1140 South Coast Highway 101
www.cerf.org info@cerf.org

P.O. Box 475 Descanso, CA 91916
www.sofar.org sofar@nethere.com

P.O. Box 779 Descanso, CA 91916
www.cnff.org info@cnff.org

December 9, 2015

County of San Diego
Planning and Development Services
5510 Overland Avenue
Suite 310
San Diego, CA 92123

Via Hand Delivery

Re: **Appeal of Case No. PDS2015-AA-15-003; Covert Canyon SAEO**
Submitted on behalf of Appellants Robin and Clark Williams; Environmental Groups: Cleveland National Forest Foundation; Save Our Forest and Ranchlands, and Coastal Environmental Rights Foundation. Notice of Intent to Sue For Violations of the California Environmental Quality Act

Dear Planning Commissioners:

Put yourself, for a moment, into the shoes of Robin and Clark Williams, and consider the timeline of events since they purchased their property in the mid-1980s. Both Vietnam Veterans, Robin worked an office job for the government, while Clark owned a small machine shop. At 3,200 feet elevation above the town of Alpine, surrounding by the Cleveland National Forest, they found their slice of paradise: 40 acres of undeveloped Agriculture Preserve land (under Williamson Act Contract).

If ever there was something to look forward to in retirement, this was it. There was only one other long-time resident in the secluded valley, with whom they quickly became friends. In such a remote setting, so far from any other neighbors, it makes sense to be cordial, to have someone who can help in a fire, or flood, or when your car just won't start for whatever reason. There is an access easement across the neighbor's property whereby the Williamses reach their home. But it's been that way for decades and there are no extra barriers or fences to make the drive difficult. The neighbor's property has an old airstrip on it, but planes rarely if ever land here, and use of the strip is becoming less frequent each year.

What is most attractive about the property, of course, is the simple peace and tranquility of the valley. That's why people leave the City and move to the backcountry in the first place, after all. Other than the wind, the bark of a dog or two, and the sounds of occasional waterfowl inhabiting the ponds that form for a large part of the year, there is virtually no disruption of the peaceful stillness one expects in such a remote location. The screech of hawks seeking prey in the field grass, or the coyotes howling at night are constant reminders of the natural world inhabiting the surrounding hillsides, trees, and waterways.

For 20 years Clark and Robin lived in harmony with their lone neighbor and the surrounding wildlife. The ponds would fill up with the first season's rain each fall, and typically persist well into the springtime (and sometimes beyond). During big storms the water would cascade over the valley's edge in a dramatic waterfall visible from points a thousand feet below. The inland summers are hot, and brush needs to be cleared to protect against the spread of wildfires. The winters are cold, with many mornings showing frost on the tips of the chaparral and on the leaves of the many oaks surrounding both properties. A thin layer of ice that forms on the surface of the ponds will melt away before midday, and wildlife are seen drinking from them daily. The changing seasons bring new and different challenges to residents of the unincorporated county, but again, that's part of the allure of living in "the country."

Now imagine after 20 years of tinkering with the property, planning for eventual retirement, and living on the land more often and for longer periods as that milestone approaches, you wake up one day to find the neighbor's property is for sale. Who would purchase his 160 acres but someone who shares the same appreciation for peace, quite, and nature?

But then you find out the buyer is Marc Halcon, owner of the American Shooting Center in Kearny Mesa. In short order, he's got earth moving equipment in the ponds, obliterating the wetland plants and excavating soil to build berms at the far end of the airstrip, right on the National Forest boundary (later it's found out he graded over the line and into the forest). In the blink of an eye, there are three shooting ranges constructed, and the obnoxious sounds of firearms shooting now regularly overpower the historic tranquility of the remote valley. One day, a locked gate shows up across the access easement, just at the entrance to the mountain-top valley. Halcon claims it is necessary to keep out any riff raff who might wander up the road. Never mind the fact that there's already a locked gate at the bottom of the hill, and that virtually no one has come up the road unintentionally in the 20 years Robin and Clark have lived there. And while Halcon conveniently maintains an alternative access around the gate to his homestead, Robin now has to exit her car twice a day on a steep, rutted, and sometimes muddy stretch of the access road. At night, it's pitch dark and Halcon's men often pull the chain so tight and twist the lock in such a way that Robin has to call Clark to help her get through. Halcon calls it but a "minor inconvenience."

