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VIA E-MAIL: Andrew.Young@acgov.org

RE: ***Sand Hill Wind, LLC, Conditional Use Permit Application, PLN2017-00201***

Dear Mr. Young:

We submit this comment letter on behalf of the Attorney General in his independent capacity on the County of Alameda's (County's) notice of public hearing on October 25, 2018, regarding the proposed Sand Hill Wind Repowering Project, Conditional Use Permit Application, PLN2017-00201.¹ As explained in greater detail below, there is substantial evidence indicating that the Sand Hill Project will have additional or more severe environmental effects on bird and bats, and other adverse effects, than were analyzed in the County's November 2014 program environmental impact report for repowering at Altamont Pass (PEIR). There also is substantial evidence that the project will require additional or different alternatives or mitigation measures than were specifically analyzed and included in the 2014 PEIR. Moreover, there is no substantial evidence to support the County's contrary conclusions. Thus, the County is required to prepare a project-specific subsequent environmental impact report (EIR) that analyzes the site-specific effects of the Sand Hill Project in detail and includes additional alternatives to and mitigation measures for this project.

¹ On September 18, 2018, the County of Alameda circulated the following documents with respect to the proposed Sand Hill Project:

- 1) Notice of preliminary public hearing on September 27, 2018;
- 2) *Sand Hill Wind Repowering Project Environmental Analysis* prepared for the County by ICF International and dated Sept. 2018;
- 3) Appendices A-D to Environmental Analysis, including *Appendix B: Biological Resources Evaluation for The Sand Hill Wind Repowering Project*, prepared for the County by ICF International and dated Sept. 2018; and
- 4) *Sand Hill Wind Repowering Project Implementation Checklist*, prepared for the County by ICF International and dated Sept. 2018.

INTRODUCTION AND OVERVIEW

The proposed Sand Hill Project will consist of replacing an estimated 671 old-generation turbines or former turbine sites with up to 40 new, 2.3 to 4.0 megawatt (MW) turbines, for a total maximum operating capacity of 144.5 MW. *Updated Notice of Public Hearing*, Oct. 25, 2018. The project would be located on fifteen parcels extending over 2,600 acres of the eastern Alameda County side of the Altamont Pass Wind Resources Area (Altamont Pass). *Id.* The project applicant is Sand Hill Wind, LLC, a subsidiary of S-Power. Three “conceptual” alternate project layouts are proposed, each using up to 40 turbines, and which purportedly are “substantially similar.” EA at 1-1.

The County intends the Environmental Analysis (EA) and accompanying Implementation Checklist (IC) to constitute an initial study for the Sand Hill Project under the California Environmental Quality Act, Public Resources Code section 21000 *et seq.* (CEQA), that is tiered from the 2014 PEIR. The EA and IC conclude, pursuant to CEQA Guidelines, Code of Regulations, Title 14 (Guidelines), section 15168(c)(2), that no subsequent or further site-specific environmental review is required for the Sand Hill Project because the project is within the scope of the 2014 PEIR and will not result in any new or more severe environmental effects or require any new or different mitigation measures that were not already discussed in the PEIR.² EA at 1-2; IC at 1.

For the reasons explained below, this conclusion is not supported by substantial evidence, and there is substantial evidence that the Sand Hill Project will have one or more significant effects, or significant effects that are more severe, and require additional or different alternatives and mitigation measures, than were examined in the 2014 PEIR. This is particularly true with regard to the project’s impacts on avian and bat resources. Accordingly, the County is required to prepare a subsequent project- and site-specific EIR, tiered from the 2014 PEIR, that examines the project’s impacts, alternatives and mitigation measures in detail.

The County must prepare a subsequent EIR for the Sand Hill Project under either of two alternative analyses. First, the Sand Hill Project was not specifically analyzed in the 2014 PEIR and accordingly is not within the scope of the PEIR. There is a fair argument based on substantial evidence that this project will have one or more significant effects and require additional mitigation measures that were not addressed in the PEIR.

² Guidelines section 15168(c)(2) provides:

If the agency finds that, pursuant to Section 15162, no new effects could occur or no new mitigation measures would be required, the agency can approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required.

14 Cal. Code Regs. § 15168(c)(2).

Second, even if the Sand Hill Project is considered to be within the scope of the PEIR, there is substantial evidence that the criteria for preparing a subsequent EIR are triggered due to substantial changes in the project, changed circumstances and significant new information, all of which will require major revisions to the 2014 PEIR. Moreover, there is no substantial evidence supporting a contrary conclusion. Indeed, the County's own analyses lead to the conclusion that additional environmental review is required for this project.

BACKGROUND

2010 Next Era-Attorney General-Audubon Society Settlement Agreement

Until the recent repowering efforts at Altamont Pass, approximately 4,000 old-generation wind turbines had been operating in this area since the 1980s. Altamont Pass is a high-density raptor breeding, foraging, and nesting area and a major migration route for birds and bats. PEIR 3.4-34 – 45. A 2004 California Energy Commission study estimated that these old-generation turbines at Altamont Pass annually killed between 880 and 1,330 raptors (including over 100 golden eagles), and thousands of other birds. BioResource Consultants, *Developing Methods to Reduce Bird Mortality in the Altamont Pass Wind Resource Area*, report prepared for the Calif. Energy Comm. Pub. Interest Energy Res. Prog., Aug. 2004.

In 2010, the Attorney General, along with several Bay Area chapters of the Audubon Society, negotiated a major settlement agreement for repowering with Next Era Energy, the company that previously owned and operated approximately 60% of the old-generation wind turbines at Altamont Pass. Under this agreement, Next Era agreed to repower its old-generation turbines in three phases. The first phase was the Vasco Winds Project on the Contra Costa County side of Altamont Pass, and the second two phases were the Golden Hills and Golden Hills North Projects on the Alameda County side. Among other things, the agreement requires Next Era to site the new turbines in the safest locations for birds and bats, based on the best available science, including pre-construction surveys and field-tested modeling. The agreement also requires the company to monitor each phase of repowering for three years following initial operation and to pay approximately \$2.5 million to the East Bay Regional Park District for all phases of repowering as a mitigation fee to compensate for ongoing raptor deaths (\$10,500 per MW of power). This fee is divided equally between scientific research on the effects of turbines on birds and bats and preservation of raptor habitat or other conservation efforts in the area.

2014 PEIR

In November of 2014, the County approved the PEIR for repowering all of the old turbines on the Alameda County side of Altamont Pass. The PEIR was “intended to identify the anticipated environmental impacts of conditional use permits (CUPs) that may be approved by [the] County for repowering windfarm projects” at Altamont Pass. PEIR at 1-1. One of the key PEIR objectives was to “[r]educe avian mortality caused by wind energy generation in the program area through repowering.” PEIR at 2-2. The PEIR stated that, based on “early evidence” from other completed repowering projects, the year-round operations of repowered turbines at

Altamont Pass “are expected to have much lower . . . avian mortality rates than the existing [old-generation] facilities.” PEIR at 1-10.

