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Via Electronic Mail Only

Mr. Dean Wright
Cleanup Program
Department of Toxic Substances Control
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Re: Comments on Centennial M-1 Property Clean-Up Project Remedial Action Plan Initial Study/Mitigated Negative Declaration

Dear Mr. Wright:

On behalf of Community Environmental Advocates Foundation ("CEA Foundation"), we have reviewed the Initial Study/Mitigated Negative Declaration ("MND") prepared in connection with the proposed Centennial M-1 Property Clean-Up Project Remedial Action Plan ("Centennial RAP"). The CEA Foundation supports the need to remediate the contaminated areas within the Centennial Site. However, the CEA Foundation has serious concerns about the environmental impacts of the Centennial RAP as drafted. Our review of the MND reflects that the Department of Toxic Substances Control ("DTSC") has not complied with its obligations under the California Environmental Quality Act ("CEQA"), Public Resources Code § 21000 *et seq.*, and the CEQA Guidelines, California Code of Regulations, title 14, § 15000 *et seq.* ("Guidelines"), or with obligations imposed by state law regarding remedial action plans.

Among the CEA Foundation's primary concerns is the fact that the Centennial RAP is merely the first step in the larger Idaho-Maryland Mine Project ("IMM Project"). However, the MND improperly segments the review of the Centennial RAP from the review of the IMM Project. In so doing, the MND avoids a full environmental analysis of the project's impacts on the wetlands and riparian habitats found on the Centennial Site in spite of substantial evidence of significant impacts on these habitats. Furthermore, the MND fails to analyze alternatives that would avoid or minimize impacts to the wetlands and riparian habitats, as required by state law. Accordingly, the CEA Foundation requests

that the DTSC not proceed with its consideration of the Centennial RAP until an environmental impact report ("EIR") for the IMM Project that accounts for the impacts of the Centennial RAP has been prepared.

I. The Centennial RAP is improperly segmented from the IMM Project.

Despite the fact that the Centennial RAP is a necessary prerequisite for the IMM Project, and therefore is a part of that larger project, the MND improperly segments the Centennial RAP and purports to analyze it in isolation. This segmentation avoids an analysis of the IMM Project as a whole, and therefore it violates CEQA. The Centennial RAP must be combined with the IMM Project and analyzed in a single EIR.

The Centennial RAP involves the approval of a draft RAP for the cleanup of the Centennial M-1 Property ("Centennial Site"), which is a 56-acre site owned by Rise Grass Valley Inc. near the city limits of Grass Valley. MND p. 1. The RAP proposes to remediate the Centennial Site by consolidating and capping contaminated materials that have metal concentrations above commercial/industrial use cleanup levels or background concentrations. MND p. 2-3. In particular, the Site contains mine waste, including tailings and waste rock, that contain arsenic, lead, thallium, mercury, and nickel. MND p. 1. The Centennial RAP involves the excavation and consolidation of a total of 133,800 cubic yards of contaminated soil. MND p. 3. Roughly 4,200 cubic yards of material at one particular "hot spot" will be mixed with roughly 335 tons of Portland cement to chemically stabilize the constituents of concern and to reduce their water solubility. MND p. 3. The project also involves utilizing 129,100 cubic yards of soil from designated "borrow areas" on the Site as clean fill to cap and regrade excavated areas. MND p. 3.

The remediation proposed in the RAP is just the first step to using the Centennial Site as a dumping ground for engineered fill from the IMM Project. The IMM Project involves reopening and expanding a large-scale gold mining operation on the nearby Brunswick Site. IMM Project Notice of Preparation ("NOP") p. 2-3. The IMM Project would include gold mineralization processing and underground mining under an 80-year permit. NOP p. 2. The IMM Project also includes a plan to place engineered fill generated by the mining activities onto 44 of the 56 acres of the Centennial Site. NOP p. 3. Referring to the Centennial Remediation, the IMM Project NOP states that only "[a]fter such environmental cleanup work is completed, *as part of the proposed project*, engineered fill from the Brunswick Industrial Site would be placed, graded, and compacted on the Centennial Industrial Site." NOP p.7 (emphasis added).

Thus the MND and RAP reveal that the Centennial RAP is merely the first step in completing the IMM Project. For example, the RAP states that "[p]ost-remediation use of the property may include the placement of additional mine waste . . . resulting from future mining operations." RAP p. 19. It goes on to explain the remediation efforts on the Site are to be done "*as part of commercial/industrial site development*." RAP p. 39 (emphasis added). Later, the RAP states that the areas from which contaminated mine waste will be excavated "are intended to support future commercial and industrial development." RAP p. 45. Thus, the RAP repeatedly states that the remediation is for the explicit purpose of preparing the site for use as part of the IMM Project.

A. The MND fails to provide an accurate project description, which should include the proposed IMM Project

Despite this connection between the IMM Project and the Centennial RAP, the MND describes the "project" narrowly as only the draft Centennial RAP. MND p. 1. By defining the project so narrowly, the MND contains an inaccurate project description.

"[A] correct determination of the nature and scope of the project is a critical step in complying with the mandates of CEQA." *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 267 (citing *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1222. Under CEQA, a "project" is an activity that may cause either a direct or reasonably foreseeable indirect change in the environment, and that involves the issuance of a permit or other entitlement for use by one or more public agencies. Pub. Resources Code § 21065. The project includes the "whole of an action," and "does not mean each separate governmental approval." Guidelines § 15378(a), (c). "This important elaboration is meant to 'ensure that a project proponent does not file separate environmental reports for the same project to different agencies thereby preventing 'consideration of the cumulative impact on the environment.'" *Nelson*, 190 Cal.App.4th at 271 (internal citation omitted). "CEQA's conception of a project is broad," and it "prevents a proponent or a public agency from avoiding CEQA requirements by dividing a project into smaller components which, when considered separately, may not have a significant environmental effect." *Nelson*, 190 Cal.App.4th at 271 (citations omitted).

"Where an agency fails to provide an accurate project description, or fails to gather information and undertake an adequate environmental analysis in its initial study, a negative declaration is inappropriate. An accurate and complete project description is necessary to fully evaluate the project's potential environmental effects." *El Dorado County Taxpayers for Quality Growth v. County of El Dorado* (2004) 122 Cal.App.4th 1591, 1597 (internal citations omitted).

In determining whether the Centennial RAP is part of the IMM "project," one must "examine how closely related" the remediation is "to the overall objective of the project." *Tuolumne County*, 155 Cal.App.4th at 1226. "The relationship between the particular act and the remainder of the project is sufficiently close when the proposed physical act is among the 'various steps which taken together obtain an objective.'" *Id.* In *Tuolumne County*, because the objective of the project was to open and operate a home improvement center, and that objective was "conditioned upon the completion of the realignment of a road," the road realignment was deemed part of "a single CEQA project" with the proposed home improvement center. *Id.* at 1227. Here, the objective of the IMM Project is to reopen and expand mining operations and to dump the engineered fill created by those mining activities on the Centennial Site. That dumping is "conditioned upon" the Site being remediated. *See* NOP p. 7. Accordingly, the Centennial RAP is necessarily a part of the "single CEQA project" that includes the remainder of the IMM Project.

