



Via Email to darryl.boyd@sanjoseca.gov (without enclosure) and UPS Overnight Delivery

June 29, 2007

Mr. Joseph Horwedel, Director
Department of Planning, Building, and Code Enforcement
200 E. Santa Clara Street, 3rd Floor
San José, CA 95113
Attn: Mr. Darryl Boyd
Email: darryl.boyd@sanjoseca.gov

Re: Comments on the DEIR for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017

Dear Mr. Horwedel:

These comments are submitted on behalf of the Center for Biological Diversity on the Draft Environmental Impact Report (“DEIR”) for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017 (“the Project”). The Project proposes the urban development of a minimum of 25,000 residential units and 50,000 new jobs on approximately 3,400 acres in northern and mid-Coyote Valley, located on an existing rural area south of the Santa Teresa neighborhood and Tulare Hill. The Project would bring a projected population increase of approximately 70,000 to 80,000 people. CVSP Notice of Preparation, p. 7. The proposed project will have many potentially significant environmental effects, *Id.*, pp. 12-16, including impacts associated with the 266,000 projected daily vehicle trips and the generation of at least 500 million kWh of electricity annually to meet community energy needs, DEIR at 417.

The Center for Biological Diversity (“Center”) is a non-profit conservation organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center’s Climate, Air, and Energy Program works to reduce U.S. greenhouse gas emissions to protect biological diversity, our environment, and public health. We work to educate the public about the impacts of climate change on our world and the animals and plants that live in it and to build the political will to enact solutions. The Center has over 35,000 members throughout California and the western United States, including Santa Clara County. Center members will be directly impacted by the Project.

The Project is an exciting opportunity for San José to serve as a model of sustainable community development at a time when many communities are struggling to deal with population growth, climate change, increased pollution and reduced biological diversity. The DEIR at 419 recognizes this chance to “think globally, and act locally’ and lead by example in adopting policies and programs to limit the production of greenhouse gases associated with the CVSP.” Unfortunately, the Project EIR largely ignores this opportunity, failing to adequately disclose, analyze, avoid, and mitigate many of the project’s significant environmental impacts. The Project as proposed will have numerous substantial impacts on the environment due to its nature, size, and location. We hereby incorporate by reference the comments of the Loma Prieta chapter Sierra Club which cover direct, indirect and cumulative

impacts to biological resources and other areas of concern. This letter will focus on the Project's greenhouse gas emissions and contribution to global warming.

Curbing greenhouse gas emissions to limit the effects of climate change is one of the most urgent challenges of our age. Fortunately, CEQA sets forth a clear and mandatory process for the City to deal with the Project's greenhouse gas and global warming impacts. As detailed below, the DEIR must be revised so that it includes a complete and adequate inventory of the Project's greenhouse gas emissions, a full discussion of the impacts from those emissions, as well as the impact of climate change on the Project, a significance determination regarding these impacts, and a thorough and quantitative analysis of alternatives and avoidance and mitigation measures to reduce those impacts. The good news is that there are numerous feasible measures that can greatly reduce the Project's greenhouse gas emissions. The City cannot lawfully approve the project until the required CEQA analysis has been completed and all feasible measures implemented.

I. GENERAL COMMENT: THE CVSP IS NOT CONSISTENT WITH THE VISION AND POTENTIAL OF THE CITY OF SAN JOSÉ

A. *San José General Plan 2020*

San José has a long history of attempting to incorporate sustainable development goals into its growth strategy. San José General Plan 2020 includes many positive strategies to conserve energy and open space while reducing harmful pollution and unchecked growth. One of the Major Strategies of the San José General Plan 2020 is the "Sustainable Cities" initiative, which envisions a "city designed, constructed, and operated to minimize waste, efficiently use its natural resources and to manage and conserve them for the use of present and future generations."

To pursue this Major Strategy, the San José General Plan 2020 details a series of goals and policies. Residential Land Use policy number twenty states that "Roads, buildings and landscaping for new residential projects should be designed and oriented to maximize energy conservation benefits for space heating and cooling to the extent feasible." Economic Development policy number two commits the city to "[p]romote fiscally and environmentally sustainable development in locations where the City can most efficiently provide urban services." In its current form, the Project is inconsistent with these and other provisions of the San Jose General Plan.

