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Via Electronic Mail

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Department of Conservation and Development
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Re: Additional Comments on Final Environmental Impact Report and Potential Conditional Use Permit for Creekside Memorial Park Cemetery, County File No. LP 052096

Dear Ms. Moreira and Department of Conservation and Development:

I am writing to further address ongoing concerns with the proposed Creekside Memorial Park Cemetery Project ("the Cemetery," "Creekside" or "the Project"), County File No. LP 052096 on behalf of the Friends of Tassajara Valley, a local group of concerned citizens; and Bill and Holly Newman, neighbors who reside next to the proposed Creekside Memorial Park Cemetery Project (collectively, "Friends"). I note that this is the third of my comment letters to the Department of Conservation and Development/Contra Costa County ("the County") concerning the Final Environmental Impact Report ("Final EIR" or "FEIR") for Creekside. The purpose of this letter is to point out additional reasons why the Final EIR fails to comply with the California Environmental Quality Act ("CEQA") and to request that the County prepare and circulate for comment a revised draft environmental impact report to allow the Friends and public to submit additional comments on Creekside. The Final EIR identifies as the County's preferred Creekside option a new design for the Cemetery project, the "Enhanced Modified Plan Alternative," that was not described in the Creekside Draft Environmental Impact Report ("Draft EIR" or "DEIR"). Additionally, the Final EIR presents new information concerning Creekside's impacts omitted from the Draft EIR. Finally, Friends have presented new information to the County concerning the feasibility of environmental mitigation for Creekside not considered in either the Draft EIR or the Final EIR that the County should consider and analyze to make a fully informed decision. The County should prepare and circulate a revised Draft EIR to give Friends and the public the opportunity to comment on the Enhanced Modified Plan Alternative and the

new information concerning Creekside's environmental impacts and mitigation for these impacts. The County should then further carefully consider and respond to this additional public comment.

I. The Final EIR's Water Supply Analysis Is Inadequate.

Both the Draft EIR and the Final EIR recognize that the water demand for the Creekside Project as proposed by the Project Sponsor, both long- and short-term, greatly exceeds the supply available from local groundwater and stream flow. *See* FEIR 2-58 to 2-59. The Draft EIR maintained that the Project's water needs would be supplied entirely from local sources and concluded that the impacts of doing so, including depletion of groundwater supplies and interference with existing neighboring water supply wells, would be significant and unavoidable. The "mitigation" analyzed in the Draft EIR included a monitoring plan which would merely quantify the extent of the Project's water-related impacts as they occur.

The Final EIR introduces a new preferred project alternative, the "Enhanced Modified Plan Alternative." This new alternative would address groundwater impacts by requiring that "[a]ll water necessary for construction and initial habitat restoration shall be trucked in from another source." FEIR at 2-55. Additionally, the Enhanced Modified Plan Alternative proposes a "phased" project, in which development would proceed in segments, as a water supply is established for some portion of the Project initially proposed. FEIR at 2-55. The Final EIR uses this "phased approach" to defer analysis of mitigation measures for impacts caused by the Project's water use. *See* FEIR at 2-157 ("The phased approach allows for the development of a cemetery in stages, based upon proven water supply. And equally important, it allows for the development of the other mitigation measures (primarily biological and aesthetical) to occur simultaneously.").

The Final EIR's endorsement of this new Enhanced Modified Plan Alternative is inconsistent with CEQA's information disclosure requirements and/or is otherwise flawed in several respects: 1, the Enhanced Modified Plan Alternative approach amounts to impermissible delaying of environmental study until after a project is commenced and harms the environment rather than performing the required advanced study, 2, this new alternative equates to a proposal so different from the alternatives analyzed in the Draft EIR such that the public has not had an opportunity to comment on the alternative that the County proposes now to approve, and 3, this new alternative perpetuates several flaws in environmental monitoring methodology and criteria for responding to information about environmental harms that Friends' expert hydrogeologist has pointed out and that the County has not addressed.

A. The Final EIR's Enhanced Modified Plan Alternative Would Impermissibly Delay Evaluation of Adverse Water Supply Impacts.

CEQA intends EIRs to serve as environmental "alarm bells," *i.e.*, to provide decision-makers and the public full notice of adverse environmental impacts *before* decisions and commitments of resources are made. *County of Inyo v. Yorty*, 32 Cal. App. 3d 795, 810 (1973). In keeping with this alarm bell function, under CEQA, a lead agency must identify the reasonably foreseeable sources of water for a project and analyze the impacts of acquiring water *before* approving a

project. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 430–432 (2007); *Sundstrom v. County of Mendocino*, 202 Cal. App. 3d 296, 306–308 (1988). CEQA's demand for meaningful information “is not satisfied by simply stating information will be provided in the future.” *E.g.*, *Santa Clarita Org. for Planning v. County of L.A.*, 106 Cal.App.4th 715, 723 (2003). In *Vineyard*, an EIR was challenged on the ground that it failed to adequately “identify and evaluate future water sources” for a development project. *Vineyard*, 40 Cal.4th at 421. The California Supreme Court held that an EIR is inadequate if it “simply ignores or assumes a solution to the problem of supplying water to a proposed land use project. Decision makers must, under the law, be presented with sufficient facts to ‘evaluate the pros and cons of supplying the amount of water that the [project] will need.’” *Id.* at 430–431, quoting *Santiago County Water Dist. v. County of Orange*, 118 Cal. App. 3d 818, 829 (1981). The water supplies identified and analyzed “must bear a likelihood of actually proving available; speculative sources and unrealistic allocations (‘paper water’) are insufficient bases for decisionmaking under CEQA. An EIR for a land use project must address the impacts of likely future water sources, and the EIR’s discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water’s availability.” *Vineyard*, 40 Cal. 4th at 432 (internal citations omitted). “[W]here, despite a full discussion, it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies....” *Id.* (emphasis added) (citation omitted). *Vineyard* held that the EIR in question was inadequate because it failed to explain how water demand was likely to be satisfied from the sources it identified and failed to discuss the environmental impact of utilizing these sources and how those impacts could be mitigated. *Id.* at 421. The Final EIR here is similarly flawed.