The PEIR explained the relationship of that environmental document to future repowering projects at Altamont Pass as follows:

This PEIR is the first tier of environmental documentation. It would be augmented by second-tier environmental documents as appropriate when additional details for the specific repowering projects are developed. These project-level environmental documents would incorporate by reference appropriate information from this PEIR regarding secondary effects, cumulative impacts, broad alternatives, and other relevant factors. These environmental documents would focus solely on site-specific issues that have not been considered in this PEIR. *If activities were later found to have effects that were not examined in this PEIR, additional CEQA review would be required.* If the County finds that implementation of a later activity would have no new effects and that no new mitigation measures would be required, that activity would require no additional CEQA review.

PEIR at 1-2, emphasis added; *see also id.* at 1-11 (“[a]ny project whose impacts are not adequately evaluated in this PEIR would have to undergo additional, project-level environmental analysis; however, such analysis may be able to tier from this PEIR”).

Alternative 1 of the PEIR placed a 417 MW cap on all repowering projects on the Alameda County side of at Altamont Pass, and Alternative 2 placed a 450 MW cap on such repowering projects. While the County’s resolution certifying the PEIR does not specify which alternative it was approving, the PEIR implied that the 417 MW alternative was the preferred alternative, stating: “[u]nder the program as proposed, the installed capacity of the program area would not increase above the level defined by the 1998 Repowering PEIR—416.4 MW in the Alameda County portion of [Altamont Pass].” PEIR at 1-11.

The PEIR estimated that the total amount of fatalities, for all repowering projects that ultimately could be approved under the repowering program, would be 4 to 17 golden eagles per year for the 417 MW alternative, and 5 to 18 golden eagles per year for the 450 MW alternative. PEIR at 3.4-105 and 120. The PEIR estimated that the total, program-wide number of fatalities of red-tailed hawks would be 42 to 103 hawks per year for the 417 MW alternative and 45 to 111 hawks per year for the 450 MW alternative. PEIR at 3.4-107 and 120.

The PEIR also analyzed, at the project level, two repowering projects that were then ready for CUP approval: Next Era’s Golden Hills Project and EDF Renewable Energy’s Patterson Pass Project. The PEIR estimated that the Golden Hills Project, an 86 MW project, would kill “less than one” to 4 golden eagles, and between 9 to 22 red-tailed hawks, per year. PEIR at 3.4-123. The PEIR also included a range of estimated bat deaths for the Golden Hills Project of between 148 to 347 bats. *Id.* at 3.4-133.

Finally, the PEIR incorporated as mitigation measures some of the major deal points of the 2010 Next Era-Attorney General-Audubon Society settlement agreement. These include: 1) micro-siting of turbines to avoid turbine sites that are most harmful to birds and bats, based on field studies and subject to review and oversight of the County's scientific Technical Advisory Committee (TAC); and 2) three years of post-construction monitoring, also subject to TAC oversight. In addition, among other measures, the PEIR included requirements for compensatory mitigation and adaptive management based on post-construction monitoring results. These measures are described on pages 3.4-109 to 118 of the PEIR.

Changes to the Project and Changed Circumstances Since the 2014 PEIR

At the time the County certified the 2014 PEIR, it had prepared a separate EIR on the original version of the Sand Hill Project, which another applicant, Ogin, Inc., initially had proposed as a pilot project to test a new "shrouded" turbine design. Ogin theorized this design potentially would significantly reduce impacts to birds and bats from ongoing operation of wind turbines. The 2014 PEIR states:

The Sand Hills Wind Project is currently undergoing separate CEQA review. This is a pilot project utilizing an experimental technology—shrouded turbines.... and as such is not evaluated in this PEIR. If the new technology proves successful in reducing avian mortality, the intention is to complete the Sand Hill repowering project using shrouded turbines. If results do not support continued use of this technology, conventional turbines would instead be installed to repower the existing project, in which case the analysis in this PEIR would cover the remainder of the Sand Hills project at a program level; however, *additional project-level analysis would be required.*

PEIR at 1-9, emphasis added.

Ogin subsequently abandoned the shrouded turbine project and proposed a standard repowering project, much smaller than that which is currently proposed, to replace 433 existing wind turbines or former turbine sites with up to 12 new 2.5 to 3.0 MW turbines, for up to 36 MW of total generating capacity. In March 2016, the County approved this project as within the scope of the 2014 PEIR and without preparing a subsequent EIR. *See East County BZA Reso. Z-2016-XX, Conditional Use Permit, PLN2015-00198.* Ogin never constructed this project, however, and the current 40-turbine, 144.5 MW project is being proposed by a new entity, S-Power. As the County acknowledges, the current project is four times as large as the previously approved project and will cover about "triple the area." EA at 1-2 – 1-3; *County Power Point Presentation, Sand Hill Wind Repowering Project, East County BZA, Sept. 27, 2018.*

The Sand Hill EA also notes that the current project would utilize 40 turbines up to 4.0 MW in size, but the PEIR only analyzed turbines up to 3 MW in size. EA at 1-3, 2-3; *see* PEIR at 2-3 to 2-4. Turbine "blade lengths would be up to 15 feet (approximately 7%) longer, rotor diameters

up to 39 feet (approximately 9%) greater, and rotor-swept area up to 2,482 square meters (approximately 17%) larger” than those analyzed in the PEIR. EA at 1-3. The much larger turbines also will require significant additional upgrades to and widening of existing roads to 20-40 feet and significantly more grading for turbine pads, which likewise was not discussed in the PEIR. EA App. B, BRA at 1-3 – 1-4; EA at 2-5 to 2-7. S-Power also proposes to construct an operations and maintenance facility on the project site, which was not discussed in the PEIR either. EA at 1-2, 1-5, 2-10.

Finally, approval of the Sand Hill Project is likely to cause the total Altamont-wide repowering program to exceed the 417 MW cap on repowering in Alternative 1, and possibly to slightly exceed the 450 MW cap for Alternative 2. EA at 1-4.

New Information Since the 2014 PEIR

On February 28, 2018, the consultant hired by Next Era, H.T. Harvey and Associates, issued its final report for the first year of the three-year monitoring program for the Golden Hills Project, as required under the PEIR’s mitigation program. *See* H.T. Harvey, *Golden Hills Wind Energy Center Post-Construction Fatality Monitoring Report: Year 1*, Feb. 2018. The report concludes that this 86 MW project alone killed up to 12 golden eagles, 70 red-tailed hawks, and up to 229 bats (documented fatalities) in its first year of operation.³ *Id.* at vii and 49-52.