And now, instead of watching deer and other wildlife drink lazily from the ponds, the Williamses get to watch dozens of men in camouflage fatigues milling about Covert Canyon day in and day out. They shoot hand guns, shotguns, assault rifles, and 50 caliber long guns that look like something straight out of the movie Rambo. They shoot down the old runway, within feet of the Williams easement. Understandably, it makes them uneasy accessing their property when the shooters are so close. The sound of each shot ricochets around the basin. Sometimes a dozen people shoot at the same time, and it sounds like the finale of a fireworks show. The wildlife that used to hang out around the valley doesn't come around much anymore.

Rumor has it these "trainees" are private mercenaries of war, and that Marc Halcon is partnered with the renowned firm "Blackwater" (the contract/shadow security force that works in Iraq and Afghanistan, often on the taxpayer's dime). Unmarked cars, often with no license plates, come and go from the property. Maybe these are actual military vehicles? No one is willing to give the Williamses

any information, so they have no way of knowing. One day, helicopters land on the airstrip. They find out a film crew is there to film for the television show "Special Ops Mission – Operation Covert Canyon."

How did this happen? What happened to the bucolic backcountry life at the top of the hill? Does Halcon even have permits for this activity?

A quick trip to the County confirms there are no permits associated with the APNs for Covert Canyon. Not a single land use permit has been pulled. Structures have been erected without permits. Habitat has been destroyed without permits. Wetlands have been dredged and graded without permits. But now that the County is informed, notices are issued to stop training activities until a Major Use Permit is obtained.

Relief. Or not?

Halcon has money, and a bevy of ex-military and law enforcement friends who like to shoot at the range. Halcon plays the PR game, and invites them to come up and shoot for free. Is anyone surprised at how vocal these folks are with their support for Halcon's scheme? Halcon goes on the offensive, alleging the Williamses' manufactured home is squatting on his land. It's not true, but the truth doesn't matter to Halcon and his cronies. Now we're in the realm of backcountry politics, small town rumors, and Planning Group shenanigans. Halcon's supporters regularly plant vitriolic comments slandering the Williamses whenever the news websites accurately reflect Halcon's wild-west, cowboy style approach to property and gun rights.

It's ironic; Halcon is the most patriotic, pro-government guy out there when he's winning contracts to train the rank and file law enforcement and military personnel. Yet, he quickly becomes the oppressed head of the 2nd Amendment militia when another branch of government wakes up and tells him he isn't above the law and must get land use permits like anyone else trying to build a paramilitary training camp in the backcountry. He tries a bunch of tricks to get around the regulations, but in the end relents and actually applies for his permits.

Then, in 2010, Covert Canyon finally comes before the County Planning Commission. Halcon brings in a swat officer in full tactical uniform from the El Cajon Police department to tell the Commission how nice the range is, and how important it is for his team to shoot up there. Halcon submits letters from friends who used to work for federal agencies to claim that his shooting range is "already approved." Interestingly, subsequent investigations with these agencies confirms that their members were not supposed to be training at unpermitted shooting ranges, and association with Covert Canyon is quickly disavowed.

At the County Planning Commission, Halcon hits a dead end. Literally. Covert Canyon is a dead end at the terminus of a substandard dirt road, and it's located right in the middle of a high fire danger area. In 2010, County officials and residents of the backcountry were still smoldering over the losses from years of devastating backcountry wildfires. There was the 2003 Cedar Fire that burned almost 275,000 acres and killed 14 people and injured 1004, destroying 2,232 residences, 22 commercial properties, 566 outbuildings, and 148 vehicles. The 2006 Horse Fire burned nearly 17,000 acres just to

the south of Alpine and the Covert Canyon property, resulting in 23 injured persons. (Interestingly, firefighting helicopters actually used the onsite ponds for water to fight the Horse fire). The 2007 Witch Fire burned nearly 200,000 acres, destroyed 1,125 residences, 509 outbuildings, killed two people, and injured 40 firefighters. Massive evacuations. Massive losses. Massive financial and emotional costs. And on the heels of these fires and the toll they took on the community, Halcon wants to drop his paramilitary training facility in a remote valley right at the end of a steep and bumpy road, right in the middle of the Cleveland National Forest.

