



**To:** BOS\_Legislative Assistants@co.slo.ca.us,  
**Cc:** cr\_board\_clerk Clerk Recorder/ClerkRec/COSLO@Wings,  
**Bcc:**  
**Subject:** Fw: California Flats Solar LLC Appeal Hearing; June 16, 2015  
**From:** Board of Supervisors/BOS/COSLO - Monday 06/15/2015 12:30 PM  
**Sent by:** Tessa Cornejo/Admin/COSLO

----- Forwarded by Tessa Cornejo/Admin/COSLO on 06/15/2015 12:30 PM -----

**From:** Tim Carmel <tcarmel@carnaclaw.com>  
**To:** "boardofsups@co.slo.ca.us" <boardofsups@co.slo.ca.us>  
**Cc:** "James Bergman (jbergman@co.slo.ca.us)" <jbergman@co.slo.ca.us>, "Robert Fitzroy (rfitzroy@co.slo.ca.us)" <rfitzroy@co.slo.ca.us>  
**Date:** 05/07/2015 10:45 AM  
**Subject:** California Flats Solar LLC Appeal Hearing; June 16, 2015

---

Honorable Board and Clerk,

Attached, please find First Solar's response to the Sierra Club's April 23, 2015 appeal of the Planning Commission's approval of the CUP for the California Flats Solar project. The appeal hearing is scheduled for June 16, 2015.

Thank you,

**Timothy J. Carmel**  
Carmel & Naccasha LLP

[tcarmel@carnaclaw.com](mailto:tcarmel@carnaclaw.com)  
[www.carnaclaw.com](http://www.carnaclaw.com)



California Flats Solar LLC\_Response to Appeal\_5 6 15.pdf



First Solar, Inc.

info@firstsolar.com  
www.firstsolar.com

May 6, 2015

Honorable Members, Board of Supervisors  
San Luis Obispo County

San Luis Obispo, CA 93408

**Re: California Flats Solar, LLC's Response to The Sierra Club's Appeal of the Planning Commission's April 9, 2015 Decision Relating to the California Flats Solar Project**

Dear Honorable Supervisors:

By this letter, California Flats Solar, LLC ("California Flats" or "Applicant") urges the Board to reject the appeal by The Sierra Club ("Sierra Club") of the Planning Commission's April 9, 2015 decision authorizing the issuance of a conditional use permit for improvements to a 3.3 mile section of an existing access road and the construction of two temporary construction staging areas in San Luis Obispo County relating to the California Flats Solar Project ("Project"). The appeal was filed on April 23, 2015. For the reasons set forth below, the Applicant requests that the Board reject the appeal, affirm the decisions of the Commission, and take all appropriate action to approve the relevant portions of the Project within San Luis Obispo County in all respects.

**THE CALIFORNIA FLATS SOLAR PROJECT**

The Project is a 280-megawatt ("MW") solar photovoltaic energy project that has been proposed for development by California Flats, which is a wholly owned subsidiary of First Solar, Inc. ("First Solar"). California Flats has two Power Purchase Agreements—one with Pacific Gas and Electric Company ("PG&E"), and one with Apple Corporation—which contemplate that California Flats will construct, own and operate a 280 MW solar energy facility. The Project will significantly contribute to achieving State and federal renewable energy policies, will combat climate change by offsetting greenhouse gas emissions from fossil fuel-fired power plants, and will provide hundreds of construction jobs for local residents.

The Project's solar plant, transmission and associated facilities are located entirely in southeast Monterey County, and Monterey County served as the Lead Agency for review under the California Environmental Quality Act ("CEQA"). The Monterey County Board of Supervisors unanimously approved the Project on February 10, 2015, certified the Final Environmental Impact Report ("Final EIR"), and took related actions. Because improvements to a 3.3 mile portion of the existing access road and two temporary construction staging areas for the Project would be located in northeastern San Luis Obispo County, the Project also requires a conditional use permit from San Luis Obispo County.

Monterey County's certification of the Final EIR enables San Luis Obispo County (hereinafter, the "County"), acting as a Responsible Agency, to rely on those portions of the Final EIR applicable to the part of the Project located in the County to analyze its environmental impacts under CEQA. Cal. Pub. Res. C. § 21167.2. As a Responsible Agency, the County must consider the environmental effects associated with the relevant portion of the access road and temporary staging areas as shown in the Final EIR, and adopt feasible alternatives or mitigation measures within the County's authority. CEQA Guidelines Section 15096(f)-(g). In accordance with these provisions, on April 9, 2015, the Planning Commission considered whether to approve the relevant portions of the Project over which it has jurisdiction, and issued a unanimous 5-0 decision approving

Conditional Use Permit No. DRC2014-00015 (“CUP”) for the relevant portions of the Project based on the Final EIR, and took related actions. The Sierra Club filed the sole appeal of the Commission’s decision, submitting a one-page appeal. Below we respond to each of the specific contentions raised in the appeal.

