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VIA ELECTRONIC & OVERNIGHT MAIL

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County of Los Angeles
Department of Public Works
Water Resources Division
Attn: Reservoir Cleanouts Program
P.O. Box 1460
Alhambra, CA 91802-1460
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Dear Director Pestrella,

On behalf of Arroyo Seco Foundation and Pasadena Audubon Society (“Commenters”) we submit these preliminary comments on the Recirculated Portions of the Final Environmental Impact Report And Mitigation Monitoring And Reporting Program (“**RFEIR**”) for the Devil’s Gate Reservoir Sediment Removal And Management Project (“**Project**”). These comments address issues identified in the RFEIR. Commenters expressly reserve the right to supplement these comments at or prior to the Board of Supervisors hearing on the Project, and at any later hearings and proceedings related to this Project. Cal. Gov. Code § 65009(b); Cal. Pub. Res. Code § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

Based on our review, and as discussed herein, it is clear that the RFEIR fails to correct the errors and omissions identified in the Los Angeles Superior Court’s 2017 judgment and writ issued in the case of *Arroyo Seco Foundation et al. v. County of Los Angeles et al.*, Case No. BS152771 (“**Judgment**”). The RFEIR fails to adequately mitigate the Project’s significant nitrogen oxide (“**NOx**”) and other criteria air pollutant emissions from the massive 5-year sediment removal phase of the Project, and fails to substantiate its reliance on the use of Model Year 2010 (“**MY2010**”) haul trucks with accurate evidence of their emissions control capabilities. The Project also poses a significant cancer risk to local sensitive receptors which the RFEIR fails to disclose and mitigate. Finally, the RFEIR fails to support its ongoing reliance on 1:1 mitigation ratios for impacts to sensitive biological resources with substantial evidence, and fails to adequately mitigate the Project’s cumulative impacts.

For the reasons discussed herein, Commenters urge the Los Angeles County Flood Control District (“**Flood Control District**” or “**District**”) to remand the RFEIR to staff to prepare a legally adequate revised EIR which fully discloses and mitigates the Project’s significant impacts.

I. PROJECT DESCRIPTION & HISTORY.

The Project is a two-phase sediment removal and maintenance project located in the City of Pasadena in Los Angeles County. The Project site is located within Hahamongna Watershed Park, owned and operated by the City of Pasadena lying west of the City of La Canada Flintridge and east of unincorporated Altadena. The Project calls for removing approximately 2.425 million cubic yards (“mcy”) of excess sediment as well as any additional sediment received during the sediment removal phase in the Devil’s Gate Reservoir (“Reservoir”) to restore the Reservoir to its original capacity of 7.42 mcy. Afterwards, the Project calls for ongoing sediment removal at the Reservoir to maintain its capacity.

II. EXPERTS.

This letter attaches comments from a number of scientific and technical experts concerning the RFEIR including Scott Cashen, Matt Hagemann, Paul Rosenfeld, and Hadley Nolan, Jessie Jaeger, T’Shaka Touré, Michael Long, Darren Dowell, PhD and Lance Benner, PhD. Their comments, attachments, and CVs are attached hereto and are incorporated by reference

Scott Cashen (“**Mr. Cashen**”) has over 23 years of professional experience in natural resources management. During that time he has worked as a field biologist, forester, environmental consultant, and instructor of Wildlife Management. Mr. Cashen focuses on CEQA/NEPA compliance issues, endangered species, scientific field studies, and other topics that require a high level of scientific expertise.

Mr. Cashen has knowledge and experience with numerous taxa, ecoregions, biological resource issues, and environmental regulations. As a biological resources expert, Mr. Cashen is knowledgeable of the various agency-promulgated guidelines for field surveys, impact assessments, and mitigation. Mr. Cashen has led field investigations on several special-status species, including ones focusing on the yellow-legged frog, red-legged frog, desert tortoise, steelhead, burrowing owl, California spotted owl, northern goshawk, willow flycatcher, Peninsular bighorn sheep, red panda, and various forest carnivores.

Mr. Cashen is a recognized expert on the environmental impacts of renewable energy development. He has been involved in the environmental review process of over 80 solar, wind, biomass, and geothermal energy projects. Mr. Cashen’s role in this capacity has encompassed all stages of the environmental review process, from initial document review through litigation support. Mr. Cashen has provided expert witness testimony on several of the Department of the Interior’s “fast-tracked” renewable energy projects. His testimony on those projects helped lead agencies develop project alternatives and mitigation measures to reduce environmental impacts associated with the projects.

Mr. Cashen was a member of the independent scientific review panel for the Quincy Library Group project, the largest community forestry project in the United States. As a member of the panel, Mr. Cashen was responsible for advising the U.S. Forest Service on its scientific monitoring program, and for preparing a final report to Congress describing the effectiveness of the Herger-Feinstein Forest Recovery Act of 1998.

Matt Hagemann (“**Mr. Hagemann**”) is a Co-Founder of SWAPE and a professional geologist with over 25 years of consulting experience in environmental policy, site assessment and remediation. His practice focuses on providing assistance to communities and as a consulting expert and expert witness for environmental litigation.

Mr. Hagemann has extensive experience in the interpretation of environmental data and the application of environmental regulations and regulatory guidance. He has provided technical consulting support and expert witness testimony for a variety of cases concerning the environmental occurrence of perchlorate, MTBE, and petroleum hydrocarbons. Mr. Hagemann has also led research on several projects to compile comprehensive histories on the chemical synthesis, production, and industry knowledge related to MTBE and perchlorate use. In addition to being licensed in California as a Professional Geologist and Certified Hydrogeologist, Mr. Hagemann is a Qualified Stormwater Pollution Plan Developer (QSD) and a Qualified Stormwater Pollution Plan Practitioner (QSP). Mr. Hagemann has conducted numerous inspections of industrial facilities and has recommended best management practices to improve stormwater quality.

