL, numerous agencies, residents, and organizations such as the California Attorney General, Center for Biological Diversity, California Chaparral Institute, Preserve Wild Santee, San Diego Audubon Society, and the California Native Plant Society have weighed in on the merits of the Project explaining that its benefits would be outweighed by the environmental impacts. EHL urges the County to reject this ill-conceived Project.

The remainder of this letter explains how the FEIR perpetuates the failings of the DEIR and new deficiencies in the EIR have emerged. We will not here reiterate our comments in full. Instead, we detail below some of the FEIR's more egregious shortcomings. In addition, EHL reserves the right to provide additional comments to the Board of Supervisors.

II. THE FEIR FAILS TO COMPLY WITH CEQA.

A. The EIR's Analysis of and Mitigation for the Impacts of the Proposed Project Remain Inadequate.

1. The FEIR Does Not Remedy the DEIR's Failure to Adequately Analyze and Mitigate the Project's Impacts on Biological Resources.

The FEIR does not cure the deficiencies identified in our comments on the DEIR. As explained in more detail below, the FEIR fails to explain the EIR's lack of adequate analysis of the Project's impacts on biological resources and fails to adequately mitigate the Project's impacts by relying on improperly deferred or illusory mitigation.

First, the FEIR continues to fail to identify the environmental impact of destroying the K6 vernal pools, which would be destroyed by construction of the Project. Comment RO-6-7. Instead, the FEIR's response evades the issue, claiming that because the K6 mesa has "no hard boundary," impacts cannot be identified. FEIR Response RO-6-7. This argument is nonsensical. Virtually no habitat on the planet contains a "hard boundary," and the lack thereof does not prevent identification of impacts to a general habitat area. The EIR must discuss the impact of destroying the K6 pools, including the impact on species that inhabit or otherwise use the pools and their surroundings.

We also pointed out in our initial comments that the DEIR failed to explain exactly *how* sensitive species included on a list would be impacted by the Project, instead stating vaguely that there would be impacts. Comment RO-6-7. The FEIR responds by describing the impact as "the species will no longer be present within the development footprint," having either been killed or driven out by habitat destruction. FEIR Response RO-6-7. But this response does not fix the deficiency. The EIR must explain the impact of the development on the species' population. If habitat is destroyed and the species can no longer use that habitat, the EIR must describe how that loss will affect the species' collective health and survival. Simply stating, vaguely, that the species will be no longer be present in the specific area is not enough.

Next, the FEIR attempts to avoid discussion of the importance of designated critical habitat for the Quino Checkerspot Butterfly ("QCB"). The FEIR responds that it is up to USFWS to determine whether critical habitat is destroyed or adversely modified. FEIR Response RO-6-9. This response misses the point. There is no dispute that the project will destroy QCB critical habitat. Our comment sought an analysis of how critical habitat is important to a species, and how critical habitat around Otay Lake in particular

is necessary to survival of the QCB, so that the public can understand the full magnitude of the project's impacts. As noted in biologist Robb Hamilton's letter attached to our comments on the DEIR, USFWS has made clear that critical habitat designation is intended, in part, to guide the conservation decisions of local governments. Discussion of the conservation purpose of designating critical habitat is thus relevant to the CEQA impact analysis, and this issue has still not been addressed in the EIR.

Indeed, the impact analysis should have—but did not—take into account the known importance of the Project site to the continued existence of the QCB. The EIR's failure to provide this relevant context undermines the credibility of its conclusion that impacting 483 acres of occupied QCB critical habitat would not represent a significant adverse effect upon the QCB.

The FEIR next evades addressing the EIR's lack of consistency with the 1993 Otay Ranch GDP/SRP Program Environmental Impact Report ("PEIR"). *See* Comment RO-6-11. Specifically, the PEIR requires that 100 percent of occupied QCB habitat be preserved. The Project, however, proposes to destroy 389 acres of occupied habitat identified by the DEIR. The FEIR points to the fact that the PEIR also allows preservation of habitat to HCP or MSCP standards to excuse this discrepancy, but neither an HCP or MSCP for the QCB currently exists. These potential future standards cannot excuse the EIR's present inconsistency. The PEIR's 100 percent preservation standard is currently the controlling mitigation standard, and it must be adhered to or shown to be infeasible. *See* Comment RO-6-12. That the mitigation measure also requires the applicant to receive a take authorization is irrelevant. As the FEIR itself made clear, federal law stands separate from CEQA's requirements, and compliance with the federal Endangered Species Act does not excuse noncompliance with CEQA. *See* Response RO-6-9.

As for the point that "[t]he County had [sic] interpreted the preservation criteria to refer to the populations at the time of the approval of the Otay Ranch GDP/SRP (1993)" (Response RO-6-11), the EIR provides no justification for this conclusion—nor can one be found in the PEIR. In fact, the 1993 Final CEQA Findings further clarified that future projects should be "designed to avoid impacts to occupied habitat" and "[p]reserve in natural open space all occupied habitat." Further, the reliance on the Quino Checkerspot Management/Enhancement Plan is not supported by substantial evidence, and the Project's major impacts to the QCB are likely to be perilous to the species as a whole.