## **RESPONSE TO ADMINISTRATIVE APPEAL**

### **I. The Final EIR’s Analysis of Environmental Impacts Fully Satisfies CEQA’s Requirements.**

#### **A. The Final EIR Adequately Addressed Potential Growth-Inducing Impacts As Relevant to the County’s Approvals.**

The Sierra Club asserts that “[t]he Project (including road improvements) has the potential to induce growth by introducing industrial development and disturbance in a previously pristine area” and that the EIR “should address the ‘ways in which the proposed project could foster economic or population growth . . . .’” Contrary to the Sierra Club’s assertion, the Final EIR specifically addressed the Project’s potential growth-inducing impacts, and concluded these impacts would be less than significant after mitigation. This analysis satisfies CEQA.

CEQA requires an EIR to describe growth-inducing impacts, including the ways in which the project could foster growth, such as by removal of obstacles to growth. Cal. Pub. Res. Code § 21100(b)(5); CEQA Guidelines Sections 15126(d) & 15126.2(d). A general analysis is sufficient to satisfy these requirements – an EIR is not required to provide a detailed analysis of a project’s effects on growth. *Napa Citizens for Honest Gov’t v Napa County Bd. of Supervisors*, 91 Cal. App. 4th 342, 369 (2001).

The Final EIR provides an adequate analysis of the Project’s growth-inducing impacts under CEQA. Final EIR, Section 6.1. First, the Final EIR’s analysis addressed the potential impacts resulting from the Project’s construction and operational workforce. Final EIR, pp. 6-1 to 6-2. The Final EIR concluded that the Project’s operational phase would not be growth inducing, and that with the implementation of Mitigation Measure LT-1, the Project’s construction phase would have a less than significant effect on growth. Final EIR, pp. 6-2 to 6-3. Relying on the Final EIR, the Commission addressed the potential impacts associated with the Project’s employment of up to 816 workers during construction, and adopted a mitigation measure to minimize these potential impacts. CEQA Findings,<sup>1</sup> pp. 56-57. The Final EIR also addressed the potential impacts associated with removal of obstacles to growth, including, as relevant to the County’s limited scope of jurisdiction, access road improvements. Final EIR, p. 6-3. After analyzing the potential impacts, the Final EIR concluded access road improvements would not increase growth because of the limited nature of the road, which is a working cattle ranch that solely provides access to the private property within which the Project is located. The Final EIR appropriately determined that the proposed access road improvements would not increase access to urban areas that would remove an obstacle to growth or indirectly increase population growth. *Id.*

Substantial evidence supports these conclusions.

First, as the Final EIR concluded and the Commission found, the Worker Housing Program (MM LT-1) will minimize potential impacts associated with the temporary increase in the local workforce. The Commission’s CEQA Findings state that “[t]he influx of up to 816 construction workers could create a temporary increase in population,” some of which “may elect to temporarily relocate near the project site.” CEQA Findings, p. 56. The Commission found that while “[t]he area has the capacity to temporarily house this workforce,” this “would occur at the exclusion of other travelers and seasonal residents” and “many of the accommodations available, such as recreational campsites, are not designed for long-term temporary residents and such use would deteriorate or degrade the facilities.” *Id.* As described in the Commission’s CEQA Findings

---

<sup>1</sup> The Commission’s CEQA Findings are attached as Exhibit C to Planning Commission Resolution No. 2015-010.

on pages 56-57, the Commission found that implementation of the Worker Housing Program would reduce the potential temporary impact of the increase in workers to a level of insignificance.

Second, the only permanent portion of the Project within the County's jurisdiction is the improvement to an existing, private road located entirely on private property and which is currently used in cattle and other ranching operations on the 72,000 acre Jack Ranch. The Final EIR reasonably concluded that such improvements to a private road located entirely within the Jack Ranch and servicing only the Project site would not induce population growth or remove obstacles to growth. Final EIR, p. 6-3. Moreover, contrary to the Sierra Club's assertions, improvements to an existing road will not introduce growth to a "previously pristine" area, as the Jack Ranch has been a working cattle ranch with portions of the property previously dryland farmed for decades.

In sum, the Final EIR adequately addressed the Project's potential growth-inducing impacts and the Commission properly concluded that impacts were less than significant after implementation of the mitigation measure required by the Conditions of Approval.

**B. The Final EIR Adequately Addressed Potential Impacts to Biological Resources Associated with the County's Approvals.**

**1. The Final EIR adequately analyzed the potential impacts to wildlife movement corridors associated with the access road and temporary staging areas.**

The Sierra Club next asserts that "[t]he County should determine to what extent the road will be an impediment to wildlife corridors...." In fact, the Final EIR fully analyzed this issue. Moreover, the Final EIR properly concluded that the Project mitigates any potential impacts to biological resources associated with the County's approvals to less than significant levels.