Mr. Hagemann has an extensive history in environmental consulting and regulatory oversight. He previously served as the Senior Science Policy Advisor with U.S. EPA Region 9 in San Francisco, where he advised senior management on emerging water quality and hazardous waste issues. Mr. Hagemann also served as a hydrogeologist in the Superfund and RCRA divisions in overseeing the investigation and cleanup of toxic waste facilities, including seven closing military bases. At EPA, Mr. Hagemann led technical aspects of enforcement against polluters resulting in significant settlements. Mr. Hagemann joined U.S. EPA in 1989 as a charter member of the RCRA Corrective Action Section. In this role, he applied newly written guidance in the investigation and cleanup of sites and assisted in the delegation of EPA’s authority to states. Mr. Hagemann also worked as a hydrogeologist in EPA’s Water Division and implemented Safe Drinking Water Act programs and provided division-wide assistance on issues involving the Clean Water Act. In addition, Mr. Hagemann worked as a hydrologist for the National Park Service to ensure protection of water quality of National Parks throughout the U.S. under provisions of the Clean Water Act.

Paul Rosenfeld (“**Dr. Rosenfeld**”) is a Co-Founder and Principal Environmental Chemist at SWAPE. He has over twenty years’ experience conducting remedial investigations, risk assessments, and developing cleanup programs for sites containing petroleum hydrocarbons, chlorinated solvents, pesticides, radioactive waste, PCBs, PAHs, dioxins/furans, volatile and semi-volatile organics, perchlorate, heavy metals, asbestos, PFOA, unusual polymers, fuel oxygenates (MTBE), and odors. Dr. Rosenfeld conducts contaminant fate and transport modeling in all environmental media and is a specialist regarding the analysis and modeling of airborne contaminants. Dr. Rosenfeld has evaluated and modeled emissions from oil and gas facilities, natural gas and fracking sites, industrial boilers, incinerators, confined animal feeding operations, rendering facilities, and various other industrial and agricultural sources. Dr. Rosenfeld has served as a Lecturer with UCLA’s School of Public Health, where he taught courses to medical doctors regarding human health risks of exposure to environmental contaminants. He publishes and presents frequently at nationally-recognized conferences on the environmental occurrence and human health consequences associated with

emerging contaminants, such as chlorinated solvents, atrazine, 1,2,3-trichloropropane, PBDE, and PFOA. He is also a recognized and well-published expert in areas of odorant speciation, odor abatement, and consulting services for the biosolids and composting industries. Over the last decade, Dr. Rosenfeld has provided consulting expert support for numerous environmental litigation projects and has served as an expert witness in more than thirty environmental cases across the nation.

Hadley Nolan (“**Ms. Nolan**”) graduated from the University of California Los Angeles in 2016 with a B.S. in Environmental Science and a minor in Environmental Systems and Society. Since joining SWAPE in 2016, Hadley has conducted research and prepared technical analyses on a wide variety of projects involving the evaluation of environmental conditions and regulatory compliance issues. Hadley specializes in evaluating the adequacy of compliance determinations made with regulations set forth by the California Environmental Quality Act (CEQA). Specifically, Hadley quantifies and models criteria air pollutant and greenhouse gas emissions that are released during construction and operation of proposed new developments within California, and determines whether or not these emissions will result in a significant impact on regional air quality and climate change. Hadley also reviews air quality assessments conducted by applicants of these proposed new development projects and determines whether or not the completeness and adequacy of those proposals are sufficient in demonstrating compliance with CEQA regulations and guidelines. Hadley has conducted these evaluations on more than sixty CEQA projects.

T'Shaka Touré (“**Mr. Touré**”) has over 25 years of diverse experience in natural resources management with an emphasis in regulatory permitting, environmental reexamination, wildlife studies, open space management planning, wetland ecology, and hydrology. Mr. Touré has conducted technical studies, prepared regulatory permits, jurisdictional delineations, and provided USFWS Section 7 consultation and expert testimony for endangered species to include mitigation and monitoring plans for impacts to special-status species. Mr. Touré has prepared and implemented natural resources management plans for artificially created wetland design planning, open space planning, and water quality control planning. He has expansive experience in habitat assessments and regulatory permitting concerns for California special-status species (i.e., Least Bell's vireo, Willow Flycatcher, Tricolored Blackbird, Burrowing Owl, Swainson's Hawk, Blunt-nosed Leopard Lizard, California Red-legged Frog, Arroyo Toad, Desert Tortoise, Kangaroo Rats, San Joaquin Kit Fox, and Valley Elderberry Longhorn Beetle). He is knowledgeable regarding special-status species mitigation banks and conservancy lands. Additionally, he's experienced in working with local and regional regulatory agencies staff personnel and has a working relationship with CDFW, RWQCB, USACE, and various municipality public works staff. Mr. Touré is an experienced senior level regulatory specialist that has navigated through the regulatory permitting process in order to identifying appropriate site locations to establish conservation to meet mitigation requirements, when appropriate. He has provided document reviews, environmental reexamination, and implementation of required technical studies. He has prepared regulatory permitting packages for DFW Sections 2081, 1602, Regional Board Section 401 Certification, and USACE 404 Permit of the CWA, to include regulatory services for projects throughout California. Mr. Touré's biological experience and

regulatory permitting knowledge extends from agricultural lands to wetlands. He has provided environmental compliance services and document reviews for BNSF railway, large scale solar energy and linear transportation projects for Caltrans, California Energy Commission, and PG&E projects in the counties of Fresno, Madera, Merced, Kern, Kings, Tulare, San Joaquin, Stanislaus, Sacramento, Santa Clara, Alameda, Monterey, Los Angeles, Orange, San Bernardino, and Riverside.