These fatalities comprise about 2/3 of the PEIR’s total estimated annual deaths of golden eagles and red-tailed hawks for the entire 450 MW repowering program at Altamont Pass, and far exceed the range of estimated annual fatalities for the Golden Hills Project for golden eagles and red-tailed hawks. *See id.*, Table 12 at 44 and Table 15 at 50; and PEIR at 3.4-120 and 123.⁴ The Golden Hills Project’s first-year per-MW annual estimated fatality rates for golden eagles in particular are anywhere from 1.75 to 6.5 times the average per-MW fatality rates of other, earlier repowering projects in the Altamont Pass region (Buena Vista, Diablo Winds and Vasco Winds), and between 1.45 to 9 times higher than these other projects for red-tailed hawks. H.T Harvey at 44, 50. Under some of the report’s estimates, the Golden Hills Project per-MW fatality rates even matched or exceeded the pre-repowering average annual fatality rates, for golden eagles and red-tailed hawks, for operation of the old-generation turbines between 2005-2013. *Id.* at xii – xiii, 44, 50.

These very high fatality rates occurred despite the fact that Next Era was required to implement the avian micro-siting and other mitigation measures in the PEIR. Thus, these fatality rates seriously call into the question the adequacy of the PEIR’s impact analysis and mitigation measures for avian fatalities for subsequent projects proposed to be “covered” by the PEIR.

³ The report eliminated some of these documented fatalities when calculating some of the per-MW annual fatality rate estimates for the project. *Id.* at vi-vii.

⁴ Twelve golden eagle deaths are about 66% of the 18 total estimated program-wide golden eagle fatalities, and 70 red-tailed hawk deaths are about 63% of the 111 estimated program-wide hawk fatalities. *Id.*

On April 10, 2018, Dr. Shawn Smallwood, the biologist who conducted the micro-siting surveys for the Golden Hills Project, prepared an analysis of the project's first-year monitoring results as reported in the February 2018 H.T Harvey Report. *See* Smallwood, *Addendum to Comparison of Wind Turbine Collision Hazard Model Performance: One-Year Post-Construction Assessment of Golden Eagle Fatalities at Golden Hills*, Apr. 10, 2018. The County circulated Dr. Smallwood's report to the TAC on April 17, 2018. Dr. Smallwood states that the number of golden eagle fatalities found in the first year at Golden Hills is "twice as many as found during three years of fatality monitoring at the similar-sized repowered Vasco Winds project" (on the Contra Costa County side of Altamont Pass). *Id.* at 1.

Dr. Smallwood's analysis opines that, among other potential causes, the increased fatalities may be due to "complex terrain features and potential changes to terrain made by grading for wind turbine pads and access roads," which Dr. Smallwood did not analyze or account for in his pre-construction surveys and siting modelling for the Golden Hills Project. *Id.* The 2014 PEIR likewise did not analyze the effects of grading on the rate of bird fatalities. *See* PEIR at 2-18 to 2-20, 2-32 to 2-34. Dr. Smallwood stated, based on past monitoring results at Altamont Pass, that "extreme grading for access roads and turbine pads can interfere with collision hazard model predictions by adding significant risk to turbine sites." *Smallwood*, Apr. 2018 at 3, 5. Dr. Smallwood also opined, again based on past monitoring results, that a turbine's position on declining ridgelines or within ridge saddles adversely affects fatality rates and "warrant[s] additional examination." *Id.* at 5; *see also id.* at 7. Further exacerbating the hazard is the fact that "[t]hese low-lying turbine sites are generally also where grading tends to be more extreme." *Id.* at 5.

Both of these reports are relevant to the Sand Hill Project because this project, like the Golden Hills Project, will be located in the Altamont Pass, which is a major raptor breeding, nesting and foraging area and bat roosting, foraging and migration area. EA App. B, BRA at 2-10 – 2-12. The Sand Hill Project also will be located on variable (though perhaps slightly less rugged) terrain, such as hills and saddles, that poses a risk to birds and bats. And like the Golden Hills Project, construction of the Sand Hill Project will require a significant amount of grading because the project also proposes to use very large, modern turbines between 1.6 to 4.0 MW in size. EA App. B, BRA at 1-3 to 1-4; EA at 2-5 to 2-7.

Finally, on April 19, 2018, the California Fish and Game Commission determined to list the tri-colored blackbird as a threatened species under the California Endangered Species Act (CESA). *See* Fish and Game Comm. Notice of Findings, Aug. 23, 2018, available at: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=161202%20&inline>. The Biological Resources Analysis (BRA) in Appendix B to the EA indicates a high likelihood that tri-colored blackbirds occur in the project area and will be adversely affected by the Sand Hill Project, with two confirmed nesting colonies along Altamont Pass Road and the California Aqueduct adjacent to the project area and suitable nesting habitat within the project area. *See* EA App. B, BRA at 2-12 and 3-6, 4-5.

ANALYSIS AND DISCUSSION

The County must prepare a subsequent project-specific EIR, tiered from the 2014 PEIR, analyzing the site- and project-specific impacts of the current version of the Sand Hill Project, including analysis of alternatives to, and additional mitigation measures for, the project as required by CEQA. The 2014 PEIR did not analyze, or include sufficient alternatives to or mitigation measures for, the site- and project-specific impacts of the Sand Hill Project, and therefore the Sand Hill Project is not within the scope of the PEIR. Moreover, even if the Sand Hill Project is generally covered by the Altamont-wide repowering program as described in the PEIR, the significant changes to the project and to the circumstances under which the project is being undertaken, and the significant new information that has become available since certification of the PEIR in November 2014, trigger the CEQA criteria mandating preparation of a subsequent EIR.

A. The Sand Hill Project Is Not Within the Scope of the PEIR and There Is a Fair Argument the Project Will Cause More Severe Significant Effects and Require Additional Mitigation Measures that Were Not Addressed In the PEIR

Under CEQA, a lead agency must analyze any subsequent site-specific project that is proceeding under an approved PEIR to determine whether the subsequent project is “consistent with” and “within the scope of the project or program covered by” the previously-certified PEIR, and if it will have one or more additional or more severe significant effects or require additional mitigation measures that were not analyzed in the prior PEIR. Pub. Res. Code, § 21094(b)-(c); 14 Cal. Code Regs. § 15168(c)(2), (c)(5). When a lead agency has prepared a prior PEIR, “the question for a court reviewing an agency’s decision not to use a tiered EIR for a later project is one of law.” *Committee for Reevaluation of the T-Line Loop v. San Francisco Muni. Transp. Agency*, 6 Cal. App. 5th 1237, 1252 (2016); *Sierra Club v. County of San Diego*, 231 Cal. App. 4th 1152, 1164 (2014).

