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December 3, 2008

Honorable Jim Patterson, Chairperson
San Luis Obispo County Board of Supervisors
County Government Center
San Luis Obispo, CA 93408

RE: Santa Margarita Ranch Final Environmental Impact Report and
Appeal

Dear Chairperson Patterson and Members of the Board of Supervisors:

This firm represents North County Watch on matters related to the environmental review for the proposed development of the Santa Margarita Ranch (the "Project"), and we submit these comments on North County Watch's behalf. As detailed below, we do not believe that the environmental impact report ("EIR") for the Project complies with the requirements of the California Environmental Quality Act ("CEQA"). In particular, the EIR fails to adequately evaluate and mitigate the Project's impacts on global climate change and air quality; it uses an unduly narrow scope for its analysis of cumulative impacts; it improperly ignores comments from trustee agencies regarding impacts to biological resources; and it over-utilizes a finding that impacts are significant and unavoidable as a substitute for conducting an adequate analysis and requiring feasible mitigation for these impacts. Therefore, the EIR must be revised and recirculated before the County may approve the Project.

Furthermore, as discussed below, the Project is patently inconsistent with most of the San Luis Obispo General Plan policies that apply to the property. As such, the Project cannot be approved by the County.

I. The EIR Does Not Comply with CEQA.

A. The EIR Fails to Adequately Disclose and Mitigate the Project's Impacts On Global Climate Change.

The EIR's analysis of global climate change impacts associated with the project consists largely of a recitation of background information about greenhouse gas emissions and global warming. Although the EIR quantifies emissions from vehicle traffic for the proposed 111-unit subdivision, it fails to disclose emissions from all potential sources associated with the project, it does not determine whether these emissions would be significant, and it does not ensure that all feasible measures to mitigate the Project's impacts have been adopted. As such, the analysis is inadequate and cannot be relied up in approving the Project.

i. The EIR Must Disclose Greenhouse Gas Emissions for All Potential Sources.

As detailed in the attached paper from the California Air Pollution Officers Association ("CAPCOA"), greenhouse gas emissions result not just from vehicle traffic, but also from a project's energy use. "CEQA & Climate Change," Exhibit B at 19. Therefore, the EIR here should calculate greenhouse gas emissions that will result from the projected energy use required by the Project. *Id.* Such emission projections should include the energy use not only by individual homes, but also energy use associated with transporting and treating water for the project. Water transport and treatment require substantial energy use, California Climate Action Team Report, Exhibit B at 50 (Exhibit includes relevant excerpts of this report), which should be included in any calculation of greenhouse gas emissions.

An EIR must consider both the direct and indirect impacts of a project. *See* CEQA Guidelines §§ 15064(d), 15358(a). "Indirect or secondary effects . . . are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* § 15358(a)(2). Air emissions from non-transportation energy use are reasonably foreseeable indirect impacts. The EIR should (1) identify the principal sources of electricity for the Project and the quantities of air pollutant emissions produced per unit of electricity generated by those sources, (2) provide estimates of average electricity demand by type of land use (e.g., per dwelling unit, per 1,000 square feet of commercial or industrial development), and (3) based on the foregoing, estimate the emissions that would be generated to serve the Project.

Without quantification of emissions associated with energy use for all phases of the Project, the EIR does not contain a full disclosure of the Project's impacts

on global climate change. The DEIR must also consider feasible mitigation measures to reduce those impacts.

ii. The EIR Improperly Fails to Acknowledge That the Project's Impacts to Global Warming Are Significant.

The EIR completely abdicates its responsibility to determine the significance of the Project's greenhouse gas emissions. Rather than determine the Project's significance, the EIR simply declares that any impacts are "speculative." EIR at 4.2-27. This conclusion runs counter to the requirements of CEQA and the information that was available at the time the Revised Draft EIR was being prepared.

First, CEQA provides that the purpose of an environmental impact report is to "identify the significant effects on the environment of a project, to identify alternatives to the project and to indicate the manner in which those significant effects can be mitigated or avoided." Pub. Res. Code section 21002.1 (a). As the California Attorney General has determined, an agency has an obligation to determine whether an identified impact is significant, and if so, to adopt all feasible measures that will reduce or avoid the impact. *Id.* at 21002.1 (b). *See* Exhibit A at 24 ("the lack of a threshold does not mean lack of significance.") Thus, the EIR's statement that because no thresholds have been established, the determination of significance cannot be made is simply incorrect.

In fact, the CAPCOA report offers three, alternative approaches for the lead agency to follow in determining significance in lieu of a significance threshold. (Exhibit A at 25-26.) It is important to note that none of these approaches results in no determination of significance. In other words, under all three of the approaches recommended by CAPCOA, the lead agency ultimately would determine whether a project's greenhouse gas emissions would be significant or less-than-significant.