Michael Long (“**Mr. Long**”) retired in 2010 as Natural Areas Administrator over 19 Natural Areas and Wildflower Sanctuaries for the Los Angeles County Department of Parks and Recreation, based at Eaton Canyon Nature Center and worked in the Nature Centers system 39 years. He obtained a BS in Zoology in 1972 from California State University Los Angeles and taught college environmental biology and human ecology courses and currently teaches natural history classes for the Nature Centers. Mr. Long's research interests are in ornithology, herpetology and botany, he has prepared or reviewed over 200 CEQA and NEPA environmental documents, and he continues to perform field biological assessments for environmental documents. He served 12 years on the County Regional Planning Dept. Significant Ecological Areas Tech. Advisory Committee. He also is Vice Pres. and Conservation Chair for the Calif. Native Plant Soc., San Gabriel Mountains. Chapter, an Advisor for the Arroyos and Foothills Conservancy, and Vice Pres. of the Pasadena Audubon Society.

Darren Dowell, PhD. (“**Mr. Dowell**”) is a research scientist at Jet Propulsion Library, and currently serves as Visiting Associate and Lecturer at the California Institute of Technology. Mr. Dowell is an experienced ornithologist and has conducted bird surveys since 2009.

Lance Benner, PhD. (“**Mr. Benner**”) is a research scientist at Jet Propulsion Library. Mr. Benner is an experienced ornithologist who has conducted bird surveys since 2003.

III. STATEMENT OF INTEREST.

The Arroyo Seco Foundation is a community-based 501(c)(3) nonprofit organization that advocates for an integrated, harmonious approach to watershed and flood management, water conservation, habitat enhancement, and the expansion of recreational opportunities through action projects, recreation, and environmental awareness activities. ASF has conducted a watershed coordination and education program in the Arroyo Seco Watershed for more than ten years. ASF members live, work, and recreate in the area surrounding the Devil's Gate Reservoir.

Pasadena Audubon Society is a California nonprofit corporation that aims to bring the excitement of birds to their community through birding, education, and the conservation of bird habitats serving the communities of Alhambra, Altadena, Arcadia, Azusa, Duarte, El Monte, La Cañada, Monterey Park, Monrovia, Montrose, Pasadena, Rosemead, San Gabriel, San Marino, Sierra Madre, South Pasadena, and Temple City. Audubon members live and work near the Project site and frequently live, work, and recreate in the areas immediately surrounding the Devil's Gate Reservoir.

IV. LEGAL STANDARD.

CEQA has two basic purposes, neither of which the RFEIR satisfies. First, CEQA is designed to inform decisionmakers and the public about the potentially significant environmental impacts of a project before harm is done to the environment.¹ The environmental impact report (“EIR”) is the “heart” of this requirement.² The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”³

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”⁴ An adequate EIR must contain facts and analysis, not just an agency’s conclusions.⁵ CEQA requires an EIR to disclose all potential direct and indirect, potentially significant environmental impacts of a project.⁶

Second, if a EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.⁷ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.⁸ Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the RFEIR to meet this obligation.

Simply because the RFEIR is a revision and recirculation of the October 20, 2014 Final Environmental Impact Report does not release the Flood Control District from its obligation to comply with CEQA as a whole. While the RFEIR was revised to respond to specific deficiencies identified by the Court in *Arroyo Seco Foundation, et al v. County of Los Angeles, et al*, Los Angeles Superior Court Case No. BS152771, the environmental documentation in its entirety must adequately evaluate the environmental impacts of the Project under CEQA.

V. THE RFEIR DOES NOT COMPLY WITH CEQA AND THE JUDGMENT.

The RFEIR takes an overly narrow approach to compliance with the Judgment. In addition to requiring the District to revise the RFEIR to address the three narrow revisions discussed in the RFEIR’s introduction (See RFEIR, p. iii), the Judgment commands the District to “[e]nsure that the entire EIR has been completed in compliance with CEQA and the CEQA Guidelines prior to its recertification.” See Judgment, Par. 3(f).

¹ 14 Cal. Code Regs. (“CEQA Guidelines”) § 15002(a)(1); *Berkeley Keep Jets Over the Bay v. Bd. of Port Commissioners*. (2001) 91 Cal.App.4th 1344, 1354; *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

² *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

³ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁴ CEQA Guidelines, § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

⁵ See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

⁶ Pub. Resources Code § 21100(b)(1); CEQA Guidelines, § 15126.2(a).

⁷ Pub. Resources Code §§ 21002.1(a), 21100(b)(3); CEQA Guidelines, § 15002(a)(2) and (3); *Berkeley Keep Jets Over the Bay v. Bd. of Port Commissioners*. (2001) 91 Cal.App.4th 1344, 1354; *Laurel Heights Improvement Assn. v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

⁸ Pub. Resources Code §§ 21002-21002.1.

The District has done less than the bare minimum necessary to bring the Project's RFEIR into compliance with CEQA. As discussed herein, the revisions made to the Project's mitigation measures are inadequate to ensure that significant air quality and biological resources impacts will be mitigated to less than significant levels. Additionally, the slim revisions in the RFEIR demonstrate that the District failed to review the entire EIR to determine whether there were additional errors or omissions that required amendment, failed to disclose previously undisclosed significant impacts (like the Project's significant cancer risk from exposure to construction emissions), and failed add necessary mitigation measures to reduce significant impacts to less than significant levels. This violates the District's most basic duties to fully disclose, analyze, and mitigate all potentially significant impacts in its EIR.

