

**Response to Comments on
Mitigated Negative Declaration
Halus Power Systems
Variance Application**

The City prepared a revised and recirculated Mitigated Negative Declaration (MND) dated October 11, 2012 for the Halus application. While responses to comments on a proposed Mitigated Negative Declaration (“MND”) are not required by the California Environmental Quality Act (“CEQA”; Pub. Resources Code, § 21000 et seq.), this Response to Comments document is provided to demonstrate the City’s careful consideration of the comments in compliance with CEQA. These responses provide the City’s good faith, reasoned analysis on the major environmental issues raised in the comments. The MND is available online at: <http://www.sanleandro.org/depts/cd/plan/polplanstudiesceqa/default.asp>

Discussion herein is also provided to set forth and clarify the relevant legal framework established by CEQA, set forth relevant information regarding the Project and the procedural history of the Project application and its environmental review, and to document and establish the bases for the findings and conclusions included in this “Response to Comments” document.

Response To Comments Structure and Contents:

This Response to Comments document is organized into the following sections:

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Section I: Responses to Comments

A. The Heron Bay Homeowners Association Comment letter including:

- 1. Letter from A. Alan Berger**
- 2. Letter/Report from Paul Taylor Consulting**
- 3. Letter from Benny Lee, President of the Heron Bay HOA**

B. Individual Comment Letters

Section II: Conclusions

Appendices:

- Appendix 1, All Responses to Comments (Section I, annotated)**
- Appendix 2, Photographs dated January 13, 2013 (six photographs)**
- Appendix 3, Excerpt from San Francisco Bay Trail East Bay Map**
- Appendix 4, Charles Bennett Résumé, ESA, Senior Managing Associate**

INTRODUCTION

The City received comments in response to the proposed Mitigated Negative Declaration including:

- A. Official Letters from Heron Bay Homeowners Association in the form of three different letters
 - 1) Letter by A. Alan Berger on behalf of the Association.
 - 2) The Paul Taylor Consulting Report and;
 - 3) Letter from Benny Lee.

- B. In addition, 20 individuals submitted comment letters

All comment letters listed above are attached hereto as Appendix 1 and have been annotated in the margins to depict the responses that pertain to the specific comments. Responses to Comments #1 through 30 are provided in Section I.

SECTION I - RESPONSES TO COMMENTS:

Response 1:

Pursuant to Public Resources Code Section 21064.5, a MND is properly used “when the Initial Study has identified potentially significant effects on the environment, but (1) revisions in the project plans or proposals made by, or agreed to by the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.” A lead agency “shall”—a mandatory term meaning “must”—adopt a negative declaration or mitigated negative declaration instead of preparing an EIR if there is no substantial evidence in light of the whole record that the project, as proposed or revised, may have a significant effect on the environment. (Pub. Resources Code, § 21080(c); CEQA Guidelines § 15070(a); *see* 1 Kostka & Zischke, *Practice Under the California Environmental Quality Act* (CEB2d Ed, 2012 Update), section 7.2, p. 393.)

Conclusion:

The City of San Leandro in its preparation of a MND has conclusively determined that the proposed project, with the incorporation of the mitigation measures agreed to by the applicant, clearly will not have a significant effect on the environment and that no substantial evidence in the light of the whole record has been presented to the City that the proposed project may have a significant effect on the environment.

Response 2:

Summary Conclusions Regarding Heron Bay Homeowners Association Comments (including those of Attorney A. Alan Berger, Paul Taylor Consulting and Heron Bay Association President Benny Lee)

The City has evaluated the comments of Mr. Berger, Mr. Taylor and Mr. Lee including the reports, findings and opinions therein, and has concluded that a substantial number of the assertions and conclusions made by them are based upon inaccurate information or unsubstantiated claims about the proposed project, its operating characteristics, location and the precise geography of the area. This lack of factual accuracy undermines the ultimate conclusions asserted in their letter and therefore, the City may disregard their comments and conclude that they are not “expert opinion based on fact” and that Mr. Berger, Mr. Taylor and Mr. Lee are insufficiently qualified to render such expert opinions and consequently, the City may conclude that their opinions should not be credited as “substantial evidence” under CEQA (See CEQA Guidelines section 15384).

As a preliminary matter, since Mr. Taylor’s letter is presented as expert opinion evidence on all environmental issue areas, and the Association relied on it for the conclusions drawn in their own comments, Mr. Taylor’s résumé and experience offered to support his asserted expert qualifications are relevant and important considerations for the City’s judgment in concluding whether he is sufficiently qualified to render such expert opinions on various issues, and consequently whether his opinions should be credited as “substantial evidence.” The City is entitled to judge the credibility of the witnesses and evidence presented to it determining whether such evidence is reasonable, credible, and of solid value so as to constitute the requisite “substantial evidence.”

For example, in the area of biological resources and particularly in the area of potential impacts to wildlife, including shore bird species, Mr. Taylor identifies objections and voices concerns over the findings including in the MND that rely on a report prepared by ESA, a San Francisco-based environmental consulting firm. In evaluating the information and conclusions provided in the MND, the City of San Leandro may consider Mr. Taylor’s qualifications in determining whether his opinions are “expert,” and may also consider whether his opinions are “clearly erroneous” or are “supported by fact,” in determining whether Mr. Taylor’s letter qualifies, in whole or in part, as substantial evidence.