Even though the EIR did not even quantify all of the greenhouse gas emissions associated with the Project, the level that was quantified would be significant under the CAPCOA proposal. Specifically, CAPCOA indicates that a residential project emitting more than 900 metric tons/year of greenhouse gases would have a significant impact. Exhibit A at 43. The emissions from vehicle traffic alone would be on the order 2,927 metric tons per year. (EIR at 4.2-28). Therefore, the greenhouse gas emissions from the Project are significant and should be identified as such.

iii. The EIR Fails To Propose Adequate Mitigation to Reduce the Project's Impact on Global Climate Change.

The EIR identifies some mitigation measures that are designed to reduce the significant impacts of the Project, but does not identify all feasible mitigation measures. Representative measures are identified in Appendix B to the CAPCOA report and include:

- The requirement that construction vehicles use alternative fuels. (Exhibit A at B-31);
- The implementation of green building requirements (Id. at B-29);
- Requiring LEED certification, (Id. at B-20);
- Energy Star Roofs (Id. at B-23); low energy cooling (Id. at B-26)
- Light colored paving for roads and sidewalks (Id. at B-27);
- Installing cool roofs (Id.);
- Providing solar water heaters (Id. at B-28)
- Providing electric outdoor lawnmower (Id. at 19);
- Requiring houses to be built with energy efficient light systems, passive heating/cooling, and programmable thermostats. (Id. at 30).

In addition, the Attorney General has identified a number of feasible mitigation measures that could be adopted here. See Exhibit C to this letter. These include off-site measures that will reduce the Project's impacts below a level of significance.

To the extent that the EIR does identify mitigation measures, it fails to ensure that these measures will actually be adopted and enforced. For example, the EIR simply indicates that measures such as the requirement to install solar water heaters or use solar panels (see EIR at 4.2-30) should be implemented if feasible. However, all of the EIR's proposed measures have already been identified as feasible by CAPCOA and the Attorney General. The EIR's provision that the mitigation measures may be waived in the future if the applicant shows they are not feasible renders the mitigation illusory. Pub. Res. Code section 21081.6(b) (mitigation must be feasible and enforceable over the life of the project.); *Federation of Hillside & Canyon Ass'ns. v. City of Los Angeles*, 83 Cal. App. 4th 1252, 1261 (2000) (agency must ensure that mitigation measures will actually be implemented.)

By failing to identify the full range of measures available and by failing to ensure they are enforced over the lifetime of the Project, the EIR violates one of the most basic requirements of CEQA.

iv. The EIR Must Discuss the Potential Effect of Climate Change on Water Supply for the Project.

In analyzing the reliability of the water supplies relied upon to support the Project, the EIR must take into account the risk that the precipitation that feeds both surface water and groundwater resources in the region may change. Specifically, in light of the known risk of climate change, the County cannot safely assume that the past will serve as an accurate predictor of future water availability. The state's system of managing surface water supplies relies on the retention of water in snowpack and gradual release of that water throughout the spring and summer months. Yet, current models estimate that the state will lose 10 to 40 percent of its snowpack by 2034. See Exhibit B at 28.

Although the EIR acknowledges in a single sentence that global climate change is expected to diminish the Sierra snow pack (EIR at 4.2-16), it does not address how this change will affect water availability for the proposed Project. This review is especially important in view of the proposal to rely on water from either the Nacimiento Water Project or the State Water Project. Without such an analysis, the EIR fails to support any conclusion that there will be adequate water from these water projects for the proposed development.

B. The EIR Does Not Adequately Analyze or Mitigate Impacts to Biological Resources

In several places, the EIR fails to recognize the significant impacts of the Project on biological resources and as a result, fails to include adequate mitigation for these impacts. For example, the EIR repeatedly finds that impacts to common grassland communities will not be significant because they are not rare grasslands. *See e.g.*, EIR at 4.3-39. However, under CEQA Guidelines section 15065, a project can have significant impacts regardless of whether the affected resource is rare or endangered. Specifically, section 15065 provides for a mandatory finding of significance where project has potential to substantially degrade the quality of the environment; substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels" The EIR's standards of significance also recognize that impacts to wildlife movement and habitat can be significant regardless of whether the affected species is rare or endangered. EIR at 4.3-34.

The EIR, however, fails to apply these standards of significance to the impacts of the Project. Thus, although the EIR acknowledges that the project will result in the loss of approximately 42 acres of grasslands and that this grassland provides habitat for a number of special status species, it finds the impact to be less than significant and requires no mitigation for the impact. EIR at 4.3-39.

