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Letter RO-6

May 28, 2019

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Re: Otay Ranch Resort Village - Village 13 Revised Draft  
Environmental Impact Report

Dear Mr. Mattson:

RO-6-1

This firm represents the Endangered Habitats League (EHL) in connection with the proposed Otay Ranch Resort Village 13 and its associated Revised Draft Environmental Impact Report (RDEIR). 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.

RO-6-2

EHL submitted a letter on the Draft EIR (DEIR) identifying a series of deficiencies in that document. *See* letter from R. W. Johnson, Johnson & Sedlack to San Diego County, May 22, 2015, incorporated by reference into this letter attached under separate cover).<sup>1</sup> Despite serious legal and technical flaws in the vast majority of the DEIR, the County opted to revise and recirculate only two chapters of the document, project alternatives and climate change. However, the RDEIR includes several new technical appendices addressing an array of environmental impacts for Alternative H, a new Project alternative. In addition to providing comments on the new RDEIR chapters

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<sup>1</sup> This letter also incorporates by reference the May 22, 2015 letter from the California Chaparral Institute, Center for Biological Diversity, and Preserve Wild Santee to Dennis Campbell, San Diego County, attached under separate cover.

and the Alternative H technical appendices, this letter also identifies additional deficiencies in the prior DEIR.

RO-6-3

Based on our review of the RDEIR and the DEIR (collectively referred to as the DEIR), we have concluded that the document fails to comply with the requirements of the California Environmental Quality Act (CEQA), Public Resources Code section 21000 et seq. As described below, the DEIR violates CEQA because it fails to properly analyze the Project's environmental impacts, especially its impacts to biological resources, climate change, wildfire, emergency evacuation, water supply, energy, and air quality. It also fails to adequately analyze Project alternatives or include mitigation for the Project's significant impacts. Such fundamental errors undermine the integrity of the EIR.

RO-6-4

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 either statute. *See* Pub. Resources Code § 21061 ("The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project."). As a result of the DEIR's numerous and serious inadequacies, there can be no meaningful public review of the Project. San Diego County must again revise and recirculate the DEIR in order to permit an adequate understanding of the environmental issues at stake.

RO-6-5

The Project also demonstrates a disturbing disregard for the San Diego County General Plan's important goal of creating a housing stock at a range of prices to meet the County's Regional Housing Needs Assessment allocations for lower income households. The proposed Project provides no affordable housing. Consequently, the County would be renegeing on its promise to provide housing for lower income individuals. In any event, approval of the proposed Project would conflict with the General Plan thereby violating the California Planning and Zoning Law, Gov. Code § 65000 et seq. And because this conflict results in significant environmental impacts, the County's failure to identify them in the EIR violates CEQA as well. Moreover, the General Plan is legally inadequate because it does not include an environmental justice element as required by SB 1000. Therefore, the County cannot rely upon the authority of the General Plan to approve the Project.

**I. THE DEIR VIOLATES THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.**

**A. The DEIR's Analysis of and Mitigation for the Impacts of the Proposed Project Are Inadequate.**

RO-6-6 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 P*”) (citations omitted). It “is an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return. The EIR is also 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).

**1. The RDEIR Fails to Adequately Analyze or Mitigate Impacts to Biological Resources.**

**(a) The RDEIR Fails to Describe Actual Impacts of the Project.**

Throughout the biological resources impacts analysis for Alternative H, the RDEIR determines that Alternative H will have significant impacts, but then fails to determine what exactly the extent and severity of those impacts are. Merely stating that an impact will occur is insufficient; an EIR must also provide “information about how adverse the adverse impact will be.” *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3d 818, 831. This information, of course, must be accurate and consist of more than mere conclusions or speculation. *Id.* The RDEIR’s analysis of impacts to biological resources fails to fulfill this mandate in several instances.

RO-6-7 For example, the RDEIR states, almost in passing, that Alternative H would “include[] development on the K6 mesa.” RDEIR Appx. D-3 at 13. It then goes on to discuss at length preservation of the K8 vernal pools. Nowhere does it describe what the environmental impact would actually be of completely destroying the K6 vernal pools. As for sensitive wildlife species, the RDEIR first provides a table listing each species, its regulatory status, its presence on site, and the number of acres of its habitat that will be impacted by Alternative H. *Id.* at 18-26 (Table 8). It then goes on to state that a host of these species would be significantly impacted by Alternative H, but it fails to say *how*. *Id.* at 27-28. The document fails to explain the actual and specific consequences of developing Alternative H to these species. It provides no information on how populations will be impacted. This is glaringly insufficient under CEQA, and causes the RDEIR to fail as an informational document.

**(b) The RDEIR Fails to Adequately Evaluate the Project's Impacts to the Quino Checkerspot Butterfly or Sufficiently Mitigate Those Impacts.**

**(i) The RDEIR's Failure to Accurately Describe the Project's Existing Setting Results in a Serious Underestimation of the Project's Impact to the Quino Checkerspot Butterfly.**

RO-6-8 An EIR's description of a project's environmental setting crucially provides "the baseline physical conditions by which a lead agency determines whether an impact is significant." CEQA Guidelines § 15125(a). "Without a determination and description of the existing physical conditions on the property at the start of the environmental review process, the EIR cannot provide a meaningful assessment of the environmental impacts of the proposed project." *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 119. Here, the RDEIR fails to accurately identify biological resources on the Project site and therefore undercuts the legitimacy of the environmental impact analysis from the outset.

RO-6-9 EHL retained Hamilton Biological, Inc. to review the RDEIR's analysis of impacts to biological resources, including the Quino Checkerspot Butterfly (QCB). The report from Hamilton Biological is attached hereto as Exhibit 1 and incorporated by reference into these comments (hereinafter, "Hamilton Report"). As explained in the Hamilton Report, the Village 13 site contains over 1,600 acres of designated critical habitat for the QCB. However, the RDEIR completely fails to discuss the implication of this critical habitat designation or the importance of this habitat to the survival and recovery of the QCB. *See* Exhibit 1 (Hamilton Report) at 2-3. Notably, the RDEIR fails to inform readers of how critical the habitat around Otay Lake is to the QCB, including that the current draft QCB Recovery Plan indicates that this habitat is "essential" for conservation. Exhibit 1 (Hamilton Report) at 3.

RO-6-10 The RDEIR also fails to adequately identify "occupied" QCB habitat. As explained in the Hamilton letter, the U.S. Fish and Wildlife Service delineates the QCB's "occupied habitat" with a one kilometer buffer around each documented occurrence of the QCB. Exhibit 1 (Hamilton Report) at 4. Using this approach, all suitable habitat for the QCB on the Project site constitutes "occupied habitat." *Id.* The RDEIR's failure to acknowledge the importance of the QCB's critical habitat and the QCB's "occupied habitat" constitute a fatal flaw. Thus, the EIR must again be revised to recognize all QCB habitat on the Project site as occupied habitat—and not just as "potential" occupied habitat.

**(ii) The RDEIR's Approach to Evaluating QCB Impacts Is Invalid.**

RO-6-11 The 1993 Otay Ranch GDP/SRP Program Environmental Impact Report (PEIR) contains explicit mitigation requirements for impacts to QCB. The PEIR requires that “one hundred percent (or approved HCP/MSCP standards) of occupied habitat for [the QCB] shall be preserved.” RDEIR Appx. D-24 at 39 (emphasis added). Notwithstanding this requirement, the proposed Project (Alternative H) would impact at least 32 individual butterflies and would destroy over 474 acres of the QCB’s critical habitat (including 389 acres of what the RDEIR identifies as occupied habitat<sup>2</sup>). The RDEIR reaches the preposterous conclusion that the mitigation standard is met because the Project would conserve 1,112 acres of “suitable restored or occupied Quino Checkerspot Butterfly habitat.” *Id.* This is not what the 1993 PEIR’s mitigation requires. “Preserving one hundred percent of occupied habitat” does *not* mean it is acceptable to destroy some habitat as long as you conserve other habitat. Indeed, the intent of the 1993 PEIR mitigation is to ensure *all* occupied QCB habitat is preserved. *See* Exhibit 1 (Hamilton Report) at 7. Alternative H would result in a *net loss* of habitat that the 1993 PEIR *required* be preserved.

RO-6-12 The RDEIR’s proposed approach illegal. CEQA forbids deleting or modifying previously-adopted mitigation measures “without a showing that it is infeasible.” *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 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. Cal. Dept. of Forestry & 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”). The RDEIR makes no attempt to demonstrate why it would be infeasible to preserve the occupied QCB habitat. This is yet another egregious flaw requiring that the RDEIR be revised and recirculated.

<sup>2</sup> As explained above, the RDEIR fails to accurately quantify the occupied habitat on-site.

**(iii) The RDEIR Relies on Flawed QCB Mitigation.**

Compounding these problems, the RDEIR's mitigation for impacts to the QCB is deficient. The primary goal of an EIR is to identify a project's significant environmental impacts and find ways to avoid or minimize them through the adoption of mitigation measures or project alternatives. Pub. Resources Code §§ 21002.1(a), 21061. The lead agency must adopt all feasible mitigation measures that can substantially lessen the project's significant impacts, and it must ensure that these measures are "fully enforceable" through permit conditions, agreements, or other legally binding instruments. Pub. Resources Code § 21002; CEQA Guidelines §§ 15002(a)(3), 15126.4(a)(2); *City of Marina v. Bd. of Trustees of the Cal. State Univ.* (2006) 39 Cal.4th 341, 359, 368-69. The requirement for enforceability ensures "that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." *Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261 (italics omitted); CEQA Guidelines § 15126.4(a)(2). Here, the RDEIR fails to satisfy these requirements.

RO-6-13

First, Measure M-BI-9a requires the Applicant to demonstrate that it has secured the appropriate take authorization, such as through Section 7 or Section 10 consultation under the federal Endangered Species Act. RDEIR at 4.0-40. But Section 7 or 10 consultation should have been conducted *prior* to release of the DEIR or RDEIR, both to fulfill CEQA's informational purpose and because those processes may result in changes to the Project that would render this current environmental review obsolete. Also, a Section 10 incidental take permit application requires preparation of a Habitat Conservation Plan (HCP) to U.S. Fish and Wildlife for approval (16 U.S.C. § 1539(a)(2)(A)). That document should have been included with the RDEIR so that the public and decisionmakers could review the proposed QCB mitigation measures.

RO-6-14

The RDEIR also improperly presumes the outcome of administrative processes that have not yet occurred. Specifically, the RDEIR assumes that the result of the Section 7 or 10 consultation process will be preserving other QCB habitat through a biological open space easement. RDEIR at 4.0-40. However, the U.S. Fish and Wildlife Service is not constrained in its approach to endangered species mitigation. It could require modification of the Project, for example. Or it could find that construction of the Project is inconsistent with recovery of the species. But instead of recognizing such possibilities, Measure M-BI-9a presumes that the easement will be the chosen mitigation, and even presumes what the acceptable terms of the easement will be.

RO-6-15

Second, the RDEIR inappropriately defers the identification of mitigation. Measure M-BI-9b requires that, prior to issuance of the first grading permit, the

RO-6-16

RO-6-16  
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Applicant “shall prepare a long-term Quino Checkerspot Butterfly Management/Enhancement Plan.” RDEIR at 4.0-69. CEQA generally prohibits deferral of mitigation, except in narrow circumstances. To defer identification of mitigation, three separate requirements must be met: (1) the EIR must contain “performance standards” that will govern future actions implementing the mitigation, (2) the agency must have assurances that the future mitigation will be both “feasible and efficacious,” and (3) practical considerations must have precluded developing the mitigation prior to project approval. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94-95; Guidelines § 15126.4(a)(1)(B). This standard is not met here.

RO-6-17

Specifically, the RDEIR fails to identify performance standards for the plan. Thus, there is no way for those implementing the Management Enhance Plan to determine if the measures to protect the QCBs are in fact working. The draft Management/Enhancement Plan attached to the RDEIR (Appendix C) identifies some performance standards, but it does not appear that these criteria have been adopted by the RDEIR itself or whether the standards could be changed in the future.

RO-6-18

Finally, Measure M-BI-17 would require conservation of open space under a biological open space easement. RDEIR at 4.0-69 – 70. What the RDEIR lacks is any explanation of the connection between the open space conservation and the mitigation of the Project’s impacts on the QCB. Selected mitigation measures must be supported by explanation and substantial evidence, so decisionmakers and the public can understand whether the proposed mitigation will actually lessen the Project’s impacts.