The case law makes clear that a project is “consistent with” and “within the scope of” the prior EIR if it is essentially part of the *same project* analyzed in the PEIR and that project was specifically identified, analyzed and discussed at a site-specific level of detail in the PEIR. *See, e.g., Sierra Club v. County of Sonoma*, 6 Cal. App. 4th 1307, 1319-21 (1992); *Friends of Mammoth v. Town of Mammoth Lakes*, 82 Cal. App. 4th 511, 528-29 (2000); *Natural Resources Defense Council, Inc. v. City of Los Angeles*, 103 Cal. App. 4th 268, 281-85 (2002); *American Canyon Community v. City of American Canyon*, 145 Cal. App. 4th 1062, 1072-73 (2006); *Center for Sierra Nevada Conservation v. County of El Dorado*, 202 Cal. App. 4th 1156, 1172-73, 1175-77 (2012); *Sierra Club v. County of San Diego*, 231 Cal. App. 4th at 1174-76.

All of these cases also hold that a project is *not* “consistent with” or “within the scope of” a PEIR if that previous environmental document did not contemplate or analyze the site- and project-specific effects of the subsequent project and those effects are not otherwise covered in the PEIR. *Id.*; *cf. Latinos Unidos de Napa v. City of Napa*, 221 Cal. App. 4th 192, 202-03 (2013) (revisions to housing element of general plan was within the scope of a prior PEIR for a general plan

update because “[u]nlike *Sierra Club v. County of Sonoma*, this case does not involve any site-specific plans or any other actual changes to a designated area,” and “no aspect of the Project involves any approval (site specific or otherwise) of any actual development or other activity”).

If a project is not “consistent with” or “within the scope of” the prior PEIR, then the lead agency must prepare a new, project-specific EIR for that project, tiered from the PEIR, if there is a *fair argument*, based on substantial evidence, that the project may have one or more significant effects that are different from or more severe than those analyzed in the PEIR, or may require mitigation measures in addition to or different from those included in the PEIR. *See, e.g., Center for Sierra Nevada Conservation*, 202 Cal. App. 4th at 1173; *Sierra Club v. County of Sonoma*, *supra*, 6 Cal. App. 4th at 1319; *see also* Pub. Res. Code, §§ 21068.5, 21094(a), (c); 14 Cal. Code Regs. § 15168(c)(1).

As the California Supreme Court recently held:

The standard for determining whether to engage in additional CEQA review for subsequent projects under a tiered EIR is more relaxed than the prohibition against additional review imposed by Public Resources Code section 21166 for project EIRs.... If the subsequent project is not consistent with the program or plan, *it is treated as a new project* and must be fully analyzed in a project—or another tiered—EIR if it may have a significant effect on the environment....

The *Sierra Club* court concluded that when a program EIR is employed, if a later proposal is not “either the same as or within the scope of the project ... described in the program EIR,” then review of the proposal is not governed by section 21166’s deferential substantial evidence standard. [Citations omitted.] Instead, under Public Resources Code section 21094, the agency is required to apply a more exacting standard to determine whether the later project might cause significant environmental effects that were not fully examined in the initial program EIR.

Friends of the College of San Mateo Gardens v. College of San Mateo, 1 Cal.5th 937, 960 (2016), citing *Sierra Club*, 6 Cal. App. 4th at 1321 and *Friends of Mammoth*, 82 Cal. App. 4th at 528-29, emphasis added.

Here, the Sand Hill Project is not consistent with or within the scope of the PEIR because it was not specifically identified, analyzed or discussed in the PEIR, and the PEIR did not address the site- and project-specific impacts of this project. The PEIR merely discussed the impacts of repowering at Altamont Pass in general and established a general mitigation program for such projects, and only discussed the Golden Hills and Patterson Pass projects at a project-specific level of detail. Nor is the PEIR’s program-wide discussion of impacts and mitigation measures for repowering projects at Altamont Pass in general adequate for the Sand Hill Project in light of the project changes, changed circumstances and new information, as discussed immediately below and in Part B.

The Sand Hill Project environmental documents do not fill this analytic gap because they are too vague and general and do not contain any meaningful site-specific analysis of the precise nature or extent of the impacts of this project, or include any additional mitigation measures for these effects. The EA does not indicate precisely how many turbines will be installed, what specific type of turbines will be used, or precisely where they will be located. EA at 1-1 – 1-5, 2-3 – 2-10. The EA does not discuss how the specific number, size and location of the turbines will affect birds and bats and how the PEIR’s mitigation measures will be adequate to mitigate these effects for this much larger project that will require substantial additional grading, installation of larger-sized turbines, a new operations and maintenance facility, and other adverse effects that were not analyzed in the PEIR. *Id.*

For example, the EA does not contain a site-specific discussion of how this project will be micro-sited to avoid and minimize impacts to birds and bats, or of the type or amount of compensatory mitigation that will be provided for ongoing deaths of birds and bats and defers this analysis to a later date following project approval. EA at 1-1, 2-4; EA App. B, BRA at 1-1 (stating that the EA and BRA do not analyze the project’s operational effects on birds and bats, and that these will be addressed “separately through a [subsequent] micro-siting study”).⁵ The EA states that there are currently three “substantially similar” turbine layouts for the project, but that “[t]he final layout may differ from the three proposed layouts . . . because the exact turbine locations are subject to micrositing,” but that “[a]ll the layouts are expected to have a similar extent of impact.” EA at 1-1, EA App. B, BRA at 1-2. But this conclusory statement is unsupported by evidence or analysis.

The Sand Hill Project environmental documents also do not discuss the likelihood, based on the new monitoring data and analysis, that the project’s impacts on golden eagles and red-tailed hawks are very likely to cause the PEIR’s project-specific and program-wide fatality estimates for these species to be exceeded, as discussed in detail in Part B below. The County’s proposed findings for the Sand Hill Project also improperly fail to find that the project will have a cumulatively significant impact on avian and bat resources. Ex. A Draft Findings, A-87—90.

Nor do the Sand Hill documents (or the PEIR) discuss the site-specific impacts of the project on the state-listed tri-colored blackbird. This is despite the fact that the BRA indicates a “high” likelihood that tri-colored blackbirds occur on the project site. EA App. B, BRA at 2-12. The

⁵ Under the PEIR’s mitigation program, both turbine micro-siting and the amount and type of compensatory mitigation is deferred to a later date following project approval. *See* PEIR 3.4-109 – 110, 3.4-113 – 116. However, such deferral is not appropriate for the Sand Hill Project in light of new information that may indicate higher raptor and bat fatalities per MW than estimated in the PEIR. This requires analysis—in advance of project approval and subject to public review and comment—of micro-siting impacts and alternatives and the amount and type of proposed compensatory mitigation for ongoing bird deaths. Moreover, the PEIR itself acknowledges that information concerning the amount and type of compensatory mitigation is evolving and requires periodic updating, based on the most recent monitoring data, in project-specific tiered EIRs. *See id.* at 3.4-113 – 114.