The EIR's analysis of cumulative impacts to biological resources is also inadequate. The entirety of the cumulative impacts analysis is based on the development of the 111-unit subdivision and the future development plan. As indicated by the Department of Fish and Game ("DFG"), the EIR's cumulative analysis should include not just projects within the Ranch boundaries but all past, present and reasonably foreseeable future projects that have the potential to affect biological resources. CEQA Guidelines section 15355. The need to look at projects outside of the Ranch boundaries is particularly important for wildlife and south central steelhead because their range is not restricted to the Ranch boundaries. *See* EIR, Department of Fish and Game letter 12, comment AW.¹

In response, the EIR fails to address the geographical scope of the cumulative impacts analysis and simply indicates that past projects are part of the baseline. EIR at R-12 AW (CR 982). This response not only fails to address the comment, it indicates that the EIR's cumulative impacts analysis does not comply with CEQA. For the purposes of assessing cumulative impacts, past projects are to be included in the impact analysis, not the baseline. Otherwise, cumulative impacts will be minimized by comparing on the incremental impacts of the project to scope of the current problem. CEQA does not permit such a segmentation of the cumulative impacts analysis. *Kings County*, 221 Cal.App.3d 690.

DFG not only made the general observation about the scope of the cumulative impact analysis, it was specific about projects that should be included. Among other projects, DFG indicated that the EIR should also look at plans to widen and expand highway 101, and the Spanish Oaks Ranch, Tassajara Canyon and Margarita Farms development. In response, the EIR notes only that the EIR looked at impacts to movement of individual species; the response fails entirely to address DFG's request that the impacts of the Project in combination with other projects be assessed. *See* EIR, response R12-AX (CR 983).

The EIR also fails to adequately respond to other comments by DFG. For example, DFG identified problems with the proposed water source for the project and its conflicts with the County General Plan. The EIR provided no response to this concern. *See* EIR Response R-12-AB (CR 978.) The EIR also failed to respond to DFG's request for information about current use of groundwater at the site and whether groundwater was in fact underflow from adjacent creeks. *See Id.* Response R-12-AC.

¹ The scope of the cumulative impacts analysis for air quality and traffic should also extend beyond the Ranch boundaries because by their nature, those impacts are not limited to the Ranch. *See Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 690 (1990).

The United States Fish and Wildlife Service was also highly critical of the EIR's analysis of the Project's impacts to biological resources. In particular, the FWS noted (as did DFG) that the EIR should have used protocol surveys to support its conclusion that the threatened California Tiger Salamander is not on the project site. The EIR however, simply concludes without evidence to support it, that the tiger salamander is not known to occur in the region and therefore not expected to occur on site. *See* EIR, R-14O (CR-1001).

As noted by FWS, the EIR failed to evaluate impacts to wildlife from the use of pesticides and herbicides. In response, the EIR indicates that the setbacks identified as mitigation would address any impacts from pesticides and herbicides. *See* EIR at R-14H (CR 1000). The EIR, however, does not actually include any analysis of potential impacts from pesticide use and therefore violates both the requirement that it analyze potentially significant impacts, and that it provide substantial evidence to support its conclusions.

FWS correctly notes that the EIR inappropriately relies on compliance with future plans to find that Project impacts have been mitigated below a level of significance. Mitigation that does not include adequate performance standards or other supporting evidence to allow for a finding that project impacts have been mitigated include:

- Plans to mitigate impacts to SC Steelhead;
- Plans to restore native grassland habitat;
- Plans to mitigate loss of wetlands through compensatory mitigation;
- Plans to mitigate impacts to the San Luis Obispo mariposa lily and morning glory;
- Plans to reduce impacts to California Red-legged Frog.

In *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, the Court of Appeal struck down mitigation measures that called for the formulation of a management plans developed in consultation with state and federal wildlife agencies after project approval. The EIR had explained that one of the management plans must be prepared by a qualified biologist "to maintain the integrity and mosaic of the vernal pool habitat." *Id.* at 669. The Court found that this generalized goal was insufficient to qualify as a performance standard. *Id.* at 670. Moreover, the Court found that the EIR provided "no reason or basis . . . for the deferral to a future management plan of these particular mitigation measures." *Id.* at 671.

C. The EIR Does Not Evaluate or Mitigate Impacts Associated with the Transportation Improvements Necessitated by the Project.

The EIR calls for a number of roadway improvements as mitigation for the impacts of the Project. See EIR at 4.12-25 through 4.12-29 (Measures T-1(a) through T-1(e)). Because these improvements are necessitated by the Project, their impacts must be evaluated in the EIR. *Tuolumne County Citizens for Responsible Growth v. City of Sonora*, 155 Cal. App. 4th 1214 (2007).