The FEIR also fails to fix critical deficiencies regarding deferred mitigation for the QCB, vernal pools, and the burrowing owl. Specifically, the FEIR continues to point to proposed draft plans as evidence that it has established sufficient performance standards

to allow deferral of mitigation. *See* Responses RO-6-13, RO-6-16, RO-6-17, RO-6-27, RO-6-33. But there is no guarantee that those *draft* plans will be approved as currently proposed. The applicant need not submit a plan for approval until sometime before the first grading permit is issued, and at that point, the applicant could propose something entirely different for approval—long after this CEQA process is concluded. The sample plans attached to the EIR thus are not enforceable components of the Project’s mitigation. Any performance standards in those drafts are subject to change and lack final approval, and thus do not satisfy CEQA’s requirements for deferred mitigation. *See Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94-95; Guidelines § 15126.4(a)(1)(B). And in the case of the burrowing owl, a draft plan does not even exist yet. Response RO-6-33. The FEIR claims that “[p]erformance standards will be included [in the mitigation plan] if necessary”—but CEQA requires that they be established now, as part of the Project’s enforceable mitigation.

The FEIR’s revision to Mitigation Measure M-BI-9b also fails to fix the problem. While some performance standards for that deferred mitigation are enumerated, that measure states that those standards “may” be included in the deferred mitigation plan—not that the listed performance standards *must* be achieved. Response RO-6-13. The lack of enforceable performance standards renders the deferred mitigation inadequate.

The EIR also cannot rely on the outcomes of Section 7 or 10 consultation processes to serve as mitigation. *See* Responses RO-6-15, RO-6-29, RO-6-30. For example, Mitigation Measure M-BI-9a requires compliance with a Biological Opinion or HCP resulting from consultation regarding the QCB and conservation of a “biological open space easement [in] the amount of suitable or occupied [QCB] habitat.” But the BiOp or HCP could require no amount of habitat be included in the easement and instead enumerate other measures. Without knowing the requirements of the BiOp or HCP, or without at least identifying enforceable performance standards, there is no way for decisionmakers or the public to know if the proposed mitigation would, indeed, reduce impacts of the Project.

The FEIR also lacks justification for the EIR’s failure to conduct surveys for the Western Spadefoot toad or to adequately protect its aestivating habitat. *See* Comments RO-6-19, RO-6-20. In particular, it is inexplicable that focused surveys could be conducted for Village 14 and Planning Areas 16/19—both nearby—but were not conducted for this Project. This is especially concerning in light of the fact the EIR presumes that Spadefoot occupancy is limited to 0.26 acres of the Project’s 1,869 acres.

Regarding the Western Spadefoot’s habitat, as explained in the Hamilton Letter attached to our comments on the DEIR, the minimum area to support a viable population

of the Western Spadefoot is quite large, with the smallest patch documented at 217 hectares (536 acres).¹ Based on the study referenced in the Hamilton letter, the 12.5 acres conserved in the K8 area is clearly insufficient to support the Western Spadefoot, and the EIR provides no evidence to support its conclusion that 12.5 acres would support the local population.

We also commented that the EIR failed to comply with CEQA because it does not explain why the Project could not be redesigned to avoid destruction of the K6 vernal pools, one pool of which (at least) is occupied by San Diego fairy shrimp. Instead of redesigning the Project to avoid the pools—or explain why this is infeasible—the FEIR’s response simply explains that the K6 pools were intended to be in the development footprint and then tries to downplay their importance. The EIR’s response is nonresponsive to the issue raised.

Finally, we commented that Mitigation Measure M-BI-7, Option 2, was inadequate mitigation because it provided no information on the effectiveness of vernal pool mitigation banks. The FEIR’s response still does not contain any information to this point, instead stating that “the acceptability of the mitigation bank, if one exists, ... will be fully vetted or approved during the permitting process.” Response RO-6-28. But Measure M-BI-7, Option 2, provides no discussion of what an acceptable mitigation bank would look like. Without some sort of performance standard, this mitigation is illusory.

2. The FEIR Does Not Remedy the DEIR’s Failure to Adequately Analyze and Mitigate the Project’s Climate Change Impacts.

The FEIR fails to address the deficiencies cited in our prior letter on the DEIR’s analysis of climate change and greenhouse gas (“GHG”) impacts. Accordingly, the comments that follow for the most part do not reiterate deficiencies already identified, but rather address further deficiencies in the FEIR and responses to comments.

Under the FEIR’s thresholds of significance, any net increase in GHG emissions above existing conditions would constitute a significant impact. FEIR at 10.2-29. The County’s conclusion that the FEIR’s proposed mitigation measures will in fact achieve this quantitative goal must be both legally sound and supported by specific, quantitative evidence. See *Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, 227-28. As discussed below, the FEIR’s conclusions and the

¹ See Rochester, C. J., K. L. Baumberger, and R. N. Fisher. 2017. Draft Final Western Spadefoot (*Spea hammondi*): Independent Scientific Advisor Report for the City of Santee Multiple Species Conservation Plan (MSCP) Subarea Plan, at pp. 5-6.

proposed findings in the Staff Report are both contrary to law and lack evidentiary support.

a. Mitigation Measures M-GCC-7 and M-GCC-8 Fail to Ensure Compliance with CEQA's Standards for Mitigation.

Mitigation measures M-GCC-7 and M-GCC-8 fail to satisfy CEQA's requirements for specific, effective, enforceable mitigation. *See* CEQA Guidelines § 15126.4. In particular, these measures lack enforceable provisions necessary to ensure that carbon credits actually will achieve “net zero” emissions.