Despite his "state of the art" fire protection plan, with its controversial and largely untested "shelter in place" strategy, the Planning Commission refused to approve Halcon's Major Use Permit. Staff found that the project inconsistent with State and County fire regulations, that the access road had insufficient dimensions for access and evacuation, that it violated Dead End Road Length regulations, that it had inappropriate road gradient and surfaces, and that no exceptions to these regulations applied. Staff also found the property too far from essential fire protection and emergency services, and that it required a second means of ingress and egress. Rather than suffer a final decision of denial, Halcon instead agreed to have the issue remanded to staff so that they can work on options for resolving the substandard road and access issues.

However, Halcon knows how the game is played. He knows Covert Canyon is so remote, no law enforcement or code enforcement officer is going to make it up to his property to catch him in the act of training on weekends, holidays, and generally "under the radar." Plus, code enforcement officers are often ex-law enforcement themselves, and the Sheriffs are friends with the guys who like to shoot at the range, so what is the likelihood anyone's going to actually hold Halcon accountable? Halcon, through his lawyers, reminds the County that he's just an ordinary citizen, shooting guns with his invited guests as anyone would be allowed to do on virtually any backcountry property.

But what about Robin and Clark Williams? Having put Halcon through the ringer, he makes clear he's going to do anything and everything to make their lives a living hell. He periodically puts locks on the gate and doesn't tell them there is a new key. He redirects water so that it now floods over the portion of the easement that enters the Williams property. Halcon pepper sprays Clark sitting in his car one night and claims it was self-defense. He poisons their dog, and cuts their utility lines. Halcon's ranch hand decides to mock up a couple of pumpkins as Robin and Clark at Halloween, and puts bullets in for the eyes as he sets them on fence posts where Robin and Clark will see them on the way to work each morning. The message being sent is clear. The same ranch hand gets drunk and screams at them from the property's edge. They do not engage, as the ranch hand is typically armed.

The Sheriff eventually comes out, but it's always deemed a "he said, she said" situation. Halcon trains law enforcement, so he knows how to work the system. And of course, the Sheriffs know Halcon, as so many of them train down at the American Shooting Center. Despite the County's multiple notices of violation, Halcon continues to both conduct himself, and to allow others to conduct, training at Covert Canyon.

And how do we know this? More men in fatigues and vests showing up in unmarked SUVs. Automatic rifles that would otherwise be illegal. Advertisements of training on gun enthusiast's

websites. More than 50 people on the property for Sonrise Community Church's "On Target With Jesus Shooting Ministry." Seriously, a shooting ministry. The Williamses remain vigilant, taking hours of video and thousands of pictures of the groups that continue to come and shoot at Covert Canyon. They're always gone by the time code enforcement comes out, if they come out at all.

Over the years, the Williamses and their attorney give code enforcement staff mountains of evidence of ongoing illegal training at Covert Canyon. Remarkably, code enforcement staff takes the evidence and then hides behind a claim of privilege when refusing to confirm whether investigations are ongoing. When a complaint is filed regarding Halcon allowing a "High Threat Protection Specialist Training" class administered by Mira Costa College to occur at Covert Canyon, the County politely declines to pursue the tip and refuses to even contact the instructors conducting the courses whose names they were given. It's almost as though the County is making excuses for Halcon. Once, Clark Williams captured a photograph of senior County code enforcement officer cruising the Covert Canyon property in the passenger seat of Halcon's Range Rover. Cozy.

Monitoring Halcon's illegal activity, and trying not to get shot, have taken the place of Robin and Clark's dream of retirement to a quiet farm property in the heart of San Diego's backcountry.

Now imagine after all of the years of effort, and after all of the failures of code enforcement and the County Sheriff to provide relief, you suddenly receive a piece of paper in the mail indicating the County has determined Halcon's training of law enforcement and military personnel doesn't require a Major Use Permit after all. Multiple meetings have been held in secret between Halcon's lobbyist and high level County officials. The Williamses haven't been given notice of any meetings. The Planning Group hasn't weighed in. No public hearings were held. County staff certainly had the discretion to reach out to the community given the long history of contention surrounding the property and use. Yet, the decision seems to have been made by Halcon's lobbyist and the Director alone. The record offered to the public shares no light whatsoever on the about-face. It's a done deal, no explanations offered.

With a straight face, the County seems to wonder, would anyone like to appeal?

This correspondence and accompanying evidence is submitted on behalf of Robin and Clark Williams, the formal appellants. These arguments and evidence are also submitted on behalf of the Cleveland National Forest Foundation, Save Our Forest and Ranchlands, and the Coastal Environmental Rights Foundation (Environmental Groups). While the Environmental Groups did not formally appeal the Stipulated Administrative Enforcement Order (SAEO), they nonetheless join in support of the appeal, and make the allegations contained herein to exhaust administrative remedies in anticipation of litigation. As the County is well aware, given the allegations of CEQA violations contained herein, the matter may, and likely will, be appealed to the County Board of Supervisors.