First, the Final EIR states that water for the Project’s construction and initial habitat restoration will “be trucked in from another source.” FEIR at 2-55. However, the EIR does not identify this “other source,” it does not disclose the impacts of obtaining or utilizing this water, and it does not evaluate any mitigation measures for those impacts. This is precisely the sort of “assumed solution” that the Supreme Court rejected in *Vineyard*. The EIR fails as an informational document because it does not provide *any* of the facts necessary to “‘evaluate the pros and cons of supplying the amount of water that the [Project] will need.’” *See Vineyard*, 40 Cal. 4th at 430–431.

Second, the “phased development” proposed in the Enhanced Modified Alternative does not liberate the County of its duty to identify and analyze potential water sources for the whole Project. As explained in *Vineyard*, an EIR “must assume that all phases of the project will eventually be built and will need water, and must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project.” *Vineyard*, 40 Cal. 4th at 431. A “measure for curtailing development if the intended sources fail to materialize *may play a role* in the impact analysis,” but it does not alone constitute a “sincere and reasoned” analysis of potential water sources, their impacts, and mitigation measures. *See id.* at 432 (emphasis added). The Final EIR must be revised to adequately address the reasonably foreseeable impacts of supplying water for the whole Project. “If the uncertainties inherent in long-term land use and water planning make it impossible to confidently identify the future water sources, an EIR may satisfy CEQA if it acknowledges the degree of uncertainty involved, discusses the reasonably

foreseeable alternatives—including alternative water sources and the option of curtailing the development if sufficient water is not available for later phases—and discloses the significant foreseeable environmental effects of each alternative, as well as mitigation measures to minimize each adverse impact.” *Id.* at 434. Again, the FEIR does not meet this standard because it fails to analyze in any fashion where water will be trucked in from should water available on site prove insufficient for the Project, what the impacts will be to neighbors if falling groundwater levels cause their wells to run dry or on wildlife should the Project’s water use cause Tassajara Creek to run dry, how water will be provided to neighbors adversely affected by falling groundwater levels caused by groundwater extraction for the Project, how flow to Tassajara Creek might be restored, and the environmental impacts associated with mitigation measures such as trucking in water from off-site sources (such as increased traffic, diminished air quality, additions to carbon emissions that are contributing to climate change, and so forth) for the Project’s impacts on groundwater and local water supplies. To elaborate particularly on mitigating adverse impacts to neighboring water supply wells such as those owned by Friends, the Final EIR plainly fails in its CEQA duty to identify mitigation alternatives and analyze their feasibility and their potential impacts, providing only speculative observations about what mitigation “could” be:

Should adverse impacts be predicted in a well report or detected by the monitoring program and ascribed to pumping of Project wells, appropriate measures *could* include (a) redistribution of pumping among project wells, (b) additional water conservation applied to the project, or (c) measures to restore pumping yield in the affected well (e.g., lowering pump or deepening well).

Final EIR at 2-62 (emphasis added). However, neither the Draft or the Final EIR analyze basic questions about these mitigation measures: are they feasible, how long would it take to implement them, what effects would occur before they were implemented, would they have adverse impacts of their own, could the County require them, who would pay for the measures to improve yields in affected off-site wells and how? In sum, the Final EIR impermissibly delays resolution of what appropriate mitigation for the Project should be to the future. *See City of Long Beach v. Los Angeles Unified School District*, 176 Cal. App. 4th 889, 915-16 (2009) (“Impermissible deferral of mitigation measures occurs when an EIR puts off analysis or orders a report without either setting standards or demonstrating how the impact can be mitigated in the manner described in the EIR.”); *Federation of Hillside & Canyon Associations v. City of Los Angeles*, 83 Cal.App.4th 1252, 1261–1262 (2000) (invalidating city adoption of aspect of general plan given lack of showing that mitigation measures will actually be implemented or be enforceable).

The Final EIR inaccurately contends that the County is not proposing to allow construction to proceed first with water supply impact mitigation measures decided in the future, after the fact. FEIR at 2-52 (“The mitigation measures in the Creekside DEIR set standards, requires coordination with the Resource Agencies, and requires that all mitigations be proven as successful (after a period of monitoring) before grading permits are issued.”). This contention is plainly a half-truth at best. The County proposes that the Project Sponsor must do only one year of groundwater monitoring to prove available water before proceeding with any construction—even though the Final EIR includes no analysis suggesting that one year of monitoring will gather sufficient information to make conclusions about available water. The County has also

failed to design an adequate monitoring program as pointed out in previous comments submitted by Friends' hydrogeologist consultant Hydrofocus. But apart from these problems, the Final EIR unmistakably indicates that the Project Sponsor *will* be allowed to develop the Cemetery in a fashion allowing building to proceed in phases before the impacts of this building are reasonably known and before mitigation measures are designed or imposed. Specifically, the Project Sponsor will be allowed: 1, to construct both an initial phase and potentially subsequent phases of the Project which will include roads, buildings, and burial sites, all of which will require grading (and thus presumably grading permits); 2, after constructing any given phase of the Cemetery, monitor the effects of the new phase of Project development on water supply; and 3, comply with mitigation not yet designed should the monitoring effort show adverse impacts on water supply. In short, grading permits will issue, project construction will proceed, and at least a partial project will be constructed all long before monitoring is completed and any mitigation measures designed or implemented.¹

In sum, to comply with CEQA, the County must recirculate and request and respond to additional public comment on a revised Draft EIR that fully analyzes the Project's impacts on all off-site water uses, mitigation measures for such impacts, and the impacts of these mitigation measures.