B. *United Nations Urban Accords*

Consistent with the goals and major strategies of the San José General Plan 2020, the San José City Council voted on November 1, 2005 to join the United Nations Urban Environmental accords, signalling its commitment to "the right to a clean, healthy, and safe environment for all members of our society." Of the twenty-one actions outlined in the Accords, the third is to "[a]dopt a citywide greenhouse gas reduction plan that reduces the jurisdiction's emissions by twenty-five per cent by 2030." The City of San José has so far delayed comprehensive action on the Accords, and should move swiftly to harmonize its actions with this and other statements of policy. The CVSP should be

June 29, 2007

Comments on the DEIR for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017

Page 2 of 17

made consistent with this and other provisions of the Accords. While the DEIR does not disclose the baseline greenhouse gas inventory for the City the Project as currently proposed is clearly inconsistent with reducing the City's greenhouse gas emissions by twenty-five percent by 2030, since the project would result in substantial amounts of additional greenhouse gas pollution.

II. COMMENT ON THE ACCURACY OF DEIR AT 4.15.2, "REGULATORY CONTEXT OF GLOBAL CLIMATE CHANGE"

A. The Global Warming Solutions Act of 2006

The DEIR at 415 discusses California's Global Warming Solutions Act of 2006, A.B.32, 2005-06 Sess., *codified* at Cal. Health & Safety Code §§ 38500-99, which provides for mandatory greenhouse gas emission reporting, verification, and mitigation measures to achieve the "maximum technologically feasible and cost-effective greenhouse gas emission reductions" from sources across the state." Cal. Health and Safety Code §38560. Though the EIR briefly discusses pending regulations from the California Air Resources Board pursuant to AB 32, the EIR neglects to discuss that the new law repeatedly emphasizes that its greenhouse gas reduction mandates are in addition to all existing legal requirements to reduce greenhouse gas emissions and protect the environment. *See, e.g.*, Cal. Health and Safety Code § 38598 ("Nothing in this division shall limit the existing authority of a state entity to adopt and implement greenhouse gas emission reduction measures....Nothing in this division shall relieve any state entity of its legal obligations to comply with existing law or regulation."); § 38592(b) ("Nothing in this division [25.5] shall relieve any person, entity, or public agency of compliance with other applicable federal, state, or local laws or regulations, including state air and water quality requirements, and other requirements for protecting public health and the environment."); and § 38592(b) ("Nothing in this division shall relieve any person, entity, or public agency of compliance with other applicable federal, state, or local laws or regulations, including state air and water quality requirements, and other requirements for protecting public health or the environment.")

B. *Massachusetts v. Environmental Protection Agency*

In addition to California's landmark efforts to combat greenhouse gas emissions, the DEIR mentions briefly at 415 *Commonwealth of Massachusetts v. Environmental Protection Agency*, 127 S.Ct. 1438 (2007). This United States Supreme Court case, in which both the State of California and the Center were Petitioners, sought to overturn the denial of a rule-making petition by the U.S. Environmental Protection Agency ("EPA") concerning greenhouse gas emissions from new motor vehicles. Since the DEIR was prepared, the case has been decided in the Petitioners' favor, with the Court holding that the effects of global warming constituted an injury on which the state of Massachusetts could establish standing in federal court: "[T]he rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real." *Id.* at 1458. Furthermore, the Court stated in dicta that the necessarily international scope of climate change mitigation does not excuse a lack of local action: "A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere." *Id.* at 1470.

June 29, 2007

Comments on the DEIR for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017

Page 3 of 17

The Court's decision recognizes that human contributions to global warming constitute a legally sufficient injury for which decision-makers can be held accountable. *Id.*

III. COMMENT ON THE INADEQUACY OF THE EIR'S ANALYSIS OF THE PROJECT'S GREENHOUSE GAS EMISSIONS

A. The DEIR's Inventory of Projected Greenhouse Gas Emissions is Inadequate

The first step in determining a project's greenhouse gas emissions is to complete a full inventory of all emissions sources. In conducting such an inventory, all phases of the proposed project must be considered. *See* 14 Cal. Code Regs. § 15126 (“All phases of a project must be considered when evaluating its impact on the environment: planning, acquisition, development, and operation.”). A basic requirement of CEQA is that “[a]n EIR should be prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences.” 14 Cal. Code Regs. § 15151. The greenhouse gas inventory for a project must include a complete analysis of all of a project's substantial sources of greenhouse gas emissions, from building materials and construction emissions to operational energy use, vehicle trips, water supply and waste disposal.