Mr. Taylor’s résumé (attached to the comment letter) provides information on his academic and professional background. He holds a B.S. in Biology/Chemistry from Livingston University in Alabama; an M.S. in Environmental Sciences from Tulane University in New Orleans and in addition to being a Principal at Paul Taylor Consulting in Los Angeles, CA, is a member of Forensis Group, a placement firm for expert witnesses and consultants in a variety of professional disciplines. Although the résumé lists Mr. Taylor’s academic degrees, it does not describe specific experience, expertise or qualifications in the areas of visual analysis, biological resources, noise, geology/soils, hazards and hazardous materials, let alone specific subareas such as bayshore birds, aircraft navigational radar, or shadow effects upon which he opines. For instance, Mr. Taylor challenges the findings of the Mitigated

Negative Declaration related to biological resources, but provides no credentials that would serve to qualify him as an expert in that area. To be a credible expert in assessing the proposed project's potential impacts on biological resources, it would be reasonable to assume that he had relevant training and experience related to the bird species that populate the area near the proposed project. The submitted résumé lists no such training or experience. By contrast, ESA, the firm engaged by the City and the applicant for this project, is a well-regarded San Francisco-based environmental consulting firm with a 25-year history of work that is specific to the San Leandro shoreline. ESA has specific and relevant experience related to the species in the vicinity of the proposed project in that ESA prepared the mitigations plans that resulted in the design of the marshes along the San Leandro shoreline in the 1980's and has had an active and ongoing role in evaluating development and mitigation proposals in San Leandro since that time. The City in concluding that there is no substantial evidence in light of the whole record before it that the project, as revised, may have a significant effect on the environment as to biological resources including shore birds, did so in reliance upon the expertise of ESA, as documented in the MND.

As noted, in evaluating whether to accept the assertions, conclusions, findings and recommendations included in the Association's letter as "substantial evidence in the record," the City of San Leandro must determine whether Mr. Taylor's assertions constitute "expert opinion supported by fact."

The City has evaluated Mr. Taylor's report and the findings and opinions therein, and has concluded that a substantial number of the assertions and conclusions made by Mr. Taylor are based upon inaccurate information about the proposed project, erroneous descriptions of its location and a general lack of knowledge regarding the precise geography of the area, as documented herein. These errors, inaccuracies and lack of knowledge undermine the ultimate conclusions drawn in his report since they are not "expert opinion supported by fact." Specific responses to the biology and other assertions and conclusions from the Association and Mr. Taylor are included below.

Response 3:

The Association letter states "the proposed wind turbine is proposed to be located at the northern boundary of the Halus Power Systems property and the southern boundary of Association homes." This is incorrect.

As shown in the MND, the proposed project is located at a central point on the Halus property, not the northern edge of the property. The Halus property does not abut the Heron Bay property but is separated from it by the existing Alameda County Flood Control land comprising the San Lorenzo Creek.

Response 4:

The City provides the following information to clarify the MND process described in the comment. Halus Power Systems submitted an application to the City of San Leandro for a small wind turbine to be located at 2539 Grant Avenue. The City of San Leandro issued a proposed Mitigated Negative Declaration (MND) on May 22, 2012 and provided notice pursuant to and in compliance with State law and the City's notification policies.

The applicant met with the Heron Bay Homeowners Association at their regularly scheduled meeting on June 20, 2012. Based upon feedback received at the June 20th meeting and written comments on the MND, Halus agreed and the City provided additional information and revised and recirculated the MND, which was dated October 11, 2012. The MND was recirculated for a 30-day review period, with all required public notice, ending November 13, 2012. In addition, a notice of a December 6, 2012 public hearing before the San Leandro Board of Zoning Adjustments (BZA) was provided.

The December 6th hearing was continued to provide additional time to consider the comments provided during the comment period. A BZA meeting public hearing has been set for February 7, 2013 to consider the MND and the project application. The BZA hearing will be fully noticed as required.

Response 5:

The Association's comments regarding the Fair Argument Standard are noted and accurately state CEQA's relevant statutory standard. CEQA and its interpretive case law and guidelines set forth several other principles relevant to the application of this standard. For purposes of CEQA, "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (Pub. Resources Code, § 21080(e)(1).) "Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." (*Id.*, §21080(e)(2).)

In *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, the Court of Appeal reviewed and reversed a trial court judgment ordering the preparation of an EIR for a 219-lot hillside subdivision project and held the City's approval of a MND for the project was correct and in compliance with CEQA. In rejecting arguments that the subdivision project would have significant aesthetic impacts requiring an EIR, the Court of Appeal distinguished the same cases that have been cited and relied on by the Association and its attorney in their comments here, and the Court of Appeal stated in its analysis (in part): "Under CEQA, the question is whether a project will affect the environment of persons in general, not whether a project will affect particular persons." [citations] Furthermore, "California landowners do not have a right of access to air, light and view over adjoining property." [citation]."