BRA states that “perennial wetland drainage habitat in the study area provides suitable nesting substrate; foraging habitat present throughout the study area,” and that “[t]wo confirmed nesting colonies have been documented along Altamont Pass Road and the California Aqueduct adjacent to the study area.” *Id.* and 3-6. The Fish and Game Commission findings listing the tri-colored blackbird under CESA cite loss of habitat as one of the primary causes of the species’ now-threatened status. *See* Fish & Game Comn. Notice of Findings, Aug. 23, 2018, at 6-9. The BRA further states that the project construction and operation may result in destruction and abandonment of active tri-colored blackbird nests and could cause incidental take of “fertile eggs or nestlings.” EA App. B, BRA at 4-5. The EA acknowledges that this would be a violation of the federal Migratory Bird Treaty Act as well as several provisions of the California Fish and Game Code. *Id.*

This take of, and loss of habitat for, the threatened tri-colored blackbird species on the project site may be subject to a mandatory finding of significance under CEQA. *See* 14 Cal. Code Regs. § 15065(a)(1) (mandatory findings of significance for significant project effects on listed species and their habitat, except where an approved habitat conservation plan is in place). Despite this, the EA does not discuss or include site-specific mitigation measures for the project’s impacts on tri-colored blackbird. Rather, the EA simply states, without analysis or supporting evidence, that PEIR mitigation measures BIO-8 and BIO-9 will reduce any impacts to tri-colored blackbirds and other ground-nesting birds to insignificance. EA at 3.4-5 to 3.4-6; *see also* IC at 11-12. But the PEIR only discusses the impacts of repowering on ground nesting birds generally, and does not discuss the site-specific effects of *this* project on tri-colored blackbird and whether the PEIR’s mitigation measures will be adequate to mitigate these effects. *See* PEIR at 3.4-89—92 and 3.4-94—96. The same analysis applies to the project’s impacts on burrowing owls, which also is highly likely to be present on the project site and adversely affected by the project. EA at 3.4-5—3.4.6; IC 11-12.

As another example, the Sand Hill documents state that mitigation measures for impacts to bat roosts is not applicable because bat roosts purportedly were not found in the project area, but it does not adequately support this conclusion by describing what bat surveys were done. EA at 3.4-9; EA App. B, BRA at 2-2, 2-10, 4-7; IC at 14. It appears that the extent of the surveys included simply driving the project site and inspecting rock outcroppings and other areas over a two-day period. EA App. B, BRA at 2-2. This is an insufficient basis on which to reach a conclusion that no bats roost on the project site. In addition, the BRA only accounts for two species of bats, the pallid bat and Townsend’s big eared bat (EA App. B, BRA at 2-10), but the PEIR documents six bat species that migrate, roost and forage in the Altamont Pass area, including two special status bats, the western red bat and pallid bat. PEIR at 3.4-42 to 45; 3.4-131.

The Sand Hill documents also contain no analysis of the project’s potentially increased impacts on bat migration and foraging due to the project’s much larger size and the H.T. Harvey Report findings that the smaller Golden Hills Project resulted in the death of 194-229 bats in the first year. *See* EA at 3.4-9; EA App. B, BRA at 2-10, 4-7; IC at 15-16; H.T. Harvey at vii. The PEIR anticipated this possibility, stating that “[t]here is evidence to suggest that larger turbines” (such

as those that will be utilized in the Sand Hill Project) “will result in additional increases in bat fatality rates for those bat species currently killed in the [Altamont Pass].” PEIR at 3.4-132. Thus, the County must examine these additional significant effects in more detail prior to approving the Sand Hill Project.

Finally, the EA dismisses the likely exceedance of the PEIR’s 450 MW cap as *de minimis*, and does not discuss the exceedance of the 417 MW cap at all. EA at 1-4. Nor does the EA discuss the additional impacts of the increased amount of project grading, significantly larger turbine size and rotor swept area, or proposed project O&M facility. *See id.* at 1-2 to 1-5.

For all of these reasons, the Sand Hill Project is not within the scope of the 2014 PEIR, and a fair argument can be made, based on substantial evidence, that the Sand Hill Project will have site-specific impacts and require additional mitigation measures that were not analyzed and included in that PEIR. Therefore, the County is obligated to prepare a subsequent EIR for this project analyzing these impacts in detail.

B. Even If the Sand Hill Project Is Within the Scope of the PEIR, There Is Substantial Evidence that a Subsequent EIR Is Required for this Project Based on the Changed Project, Changed Circumstances, and Significant New Information, and No Substantial Evidence to the Contrary

Second, in the alternative, even if the Sand Hill Project is “within the scope of the PEIR” and the fair argument standard for preparation of a subsequent EIR does not apply, a subsequent EIR still is required applying the substantial evidence standard. There is substantial evidence that all of the criteria under Public Resources Code section 21166 and section 15162 of the CEQA Guidelines for preparation of a subsequent EIR have been met for this project, and no substantial evidence to support the County’s contrary determination.⁶ *See* Pub. Res. Code, § 21166; 14 Cal. Code Regs. § 15168(c)(2).

⁶ Public Resources Code section 21166 provides that:

When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

Guidelines section 15162 incorporates these same triggers for subsequent environmental review, but clarifies that “new information” may show that: (1) the project will have one or more significant effects

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Specifically, the project has changed significantly since its previous iteration, and there are changed circumstances and significant new information since the County certified the PEIR in November of 2014, as reflected in the following:

- 1) The significantly larger overall size of the project size (number and size of turbines, total MW, total project area) than the County previously approved for a portion of this site in March 2016, the significant additional grading required for roads and turbine pads, the addition of much larger size turbines than analyzed in the PEIR, the addition of an O&M facility not analyzed in the PEIR, and the potential exceedance of the PEIR's total MW cap;
- 2) The H.T. Harvey final first-year monitoring report for Golden Hills dated February 28, 2018 and Dr. Smallwood's April 10, 2018 analysis of this report. Both documents indicate that the project is likely to exceed the PEIR's estimated annual number of golden eagles and red-tailed hawk fatalities Altamont-wide, and estimated bat fatalities per MW; and
- 3) The California Fish and Game Commission's listing of the tri-colored blackbird as a threatened species under CESA on April 19, 2018.

