O.P.E.N.

Open-space Preservation Education Network
A project of the Environmental Defense Center

September 3, 2010

Lompoc City Council
City of Lompoc Planning Department
100 Civic Center Plaza
Lompoc, California 93438-8001

Re: City of Lompoc General Plan – Comprehensive Update, Phase I
Environmental Impact Report – EIR 09-01
General Plan Amendment – GP 07-04
Zone Change – ZC 10-01

Honorable Council Members:

The following comments are submitted by the Environmental Defense Center (EDC) in response to the City's proposed final EIR, GPA and Zone Change for the General Plan (GP) Phase I Comprehensive Update as it relates to the Bailey Avenue Specific Plan (BASP) project. The BASP project is being considered as a potential expansion area for the City. This letter has been prepared as part of the Open-Space Preservation Educational Network (OPEN) program, which provides a proactive approach to assessing General Plans and the planning process throughout Santa Barbara County. The purpose of the OPEN project is to engage all interested sectors of our communities in a dialog about developing policies and programs to protect agricultural, open space lands, and the urban-rural interface.

This letter is a follow-up to the City of Lompoc Planning Commission (PC) hearing on July 14, 2010, during which time the PC discussed various aspects of the GP update for the City. The GP update for the City of Lompoc presents both an opportunity and a responsibility for the City Council. Since the City's downtown has been suffering from the recent economic downturn, the GP update is the time to focus needed energy on revitalizing the *existing downtown and maintaining the current City boundaries and the Urban Limit Line (ULL), rather than considering expansion of the City where it is not needed.* This is particularly true for the BASP property, which contains prime agricultural land currently not within the City's Sphere of Influence (SOI).

The BASP project should be eliminated from the Phase I GP update because it violates applicable State and County (and proposed 2030 City of Lompoc) policies, and would result in an unnecessary significant and unavoidable loss of valuable agricultural resources. We describe the numerous reasons for this assertion in the following text.

The future growth of the City (via the GP update) can help to address the economic blight of the downtown area by revitalizing existing business infill opportunities in the core area of Lompoc, instead of encouraging further growth and annexation into unincorporated areas of Santa Barbara County. Such growth is consistent with State and local goals, including protecting the public health and welfare of City inhabitants and protecting the environment and economy, particularly as it relates to the protection of extremely productive agricultural land, which has historically characterized the Lompoc area.

We have reviewed the draft minutes of the July PC hearing prepared by City staff, and note that the public testimony regarding the BASP unanimously opposed the City considering Expansion area A as part of the GP update. EDC and OPEN have commented extensively on the folly of including the BASP as a potential expansion area, and we support the PC's **unanimous** recommendation and vote *NOT to include the BASP as a potential expansion area in their recommendation to your Council*. Organizations such as the County's Agricultural Advisory Committee and the Santa Barbara Farm Bureau oppose the project, as do SBCAN and the Citizens Planning Association. Various Commissioners noted the following points, which EDC and OPEN support:

- Commissioner Griffith indicated that the City has adequate housing opportunities (to meet RHNA numbers), that development should be focused on infill projects, and there is no reason to expand into prime agricultural land.

- Commissioner Gonzales agreed with Commissioner Griffith, noting that there has been a recent correction in the housing market and adequate inventory exists at this time. The State recommends that the General Plan be reviewed regularly and if, in the future, there is a need, the area could be considered then.

- Commissioner Rodenhi stated there is little need for housing currently; that Mr. Wineman and Mr. Hibbits outlined well-stated points of Lompoc's prime agricultural land; and there is no hurry to expand the General Plan into this area.

The City Council should support the PC's recommendation regarding the BASP potential expansion area. The BASP project would set a bad precedent for unnecessary conversion of prime agricultural land to urban uses, when it is clear from the GP process that the City has more than adequate housing and vacant commercial space available for the foreseeable future.

The GP update offers the City the opportunity to evaluate what the next twenty years of growth should look like, as well as to determine what, if any, expansion of the City would assist the community of Lompoc in creating a vibrant and healthy economy and community. The City Council inherently recognizes the importance of keeping and directing growth and development in a manner that will preserve the special agricultural and rural nature of Lompoc, as is evidenced in the proposed policies for the 2030 GP update, described later in this letter. Balancing the need for revitalizing the existing downtown area against the equally important need to preserve agriculture and the natural

environment requires significant vision and leadership on the part of the City, and the GP update provides the City with the tools to ensure this occurs.

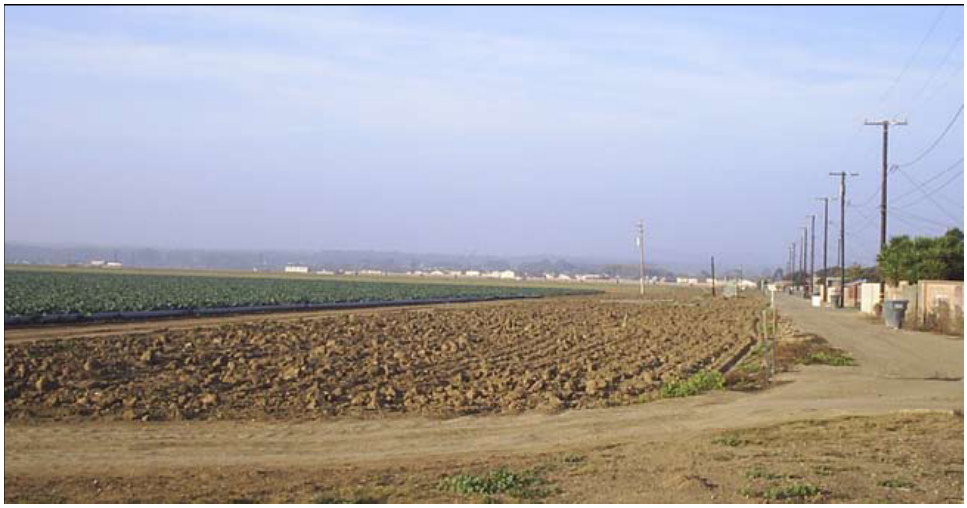
The choice before the City Council should be a simple one; it is clear that the BASP project is not appropriate for consideration as an Expansion area at this time. ***We urge you to uphold the PC's unanimous motion/recommendation to the City Council: to adopt Alternate 1, which would move the Urban Limit Line to be consistent with the current City limit line, indicating no City interest to develop in this area in the future.*** Adoption of this option would establish clear boundaries for this portion of the City and would protect the important agricultural resources of the BASP area, which consists of 270 acres of incredibly productive *prime agricultural land*. This alternative would also eliminate the stated "Class I" impacts to agricultural resources, and would significantly lower other environmental impacts, including impacts of greenhouse (GHG) emissions from increased traffic. (It should be noted that the analysis of GHG emissions in the EIR is inadequate, as described in detail in Exhibit 1 of this letter. Exhibit 2 provides a FAQ sheet on climate change and GP updates for your review.)

The threat of agricultural and rural land conversion is an issue that is prevalent throughout much of California. Without a view to the future, our agricultural land will suffer the fate of so many other jurisdictions in the State, which have converted fertile and productive agricultural lands to urban sprawl. Since the agricultural economy is an integral part of Santa Barbara County's fiscal health, we must take every step to prevent the unneeded conversion of agricultural land to urban uses. Agriculture continues to be the County's major producing industry with a gross production value of $1,241,400,501 in 2009 (Santa Barbara County Agricultural Commissioner's Report, 2009).

Overarching Project Issues

The BASP project would permanently convert approximately 270 acres of prime soils in active agricultural production in unincorporated Santa Barbara County, a portion of which is still under active Williamson Act contract[s], to urban uses. The BASP site has been historically used for agricultural purposes, primarily as irrigated croplands (row crop and flower seed production). The BASP site is within Santa Barbara County's unincorporated area, and is zoned for agricultural uses ranging from AG-II-100 to AG-40 under the County's General Plan. The BASP site is currently used for agricultural production, with approximately 260 acres of prime farmland and 12 acres of unique farmland. The Bodger seed facility is located in the southern portion of the site, south of Ocean Avenue. The northern half of this site is currently under Williamson Act Contract (although this contract is proposed for non-renewal). The BASP project, if approved as a potential Expansion area by the City Council, would create an improper and incompatible land use pattern and example of potential City expansion and annexation. The following pictures show the BASP in its current state: as a productive farmland operation that characterizes the historic agricultural land of the Lompoc Valley (Photos 1-3 below).

Photos 1-3: The BASP site



Source: BASP 2008. RRM Design Group.

Current Land Use Designations for the BASP site are shown in Table 1 below.

Table 1
Land Use Designations on the Proposed Specific Plan Area

APN	Acreage	City Land Use Element	City Zoning	County Zoning
093-070-033	39.55	VLDR	N/A	AG-II-100[1]
093-070-032	19.77	VLDR	N/A	AG-II-40[2]
093-070-039	51.93	LDR[6]	N/A	AG-I-20[3]
093-070-031		VLDR	N/A	AG-II-40
093-070-030		VLDR	N/A	40-AL-O[4]
093-090-026	60.10	VLDR	N/A	AG-II-40
093-111-007	98.39	VLDR	N/A	40-AG[5]
093-111-010		LDR	N/A	40-AG
093-111-008		LDR	N/A	40-AG
093-111-011		LDR	N/A	40-AG
093-111-009		LDR	N/A	40-AG
093-111-012		LDR	N/A	40-AG

[1] Class II agricultural lands with a minimum parcel size of 100 acres
[2] Class II agricultural lands with a minimum parcel size of 40 acres
[3] Class I agricultural lands with a minimum parcel size of 20 acres
[4] Limited agriculture district and oil drilling, minimum of 40 acres
[5] Non-prime agricultural lands with a minimum parcel size of 40 acres
[6] Park Overlay

Source: Rincon Consultants, 2007.

Table 2 below provides an overview of proposed land uses for the BASP.

Table 2: BASP Proposed Land Use Summary

Land Use Summary

Bailey Avenue Specific Plan Area						
Land Use	Gross Acreage	%of Site	DU / Net Acre [1]	Maximum Dwelling Units [2]	Total Population [3]	Com SF [4]
Low Density Residential (LDR)	38	14%	2.3 - 6.2	237	705	
Medium Density Residential (MDR)	126	46%	6.2 - 14.5	1,821	5,409	
High Density Residential (HDR)	25	9%	14.5 - 21.8	534	1,586	
Mixed-Use	11	4%	8 - 12	126	374	228,690
Public Facilities	2	1%				
Parks	24	9%				
Open Space OS)	37	14%				
Major Circulation	8	3%				
Total	271	100%		2,718	8,074	

1. DU net acre describes the number of Dwelling Units permitted on an acre of land less the area required for streets and public right-of-way.
2. Maximum dwelling units are based on gross acreage. The actual number of units will be based on net acreage as described in footnote # 1.
3. Total Population is estimated at 2.97 people per household, as indicated by Table 6 in the Lompoc General Plan.
4. The FAR indicates the maximum intensity of development on a parcel. The FAR is expressed as a ratio of building space to land area. A FAR of .50 was used to determine potential Floor Area or Commercial SF.

Source: BASP, RRM Design Group, 2008.

The primary issues of concern related to the BASP project and the City's Phase I General Plan update include the following:

- The precedent that would be set by the BASP project for unnecessary conversion of prime agricultural land is of major concern, and would conflict with the Local Agency Formation Commission's (LAFCO) own policies for agricultural protection and the need to plan for orderly expansion of cities. It also conflicts with the County's agricultural protection policies, and the **City's own proposed policies for the GP update**.

- The BASP project would create Class I, Significant and Unavoidable Impacts to Agriculture and Land Use. These impacts should not qualify for a Statement of Overriding Consideration because the project is entirely unnecessary to meet RHNA numbers or to serve the public good. Further, the BASP project has been incorporated into the GP update without proper analysis of the potential environmental impacts of the project.

- The draft EIR notice was not received by EDC or OPEN staff, although scoping comments were submitted on October 17, 2008 to the City of Lompoc. We were advised by City Staff regarding the draft EIR that we were "inadvertently" omitted from the Draft EIR mailing list and notice, thus there was no opportunity to comment on the draft document. As noted above, the analysis of GHG emissions is entirely inadequate. The City must respond to significant substantive issues in the final EIR that were not addressed in the draft EIR.

In order for the project to move forward, all land within the BASP area would ultimately require annexation and associated approval from LAFCO. Proposed land use changes under the Specific Plan's buildout scenario would potentially affect agricultural areas *outside* of the City's GP and Sphere of Influence (SOI) area by introducing new higher-density residential and commercial uses likely to conflict with other agricultural activities abutting the Specific Plan area.

The EIR for the Phase I General Plan update incorporates land use changes for the BASP area ("Expansion Area A"), and partially analyzes the impacts of potential annexation into the City for the area. However, the analysis and mitigation proposed in the EIR do not adequately assess all of the potential impacts of the conversion of Expansion Area A into intensive urbanized uses. While it is acknowledged that cities must plan for future growth during General Plan updates, this must be done while carefully considering the implications of expansion and annexation proposals.

The BASP Project Must Be Excluded From The General Plan Update.

I. <u>The proposal to annex the BASP must be denied because it violates LAFCO, County and City policies protecting agricultural land</u>

The precedent for unnecessary conversion of prime agricultural land is of major concern, and would conflict with LAFCO's own policies for agricultural protection and the need to plan for orderly expansion of cities. It also conflicts with the County's agricultural protection policies, and the *City's own proposed policies for agricultural protection in the GP update*.

The BASP's proposed residential and commercial land uses are not consistent or compatible with existing or surrounding County zoning designations, violate the Agricultural Element's goals and policies of the County's General Plan, and would be

incompatible with surrounding land use upon buildout. The following discussion of individual policy violations illuminates inconsistencies with existing Santa Barbara County General Plan and LAFCO policies, as well as the City's own proposed policies for the 2030 GP update.

Santa Barbara County Agricultural Element

The policies listed in the Santa Barbara County Agricultural Element do not support the conversion of prime agricultural land (particularly for AG-II land) into urbanized uses, nor do they allow for the introduction of conflicting land uses. LAFCO must take the County's agricultural protection policies into consideration when reviewing annexation proposals. Each of the following Agricultural Element policies would be violated if LAFCO and the County move forward with the BASP Specific Plan, and allow the land to be annexed into the City.

Policy I.A. of the County's Agricultural Element states that the integrity of agricultural operations shall not be violated by non-compatible uses. The BASP project would violate this policy by expanding non-compatible urban development into and adjacent to active agricultural areas.

Policy I.F. requires that the quality and availability of water, air and soil resources shall be protected though provisions including, but not limited to, the stability of Urban/Rural Boundary lines, maintenance of buffer areas around agricultural areas, and the promotion of conservation practices. The unnecessary expansion of the urban boundary line via proposed expansion area "A" (BASP) would destabilize the Urban Limit Line [ULL] and would also conflict with adjacent agricultural operations.

Most importantly, Goal II requires that agricultural lands shall be protected from adverse urban influences. The permanent conversion of prime agricultural land and the introduction of adverse urban influences would be in violation of this goal since the BASP would convert existing agricultural land into urban uses and would be located adjacent to agricultural land (after buildout).

Policy II.C requires that Santa Barbara County discourage the extension by the LAFCO of urban spheres of influence into productive agricultural lands designated Agriculture II (A-II) or Commercial Agriculture (AC) under the Comprehensive Plan. The proposed project must be discouraged to proceed as part of the City's General Plan update because it would introduce an urban sphere of influence into productive agricultural lands designated A-II.

Policy II.D. of the Agricultural Element states that the conversion of highly productive agricultural lands, whether urban or rural, shall be discouraged. The economic value of the highly productive prime agricultural land that would be converted by the BASP land is apparent based on the returns reaped from current farming operations. An article in the Lompoc Record (Tayllor, July 2008) states the importance of the of the soils located on the site, noting that Mr. Wineman, a farmer of the land and

landowner within the Specific Plan area, reported per acre total yields of about 57,000 pounds of broccoli and lettuce for this land. The article further quotes Mr. Wineman: "These favorable growing conditions do not exist throughout California or even the Lompoc Valley" (due to different microclimates). Mr. Wineman could not recall a crop failure due to weather, lack of water, disease or any other natural cause.

Goal III requires that where it is necessary for agricultural lands to be converted to other uses, this use shall not interfere with remaining agricultural operations. The introduction of medium-density residential uses would interfere with remaining agricultural operations located adjacent to the BASP site.

Policy III.A. ***discourages the expansion of urban development into active agricultural areas outside of urban limits as long as infill is available***. *The Phase I General Plan update and associated EIR for the City of Lompoc conclude that* ***adequate housing sites are currently available to meet RHNA fair share requirements and that no Land Use Changes would be necessary as part of the update. The proposed BASP would be in direct violation of Policy III.A, since infill is available to meet necessary requirements for future growth of the City.***

Removing prime soils from agricultural production would conflict with County policies set forth in the Comprehensive Plan's Agriculture Element. Therefore, from a policy perspective, the current BASP violates Santa Barbara County General Plan goals and policies and the project should not move forward as it is currently proposed, nor should it be incorporated into the General Plan update for a rezone. The BASP would permanently convert prime agricultural land into urbanized uses, and create a precedent for additional agricultural lands to be annexed into the City, fostering unneeded urban sprawl. A discussion of LAFCO and City of Lompoc policies follows.

LAFCO Policies and Standards

The Santa Barbara County LAFCO is a state-mandated regulatory agency that provides assistance to citizens, cities, counties, and special districts regarding jurisdictional boundary changes. LAFCO provides policies to encourage urban growth and ***protect agricultural and open space areas from sprawl***. In addition to its considerations of applicable Santa Barbara County policies and goals, LAFCO also has agricultural protection and annexation/SOI policies to which it must adhere. For example, LAFCO policies encourage the conservation of prime agricultural lands and open space areas, and discourage proposals which would conflict with the goals of maintaining the physical and economic integrity of open space lands, agricultural lands, or agricultural preserve areas in open space uses, as indicated on the city or county general plan. LAFCO policies also require that development shall be guided towards areas containing nonprime agricultural lands [http://www.sblafco.org/pol5.html]. The proposed BASP expansion/annexation conflicts with these policies because it would permanently convert prime and important farmland.

The BASP proposal would also result in a premature intrusion of urbanization into a predominantly agricultural or rural area, which is listed as a "factor unfavorable to approval" on the LAFCO website [http://www.sblafco.org/pol5.html]. LAFCO previously denied an application to annex the BASP area into the City's SOI (Pers. Comm., Bess Christensen, 2009). Further, the BASP area is not currently within the City's SOI. The BASP proposal is inconsistent with LAFCO's adopted SOI and proposed/adopted GP policies (note: LAFCO's "Standards for Annexation to Cities" state that annexations should be consistent with adopted SOIs and the GP). Other factors "unfavorable to approval" listed by LAFCO state that if "annexation would encourage a type of development in an area which due to terrain, isolation, or other economic or social reason, such development is not in the public interest (emphasis added) [http://www.sblafco.org/pol5.html]." The BASP would clearly result in economic hardship for the City of Lompoc, since it would draw potential core downtown visitors to the outer limits of the City, which would further debilitate downtown business and home owners.

One additional LAFCO "unfavorable to approval" criteria applies (if) "[t]he proposal appears to be motivated by inter-agency rivalry, land speculation, or other motives not in the public interest." Clearly, the BASP proposal is motivated by agricultural landowners seeking to change the zoning in order to reap financial benefits from a project that would create unneeded urban sprawl into prime agricultural land.

A characteristic listed on the LAFCO website as "favorable to approval" is whether (the) "proposed area is urban in character or urban development is imminent, requiring municipal or urban-type services." The BASP site is not urban in character, and development on the site is not imminent, nor is it needed to further the growth of the City. The draft BASP acknowledges that: "As with most large planning areas with multiple property ownerships, the timing of the development of the Specific Plan is uncertain and will respond to market conditions as well as landowner and developer interest (2008, RRM Design Group)."