Commenters urge the District to take a hard look at the entire FEIR, and to revise and recirculate it for public comment as necessary to bring the FEIR into full compliance with CEQA prior to presenting it to the Board of Supervisors for any proposed recertification.

VI. THE RFEIR DOES NOT ADEQUATELY ANALYZE THE PROJECT'S IMPACTS TO BIOLOGICAL RESOURCES.

A. The RFEIR Does Not Adequately Analyze Impacts To Riparian Habitats And Sensitive Natural Communities

1. **The RFEIR Fails To Provide Evidence that Mitigation Ratios of 1:1 Were successful In Achieving No Net Loss Of Wetlands.**

The RFEIR claim that mitigation ratios of 1:1 or less were successful in achieving or exceeding mitigation acreage required is inaccurate, misleading and unsupported by the documentation provided in the RFEIR. In particular, the RFEIR claims that 1:1 mitigation is sufficient based upon seriously misrepresents the conclusion of does not demonstrate that projects that adopted mitigation ratios of 1:1 successfully mitigated their impacts. The RFEIR relies upon a comparative study conducted by researchers at the University of California Los Angeles and University of California San Francisco as evidence that 1:1 mitigation would be successful when the study actually came to the exact opposite conclusion. Ambrose, R. F., J. L. Callaway, and S. F. Lee. 2007. An Evaluation of Compensatory Mitigation Projects Permitted Under Clean Water Act Section 401 by the California State Water Resources Control Board, 1991-2002 ("**Ambrose Study**").

The Ambrose Study in fact demonstrates that mitigation ratios much higher than 1:1 are required to achieve sufficient mitigation to mitigate impacts to riparian habitat and sensitive natural communities to less than significant levels. As Biological expert Scott Cashen notes:

. . . . Contrary to the conclusions in the RFEIR, not only did the Ambrose study demonstrate that most projects were required to provide a mitigation ratio greater than 1:1, but it also demonstrated that many projects were required to provide a ratio substantially greater than 1:1. Specifically, data in the study demonstrate that it was not uncommon for permits to require a mitigation ratio ranging from 5:1 to 7:1, and that a few even required mitigation in excess of 10:1. Data provided in the Ambrose study further demonstrate that projects with higher mitigation ratios were more likely

to achieve the “no net loss” standard than projects with lower mitigation ratios, even if they did not achieve the acreage required by the permits. (footnote omitted)

Cashen at 2 – 3.

In addition, the examples of projects cited to by the RFEIR are both irrelevant as to whether 1:1 mitigation in actuality could and actually provide shining examples of why 1:1 mitigation is insufficient. As Mr. Cashen notes:

Furthermore, careful examination of the projects cited in the RFEIR reveal they were markedly dissimilar from the proposed Project. The LACFCD has no basis for comparing the proposed Project to projects that had no potential for permanent impacts to wetlands, and thus, no potential for net loss of wetlands. In addition, the LACFCD has no basis for comparing the proposed Project to projects that simply required the planting of vegetation to achieve “success,” or to projects that achieved success by purchasing credits at a wetlands mitigation bank. As a result, the RFEIR fails to provide evidence supporting the conclusion that a 1:1 mitigation ratio would ensure Project impacts to wetlands and other jurisdictional habitats are mitigated to insignificant levels.

Cashen at 5.

Even Federal and State permitting agencies have refused to permit mitigation for the Project at a 1:1 mitigation ratio in the three years since the original FEIR for the Project was released. Recently on March 1, 2017 the California Department and Fish & Wildlife issued a Streambed Alteration Agreement that required greater than 1:1 mitigation for the Project, directly contradicting the terms of the RFEIR which allows mitigation to occur even outside the local watershed.

2. The RFEIR Inaccurately Claims That State And Federal Policies Requiring A Minimum Of 1:1 Mitigation Ratios Have Resulted In “No Net Loss Of Wetlands.”

The RFEIR incorrectly claims that the State of California has achieved its “No Net Loss Of Wetlands” goals by imposing merely a 1:1 mitigation ratio for riparian habitat removal projects. As Mr. Cashen notes:

The RFEIR is correct that the Ambrose study showed no overall net loss of wetland acreage. However, **the authors clearly stated that this was due to the large mitigation ratios required by the regulatory agencies.** (footnote omitted) Indeed, if one examines the data associated with the projects that were permitted with a 1:1 ratio (or less), the data reveal that **those projects resulted in an overall net loss of at least 17.84 acres.** (footnote omitted) As a result, data provided in the Ambrose study directly contradict the RFEIR’s claim that a 1:1 mitigation ratio would be sufficient to prevent “no net loss” of wetlands.

Cashen at 6 (emphasis added).

3. The RFEIR Inaccurately Claims That There Is A “Precedent” For 1:1 Habitat Mitigation.

The RFEIR incorrectly claims that there is a “precedent” for 1:1 mitigation for the replace of riparian and sensitive natural communities. As Mr. Cashen notes:

. . . the RFEIR’s claim that the City of Riverside and regulatory agencies have established a precedent for 1:1 mitigation is nonsense. If that were the case, the regulatory agencies would have formal guidelines identifying 1:1 as the accepted standard and there would be no controversy over the Project’s mitigation ratio. **One of the primary reasons why there is no standard mitigation ratio requirement is that the appropriate ratio is dependent on numerous site-specific and project-specific factors. The fact that the City of Riverside required 1:1 mitigation for one project that affected Riversidean Alluvial Fan Sage Scrub does not mean that is the precedent for all other projects, all other habitat types, and in all other regions.** The RFEIR’s claim that regulatory agencies have established a precedent for 1:1 mitigation is particularly absurd because the RFEIR acknowledges that 84% of the permits issued by the California State Water Resources Control Board between 1991 and 2002 required a mitigation ratio greater than 1:1.