To summarize the Williamses and Environmental Groups' position: the County cannot legally allow commercial firearms training at Covert Canyon absent review pursuant to the California Environmental Quality Act, and without amendment of the underlying Agricultural Preserve and cancellation of the applicable Williamson Act contract. Equitably, Covert Canyon does not deserve the special treatment it has received to date.

The Planning Commission is respectfully requested to grant the appeal, order training activities to immediately cease, and direct staff to remain steadfast in its historic interpretation that Covert Canyon commercial desires require a Major Use Permit.

Legal Analysis and Discussion

Since acquiring the property in 2005, Covert Canyon LLC and its owner, Marc Halcon, have consistently disregarded County laws with respect to operations of the paramilitary training facility at issue in this Stipulated Administrative Enforcement Order (SAEO). Since purchasing the land, they have constructed multiple large gun ranges without as much as a grading permit. They have had commercial military and paramilitary training, including helicopter landings, hand gun and large caliber rifle shooting, tactical casualty care, live fire action drills, practical surveillance detection drills, vehicle tactic training, and a host of other classes without obtaining a County Major Use Permit

At the request of Covert Canyon's lobbyist, County staff alleges it has re-imagined the use category based upon the changes in the current proposal from that submitted back in 2007. At that time, the County states, the original proposal contained "an urban warfare training house, helipad, simulated ship training structure, and 45 feet repelling and training tower for training open to the general public."

As recounted by staff in an email sent to Channel 8:

> "At the applicant's request, the County of San Diego's Department of Planning & Development Services (PDS) conducted a careful review of the revised proposed project, and previous land use and permitting determinations. The Director determined that a modified project, limited in scale and scope for government military and law enforcement firearms training, is classified as Law Enforcement Services as defined in SDCZO section 1346, and the applicant could pursue permits accordingly. The interim use is only allowed while the applicant pursues the Site Plan permit or Major Use Permit for possible permanent use and complies with the outlined performance measures in the Stipulated Administrative Enforcement Order (SAEO)."

(http://www.cbs8.com/story/30428952/county-approves-military-training-at-covert-canyon-without-public-hearing)

Substantial evidence in the record does not support staff's and Covert Canyon's revisionist history. At multiple times since 2007, the County has taken the position that commercial firearms training alone triggers the SDCZO section 1350 "Major Impact Services and Utilities" use, and therefore a Major Use Permit is required. Indeed, Halcon himself admitted during a 2007 forum on Paramilitary Training Camps that the County had shut him down from firearms training for military and law enforcement. (8/12/07 Citizen's Oversight Forum on Paramilitary Training Camps; Covert Canyon; http://www.copswiki.org/Common/M115). The notion that a significant change in the project warrants reclassification of use was fabricated out of whole cloth.

The staff Report further seeks to improperly narrow the scope of the Planning Commission's review to just the Director's determination that the property classification of the use of Covert Canyon

is consistent with the Law Enforcement Services use type generically described in SDCZO 1346. In so doing, staff seeks to remove from consideration the specific entitlements and limitations contained in the SAEO. This is problematic for multiple reasons.

First, the so-called conditions of the SAEO create a new right for Covert Canyon that did not previously exist. While the staff report does almost nothing to describe the long history of violations at the site, the years of communication with neighbors and environmental groups regarding the violations, or the mountain of evidence transmitted to County staff, the fact remains that this is resolving one or more outstanding enforcement actions, and creates a new outline for the activities and impacts that will occur at Covert Canyon. Therefore, the scope of activities to be allowed at Covert Canyon directly relates to the propriety of discretion exercised by the Director in reinterpreting the applicable use classification from Major Impact Services and Utilities to Law Enforcement Services.