This information, together with the policy violations listed above, should result in denial of a SOI extension and concurrent annexation by LAFCO.

City of Lompoc proposed GP policies

The following proposed goal and policies in the City's 2030 Land Use Element are counter to the annexation of the BASP Expansion Area A. Proposed Goal 7, which states: "Preserve and protect the highest quality agricultural soils" would clearly be violated if the BASP is approved as an expansion area. Proposed policies in the Land Use Element specifically name Bailey Avenue as the stopping point for urbanization, and encourage the utilization of "under-developed and vacant land within its boundaries, and direct [that the City] shall oppose urbanization of agricultural lands".

The proposed relevant policies from the 2030 GP update, in full text, are provided below:

- Policy 1.3 The City shall *encourage development of* ***under-developed and vacant land within its boundaries****, and shall oppose urbanization of agricultural lands east of the City and west of Bailey Avenue (emphasis added).*

- Policy 1.4 *The City shall encourage Santa Barbara County and the Local Agency Formation Commission to* ***plan urbanization within municipalities in order to protect prime agricultural land outside the Urban Limit Line*** and to efficiently utilize public infrastructure *(emphasis added).*

- Policy 1.7 The *City shall* ***encourage infill development to meet City residential and commercial growth needs***…

- Policy 5.2 *The City shall* ***protect prime agricultural lands east of the City and west of Bailey Avenue.***

- Policy 5.3 To help preserve agriculture on a regional basis, the *City shall* ***encourage Santa Barbara County to protect the most productive agricultural soils***.

- Policy 7.5 The City *should protect and enhance the agricultural industry, as well as other specialty crops that are unique to the region*.

It is apparent from the proposed policies listed above that the City values and desires to protect its agricultural land and heritage, thus, the approval of the BASP Expansion area is counter to the intent of the proposed GP policy directives and must be denied in order to maintain internal consistency within the GP.

The vision for the City as set forth in the GP update follows:

> Lompoc is committed to protecting the unique and positive existing aspects of the community for future generations while accepting the challenges associated with seeking improvement in areas of current concern. Lompoc's vision is of an economically prosperous, compact urban place nestled among natural hillsides with undisturbed ridgelines, *adjacent to wide expanses of fertile agricultural land*, and straddling the biologically-rich Santa Ynez River. The community protects its rural setting by promoting sustainable use of resources [emphasis added, statement abridged].

The 2030 General Plan should exclusively facilitate the development and *redevelopment of lands* within the Lompoc plan area including reuse of existing urbanized lands and infill development on vacant parcels, while eliminating unnecessary and potential new development on the urban fringe, as with the BASP Expansion Area "A". As discussed in Section 4.1 of the EIR (Aesthetics), *the reuse and intensification of*

already developed areas *would reduce the pressure for development at the City's periphery*. This reuse and intensification would similarly reduce potential land use conflicts, as relatively few land use changes are proposed within the City. Further, it would be in alignment with the planning vision set forth above.

II. Approval of the BASP Project would violate the CEQA requirement that agencies must adopt feasible alternatives and mitigation measures.

CEQA sets forth both procedural and substantive components. As a matter of procedure, CEQA requires that the environmental impacts of a project be examined and disclosed prior to approval of a project. As a matter of substance, CEQA precludes agencies from approving projects "if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant effects of such projects." (Pub.Res.Code §21002.)

According to the EIR, the project would create Class I, Significant and Unavoidable Impacts to Agriculture and Land Use, and therefore require adoption of a Statement of Overriding Considerations. The City may not approve the project, however, because it is entirely unnecessary to meet RHNA numbers or to serve the public good, and there is a feasible alternative that would avoid or substantially lessen such impacts.

The EIR discloses that potential impacts from the buildout of the GP could:

- Result in incompatibilities with adjacent existing and planned land uses, particularly where urban and agricultural uses would directly abut each other;
- Conflict with some provisions of the County's Standards for Annexation to Cities, and
- Result in Class I, significant and unavoidable impacts related to agricultural conversion.

Fortunately, these impacts can be avoided because the project is entirely unnecessary to meet RHNA numbers or to serve the public good. The City of Lompoc's Planning Commission Staff Report for the General Update prepared by Lucille Breese, Planning Manager for the City, and Richard Daulton of Rincon Consultants (September 30, 2008), states: "**Based on a review of vacant and underutilized residential parcels in the City, the [Housing Element] report determines that the City maintains a sufficient current land inventory to address its RHNA goals *without changes to existing General Plan and zoning designations (emphasis added)***." It also states: "*land use strategies such as rezoning residential sites to higher densities are not necessary to demonstrate the City's ability to meet its assigned share of regional housing needs due to the sufficient supply of existing residential land*" (emphasis added). The BASP is a project that is not required for City growth, and clearly violates County General Plan and LAFCO policies with its inappropriate and unnecessary land use densities/designations and conversion of prime agricultural land, as described in Item I above.

Alternative 1 does not include the BASP project, and meets the basic objectives of the GP update proposal. Therefore, the City should adopt Alternative 1 and avoid the significant impacts associated with the BASP project.

This alternative is preferable to the single proposed mitigation (LU-3) in the General Plan EIR designed to address impacts to the loss of agricultural land. This measure would not reduce the identified significant impacts and would be entirely unenforceable, as well as unfunded. The proposed mitigation is as follows:

> LU-3 Purchase of Agricultural Conservation Easements (PACE) Program.
>
> The City shall implement a program that facilitates the establishment and purchase of on- or off-site Agricultural Conservation Easements for prime farmland and/or important farmland converted within the expansion areas, at a ratio of 1:1 (acreage conserved: acreage impacted). A coordinator at the City shall oversee and monitor the program, which will involve property owners, developers, the City, and potentially a conservation organization such as The Land Trust for Santa Barbara County. Implementation of a PACE program shall be coordinated with similar efforts of Santa Barbara County.

While the purchase of Agricultural Conservation Easements is a laudable goal, mitigation must be implementable and required on a project-specific basis. Mitigation measures must be known, specific, feasible, effective and enforceable.[1] Further, even if this mitigation was applied on a site-specific basis to the BASP project, it would not avoid a net impact of loss to the agricultural lands of the region. As Mr. Wineman points out, this land is unique and particularly fertile, and should be preserved. Alternative 1, on the other hand, would simply avoid significant impacts to agricultural lands and should be adopted by the City.

The EIR Cannot Be Certified Because It Fails To Adequately Address Project Impacts.

I. The EIR is defective because it fails to adequately address impacts related to traffic and GHG emissions.

The EIR fails to adequate address all of the potential impacts that would result from the BASP project. The staff report presented to your Council states that "environmental review and public hearings will be held to evaluate the proposed Specific Plan after adoption of the General Plan Update but prior to City Council direction to proceed with the proposed Annexation". While CEQA permits large, multi-part projects such as General Plans to "tier" environmental analysis, wholescale deferral of review

[1] Pub. Res. Code § 21081.6(b); CEQA Guidelines, §§ 15091(d), 15126.4(a)(2); *Federation of Hillside and Canyon Assns v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261 (agency must ensure that mitigation measures identified in the EIR will actually be implemented); *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645; *Napa Citizens,* supra, 91 *Cal.*App.4th 342.

violates CEQA. CEQA Guidelines § 15152 (b) ("Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental impacts of the project and does not justify deferring such analysis to later tier EIR or negative declaration"); *Stanislaus Nat. Heritage Project v. County of Stanislaus*, 48 Cal. 4th 182, 199-200 (1996) ("No matter what subsequent environmental review might take place, and no matter what additional mitigation measures might be adopted to ameliorate adverse environmental impacts . . .[t]o defer any analysis whatsoever of the impacts of supplying water to the project until after the adoption of the specific plan calling for the project to be built would appear to be putting the cart before the horse.")

An example of an impact that is not fully analyzed in the EIR relates to traffic that would be generated by the proposed project. As stated in a CALTRANS comment letter on the BASP component of the General Plan:

> "This project alone [BASP] will increase the City's housing stock by 19.2% and population by 18.2%. As indicated in the General Plan DEIR, there are many intersections on Ocean Ave and H St, which will suffer poor performance in the cumulative period, apparently without Area A included, specifically the left turning movements."

In addition, as noted in Exhibit 1, attached hereto, the EIR fails to adequately analyze and address GHG emissions from the project. It does not estimate baseline GHG Emissions, and lacks a rational basis for concluding that GHG Emissions will be reduced to a less than significant level. The FEIR also does not properly consider the effects of climate change on the project area.

It is entirely premature for the Council to approve the BASP as an Expansion area for the General Plan update until all of the impacts of the project are understood.

II. <u>The draft EIR notice was not received by EDC or OPEN staff, although comprehensive scoping comments were submitted on October 17, 2008 to the City of Lompoc.</u>

EDC was advised by City Staff that we were "inadvertently" omitted from the Draft EIR mailing list and notice, thus there was no opportunity to comment on the draft document, although extensive scoping comments were submitted on the GP in October of 2008. While we appreciate City staff providing our original scoping letter to the PC during their June 2010 hearing, EDC and OPEN did not have the opportunity to comment on the draft document. Upon subsequent review, it was determined that the analysis of GHG emissions in the draft EIR is inadequate, and must be substantially revised in order to comply with CEQA. An extensive discussion on the lack of GHG impact disclosure and mitigation is appended to this letter as Exhibit 1.

Conclusion

The recommendations contained in this letter are provided for the City's consideration during the Phase I General Plan Update. The City must evaluate the BASP project carefully and determine whether it is appropriate and prudent to proceed with incorporating it into the General Plan as a potential Expansion area. To recap, the following items are suggested:

- The BASP project should not be incorporated into the Phase I General Plan update because it would conflict with LAFCO's policies for agricultural protection and the need to plan for orderly expansion of cities, the County's agricultural protection policies as stated in the Agricultural Element of the General Plan, and the **City of Lompoc's own proposed agricultural policies for the GP update contained in the Land Use Element draft**.

- The project would create Class I, Significant and Unavoidable Impacts to Agriculture and Land Use, which can be avoided by adoption of an alternative that excludes the BASP project and conforms to the City's existing Urban Limit Line (Alternative 1).

- The City Council should uphold the PC's recommendation that indicates no interest exists on the part of the City to develop in this area in the future, given the overarching problematic and precedent-setting issues with the BASP project from a policy and planning perspective.

- The EIR must be revised to fully disclose and evaluate impacts pertaining to traffic increases and GHG emissions.

The General Plan update is the time for the City to create a long-term vision for the community. The conversion of agricultural land for unneeded urbanized uses (such as the BASP Expansion Area A) is not consistent with sound planning practices for the City of Lompoc. The GP update presents a unique opportunity for the City Council to create a vibrant, revitalized downtown by denying the unneeded expansion of portions of the City which would encroach on valuable agricultural land and create unneeded land use conflicts. We look forward to supporting the City's leadership in upholding the vision set forth in the draft GP update that will maintain and support a working agricultural landscape into the foreseeable future. EDC and OPEN appreciate the opportunity to provide comments on the Phase I General Plan update, and look forward to working with interested stakeholders in discussing the recommendations contained in this letter.

Sincerely,
Via e-mail
Christina E. McGinnis, M.U.P., OPEN Project Planner

Exhibit 1

The Analysis of Greenhouse Gas Emissions is Inadequate Under CEQA

As we have made clear in comments and testimony during the General Plan CEQA process, EDC opposes the Bailey Avenue Specific Plan expansion area, and urges the Lompoc City Council to reject the potential future annexation as "Expansion Area A" in its ultimate approval of the 2030 General Plan Update (GPU) and associated certification of the GPU Draft Environmental Impact Report (DEIR). In the event the City nonetheless chooses to approve Bailey Avenue annexation as part of the GPU, EDC offers the following comments on the inadequacy of greenhouse gas (GHG) emissions analysis in the DEIR.

The City has commendably attempted to address GHGs in the DEIR, including a clear discussion of the relationship between GHGs and climate change (pp. 4.2-2-4.2-5), and quantification of estimated GHG emissions resulting from approval of the GPU, including the specific estimated GHG emissions from Bailey Avenue and other proposed annexation areas (pp. 4.2-33-4.2-37). As addressed below, however, the GPU analysis of GHGs is inadequate in several respects.

1. *The EIR Fails to Estimate Baseline GHG Emissions*

Adequately defining the project baseline is a critical component of CEQA implementation. *See Cmtys. for a Better Env't v. S. Coast Air Quality Mgmt. Dist.*, 48 Cal. 4th 310, 315 (2010) ("To decide whether a given project's environmental effects are likely to be significant, the agency must use some measure of the environment's state absent the project, a measure sometimes referred to as the 'baseline' for environmental analysis."). As defined by the CEQA Guidelines, the baseline "normally consists of the physical environmental conditions in the vicinity of the project, as they exist at the time … environmental analysis is commenced." *Id*. (*citing* Cal. Code Regs., tit. 14, § 15125(a)) (CEQA Guidelines) (internal quotations omitted). In fulfilling this requirement, the agency must define the baseline based on "the real conditions on the ground, rather than the level of development or activity that *could* or *should* have been present according to a plan or regulation." *Id*. at 321 (emphases in original) (internal citations and quotations omitted).

The public policy rationale for CEQA's baseline requirement is clear and compelling: "An approach using hypothetical allowable conditions as the baseline results in illusory comparisons that can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts, a result at direct odds with CEQA's intent." *Id*. at 322 (internal quotations and citations omitted). The importance of a meaningful baseline analysis in relation to GHG emissions was specifically endorsed in the CEQA Guideline amendments, which were recently finalized in accordance with SB 97. *See* CEQA Guidelines, § 15064(b)(1) (directing lead agency to consider "[t]he extent to which the project may increase or reduce greenhouse gas

emissions *as compared to the existing environmental setting*" as key factor in determining significance).[2]

CEQA's baseline requirement applies equally to General Plans as it does to specific project proposals. *Envt'l Planning & Info. Council of W. El Dorado County, Inc. v. County of El Dorado*, 131 Cal. App. 350 (1982). As stated in the CAPCOA White Paper, *CEQA & Climate Change: Evaluating and Addressing Greenhouse Gas Emissions Subject to the California Environmental Quality Act* (January 2008), relied upon heavily by the City in its environmental analysis, "[a]t the general plan level, the baseline used for analyzing most environmental impacts of a general plan update is typically no different from the baseline for other projects. The baseline for most impacts represents the existing conditions, normally on the date the Notice of Preparation is prepared." CAPCOA White Paper, at p. 66. The CAPCOA White Paper states further that, with respect to GHG emissions, such "existing conditions" are the "existing, on-the-ground conditions within the planning area." *Id*.

The GPU DEIR fails to provide a "real world" assessment of existing GHG emissions within Lompoc city limits. Although the City has attempted to quantify GHG emissions under the GPU, EDC cannot locate any information in the DEIR that addresses *current* levels of such emissions. As discussed in more detail below, this failure fatally undermines key conclusions in the EIR, including the City's assertions that the GHG emissions mitigations can assure City compliance with AB 32 and reduce impacts to a less than significant level under CEQA, despite the fact that the proposed Bailey Avenue annexation alone would result in nearly 50,000 metric tons of CO_2 (p. 4.2-39).[3]

2. *The EIR Lacks a Rational Basis for Concluding that GHG Emissions Will Be Reduced to a Less Than Significant Level*

The City acknowledges in the DEIR that the proposed GPU, even when confined to existing city limits, would result in approximately 72,000 metric tons of CO_2 emissions per year. According to the City, this increase would "hinder implementation of AB 32," and would "therefore be potentially significant" under CEQA (p. 4.2-35). If the Bailey Avenue annexation is included as proposed, the inability to meet AB 32 mandates would be further exacerbated, as it alone would result in almost an additional 50,000 metric tons of CO_2 emissions (p. 4.2-35). Nonetheless, the City asserts that two proposed mitigation measures will be sufficient to reduce these impacts to a less than significant level. As addressed below, this conclusion lacks a rational basis for at least two independent reasons: the City has failed to estimate 1990 GHG emissions despite the fact that AB 32's

[2] Importantly, SB 97 did not create a new duty to analyze GHG emissions under CEQA, but provided certainty and clarity as to the scope of existing responsibilities. As stated in its legislative history, "[t]he analysis of GHG impacts under laws like CEQA, and its federal counterpart NEPA, is not new, nor did it commence with the passage of the California Global Warming Solutions Act of 2006." (SB 97, Senate Floor Analyses at 4 (Aug. 22, 2007)).

[3] The City's omission is especially notable given that it did provide baseline estimates for "traditional" air pollutants including ozone, carbon monoxide, nitrogen dioxide, and particulate matter. (DEIR, p. 4.2-10.)

mandates require GHG reductions from 1990 levels, and the mitigation measures themselves are legally indefensible.

a. To Properly Rely on AB 32 as a Threshold for Significance, the City Must Compare Predicted GHG Emissions Under the GPU With Estimated 1990 Emissions

Under the recently amended CEQA Guidelines, CEQA lead agencies have an explicit duty to determine the significance of impacts from GHG emissions. CEQA Guidelines, § 15064.4. Like all environmental analysis under CEQA, this duty applies whether or not the lead agency has established thresholds for significance. Indeed, the amended Guidelines reference thresholds as one of three specific factors, "among others," that lead agencies should consider when considering the significance of GHG emissions. CEQA Guidelines, § 15064.4(b).

In the DEIR, the City acknowledges that it has not established thresholds, noting that "this analysis is specific to the proposed 2030 General Plan and does not establish thresholds for the City or set precedence for the type of analysis in a climate change analysis, as the discipline is still evolving and is expected to undergo multiple renditions before standards and thresholds are published." (p. 4.2-13). It instead relies on the CAPCOA White Paper "Threshold 1.1," under which significance is determined in relation to the 2020 target mandated under AB 32. Under this threshold, agencies must "achieve a measureable 28% to 33% reduction from projected unmitigated emissions to be considered less than significant." *Id*.

As an initial matter, EDC does not believe that relying on AB 32 targets is an ideal manner in which to determine thresholds of significance for GHG emissions for several reasons:

- The GHG emission goals of AB 32, while laudable, were based on a global target of 450 parts per million (ppm) of CO_2 in the global atmosphere. More recent science strongly indicates that a limit of 350 ppm is a more accurate estimation of a safe upper limit of CO_2 concentrations, and that levels higher than this risk "tipping points" of irreversible impacts.[4]

- AB 32 mandates reductions by the year 2020, which is 10 years away. The proposed GPU, in contrast, would remain effective for 20 years, or until approximately 2030. Establishing GHG targets

[4] Matthews H.D., and K. Caldeira (2008), *Stabilizing climate requires near-zero emissions*, Geophys. Res. Lett., *35*, L04705, doi:10.1029/2007GL032388; James Hansen, et al., *Target Atmospheric CO2: Where Should Humanity Aim?* The Open Atmospheric Science Journal, 2008, 2, 217-231; Statements of Dr. Chris Field, Carnegie Institution for Science, Decisive Action Needed as Warming Predictions Worsen, Says Carnegie Scientist, available at http://www.ciw.edu/news/decisive_action_needed_warming_predictions_worsen_says_carnegie_scientist

> for a 2030 GPU based on a 2020 mandate encompasses only half the life of the GPU, and is therefore a fundamentally flawed approach.
>
> ▪ Relying solely on AB 32 ignores the further mandate contained in Executive Order S-3-05, which requires reduction of emissions after 2020 to 80% below 1990 levels by 2050.