Cashen at 7 (emphasis added) (footnotes omitted).

4. The RFEIR Does Not Account For The Difference In Functional Value Between On-Site And Off-Site Mitigation Sites In Allowing 1:1 Mitigation.

The RFEIR does not account for the difference in functional value between on-site and off-site mitigation. As Mr. Cashen notes:

. . . According to the RFEIR, offsite mitigation will be conducted within the Arroyo Seco subwatershed or within the greater Los Angeles River Watershed. However, the RFEIR does not identify specific locations for offsite mitigation, nor does it identify specific projects that could be accomplished to mitigate the Project’s significant impacts. This is important because there are limited opportunities for compensatory mitigation in the Los Angeles River Watershed, and thus, the mitigation proposed in the RFEIR may not be feasible. Consequently, there is uncertainty as to what the LACFCD will actually do to compensate for the Project’s significant impacts to sensitive biological resources, and where it will do it.

The ambiguity associated with offsite mitigation options is exacerbated by the RFEIR’s failure to establish a mechanism (e.g., vetting by the resource agencies) that ensures offsite mitigation projects proposed by the LACFCD would adequately compensate the Project’s significant impacts to sensitive biological resources. Consequently, the RFEIR fails to provide the evidence needed to substantiate the LACFCD’s conclusion

that impacts to wetlands, riparian habitats, and other sensitive natural communities would be reduced to a level below significance.

Cashen at 11. The RFEIR should disclose and analyze the functional value of potential mitigation sites within the Los Angeles Watershed.

The RFEIR's failure to disclose potential mitigation sites is particularly galling since the Flood Control District has already proposed specific locations and configurations of on-site and off-site mitigation projects that have met resistance and criticism from federal and state agencies. T

5. The RFEIR Does Not Account For The Presence Of Endangered Species On-Site.

The RFEIR does not account for the presence of federally endangered and state species of concern on the Project Site in concluded that a 1:1 mitigation ratio, much if not all of which is allowed to be placed off-site, at the Project Site. As Mr. Cashen notes:

The RFEIR indicates compensatory mitigation may be accomplished through habitat enhancement, either onsite or offsite. By definition, habitat is an area that is occupied by individuals of a given species. Thus, by definition, "habitat enhancement" means habitat for the given species already exists within the enhancement area. As a result, **LACFCD's proposal for habitat enhancement as compensatory mitigation would result in a net loss of habitat.** Consequently, any habitat enhancement activities that are conducted as compensatory mitigation **warrant a mitigation ratio much greater than 1:1.**

Cashen at 11 (emphasis added). Leather

The presence of the Federally endangered Least Bell's Vireo as well as State Species of Special Concern Yellow Warbler, Yellow-breasted Chat and Loggerhead Shrike on the Project Site is well document. Letter from Brian Leatherman, Principal Biologist, Leatherman BioConsulting, Inc. to Ms. Mari Quilmann, ECORP CONSULTING RE: Results of Focused Surveys for the Southwestern Willow Flycatcher, Western Yellow-billed Cuckoo and Least Bell's Vireo for the Devil's Gate Reservoir Sediment Removal and Management Project (Sept. 6, 2016); C. Darren Dowell, Ph. D., Lance A. M. Benner, Ph. D., and Michael C. Long (2015) Endangered Bird Species and California Bird Species of Special Concern within Hahamongna Watershed Park.

Habitat mitigation in amounts greater than 1:1 are required because of the incredibly adverse impact that the Project will have on habitat for federally endangered species and state species of special concern. As Mr. Touré notes:

The Project would substantially reduce and fragment the foraging habitat available to LBV that occurs at the Hahamongna Watershed Park. Adverse effects to LBV from habitat loss, habitat fragmentation, and the reduction of habitat patch size have been well documented. These adverse effects include nest abandonment, increased depredation (both intra- and inter-specific), and foraging interference.

Touré at 4.

Finally, the Flood Control District has admitted that the Project activities will result in “take” of the federally endangered Least Bell’s Vireo. As the Flood Control District’s application for an Incidental Take notes:

Indirect take may result from noise associated with the operation of construction equipment during the sediment removal phase of the project if these activities are conducted during the breeding season. The initial sediment removal phase of the project will take approximately 3 to 5 years to complete and the activities will be conducted between April 15 and November 30 pending dry working conditions. Therefore, during each year when the initial sediment removal occurs, indirect take of nesting least Bell’s vireos as a result of noise may occur from April 15 through July 31, the season when most vireos complete their nesting cycles. Early in the breeding season, the noise associated with the construction activities may result in indirect take of nesting least Bell’s vireos if nests are established near the construction activities and the birds subsequently abandon their nests. Avoidance and minimization measures will be implemented to determine where vireos are nesting and buffers will be established to reduce the likelihood of indirect take of nesting vireos. Vireos may continue stay on the breeding grounds into September before departing for their wintering grounds. After July 31, noise is not expected to result in indirect take of non-nesting or migrating Least Bell’s vireos and nonnesting southwestern willow flycatchers because these species are highly mobile, they can move throughout the habitats adjacent to where sediment removal is taking place, and they are not restricted to occupying nesting territories.