Second, the County has now created a new, enhanced definition of the Law Enforcement Services use. Through his discretionary review of the Covert Canyon circumstances, and determination that the uses approved in the SAEO qualify as such, the Director has set a new precedent for the scope of activities applicable to each and every zone that allows Law Enforcement Services. The SDCZO Use & Enclosure Matrix identifies all of the zones that allow for the Law Enforcement Services use, but among the more sensitive (in addition to A72) are the Rural Residential, Limited Agriculture, and General Rural zones. Therefore, before the firearms training sues can be applied to the Law Enforcement Services use, the County must consider the full scope of impacts that would occur throughout the County if law enforcement and military firearms training are allowed on each and every parcel of land where such permission might reasonably be sought. Arguably, the County will now be required to allow any such property owner to conduct commercial firearms training on an interim basis so long as a permit application is eventually submitted.

Therefore, while staff may believe that the contents of the SAEO are not subject to the Administrative Appeal Process, they are certainly relevant to the question of whether the County should have conducted CEQA review prior to making its use determination and issuing the SAEO.[1]

I. The approval of interim Law Enforcement Services activities at Covert Canyon pending application for and decision on a future discretionary permit, absent CEQA, is an abuse of discretion.

The original Major Use Permit application was pending for approximately *eight years* (staff has repeatedly confirmed it was still "in process" despite Planning Commission rejection). The SAEO allows temporary uses at Covert Canyon so long as an application is filed within a certain timeframe. So, how long will these "temporary" uses actually last while the new Site Plan or Major Use Permit are processed?

[1] It should also be noted that County staff, at p. 7-6 of the Staff Report relies on specific conditions in the SAEO as evidence to justify the Director's determination. (e.g. "The Enforcement Order incorporated specific enforcement mechanisms to ensure the use of Covert Canyon remains within the range of the law Enforcement Services use type"). Clearly, the Director believes the contents of the SAEO frame his decision on the use classification.

Notwithstanding disagreements between appellants and the County with regard to the appropriateness of the SDCZO 1346 use classification for activities in the SAEO, addressed further below, the County simply does not have the authority to issue the SAEO without *first* conducting CEQA review. Put another way, the County cannot delay environmental review by piecemealing purported ministerial or "non-project" approvals and those for future, admittedly discretionary permits.

A. The County's SAEO scheme is predicated upon Covert Canyon applying for a Site Plan Permit or Major Use Permit, both of which are discretionary approvals that trigger CEQA review.

There can be no credible dispute that even under the County's new scheme, in order for Covert Canyon to permanently conduct Law Enforcement Services provided for in the SAEO, it will subsequently be required to obtain a discretionary Site Plan or Major Use permit. SDCZO 2720, et seq. identifies the permitted uses for the A72, "General Agricultural" zone. Section 2722 identifies "Law Enforcement Services" and references section SDCZO 6905. Section 6905 prescribes additional requirements applicable to law enforcement services in the A72 zone.

SDCZO 6905 requires "Site Plan review in accordance with the Site Plan Review Procedure commending at Section 7150," including review and evaluation of the Site Plan by the Director, with content to be included as determined by the Director. Another way of putting it-- the Director will exercise discretion when dictating the information to be included in the Site Plan, and will exercise discretion to ensure all elements of the proposed law enforcement services "are consistent with the intent and purpose and meet the requirements of this section and applicable zone requirements." (See SDCZO 6905(c)). The Director is empowered to condition the Site Plan to ensure buildings and structures are located in such a way that they appear attractive, and are "agreeably related to surrounding development and the natural environment." The Director is charged with ensuring earth-moving and grading are executed so as to blend with the existing terrain both on and adjacent to the site. (Id.).

The general provisions of SDCZO 7150 et seq. would also apply to the subsequent process, and are intended "to provide a review procedure for development proposals which is concerned with physical design, siting, interior vehicular and pedestrian access, and the interrelationship of these elements." The Director is responsible for administering the procedure and for reviewing and evaluating all Site Plans. (SDCZO 7154, 7158). The Director is expressly empowered to exercise discretion when approving Site Plans, and to "eliminate or mitigate significant adverse environmental effects disclosed by an environmental impact report." (SDCZO 7158(b)). The Director must make findings that the proposed development meets the intent and specific standards and criteria of the relevant zoning ordinance, and that the proposed development is consistent with the General Plan. The Director has broad discretion to approve or modify Site Plans pursuant to conditions it deems "reasonable and necessary or advisable under the circumstances." (SDCZO 7164; See also, *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, for the proposition that a decision will be deemed discretionary for purposes of CEQA when the agency has the ability to require mitigation for impacts identified in an environmental review document).

There can be no disputing that Site Plan review and approval shapes the project through the exercise of discretion by the Director, and therefore will require CEQA review.[2]

B. CEQA review must occur at the earliest possible time in the approval process, and must include "the whole of the action." Here, that means CEQA is required prior to issuance of the SAEO.