State law establishes specific standards for GHG offsets used in California's Cap-and-Trade program: emissions reductions from projects producing offset credits must be real, permanent, quantifiable, verifiable, and enforceable, as well as “additional” to any reductions required by law or that would have occurred anyway for any other reason. *See* Health & Safety Code § 38562(d)(1) and (2). The FEIR and responses to comments indicate that the County now agrees that all of these standards—particularly the additionality standards in section 38562(d)(2)—apply equally to offsets used as CEQA mitigation. *See* FEIR at 2.10-33, 2.10-35; Response RO-6-46.

Measures M-GCC-7 and M-GCC-8 provide no enforceable mechanism for the County to ensure that these standards are met. Under these measures, the County does not review whether any credit purchase or registry protocol actually complies with the Health and Safety Code. Rather, the County's role is limited to verifying (a) the identity of the registry that sold the credits and (b) the quantity of credits purchased. All decisions as to the rigor of offset protocols, and the quality and enforceability of offset project implementation, are left to the registries.

Measures M-GCC-7 and M-GCC-8 fail to satisfy CEQA's requirements for several reasons. First, numerous studies have shown that a wide range of offset projects—including but not limited to Clean Development Mechanism (“CDM”) projects listed by Verra/Verified Carbon Standard and American Carbon Standard—do not produce “additional” GHG reductions. The FEIR states that CDM-related offsets will not be accepted. (Global Response R1 at PDF 5, fn. 9.) But because measures M-GCC-7 and M-GCC-8 appear to require the County to accept *all* Verra and American Carbon Standard offsets, the measures provide no way for the County to enforce a limitation on CDM projects listed by those registries. Second, measures M-GCC-7 and M-GCC-8 apparently require the County to accept offsets from presently unknown registries that might someday be approved to handle Cap-and-Trade transactions, even though

California Air Resources Board (“CARB”) approval of a registry to *transact* in Cap-and-Trade credits is separate from, and does not confer, approval of the *protocols* used by that registry. Compare 17 Cal. Code Regs. §§ 95970-95972 (CARB compliance protocol approval process) with *id.*, § 95986 (CARB registry transaction approval requirements). Third, there is no evidence the County has reviewed *every* protocol or methodology used by the specified registries and has determined that *each* protocol or methodology complies with the Health and Safety Code standards the County now agrees should apply. Absent evidence that such a review has taken place (which, in the case of unknown future registries, would be impossible in any event), and absent evidence of the County’s expertise to conduct such a review in the first place, the County cannot rely on the registries’ review and approval of their own protocols. Nor is there any evidence that the specified registries even review their own voluntary protocols for specific compliance with Health and Safety Code standards, as CARB does for Cap-and-Trade compliance protocols. Fourth, measure M-GCC-8 allows the developer to purchase offsets prior to each phase of construction as an alternative to mitigating all of the Project’s emissions up front. FEIR at 2.10-35. However, the FEIR offers no evidence that either the specified registries or future unnamed registries will continue to exist, and will have sufficient credits available for mitigation, over the entire construction phasing period. Measures M-GCC-7 and M-GCC-8 are unenforceable, impermissibly delegate verification and enforcement to private third parties, lack specific performance standards essential to ensure the effectiveness of mitigation, and improperly defer development of mitigation.

b. The Project May Not Rely on Offset Credits Derived from “Forecasted” Emissions Reductions.

M-GCC-7 and M-GCC-8 also impermissibly defer the implementation of mitigation. These measures would allow the Project to rely on carbon credits based on “forecasted” future emissions reduction or sequestration. FEIR at 2.10-33, 2.10-35; Staff Report at 1-331, 1-333. Reliance on “forecasted” reductions that have not yet occurred would allow the adverse impacts of GHG emissions to persist for years before being mitigated. CEQA does not permit an agency to defer implementation of mitigation measures until after significant impacts occur. *King and Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, ___, 259 Cal.Rptr.3d 109, 146-47, as modified on denial of reh’g (Mar. 20, 2020). Rather, “[o]nce the project reaches the point where activity will have a significant adverse effect on the environment, the mitigation measures must be in place.” *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 738. The EIR should remove all references suggesting the Project may rely for mitigation on “forecasted” emissions reductions under Climate Action Reserve’s “Climate Forward” or any other similar program.

c. The Project's Mitigation Obligations Are Limited to a 30-Year Time Frame and Cannot Support a "Net Zero" Conclusion.

Our prior letter pointed out that the EIR provides mitigation for only the first 30 years of the Project's operational emissions, despite the lack of any substantial evidence that the Project is designed to operate or will operate for only 30 years. Comment RO-6-44. Because the FEIR's significance determination rests entirely on a quantitative "net zero" calculation, the only relevant question is whether there is substantial evidence that this Project's emissions will last for only 30 years. There is no such evidence here. Indeed, the County concedes the Project "could continue to exist for more than 30 years." Response RO-6-44; *see also* Global Response R1 at PDF 8-12.