In addition, even presuming the appropriateness of utilizing AB 32 to inform the City's threshold determination, as is the case with estimating current baseline conditions, the FEIR contains no information or estimate of emissions in 1990. *See* CAPCOA White Paper at p. 66 (recommending estimation of 1990 conditions in relation to AB 32 compliance). Without such an estimate, there simply is no rational basis for the City to conclude, as it does, that proposed mitigation measures "would ensure City compliance with regional efforts to meet GHG emissions targets in AB 32." (p. 4.2-39).

b. <u>The Proposed Mitigation Measures Are Woefully Inadequate Under CEQA</u>

Mitigation is a centrally-important aspect of CEQA compliance, and indeed, has been called "[t]he core of an EIR." *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553, 564 (1990). The fact that analysis and mitigation of GHG emissions is a relatively new concept in environmental planning does not diminish this importance. To the contrary, "the novelty of greenhouse gas mitigation measures is one of the most important reasons that mitigation measures timely be set forth, that environmental information be complete and relevant, and that environmental decisions be made in an accountable arena." *Cmtys. for a Better Env't v. City of Richmond*, 184 Cal. App. 4th 70, 96 (2010). Moreover, the California Attorney General has provided specific guidance to lead agencies for addressing climate change and mitigation in General Plan updates. *See* Climate Change, CEQA, and General Plan Updates FAQ (Exh. 2); May 27, 2010 Letter Re: Tulare County General Plan and Recirculated Draft Environmental Impact Report (Exh. 3).

Even if the City had properly addressed thresholds for GHG emissions significance, its proposed measures to mitigate that significance fall far short of existing legal requirements. As estimated in the DEIR, the GPU will result in more than 71,000 metric tons of CO_2 emissions each year. Inclusion of the Bailey Avenue annexation would add nearly 50,000 additional metric tons to this figure annually—an increase of more than 70% from a GPU that confines development to within existing city limits.

Despite the clear significance of these GHG emission levels, the City asserts that two mitigation measures, "GHG Emissions Reduction Planning" and "Consideration of Project GHG Reduction Measures" will somehow "ensure" that the City will be in compliance with AB 32, thus reducing emissions to a less than significant level (p. 4.2-38-39). Even a cursory examination, however, reveals that these proposed measures, as well as the City's further clarifications in its draft Final EIR, fail to pass muster under

CEQA, its implementing regulations, and applicable case law due to their lack of enforceability and vagueness.

For example, the first mitigation measure, "GHG Emissions Reduction Planning" states that the City will amend the Open Space Element to state that it "shall participate in regional planning efforts," and that these efforts *are anticipated* to include City assistance in a GHG emissions and "identifying reduction measures related to site design, energy conservation, and trip reduction." (p. 4.2-38) (emphasis added). These type of vague, undefined, and ultimately voluntary measures are not enforceable, and thus, do not constitute lawful mitigation under CEQA. Cal. Pub. Res. Code § 21081.6(b); CEQA Guidelines § 15091(d); *Fed'n of Hillside and Canyon Assocs. v. City of Los Angeles*, 83 Cal. App. 4th 1252, 1261 (2000). This conclusion is underscored by the Attorney General's Climate Change, CEQA, and General Plan Update FAQ, which expressly states that lead agencies may not rely on policies and measures that "simply encourage" GHG measures, but must be identify measures that are "fully enforceable." *See also* Tulare County letter (advising County to "re-word its [mitigation] policies and implementation measures to make them mandatory and enforceable, not merely advisory.").

The second mitigation measure, "Consideration of Project Greenhouse Gas Emissions," stating that "the City shall consider all feasible GHG emissions reduction measures to reduce direct and indirect emissions associated with project vehicle trip generation and energy consumption," suffers from similar defects. The City's pledge to "consider" such measures is neither enforceable nor specific, and it improperly defers identification of specific mitigation measures until some undetermined point in the future.

The Attorney General's FAQ and Tulare County letter each provide several specific examples of lawful GHG mitigation measures. See, e.g. FAQ at p. 6 ("There are many concrete mitigation measures appropriate for inclusion in a general plan and EIR that can be enforced as conditions of approval or through ordinances. Examples are described in a variety of sources, including the CAPCOA's white paper, OPR's Technical Advisory, and the mitigation list on the Attorney General's website. Lead agencies should also consider consulting with other cities and counties that have recently completed general plan updates or are working on Climate Action Plans.").

3. *The FEIR Does Not Properly Consider the Effects of Climate Change on the Project Area*

As acknowledged in the FEIR, climate change will have substantial and far-reaching effects in California. However, the FEIR improperly fails to consider the specific effect of climate change on the GPU area. *See* Guidelines § 15126.2(a) (EIR "shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected."). In the context of the Lompoc GPU, this analysis should include, at a minimum, the effects of climate change on local water supply, fire risk, and air quality.

Exhibit 2: Climate Change FAQ sheet from the California Attorney General's Office

Climate Change, the California Environmental Quality Act, and General Plan Updates: Straightforward Answers to Some Frequently Asked Questions California Attorney General's Office

At any given time in this State, well over one hundred California cities and counties are updating their general plans. These are complex, comprehensive, long-term planning documents that can be years in the making. Their preparation requires local governments to balance diverse and sometimes competing interests and, at the same time, comply with the Planning and Zoning Law and the California Environmental Quality Act (CEQA).

Local governments have decades of experience in applying state planning law and excellent resources to assist them – such as the "General Plan Guidelines" issued by The Governor's Office of Planning and Research (OPR).[1] They are also practiced in assessing whether general plans may have significant localized environmental effects, such as degradation of air quality, reductions in the water supply, or growth inducing impacts. The impact of climate change, however, has only fairly recently shown up on the CEQA radar.

The fact that climate change presents a new challenge under CEQA has not stopped local governments from taking action. A substantial number of cities and counties already are addressing climate change in their general plan updates and accompanying CEQA documents. These agencies understand the substantial environmental and administrative benefits of a programmatic approach to climate change. Addressing the problem at the programmatic level allows local governments to consider the "big picture" and – provided it's done right – allows for the streamlined review of individual projects.[2]

Guidance addressing CEQA, climate change, and general planning is emerging, for example, in the pending CEQA Guideline amendments,[3] comments and settlements by the Attorney General, and in the public discourse, for example, the 2008 series on CEQA and Global Warming organized by the Local Government Commission and sponsored by the Attorney General. In addition, the Attorney General's staff has met informally with officials and planners from numerous jurisdictions to discuss CEQA requirements and to learn from those who are leading the fight against global warming at the local level.

Still, local governments and their planners have questions. In this document, we attempt to answer some of the most frequently asked of those questions. We hope this document will be useful, and we encourage cities and counties to contact us with any additional questions, concerns, or comments.

- **Can a lead agency find that a general plan update's climate change-related impacts are too speculative, and therefore avoid determining whether the project's impacts are significant?**

  No. There is nothing speculative about climate change. It's well understood that (1) greenhouse gas (GHG) emissions increase atmospheric concentrations of GHGs; (2) increased GHG concentrations in the atmosphere exacerbate global warming; (3) a project that adds to the atmospheric load of GHGs adds to the problem.

  Making the significance determination plays a critical role in the CEQA process.[4] Where a project may have a significant effect on the environment, the lead agency must prepare an Environmental Impact Report (EIR).[5] Moreover, a finding of significance triggers the obligation to consider alternatives and to impose feasible mitigation.[6] For any project under CEQA, including a general plan update, a lead agency therefore has a fundamental obligation to determine whether the environmental effects of the project, including the project's contribution to global warming, are significant.

- **In determining the significance of a general plan's climate change-related effects, must a lead agency estimate GHG emissions?**

  Yes. As OPR's Technical Advisory states:

  > Lead agencies should make a good-faith effort, based on available information, to calculate, model, or estimate the amount of CO2 and other GHG emissions from a project, including the emissions associated with vehicular traffic, energy consumption, water usage and construction activities.[7]

  In the context of a general plan update, relevant emissions include those from government operations, as well as from the local community as a whole. Emissions sources include, for example, transportation, industrial facilities and equipment, residential and commercial development, agriculture, and land conversion.

  There are a number of resources available to assist local agencies in estimating their current and projected GHG emissions. For example, the California Air Resources Board (ARB) recently issued protocols for estimating emissions from local government operations, and the agency's protocol for estimating community-wide emissions is forthcoming.[8] OPR's Technical Advisory contains a list of modeling tools to estimate GHG emissions. Other sources of helpful information include the white paper issued by the California Air Pollution Control Officers Association (CAPCOA), "CEQA and Climate Change"[9] and the Attorney General's website,[10] both of which provide information on currently available models for calculating emissions. In addition, many cities and counties are working with the International Council for Local Environmental Initiatives (ICLEI)[11] and tapping into the expertise of this State's many colleges and universities.[12]

- **For climate change, what are the relevant "existing environmental conditions"?**

  The CEQA Guidelines define a significant effect on the environment as "a substantial adverse change in the physical conditions which exist in the area affected by the proposed project."[13]

  For local or regional air pollutants, existing physical conditions are often described in terms of air quality (how much pollutant is in the ambient air averaged over a given period of time), which is fairly directly tied to current emission levels in the relevant "area affected." The "area affected," in turn, often is defined by natural features that hold or trap the pollutant until it escapes or breaks down. So, for example, for particulate matter, a lead agency may describe existing physical conditions by discussing annual average PM10 levels, and high PM10 levels averaged over a 24-hour period, detected at various points in the air basin in the preceding years.

  With GHGs, we're dealing with a global pollutant. The "area affected" is both the atmosphere and every place that is affected by climate change, including not just the area immediately around the project, but the region and the State (and indeed the planet). The existing "physical conditions" that we care about are the current atmospheric concentrations of GHGs and the existing climate that reflects those concentrations.

  Unlike more localized, ambient air pollutants which dissipate or break down over a relatively short period of time (hours, days or weeks), GHGs accumulate in the atmosphere, persisting for decades and in some cases millennia. The overwhelming scientific consensus is that in order to avoid disruptive and potentially catastrophic climate change, then it's not enough simply to stabilize our annual GHG emissions. The science tells us that we must immediately and substantially reduce these emissions.

- **If a lead agency agrees to comply with AB 32 regulations when they become operative (in 2012), can the agency determine that the GHG-related impacts of its general plan will be less than significant?**

  No. CEQA is not a mechanism merely to ensure compliance with other laws, and, in addition, it does not allow agencies to defer mitigation to a later date. CEQA requires lead agencies to consider the significant environmental effects of their actions and to mitigate them today, if feasible.

  The decisions that we make today do matter. Putting off the problem will only increase the costs of any solution. Moreover, delay may put a solution out of reach at any price. The experts tell us that the later we put off taking real action to reduce our GHG emissions, the less likely we will be able to stabilize atmospheric concentrations at a level that will avoid dangerous climate change.

- **Since climate change is a global phenomenon, how can a lead agency determine whether the GHG emissions associated with its general plan are significant?**

  The question for the lead agency is whether the GHG emissions from the project – the general plan update – are considerable when viewed in connection with the GHG emissions from past projects, other current projects, and probable future projects.[14] The effects of GHG emissions from past projects and from current projects to date are reflected in current atmospheric concentrations of GHGs and current climate, and the effects of future emissions of GHGs, whether from current projects or existing projects, can be predicted based on models showing future atmospheric GHG concentrations under different emissions scenarios, and different resulting climate effects.

  A single local agency can't, of course, solve the climate problem. But that agency can do its fair share, making sure that the GHG emissions from projects in its jurisdiction and subject to its general plan are on an emissions trajectory that, if adopted on a larger scale, is consistent with avoiding dangerous climate change.

  Governor Schwarzenegger's Executive Order S-3-05, which commits California to reducing its GHG emissions to 1990 levels by 2020 and to eighty percent below 1990 levels by 2050, is grounded in the science that tells us what we must do to achieve our long-term climate stabilization objective. The Global Warming Solutions Act of 2006 (AB 32), which codifies the 2020 target and tasks ARB with developing a plan to achieve this target, is a necessary step toward stabilization.[15] Accordingly, the targets set in AB 32 and Executive Order S-3-05 can inform the CEQA analysis .

  One reasonable option for the lead agency is to create community-wide GHG emissions targets for the years governed by the general plan. The community-wide targets should align with an emissions trajectory that reflects aggressive GHG mitigation in the near term and California's interim (2020) [16] and long-term (2050) GHG emissions limits set forth in AB 32 and the Executive Order.

  To illustrate, we can imagine a hypothetical city that has grown in a manner roughly proportional to the state and is updating its general plan through 2035. The city had emissions of 1,000,000 million metric tons (MMT) in 1990 and 1,150,000 MMT in 2008. The city could set an emission reduction target for 2014 of 1,075,000 MMT, for 2020 of 1,000,000 MMT, and for 2035 of 600,000 MMT, with appropriate emission benchmarks in between. Under these circumstances, the city could in its discretion determine that an alternative that achieves these targets would have less than significant climate change impacts.

- **Is a lead agency required to disclose and analyze the full development allowed under the general plan?**

  Yes. The lead agency must disclose and analyze the full extent of the development allowed by the proposed amended general plan,[17] including associated GHG emissions.

This doesn't mean that the lead agency shouldn't discuss the range of development that is likely to occur as a practical matter, noting, for example, the probable effect of market forces. But the lead agency can't rely on the fact that full build out may not occur, or that its timing is uncertain, to avoid its obligation to disclose the impacts of the development that the general plan would permit. Any other approach would seriously underestimate the potential impact of the general plan update and is inconsistent with CEQA's purposes.

- **What types of alternatives should the lead agency consider?**

  A city or county should, if feasible, evaluate at least one alternative that would ensure that the community contributes to a lower-carbon future. Such an alternative might include one or more of the following options:

  - higher density development that focuses growth within existing urban areas;
  - policies and programs to facilitate and increase biking, walking, and public transportation and reduce vehicle miles traveled;
  - the creation of "complete neighborhoods" where local services, schools, and parks are within walking distance of residences;
  - incentives for mixed-use development;
  - in rural communities, creation of regional service centers to reduce vehicle miles traveled;
  - energy efficiency and renewable energy financing (see, e.g., AB 811)[18]
  - policies for preservation of agricultural and forested land serving as carbon sinks;
  - requirements and ordinances that mandate energy and water conservation and green building practices; and
  - requirements for carbon and nitrogen-efficient agricultural practices.

  Each local government must use its own good judgment to select the suite of measures that best serves that community.

- **Can a lead agency rely on policies and measures that simply "encourage" GHG efficiency and emissions reductions?**

  No. Mitigation measures must be "fully enforceable."[19] Adequate mitigation does not, for example, merely "encourage" or "support" carpools and transit options, green building practices, and development in urban centers. While a menu of hortatory GHG policies is positive, it does not count as adequate mitigation because there is no certainty that the policies will be implemented.

  There are many concrete mitigation measures appropriate for inclusion in a general plan and EIR that can be enforced as conditions of approval or through ordinances. Examples are described in a variety of sources, including the CAPCOA's white paper,[20] OPR's Technical Advisory,[21] and the mitigation list on the Attorney General's website.[22] Lead agencies should also consider consulting with other cities and counties that have recently completed general plan updates or are working on Climate Action Plans.[23]

- **Is a "Climate Action Plan" reasonable mitigation?**

  Yes. To allow for streamlined review of subsequent individual projects, we recommend that the Climate Action Plan include the following elements: an emissions inventory (to assist in developing appropriate emission targets and mitigation measures); emission targets that apply at reasonable intervals through the life of the plan; enforceable GHG control measures; monitoring and reporting (to ensure that targets are met); and mechanisms to allow for the revision of the plan, if necessary, to stay on target.[24]

  If a city or county intends to rely on a Climate Action Plan as a centerpiece of its mitigation strategy, it should prepare the Climate Action Plan at the same time as its general plan update and EIR. This is consistent with CEQA's mandate that a lead agency must conduct environmental review at the earliest stages in the planning process and that it not defer mitigation. In addition, we strongly urge agencies to incorporate any Climate Action Plans into their general plans to ensure that their provisions are applied to every relevant project.

- **Is a lead agency also required to analyze how future climate change may affect development under the general plan?**

  Yes. CEQA requires a lead agency to consider the effects of bringing people and development into an area that may present hazards. The CEQA Guidelines note the very relevant example that "an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision."[25]

  Lead agencies should disclose any areas governed by the general plan that may be particularly affected by global warming, e.g.: coastal areas that may be subject to increased erosion, sea level rise, or flooding; areas adjacent to forested lands that may be at increased risk from wildfire; or communities that may suffer public health impacts caused or exacerbated by projected extreme heat events and increased temperatures. General plan policies should reflect these risks and minimize the hazards for current and future development.

Endnotes

[1]For a discussion of requirements under general planning law, see OPR's General Plan Guidelines (2003). OPR is in the process of updating these Guidelines. For more information, visit OPR's website at http://www.opr.ca.gov/index.php?a=planning/gpg.html.

[2]OPR has noted the environmental and administrative advantages of addressing GHG emissions at the plan level, rather than leaving the analysis to be done project-by-project. See OPR, Preliminary Draft CEQA Guideline Amendments, Introduction at p. 2

(Jan. 8, 2009), available at http://opr.ca.gov/download.php?dl=Workshop_Announcement.pdf.

[3] OPR issued its Preliminary Draft CEQA Guidelines Amendments on January 8, 2009. Pursuant to Health and Safety Code, § 21083.05 (SB 97), OPR must prepare its final proposed guidelines by July 1, 2009, and the Resources Agency must certify and adopt those guidelines by January 1, 2010.

[4]Cal. Code Regs., tit. 14 (hereinafter "CEQA Guidelines"), § 15064, subd. (a).

[5]CEQA Guidelines, § 15064, subd. (f)(1).

[6]CEQA Guidelines, § 15021, subd. (a).

[7]OPR, CEQA and Climate Change: Addressing Climate Change Through California Environmental Quality Act (CEQA) Review (June 2008), available at http://opr.ca.gov/ceqa/pdfs/june08-ceqa.pdf.

[8] ARB's protocols for estimating the emissions from local government operations are available at http://www.arb.ca.gov/cc/protocols/localgov/localgov.htm.

[9] CAPCOA, CEQA and Climate Change, Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act (January 2008) (hereinafter, "CAPCOA white paper"), available at http://www.capcoa.org/.

[10] http://ag.ca.gov/globalwarming/ceqa/modeling_tools.php

[11] http://www.iclei-usa.org

[12] For example, U.C. Davis has made its modeling tool, UPlan, available at http://ice.ucdavis.edu/doc/uplan; San Diego School of Law's Energy Policy Initiatives Center has prepared a GHG emissions inventory report for San Diego County http://www.sandiego.edu/EPIC/news/frontnews.php?id=31; and Cal Poly, San Luis Obispo City and Regional Planning Department is in the process of preparing a Climate Action Plan for the City of Benicia, see http://www.beniciaclimateactionplan.com/files/about.html.

[13]CEQA Guidelines, § 15002, subd. (g).

[14] CEQA Guidelines, § 15064(h)(1).

[15]See ARB, Scoping Plan at pp. 117-120, available at http://www.arb.ca.gov/cc/scopingplan/document/psp.pdf. (ARB approved the Proposed Scoping Plan on December 11, 2008.)

[16]In the Scoping Plan, ARB encourages local governments to adopt emissions reduction goals for 2020 "that parallel the State commitment to reduce greenhouse gas emissions by approximately 15 percent from current levels . . . ." Scoping Plan at p. 27; see *id.* at Appendix C, p. C-50. For the State, 15 percent below current levels is approximately equivalent to 1990 levels. *Id.* at p. ES-1. Where a city or county has grown roughly at

the same rate as the State, its own 1990 emissions may be an appropriate 2020 benchmark. Moreover, since AB 32's 2020 target represents the State's *maximum* GHG emissions for 2020 (see Health & Safety Code, § 38505, subd. (n)), and since the 2050 target will require substantial changes in our carbon efficiency, local governments may consider whether they can set an even more aggressive target for 2020. See Scoping Plan, Appendix C, p. C-50 [noting that local governments that "meet or exceed" the equivalent of a 15 percent reduction in GHG emissions by 2020 should be recognized].