The Final EIR contains a thorough analysis of the Project's impacts on wildlife movement corridors for potentially affected species. Final EIR, Section 4.4, pp. 78-81, 181-84 & 193. This analysis included the study of an approximately 698-acre area around the access road, and the Final EIR's analysis specifically addresses the access road's potential impacts on wildlife movement corridors. In addition, the analysis of wildlife movement corridor impacts was based on a number of scientific sources, including the CDFW BIOS website (CDFW, 2014x) California Essential Habitat Connectivity Project: A Strategy for Conserving Connected California (Spencer et al., 2010) and Penrod et al. (2010), Recovery Plan for Upland Species of the San Joaquin Valley California (USFWS, 1998) and five-year review (USFWS, 2007), that analyzed how the Cholame Valley and Carrizo Plain provide habitat and movement opportunities for wildlife. Based on this analysis, the Final EIR concluded that the impact on tule elk was insignificant, and that the impact on movement corridors for the kit fox and pronghorn antelope would be significant but mitigable. The Final EIR concluded that there was no compelling evidence that the Project site itself serves as a distinct habitat linkage between known kit fox populations (core or satellite), or functions as a critical movement corridor that would be significantly disrupted by project development.

Accordingly, the Final EIR identifies a number of biological resource mitigation measures that will be implemented, such as preconstruction surveys for kit fox, the installation of kit fox-friendly fencing for Project-related enclosures, den avoidance measures, and the acquisition of compensatory mitigation lands, that would reduce impacts to the kit fox movement corridor to less than significant levels. Final EIR, Section 4.4, pp. 121-22, 126-33, 187. Similarly, the Final EIR identifies a number of mitigation measures that will reduce the Project's impact on pronghorn antelope to less than significant, including the implementation of pronghorn-friendly fencing for Project-related enclosures, and pronghorn calving ground avoidance and minimization

measures. Final EIR, pp. 4.4-187 to 188. These mitigation measures are incorporated into the County's Conditions of Approval for the Project. COA,<sup>2</sup> pp. 15-20, 23-24, 47-48.

**2. The Record shows the access road will not be fenced and, therefore, will not impede wildlife movement.**

The Sierra Club states “[t]he County should determine . . . if [the road] will it [sic] be fenced.” Contrary to the Sierra Club’s confusion, the Final EIR on which the County relies clearly states that the access road will not be fenced. Final EIR, p. 4.4-184 (“no new fencing would be installed along the Access Road. . .”). The County Staff Report upon which the Commission relied also specifically notes that the access road will not be fenced. Staff Report for April 9, 2015 Meeting, pp. 3 & 5. Furthermore, the proposed improvements to the access road will not create a new impediment to wildlife movement, as the access road already exists and currently serves the Jack Ranch; the Applicant seeks only to make improvements to the road to provide safe and adequate access to the Project site.

**3. Providing funds for conservation easements is appropriate and adequate mitigation of species impacts.**

The Final EIR contains a suite of mitigation measures for impacts to biological resources, including the acquisition of off-site lands that contain obligatory requirements and well-defined performance standards, as required under CEQA. Nonetheless, the Sierra Club asserts that the Applicant “should provide the conservation easements” referenced in mitigation measure B-1(a) rather than be allowed the option of funding the acquisition of the conservation easements. The Sierra Club states, without any justification, citation or further explanation, that providing funds for acquisition rather than the conservation easements themselves is insufficient, even though either means would lead to the exact same end. The Sierra Club is incorrect – funding the acquisition of conservation easements is entirely appropriate and satisfies CEQA’s requirements.

CEQA does not dictate the method or means of mitigation. *See* CEQA Guidelines Section 15370 (defining “mitigation” broadly). CEQA only requires that mitigation of significant impacts be based on substantial evidence in the record and that the means of mitigation be deemed feasible. CEQA Guidelines Section 15126.4(a); *Save Panoche Valley v. San Benito County*, 217 Cal. App. 4th 503, 526 (2013).

Here, the Final EIR concluded that impacts to biological resources could be reduced to less than significant levels through the acquisition of conservation easements, whether the Applicant obtains the easements directly or funds their acquisition by a third party. Further, the Commission exercised its discretion to determine that this measure constituted appropriate mitigation and adopted it as one of the conditions of approval for the Project. CEQA Findings, pp. 11-13; COA, pp. 8-10. The Sierra Club points to no authority or justification for why funding the acquisition of conservation easements is inadequate or improper; rather, it simply appears to be the Sierra Club’s preference.

The relevant mitigation measure also provides specific performance standards and other requirements that ensure the required mitigation is effective and enforceable. The Final EIR (and the Commission’s Conditions of Approval adopting this mitigation measure) thoroughly explained how the off-site compensation for the impacts to biological resources would be accomplished and included numerous criteria for the lands to be acquired and their management in mitigation measure B-1(a). In particular, in the event the Applicant chooses to fund rather than directly acquire the conservation easements, the mitigation measure imposes additional requirements to ensure the conservation easement holder is properly qualified:

---

<sup>2</sup> The Commission’s Conditions of Approval (“COA”) are attached as Exhibit B to Planning Commission Resolution No. 2015-010

The applicant shall either provide conservation easements or provide funds for the acquisition of such easements to a qualified easement holder as defined below. The CDFW and organizations approved by CDFW that meet the criteria below may be considered qualified easement holders for those species for which the CDFW has regulatory authority. To qualify as a “qualified easement holder” a private land trust must at a minimum have:

1. Substantial experience managing conservation easements that are created to meet mitigation requirements for impacts to special-status species;
2. Adopted the Land Trust Alliance's Standards and Practices; and
3. A stewardship endowment fund to pay for its perpetual stewardship obligations.