The FEIR's explanations, although lengthy, fail to justify the County's approach. For example, the County emphasizes that other agencies and consultants have used a 30-year project life in calculating mitigation obligations, but whether other agencies and EIRs have used a similarly unsupported time frame for other projects is beside the point. The FEIR also grossly misinterprets a South Coast Air Quality Management District ("SCAQMD") guidance document recommending that *construction* emissions be amortized over a 30-year period for *industrial* projects. SCAQMD did not determine that residential or commercial projects have a similar 30-year life; accordingly, SCAQMD's threshold does not provide substantial evidence that limiting construction emissions to 30 years is appropriate for such projects. Nor did SCAQMD's threshold recommend that the same 30-year period be used for *operational* emissions, which the FEIR concedes will exceed 30 years here. SCAQMD's guidance document lends no support to the FEIR's 30-year limitation on mitigation.

Finally, because the Project is part of the built environment, its effects will be long-lasting. Natural gas infrastructure for heating, cooking, and fireplaces will be built into the development and will continue to emit GHGs without regard to any future regulatory or technological developments. Nor does it require undue speculation to conclude that at least some of the Project's emissions will continue for more than 30 years. A present inability to predict exactly what regulations or technologies might exist in 2050 cannot justify an arbitrary limitation on mitigation obligations for projects that will be built well before then. Unless the Project is conditioned to shut down entirely after 30 years—or unless the developer's mitigation obligations continue for the entire life of the Project—the County cannot support its proposed finding that the FEIR's mitigation measures will ensure "net zero" emissions, and cannot support a determination that climate change impacts will be less than significant.

d. The FEIR Fails to Analyze Additional Feasible On-Site Mitigation.

The FEIR fails to ensure that maximum GHG reductions are achieved from on-site measures before offsets can be purchased. Global Response R1 at PDF 13-14. The Global Response cites CARB's 2017 Climate Change Scoping Plan Update (*id.* at 14), but gets CARB's conclusion exactly backwards. CARB did not recommend a "portfolio-based approach," as the Global Response claims, but rather clearly stated that reliance on offset credits would be appropriate only where further on-site reductions and direct local investments "are infeasible or not proven to be effective." *Ibid.* The Global Response makes no effort to show that further on-site measures are infeasible or ineffective.

The FEIR therefore must consider additional on-site measures to reduce GHG emissions. For example, in addition to measures suggested in prior comments, the County could require a mitigation measure prohibiting natural gas usage in the Project's homes and buildings. Requiring electrification of new residential buildings is both feasible and cost-effective, as shown by both recent California Energy Commission studies and numerous local ordinances either adopted or under consideration by other California jurisdictions. The County could also require that the developer pay for the acquisition of conservation easements over local rural lands within the County where development is planned or foreseeable, in order to permanently retire GHG-generating development rights in an amount equivalent to the GHGs generated by the project. The FEIR fails to consider these and numerous other feasible mitigation measures.

e. The FEIR Misinterprets California's Cap-and-Trade Program.

The FEIR claims compliance with California's 2020 GHG reduction goals is "assured" by the Cap-and-Trade program, which the FEIR claims covers "nearly all of the sources associated with land use development projects," including sources not subject to Cap-and-Trade compliance obligations. *See* FEIR at 2.10-17 & n.36, 2.10-40 (Table 2.10-2). This represents a fundamentally erroneous interpretation of the Cap-and-Trade program. As CARB repeatedly emphasized in its 2017 Climate Change Scoping Plan Update, the Cap-and-Trade program does not cover all sectors of the state's economy and was not designed to achieve state targets on its own. Rather, local government action—including land use decisions that reduce vehicle miles traveled and associated GHG emissions—will be critical to meeting state targets.

The FEIR does not appear to rely on this misinterpretation of the Cap-and-Trade program in determining the significance of the Project's climate impacts. To eliminate

any confusion, however, this erroneous discussion should be deleted from the FEIR and all other Project-related documents.

f. Measures M-GCC-7 and M-GCC-8 Conflict with the County's General Plan.

As we previously pointed out, the Project's reliance on national and international offsets conflicts with the plain text of the General Plan. Comment RO-6-45. Global Response R1 and Appendix E-1 argue that the General Plan does not actually mean what it says. See Global Response R1 at PDF 12-13, 15-19. However, an interpretation that conflicts with the plain language of a General Plan is unreasonable and not entitled to deference. See *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 642. The County's proposed findings (Staff Report at 1-74 to 1-75) regarding consistency with Policy COS-20 are therefore legally erroneous and unsupportable.

3. The FEIR Does Not Remedy the DEIR's Failure to Adequately Analyze and Mitigate Impacts Relating to Wildfire-Related Impacts.

a. Exposure to Wildland Fire

The FEIR, like the DEIR, fails to provide the required evidentiary support for its conclusion that the proposed Project would not expose people or structures to a significant risk of loss, injury, or death from wildland fires. The FEIR continues to assert, absent adequate support, that code compliance and Project "fire hardening" features (sprinklers, an onsite fire station, landscaping, fuel modification zones, and public education) would protect adjacent communities from Project-ignited fires. Response RO-6-68. Yet, as we explained in prior letter—with abundant evidentiary support—neither code compliance nor fire hardening feature are sufficient to protect people from a significant risk of injury or death from wildland fires. Nothing in the FEIR, including the newly prepared Fire Protection Plan Supplemental Analysis Otay Ranch Resort Village 13 – Alternative H (March 19, 2020), corrects the DEIR's deficiencies.

