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13
14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **IN AND FOR THE COUNTY OF FRESNO**

16 CENTER FOR BIOLOGICAL
DIVERSITY, EUGENIA MELESIO,

17 Petitioners,

18 vs.

19 SAN JOAQUIN VALLEY AIR POLLUTION
20 CONTROL DISTRICT, the GOVERNING BOARD
21 OF THE SAN JOAQUIN VALLEY AIR
22 POLLUTION CONTROL DISTRICT, and DOES 1-
20,

23 Respondents,

24 CHARLES VAN DER KOOI, LYNETTE VAN DER
25 KOOI, CHARLES VAN DER KOOI DAIRY
26 and DOES 21-50,

27 Real Parties in Interest.

) Case No.

)
) **VERIFIED PETITION FOR WRIT
OF MANDATE**

)
) [CCP § 1085, § 1094.5; Public
Resources Code § 21000 et seq.

) (California Environmental Quality Act)]

1 by dairies before it escapes into the atmosphere and converts this methane to energy,
2 Respondents arbitrarily failed to meaningfully analyze the adoption of this effective
3 mitigation measure.

4 3. The EIR also failed to adequately analyze the significant impacts to a range
5 of environmental resources including air quality, hydrology and water quality, and biological
6 resources, dismissing these impacts in a cursory fashion based upon flawed and outdated
7 information that was not supported by substantial evidence.

8 4. Petitioners request that this Court vacate and set aside the Project, related
9 approvals and the certification of the EIR because Respondents failed to comply with the
10 CEQA.

11 **JURISDICTION AND VENUE**

12 5. This Court has jurisdiction over this action pursuant to California Code of
13 Civil Procedure sections 1085, 1094.5, 187, and 526, and Public Resources Code sections
14 21168 and 21168.5. This Court has the authority to issue a writ of mandate directing
15 Respondent to vacate and set aside its approval of the Project and certification of the EIR for
16 the Project under the Code of Civil Procedure sections 1085 and 1094.5.

17 6. Venue for this action properly lies in the Fresno County Superior Court. The
18 proposed Project is located in Fresno County and the District is a local air pollution control
19 district with its principal office located in Fresno County.

20 **THE PARTIES**

21 7. Petitioner CENTER FOR BIOLOGICAL DIVERSITY (“Center”) is a non-
22 profit, public interest corporation with over 40,000 members and offices in Joshua Tree, San
23 Francisco, Los Angeles and San Diego, California; as well as offices in Arizona, New
24 Mexico, Oregon, Vermont, and Washington, D.C. The Center and its members are dedicated
25 to protecting diverse native species and habitats through science, policy, education, and
26 environmental law. Recognizing that global warming from society’s emission of greenhouse
27 gases is one of the foremost threats to the Center’s members and their recreational, spiritual,

1 vocational, educational, aesthetic and other interests in the earth's environment, biodiversity,
2 and public health, the Center's Climate Law Institute works to reduce United States
3 greenhouse gas emissions and promote sound conservation strategies in order to protect these
4 interests. Center members reside in Fresno County.

5 8. The Center and its members would be directly, adversely and irreparably
6 affected, by the Project and its components, as described herein, until and unless this Court
7 provides the relief prayed for in this petition.

8 9. Petitioner EUGENIA MELESIO is a resident of rural Fresno County, where
9 new and expanding dairy development is now occurring. She is a taxpayer in the County of
10 Fresno, and is a person whose own medical, economic, personal, aesthetic, and property
11 interests will be severely injured if the approvals of the Project are not set aside pending full
12 compliance with CEQA and other laws. Petitioner Melesio uses and enjoys the County's and
13 state's natural resources, and brings this petition on behalf of all others who share common
14 interests and who are too numerous to be named and brought before this Court.

15 10. As a resident within the County of Fresno, Petitioner Melesio is directly and
16 beneficially interested in and aggrieved by the acts of Respondent as alleged below.

17 .Petitioner Melesio and the residents of Fresno County would be directly, adversely and
18 irreparably affected by the Project and its components, as described herein, until and unless
19 this Court provides the relief prayed for in this petition.

