

# mintierharnish

planning consultants

Monterey County  
Planning and Building  
Inspection Administration

1415 20<sup>th</sup> Street  
Sacramento, CA 95811  
Phone: (916) 446-0522  
Fax: (916) 446-7520

Email: [mintier@mintierharnish.com](mailto:mintier@mintierharnish.com)  
[www.mintierharnish.com](http://www.mintierharnish.com)

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February 2, 2009

Mr. Carl Holm  
RMA-Planning Salinas Permit Center  
168 W. Alisal St.  
2<sup>nd</sup> Floor  
Salinas CA 93901  
[ceqacomment@co.monterey.ca.us]

**RE: Comments on the Monterey County General Plan Draft Environmental Impact Report, Section 4.9, Biological Resources**

Dear Mr. Holm:

On behalf of Plan for the People, a group of citizens and organizations in Monterey County concerned about the future of the area's agriculture, hospitality, housing and jobs, I have prepared comments on the Monterey County 2007 General Plan Update (Plan) Draft Environmental Impact Report Section 4.9, Biological Resources, dated September 2008 (DEIR). My overall conclusion is that the DEIR applies an inappropriately broad definition of "special status species" that is inconsistent with the Plan. Furthermore, this broad definition is unsupported under the California Environmental Quality Act (CEQA) in the absence of supporting evidence in the record. As a result, the DEIR incorrectly finds certain impacts of the Plan to be significant that should in fact be found less than significant. Further, based on its incorrect significance findings, the DEIR recommends unnecessary, and in some cases very expensive, mitigation measures that must be removed.

## General Comments

1. **Redefining Special Status Species.** The DEIR, at page 4.9-1, inappropriately rejects the Plan's definition of special status species in favor of a broader, more inclusive definition without substantive explanation or justification. While the California Environmental Quality Act (CEQA) permits the broader definition, it does not require it. CEQA does require that if a lead agency chooses to treat other species as if they are a species that is listed as rare, threatened, or endangered pursuant to the Federal or State Endangered Species Acts, the agency must apply tests approximating the statutory listing process to substantiate that the treatment is justified. The DEIR fails to provide that substantiation. The DEIR must be revised to rely on the approved County definition found in the glossary of the Plan, correct conclusions of significance that rely on the DEIR's unsupported definition, and remove or correct related mitigation measures appropriately.

2. **Impact Assessment for the Planning Horizon and Buildout.** The DEIR describes and assesses the Project (which in this case is the 2007 General Plan) impacts for two time periods: the 2030 planning horizon; and buildout of all land designated for development under the Plan, which is estimated to be 84 years (2092). Assessment of potential impacts for an 84-year period is a meaningless, inappropriate exercise for two basic reasons. First, and most importantly, the Project is defined as a general plan intended to guide growth and development through 2030, not 2092. CEQA requires that an EIR assess the potential environmental impacts of a proposed project, which in this case is a plan for 2030. Before or by 2030, in accordance with planning practice and State General Plan Guidelines, the County of Monterey will update the Plan. It is inappropriate to speculate what development might occur beyond the planning horizon because the Plan will be updated and a new assessment of development impacts beyond 2030 can be prepared at that time. Secondly, assessing potential impacts 84 years in the future is simply far too speculative to have any substance or relevance to the County decisionmakers. The DEIR states as much. Not only is it impossible to determine what lands and species might be impacted 84 years in the future, many of the species currently listed as special status may not even be listed in 2092. Some species may have disappeared while others may have recovered to the point of being de-listed. Any discussion of potential impacts beyond the planning horizon of the Plan must be removed from the DEIR.

### Specific Comments

1. **Page 4.9-1, Special Status Species [Note].** The DEIR proposes expanding the Plan's "special status species" definition to include many unlisted species and plant groupings, calling the new definition "CEQA-defined special-status species." Despite the implication in the name, CEQA does not define special status species, or use the term. While the DEIR does not say its expansive definition is required by CEQA, it implies it is required by Section 15380 in the CEQA Guidelines. Section 15380 is the Guidelines' definition for endangered, rare and threatened species. The definition allows species other than those listed in Title 50, Code of Federal Regulations, or Title 14, California Code of Regulations, to be considered endangered, rare or threatened for CEQA purposes, but only after it has been shown the species meet tests that approximate the statutory tests required for listing in Title 50 or Title 14. The DEIR provides no evidence the species it proposes to treat like listed species have passed the tests. CEQA requires such determinations to be supported by substantial evidence in the record, based on facts.

<sup>1</sup> The DEIR implicitly assumes that a species' appearance on a different list is sufficient factual basis. However, the California Court of Appeal has rejected that notion.<sup>2</sup> Neither CEQA nor the California or federal endangered species acts provide for treating plant groupings like "plant communities" as listed threatened or endangered species.