The court in *Nelson* held that the County abused its discretion when it reviewed only a mining reclamation plan, rather than the surface mining operations as a whole. 190 Cal.App.4th at 269, 272. "[T]he entire CEQA project that had to be reviewed by County included *both* the mining operations and the reclamation plan," because the aspects were "integrally related and constituted the whole of the action" for which approvals were sought. *Id.* at 272. The reclamation plan "was simply the final phase of the overall usage of the land," and that the reclamation plan was "legally required in any proposal to engage in surface mining operations in California." *Id.* at 272.

Similarly here, the whole of the project includes both the IMM Project and the Centennial RAP, which is a necessary prerequisite to the IMM Project. Just like the reclamation in *Nelson*, the Centennial RAP is "integrally related" to the IMM Project, which relies on the remediation being completed in order to use the Centennial Site to dump engineered fill. *See* NOP p. 5. Moreover, just like the reclamation plan in *Nelson* was required in order to engage in surface mining, the remediation of the Centennial Site must be completed before the IMM Project can use the Site to dump engineered fill. *See* NOP p. 5 ("[T]he majority of the Centennial Industrial Site currently cannot be developed due to unstable soils and/or contamination . . . ."). DTSC failed to provide an accurate project description by omitting an analysis and discussion of the IMM Project, of which the remediation of the Centennial Site is just a part.

As further evidence of the improperly narrow project description in the MND, which purports to be focused only on the remediation of the Centennial Site, the RAP repeatedly refers to work to be done on the Centennial Site that is unrelated to remediating that site. Instead, that work is plainly required only to prepare for the future

stages of the IMM Project. For example, the RAP states that the "remaining shallow takings (ETP Remainder, WTP Remainder and SIL) *do not require consolidation*, but are to be reworked in place as engineered fill and covered with clean engineered fill *to prepare the site for future commercial/industrial site development*." RAP p. XVIII (emphases added). Because the RAP is not solely focused on remediating the Centennial Site, but is instead focused on preparing this Site for future use in the IMM Project, it is improper to refer to the "project" at issue in the MND as solely the remediation. The project as a whole is the IMM Project.

Because the MND improperly defined the project as the remediation of the Centennial Site only, thereby distinguishing between this activity and the remainder of the IMM Project, DTSC has engaged in improper piecemeal consideration of the Project, in violation of CEQA. Because the County is the lead agency for the IMM Project, it must include an analysis of the impacts of the Centennial RAP in the EIR for that project. DTSC should participate in that process as a responsible agency but not approve the Centennial RAP until the County has completed an adequate analysis of both the IMM Project and the Centennial RAP.

B. A single EIR for the Centennial RAP and the IMM Project should be prepared.

Once the Project is properly defined as the entirety of the IMM Project, including the Centennial RAP as a necessary prerequisite, a single EIR for the whole of the Project should be prepared. This EIR would analyze and mitigate the impacts of the Centennial RAP in addition to the subsequent actions proposed in the IMM Project of mining, gold mineralization processing, and dumping engineered fill on the Centennial Site.

Where two actions are integrally related or where one project is conditioned on another project, they must both be considered together in an EIR. *See, e.g., Nelson*, 190 Cal.App.4th 252 (it was improper for a County to adopt a negative declaration for a reclamation plan only without considering or analyzing the impacts of the proposed mining operations); *Tuolumne County*, 155 Cal.App.4th 1214. Piecemeal environmental review that breaks up projects into smaller pieces to evade a complete analysis is not permitted under CEQA. *See Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 193; *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283. Relatedly, when "an individual project is a necessary precedent for action on a larger project, or commits the lead agency to a larger project, with significant environmental effect, an EIR must address itself to the scope of the larger project." Guidelines § 15165. The Centennial RAP is an integral part of the IMM Project, and as such the two Projects should be evaluated together in a single EIR.

Segmenting a portion of a project from the whole is forbidden under CEQA. *Ass'n for Sensible Development of Bishop Area v. County of Inyo* ("*County of Inyo*") (1985) 172 Cal.App.3d 151, 165-66. In *County of Inyo*, where the lead agency broke a shopping center project into two and filed a negative declaration for each "project," the court explained that the "danger of filing separate environmental documents for the same project is that consideration of the cumulative impact on the environment of the two halves of the project may not occur." *Id.* at 166. Dividing the project into two parts constituted an abuse of discretion by the lead agency, because the two environmental documents were "considered as mutually exclusive environmental documents." *Id.* at 167. Such an approach was "inconsistent with the mandate of CEQA that a large project shall not be divided into little ones because such division can improperly submerge the aggregate environmental considerations of the total project." *Id.*

The unstated purpose of dividing the Centennial RAP from the IMM Project appears to be to avoid a full environmental analysis of the impacts of the Centennial RAP on the wetlands on the Centennial Site. The Centennial RAP plans to excavate clean fill from portions of the Site that are not contaminated and to use this fill to cap the contaminated areas. Much of the clean fill will be taken from areas that include 4.35 acres of wetlands. The MND contends that the impacts on the wetlands will be less than significant following mitigation. This mitigation is improperly deferred, as discussed in detail below. The NOP for the IMM Project, in turn, plans to fill and grade "approximately 44 of the 56-acre Centennial industrial Site," avoiding only 12 acres that include Wolf Creek, a 100-foot setback from the Creek, and sensitive plant species. NOP p. 7. Plainly, the 44 acres of the Centennial Side that will be used as a dumping ground for the engineered fill from the Brunswick Site include those acres that are currently wetlands, but will have been destroyed by the Centennial RAP 's using them for clean fill. Therefore, by separating out the destruction of the wetlands into the Centennial RAP —where the impact is barely discussed, other than to say that it will be mitigated with future permits—rather than analyzing this impact in the IMM Project EIR, the project proponent avoids any analysis of this impact. *See* NOP p. 7.

DTSC must prevent this improper segmentation by requiring the project proponent to accurately situate the Centennial RAP in the scope of the IMM Project, and to include an analysis of the Centennial RAP's impacts in the IMM Project EIR. Doing so would require the project proponent to confront and fully analyze the impacts of needlessly destroying 4.35 acres of wetlands only to use this land as a destination for engineered fill.

II. The Centennial RAP's Potentially Significant Impacts Require Preparation of an EIR.

DTSC's MND also fails to adequately analyze the impacts of the RAP as a standalone project.

It is well settled that CEQA establishes a "low threshold" for the initial preparation of an EIR, especially in the face of conflicting assertions concerning the possible effects of a proposed project. *Pocket Protectors v. City of Sacramento* (2005) 124 Cal.App.4th 903, 928. CEQA provides that a lead agency may issue a negative declaration and avoid preparing an EIR only if "[t]here is *no* substantial evidence, in light of the whole record before the lead agency, that the Project may have a significant effect on the environment." Pub. Resources Code § 21080(c)(1) (emphasis added). A lead agency may adopt a mitigated negative declaration only when all potentially significant impacts of a project will be avoided or reduced to insignificance. *Id.* § 21080(c)(2); Guidelines § 15070(b). A mitigated negative declaration will also be set aside if the proponent's conclusions are not based on substantial evidence in the record. *See Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

An initial study must provide the factual basis, with analysis included, for making the determination that no significant impact will result from the project. Guidelines § 15063(d)(3). In making this determination, the agency must consider the direct and indirect impacts of the project as a whole (Guidelines § 15064(d)), as well as the project's cumulative impacts (see *City of Antioch v. City Council of Pittsburg* (1986) 187 Cal.App.3d 1325, 1332-33).