As part of the evidentiary support for our comments on the DEIR, we provided two reports prepared by Christopher Lautenberger, PhD, PE, a fire protection engineer, with REAX Engineering ("REAX Engineering Reports"). While the REAX Engineering Reports were prepared in connect with the Village 14 Project, we explained that the Reports were directly relevant to the analysis in the V13 EIR because both projects are in similar locations in the County (Village 13 is located just to south of Village 14); both

projects are within Very High Fire hazard Severity Zones; and the precise flaws found in the Village 14 EIR were repeated in the Village 13 EIR. The EIRs for both projects focused on code compliance and fire hardening features to protect people and structures from wildland fire. And both EIRs focused exclusively on protecting people and structures within the projects' sites rather than analyzing how the projects would pose a threat to adjacent communities. Rather than address the legitimate issues raised in the REAX Engineering Reports as they pertain to the Village 13 Project, the FEIR refuses to provide any responses to the legitimate issues raised in the Reports simply because the Reports "were prepared for a different project." Response RO-6-70. The FEIR's non-responsiveness does not withstand scrutiny. CEQA requires that a lead agency respond to comments raising significant environmental issues received during the comment period and that the agency make a good faith, reasoned analysis in response. CEQA Guidelines section 15088(a) (c). Here, our comments explicitly cited, attached as exhibits, and incorporated by reference, the REAX Engineering Reports dated April 12, 2018 and May 6, 2019. We explained precisely how the Reports were applicable to the proposed Project and to the deficiencies in the DEIR for the proposed Project. The County's failure to provide any responses to the issues raised in the REAX Engineering Reports, let alone good faith, reasoned analysis, constitutes a fatal flaw.

The FEIR suggests that its approach to wildland-fire impact analysis is sufficient because impacts were analyzed according to the San Diego County Guidelines for Determining Significance –Wildland Fire and Fire Protection ("Guidelines"). Response RO-6-71. The County asserts that the Guidelines constitute a comprehensive approach to fire protection planning in fire hazard severity zones and in wildland urban interface areas. Response RO-4-66. However, as we and REAX Engineering explained in our prior submission and as discussed below, the Guidelines do not provide a sound methodological approach to evaluating the Project's impacts. Consequently, mere compliance with the Guidelines is not sufficient to ensure that property and public safety would be protected in the types of wildfires that are now increasingly common in the West.

The County's Guidelines were prepared in 2010. There has been a tremendous amount of scientific study since 2010 documenting that code compliance and fire hardening project features alone are insufficient to protect public safety and structures. Much of this new information exists as a result of the devastating fires in 2017 and 2018. The fact that the Guidelines continue to emphasize ignition resistive building construction, defensible space and ornamental landscaping, vegetation management, and sheltering in place (Guidelines at 18-22) are a clear indication that they are obsolete. Moreover, the Guidelines focus on protecting people and structures within the Project site

and ignore risks to downwind communities from flame spread and ember spotting. Agencies may not rely exclusively on a methodology if other substantial evidence in the record demonstrates that the Project may actually cause significant impacts. *Communities for a Better Env't v. California Resources Agency* (2002) 103 Cal.App.4th 98, 112-13 (thresholds of significance cannot be used as binding standards that foreclose the use of other evidence to demonstrate that a project may have significant effects); *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 (“in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met”).

In addition, as the REAX Engineering Reports explained, the DEIR understated the Project’s impacts because it relied on outdated, flawed and otherwise inaccurate analytical data and assumptions relating to, for example: fire behavior and expected fire frequency; fire threat maps; wind data; the relationship between steep slopes and fire spread rate and firefighting response; fire suppression data; fuel modification zones and their relationship to fire propagation by firebrand spotting; and the relationship between development density and structure loss and loss of life.

Our letter, together with the REAX Engineering Reports, provided substantial evidence that the County relied on flawed methodology and inaccurate assumptions in evaluating the Project’s impacts. Because it relied on the outdated County’s Guidelines rather than accurate scientific information, the DEIR did not adequately address the Project’s potential to expose people or structures to a significant risk of loss, injury or death from fires ignited inside the Project area. The FEIR does nothing to correct these deficiencies. Consequently, the EIR lacks the evidentiary basis to support its conclusion that wildland fire-related impacts would be less than significant.

b. Emergency Evacuation

CEQA requires an EIR to discuss any “health and safety problems caused by physical changes” in the environment that arise out of a project. Guidelines § 15126.2(a). Where those physical changes contribute to or exacerbate wildfire and evacuation risks, the EIR must adequately inform the public and decisionmakers about the risks of attempting to evacuate the Project area. Here, neither the DEIR nor the FEIR adequately disclose the risk to the public from evacuating the Project area.

The DEIR failed to provide *any* analysis of the Project’s evacuation risks. Recognizing this glaring omission, the FEIR includes a new “Conceptual Wildland Fire Evacuation Program” (March 2020). FEIR Appendix D-21A. Yet, this Evacuation

Program is indeed conceptual and does not disclose whether it is even feasible to evacuate the Project residents, and surrounding community, in a timely manner. Consequently, the FEIR, like the DEIR lacks support for its conclusion that such impacts would be less than significant.