B. The Enhanced Modified Plan Alternative Departs Significantly from Project Alternatives That the County Has Taken Public Comment on – Thus Mandating a New Round of Public Comment.

The Enhanced Modified Plan Alternative is substantially different from any of the alternatives analyzed in the Draft EIR. As noted, the Enhanced Modified Plan Alternative would allow for a phased development, with additional development only allowed if long-term monitoring showed sufficient water supply to expand the Project. None of the alternatives studied in the Draft EIR provided for such a phased approach. The phased approach endorsed by the Final EIR poses new problems not considered by the Draft EIR (nor, for that matter adequately considered by the Final EIR). Implicit in the Enhanced Modified Plan Alternative is the possibility that the Project Sponsor will not be allowed to continue to develop the Cemetery beyond the first phase that the County would allow under this alternative because insufficient water supply is shown to be available by the monitoring effort. Furthermore, implicit in the Enhanced Modified Plan Alternative is that the Project Sponsor will be required to curtail even the limited amount of water initially authorized for the first phase of the Cemetery project unless and until the Project

¹ The Final EIR's further contention that the County must issue approval of the Project before monitoring and mitigation measures could be designed because such measures require approvals from resource management agencies such as the U.S. Army Corps of Engineers, the California Regional Water Quality Control Board, and the California Department of Fish and Wildlife which these agencies will not issue until the County issues its approvals is simply false. *Id.* Nothing in the statutes that these agencies administer (the Clean Water Act, the Porter Cologne Act/California Water Code, the California Fish and Game Code) require County land use approvals before these agencies can issue the regulatory approvals within their jurisdiction. Moreover, CEQA does not allow the County to shirk its own duty to analyze environmental impacts and consider mitigation for these impacts by contending that these impacts will be addressed by other agencies in exercising their authorities in the future.

Sponsor is able to find sufficient off-site water supply. These eventualities are significant new twists on project development that were not part of any of the alternatives considered in the Draft EIR. These eventualities raise environmental impact issues and problems not considered by the Draft EIR, such as: (1) will the Cemetery still be financially viable if development is frozen at phase 1 levels and thus able to meet the financial assurance requirements of Contra Costa County Code § 88-2.402(b)(5) and California Health and Safety Code §§ 8738, 8738.1, (2) has the County established a reasonable monitoring program to properly discern impacts of Creekside's groundwater pumping associated with differing phases of the Project on neighboring water supply wells, Tassajara Creek flows, and water levels in on-site tributaries and ponds that provide habitat for sensitive species, (3) has the County established reasonable criteria for determining whether groundwater pumping associated with differing phases of the Project are having adverse impacts on neighboring water supply wells, Tassajara Creek flows, and water levels in on-site tributaries and ponds--and a reasonable regime for making and enforcing a decision made according this criteria, and (4) has the County established a reasonable approach for deciding what alternatives to mandate that the Project Sponsor take in response to a finding that groundwater pumping associated with differing phases of the Project are having adverse impacts on neighboring water supply wells, Tassajara Creek flows, and water levels in on-site tributaries and ponds. The County has not provided the public the opportunity to comment on this substantially different project design and the environmental impacts associated with this revised project design. To comply with CEQA, the County must circulate a revised draft EIR, allow the public the opportunity to comment on this new project design, duly consider this public comment and respond in writing to that comment. *See, e.g., Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.*, 42 Cal. 3d 929, 937 (1986) (requiring circulation of new EIR given substantial modifications to project design).

C. The Enhanced Modified Plan Alternative and the Final EIR's Analysis of That Alternative Fails to Properly Analyze and Address Water Supply Impacts.

The Enhanced Modified Plan Alternative and the Final EIR's discussion of that alternative fails to properly analyze and address water supply impacts, failing, *inter alia*, to properly consider and respond to Hydrofocus's critique of the Draft EIR's hydrology analysis and approach to monitoring and mitigating hydrological impacts. *Santa Clarita Org. for Planning*, 106 Cal. App. 4th at 723 ("It is not enough for the EIR simply to contain information submitted by the public and experts. Problems raised by the public and responsible experts require a good faith reasoned analysis in response....The requirement of a detailed analysis in response ensures that stubborn problems or serious criticism are not 'swept under the rug.'").