It went on to further explain the reasons it rejected the project opponents' arguments of significant adverse aesthetic impacts: "It is important to recognize that there is no evidence that the housing project will impact any public views, vistas or scenic highways. 'That a project affects only a few private views may be a factor in determining whether the impact is significant.' [citing *Ocean View Estates* case] The initial study states, "that there are no scenic views or vistas located in the project vicinity. There is no evidence in the record contradicting this determination. ...". The Court of Appeal went on to cite a case holding that construction of a house with aesthetic impacts on only a few neighbors did not raise concerns affecting "the environment of persons generally" (*id.* at 902-903, citing *Association for*

Protection etc. Values v. City of Ukiah (1991) 2 Cal.App.4th 720), and to *distinguish* the case before it from *both* the *Ocean View Estates* and *Quail Botanical Gardens Foundation* cases (the same cases cited by the Association here) on the basis that the case before it presented no "evidence of adverse impact on a public view, park or trail...." (*Id.* at 903.) Further, it noted the only concerns raised regarding aesthetic impacts were "vague and unsupported by a specific factual basis or any photographic evidence" and concluded: "These vague complaints do not rise to the level of substantial evidence supporting a fair argument that the housing project may have a significant adverse aesthetic impact." (*Id.*)

As indicated by the above authority, to show that the MND is not appropriate and required by CEQA here, the record must contain "substantial evidence supporting a fair argument that the project may have a significant adverse aesthetic [or other environmental] impact." For purposes of CEQA, "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (Pub. Resources Code, section 21080(e)(1).) "Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." (*Id.*, section 21080(e)(2).)

For a fair argument to be supported by substantial evidence, it must be based upon an accurate factual understanding of the proposed project. After review of the Association's and Mr. Taylor's assertions, the City has concluded that the numerous errors, inaccuracies, incorrect references regarding the project description, the project site, its surroundings and biology and the numerous inaccurate conclusions that are not supported by fact, invalidate that a fair argument has been made regarding the project having a significant environmental impact on biological, or any other, CEQA resources.

Response 6:

No substantial evidence has been provided that would support a conclusion that *any* scenic vistas or public views are "compromised" or "destroyed." While CEQA does consider impacts to public vistas, there is no similar provision for impacts to solely private views. The referenced views are private views only, and are not pristine as they are comprised of fully developed, heavy industrial buildings, and uses, which include a sewage treatment plant, PG&E electrical transmission towers and sub station, other utility structures including a cell phone antennae, a junk yard, extended cranes, and numerous industrial buildings. Furthermore, the Association's comment that the MND should not be allowed to rely on the presence of existing power lines and what is already onsite, is directly contrary to CEQA. CEQA Guidelines section 15064(b), for example, states that "... an ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. ..."

The photo simulations provided by the applicant in the MND confirms it is not possible to stand at the southwest corner of Heron Bay and view both the bay waters and the Halus property simultaneously. The Halus property is located to the southeast of the southwest corner of Heron Bay and would be behind a person looking to the bay waters from that vantage point. The MND includes many photographs that simulate the proposed location of

the turbine from the Bay Trail. See MND photos 4-9 of 11 showing that trail users would be facing away from the Bay to see the proposed turbine, and generally looking across and towards existing industrial uses. The area adjacent to Halus on its north side is the San Lorenzo Creek canal, which is maintained by the County flood control district. The area adjacent to Halus is enclosed by locked gates at either end, is not authorized for public use, and is not part of the Bay Trail. The nearest segment of the Bay Trail is at the locked gate near the southwest corner of the Heron Bay site, and as shown in MND photos 9-10 of 11, affords no view of both the bay waters and the project. Public views comprising any scenic vista in the area would commence at the Bay Trail, just beyond the enclosed canal area looking west towards the marsh and baylands. The project site would not be within the scenic vista from this public vantage point. The MND photos and additional photos appended to these responses confirm the industrial nature of the views facing the subject property. Two of the photos were taken from the southwest corner of Heron Bay showing the Halus property and surrounding industrial property. The proposed turbine location is not in a scenic vista as supported by substantial evidence in the MND and record and there is clearly no potential for significant impact to the environment with respect to scenic vistas. The Association letter and the Taylor report provide no substantial evidence to show the turbine is in a scenic vista or significantly impacts public views.

Response 7:

The first part of the statement in Line 16 of Page 9 of the Association letter is accurate (“the applicant did not take photos from private property that was inaccessible to it or the general public”). The remainder of the statement asserts, without providing any photographic evidence to support the assertion, that 25 homes would have private views significantly adversely impacted by the proposed project. No evidence is provided to demonstrate an impact and no evidence is provided that would allow the City to conclude that any alleged “impacts” affecting this number of private views would constitute impacts that “affect the environment of persons in general” so as to potentially constitute significant adverse environmental impacts under CEQA.

The MND demonstrates the proposed turbine would be central to the Halus property, and therefore, given the significant distances between the turbine and the Heron Bay residences (the closest residence is well over 500 feet away from the proposed turbine location) it would not be predominantly visible from the entire row of approximately 25 Heron Bay homes on the southern border of the Heron Bay development. Further, any private views of the turbine from approximately half of this row of homes would be obscured, either totally or nearly so, by an intervening industrial building, the San Leandro Distribution Center building (2505-2515 Grant Avenue) which is approximately 600 feet long and 30 feet high, as well as backyard fences and numerous trees of significant height.