[17] *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 194 [EIR must consider future development permitted by general plan amendment]; see also CEQA Guidelines, §§ 15126 [impact from all phases of the project], 15358, subd. (a) [direct and indirect impacts].

[18] See the City of Palm Desert's Energy Independence Loan Program at http://www.ab811.org.

[19] Pub. Res. Code, § 21081.6, subd. (b); CEQA Guidelines, § 15091, subd. (d); see also *Federation of Hillside and Canyon Assocs.* (2000) 83 Cal.App.4th 1252, 1261 [general plan EIR defective where there was no substantial evidence that mitigation measures would "actually be implemented"].

[20] CAPCOA white paper at pp. 79-87 and Appendix B-1.

[21] OPR Technical Advisory, Attachment 3.

[22] See http://ag.ca.gov/globalwarming/pdf/GW_mitigation_measures.pdf [mitigation list];http://ag.ca.gov/globalwarming/pdf/green_building.pdf [list of local green building ordinances].

[23] See http://opr.ca.gov/ceqa/pdfs/City_and_County_Plans_Addressing_Climate_Change.pdf.

[24] See Scoping Plan, Appendix C, at p. C-49.

[25] CEQA Guidelines, § 15126.2, subd. (a).

Exhibit 3: Department of Justice Letter on the Tulare County General Plan Update and related Court Case

ATTACHED AS SEPARATE PDF FILE FOR YOUR REFERENCE

EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE

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May 27, 2010

By Overnight Mail and Facsimile

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RE: Tulare County General Plan and Recirculated Draft Environmental Impact

Dear Mr. Bryant:

The Attorney General submits these comments pursuant to the California Environmental Quality Act ("CEQA") on the Tulare County General Plan (General Plan) and Recirculated Draft Environmental Impact Report ("DEIR").[1] We applaud the County's recognition of the vital importance of directing growth and development in a manner that will preserve the special agricultural and rural nature of Tulare County. Balancing the need for sustainable development against the equally important need to preserve agriculture and the natural environment requires significant vision and leadership on the part of the County.

As discussed below, however, the General Plan and DEIR fail to further the County's goals. The General Plan relies on unenforceable policies that "encourage," but do not mandate that growth will occur in certain areas, with the result that all important development decisions are left to the marketplace.

According to the County website, Tulare County is the second leading producer of agricultural commodities in the United States, as well as a gateway to Sequoia National Park. The rural and agricultural character of the County is the backbone of its present economy and the mainstay of its future. In the past Tulare County showed remarkable foresight in developing

[1] The Attorney General provides these comments pursuant to his independent power and duty to protect the natural resources of the State from pollution, impairment, or destruction in furtherance of the public interest. (See Cal. Const., art. V, § 13; Cal. Govt. Code, §§ 12511, 12600-612; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.) These comments are made on behalf of the Attorney General and not on behalf of any other California agency or office.

plans, like the Rural Valley Land Plan, that have protected agricultural land from conversion to non-agricultural uses and preserved the special rural character of the County. The County leaders of today should exercise similar foresight in planning, to preserve the County's unique and irreplaceable resources for its present and future generations.

1. Introduction

In April, 2008, the Attorney General submitted comments to Tulare County concerning its Draft Environmental Impact Report. We appreciate the fact that the revised General Plan and the recirculated DEIR address and correct a number of the deficiencies noted in those comments. Just as one example, we note that the County has prepared a Greenhouse Gas Inventory for the planning area and has taken the first steps toward developing a Climate Action Plan.

Ultimately, however, serious and critical deficiencies remain that undermine both the Plan and the DEIR and render them legally inadequate and ineffective as tools for implementing the County's goals. The most important of these deficiencies are discussed in more detail below. Where the Plan and DEIR are deficient in the same manner as noted previously, we hereby incorporate our previous comments into this comment letter. (A copy of the Attorney General's previous letter is attached.)

2. Legal Background

a. General Plan Requirements

As noted in our previous letter, the general plan is "at the top of the 'hierarchy of local government law regulating land use[.]'"[2] As the California Supreme Court noted, this basic land use charter governing the direction of future land use is in the nature of a "'constitution' for future development,"[3] and taking some measure of control over future land use is the local government's affirmative duty. "The planning law . . . compels cities and counties to undergo the discipline of drafting a master plan to guide future local land use decisions."[4]

Thus, a general plan must be more than a statement of broad but unenforceable policies and goals for the future. It must "designate[] the proposed general distribution and general location and extent" of land uses.[5] Finally, a general plan must disclose information to the public in a format that is readily accessible. "A general plan which does not set forth the required elements in an understandable manner cannot be deemed to be in substantial compliance" with planning law.[6] The General Plan must state "with reasonable clarity" what the plan is.[7] Thus, a

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[2] *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773 (internal citation omitted).
[3] *Id.* (quoting *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 542).
[4] *DeVita, supra,* 9 Cal.4th at p. 773.
[5] Gov. Code § 65302(a).
[6] *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 744.

reader consulting the general plan must be able to determine with relative ease, the amount of land available for development, the land-use designation of that land, any restrictions on development of the land, and the maximum amount of new development that can occur under the plan.

b. CEQA Requirements

CEQA is one of the California's most important and fundamental environmental laws. For more than 40 years, CEQA has guided the State toward sustainable development. As the Act states, it is California's policy to "create and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations."[8]

An environmental impact report (EIR) is an informational document intended to provide both the public and government agencies with detailed information about the effects of a proposed project on the environment, to list ways in which those effects can be mitigated, and to discuss and analyze alternatives to the project. A "project" is defined as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. . . ."[9] The project must be adequately described in the EIR,[10] and the entirety of the project must be considered, not just some smaller portion of it.[11]

CEQA further mandates that public agencies not approve projects unless feasible measures are included that mitigate the project's significant environmental effects.[12] CEQA therefore requires that "[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so."[13] The mitigation measures must be enforceable, rather than just vague policy statements.[14]

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[7] *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90, 97.
[8] Pub. Resources Code, § 21001, subd. (e).
[9] Cal. Code Regs., tit. 14, § 15378, subd. (a) (hereafter "Guidelines").
[10] Guidelines, § 15124.
[11] *San Joaquin Raptor/Wildlife Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654.
[12] Pub. Resources Code, § 21002.
[13] Pub. Resources Code §§ 21002.1, subd. (b); *City of Marina Board of Trustees* (2006) 39 Cal.4th 341, 360.
[14] See Pub. Resources Code § 21081.6, subd. (b); *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261 & n.4 (agency must take steps to ensure mitigation measures are fully enforceable through permit conditions, agreements, or other measures).

3. Analysis

a. The General Plan is primarily an aspirational document that does not exercise control over growth.

As currently drafted, with the exception of the Rural Valley Lands Plan (Rural Valley Plan),[15] the General Plan is not a true planning document. It states a set of unenforceable preferences and policies for how growth will occur in the County on the available non-agricultural land. The Plan purports to direct development to the designated Urban Development Boundaries (UDB) and Hamlet Development Boundaries of the existing cities, hamlets, and communities, but declines to set any criteria for determining where such growth will be permitted and in what density, thus leaving open development that can occur haphazardly in those areas. It permits development of an undetermined amount in the "Foothill Development Corridors" and within areas set aside under the "Mountain Framework Plan." (General Plan ("GP") 2-7.) Finally the Plan permits the development of "New Towns (Planned Communities)" on unspecified rural land "when appropriate to meet the social and economic needs of current and future residents." (GP 2-67.) There is no indication of the standards that would make such development "appropriate," the number of the New Towns that will be allowed "when appropriate," where the New Towns will be located, the number of acres that will be developed, and in what densities. The Plan also permits the County to adopt as yet undetermined Corridor Plans adjacent to major transportation routes with no identification of what areas these Corridor Plans will cover, the acreage available for development, and the density.

In addition, large portions of the General Plan consist of unenforceable statements of goals and objectives, using terms like "encourage," rather than "require." For example: "The County shall encourage new major residential development to locate near existing infrastructure for employment centers, services, and recreation"; "The County shall encourage high-density residential development . . . to locate along collector roadways and transit routes, and near public facilities . . . , shopping, recreation, and entertainment" (GP 4-27); the County "shall strive to maintain distinct urban edges for all unincorporated communities"; and the County "shall encourage urban development to locate in existing UDBs and HDBs where infrastructure is available or may be established . . ." (GP 2-25 – 2-26.) These advisory statements do not constrain or direct growth in an enforceable manner.

The County can transform the General Plan from an aspirational document to the legally-required constitution for future development by ensuring that goals and objectives are linked to specific and enforceably worded policies and implementation measures. Such measures can include, for example, development phasing so that land is not developed until available infill (areas in or adjacent to developed areas) has been used to the maximum extent feasible, and coordination between a County and the cities in its jurisdiction about where future growth will occur. For example, the City of Stockton has entered into a settlement agreement with the

[15] We recognize that the County has a strong Rural Valley Plan that significantly limits conversion of agriculture land to other uses.

Attorney General that incorporates this type of phasing approach. (Copy attached.) The agreement stipulates that Stockton will locate a specified number of new housing units in infill areas (¶¶ 6.a., 6.b) and will impose limits on growth outside the city limits until certain criteria are met. (¶ 7.) In a similar fashion, the Livermore General Plan imposes growth boundaries for the purpose of managing growth and directing growth into the existing city limits, and specifically into the downtown. In combination with these growth boundaries, the City of Livermore and the County of Alameda have adopted a transfer of development credit system that further manages growth by providing an incentive for potential development in the unincorporated County to be transferred and built in the downtown of Livermore.

b. The open-ended nature of the General Plan affects the County's obligation to describe the project and analyze the project's impacts under CEQA.

The *sine qua non* of an environmental impact report is an accurate project description.[16] Any evaluation of the General Plan "must necessarily include a consideration of the larger project, i.e., the future development permitted by the amendment."[17] In order to comply with CEQA, the DEIR therefore must describe and consider the full extent of the growth permitted by the Plan and must quantify the impacts. (*Id.*)

Because the Plan itself does not direct and control growth, the DEIR relies on market-driven projections and "Population Growth Assumptions under the General Plan," including the assumption that certain percentages of the population growth will occur within certain areas. (DEIR 2-24). The DEIR assumes that 75% of the growth will occur within the UDBs and Spheres of Influence of incorporated cities throughout the County and that the remaining 25% of growth "is expected to occur" in unincorporated communities and hamlets, foothill development corridors, urban and regional growth corridors, and mountain service centers. (GP 2-24.)

Other outcomes are, however, also quite possible. As discussed, there is nothing in the General Plan or the DEIR that limits or caps growth to the amount projected to occur in the County during the planning period. Nor is there anything in the General Plan or DEIR that affirmatively requires that any set percentage of growth be located in particular areas. Unfocused development in rural areas of Tulare County is not only likely in the future – it is already in progress; the County is currently considering just such a development project, the Yokohl Valley Ranch, a 10,000 unit residential development to be located in the Sierra Nevada foothills on land that is currently set aside for agriculture. This is only one example of New Towns allowed by the Plan, that are not described in terms of number, location, or type of growth.

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[16] *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 730; *County of Inyo v. City of L.A.* (1977) 71 Cal.App.3d 185, 199.

[17] *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 409 (citation omitted).)

The DEIR analysis, therefore, does not satisfy the CEQA requirements that the DEIR must consider as the "project," the full potential for growth that is permitted under the Plan, and must evaluate the full extent of the impacts if a significant portion of that growth is accommodated, in particular, in rural, undeveloped areas, as the Plan appears to allow. [18] This analysis is not a "worst case scenario."[19] It is simply a CEQA requirement that an EIR must evaluate the project's potential to affect the environment, even if the project does not ultimately materialize.[20]

c. The DEIR fails to consider and impose enforceable mitigation measures.

CEQA provides that a public agency should not approve a project as proposed if there are feasible mitigation measures that would substantially lessen the significant environmental effects of the project. Further, in order to ensure that mitigation measures are actually implemented, they must be "fully enforceable through permit conditions, agreements, or other measures."[21]

There are a number of areas in which the DEIR fails to impose enforceable mitigation measures. In the area of climate change alone, the DEIR notes that greenhouse gas ("GHG") emissions *based on projected population growth* would increase nearly 1 million metric tonnes (metric tons)/year from 2007 to 2030 (DEIR 3.4-22) and that this would cause several significant and unavoidable impacts, including conflicting with the State's goal of reducing GHG emissions.[22]

While the DEIR relies on a number of General Plan policies to mitigate the impact of this increase in GHG emissions, many of these policies are unenforceable. For example, the policies merely "promote" smart growth (LU 1.1); "promote" innovative development (LU 1.2); "encourage" and "provide incentives" for infill (LU 1.8.), "encourage" new development to locate near existing infrastructure (LU 3.1); "encourage" new development to incorporate energy conservation and green building practices (AQ 3.5); "encourage" high density residential development to locate along transit routes and near public facilities (LU 3.3); "encourage" school

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[18] We note that there is no information disclosed either in the General Plan document itself or in the incorporated area plans that would enable a reader to calculate the total acres of land available for development, and the land use designation of those acres. The County of Tulare has one of the oldest and most sophisticated geographic information mapping systems of all the counties in California. Information on land use locations, densities, and intensities is available and can be readily produced by the County and will enable the public and decision makers to determine where the actual development can occur, and in what amount.

[19] An EIR need not engage in speculation to analyze a "worst-case scenario." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 373.)

[20] *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 279, 282.

[21] Public Resources Code, § 21081.6, subd. (b).

[22] We note that because this estimate is based on projected population growth focused in incorporated cities and CACUDBs, and not on the development that may occur under the Plan, the estimates of GHG emissions may be substantially understated.

districts to locate new schools in areas that allow students to walk or bike from their homes (LU 6.3), "encourage" land uses that generate higher ridership (TC 4.4); "consider" incorporating facilities for bike routes, sidewalks and trails when reviewing new development proposals (TC-5); "encourage" location of ancillary employee services near major employment centers (AQ 3.1); "encourage" the use of solar power and energy conservation in all new development (LU 7.15); "encourage" the use of ecologically based landscape design principles that improve air quality; and "encourage" LEED and LEED-ND certification for new development (AQ implementation measure 12). None of these measures are mandatory and enforceable.

Until the County adopts mitigation measures that will be imposed and enforced as conditions of all future development projects, the County has not complied with its duty under CEQA to implement mitigation measures to reduce the environmental impacts of the project. There are a number steps that the County can take to correct these deficiencies. First, and most simply, the County can re-word its policies and implementation measures to make them mandatory and enforceable, not merely advisory. We pointed out some of these opportunities in our previous letter. In addition to the policies and programs noted previously, there are good examples of policies and implementation measures that foster energy efficiency and smart growth contained in California Air Pollution Control Officers' Model Policies for Greenhouse Gases in General Plans (June 2009), Caltrans's Smart Mobility Handbook (Feb. 2010), and the California Energy Commission's Energy Aware Planning Guide (Dec. 2009), which the County should consult.[23]

Finally, in connection with the Draft Climate Action Plan (CAP), we recommend that the County should (1) commit in the General Plan to adopting by a date certain a CAP with defined attributes (targets, enforceable measures to meet those targets, monitoring and reporting, and mechanisms to revise the CAP as necessary) that will be integrated into the General Plan; (2) incorporate into the General Plan interim policies to ensure that any projects considered before completion of the CAP will not undermine the objectives of the CAP; and (3) for all GHG impacts the County has designated as significant, adopt feasible mitigation measures that can be identified today and that do not require further analysis. (CEQA Guidelines § 15183.5.) Such a programmatic approach would have the substantial benefit of streamlining the CEQA review for future projects. (*Id.*)

d. The DEIR does not consider all feasible alternatives

The CEQA Guidelines provide that an EIR must discuss a "range of reasonable alternatives to the project or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." [24] The EIR must

[23] http://www.capcoa.org/download/Model+Policies+Document, http://www.dot.ca.gov/hq/tpp/offices/ocp/smf_files/SmMblty_v6-3.22.10_150DPI.pdf http://www.energy.ca.gov/energy_aware_guide/index.html

[24] Cal.Code Regs., tit. 14, § 15125.5, subd. (a).

include sufficient information about each alternative to provide meaningful analysis and comparison, and must consider alternatives that could eliminate significant effects or reduce them to a less than significant level, even if the alternatives could impede the attainment of the project's objectives to some degree.

CEQA requires public agencies to refrain from approving projects with significant environmental impacts when there are feasible alternatives that can substantially lessen or avoid those impacts.[25] The "cursory rejection" of a proposed alternative "does not constitute an adequate assessment of alternatives as required under CEQA," and it "fails to provide solid evidence of a meaningful review of the project alternative that would avoid the significant environmental effects identified . . . ." [26]

In light of the acknowledged significant impact the General Plan will have an multiple resources, including air, water, and greenhouse gas emissions, it is incumbent on the County to carefully consider all of the feasible alternatives to the General Plan. Based on the existing record, there appear to be at least two alternatives to the proposed General Plan which, alone or combined, would significantly reduce the impacts. The DEIR attempts to define more compact and urban alternatives with the "City Centered Development Scenario," which focuses more growth in the city UDBs, and the "Confined Growth Alternative," which would establish hard boundaries to protect important agricultural resources. Both of these alternatives protect agricultural land and maintain the rural character of the County to a greater extent than the General Plan and would have significantly lower environmental impacts, including impacts on GHG emissions. The County rejected the City Centered scenario based on its assertion that it "may make it more difficult to achieve the desired level of reinvestment within existing communities and hamlets." (DEIR 4-19.) There is no analysis or discussion, however as to why the anticipated 20% growth in the unincorporated community and hamlet areas under this alternative would not be sufficient to meet these goals.

The County notes that the Confined Growth Alternative would meet all of the project's objectives (DEIR 4-33) and is the environmentally superior alternative and would reduce the severity of most environmental impacts associated with the project. (DEIR 4-36) It is not clear, therefore, why the County has not adopted this alternative.

Further, the DEIR notes that the Planning Commission directed the staff to consider an additional City/Focused Community Alternative, one in which growth would be accommodated in vacant urban, as well as legal suburban and rural (hamlet and other existing communities) lots of record in the County, without permitting development in outlying rural areas. The DEIR summarily concludes that the suggested alternative was not significantly different from the City Centered alternative and therefore was not discussed further. (DEIR 4-18.) Since the City/Focused Community Alternative appears to meet the project goal of fostering development

[25] Pub. Resources Code § 21002; CEQA Guidelines, §§ 15002, subd. (a)(3), 15021, subd. (a)(2).)
[26] *Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 136.

in the communities and hamlets, while having less of an environmental impact than the project, it is not clear why the DEIR declines to discuss it in any detail.

Finally, the DEIR does not evaluate an alternative that would limit growth to the cities and existing unincorporated community (hamlet, etc.) boundaries, and does not determine whether there is sufficient capacity in these areas to accommodate growth during the period of the General Plan, without permitting further growth in rural and agricultural areas. There is no support in the record for this omission.

e. The DEIR's conclusion that environmental impacts are significant and unavoidable is unsupported.