The greenhouse gas inventory can be conducted in conjunction with the required assessment of the project's energy consumption. As CEQA Guidelines Appendix F, entitled “Energy Conservation,” clarifies: “In order to assure that energy implications are considered in project decisions, the California Environmental Quality Act requires that EIRs include a discussion of the potential energy impacts of proposed projects, with particular emphasis on avoiding or reducing inefficient, wasteful and unnecessary consumption of energy.” *See also* Cal. Pub. Res. Code § 21000(b)(3) (EIR must include section discussing “[m]itigation measures proposed to minimize significant effects on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy.”)

A greenhouse gas inventory for the project must include the project's direct and indirect greenhouse gas emissions. *See* 14 Cal. Code Regs § 15358(a)(1) (the effects considered under CEQA must include “[d]irect or primary effects which are caused by the project and occur at the same time and place”); *id.* at § 15358(a)(2) (CEQA also requires a disclosure of the project's “[i]ndirect or secondary effects which are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect or secondary effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density, or growth rate, and related effects on air and water and other natural systems, including ecosystems.”). Consequently, a complete inventory of a project's emissions should include, at minimum, an estimate of emissions from the following:

- Construction vehicles and machinery;
- Manufacturing and transport of building materials;

June 29, 2007

Comments on the DEIR for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017

Page 4 of 17

- Electricity generation and transmission for the heating, cooling, lighting, and other energy demands of commercial, industrial, residential and other structures and units;
- Water supply and transportation to the project;
- Residential and industrial propane and natural gas use;
- Vehicle trips and transportation emissions generated by the project, used for moving raw materials, finished products, supplies, or people;
- Process emissions, such as from the production of cement, adipic acid, and ammonia, as well as emissions from agricultural processes;
- Fugitive emissions, such as methane leaks from pipeline systems and leaks of HFCs from air conditioning systems;
- Wastewater and solid waste storage or disposal, including transport where applicable; and
- Outsourced activities and contracting.

The DEIR's current inventory falls far short of CEQA's requirements. The only two sources included in the existing inventory are electricity use from the buildings constructed and vehicle emissions. DEIR at 418. The DEIR states that these two sources would result in more than 507,000 metric tons of carbon dioxide equivalent gases annually, which is an enormous amount of new pollution. The DEIR also misrepresents this amount as "less than 0.001% of California's total 2004 emissions of 492 million metric tons..." The DEIR is off by a factor of one hundred, as 507,000 metric tons is actually over 0.1% of 492 million metric tons. A miscalculation of this magnitude clearly misleads the public, calls into question the accuracy of the rest of the DEIR's figures and calculations, and requires recirculation of the DEIR.

Perhaps even more importantly, however, the inventory is incomplete. The inventory does not include obvious sources of greenhouse gas emissions, including the Project's combustion of natural gas, which, according to the DEIR's own estimate, would result in approximately 100,000 additional metric tons of carbon dioxide equivalent gases per year. The inventory also does not appear to include the emissions from the energy used in the production and transportation of building materials and infrastructure components, and it includes no information on the emissions associated with obtaining the Project's water supply. As the DEIR itself admits:

Energy will be consumed during both the construction and operational phases of development. The construction phase will require energy for the manufacture and transportation of building materials, preparation of the various sites (e.g., grading), and the actual construction of the building and infrastructure. The operational phase will consume energy for multiple purposes including, but not limited to, building heating and cooling, lighting, appliances, electronics, office equipment, and commercial machinery. Operational energy will also be consumed during each vehicle trip associated with these proposed uses.

DEIR at 393.

Without a complete inventory, the DEIR cannot adequately inform the public and decisionmakers about the Project's impacts. Without a complete inventory, there is simply no way that the DEIR can

June 29, 2007

Comments on the DEIR for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017

Page 5 of 17

then adequately discuss alternatives, avoidance, and mitigation measures to reduce those impacts. The DEIR must be revised to include a full and adequate inventory of the Project's greenhouse gas emissions. Because the incomplete inventory precludes adequate analysis of environmental impacts in all sections of the DEIR, the DEIR must be revised and recirculated once this critical information is included.

B. The DEIR's Failure to Make a Significance Determination Violates CEQA

Once the DEIR is revised to include a complete greenhouse gas inventory for the Project, the City must determine whether or not there is substantial evidence that the project *may* have a "significant" effect on the environment. Cal. Pub. Res. Code § 21082.2(d). "Said another way, if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect." 14 Cal. Code Regs. § 15064(f)(1) *citing No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68.

A significance determination by the lead agency is mandatory, not discretionary. Cal. Pub. Res. Code § 21082.2(a) ("The lead agency shall determine whether a project may have a significant impact on the environment based on substantial evidence in light of the whole record." (emphasis added)). CEQA defines "significant effect on the environment" as "a substantial, or potentially substantial, adverse change in the environment." Cal. Pub. Res. Code § 21068; *see also* 14 Cal. Code Regs. § Section 15002(g); § 15382.

