

# Morgan Lewis

**Deborah E. Quick**

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October 26, 2017

**BY HAND DELIVERY**

City Clerk  
City of San Jose  
200 East Santa Clara Street # 200  
San José, CA 95113

**Re: Notice of Environmental Appeal – Petition for Reconsideration Pursuant to Municipal Code Section 21.07.080: 237 Industrial Center, Council File No. 17-094, Rezoning (File No. C15-054), Special Use Permit (File No. SP16-053) and Development Exception (File No. V17-004) Applications, and Environmental Impact Report SCH # 201605203**

To the City Clerk of the City of San José:

Morgan, Lewis & Bockius LLP represents Los Esteros Critical Energy Facility, LLC (“Los Esteros”) in connection with its facility located at 800 Thomas Foon Chew Way, San José. The 237 Industrial Center (the “Project”) is the subject of City Council File Number 17-094 and Planning Files Number C15-054, SP16-053 and V17-004. On October 24, 2017, the City Council took action on the Project, including certifying the Environmental Impact Report for the Project (SCH # 201605203, the “EIR”) and adopting statements of overriding consideration in connection with certain significant, unmitigated impacts of the Project. Attached hereto is Los Esteros’ petition for reconsideration of the Council’s October 24, 2017 environmental determination(s) pursuant to San José Municipal Code Section 21.07.080, including:

1. Executed Notice of Environmental Appeal.
2. Assistant Secretary’s Certificate of Los Esteros Critical Energy Facility, LLC, authorizing execution of the Notice of Environmental Appeal by Robert Parker, its Vice President.
3. Los Esteros’ counsel’s October 24, 2017 letter to the City Council and October 11, 2017 letter to the Planning Commission, which set forth the specific grounds for this petition, including that the Council’s actions abused its discretion by:
  - a. Not proceeding in a manner required by law (San José Municipal Code § 21.07.080(C)(4)(a));
  - b. Rendering a decision which was not supported by findings of fact (*id.* at § 21.07.080(C)(4)(b)); and

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City Clerk, City of San Jose  
October 26, 2017  
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c. Rendering a decision in which the finding of fact were not supported by the evidence (*id.* at § 21.07.080(C)(4)(c)).

4. Check Number 1365165 in the amount of \$500, the appeal fee.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Quick", with a long horizontal flourish extending to the right.

Deborah E. Quick  
Enclosures



**CITY OF SAN JOSE**

Planning, Building and Code Enforcement  
 200 East Santa Clara Street  
 San José, CA 95113-1905  
 tel (408) 535-3555 fax (408) 292-6055  
 Website: [www.sanjoseca.gov/planning](http://www.sanjoseca.gov/planning)

**NOTICE OF ENVIRONMENTAL APPEAL**

TO BE COMPLETED BY PLANNING STAFF			
FILE NUMBER	RECEIPT # _____		
TYPE OF ENVIRONMENTAL DETERMINATION (EIR, MND, EX)	AMOUNT _____		
	DATE _____		
	BY _____		
TO BE COMPLETED BY PERSON FILING APPEAL			
PLEASE REFER TO ENVIRONMENTAL APPEAL INSTRUCTIONS BEFORE COMPLETING THIS PAGE.			
THE UNDERSIGNED RESPECTFULLY REQUESTS AN APPEAL FOR THE FOLLOWING ENVIRONMENTAL DETERMINATION: 237 Industrial Center Rezoning City Council File 17-7094; Planning Files C14-054, SP16-053 and V17-004			
REASON(S) FOR APPEAL (For additional comments, please attach a separate sheet.): See attached letters to (1) Planning Commission dated October 11, 2017, and (2) City Council dated October 24, 2017.			
PERSON FILING APPEAL			
NAME Los Esteros Critical Energy Facility, LLC		DAYTIME TELEPHONE (     )	
ADDRESS 800 Thomas Foon Chew Way	CITY San Jose	STATE CA	ZIP CODE 95134
SIGNATURE By:  its Vice President		DATE 10/25/17	
CONTACT PERSON (IF DIFFERENT FROM PERSON FILING APPEAL)			
NAME Deborah E. Quick, Morgan, Lewis & Bockius LLP			
ADDRESS One Market, Spear Tower	CITY San Francisco	STATE CA	ZIP CODE 94105
DAYTIME TELEPHONE ( 415 ) 442-1000	FAX NUMBER ( 415 ) 442-1001	E-MAIL ADDRESS <a href="mailto:deborah.quick@morganlewis.com">deborah.quick@morganlewis.com</a>	

**PLEASE CALL THE APPOINTMENT DESK AT (408) 535-3555 FOR AN APPLICATION APPOINTMENT.**

**LOS ESTEROS CRITICAL ENERGY FACILITY, LLC**

**ASSISTANT SECRETARY'S CERTIFICATE**

October 25, 2017

The undersigned, being the duly elected Assistant Secretary of Los Esteros Critical Energy Facility, LLC, a Delaware limited liability company ("LECEF"), hereby certifies in her capacity of LECEF:

1. I am the duly elected, qualified and acting Assistant Secretary of LECEF.
2. Attached as Exhibit A is a true, correct and complete copy of the resolutions duly adopted by the Board of Directors of LECEF, electing Robert Parker as an officer of LECEF. These resolutions have not been subsequently modified, revoked, repealed, rescinded or otherwise amended to remove Robert Parker as an officer, and remain in full force and effect on and as of the date hereof in the form adopted.
3. Robert Parker is authorized to execute the City of San Jose's Notice of Environmental Appeal for the property located at the North of S.R. 237 between Zanker Road and Coyote Creed on behalf of LECEF.
4. Below is a true and complete copy of Robert Parker's name, position and specimen signature.

**Name**

**Position**

**Specimen Signature**

Robert Parker

Vice President



IN WITNESS WHEREOF, the undersigned Assistant Secretary of LECEF has hereunto set her hand as of the date first set forth above.

By: \_\_\_\_\_

Name: Rosemary Antonopoulos

Title: Assistant Secretary

**Exhibit A**

**Resolutions**

[See attached.]