**(c) The RDEIR Fails to Adequately Analyze or Mitigate Impacts to the Western Spadefoot.**

RO-6-19

The RDEIR pays scant attention to the Western Spadefoot. Although the document refers to the fact that tadpoles were observed in a depression on K8 mesa, the RDEIR fails to conduct focused surveys for this California Species of Special Concern. *See Exhibit 1 (Hamilton Report) at 9.* Without thorough surveys, there is no way of determining the severity and extent of the Project’s impacts on this species. The EIR prepared for a nearby project—the Village 14 and Planning Areas 16/19 project (Village 14 Project)—determined that there were 16 breeding pools in the vicinity of that project *because it conducted focused surveys. See Exhibit 1 (Hamilton Report) at 8 -9; see also Village 14 and Planning Areas 16/19 project Draft FEIR Excerpts, attached as Exhibit 3.* Once focused surveys are undertaken for the Village 13 Project, the EIR must be revised and recirculated.

RO-6-20 Nor does the DEIR conduct an adequate analysis of impacts on the spadefoot. The document indicates that a 0.26-acre complex of vernal pools would be preserved (*see* DEIR Table 2.3-10 at 2.3-77), suggesting that preservation would reduce the Project's impacts to a less than significant level. But this is not the case. As the Hamilton Report explains, the Project (Alternative H) footprint would surround the spadefoot-occupied vernal pool complex at the K-8 mesa. *See* Exhibit 1 (Hamilton Report) at 9. Impacts to the spadefoot would thus occur outside the 0.26-acre pool. As Hamilton explains, spadefoots spend large parts of the year aestivating underground, often well away from their breeding ponds. *Id.* at 10. By focusing its limited impact analysis entirely upon preservation of 0.26 acre of breeding pools, the EIR preparers fail to consider all of the spadefoot's other habitat requirements, including aestivation sites. *Id.* at 10-11. Failure to consider all of the spadefoot's life-history requirements leads to an incomplete, inadequate, and misleading CEQA impact analysis for this species. Moreover, because the EIR fails to acknowledge the Project's impacts on this species, it also fails to identify feasible mitigation for these impacts. *Id.* at 11

**(d) The DEIR Fails to Adequately Analyze or Mitigate Impacts to the Golden Eagle.**

RO-6-21 The Project site occupies the southern part of the foraging area for a pair of Golden Eagles that occupy what biologists refer to as the "Cedar Canyon" territory in the Jamul Mountains, north of the Village 13 site. Implementation of the proposed Project (Alternative H) would directly impact 556 acres of foraging habitat for this pair. *See* Exhibit 1 (Hamilton Report) at 12. The DEIR incorrectly concludes that this impact would be less than significant because "other" suitable foraging habitat would be preserved on site. DEIR at 2-3-22. This approach is unacceptable. Preserving land that would otherwise not be developed is not mitigation. The loss of 556 acres of eagle habitat constitutes a net loss of habitat which constitutes a significant impact.

RO-6-22 Nor does the EIR address the cumulative loss of habitat on the Cedar Canyon eagles. As the Hamilton Report explains, the Project, together with other proposed development in the area, would substantially reduce the area of suitable foraging habitat for this pair of eagles. *See* Exhibit 1 (Hamilton Report) at 16- 17. The EIR's failure to acknowledge or mitigate this impact is an egregious flaw requiring that the EIR be again revised and recirculated.



**(e) The RDEIR Fails to Avoid or Adequately Mitigate for Impacts to Vernal Pools and the San Diego Fairy Shrimp.**

RO-6-23 The RDEIR recognizes that Alternative H would have significant impacts to vernal pools and the endangered San Diego fairy shrimp, which is endemic to those pools. RDEIR at 4.0-63, 4.0-67. Indeed, the Project would completely destroy the K6 vernal pools, where the San Diego fairy shrimp has been observed. RDEIR Appx. D-3 at 12. As explained in the May 22, 2015 comment letter submitted by the California Chaparral Institute, the Center of Biological Diversity, and Preserve Wild Santee (“CCI Letter”), the Project’s objectives could be achieved without developing a subdivision directly atop the K6 vernal pools (CCI Letter at 39), yet Alternative H (or any alternative other than Alternative G) fails to take this logical approach. Because this significant impact could be avoided by redesigning the Project to avoid the K6 pools, the RDEIR fails to comply with CEQA. *See* Pub. Resources Code § 21002.

RO-6-24 Moreover, any harm to the K6 vernal pools and the San Diego fairy shrimp is likely to be inconsistent with the 1998 Recovery Plan for Vernal Pools of Southern California, which focuses on preservation and restoration of vernal pools, which are essential habitat for the fairy shrimp and other sensitive species. *See* Exhibit 2. The EIR must explain how the Project, including Alternative H, is consistent with the Recovery Plan.

RO-6-25 Further, the RDEIR lacks evidentiary support that Alternative H’s impacts on vernal pools and San Diego fairy shrimp would be mitigated to a less than significant level. First, the RDEIR identifies measure M-BI-7 as mitigation for impact to the K6 vernal pools. RDEIR at 4.0-63 – 64. This measure gives two options for mitigation, both of which are inadequate. The first option would require the Applicant to “restore and reconfigure” the K8 vernal pool group, create new vernal pools in the K8 group, and provide a buffer around those pools. RDEIR Appx. D-3 at 44.

RO-6-26 Yet the RDEIR provides no evidence that this measure would actually be effective. Indeed, both federal agencies and federal courts have recognized that *creating and “inoculating” vernal pools does not work*. As explained by the court in *Southwest Center for Biological Diversity v. Bartel*, which relied on the 1997 Determination of Endangered Status for the San Diego Fairy Shrimp:

Vernal pools cannot be “created” and there is no known method to replace destroyed pools. E.g., 62 Fed.Reg. at 4931 . . . . As applied to the vernal pool species, the “creation” of off-site vernal pools is ineffective and unacceptable

RO-6-26  
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mitigation. 62 Fed.Reg. at 4931 (attempts to collect and move vernal pool species failed; and re-introducing species into other pools risks hybridization); AR 23724, 24435 (because creation of vernal pool habitat is not successful, “the wildlife agencies do not accept creation as mitigation for vernal pool impacts”); AR 32472 (FWS concludes that efforts to “create” vernal pools by transporting the soil are unsuccessful, unscientific, and unmonitored; and transplanting species had not been tested or proven successful).

470 F. Supp. 2d 1118, 1127 (S.D. Cal. 2006). The RDEIR cannot rely on this purported mitigation, which the U.S. Fish and Wildlife Service has already identified as futile.

RO-6-27

Measure M-BI-7, Option 1, is also inadequate because it improperly defers identification of mitigation until a later date. As discussed above, CEQA generally prohibits deferral of mitigation. Here, Measure M-BI-7, Option 1, requires that a Conceptual Vernal Pool Mitigation Plan for the Project that would govern the restoration shall be prepared and later approved. However, the RDEIR fails to identify any performance standards for this mitigation—that is, there is no way for decisionmakers or the public to be able understand what the standards are for determining if the mitigation is working. The draft Conceptual Vernal Pool Mitigation Plan that is attached as a technical appendix to the RDEIR does outline some performance standards for mitigation. *See* RDEIR Appx. B to Appx. D-3 at 61-62. However, it does not appear that the RDEIR itself has adopted these performance criteria, or whether they could be changed in the future as the Conceptual Plan is revised or modified.

RO-6-28

Option 2 of Measure M-BI-7 is also inadequate to rely on to conclude that the Project’s impacts would be less than significant. Option 2 requires mitigation by purchase of vernal pool mitigation bank credits. RDEIR Appx. D-3 at 45. However, the RDEIR fails to identify where the mitigation bank pools would be located, what species currently exist in those pools, or any other information that would allow the reader to discern whether the mitigation measure would actually mitigate for Alternative H’s destruction of the K6 vernal pools. *See San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 684 (description of mitigation must be specific).

RO-6-29

As for the San Diego fairy shrimp, a federally listed endangered species that the RDEIR recognizes has been documented in the K6 vernal pools, the RDEIR likewise fails to identify adequate mitigation for its impacts. Mitigation Measure M-BI-10 would require the Applicant to secure take authorization either through Section 7 consultation or a Section 10 incidental take permit under the federal Endangered Species Act, or take authorization “as may be incorporated into the provisions of the MSCP Subarea Plan

RO-6-29 | Quino Checkerspot Butterfly Addition to achieve the best results toward the survival and  
Continued | recovery of the species.” RDEIR Appx. D-3 at 47.

RO-6-30 | As an initial matter, it is unclear how an addition to the MSCP related to the Quino Checkerspot Butterfly is at all relevant to mitigation for impacts to the San Diego fairy shrimp. Second, Section 7 or 10 consultation should have been conducted *prior* to release of the DEIR or RDEIR, both to fulfill CEQA’s informational purpose and because those processes may result in changes to the Project that would render this current environmental review obsolete. Finally, a Section 10 incidental take permit application requires submission of a Habitat Conservation Plan (“HCP”) to U.S. Fish and Wildlife for approval (16 U.S.C. § 1539(a)(2)(A)), and that document should have been included with the RDEIR so the public and decisionmakers could review what the Applicant actually would propose to do to mitigate the Project’s impacts on the endangered San Diego fairy shrimp.

**(f) The RDEIR Fails to Avoid or Adequately Mitigate for Impacts to Nesting Migratory Birds and the Burrowing Owl.**

RO-6-31 | The RDEIR recognizes that the Project would significantly impact nesting migratory birds, including the burrowing owl. RDEIR at 4.0-74. Specifically, the proposed Alternative H would impact 167 of the 190 acres (88 percent) of suitable burrowing owl habitat on the site—an increase over the 137 acres the previous preferred project would have impacted. *Compare* RDEIR Appx. D-3 at 24 *with* DEIR at 2.3-83. This destruction includes razing the K6 vernal pool habitat, where previous burrowing owl occupancy has been observed. DEIR at 2.3-64. Despite this significant impact on the already sensitive burrowing owl, the RDEIR fails to identify adequate mitigation for Alternative H’s impacts.

RO-6-32 | The RDEIR identifies two mitigation measures that it purports will reduce impacts to the owl—and to other nesting migratory birds—to a less than significant level, yet neither meets legal muster under CEQA. The first, Measure M-BI-11 provides that if removal of habitat is required during the breeding season, a biologist shall conduct a pre-construction survey for nesting birds. If birds are detected, “a letter report or mitigation plan, as deemed appropriate by the County of San Diego, shall be prepared and include proposed measures to be implemented.” RDEIR at 4.0-74. Similarly, Measure M-BI-16 requires pre-construction surveys for burrowing owls, and development of a plan if any are located. *Id.* at 4.0-74 – 75.

RO-6-33 As explained above, deferred identification of mitigation is generally impermissible under CEQA, unless there is a reason for the deferral and specific performance standards are set for the future mitigation, which ensures that the mitigation will be effective. Here, the RDEIR provides neither for either of these mitigation measures for nesting migratory birds and the burrowing owl. There is no explanation why a mitigation plan that would apply if birds are encountered cannot be developed now. Further, the measures provide absolutely no performance standards for the future mitigation. Without such standards, there is no way for the public or decisionmakers to actually assess whether the mitigation will be effective.

RO-6-34 Also, the RDEIR fails to identify any mitigation for the loss of a large amount of burrowing owl habitat on the site. This failure to identify mitigation for a significant impact renders the RDEIR's analysis inadequate. The RDEIR should be revised to identify mitigation that could actually reduce the impacts to the owl to a less-than significant level. Indeed, the RDEIR should include the mitigation required by the MSCP for the burrowing owl, which provides that "mitigation for impacts to occupied habitat . . . must be through the conservation of occupied burrowing owl habitat or conservation of lands appropriate for restoration, management and enhancement of burrowing owl nesting and foraging requirements." MSCP at 161. The burrowing owl has been observed at the K6 site; that area must be preserved.

## 2. The RDEIR Lacks an Adequate Analysis of and Mitigation for the Project's Climate Change Impacts.

RO-6-35 Analysis of greenhouse gas (GHG) emissions is particularly important with regard to global climate change because we have already exceeded the capacity of the Earth's 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").

RO-6-36 And it is sprawling, auto-based development projects such as the Village 13 Project that are sabotaging efforts to achieve the state's climate change goals. *See A Climate Problem Even California Can't Fix*, Reuters, February 1, 2019 attached as Exhibit 4. Transportation is tied with power generation as America's leading source of carbon dioxide emissions, at 28 percent, according to the U.S. Environmental Protection

Agency—and it takes top billing in California, at about 40 percent. *Id.* Indeed, projects located far from job centers—that require long commutes—are also responsible for the San Diego Association of Governments’ (SANDAG) failure to achieve its 2020 and 2035 GHG emission reduction targets. As SANDAG’s executive director Hasan Ikhata recently explained, achieving the region’s GHG reduction goals will require a substantial reduction in VMT. *See* “San Diego Can’t Hit State Climate Goals Without Major Transportation Changes,” Voice of San Diego, A. Keats, attached as Exhibit 5. Mr. Ikhata stated that even if the region built the trolley lines and bus services leaders have been discussing, it would not change enough. *Id.* A sprawling, car-centric way the county has grown for decades is incompatible with the state’s vision of itself as a global leader on climate change. *Id.* In other words, according to Mr. Ikhata “San Diego isn’t a trolley line here, a few improved bus routes there, and a new highway lane over there away from meeting the [GHG reduction] requirements. The status quo, or modest alterations of it, won’t work. The region needs a new vision entirely.” *Id.*

Here, the RDEIR’s new section 2.10 on Global Climate Change impacts concludes that “the Project’s increase in GHG emissions may have a potentially significant impact on the environment.” RDEIR at 2.10-23. However, the RDEIR goes on to conclude that the impacts will be reduced to less-than-significant levels through implementation of proposed mitigation measures. *Id.* However, the RDEIR’s analysis is fatally flawed because it (1) underestimates the Project’s GHG emissions, (2) fails to sufficiently mitigate for the Project’s climate change impacts, (3) fails to properly analyze the Project’s consistency with plans, policies, and regulations adopted for the purpose of reducing GHG emissions and (4) lacks a legally defensible analysis of cumulative impacts.