The DEIR concludes that the project will result in 27 significant and unavoidable impacts including violation of air quality standards, conflicting with or obstructing implementation of an applicable air quality plans, and conflicting with the State goal of reducing greenhouse gas emissions in California to 1990 levels by 2020. (DEIR ES-13.) In light of the fact that the project is not properly defined, the impacts are not adequately quantified, enforceable mitigation measures are not imposed, and adequate alternatives are not considered, this conclusion is unsupported and contravenes CEQA.[27]

4. Conclusion

Tulare County showed remarkable foresight in enacting the Rural Valley Plan that has served for decades to protect the special rural and agricultural nature of Tulare County. The County again is in a position to exercise similar foresight and leadership for the benefit of current and future generations. We would be happy to provide examples of land use policies and mitigation measures that should be considered by the County, and to meet with you and work

[27] See *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1371 (lead agency cannot simply conclude that there are overriding considerations that would justify a significant and unavoidable effect without fully analyzing the effect.)

together in whatever way possible to achieve the goals of preservation and smart growth set by the County.

Sincerely,

/s/

SUSAN S. FIERING
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

Attachments

EXHIBIT A

EDMUND G. BROWN JR.
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April 14, 2008

By Overnight Mail and Facsimile

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RE: Draft Environmental Impact Report for Tulare County General Plan 2030 Update
SCH # 2006041162

Dear Mr. Bryant:

The Attorney General submits these comments pursuant to the California Environmental Quality Act ("CEQA") on the Draft Environmental Impact Report ("DEIR") for the Tulare County General Plan 2030 Update ("General Plan").[1]

1. Introduction

The general plan is "at the top of the hierarchy of local government law regulating land use[.]"[2] As the California Supreme Court has noted, this basic land use charter governing the direction of future land use is in the nature of a planning "constitution."[3] Taking some measure of control over future land use is the local government's affirmative duty. "The planning law . . . compels cities and counties to undergo the discipline of drafting a master plan to guide future

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[2]*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773 (internal citation omitted).

[3]*Ibid; Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 542.

local land use decisions."[4] The Tulure County General Plan thus presents both an opportunity and a responsibility to the County – an opportunity to shape the future growth of the County, and a responsibility to ensure that such growth is consistent with State and local goals, including protecting the public health and welfare of the County's inhabitants and protecting the environment.

According to the DEIR, the Plan anticipates that the population of Tulare County will reach 621,549 by 2030, an increase of approximately 254,000 people,[5] and that emissions of carbon dioxide (CO_2) from this growth will increase by approximately 1.7 million tons/year. As you are aware, global warming presents profoundly serious challenges to California and the nation. While we commend the County for addressing greenhouse gas ("GHG") emissions in the DEIR, we have concluded that the DEIR is not in compliance with the requirements of CEQA in significant respects. First, the DEIR does not disclose the actual growth that may occur under the proposed General Plan – which leaves much of the control over land uses and growth patterns to the market – and the GHG emissions that will result from such growth. Second, the DEIR considers only vehicle miles traveled and dairies as sources of GHG emissions, and neglects to consider other significant new sources of GHG emissions, including emissions from construction, residential and non-residential energy use, and other activities that will result from the build-out of the Plan. Third, the DEIR considers only a narrow range of alternatives, ignoring any alternative that would aggressively foster "smart growth" by more significantly limiting development to existing urban areas. Finally, the DEIR does not impose enforceable and quantifiable mitigation measures to mitigate the impact of the GHG emissions.

Because the analysis of GHG emissions is inadequate and incomplete, the DEIR does not comply with CEQA, and does not provide substantial evidence to support the County's finding that the impacts of GHG emissions will be "significant and unavoidable."

2. Climate Change Background

Before discussing the General Plan and legal adequacy of the DEIR, it is important to understand why human-caused climate change is of particular concern to California and to the San Joaquin Valley.[6]

The impacts of climate change are not limited to remote parts of the world – they are being felt in California today. In California, global warming is causing damage to agriculture, losses to the Sierra snowpack, higher risks of fire, eroding coastlines, and habitat modification

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[4] *DeVita, supra*, 9 Cal.4th at p. 773.

[5] The County indicates that the General Plan is intended to accommodate 25% of this grown in the unincorporated areas, an increase of approximately 64,000 residents.

[6] The physics of climate change are well described in the Intergovernmental Panel on Climate Change, Fourth Assessment Report, "Frequently Asked Questions" (available at http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_FAQs.pdf) and need not be repeated here.

and destruction. Global warming affects public health directly, through heat-related illnesses and deaths caused by more hot days, and longer heat waves, and indirectly as higher temperatures favor the formation of ozone and particulate matter in areas that already have severe air pollution problems.[7]

The impacts of climate change are of particular concern to the San Joaquin Valley and Tulare County, especially in the areas of agriculture and public health. According to a whitepaper from the California Climate Action Team on the impacts of climate change on agriculture, "California's cornucopia is predicated on its current climate and its supply and distribution of irrigation water[.]"[8] Rising temperatures will cause larger crops growing in warmer climates to use more water and also may stimulate more weeds and insect pests. Pollination – essential to many Valley crops – will be negatively affected if warming causes asynchronization between flowering and the life cycle of insect pollinators. And the occurrence of adequate winter chill, necessary for fruit trees to flower, may be lost for many fruit species.[9] Higher temperatures due to global warming also have an impact on the dairy industry, which is of special importance to Tulare County, by causing lower milk production and heat-related animal deaths. Dairy producers will no doubt recall the extended heat wave of 2006, which caused the death of thousands of cows and created a backlog of carcasses for disposal.[10]

The health related impacts of climate change are also of substantial importance to the County. A Stanford study details how for each increase in temperature of 1 degree Celsius (1.8 degrees Fahrenheit) caused by climate change, the resulting air pollution would lead annually to about a thousand additional deaths and many more cases of respiratory illness and asthma.[11] The effects of warming are most significant where the pollution is already severe. Thus, the study has serious implications for California overall and for the San Joaquin Valley in particular. Given that California is home to six of the ten U.S. cities with the worst air quality, including Visalia-Tulare, and that the San Joaquin Valley has some of the worst air quality in the nation, the State and the Valley are likely to bear an increasingly disproportionate public health burden if we do not significantly reduce our GHG emissions.

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[7]A summary of impacts to California, together with citations, is available on the Attorney Generals' website at http://ag.ca.gov/globalwarming/impact.php.

[8]California Climate Change Center, *An Assessment of the Impacts of Future CO2 and Climate on Californian Agriculture* (March 2006) at p. 1, available at http://www.energy.ca.gov/2005publications/CEC-500-2005-187/CEC-500-2005-187-SF.PDF.

[9]*Id.*, Abstract.

[10]Williams, "Dairy producers regroup after cow deaths," Bakersfield Californian (Aug. 5, 2006) available at http://www.bakersfield.com/102/story/66292.html.

[11] Jacobson, Mark Z., *On the causal link between carbon dioxide and air pollution mortality*, Geophysical Research Letters, Vol. 35 L03809 (2008).

The atmospheric concentration of CO_2, the leading GHG, is now 380 parts per million (ppm),[12] higher than any time in the last 650,000 years,[13] and rising at about 2 ppm per year. According to experts, an atmospheric concentration of CO_2 "exceeding 450 ppm is almost surely dangerous" to human life because of the climate changes it will cause.[14] Thus, we are fast approaching a "tipping point," where the increase in temperature will create unstoppable, large-scale, disastrous impacts for all the inhabitants of the planet.[15]

We must take prompt action and control of our future. In the words of Rajendra Pachauri, Chairman of the United Nations Intergovernmental Panel on Climate Change, "If there's no action before 2012, that's too late. What we do in the next two to three years will determine our future. This is the defining moment."[16]

3. Description of the General Plan

Pursuant to Government Code section 65302, subdivision (a) a general plan must contain a land use element that

> designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space . . . and other categories of public and private uses of land. . . .

The distribution and general location of land uses under the Tulare County General Plan Update is almost impossible to discern from Plan documents. Maps typically accompany general plans.[17] While the General Plan does identify a limited number of land use designations (General Plan at pp. 5-5 to 5-12), it does not include any maps or diagrams identifying where the designations are, or the acreage available for development within each designation. A document entitled Board Update, dated April 2006, which was provided to the Board of Supervisors, includes detailed land use maps for certain limited areas – specifically, each of the 21 existing

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[12] http://www.esrl.noaa.gov/gmd/ccgg/trends/

[13] IPCC 4th, WGI, Frequently Asked Question 7.1, *Are Increases in Atmospheric Carbon Dioxide and Other Greenhouse Gases During the Industrial Era Caused by Human Activitites?* http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_FAQs.pdf.

[14] *See* http://www.nasa.gov/centers/goddard/news/topstory/2007/danger_point.html.

[15] *See ibid.*

[16] Rosenthal, *U.N. Chief Seeks More Leadership on Climate Change*, N.Y. Times (November 18, 2007).

[17] *See Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles* (1986) 177 Cal.App.3d 300, 307 [general plan maps are visual depictions of planned development policies indicating the geographic or spatial aspects of the plan].

unincorporated communities "hamlets." These maps, however, are not included in the General Plan. Nor does the Plan contain a table or tables indicating the general location, extent and type of land uses that could occur in the various geographic areas of the County. Ultimately, it is "impossible to relate any tabulated density standard of population to any location in the County."[18]

The General Plan contains a Goals and Policies Report that purports to set forth a "hierarchy of goals, policies, and implementation measures designed to guide future development in the County." (General Plan at p. 1-3.) The policies and implementation measures are in many cases nothing more than statements of preferences and opinions, rather than definite commitments to adopt enforceable policies and specific standards, or to use the powers the County has to enact ordinances and control development.

For example, one policy states that the County shall "encourage" residential growth to locate in existing Urban Development Borders ("UDBs"), Urban Area Boundaries ("UABs"), and Hamlet Development Boundaries ("HDBs"), but none of the accompanying implementation measures provide enforceable requirements or standards that would ensure that this policy is followed.[19] (General Plan at pp. 2-16 to 2-21.) Similarly, while the Plan states a policy of discouraging "new towns" (*id.* at p. 2-12), the policy has only very broad, general criteria and appears to allow new planned communities at an unlimited number of locations in the County as controlled by the market.[20] In the area of Land Use, the Plan again states a series of policies that are said to promote smart growth, encourage mixed use and infill development, etc. (General Plan at pp. 5-12 to 5-19), but the accompanying implementation measures contain no enforceable requirements that would ensure that development occurs consistent with these policy statements. (*Id.* at pp. 5-22 to 5-24.)

Thus, despite the general goals of the Plan to direct development in urban areas and in unincorporated hamlets and communities, nothing in the Plan will prevent a significant portion of the future growth from occurring outside the UDBs, for example in the foothill areas in the far eastern part of the County that are far from services, jobs, and transportation.

Ultimately, it appears that, rather than being a "constitution" for future development, the General Plan will largely leave the shape of new development, in amount and in location,

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[18] *See Camp v. Board of Supervisors of Mendocino County* (1981) 123 Cal.App.3d 334, 350.

[19] According to the 2003 State of California General Plan Guidelines ("General Plan Guidelines") at pp. 16-17, published by the Governor's Office of Planning and Research, a general plan should contain implementation measures which are actions, procedures, programs, or techniques, that carry out the general plan policy, as well as standards, which are rules or measures establishing a level of quality or quantity that must be complied with or satisfied.

[20] Similarly the Plan states a policy to "discourage the creation of ranchettes. . . ." (Plan at p. 4-4), which are residences built on large lots from 1.5 acres up. This policy does not, however, impose any enforceable limitations on ranchette development.

primarily to the control of the market. This is as much as acknowledged in the DEIR which states repeatedly that "[w]hile the proposed General Plan Update includes policies intended to control the amount and location of new growth. . . it does not solidly advocate, promote or represent any one development scenario because any attempt to predict the exact pace and locations of future market-driven growth is considered speculative." (DEIR at p. ES-7.)

4. CEQA Requirements

An EIR is an informational document intended to provide both the public and government agencies with detailed information about the effects of a proposed project on the environment, to list ways in which those effects can be mitigated, and to discuss and analyze alternatives to the project.[21] A "project" is defined as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. . . ."[22] The project must be adequately described in the EIR,[23] and the entirety of the project must be considered, not just some smaller portion of it.[24] A decision to approve a project "is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA."[25]

CEQA was enacted to ensure that public agencies do not approve projects unless feasible measures are included that mitigate the project's significant environmental effects.[26] CEQA therefore requires that "[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so."[27] The mitigation measures must be enforceable and the benefits quantifiable, rather than just vague

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[21] *Laurel Heights Improvement Ass'n v. Regents of University of California* (1988) 47 Cal.3d 376, 390-91 (citing Pub. Res. Code, § 21061; Cal.Code Regs., tit. 14, § 15003, subd. (b)-(e) (hereafter "Guidelines").

[22] Guidelines, § 15378, subd. (a).

[23] Guidelines, § 15124.

[24] *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654.

[25] *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-22 (quoting *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829).

[26] Pub. Res. Code, § 21002.

[27] Pub. Res. Code, §§ 21002.1, subd. (b); *City of Marina Board of Trustees* (2006) 39 Cal.4th 341, 360.

policy statements.[28]

The CEQA Guidelines further provide that the EIR must discuss a "range of reasonable alternatives to the project or to the location of the project which would feasiblely attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives."[29] The EIR must include sufficient information about each alternative to provide meaningful analysis and comparison,[30] and must consider alternatives that could eliminate significant effects or reduce them to a less than significant level, even if the alternatives could impede the attainment of the project's objectives to some degree.[31]

5. The DEIR Does Not Adequately Analyze GHG Emissions Under CEQA

As the Legislature has recognized, global warming is an "effect on the environment" under CEQA, and an individual project's incremental contribution to global warming can be cumulatively considerable and therefore significant.[32] The DEIR briefly and generally discusses global climate change, noting that California has passed Assembly Bill 32 ("AB 32"), the Global Warming Solutions Act of 2006, which requires the Air Resources Board to implement regulations to reduce GHG emissions statewide to 1990 levels by 2020. (DEIR at pp. 4-44 to 4-46.) The DEIR concludes that, even with mitigations, the GHG emissions from the project will be significant and unavoidable and will conflict with the goals of AB 32. (*Id.* at pp. 4-64 to 4-68). This analysis is deficient for the reasons discussed below.

a. The DEIR Does Not Adequately Disclose and Analyze All of the Potential Growth and GHG Emissions that May Result from the General Plan

A general plan embodies an agency's decisions as to how to guide future development, and any evaluation of the general plan "must necessarily include a consideration of the larger

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[28] *See* Publ. Res. Code, § 21081.6, subd. (b); *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261 (agency must take steps to ensure mitigation measures are fully enforceable through permit conditions, agreements, or other measures).

[29] Guidelines, § 15126.6, subd. (a).

[30] Guidelines § 15126.6, subd. (d).

[31] Guidelines § 15126.6, subd. (b); see also *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1456-57 [cannot exclude alternative simply because it impedes project objectives or is more costly].

[32] *See* Pub. Res. Code, § 21083.05 subd. (a); see also Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 97 (2007-2008 Reg. Sess.) Aug. 22, 2007.

project, i.e., the future development permitted by the amendment."[33] Thus, in order to comply with CEQA, the DEIR must describe and consider the full extent of the growth permitted by the Plan and must quantify the GHG emissions, both direct and indirect from that growth.[34]

Because the Plan does not include enforceable measures guiding how and where development will occur in Tulare County, the DEIR performs its analysis based on "assumptions" about "population growth and the market distribution of that growth throughout the County." (DEIR at p. 2-7.) The DEIR states that the population of Tulare County is anticipated to reach 621,549 by 2030, an increase of approximately 254,000 people, and assumes that approximately 75% of that growth is expected to occur within the UDBs of the incorporated cities, with the remaining 25%, or approximately 64,000 new residents, in unincorporated communities, hamlets and development corridors. (*Id.* at pp. ES-5, 2-7.)

In fact, however, as discussed above, the proposed General Plan is so open-ended that it does nothing to constrain market-driven population growth in the County and appears to allow unlimited development far beyond the scope of what is assumed in the DEIR. The actual remaining capacity for development within the existing UABs and UDBs of unincorporated communities in Tulare County is over 126,000 residents, indicating that the existing potential for growth in unincorporated areas is nearly twice the 64,000 that the DEIR assumes.[35] Further, development is not limited to existing communities and hamlets, but can occur at the discretion of the County in new towns located in rural, undeveloped areas of the County. Such development is not only likely in the future – it is already in progress; the County is currently considering just such a development project, the Yokohl Valley Ranch, a 10,000 unit residential development to be located in the Sierra Nevada foothills on land that is currently set aside for agriculture.[36]

In order to comply with CEQA, it is not sufficient for the DEIR to disclose only an assumed level of growth based on population projections, and an assumed distribution of that growth based on general policies and statements of preference. Rather, it must disclose the full potential for market-driven growth that is permitted under the Plan, and must evaluate the extent and impact of GHG emissions if a significant portion of that growth is accommodated in rural,

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[33] *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 409.

[34] *See* Guidelines, §§ 15126, 15358, subd. (a)(1), (2); *Las Virgenes Homeowners Federation, supra,* 177 Cal.App.3d at p. 307 [in adopting General Plan, County "necessarily addressed the cumulative impacts of buildout to the maximum possible densities allowed by those plans"]; see also *Christward Ministery v. Superior Court* (1986) 184 Cal.App. 3d 180, 194 [evaluation of general plan must include future development permitted by amendment].

[35] Tulare County General Plan Board Update (2006) at p. 8 [table showing estimate of population capacity within existing UDBs and UABs of unincorporated communities].

[36] *See* Notice of Preparation and Initial Study for Yokohl Ranch Project, available at http://www.ceqanet.ca.gov/DocDescription.asp?DocPK=617530.

undeveloped areas, as the Plan appears to allow.

b. The DEIR Does Not Adequately Quantify the Emissions from the Assumed Growth

In addition to failing to disclose the full amount of potential growth that may occur under the General Plan, the DEIR also fails to properly quantify the GHG emissions from the development it does disclose. The DEIR purports to quantify GHG emissions from the anticipated increase in vehicle miles traveled ("VMT") in the assumed market-driven development, stating that CO_2 emissions will increase from 1,997,046 to 3,446,934 tons/year, (approximately a 73% increase). (DEIR at p. 4-50.)

There is no explanation or supporting analysis describing how the DEIR derives this number. It would seem impossible to determine VMT without knowing in general terms where the new development will occur in the County and the distance from workplaces and services. Development that occurs close to urban centers and mass transit will produce significantly less VMT (and GHG emissions) than development that occurs in the far foothills, away from the population centers. Since the General Plan relies on "market-driven" development and does not implement enforceable procedures to guide development, the assessment of GHG emissions from increased VMT is inaccurate and incomplete.

Second, the DEIR discusses only emissions related to VMT and dairy operations. While the DEIR notes that there will be increased emissions from the actual "buildout" of the Plan (including increased use of electricity, woodburning fireplaces, natural gas, and equipment), it states that it lacks information to quantify these emissions, and therefore makes no effort to do so. (DEIR at p. 4-50) These omitted emissions are almost certainly substantial. According to the California Energy Commission, residential, commercial, and industrial sources make up about 30% of the CO_2 emissions in the State,[37] and that does not include methane production from sources such as landfills and wastewater treatment.

There are a number of models available to assist the County in estimating future GHG emissions. One source of helpful information is the report issued by the California Air Pollution Control Officers Association (CAPCOA), "CEQA and Climate Change."[38] The document discusses a variety of models that can be used to calculate GHG emissions. Similarly, the Attorney General's Website provides a table of currently available models that are useful for calculating emissions.[39] Other models are available from a variety of sources,[40]

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[37]California Energy Commission, *Inventory of California Greenhouse Gas Emissions and Sinks: 1990 to 2004*, December 2006, Table 6.

[38]The document is available at http://www.capcoa.org/.

[39] http://ag.ca.gov/globalwarming/ceqa/modeling_tools.php.

[40] *See, e.g.*, UPlan at http://ice.ucdavis.edu/doc/uplan.