D. The EIR Should Be Revised and Re-Circulated.

Under CEQA, “[a] lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification.” CEQA Guidelines § 15088.5; see also *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112 (requiring recirculation where the new information changes to the EIR “in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect”). For example, recirculation is required where the FEIR discloses a “new significant impact” or a “substantial increase in the severity of an environmental impact.” CEQA Guidelines § 15088.5(a)(1) & (a)(2).

In view of the many inadequacies in the EIR, it must be revised to reflect any new analysis that is required. This analysis will almost certainly result in the identification of new significant impacts. In addition, some of the impacts that the EIR failed to identify as significant (e.g., global climate impacts) are in fact significant. To comply with CEQA’s mandate that all of the potentially significant impacts of a project and feasible mitigation measures be subject to public comment and agency response, the EIR must be revised and be re-circulated.

II. The Project is Inconsistent with the County General Plan and Land Use Ordinance.

A series of reports prepared by Planning Commission staff correctly identified numerous inconsistencies between the Project and the County’s General Plan and Land Use Ordinance. (See Planning Commission Staff Report (July 7, 2008); Planning Commission Staff Report (September 25, 2008); Planning Commission Staff Report and Findings (October 9, 2008).) The inconsistencies identified in these staff reports, and in the Planning Commission’s findings recommending denial, preclude approval of the project. See, e.g., *Napa Citizens for Honest Government v. Napa County*

Board of Supervisors, 91 Cal.App.4th 342, 378-79 (2001) (development project may not be approved if it interferes with or frustrates the general plan's policies and objectives); *Land Waste Mgmt. v. Bd. of Supervisors*, 222 Cal. App. 3d 950, 958 (1990) (land use permit issued contrary to zoning ordinance "may be set aside and invalidated as *ultra vires*"). North County Watch objects to Project approval based on each inconsistency identified in the staff reports and the Planning Commission's findings.

North County Watch specifically agrees with the Planning Commission that the plain text of the Salinas River Area Plan and the area planning standards set forth in Title 9 of the Land Use Ordinance allows only reconfiguration of existing parcels, and not creation of new parcels, in agricultural cluster subdivisions. (See Planning Commission Staff Report and Findings (October 9, 2008) at 6-7, 15-16 (finding E.1).) Moreover, even absent this finding, the density calculations for the Project's agricultural cluster subdivision would still be directly inconsistent with the General Plan. The Project proposes 111 residential units based on a minimum parcel size of 20 acres for irrigated vineyards. (EIR Fig. 2-4.) Under Agriculture and Open Space Element Policy Fig. 2-2, however, the default minimum size for irrigated parcels is 40 acres. (Ag. and Open Space Element at 2-43.) The 20-acre minimum parcel size only applies if certain specific criteria—including a limitation to one primary residence per parcel—are met. (*Id.*) The Project's density calculations, however, assume two primary residences for each 20-acre parcel. (EIR Fig. 2-4.) This directly conflicts with Agriculture and Open Space Element Policy AGP22(b), which requires agricultural cluster subdivisions to use "the minimum parcel size criteria specified in Figure 2.2." (Ag. and Open Space Element at 2-44.) Those criteria prohibit more than one primary residence on a 20-acre parcel. The Project's density calculations are therefore unlawfully inflated.²

In addition, proposed Open Space Lot 85, a *non*-vineyard parcel consisting of only 190.2 acres (EIR at Figs. 2-3, 2-4), conflicts with the requirement of Policy AGP22(c) that all agricultural parcels resulting from a cluster subdivision meet the minimum parcel sizes of Figure 2.2. (Ag. and Open Space Element at 2-44.) Under Figure 2.2., non-irrigated parcels like Lot 85 must be at least 320 acres in size. (Ag. and Open Space Element at 2-43.)

Finally, we note that although the EIR identified many inconsistencies between the Project and the General Plan, it failed to determine that these inconsistencies were significant. However, as determined by the court in *Pocket Protectors v. City of*

² The contrary conclusion of Planning Commission Staff (see Planning Commission Staff Report (July 7, 2008) at 20) is incorrect. The report states that provisions of the Salinas River Area Plan require a higher-density calculation, but the quoted provisions appear to be drawn from the area planning standards of the Land Use Ordinance. (See Land Use Ordinance § 22.104.040(A)(1).) The provisions of the General Plan must control over those of the Land Use Ordinance. See *Leshner Communications v. City of Walnut Creek*, 52 Cal.3d 531, 541 (1990) ("The tail does not wag the dog. The general plan is the charter to which the ordinance must conform.").

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October 31, 2008

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Sacramento, 124 Cal. App. 4th 903 (2004), inconsistency with a general plan is a presumptively significant impact under CEQA. The EIR provides no evidence to support its conclusion that the Project's many conflicts with the General Plan are not significant and is therefore incorrect as a matter of law.

Very truly yours,

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