As noted in the Final EIR, the Draft EIR concluded the Project's "proposed groundwater use, including indoor use and irrigation, would exceed the available groundwater supply." FEIR at 2-58. The Draft EIR noted that the estimated water demands for the Creekside Project as proposed by the Project Sponsor were about 45 acre-feet per year (AFY)—6 to 7 AFY for non-irrigation uses and 38 AFY for irrigating about 9.5 acres of traditional landscaping. DEIR at 3.9-28.² The

² However, this is an underestimate of water use as it excludes water needed for implementation of the final design of the riparian habitat restoration and woodland enhancement mitigation measures. Even in the Final EIR, these mitigation measures remain only conceptual and the Draft

analysis provided by Todd Engineering, the County's independent consultant, concluded that rainfall recharge to groundwater on the Creekside site is about 10 AFY under current conditions, but that Project development as planned by the Project Sponsor, which would increase evapotranspiration losses (due to increased planting of trees and other changes to vegetation) and reduce groundwater recharge (due to the creation of impervious surfaces associated with buildings and paving), would reduce rainfall recharge on the site to about 7 AFY. *Id.* Thus, annual rainfall recharge on the site after Project development would only be sufficient to provide for Creekside's non-irrigation water needs of 6-7 AFY. It would be insufficient for supplying any Project irrigation needs. The Draft EIR, again relying on Todd Engineering's analysis, concluded that all sources of inflow to groundwater on the Creekside site when added together amount to 27.8 AFY (including rainfall recharge to the property--10.3 AFY, upper watershed rainfall recharge--2.5 AFY, subsurface inflow from Tassajara Creek alluvium--12.0 AFY, and percolation from Tassajara Creek—3.0 AFY).³ *Id.* As the Draft EIR pointed out, this is an insufficient amount of groundwater recharge to replenish groundwater pumping of 45 AFY as proposed by the Project Sponsor. Thus, groundwater extraction as proposed by the Project Sponsor would cause annual, cumulative depletion of groundwater supply and declining groundwater levels. *Id.* at 3.9-29. In turn, this would reduce the supply of water to riparian/wetlands vegetation on-site and decrease flows in Tassajara Creek, especially during the summer and drought. *Id.* Though its analysis on this point is far from adequate, even the Draft EIR acknowledges that Creekside's additional use of groundwater resources could adversely impact the existing water supply wells of nearby property owners (which, though the DEIR fails to point this out, include wells owned by Friends). *Id.* at 3.9-30 to 3.9-33, 3.15-1.

The point is obvious and intuitive: by capturing any portion of groundwater recharge and using it for consumptive irrigation that increases evapotranspiration loss of groundwater, Creekside will necessarily reduce the flow of groundwater off-site onto down gradient areas. This will necessarily reduce the groundwater available to properties located down gradient, including properties owned by the Friends. The Draft EIR lacked any meaningful analysis concerning the magnitude of loss of down gradient groundwater flow to adjoining properties and the effect of this groundwater loss on down gradient water supply wells owned by Creekside's neighbors. The Draft EIR did not identify the locations of down gradient water supply wells, did not attempt to quantify the amount of water currently extracted by these wells, the volume of water needed by downstream users, how dependent these wells are on up gradient groundwater flow to replenish groundwater extracted by these wells, and the potential effect of Creekside's pumping extraction on groundwater flow to these down gradient wells. *See* FEIR at 2-58 (acknowledging that "the Draft EIR does not disclose the location and use of private wells.").

The Final EIR's attempts to address the adverse impacts of groundwater depletion that the Draft EIR concluded Creekside would cause with the Enhanced Modified Plan Alternative, but the Final EIR's analysis of how the alternative would affect groundwater depletion is itself woefully

and Final EIR include no analysis of the amount of water needed for these measures. FEIR at 2-60.

³ However, the Draft EIR was logically flawed here, in ignoring its own conclusion that Project development would reduce rainfall recharge from 10.3 AFY to only 7 AFY. By its own logic, the Draft EIR should have found available groundwater recharge to be only 24.8 AFY, not 27.8 AFY.

flawed. The Final EIR acknowledges that “the project pumping [at the level proposed by the Project Sponsor] impact on wells would be manifested by groundwater level declines and potential loss of well yield, which would be greatest on the property itself but *any drawdown of the water table on-site has potential to affect nearby wells to varying degrees.*” *Id.* (emphasis added). However, like the Draft EIR, the Final EIR continues to lack any meaningful analysis of how the Project’s pumping extraction and resulting decline in the water table would affect down gradient neighboring water wells. The Final EIR acknowledged Friends and other comment letters pointing out the existence of neighboring wells and supplying a modeling effort estimating the potential range of maximum drawdown impacts that the property edge of 10 to 70 AFY. *Id.* However, the Final EIR does not meaningfully utilize or respond to this new information, noting only that information further confirms that the Project “will have a significant and unavoidable impact, consistent with the DEIR’s findings.” *Id.* The Final EIR further acknowledges that great uncertainty remains with respect to the magnitude of Creekside’s pumping extraction of groundwater on down gradient water supply wells, Tassajara Creek flows, riparian and wetland vegetation, and on-site stock ponds which provide aquatic habitat for sensitive species. The Final EIR notes that when the Draft and Final EIRs were prepared, the County lacked any information concerning project well field siting, design, or operation-- all of which could critically affect “drawdown impacts on [Tassajara] creek and associated uses.” *Id.*