**RESOLUTIONS**  
**IN LIEU OF 2013 ANNUAL MEETING**  
**OF THE BOARDS OF DIRECTORS OR THE GENERAL PARTNER**  
**OF EACH OF THE ENTITIES LISTED ON**  
**THE SCHEDULES ATTACHED HERETO**  
**(2013 West Region Officers)**

The undersigned, being all of the members of the Board of Directors (each, a "Board") or the General Partner (the "Partner") of each of the Delaware corporations, California corporations, Delaware limited liability companies, Delaware limited partnerships and California limited partnerships listed on Schedule I, II, III and IV attached hereto (each, an "Entity" and collectively, the "Entities"), without the formality of convening a meeting, do hereby consent by this writing to take the following actions, to adopt the following resolutions and to transact the following business by unanimous written consent or written consent (the "Written Consent"), pursuant to Section 141 (f) of the Delaware General Corporation Law, Section 307(b) of the California Corporation Code, Section 18-302(d) of the Delaware Limited Liability Company Act, Section 17-405(d) of the Delaware Revised Uniform Limited Partnership Act, and Section 15637(i) of the California Revised Limited Partnership Act and in accordance with the provisions of the respective Bylaws of each of the Delaware corporations and California corporations, Limited Liability Company Operating Agreements of each of the Delaware limited liability companies and Limited Partnership Agreements of each of the Delaware limited partnerships and California limited partnerships.

WHEREAS, this consent is being executed in lieu of, and shall constitute, the 2013 annual meeting of the Board or the Partner for each of the Entities, which consent shall be filed by the Secretary of each of the Entities with the minutes of the meetings of the Board or the Partner;

NOW, THEREFORE BE IT RESOLVED, that the undersigned directors or partner hereby adopt the following resolutions:

**1. Election of Officers**

1.1. Election of Officers to the Entities listed on Schedules I, II, III and IV

BE IT RESOLVED, that effective as of the date of this resolution, the following persons are hereby elected to the offices of the Entities listed on Schedules I, II, III and IV set forth opposite their respective names, to serve in such capacities until their successors are duly elected and qualified or until their earlier death, resignation or removal.

<u>Name</u>	<u>Title</u>
Jack A. Fusco	President
W. Thaddeus Miller	Chief Legal Officer and Corporate Secretary
Zamir Rauf	Chief Financial Officer
Thad Hill	Vice President
John Adams	Vice President
Steven D. Pruett	Vice President
Todd Thornton	Vice President
Stacey Peterson	Vice President
Michael Rogers	Vice President
Alexandre B. Makler	Vice President
Robert Parker	Vice President
Jennings Goodman	Vice President
Shonnie Daniel	Vice President and Assistant Secretary
Rosemary Antonopoulos	Assistant Secretary

1.2 Election of Officer to the Entities listed on Schedules I and IV

BE IT RESOLVED, that effective as of the date of this resolution, the following person is hereby elected to the office of the Entities listed on Schedules I and IV set forth opposite his respective name, to serve in such capacity until his successor is duly elected and qualified or until his earlier death, resignation or removal.

<u>Name</u>	<u>Title</u>
Scott L.B. McLaughlin	Assistant Secretary

1.3 Election of Officers to the Entity listed on Schedule III

BE IT RESOLVED, that effective as of the date of this resolution, the following persons are hereby elected to the offices of the Entity listed on Schedule III set forth opposite their respective names, to serve in such capacities until their successors are duly elected and qualified or until their earlier death, resignation or removal.

<u>Name</u>	<u>Title</u>
David Plauck	Vice President
William Valagura	Vice President

2. Banking Resolutions

BE IT RESOLVED, that the Officers of the Entities are authorized and directed to open such bank accounts in the name of the Entities as may be necessary in order to carry out the business of the Entities; and

BE IT RESOLVED FURTHER, that all form resolutions required by the bank or banks are hereby adopted and approved as though set forth in full in these resolutions, and the Corporate Secretary is hereby so authorized and directed to certify the adoption of these form resolutions and to file them so certified with the minute books of the Entities.

3. **Minute Book**

BE IT RESOLVED, that a copy of these written resolutions be inserted in the Minute Books of the Entities and shall become a part of the records of the Entities.

4. **Omnibus Resolutions**

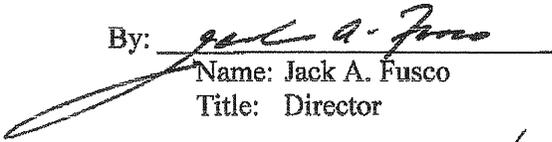
BE IT RESOLVED, that the Officers of the Entities be, and each of them hereby is, authorized to do and perform any and all such acts, including execution of any and all document and certificates, as said Officers shall deem necessary or advisable to carry out the purposes and intent of the foregoing resolutions; and

BE IT RESOLVED FURTHER, that any and all actions previously taken or caused to be taken by the Officers of the Entities, or any of them, in connection with any of the matters contemplated by any of the foregoing resolutions, are hereby acknowledged to be duly authorized acts and deeds performed on behalf of the Entities, and are hereby approved, adopted, accepted and ratified in all respects.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the undersigned, being all the members of the Board of Directors or the General Partner of each of the Entities listed on Schedules I, II, III and IV attached hereto, have executed this Written Consent as of May 17, 2013.