20 11. Respondent SAN JOAQUIN VALLEY AIR POLLUTION CONTROL
21 DISTRICT is one of 35 regional Air Pollution Control Districts (APCDs) in the State of
22 California. The San Joaquin Valley APCD is made up of eight counties: Fresno, Kings,
23 Madera, Merced, San Joaquin, Stanislaus, Tulare, and the San Joaquin Valley Air Basin
24 portion of Kern County. Each APCD is responsible for issuing regulations for stationary
25 sources that emit or may emit air contaminants within their district, developing air quality
26 control plans, and implementing pollutant control measures in their district. Respondent has
27 asserted that it is the lead agency under CEQA for the preparation of the EIR and for the

1 approval of the Project.

2 12. Respondent the GOVERNING BOARD OF THE SAN JOAQUIN VALLEY
3 AIR POLLUTION CONTROL DISTRICT is comprised of 15 locally elected officials and
4 appointees and provides leadership and direction of air pollution control activities for the
5 District. The Board ensures that the process of developing and implementing the policies,
6 procedures, plans, rules and regulations necessary to fulfill the state and federal mandates is
7 carried out in an open, public forum, as required by California law.

8 13. Real Party in Interest CHARLES VAN DER KOOI ("Applicant") is the sole
9 applicant for the entitlements that constitute the Project. LYNETTE VAN DER KOOI and
10 VAN DER KOOI DAIRY are also named in application documents. Based on the
11 Applicant's status as the sole identified applicant and developer for the Project, and on
12 Petitioners' information and belief, Applicant and LYNETTE VAN DER KOOI and VAN
13 DER KOOI DAIRY adequately represent the interests of any and all other non-joined parties
14 in the Project.

15 14. The Petitioner is currently unaware of the true names and capacities of Does
16 1 through 20, inclusive, and therefore sues those parties by such fictitious names. Does 1
17 through 20, inclusive, are agents of the SAN JOAQUIN VALLEY AIR POLLUTION
18 CONTROL DISTRICT, state, or federal government who are responsible in some manner
19 for the conduct described in this petition, or other persons or entities presently unknown to
20 the Petitioner who claim some legal or equitable interest in the Project that is the subject of
21 this action. The Petitioner will amend this petition to show the true names and capacities of
22 Does 1 through 20 when such names and capacities become known.

23 15. The Petitioner is currently unaware of the true names and capacities of Real
24 Parties in Interest, Does 21 through 50, inclusive. Does 21 through 50, inclusive, are persons
25 or entities presently unknown to the Petitioner who claim some legal or equitable interest in
26 the Project that is the subject of this action. The Petitioner will amend this petition to show
27 the true names and capacities of Does 21 through 50 when such names and capacities

1 become known.

2 **STATEMENT OF FACTS**

3 **I. BACKGROUND**

4 **A. Global Warming and the Analysis of Greenhouse Gas Emissions Under**
5 **CEQA**

6 16. California is not only extremely vulnerable to the impacts of global warming,
7 but is also responsible for a significant portion of the U.S. and global emissions of
8 greenhouse gases. Because most global warming emissions remain in the atmosphere for
9 decades or centuries, the quality of life our children and grandchildren experience depends on
10 if and how rapidly California and the rest of the world reduce greenhouse gas emissions.
11 Although research indicates that some climactic changes are now unavoidable, aggressive
12 reductions in emissions can avoid drastic global warming impacts predicted for the end of the
13 century, including temperature rises between 8 and 10.5° F, 90% loss of the Sierra snowpack,
14 22-30 inches of sea level rise, and 4-6 times as many heat-related deaths in major urban
15 centers.

16 17. California has set emission reduction targets in order to combat global
17 warming. Under the California Global Warming Solutions Act of 2006 ("AB 32"), State
18 emissions levels must be reduced to 1990 levels by 2020. Under Executive Order S-3-05,
19 emission levels must be reduced to 80% 1990 levels by 2050. At the time they were passed,
20 the emission reduction targets set by AB 32 and Executive Order S-3-05 roughly
21 corresponded to the level of reduction scientists deemed necessary to stabilize the climate.
22 However, based on the alarming and unpredicted rate of loss of Arctic sea ice and other
23 recent climate change observations, leading scientists have now concluded that deeper
24 reductions are necessary to stabilize the climate at a level that would avoid truly devastating
25 impacts.