Generally speaking, CEQA applies to discretionary projects approved by public agencies. (California Public Resources Code (PRC) 21080(a)). As was shown above, both the Site Plan and Major Use Permit processes implicate discretionary review, and neither can be issued without CEQA being triggered.[3]

The primary question, then, is one of timing. For private projects, "approval occurs upon the *earliest commitment* to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or *other entitlement for use of the project*." (CEQA Guidelines 15352(b), emphasis added). When considering whether an agency has committed to a particular use, courts typically deal with circumstances where an agency makes clear it will not allow an activity or development until some future point in time *after* CEQA review has been completed. The current situation is virtually unheard of, where the County **has already approved on an interim basis the very use (and impacts associated therewith) that are to be the subject of an admittedly discretionary future permit**. (See *Stand Tall on Principles v. Shasta Union High School District* (1991) 235 Cal. App.3d 772, 783). While the County can argue that future environmental review and the discretionary permitting process could result in denial of the permanent project, this would completely fail to address the temporary impacts that are permitted under the SAEO, and is therefore unlawful.[4]

The CEQA guidelines define "project" to mean "the whole of an action" that may result in either a direct or reasonably foreseeable indirect physical change in the environment. (CEQA Guidelines 15378(a)). The "California Supreme Court has considered how to interpret the word 'project' and concluded that CEQA is 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. '" (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal. App. 4th 1214,1223, quoting, *Friends of Mammoth v. Board of Supervisors* (1972) 8 Ca1.3d 247, 259). Agencies, therefore, are precluded from splitting larger projects into two or more segments or smaller projects, and putting off or avoiding CEQA review prior to implementation of one of the smaller segments. As one court put it, this ensures "that environmental considerations not become submerged by chopping a large project into many little

[2] That a Major Use Permit approval is discretionary and subject to CEQA is so beyond controversy, the specific code provisions dictating as much need not be repeated here.

[3] It should be noted, County staff expressly represented to the Planning Commission when it was hearing the Environmental Groups' request for right to appeal that Covert Canyon would be subject to CEQA review as part of its future permitting.

[4] Of further concern is the fact that the County will have inappropriately shifted the environmental baseline for the future environmental review such that the temporary uses become the starting point from which environmental impacts would be measured. (*Riverwatch v. County of San Diego* (2000) 76 Cal.App.4th 1428).

ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences." (*Burbank Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592; *Bozung v. LAFCO* (1975) 13 Cal.3d 163,283-284).

Here, the County is clearly failing to define the project as the both the temporary and permanent uses at Covert Canyon, and therefore approval of the SAEO without CEQA review amounts to illegal piecemealing. As noted prior, when courts have addressed issues related to the timing of environmental review and claims of piecemeal approvals, there have typically been questions regarding whether the preliminary approval commits the agency to a future course of action. Here, *the future course of action is a component of the temporary use permitted via the SAEO*! As such, the failure to conduct CEQA prior to its issuance is an abuse of discretion, a failure to proceed in a manner required by law, and an open invitation to litigation.[5]

II. The "Director's determination that the proper classification of the use of Covert Canyon is consistent with the Law Enforcement Services use type as described in ZO section 1346" is a discretionary project subject to CEQA.

The full extent of the County's consideration of CEQA compliance is a summary statement that, "The determination of use classification pursuant to Section 1220 of the San Diego County Zoning Ordinance is not a "project" as defined in the [CEQA] Guidelines Section 15378. The determination of use classification is an interpretation of the County Zoning Ordinance." County staff is sorely mistaken.

SDCZO 1008 empowers the Director to resolve ambiguities concerning the content or application of the zoning ordinance by ascertaining all pertinent facts and rendering a decision on the interpretation. However, there is absolutely nothing in section 1008 that makes such action ministerial or otherwise not subject to CEQA. Similarly, while SDCZO 1220 grants the Director authority to classify common uses according to use types, this activity (including the inclusion of such decisions on a prescribed "list") amounts to the exercise of discretion in the form of legislative activity, and therefore cannot occur without appropriate CEQA review.

There is no case, statute, or guideline that empowers the County to exercise substantial discretion and judgment to effectively legislate a definition of "Law Enforcement Services" that: (a) supplants the clear language of another zoning ordinance; (b) is inconsistent with historical interpretation of the SDCZO; and, (c) curries favor to the specific circumstances of an applicant long found in violation of the same compilation of statutes. No court will support the County's willingness to bend over backwards for this applicant, certainly not on the existing record.