The MND also provided photo simulations, including sample photos from a publicly accessible trail only a few feet away from a Heron Bay fence on the southwest corner, that substantiates the de minimus character of the private view to the proposed turbine from that area.

Response 8:

These statements suggest and lead the reader to believe that that the proposed turbine would be located within approximately 300 acres of protected marsh and creek. This is incorrect. The proposed small wind turbine will be built on land that is zoned for heavy industrial uses and in no way will impact the bay and the marsh. The turbine would be built on private property owned by the Applicant, and which has been occupied by industrial uses for 40 years. The proposed turbine location is not in a scenic vista. The Association letter and Taylor report have provided no evidence to show the turbine is in a scenic vista or significantly impacts public views.

Response 9:

Contrary to the comment, twenty-five (25) homes would not have direct and unimpeded views of the proposed turbine. As the proposed turbine would be located at the center of the Halus property, it would not be visible from the entire row of approximately 25 Heron Bay homes on the southern boundary of the Heron Bay development. Most of the 25 homes along the southern border of Heron Bay would have significantly obstructed views of the Halus property and the turbine, as the adjacent San Leandro Distribution Center building at 2505-2515 Grant Avenue is approximately 600 feet long and 30 feet high and would block most or all of the view for many of these houses. Additionally, as shown in the photos in the MND and these responses, existing private trees, landscaping and fencing at the rear of the homes and County trees and landscaping along San Lorenzo Creek would significantly block the view from the majority of the homes.

Response 10:

The proposed wind turbine includes blades that are approximately 20 feet long and 2 feet wide (area about 50 square feet). A comparison of the proposed turbine to a Cessna 500 aircraft spinning atop a tower on a horizontal axis is inaccurate in the context of realistic and substantive analysis of visual and environmental impacts. A Cessna 500 aircraft has the following approximate characteristics: wing area of 300 square feet; wingspan of 50 feet; total length of 45 feet; height of 15 feet; and a fuselage large enough to seat 8 people. The Association's assertion is provided without any photographic or other evidence, or reference to proportions, mass, surface area and shape. Reliance upon this characterization creates a significant misunderstanding of the nature and dimensions of the proposed project and a misleading and inaccurate portrayal of visual impact. Neither the assertions nor the conclusions are supported by facts.

Response 11:

Mr. Taylor's and the Association's letters incorrectly characterize the location and distance from homes, distance from the Bay Trail, and the number of homes with views of the proposed turbine. The Google Earth aerial photo included in the MND confirms that the Halus property does not abut any of the Association homes and is separated from the homes by the Alameda County Flood Control land including parts of the San Lorenzo Creek. Further, the proposed project site is located near the center of the Halus property, more than 500 feet from the nearest Heron Bay residence. There are approximately 8 residences located roughly 500-600 feet from the proposed turbine. Approximately 10 residences are

located 600-700 feet from the proposed turbine and approximately 50 residences are 700-1,000 feet away from the proposed turbine. The remaining 500+ homes are approximately 1/4 mile or more from the proposed turbine. This incorrect description of distance and the affected homes overstates the number of affected views, the magnitude of visual effect and renders conclusions that are not supported by fact. As shown on the map submitted with the MND the proposed wind turbine location is greater than 350 feet from the Bay Trail.

Response 12:

The Association claims that the turbine would be “in the middle of such protected areas” is incorrect. The proposed turbine would be constructed on land that is zoned for and has been occupied by heavy industrial uses for decades. Any claim that the proposed project would be within a protected area is untrue and unsupported by fact.

Response 13:

While there may or may not be other similarly located wind turbines, the Association has provided no evidence to suggest that there have been proposals that have been denied or rejected near or adjacent to the Bay Trail. The project will not and cannot be “precedent setting” given that pursuant to the City of San Leandro’s Zoning Code, any similar application would require discretionary review by the BZA in the form of a Variance application. The findings required for approval of a Variance ensure that each project would be considered on its merits and each application would be the subject of a public hearing and review process.

Response 14:

While a project’s “purpose” is not the focus of the CEQA process, for purposes of clarification, it should be noted, that Halus’ clients are located throughout the United States and Europe. Few customers, if any, visit the subject property. The primary purpose of the proposed turbine is to allow onsite research and development and onsite testing of new wind turbine components.

Response 15:

The MND included a comprehensive shadow analysis prepared by ESA, a highly qualified environmental consulting firm, which concluded that the proposed project would have no significant shadow or shadow flickering impacts. ESA used the shadow evaluation standards as used in the City of San Francisco (as the City of San Leandro has no similar standards for shadow evaluations). ESA evaluated the worst-case shadow condition that would be created by the proposed turbine which is one hour after sunrise and one hour before sunset on any day of the year, including winter solstice on December 21st (the day of the year with the longest shadows cast). ESA concluded that the turbine would cast no shadows on any of the Heron Bay properties or any other publicly accessible properties. The analysis reflects a very minor amount of shadowing with a very short duration and during an insignificant time period (the winter solstice, December 21st) on an area not designated as either Bay Trail or open space, but is a maintenance access road area for the San Lorenzo Creek. This area, which extends from the southwestern corner of the Heron Bay homes to the southeastern corner of the Heron Bay homes on both sides of the creek, is closed to public access as flood control land. In further evidence that this is not publicly accessible open space, there are a

number of “no-trespassing signs” posted by Alameda County at both ends of the maintenance area citing a \$500 fine for trespassers. See attached Appendix 2, Photographs dated January 13, 2013 “Alameda County Flood Control/No Trespassing.”