Following the DEIR's general discussion of greenhouse gas emissions and global warming, the DEIR concludes:

Declaring an impact significant or not significant implies some knowledge of incremental effects that is several years away, at best. To determine whether the proposed CVSP project would have a significant impact associated with global climate change, in light of the fact that there exists no numerical threshold for such an impact, would be speculative. For this reason, a determination of significance cannot be made.

DEIR at 420.

The absence of a quantitative threshold of significance for greenhouse gas pollutants cannot be used to justify the DEIR's and the City's failure to make a significance determination, nor does it render a significance determination "speculative." *See, e.g.*, 14 Cal. Code Regs. §15064(b) ("An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting"); Cal. Pub. Res. Code §21068 (defining "significant effect" qualitatively as a "substantial adverse change"). Not only are significance thresholds only "encouraged" (14 Cal. Code Regs. § 15064.7 (a)) as opposed to required, but lead agencies cannot rely solely on rigid matrices in determining impact significance; they must always consider "any fair argument that a certain environmental effect may be significant." *Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal. App. 4th 1099, 1109 (2004).

June 29, 2007

Comments on the DEIR for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017

Page 6 of 17

To the extent the City relies on CEQA Guidelines §15145 in refusing to find greenhouse gas impacts “significant”, this effort must fail. Section 15145 only applies in limited circumstances, none of which apply here. There can be no serious contention that it is not possible to measure the Project’s emissions, or that the impact of greenhouse gas emissions on human health, natural resources, and the environment have not been extensively studied and reported in the scientific literature. As discussed further below, determining the significance of the Project’s greenhouse emissions is far from speculative. No reasonable argument can be made that this massive Project’s greenhouse gas emissions would not be significant.

C. The Project’s Greenhouse Gas Emissions Would Clearly Be Significant

CEQA defines “significant effect on the environment” as “a substantial, or potentially substantial, adverse change in the environment.” Cal. Pub. Res. Code § 21068; *see also* 14 Cal. Code Regs. § Section 15002(g); § 15382. In evaluating the significance of a project’s environmental impacts, the lead agency must consider direct and reasonably foreseeable indirect physical changes in the environment which may be caused by the project. 14 Cal. Code Regs. § 15064(d).

Under CEQA, certain circumstances trigger a mandatory finding of significance. They are:

- (1) “A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals;”
- (2) “The possible effects of a project are individually limited but cumulatively considerable. As used in this paragraph, ‘cumulatively considerable’ means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects;” and
- (3) “The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.”

Cal. Pub. Res. Code § 21083(b); *see also* 14 Cal. Code Regs. § 15065 (repeating and expanding on these three triggers). It is clear from an examination of these factors, as well as the overall context and information in the record relating to this issue, that the Project’s greenhouse gas emissions are significant.

1. There is an Urgent Need to Reduce Greenhouse Gas Emissions.

A DEIR must include a discussion of climate change and greenhouse gas emissions in California in order to provide context for the discussion of impacts and the significance determination. While the DEIR contains some useful information on climate change and greenhouse gas emissions in California, it contains an inadequate review of scientific literature available on the effects of global warming and the benefits of greenhouse gas emission reductions.

June 29, 2007

Comments on the DEIR for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017

Page 7 of 17

This literature details many predicted and potential statewide environmental impacts. Some of the types of impacts and estimated ranges of severity are summarized as follows:

- A 30-90% reduction of the Sierra snowpack during the next 100 years, including earlier melting and runoff.
 1. greater difficulty with water storage, and an accompanying greater risk of drought;
 2. increased risk of flooding, especially in areas such as the Sacramento-San Joaquin Delta (“Delta”);
 3. lower stream levels for much of the year including the summer, resulting in increased stream temperatures and deleterious effects on many fish, including species of salmon and steelhead trout listed as threatened or endangered by the State and federal endangered species acts, and other aquatic organisms;
 4. decreased albedo effect, with a resultant increase in global warming.

- An increase in water temperatures at least commensurate with the increase in air temperatures.
 1. deleterious effects on aquatic organisms, including the Delta smelt and species of salmon and steelhead trout currently listed as threatened or endangered by the State and federal endangered species acts. California already constitutes the southern end of many of these species' ranges, and further water warming could result in their extirpation.