ON BEHALF OF THE ENTITIES  
LISTED ON SCHEDULES I, II and III

By:   
Name: Jack A. Fusco  
Title: Director

By:   
Name: W. Thaddeus Miller  
Title: Director

ON BEHALF OF THE ENTITY  
LISTED ON SCHEDULE IV

By:   
Anderson Springs Energy Company,  
its general partner by default

## SCHEDULE I

Anacapa Land Company, LLC, a Delaware limited liability company  
Anderson Springs Energy Company, a California corporation  
Bellingham Cogen, Inc., a California corporation  
Butter Creek Energy Center, LLC, a Delaware limited liability company  
Byron Highway Energy Center, LLC, a Delaware limited liability company  
Calpine Agnews, Inc., a California corporation  
Calpine California Holdings, Inc., a Delaware corporation  
Calpine Calistoga Holdings, LLC, a Delaware limited liability company  
Calpine Gilroy 1, Inc., a Delaware corporation  
Calpine Gilroy 2, Inc., a Delaware corporation  
Calpine Greenleaf Holdings, Inc., a Delaware corporation  
Calpine King City 1, LLC, a Delaware limited liability company  
Calpine King City 2, LLC, a Delaware limited liability company  
Calpine King City, Inc., a Delaware corporation  
Calpine King City, LLC, a Delaware limited liability company  
Calpine Monterey Cogeneration, Inc., a Delaware corporation  
Calpine Peaker Holdings, LLC, a Delaware limited liability company  
Calpine Pittsburg, LLC, a Delaware limited liability company  
Calpine Russell City, LLC, a Delaware limited liability company  
Calpine Siskiyou Geothermal Partners, L.P., a California limited partnership  
Calpine Solano Solar, LLC, a Delaware limited liability company  
Calpine Sumas, Inc., a Delaware corporation  
CPN Cascade, Inc., a Delaware corporation  
CPN Pipeline Company, a Delaware corporation  
CPN Telephone Flat, Inc., a Delaware corporation  
CPN Wild Horse Geothermal, LLC, a Delaware limited liability company  
Fontana Energy Center, LLC, a Delaware limited liability company  
Geysers Power I Company, a Delaware corporation  
King City Holdings, LLC, a Delaware limited liability company  
Los Esteros Holdings, LLC, a Delaware limited liability company  
Metcalf Funding, LLC, a Delaware limited liability company  
Metcalf Holdings, LLC, a Delaware limited liability company  
Modoc Power, Inc., a California corporation  
Mount Hoffman Geothermal Company, L.P., a California limited partnership  
Northwest Cogeneration, Inc., a California corporation  
Otay Holdings, LLC, a Delaware limited liability company  
Pastoria Energy Center, LLC, a Delaware limited liability company  
Peaker Holdings I, LLC, a Delaware limited liability company  
South Point Holdings, LLC, a Delaware limited liability company  
Sutter Dryers, Inc., a California corporation  
Thermal Power Company, a California corporation

## SCHEDULE II

Calpine Gilroy Cogen, LP, a Delaware limited partnership  
Calpine Greenleaf, Inc., a Delaware corporation  
Delta Energy Center, LLC, a Delaware limited liability company  
Geysers Power Company, LLC, a Delaware limited liability company  
Los Esteros Critical Energy Facility, LLC, a Delaware limited liability company  
Los Medanos Energy Center, LLC, a Delaware limited liability company  
Metcalf Energy Center, LLC, a Delaware limited liability company  
O.L.S. Energy-Agnew, Inc., a Delaware corporation  
Otay Mesa Energy Center, LLC, a Delaware limited liability company  
Pastoria Energy Facility, L.L.C., a Delaware limited liability company  
South Point Energy Center, LLC, a Delaware limited liability company

**SCHEDULE III**

Sutter Energy Center, LLC, a Delaware limited liability company

**SCHEDULE IV**

Calpine Geysers Company, L.P., a Delaware limited partnership

# Morgan Lewis

## **Ella Foley Gannon**

Partner  
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October 24, 2017

City Council of the City of San José  
Mayor Ricardo  
Vice Mayor Carrasco  
Council Members Jones, Jimenez, Peralez, Diep, Davis, Nguyen, Arenas, Rocha and Khamis  
City of San Jose  
200 East Santa Clara Street  
San José, CA 95113

Submitted via e-mail to: [cityclerk@sanjoseca.gov](mailto:cityclerk@sanjoseca.gov)

**Re: 237 Industrial Center Rezoning (File No C15-054), Special Use Permit (File No. SP16-053) and Development Exception (File No. V17-004) Applications, and Environmental Impact Report**

Dear Mayor Ricardo, Vice Mayor Carrasco, and Honorable Council Members:

Morgan, Lewis & Bockius LLP represents Los Esteros Critical Energy Facility, LLC ("Los Esteros") in connection with its facility located at 800 Thomas Foon Chew Way, San José, which provides critically needed reliability functions to serve the electrical grid. The 237 Industrial Center (the "Project") is proposed for the approximately 64.59 acre Cilker agricultural property (the "Cilker Site") adjacent to Los Esteros' site. Los Esteros offers these comments on the Project and the Final Environmental Impact Report (comprised of the Draft Environmental Impact Report (the "DEIR") and the First Amendment to the Draft Environmental Impact Report, together the "FEIR"), which supplement its July 17, 2017 comments on the DEIR for the Project, and our October 11, 2017 letter to the Planning Commission (a copy of which is attached hereto and incorporated herein).

We reiterate that Los Esteros supports development consistent with the *Alviso Master Plan* and *Envision San José 2040* (the "General Plan"), particularly as that development supports the continued economic vitality of, and job growth in, San José and the South Bay region. Los Esteros is engaged in discussions with Microsoft, the current project applicant, and we are hopeful those will result in mutually-agreeable binding measures to address Los Esteros' construction-related and operational issues. However, as an adjacent neighbor Los Esteros remains concerned that the City's analysis falls short of what is legally required. While the October 18, 2017 Memorandum from the Planning Commission to the Mayor and Council (the "Memorandum") purports to address Los Esteros' October 11, 2017 comments, those responses fail to resolve the inadequacies in the FEIR.

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**Recirculation Is Required.** The Memorandum concedes that the First Amendment to the DEIR identified a new cumulative impact at Mission College Boulevard and Montague Expressway, and fails to respond to the identification of a new significant Water Supply Impact. Memorandum, p. 7; October 11, 2017 letter, p. 3. As our October 11, 2017 letter stated, recirculation is **required** when a new significant impact is identified after notice has been given of the availability of the EIR for public review and prior to certification. Public Resources Code Section 21092.1; 14 Cal. Code Regs. § 15088.5(a); *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 447-448 (identification of new significant impact required recirculation of draft environmental impact report). The failure to comply with the procedural requirements of the California Environmental Quality Act (Public Res. Code §§ 21000 *et seq.*, "CEQA"), is not granted judicial deference; California's courts "scrupulously enforc[e] all legislatively mandated CEQA requirements." *Ebbetts Pass Forest Watch v. Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 944.

**The Air Quality Analysis Is Not Supported By Substantial Evidence.** Our October 11, 2017 letter commented that the EIR's analysis of construction-related air quality impacts only examined Option 1, the Light Industrial Development Option, despite the extremely large disparity in anticipated construction-related truck traffic associated with the import of an estimated 1,000 net new cubic yards of fill for Option One versus **124,000 net new cubic yards of fill** for Option 2, the Data Center/Light Industrial Option. The response in the Memorandum is both inadequate and, if accurate, discloses a very significant flaw in the EIR's air quality analysis.

The Memorandum reiterates that the choice to analyze construction-related air quality impacts only for Option 1 is "more conservative" based on a shorter construction timeframe for Option 1 (20 months) versus Option 2 (30 months for the data center, and a separate 20 months for the light industrial center). Therefore, the Memorandum asserts, "[i]n Option 1, more construction equipment will be on site releasing toxic air contaminants at any time, whereas in Option 2 there will be less construction equipment on site at any one time because there will be two separate phases of construction." Memorandum, p. 6.