An agency must prepare an EIR whenever it is presented with a "fair argument" that a project may have a significant effect on the environment, even if there is also substantial evidence to indicate that the impact is not significant. *See No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68; *see also Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988; Guidelines § 15064(f)(1). "A project 'may' have a significant effect on the environment if there is a 'reasonable possibility' that it will result in a significant impact." *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 CAl.App.4th 1544, 1581. A "significant effect on the environment" is a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project . . . ." Guidelines § 15382. Where there are conflicting opinions regarding the significance of an impact, the agency must treat the impact as significant and prepare an EIR. *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-51; Guidelines § 15064(f)(1).

Here, the MND is subject to the fair argument test, and substantial evidence in the record supports a fair argument that the proposed Project will result in significant impacts on the environment. In particular, there is substantial evidence of a significant effect on biological resources, including wetlands and riparian habitats, air quality, and climate change, among others. A revised environmental document must include a detailed and thorough analysis of the Project's likely impacts to permit informed decisions about the Project, and identify effective mitigation measures and alternatives that could reduce these impacts.

A. The MND fails to adequately analyze and mitigate the Centennial RAP's impacts on biological resources, including wetlands.

The Centennial RAP needlessly plans to destroy and fill 4.35 acres of wetlands and 0.60 acres of "other waters of the U.S." on the Centennial Site in order to use the soil from these areas to cover contaminated areas within the Site. This plan appears to be an effort to prepare the acreage that currently includes wetlands to later serve as a dumping ground for engineered fill from the IMM Project. By including the destruction of the wetlands and ephemeral streams in the MND rather than in the EIR for the IMM Project, the project proponent avoids a full analysis of the impacts of its actions on the wetlands, streams, and other biological resources.

Compounding this failure to analyze and mitigate the impacts of destroying wetlands and streams, the MND does not even contemplate an alternative involving the transport off-site clean fill rather than needlessly destroying wetlands. This planned destruction of wetlands is completely antithetical to California's wetlands protection policy. *See Mira Monte Homeowners Assn v. County of Ventura* (1985) 165 Cal.App.3d 357, 364. The State Resources Agency's "policy for preservation of wetlands in perpetuity" states that "this Agency and its Departments, Boards and Commissions will *not* authorize or approve projects that fill or otherwise harm or destroy . . . inland wetlands." *Id.* (citing Final EIR, State Clearinghouse # 83013050, Appendix D).

Because there is substantial evidence that the Centennial RAP may have significant impacts on biological resources, including wetlands, other waters, and the species that rely on these areas, an EIR that includes proper mitigation of the significant impacts on biological resources must be prepared.

1. The MND's failure to adequately describe the Centennial RAP 's existing setting results in a serious underestimation of the project's impacts on biological resources.

CEQA requires that an initial study provide a description of the environmental setting of a project, which serves as a baseline for evaluating a project's impacts. Guidelines § 15063(d)(2). "[W]ithout such a description, analysis of impacts, mitigation measures and project alternatives becomes impossible." *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 953. Decision-makers must be able to weigh the project's effects against "real conditions on the ground." *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal. App. 3d 229, 246. One initial study's "environmental setting" section that was held to be adequate set forth the existing site conditions, facilities, and recreational uses, and contained a description of the existing physical conditions, including the topography and types of habitats and vegetation. *Lighthouse Field Rescue v. City of Santa Cruz* (2005) 131 Cal. App. 4th 1170, 915-17. According to the court, the initial study's several-pages-long environmental setting discussion "met the minimum requirements of the Guidelines." *Id.* at 917.

In contrast to this type of thorough description of the environmental context in which a project is proposed, the MND omits essential baseline information about existing wetlands and waters and thus fails to meet CEQA's requirements. In order for the public and decision-makers to be able to fully understand the environmental impacts of the Centennial RAP, more information about the existing wetlands and streams is necessary.

The MND omits discussion of the existing environmental conditions with respect to wetlands and waters. In its discussion of the environmental setting for purposes of impacts on biological resources, it notes that there are "mixed wetland types," which are later described as "freshwater emergent marsh wetland" and "wet meadow." MND p. 30-31. The MND provides no explanation or description of these wetland types. It goes on to state summarily that the Site contains a "total of 4.97 acres of 'waters of the U.S.,' including wetlands, and 'waters of the State of California'" on the Site, of which 4.37 acres are "mapped wetlands" and 0.60 acres are mapped "other waters of the U.S.," including the "main stem of Wolf Creek and several unnamed intermittent and ephemeral streams." MND at 31. However, it does not describe these wetlands, nor does it describe the water quality of those features. Adding to the obfuscation of the nature or characteristics of the wetlands and ephemeral streams on the site, the Biological Resources Impact Assessment lists various types of wetlands that do not correspond to the descriptions in the Environmental Setting. *Compare* Tables 3 and 4, RAP App. G (listing various types of wetlands, including "meadow wetland," "marsh," and "riparian," along with "perennial stream," "intermittent stream," and "ephemeral stream") *with* Table

13, MND at p. 30-31 (listing ""freshwater emergent marsh wetland" and "wet meadow."). The MND and RAP fail to explain or describe these different types of wetlands or waters.

An agency's choice of baseline must allow it to realistically describe *both* the existing environmental conditions and the impacts of the project. Thus, an agency's choice of baseline should both accurately characterize the existing environment and allow the agency to analyze and mitigate the full scope of a project's impacts. Given the inadequacies of the Project setting description, a member of the public would not be made aware of the impacts to wetlands, streams, and special species, and thus the MND violates CEQA.

2. The MND fails to adequately identify and analyze the project's impacts on biological resources, which could be significant.

In addition to using an improper baseline for assessing the Centennial RAP's impacts, the MND's analysis of impacts on biological resources, including wetlands and other waters, fails to achieve CEQA's most basic purpose: informing governmental decisionmakers and the public about the potential significant environmental effects of a proposed activity. Guidelines § 15002(a). CEQA additionally requires "adequacy, completeness, and a good-faith effort at full disclosure" in an environmental document. *Id.* § 15003(i). Here, the MND's analysis of the Project's impacts on wetlands, waters of the U.S., and special species fails to meet these standards. The MND is vague in describing the devastating impacts of the planned remediation on the Site's biological resources, relying entirely on undetermined future remediation to mitigate these impacts.

The MND acknowledges that "[t]he estimated maximum fill from the implementation of the project includes 4.35 acres of mapped wetlands and 0.19 acres of intermittent and ephemeral streams." MND p. 36. However, this description fails to clarify that "fill" means the wetlands and streams will be entirely destroyed. The MND elsewhere similarly avoids the fact that the plan is to destroy the wetlands, stating instead that the "project will result in the *disturbance* of the large marsh wetlands." MND p. 33 (emphasis added). These descriptions do not convey the true impact of the project, which will remove vegetation from the wetlands and ephemeral stream areas (RAP p. 67), excavate the soil found in these areas, and use that soil to cap and regrade the contaminated portion of the Site. MND p. 3. Indeed, in discussing the use of the soil obtained from wetland areas to cap the contaminated areas, the MND hides the fact that these areas contain wetlands, referring to these areas only as "borrow areas." MND p. 3.