The County's Enhanced Modified Plan Alternative attempts to make up for the shortfall in information and analysis in the Draft and Final EIRs by limiting Creekside’s groundwater extraction to what the Final EIR calls “the conservative estimate of available groundwater” of 10.3 AFY until the Project Sponsor implements a monitoring plan that will gauge the effects of the Project’s groundwater pumping as that pumping proceeds. If this monitoring effort shows a greater water supply, then Creekside would be allowed to increase its groundwater pumping. However, this approach reflects fundamental errors. First, the County assumes that the conservative estimate of available groundwater is the “10.3 AFY” of on-site rainfall recharge to groundwater. However, this is erroneous. The County’s own consultant’s analysis concluded that paving and building construction for the Project and alteration of on-site landscaping will reduce rainfall recharge to only 7 AFY. The 12.68 acres of building footprint and paving associated with the Project will alone reduce groundwater recharge by 0.6 AFY. Draft EIR, Appendix D at 27. Moreover, even if the County alters initial construction to reduce impervious surfaces or restrict tree planting under the Enhanced Modified Plan Alternative, the combined effects of adding impervious surfaces and altering landscape vegetation would reduce groundwater recharge at least somewhat (for example, even without any new tree planting, the Project will increase evapotranspiration given that the xeriscaped and riparian mitigation planting vegetation necessary for the Project will have greater evapotranspiration rates than the current grassland). *Id.* at 26. At a minimum, the County must correct the Final EIR analysis to reflect its own evaluation of available groundwater recharge, which is something substantially less than 10.3 AFY.

Second, as discussed in section I.A. above, the County cannot approve Creekside without performing the hydrological study called for in the monitoring plan *before* the Project is allowed to proceed. Notably, the County lacks rational basis for concluding that extracting 10.3 AFY of groundwater from the Project site will not cause significant adverse environmental impacts. The Draft and Final EIR effectively concede that the County simply does not know what effect

Creekside's extraction of even this amount of groundwater will have on Tassajara Creek flows and riparian and wetland vegetation on-site given the lack of information concerning where Creekside will place groundwater extraction wells and how groundwater pumping at the specific locations chosen by the Project Sponsor will affect Tassajara Creek flows. FEIR at 2-58. To comply with CEQA, the County must insist on well placement information and develop the hydrogeology information necessary to analyze how groundwater extraction will affect Tassajara Creek flows given this well placement *before* it approves the Project.

To comply with CEQA, the County must recirculate and request and respond to additional public comment on a revised Draft EIR that fully analyzes the Project's impacts on all off-site water uses, including neighbors' use of groundwater for their water supply and wildlife use supported by surface flow in Tassajara Creek, whether mitigation measures to offset these impacts are realistically available, how such mitigation measures would be implemented, and what the effects would be of those mitigation measures. In a revised Draft EIR, the County should further analyze the more robust mitigation measures for groundwater impact monitoring and response outlined in the October 6, 2015 letter from Friends' hydrological expert Hydrofocus. At a minimum, these measures should be included as feasible measures that would at least lessen (though, alas, still not eliminate) the significant adverse impacts of the Project.

II. The County Must Provide Public Comment Opportunity and Respond to Public Comment on the New Environmental Impact Information in the Final EIR.

The County must circulate a new draft EIR to provide public comment opportunity and respond to public comment on new environmental impact information provided for the first time in the Final EIR. Recirculation of a draft EIR is required where "significant new information" comes to light after a draft EIR is circulated for public review, but before certification of a final EIR. Pub. Res. Code, § 21092.1. Significant new information includes information revealing new environmental impacts not previously discussed or that environmental impacts are more severe than previously discussed or significant modifications to a project design. CEQA Guidelines § 15088.5(a)-(b); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.*, 6 Cal. 4th 1112, 1124-27 (1993); *Mira Monte Homeowners Ass'n v. County of Ventura*, 165 Cal. App. 3d 357, 364-65 (1985). Without recirculation of a draft EIR when substantial new information comes to light, the EIR process becomes "a useless ritual." *Sutter Sensible Planning, Inc. v. Board of Supervisors*, 122 Cal. App. 3d 813, 822 (1981). The Final EIR includes substantial new environmental impact information.

The Final EIR revised the Draft EIR to disclose that San Joaquin kit fox have been consistently recorded in recent surveys within dispersal distance of the Project Site and that "mitigation would be necessary." FEIR 2-73. In contrast, the Draft EIR stated that "kit fox were not expected to occur onsite due to the distance from recent sightings and historical occurrences" and concluded that their potential for occurrence on the Project site was "very low." DEIR 3.4-14; 3.4-21. The revisions reveal, for the first time, the importance of the Project site to the kit fox and, thus, disclose a substantial increase in the severity of the Project's impact. The County did not, however, revise the mitigation measure for the kit fox (Mitigation Measure 3.4-8) and there is no indication that the existing mitigation will be sufficient, given the Draft EIR's erroneous assumption that the kit fox was not likely to occur on the Site. The County must further circulate

a new draft EIR that identifies presence of San Joaquin kit fox at the Project location and that includes an analysis of the Project's effects that take into account this important new information. *See, e.g., Sutter*, 122 Cal. App. 3d at 823 (providing supplemental information in final EIR that has not been processed in the same manner as a draft EIR “cannot resurrect a deficient impact statement.” The failure to include such information in the draft impact statement denies the public the “opportunity to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn.”).

The Final EIR further expressly acknowledges that it has included information about Creekside’s impacts on views from a public trail that was not included in the Draft EIR because the information was not available at the time the Draft EIR was prepared:

Potential impacts to views from the Tassajara Ridge Trail were not included in the DEIR because the original visual analysis of the project site was complete before the trail was established as a public trail and its presence was not known at the time the DEIR was completed. As a result, this response assesses the potential aesthetic impacts of the proposed Project from the Tassajara Ridge Trail.

FEIR at 2-12. The County must circulate a new draft EIR, allow the public to comment on this new assessment of aesthetic impacts, and duly respond to this public comment. *See, e.g., Sutter*, 122 Cal. App. 3d at 823.