First, from this response it appears that the EIR's construction-related air quality analysis only took into account on-site construction-related emissions, and failed, for example, to include emissions due to off-site truck traffic associated with the haul of cut and fill materials. This omission is a fatal flaw in the EIR's construction-related air quality impact analysis. The Bay Area Air Quality Management District's CEQA Air Quality Guidelines, May 2017 rev. ("BAAQMD Guidelines"), on which the EIR purportedly relied (DEIR, pp. 79-80), requires the assessment of construction-related air quality impacts from off-site, as well as on-site, construction-related activities. For example:

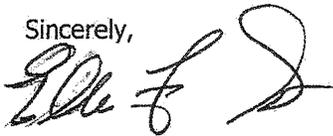
- Section 3.5.1 (p. 3-5) lists "[e]xtensive material transport (e.g., greater than 10,00 cubic yards of soil import/export) **requiring a considerable amount of haul truck activity**" as disqualifying construction-related activities from a finding of less-than-significant impact under the BAAQMD's Guidelines "Screening Criteria" for toxic air contaminants.
- Appendix A – "Construction Assessment Tools," clearly require the inclusion of both on-site and off-site fugitive dust emissions, stating "Off-site ton-mile assumes cut/fill volume is moved by haul trucks." BAAQMD Guidelines, p. A-1.

- Appendix B – “Air Quality Modeling Instructions and Project Examples,” states that for “Soil Hauling” the recommended modeling program to calculate anticipated fugitive dust **and toxic air contaminant emissions**, “URBEMIS,” “quantifies entrained PM road dust and **exhaust emissions** from soil hauling ... Information requirements include the amount of soil import/export (yd<sup>3</sup>), **round trips** per day, round trip distance (miles), and haul truck capacity (yd<sup>3</sup> per truck). For round trip distance ..., URBEMIS provides default assumptions of ... **20 miles.**” BAAQMD Guidelines, p. B-10 (emphasis added).

Second, the Memorandum merely reiterates, but fails to provide any additional analysis or information in defense of, the EIR’s assumption that taking 10 months longer to import and place 123,000 additional new cubic yards of fill will be sufficient to attenuate a 123-fold increase in dust and toxic air contaminant emissions. This response is inadequate on its face. On this point, the EIR simply fails as an informational document; revisions and recirculation are required. *San Joaquín Raptor Rescue Center v. Cty. of Merced* (2007) 149 Cal.App.4th 645, 666.

With respect to the balance of Los Esteros’ comments and the Memorandum’s responses, Los Esteros maintains that the EIR and the record before the Council do not provide substantial evidence to support the required findings for certification of the EIR and adoption of a statement of overriding consideration in connection with certain significant and unmitigated impacts of the Project. See San José Municipal Code § 21.07.080.C.4.

Sincerely,



Ella Foley Gannon

c: Kieulan Pham (via e-mail at [Kieulan.Phan@sanjoseca.gov](mailto:Kieulan.Phan@sanjoseca.gov))  
Tracy Tam (via e-mail at [Tracy.Tam@sanjoseca.gov](mailto:Tracy.Tam@sanjoseca.gov))

# Morgan Lewis

**Deborah E. Quick**

Of Counsel

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October 11, 2017

City of San José Planning Commission

Chair Pham

Commissioners Allen, Abelite, Bit-Badal, Ballard, Vora and Yesney

City of San Jose

200 East Santa Clara Street

San José, CA 95113

**Re: 237 Industrial Center Rezoning (File No C15-054), Special Use Permit (File No. SP16-053) and Development Exception (File No. V17-004) Applications, and Environmental Impact Report**

Dear Chair Pham and Honorable Commissioners:

Morgan, Lewis & Bockius LLP represents Los Esteros Critical Energy Facility, LLC ("Los Esteros") in connection with its facility located at 800 Thomas Foon Chew Way, San José, which provides critically needed reliability functions to serve the electrical grid. The 237 Industrial Center (the "Project") is proposed for the approximately 64.59 acre Cilker agricultural property (the "Cilker Site") adjacent to Los Esteros' site. Los Esteros offers these comments on the Project and the Final Environmental Impact Report ("FEIR") as a supplement to its comments on the Draft Environmental Impact Report ("DEIR") for the Project.

Los Esteros supports development consistent with the *Alviso Master Plan* and *Envision San José 2040* (the "General Plan"), particularly as that development supports the continued economic vitality of, and job growth in, San José and the South Bay region. As a neighbor, Los Esteros, is very concerned about the environmental impacts that may occur as a result of construction of the Project and is vitally interested in ensuring that development decisions are made only after impacts have been identified and assessed adequately as required by the California Environmental Quality Act (Public Res. Code § 21000 *et seq.*, "CEQA"). As is detailed below, we believe that there are currently significant deficiencies in the Project's FEIR which need to be addressed prior to certification of the EIR and consideration of the Project's entitlements. We believe that there is a pathway forward for considering and addressing these issues and we are willing to work with the City and the Project applicant to address these issues.

**1. The Required Finding That The Project Will Not Have An Unacceptable Negative Effect On Adjacent Property Cannot Be Made Unless Dust Impacts To Critical Energy Infrastructure Are Adequately Addressed.**

The Project requires approval of a Special Use Permit under San José Municipal Code Section

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20.100.720. That approval cannot be issued unless substantial evidence supports the finding that “[t]he environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, **even if insignificant for purposes of [CEQA]**, will not have an unacceptable negative affect [*sic*] on adjacent property or properties.” Staff Report, p. 15 (emphasis added). As Los Esteros stated in its July 17, 2017 letter commenting on the DEIR and the Project (the “Comment Letter”), the Los Esteros facility has a unique sensitivity to dust and particulate matter, which “can degrade and potentially clog the air inlet filters of the LECEF Facility’s combustion turbines.” Comment Letter, p. 2. The First Amendment to the DEIR asserts that, in the context of the City’s CEQA analysis, impacts to the Los Esteros critical energy infrastructure are insignificant and do not require mitigation. Los Esteros believes that analysis is incorrect.<sup>1</sup> More importantly, neither the staff report nor the proposed finding makes any attempt to supply substantial evidence that the Project “will not have an unacceptable negative affect [*sic*] on” the adjacent Los Esteros property, “even if” the dust and particulate matter impacts of the Project on the Los Esteros critical energy facility are “insignificant for purposes of” the City’s CEQA analysis. Staff Report, p. 15 and Attachment E, p. 20 (Draft Resolution for File Nos. SP16-053 and V17-004, § 10.g. The analysis and proposed findings rely solely on the FEIR’s CEQA analysis. Harmful dust emissions are recognized under California law as a nuisance. *Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 866; *Wade v. Campbell* (1962) 200 Cal.App.2d 54, 59. That the harm suffered by third parties is unequal does not prevent dust emissions from constituting an abatable nuisance. *People v. Mason* (1981) 124 Cal.App.3d 348, 352. The record before the Planning Commission does not support the proposed finding that the environmental impacts of the Project, including dust, will not result in unacceptable negative effects to Los Esteros. Los Esteros is willing to cooperate with the City and the Project’s proponents to develop an effective and practical dust mitigation program in order to prevent negative impacts to critical energy infrastructure and avoid time-consuming and costly post-approval conflicts.