Relying exclusively on the Director's powers contained in SDCZO 1220, staff claims that the determination that proper classification of the use of Covert Canyon is consistent with the Law Enforcement Services use type as described in ZO section 1346 is not a project. In essence, staff seeks to divorce its determination that law enforcement and military firearms training constitute Law Enforcement Services, from the specific factual circumstances surrounding the request from Covert

[5] The County has not claimed, and indeed it cannot, that the SAEO qualifies for a Class 21 CEQA exemption. (CEQA Guidelines 15321). None of the prerequisites of that exemption apply.

Canyon. This back-room deal that would resolve years of claims of improper use by residents *and the County* is as it seems: an *application by Covert Canyon* for amendment of the Law Enforcement Services use to include those activities it has been illegally conducting on its property for years.[6]

A. The Director's classification of use in the context of Covert Canyon's request was a legislative act subject to CEQA.

Pursuant to California Public Resources Code section 21065 and CEQA Guidelines section 15378(a), a "project" includes an activity directly undertaken by a public agency that has the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. Such governmental activity includes legislative acts such as implementation and amendment of zoning ordinances, general plans, and administrative regulations. At question here is whether the Director is legislating an expansion of the Law Enforcement Services use, or merely interpreting an activity as consistent with the description of the use. He is clearly legislating.

The key question the court will ask in resolving this distinction is whether the environmental impacts associated with the new use were considered when the zoning ordinance in question was first passed. The County will be hard pressed to argue the plain reading of SDCZO 1346 indicates outdoor firearms training impacts throughout the backcountry were among those contemplated when the ordinance was adopted. Certainly, the County has not provided substantial evidence that this is the case.[7]

SDCZO section 1346 defines Law Enforcement Services as, "the provision of police protection by a governmental agency, including administrative offices, storage of equipment and the open or enclosed parking of patrol vehicles." This definition does not leave much room for the flexibility of interpretation sought by Covert Canyon and the Director. From a facilities perspective, the "provision of police protection" is defined to include offices, storage, and parking. The County inappropriately seeks to expand the notion of police administrative offices to include long and short distance outdoor gun ranges. There is no substantial evidence in the record to support the notion that a typical police administrative office includes a gun range at all, let alone an *outdoor* range as contemplated by Covert Canyon.

Pursuant to SDCZO section 1220, "A list of common uses and the use types into which they are classified shall be maintained by the Director." For SDCZO 1346, the list says "See Section for details" and references *only* "Police Stations (public)" as the type of facility that would qualify as Law Enforcement Services. As noted, the "details" in that section indicate only offices, storage, and parking qualify for the use. The County has claimed, with absolutely no evidentiary support, that firearms training facilities are a typical component of police stations and therefore within the Law Enforcement

[6] The record is clear -- Covert Canyon, after years of violating the County's restriction on conducting training without a Major Use Permit, approached the County with the current, dubious scheme.

[7] Counsel for appellants sent the County a request for all relevant evidentiary documents pursuant to the California Public Records Act. To the extent non-disclosed documents support a claim of substantial evidence to support the decision, they will not be allowed before the court.

Services use. Appellants vehemently disagree, at least in part because if this was the case, the claim of need for private facilities like Halcon's would have to be untrue.[8]

Further, there is nothing to suggest that the noise, habitat, fire danger, air quality, water quality, or other impacts that could occur from an *outdoor* range were ever considered when the general "administrative offices" description was inserted in the statute. Importantly, the ordinance defines the use as "including," but does not include the typical phrase, "but not limited to." Nor does it say Law Enforcement Services "*may* include" the listed uses. The statute is clear, and the court will presume the County originally intended the description of compliant facilities to be limited to the finite list provided. Covert Canyon is not a police station. The County's effort must be called what it is: an expansion of the use beyond that written in the ordinance, or simply, an amendment.

Absent CEQA review, the County's legislative action is an abuse of discretion.

B. The County is not entitled to deference in the interpretation of SDCZO sections 1346 and 1350.

A county's interpretation of its own ordinances is entitled to considerable deference (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1129-1130), **unless that interpretation is clearly erroneous or unreasonable** (see *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 28).[9] Here, the County made two decisions. First, it made the decision to expand SDCZO 1346's clear and limited articulation of law enforcement services to include the outdoor firearms training (addressed above) as described and conditions in the SAEO. Second, it made the decision to ignore SDCZO 1350's description of typical "Major Impact Services and Utilities" as including "security, law enforcement, military, paramilitary type training facilities."[10] Neither decision will stand judicial scrutiny on the current record.