Only the figures in the Biological Impact Assessment, which is Appendix G of the RAP, show that the "borrow areas" from which 129,100 cubic yards of clean soil will be excavated are the areas that contain the majority of the wetlands and streams on the Site. *See* Figure 5 in RAP App. G. In contrast, many of the figures attached to Appendix H, which contains the "Design Drawings" for the RAP, obscure the connection between the "borrow areas" and the wetland. *See, e.g.*, App. H Figures E2, E3 (showing the East and West Borrow Areas and the amounts of soil planned to be taken from each area, but omitting any reference to or indication of the location of wetlands in those borrow areas). By failing to make clear that nearly all of the wetlands and the ephemeral streams on the Centennial Site will be destroyed to use the soil to cap the contaminated area, the MND fails to serve as a "good-faith effort at full disclosure" of the impacts to biological resources. *See* Guidelines § 15003(i)

The MND also fails to make clear that the remediation will also result in the destruction of suitable habitat for many special status wildlife species. *See, e.g.*, MND p. 34 (after noting that "[s]uitable habitat" for the California black rail occurs in the "large marsh wetlands" on the eastern portion of the site, the MND states that "*[s]ome* of these habitat areas will be removed or disturbed as a result of remedial activities, specifically surface disturbance related to site preparation activities (e.g., vegetation removal) and soil excavation, stabilization and placement.") (emphasis added). The MND improperly attempts to minimize the impacts to the relevant habitat areas, despite the fact that it has clearly stated its plan to fill or dredge *nearly all* of the wetlands on the Site, thereby destroying nearly all of the habitat areas the wetlands provide to the various species.

3. The MND fails to identify adequate mitigation for the Centennial RAP project's impacts on biological resources.

Despite these significant impacts on wetlands, ephemeral streams, and the special status species that rely on them, the MND concludes summarily, and without analysis, that simply complying with permitting requirements will mitigate these impacts to less than significant. MND p. 35-36. These findings are not supported with evidence and analysis. The proposed mitigation measures are deferred and are not clearly defined. Instead, there is substantial evidence in the MND and the RAP that the impacts on the wetlands will be significant. Many of the mitigation measures relied on by the MND do nothing more than require compliance with existing laws and regulations and will not address the Remediation's significant environmental impacts.

"[I]t is improper to defer the formulation of mitigation measures." *Center for Biological Diversity v. Dept. of Conservation, etc.* (2019) 36 CAl.App.5th 210, 239. An exception to this rule "applies when the agency has committed itself to specific

performance criteria for evaluating the efficacy of the measures to be implemented in the future, and the future mitigation measures are formulated and operational before the project activity that they regulate begins." *Id.* Here, however, DTSC did not identify any specific performance criteria by which to evaluate the future mitigation measures, instead simply stating that compliance with permit requirements, regulations, and habitat management plans will mitigate any impacts to less than significant. These conclusory statements, which are not supported with any performance criteria, are insufficient.

Further, under well-established case law, compliance with regulations does not excuse the agency from describing project activities or from analyzing resulting impacts and appropriate mitigation. *Oro Fino Gold Mining Corporation v. County of El Dorado* (1990) 225 Cal.App.3d 872, 885. While a project may comply with regulations, this does not necessarily mean that its impacts will not be significant under CEQA and require further mitigation. *See e.g., Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 732. Thus, the RAP may not be approved without preparation of a full EIR that describes the existing setting and proposed project activities, analyzes anticipated impacts, and identifies appropriate mitigation.

If significant environmental impacts will occur as a result of project implementation and cannot be mitigated to less than significant levels, an MND is not appropriate. Further, when an MND is prepared, mitigation measures must be specific, clearly defined, and cannot be deferred to a future time. Here, the MND improperly fails to analyze impacts to biological resources, including wetlands and ephemeral streams because it assumes that those impacts will be addressed by other agencies.

For example, under the analysis of impacts on state or federally protected wetlands, the MND requires compliance with Mitigation Measure ("MM") Bio-9, which requires the applicant to obtain "all required federal, state, and local resource agency permit approvals" before beginning work within potentially jurisdictional waters and wetlands, and to comply with conditions of those approvals. MND p. 36. This Mitigation Measure states that permit approvals may include a Section 404 Permit from the Army Corps of Engineers, a Section 401 Water Quality Certification from the Regional Water Quality Control Board, and a Section 1602 Lake and Streambed Alteration Agreement from the California Department of Fish and Wildlife. MND p. 36. This section further states that the impacts to jurisdictional wetlands and waters "typically require compensatory mitigation at a minimum 1:1 ratio on a functions and values basis," which can be met by "creating wetlands on-site or off-site" or by "purchasing wetland credits (1:1 ratio) from a wetland mitigation bank. MND p. 36. However, the Mitigation Measure notes that the final mitigation requirements are determined by the regulatory agencies during the permitting process. MND p. 36. This Mitigation Measure is

purported to mitigate the remediation's impacts on mapped wetlands and streams on the site. MND p. 36.

The MND's mitigation measures for special species are also inadequate and deferred. For example, Mitigation Measures ("MM") Bio-1, Bio-2, and Bio-3 require a preconstruction survey by a biologist to identify the presence of Townsend big-eared bats, Coast horned lizards, and nest raptors or other regulated bird species, respectively. MND p. 31-32. Should these species be discovered, they are to be removed or permitted to leave the area, thereby avoiding any direct impacts to individuals of the species. MND p. 31-32. These measures are plainly aimed at avoiding direct impacts to individuals, but they will do nothing to mitigate the *indirect* impacts to the species "through habitat modifications," which the MND is required to assess. MND p. 31.

Further, MM Bio-6 and Bio-8, which are meant to mitigate impacts to California red-legged frog and California black rail, respectively, call for the avoidance of the marsh wetlands on the eastern side of the site to avoid disturbing these species' potential habitat. *See* MND p. 33, 34. Given the MND's stated plan to fill nearly all of the wetlands on the Site as part of the remediation, these mitigation measures are patently impossible. The mitigation measures also call for pre-construction surveys to identify any members of the species, and coordination with the relevant regulatory agencies if the species are identified. MND p. 34, 35. By deferring ultimate mitigation measures to the determination of the regulatory agencies, these mitigation measures improperly defer mitigation. *See Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 944-45.

Similarly, the MND defers mitigation of impacts to riparian habitat. It states that the project will disturb the County's 100-foot non-disturbance buffer to Wolf Creek and to several wetlands and intermittent streams, and that it has the potential to impact special status species. MND p. 35. The required mitigation measure ("MM") Bio-8a requires only that the project proponent prepare a Management Plan for impacts within non-disturbance buffers that is consistent with the Nevada County Development Code, Chapter II: Zoning Regulations, while MM Bio-8b requires that the project proponent prepare a Habitat Management Plan for any special-status wildlife species documented within the site, in compliance with the County Land Use and Development Code, Section L-II 4.3.12. MND p. 35.