## **2. Recirculation Is Required Because The First Amendment To The DEIR Identifies New Significant Impacts.**

Public Resources Code Section 21092.1 requires recirculation of an EIR for public comment “[w]hen significant new information is added” after notice has been given of the availability of the EIR for public review and prior to certification. CEQA’s regulations (14 Cal. Code Regs. §§ 15000-15387, the “Guidelines”) provide that recirculation is required when:

- (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
- (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.

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<sup>1</sup> See the discussion of clear inadequacies in the EIR’s disclosure and analysis of construction related emissions in Section 5(b) of this letter.

(3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the environmental impacts of the project, but the project's proponents decline to adopt it.

(4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.

Guidelines § 15088.5(a); *see also Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1130 and *Mountain Lion Coalition v. Fish & Game Comm'r* (1989) 214 Cal.App.3d 1043. The First Amendment to the DEIR identifies the following new, significant impacts:

- Impact TRAN(C)-1 has been revised to include a newly identify a cumulatively considerable impact at the Mission College Boulevard/Montague Expressway intersection. First Amend. to DEIR, pp. 84, 95-96 and 99.
- DEIR Section 3.14.2.1's thresholds of significance for Utilities includes that the Project will have a significant impact if there is insufficient water to meet the Project's needs from existing entitlements or resources, or if it requires new or expanded water supplies or entitlements. DEIR, p. 226. Section 3.14.2.3, Water Supply Impacts, has been revised to identify that "the potable backup flow [for cooling purposes to serve the data center use] at the required daily rate would adversely impact system-wide operations" and requires the Project to mitigate this significant impact through the dedication of a new well site to the City. First Amend. to the DEIR, p. 97.

The identification of these new significant impacts mandates recirculation. Public Res. Code § 21092.1, Guidelines § 15088.5(a)(1).

### **3. Recirculation Is Required To Provide Public Disclosure Of The Impacts Associated With Construction And Operation Of The Oakmead Pump Station Utilization.**

The DEIR presented two alternatives for disposal of the Project's storm water, as well as storm water runoff from City-owned properties east of Zanker Road: constructing a new outfall in Coyote Creek, or conveying runoff to the existing Oakmead Pump Station, located on the Guadalupe River approximately two miles southeast of the Cilker Site. As noted in Los Esteros' Comment Letter, the DEIR discussion of these options was deficient. First, the DEIR did not include any concrete criteria for determining whether the Oakmead Pump Station is feasible nor did it describe the factors that will impact the choice of disposal option. In addition, the DEIR failed to adequately disclose the impacts from either option, the mitigation measures that could reduce those impacts, or provide an adequate basis for assessing the differential in impacts as between the two options. FEIR, pp. 42-43. With respect to the analysis of the Oakmead Pump Station option, the FEIR states that "[u]tilization of the pump station by the project was analyzed in the attached memo (Appendix A)." However, no such memorandum is attached to the FEIR. Appendix A to the FEIR consists solely of "Transportation Impact Analysis (TIA) Revisions."

The memorandum analyzing utilization of the Oakmead Pump Station, per the FEIR, disclosed that "the existing pump station has the capacity to discharge storm water runoff generated at the site and new roadways; however, there is not enough capacity to accommodate runoff from City held properties east of Zanker Road." FEIR, p. 43. The memorandum not included in the FEIR identified a material difference between the two storm water disposal options; its exclusion renders the FEIR inadequate as an informational document, triggering an obligation to recirculate. Guidelines § 15088.5(a)(4). Further, the accompanying text revisions at FEIR pages 86-87 still do not clarify what criteria will be used to select between the two options. Further text revision is required to clarify the criteria for selection between the two storm water disposal options, followed by recirculation with the inclusion of the omitted memorandum, in order to allow for public comment on the revised text, newly-disclosed memorandum and the potential impacts associated with this option.

#### **4. The FEIR Fails To Adequately Consider Potential Mitigation For Impacts To Agricultural Resources.**

The Cilker Site has been in agricultural use for more than a century and is identified as Prime Farmland on the *Santa Clara County Important Farmlands 2012 Map*. DEIR, pp. 115 and 171. The Cilker Site is among the limited number of remaining properties designated as Prime Farmland within the Urban Growth Boundary, as discussed in the EIR analyzing the General Plan. General Plan DEIR, p. 142, Table 3.1-1. The General Plan EIR recognized that the permanent conversion of Prime Farmland would impose a significant, unavoidable impact on each identified property, as well as cumulatively. General Plan DEIR, pp. 179 and 845. The General Plan DEIR recognized that "[f]or properties without existing entitlements that include some Prime Farmland, agricultural easements could be considered at the time of future development" to address the property-specific impact, and that "conservation easements .... for agriculture could be used to limit future loss of Prime Farmland in other parts of the County." General Plan DEIR, pp. 193-194 and 845. In response to comments questioning the City's failure to adopt feasible mitigation for loss of Prime Farmland by requiring agricultural conservation easements at the time of entitlement for permanent conversion of Prime Farmland, the General Plan First Amendment to the DEIR stated:

The EIR does identify conservation easements as a possible means of offsetting some of the impacts of converting agricultural land to non-agricultural uses. The decision of whether or not to require such easements of new development on land not yet entitled in San José must be made by the decision-making body for the City of San José, the City Council. Those properties that are designated as Prime Farmland, do not have entitlements for the uses discussed, and whose development is considered likely during the timeframe of this General Plan ... include: Cilker ... .

