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Monterey County
Planning and Building
Inspection Administration

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Via Electronic and Regular Mail
Alana Knaster
Carl P. Holm, AICP
Monterey County
Resource Management Agency
168 W. Alisal Street, 2nd Floor
Salinas, CA, 93901

Re: Comment to Biological Resources Section of the DEIR

Dear Alana:

This letter is written on behalf of the Cattlemen's Association. The purpose of this letter is to comment on Section 4.9, Biological Resources, of the 2007 General Plan's Draft Environmental Impact Report ("DEIR"). As discussed in detail below, we request that (1) the EIR adhere to the scope of the Project, i.e., the adopted 2007 General Plan, by using the General Plan's definition for "special status species", or if non-listed species are to be included, they must be qualified in accordance with CEQA Guidelines section 15380 by meeting the criteria for "endangered" or "rare" (i.e., threatened) species based on substantial evidence; and (2) remove all discussion of databases and inventories prepared by non-profit organizations, including the California Native Plant Society and the California Natural Diversity Database, because these have no formal legal status and are contrary to the approved scope of work. 1

First, the DEIR impermissibly strays away from the defined "Project" scope by broadening the special-status species definition in the adopted 2007 General Plan. The DEIR acknowledges that the General Plan Glossary defines "special-status species" as species that are listed and protected by the federal and California Endangered Species Act, and yet, the environmental consultant broadens this definition in the DEIR by stating, "For *this* EIR, CEQA-defined special-status species are defined to include both listed and non-listed species that are candidate, sensitive, or special-status species in local or regional plans, policies, or regulations, or by the CDFG or USFWS or that otherwise meet the definitions of rare or endangered under CEQA based on substantial evidence. (State CEQA Guidelines Section 15380.)" (DEIR, p. 4.9-1.) 2

It is important to note at the outset that the CEQA Guidelines section 15380 is intended to be directory rather than mandatory. *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 47 (where the court found the City's conclusion that the California tiger salamander was not a threatened species was supported by substantial evidence on the record). Furthermore, courts

have made it clear that an evaluation of the environmental effects of a project need not be exhaustive (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437,1467) and that CEQA does not require a lead agency to conduct every test and perform all research to evaluate the impacts of a proposed project *(Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1395; CEQA Guidelines §15204, subdv.(a).) That is, the agency has the discretion to reject additional research. *Ibid.* Here, the County permissibly limited the definition of special-status species to formally listed species with legal status only, and thus, the scope of the EIR was also specifically and permissibly defined and limited. Yet, the EIR consultant impermissibly strayed beyond this scope.

The EIR consultant then took another step to further broaden the definition even beyond the definition/limitation it set forth for itself in the introduction of the Biological Resources Section, i.e., non-listed species that meet the requirement of CEQA Guidelines section15380 based on substantial evidence. For non-listed species, section 15380(d) specifically provides the following: "A species not included in any listing identified in subdivision (c) shall nevertheless be considered to be endangered, rare, threatened, if the species can be shown to meet the criteria in subdivision (b)." Under subdivision (b) for unlisted species, a species of animal or plant is considered "endangered" when its survival and reproduction in the wild is in *immediate jeopardy* from one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, disease, or other factors; or "rare" when either: (1) although not presently threatened with extinction, the species is existing in such small numbers throughout all or a significant portion of its range that *it may become endangered* if its environment worsens; or (2) the species is *likely to become endangered* within the foreseeable future throughout all or a significant portion of its range and may be considered "threatened" as that term is used in the Federal Endangered Species Act. (Emphasis added.) "Threatened species" is defined under the Federal ESA as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(20). The focus for unlisted species subject to permissive protection under CEQA Guidelines section 15380 is based on whether the species is (1) in immediate jeopardy or (2) is likely to become endangered within the foreseeable future. 2

Relevant parts of section 15065(a) of the CEQA Guidelines state, "a project has a significant effect on the environment if it will substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below *self-sustaining levels*; threaten to *eliminate* a plant or animal community; substantially reduce the number or restrict the range of an *endangered, rare or threatened species*." (Emphasis added.) Again, the focus is on protecting species that may become threatened or endangered (i.e., eliminated) within the foreseeable future.

Accordingly, courts have further defined "special status species" for the purpose of CEQA as "species that are either declining at a rate that could result in listing or historically

occurred in low numbers, and known threats to their persistence currently exist." See e.g. *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1466.