Other specific conditions for qualified easement holders may be outlined in incidental take permits that could be issued by CDFW and USFWS for this project.

The County shall determine whether a proposed easement holder meets these requirements. . . .

CEQA does not require more. Indeed, California courts routinely approve of mitigation accomplished through the provision of fees. *See, e.g., Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors*, 87 Cal. App. 4th 99, 141 (2001).

In sum, the Final EIR and the County’s Conditions of Approval provide for the mitigation of impacts to biological resources based on the County’s informed view of how and when such mitigation would occur, including the Final EIR. That is all that CEQA requires be done and is fully satisfied in this instance.

#### **4. Wetland habitat is adequately mitigated.**

The Sierra Club asserts the ratios for compensatory mitigation of wetland habitat determined by the Final EIR and incorporated in the County’s Conditions of Approval are inadequate. The Sierra Club’s assertion is incorrect and unsubstantiated, and should be rejected.

Wetland features comprise a small portion of the Project. In particular, the access road includes: 0.02 acres of ephemeral stream habitat; 0.01 acres of seasonal wetlands; and 0.02 acres of perennial marsh. Final EIR, pp. 4.4-34 to 36. No intermittent streams or perennial streams occur within the access road. Final EIR, pp. 4.4-34 to 35. Two perennially flooded ponds occur near but outside of the access road and will therefore not be impacted. Final EIR, p. 4.4-35. The Final EIR identifies potential impacts to this and other wetland habitat in the Project site and concludes that the impacts are potentially significant but mitigable. Final EIR, Section 4.4, pp. 173-180. Accordingly, the Final EIR requires wetland habitat mitigation measures to compensate for permanent impacts to wetland habitat. The Commission adopted the compensatory mitigation measure, as well as other mitigation measures that reduce the Project’s impacts on wetland habitat. COA, pp. 42-47.

Substantial evidence in the record shows that potential impacts to wetland habitat will be mitigated to less than significant levels. Final EIR, Section 4.4, pp. 175-180. Mitigation measures include wetland avoidance and minimization measures (Mitigation Measure B-3(a)), a Habitat Restoration and Revegetation Plan

(Mitigation Measure B-2(b)), and habitat mitigation (Mitigation Measure B-3(d)), among others. Final EIR, Section 4.4, pp. 175-180. Under the wetland habitat mitigation measure, all permanently impacted wetlands will be mitigated at a ratio between 1:1 and 2:1. Section 4.4, pp. 177-180. Temporary impacts will be mitigated through onsite restoration under mitigation measure B-2(b) as well as through compensatory habitat mitigation depending on the duration of the temporary impacts. For example, if temporarily impacted wetlands are not restored prior to the next rainy season, then they must be mitigated at a ratio of 0.5:1; if these areas are unrestored for more than two rainy seasons, then they must be mitigated at a 1:1 ratio. Varying ratios depending on the nature of the impact and its duration is appropriate because “[m]itigation measures must be roughly proportional to the impacts caused by the project.” See *Environmental Council of Sacramento v. City of Sacramento*, 142 Cal. App. 4th 1018, 1039-40 (2006) (upholding 0.5:1.0 mitigation ratio under CEQA); CEQA Guidelines Section 15126.4(a)(4)(B).

The Sierra Club does not dispute the conclusion in the Final EIR that impacts to wetland habitat were reduced to less than significant levels based on these mitigation measures. Rather, the Sierra Club asserts the County should impose increased mitigation ratios. CEQA, however, does not dictate the method or means of mitigation. CEQA only requires that mitigation of significant impacts be based on substantial evidence in the record and that the means of mitigation be deemed feasible. CEQA Guidelines Section 15126.4(a). There is no statutory requirement for affected habitat to be compensated at any particular ratio of preserved habitat to affected habitat. Nor is there currently a standard mitigation ratio applicable to wetland habitat across the State or even the County. The ratios set forth in the Final EIR and Conditions of Approval are appropriate given the magnitude of the Project’s potential temporary and permanent impacts to wetlands and would ensure no net loss of wetlands.

**C. The Final EIR Adequately Addressed Hydrology Impacts Associated with the Access Road.**

The Sierra Club asserts “[t]he County should determine to what extent the [access] road . . . will impact the natural flow of water.” Contrary to the Sierra Club’s suggestion, this potential impact was fully analyzed in the Final EIR. Specifically, the Final EIR analyzed the potential hydrology impacts associated with the access road, including the potential for the access road improvements to alter existing drainage patterns. Final EIR, Section 4.9 (see especially pp. 4.9-6, 4.9-7, 4.9-15, 4.9-23). The Final EIR’s analysis was based on the Preliminary Drainage Report prepared for the project by RBF Consulting, Inc. (August 2013), which described the site’s existing drainage characteristics and included preliminary modeling, and an Addendum to the Preliminary Drainage Report prepared by the Wallace Group (February 2014), which provides a description of watersheds and maps the watersheds that drain across the existing access road. Based on this analysis, the Final EIR concluded that hydrology impacts related to alteration of existing drainage patterns would be less than significant, and, therefore, no mitigation is required.