By proposing that non-listed species and plant groupings be treated like species that have been through the rigorous statutory process required to list them as endangered, threatened or rare, the DEIR disregards the due process inherent in the state and federal endangered species acts.<sup>3</sup> That due process provides the opportunity for citizens to study the effects of extending protection to previously non-listed species and to present scientific and commercial data to rebut the need to extend protection to a previously non-listed species, and also, to protect the property rights of landowners who would be affected by unjustified regulations to protect a species, or its habitat, when it may not actually need protection. The DEIR significance determinations and mitigation measures must be corrected to be consistent with the definition of special status species in the Plan Glossary.

2. **Pages 4.9-21 to -23, Section 4.9.3.3, CEQA-Defined Special-Status Species.** Consistent with previous comments, this section must be revised to include only those species listed under the Federal Endangered Species Act (FESA) or California Endangered Species Act (CESA) [the first two bullet points on page 4.9-22]. The DEIR fails to provide the required substantial evidence with facts to support the inclusion of the additional categories of species listed on page 4.9-22. Again, the DEIR significance

<sup>1</sup> (CEQA) PRC section 21082.2.(a) and (c), for example, "**Substantial evidence shall include facts**, reasonable assumptions predicated upon **facts**, and expert opinion supported by **facts**." (Emphasis added.)

<sup>2</sup> "Defend the Bay contends the EIR was required to find the project impact on the creature significant because it is an '**endangered, rare or threatened species**.' (Guidelines, § 15065.) But it does not point to any **evidence** of this designation. **To the contrary**, the record characterizes the toad as a '**sensitive**' species and a **California species of 'special concern'** and **there is no suggestion that is the same thing**. We assume the different labels were attached for a reason and Defend the Bay does not address the issue." (*Defend the Bay v. City of Irvine* (2004) Cal. App. 4th 1261, 1277; emphasis added.)

<sup>3</sup> For example, see the Federal Endangered Species Act, at Title 16, Section 1533, which requires receiving a petition to list, preparing a 90-day government review to determine whether the petition has merit, publishing the proposal to list, allowing 12 months for public review and comment, giving notice to professional scientific organizations, publishing the proposal in a newspaper of general circulation, holding a public hearing if requested, and publishing a final decision that includes the factual basis for the decision (e.g., at 16 USC 1533(b)(8), "The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act **shall include** a summary by the Secretary of **the data on which such regulation is based and shall show the relationship of such data to such regulation ...**" (Emphasis added.)

determinations and mitigation measures must be corrected to be consistent with the definition of special status species in the Plan Glossary.

3. **Pages 4.9-64 to -73, Section 4.9.5.4, Impacts on CEQA-Defined Special-Status Species, Impact BIO-1.** This impact analysis must be revised to address only impacts on special status species as defined by the Plan. The land area proposed for development under the Plan that includes special status species must be clearly identified and the potential impacts clearly defined. The DEIR refers (page 4.9-65) to habitat conversion but is unclear how much of that habitat, if any, includes special status species as defined in the Plan. This uncertainty must be clarified.

4. **Page 4.9-73, Significance Determination.** The DEIR acknowledges that Plan policies require avoidance, minimization, and compensation for impacts to special status species. This acknowledgement, in and of itself, is sufficient basis for a conclusion of less than significant impacts without mitigation. The reference to "landscape-level concern" related to potential impacts of development in the Salinas Valley on kit fox habitat (presumably the San Joaquin kit fox which is listed as endangered under the FESA and threatened under the CSEA) is unclear. First, the DEIR contains no analysis of this "concern." It fails to identify any potential impacts to the kit fox and fails to explain why the Plan policies will not result in avoidance, minimization, or compensation for any potential impacts to the listed kit fox. This discussion must either be removed from the DEIR or expanded to explain why the Plan policies are insufficient to address the concern.

The DEIR erroneously concludes that the Plan does not provide for a systematic approach to address impacts of development on special status species. The DEIR fails to provide substantial evidence that any species other than those listed under the FESA and CESA qualify for the same protection under CEQA. The Plan policies clearly provide for protection or impact mitigation for listed policies, as acknowledged by the DEIR. The DEIR conclusion that this is not enough is unsubstantiated by factual analysis and must be revised to be less than significant.

The further conclusion that development under the Plan would result in significant impacts to unlisted species is erroneous for two reasons. First, the DEIR fails to provide substantial evidence that those non-listed species are entitled to the same presumption of impact significance as listed species. Second, in the absence of that presumption, the DEIR must show that the impacts to those species would be "substantial." The DEIR provides no evidence to support such a conclusion. The DEIR must be revised to provide substantial evidence to support the significance conclusion or conclude that the impacts will be less than significant and no further mitigation is required.