**(a) The RDEIR Underestimates the Project’s GHG Emissions.**

The RDEIR fails to accurately account for all project-related GHG emissions and therefore underestimates the Project’s impact on climate change. For example, the RDEIR fails to include GHG emissions from explosive detonation. The Project would involve blasting to break up bedrock close to the ground surface, though the extent of the blasting required is currently unknown. DEIR at 2.7-17. Instead of disclosing and attempting to estimate the emissions from such activities, the RDEIR ignores them, stating that construction GHG emissions would be limited to “heavy construction equipment, truck traffic, and worker trips.” RDEIR Appx. C-2 at 37.

The RDEIR 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, e.g.*, RDEIR, Appx. C-2 at pdf page 47 (describing the land use setting as “urban”). The CalEEMod model used for the RDEIR’s emissions calculations relies on estimated trip lengths in its calculations. Exhibit 6 at 21 (CalEEMod Appx. A, Calculation Details for CalEEMod, Oct. 2017). These trip lengths are different for urban and rural settings. *Id.* Notably, rural environments will result in higher emissions from vehicle combustion exhaust due to longer trips to work, shopping, and schools.

Finally, the RDEIR improperly assumes that the state Renewable Portfolio Standard (RPS) for 2030 will actually be met. The CalEEMod Model assumes actual conditions: that the local energy provider, San Diego Gas and Electric, procures 10.2% of its electricity from renewable resources. RDEIR, Appx. C-2 at ES-4. But the RDEIR modifies this assumption to presume that *60 percent* of the provider’s power will be from renewable sources. *Id.* There is no reasonable basis for making this assumption. While it is true that Senate Bill (SB) 100 mandates utilities procure 60% of their electricity from renewable sources by 2030, there is no guarantee that this will actually happen. And the RDEIR provides no evidence that the utilities have been able to meet the targets set by SB 100, or that they will be able to in the future. The RDEIR cannot rely on this assumption of hypothetical future conditions to so vastly reduce its estimate of the Project’s GHG emissions.

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

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

The RDEIR relies predominantly 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 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.

RO-6-42 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 explained below, the RDEIR provides no evidence that the offset program would be enforceable, let alone effective.

**(i) The Proposed “Offset” Program Will Not Mitigate the Project’s GHG Impacts.**

RO-6-43 Mitigation M-GCC-7 (for construction GHG emissions) and M-GCC-8 (for operational GHG emissions) require the applicant to purchase and retire carbon offsets. For the Project’s construction-related GHG emissions, M-GCC-7 calls for offsetting 100% offset of emissions. RDEIR at 2.10-30 – 31. As for the Project’s operational emissions, M-GCC-8 calls for offsetting emissions for a 30-year period. *Id.* at 2.10-32. This approach is flawed—and in violation of CEQA—for a number of reasons.

RO-6-44 First, M-GCC-8 is inadequate because it proposes mitigation only for the first 30 years of Project operational emissions. Housing in San Diego County cannot be assumed to have a “project life” of only 30 years. As of 2014, roughly half the housing in unincorporated San Diego County was at least 30 years old. Exhibit 7 (San Diego County Housing Element Background Report) at 48-49. More than 75% of the housing in the City of San Diego is more than 30 years old. Exhibit 8 (City of San Diego Housing Inventory Annual Report) at 6-7. The RDEIR fails to provide any evidence that the Project will simply cease to exist (and stop emitting GHGs) after 30 years. By relying on this unsupported assumption, the mitigation measure fails to ensure that the Project’s true, long-term impacts will be mitigated at all.

RO-6-45 Second, both measures M-GCC-7 and M-GCC-8 allow the Applicant to purchase offsets outside of the County, California, and even the United States. RDEIR at 2.10-31, 34. The Applicant need only show that local offsets are unavailable or infeasible. RDEIR at 2.10-32 – 33, 34 – 35. The RDEIR points to the Newhall Ranch Greenhouse Gas Reduction Plan as justification for allowing purchase of offsets anywhere in the world. *See* RDEIR, Appx. C-2 at 29. But the Newhall Ranch plan actually limits the number of

offsets that can be purchased from far afield: it requires at least 68% of emissions reductions to be achieved in California, at least 80% in the United States, and no more than 20% of emissions reductions to be achieved internationally. RDEIR, Appx. C-27 at 15. More importantly, the use of out-of-county offsets violates General Plan policies (including policy COS-20.1) and related General Plan mitigation measures (including Mitigation Measure CC-1.2) which require GHG impacts be mitigated within the County.

Third, M-GCC-7 and M-GCC-8 fail to require that any offsets be *additional*—not just “not otherwise required.” While the RDEIR acknowledges the applicability of CEQA Guidelines section 15126.4(c)(3), it fails to make clear what this means: 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.

California’s statutory definition of “additionality” has two important components. AB 32, California’s landmark GHG reduction statute, defines an additional GHG credit as representing an emissions reduction “in addition to any greenhouse gas emission reduction otherwise required by law or regulation, *and* any other greenhouse gas emission reduction that otherwise would occur.” Health & Safety Code § 38562(d)(2) (emphasis added); *see also* Cal. Code Regs., tit. 17, §§ 95802(a) (“‘Additional’ means, in the context of offset credits, greenhouse gas emission reductions or removals that exceed any greenhouse gas reduction or removals otherwise required by law, regulation or legally binding mandate, *and* that exceed any greenhouse gas reductions or removals that would otherwise occur in a conservative business-as-usual scenario.”). To be “additional,” therefore, an offset credit must meet both halves of the definition: it must not result from actions otherwise legally required, *and* it must be in addition to any reduction that would otherwise occur. The RDEIR should be revised to make clear what “additional” offsets means under California law.

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 RDEIR lacks evidence that there exist any offset programs capable of ensuring that offsets are “additional.” This is a particular concern given the RDEIR’s allowance of international offsets, which are especially challenging to verify. This concern is discussed in more detail in the expert comments of Barbara Haya, PhD, on the nearly identical Village 14 GHG mitigation measures, which is incorporated by reference and attached hereto as Exhibit 9.

Consequently, the RDEIR lacks the standards sufficient to ensure that offsets are real, enforceable, additional, and otherwise consistent with CEQA’s mitigation

RO-6-45  
Continued

RO-6-46



requirements. *See Sacramento Old City*, 229 Cal.App.3d at 1027 (record must include substantial evidence that mitigation is effective and enforceable).

RO-6-47 Fourth, the RDEIR identifies no evidence that the offsets allowed to be procured under M-GCC-7 and M-GCC-8 will be effective. The Measures allow purchase of any offset from the Climate Action Reserve, the American Carbon Registry, or Verra, or any other registry approved by the ARB under the State cap-and-trade program. RDEIR at 2.10-31. However, purchase from a CARB-approved registry does not establish that the credits purchased meet CARB's standards. Cap-and-trade offsets must be issued pursuant to specific, substantive standards set forth in CARB-approved "protocols," not merely sold by registries approved to handle transfers of credits in the cap-and-trade system. *See Cal. Code Regs.*, tit. 17 §§ 95970, 95971, 95972(a). The identity of the registry selling an offset credit does not establish the quality of the credit or the protocol under which it was issued.<sup>3</sup>

RO-6-48 Fifth, the RDEIR provides no indication whether there are a sufficient amount of GHG offset credits available from the registries approved in the RDEIR to satisfy the mitigation measures' requirements. There are only a limited number of offset projects that can demonstrate additionality, as explained above. The proposed Project will require approximately 66,540 MT CO<sub>2</sub>e (carbon dioxide equivalent) in offsets total. RDEIR, Appx. C-2 at 45. But as explained above, the Project does not exist in a vacuum. The San Diego Union Tribune noted last year 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 10. There is a massive volume of emissions seeking offset credits, and the lack of evidence that sufficient credits exist renders measures M-GCC-7 and M-GCC-8 invalid. *See Kings County*, 221 Cal.App.3d at 728.

RO-6-49 Sixth, 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*

<sup>3</sup> The San Diego Superior Court rejected the County's efforts to paint a similar proposed mitigation measure as "CARB-approved," finding the County's mitigation program "not remotely similar to the CARB program." Minute Order, *Golden Door Properties LLC v. County of San Diego*, San Diego Superior Court No. 37-2018-00013324-CU-TT-CTL (Dec. 24, 2018) at 13.

of the application of current tools and proposed alternatives, Institute of Applied Ecology, March 2016 at 11, attached as Exhibit 11; *see also* Carbon Credits Likely Worthless in Reducing Emissions, Study Says, Inside Climate News, April 19, 2017, attached as Exhibit 12.

The three registries identified in the RDEIR (which are, incidentally, the only three registries currently approved by CARB) 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.

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 reduction compliance obligations 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 cobenefits locally.” California’s 2017 Climate Change Scoping Plan, November 2017, CARB at 102 (emphasis added), attached as Exhibit 13.

The San Diego County General Plan likewise calls for GHG mitigation to occur locally; 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 RDEIR relies on offsets to mitigate virtually all emissions caused by the Project’s remote location (i.e., vehicular emissions). Yet there is simply no evidence that the undefined, unenforceable offsets proposed by the RDEIR will cause any meaningful reduction to mitigate the permanent increase in GHG resulting from the Project.

Seventh, the DEIR allows for impermissible decreases in mitigation after the Project is approved, contrary to CEQA. M-GCC-8 allows the County 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 RDEIR’s emissions assumptions are too

RO-6-49  
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RO-6-50

RO-6-50  
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low. RDEIR at 2.10-33 – 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 anticipates. The mitigation measure should thus be broadened to require offsetting increases in future operational GHG emissions beyond those estimated in the RDEIR, as increases are equally likely because future emissions depend upon many factors that cannot be currently predicted—such as 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.

RO-6-51

Further, this “true-up” process allows only the *applicant* to initiate the process to review whether the current level of mitigation is appropriate. RDEIR at 2.10-33. If actual emissions increase above the current projected inventory, or if it appears to the applicant that modeling inputs used in the current inventory are no longer valid, the applicant can escape responsibility for additional mitigation simply by not “electing” to process a “true up.” It is difficult to imagine a scenario where a project applicant would voluntarily increase its mitigation requirements. Nor are there any provisions for monitoring or recalculating actual emissions from the Project if it changes during final design or as it is built out. This one-way provision that allows the County to ratchet mitigation down at the Applicant’s request moves the County in the wrong direction.

RO-6-52

Eighth, M-GCC-7 and M-GCC-8’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 14, Harmony Grove, Lilac Hills Ranch, Warner Springs Ranch Resort, and Newland Sierra—many of which would require general plan amendment—would all increase sprawl, VMT, and GHG emissions. The RDEIR’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).

RO-6-53

Ninth, the RDEIR 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 California, the United States, or the world. The RDEIR, however, fails to evaluate the environmental effects of such actions. For example, as discussed above, 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 further undermining the viability of the RTP/SCS to achieve its GHG reduction goals.

RO-6-54 Tenth, the RDEIR must discuss the significant effects that may be caused by mitigation measures above and beyond the effects of the Project itself. CEQA Guidelines § 15126.4(a)(1)(D). Here, the RDEIR fails to provide this analysis regarding whether the Project's heavy reliance on offset credits will cause any significant environmental impacts. Notably, one of the key impacts of relying on offsets rather than on-site emissions reductions is that local emissions of co-pollutants and other indirect effects will increase. Again, an emphasis on on-site emissions reductions, followed by off-site projects with clear local co-benefits, is needed to address the effects of reliance on offsets as the primary method of climate mitigation here.

RO-6-55 In sum, the RDEIR lacks the evidentiary support that mitigation measures M-GCC-7 and M-GCC-8 would achieve emission reductions sufficient to reduce the Project's GHG emissions to a less-than-significant level. Moreover, the RDEIR fails to evaluate the precedent-setting nature of the proposed mitigation measures.