Thus in summary, the MND has improperly deferred mitigation on biological resources, including wetlands, special status species, and riparian habitat and ephemeral streams. These improper deferrals of mitigation violate CEQA. *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 915-16 ("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."); *see also Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 (requiring report without established standards is impermissible delay); *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275 (requiring biological report and compliance with *any* recommendations in the report is impermissible deferral of mitigation measure).

B. The MND fails to adequately analyze and mitigate the Centennial RAP's air quality impacts.

As the courts have explained, the environmental review document serves as "an environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Laurel Heights Improvement Ass'n v. Regents of University of California* (1988) 47 Cal. 3d 392. However, rather than alert the public and decisionmakers to the air quality and climate impacts of the proposed Centennial RAP by providing any actual data and analysis of these impacts, the MND improperly relies on the analysis conducted for the IMM Project. It explains that the air and climate pollutant emissions from that Project provide a conservative assessment for the Centennial RAP. MND p. 25. However, in so doing, DTSC has failed to identify or explain any actual impacts from the Centennial RAP. It provides no reason supporting its reliance on the air quality and climate change impacts for the IMM Project rather than actually analyzing the impacts associated with the Centennial RAP.

1. The MND's analysis of impacts to air quality is inadequate, and there is a fair argument that the Centennial RAP may have significant air quality impacts.

The MND acknowledges that although the western portion of Nevada County is currently designated as in "moderate" nonattainment of the federal 8-hour ozone (O_3) standard, the Northern Sierra Air Quality Management District ("NSAQMD") requested voluntary reclassification as a "Serious" nonattainment area. MND p. 23. Despite this disclosure, which acknowledges the serious nature of the air quality setting in the area, the MND's analysis of air quality impacts is grossly inadequate.

In fact, the MND fails to analyze the Centennial RAP's air quality impacts at all. Instead, it relies on the air quality analysis done for the construction of the IMM Project. MND p. 24. The MND states that "Construction emissions estimated below are based on initial construction of the Idaho-Maryland Mine Project." MND p. 24. DTSC contends

that "the emission estimates for the IMM project . . . are very conservative when used as estimates for this project," because construction of the IMM Project has a longer duration and involves more equipment, employees, and surface disturbance. MND p. 25. But this analysis ignores the fact that the IMM Project is different in kind than the Centennial RAP.

The IMM Project proposes different activities than the Centennial RAP. It does not, for example, involve mixing soil with over 335 tons of cement to stabilize the contaminants in that soil. *See* MND p.3. Furthermore, while the Centennial RAP will result in the excavation and/or grading of 36.7 acres of land on the Centennial Site (*see* RAP p. 44), the IMM Project calls for grading of only 15 acres of previously disturbed land. NOP p. 4.

Accordingly, it is inappropriate to use the analysis done for the IMM Project as a proxy for the air quality analysis required for the Centennial RAP. Because the MND does not provide the public or decisionmakers with any information about that actual air quality emissions that will result from the Centennial RAP, the environmental review is incomplete, and the remediation cannot lawfully be approved. Under CEQA an "agency should not be allowed to hide behind its own failure to gather relevant data." *Sundstrom*, 202 Cal.App.3d at 311.

2. The MND fails to identify adequate mitigation for the Centennial RAP's impacts on air quality.

Compounding its failure to provide any information or analysis of the air quality or climate change impacts of the Centennial RAP, the MND also relies on deferred mitigation for these impacts. The MND states that, after implementing MM AQ-1 and AQ-2, emissions of ROG, NOx, and PM10 would be less than significant and would not obstruct implementation of the Ozone Attainment Plan. MND p. 24. It also concludes that emissions of ROB, NOx, and PM10 would be less than significant during project construction after mitigation. MND p. 24.

However, the mitigation measures identified in the MND do not even appear to be related to the main causes of air emissions identified for the IMM Project, on which the MND's analysis is based. *See* MND p. 26. Table 11, which lists the sources and amounts of emissions, shows that the majority of the emissions come from off-road equipment, on-road vehicles, and architectural coatings. MND p. 24. In contrast, MM AQ-1 requires the use of alternatives to open burning of vegetation (which is irrelevant here); requires the use of grid power rather than diesel generators (there is no indication that diesel generators will be used); and that traffic controls be used to improve traffic flow (but by

the MND's own admission, the "project would result in minimal new traffic trips"). *See* MND p. 25-26. Thus, there does not appear to be any connection between these mitigation measures and the causes of emissions listed in Table 11 of the MND, which shows that the majority of the emissions come from off-road equipment, on-road vehicles, and architectural coatings. MND p. 24. Similarly, MM AQ-2 merely requires that the project proponent construct a Construction Exhaust Minimization Plan to DTSC for review or approval. MND p. 26. Requiring development and approval of a plan in the future constitutes improper deferral of mitigation. *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670 ("[A]n agency goes too far when it simply requires a project applicant to obtain a . . . report and then comply with any recommendations that may be made in the report.") (internal citation omitted).

C. The MND fails to adequately analyze and mitigate the Centennial RAP's climate change impacts.

As with its analysis of air quality impacts, the MND's analysis of climate change impacts is woefully inadequate and fails to apprise the public or decision makers of any climate impacts of the remediation, because it is based entirely on the IMM Project. *See* MND p. 46-47. The MND assumes that because the Centennial RAP is slated to occur over 4-6 months, rather than 12, and to require "fewer pieces of equipment, employees, and surface disturbance, and would not have emissions associated with emergency generators, on-road vehicles, and PG&E supplied disturbance," the GHG emissions are estimated to be approximately 1,077.25 metric tons per year. MND p. 47. The MND cites the Air Quality and Greenhouse Gas Emissions Analysis Technical Report for the IMM Project for this figure. MND p. 47. Reviewing that report reveals that the MND for the Centennial RAP has simply borrowed the CO_{2e} figure from "off-road equipment" associated with the IMM Project, which is stated as 1,077.25 metric tons per year, and has ignored all other potential sources of emissions from the remediation that might contribute to climate change.

This analysis is inadequate because it ignores the activities that are actually a part of the remediation and which could have a significant impact on climate change. As noted above, the Centennial RAP is different in kind than the IMM Project, and these differences are likely to result in divergent climate impacts. For example, the MND plans to denude vegetation from much of the Site, which will result in carbon loss. *See* MND p. 4. Similarly, destroying more than four acres of wetlands, as the Centennial RAP plans to do, will release a significant source of carbon. *See* "Carbon Sequestration in Wetlands," MN Board of Water and Soil Resources (2019) ("freshwater inland wetlands . . . hold nearly ten times more carbon than tidal coastal wetlands."), *available at* https://bwsr.state.mn.us/carbon-sequestration-wetlands#:~:text=Freshwater%20inland

20wetlands%2C%20in%20part,carbon%20than%20tidal%20coastal%20wetlands.&text=The%20study%20found%20that%20peatlands,carbon%20in%20the%20United%20States. Furthermore, trucking in and mixing more than 335 tons of cement will have significant climate impacts. *See* MND p. 3.

None of these known sources of climate impacts were identified or analyzed in the MND. DTSC provides no explanation for its failure to consider these impacts. An agency is not relieved from its obligation to provide an analysis just because that task may be difficult. *Sundstrom*, 202 Cal.App.3d at 399. Accordingly, an EIR that actually identifies and analyzes the Centennial RAP's climate impacts must be prepared before the RAP can be approved.