The FEIR's Evacuation Program now asserts a total evacuation time (2 to 2.5 hours) that the Project's residents could be evacuated west to Chula Vista. Response to Comment RO-6-73. The FEIR does not, however, provide any description of the methodology or assumptions use to derive this evacuation time so it is not possible for the public to verify the accuracy of this estimate. Nor does the Evacuation Program explain the implications of this 2 to 2.5-hour evacuation time frame, i.e., would this evacuation time frame create a safety risk or not?

The Evacuation Program also fails to provide the following critical information: (1) an estimate of total traffic on Otay Lakes Road (the sole evacuation route) during an evacuation assuming Project traffic and traffic from adjacent communities; (2) an estimate of the traffic-carrying capacity of Otay Lakes Road; (3) any acknowledgement that certain segments of Otay Ranch Road would operate at LOS F (gridlock conditions) as a result of the Project; (4) the implications of escaping on a roadway that is operating at gridlock conditions (i.e., how much additional time beyond 2 to 2.5 hours would residents need to evacuate the area once they reach gridlock conditions on Otay Lakes Road?); (5) an analysis of an evacuation in which motorists must escape to the east (i.e., if a wildfire approaches from the west or Otay Lakes Road is blocked west of the Project area if, for example, a fire starts west of the Project site; and (6) an assessment of the impacts to emergency personnel trying to respond to the wildfire in light of the evacuation.

The DEIR also made no attempt to take into account the fact that evacuation would not necessarily proceed in an orderly fashion. When we requested that the EIR should have taken into consideration factors that would likely occur during a wildfire evacuation, such as smoke, visible flames, and/or visibility issues and the emotional state of evacuees, the FEIR asserts "the emotional state of evacuees is not a CEQA issue and therefore no further response is required." RO-6-80. This assertion completely misses the point. The comment is plainly not suggesting that the emotional state of evacuees is itself an environmental impact, but rather that such state must be accounted for in any analysis of evacuation times, which relates directly to the fire-related impacts of the Project. Recent events have conclusively shown that wildland fire evacuation rarely goes textbook smoothly. The EIR cannot simply assume that fleeing residents would wait patiently to leave the scene of a wildfire or that their mental state would have no effect on evacuation efforts.

In sum, the aforementioned information is precisely what must be taken into account in order to determine whether an evacuation can be successfully accomplished. Determining whether an evacuation can be successfully accomplished is the first step in evaluating whether the Project would pose a threat to public safety. Guidelines § 15126.2(a). Like the DEIR, the FEIR fails to do so.

4. The FEIR Does Not Remedy the DEIR's Failure to Adequately Analyze the Project's Impacts on the Water Supply.

In our prior comments, we pointed out numerous failures in the analysis and mitigation of Project impacts related to water supply. As explained below, many issues remain unresolved by evasive, conclusory, and incomplete responses to comments in the FEIR. This failure renders the analysis and proposed mitigation insufficient to support responsible, legal, decision-making under CEQA.

a. The FEIR Fails to Adequately Describe The Existing Setting.

The OWD Water Supply Assessment and Verification Report ("WSA&V Report") is intended to form the basis of the EIR's water supply analysis. Under the California Water Code, lead agencies are obliged to "determine whether the projected water demand associated with a proposed project was included as part of the *most recently adopted* urban water management plan adopted pursuant to Part 2.6 (commencing with Section 10610)." California Water Code Section 10910(c)(1); emphasis added.

Moreover, CEQA provides that:

"Where existing conditions change or fluctuate over time, and where necessary to provide the most accurate picture practically possible of the project's impacts, a lead agency may define existing conditions by referencing historic conditions, or conditions expected when the project becomes operational, or both, that are supported with substantial evidence. In addition, a lead agency may also use baselines consisting of both existing conditions and projected future conditions that are supported by reliable projections based on substantial evidence in the record."

CEQA Guidelines 15125(a)(1). Given that the conditions described in the 2010 UWMP are now a decade old, the FEIR should have incorporated analysis using the most current UWMP. *Neighbors for Smart Rail v. Exposition Metro Line Construction Auth.* (2013) 57

Cal.4th 439, 449 (“Neighbors”) (agencies must use a baseline that provides “the most accurate picture practically possible of the project’s likely impacts”).

Here, the FEIR’s WSA&V Report falters at the outset because it continues to rely on an outdated Urban Water Management Plan (“UWMP”). The OWD WSA&V Report relies on the 2010 UWMP rather than the most recently adopted UWMP 2015 plan, adopted in June 2016. The FEIR claims that “the 2015 UWMP for each water agency was released after this document was released for public review.” FEIR at 3-7-20. However, the FEIR also states that “[W]hile this analysis was not updated to include the 2015 UWMPs, the documents were reviewed and do not change the determinations of the analysis.” *Id.* Given that the updated documents were available to the EIR preparers prior to publication, the EIR should have incorporated the new data.

The current OTW UWMP describes a more realistic setting regarding water supply and demand, and the FEIR’s failure to use the updated data in that report renders its analysis of water supply impacts inadequate. For example, relying on data from the outdated UWMP means that the underlying demand forecast understates water demand. The current UWMP also takes into account the extreme drought conditions present between 2014 and 2016, whereas the previous version does not. In addition, the current UWMP incorporates climate change conditions into the plan, which the prior version does not. Thus, the EIR’s use of the outdated UWMP results in an inaccurate description of baseline conditions related to water supply and skews the EIR’s analysis of related impacts.

b. The FEIR Fails to Consider Potential Impacts from Securing a Long-Term Water Supply for the Project.