26 18. Large confined animal feeding operations like the proposed Project generate
27 large quantities of methane, a greenhouse gas about 21 times more potent than carbon

1 dioxide, and nitrous oxide, a greenhouse gas about 310 times more potent than carbon
2 dioxide. Animal agriculture is responsible for 18 percent of all greenhouse gas emissions
3 resulting from human activity, including 35-40 percent of global methane emissions and 65
4 percent of nitrous oxide emissions. However, many viable mitigation measures exist to
5 reduce these impacts. For example, if best practices for manure methane mitigation from
6 confined animal feeding operations were adopted, including the efficient collection and
7 processing of manure methane emissions in anaerobic digesters for use as fuel, total U.S.
8 agricultural methane emissions could be reduced by 20 to 40 percent, and additional
9 greenhouse gas reductions would be achieved through displacement of fossil fuels.

10 19. An analysis of impacts from a Project's generation of greenhouse gases is
11 required under CEQA. In passing Senate Bill 97 (2007), the State of California explicitly
12 recognized that greenhouse gas emissions are an important environmental issue that requires
13 analysis under CEQA. SB 97 requires the Office of Planning and Research to prepare
14 guidelines "for the mitigation of greenhouse gas emissions or the effects of greenhouse gas
15 emissions *as required by* [CEQA], including, but not limited to, effects associated with
16 transportation or energy consumption." (SB 97, codified as Pub. Res. Code § 21083.05)
17 (emphasis added.) SB 97 "confirm[s] that GHG emissions are a significant adverse effect
18 under" CEQA. (Senate Bill Analysis for SB 97). As recognized in the Senate Bill Analysis
19 for SB 97, "[t]he analysis of GHG impacts under laws like CEQA, and its federal counterpart
20 NEPA, is not new, nor did it commence with the passage of the California Global Warming
21 Solutions Act of 2006." (*Id.*)

22 20. In January 2008, CAPCOA released a white paper titled "Evaluating and
23 Addressing Greenhouse Gas Emissions from Projects Subject to the California
24 Environmental Quality Act." CAPCOA is an association of air pollution control officers
25 representing all thirty-five local air quality agencies and air districts throughout California.
26 In its white paper, CAPCOA described and analyzed a range of approaches to determining
27 the significance of the impacts from a project's greenhouse gas emissions. Under

1 CAPCOA's analysis, the only two thresholds that were both highly effective at reducing
2 greenhouse gas emissions and highly compliant with AB 32 and Executive Order S-3-05
3 emission reduction targets were a threshold of zero or a 900-ton CO₂ eq. threshold.
4 CAPCOA ranked higher thresholds, such as those in the 40,000 – 50,000 CO₂ eq range, as
5 having a low effectiveness at reducing GHG remissions and a low consistency with AB 32
6 and Executive Order S-3-05 emission reduction targets.

7 21. On June 17, 2008, the Office of Planning and Research ("OPR") issued a
8 technical advisory titled "CEQA AND CLIMATE CHANGE: Addressing Climate Change
9 Through California Environmental Quality Act (CEQA) Review." The technical advisory
10 noted that "[I]ead agencies should make a good-faith effort, based on available information,
11 to calculate, model, or estimate the amount of CO₂ and other GHG emissions from a project,
12 including the emissions associated with vehicular traffic, energy consumption, water usage,
13 and construction activities." The technical advisory also stated that "[I]ead agencies should
14 not dismiss a proposed project's direct and/or indirect climate change impacts without careful
15 consideration, supported by substantial evidence."