First Amend to General Plan DEIR, p. 45. Neither the Project EIR nor the staff report address this commitment to consider at the entitlement stage whether it would be appropriate to off-set the individual and cumulative impacts of the Project's permanent conversion of Prime Farmland by requiring an agricultural conservation easement within the County.

This omission must be addressed in a recirculated document. Guidelines § 15088.5(a)(3). The revised analysis should include consideration of the "Agricultural Mitigation Policies" of the Santa

Clara County Local Agency Formation Commission, attached hereto as Exhibit A, including that project proponents proposing the permanent conversion of Prime Farmland put in place agricultural conservation easements providing for permanent conservation of agricultural land at a 1:1 ratio, or payment of in-lieu fees to an agricultural conservation entity sufficient to fund that entity's acquisition and management of an agricultural conservation easements at a 1:1 ratio. Santa Clara LAFCO Ag Mit. Policies, Ex. A, pp. 2-3. The analysis should address the ongoing conversion of small-parcel agricultural land in the Morgan Hill/San Martin area to "rural ranchette development," as found by the Santa Clara Valley Climate & Agriculture Preservation Program.<sup>2</sup> Putting in place one or more conservation easement(s) to protect regional small-parcel Prime Farmlands from permanent conversion is eminently feasible, as the Santa Clara County Open Space Authority currently administers several regional agricultural conservation easements.<sup>3</sup> While such a mitigation measure may not reduce the impact to Prime Farmland to a less than significant level, it does have the potential to reduce the magnitude of a significant, unavoidable impact, and therefore the City has an obligation to consider it.

##### **5. The FEIR Fails To Adequately Identify And Analyze The Potential Impacts Associated With The Whole Of The Project.**

California courts have consistently held that "an accurate, stable and finite project description is the *sin quo non* of an informative and legally sufficient [CEQA document]." *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193. CEQA also requires that a lead agency evaluate the potential impacts of the whole of the action including "later phases of the project, and any secondary, support or off-site features necessary for its implementation." *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283-84. Here, although the FEIR includes a description of two potential projects, it does not evaluate all potential impacts (including off-site impacts) associated with both options and therefore fails to meet the legal requirements of CEQA.

The EIR defines the Project as including two options: (i) a "Light Industrial Development Option," "Option 1," including up to seven two-story light industrial buildings covering the majority of the Cilker Site (DEIR, pp. 38 and 40, Fig. 2.0-7); and (ii) a "Data Center/Light Industrial Option," "Option 2," including four main buildings for data center uses, and ancillary structures including an electrical substation, on "26.5 acres of the 64.5 acre site," with "the remainder of the site (a total of approximately 38 acres) ... developed with up to 728,000 square feet of light industrial uses similar to what is proposed in" Option 1. DEIR, pp. 42-43, Fig. 2.0-9. Los Esteros' Comment Letter noted that instability in the descriptions of Options 1 and 2 of the Project led to the Project not being consistently analyzed in the DEIR. Those problems persist.

(a) There Is No Geotechnical Analysis Of Option 1 Or The Light Industrial Portion Of Option 2.

The DEIR's geological analysis analyzes only the data center portion of Project Option 2. DEIR, p. 131 and Appendix H, *Geotechnical Investigation Report*, Kleinfelder, June 10, 2016, p. 2 ("[S]ite

<sup>2</sup> See

[https://www.sccgov.org/sites/dpd/DocsForms/Documents/CAPP\\_TechPanel\\_InitialFindings\\_201702.pdf](https://www.sccgov.org/sites/dpd/DocsForms/Documents/CAPP_TechPanel_InitialFindings_201702.pdf) .

<sup>3</sup> See <https://www.openspaceauthority.org/conservation/land-protection.html> .

development may include up to four 90-foot tall, 4-story structures,<sup>[4]</sup> each with an approximately 250,000 square-foot footprint, as well as smaller ancillary structures including a new electrical substation, storm water outfall, and parking.”). There is no analysis geotechnical analysis whatsoever in the EIR—either the DEIR or the First Amendment to the DEIR—regarding Option 1 **or** the light industrial portion of Option 2. The EIR cannot be certified until this analysis is completed and the DEIR is recirculated for public review and comment. Guidelines § 15088(a)(4).

(b) Construction-Related Vehicle And Fugitive Dust Emissions Associated With The Import Of 124,000 Net New Cubic Yards Of Fill For The Data Center Portion Of Option 2 Are Neither Disclosed Nor Analyzed.

The discussion of air quality impacts during construction (DEIR Section 3.2.2.4, pp. 79-80) analyzes only the projected impacts from Option 1, the Light Industrial Development Option, based solely on a projected shorter time period for construction of Option 1.<sup>5</sup> This analytical approach fails to take account of the dramatic difference in the amount of imported fill required by the two development options: “Option 1 is anticipated to require the import of approximately **1,000 cubic yards of fill**. Option 2 would require importing approximately **124,000 net new cubic yards of fill** to be spread on the data center portion of the site.” DEIR, p. 42 (emphasis added). The EIR fails to calculate the differential in truck trips required for import of fill materials as between Options 1 and 2, and also fails to disclose or analyze the fugitive dust impacts from Option 2, which is anticipated to require **124 times the amount of fill** required by Option 1. Without this information, it is impossible to evaluate whether substantial evidence supports—or, more likely, does not support—the decision to base the analysis of air quality impacts during the construction phase solely on Option 1. This inadequate disclosure and analysis is of particular concern for Los Esteros in light of the dangers posed to Los Esteros’ critical energy infrastructure by fugitive dust.<sup>6</sup> This information must be provided and the revised analysis recirculated for comment. Guidelines § 15088(a)(4); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722 (Omission of information in an EIR is prejudicial “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.”).

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<sup>4</sup> Note that this is inconsistent even with the Project description for Option 2, as the DEIR states only one of the data center buildings will be four-stories. DEIR, pp. 42 and 44, Fig. 2.0-10.

<sup>5</sup> “Based on construction phasing, construction emissions for the data center/light industrial development option (approximately 10 years between the completion of the data center and the construction of light industrial uses on the southern portion of the site) would be less than for the light industrial development option (approximately 20-months of construction), as that project would be built over an extended number of years which reduce the full impacts of construction on the entire site. Therefore, the following analysis is based on the light industrial option which represents the worst-case for construction emissions.” DEIR, p. 79. Construction of the data center portion of Option 2 is anticipated to last 30 months. DEIR, p. 49. The ten-month differential in projected construction times for the data center portion of Option 2 is clearly insufficient to attenuate the increased vehicle and fugitive dust emissions associated with 124 times the amount of fill and consequent dramatic increase in the number of truck trips.