These changed circumstances and new information indicate that:

- 1) Substantial changes are proposed to the project and substantial changes have occurred "with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR...due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects"; and
- 2) "New information of substantial importance, which was not known and could not have been known in the exercise of reasonable diligence at the time the previous EIR was certified as complete" shows that (a) "[s]ignificant effects previously examined will be substantially more severe than shown in the previous EIR" and (b) "[m]itigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment."

that were not examined in the prior EIR or will be substantially more severe than shown in the prior EIR; (2) mitigation measures or alternatives previously found to be infeasible would now be feasible and would reduce one or more of the project's significant effects; or (3) new or different mitigation measures or alternatives have been identified that would substantially reduce one or more of the project's significant effects. 14 Cal. Code Regs. § 15162(a).

14 Cal. Code Regs. § 15162(a)(1), (2), (3)(B) & (D).

1. Substantial changes in the project and changed circumstances require preparation of a subsequent EIR

For the same reasons discussed in Part A above, there have been substantial changes in the project and changed circumstances that will require significant revisions to the analysis in the PEIR “due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects.” 14 Cal. Code Regs. § 15162(a)(1)-(2). Neither the PEIR nor the Sand Hill environmental documents adequately address the scope and severity of the impacts of, or include sufficient alternatives to or mitigation measures for, the changes in the project or circumstances surrounding the project that have arisen since 2014.

2. New information of substantial importance requires preparation of a subsequent EIR

Furthermore, the new H.T. Harvey monitoring results, and Dr. Smallwood’s assessment of those results, point strongly to the need for further site-specific analysis of and mitigation measures for the Sand Hill Project. This new information, which was not available at the time the PEIR was certified, indicates that the Sand Hill Project is highly likely to cause significant effects to birds and bats, and/or an increase in the severity of such effects, which were not analyzed in the PEIR, and that this will require the County to consider additional or different alternatives to or mitigation measures for the project as a result. 14 Cal. Code Regs. § 15162(a)(3). This is true for several reasons.

First, the H.T Harvey first-year monitoring report for the Golden Hills Project indicates that the Sand Hill Project may cause a substantially greater number of annual fatalities than was assumed in the PEIR. For example, the PEIR estimated that the 86 MW Golden Hills Project would only kill between 1 to 4 golden eagles per year and between 9 to 22 red-tailed hawks. PEIR at 3.4-123. The first-year monitoring results for that project estimate that the actual, documented fatalities were far greater: 10 to 12 golden eagles and 70 red-tailed hawks during the monitoring year. H.T. Harvey at vii. At 144.5 MW, the Sand Hill Project is 1.7 times (almost 60%) larger than the Golden Hills Project, is located in the same overall terrain, and also will use very large turbines requiring significant grading, and so has the potential to cause even greater numbers of raptor fatalities than the Golden Hills Project.

Second, the potential number of fatalities from the Sand Hill Project almost certainly will cause the Altamont-wide repowering program to exceed the PEIR’s estimated total annual fatalities for golden eagles and red-tailed hawks Altamont-wide, even for the 450 MW alternative. The new monitoring results indicate that it is very likely that operation of this huge new 144.5 MW project at Altamont Pass will cause the PEIR’s estimates for the range of annual fatalities of 5 to 18 golden eagles and 45 to 111 red-tailed hawks to be exceeded. This is because operation of the 86 MW Golden Hills Project alone has resulted in fatalities of 10 to 12 golden eagles and 70 red-

tailed hawks per year, which would leave only 6 to 8 golden eagle fatalities and 41 red-tailed hawk fatalities per year for the remainder of the entire 450 MW County repowering program at Altamont Pass. H.T. Harvey at vii; PEIR at 3.4-120. This program includes 200.5 MW of already approved projects. EA at 1-5. Thus, the new information seriously calls into the question the adequacy of the impact analysis for raptor fatalities (as well as the adequacy of the suite of mitigation measures for such take) in the 2014 PEIR.⁷

Third, the H.T. Harvey report documents 194 to 229 bat fatalities in the first year of operation of the Golden Hills Project, which is substantially higher than the per-MW bat fatality estimates in the PEIR. H.T. Harvey at vii, 44, 50, 52; PEIR at 3.4-132. The PEIR estimated bat fatalities would range from 1.68 to 3.92 annual fatalities per MW, while the H.T. Harvey report found actual bat fatality rates ranged from 2.26 to 6.46 annual fatalities per MW. *Cf.* PEIR at 3.4-132 and H.T. Harvey at 44, 52. Thus, the bat fatality estimates for the Sand Hill Project must be updated in light of the new information in the H.T. Harvey Report.

Fourth, Dr. Smallwood's April 2018 report identifies the effects of massive grading of turbine pads and roads, as required for installation of very large turbines like those proposed for the Sand Hill Project, as one potential cause of the higher raptor fatalities at Golden Hills. In particular, Dr. Smallwood concluded that this grading, which was not adequately accounted for in his analysis and also was not addressed in the PEIR, potentially caused the hazard ratings for the selected turbine sites for the Golden Hills Project to be underestimated. The EA admits that the Sand Hill Project will require large amounts of grading (2.9 acres of grading per turbine site and roads between 20-40 feet wide). EA App. B, BRA at 1-3 – 1-4; EA at 2-5 – 2-7. Thus, in light of this new information, the County must now conduct a further environmental analysis of the effects of large-scale grading for turbine pads and roads on estimated avian fatality rates.

Fifth, the Golden Hills monitoring report and Smallwood report indicate that the Sand Hill Project is likely to require more and significantly different mitigation measures to mitigate for

⁷ It is noteworthy that the U.S. Fish and Wildlife Service (FWS) commented on the PEIR that ongoing fatalities of golden eagles due to operation of wind turbines over the entirety of Altamont Pass (both Alameda and Contra Costa Counties) was then estimated to be an unsustainable 12% of the local golden eagle population annually, and that ongoing deaths would need to be reduced to 5% of the local population, or no more than 29 eagles for *both counties*, per year. PEIR, App. E, *Responses to Comments on DEIR*, at E-33, 35-36. The FWS also recommended a moratorium on wind development on previously undisturbed prime grassland habitat "until such time that ongoing take can be substantially reduced to a more sustainable level." *Id.* at E-36. The County's response was that the 450 MW repowering program would only result in a maximum of 18 golden eagle deaths per year (in Alameda County), a number which we now know is likely to be exceeded, perhaps significantly. *Id.* at E-40.

In addition, since 2014, the FWS has conducted additional research on the status of golden eagle populations and the amount of take that is sustainable, and has increased its estimate of annual golden eagle deaths in the Altamont Pass and surrounding area to 15.67% of the local area population. *See* FWS, *Bald and Golden Eagles: Population Demographics and Estimation of Sustainable Take in the U.S.*, 2016 Update, Apr. 2016; pers. comm., Heather Beeler, FWS, Oct. 22, 2018.