- A 6-30 inch rise in sea level, before increased melt rates from the dynamical properties of ice-sheet melting are taken into account.
 1. increased salt water intrusion into fresh groundwater supplies, which could lead to decreased water supplies in coastal areas and an increased reliance on water from snowmelt;
 2. inundation of coastal marshes and estuaries;
 3. increased risk of flooding near river mouths due to backwater effects;
 4. increased chance of levee failure in the Delta and resultant flooding;
 5. increased salinity intrusion into the Delta with impacts on both estuarine species and California water supply from the State Water Project, Central Valley Project, and Contra Costa Water District.

- An increase in the intensity of storms, the amount of precipitation and the proportion of precipitation as rain versus snow.
 1. increased risk of flooding generally;
 2. increased difficulty of water storage.

- Profound impacts to ecosystem and species, including changes in the timing of life events, shifts in range, and community abundance shifts. Depending on the timing and interaction of these impacts, they can be catastrophic.
 1. Approximately 59% of species in one survey of over 1600 species are already

June 29, 2007

Comments on the DEIR for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017

Page 8 of 17

experiencing impacts in one of the three categories described above, and 85% of those changes are in the direction predicted (Parmesan and Galbraith 2004);

2. One leading study of over 1,100 species occurring over 20% of the Earth's surface predicts that 18%, 24%, and 35% of species will be committed to extinction by the years 2040 under low, medium, and high warming scenarios, respectively (Thomas et al. 2004).

- A 200-400% increase in the number of heat wave days in major urban centers.
 1. increased risk of death and illness for the elderly, children and other at-risk populations, including persons with low-income.
- An increase in the number of days meteorologically conducive to ozone (O₃) formation.
 1. increased risk to persons with asthma;
 2. reduction in crop and forest yields, increased plant susceptibility to disease and pest infection and foliar damage to plants.
- At least a 10% increase in the potential for large wildfires (partially due to increase concentrations of O₃ and its resultant effects on vegetation).

This list of environmental, economic, and health impacts from global warming is not exhaustive, but only illustrative of the types of impacts that the EIR should describe and analyze since the Project would exacerbate or help precipitate them. *See* Cal. Pub. Res. Code § 21060.5. Major sources that should be reviewed and considered are attached to these comments below, and include: California Department of Water Resources, (2006); California EPA (2006); Intergovernmental Panel on Climate Change (2007a,b); Kim (2005); Murray and Weiss (2002); Parmesan and Galbraith (2004); Union of Concerned Scientists (2006); Thomas et al. (2004); Zavaleta et al. (2003).

There is also a robust, peer-reviewed literature on estimating the social costs of climate change and quantifying the cost of carbon dioxide emissions (Stern, 2006). We now know that the cost of continued greenhouse gas emission trajectories would be astronomical (Stern 2006). Economic and Social Costs may be used to determine the significance of physical changes to the environment. *See* CEQA Guidelines 15046(e).

The Stern Review of the Economics of Climate Change, a comprehensive report commissioned by the British government, recently concluded that allowing current emissions trajectories to continue unabated would eventually cost the global economy between 5 to 20 percent of GDP each year within a decade, or up to \$7 trillion, and warned that these figures should be considered conservative estimates (Stern 2006). By contrast, measures to mitigate global warming by reducing emissions were estimated to cost about one percent of global GDP each year, and could save the world up to \$2.5 trillion per year (Stern 2006). If we take no action to control emissions, each ton of CO₂ that we emit now is causing damage worth at least \$85 (Stern 2006).

Overall, the World Health Organization estimates that as of the year 2000, 154,000 deaths and the loss of 5.5 million daily adjusted life years per year worldwide are attributable to global warming (World June 29, 2007

Comments on the DEIR for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017

Health Organization 2002). This toll is due to the combined impacts of higher temperatures, increasing weather variability such as more frequent and intense droughts and floods, a pattern of more violent tropical storms, as well as more subtle, gradual changes that can also profoundly damage public health (Epstein, P.R. and E. Mills 2005).

In summary, the urgency of the climate crisis and the need to reduce emissions cannot be overstated. This is the critical context in which the DEIR should consider the Project's greenhouse gas emissions. The DEIR's treatment of the impacts to and resulting from the Project must be commensurate with the considerable scale of the problem.

Instead of conducting the critically important analysis and significance determination, the DEIR downplayed the significance of the Project's massive emissions. For example, the DEIR states:

[i]t should be noted that the greenhouse gases generated are related to growth that will occur elsewhere in the region, if not in the Coyote Valley. Therefore, by planning a high-density, mixed use, and pedestrian and transit-oriented community, overall increases in greenhouse gas emissions per capita may be less than they would be with a similar amount of population growth occurring at more remote locations, i.e., in the Central Valley.