In response to comments that the EIR fails to account for impacts associated with providing water for the Project, the FEIR asserts that there is adequate water supply for Alternative H according to the OTD WSA&V Report based on the outdated UWMP. Response RO-6-83. Rather than conduct the required analysis, the FEIR asserts that “regional water suppliers are responsible for securing water supplies within their jurisdiction.” Response RO-6-85. The FEIR goes on to state that the “proposed Project itself is not responsible for identifying water supplies for regional water suppliers and is therefore not required to identify potential impacts associated with those supplies.” *Id.* This interpretation of CEQA requirements is fatally flawed. The County is obliged to conduct this analysis and to disclose any significant impacts.

As explained in our previous letter, long-established case law requires an EIR to both establish a likely source of water and also to address the reasonably foreseeable

impacts of supplying water to the project. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 430-31, 434. The FEIR fails on both counts and is therefore inconsistent with CEQA requirements.

Furthermore, in response to comments that it is not enough to present generic information about the water agency's "intent" to provide adequate water supplies, the FEIR asserts that "water supplies will be confirmed prior to occupancy of the proposed Project." FEIR at Response RO-6-87. Such deferral of analysis is expressly prohibited under CEQA and the resulting "bare conclusions" are insufficient; the EIR "must contain facts and analysis" to support and explain such conclusions. *Santiago County Water Dist. v. County of Orange*, 118 Cal.App.3d 818, 831 (1981). An EIR may conclude that impacts are insignificant only if it provides an adequate analysis of the magnitude of the impacts and the degree to which they are mitigated by the project's design or mitigation measures. See *Sundstrom*, 202 Cal.App.3d at 306-07. If an agency fails to investigate a potential impact, its finding of significance cannot stand. *Id.*

Moreover, this FEIR includes no discussion of the potential impacts of climate change on the availability of water supply and on how the Project could affect future water supply reliability. Water suppliers around the state, have recognized the potentially significant impacts of climate change on future water supply reliability. Evaluations of the impacts of a project such as this must likewise address the manner in which those impacts are affected by climate change. *Id.* The FEIR states that a discussion of impacts to water supply as a result of climate change is included in the 2019 Recirculation Package at Section 2.10.1.3. Response RO-6-85. However, this section, includes only a generic discussion of the potential for climate change to impact potable water sources and fails to provide any substantive analysis related to this impact.

As the FEIR points out, neither the 2010 nor the 2015 UWMP includes buildout of the Project site because the site is not currently part of the OTW service area boundary. DEIR at 4.11-26. A revised analysis must recognize that the water demand for this Project would be additive to the UWMP projections and must provide a full evaluation of the Project's impacts on forecasted water supplies in the 2015 UWMP.

5. The FEIR Does Not Remedy the DEIR's Failure to Adequately Analyze the Project's Energy Impacts.

Our prior letter pointed out that, although the Project would result in a massive increase in vehicular travel, the DEIR fails to identify the Project's gasoline and diesel consumption. The FEIR response directs the reader to the Global Climate Change section of the RDEIR for an analysis of impacts related to fuel consumption. Response RO-6-

101. However, the EIR does not appear to include any such analysis. Even assuming that the “mobile emissions” estimates included in the Climate Change section are estimated from Project vehicular traffic, the EIR fails to include any specific calculation of gasoline/diesel consumption or any separate analysis of transportation energy impacts resulting from that consumption. Calculating vehicle trips is not a substitute for the transportation energy analysis CEQA requires. See, *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 263-265; *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 206-211.

In addition, because the EIR incorrectly concludes that the Project’s energy consumption would not be wasteful or inefficient, it fails to identify any mitigation for this impact. The EIR should have evaluated measures to reduce fuel consumption due to excessive commuting. The FEIR mentions a “mobility hub” for Alternative H which would purportedly offset some of the impacts related to VMT. Response RO-6-104. However, the features that would be used at this “mobility hub” would do little to reduce VMT. For example, the mobility hub would include ride-hailing services. Yet, there is no indication that ride-hailing services reduce VMT. In fact, they tend to increase vehicular trips. Micro-mobility devices, such as electric scooters and electric bicycles, would also be ineffective in transporting people more than a few miles and would therefore not reduce VMT for residents commuting farther distances for work and services. One obvious measure that would work would be to support the Project site with local transit service. The applicant should coordinate with SANDAG and the San Diego Metropolitan Transit System to evaluate potential service options. In addition, the applicant could implement daily shuttle service to the Otay Ranch Town Center Transit (which is less than four miles from the project site) which provides bus service to downtown San Diego.

B. The FEIR Fails to Correct the Deficiencies in the DEIR’s Alternatives Analysis.

We identified several deficiencies in the DEIR’s alternatives analysis. Unfortunately, the FEIR fails to remedy these flaws. Perhaps the FEIR’s most egregious deficiency as it relates to the Project’s alternatives analysis is that it fails to demonstrate the infeasibility of Alternative G.