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the potentially significant increase in fatalities. Examples of project alternatives and mitigation measures that should be analyzed in a subsequent EIR include reducing the project size and number of turbines and providing more mitigation than is currently required under the PEIR's mitigation program. This could include more stringent micro-siting requirements with greater TAC oversight, reduced amount of grading for turbine pads and roads, more intensive and/or a longer period of monitoring, more stringent adaptive management measures, and a greater amount of compensatory mitigation than is currently provided for in the PEIR, similar to the \$10,550 per MW fee required under the Next Era-AG-Audubon agreement, as updated and adjusted for inflation and other factors.⁸

Finally, as discussed in Part A, the PEIR likewise does not address the site-specific impacts of the project on the tri-colored blackbird, newly-listed as a threatened species under CESA in April 2018. As mentioned, this species has a high likelihood of occurring on the project site and being adversely affected by the Sand Hill Project. EA App. B, BRA at 2-12, 3-6, 4-5.

3. The County's determination that the criteria for preparation of a subsequent EIR have not been triggered is not supported by substantial evidence

For the reasons discussed below, the County's explanation of its conclusion that the changes to the Sand Hill Project, changed circumstances and significant new information do not trigger the CEQA criteria for a supplemental EIR is not supported by substantial evidence. *See* EA at 1-2 to 1-5.

Changed Project and Changed Circumstances

Increased size of the project. The EA admits that "the mix of foreseeable future wind projects has changed from that contemplated in the PEIR" and that the Sand Hill Project is larger both in terms of MW and total project area than the original Sand Hill Project. EA at 1-2; *County Power Point Presentation*, Sept. 27, 2018. Yet, the EA dismisses the inescapable conclusion that a project over four times the size and covering three times the area of the project previously approved for this area is a significant change, based simply on the fact that "the overall level of development [Altamont-wide] remains the same." EA at 1-2.

In fact, it appears that the County originally contemplated only 417 MW, and not over 450 MW, of wind energy development on the Alameda County side of Altamont Pass, but even if the total level of development is the same, this is not the test for whether a project is "within the scope of" the PEIR. Rather, as discussed above, the test is whether the subsequent project is the same

⁸ For example, more stringent adaptive management measures could involve advancing PEIR adaptive management measures labeled ADDM 5, 6 and 7 to the front of the line to require immediate nighttime or seasonal turbine shutdowns, real-time turbine curtailments, and changes in turbine cut-in speed, for turbines that are found to kill a disproportionate number of raptors or bats in the first year of operation. *See* PEIR 3.4-116 – 118. Currently, the PEIR views such measures only as a last resort to be implemented after several years of monitoring and further study. *Id.*

project that was analyzed at a site-specific level of detail in the PEIR. *See, e.g., Sierra Club*, 6 Cal. App. 4th at 1319-20; *NRDC*, 103 Cal. App. 4th at 281-82; *Center for Sierra Nevada Conservation*, 202 Cal. App. 4th at 1172-73. The PEIR did not analyze the Sand Hill Project at all, as the EA essentially admits.

Increased turbine size. The EA also admits that the PEIR did not analyze turbines larger than 3.0 MW, which will increase the total rotor-swept area by nearly 20%. EA at 1-2 to 1-3. It further acknowledges that turbines larger than 3.0 MW could adversely affect birds and bats, but states that “the consequence of the increased nameplate capacity for a 3.6, 3.8 or even 4.0 MW turbine . . . would be lower impacts per MW for certain environmental topic areas.” EA at 1-3. These topic areas specifically do *not* include impacts to birds and bats, however. *Id.* Moreover, the County cites no evidence in support of its “lower impacts per MW” conclusion. The County also does not discuss the significant increase in rotor swept area of the larger turbines, which have been documented to result in increased impacts to golden eagles. *See ICF Intl., Altamont Pass Wind Resource Area Bird Fatality Study, Monitoring Years 2005–2013, Final Report*, Apr. 2016 at 3-22, 4-3.

Exceedance of PEIR MW cap. As mentioned, the EA dismisses the potential exceedance of the PEIR’s 450 MW cap as *de minimis*, and does not discuss exceedance of the 417 MW cap at all. EA at 1-4.

Grading. The EA admits that the significantly larger turbines would require significant foundations, which will require substantial grading (2.9 acres of grading per turbine site). EA at 2-5; EA App. B, BRA at 1-4. In addition, the significantly larger turbines will require significant upgrades to and widening of existing roads on site, to 20-40 feet. EA App. B, BRA at 1-3. But neither the PEIR nor the EA address these impacts, either generally or at a site-specific level of detail, with regard to the potential for this amount of grading to result in increased avian fatalities at turbine sites. *See Smallwood*, Apr. 2018.

O&M facility. The project now involves construction of two-acre onsite O&M facility, including an onsite wastewater treatment system or portable toilets. EA at 2-10. The precise location of the facility is not yet determined. *Id.* The EA admits that PEIR did not analyze O&M facilities at the program level, but that the project-specific analysis in the PEIR for the Golden Hills and Patterson Pass did analyze these facilities. EA at 1-5. The EA unjustifiably attempts to rely on the project-level analyses for these *other* projects, even though these other projects did not include installation of a septic or wastewater treatment system as proposed for the Sand Hill Project. *Id.*

New Information

H.T. Harvey Report and Smallwood Report. The EA essentially dismisses the H.T Harvey report results and does not evaluate the Smallwood report at all. The EA states that “[t]he differences between the H.T. Harvey report and the mortality estimates of the PEIR do not indicate a new or more intense significant impact beyond the scope of the PEIR.” EA at 3.4-8.

The EA unconvincingly attempts to explain away the H.T Harvey Report results as follows:

The new information on avian and bat fatalities from 1 year of monitoring a single project during an abnormally wet year within the larger APWRA—and suggesting more severe impacts on birds and bats—cannot be extrapolated to imply that the Sand Hill Project would result in new significant effects or a substantial increase in the severity of effects. A body of information spanning multiple projects and multiple years of monitoring are necessary to form conclusions regarding effects.

EA at 1-4; *see also id.* at 3.4-7. But this statement ignores Dr. Smallwood’s conclusion that, based on his field surveys between 2012 and the present, he “observed no annual peak in golden eagles corresponding with the first year of fatality monitoring at Golden Hills, nor was there much of a difference in inter-annual eagle counts outside versus inside Golden Hills.” Smallwood, Apr. 2018 at 2. The H.T. Harvey Report also states that the relatively wetter climactic conditions during its first-year monitoring study may have contributed to higher numbers, and therefore higher fatalities, of common *smaller breeding birds*, but does not state that this may have contributed to higher raptor fatalities. H.T. Harvey at 51.

The EA also concludes, without supporting evidence or analysis, that the report “does not change the findings or conclusions of the PEIR with respect to avian and bat fatalities—namely, that impacts will be significant and unavoidable after mitigation.” EA at 3.4-7. Relatedly, the EA asserts that the PEIR never concluded that impacts of repowering projects on birds and bats would be mitigated to a level of insignificance, and acknowledged that the PEIR estimates were “uncertain.” EA at 3.4-6, 3.4-8 – 3.4-9.