Separately from its analysis of hydrology impacts, the Final EIR also analyzed the impacts of the improvements to the access road on streams, including alterations of natural flow patterns and capacity. The Final EIR concluded that the access road improvements had the potential to significantly impact biological resources by modifying streams, and thus the Final EIR required implementation of a stream channel avoidance and minimization measure (MM B-2(f)).

Relying on the Final EIR, the Commission found that although the Project would alter the existing drainage pattern, “[c]ompliance with recommendations in the design-level drainage analysis and existing regulations would result in impacts related to increased erosion downstream that are less than significant.” CEQA Findings, p. 5. The Commission also required implementation of the stream channel avoidance and minimization measure as a condition of approval. As incorporated into the Conditions of Approval adopted by the Commission, this mitigation measure requires that all improvements to the access road and related activities

“be designed to minimize alterations to natural flow patterns and capacity, consistent with the design-level drainage analysis” and that “rerouted drainages shall be assessed by a qualified geomorphologist or hydrologist to ensure that drainage patterns downstream of the rerouted reach shall not be affected. Where present, cobble substrates within the reaches of streams to be rerouted shall be collected and replaced within the rerouted reaches.” COA, p. 41.

In sum, the Final EIR and the Commission adequately addressed whether the access road improvements might alter existing drainage patterns or stream flows.

## II. Conclusion

As discussed above, the Final EIR thoroughly analyzed the Project’s environmental impacts, and the administrative record fully supports the decision to approve the CUP based on the Final EIR, CEQA Findings, and Conditions of Approval. Therefore, the Sierra Club’s appeal of the Commission’s decision should be denied, and the Board should affirm the Commission’s decisions approving the relevant portions of the Project within the County.

Sincerely,

A handwritten signature in blue ink, appearing to read "Koryn Kendall", is centered on a light yellow rectangular background.

Koryn Kendall  
Manager, Project Development

cc: Beth Deane, First Solar, Inc.  
Tim Carmel, Carmel & Naccasha LLP  
David Lazerwitz, Farella Braun + Martel LLP  
Tyler Potter, Denise Duffy & Associates, Inc.



SIERRA  
CLUB  
FOUNDED 1892

Santa Lucia Chapter

San Luis Obispo, CA 93406

[www.santalucia.sierraclub.org](http://www.santalucia.sierraclub.org)

---

June 15, 2015

Board of Supervisors  
San Luis Obispo County

San Luis Obispo, CA 93408

Re: 6/16/15 BOS hearing Agenda Item #39 - Sierra Club Appeal of Planning Commission's Approval of Conditional Use Permit DRC2014-00015 for California Flats Solar Project

The following comments are submitted in support of the Santa Lucia Chapter of the Sierra Club's appeal of the Planning Commission's approval of California Flats Solar Project. The Chapter continues to maintain that the Final Environmental Impact Report ("EIR") for the California Flats Solar Project fails to satisfy the mandatory requirements of the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 *et seq.* First it must be noted that the Project is poorly sited within an inappropriate area given the biological resources and special status species that would be compromised and impaired as a result of this development. Given San Luis Obispo County's role as a responsible agency in reviewing the Final EIR and consideration of approval of the Project, the County should understand the many inadequacies contained in the Final EIR.

California Flats Solar, LLC, a wholly owned subsidiary of First Solar, Inc., has obtained approval to construct and operate a 280-megawatt (MW) alternating current (AC) photovoltaic (PV) solar power facility in unincorporated southeastern Monterey County, approximately seven miles southeast of the community of Parkfield and 25 miles northeast of the City of Paso Robles, near the borders of Monterey, San Luis Obispo, Kings and Fresno counties.

As approved, the Project will be built and operated on an approximately 3,000-acre portion of a existing 72,000-acre cattle ranch, known as the "Jack Ranch," which is owned by the Hearst Corporation. The predominant habitat type on the project site is California annual grassland dominated by non-native grasses typical of the region. Other habitats include wildflower field, serpentine bunchgrass grassland, valley needlegrass grassland, grassland riparian, interior coast range goldenbush scrub, willow-cottonwood

Item No. 39  
Meeting Date: June 16, 2015  
Presented by: Andrew Christie  
Rec'd prior to meeting & posted to web on: June 15, 2015

riparian woodland, ornamental non-native woodland, blue oak woodland, valley oak riparian woodland, ephemeral stream, intermittent stream, perennial stream, cottonwood alluvial riparian woodland, alluvial intermittent stream, perennial marsh, seasonal wetland, agricultural land, and developed/ruderal grassland.

The Project will result in significant conversion of undeveloped grazing lands to industrial energy production and would directly result in the loss of habitat and displacement of a variety of species including State and Federally listed wildlife species such as tri-colored blackbird, San Joaquin kit fox, California tiger salamander, conservancy fairy shrimp, longhorn fairy shrimp, vernal pool fairy shrimp, California red-legged frog, Swainson's hawk, Golden eagle, and Bald eagle that are known to occur on or directly adjacent to or have the potential to occur, at the proposed Project site and/or surrounding areas. The area within and surrounding the project also provides habitat for a suite of sensitive, list-candidate, grassland birds that are species of concern including, but not limited to, Mountain Plover, Prairie Falcon, Ferruginous Hawk, Rough-legged Hawk, Yellow-billed Magpie, Short-eared Owl, Loggerhead Shrike, Lewis's Woodpecker, and American Badger.