**(ii) The County Is Enjoined From Relying on Its Flawed Offset Program**

RO-6-56 The County's attempt to rely on offsets to mitigate GHG impacts is not new. The offset program put forward in measures M-GCC-7 and -8 is virtually identical to Mitigation Measure M-GHG-1, the offset program the County sought to rely on as the centerpiece of its 2018 Climate Action Plan (CAP). That program was struck down last December by the San Diego Superior Court in litigation challenging the CAP (*Golden Door Properties LLC vs County of San Diego*, Case No. 2018-13324, and consolidated cases) ("*Golden Door*"), and the County was enjoined from relying on the invalid offset program. See Minute Order dated Dec. 24, 2018, attached as Exhibit 14.

The court struck down the County's offset program on numerous independent grounds, including many of the deficiencies described above. For example, the court held that the program, in allowing offsets anywhere in the world, violates General Plan policies requiring that GHGs be mitigated in the County. The court also found an absence of substantial evidence that the proposed out-of-county offsets will be enforceable, verifiable, and of sufficient duration to actually mitigate GHG impacts.

The County may not avoid the injunction—which remains in effect—merely by changing the name of the mitigation measure, and leaving in place its substance and all of the deficiencies identified by the Court. Relying on the proposed offsets to mitigate GHG

impacts would not only violate CEQA and General Plan law, it would put the County at risk of violating a court order.

**(c) The RDEIR Lacks the Evidentiary Basis to Conclude that the Project is Consistent with SANDAG's Sustainable Communities Strategy.**

The RDEIR's conclusion that the Project would support the goals of SANDAG's San Diego Forward Plan's Sustainable Communities Strategy (SCS) lacks evidentiary support. The RDEIR largely relies on the Project's transportation demand management program, and other project components such as a walking and bicycle trail system, mixed-use development, and elementary school to conclude that the Project would be consistent with SCS. RDEIR at 2.10-25. The RDEIR's conclusion, however, is belied by factual information that the document completely ignores.

According to the RDEIR, the Project will generate about 27,000 vehicular trips every day. DEIR at 2.9-60 (Table 2.9-10). These vehicle trips will equate to more than 77 million VMT each year. RDEIR GHG Technical Appendix D-1 (at pdf page 2). 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 SCS focuses on building housing and providing jobs in "areas where there is existing and planned transportation infrastructure, including transit"—namely, urban areas.<sup>4</sup> Accordingly, the 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.* at 33. 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 70 percent of the Project's annual operating GHG emissions will be generated by vehicle trips. RDEIR, Appx. C-2 at 41 (Table 5a). The handful of trips that would purportedly be "internally captured" by the Project does not somehow save it from this stark inconsistency with the SCS. *See* RDEIR at 2.10-25.

Indeed, the RDEIR fails to analyze the Project's consistency with the policy objectives and strategies set forth in the SCS. One of these strategies, as mentioned above, calls for growth to be focused in areas that are already urbanized. *See* San Diego Forward Plan, Ch. 2 at 32. The RDEIR does not clearly analyze this point, but mentions

<sup>44</sup> San Diego Forward Plan, Ch. 2 at 32; *available at* [http://www.sdforward.com/pdfs/Final\\_PDFs/Chapter2\\_A\\_Strategy\\_for\\_Sustainability.pdf](http://www.sdforward.com/pdfs/Final_PDFs/Chapter2_A_Strategy_for_Sustainability.pdf).

RO-6-57  
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the Project's proximity to Chula Vista. Chula Vista cannot be considered a major employment center by any stretch of the imagination. In reality, most of its residents commute out of Chula Vista for employment, according to the Chula Vista General Plan. The nearest major employment center is San Diego, which is over 20 miles from the Project site.

RO-6-58

Also, notably, the RDEIR does not even attempt to explain how the car-focused Project is consistent with the SCS's strategy to "invest in a transportation network that gives people transportation choices and reduces greenhouse gas emissions." San Diego Forward Plan, Ch. 2 at 26.

RO-6-59

The court in *Golden Door* invalidated the County's CAP SEIR for these very reasons. The court ruled that the County failed to adequately analyze the impact of the CAP on the RTP/SCS prepared by SANDAG "to carry out the mandate of SB 375 that transportation planning and funding should be used to reduce GHG emissions, in part by changing land use patterns to require less driving. *Cleveland National Forest Foundation v. SANDAG* (2017) 3 Cal.5th 497, 506. . . . In essence, the County failed to adequately analyze the VMT impacts and resulting implications for the San Diego's area SB 375 Planning and Goals." Dec. 24, 2018 Minute Order at 13-14.

RO-6-60

By again ignoring the project's impacts on VMT and ability to meet VMT reduction objectives and other policies of the RTP/SCS, the County's DEIR is fatally defective, and must be revised and recirculated.

**(d) The RDEIR Fails to Incorporate Feasible Mitigation Measures.**

RO-6-61

The RDEIR ignores 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.

- Create car sharing programs. Accommodations for such programs include providing parking spaces for the car share vehicles at convenient locations accessible by public transportation.

RO-6-61  
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- 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.
- 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.
- Install energy-efficient heating ventilation and air conditioning. Educate consumers about existing incentives.
- Use combined heat and power in appropriate applications.
- 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.

RO-6-61  
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- 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.)

**(e) The RDEIR Fails to Provide an Adequate Cumulative Impacts Analysis.**

RO-6-62

The RDEIR fails to evaluate the Project's cumulative climate change impacts. Rather than quantify the cumulative increase in GHG emissions, the RDEIR simply concludes that "any increase in GHG emissions [is] cumulatively considerable," but because the Project would result in "no net increase" in GHG emissions, the cumulative impact would be less than significant with mitigation. RDEIR at 2.10-27. The RDEIR lacks evidentiary support for this conclusion. As explained above, there is no evidence that the Project's proposed mitigation will be effective at all, let alone whether it will be able to mitigate the Project's GHG emissions to a net-zero level.

RO-6-63

It is imperative that the EIR be revised to calculate the Project's cumulative increase in GHG emissions because the County has either just approved or is about to approve several land use projects that will result in a cumulatively considerable increase in GHG emissions. In fact, by our accounting, just five of these projects (Harmony Grove, Lilac Hills, Newland Sierra, Village 14, and PSR GPA) would generate 74,594 metric tons (MT) CO<sub>2</sub>e during construction while operation of these projects would generate another 150,451 MT CO<sub>2</sub>e every year. *See* the attached letter from William White, Shute, Mihaly & Weinberger LLP to the San Diego County Board of Supervisors, Table 2, July 24, 2018, attached as Exhibit 15.

RO-6-64

As Table 2 from the July 24, 2018 letter also shows, the County is proposing to "mitigate" these projects' GHG emissions through the purchase of carbon offsets. For many of the reasons explained above, it is highly unlikely that there is a sufficient amount of offset credits available to mitigate the emissions from the County's planned development as the sheer volume of emissions creates a large and growing demand for offsets. For example, the Newland Sierra project proposes that 82% of its GHG emissions be mitigated through offsets. Yet, according to the EIR prepared in connection with the County's Climate Action Plan, as of January 2018, there were no credits from carbon offset projects located in the County that were available on any of the three offset registries approved by the California Air Resources Board (CARB). *See* Final Supplement to the 2011 General Plan Update Program Environmental Impact Report for



RO-6-64  
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the Climate Action Plan, Chapter 8, Comments and Responses, at 8-53, attached as Exhibit 16; *see also*, An even More Inconvenient Truth – Why Carbon Credits for Forest Preservation May Be Wore than Nothing, L. Song and P. Moura for ProPublica, May 22, 2019, attached as Exhibit 17.

RO-6-65

The failure of the County to analyze the cumulative impacts of proposed GPAs on GHG and VMT in the County was fatal to the CAP SEIR. As the court stated in *Golden Door*, “there is no discussion in the SEIR of the impact that the GHG emissions from the GPAs approved after the County submitted its data to SANDAG, or from reasonably foreseeable future GPAs, may have on the regional plan's VMT or GHG reduction goals. As such, the County's approach does not properly address VMT impacts.” Dec. 24, 2018 Minute Order at 14. The County must quantify the increase in VMT and GHG emissions from all of the development projects currently being considered, and analyze the effect of those cumulative increase on the County’s ability to meet regional VMT and GHG reduction goals.

### **3. The RDEIR Fails to Adequately Analyze Wildfire-Related Impacts.**

#### **(a) The RDEIR Fails to Adequately Analyze the Project’s Potential to Expose People or Structures to Hazardous Conditions.**

RO-6-66

Under CEQA, an EIR must fully evaluate the risks of exposing people or structures in areas susceptible to hazardous conditions. Guidelines § 15126.2(a), App. G § VIII(g)-(h). Here, the RDEIR fails because it lacks evidentiary support for its conclusion that impacts relating to the Project’s potential to expose people to a significant risk of injury or death would be less than significant.

RO-6-67

The Project’s steep canyons and slopes—that average 44 percent—have the potential to facilitate rapid fire spread. DEIR at 2.6-7. There have been numerous fires recorded by the California Department of Forestry and Fire Protection (CalFire) in the direct vicinity of the Project area, including five fires that have burned on the property. *Id.* The RDEIR identifies the potential for wildland fire hazards in and around the Project site as “high.” *Id.* at 2.6-20.

RO-6-68

The RDEIR relies on compliance with applicable fire codes and standards (which would include ignition-resistant construction and fire suppression infrastructure such as fire hydrants), vegetation management zones, and an on-site fire station to conclude that wildfire-related impacts would be less than significant. DEIR at 2.6-21—2.6-24. The Fire

RO-6-68  
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Protection Plan prepared in connection with Alternative H, and included as technical Appendix D-21, similarly concludes that ignition resistant requirements (i.e., compliance with building and codes for new communities) would prevent home loss. RDEIR Appendix D-21 at 21; DEIR at 2.6-24. The RDEIR’s conclusion that these measures would be sufficient to protect structures from wildfire hazards, and accordingly that impacts will be less than significant, thus lacks substantial evidentiary support.<sup>5</sup>

California’s devastating wildfires in 2017 and 2018 constitute overwhelming evidence that neither code compliance nor project features are sufficient to protect against structure loss and loss of life. In the October 2017 Tubbs fire in Sonoma County, houses that were built to current fire codes burned. According to a former Sonoma County planning director and past president of the California chapter of the American Planning Association,

RO-6-68  
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The WUI standards for new buildings increase the odds of a building surviving a wildfire, but relying on a hardened structure to protect whole communities in a known fire-prone area is the height of hubris and callousness . . . The lesson is that we cannot engineer our way out of every hazard. (*See* December 5, 2018 letter from D. Silver, EHL to San Diego County, quoting APA Northern News, Oct. 2018, and documenting that code compliance and other measures such as defensible space were completely inadequate to avoid loss of life and structures during the Paradise fire, the Woolsey (Malibu) fire, and the Tubbs (Sonoma) fire (submitted under separate cover)).

RO-6-69

The flaws in the EIR’s wildfire risk analysis extend far beyond the document’s failure to recognize that so-called “fire-hardening” measures would be insufficient to protect public safety and structures. The document fails entirely to address the impact of Project-ignited fires spreading to adjacent communities.

RO-6-70

The County made this precise error in its EIR for the Village 14, 16, 19 Project (Village 14). EHL retained Christopher Lautenberger, PhD, PE, with REAX Engineering to critique the Village 14 EIR. Dr. Lautenberger prepared two reports – the first report (April 12, 2018) evaluated the Village 14 DEIR’s wildfire analysis while the second report (May 6, 2019) analyzed the Village 14 FEIR. Both of Dr. Lautenberger’s reports are incorporated by reference into this letter and attached as Exhibits 18 and 19. The

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<sup>5</sup> The RDEIR document does not reach a conclusion regarding life safety.

RO-6-70  
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precise flaws that Dr. Lautenberger found in the Village 14 EIR are repeated in the Village 13 EIR. According to Dr. Lautenberger, EIRs for projects in high-risk areas must recognize the inherent threat of a fire igniting within a project's footprint and spreading to adjacent areas. Yet, the Village 13 EIR, like the Village 14 EIR, focuses exclusively on protecting people and structures *within the Project site*. See Exhibit 19 (May 6, 2019 REAX Report) at 1; *see also* FEIR at RTC-346 (response O-6-200) stating, "implementation of fire protection strategies proposed in the FPP would reduce the potential vegetation fire threat and would assist the responding fire authorities in controlling and/or extinguishing vegetation fires *within the Project Area* (emphasis added).

Dr. Lautenberger explains that even for "ignition-resistant" projects, as the County asserts the proposed V13 Project is, a vegetation or structure fire ignited under Santa Ana winds can easily propagate beyond the project footprint. See Exhibit 19 (May 6, 2019 REAX Report) at 6. This is because, during windy conditions, one of the primary mechanisms through which fires spread downwind is by spotting and firebrand showers:

In high wind conditions in California, fires have been known to spot miles ahead of the fire front, cross six lane highways, and jump large rivers. The presence or absence of fire resistant structures (in Village 14, for example) would have no effect on the ability of fires to spread downwind by firebrand spotting. Under high winds, a fire would simply spot over (jump) any fire resistant construction in its path because the spotting distance is much greater than the size of the Project footprint. Again, the presence or absence of Village 14 would have no impact on the spread of a fire ignited within the Project Area from spreading toward adjacent communities including Chula Vista. See Exhibit 19 (May 6, 2019 REAX Report) at 10, 11.