<sup>6</sup> See the discussion at Section 1 of this letter.

(c) The EIR Fails To Consider All Impacts Associated With Construction Of Off-Site Infrastructure.

The FEIR fails to adequately consider all impacts from construction of off-site infrastructure. For example, while the DEIR states that archeological surveys were conducted on "the project site and off-site utility corridors," (DEIR, p. 113) there is no indication that the area of disturbance necessary to construct the proposed site of the storm water outfall in Coyote Creek was surveyed. Given the EIR's admission that "[i]n this area of North San José, Native American sites have been recorded on the wide valley terraces within one-half mile of major waterways and creeks," and the confirmed archaeological site located "generally southeast of the" Cilker Site, Coyote Creek must be surveyed and, to the extent that expanded survey discloses new impacts, the EIR recirculated. Guidelines § 15088.5(a)(1).

**6. The FEIR Improperly Relies On Mitigation Measures To Reduce Impacts To Less Than Significant That Are Not Imposed As Binding And Enforceable Permit Conditions.**

Mitigation measures relied on by an agency to conclude that a project's impacts will be reduced to less than significant must be imposed as binding and enforceable permit conditions. Public Res. Code § 21002.1(b); Guidelines § 15126.4(a)(2) ("Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments."). In a number of areas, the FEIR inexplicably relies on various "permit conditions" to reduce otherwise significant impacts to less-than-significant but does not impose those measures as required mitigation and avoidance measures nor describe how they will be enforced. This does not satisfy the requirements of CEQA. For example, the DEIR recognizes that construction activities can result in significant air quality impacts but finds that such impacts can be reduced to a less than significant level through the use of identified Best Management Practices. DEIR p. 80. However, the DEIR does not impose implementation of the identified Best Management Practices as a necessary Mitigation and Avoidance Measure for Air Quality Impacts. DEIR p. 81; *see also* the similar treatment of impacts to subsurface cultural resources (DEIR, pp. 12-121), and soil contamination impacts (pp. 158-159). The analysis of impacts to historic structures likewise relies on specific documentation, relocation and salvage mitigation measures to arrive at a conclusion of less than significant impact, yet these are described as being incorporated into the project rather than being imposed as binding and enforceable permit conditions. DEIR, pp. 118-119. All mitigation measures relied on to conclude impacts will be less than significant must be incorporated into the permit approvals as binding, enforceable conditions of approval.

**7. The Differences In Kind And Degree Of Significant, And Significant And Unavoidable, Impacts Among The Alternatives Analyzed Must Be Disclosed.**

CEQA is designed to inform decisions makers and the public of the relative consequences of taking various actions. To satisfy this disclosure requirement, it is critical that an EIR provide a mechanism for meaningfully comparing the impacts of various ways of meeting a project's objectives. The DEIR frames its alternatives analysis as considering "the significant impacts from the proposed project that could be reduced or avoided by an alternative," and states that "[a]lternatives may also be considered if they would further reduce impacts that are already less than significant because the project is proposing mitigation." DEIR, p. 244-245. The analysis that follows, however, does not fulfill this function. The "Comparison of Environmental Impacts" for the "No Project-Existing Zoning," "Reduced Scale – Data Center Only," "Reduced Scale – Light

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Industrial Only Alternative" and "Reduced Development – Data Center and Reduced Light Industrial Development Alternatives" fail to quantify the differential in impacts from the alternatives, instead finding alternatives equivalent if they, like the Project, result in significant and unavoidable impacts to the same resources. It is therefore impossible to compare the magnitude of impacts between the various alternatives. The complete lack of any quantification of, for example, greenhouse gas or other air emissions, or vehicle trips and differences in trip distribution, means there is not substantial evidence supporting the EIR's alternatives analysis or its conclusions. An EIR is required to "include sufficient information about each alternative to allow meaningful evaluation, analysis and comparison with the proposed project." Guidelines § 15126.6(d). The unsupported conclusion that there is no significant difference between the alternatives because they share a similar number of unavoidable impacts does not meet this requirement. The EIR must be revised to include a comparative analysis of the level of impacts associated with each alternative and the revised EIR must be recirculated for public review and comment. Guidelines § 15088.5(a).

Sincerely,



Deborah E. Quick

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EXHIBIT A

EXHIBIT A

# AGRICULTURAL MITIGATION POLICIES

## Background

LAFCO's mission is to encourage orderly growth and development, discourage urban sprawl, preserve open space and prime agricultural lands, promote the efficient provision of government services and encourage the orderly formation of local agencies. LAFCO will consider impacts to agricultural lands along with other factors in its evaluation of proposals. LAFCO's Urban Service Area (USA) Amendment Policies discourage premature conversion of agricultural lands, guide development away from existing agricultural lands and require the development of existing vacant lands within city boundaries prior to conversion of additional agricultural lands. In those cases where LAFCO proposals involve conversion of agricultural lands, LAFCO's USA Amendment Policies require an explanation of why the inclusion of agricultural lands is necessary and how such loss will be mitigated.

## Purpose of Policies

The purpose of these policies is to provide guidance to property owners, potential applicants and cities on how to address agricultural mitigation for LAFCO proposals and to provide a framework for LAFCO to evaluate and process in a consistent manner, LAFCO proposals that involve or impact agricultural lands.

## General Policies

1. LAFCO recommends provision of agricultural mitigation as specified herein for all LAFCO applications that impact or result in a loss of prime agricultural lands as defined in Policy #6. Variation from these policies should be accompanied by information explaining the adequacy of the proposed mitigation.
2. LAFCO encourages cities with potential LAFCO applications involving or impacting agricultural lands to adopt citywide agricultural mitigation policies and programs that are consistent with these policies.
3. When a LAFCO proposal impacts or involves a loss of prime agricultural lands, LAFCO encourages property owners, cities and agricultural conservation agencies to work together as early in the process as possible to initiate and execute agricultural mitigation plans, in a manner that is consistent with these policies.
4. LAFCO will work with agricultural entities, the County, cities and other stakeholders to develop a program and public education materials to improve the community's understanding of the importance of agriculture in creating sustainable communities within Santa Clara County.