5. **Page 4.9-73, Mitigation Measure BIO-1.1.** This measure must be deleted because it would needlessly waste County funds and staff time mapping species and plant groupings that are not properly included in the definition of special status species, as discussed above. Adequate inventories of legitimate special status species and other resources, as defined in the Plan, currently exist. 5
  
6. **Page 4.9-74, Mitigation Measure BIO-1.2.** This mitigation measure is not supported by substantial evidence in the record. The DEIR reaches the unsubstantiated conclusion (page 4.9-73) that there is a "...landscape level concern" related to new development in the Salinas Valley that may occur in potential kit fox habitat that is not addressed by Plan policies. No factual analysis of this concern is presented in the DEIR. More importantly, this issue is characterized as a "concern," not a significant impact. CEQA does not require mitigation measures to resolve concerns. CEQA does require an EIR to include feasible mitigation measures to reduce potential significant impacts to a less than significant level. Mitigation measure BIO-1.2 does not mitigate any potentially significant impacts identified in the DEIR and must be removed. Further, even if the DEIR provided substantial evidence of a potential significant impact to San Joaquin kit fox in the Salinas Valley as a result of development permitted under the Plan, an appropriate mitigation measure would recommend additional policies to address the impact. It is not appropriate for a DEIR on a general plan to recommend specific program implementation, particularly one such as described in BIO-1.2 that has such significant cost and policy implications. Measure BIO-1.2, among other things, requires the County to assure the cooperation of Federal, State, and local agencies over which the County has no control. Further exacerbating this impossible situation is the proposed requirement that the measure be implemented in four years. Even in the best of circumstances, Habitat Conservation Plans require five or more years to complete. This measure is not supported by evidence in the record, does not mitigate any identified potential significant impact, is likely impossible to implement, and must be removed from the DEIR. 6
  
7. **Pages 4.9-74, Mitigation Measure BIO-1.3.** This measure is inconsistent with CEQA. As discussed in comments above, the DEIR provides no substantial evidence that non-listed species qualify to be considered special status. While the County has the discretion to make this determination, it has not done so. This mitigation measure has cost and policy considerations that must be subjected to thorough discussion and decisions by the Monterey County Board of Supervisors. The preparers of the DEIR have exceeded their authority by determining new CEQA policy without any direction from the Board. 7

Mitigation Measure BIO-1.3 must be removed as inconsistent with CEQA's substantiation requirements. 7

8. **Page 4.9-75, Significance Conclusion.** This discussion must be revised to reflect the revisions recommended in the comments above. The discussion must be based on substantial evidence in the DEIR as to the potential significant impacts and the effectiveness of feasible mitigation measures. For example, the reference to significant San Joaquin kit fox impacts in the first paragraph is not only unsubstantiated by factual analysis, the DEIR at page 4.9-73 includes that there is merely a "landscape-level concern" about San Joaquin kit fox habitat impacts, not a potential significant impact requiring mitigation. 8

9. **Page 4.9-77, Significance Determination.** Again, the DEIR makes a determination unsupported by factual analysis. The DEIR has not shown that the Plan will result in significant impacts to non-listed species. CEQA requires substantial fact-based evidence that the Plan will result in the *substantial* reduction of the range of these non-listed species. The DEIR has not presented this evidence and, therefore, the significance conclusion is wrong and must be removed. 9

10. **Page 4.9-77, Mitigation Measure BIO-1.4.** This mitigation measure must be removed for three reasons. First, the DEIR fails to identify a potential significant impact this measure is intended to mitigate. Second, it is so general that it is impossible to reach a conclusion, based on evidence in the record, that it will mitigate a specific impact to a less than significant level. Mere identification of growth areas will not assure that natural habitat loss will be reduced. Third, and most importantly, it is both inappropriate and well beyond the scope of an EIR to set a timetable for a subsequent General Plan update. While it is likely an update will occur in the next 22 years, the timing and content of the next General Plan update is outside the purview of CEQA. 10

11. **Page 4.9-78, Mitigation Measure BIO-1.5.** Mitigation measure BIO-1.5 does not mitigate any potentially significant impacts identified in the DEIR and must be removed. It is not appropriate for a DEIR on a general plan to recommend specific program implementation, particularly one such as described in BIO-1.5 that has such significant cost and policy implications. Measure BIO-1.2, among other things, requires the County to assure the cooperation of Federal, State, and local agencies, as well as dozens of private property owners, over which the County has no control. This is an enormous and 11

costly undertaking. Including such a program as a mitigation measure obligates the County to complete the HCP or face legal challenge under CEQA. A county-wide HCP is a controversial issue which has been discussed for years. It is at the heart of much of the controversy that has plagued the Monterey County General Plan Update process. It is highly inappropriate for the DEIR to include a county-wide HCP as a mitigation measure, particularly since the measure is not supported by evidence in the record, does not mitigate any identified potential significant impact, and is likely impossible to implement. BIO-1.5 must be removed from the DEIR.