The DEIR must fully quantify and consider all of the emissions from the project, including those resulting from the build-out.

c. The DEIR Does Not Include All Feasible Alternatives and Does Not Quantify GHG Emissions from Those Alternatives

The DEIR considers five alternatives which it terms the (1) No-Project alternative, (2) City-Centered Alternative, (3) Rural Communities Alternative, (4) Transportation Corridors Alternative, and (5) Confined Growth Alternative. (DEIR at pp. ES-8 to 9, 7-3 to 7-34.) Based on Table 7-1, which outlines the assumed population growth in unincorporated areas for each of the alternatives, it appears that the range of alternatives is narrow, representing a difference of only approximately 4% in growth in unincorporated areas (from 26% to 30%). (DEIR at pp. 7-3 to 7-4.) The alternatives thus ignore a range of "smart growth" alternatives that would concentrate development in already existing urban areas near mass transit and preserve more agricultural land and open space. A more intense "smart growth" alternative would appear to be feasible given the evidence that existing cities can currently accommodate all of the growth anticipated by the County.[41] Thus, in order to be consistent with CEQA, the DEIR must consider a broader range of alternatives that would focus more of the development in existing urban areas, or explain and provide evidence supporting a conclusion as to why such alternatives would be infeasible.

Moreover, while the DEIR purports to compare the impacts of the various alternatives, the discussion of the alternatives is inadequate. There are no anticipated population numbers provided for two of the alternatives (No-Project and Confined Growth alternatives), making it impossible to compare them to the other three alternatives (DEIR at pp. 7-3 to 7-4), and the discussion of alternatives does not even mention GHG emissions. (DEIR at pp. 7-14 to 7-34.) In order to comply with CEQA, the DEIR must quantify and compare the GHG emissions from each of the alternatives. Again, as discussed above, there are modeling resources available to the County for performing this analysis.

d. The DEIR Does Not Impose All Feasible Measures to Mitigate GHG Emissions

CEQA provides that a public agency should not approve a project as proposed if there are additional feasible mitigation measures that would substantially lessen the significant environmental effects of the project.[42] Further, in order to ensure that mitigation measures are actually implemented, they must be "fully enforceable through permit conditions, agreements, or

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[41]Tulare County General Plan: Policy Alternatives, Board of Supervisors Edition (August 2005) at p. 9, available at http://generalplan.co.tulare.ca.us/documents.html.

[42] Pub. Res. Code, § 21002.

other measures."[43]

The DEIR refers to a series of policies in the General Plan that purport to mitigate GHG emissions related to general development. They include, for example, requiring any development to minimize air impacts, requiring the County to "consider" any strategies identified by the California Air Resources Board, studying methods of transportation to reduce air pollution, encouraging departments to replace existing vehicles with low emission vehicles, and identifying opportunities for infill. (General Plan at pp. 9-4 to 9-5.) While these policies are a positive step, they are general and unenforceable, as are the accompanying implementation measures. Further, the DEIR makes no attempt to quantify the extent to which these mitigation measures will reduce GHG emissions, instead simply jumping to the conclusion that the climate change impacts from the project would be "significant and unavoidable." (DEIR at pp. 4-65 to 4-68.)[44]

In fact, there are many mitigation measures that are readily available to the County to decrease GHG emissions from new development. We are not suggesting that the County must adopt any specific set of mitigation measures, since this is a decision within its discretion. The County is, however, required by law to determine which measures are reasonable and feasible and to implement and enforce those measures. In considering which mitigation measures to implement, the County has many resources available. It can consider, for example, the measures set out in the CAPCOA document referenced above (pp. 79-87 and Appendix B-1), and those set forth in the list on the Attorney General's website[45] (copy attached), and in the comments in the letter of the San Joaquin Valley Unified Air Pollution Control District ("APCD") dated May 26, 2006, included in Appendix A to the Notice of Preparation. All of these sources provide concrete and enforceable recommendations, and address all aspects of project development that have an impact on GHG emissions, including conservation, land use, circulation, housing, open space,

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[43] Pub. Res. Code, § 21081.6, subd. (b); *Federation of Hillside & Canyon Ass'ns, supra,* 83 Cal.App.4th at p. 1261.

[44] The shortcomings of the mitigation discussion is further apparent in the DEIR's discussion of mitigation measures for dairies, which addresses GHG reduction only incidentally in the context of reducing other air pollutants, and which fails to discuss many potentially significant mitigation measures that are available. (DEIR at pp. 4-66 to 4-67.) To take one example, methane digesters, which are increasingly being used on dairies in California, process animal waste under anaerobic conditions, yielding methane gas that is collected on site and can be sold directly to utilities or used to generate electricity, bringing in revenue to the dairy. *See* California Energy Commission, *Dairy Power Production Program, Dairy Methane Digester System 90-Day Evaluation Report, Eden-Vale Dairy,* December 2006 at p. 4; http://cpuc.ca.gov/Final_resolution/68429.htm; http://www.epa.gov/agstar/resources.html; Fresno County Notices of Intention to Adopt a Mitigated Negative Declaration (Unclassified Conditional Use Permits 3215-3218).

[45] http://ag.ca.gov/globalwarming/ceqa.php.

safety, and energy. Other sources discussing mitigation measures are readily available.[46]

Finally, the DEIR states that the County will, at some unspecified future time, develop a GHG Emissions Reduction Plan that parallels requirements adopted by the California Air Resources Board. (DEIR at p. 4-67) While we commend the County for recognizing that such a plan is necessary, this reference to an as yet undeveloped and completely undefined plan cannot serve as mitigation for the project's GHG emissions, since deferring environmental assessment to some future date is counter to CEQA's mandate that environmental review be performed at the earliest stages in the planning project.[47]

We encourage the County to pursue adoption of a GHG Emissions Reduction Plan as part of its General Plan. To constitute effective mitigation, the County should consider including in the Plan a baseline inventory of the GHGs currently being emitted in the County from all sources, projected emissions for target years (e.g., 2020 and beyond), targets for the reduction of those sources of emissions that are consistent with AB 32 and Executive Order #S-03-05, and a suite of feasible emission reduction measures to meet the reduction target(s).[48] An effective plan would also likely include monitoring and reporting requirements so that the County will obtain information on the performance of its plan, and an adaptive management element to ensure that the Plan, once implemented, can be adjusted if necessary to meet the reduction targets.

In sum, given the wealth of resources available describing specific mitigation measures for GHG emissions, it is feasible for the County to develop and impose a set of mitigation measures that will be implemented and enforced as conditions of all future development projects. Since the County has not fully explored the extent to which there are feasible mitigation measures that would substantially reduce the global warming impacts of this project, it has not complied with CEQA.

e. The DEIR Cannot Conclude, Without Fuller Analysis, that GHG Effects are Significant and Unavoidable and Inconsistent with AB 32

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[46] *See, e.g.*, www.gosolarcalifornia.ga.gov/nshp [discussing the California Energy Commissions' New Solar Homes Partnership which provides rebates to developers of six units or more who offer solar power on 50% of the new units]; www.energy.ca.gov/efficiency/lighting/outdoor_reduction.html and www.newbuildings.org/lighting.htm [energy efficient lighting]; www.energy.ca.gov/title24/2005standards/ [feasible green building measures identified by the California Energy Commission's Compliance Manuals]; www.vtpi.org/park_man.pdf [discussion of parking management programs that provide environmental benefits].

[47] Pub.Resources Code, § 21003.1; *Sunstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307 (and cases cited therein).

[48] See the Attorney General's settlement with San Bernardino County, available at http://ag.ca.gov/cms_pdfs/press/2007-08-21_San_Bernardino_settlement_agreement.pdf.

The DEIR concludes that the GHG emissions from the project will be significant and unavoidable. (DEIR at p. 4-68.) In light of the fact that the emissions are not fully quantified, enforceable mitigation measures are not imposed, and the efficacy of any mitigation are not analyzed qualitatively or quantitatively, this conclusion is unsupported and contravenes CEQA.[49]

6. Conclusion

This is a critical time for all of California. Scientists acknowledge that global warming is real. Unless we depart from the "business as usual" paradigm and embrace the new principles of "smart growth," we risk pushing the environment past the "tipping point" into catclysmic climate change. The stakes are too high for Tulare County to abdicate it responsibilities, allowing the market to control the future of the hundreds of thousands of people who currently live and work – and the hundred thousands more who will live and work – in Tulare County. The County, through its General Plan and the CEQA process, has the opportunity, and indeed the duty, to become one of the leaders in planning the future of California. The decisions the County makes today will determine what the County will look like in the coming years and 30 years from now, and they can help move California forward into a new era of development and sustainable growth, consistent with the State's goals for a lower-carbon future.

Thank you for your consideration of these comments. We would appreciate the opportunity meet with County staff to discuss these comments further in an effort to work cooperatively on these issues.

Sincerely,

/S/

SUSAN S. FIERING
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

[49] *See Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1371 [lead agency cannot simply conclude that there are overriding considerations that would justify a significant and unavoidable effect without fully analyzing the effect].

EXHIBIT B

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement ("Agreement") is entered into by and between the City of Stockton ("City"), Edmund G. Brown Jr., Attorney General of California, on behalf of the People of the State of California ("Attorney General"), and the Sierra Club, and it is dated and effective as of the date that the last Party signs ("Effective Date"). The City, the Attorney General, and the Sierra Club are referred to as the "Parties."

RECITALS

On December 11, 2007, the City approved the 2035 General Plan, Infrastructure Studies Project, Bicycle Master Plan, Final Environmental Impact Report ("EIR"), and Statement of Overriding Considerations. The General Plan provides direction to the City when making land use and public service decisions. All specific plans, subdivisions, public works projects, and zoning decisions must be consistent with the City's General Plan. As adopted in final form, the General Plan includes Policy HS-4.20, which requires the City to "adopt new policies, in the form of a new ordinance, resolution, or other type of policy document, that will require new development to reduce its greenhouse gas emissions to the extent feasible in a manner consistent with state legislative policy as set forth in Assembly Bill (AB) 32 (Health & Saf. Code, § 38500 et seq.) and with specific mitigation strategies developed by the California Air Resources Board (CARB) pursuant to AB 32[.]" The policy lists the following "potential mitigation strategies," among others, for the City to consider:

(a) Increased density or intensity of land use, as a means of reducing per capita vehicle miles traveled by increasing pedestrian activities, bicycle usage, and public or private transit usage; and

(b) Increased energy conservation through means such as those described in Appendix F of the State Guidelines for the California Environmental Quality Act.

The 2035 General Plan also includes other Policies and goals calling for infill development, increased transit, smart growth, affordable housing, and downtown revitalization.

In December 2006, in accordance with the requirements of the California Environmental Quality Act ("CEQA"), the City prepared and circulated a Draft EIR. Comments were received on the EIR; the City prepared responses to these comments and certified the EIR in December 2007.

On January 10, 2008, the Sierra Club filed a Petition for Writ of Mandate in San Joaquin County Superior Court (Case No. CV 034405, hereinafter "Sierra Club Action"),

alleging that the City had violated CEQA in its approval of the 2035 General Plan. In this case, the Sierra Club asked the Court, among other things, to issue a writ directing the City to vacate its approval of the 2035 General Plan and its certification of the EIR, and to award petitioners' attorney's fees and costs.

The Attorney General also raised concerns about the adequacy of the EIR under CEQA, including but not limited to the EIR's failure to incorporate enforceable measures to mitigate the greenhouse gas ("GHG") emission impacts that would result from the General Plan.

The City contends that the General Plan and EIR adequately address the need for local governments to reduce greenhouse gas ("GHG") emissions in accordance with Assembly Bill 32, and associated issues of climate change.

Because the outcome of the Parties' dispute is uncertain, and to allow the Stockton General Plan to go forward while still addressing the concerns of the Attorney General and the Sierra Club, the Parties have agreed to resolve their dispute by agreement, without the need for judicial resolution.

The parties want to ensure that the General Plan and the City's implementing actions address GHG reduction in a meaningful and constructive manner. The parties recognize that development on the urban fringe of the City must be carefully balanced with accompanying infill development to be consistent with the state mandate of reducing GHG emissions, since unbalanced development will cause increased driving and increased motor vehicle GHG emissions. Therefore, the parties want to promote balanced development, including adequate infill development, downtown vitalization, affordable housing, and public transportation. In addition, the parties want to ensure that development on the urban fringe is as revenue-neutral to the City as to infrastructure development and the provision of services as possible.

In light of all the above considerations, the Parties agree as follows, recognizing that any legislative actions contemplated by the Agreement require public input and, in some instances, environmental review prior to City Council actions, which shall reflect such input and environmental information, pursuant to State law:

AGREEMENT

Climate Action Plan

1. Within 24 months of the signing of this Agreement, and in furtherance of General Plan Policy HS-4.20 and other General Plan policies and goals, the City agrees that its staff shall prepare and submit for City Council adoption, a Climate Action Plan, either as a separate element of the General Plan or as a component of an existing General Plan element. The Climate Action Plan, whose adoption will be subject to normal requirements for compliance with CEQA and other controlling state law, shall include, at least, the measures set forth in paragraphs 3 through 8, below.

2. The City shall establish a volunteer Climate Action Plan advisory committee to assist the staff in its preparation and implementation of the Plan and other policies or documents to be adopted pursuant to this Agreement. This committee shall monitor the City's compliance with this Agreement, help identify funding sources to implement this Agreement, review in a timely manner all draft plans and policy statements developed in accordance with this Agreement (including studies prepared pursuant to Paragraph 9, below), and make recommendations to the Planning Commission and City Council regarding its review. The committee shall be comprised of one representative from each of the following interests: (1) environmental, (2) non-profit community organization, (3) labor, (4) business, and (5) developer. The committee members shall be selected by the City Council within 120 days of the Effective Date, and shall serve a one-year term, with no term limits. Vacancies shall be filled in accordance with applicable City policies. The City shall use its best efforts to facilitate the committee's work using available staff resources.

3. The Climate Action Plan shall include the following measures relating to GHG inventories and GHG reduction strategies:

a. Inventories from all public and private sources in the City:

(1) Inventory of current GHG emissions as of the Effective Date;

(2) Estimated inventory of 1990 GHG emissions;

(3) Estimated inventory of 2020 GHG emissions.

The parties recognize that techniques for estimating the 1990 and 2020 inventories are imperfect; the City agrees to use its best efforts, consistent with methodologies developed by ICLEI and the California Air Resources

Board, to produce the most accurate and reliable inventories it can without disproportionate or unreasonable staff commitments or expenditures.

b. Specific targets for reductions of the current and projected 2020 GHG emissions inventory from those sources of emissions reasonably attributable to the City's discretionary land use decisions and the City's internal government operations. Targets shall be set in accordance with reduction targets in AB 32, other state laws, or applicable local or regional enactments addressing GHG emissions, and with Air Resources Board regulations and strategies adopted to carry out AB 32, if any, including any local or regional targets for GHG reductions adopted pursuant to AB 32 or other state laws. The City may establish goals beyond 2020, consistent with the laws referenced in this paragraph and based on current science.

c. A goal to reduce per capita vehicle miles traveled ("VMT") attributable to activities in Stockton (i.e., not solely due to through trips that neither originate nor end in Stockton) such that the rate of growth of VMT during the General Plan's time frame does not exceed the rate of population growth during that time frame. In addition, the City shall adopt and carry out a method for monitoring VMT growth, and shall report that information to the City Council at least annually. Policies regarding VMT control and monitoring that the City shall consider for adoption in the General Plan are attached to this Agreement in Exhibit A.

d. Specific and general tools and strategies to reduce the current and projected 2020 GHG inventories and to meet the Plan's targets for GHG reductions by 2020, including but not limited to the measures set out in paragraphs 4 through 8, below.

4. The City agrees to take the following actions with respect to a green building program:

a. Within 12 months of the Effective Date, the City staff shall submit for City Council adoption ordinance(s) that require:

(1) All new housing units to obtain Build It Green certification, based on then-current Build It Green standards, or to comply with a green building program that the City after consultation with the Attorney General, determines is of comparable effectiveness;

(2) All new non-residential buildings that exceed 5000 square feet and all new municipal buildings that exceed 5000 square feet to be certified to LEED Silver standards at a minimum, based on the then-current LEED standards, or to comply with a green building program that the City, after consultation with the Attorney General, determines is of comparable effectiveness;

(3) If housing units or non-residential buildings certify to standards other than, but of comparable effectiveness to, Build It Green or LEED Silver, respectively, such housing units or buildings shall demonstrate, using an outside inspector or verifier certified under the California Energy Commission Home Energy Rating System (HERS), or a comparably certified verifier, that they comply with the applicable standards.

(4) The ordinances proposed for adoption pursuant to paragraphs (1) through (3) above may include an appropriate implementation schedule, which, among other things, may provide that LEED Silver requirements (or standards of comparable effectiveness) for non-residential buildings will be implemented first for buildings that exceed 20,000 square feet, and later for non-residential buildings that are less than 20,000 and more than 5,000 square feet.

(5) Nothing in this section shall affect the City's obligation to comply with applicable provisions of state law, including the California Green Building Standards Code (Part 11 of Title 24 of the California Code of Regulations), which, at section 101.7, provides, among other things, that "local government entities retain their discretion to exceed the standards established by [the California Green Building Standards Code]."

b. Within 18 months of the Effective Date, the City staff shall submit for City Council adoption ordinance(s) that will require the reduction of the GHG emissions of existing housing units on any occasion when a permit to make substantial modifications to an existing housing unit is issued by the City.

c. The City shall explore the possibility of creating a local assessment district or other financing mechanism to fund voluntary actions by owners of commercial and residential buildings to undertake energy efficiency

measures, install solar rooftop panels, install "cool" (highly reflective) roofs, and take other measures to reduce GHG emissions.

d. The City shall also explore the possibility of requiring GHG-reducing retrofits on existing sources of GHG emissions as potential mitigation measures in CEQA processes.

e. From time to time, but at least every five years, the City shall review its green building requirements for residential, municipal and commercial buildings, and update them to ensure that they achieve performance objectives consistent with those achieved by the top (best-performing) 25% of city green building measures in the state.

5. Within 12 months of the Effective Date, the City staff shall submit for City Council adoption a transit program, based upon a transit gap study. The transit gap study shall include measures to support transit services and operations, including any ordinances or general plan amendments needed to implement the transit program. These measures shall include, but not be limited to, the measures set forth in paragraphs 5.b. through 5.d. In addition, the City shall consider for adoption as part of the transit program the policy and implementation measures regarding the development of Bus Rapid Transit ("BRT") that are attached to this Agreement in Exhibit B.

a. The transit gap study, which may be coordinated with studies conducted by local and regional transportation agencies, shall analyze, among other things, strategies for increasing transit usage in the City, and shall identify funding sources for BRT and other transit, in order to reduce per capita VMT throughout the City. The study shall be commenced within 120 days of the Effective Date.

b. Any housing or other development projects that are (1) subject to a specific plan or master development plan, as those terms are defined in §§ 16-540 and 16-560 of the Stockton Municipal Code as of the Effective Date (hereafter "SP" or "MDP"), or (2) projects of statewide, regional, or areawide significance, as defined by the CEQA Guidelines (hereafter "projects of significance"), shall be configured, and shall include necessary street design standards, to allow the entire development to be internally accessible by vehicles, transit, bicycles, and pedestrians, and to allow access to adjacent neighborhoods and developments by all such modes of transportation.

c. Any housing or other development projects that are (1) subject to an SP or MDP, or (2) projects of significance, shall provide financial and/or other

support for transit use. The imposition of fees shall be sufficient to cover the development's fair share of the transit system and to fairly contribute to the achievement of the overall VMT goals of the Climate Action Plan, in accordance with the transit gap study and the Mitigation Fee Act (Government Code section 66000, *et seq.*), and taking into account the location and type of development. Additional measures to support transit use may include dedication of land for transit corridors, dedication of land for transit stops, or fees to support commute service to distant employment centers the development is expected to serve, such as the East Bay. Nothing in this Agreement precludes the City and a landowner/applicant from entering in an agreement for additional funding for BRT.

d. Any housing or other development projects that are (1) subject to an SP or MDP or (2) projects of significance, must be of sufficient density overall to support the feasible operation of transit, such density to be determined by the City in consultation with San Joaquin Regional Transit District officials.