Mari Quillman, ECORP Consulting, Inc. (2016) Devil’s Gate Sediment Removal and Management Project Application for Incidental Take of Endangered Species 23. The project requires additional habitat mitigation due to the presence and impact the Project will have on sensitive species.

6. The RFEIR Requires Atleast 4:1 Mitigation Due To Numerous Factors

Due to numerous factors, the Project requires a mitigation ratio of at least 4:1 to have a less than significant impact on biological resources. As Mr. Cashen notes:

Based on my review of the scientific literature, RFEIR, and associated documents, I believe a **4:1 ratio** would be “fair” to the LACFCD and **would provide a reasonably high probability that Project impacts would be mitigated to insignificant levels.**

Cashen at 10. Mr. Cashen points to several factors including lag time between project implementation and successful establishment of mitigation sites, uncertainty of success of mitigation sites, need for buffers, scarcity of biological resources, distance between mitigation sites, and the indirect impacts of the Projects. *Id.* at 9 – 11.

7. The RFEIR Fails To Provide Adequate Performance Standards For Compensatory Mitigation

The RFEIR fails to provide adequate performance standards for the compensatory mitigation that would be implemented as part of the Project. As Mr. Cashen notes:

The RFEIR suggests performance standards for the compensatory mitigation would be based on a comparison of variables at the mitigation sites, with those at reference sites. Specifically, the RFEIR indicates LACFCD will measure: (a) percent cover of native and nonnative plant species, and (b) native plant species richness. However, the RFEIR fails to identify the specific performance standards that would be applied to these variables (i.e., the specific values that would constitute success). For example, would mitigation sites that had half the species richness of reference sites be considered a success, or do mitigation sites need to achieve the same species richness as the reference sites to be considered a success?

Cashen at 12. The RFEIR fails to provide adequate performance standards for the Project's compensatory mitigation.

8. The RFEIR Improperly Defers Performance Standards for Compensatory Mitigation.

The FEIR improperly defers critical details of mitigation measures. Feasible mitigation measures for significant environmental effects must be set forth in an EIR for consideration by the lead agency's decision makers and the public before certification of the EIR and approval of a project. The formulation of mitigation measures generally cannot be deferred until after certification of the EIR and approval of a project. 14 Cal. Code Regs. § 15126.4(a)(1)(B) ("...[f]ormulation of mitigation measures should not be deferred until some future time.").

Deferring critical details of mitigation measures undermines CEQA's purpose as a public information and decision-making statute. "[R]eliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking; and[,] consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment." *Communities for a Better Environment v. City of Richmond* (2010) ("*Communities*") 184 Cal.App.4th 70, 92. As the Court noted in *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307 "[a] study conducted after approval of a project will inevitably have a diminished influence on decision-making. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA."

A lead agency's adoption of an EIR's proposed mitigation measure for a significant environmental effect that merely states a "generalized goal" to mitigate a significant effect without committing to any specific criteria or standard of performance violates CEQA by improperly deferring the formulation and adoption of enforceable mitigation measures. *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670; *Communities*, 184 Cal.App.4th at 93 ("EIR merely proposes a generalized goal of no net increase in greenhouse gas emissions and then sets out a

handful of cursorily described mitigation measures for future consideration that might serve to mitigate the [project's significant environmental effects.]); cf. Sacramento Old City Assn. v. City Council (1991) 229 Cal.App.3d 1011, 1028-1029 (upheld EIR that set forth a range of mitigation measures to offset significant traffic impacts where performance criteria would have to be met, even though further study was needed and EIR did not specify which measures had to be adopted by city).].

In particular MM-Bio-6 and MM Bio-8 unlawfully defers the development of performance standards as well as any adaptive measures if a mitigation site were to not meet the unknown performance standards to be developed after Project implementation. MM-Bio-6 and 8 defers the development of performance standards, habitat restoration plan (and failing to disclose a draft habitat mitigation and monitoring plan that was roundly criticized by the United States Fish & Wildlife Service).

9. The RFEIR Does Not Provide For Adequate Monitoring Of Mitigation Sites.

The RFEIR does not provide for adequate monitoring as the RFEIR does not provide specific performance standards that the mitigation sites would be monitored for and does not provide an adequate monitoring period to ensure the long-term success of the mitigation habitat. As Mr. Cashen notes:

First, the RFEIR fails to establish the performance standards. As a result, it is impossible to evaluate whether five years of monitoring is appropriate for those standards. Similarly, the RFEIR fails to identify the variables that will be monitored besides vegetation. The primary reason for the failure of wetland mitigation sites has been the lack of proper hydrology. Consequently, the RFEIR needs to incorporate performance standards for hydrology, coupled with a hydrologic monitoring program.

Second, the statement that monitoring would be conducted “for five years or until the established performance standards are met” is vague. Specifically, it implies that monitoring might terminate after the first year or two if the performance standards are met during that timeframe. This is unacceptable because it would enable LACFCD to remove weeds, plant natives, and immediately claim success. However, weeds would undoubtedly return and some of the native plants probably would die. The scientific literature is clear that successful weed eradication requires a sustained effort over multiple years.

Third, five years of monitoring is too short a timeframe to infer the long-term success of riparian habitats. Riparian habitats in general, and least Bell's vireo habitats in particular, are dependent on periodic disturbance events (e.g., storm events that scour the channel, deposit sediment, and create open space for the development of early successional riparian vegetation). Thus, riparian habitats are dependent on hydrologic processes that are inherently variable and that may occur at intervals in excess of every five years. As a result, longer monitoring timeframes are needed for compensatory mitigation projects involving riparian vegetation. Based on my review of the literature,

I recommend monitoring for at least five years and until success criteria have been met for three consecutive years. Thereafter, monitoring could be reduced to every three or five years (depending on the habitat) with an annual screening assessment (visual inspection) to identify any major problems (e.g., unauthorized trespass or weed infestation).