We explained that because Alternative G, the environmentally superior alternative, meets or could easily meet the Project’s objectives, it should be adopted instead of the proposed Project. Comment RO-6-121. The FEIR concludes that Alternative G is the environmentally superior alternative and explains that it would meet 6 of the Project’s 13 objectives. Response RO-6-122; 123. It then asserts, without evidentiary support, that

Alternative G would not meet the remaining seven objectives. *Id.* For example, the FEIR asserts that Alternative G would not achieve the objective calling for the creation of a prestigious destination resort that maximized open space and views with a distinct, predominantly single-family home community. Yet, Alternative G would accomplish all of this; it would develop 465 single-family homes; it would include a 17.4-acre resort site in the same location as the proposed Project; and it would conserve even more open space than the proposed Project. RDEIR at 4.0-3.

And because Alternative G calls for single-family housing, it would also meet the Project objective calling for “the establishment of an executive-level housing enclave that would attract business owners and employers within both the Otay Ranch and Otay Mesa planned business parks, urban centers, and university uses, thereby providing this segment of the housing community with opportunities to live and work in South County.” In fact, the *only* Project objective that Alternative G would not achieve is the creation of a neighborhood elementary school site. Yet, Alternative G could certainly be revised to include an elementary school. Perhaps, however, with the reduced number of units contemplated by Alternative G, there may not be the demand for an elementary school at all.

As noted in our letter on the DEIR, the County cannot approve the Project as proposed if there is a feasible alternative that would substantially lessen the Project’s significant impacts. Pub. Res. Code § 21002. An alternative need not meet every Project objective or be the least costly in order to be feasible. *See* CEQA Guidelines § 15126.6(b). Because Alternative G would achieve almost every one of the Project objectives, approval of the Project, or any alternative with greater impacts than Alternative G, would violate CEQA.

C. The FEIR Must Be Recirculated.

Our comments on the DEIR set forth CEQA’s standard for recirculation. As demonstrated throughout our prior letter and this letter, EHL and others have presented information that reveals either new or more severe significant environmental impacts, or potentially feasible mitigation measures or alternatives to lessen these impacts, that have not been subject to review and comment in a DEIR. Now, the FEIR includes substantial new analysis which also warrants recirculation of the DEIR.

For example, there are more than 1,000 pages of new or revised analysis relating to climate change. In addition, on March 19, 2020, the County released a Fire Protection Plan Supplemental Analysis Otay Ranch Resort Village 13 – Alternative H. The FEIR now also includes a new “Conceptual Wildland Fire Evacuation Program” dated March

19, 2020. On April 9, 2020, County staff released the Planning Commission staff report which consists of over 1,000 pages of information. On April 13, 2020, just four days before the Planning Commission's scheduled April 17, 2020 hearing date, County contract planner (Gregory Mattson) informed EHL that the County had made several changes to several appendices (C-2, C-12, D-3, D-16, D-17 and D-24).

The net effect of all of these, and myriad other changes, demonstrates that the EIR includes significant new information and the public has not has a meaningful opportunity to comment on those changes. The County must revise and recirculate the DEIR to include proper analysis and mitigation of all the Project's significant impacts. Otherwise, approval would be illegal under state law.

III. APPROVAL OF THE PROJECT WOULD VIOLATE THE STATE PLANNING AND ZONING LAW AND THE SUBDIVISION MAP ACT.

The State Planning and Zoning Law and the Subdivision Map Act require that development decisions be consistent with the jurisdiction's general plan. As reiterated by the courts, "[u]nder state law, the propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements." *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806. Accordingly, "[t]he consistency doctrine [is] the linchpin of California's land use and development laws; it is the principle which infuses the concept of planned growth with the force of law." *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336.

As explained in our previous comments a Project's consistency with applicable Plans and ordinances plays two separate and distinct roles in the environmental review and project approval process. The State Planning and Zoning Law requires that development decisions, including conditional use permits, be consistent with the jurisdiction's general plan. See *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1184. And under CEQA, an inconsistency or conflict between a plan or ordinance and the Project is a significant impact that must be disclosed and analyzed. Once again, the FEIR misses the mark in its evaluation of these issues.

The County Plan is clear in its direction concerning requiring developers to provide an affordable housing component when requesting General Plan amendments for large-scale residential projects. County General Plan, Housing Element, Policy H-1.9 Affordable Housing through General Plan Amendments. As explained in detail in our prior letter, the Project requests General Plan amendments, but fails to include *any* affordable housing, and instead would construct approximately 1,800 luxury units, a

conference center and other amenities. The FEIR response dismisses the Project's inconsistency with the General Plan requirements to include affordable housing and states that "the Project is designed to provide executive-level housing within the larger Otay Ranch community, so as to provide employers and others with an opportunity to reside in South San Diego County where their businesses are located." Response RO-6-127. This rationale is bootstrapping at its best given that the proposed Project is located far from any job center in the County. DEIR at 3.9-7; RDEIR Appendix D-1 at pdf page 2.

The Project's inconsistency with the General Plan has two legal results. First, the EIR's analysis of land use impacts is flawed, and its conclusion that impacts will be less than significant is not supported by substantial evidence. Second, the County may not approve a project that is inconsistent with the General Plan.

IV. CONCLUSION

In sum, the EIR is legally inadequate and cannot serve as the basis for Project approval. Further, the Project is inconsistent with key planning policies for the region. For these reasons, EHL respectfully requests that the Planning Commission recommend denial of the Project.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



William J. White

cc: Dan Silver, Endangered Habitats League

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