But the fact that the project-specific impacts of repowering are necessarily significant and unavoidable and the PEIR avian and bat fatality estimates were uncertain does not excuse the County from its duty under CEQA to analyze the nature and extent of the site-specific impacts of subsequent repowering projects based on the most recent data, and to require mitigation measures for, or alternatives to, such projects to reduce any significant adverse impacts to the extent feasible. Pub. Res. Code, §§ 21001, 21002.1(a) & (b); *see Center for Sierra Nevada Conservation*, 202 Cal. App. 4th at 1184 (“[t]hat the preceding [PEIR] contemplated adverse environmental impacts resulting from development under the 2004 General Plan does not remove the need for a tiered EIR for the oak woodland management plan”).

CEQA requires this analysis to be done *before* any subsequent project is approved. Pub. Res. Code, §§ 21001, 21002.1(a) & (b); 14 Cal. Code Regs. §§ 15002(a), (h). The whole point of CEQA is to reveal *in advance* “the true impacts of the proposed project, no matter how unattractive. The agency must unblinkingly include all significant impacts in the EIR and consider them with an open mind when deciding on project approval.” *Citizens for Ceres. v. Superior Court*, 217 Cal. App. 4th 889, 918 (2013).

The EA's reference to the PEIR's monitoring and adaptive management measures for birds and bats, which are required to be implemented *after* the project is approved and constructed, do not obviate the County's fundamental obligation under CEQA to analyze and mitigate for project impacts before the project is approved. EA at 3.4-8. Moreover, the PEIR states that post-construction monitoring results will be used to "contribute to the body of knowledge supporting future analyses." PEIR at 3.4-119. Thus, PEIR itself contemplated that future project-specific analyses would be conducted based on the most recent and best available monitoring and other data. *Id.*; *see also* PEIR at 1-2, 1-9, 1-11.

The EA further dismisses the H.T. Harvey Report results as "inflated." EA at 3.4-7. But this analysis ignores the fact that the monitoring for the Golden Hills Project found at least 10 confirmed golden eagle carcasses and 70 red-tailed hawk carcasses in one year of monitoring, when the PEIR's estimate of *total* golden eagle fatalities for the entire 450-MW repowering program was a maximum of 18, and as few 5, as golden eagles per year and between 45 and 111 hawks per year. PEIR at 3.4-120. The analysis also ignores that even the lower estimates in the H.T. Harvey Report for golden eagle deaths were between 1.75 and 3.5 times higher for the Golden Hills Project than for other previous repowering projects at Altamont Pass (Vasco Winds, Buena Vista and Diablo Winds). And the H.T. Harvey Report estimates for red-tailed hawk fatalities were between 1.45 and 9 times higher for Golden Hills than these other projects. *Cf.* H.T. Harvey, Table 12 at 44 with Table 15 at 50.⁹

The EA also states that the H.T. Harvey results were inflated for red-tailed hawks due to bias from old turbines near the Golden Hills Project site which provided perching and nesting opportunities for golden eagles and red-tailed hawks. EA at 3.4-7 – 3.4-8. But the H.T. Harvey Report did not so conclude. Rather, it stated that red-tailed hawk perching on old turbines adjacent to *one area* of the project site may have been a factor in causing that area to be deemed a "hot spot" for red-tailed hawk fatalities. H.T. Harvey at 50-51.

The EA also admits that the PEIR's bat fatality estimates were "faulty" and likely too low. EA at 3.4-8. This means that Sand Hill Project impact estimates must be updated in light of the new information in the H.T. Harvey Report, which found substantially higher per-MW bat fatality rates than included in the PEIR. *Cf.* H.T. Harvey at 50, 52 and PEIR at 3.4-132. The County cannot simply ignore this new information and fail to undertake additional analysis of the project's impacts on bats, as required by CEQA, based simply on an assertion that the original fatality estimates were inaccurate to begin with.

⁹ The EA also states that the Golden Hills first-year annual fatalities per-MW for all raptors combined was lower than the pre-repowering average annual fatalities per-MW (2005-2013) for all raptors combined. EA at 3.4-7. While correct, this assertion ignores that the range of estimated annual fatalities for golden eagles were between three-quarters of, and 1.4 times, the pre-repowering average annual fatality estimate, and the results for red-tailed hawks were between 1.6—2.3 times the pre-repowering estimate. *Cf.* H.T. Harvey, Table 12 at 44 with Table 15 at 50.

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Finally, the EA states that the PEIR's mitigation measures, including adaptive management, for impacts to birds and bats are based on admittedly outdated estimates of the anticipated level of fatalities from repowered wind projects at Altamont Pass. EA at 3.4-8. Thus, as required by CEQA, these measures will need to be improved and strengthened for this project in light of new monitoring data and other information, as the EA effectively admits. *Id.*

Listing of tri-colored blackbird. The EA also does not include any explanation as to why the listing of the tri-colored blackbird does not meet the test for a subsequent EIR, particularly in light of the mandatory findings of significance for effects to listed species and their habitat in CEQA Guidelines section 15065. The County's staff report for the October 25, 2018 East County Board of Zoning Adjustments hearing (at page 10) states that the Sand Hill Project's effects on the tri-colored blackbird need not be considered because the project application was deemed complete prior to the listing. However, the environmental baseline for purposes of CEQA analysis must account for the conditions existing at the time the environmental analysis is commenced, not when the application is deemed complete. 14 Cal. Code Regs. § 15125(a); *Commun. for a Better Env't. v. SCAQMD*, 48 Cal. 4th 310, 320 & n. 5 (2010).

In addition, the project applicant cites *Chaparral Greens v. City of Chula Vista*, 50 Cal. App. 4th 1134, 1149 (1994), for the proposition that listing of a new species is not significant new information requiring preparation of a subsequent EIR. However, that case is distinguishable because, among other things, the PEIR at issue analyzed "at length" the site-specific effects of the project on the listed species and habitat at issue. *Id.* at 1148-49.

CONCLUSION

In sum, there is substantial evidence indicating that the Sand Hill Project will have additional or more severe environmental effects on bird and bats than contemplated in the PEIR, and thus will require additional or different alternatives or mitigation measures than were specifically analyzed and included in the PEIR. There also is no substantial evidence to support the County's contrary conclusions. Thus, the County is required to prepare a project-specific subsequent EIR analyzing the site-specific effects of the Sand Hill Project in detail and including additional alternatives to and mitigation measures for such project. If you have any questions concerning this letter, please feel free to contact me. Thank you for your consideration of these comments.

Sincerely,

TARA L. MUELLER
Deputy Attorney General

For XAVIER BECCERA
Attorney General