DEIR at 418. This statement is inaccurate, irrelevant, and renders the DEIR misleading and legally defective. The DEIR must compare the Project's impacts to the "no project" alternative, not to a hypothetical scenario. The DEIR cannot avoid the need to find the Project's greenhouse gas emissions significant by speculating that perhaps the Project will have fewer impacts than some other hypothetical development that could be proposed. Such speculation appears designed to minimize the Project's impacts and undercuts the purpose and mandates of the CEQA process. Even the limited subset of the Project's impacts that were disclosed, from vehicle miles traveled and electricity use, are clearly significant.

The DEIR also failed to adequately analyze the impacts of global warming on the Project and its impacts. While the DEIR mentions this topic generally and admits that it must be analyzed, the DEIR fails to do so in any meaningful way. Many of the impacts described above will substantially affect the Project and its impacts in the areas of energy use and utilities, water supply, and biological resources, among others. The DEIR must be revised to include a full discussion of these implications.

2. The Project will Create a Substantial New Source of Greenhouse Gas Emissions and Obstruct the State's Efforts to Reduce Emissions

The State of California is working to identify all opportunities for major greenhouse gas reductions in order to meet the mandate of the California Global Warming Solutions Act, as well as comply with Executive Order S-3-05 (June 1, 2005) and other authority. Any new source of greenhouse gas pollution must be considered significant, as approving a new source of emissions when the state is working to substantially reduce its total emissions clearly impedes and frustrates that mandate. Moreover, many of the proposed reduction measures, even on an industry-wide basis, would result in

June 29, 2007

Comments on the DEIR for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017

Page 10 of 17

reductions on the order of 0.5 million metric tons of carbon dioxide (CARB 2007). Thus, this project alone could “cancel out” reduction measures for entire industries and sectors.

When viewed in light of all of the evidence relating to climate change, and the factors enumerated by Cal. Pub. Res. Code § 21083(b) and 14 Cal. Code Regs. § 15065, it is clear that the Project’s greenhouse gas emissions must be considered significant. The Project will result in over 25,000 new residences and over 266,000 daily vehicle trips, and will result, even by the DEIR’s severe underestimate, in over 0.5 million metric tons of carbon dioxide equivalent gases. The Project clearly “has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals.” Cal. Pub. Res. Code § 21083(b). The Project would also “cause substantial adverse effects on human beings, either directly or indirectly,” particularly because as proposed it would obstruct California’s mandate to reduce greenhouse gas emissions back to 1990 levels by 2020, and to 80% below 1990 levels by 2050. The greenhouse gas emissions from the Project exceed any reasonable threshold of significance.

3. The Project’s Cumulative Impacts Would be Significant

A project’s impacts also require a mandatory finding of significance if they are “cumulatively considerable.” Cal. Pub. Res. Code § 21083(b). The cumulative impacts analysis is a critically important part of CEQA environmental review. The California legislature put particular emphasis on cumulative impacts to ensure that environmental problems that result from the combined effects of many relatively small factors are not overlooked because any one project’s contribution can be characterized by a project proponent or lead agency as small or insignificant. Importantly, the requirement to analyze cumulative impacts cannot be avoided by contending a project would only make a *de minimis* contribution to the problem as a whole. As the court noted in *Communities for a Better Environment v. California Resources Agency*, 103 Cal.App.4th 98, 117 (2002), this interpretation of the cumulative impacts requirement would “contravene the very concept of cumulative impacts” and “turn the cumulative impact analysis on its head by diminishing the need to do a cumulative impact analysis as the cumulative impact problem worsens.” *See id.* at 120 (“[i]n the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project’s contribution to cumulative impacts as significant.”); *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3D 692, 721 (1990) (the EIR “improperly focused upon the individual project’s relative effects and omitted facts relevant to an analysis of the collective effect this and other sources will have”).

Climate change is a classic example of a cumulative effects problem; emissions from numerous sources combine to create the most pressing environmental and societal problem of our time. The solution to climate change lies not in any one single action, but in systematically reducing emissions from all possible sources. The CEQA process is an ideal context in which to do this, as CEQA requires full analysis, avoidance, and mitigation of a proposed project’s direct, indirect, and cumulative greenhouse gas emissions.