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**12. Pages 4.9-97 and -98, Impact BIO-3.2.** The DEIR concludes without factual support that the disturbance or loss of nesting migratory bird and raptor habitat is a potentially significant impact. This statement is unsupported by facts in the record or CEQA. To reiterate the CEQA significance standard stated previously, CEQA permits consideration of wildlife species, other than those formally listed under the FESA or CESA, provided that substantial factual evidence shows that the species in question meets the tests in CEQA Guidelines section 15380(b), which approximate the tests required for a species to be listed under FESA or CESA. The DEIR fails to provide this evidence for nesting migratory birds and raptors, including birds and raptors protected under the Migratory Bird Treaty Act (MBTA). The MBTA provides protection separate from CEQA. Unless there is substantial evidence provided in the record, protection for those species covered under the MBTA does not extend to CEQA. Impact BIO-3.2 is not substantiated by substantial evidence in the record and must be removed.

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**13. Page 4.9-98, Mitigation Measure BIO-3.2.** Following on comment 12 above, this mitigation measure must be removed as unnecessary since the impact it is intended to mitigate is unsubstantiated and must be removed from the DEIR. Further, the mitigation measure is infeasible based on the severe, over-reaching, impractical limitations placed on vegetation removal. The measure refers generically only to "vegetation" which can be interpreted as all vegetation. In fact migratory birds may nest in a wide variety of vegetation types, including natural vegetation, ornamental landscaping, and other common urban vegetation. This measure, if adopted, would potentially regulate modification to all vegetation in the County, including backyards and street trees. This extreme regulation defies common sense. The measure is also flawed given the unreasonably narrow and impractical window allowed for vegetation removal. The September 16 through January 31 window falls largely in the winter time when construction activities are limited or prohibited due to the rainy season. The terms of the removal are absolute. The measure does not permit vegetation removal from February 1 through September 14 under any circumstances, even if no "protected" species or habitat is present. Finally, as with many other measures found in the DEIR, this measure is far

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Comments on Monterey County GPU DEIR

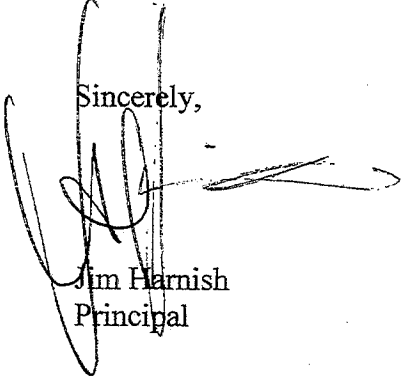
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too specific for a General Plan program DEIR. The purpose of program EIR is to evaluate the potential impacts resulting from implementation of General Plan goals and policies and recommend policy modifications to mitigate those impacts. Instead, Mitigation Measure BIO-3.2 inappropriately imposes detailed, over-reaching, project-specific actions appropriate for a project-level EIR. This measure must be removed from the DEIR or, at a minimum, modified to simply recommend additional policies intended to address protection of migratory birds and raptors, provided that substantial factual basis is provided to show significant impacts and justify the policies.

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Sincerely,



Jim Harnish  
Principal

JH/twj



**Calderon, Vanessa A. x5186**

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**From:** Mintier Harnish [mintier@mintierharnish.com]  
**Sent:** Monday, February 02, 2009 2:19 PM  
**To:** ceqacomments  
**Subject:** Monterey County GPU DEIR – Comment Letter

To: Mr. Carl Holm

Please find attached comments on the Monterey County General Plan Draft Environmental Impact Report, Section 4.9, Biological Resources, for your review.

Jim Harnish, Principal

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Mintier Harnish  
1415 20th Street  
Sacramento, CA 95811 (new zip code)  
916-446-0522  
916-446-7520 (fax)  
[mintier@mintierharnish.com](mailto:mintier@mintierharnish.com)

"Mintier & Associates has changed its name to Mintier Harnish, effective September 1, 2008, reflecting a corporate reorganization. This change includes a new website ([www.mintierharnish.com](http://www.mintierharnish.com)) and new email extensions ("@"[mintierharnish.com](mailto:mintierharnish.com)). Please update your contact list accordingly."