16 **B. Public Health Impacts from Large Confined Animal Feeding Operations**

17 22. The residents of Fresno County are disproportionately burdened by
18 environmental health impacts. Almost one in five County residents has asthma, which is at
19 least three times the national average. A University of California Berkeley-funded survey of
20 all 7th graders in Fresno Unified School District last year indicated an asthma prevalence as
21 high as 24% or one in four children, a rate which has been rising half a percent or more per
22 year for the last dozen years. Average asthma costs (the cost of caring for one patient for one
23 year) are about \$3,500. Three hundred people die every year in Fresno County from
24 pollution-related causes; the average resident of Fresno County will die one to two years
25 earlier here than elsewhere, due to pollution.
26
27

1 23. Health risks to young children are especially amplified because of their
2 increased activity outdoors in comparison to adults. Resulting high exposure to ground
3 ozone in the summers, and to abundant small particulate matter (2-10 microns in diameter)
4 during all seasons, interferes and slows young lung development and drives developing
5 immune systems into increased detrimental allergic responses. Compromised lung
6 development and aggravated allergic response translates into significantly more asthma,
7 bronchitis, allergic diseases, allergic rhinitis (hay fever), sinusitis, ear infections and sore
8 throats for these children. Such children require more inhaled steroids and other medications
9 to control worsening problems with asthma, and often demonstrate poor social and physical
10 development, increased incidence of learning disorders, and decreased exercise tolerance
11 (which in turn contributes to childhood onset of morbid obesity).
12

13 24. Large confined animal feeding operations (CAFOs) like the proposed Project
14 exacerbate the already deleterious environmental health impacts experienced by Fresno
15 County residents. CAFOs generate large quantities of waste which includes manure, wash
16 water, coral runoff, stormwater runoff, irrigation runoff, spoiled feed materials, runoff from
17 feeds, dead animals, bedding and cleanup compounds. All of these types of waste pose a
18 significant impact on air quality and both surface and groundwater quality. Operations like
19 the proposed project produce large amounts of liquid waste stored in retention ponds or
20 lagoons which is oftentimes applied to cropland for disposal. There is a documented risk of
21 drinking water contamination caused by the mismanagement of the aforementioned types of
22 waste. Mismanagement of dairy waste has been documented to result in infectious diseases,
23 acute gastroenteritis, fever, kidney failure and even death. Infants exposed to water
24 contaminated by dairy waste, which contains high levels of nitrates, are at risk for
25
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27

1 methemoglobinemia, cognitive impairments and other developmental disabilities.

2 25. Similarly, dairy waste piles and lagoons create polluting air emissions known
3 as volatile organic compounds, such as hydrogen sulfide and ammonia. In particular,
4 hydrogen sulfide is a gas that can cause eye, nose and throat irritation, diarrhea, hoarseness,
5 sore throat, cough, chest tightness, shortness of breath, stress, sudden fatigue, headaches and
6 nausea. Dairy retention ponds or lagoons emit other toxic airborne chemicals that cause
7 inflammatory, immune, irritation and neurochemical problems in humans.

8
9 26. The greenhouse gases and other global warming pollutants generated by
10 CAFOs contribute to global warming, which is projected to exacerbate the environmental
11 health impacts already experienced in the Central Valley.

12 **II. PROJECT BACKGROUND, ENVIRONMENTAL REVIEW, AND APPROVAL**

13 27. The subject of this action is the Van Der Kooi Dairy, a proposed 3,200
14 Holstein milk cow dairy. The milk cow herd would be supported by 480 dry cows, 2,060
15 heifers and 380 calves. The dairy facilities would occupy 110 acres and require the
16 construction of barns, freestalls and wastewater lagoons. Liquid waste would be processed
17 through separator basins, which remove solids from liquids, and liquids would then flow to
18 wastewater lagoons. The Project site is located in Fresno County approximately three miles
19 from the community of Burrel and is currently used to cultivate field crops such as corn,
20 wheat and alfalfa.

21 28. The Notice of Preparation ("NOP") for the Project was issued on January 26,
22 2006. The San Joaquin Air Pollution Control District acted as lead agency even though the
23 project would result in a wide range of potentially significant environmental impacts outside
24 its expertise or authority, such as impacts to water quality and biological resources.

25 29. Respondents circulated a Draft EIR for the Project from November 14, 2006
26 though December 29, 2006. The Draft determined that the Project would not result in any
27

1 significant impacts.