Cashen at 15.

B. The RFEIR Does Not Adequately Mitigate The Project's Impact On Wildlife Movement.

The RFEIR does not adequately mitigate the Project's impacts on wildlife movement. As Mr. Cashen notes:

A major problem with this claim is the RFEIR's lumping of all animals into the generic category "wildlife." The scientific literature is clear that all movements must be considered on a species-specific basis. Notwithstanding that problem, there are considerable flaws with the LACFCD's logic. Most notably, the LACFCD has no basis for concluding habitat enhancement would offset impacts on wildlife movement because it has not demonstrated existing habitat conditions preclude or impair wildlife movement. Furthermore, the LACFCD has no basis for concluding offsite mitigation would mitigate impacts to movement at the Project site because it provides no evidence that movement is an issue at offsite locations, nor does the RFEIR require consideration of movement in the selection of mitigation sites. Indeed, the RFEIR summarily concludes BIO-1 through BIO-8 would mitigate the impacts without providing any actual analysis to support that conclusion. Wildlife movement is site and species-specific and requires an understanding of the population structure. Because the LACFCD has not identified potential offsite mitigation sites, it has no knowledge of the population structure at those sites, and similarly, no knowledge of whether there are any constraints on wildlife movement. As a result, the RFEIR fails to provide evidence supporting the LACFCD's conclusion.

Cashen at 21.

VII. THE RFEIR DOES NOT ADEQUATELY ANALYZE CUMULATIVE IMPACTS.

The RFEIR fails to adequately analyze the cumulative impacts of the Project with the proposed Eaton Canyon Pipeline project. As Mr. Cashen notes:

The RFEIR identifies two projects that could contribute to cumulative impacts: (1) the Hahamongna Watershed Park MBMU Project, and (2) the Arroyo Seco Canyon Project. The RFEIR indicates the potential impacts of these two projects "are not known at this time." As discussed in the Court's ruling, this is woefully inadequate. The Arroyo Seco Canyon Project is one of the LACFCD's projects. Thus, as pointed out by the Court, the LACFCD "must have a good idea what the environmental

impacts will be and should be able to assess the Project's contribution to those impacts, as well as feasible mitigations."

The RFEIR ultimately concludes that significant cumulative impacts to biological resources would not occur because: (a) the proposed Project would have a less-than-significant impact to biological resources, and (b) impacts to biological resources from the Hahamongna Watershed Park MBMU Project and the Arroyo Seco Canyon Project would be evaluated through project-specific CEQA documents, and if found significant, those projects would be required to implement all feasible mitigation measures. These are specious arguments. If the impacts associated with the other two projects are not known and have not been evaluated yet, how does the LACFCD know those impacts can be mitigated to less-than-significant levels? A conclusion of this nature relies on the flawed premise that all impacts, no matter the type and severity, can be mitigated to a less than significant level. This is clearly not the case, as lead agencies sometimes conclude impacts are "significant and unavoidable." Furthermore, just because individual projects mitigate their impacts to less than significant levels, does not mean there cannot be a significant cumulative impact, or that an individual project's contribution is not cumulatively considerable. A proposed project's incremental effects may be cumulatively considerable even when its individual effects are limited. In other words, CEQA does not excuse an EIR from evaluating cumulative impacts simply because the project-specific analysis determined its impacts would be "less than significant."

Cashen at 23 – 24.

VIII. THE RFEIR DOES NOT ADEQUATELY ANALYZE THE PROJECT'S IMPACTS TO AIR QUALITY.

A. The RFEIR Fails to Ensure that MM AQ-1 Will Effectively Reduce NOx Emissions to Less than Significant Levels.

An EIR must contain mitigation measures sufficient to minimize the significant adverse environmental impacts identified in the document. PRC §§ 21002.1(a), 21100(b)(3). CEQA requires the lead agency to adopt feasible mitigation measures that will substantially lessen or avoid a project's potentially significant environmental impacts (CEQA §§ 21002, 21081(a)) and describe those mitigation measures in the EIR. (CEQA § 21100(b)(3); CEQA Guidelines section 15126.4.) A public agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727. Mitigation measures must be enforceable through conditions of approval, contracts or other means that are legally binding. PRC § 21081.6(b); 14 CCR § 15126.4(a)(2); *Lotus v. Dep't of Transp.* (2014) 223 Cal. App. 4th 645, 651-52. This requirement is intended to ensure that mitigation measures will be implemented, not merely adopted and then ignored. *Fed'n of Hillside & Canyon Ass'n v. City of Los Angeles* (2000) 83 Cal. App. 4th 1252, 1261; *Anderson First Coal. v. City of Anderson* (2005) 130 Cal.4th 1173, 1186. MM-AQ-1 fails

to meet these requirements because it fails to ensure that the use of EPA-compliant haul trucks will reduce the Project's admittedly significant NO_x emissions to less than significant levels.

1. The RFEIR's Conclusion that the Revised MM AQ-1 Will Reduce NO_x Emissions to Less than Significant Levels is Unsupported.

The FEIR concluded that the Project's 425 haul trucks per day would generate significant NO_x emissions of 328 lbs/day, which vastly exceeds the SCAQMD's significance threshold of 100 lbs/day. The FEIR relied on the use of EPA 2007-compliant trucks to reduce NO_x emissions to less than significant levels. The RFEIR revised MM AQ-1 to require the use of "Model Year 2010" trucks to ensure that all trucks meet EPA 2007 standards. However, the RFEIR failed to analyze critical new emissions studies which demonstrates that the use of MY2010 trucks will result in lower NO_x reductions – and consequently higher NO_x emissions – than previously assumed by the FEIR.