The MND and these responses comprise substantial evidence that no significant shadowing effects will occur from the project. There is nothing in Mr. Taylor’s résumé showing any expertise in shadowing effects or analysis, therefore, his conclusions are not expert opinion supported by facts and are not substantial evidence of a fair argument with respect to shadowing.

Response 16:

The MND included many specifically labeled photographs provided by the applicant that were taken from multiple vantage points on the public trails and adjacent to the Heron Bay backyards on the Southwest corner of that property. The applicant accurately simulated the height of the proposed turbine by initially photographing a crane extended to the turbine height. The photos were carefully and precisely augmented with a simulation of the turbine. This detailed effort confirmed that the scale was accurate. Finally, the proposed project is not within a “*scenic vista*” but is located in a fully developed industrial area. The Association and Mr. Taylor have provided no evidence nor any fair argument that the proposed project would have a significant environmental impact with respect to shadowing or visual resources.

Response 17:

A comment letter submitted by Mr. Benny Lee is incorporated and adopted by the Association. The Association in “incorporating and adopting” Mr. Lee’s opinions used those opinions to support the conclusions drawn in the Association letter. Mr. Lee’s role as president of the Heron Bay Homeowners Association is the sole qualification cited for the Association’s reliance upon the points raised in his letter. No résumé or citation of experience were submitted to support his qualifications; no evidence established his opinions are intended as expert. Mr. Lee’s opinions, and his qualifications to assert those opinions are relevant and important considerations for the City’s judgment in concluding whether he is sufficiently qualified to render expert opinions on various issues, and consequently whether his opinions should be credited as “substantial evidence.” The City is entitled to judge the credibility of the witnesses and evidence presented to it determining whether such evidence is reasonable, credible, and of solid value so as to constitute the requisite “substantial evidence.” The City of San Leandro must determine whether Mr. Lee’s assertions constitute “expert opinion supported by fact.”

The following are responses to the points raised by Mr. Lee in his letter (and incorporated and adopted into the Association letter):

17-1: CEQA is not an economic protection statute. Landowners surrounding a proposed project do not state a valid CEQA concern when they express fears that the proposed project could adversely affect their property values. (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 903, citing *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 157 Cal.App.4th 1184, 1205 [CEQA is “not a fair competition statutory scheme” and “[t]herefore, the

economic and social effects of proposed projects are outside CEQA's purview."].) Further, "A social or economic change by itself shall not be considered a significant effect on the environment." (14 Cal. Code Regs. ["CEQA Guidelines"], section 15382.) Finally, Mr. Lee's comments regarding Halus' economic status relative to any other business or homeowner are not relevant to the discussion of environmental impacts.

The Association makes similar comments to Mr. Lee's on property values (pp. 14-15), to which the above also applies. There is no evidence to support the Association's further comments on urban decay from assertedly unsightly projects.

17-2: Mr. Lee's comments regarding his family's experience with migraines do not rise to the level of substantial evidence supporting a fair argument that the proposed project may have a significant adverse environmental impact or affect persons in general. Mr. Lee's inference that there could be a relationship between the proposed project and the triggering of health effects of persons in general is speculation that is not supported by fact.

17-3: Comments noted. Mr. Lee's observations, opinions and statements regarding concerns that the proposed project may invite other wind turbines is speculative and unrelated to the environmental effect of the proposed project and contains false assertions. While there may or may not be other similarly located wind turbines, no evidence has been provided to suggest that there have been proposals that have been denied or rejected near or adjacent to the San Francisco Bay, or that there would be an increase in future proposals as a direct result of the proposed project. The project will not and cannot be "precedent setting" given that pursuant to the City of San Leandro's Zoning Code, any similar application would require discretionary review in the form of a Variance application. The findings required for approval of a Variance ensure that each project would be considered on its merits and each application would be the subject of a public hearing and review process. Personal opinions regarding the appearance of wind turbines are not a relevant consideration in the City's consideration of environmental effects of the proposed project. Speculation regarding the potential for wind turbines in other locations is not supported by facts. Further his opinion is unsupported by any photographic or other evidence including photographic evidence from relevant public views accessible to and documented by the applicant.

The statement "*There are no metropolitan areas with Wind Turbines propagated with one or many throughout the United States*" is false. San Francisco has several wind turbine installations. The San Francisco Department of Building Inspections (DBI) is currently accepting applications for small wind turbine permits. The City of San Francisco defines small wind turbines as having a rated capacity of 50 kilowatts or less. Permits for wind turbines have been prioritized by DBI as written in the revision of AB-004 which establishes guidelines for exceptions to the equal treatment of permit applicants and that permit applications for work consisting solely of wind power generation systems be given priority assignment for plan review and issuance. Another example of an urban turbine in the US is a large wind turbine (Vestas 225kW) about 350

feet away from the Cleveland Browns Stadium (seating capacity over 73,000) and about 200 feet away from the Great Lakes Science Center in Cleveland, Ohio.