5. LAFCO will review and revise these policies as necessary.

#### **Definition of Prime Agricultural Lands**

6. "Prime agricultural land" as defined in the Cortese Knox Hertzberg Act means an area of land, whether a single parcel or contiguous parcels, that has not been developed for a use other than an agricultural use and that meets any of the following qualifications:
  - a. Land that qualifies, if irrigated, for rating as class I or class II in the USDA Natural Resources Conservation Service land use capability classification, whether or not land is actually irrigated, provided that irrigation is feasible.
  - b. Land that qualifies for rating 80 through 100 Storie Index Rating.
  - c. Land that supports livestock used for the production of food and fiber and that has an annual carrying capacity equivalent to at least one animal unit per acre as defined by the United States Department of Agriculture in the National Handbook on Range and Related Grazing Lands, July, 1967, developed pursuant to Public Law 46, December 1935.
  - d. Land planted with fruit or nut-bearing trees, vines, bushes, or crops that have a nonbearing period of less than five years and that will return during the commercial bearing period on an annual basis from the production of unprocessed agricultural plant production not less than four hundred dollars (\$400) per acre.
  - e. Land that has returned from the production of unprocessed agricultural plant products an annual gross value of not less than four hundred dollars (\$400) per acre for three of the previous five calendar years.

#### **Mitigation Recommendations**

7. Proposals involving the conversion of prime agricultural lands should provide one of the following mitigations at a not less than 1:1 ratio (1 acre preserved for every acre converted) along with the payment of funds as determined by the city / agricultural conservation entity (whichever applies) to cover the costs of program administration, land management, monitoring, enforcement and maintenance of agriculture on the mitigation lands:
  - a. The acquisition and transfer of ownership of agricultural land to an agricultural conservation entity for permanent protection of the agricultural land.
  - b. The acquisition and transfer of agricultural conservation easements to an agricultural conservation entity for permanent protection of the agricultural land.

- c. The payment of in-lieu fees to an agricultural conservation entity that are sufficient to fully fund\*:
  - 1. The cost of acquisition of agricultural lands or agricultural conservation easements for permanent protection, and
  - 2. The cost of administering, managing, monitoring and enforcing the agricultural lands or agricultural conservation easements, as well as the costs of maintaining agriculture on the mitigation lands.

\* with provisions for adjustment of in-lieu fees to reflect potential changes in land values at the time of actual payment
- 8. Agricultural lands or conservation easements acquired and transferred to an agricultural conservation entity should be located in Santa Clara County and be lands deemed acceptable to the city and entity.
- 9. The agricultural mitigation should result in preservation of land that would be:
  - a. Prime agricultural land of substantially similar quality and character as measured by the Average Storie Index rating and the Land Capability Classification rating, and
  - b. Located within cities' spheres of influence in an area planned/envisioned for agriculture, and
  - c. That would preferably promote the definition and creation of a permanent urban/agricultural edge.
- 10. Because urban/non-agricultural uses affect adjacent agricultural practices and introduce development pressures on adjacent agricultural lands, LAFCO encourages cities with LAFCO proposals impacting agricultural lands to adopt measures to protect adjoining agricultural lands, to prevent their premature conversion to other uses, and to minimize potential conflicts between the proposed urban development and adjacent agricultural uses. Examples of such measures include, but are not limited to:
  - a. Establishment of an agricultural buffer on the land proposed for development. The buffer's size, location and allowed uses must be sufficient to minimize conflicts between the adjacent urban and agricultural uses.
  - b. Adoption of protections such as a Right to Farm Ordinance, to ensure that the new urban residents shall recognize the rights of adjacent property owners conducting agricultural operations and practices in compliance with established standards.
  - c. Development of programs to promote the continued viability of surrounding agricultural land.

### **Agricultural Conservation Entity Qualifications**

11. The agricultural conservation entity should be a city or a public or non-profit agency. LAFCO encourages consideration of agricultural conservation entities that:
  - a. Are committed to preserving local agriculture and have a clear mission along with strategic goals or programs for promoting agriculture in the areas that would be preserved through mitigation,
  - b. Have the legal and technical ability to hold and administer agricultural lands and agricultural conservation easements and in-lieu fees for the purposes of conserving and maintaining lands in agricultural production and preferably have an established record for doing so, and
  - c. Have adopted written standards, policies and practices (such as the Land Trust Alliance's "Standards and Practices") for holding and administering agricultural lands, agricultural conservation easements and in-lieu fees and are operating in compliance with those standards.

### **Timing and Fulfillment of Mitigation**

12. LAFCO prefers that agricultural mitigation be in place at the time of LAFCO approval or as soon as possible after LAFCO approval. The mitigation (as detailed in the Plan for Mitigation) should be fulfilled no later than at the time of city's approval of the final map, or issuance of a grading permit or building permit, whichever occurs first.
13. Cities should provide LAFCO with information on how the city will ensure that the agricultural mitigation is provided at the appropriate time.
14. Cities should provide LAFCO with a report on the status of agricultural mitigation fulfillment every year following LAFCO approval of the proposal until the agricultural mitigation commitments are fulfilled.
15. The agricultural conservation entity should report annually to LAFCO on the use of the in-lieu fees until the fees have been fully expended.

### **Plan for Mitigation**

16. A plan for agricultural mitigation that is consistent with these policies should be submitted at the time that a proposal impacting agricultural lands is filed with LAFCO. The plan for mitigation should include all of the following:
  - a. An agreement between the property owner, city and agricultural conservation entity (if such an entity is involved) that commits the property owner(s) to provide the mitigation for the loss of prime agricultural lands and establishes the specifics of the mitigation. Upon LAFCO approval of the proposal, the agreement should be recorded with

the County Recorder's office against the property to be developed. The agreement should specify:

1. The type of mitigation that will be provided in order to mitigate for conversion of agricultural lands. (purchase of fee title or easement or payment of in-lieu fees)
  2. The agricultural conservation entity that will be involved in holding the lands, easements, or in-lieu fees.
  3. The acreage that would be preserved through mitigation and /or the amount of in-lieu fees that would be paid (with provisions to adjust fees to reflect land values at time of payment) along with the methodology adopted by the entity for calculating the in-lieu fees.
  4. The location of the mitigation lands, when possible.
  5. Information on the specific measures adopted by the city as encouraged in Policy #10 (mitigation for impacts to adjacent agricultural lands)
  6. The time-frame within which the mitigation will be fulfilled, which should be no later than at the time of city's approval of the final map, or issuance of the grading permit or building permit, whichever occurs first.
  7. The mitigation agreement is to be contingent on LAFCO approval of the proposal.
- b. Applicant should provide all other supporting documents and information to demonstrate compliance with these policies.

Morgan, Lewis & Bockius LLP

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