6. To ensure that the City's development does not undermine the policies that support infill and downtown development, within 12 months of the Effective Date, the City staff shall submit for City Council adoption policies or programs in its General Plan that:

a. Require at least 4400 units of Stockton's new housing growth to be located in Greater Downtown Stockton (defined as land generally bordered by Harding Way, Charter Way (MLK), Pershing Avenue, and Wilson Way), with the goal of approving 3,000 of these units by 2020.

b. Require at least an additional 14,000 of Stockton's new housing units to be located within the City limits as they exist on the Effective Date ("existing City limits").

c. Provide incentives to promote infill development in Greater Downtown Stockton, including but not limited to the following for proposed infill developments: reduced impact fees, including any fees referenced in paragraph 7 below; lower permit fees; less restrictive height limits; less restrictive setback requirements; less restrictive parking requirements; subsidies; and a streamlined permitting process.

d. Provide incentives for infill development within the existing City limits but outside Greater Downtown Stockton and excluding projects of significance. These incentives may be less aggressive than those referenced in paragraph 6.c., above.

7. Within 12 months of the Effective Date, the City staff shall submit for City Council adoption amendments to the General Plan to ensure that development at the City's outskirts, particularly residential, village or mixed use development, does not grow in a manner that is out of balance with development of infill. These proposed amendments shall include, but not be limited to, measures limiting the granting of entitlements for development projects outside the existing City limits and which are (1) subject to an SP or MDP, or (2) projects of significance, until certain criteria are met. These criteria shall include, at a minimum:

a. Minimum levels of transportation efficiency, transit availability (including BRT) and Level of Service, as defined by the San Joaquin Council of Government regulations, City service capacity, water availability, and other urban services performance measures;

b. Firm, effective milestones that will assure that specified levels of infill development, jobs-housing balance goals, and GHG and VMT reduction goals, once established, are met before new entitlements can be granted;

c. Impact fees on new development, or alternative financing mechanisms identified in a project's Fiscal Impact Analysis and/or Public Facilities Financing Plan, that will ensure that the levels and milestones referenced in paragraphs 7.a. and 7.b., above, are met. Any such fees:

(1) shall be structured, in accordance with controlling law, to ensure that all development outside the infill areas within existing City limits is revenue-neutral to the City (which may necessitate higher fees for development outside this area, depending upon the costs of extending infrastructure);

(2) may be in addition to mitigation measures required under CEQA;

(3) shall be based upon a Fiscal Impact Analysis and a Public Facilities Financing Plan.

d. The City shall explore the feasibility of enhancing the financial viability of infill development in Greater Downtown Stockton, through the use of such mechanisms as an infill mitigation bank.

8. The City shall regularly monitor the above strategies and measures to ensure that they are effectively reducing GHG emissions. In addition to the City staff reporting on VMT annually, as provided in paragraph 3.c., the City staff or the advisory committee shall report annually to the City Council on the City's progress in implementing the

strategies and measures of this Agreement. If it appears that the strategies and measures will not result in the City meeting its GHG reduction targets, the City shall, in consultation with the Attorney General and Sierra Club, make appropriate modifications and, if necessary, adopt additional measures to meet its targets.

Early Climate Protection Actions

9. To more fully carry out those provisions of the General Plan, including the policy commitments embodied in those General Plan Policies, such as General Plan Policy HS-4.20, intended to reduce greenhouse gas emissions through reducing commuting distances, supporting transit, increasing the use of alternative vehicle fuels, increasing efficient use of energy, and minimizing air pollution, and to avoid compromising the effectiveness of the measures in Paragraphs 4 through 8, above, until such time as the City formally adopts the Climate Action Plan, before granting approvals for development projects (1) subject to an SP or MDP, or (2) considered projects of significance, and any corresponding development agreements, the City shall take the steps set forth in subsections (a) through (d) below:

(a) City staff shall:

(1) formulate proposed measures necessary for the project to meet any applicable GHG reduction targets;

(2) assess the project's VMT and formulate proposed measures that would reduce the project's VMT;

(3) assess the transit, especially BRT, needs of the project and identify the project's proposed fair share of the cost of meeting such needs;

(4) assess whether project densities support transit, and, if not, identify proposed increases in project density that would support transit service, including BRT service;

(5) assess the project's estimated energy consumption, and identify proposed measures to ensure that the project conserves energy and uses energy efficiently;

(6) formulate proposed measures to ensure that the project is consistent with a balance of growth between land within Greater Downtown Stockton and existing City limits, and land outside the existing City limits;

(7) formulate proposed measures to ensure that City services and infrastructure are in place or will be in place prior to the issuance of new entitlements for the project or will be available at the time of development; and

(8) formulate proposed measures to ensure that the project is configured to allow the entire development to be internally accessible by all modes of transportation.

(b) The City Council shall review and consider the studies and recommendations of City staff required by paragraph 9(a) and conduct at least one public hearing thereon prior to approval of the proposed project (though this hearing may be folded into the hearing on the merits of the project itself).

(c) The City Council shall consider the feasibility of imposing conditions of approval, including mitigation measures pursuant to CEQA, based on the studies and recommendations of City staff prepared pursuant to paragraph 9(a) for each covered development project.

(d) The City Council shall consider including in any development approvals, or development agreements, that the City grants or enters into during the time the City is developing the Climate Action Plan, a requirement that all such approvals and development agreements shall be subject to ordinances and enactments adopted after the effective date of any approvals of such projects or corresponding development agreements, where such ordinances and enactments are part of the Climate Action Plan.

(e) The City shall complete the process described in paragraphs (a) through (d) (hereinafter, "Climate Impact Study Process") prior to the first discretionary approval for a development project. Notwithstanding the foregoing, however, for projects for which a draft environmental impact report has circulated as of the Effective Date, the applicant may request that the City either (i) conduct the Climate Impact Study Process or (ii) complete its consideration of the Climate Action Plan prior to the adoption of the final discretionary approval leading to the project's first phase of construction. In such cases, the applicant making the request shall agree that nothing in the discretionary approvals issued prior to the final discretionary approval (i) precludes the City from imposing on the project conditions of approvals or other measures that may result from the Climate Impact Study Process, or (ii) insulates the project from a decision, if any, by the City to apply any ordinances and/ or enactments that may comprise the Climate Action Plan

ultimately adopted by the City.

Attorney General Commitments

10. The Attorney General enters into this Agreement in his independent capacity and not on behalf of any other state agency, commission, or board. In return for the above commitments made by the City, the Attorney General agrees:

a. To refrain from initiating, joining, or filing any brief in any legal challenge to the General Plan adopted on December 11, 2007;

b. To consult with the City and attempt in good faith to reach an agreement as to any future development project whose CEQA compliance the Attorney General considers inadequate. In making this commitment, the Attorney General does not surrender his right and duties under the California Constitution and the Government Code to enforce CEQA as to any proposed development project, nor his duty to represent any state agency as to any project;

c. To make a good faith effort to assist the City in obtaining funding for the development of the Climate Action Plan.

Sierra Club Commitments

11. The Sierra Club agrees to dismiss the Sierra Club Action with prejudice within ten (10) days of the Effective Date. Notwithstanding the foregoing agreement to dismiss the Sierra Club Action, the City and Sierra Club agree that, in the event the City should use the EIR for the 2035 General Plan in connection with any other project approval, the Sierra Club has not waived its right (a) to comment upon the adequacy of that EIR, or (b) to file any action challenging the City's approval of any other project based on its use and/or certification of the EIR.

General Terms and Conditions

12. This Agreement represents the entire agreement of the Parties, and supercedes any prior written or oral representations or agreements of the Parties relating to the subject matter of this Agreement.

13. No modification of this Agreement will be effective unless it is set forth in writing and signed by an authorized representative of each Party.

14. Each Party warrants that it has the authority to execute this Agreement. Each Party warrants that it has given all necessary notices and has obtained all necessary consents to permit it to enter into and execute this Agreement.

15. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

16. This Agreement may be executed in counterparts, each of which shall be deemed an original. This Agreement will be binding upon the receipt of original, facsimile, or electronically communicated signatures.

17. This Agreement has been jointly drafted, and the general rule that it be construed against the drafting party is not applicable.

18. If a court should find any term, covenant, or condition of this Agreement to be invalid or unenforceable, the remainder of the Agreement shall remain in full force and effect.

19. The City agrees to indemnify and defend the Sierra Club, its officers and agents (collectively, "Club") from any claim, action or proceeding ("Proceeding") brought against the Club, whether as defendant/respondent, real party in interest, or in any other capacity, to challenge or set aside this Agreement. This indemnification shall include (a) any damages, fees, or costs awarded against the Club, and (b) any costs of suit, attorneys' fees or expenses incurred in connection with the Proceeding, whether incurred by the Club, the City or the parties bringing such Proceeding. If the Proceeding is brought against both the Club and the City, the Club agrees that it may be defended by counsel for the City, provided that the City selects counsel that is acceptable to the Club; the Club may not unreasonably withhold its approval of such mutual defense counsel.

20. The City shall pay Sierra Club's attorney's fees and costs in the amount of $157,000 to the law firm of Shute, Mihaly & Weinberger LLP as follows: $50,000 within 15 days of dismissal of the Sierra Club Action, and (b) the balance on or before January 30, 2009.

21. Any notice given under this Agreement shall be in writing and shall be delivered as follows with notice deemed given as indicated: (a) by personal delivery when delivered personally; (b) by overnight courier upon written verification of receipt; or (c) by certified or registered mail, return receipt requested, upon verification of receipt. Notice shall be sent as set forth below, or as either party may specify in writing:

City of Stockton: Attorney General's Office

Richard E. Nosky, City Attorney
425 N. El Dorado Street, 2nd Floor
Stockton, CA 95202

Lisa Trankley
Susan Durbin
Deputy Attorneys General
1300 I Street, P.O. Box 944255
Sacramento, CA 94255-2550

Sierra Club:
Aaron Isherwood
Environmental Law Program
85 Second Street, 2nd Floor
San Francisco, CA 94105

Rachel Hooper
Amy Bricker
Shute, Mihaly & Weinberger
396 Hayes Street
San Francisco, CA 94102

22. Nothing in this Agreement shall be construed as requiring the City to relinquish or delegate its land use authority or police power.

(SIGNATURES ON FOLLOWING PAGE)

In witness whereof, this Agreement is executed by the following:

PEOPLE OF THE STATE OF CALIFORNIA
BY AND THROUGH ATTORNEY GENERAL
EDMUND G. BROWN JR.

Lisa Trankley

DATED: 10/14/08

ATTEST:

KATHERINE GONG MEISSNER
City Clerk of the City of Stockton

CITY OF STOCKTON,
a municipal corporation

J. GORDON PALMER, JR.
City Manager

DATED 9/25/08

APPROVED AS TO FORM:

RICHARD E. NOSKY, JR.
City Attorney

DATED 9-9-08

THE SIERRA CLUB

BARBARA WILLIAMS, CHAIR
MOTHER LODE CHAPTER

DATED _____

In witness whereof, this Agreement is executed by the following:

PEOPLE OF THE STATE OF CALIFORNIA
BY AND THROUGH ATTORNEY GENERAL
EDMUND G. BROWN JR.

_____

DATED: _____

ATTEST:

_____
KATHERINE GONG MEISSNER
City Clerk of the City of Stockton

APPROVED AS TO FORM:

_____
RICHARD E. NOSKY, JR.
City Attorney

DATED _____

CITY OF STOCKTON,
a municipal corporation

_____
J. GORDON PALMER, JR.
City Manager

DATED _____

THE SIERRA CLUB

Barbara Williams
BARBARA WILLIAMS, CHAIR
MOTHER LODE CHAPTER

DATED 10/11/08

EXHIBIT A

Policy Re: VMT Monitoring Program

The City's policy is to monitor key City-maintained roadways to estimate Vehicle Miles Traveled (VMT) by single-occupant automobile per capita on an annual basis, to be submitted as an annual report to the City Council. The estimate of citywide VMT should be developed in cooperation with the San Joaquin Council of Governments (**"**SJCOG**"**), by augmenting local City data with VMT estimates from SJCOG and Caltrans for the regional Congestion Management Plan network. The estimated change in annual VMT should be used to measure the effectiveness of jobs/housing balance, greenhouse gas emission reduction, and transit plans and programs.

Implementation Program

In order to develop an annual estimate of citywide VMT, the City should augment local City data with VMT estimates from SJCOG and Caltrans for regional facilities, or adopt other methodologies to estimate citywide VMT that are approved in concept by the two agencies. For purposes of calculating annual changes in VMT, the annual estimate of VMT should subtract out the estimates of regional truck and other through traffic on the major freeways (I-5, SR 4, SR 99).

Policy Re: Reduce Growth in VMT

The City's policy is to achieve the following fundamental goals to regulate vehicle emissions and reduce greenhouse gas emissions, improve jobs/housing balance, and increase transit usage over the duration of this General Plan: Reduce the projected increase in VMT by single-occupant automobile per capita to an annual rate over the planning period that is equal to or less than the population increase (this goal is also required for the City to receive funding through the Measure K/Congestion Management Plan program).

Implementation Program

In order to keep annual increases in VMT to a rate equal to or less than population increases, the following trip reduction programs should be considered by the City: increased transit service (Bus Rapid Transit) funded through new development fees; planning all future housing development to be in the closest possible proximity to existing and planned employment centers; provision of affordable housing; creation of higher density, mixed use and walkable communities and development of bicycle and pedestrian trails; and other proven programs.

Implementation Program

If the City goal of reducing the projected increase in VMT to an amount equal to or less than the population increase, and increase transit usage, is not met for two or more years during each five-year cycle of VMT monitoring, the City should consider adoption of the following programs, among others:

Adopt more vigorous economic development programs with funding for staff; and

Slow the rate of approvals of building permits for housing developments.

EXHIBIT B

Policy Re: Bus Rapid Transit

The City's policy is to vigorously support efforts to develop Bus Rapid Transit (BRT) within and beyond Stockton as a major priority of its General Plan, in order to increase overall transit usage over time. Based on an updated transit study, the City should plan for and provide BRT service running along key north-south routes as a first priority: Pacific Avenue; El Dorado Street; West Lane/Airport Way; Pershing Avenue. BRT service along key east-west corridors should also be provided. Transit use goals should be approved and monitored by the City over the planning period.

Implementation Program

In order to fund the initial capital and operating costs for BRT along major north-south arterials, the City should consider adoption of a comprehensive new development BRT fee program that requires new growth to significantly fund BRT, following a study consistent with the requirements of State law. The new development BRT fee program should ensure that "greenfield" projects approved at the fringe of the City pay a fee that represents the full cost of providing BRT service to the new housing; infill development may be granted a reduced BRT fee based on the reduced distance of service provided to the inner city areas.

Implementation Program

In order to augment the new development funding of the initial capital and operating costs for BRT, the City should strongly advocate for Measure K funding and should seriously consider placing an initiative on the ballot to receive voter approval for additional funding from existing residents and businesses.

Implementation Program

The City should establish transit use goals that set specific targets (e.g., transit mode split percentage of total trips and bus headways) that represent an increase in public transportation ridership and level of service over current levels by 2012 and then another increase by 2018.

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TULARE COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

Sierra Club, Petitioner, and City of Tulare, et. al., Respondents.	Case No.: 08 - 228122 Order Granting Petition in Part For Writ of Mandate

This matter came on regularly for hearing on February 11, 2009 in Department 6 of the Tulare Superior Court, located at 221 S. Mooney Blvd., Visalia, California, the Honorable Patrick J. O'Hara presiding. Kara K. Ueda appeared on behalf of the Respondent, City of Tulare. Petitioner, Don Manro appeared on his own behalf. Babak Naficy appeared on behalf of Petitioner, the Sierra Club.

This case was consolidated with Manro v. City of Tulare, et. al., case no. 08-228094 as both cases challenge the validity of Resolution No. 08-13 of the City of Tulare (City) adopting Findings, A Statement of Overriding Considerations, and Certifying a final programmatic environmental impact report (EIR) in connection with its adoption of Resolution No. 8-14, approving the 2030 General Plan Update (GPU), specifically revising the land use, circulation, and conservation elements of the general plan.

The court having reviewed the record of the proceedings in this matter, the briefs

submitted by counsel, and the arguments of counsel, and the matter having been submitted for decision, the Court finds that Resolution No. 08-13 of the City of Tulare (City) adopting Findings, A Statement of Overriding Considerations, and Certifying a final programmatic environmental impact report (EIR) in connection with its adoption of Resolution NO. 8-14, approving the 2030 General Plan Update (GPU), specifically revising the land use, circulation, and conservation elements of the general plan, fails to comply with the provisions of the California Environmental Quality Act on certain issues as presented herein.

PROCEDURAL STATUS

Petitioners argue that the City violated the California Environmental Quality Act (CEQA); Mr. Manro concurs and also brings this action under the Planning and Zoning Law, Division 1 of Title 7 of the Government Code, section 65000, et. seq.

Only parties who objected to the agency's approval of the project either orally or in writing may thereafter file a petition. (CEQA Guideline § 21177(b)). A petitioner who has standing to sue may litigate issues raised by others. (Guideline § 21177(a)). Both Petitioners objected to the agency's approval of the project, and have standing to sue, and may litigate any issued raised by others.

After the court issued its tentative ruling, in which the court analyzed the two petitions together and in sequence of the parties' arguments in their opening briefs, the City asked for separate judgments. Therefore, the court complies with the City's request, and issues this ruling on the Sierra Club's Petition, and a separate ruling on Mr. Manro's Petition.

However, in doing so, the court adopts a different format. The parties' briefs addressed different issues rather than following the outline of the petitions as to each cause of action, thus the court followed that format in its tentative. Now the court's analysis will address each cause of action as presented in the petitions, as the pleadings control.

The Administrative Record

The parties lodged the administrative record, and then prepared their briefs. No one at that point evidently had any argument with the administrative record, and thus the court

considered it agreed upon to be final and complete.

However, at the first hearing of this matter, Petitioner, the Sierra Club made an oral motion to augment the record by admitting the declaration of Dr. Gordon Nipp.

Sierra Club acknowledged that normally only the administrative record is available for review in CEQA but requested Dr. Nipp's declaration be admitted as to Respondent's affirmative defense of Sierra's failure to exhaust its administrative remedies, which Sierra Club argued is an exception to the general rule. Petitioner cited to footnote 5 in Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 575 (Cal. 1995), which provides as follows:

> "n5 These commentators propose several limited exceptions to the general rule excluding extra-record evidence in traditional mandamus actions challenging quasi-legislative administrative decisions. Specifically, they suggest that courts should admit evidence relevant to (1) issues other than the validity of the agency's quasi-legislative decision, such as the petitioner's standing and capacity to sue, (2) affirmative defenses such as laches, estoppel and res judicata, (3) the accuracy of the administrative record, (4) procedural unfairness, and (5) agency misconduct. (Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, op. cit. supra, § 23.55, pp. 967-968.) Because none of these exceptions apply to the case at bar, we need not consider them."