2 30. Respondents circulated a Final EIR for the Project in November 2007. Prior
3 to EIR certification the Center submitted comments of the failure of the EIR to analyze the
4 impacts of the Project's greenhouse gas emissions. California Rural Legal Assistance, Inc.
5 ("CRLA"), counsel for Petitioner Melesio, submitted separate comments regarding the health
6 and water quality impacts resulting from the Project.

7 31. In May 2008, Respondents circulated a Supplemental EIR for the Project that
8 purported to analyze impacts from the Project's greenhouse gas emissions. Petitioners
9 submitted extensive joint written comments on the Draft EIR identifying the legal
10 inadequacies of the document, which are incorporated herein as if fully set forth. These
11 comments included, but were not limited to, the following:

12 a. The Supplemental EIR failed to adequately quantify the global warming
13 pollution generated by the project. Among other things, in evaluating Project impacts, the
14 EIR assumed that the environmental baseline was the level of dairy cows previously
15 permitted for the project site even though the existing environmental conditions at the project
16 site do not contain a daiary. The Supplemental EIR also ignored significant sources of
17 Project greenhouse gas emissions, such as emissions from construction, energy use, and
18 transportation, as well as emissions from other global warming pollutants, such as black
19 carbon.

20 b. The Supplemental EIR's determination that the Project's global
21 warming impacts were less than significant was arbitrary and not supported by substantial
22 evidence. Respondent set a 42,000-ton CO₂ eq. threshold of significance based on a
23 comparison with significance thresholds for criteria pollutants under the Clean Air Act. In
24 setting forth this threshold, Respondent did not articulate an environmental objective to be
25 attained though application of this threshold or provide any scientific or factual evidence of
26 the effectiveness of a 42,000-ton CO₂ eq. threshold in controlling greenhouse gas emissions
27 or complying with the emission reduction targets set forth in AB 32 and Executive Order S-

1 3-05.

2 c. The Supplemental EIR failed to adequately mitigate Project greenhouse
3 gas impacts, or properly analyze and mitigate Project impacts to air and water quality. For
4 example, the EIR failed to discuss whether mitigation measures, such as lagoon liners, will
5 protect against the contamination of air and water resources. Effective mitigation measures
6 are critical because Title 27 of the California Code of Regulations has been found to be
7 “insufficient to prevent groundwater contamination from confined animal facilities.”

8 32. In September 2008, Respondents circulated a second Supplemental EIR that
9 purported to respond to comments on the original Supplemental EIR.

10 33. The Notice of Determination for the Project was signed on September 17,
11 2008.

12 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

13 34. The Center and Petitioner. Melesio have exhausted all administrative remedies
14 by submitting written comments on the Project to Respondents to request compliance with
15 CEQA and the completion of full and adequate environmental review. All issues raised in this
16 petition were raised before Respondents by the Center, Petitioner Melesio, and other members
17 of the public, or public agencies prior to approval of the Project.

18 35. The Petitioners have complied with Public Resources Code section 21167.5
19 by prior service of a notice upon Respondent indicating their intent to file this Petition. Proof
20 of Service of this notification, with the notification, is attached as Exhibit A.

21 36. The Petitioners have elected to prepare the record of proceedings in the
22 above-captioned proceeding or to pursue an alternative method of record preparation
23 pursuant to Public Resources Code Section 21167.6(b)(2). Notification of the Election to
24 Prepare the Administrative Record is attached as Exhibit B.

25 37. This petition is timely filed in accordance with Public Resources Code
26 section 21167 and CEQA Guidelines section 15112.

27 38. Respondents have abused their discretion and failed to act as required by law

1 in the following ways:

2 **FIRST CAUSE OF ACTION**

3 **(VIOLATION OF CEQA; EIR Does Not Comply With CEQA)**

4 39. Petitioners hereby incorporate by reference each and every allegation set
5 forth above.

6 40. CEQA requires a lead agency for a project to prepare an EIR that complies
7 with the requirements of the statute. The lead agency must also provide for public review
8 and comment on the project and associated environmental documentation. An EIR must
9 provide sufficient environmental analysis such that decision-makers can intelligently
10 consider environmental consequences when acting on proposed projects.