III. The MND fails to consider alternatives that would avoid or minimize harm.

The law governing remedial action plans and the law protecting wetlands both require a thorough consideration of alternatives to the proposed project. In addition, because the project has significant impacts and an EIR should be prepared, DTSC must also consider alternatives. Here, the MND failed to engage in the required analysis of alternatives. In particular, it did not consider even a single alternative that would use *imported* clean fill, rather than destroying the wetlands and ephemeral creeks on the Site to "borrow" soil from these areas for clean fill. Instead, all of the alternatives it considered (aside from the "No Action" alternative) would involve the destruction of the wetlands to use the soil for clean cover, thereby also preparing the former wetlands area to be used for fill from the IMM Project. DTSC must consider an alternative that would truck in clean fill rather than needlessly destroying wetlands.

A. Remedial Action Plans must evaluate all potential alternatives.

The statutes governing remedial action plans also require that DTSC consider alternatives and explain why it is rejecting each one. Health & Saf. Code § 25356.1(e). Further, remedial actions plans must be based upon "[t]he potential environmental impacts of alternative remedial action measures," and all RAPS "shall include an evaluation of each alternative considered and rejected by [DTSC] . . . for a particular site," *Id.* §§ 25356.1(d)(6), 25356.1(e).

Here, the RAP violates Section 25356.1 by failing to analyze the environmental impacts of the single alternative remedial action that would avoid the most harm: importing clean fill, rather than destroying the wetlands to obtain that soil. Instead, the RAP assessed the following alternatives: (1) No Action; (2) On-Site Placement under Land Use Controls; (3) Off-Site Disposal; (4) Off-Site Disposal and On-Site Placement

Under Land Use Controls; and (5) Stabilization and On-Site Placement Under Land Use Controls." RAP p. 49. DTSC ultimately selected the fifth option to study in the MND. RAP p. 57. The RAP explains that this option is protective of human health and the environment while mitigating the cost, traffic impacts, and greenhouse gas impacts associated with offsite disposal. RAP p. 57. The RAP states that the "cost implementation" for its selected remedial alternative is "over 7 times less" than transporting the waste offsite for disposal, but it fails to provide such an analysis for an alternative that would truck in clean fill rather than using soil from the wetlands for this purpose.

However, as noted, none of these alternatives addresses the biggest source of environmental harm from the RAP: destroying nearly all the wetlands on the Site in order to use these area as the source of clean fill, and ultimately to fill in the wetlands so they can be used as a dumping ground in the IMM. The RAP clearly understood and contemplated the potential to import clean fill, but it failed to analyze an alternative based on this option. For example, in the cost tables for each of the alternatives, the RAP includes a line item for "Import and Placement of Clean Fill," which would cost $20 per cubic yard, but in each case, this line item is listed as "Not applicable." See Tables 3-6 to RAP (PDF p. 139-42) ("Cost Estimate" for each alternative). This constitutes a failure to "include an explanation for rejection of alternative remedial actions considered but rejected," as required by state law. Health & Saf. Code § 25356.1(e).

B. Federal and state law protecting wetlands require the study of alternatives before harming these habitat areas.

Federal and state law governing discharges into waters and wetlands also require an alternatives analysis. The MND acknowledges that all of the mapped wetland and stream features that were assessed in the Aquatic Resources Delineation Report on the Centennial Site are assumed to fall under the jurisdiction of the Army Corps of Engineers pursuant to Section 404 of the Clean Water Act. MND p. 36. The Clean Water Act requires that any action to place fill or dredged material within a jurisdictional wetlands or waters requires a Section 404 permit and a Regional Water Quality Control Board Section 401 Water Quality Certification.

The U.S. EPA's regulations enacting the federal Clean Water Act forbid any discharge into a wetlands if there is a less harmful alternative. In particular, 40 CFR § 230.10(a) states that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." This section goes on to explain that "practicable

alternatives" include "[a]ctivities which do not involve a discharge of dredged or fill materials into waters of the United States." 40 CFR § 230.10(a)(1)(i).

The State Water Resources Control Board's Procedures for Regulation of Discharges of Dredged or Fill Material to Waters of the State, which are derived from the EPA's federal regulations, contain a similar requirement to consider alternatives. Section 230.10 of those procedures prohibits a discharge of dredged or fill materials "if there is a practicable alternative. . . which would have less adverse impact on the aquatic ecosystem." Procedures for Discharges of Dredged or Fill Material to Waters of the State, Appendix A: State Supplemental Dredge or Fill Guidelines, *available at* https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2019/040219_10_procedures_clean_v032219_conformed_final.pdf.

The MND violates these federal and state requirements. As noted, the Centennial RAP purports to excavate soil from 4.35 acres of wetlands on the "borrow sites" and then to regrade these wetlands to prepare the areas to be a dumping ground for waste from the IMM Project. The MND did not assess whether there was a practicable alternative to destroying the wetlands that would "not involve a discharge" into the wetlands. The environmental review document prepared for the Centennial RAP must do so to comply with these federal and state requirements.

C. The Nevada County General Plan requires the assessment of alternatives to damaging wetlands.

The Nevada County General Plan's Wildlife and Vegetation Element describes the variety of important or unique wildlife habitats in the County, including "wetlands and riparian areas, and residence/breeding/foraging areas." Nevada County General Plan ("General Plan"), Chapter 13, Vol. I, Page 13-2, *available at* https://www.mynevadacounty.com/DocumentCenter/View/12585/Chapter-13-Wildlife-and-Vegetation-1995-PDF. To protect these wildlife habitats, Policy 13.2B states:

> Development projects which have the potential to remove natural riparian or wetland habitat of 1 acre or more *shall not be permitted* unless:
>
> a. No suitable alternative site or design exists for the land use;
>
> b. There is no degradation or reduction in the numbers of any rare, threatened, or endangered plant or animal species as a result of the project;

c. Habitat of superior quantity and superior or comparable quality will be created or restored to compensate for the loss; and

d. The project conforms with regulations and guidelines of the U.S. Fish and Wildlife Service, U.S. Army corps of Engineers, California Department of Fish and Game, and other relevant agencies.

Id. Page 13-5-13-6 (emphasis added). Despite this policy's prohibition on projects that remove wetland habitats greater than one acre unless those projects meet a variety of requirements, the Centennial RAP plans to remove *nearly five acres* of wetlands and riparian habitat without meeting the requirements of Policy 13.2B. As noted, the Centennial RAP does not even mention an alternative plan that would import clean fill rather than destroy the wetlands, so it has not shown that "[n]o suitable alternative site or design exists for the land use," as required by Policy 13.2B(a).

To ensure consistency with the County's General Plan, DTSC may not approve the Centennial RAP before it considers alternatives that would (1) import clean fill from off-site, rather than excavating this soil from the "borrow areas" on the site that contain wetlands, and/or (2) minimize the damage to the wetlands areas by "borrowing" soil only from limited areas of the Eastern and Western Tailings Ponds that avoid the wetlands to the extent possible. Considering such alternatives would also minimize or avoid the significant impacts to special species and ephemeral streams outlined above.