The RDEIR's Appendix D-21 clearly acknowledges the severe threat that would accompany the proposed Project, yet it stops short of acknowledging or analyzing the threat to adjacent communities:

The Alternative H site is considered vulnerable to wildfire starting in, burning onto, or spotting onto the site. This is especially the case due to the large amount of naturally vegetated, unmaintained open space that will be preserved adjacent the site. Under worst-case fall weather conditions,

RO-6-70  
Continued

there is potential for fire to move rapidly through the Alternative H site's fuel types. The most common type of fire anticipated in the vicinity of the Alternative H area is a wind-driven brush fire from the north, northeast during the fall with flame lengths reaching nearly 50 feet. The rate of spread would be rapid due to volatile fuels, wind, and low fuel moisture. A typical cause may be related to roadways (tossed cigarette, vehicle accidents, or vehicle fire), or agricultural tractor work, welding, burning, arson or fireworks discharged in the area. RDEIR Appendix D-21 at 30.

The Village 13 EIR's failure to address the Project's potential impact from fires igniting within the Project Area and spreading to adjacent communities is an egregious flaw.

Nor does the RDEIR acknowledge that projects such as this, that would add thousands of new residents to the wildland urban interface WUI, increase the potential for wildfire. As Dr. Lautenberger explains,

RO-6-71

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 18 at 11 (April 12, 2018 REAX Report).

RO-6-72

The RDEIR's failure to evaluate the Project's potential to increase wildfire ignitions is a serious flaw. The RDEIR should again be revised to evaluate these impacts.

**(b) The RDEIR Does Not Adequately Analyze Emergency Evacuation Impacts.**

RO-6-73

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. *Id.* Here, those risks unquestionably exist yet the RDEIR's analysis of fire evacuation risk is utterly deficient.

RO-6-74

Given the state's recent experience with devastating fires, common sense dictates that an EIR should *at least* consider (1) the number of cars attempting to evacuate the Project area; (2) the amount of time needed to implement a full evacuation of the Project site; (3) an assessment of whether the evacuation could be accomplished within an acceptable time period; (4) an evaluation of the adequacy of the primary evacuation route; and (5) any impacts to emergency personnel attempting to respond while an evacuation is underway. *See Save the Plastic Bag Coal. v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 175 ("Common sense ... is an important consideration at all levels of CEQA review"). The EIR, however, contains no meaningful analysis.

RO-6-75

In light of the DEIR's lackluster approach to wildfire evacuation, EHL retained Griffin Cove Transportation Consulting, PLLC, (GCTC) to evaluate the RDEIR's analysis. (*See* GCTC April 29, 2019 Report, attached as Exhibit 20). Set forth below is a summary of GCTC's conclusions.

RO-5-76

First, the RDEIR asserts evacuation would be focused on early evacuations, *if sufficient time allows*. RDEIR Appendix D-21 at 24. The RDEIR provides no information with respect to the characteristics of such an early evacuation. More importantly, it thoroughly ignores the parameters of an evacuation that is determined to be necessary when sufficient time is *not* available, such as a fire that erupts quickly and in close proximity to the site. *See* DEIR Hazards Chapter and Appendix D-21. Rather, the RDEIR simply asserts, absent any analytical support, that the Project [Alternative H] would not result in inadequate emergency access ultimately concluding that any impacts would be less than significant. RDEIR Appendix D-21 at 24; RDEIR at 2.6-24.

RO-6-77

Second, the RDEIR contains *no analysis* of the ability of the roadway system to accommodate evacuating traffic. The document omits an estimate of the number of Project-related vehicles that would need to be accommodated during an evacuation. GCTC calculated that the Project (Alternative H) would generate over 4,260 vehicles during an evacuation. *See* Exhibit 20 (GCTC Report) at 3. Coincidentally, that volume represents the approximate capacity of Otay Lakes Road (once it is widened upon completion of the Project).<sup>67</sup> *Id.* Thus, assuming that evacuating traffic would primarily

<sup>6</sup> The RDEIR does not reach a conclusion regarding life safety.

<sup>7</sup> According to the Highway Capacity Manual, the capacity of a multi-lane highway with a free-flow speed of 55 MPH is 2,100 passenger cars/hour/lane. Exhibit 20 at 3 (GCTC Report).

be traveling toward Chula Vista, Otay Lakes Road would be capable of carrying about 4,200 vehicles per hour, which is slightly *less* than the volume of traffic that might be generated by the Project (Alternative H) under an emergency evacuation. *See* Exhibit 20 (GCTC Report) at 3.

RO-6-78

Third, the RDEIR fails to consider that non-Project vehicles will also be on area roads during an evacuation. As discussed further below, Otay Lakes Road would be the primary evacuation route for communities other than the proposed Project. *See* Exhibit 20 (GCTC Report) at 3. Specifically, Otay Lakes Road must also serve the emergency evacuation needs of the Eastlake and Rolling Hills Ranch communities, as well as Jamul area residents who might approach by way of State Route 94. Because Otay Lakes Road is the only route through the Project area, it carries substantial traffic volumes even under typical, non-evacuation circumstances. As such ambient traffic, (i.e., not evacuation-related) will also likely be on that road when an emergency is declared and evacuation commences.

RO-6-79

Fourth, the RDEIR fails to take into account that evacuation efforts would be thwarted due to extreme traffic congestion on Otay Lakes Road. Several roadway segments and intersections along Otay Lakes Road are expected to operate at unacceptable levels of service as a result of the Project; the EIR identifies these operational levels as significant and unavoidable impacts. DEIR at 2.9-49-2.9-51. Given this fact, traffic flow would be substantially impeded, with congestion and stop-and-go conditions. *See* Exhibit 20 (GCTC Report) at 5.

RO-6-80

Fifth, the EIR fails to even acknowledge, let alone analyze, numerous other factors that would likely occur during a wildfire evacuation. As GCTC explains, the RDEIR fails to consider the possibility that roadways could be obscured by smoke and/or visible flames and that these conditions will have the effect of reducing roadway capacity or blocking the roadway altogether. The document also fails to consider that the emotional state of the evacuees could lead to irrational or unpredictable behavior by drivers. *See* Exhibit 20 (GCTC Report) at 6.

RO-6-81

The EIR's failure to take into account these fundamental issues is particularly alarming in light of the fact that, more than seven years ago, the County studied the adequacy of emergency evacuation routes in Jamul and Dulzura area. *See* Jamul/Dulzura Evacuation Final Study (Evacuation Study), August 13, 2012, attached as Exhibit 21. The Evacuation Study stressed, among other things, the importance of multiple access points to ensure that residents have safe, reliable and known evacuation alternatives during emergencies, and that firefighters have access flexibility to deal with changing dynamics in wildfires and other emergencies. Evacuation Study at 18. The underlying assumption is

RO-6-81  
Continued that a roadway network with extensive connectivity includes numerous access points between roadways, (e.g., intersections), and therefore a variety of alternatives for evacuation routings. *Id.* at 20. We can find no indication that Otay Lakes Road was ever intended to serve as an emergency evacuation route. Worse yet, the EIR fails to include a “roadway connectivity assessment.” Had it conducted such an assessment; it likely would have revealed that most, if not all, of the Project’s residents (and emergency responders) will be traveling on a single road, Otay Lakes Road. A single evacuation route is utterly deficient during a fast moving (i.e., wind-driven) wildfire.

RO-6-82 In sum, the RDEIR’s failure to take into account any of the aforementioned factors when assessing the Project’s potential to result in safe evacuations is a fatal flaw. Consequently, the EIR does not meet the standards recently confirmed by the Supreme Court in *Sierra Club v. County of Fresno*. That Court made clear that “[t]he ultimate inquiry ... is whether the EIR includes enough detail ‘to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the project.’” *Sierra Club v. County of Fresno* (2018) 226 Cal.App.4th at 516 (quoting *Laurel Heights I*, 47 Cal.3d at 405). Such detail “protects not only the environment but also self-informed government,” as it empowers the public both to “know the basis on which its responsible officials [act]” and to “respond accordingly to action with which it disagrees.” *Id.* at 512 (internal quotations omitted). The EIR therefore fails in its role as an informational document.

#### 4. The RDEIR’s Analysis of the Project’s Impacts on Water Supply Resources Is Inadequate.

RO-6-83 The Project would unquestionably require significant amounts of water to serve construction and operational needs. Indeed, the RDEIR (Appendix D-18 (Water Supply Assessment and Verification Report)) identifies the Project’s water demand as 1,177,200 gallons per day (gpd) or about 1,318.7 acre feet per year (AFY). Appendix D-18 at 2; 6;16. While the EIR acknowledges this need, it fails to properly account for the impacts associated with providing water for the Project.

##### (a) Project-Specific Impacts

RO-6-84 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.

RO-6-84 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—and discloses the significant foreseeable environmental effects of each alternative, as well as mitigation measures to minimize each adverse impact. *Id.* at 434.

The RDEIR’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 RDEIR 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. RDEIR Appendix D-18 at 3. The RDEIR apparently takes this approach because the most-recent Urban Water Management Plans (UWMPs) from Metropolitan Water District (MWD), the San Diego County Water Authority (Water Authority) and the Otay Water District only include supply projections through 2040.<sup>8</sup> *Id.* at 5. While it is appropriate to incorporate these documents into the County’s environmental review, the RDEIR 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.

RO-6-85 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 22; California Water Year 2014 Among Driest Years on Record, attached as Exhibit 23; Assessing the Risk of Persistent Drought Using Climate Model Simulations and Paleoclimate Data, attached as Exhibit 24. A study of California droughts concluded that anthropogenic climate change will continue to cause the co-occurrence of warm and dry



RO-6-85  
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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 25. 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 26. 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).

RO-6-86

Moreover, California’s recent rains do not mean that the state—or the San Diego region—is out of danger. Because of years of over pumping to the point of wells going dry, water basins remain too low and have not returned to pre-drought levels. *See* Drought, schmrought, water experts already fret the next dry year and still preach conservation, Los Angeles Daily News, March 15, 2019, attached as Exhibit 27. The RDEIR must acknowledge the potential for long-term drought-induced deficits in California’s water supply, identify concrete measures that could supplement the water supply for the Project, and evaluate the environmental impacts of obtaining that new water supply. In light of this mounting evidence, the RDEIR’s short-term water supply assessment is inadequate.

RO-6-87

Even with this truncated review window, the RDEIR reveals that secure water supplies to serve the Project are far from assured. The RDEIR states that the Water Supply Assessment and Verification (WSA&V) Report included as an appendix to the RDEIR includes, among other information, “an identification of existing water supply entitlements, water rights, water service contracts, proposed water supply projects, and agreements relevant to the identified water supply needs” for the proposed Otay Ranch Resort Village. RDEIR at Appendix D-18 at 7. Unfortunately, it does no such thing. While the WSA &V describes certain existing and proposed water supply projects, it never discloses the relationship between these water supply projects and the ability to provide water to meet the demands of the Otay Ranch Project. Rather the RDEIR simply asserts that MWD, the Water Authority, and the Otay Water District have a process that ensures supplies *are being planned* to meet future general growth. *Id.* at 2. There is a difference, however, between actually having those supplies (i.e., water supply entitlements and water rights) and planning to have them.

RO-6-88

According to the RDEIR, the Water Authority and MWD update their demand forecasts and supply needs based on the San Diego Association of Governments’ (SANDAG) forecasts approximately every five years to coincide with preparation of their

RO-6-88  
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UWMPs.<sup>9</sup> *Id.* at 2; 3; 51; 52. The RDEIR explains that proposed land areas with pending or proposed annexations *typically result in creating higher demand and supply requirements than previously anticipated.* *Id.* at 7; 52. Here, the Project site is not currently located within the jurisdictions of the Otay Water District, the Water Authority, or the MWD. RDEIR Appendix D-18 at 1. Consequently, in order to obtain permanent imported water supply service, the Project would be required to annex into the jurisdictions of each of these water districts. *Id.* at 6. Thus, while the RDEIR asserts that MWD’s 2015 UWMP states that MWD has supply capabilities that would be sufficient to meet expected demands from through 2040 (Appendix D-18 at 3), the RDEIR fails to disclose that the 2015 UWMP does not account for the proposed Project because the Project site is not within MWD’s boundaries. Rather than provide clear documentation that MWD has existing water supply entitlement, water rights, or water service contracts, the RDEIR asserts that MWD “*fully intends to have sufficient, reliable supplies to serve demands.*” Appendix D-18 at 22; *see also Id.* at 52, “MWD’s IRP identifies a mix of resources (imported and local) that, *when implemented*, will provide 100 percent reliability for full-service demands through the attainment of regional targets set for conservation, local supplies, State Water Project supplies, Colorado River supplies, groundwater banking, and water transfers” (emphasis added). This conclusory language is not sufficient. It is especially egregious that the EIR does not provide this certainty. It has been four years since the DEIR was published. The DEIR appears to have relied on SANDAG forecasts adopted in 2013. *See* RDEIR Appendix D-18 at 13. If adequate water supplies were available to serve the proposed Project, the Project should already have been included in the Water Authority’s and MWD’s demand and supply projections.