The Final EIR notes that the U.S. Fish and Wildlife Service (“FWS”) and other commenters objected that the Draft EIR did not appropriately analyze whether Valley Elderberry Longhorn Beetle (VELB), a species listed as threatened under the federal Endangered Species Act, are present on the Creekside site and thus might be potentially harmed by the project. In response to these comments, the Project Sponsor’s biologist conducted a habitat assessment and protocol level surveys for VELB. The Final EIR uses the results of this additional analysis to express new conclusions concerning VELB’s presence at the Creekside site and potential impacts of the project on VELB. Final EIR at 2-24 to 2-25, Appendix B-3, B-4. The public has not been provided an opportunity to comment on this new analysis. The County must circulate a new draft EIR, allow the public to comment on this new VELB presence and impact analysis, and duly respond to this public comment. *See, e.g., Sutter*, 122 Cal. App. 3d at 823.

The Final EIR also notes that the FWS and other commenters objected that the Draft EIR did not adequately analyze Creekside’s potential impacts on vernal pool fairy shrimp, another ESA-listed species. In response to these comments, the Project Sponsor’s biologist prepared an expanded assessment of potential impacts on fairy shrimp. The Final EIR uses the results of this additional analysis to express new conclusions concerning Creekside’s potential impacts on fairy shrimp. Final EIR at 2-25 to 2-27, Appendix B-5. Additionally, the Final EIR analyzes the potential impacts of the Creekside project on fairy shrimp assuming implementation of the Enhanced Modified Plan Alternative. The public is not provided an opportunity to comment on either the Project Sponsor’s biologist’s new assessment of potential impacts on fairy shrimp or the impacts on fairy shrimp assuming implementation of the Enhanced Modified Plan Alternative. As noted above, the County created this latter alternative after circulating the Draft EIR. The County must circulate a new draft EIR, allow the public to comment on this new fairy

shrimp impact analysis, and duly respond to this public comment. *See, e.g., Sutter*, 122 Cal. App. 3d at 823.

The Final EIR notes that numerous commenters expressed concern over Creekside's potential impacts on two special status plant species, Congdon's tarplant and San Joaquin Spearscale. In response to these comments, the Project Sponsor's biologist prepared a supplemental review of the assessment on special status plant species. The County must circulate a new draft EIR, allow the public to comment on this new special plant species impact analysis, and duly respond to this public comment. *See, e.g., Sutter*, 122 Cal. App. 3d at 823.

The Enhanced Modified Plan Alternative also includes new provisions for mitigating impacts to ESA listed wildlife species and special status plant species that were not included in the Draft EIR. The County has failed to provide the public the opportunity to submit comments pointing out the problems with these mitigation measures. For example, to address Creekside's potential adverse impacts associated with disturbing movement opportunities for California red-legged frog, California Tiger salamander and other wildlife across the western portion of the site, the Final EIR provided that the "Master Site Plan and Conceptual Landscape Plan shall be revised to acquire that the upper gardens area be improved as a 'natural area.'" The Final EIR further provided that this would be accomplished, in part, by "retaining the area as primarily grassland in cover type and enhancing it with native grassland species, with only limited tree plantings for screening and aesthetic enhancement." FEIR at 2-30 to 2-31. This is flawed because the Final EIR included no design or even rough guideline either proposed by the Project Sponsor or County staff concerning what "limited tree plantings" means or how landscaping in this area would otherwise be designed. Without further description of how landscaping will be altered, neither the County nor the public can assess and meaningfully comment on the impacts of the altered landscaping design.⁴

For another example, the Final EIR has new information concerning mitigation of Creekside's potential adverse impacts on two special status plant species, Congdon's tarplant and San Joaquin Spearscale. A new review of these plant species done by the Project Sponsor's consultant identifies locations where Congdon's tarplant has been successfully re-established through seeding programs at mitigation locations in Milpitas and Alviso, but indicates that there are no known instances of successful translocation efforts for San Joaquin Spearscale. In the Final EIR, the County has responded to this information and comments from California Department of Fish and Wildlife to revise off-site mitigation requirements so as to demand that Creekside compensate for the loss of these on the site plants by implementing off-site restoration of these plants at a 3:1 ratio rather than the 1:1 ratio identified in the Draft EIR. Final EIR at 2-39

⁴ Mitigation measures for Creekside's impacts on California red-legged frog described in the Final EIR further remain highly flawed in providing that if post construction monitoring shows that California red-legged frog populations are diminished on-site after two years "subsequent monitoring or mitigation at a ratio 1:1 may be applied." (Emphasis added). FEIR at 2-38. Thus, not only does the Final EIR impermissibly fail to proscribe any specific California red-legged frog mitigation or analyze the feasibility of the mitigation or potential impacts of that mitigation, the Final EIR leaves open the possibility that no mitigation will be required even if adverse impacts to California red-legged frog are detected.

to 2-43, Appendix B-5. However, the Final EIR contains no analysis of the feasibility of accomplishing such off-site mitigation, as it lacks even cursory explanation of where Creekside might be able to accomplish off-site restoration at a 3:1 ratio. The County must circulate a new draft EIR, allow the public to comment on this new mitigation approach, and duly respond to this public comment. A new draft EIR should further include analysis of the feasibility of off-site mitigation, including what the impacts (positive and negative) of such off-site mitigation effort might be.