D. CEQA requires an analysis of alternatives.

Under CEQA, a proper analysis of alternatives is essential for DTSC to comply with the law's mandate that significant environmental damage be avoided or substantially lessened where feasible. Pub. Resources Code § 21002; Guidelines §§ 15002(a)(3), 15021(a)(2); *Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 443-45. The State's policy is "that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." Pub. Resources Code § 21002. Given the Centennial RAP project's potential for significant impacts as outlined above, DTSC should not approved the RAP until an EIR that analyzes the extent and severity of the Project's impacts related to wetlands, biological resources, air quality, and climate change is prepared.

IV. The Centennial RAP is inconsistent with the Nevada County General Plan and Land Use and Development Code and with Grass Valley Zoning

The state Planning and Zoning Law (Gov't Code § 65000 *et seq.*) requires that development approvals be consistent with the jurisdiction's general plan. As reiterated by the courts, "[u]nder state law, the propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements." *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806; *see also Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570. Accordingly, "[t]he consistency doctrine [is] the linchpin of California's land use and development laws; it is the principle which infuses the concept of planned growth with the force of law." *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336.

Further, it is an abuse of discretion to approve a project that "frustrate[s] the General Plan's goals and policies." *Napa Citizens for Honest Gov't v. Napa County* (2001) 91 Cal.App.4th 342, 379. The project need not present an "outright conflict" with a general plan provision to be considered inconsistent; the determining question is instead whether the project "is compatible with and will not frustrate the General Plan's goals and policies." *Napa Citizens*, 91 Cal.App.4th at 379. A conflict between a plan or ordinance and the Project is a significant impact that must be disclosed and analyzed in the Environmental Impact Report (" EIR"). See *Pocket Protectors v. City of Sacramento* (2005) 124 Cal.App.4th 903, 929-36; *see also* MND at 5718 (acknowledging that the Project would have a significant impact if it would "[c]onflict with any land use plan, policy, or regulation"). The environmental document's conclusions regarding these impacts, like those for any other impact, must be supported by substantial evidence.

The Centennial RAP project requires approval of a grading permit from the County. *See* RAP p. 43. As discussed in the following sections, the proposed Project does more than just frustrate the goals of the County's General Plan and County Code, but it is in fact directly inconsistent with numerous provisions therein. Therefore, the County should not issue a grading permit unless it is consistent with the General Plan and the County Code.

A. The Centennial RAP frustrates the Nevada County General Plan's goals and policies to protect wetlands, riparian areas, and other wildlife habitats.

The Centennial RAP is completely inconsistent with a variety of policies in the Nevada County General Plan. As noted in the discussion of alternatives, General Plan

Policy 13.2B—which the MND fails to mention—prohibits development projects with the potential to remove more than one acre of natural riparian or wetland habitat unless there is no suitable alternative design or site; the project does not result in the degradation in the numbers of rare, threatened, or endangered species; habitat of superior quantity and at least comparable quality will be created or restored; and the project will conform with the relevant regulations of federal and state agencies. Nevada County General Plan, Chapter 13, Vol. I, Page 13-5-13-6. As described above, the Centennial RAP is inconsistent with this policy by failing to show that there is not an alternative that would avoid or minimize the damage to the wetlands. Instead, it did not assess such an alternative at all.

Further, because it has deferred mitigation measures with respect to impacts on special status species, the project proponent cannot show that the project will not result in a reduction in the numbers of any special species, as required by Policy 13.2B(b). Finally, by requiring as its only mitigation for wetlands loss that the project proponent satisfy state and federal permit requirements, which generally require mitigation at a rate of 1:1 (*see* MND p. 36), the MND does not require that "[h]abitat of *superior quantity*" will be created or restored, as required by Policy 13.2B(c). Therefore, the Centennial RAP and its MND are inconsistent with this Policy in the General Plan.

The Centennial RAP and the MND are also inconsistent with the County's Policy 13.1. This Policy states that when significant environmental features are identified on a project site, the County must require all portions of the site containing such features to be "retained as non-disturbance open space through clustered development on suitable portions of the project site." General Plan, p. 13-4. The RAP fails to comply with this Policy, as it plans to excavate and grade all of the "borrow areas" rather than strategically avoid the wetlands areas therein, thereby "clustering" the development on more suitable portions of the Site. The RAP should be modified to be consistent with Policy 13.1.

The Centennial RAP is also inconsistent with the General Plan's Water element, found in Chapter 11. This Chapter identifies one of the "primary issues related to wetlands" as "loss due to filling as a result of land development," which is exactly what the Centennial RAP project plans to do. *See* General Plan, p. 11-2. Objective 11.3 is to "[p]reserve and, where economically feasible, restore the density and diversity of water-dependent species and continuous riparian habitats," and Policy 11.7 enacts that objective: "[t]hrough the development and application of Comprehensive Site Development Standards, and project environmental review, establish and enforce minimum building setback lines from perennial streams and significant wetlands that are adequate to protect stream and wetland resource values." General Plan, p. 11-5. Policy

11.8 similarly requires the use of "voluntary clustering of development to preserve stream corridors, riparian habitat, wetlands, and floodplains." General Plan, p. 11-5.

The Centennial RAP plainly ignores these policies by planning to needlessly fill nearly five acres of wetlands and riparian areas, rather than assessing an alternative to import clean fill. To be consistent with the General Plan policies, the RAP should, at the very least, consider an option to take clean fill from only portions of the "borrow areas" that do not contain the wetlands, thereby "clustering" the impacts and avoiding the wetlands to the extent possible. *See* General Plan, p. 11-5.

Despite these plain inconsistencies with the General Plan's policies and goals, the MND completely ignores the General Plan. Instead it concludes summarily that the Centennial RAP "does not conflict with any land use plan, policy or regulation adopted for the purpose of avoiding or mitigating an environmental impact." MND p. 58. These inconsistencies require preparation of an EIR before the Centennial RAP may be approved.

B. The Centennial RAP is inconsistent with the County's Land Use and Development Code's requirements to avoid and minimize impacts to wetlands and riparian areas.

Additionally, the General Plan requires that the Comprehensive Site Development Standards contained in the County's Land Use and Development Code ("LUDC") be "used during the 'project site review process' to provide a consistent approach for addressing the presence of sensitive environmental features and/or natural constraints . . ." Policy 1.5.3. To that end, those Comprehensive Site Development Standards identify standards to mitigate the impact of development on wetlands, rare and endangered species, and riparian corridors within 100 feet of intermittent or perennial water courses, among others. *Id.*

In particular, the Resource Standards, found in Division 4.3 of the Comprehensive Site Development Standards, have as their stated "primary purpose . . . to avoid the impact of development projects on sensitive environmental resources and natural site constraints" LUDC Sec. L-II 4.3.1. This section states that "[w]here avoidance is not possible, development should minimize impacts in a reasonably fashion that strikes a balance between allowing development of the project site and protecting the resources or avoiding the constraint." *Id.* The Resource standards apply to all development and use permits, and the standards for watercourses, wetlands, and riparian areas apply to allowable uses subject to zoning compliance. LUDC Sec. L-II 4.3.2.