17-4: See Response 17-1. No substantial evidence was provided to support Mr. Lee's claim regarding the potential impact of noise that would result from the proposed turbine.

17-5: The comment that the proposed wind turbine is "directly adjacent to homes and a natural estuary" is not correct. See Response 11 regarding the project description. A full discussion of the noise specifications and operational characteristics of the proposed turbine is included in the applicant's submittal.

17-6: No evidence was provided by Mr. Lee to support the asserted conclusions regarding the potential for risks associated with the construction and operation of a small wind turbine. The proposed turbine will be subject to all applicable building code requirements, and the City's review and approval of a building permit, and any adopted conditions of approval, which will govern its ongoing maintenance and operations and ongoing code enforcement by the City of San Leandro to ensure that the turbine operates safely and complies with City requirements. Reference to the potential success or failure of any business is speculation that isn't supported by evidence provided by the commenter. A single small wind turbine installation is unlikely to transform the parcel to which it is attached to a degree that would encumber the property with undue liability in case of bankruptcy or abandonment.

17-7: See Response 14. Also, the relative merits of cost savings and/or alternative energy saving options are not relevant to a discussion of the environmental impacts of the proposed project.

The City carefully considered Mr. Lee's comments and has determined that they do not constitute substantial evidence of a fair argument on any of the asserted impacts.

Response 18:

The ESA report, upon which the City relied in preparing the Mitigated Negative Declaration, includes references to specific studies and methods upon which this conclusion was reached. The Association and Mr. Taylor provided no credible evidence that would contradict the findings in the ESA report. Furthermore, as noted previously, there is no evidence that Mr. Taylor is an expert on biological resources, including avian species or their habitats.

Response 19:

The particulars of in-flight mating patterns of any avian species are irrelevant to the analysis of potential collisions between birds and turbines. The ESA report correctly focuses on the potential for collision of all special status species that were identified as having potential to nest, forage, or otherwise move through the vicinity of the marsh. Mitigation measures developed with the guidance of the California Department of Fish and Wildlife (CDFW) formerly the California Department of Fish and Game, were incorporated into the project to further reduce the impacts of the low potential for collisions. The Northern Harrier is not a Federal or State Threatened and/or Endangered Species, but a State Species of Special

Concern. The Department submitted no comments on the MND and no expert biological evidence has been submitted to support the Association's assertions.

Response 20:

The ESA report acknowledges the unavailability of direct comparisons to small wind turbines adjacent to the Bay, but provides information from other turbines and published results from elsewhere as the basis for the assessment of this project.

The Association has provided no evidence for their claim nor have they asserted any expert qualifications in the area of biological resources. The photos of various birds provided in the Taylor Report are illustrations and definitions that are readily available from online or other sources and provide no evidence to their existence in the vicinity of the project, nor do they demonstrate any potential significant impact that would contradict the findings of the ESA report. While it is considered an important habitat area for birds and other wildlife, and is managed by the City for the purpose of conservation and recreational use, the San Leandro Shoreline Marshlands are not a bird sanctuary. The U.S. Fish and Wildlife Service administers seven National Wildlife Refuges in the San Francisco Bay National Wildlife Refuge Complex. The roughly 30,000-acre Don Edwards San Francisco Bay National Wildlife Refuge in the South Bay is the closest of these National Wildlife Refuges to the East Bay. More information on the San Francisco Bay National Wildlife Refuge Complex can be found on the U.S. Fish and Wildlife Service website.

Under the Bird Checklists of the United States and San Francisco Bay and San Pablo Bay National Wildlife Refuges web pages of the US Department of the Interior/US Geological Survey website it states "*The San Francisco Bay is the largest estuary on the west coast of the United States. Its 1600 square miles of wetlands and open water are home to about 800,000 water birds at any given time and to millions during peak migration.*" The marsh area near Heron Bay comprises a small increment (less than 1 square mile) of these approximately 1600 square miles. The Association does not provide any evidence that there could be anywhere close to '*nearly one million birds*' in the small marsh area near the Halus property. Additionally, the marsh area location is adjacent to a highly developed industrial and residential area, and not within the San Francisco Bay National Wildlife Refuge system. The Association presented no evidence that the 300 acres (actual number is 406 acres) of the San Leandro Shoreline Marshlands constitutes an area that "would be affected by the presence of the turbine". Therefore the conclusions urged by the Association are not supported by fact.