Having improperly terminated discussion of the Project’s greenhouse gas emissions, the DEIR omits any mention of greenhouse gases from the cumulative impacts section. This is particularly troubling

June 29, 2007

Comments on the DEIR for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017

Page 11 of 17

since the DEIR's cumulative impacts section finds that the Project will have cumulative impacts in areas including traffic and vehicle miles traveled, wastewater, landfill capacity, and energy use, all of which are areas implicating greenhouse gas emissions. The greenhouse gas emissions from the disclosed cumulative energy use alone (DEIR p. 513) would be well over 1.4 million metric tons of carbon dioxide equivalent gases (although the DEIR does not calculate or disclose the figures), and this does not even include all sources of greenhouse gas emissions. There can be no reasonable argument that the Project's cumulative greenhouse gas emissions are not significant.

Because the Project's greenhouse gas emissions are clearly significant, the DEIR must move on to the critical step of analyzing alternatives and measures to mitigate or avoid those impacts. For many of the impacts relating to greenhouse gas emissions, such as traffic and vehicle miles traveled, wastewater, landfill capacity, and energy use, the DEIR concludes without any real analysis that there is simply nothing that can be done (even after listing several obvious measures, such as the use of photovoltaic panels and solar water heating on buildings, but failing to require them through mandatory, enforceable mitigation measures). This conclusion is factually incorrect and legally flawed. As discussed below, there are numerous measures available to greatly reduce the Project's greenhouse gas emissions.

IV. COMMENT ON THE DEIR'S FAILURE TO ANALYZE ALTERNATIVES AND AVOIDANCE AND MITIGATION MEASURES TO REDUCE THE PROJECT'S GREENHOUSE GAS EMISSIONS

Having failed to make a significance determination with regard to the Project's greenhouse gas emissions, the DEIR then fails to undertake the next crucial step of analyzing alternatives and avoidance and mitigation measures to reduce these impacts. This analysis is the heart of CEQA, and must be undertaken once the DEIR has been revised to include a complete and adequate inventory of the Project's greenhouse gas emissions and a complete discussion of the Project's impacts. The DEIR should utilize a hierarchy of options to reduce greenhouse gas emissions: First, reduce the Project's energy use and greenhouse gas emissions as much as possible in the first instance; Second, generate the Project's remaining required energy from carbon-free sources, thereby reducing or eliminating the Project's emissions; Finally, offset or otherwise mitigate emissions that cannot be eliminated.

There are many feasible options and measures to limit each of the Project's greenhouse gas emission sources. While some of the available measures have been identified as mitigation for energy or other impacts, all of these measures must be discussed explicitly with regard to greenhouse gas emissions. The amount that each measure will reduce emissions must be quantified wherever possible. All feasible measures must be adopted, 14 Cal. Code Regs. § 15065(c)(3), and must be mandatory and enforceable, not aspirational or voluntary. 14 Cal. Code Regs. § 15126.4(a)(2). Measures to reduce impacts may not be deferred until some future time. 14 Cal. Code Regs. § 15126.4(a)(1)(B).

Available measures include, but are not limited to the following:

Measures Relating to Project Design and Transportation

June 29, 2007

Comments on the DEIR for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017

Page 12 of 17

- Analyze and incorporate alternative project locations and design to achieve urban in-fill, minimize commute distances and times, and locate buildings near existing transportation hubs;
- Analyze and incorporate public transportation improvements as integral Project components to minimize individual vehicle trips as follows:
 - analyze the use of or availability of transportation impact or other fees to provide public transportation improvements;
 - analyze new infrastructure and service to serve the Project such as light rail, bus, and shuttle service, which will utilize alternative fuels and energy sources wherever possible;
 - analyze improvements to overcome barriers to public transportation use, including more frequent service, better coordination of transfers and connecting services, enhancements to safety, comfort, and cleanliness of conveyances, stations, and common areas, the provision of shuttle services, and other services and incentives;
- Analyze and incorporate bicycle and pedestrian access pathways and access, including both the routes and availability of bicycle parking/storage, as well as access for bicycles to office buildings, etc.
- Analyze and incorporate measures to promote ride-sharing and car-sharing to reduce single-occupancy vehicle trips, including:
 - Utilizing fee structures for access and parking to encourage ride and car-sharing and discourage individual vehicle trips;
 - Provide convenient, accessible, and affordable, centrally-located car-share resources, including prioritizing parking spaces for such vehicles;
 - Encourage ride-sharing, van-pooling, and other measures with prioritized parking spaces, adequate and safe loading and unloading zones, etc.;
 - Develop the necessary infrastructure for alternative fuel vehicles, including plug-in hybrid and electric vehicles, such as solar-powered plug-in hybrid and electric vehicle charging stations

The DEIR calls the Project transit-oriented, yet at the same time estimates that 88% of all trips generated will be individual, private vehicle trips. This number can and must be greatly reduced via a rigorous analysis and incorporation of transportation related alternatives and avoidance and mitigation measures.