The City did not object to the declaration of Dr. Nipp being admitted so long as the declaration of Lucy Sylvester was also admitted on their oral motion. Sierra Club moved to strike Ms. Sylvester's declaration but provided no authority for doing so, and no explanation as to why Mr. Nipp's declaration should be admitted and not Ms. Sylvester's (which was only submitted to counter the allegations in Mr. Nipp's declaration). However, at the second oral argument Sierra Club objected "on the basis that it contradicts the city's certification earlier of the record that does not include the documents that they now try to use to augment it." In any event, the declarations go to the fact of whether or not Sierra Club was given direct notice of the Final EIR (FEIR) in time to comment on the FEIR's failure to adequately describe the existing environmental setting with respect to biological resources and, that as a consequence, the biological impacts are deficient. Sierra Club argued that since they did not get notice of the Final EIR in time to comment, they have standing to bring this issue before the court. Sierra Club did not argue that it, or anyone, had presented this issue during the comment period on the draft EIR.

Sierra only raised it after the City certified the FEIR.

On Sierra's oral motion to admit the declaration of Dr. Nipp, the court finds an exception to the general rule and grants the motion. On Respondent City of Tulare's oral motion to admit Lucy Sylvester's declaration if Dr. Nipp's declaration was granted, the court grants the motion, and thus, denies Sierra Club's motion to strike Lucy Sylvester's declaration. Having admitted these declarations, the court considers the administrative record to be final and complete.

Having admitted the declarations, the court finds that it does not help Sierra. Sierra Club argues that the public was not properly notified of the availability of the Final EIR, and thus the City cannot legitimately complain that Sierra Club failed to exhaust its administrative remedies relative to issues raised for the first time in the Final EIR, citing to Endangered Habitats League, Inc. v. State Water Resources Control Board (1997) 63 Cal.App.4th 227.

However, the City is not required to submit the Final EIR for public review but may do so in its discretion. (14 Cal Code Regs 14089(b)). CEQA requires public review only at the draft EIR stage. (Public Resources Code § 21092). Endangered Habitats League, Inc., supra, is distinguishable, as its discussion of the exhaustion doctrine refers to where an effective administrative remedy is wholly lacking. In that case, when the master drainage plan was originally filed in 1986, it alluded to further environmental review, which was never done. The county gave no notice and provided no opportunity to be heard on the question of implementation, which was the second tier of environmental review.

Therefore, as to the City's argument that Sierra Club did not exhaust its administrative remedies as to the biological impacts, the court finds that Petitioner Sierra Club did not exhaust on that issue and is thus barred from raising it as an issue in this review.

But even if the Sierra Club had raised the specific issue of the draft EIR's failure to adequately describe the existing environmental setting with respect to biological resources at the public hearings, the City's citation to the administrative record at pages 448-450 (AR: 448-450) and Appendix F, AR: 1335, supports with substantial evidence that the draft EIR considered the existing biological setting sufficient for a GPU. A GPU is broad in scope and more environmental review will be required for each specific project within the GPU.

STANDARD OF REVIEW

The court finds Public Resources Code § 21168.5 sets forth the standard of review in this case. Under section 21168.5, judicial review "extends only to whether there was a prejudicial abuse of discretion." An abuse of discretion is established "if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Laurel Heights Improvement Assn. v. Regents of the University of California (1988) 47 Cal. 3d 376, 392 (Laurel Heights I).) As a result of this standard, "The court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." (County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185, 189 [139 Cal.Rptr. 396].)

"An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and consider meaningfully the issues raised by the proposed project." (Laurel Heights Improvement Assn. v. Regents of the University of California (1988) 47 Cal. 3d 376, 405 (Laurel Heights I)). "[N]oncompliance with the information disclosure provisions. . . which precludes relevant information from being presented. . . may constitute a prejudicial abuse of discretion. . . regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (Public Resources Code § 21005(a)). The trial court may not exercise its independent judgment on the omitted material by determining whether the ultimate decision of the lead agency would have been affected had the law been followed. (Rural Land Owners Association v. City Council (1983) 143 Cal. App. 3d 1013, 1023).

The court must presume the agency complied with the law and petitioners bear the burden of proving otherwise. (Save Our Peninsula Committee v. Monterey County Board of Supervisors (2001) 87 Cal. App. 4th 99, 117). "CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive." (Dry Creek Citizens Coalition v. County of Tulare (1977) 70 Cal. App. 4th 20, 26, citing CEQA Guidelines, § 15151).

"The substantial evidence standard is applied to conclusions, findings and determinations. It also applies to challenges to the scope of an EIR's analysis of a topic, the methodology used

for studying an impact; and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions." (Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal. App. 4th 1184, 1198).

DISCUSSION

Sierra Club makes multiple arguments as to the City's failure to comply with CEQA. Thus, the court reviews the administrative record to see if a prejudicial abuse of discretion is established because the City has not proceed in a manner required by law, or if the determination or decision is not supported by substantial evidence.

I. Sierra Club's First Cause of Action is "Failure to Impose Adequate Mitigation Measures to Address Significant Adverse Environmental Impacts."

Sierra Club alleges the mitigation measures are inadequate as to: (1) agricultural resources; (2) aesthetics; (3) air quality; (4) biological resources. Sierra Club only presented argument in its brief as to issue 1, agricultural resources, and global climate change, which was addressed in its petition under issue 3, air quality. The court has found Sierra Club is precluded from raising issue 4, biological resources for failure to exhaust its administrative remedies. Thus, the court only addresses mitigation issues as to agricultural resources and global climate change.

First, the City argues that Sierra Club did not exhaust their administrative remedies as to the argument regarding mitigation measures as to agricultural conversion and global warming. However, these issues were raised in the public hearings on the draft EIR as the City responded to Sierra Club's comments on these issues in the FEIR. The City complains that after it responded to Sierra Club in the FEIR that Sierra Club did not comment further that the City's responses were inadequate before the adoption of the FEIR. Thus, the City argues Sierra Club is precluded from bringing these arguments now as no one raised them before the public agency before its adoption of the FEIR. Sierra Club argues that it is not required to comment on the FEIR so long as it had previously raised the issue sufficiently for the City to be aware of the deficiency.

The court finds that this argument also goes to the sufficiency of the responses to comments

in the FEIR (Sierra Club's Fifth Cause of Action). The court finds that Sierra Club exhausted on these issues as it raised them sufficiently in the comment period on the draft EIR, and is not barred from raising them herein.

In the FEIR the City adopted mitigation Policy COS -3.12 and 3.13 in response to Sierra Club's comments. Sierra Club argues these mitigation measures are inadequate as a matter of law, and did not adequately respond to their comments as to a standard for mitigation regarding the ratio of agricultural resources.

The City admits that it was required to identify feasible and "fully enforceable" mitigation measures. However, the city ignores CEQA's prohibition against deferral of the formulation measures unless it can be shown that practical considerations prevent formulation of mitigation measures, in which case the agency can satisfy CEQA by (1) committing to eventually devising such measures, **and** (2) articulate specific performance criteria at the time of project approval. (San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App.4th 645, 670).

The proposed agricultural policies set forth in Conservation and Open Space (COS) -3.12 and 3.13 fail under this standard in part because they do not include "specific performance criteria. In this context, the essential missing specific performance criteria is the relationship (i.e. the ratio) between the number of farmland acres converted and the number of acres that must be set aside. Therefore, there is no mandatory ratio to guide future development.

Sierra Club commented that the City should adopt a ratio and the City did not adequately respond to this comment. Responses should explain rejections of the commentors' proposed mitigations and alternatives. Evasive, conclusory responses and mere excuses are not legally sufficient. (Cleary v. County of Stanislaus (1981) 118 Cal.App.3rd 348, 355-360, (failure to adequately respond to any significant public comment is an abuse of discretion); Guidelines §15088(b)).

The center-piece of the City's global warming mitigation measures is policy COS-7.2, pursuant to which, the City hopes to develop a plan ("Plan") to identify and reduce Green House Gases (GHG) emissions. The FEIR hopefully promises that the Plan will explain how the City will inventory GHG emissions, establish GHG levels in 1990 and 2020, and "set a target for the

reduction of emissions attributable to the City's discretionary land use decisions and its own internal government operations." AR 3:747. COS-7.2 is an inadequate mitigation measure because it impermissibly defers the formulation of mitigation measure and does not include any specific performance criteria. (San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App.4th 645, 670).

The court agrees with Sierra Club that the City failed to impose adequate mitigation measures to address significant adverse environmental impacts as to agricultural resources and global climate change. This is a failure to proceed in the manner required by law and is a prejudicial abuse of discretion. In each case, the City made a finding that the significant adverse impact was "unavoidable" despite the proposed mitigation measures. The City's findings, that these impacts are "unavoidable," are not supported by substantial evidence because feasible mitigation measures exist, and were suggested to the City that could reduce the significance of these environmental impacts. The City's responses to Sierra Club's comments as to the mitigation measures were insufficient. It was a failure to proceed in the manner required by law and a prejudicial abuse of discretion.

The court issues the Writ of Mandate setting aside the City's approval of the GPU and the certification of the Final EIR as to the City's failure to adequately impose mitigation measures as to the issues of agricultural resources and global climate change, and orders the City to comply with CEQA.

II. Sierra Club's Second Cause of Action is "Failure to Adequately Analyze Project Impacts on Water Supplies."

The court agrees with Sierra Club. Although the City relies exclusively on a groundwater basin that is in overdraft, the EIR found that the City's water supplies could adequately support the projected population increase under the Update without exacerbating the overdraft. AR 2:310-315. To reach this conclusion, the EIR relies exclusively on a draft Urban Water Management Plan (UWMP) and a poorly defined groundwater recharge program. AR 3:315.

Our Supreme Court set forth the necessary criteria for discussion as to impacts on water

supplies in a proper EIR in Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 432, as follows:

> "First, CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed land use project. Decision makers must, under the law, be presented with sufficient facts to "evaluate the pros and cons of supplying the amount of water that the [project] will need." (Santiago County Water Dist. v. County of Orange, supra, 118 Cal. App. 3d at p. 829.) Second, an adequate environmental impact analysis for a large project, to be built and occupied over a number of years, cannot be limited to the water supply for the first stage or the first few years. While proper tiering of environmental review allows an agency to defer analysis of certain details of later phases of long-term linked or complex projects until those phases are up for approval, CEQA's demand for meaningful information "is not satisfied by simply stating information will be provided in the future." (Santa Clarita, supra, 106 Cal.App.4th at p. 723.) As the CEQA Guidelines explain: "Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration." (Cal. Code Regs., tit. 14, § 15152, subd. (b).) Tiering is properly used to defer analysis of environmental impacts and mitigation measures to later phases when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases. For example, to evaluate or formulate mitigation for "site specific effects such as aesthetics or parking" (id., § 15152 [Discussion]) may be impractical when an entire large project is first approved; under some circumstances analysis of such impacts might be deferred to a later-tier EIR. But the future water sources for a large land use project and the impacts of exploiting those sources are not the type of information that can be deferred for future analysis. An EIR evaluating a planned land use project must assume that all phases of the project will eventually be built and will need water, and must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project. (Stanislaus Natural Heritage, supra, 48 Cal.App.4th at p. 206.) Third, the future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations ("paper water") are insufficient bases for decision making under CEQA. (Santa Clarita, supra, 106 Cal.App.4th at pp. 720–723.) An EIR for a land use project must address the impacts of likely future water sources, and the EIR's discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water's availability. (California Oak, supra, 133 Cal.App.4th at p. 1244.) Finally, where, despite a full discussion, it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies. (Napa Citizens, supra, 91 Cal.App.4th at p. 373.) The law's informational demands may not be met, in this context, simply by providing that future

development will not proceed if the anticipated water supply fails to materialize. But when an EIR makes a sincere and reasoned attempt to analyze the water sources the project is likely to use, but acknowledges the remaining uncertainty, a measure for curtailing development if the intended sources fail to materialize may play a role in the impact analysis. (See id. at p. 374.)."

The City's EIR does not adequately analyze project impacts on the water supply as it does not comply with the criteria as set forth in Vineyard. The City's reliance on 12,500 Acre Foot per Year (AFY) surface water deliveries from the Tulare Irrigation District (TID) is misplaced and inadequately explained. The City was required to identify alternatives to this potential supply because the future availability of this water cannot be confidently determined. The EIR did not offer any analysis or facts to show that this water will actually materialize. The only evidence the City offered is that once, in 2006, the City was able to purchase 11,000 acre feet. This is not substantial evidence. CEQA requires evidence and analysis to support the conclusion that water supplies will materialize. The EIR violates CEQA because the conclusion that sufficient surplus surface water supplies will be available to TID for purchase by the City is not supported by substantial evidence. This is a prejudicial abuse of discretion.

The court issues the Writ of Mandate setting aside the City's approval of the GPU and the certification of the Final EIR as to the City's failure to adequately analyze the project impacts on water supplies, and orders the City to comply with CEQA.

III. Sierra Club's Third Cause of Action is "Violation of Water Code §10910, et. seq.: Failure to Prepare a Water Supply Assessment."

This cause of action was not argued in Sierra Club's brief; therefore the court determines that Sierra Club abandoned this argument.

IV. Sierra Club's Fourth Cause of Action is "Inadequate Alternatives Analysis."

The court agrees with Sierra Club that the City failed to discuss a reasonable range of alternatives. CEQA requires that "The alternatives shall be limited to ones that would avoid or substantially lessen any of the significant effects of the project." (Guidelines, sec. 15126.6, subd. (f)) The EIR must compare the merits of each feasible alternative and explain in some detail how the alternatives were selected. (Guidelines, sec. 15126.6). Significantly, the discussion of

alternatives must include sufficient information about each alternative to allow evaluation and comparison of alternatives to the Project. (Guidelines, sec. 15126.6(d)); Association of Irritated Citizens v. County of Madera (2003) 207 Cal.App.4th 1383, 1400).

There is no project alternative that would require less conversion of farmland or a reduced population scenario. None of the alternatives, other than the no project alternative, provide a scenario that might substantially reduce any of the significant effects of the Project. The range of alternatives is, therefore, unreasonably narrow. This is a failure to proceed in the manner required by law. Additionally, the City's adoption of alternative 1 is not supported by substantial evidence. Both of these constitute a prejudicial abuse of discretion.

However, as to Sierra Club's argument that the City should have adopted Alternative 4, not alternative 1, the court disagrees. The court's role does not include reweighing the evidence that was before the agency. The court may not substitute its judgment for that of the people and their local representatives and may not set aside an agency's certification of an EIR "on the ground that an opposite conclusion would have been equally or more reasonable." (Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 564).

The court issues the Writ of Mandate setting aside the City's approval of the GPU and the certification of the Final EIR as to its failure to adequately present and analyze a reasonable range of project alternatives, and orders the City to comply with CEQA.

V. Sierra Club's Fifth Cause of Action is "Inadequate Response to Comments."

The court agrees with Sierra Club. CEQA Guideline § 15088(c) provides that the written responses shall describe the disposition of significant environmental issues raised (e.g. revisions to the proposed project to mitigate anticipated impacts or objections). In particular, the major environmental issues raised when the Lead Agency's position is at variance with recommendations and objections raised in the comments must be addressed in detail giving reasons why specific comments and suggestions were not accepted. There must be good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice.

See the discussion in the First Cause of Action. Additionally, the City's responses to the Farm

Bureau comments were inadequate. With respect to mitigation measure COS-3.10, the Farm Bureau argued that protesting the formation of new Williamson Act contracts within the planning area would not mitigate the impacts on important farmlands and Williamson Act lands in the planning area. AR 3:636, comment 03-35. The City's response completely ignores the Farm Bureau's complaint that the EIR describes COS-3.10 as a policy intended to conserve agricultural resources, when in fact, by protesting Williamson Act contracts, which are intended to protect farmlands and prevent their premature conversion, COS-3.10 would have the opposite effect. The City's responses to the Farm Bureau's comments relative to the EIR's alternatives analysis are no better. This is a failure by the agency to proceed in the manner required by law constituting an abuse of discretion.

The court issues the Writ of Mandate setting aside the City's approval of the GPU and the certification of the Final EIR as to its inadequate responses to Comments, and orders the City to comply with CEQA.

VI. Sierra Club's Sixth Cause of Action is "Inadequate Analysis of Project Impacts."

Although Sierra Club set forth several issues in its Petition under this cause of action, its opening brief only argued the inadequate analysis of project impacts as to the issue of global climate change. Thus, the court only discusses that issue finding the other issues abandoned.

The court agrees with Sierra Club on this issue. Although the City devoted subchapter 6.2 of the EIR to the issue of Climate Change (AR 2:403-410), it failed to show where in that section it analyzed stationary sources for GHG. The City appears to be arguing that it was not required to do so because no guideline specifically requires it; and the analysis of the Project's GHG emissions from stationary sources was unnecessary in light of the City's conclusions that the Project's impact on global warming is significant and unavoidable.

Under CEQA's general requirements, the City was required to estimate the Project's overall emissions, including stationary and non-statutory sources Contrary to this requirement, the EIR only calculated the emissions from vehicular traffic. No explanation is given for why this calculation could be done without information about specific projects but the same could not be done for stationary sources. Sierra Club has shown that analytical models exist to calculate

emissions from stationary sources without the specific information as to later specific projects the City claims are necessary for this analysis. This is a failure to proceed in the manner required by law and is an abuse of discretion.

Before assessing the significance of the Project's impact on global warming the City was required to calculate the Project's GHG emissions using best available tools. (Berkley Keep Jets Over the Bay v. Board of Port Commissioners (2001) 91 Cal.App.4th 1344, 1371). Guideline section 15144 ("agency must use its best efforts to find out and disclose all that it reasonably can" about the Project's impacts).

The court issues the Writ of Mandate setting aside the City's approval of the GPU and the certification of the Final EIR as to its analysis of global climate change, and orders the City to comply with CEQA.

VII. Sierra Club's Seventh Cause of Action is "Failure to Adequately Describe Project Goals and Objectives."

This argument was not set forth in Sierra Club's opening brief; therefore the court considers Sierra Club abandoned this argument.

VIII. Sierra Club's Eighth Cause of Action is "Finding Not Supported by Substantial Evidence."

The court finds that this is not a cause of action but this argument is subsumed within the argument regarding the mitigation measures. Sierra Club argues that the City's finding that the significant impacts to the agricultural resources and air quality were "unavoidable," despite the proposed mitigation measures, is not supported by substantial evidence. See the discussion under section one regarding mitigation measures.

CONCLUSION

For the reasons stated herein, and on the specific causes of action as stated herein, the court issues the Writ of Mandate setting aside the City's approval of the GPU and the certification of the Final EIR, and orders the City to comply with CEQA. Sierra Club shall

prepare a judgment and preemptory writ of mandate according to the court's ruling. The Writ shall include that this court does not direct respondent to exercise its lawful discretion in any particular way (Public Resources Code § 21168.9(c)) and this court will retain jurisdiction over respondent's proceedings by way of a return to this peremptory writ of mandate until the court has determined that respondent has complied with the provisions of CEQA (Public Resources Code § 21168.9(b). The judgment and writ shall be prepared in compliance with California Rule of Court, rule 3.1312.

March 12 2009

Patrick J. O'Hara
Superior Court Judge

SUPERIOR COURT ★ TULARE COUNTY CALIFORNIA ★

SUPERIOR COURT OF CALIFORNIA
COUNTY OF TULARE
Superior Court Division
County Civic Center, Room 303
Visalia, CA 93291-4593

Sierra Club Plaintiff/Petitioner, vs **City of Tulare** Defendant/Respondent	Case No **VCU228122**

CLERK'S CERTIFICATE OF MAILING (CCP 1013a(4))

I certify that I am not a party to this action.

The Order Granting Petition in Part for Writ of Mandate was mailed first class, in a sealed envelope, postage prepaid, to the parties at the addresses shown. The mailing and this certification occurred at the place and on the date shown.

Dated: March 16, 2009 at Visalia, California.

LARAYNE CLEEK, CLERK OF THE
SUPERIOR COURT, COUNTY OF TULARE

By _____
Deputy Clerk

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