More information can be found on the US Dept. of the Interior website:
<http://www.npwrc.usgs.gov/resource/birds/chekbird/r1/sfbay.htm>

Response 21:

The City initially circulated a Mitigated Negative Declaration and Initial Study in May 2012. The California Department of Fish and Wildlife (CDFW) responded with a letter dated June 29, 2012 wherein they commented on the proposed project and recommended adoption of certain avoidance and minimization measures. Subsequent to that date, a CDFW staff biologist Danielle Roach conducted an onsite review at the Halus property and stated in a subsequent email dated January 11, 2013 when asked if she received the revised MND *“I did receive the Recirculated MND at the Regional office sometime in October. I reviewed the document and saw that you included the measures we had spoken about in person and in phone calls, and since you will be involved in an adaptive management plan with CDFW (we have a new name now) throughout the life of this project, I did not feel that additional comments were necessary.”*

All of CDFW’s recommended mitigations were included in the revised and recirculated MND, which is the only MND currently under consideration. CDFW stated its satisfaction with the MND and submitted no comments or additional recommendations.

Response 22:

The updated Taylor report (page 7 & 8) makes assertions regarding potential impacts related to hazards and hazardous materials including a comment regarding the “extremely large” size of the radar signature for wind turbine blades. Mr. Taylor’s résumé includes no references to training, expertise or qualifications regarding radar or airport/airplane operations, and no other evidence to qualify him as an expert on this subject. Furthermore, the City notes that consistent with Mitigation Measure 3 in the MND, the United States Federal Aviation Administration (FAA), the agency authorized to review wind turbine applications, has issued a “Determination of No Hazard to Air Navigation” on June 21, 2012 for the project, which is on file in the project materials and available for review at the City planning department during normal business hours. Moreover, in that determination, Air Traffic Control stated that the project would not have a significant adverse effect on their operations. Mr. Taylor’s assertions are not supported by the facts. Further, Mr. Taylor incorrectly claims that the location of the proposed wind turbine is less than 500 feet from the nearest Heron Bay residence. All Heron Bay residences are in excess of 500 feet from the proposed turbine location.

The FAA imposed no conditions on the project in their determination. However, the FAA will require a Notice of Actual Construction or Alteration be completed and returned to their office should the project be abandoned or within 5 days after the construction reaches its greatest height as a routine matter. The FAA required no marking or lighting for the turbine given its proposed location and relatively low height.

An example of a wind turbine in similar proximity to an airport is a turbine that Halus supplied to the Cuyahoga County Fairgrounds, located only 3.7 miles from the Cleveland Hopkins International Airport in Cleveland, Ohio. Additionally, that turbine is much larger than the proposed turbine and is a 500kW unit on a 60-meter (197 feet) tower. The total

height of the Cuyahoga County Fairgrounds wind turbine is 2.5 times taller than the proposed project at over 265 feet versus 100 feet for the proposed wind turbine.

Another example (still from the Halus client list) is a wind turbine supplied by Halus Power Systems to Pearl Road Auto in Cleveland, which is 6.9 miles from the Cleveland Hopkins International Airport in Cleveland, Ohio. This 175 foot tall turbine is also much taller than the proposed turbine. The Halus Power Systems property is 7.82 miles from the Oakland International Airport. The existence or absence of a public benefit is not determinative of a significant impact under CEQA.

Response 23:

The proposed project is consistent with all applicable noise standards and requirements of the City of San Leandro. No evidence was provided to support the Association's claims regarding the potential impact of noise that would result from the proposed turbine, and nothing in Mr. Taylor's résumé shows any expertise in acoustics. San Leandro land use policies address noise impacts and restrict noise levels at property boundaries. San Leandro General Plan Chapter 6 contains a Noise section on pages 6-16 to 6-27 and 6-43 to 6-45. Table 6-1 on page 6-23 has the Noise Compatibility Standards for San Leandro Land Uses and addresses noise impacts and restricts Exterior Noise Exposure for Industrial and Manufacturing land within 500 feet of a residentially zoned area to 65 dBA. As noted in the MND, potential noise levels are expected to be well below this threshold. The project noise specifications provide information that was intended to be conservative by providing noise level data related to a much larger turbine (Vestas 225kW model) than the one proposed (Vestas 50kW). The smaller turbine will generate even lower sound levels. The evidence in the record and reasonable inferences from it show that the proposed turbine will not exceed 55dBA at the Halus property boundary line nearest the Heron Bay Homes, or any part of the property boundary line, and therefore its noise effects are well within the City's noise standard policies. The record supports the MND conclusions on the potential noise impacts; no substantial evidence has been submitted showing a fair argument on this subject.

Responses to Taylor Report

Mr. Paul Taylor of Paul Taylor Consulting submitted an extensive letter dated November 9, 2012 (referred to above as the Taylor Report and attached hereto as part of Appendix 1) in response to the Mitigated Negative Declaration. In addition to Responses 1 through Response 23, the following responses address the comments provided in the Taylor Report that have not already been addressed.

Response 24:

Mr. Taylor's description overstates the actual size and dimensions of the proposed turbine tower, effectively doubling them. The turbine tower dimensions are approximately 6 foot at the base and 3 feet at the top. His description is not supported by fact. The proposed small wind turbine is approximately 20 feet shorter than the nearby existing PG&E power lines and is narrower in profile. The PG&E power line towers are approximately 16 feet at the base.

Response 25:

See Response 1. Based upon the review of the application, the MND, the comments and these responses and the other documentation in the record, the City has concluded that a Mitigated Negative Declaration is appropriate as there is no substantial evidence in light of the whole record that the project, as revised, may have a significant effect on the environment.