**A. THE EIR APPROVED BY MONTEREY COUNTY FAILS TO COMPLY WITH CEQA.**

**1. The EIR's Project Description Fails to Adequately Address the Decommissioning Phase of the Project**

CEQA requires that an environmental review document contain an accurate description of the entire project. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) The adequacy of an EIR's project description is closely linked to the adequacy of the impact analyses. If the description is inadequate because it fails to discuss an aspect of the project, the environmental analysis will probably reflect the same mistake. (*See San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.3d 713, 722-723.)

In *County of Inyo*, the court stated that "[a]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." (*Id.*) CEQA requires a complete project description to ensure that all of the project's environmental impacts are considered. (*City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1450, 1454.) As stated in *County of Inyo*, "[a] curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantages of terminating the proposal (i.e., the "no project" alternative) and weigh other alternatives in the balance." (71 Cal.App.3d at 192-193; see also *Communities for a Better Environment v.*

*City of Richmond* (2010) 184 Cal.App.4th 70, 82 [court found project description inadequate where EIR concealed, ignored, excluded, or simply failed to provide pertinent information" regarding a reasonably foreseeable consequence of the project].) A curtailed, enigmatic or unstable project description draws a red herring across the path of public input." (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 656; quoting *County of Inyo, supra*, 71 Cal.App.3d at 197-198.)

An accurate project description allows the public and the decision-makers to evaluate the project's benefits against its environmental effects. (*County of Inyo, supra*, 71 Cal.App.3d at 192-193.) An inaccurate project description may result in an EIR that fails to disclose impacts associated with the project. (See *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829.) Moreover, an accurate project description provides for full disclosure and informed decision-making. (See Kostka & Zischke, *Practice Under the California Environmental Quality Act* (Cont. Ed. Bar 2013) § 12..7, at 580.) "[O]nly through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives ... ." (*City of Santee, supra*, 214 Cal.App.3d at 1454.) If the description is inadequate because it fails to discuss an aspect of the project, the environmental analysis will probably reflect the same mistake. (See *San Joaquin Raptor/Wildlife Rescue Center, supra*, 27 Cal.App.3d at 722-723.)

CEQA requires an agency to assess the environmental impacts of all reasonably foreseeable phases of a project. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396-397 (EIR must assess impacts of second phase of pharmacy school's occupancy of a new medical research facility.)

The EIR's Project Description failed to adequately address the eventual decommissioning of the Project. The EIR states that decommissioning would be subject to CEQA review prior to implementation and potential impacts would be assessed at that time. (FEIR, p. 2-325 – 2-326.) Decommissioning consists of dismantling and repurposing, salvaging/recycle, or disposing of the solar energy improvements and revegetation of the of the 3000 acres. These decommissioning activities may have construction impacts regarding air quality, biological resources, and water quality. While the EIR contains Conceptual Restoration Plan for Project Decommissioning, that Plan simply describes the steps that the operator may take during decommissioning rather than analyzing the potentially significant environmental impacts.

Decommissioning of the Project is part of the whole of the action, which CEQA requires to be disclosed and analyzed. While the EIR identifies a decommissioning plan it fails to analyze the potential impacts associated with decommissioning. This constitutes a

failure to proceed in a manner required by law – CEQA’s requirement that the EIR consider the impacts of the whole project.

**2. The EIR Fails to Adequately Address the Project’s Impacts to Biological Resources**

**a. Inadequate Baseline for Biological Resources**

A project’s impacts must be measured against the “real conditions on the ground.” *Save Our Peninsula Com. v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121-22; *City of Carmel-by-the Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 246.

The EIR’s environmental setting constitutes the baseline physical conditions by which a lead agency must measure the significance of a project’s impacts. CEQA Guidelines, § 15125, subd. (a). “The EIR must demonstrate that the significant environmental impacts of the proposed project were investigated and discussed” and permit project effects “to be considered in the full environmental context.” (CEQA Guidelines § 15125 subd. (c).)

An EIR must also include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project. (*Association of Irrigated Residents, supra*, 107 Cal.App.4th at 1390.) CEQA requires that a lead agency include a description of the physical environmental conditions in the vicinity of the Project, as they exist at the time environmental review commences. CEQA Guidelines § 15125, subd. (a); see also *Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 321.)

The County must describe the existing environmental setting in sufficient detail to enable a proper analysis of project impacts. (*Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, 1121-22.) CEQA Guidelines section 15125 provides, in relevant part, that “[k]nowledge of the regional setting is critical to the assessment of environmental impacts.” (CEQA Guidelines § 15125, subd. (d).) This level of detail is necessary to “permit the significant effects of the project to be considered in the full environmental context.” (*Id.*)

Comments by biologist Scott Cashen revealed that the description of the existing environmental setting found in the EIR and the Biotic Report upon which it relies, is incomplete and contains many errors. Mr. Cashen demonstrates that the EIR fails to provide an adequate description of the presence of special-status biological resources on the Project site against which to assess the Project’s significant impacts. Mr. Cashen’s comments are not a mere disagreement among experts but instead demonstrate that the environmental setting is not supported by substantial evidence and actually conflicts with the evidence in the record. Mr. Cashen points out that protocol-level surveys for several plant and animal species were not properly implemented, or implemented at all. See Cashen’s Comments dated September 24, 2014, and January 13, 2015.