RO-6-89

Nor does the RDEIR provide the required evidentiary support that the Water Authority has water supplies sufficient to serve the proposed Project. Rather the RDEIR identifies several projects that are in various stages of planning and development. But here again, the document makes no attempt to correlate the Water Authority’s existing and planned supplies to the proposed Project. RDEIR Appendix D-18 at 23. Here too, the RDEIR offers only vague assurance that the Water Authority will have sufficient water supplies to serve the Project: “Through implementation of the Water Authority and member agency *planned* supply projects, along with reliable imported water supplies from MWD, the region *anticipates having adequate supplies* to meet existing and future water demands.” *Id.* at 23.

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<sup>9</sup> It appears that the Otay Water District relied on SANDAG’s Series 13; 2050 Regional Growth Forecast, adopted on October 15, 2013. RDEIR Appendix D-18 at 13.

RO-6-90 Moreover, the RDEIR likely overstates the amount of water supply that these water agencies will have in future years. For instance, the RDEIR states that the Water Authority is taking delivery of conserved agricultural water from the Imperial Irrigation District (IID) and desalinated seawater from the Carlsbad desalination plant. Yet, both of these sources of water appear to be highly problematic. The RDEIR asserts that the IID water project, for example, is considered a “drought-proof” water supply with the Water Authority expecting to receive up to 200,000 acre feet per year by 2021. Appendix D-18 at 23. Yet, it appears that neither the Water Authority nor MWD have updated their foundational water supply documents to account for the fact that MWD has committed to enter into agreements that will require it to forgo diverting up to hundreds of thousands of acre feet of water annually from the Colorado River. *See Verified Petition for Writ of Mandate, Imperial Irrigation District v. The Metropolitan Water District of Southern California*, Superior Court of California, County of Los Angeles, attached as Exhibit 28. Restrictions on deliveries from the Colorado River create demands for water from other sources, which, in turn, result in other environmental impacts. *Id.*

RO-6-91 Nor is there assurance that the Carlsbad Desalination Plant will be a reliable source of local water. According to the RDEIR, the Carlsbad Desalination Plant was projected to provide the Water Authority with up to 56,000 acre feet per year of water. Appendix D-18 at 23; 36. 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 acre feet 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 29. 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.

RO-6-92 The RDEIR fares no better in its discussion of the Otay Water District’s water supply development program. Here, the RDEIR states that the proposed Project will be required to financially participate in water supply development projects. RDEIR Appendix D-18 at 4; 55. The document explains, however, that these new water supply projects are not yet developed and are only in various stages of the planning process. *Id.* at 4; 14; 39; 55. Again, the RDEIR lacks evidentiary support that these water projects will be implemented or that, even if they are implemented, they would generate sufficient water to meet the proposed Project’s water demand. The closest the document comes is a statement that estimated water supply *is being planned for and is intended to be acquired* to meet the estimated demand targets of the Otay WD pursuant to its 2015 UWMP. (*Id.* at 8; *see also Id.* at 56, “The regional water suppliers along with Otay WD *fully intend to*

RO-6-92  
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maintain sufficient reliable supplies through the 20-year planning horizon under normal, single, and multiple dry year conditions to meet projected demand of the Otay Ranch Resort Village, along with existing and other planned development projects within the Otay WD service area.”). The fact that the Otay Water District is planning for supplies to meet future demand is not sufficient as it provides no evidence that water supply entitlements are in place to serve the Project.

RO-6-93

Finally, the RDEIR includes a few charts that conveniently show identical water demands and supplies, implying that future supplies will precisely match the amount required to serve the proposed Project. Appendix D-18 at 54, 55. Yet, the RDEIR offers no data, or any other factual support, to show how the RDEIR preparers arrived at these demand and supply projections. Setting aside the fact that these water data appear to be entirely theoretical, the second chart, which purports to show water demands and supplies “during multiple dry years” only identifies water supplies through 2019. *Id.* at 55. In order to demonstrate that water supplies will be sufficient to meet the Project’s future water demands, the RDEIR must actually show *future* water supply data (and show this data for multiple years). Without this information, it is simply not possible for the public or decisionmakers to determine (1) whether a source of water exists for the Project and (2) the reasonably foreseeable environmental impacts of supplying water to the Project.

RO-6-94

For the aforementioned reasons, the RDEIR lacks factual support for its assertion that sufficient water supplies are available to serve the proposed Project. Consequently, the RDEIR also lacks the evidentiary basis that water supply impacts would be less than significant. RDEIR at 3.7-13.

### (b) Cumulative Impacts

RO-6-95

The RDEIR fails to analyze the cumulative impacts associated with providing water for the Project. As an initial matter, the RDEIR’s Appendix D-18 does not provide *any* analysis of the Project’s cumulative water supply impacts. The DEIR asserts, incorrectly, that an adequate water supply from the Water Authority has been identified so that the Project is not anticipated to contribute to a cumulatively considerable impact on water supply. DEIR at 3.7-20. As discussed above, there is no assurance that an adequate water supply exists to serve the Project.

RO-6-96

Moreover, even if the EIR were correct in its assessment that the project-specific water supply impacts would be less than significant, this does not excuse the EIR from identifying and analyzing cumulative water supply impacts. Cumulative impacts analysis is necessary because “environmental damage often occurs incrementally from a variety of small sources [that] appear insignificant when considered individually, but assume

threatening dimensions when considered collectively with other sources with which they interact.” *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 114.

RO-6-97 To comply with CEQA, the EIR should first determine whether cumulative impacts to a resource are significant, and then determine whether the Project’s impacts are cumulatively considerable (i.e., significant when considered in conjunction with other past, present and reasonably foreseeable projects). CEQA Guidelines § 15064(h)(1). The DEIR skipped the first step altogether. This error caused the document to focus solely on the significance of the Project’s impacts as opposed to considering them in the context of the cumulative problem. It is wholly inappropriate to end a cumulative analysis on account of a determination that a project’s individual contribution would be less than significant. Rather, this should constitute the beginning of the analysis.

RO-6-98 In any event, the DEIR makes no attempt to actually analyze the Project’s cumulative water supply impact. The DEIR’s project description chapter asserts that the cumulative analysis of each environmental topic includes a combination of growth projections and project list. DEIR at 1.0-31. The project description chapter also identifies 40 projects that were purportedly used to evaluate the Project’s impacts. *See* DEIR at Table 1.0-6. Yet, the DEIR’s utilities chapter, where project-specific water supply impacts are analyzed, does not even mention these other projects. Nor does it make any attempt to disclose the cumulative water demand of these projects or assess what effect the development of the cumulative projects would have on the water entitlements and other facilities that would serve the Project. This omission is an egregious flaw necessitating that the EIR be revised and recirculated.

RO-6-99 It will be important for this revised cumulative water supply analysis to acknowledge development projects since the DEIR was published in 2015. The Water Authority’s water demand projections are tied to development assumptions in general plans, as they existed during preparation of the 2015 UWMP. *See* Water Authority 2015 Urban Water Management Plan, excerpted and attached as Exhibit 30. Since then, the County has adopted or is considering numerous general plan amendments that would add growth in the Water Authority’s service territory but were not considered in the 2015 UWMP. *See, e.g.,* Summary Newland-Sierra DEIR, excerpted and attached as Exhibit 31. Thus, cumulative development in San Diego County will require expansion of existing water supplies beyond the Water Authority’s projections. This revised analysis must also take into account the reduced supplies due to MWD’s commitment to enter into agreements that will require it to forgo diverting up to hundreds of thousands of acre feet of water annually from the Colorado River. *See* Exhibit 28 (Verified Petition for Writ of

Mandate, *Imperial Irrigation District v. The Metropolitan Water District of Southern California*, Superior Court of California, County of Los Angeles).

**5. The DEIR Fails to Adequately Analyze or Mitigate the Project's Energy Impacts.**

RO-6-100 The transportation sector makes up the single largest consumer of energy in California, accounting for 38 percent of the state's total energy demand, and nearly all of this energy is provided by petroleum. DEIR at 3.0-1. Fuel consumption rises when vehicle travel increases. Sprawling patterns of development has a major impact on travel both because it extends the distance that vehicles must travel and because there are limited alternatives to the automobile (i.e., limited or no access to public transit). Due to the proposed Project's remote (i.e., far from job centers) location, the Project would generate more than 27,000 daily vehicular trips and result in more than 77 million vehicle miles (VMT) traveled each year. DEIR at 3.9-7; RDEIR GHG Technical Appendix D-1 (at pdf page 2).

RO-6-101 Although the Project would result in a massive increase in vehicular travel, the DEIR fails to identify the Project's gasoline and diesel consumption. It is of the utmost importance that the EIR be revised to identify this information so that the public and decisionmakers are apprised of the amount of fuel that would be consumed by this greenfield development. EIRs routinely identify this information. For example, the EIR for the Village 14, 16, and 19 project (Village 14 project), also located in Otay Valley, determined that that project would consume about 1,718,084 gallons of gasoline and 123,215 gallons of diesel every year. *See* Village 14 Project DEIR at 3.1.9-19, energy chapter attached as Exhibit 32. Given that the Village 13 project would generate 77 million VMT, compared to 50 million VMT for the Village 14 project, it is evident that the Village 13 Project would consume even more gasoline and diesel fuel than the Village 14 project.

RO-6-102 Notwithstanding the DEIR's failure to identify the Project's fuel consumption, it nonetheless concludes that the Project would not result in an inefficient and wasteful use of nonrenewable resources. DEIR at 3.9-8. The EIR offers several reasons why this tremendous increase in fuel consumption should not be considered inefficient or wasteful. Each of the reasons is unavailing.

RO-6-103 First, the DEIR asserts that due to the mix of uses on the Project site, not all vehicular trips would leave the Project site. Specifically, the DEIR asserts that about 20 percent of these trips would never leave the Project site. DEIR at 3.9-7. Even if 20 percent of the Project's trips would stay internal to the Project site—a highly optimistic

assumption—the Project would still generate 21,916 trips every day. DEIR at 2.9-7. A Project that generates this massive number of vehicles trips (and 77 million VMT) cannot be considered a project that uses energy efficiently.

RO-6-104 Second, the DEIR asserts that the Project would not result in an inefficient or wasteful use of energy because it includes design measures to enhance walkability and to improve the on-site pedestrian network. DEIR at 3.9-7. While walkable neighborhoods are an important community amenity, they would have a nominal effect on VMT and fuel consumption. Indeed, we can find no indication that the EIR relies on these design features to reduce VMT. There are two ways to substantially reduce a project's VMT and fuel consumption. The first is to develop the project in an urbanized location, close to major employment centers. Here, although the DEIR does not disclose where most of the Project's residents would be employed, it is clear that they would be traveling a good distance given the massive increase in project-related VMT. Second, a project would either need to include extensive transit service or be located in proximity to a well-established comprehensive transit network. Here, the Project includes no transit and there is no indication that any transit service exists in the area. DEIR at 3.5-6.

RO-6-105 Third, the DEIR looks to various regulations on vehicle and fuel manufacturing that “would likely result in a substantial reduction of the project's vehicle fuel consumption each year into the future.” DEIR at 3.9-7. Specifically, the DEIR states that the federal CAFE standards are anticipated to improve fuel economy of vehicles suggesting that the amount of petroleum consumed as a result of vehicular trips to and from the Project during operation would decrease over time. *Id.* It is unrealistic, however, to assume that governmental policies and regulations will ensure that vehicle fuel efficiency will continued to improve in light of the Trump Administration's attempts to freeze, or even roll back, rules that require automakers to build cleaner, more fuel-efficient cars. The current Administration recently proposed a rule that would roll back vehicle efficiency standards for model years 2021-2026 to 2020 levels. *See* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2016 Passenger Cars and Light Trucks 7, 31, U.S. EPA and National Highway Traffic Safety Administration, (prepublication version Aug. 2, 2018), attached as Exhibit 33; *see also* Trump to Seek Repeal of California's Smog-Fighting Power, Bloomberg, July 23, 2018, attached as Exhibit 34. There is also increasing likelihood that the Trump Administration will seek to revoke California's ability to adopt and enforce more stringent standards. Moreover, even if fuel economy were improving, the proposed Project is doing nothing to facilitate increased fuel efficiency.