The comment grievously misstates the nature and role of MNDs under CEQA, describing them as a short cut designed to avoid an EIR. Mitigation Negative Declarations are a well-established, long-standing process under CEQA. The City's MND complies with all applicable substantive and procedural requirements for MNDs as set forth in CEQA and the CEQA Guidelines. Information about the potential impacts of the project was disclosed through the MND and circulated for public review and comment. In this case, the City went beyond CEQA requirements, and prepared responses to comments on the MND. The environmental analysis and information on the project will be considered at a public hearing, in full compliance with CEQA and the City zoning ordinance.

Response 26:

There are no authorized public trails along the southern boundary of the Heron Bay properties. The Association of Bay Area Governments website displays the official Bay Trail map of the East Bay (attached hereto as Appendix 3, Excerpt from San Francisco Bay Trail East Bay Map), and shows the Grant Avenue parking lot access to the Bay Trail. This parking lot is also shown in several of the photo simulations submitted with the application and included in the MND. Photo 1 is taken from the Grant Avenue parking lot access to the Bay Trail. Photo 2 is taken walking north from the parking lot along the Bay Trail and the existing junk yard property and PG&E power lines are visible in the photo to the east. Photo 3 is taken as the Bay Trail turns roughly 90 degrees to the west towards and along the PG&E substation and towards the Bay. The Bay Trail does not continue eastbound along the San Lorenzo Flood Canal between the Heron Bay and Halus properties. There are no current or future planned Bay Trail extensions on either side of the San Lorenzo Creek at any point between the Heron Bay property and the Halus Power Systems property, and no authorized public use of this county flood control area. The Bay Trail is a planned recreational corridor that, when complete, will encircle San Francisco and San Pablo Bays with a continuous 500-mile network of bicycling and hiking trails. More information and Trail maps can be found at www.baytrail.org. No part of the Bay Trail adjoins the Halus property; the property is easterly of the trail away from the marshes and bay waters.

Response 27:

The existence or absence of wind turbine siting criteria is not a concern under CEQA.

Response 28:

Comment noted. No evidence has been provided by Mr. Taylor to indicate that the proposed project would result in any habitat degradation nor has Mr. Taylor established any expertise on the subject. See Response 1.

Response 29:

The Association has provided no evidence to support a conclusion that these impacts would result in contradiction of ESA's findings. The ESA report considers the effects of the location and operation of the proposed turbine as a central focus of the analysis, including the height, power rating, and rotor sweep area. It specifically considered the potential effects of the turbine on birds with different flight characteristics, and evaluated the risk of nest or home range abandonment in the context of other pre-existing sources of disturbance in the vicinity, such as transmission line towers, recreational trail use, and off-leash dogs.

Response 30:

As stated in Response 27, the existence or absence of wind turbine siting criteria is not a concern under CEQA. However, the 500 feet setback requirement proposed by Mr. Taylor will be met under the proposed project, as the turbine would be located a minimum of 500 feet from any residence.

Response 31:

The application submittal materials identify a number of significant public benefits that would result from the proposed project. Those public benefits include local green/high tech jobs, research and development investment that creates local revenues, and compliance with state and local mandated policies which promote green / wind energy projects to reduce greenhouse gasses, reduce dependence on foreign energy sources and reduce the overall consumption of fossil fuels. In any case, public benefits, or lack thereof is not determinative of a significant impact under CEQA.

B. Individual Comment Letters

The persons listed below submitted individual comment letters. The individual letters have been annotated to direct the reader to the appropriate responses above.

1. John and family
2. Qui Chau
3. Rose Ng
4. Wenqiang Ye and family
5. Mrs. Wong
6. Jenny Chen
7. Stephanie L'Archuleta
8. Ms. Min Mei Huang, Mr. Jiming Duan, Ms. Jennifer Duan
9. Hong Dalisay
10. Rod Harryman
11. Frederick and Kimmerly Simon
12. Roland Phillips
13. Misha Wyatt
14. Carlos P. Ocampo
15. Mary Lavodnas
16. Tony Ferreira
17. Enkargian Arslan
18. Katherine Lan
19. Mitch Huitema
20. Howard Kerr

Section II: Conclusion

This Response to Comments document fully illustrates that, despite the number of comments provided by the public as part of the review of the Mitigated Negative Declaration, the project is one that is fully compliant with all requirements of the City, the FAA and the State Department of Fish and Wildlife. The proposed use is permitted and complies with all applicable zoning standards, with the exception of its height which is the subject of the variance request. The project will not conflict with any scenic vista, nor will it have any significant impacts to public views. Contrary to the many erroneous statements by the Heron Bay Association and their consultant, Paul Taylor, the proposed project is located easterly of the shoreline so that the proposed turbine would be *behind* any person taking in the view of the Bay. Further, as stated above, the project site is an industrial property zoned by the City's to allow the most intensive industrial land uses.

The City of San Leandro in its preparation of a MND has conclusively determined that the proposed project, with the incorporation of the mitigation measures agreed to by the applicant, clearly will not have a significant effect on the environment and that no substantial evidence in the light of the whole record has been presented to the City that the proposed project may have a significant effect on the environment.