Measures Related to Project Construction:

- Utilize recycled, low-carbon, and otherwise climate-friendly building materials such as salvaged and recycled-content materials for building, hard surfaces, and non-plant landscaping materials;
- Minimize, reuse, and recycle construction-related waste;
- Minimize grading, earth-moving, and other energy-intensive construction practices;

- Landscape to preserve natural vegetation and maintain watershed integrity;
- Utilize alternative fuels in construction equipment and require construction equipment to utilize the best available technology to reduce emissions.

Measures Relating to Building Design and Project Operation:

- Analyzing and incorporating the U.S. Green Building Council's LEED (Leadership in Energy and Environmental Design) or comparable standards for energy- and resource-efficient building during pre-design, design, construction, operations and management. See <http://www.usgbc.org> and links; Alameda County 2005. Though the DEIR suggests at 4.12 using the LEED rating system, no mandatory standards are suggested;
- Designing buildings for passive heating and cooling, and natural light, including building orientation, proper orientation and placement of windows, overhangs, skylights, etc.;
- Designing buildings for maximum energy efficiency including the maximum possible insulation, use of compact florescent or other low-energy lighting, use of energy efficient appliances, etc.
- Using electric appliances in solar powered buildings in lieu of household and commercial natural-gas appliances, which cannot use energy from renewable sources;
- Reducing the use of pavement and impermeable surfaces;
- Requiring water re-use systems;
- Maximizing water conservation measures in homes and landscaping, using drought-tolerant plants in lieu of turf, planting shade trees;
- Ensure that the Project is fully served by full recycling and composting services;
- Ensure that the Project's wastewater and solid waste will be treated in facilities where greenhouse gas emissions are minimized and captured.

Measures Relating to Renewable Energy Generation

- Installing the maximum possible photovoltaic array on the building roofss and/or on the project site to generate all of the electricity required by the Project, and utilizing wind energy to the extent necessary and feasible;
- Installing solar water heating systems to generate all of the Project's hot water requirements;

- Installing solar or wind powered electric vehicle and plug-in hybrid vehicle charging stations to reduce emissions from vehicle trips.

Offsetting Emissions

- After all measures have been implemented to reduce emissions in the first instance, remaining emissions that cannot be eliminated may be mitigated through offsets. Care should be taken to ensure that offsets purchased are real (additional), permanent, and verified, and all aspects of the offsets should be discussed in the DEIR.

The DEIR's deficiencies as discussed throughout not only render it legally defective but also represent an enormous missed opportunity to improve land use planning and decision-making and greatly slash the proposed project's greenhouse gas emissions. All of the measures listed above must be incorporated unless it is shown, with substantial evidence on the record, that they would be infeasible. Fortunately, these measures are eminently feasible and will result in a vastly improved Project that saves consumers energy costs, promotes local jobs and innovation, and complies with the mandates and aspirations of CEQA.

VI. CONCLUSION

In summary, the current DEIR has not adequately disclosed, analyzed, minimized, or mitigated the environmental impacts of the proposed project, and therefore approval in its current form would violate CEQA. Because of the document's shortcomings, the public and decision makers cannot make informed decisions about the proposed project's costs in areas including greenhouse gas pollution and climate change. The Center urges that the City revise and recirculate the DEIR for public review.

A number of the references cited have been included on the enclosed compact disk as indicated below. These important references should be considered carefully and included in the administrative record for the project approval process.

Please do not hesitate to contact Kassie Siegel at (760) 366-2232 x.302 or ksiegel@biologicaldiversity.org if you have any questions regarding these comments. The Center for Biological Diversity wishes to be placed on the mailing/notification list for all future environmental decisions regarding this Project. We look forward to working with the City of San José now and in the future to reach our shared goals of reducing greenhouse gas emissions and protecting biological diversity, public health, and our environment. Thank you for your time and consideration of our concerns.

Sincerely,

June 29, 2007

Comments on the DEIR for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017

Page 15 of 17



Edmund J. Gorman
Legal Fellow



Kassie Siegel
Climate, Air and Energy Program Director

Enc: Literature Cited and Attached: the references marked with an asterisk (*) are included on the enclosed compact disk for your review and inclusion in the administrative record.

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June 29, 2007

Comments on the DEIR for the Coyote Valley Specific Plan, State Clearinghouse Number 2005062017

Page 16 of 17

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