RO-6-106 Because the Project would result in an additional 77 million VMT each year and because the EIR offers no measures to reduce the Project's petroleum consumption, it

RO-6-106  
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epitomizes the definition of a wasteful use of energy, constituting a significant impact. The Project's inefficient use energy undoubtedly constitutes a significant impact warranting that the EIR again be recirculated for public review and comment. This is precisely what the court ruled in *Golden Door*, invalidating the County's SEIR for the CAP on the independent ground that "it is undisputed that the County failed to evaluate the reasonably foreseeable impacts on energy usage in allowing increased VMTs in exchange for GHG reduction through offsets." Exhibit 14 (Dec. 24, 2018 Minute Order at 15).

RO-6-107

In addition to quantifying the Project's increase in petroleum and diesel fuel consumption, and analyzing alternative land use plans that will reduce that consumption by significantly reducing VMT, the revised EIR must evaluate the feasibility of the following additional measures to reduce the Project's wasteful fuel consumption:

- Installing electric vehicle (EV) charging stations in the residential and commercial components of the Project.
- Provide preferential parking locations for EVs and compressed vehicles.
- Implement parking cash-out program for non-driving employees.
- Implement a carpool/vanpool program.
- Provide subsidies or incentives to employees who use public transit or carpooling.
- Provide direct, safe, attractive pedestrian access from project to transit stops and adjacent development.
- Connect bicycle lanes/paths to city-wide network.
- Construct transit facilities such as bus turnouts/bus bulbs, benches, shelters, etc.
- Provide a display case or kiosk displaying transportation information in a prominent area accessible to employees.
- Provide shuttle service to food service establishments/commercial areas.
- Provide shuttle service to transit stations/multimodal centers.



RO-6-107  
Continued

- Implement home-based telecommunicating program, alternate work schedules, and satellite work centers.
- Construct renewable energy sources sufficient to offset the equivalent of 100% of all greenhouse gas emissions from mobile sources (internal combustion engines) for the entire Project.

**6. The DEIR Fails to Adequately Analyze the Project's Air Quality Impacts.**

**(a) Criteria Air Pollutant Emissions**

The Project would be developed in the San Diego Air Basin (Air Basin). The Air Basin is designated as non-attainment for the federal ozone standard. DEIR at 2.2-3. The Air Basin is classified as "serious" nonattainment of the state ozone standards and nonattainment of the state PM10 and PM2.5 standards. *Id.*

The DEIR determines that Project-related construction-related VOCs and NOx (ozone precursor emissions), CO, PM10, and PM2.5 would exceed the County's standards and that these emissions have the potential to result in air quality violations. DEIR at 2.2-7, 2.2-8; RDEIR Technical Appendix D-1 at 5. The DEIR also determines that daily operational emissions at full buildout would exceed the County's standards for VOC, CO, and PM10 and therefore the Project has the potential to result in air quality violations. *Id.* The DEIR correctly concludes that these emissions would result in a significant impact to regional air quality. *Id.*

Despite acknowledging that construction-related and operational air quality impacts would be significant, the EIR errs because it does not explain the nature and magnitude of these long-term air quality effects. In a recent Supreme Court case, the Court found an EIR's analysis deficient because it did not provide a discussion of whether the project's foreseeable adverse effects would likely increase the number of days that the national ambient air quality standards (NAAQS) and the California ambient air quality standards (CAAQS) would be exceeded or explain whether there was a connection between the project's emissions and deleterious human health impacts. *Sierra Club v. County of Fresno* (2018) 226 Cal.App.4th 704. Here, the EIR simply states that it would be difficult to predict the number of future daily exceedances (at 2.2-8), but it provides no explanation as to why providing such detail would be difficult. Nor does the EIR make any effort to disclose the health consequences that result when more pollutants are added to a nonattainment basin.

RO-6-108

RO-6-109 | The revised EIR should evaluate to what extent human health would be affected by exposure to these pollutants and describe where the daily exceedances of the NAAQS and CAAQS would occur in the Air Basin.

**(b) Toxic Air Contaminants**

RO-6-110 | The DEIR fails to adequately analyze the Project's potential to expose nearby sensitive receptors to substantial toxic air contaminant (TAC) emissions. A residence is located about 1,700 feet northwest of the Project site, DEIR at 2.2-9. In addition, the Project would develop a school and one or more day care centers. *Id.* Consequently, the Project has the potential to cause adverse health effects to residents and students during its lengthy construction period, which is estimated to last upwards of ten years. DEIR at 2.2-11.

RO-6-111 | The DEIR's health risk assessment (HRA) determines that the Project would cause an excess cancer risk of 4.97 in one million. DEIR at 2.2-11. Because this cancer risk was determined to be less than the County's significance threshold of 10 in a million, the DEIR concludes that the Project's health risk was less than significant. DEIR at 2.2-11; 12. However, there are at least two flaws in the DEIR's analysis that resulted in an underestimation of the Project's health risk.

RO-6-112 | First, the DEIR focuses exclusively on TAC emissions during the Project's construction phase, ignoring altogether the TAC emissions that would be generated by the Project's operational sources. The Project's protracted construction schedule will mean that certain of the Project's residents and students would be exposed to construction-related *and* operational TAC emissions. While sources of operational emissions (e.g., delivery trucks, generators, etc.) would be less than construction-related emissions, these emissions must nonetheless be taken into account. Specifically, the DEIR identifies PM<sub>2.5</sub> emissions from area sources, energy use, and motor vehicles for purposes of determining whether these emissions would exceed applicable air quality standards (*see* DEIR Table 2.2-7 at page 2.2-27), but fails to include these emissions in its HRA.

RO-6-113 | Second, the DEIR relies on outdated health risk methodology and therefore understates the Project's potential to expose sensitive receptors to TAC emissions. Specifically, the DEIR relies on a 2003 version of the Office of Environmental Health Hazard Assessment (OEHHA) Air Toxics Hot Spots Program Guidance Manual for Preparation of Health Risk Assessments (OEHHA Guidance). *See* DEIR at Appendix C-1 (Air Quality Impact Report). Important revisions to the OEHHA Guidance were adopted in 2015. *See* Air Toxics Hot Spots Program, Risk Assessment Guidelines, Guidance

RO-6-113  
Continued

Manual for Preparation of Health Risk Assessments, OEHHA, February 2015, attached as Exhibit 35. The revised 2015 Guidance recognizes the Children’s Environmental Health Protection Act of 1999 (Health and Safety Code Section 39606), which requires explicit consideration of infants and children in assessing risks from air toxics. *Id.* at 1. In particular, the intent of the new Guidelines is to incorporate children’s health concerns, update risk assessment practices, and to provide consistent risk assessment procedures. *Id.* at 2. According to the California Air Resources Board, use of the 2015 OEHHA Guidelines “will result in higher estimated risk for many situations than would have been calculated by the 2003 risk estimates; while in other cases, the new estimated inhalation cancer risk could be up to three times higher.” *See Risk Management Actions Related to the OEHHA Guidelines*, California Air Resources Board, August 18, 2016, attached as Exhibit 36.

RO-6-114

Especially because the Project has the potential to expose children at the Project’s schools and daycare centers to elevated levels of TACS, it is imperative that the EIR be revised to include a new HRA relying on current OEHHA guidance. This updated analysis may reveal that the Project’s health risks are significant. If so, the revised EIR must identify feasible mitigation measures and or project alternatives capable of reducing these impacts.

## **B. The DEIR’s Analysis of Project Alternatives is Inadequate.**

RO-6-115

Under CEQA, a proper analysis of alternatives is essential to comply with the Act’s mandate that significant environmental damage be avoided or substantially lessened where feasible. Pub. Resources Code § 21002; Guidelines §§ 15002(a)(3), 15021(a)(2), 15126(d); *Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 443-45. As stated in *Laurel Heights I*, “[w]ithout meaningful analysis of alternatives in the DEIR, neither the courts nor the public can fulfill their proper roles in the CEQA process . . . . [Courts will not] countenance a result that would require blind trust by the public, especially in light of CEQA’s fundamental goal that the public be fully informed as to the consequences of action by their public officials.” 47 Cal.3d at 404. Here, the RDEIR fails to comply with this mandate.

### **1. The RDEIR Fails to Identify a Reasonable Range of Alternatives.**

RO-6-116

Critically, an EIR must consider a “reasonable range” of alternatives “that will foster informed decision-making and public participation.” CEQA Guidelines § 15126.6(a); *Laurel Heights I*, 47 Cal.3d at 404 (“An EIR’s discussion of alternatives must contain analysis sufficient to allow informed decision-making.”). The discussion of

RO-6-116  
Continued | alternatives must focus on alternatives to the project or its location that are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly. CEQA Guidelines § 15126.6(b).

RO-6-117 | The EIR identifies the Project’s primary significant and unavoidable impacts as those on visual resources, air quality, and traffic. RDEIR at 4.9-53—4.9-57. Yet, except for the “no project” alternative, which “would not meet any of the project objectives,” none of the examined alternatives would reduce any of these impacts to a less than significant level.<sup>10</sup> See Table 4.0-2 at RDEIR pgs. 2.9-48; 4.0-51, 52. Moreover, one of the proffered alternatives (Alternative B) would concededly *increase* the Project’s air quality and traffic impacts. RDEIR at 4.0-51, 4.0-52. An alternative that would increase the Project’s environmental impacts does not contribute to a “reasonable range” of alternatives. See Pub. Resources Code § 21100(b)(4); Guidelines § 15126.6(a) & (b). The EIR must be revised again to provide a range of alternatives that reduce the Project’s environmental impacts.

## 2. Alternative H Would Worsen the Project’s Environmental Impacts.

RO-6-118 | The RDEIR identifies a new Alternative, Alternative H, that is far more environmentally damaging than the proposed Project—exactly the opposite of what an alternative should accomplish. Alternative H proposes the same number of dwelling units as the proposed Project. RDEIR at 4.0-1. It would develop 1,938 units on 692.5 acres of the 1,869 Project site. RDEIR at 4.0-3.

RO-6-119 | It is perplexing why the DEIR was revised to include Alternative H, as it appears to be modeled after one of the most environmentally damaging alternatives identified in the DEIR, Alternative B. Despite the similarities (i.e., almost identical development footprints and similar amounts of preserved/conserved lands) between Alternative B and

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<sup>10</sup> The DEIR asserts that Alternative H would have traffic impacts similar to the Project and that both the Project’s and Alternative H’s traffic impacts would be less than significant with mitigation. However, this assertion is contradicted by the EIR. The DEIR identifies traffic (and cumulative traffic) as significant and unavoidable impacts. See e.g., DEIR at 2.9-46; 2.9-50; 2.9-51 (significant and unavoidable impacts on Otay Lakes Road between Lake Crest Drive and Wueste Drive, Otay Lakes Road between Lake Crest Drive and the City of Chula Vista/County boundary, at Otay Lakes Road/SR-94).

RO-6-119  
Continued

Alternative H, the RDEIR arrives at very different conclusions regarding the environmental impacts of each alternative. *See* Figure 4.0-1 (Alternative B Land Use Plan) and Figure 4.0-7 (Alternative H Land Use Plan). The RDEIR asserts that Alternative B's impacts to air quality, biological resources, noise, traffic, and global climate change would be *greater* than the proposed Project. RDEIR at 4.0-15. *Id.* The RDEIR's summary of Alternative H, on the other hand, asserts impacts to air quality, biological resources, noise, and traffic would be the *same or slightly less* compared to the proposed Project. RDEIR at 4.0-49. In short, the RDEIR's analysis of Alternative H makes no sense. A conclusion regarding the significance (or insignificance) of an environmental impact that is not based on an analysis of the relevant facts fails to fulfill CEQA's informational goal. *See Stanislaus Natural Heritage Project*, 48 Cal.App.4th at 182; *Citizens of Goleta Valley*, 52 Cal.3d at 568. The RDEIR neglects to present all relevant facts relating to Alternative H's environmental impacts and its cursory conclusions – which appear to have been preordained -- are based upon faulty analysis.

### **3. Alternative G Is the Environmentally Superior Alternative and It Meets the Project's Objectives.**

RO-6-120

Under CEQA, an agency may not approve a proposed project if a feasible alternative exists that would meet a project's objectives and would diminish or avoid its significant environmental impacts. Pub. Resources Code § 21002; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 731; *see also CEQA Guidelines* §§ 15002(a)(3), 15021(a)(2), 15126(d); *Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 443-45. An alternative need not meet every Project objective or be the least costly in order to be feasible. *See* CEQA Guidelines § 15126.6(b).

RO-6-121

Only one alternative (Alternative G) would clearly lessen Project impacts, although three environmental impacts would remain significant and unavoidable. RDEIR at 4.0-51, 52. Alternative G would concentrate development within the eastern portion of the Project site and reduce the development footprint by roughly 556 acres as compared to the proposed Project. RDEIR at 4.0-31. Alternative G would develop 224 acres of the Project site including: 465 single-family detached units on 149.2 acres, a 2.0-acre public safety site, and a 17.4-acre resort site in the same location as the proposed Project. Approximately 1,090 acres of Preserve Open Space and 555 acres of Conserved Open Space would be provided. RDEIR at 4.0-3. Of paramount importance, Alternative G would reduce impacts compared to the Project in every single impact category. RDEIR at 4.0-51, 52.