III. The Final EIR's Alternatives Analysis Is Flawed.

A key component of CEQA analysis is requiring that all reasonable alternatives to proposed project be thoroughly assessed to allow for the possibility of choosing an alternative that minimizes adverse environmental impacts. *Yorty*, 32 Cal. App. 3d at 810. The Final EIR fails to comply with CEQA's alternatives analysis requirements.

A. The Final EIR Impermissibly Truncated Alternatives Analysis to Exclude Out of County Sites or Sites Not Owned by the Project Sponsor.

The Final EIR acknowledges that Creekside is intended to be a regional serving facility, including serving three cities located outside of Contra Costa County (Dublin, Pleasanton and Livermore). However, the County nonetheless categorically rejected consideration of any potential alternative locations for the Creekside project located outside of Contra Costa County on the basis that the County's permitting jurisdiction is limited to locations within the County's political boundaries. FEIR at 2-48; *see also* DEIR, Appendix F at F-5. This is impermissible truncating of the required CEQA environmental review. An EIR may not ignore the regional impacts of a project proposal, including those impacts that occur outside of its borders; "a regional perspective is required." *Citizens of Goleta Valley v. Board of Supervisors* ("Goleta I"), 52 Cal. 3d 553, 574-575 (1990). Site ownership and jurisdictional borders are "simply [factors] to be taken into account and do not establish an ironclad limit on the scope of reasonable alternatives." *Id.* at 575, n.7. That a project alternative is located outside the agency's jurisdiction does not itself make the alternative infeasible. *Id.* at 575. "An EIR is not a document of advocacy but of information." *San Joaquin County Raptor Wildlife Rescue Center v. County of Stanislaus*, 27 Cal. App. 4th 713, 738 (1994). Just as CEQA requires an EIR to contain "an evaluation of the cumulative impacts caused by other past, present and reasonably foreseeable probable future projects *including those projects outside the control of the agency*," it also requires the EIR to consider alternatives outside the control of the agency in order to effectively inform the public of possible alternatives. *Id.* at 741, *citing* 14 C.C.R. §§ 15130(a), 15355; Cal. Pub. Resources Code § 21083 (b)(2) (emphasis added); *cf. Sierra Club v. Lynn*, 502 F.2d 43, 62 (1974) (Under NEPA, "the agency must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide."); *Bowman v. City of Berkeley*, 122 Cal. App. 4th 572, 591 (2004) (CEQA was patterned on NEPA and NEPA cases can be persuasive authority for interpreting CEQA).

The Final EIR further rejected alternatives as infeasible if the alternative site "was not under the control of the Project Sponsor." FEIR at 2-50; *see also* DEIR, Appendix F at F-6 to F-8. This is also an impermissible basis for rejecting alternatives as infeasible. Any site that could potentially

be required by a project sponsor is *per se* a potentially feasible site location. *See San Bernardino Valley Audubon Soc'y v. County of San Bernardino*, 155 Cal. App. 3d 738, 752-753 (1984) (EIR's analysis of alternatives inadequate because the County failed to identify a land exchange for a parcel not currently owned by project proponent out of its jurisdiction and other alternatives as feasible or infeasible in the EIR and to explain a basis for such determination).

The County must circulate a new draft EIR with a proper alternatives analysis that does not limit the range of potentially feasible alternative cemetery project locations to those located within the County's political boundaries and that are owned by the Project Sponsor.

B. The Final EIR's Enhanced Modified Plan Alternative and Basis for Rejecting Alternatives Are Logically Contradictory.

The Draft and Final EIR effectively acknowledged that the Green Cemetery Alternative would best reduce adverse impacts of the Project, *i.e.*, would better reduce adverse impacts of the project than the Enhanced Modified Plan Alternative. FEIR at 2.0-50; DEIR at 4.0-10 to 4.0-13. Indeed, the FEIR found that only the Green Cemetery Alternative "could avoid the significant and unavoidable impacts of the project." FEIR at 2.0-50.⁵ The Draft EIR further acknowledged that the Smaller Project Alternative would further mitigate Creekside's adverse impacts. DEIR at 4.0-8 to 4.0-10. The Draft and Final EIR nonetheless rejected these alternatives because they would not meet "project objectives." The Final EIR's alternatives analysis assumed that for an alternative to be feasible it had to "meet basic objectives of the project." FEIR at 2-49. The Final EIR defined these as including: "To utilize large acreage in Contra Costa County to accommodate approximately 100,000 burials" and to include creating "a distinguished state-of-the-art cemetery" on a site suitable for "landscaping as found in traditional cemetery settings" FEIR at 2-47, 2-49, 2-50. The Draft and Final EIR concluded that the Green Cemetery Alternative and Smaller Project Alternative "would not meet project objectives related to the number of burials." *Id.* at 2-50; DEIR at 4-10, 4-13. The Draft and Final EIR further ruled out the Green Cemetery Alternative because it would have "no traditional cemetery landscaping (manicured lawns)." FEIR at 2-50; DEIR at 4.0-13. The Final EIR's rejection of the Green Cemetery Alternative and the Smaller Project Alternative on these bases is logically contradicted by the County's selection of the Enhanced Modified Plan Alternative.