The EIR also contains several issues regarding rare plants. The County released the 2014 surveys after the close of the comment period on the Draft EIR and the surveys contain new information regarding the status of rare plants on the Project site. According to Mr. Cashen, this new information reveals additional significant impact to rare plants. Mr. Cashen's comments identified the failure to conduct proper surveys for the CTS, San Joaquin pocket mouse, and special status kangaroo rats. This failure impacts the adequacy of the mitigation measures for these species.

**b. The EIR Fails to Adequately Analyze the Project's Impacts to Biological Resources**

The comments in the record contain significant information regarding the Project's potential impacts to biological resources that were not adequately addressed in the EIR. The key to the comments, particularly the expert opinions attached to the comments submitted by Adams Broadwell and Mr. Cashen, is that the comments are not simple disagreements among experts. Mr. Cashen's comments do a particularly good job of demonstrating the EIR's failure to adequately analyze impacts to biological resources. For example, the EIR's conclusion that the project site does not include breeding habitat for California Tiger Salamander is not supported by substantial evidence as the data relied upon was collected in years with below average rainfall. Moreover, a later analysis indicates that breeding habitat may be present at the site.

Mr. Cashen, as well as NGOs, provided detailed comments to support the argument that substantial evidence in the record does not support the Final EIR's findings regarding the Project's impacts to eagles. In fact, the Final EIR contradicts the scientific information in the record regarding eagles. To support this assertion, the comments rely directly upon the information contained in the Draft EIR, the Final EIR, as well as the appendices to those documents.

Also, the Final EIR disclosed that the Project area has one of the highest densities of golden eagles in the state. The Project could impact approximately 8.5 percent of the population within Bird Conservation Region 32 and an even greater proportion of the population within the Central Coastal Ranges portion of that region. Despite this disclosure, the EIR failed to address the Project's cumulative impacts to golden eagles. The Final EIR fails to disclose or analyze the magnitude of the Project's potential impact of this impact.

The EIR also failed to adequately mitigate impacts to the Western Pond Turtle. The mitigation measure that addresses the Western Pond Turtle does not mitigate the decline in population viability, the loss of habitat, or increased mortality. See Mitigation Measure B-1(t).

Mr. Cashen provides strong testimony that the Project's impacts to golden and bald eagles will be more significant than described in the EIR. To that end, Mr. Cashen identifies that the scientific information in the record does not support the EIR's determination regarding the low level of eagle take risk.

Mr. Cashen also provides significant comments that the EIR fails to adequately analyze and mitigate the Project's impacts to the San Joaquin Pocket Mouse, Kangaroo Rat, Burrowing Owl, and Tricolored Blackbird. Additionally, the EIR failed to analyze and mitigate impacts to wildlife movement corridors.

**c. The EIR Contains Deferred Mitigation**

CEQA Guidelines Section 15126.4(a) requires that "mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments." "CEQA permits a lead agency to defer specifically detailing mitigation measures as long as the lead agency commits itself to mitigation and to specific performance standards." (*Gray v. County of Madera* (2008) 167 Cal.App.4<sup>th</sup> 1099, 1118; see also *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4<sup>th</sup> 70, 94; *Sacramento Old City Association v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029.)

In *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4<sup>th</sup> 645, the court held a mitigation measure which required "a management plan" to be prepared "by a qualified biologist to 'maintain the integrity and mosaic of the vernal pool habitat violated CEQA because it merely included a "generalized goal of maintaining the integrity of the vernal pool habitats," placing the onus of mitigation to the future plan and leaving the public "in the dark about what land management steps will be taken, or what specific criteria or performance standard will be met...." (*Id.* at p. 670.)

The Bird and Bat Conservation Strategy (BBCS) constitutes deferred mitigation with a lack of performance standards. Moreover, even though the EIR does not include the BBCS as a mitigation measure, but an Applicant Proposed Measure, it appears that the EIR's assessment regarding impacts relied upon the BBCS to provide additional conservation measures to reduce operational impacts to avian species.

To the extent the EIR relied upon the BBCS as a mitigation measure, it fails as a mitigation measure. If the EIR did not rely upon the BBCS, then arguably the record supports a conclusion that the potential impacts are not fully mitigated.

**d. Tricolored Blackbird Emergency Listing under the CESA**

Subsequent to the release of the Draft EIR, the California Fish and Game Commission approved an emergency listing of the tricolored blackbird under the California Endangered Species Act. Tricolored Blackbirds are on the Project site and have the

potential to nest at the site. When a species is listed after the Draft EIR is released, the EIR must be revised to address the impacts to the newly listed species. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4<sup>th</sup> 342, 386.) The EIR, however, failed to provide any specific analysis regarding the tri-colored blackbird.