Alternative G not only reduces environmental impacts compared to the Project, but also meets, or could easily meet, the Project objectives<sup>11</sup> (see DEIR at 1.0-1, 1.0-2):

- Implement the goals, objectives and policies of the adopted Otay SRP, the Otay Ranch RMP, and the County MSCP Subarea Plan South County segment
- Create a prestigious destination resort that maximizes unique South County open space, high-terrain, and lake views within a distinct, predominantly single-family home community, and allow first-time buyers and others to transition to distinct, high-quality homes within Otay Ranch
- Decrease the intensity of development at higher elevations away from Lower Otay Lake
- Establish an executive level, “specialty” housing enclave within Otay Ranch that attracts business owners and employers
- Create increased housing diversity within Otay Ranch by balancing higher densities associated with Otay Ranch’s multi-family development with lower density predominately single-family homes to ensure a balance of housing opportunities
- Ensure public facilities are provided in a timely manner
- Preserve the Project site’s most sensitive resources, including the Quino checkerspot butterfly and higher quality vernal pools.

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<sup>11</sup> Certain of the Project objectives include features that, while not specified in the EIR’s description of any of the Project alternatives, could easily be incorporated into any alternative. For example, although the EIR does not explicitly state that Alternative G’s public facilities would be provided in a timely manner, if Alternative G were developed rather than the proposed Project, the developer could certainly provide the public facilities in a timely manner. Similarly, the developer could include a continuous public trail system, neighborhood park system, and incorporate sustainable design elements if Alternative G were approved and developed.

RO-6-122

RO-6-122  
Continued

- Provide a continuous public trail system through the community, with access to the resort, the village core, mixed-use area and surrounding trails
- Provide for a neighborhood park system that provides a variety of active recreational opportunities within walking distance of all planned neighborhoods.
- Create an internal, safe, and efficient street circulation system that is safe and efficient and that promotes walking and community cohesiveness while minimizing paved surfaces.
- Incorporate sustainable design elements and the latest conservation technologies, consistent with creating a distinct destination-resort unique to South County.

RO-6-123

The RDEIR readily admits that Alternative G is the environmentally superior alternative. RDEIR at 4.0-49. Further, because Alternative G would achieve most, if not all, of the Project objectives, approval of the Project, or any alternative with greater impacts than Alternative G, would violate CEQA.

**C. The DEIR Must Be Recirculated.**

RO-6-124

Under California law, this RDEIR cannot properly form the basis of a final EIR. CEQA and the CEQA Guidelines describe the circumstances that require recirculation of a draft EIR. Such circumstances include: (1) the addition of significant new information to the EIR after public notice is given of the availability of the DEIR but before certification, or (2) the draft EIR is so “fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” CEQA Guidelines § 15088.5.

RO-6-125

Here, both circumstances apply. Decisionmakers and the public cannot possibly assess the Project’s impacts, or even its feasibility, through the present RDEIR, which is riddled with errors. Among other fundamental deficiencies, the RDEIR repeatedly understates the Project’s significant environmental impacts and assumes that unformulated or clearly useless mitigation measures will effectively reduce these impacts. In order to resolve these issues, the County must again prepare a revised EIR that would necessarily include substantial new information.

## II. APPROVAL OF THE PROJECT WOULD VIOLATE CALIFORNIA PLANNING AND ZONING LAW.

### A. Approval of the Project Would Be Inconsistent With the General Plan

RO-6-126 The State Planning and Zoning Law (Gov. Code § 65000 et seq.) requires 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. Bd. of Supervisors* (1998) 62 Cal.App.4th 1332, 1336 (citations and internal quotations omitted). It is an abuse of discretion to approve a project that "frustrate[s] the General Plan's goals and policies." *Napa Citizens*, 91 Cal.App.4th at 357. The project need not present an "outright conflict" with a general plan provision to be considered inconsistent; the determining question is instead whether the project "is compatible with and will not frustrate the General Plan's goals and policies." *Id.* at 379.

RO-6-127 Here, the County's General Plan requires all large-scale residential projects requiring a general plan amendment to provide an affordable housing component. The General Plan Housing Element recognizes that one of the most promising mechanisms for achieving this goal is by requiring large-scale residential developers to provide affordable housing. For this reason, Policy H-1.9 "[r]equires developers to provide an affordable housing component when requesting a General Plan amendment for a large-scale residential project when this is legally permissible." The approval of the Project would directly defy this important general plan provision as it promotes "executive housing" rather than affordable housing. (See DEIR at 3.5-6, "Rather, these areas were anticipated to provide "Executive Housing" options to satisfy a segment of the market that is not provided within the more densely planned Otay Valley Parcel. Lastly, these lower density areas were farther away from transit and services and, as such, are not considered ideal locations for affordable housing.").

RO-6-128 The Project proposes to amend the County General Plan by amending the Land Use Element, Mobility Element, Otay Subregional Plan, and Otay Ranch Resource Management Plan. DEIR at 1-0-22. Consequently, failure to include an affordable housing component renders the Project in violation of the State Planning and Zoning Law, which requires compliance with all General Plan policies that are "fundamental, mandatory, and specific." *Families Unafraid to Uphold Rural etc. County v. Board of*



RO-6-128  
Continued

*Supervisors* (1998) 62 Cal.App.4th 1332, 1342; *Spring Valley Lake Assn v. City of Victorville* (2016) 248 Cal.App.4th 91, 100-101. It also belies the claim that the Project is needed to address the housing crisis. Building more “Executive Housing” addresses no critical housing need. On the contrary, allowing the Project to move forward without making any contribution to affordable housing would represent a significant missed opportunity for the County and its residents.

**B. The County May Not Approve the Proposed Project Because It Implicates Inadequacies in the General Plan.**

RO-6-129

A General Plan that fails to contain the information required by state law and that fails to properly correlate its various elements cannot serve its purpose as the constitution for future development. *See Neighborhood Action Group for the Fifth District v. County of Calaveras*, 156 Cal.App.3d 1176, 1184-85 (Cal. Ct. App. 1984). For example, without adequate standards for population density, the County cannot use the General Plan as a guide for allocating population growth to the various neighborhoods through zoning ordinances and building permits. When faced with a deficient General Plan, courts find that land use decisions implicating those deficiencies are ultra vires and invalid. “[A] proposed project cannot be consistent with an invalid general plan.” *Guardians of Turlock's Integrity v. Turlock City Council*, 149 Cal.App.3d 584 (Cal. Ct. App. 1983). There is no way to tell from an inadequate General Plan whether a given project should or should not happen, and the County will be unable to make the requisite findings of consistency. *Neighborhood Action Group*, 156 Cal.App.3d at 1185 (“If the general plan fails to provide required criteria relevant to the use sought by the permit, there is no valid measure by which the permit may be evaluated”). Here, the County has failed to adopt an environmental justice element in its General Plan. The proposed Project directly implicates this General Plan inadequacy

RO-6-130

SB 1000 (Leyva, 2016) “require[s] the environmental justice element, justice goals, policies, and objectives in other elements, to be adopted or reviewed upon the adoption or next revision of 2 or more elements concurrently on or after January 1, 2018.” As discussed above, the proposed Project includes amendments to the County’s General Plan. Previously, in February 2018, the County also revised two mandatory elements under the Planning and Zoning Law: the Conservation Element and the Open Space Element (which the County has combined in its General Plan). In January 2018, the County revised its Land Use element, another mandatory element under the Planning and Zoning Law. In July 2018, the County revised the Land Use element again, with regard to two separate development projects. Accordingly, SB 1000 requires the County to adopt an environmental justice element, or review environmental justice policies in other elements, before it approves the proposed Project.

RO-6-131 The proposed Project implicates the very issues that an environmental justice element is meant to address. First, as discussed above, the Project does not include any affordable housing. Second, an environmental justice element would almost certainly identify objectives and policies that prioritize improvements and programs that address the needs of disadvantaged communities (i.e., those inhabiting low-income areas), including the need for safe and affordable homes. Third, the County is desperately in need of affordable housing. Over the past several decades in the San Diego region, builders have built market rate (high-end) homes at a much higher rate than entry-level or low end homes. *See* Glut of High End Homes in San Diego Not Contributing to Housing Affordability, Grow the San Diego Way, January 28, 2019, attached as Exhibit 37. In the last complete cycle of the Regional Housing Needs Assessment (RHNA), the San Diego region produced 152% of the State-mandated goals in the “above moderate” income housing, while at the same time producing around 20% of the RHNA goals for “moderate” income, “low” and “very low” segments. *Id.*

RO-6-132 Based upon the inadequacies in, and the Project’s inconsistencies with, the County’s General Plan, and the nexus between the proposed Project and the General Plan’s inadequacies, the County cannot rely upon the authority of the General Plan to approve the proposed Project.

### III. CONCLUSION

RO-6-133 As set forth above, the RDEIR suffers from numerous deficiencies, many of which would independently render it inadequate under CEQA. Taken as a whole, the deficiencies of the RDEIR necessitate extensive revision of the document and recirculation for public comment. Moreover, the Project conflicts with the County General Plan and the General Plan is legally inadequate in ways that implicate the Project. Consequently, the Project may not be approved.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



William White



Laurel L. Impett, AICP, Urban Planner

**List of Exhibits:**

1. Robert Hamilton Biological Resources Report, May 23, 2019
2. Recovery Plan for Vernal Pools of Southern California
3. Village 14 and Planning Areas 16/19 project Draft FEIR Biological Resources Excerpts
4. A climate problem even California can't fix: tailpipe pollution, Reuters, February 1, 2019
5. San Diego Can't Hit State Climate Goals Without Major Transportation Changes," Voice of San Diego, A. Keats
6. CalEEMod Appendix A, Calculation Details for CalEEMod, Oct. 2017
7. San Diego County Housing Element Background Report
8. City of San Diego Housing Inventory Annual Report
9. Expert comments of Barbara Haya, PhD, on Village 14 GHG mitigation measures
10. Sierra Club, others sue San Diego County to block carbon credit plan for new development, San Diego Union Tribune, March 19, 2018
11. How additional is the Clean Development Mechanism? Analysis of the application of current tools and proposed alternatives, Institute of Applied Ecology, March 2016

12. Carbon Credits Likely Worthless in Reducing Emissions, Study Says, Inside Climate News, April 19, 2017
13. California's 2017 Climate Change Scoping Plan, November 2017
14. *Golden Door Properties LLC vs County of San Diego*, Case No. 2018-13324 Minute Order dated Dec. 24, 2018.
15. Letter from William J. White, Shute, Mihaly & Weinberger LLP to San Diego County Board of Supervisors, July 24, 2018
16. Final Supplement to the 2011 General Plan Update Program Environmental Impact Report for the Climate Action Plan, Chapter 8, Comments and Responses
17. An Even More Inconvenient Truth – Why Carbon Credits for Forest Preservation May Be Worse than Nothing, L. Song and P. Moura for ProPublica, May 22, 2019
18. Wildfire Report, Christopher Lautenberger, PhD, PE, REAX Engineering, April 12, 2018.
19. Wildfire Report, Christopher Lautenberger, PhD, PE, REAX Engineering, May 6, 2019.
20. Griffin Cove Transportation Consulting, PLLC Report, April 29, 2019.
21. Jamul-Dulzura Evacuation Route Study, San Diego County, August 13, 2012
22. California's Most Significant Droughts.
23. California Water Year 2014 Among Driest Years on Record.
24. Assessing the Risk of Persistent Drought Using Climate Model Simulations and Paleoclimate Data.
25. Anthropogenic Warming Has Increased Drought Risk in California.
26. Contribution of Anthropogenic Warming to California Drought.

27. Drought, schmrought, water experts already fret the next dry year and still preach conservation, Los Angeles Daily News, March 15, 2019.
28. Verified Petition for Writ of Mandate, *Imperial Irrigation District v. The Metropolitan Water District of Southern California*, Superior Court of California, County of Los Angeles.
29. SDCWA Report on Carlsbad Desalination Plant Operations for Fiscal Year 2017.
30. SDCWA 2015 Urban Water Management Plan, excerpted.
31. Summary Newland-Sierra DEIR, excerpted.
32. Otay Ranch Village 14 and Planning Areas 16/19 EIR, Energy Chapter
33. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2016 Passenger Cars and Light Trucks 7, 31, U.S. EPA and National Highway Traffic Safety Administration, (prepublication version Aug. 2, 2018)
34. Trump to Seek Repeal of California's Smog-Fighting Power, Bloomberg, July 23, 2018.
35. Air Toxics Hot Spots Program, Risk Assessment Guidelines, Guidance Manual for Preparation of Health Risk Assessments, OEHHA, February 2015.
36. Risk Management Actions Related to the OEHHA Guidelines, California Air Resources Board, August 18, 2016
37. Glut of High End Homes in San Diego Not Contributing to Housing Affordability, Grow the San Diego Way

cc: Dan Silver Endangered Habitats League