11 41. Respondents violated CEQA by certifying an EIR for the Project that is
12 inadequate and fails to comply with CEQA. Among other things, Respondents:

13 a. Failed to adequately disclose or analyze the Project's significant impacts
14 on the environment, including but not limited to, the Project's impacts on global warming,
15 hydrology and water quality, biological resources, air quality, and public health;

16 b. Failed to provide a stable and consistent description of the Project;

17 c. Failed to adopt a consistent and appropriate environmental "baseline"
18 for analysis of the Project's environmental impacts;

19 d. Failed to adequately analyze the significant cumulative impacts of the
20 Project;

21 e. Improperly deferred impact analysis and mitigation measures;

22 f. Failed to adequately mitigate Project impacts;

23 g. Failed to consider a reasonable range of alternatives.

24 42. As a result of the foregoing defects, Respondents prejudicially abused their
25 discretion by certifying an EIR that does not comply with CEQA and by approving the
26 Project in reliance thereon. Accordingly, Respondents' certification of the EIR and approval
27 of the Project must be set aside.

1 for the Project in the separate environmental review of other projects for which the District is
2 lead agency.

3 50. Respondents' failure to develop a threshold of significance that it is applying
4 for general use through a public review process and adopt this threshold by ordinance,
5 resolution, rule, or regulation violates CEQA. Accordingly, Respondents' certification of
6 the EIR and approval of the Project must be set aside.

7 **FOURTH CAUSE OF ACTION**

8 **(VIOLATION OF CEQA; Inadequate Response to Comments)**

9 51. Petitioners hereby incorporate by reference each and every allegation set
10 forth above.

11 52. Respondents failed to respond adequately to comments submitted by the
12 Petitioners, other members of the public, and other agencies. Instead, the responses given to
13 numerous comments regarding the Project's impacts to biological resources, air quality,
14 global warming and greenhouse gas emissions, water quality, and regarding the adequacy of
15 the EIR's treatment of mitigation measures and alternatives are conclusory, evasive,
16 confusing, or otherwise non-responsive, contrary to the requirements of CEQA. In
17 particular, Respondents' response to comments did not resolve the fair argument made by
18 Petitioners of the potentially significant environmental effects of the Project's greenhouse
19 gas emissions irrespective of whether the Project met the threshold of significance
20 established by Respondent.

21 53. By failing to provide adequate responses to public comments and proposed
22 alternatives, Respondents failed to proceed in the manner required by law. Moreover,
23 Respondents' finding that adequate responses to comments were provided is not supported
24 by substantial evidence.

25 **PRAAYER FOR RELIEF**

26 WHEREFORE, the Petitioners pray for relief as follows:

27 1. For alternative and peremptory writs of mandate, commanding Respondent:

1 (A) to vacate and set aside approval of the Project, including approval of the Project
2 and associated permits;

3 (B) to vacate and set aside certification of the Final EIR for the Project;

4 (C) to prepare and certify a legally adequate EIR for the Project;

5 (D) to suspend any and all activity pursuant to Respondents' approval of the Project
6 that could result in an adverse change or alteration to the physical environment until
7 Respondents have complied with all requirements of CEQA and all other applicable state and
8 local laws, policies, ordinances, and regulations as are directed by this Court pursuant to Public
9 Resources Code section 21168.9.

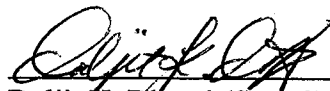
10 2. For a stay, temporary restraining order, preliminary injunction, and permanent
11 injunction prohibiting any actions by Respondents pursuant to Respondents' approval of the
12 Project and certification of the EIR for the Project until Respondents have fully complied with
13 all requirements of CEQA, and all other applicable state and local laws, policies, ordinances,
14 and regulations;

15 3. For costs of the suit;

16 4. For attorney's fees to be paid only to CENTER FOR BIOLOGICAL
17 DIVERSITY and its counsel pursuant to the Code of Civil Procedure section 1021.5; and

18 5. For such other and further relief as the Court deems just and proper.

19
20 Dated: October 16, 2008

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