The LUDC requires that when "wetlands and riparian areas" are impacted, "mitigation measures and alternatives shall be incorporated into the project design to avoid, minimize, or compensate for such impacts." LUDC Sec. L-II 4.3.3(A)(1)(n), 4.3.3(2). The "intent of these site development standards is to avoid resource impacts and natural constraints to the maximum possible." LUDC Sec. L-II 4.3.3(B). To that end, an applicant must "[a]void[] the impact by designing or re-designing the project so that the resource or constraint is fully protected and not disturbed." LUDC Sec. L-II 4.3.3(B)(1). "Avoidance is the preferred standard" unless infeasible, in which case the applicant may "[m]inimiz[e] the impact through preparation and implementation of a County-approved Management Plan . . . that limits the degree of impact to the maximum extent possible." LUDC Sec. L-II 4.3.3(B)(2). Only if avoiding or minimizing the impact are not acceptable may the applicant "[c]ompensat[e] for the impact." LUDC Sec. L-II 4.3.3(B)(C).

Here, the Centennial RAP entirely fails to follow the County's process to first attempt to avoid or minimize the impacts to the wetlands and riparian areas. The RAP and MND do not consider a single alternative remediation plan that would import clean fill rather than destroying the wetlands and riparian areas to obtain the clean fill, nor do they consider an alternative that would attempt to minimize the impacts to these resources. This failure to consider alternatives violates the County's Land Use and Development Code.

The LUDC also sets out specific standards "[t]o preserve the integrity and minimize the disruption of watersheds and watercourses," to preserve "riparian habitat," and to "avoid the impact of development on wetlands, or *where avoidance is not possible*, to minimize or compensate for such impacts, to provide for minimum setbacks to protect resources values, and to retain wetlands as non-disturbance open space." Sec. L-II 4.3.17(A) (emphasis added). As this section makes clear, minimization or compensation for impacts to wetlands is acceptable *only when avoidance is not possible*. Here, DTSC has failed to show that avoidance of impacts to wetlands is not possible, because it did not even study an alternative that would avoid impacts to wetlands. Accordingly, DTSC must prepare an EIR for the Centennial RAP that actually analyzes an alternative that does not destroy the wetlands.

This section goes on to state that if compliance with the County standards that prohibit development within the buffer zones from riparian areas and perennial streams "effectively *preclude development of the project or a revised project*," then a Management Plan shall be prepared that avoids or minimizes impacts to the resource. LUDC Sec. L-II 4.3.17(C)(8). Here, however, DTSC did not find that complying with these buffer zones would make the Centennial RAP impossible. Instead, it simply stated

that the remediation would not comply with the buffer zones, that it would destroy all the wetlands on the Site, and would also prepare a Management Plan. MND p. 35. This is improper. DTSC *must* first find that complying with the standards would preclude the remediation, both as proposed or in a revised form, before it proceed with the plan and a Management Plan. DTSC cannot make this finding without first proposing and analyzing an alternative remediation that would not destroy all the wetlands, or that would disturb far less of the wetlands on the property.

Finally, the Centennial RAP is inconsistent with LUDC Sec. L-II 4.3.17(C)(8), which states that if wetlands or riparian areas are to be mitigated using the creation of on-site or off-site wetlands or riparian areas, then these replacement areas must ensure "full replacement of wetland or riparian areas lost at a minimum of not less than a 2:1 ratio"). Here, in contrast, the mitigation level is set at only 1:1.

The RAP and any environmental review document that assesses it must be consistent with the General Plan and the Land Use and Development Code's aims to protect, preserve, and increase wetlands and riparian areas.

C. The Centennial RAP is inconsistent with nearby Grass Valley General Plan Designations, despite plans for near-term annexation.

The RAP acknowledges that the Centennial Site is within the City of Grass Valley's sphere of influence, and that it is designated for near-term annexation. RAP p. 19; *see also* Grass Valley Spheres of Influence (May, 2012) (showing the Centennial Site within a "near-term" annexation zone), *available at* https://www.cityofgrassvalley.com/sites/main/files/file-attachments/cityspheres_d_053012.pdf?1565198864. However, the RAP fails to consider whether the planned remediation is consistent with any City of Grass Valley General Plan designations. In fact, the Site is largely pre-designated "BP," for "Business Park," but portions of the Site are also pre-designated "UMD," for "urban medium-density." *See* City of Grass Valley Sphere of Influence Plan Public Review Draft (Feb. 2011) Figure 4-2, p. 4-8, *available at* https://www.mynevadacounty.com/DocumentCenter/View/14667/61-Public-Review-Draft-GV-SOI-Plan-Update-2-2011-Attachment-1-PDF. There is no discussion in the RAP or the MND of whether the planned remediation will be consistent with those planned designations.

DTSC should consider whether the planned remediation is consistent with these City designations, and whether configuring the planned remediation differently could achieve greater consistency. In particular, DTSC it should consider whether the planned "Mine Waste Consolidation Area," identified on figure 5 of the RAP, could be configured differently to avoid inconsistency with the City's UMD General Plan

designation. As currently planned, the consolidation area will be remediated to commercial/industrial standards, and a Land Use Covenant will be enacted to restrict future residential use of that area. In so doing, the RAP and Land Use Covenant will result in inconsistency with the City's UMD designation, which requires between 4 and 8 residential units per acre. City of Grass Valley 2020 General Plan, p. 3-3 *available at* https://www.cityofgrassvalley.com/sites/main/files/file-attachments/general_plan_2014_website_copy.pdf?1570425933. By reconfiguring the southern portion of the consolidation area to avoid the UMD zone, and remediating the southern portion to residential standards, the RAP could allow for eventual urban development of that area.

Furthermore, the RAP should elaborate on whether the planned remediation will permit the City eventually to realign the intersection of Spring Hill and Centennial Drives, which currently do not directly intersect on Idaho Maryland Road. See RAP p. 11, Inset 2.4. The City should be permitted to evaluate the grade and location of the plan to cap the contaminated materials on the Centennial Site to avoid any future conflicts with plans to develop the road and any utilities in that area.

V. Conclusion

As set forth above, the MND does not come close to satisfying CEQA's requirements. It improperly segments the Centennial RAP from the IMM Project, thereby failing to provide a clear and complete project description and failing to analyze the cumulative impacts of the IMM Project on the remediation effort. The MND also fails to describe the Project setting and fails to provide a complete analysis of Project impacts and feasible mitigation measures. At the same time, ample evidence demonstrates that a fair argument exists that the Project may result in significant environmental impacts. In light of this evidence, CEQA requires that an EIR be prepared.

For this reason, and because the Project conflicts with core policies of the County's General Plan, Land Use and Development Code, and Zoning, our clients respectfully request that DTSC not consider or approve the RAP until an EIR that examines the impacts of the IMM Project, the Centennial RAP, and alternatives to them is prepared. Because the County is the lead agency for the IMM Project, which depends on approval of the Centennial RAP, the County should act as the lead agency for both projects. DTSC should participate in that environmental review process as a responsible agency to ensure it adequately addresses the impacts of the Centennial RAP that are within the jurisdiction of DTSC. However, DTSC should not approve the Centennial RAP until a comprehensive EIR analyzing the whole of the project, including the IMM Project, has been prepared and certified.

Very truly yours,

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