As explained by SWAPE, the CE-CERT studies, prepared between 2013 and 2017, conducted real-time in-use studies of truck emissions using heavy-duty chassis dynamometers to measure actual NO_x and other air pollutant emissions. The studies concluded that Model Year 2010 (and later) trucks emit NO_x at levels that are 5 to 18 times higher than the levels assumed in the original 2007 EPA certification standard. See SWAPE Comments, pp. 3-5. Because MM AQ-1 relies exclusively on the use of MY2010 trucks, MM AQ-1 will similarly result in higher, unmitigated NO_x emissions that are 5 to 18 times higher than the levels assumed in the RFEIR. The District must prepare an updated air quality analysis is prepared that adequately evaluates the effectiveness of the Project's proposed mitigation in reducing the significant NO_x and other criteria air pollutant emissions generated during Project sediment removal activities. The RFEIR may not be certified until the District implements all feasible mitigation measures to reduce these significant impacts to less than significant levels.

2. Substantial Evidence Demonstrates that the Project's Mitigated NO_x Emissions (With MY2010 Trucks) Will Exceed Thresholds at Congested Intersections.

Substantial evidence contained in the CE-CERT studies demonstrates that the Project trucks' NO_x emissions will remain significant and inadequately mitigated during periods in which the trucks are idling or creeping during heavy traffic conditions.

The Project will require 425 round trip hauling truck trips per day to export sediment from the Project site. The traffic analysis in the FEIR demonstrates that those trucks will be reduced to minimal speeds and or stuck in stop-and-go traffic at specific intersections near the Project site. The FEIR relies upon the Highway Capacity Manual (HCM) method to estimate the Project's impact to the level of service (LOS) at various intersections along the Project's proposed haul truck routes (FEIR, p. 245). According to the FEIR, Project trucks will pass through the intersection of Berkshire Place and the I-210 eastbound ramp. This intersection is estimated to operate at LOS F without mitigation. The FEIR concedes that its proposed mitigation for that intersection is speculative, because it requires subsequent approval of new traffic control measures by the City of Pasadena that the District has not obtained. See SWAPE, p. 7, FEIR, p. 50.

According to one of the CE-CERT studies, the *Heavy-Duty Chassis Dynamometer Test Program* report, in-use NO_x emissions were found to be the highest during the creep cycle (i.e., short, low-speed accelerations between periods of idle), where the highest emissions were found to be 3.613 g/bh-hr.⁹ This emissions estimate is approximately 18 times higher than the 0.2 g/bh-hr NO_x certification level. Therefore, the RFEIR's exclusive reliance on the use of MY2010 trucks to reduce the Project's NO_x emissions is inadequate, as the potential in-use emissions resulting from use of MY2010 diesel trucks that are queuing and idling at the Berkshire Place and I-210 eastbound ramp intersection could be up to 18 times higher than what is anticipated by the RFEIR. Thus, slow traffic conditions anticipated in the FEIR are likely to cause the MY2010 trucks to emit up to 18 times more NO_x than the RFEIR assumes, potentially resulting in severe and unmitigated NO_x emissions. The RFEIR fails to address this potentially significant impact, and fails to ensure additional protections beyond the use of MY2010 trucks to ensure that such impacts are adequately mitigated.

B. The Project's Sediment Removal Phase Poses a Significant Cancer Risk to Sensitive Receptors that the RFEIR and FEIR Failed to Disclose and Mitigate.

The RFEIR failed to correct significant errors in the FEIR, which failed to adequately evaluate the health risk posed to nearby sensitive receptors from exposure to diesel particulate matter ("DPM") emissions, released during the Project's sediment removal phase.

The Project will emit DPM from diesel equipment and trucks during the Project's 5-year long sediment removal phase. Exhaust from heavy-duty construction equipment releases DPM. DPM is a toxic air contaminant ("TAC") that is recognized by state and federal agencies, and atmospheric scientists, as causing severe respiratory disease, lung damage, cancer, and premature death. Air districts have recently recognized that "TACs present an even greater health risk than previously thought." *California Bldg. Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 379. By contrast, "particulate matter," including both PM₁₀ and PM_{2.5}, are defined under both federal and state laws as "criteria pollutants." PM alone does not contain toxic chemicals. PM is simply defined as "very small solid or liquid particles that can be suspended in the atmosphere." *CURE v. Mojave Desert Air Qual. Mgm't Dist.* (2009) 178 Cal. App. 4th 1225, 1231-32; see 40 C.F.R. § 50.6(c). TACs, by contrast, are defined as "air pollutant[s] which may cause or contribute to an increase in mortality or in serious illness, or which may pose a present or potential hazard to human health. A substance that is listed as a hazardous air pollutant pursuant to subsection (b) of Section 112 of the federal act (42 U.S.C. Sec. 7412 (b)) is a toxic air contaminant." *CURE v. Mojave Desert Air Qual. Mgm't Dist.* (2009) 178 Cal. App. 4th 1225, 1231-32; see 40 C.F.R. § 50.6(c). Unlike particulate matter, DPM contains toxic chemicals, making it a TAC.

⁹ Durbin, Thomas D, et al. (February 2017). Final Report: Heavy-Duty Chassis Dynamometer Test Program, p. 60

IX. CONCLUSION.

For the above-mentioned reasons, we urge the Flood Control District to revise and recirculate the RFEIR.

Sincerely,



Mitchell M. Tsai



Christina Caro

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& Pasadena Audubon