**e. The EIR Fails to Address and Analyze the Project's Impacts to the California Condor**

Despite the fact that condors have been observed in the Project area, the EIR fails to address the Project's potential impact to condors and their habitat. Condor tracking by the USFWS demonstrates that condors actively use the area for foraging and habitat in and around the Project. The EIR, however, fails to provide any mitigation for the potential impacts to condors.

**B. GROWTH-INDUCING IMPACTS IN SAN LUIS OBISPO**

The Project (including road improvements) has the potential to induce growth by introducing industrial development and disturbance in a previously pristine area. The EIR fails to address the "ways in which the proposed project could foster economic or population growth..." (CEQA Guidelines, § 15126.2(d). For future development in the area, the project will reset the baseline for consideration of impacts to threatened and endangered species, impacting the potential for species recovery. This growth-inducing impact of the Project and access improvement could facilitate other activities significantly affecting the environment is not evaluated.

CEQA requires that an EIR discuss way in which a project could directly or indirectly foster economic or population growth or the construction of new housing in the surrounding environment. (Pub. Resources Code, § 21100(b)(5); CEQA Guidelines, § 15126.6(d).) A project has growth inducing impacts if it would (1) foster economic or population growth or additional housing; (2) remove obstacles to growth; or (3) facilitate other activities that cause significant environmental effects. (Guidelines, § 15126.2(d).) An EIR must discuss growth-inducing effects even though those effects will result only indirectly from the project. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors, supra*, 91 Cal.App.4<sup>th</sup> at p. 368.) Such discussion must describe the growth-accommodating features of the project that may remove obstacles to population growth. (*Id.*) Population growth resulting from a project can indirectly lead to further development by taxing existing community service facilities, which could require construction of new facilities. (CEQA Guidelines, § 15126.2(d).)

If a project may have growth inducing impacts, an EIR must address those impacts. (See *City of Antioch v. City Council, supra*, 187 Cal.App.3d at p. 1335-1337; *Friends of "B" Street v. City of Hayward, supra*, 106 Cal.App.3d 988.) Projects that involve the

construction of new roads and/or infrastructure such as sewer lines are generally found to be growth inducing as they foster population growth and remove obstacles to growth. (See *City of Antioch v. City Council, supra*, 187 Cal.App.3d at p. 1335-1337 (EIR required due to possible growth inducing impacts associated with new road and sewer lines).) In *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4<sup>th</sup> 144, the court held that an EIR was required for a golf course project because substantial evidence supported the fair argument that the golf course project would induce residential growth. (*Id.* at p. 147.) In *Friends of "B" Street v. City of Hayward, supra*, 106 Cal.App.3d at p. 1003, the court required an EIR for a road construction project as the road construction would accelerate the conversion of homes to commercial or multifamily use.

In the present matter, the Project (including road improvements) has the potential to induce growth by introducing industrial development and disturbance in a previously pristine area. Simply because some or all of the road improvements are on private land does not mean that the County need not consider the growth-inducing impacts.

#### **C. RECOMMENDED PERMIT CONDITIONS AND MITIGATION MEASURES**

If the Board denies the appeal and grants the Conditional Use Permit, then the Santa Lucia Chapter recommends that the Board include the following permit conditions and mitigation measures in the conditions of approval. Many of the recommended changes are to recognize the County's role in overseeing the portions of the Project within the County's jurisdiction.

1. AQ-6(c) – California Flats shall notify SLO County Health Department before construction starts and shall notify SLO County Health Department of all cases of Valley Fever.
2. B-1 (a) California Flats shall acquire the necessary conservation easements prior to initiating construction.
3. B-1 (b) An HMMP shall be prepared within 6 months of issuance of a grading permit.
4. Applicant shall provide funding to SLO County for peer review of HMMP, HRRP, PVIMP and WMMP.
5. Mitigation Ratios for Wetland Habitat: Permanent fill for road crossings shall be mitigated at 2:1, similar to the 2:1 mitigation for permanent fill for project site. Temporary access un-restored for more than one rainy season shall be mitigated at a rate of 1:1. Temporary dewatering of wetlands by new construction wells shall be mitigated at 2:1. Permanent dewatering shall be mitigated at 3:1.

6. HAZ-4 (b) Emergency Access: All access gate lock codes, combinations, and/or Knox box codes shall be provided to the SLO County Emergency Operations Dispatch prior to construction and CDF Emergency Operations Dispatch. Also prior to construction, a 24-hour contact person with access to all access gates shall be identified and the contact number provided to the SLO County Emergency Operations Dispatch and CDF Emergency Operations Dispatch.

7. HYD-2(a) Accidental Spill Control and Environmental Training. Prior to the issuance of any grading and/or building permit, the project applicant shall submit a Spill Response Plan and Spill Prevention, Control and Countermeasure Plan to SLO County for review and approval.

8. Prior to the issuance of a construction permit, the applicant shall provide SLO County with a copy of the final Construction Management Plan approved by CAL FIRE that includes measures that adequately reduce the demand for fire protection services.

9. PS-1(c) Fire Protection during Construction. A copy of the final executed agreement between Cal Fire and the applicant shall be submitted to SLO County.

Thank you for your attention to these issues,



Andrew Christie  
Chapter Director