Courts have also noted that "endangered, rare or threatened species" under CEQA Guideline section 15065 is sufficiently distinct from "sensitive" species and a California species of "special concern" and the two should not be treated as same under CEQA. In *Defend the Bay v. City of Irvine* (2004) 119 Cal. App.4th 1261,1277[1], the court stated that the administrative record characterized the Western Spadefoot Toad as a "sensitive" species and a California species of "special concern" and there is no suggestion that this designation was the same thing as endangered, rare or threatened species under CEQA Guideline section 15065. Furthermore, the court assumed that the different labels were attached for a reason and concluded that the petitioner did not sufficiently address this distinction. *Defend the Bay v. City of Irvine* (2004) 119 Cal. App. 4th at 1277. 2

Rather than adhering to the definition in the 2007 General Plan for special status species, the EIR consultant impermissibly broadened the definition of special status species to include

1. *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261 was further explained in *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 792 (Footnote 12) as follows:

> "Our statement in *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1273-1274 [15 Cal.Rptr3d 176], that a project is deemed to have a significant impact on the environment as a matter of law if it reduced the habitat of a wildlife species, or reduces the number or range of an endangered, rare, or threatened species, was not intended as exhaustive list of the components of "significant impact," but rather a compilation of the effects which rendered that particular EIR inadequate. It cites Guidelines section 15065, which lays out additional mandatory findings of significance." (Emphasis Added.)

The *Endangered Habitats League* court stated that the EIR's "threshold of significance" was too lenient, because it failed to include the entire section 15065 mandatory findings of significance. The EIR limited the "threshold of significance" to a test of "substantial effect" on enumerated species, whereby "substantial effect" was defined as: "significant loss or harm of a magnitude... 1) would cause species or a native plant [or] animal community to drop below self-perpetuating levels on a statewide or regional basis; or 2) would cause a species to become threatened or endangered."

As stated in the body of this letter, relevant parts of section 15065(a) of the CEQA Guidelines state, "a project has a significant effect on the environment if it will substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels; threaten to eliminate a plant or animal community; substantially reduce the number or restrict the range of an endangered, rare or threatened species."

In essence, the EIR, in *the Endangered Habitats League* case, should have included all of the above section 15065 mandatory findings of significance. That is, the EIR failed to include the following thresholds of significance in accordance with section 15065: (1) substantially reduce the habitat of endangered or rare (i.e., threatened) species (in accordance with the definition in section 15380) and (2) substantially reduce the number or restrict the range of an endangered, rare or threatened species.

This case presents no new information than what has already been discussed in the body of this letter.

species listed on the California Native Plant Society and the California Natural Diversity Databases. Case law has established that the duty to designate a plant or animal species as rare or endangered has been delegated under the California Endangered Species Act to the Fish and Game Commission (Fish & G. Code, 2070) and under the federal Endangered Species Act jointly to the Secretaries of Interior and Commerce. *See, e.g. Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30. The California Native Plant Society and the California Natural Diversity Databases are not prepared by these public agencies, but rather prepared and updated by non-profit organizations. The main problem with the databases created by non-profit organizations is that, unlike a public agency, these organizations are not subject to the scrutiny afforded by procedural due process. Also, unlike a public agency, there is no requirement imposed on these non-profit organizations to support their decisions, i.e., their listings, based on substantial evidence or, for that matter, any evidence. 2

The California Department of Fish and Game ("DFG") has a partnership with these non-profit organizations, and the DFG's Biogeographic Data Branch maintains a "species of special concern" designation based on the California Natural Diversity Database. However, the DFG cautions that its species of special concern designation "is an administrative designation and carries no formal legal status." (Species of Special Concern: A Brief Description of Important California Department of Fish and Game Designation, www.dfg.ca.gov/wildlife/species/ssc/birds.html.) Utilizing non-profit organizations to list species in these "semi-private" databases, in essence, circumvents the public notice and hearing process set forth by procedural due process. These databases do not carry the same weight as the formal listing. The environmental consultant's determination to give them equal weight in the DEIR contrary to the scope of work was improper and certainly not compelled by law. 3

Accordingly, the DEIR should not rely on these databases and inventories to identify permissively protected species under CEQA Guidelines section 15380, because the listings in the databases circumvent procedural due process, contravene the approved scope of work, there is no requirement of substantial evidence, or for that matter, any evidence to support the listings, and the listings do not carry formal legal status.

Conclusion

Based on the foregoing, the Cattlemen's Association requests the following:

(1) The EIR adhere to the approved scope of work by using the definition in the adopted 2007 General Plan Glossary for "special-status species," or if non-listed species are to be included, they must be qualified in accordance CEQA Guidelines section 15380 by meeting the criteria for "endangered" or "rare" (i.e., threatened) species based on substantial evidence; and 4

(2) The EIR remove all discussions of databases and inventories having no legal status, such as the California Native Plant Society and the California Natural Diversity Databases, because there is no evidence that the listing in these databases is supported by substantial evidence. 4

We appreciate this opportunity to comment on the DEIR.

Respectfully submitted,

Pamela H. Silkwood

cc: Scott Violini