Notably, the Enhanced Modified Plan Alternative would expressly prohibit the Project Sponsor from proceeding forthwith to develop a cemetery large enough for 100,000 burials and embraces the possibility that if the monitoring program required by the County shows insufficient groundwater supply, the Project Sponsor will be forbidden from ever developing a cemetery that large. The County cannot have it both ways, both ruling out some alternatives because they are incompatible with a basic project objective of a cemetery large enough for 100,000 burials and then embracing as its preferred alternative the Enhanced Modified Plan Alternative that is expressly predicated on the possibility of the cemetery being too small to accommodate 100,000 burials. Indeed, in embracing the Enhanced Modified Plan Alternative, the County has belatedly

⁵ Note: Friends do not agree that the Green Cemetery Alternative would avoid all the significant impacts of the project, but they do agree that of all the alternatives identified by the County to date, the Green Cemetery Alternative reduces impacts the most.

found that a cemetery large enough for 100,000 burials is not an essential feature of the project. Thus, the County should from the outset have not defined the Creekside project so narrowly as to mandate 100,000 burials as CEQA does not allow the County to adopt a project proponent's definition of a project's purposes that are so narrowly crafted as to rule out meaningful consideration of project alternatives. *See City of Santee v. County of San Diego*, 214 Cal. App.3d 1438, 1455 (1989); *Rural Land Owners Assn. v. Lodi City Council*, 143 Cal. App.3d 1013, 1025-26 (1983); *Kings County Farm Bureau*, 221 Cal. App.3d at 735-37. The County should prepare a revised Draft EIR which assumes the Project's essential basic objective is only a commercially viable cemetery to serve the Tri-Valley Cities, with a size sufficient to serve that more generally framed purpose. Such a revised draft EIR would not impermissibly rule out the Green Cemetery Alternative, the Smaller Project Alternative, or other options for downsizing the Creekside project simply on the basis that these alternatives would not allow for 100,000 burials.

Furthermore, the Enhanced Modified Plan Alternative eliminates traditional cemetery landscaping from the majority of the Creekside site and hold out the possibility that *no* traditional landscaping will ever be allowed for Creekside. Even if the required long-term monitoring reveals enough water for expanded cemetery development, only 9.4 acres of the site in the lower gardens area would have traditional lawn landscaping whereas the remainder the lower gardens area and all of the upper gardens area, 20.8 acres total, would be xeriscaped. Under the Enhanced Modified Plan Alternative, more than two-thirds of Creekside's burial sites would be in areas of what would effectively be a "green cemetery." Furthermore, the Enhanced Modified Plan Alternative eliminates the Project Sponsor's proposed decorative lake and would only allow other decorative water features if the long-term monitoring program shows sufficient water supply. It is simply irrational for the County to conclude in its alternatives analysis that it could rule out the Green Cemetery Alternative because such an alternative would lack traditional lawn landscaping and eliminate some of the decorative features necessary to meet project objectives of a state-of-the-art cemetery while the County also embraces as its preferred alternative the Enhanced Modified Plan Alternative which would require two-thirds of the burial area at Creekside to be effectively a "green cemetery," would eliminate at least some of the Project Sponsor's decorative water features, and might prohibit all traditional landscaping at Creekside.

The County should reconsider its failure to identify either the Green Cemetery Alternative or the Smaller Project Alternative as environmentally preferable to the other alternatives considered by the County, including the Enhanced Modified Plan Alternative.

IV. Additional Significant Information Gaps Remain in the County's Environmental Analysis.

The Draft and Final EIR acknowledges that there are two existing stock ponds on the site that potentially provide habitat for sensitive species. FEIR at 2.0-69; DEIR at 3.9-3. The Final EIR further acknowledges that installation and pumping of a nearby production well could deplete pond storage and cause earlier seasonal drying--which would adversely impact the habitat provided by these ponds and the species utilizing the ponds. *Id.* The Final EIR acknowledges that the County lacks the hydrogeology hydrology/information to reach conclusions about whether these ponds are fed by groundwater that Creekside's pumping operations might deplete. Rather

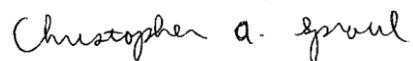
than requiring the Project Sponsor to perform the hydrogeology investigation necessary to conclude whether these ponds are fed by groundwater that could be depleted by Creekside's proposed pumping *before* Creekside would be authorized to begin groundwater extraction, the Final EIR proposes effectively to allow Creekside to gamble with adverse impacts on the ponds and their habitat by commencing commercial pumping and then monitoring to see what this pumping does--without setting any firm criteria for evaluating what will constitute a sufficient adverse impact on the ponds to require an alteration in the pumping practice or clear mandate on what mitigation Creekside would be required to implement should impact be shown. In so doing, the County further fails to analyze whether mitigation of these impacts would be feasible and what the environmental impacts of the mitigation measures themselves would be. This approach of leaping first and looking second is impermissible under CEQA. As discussed above, it is impermissible for the County to allow a project to proceed and to specify that the environmental impacts of the project will be studied after the fact rather than analyzed in advanced. *See, e.g., Sundstrom*, 202 Cal. App. 3d at 306-308.

V. County Approval of the Project without ESA Section 7 or 10 Authorization Risks County Endangered Species Act Liability.

Agencies or other governmental entities that permit third-party activity that takes species protected under the federal Endangered Species Act ("ESA") without authorization under either ESA section 7 or section 10 are themselves liable under ESA section 9 for unauthorized take of listed species. *See, e.g., Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231 (11th Cir. 1998); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir 1997); *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495 (9th Cir 1981). The Draft and Final EIR well document risks to ESA-listed species should the Project proceed, including California red-legged frog and other species. The County should not issue a conditional use permit to Creekside before the County and/or the Project Sponsor acquires authorization for take of listed species in implementing the Creekside Project.

Thank you for your attention to this matter. We look forward to the County's response.

Sincerely,



Christopher Sproul
Environmental Advocates