In the A72 zone, a SDCZO 1350 use requires a Major Use Permit. (SDCZO 2725(b)). "The Major Impact Services and Utilities use type refers to public or private services and utilities which have substantial impact." (Id.) The ordinance describes "typical" Major Impact developments to include places or uses involving security, law enforcement, military, and paramilitary type training facilities.

---

[8] Notably, for section 1350, there is listed *almost 90* different types of Major Impact Services and Utilities, reflecting an intent to capture a much wider variety of uses that require specific attention and conditioning, as would an outdoor firearms training facility.

[9] See also, *Stolman v. City of L.A.* (2003) 114 Cal.App.4th 916, 928:

> Courts interpret ordinances in the same way as they construe statutes. Ordinarily, questions of law such as interpretation of an ordinance are subject to de novo review. City contends that the zoning administrator's interpretation of the ordinance should be given great weight and substantial deference. "'While an administrative interpretation … will be accorded great respect by the courts and will be followed if not clearly erroneous' the court has the duty 'to state the true meaning of the statute finally and conclusively,'" notwithstanding the agency construction. **We may, therefore, consider the zoning administrator's interpretation, but we are not bound by it.** [Citations omitted, emphasis added].

[10] SDCZO 1350 further applies to "field medical training uses." The extent of Pig Trauma Training uses authorized by the SAEO expands the previously alleged legal nonconforming activity, thus providing yet another example of County staff's incorrect interpretation of its ordinance.

Importantly, in interpreting this provision of the Zoning Ordinance, staff does not provide any analysis of the statute, but instead summarily finds "the limited law enforcement and military training activities at Covert Canyon do not meet the substantial impact threshold required for classification within the Major Impact Services and Utilities use type." And what exactly defines that threshold? Staff does not cite to evidence in the record to support a determination that both law enforcement and military outdoor firearms training as described in the SAEO is better defined by SDCZO section 1346 than 1350. Indeed, the impacts that have occurred during illegal training sessions the last number of years, and will continue to occur under the SAEO, are substantial and better described as "Major Impacts".[11]

In legal terminology, staff's interpretation is both clearly erroneous and unreasonable.

And while there is nothing on the face of section 1346 that would lead a court to believe the County contemplated the litany of impacts associated with a Covert Canyon-esque Law Enforcement Service, the same cannot be said for section 1350. The County stretches to interpret "Law Enforcement" and "police protection by a governmental agency" to include both traditional law enforcement and government military agencies, while section 1350 **lists them both outright**.

Courts will also consider whether the County's interpretation has been consistent over time. It certainly has not. Multiple documents in the record evidence a history of County interpretation of firearms training activities at Covert Canyon as being sufficient to either reject a claim of section 1346 use, or to affirmatively ascribe a section 1350 use classification.[12] For instance, on May 25, 2007, Covert Canyon communicated to DPLU that the firearms training activities then being provided could be classified as Law Enforcement Services. The County rejected the contention. On October 9, 2007, Covert Canyon's consultant transmitted a Major Use Permit application wherein he described the use as consistent with section 1350 despite it being a "limited scale training facility," claiming "types and combination of activities occurring on the property are uncommon."

As noted prior, Halcon himself admitted he was "shut down" in 2007 from conducting law enforcement and government firearms training (implying even at that time he should have been treated differently because he was service government and not the general public). Further, on December 3, 2010, the County Department of Planning and Land Use amended SDCZO 1350 to include the "security, law enforcement, military, paramilitary-type training facilities, or field medical training uses" language **in part because of the historic and ongoing uses at Covert Canyon**.[13] On June 15, 2011,

[11] See discussion and evidence of potential impacts, below and attached.

[12] See, e.g. January 18, 2008 County of San Diego Inter-Departmental Correspondence between environmental planner J. Ramaiya and Sheriff's Department licensing manager, Blanca Pelowitz, wherein the Sherriff's Department notes Halcon was advised in 2006 that licensing of the shooting range would require a Major Use Permit. The Sheriff's position on Covert Canyon's shooting range at that time was to "require a mandatory and comprehensive impact study review" that would include engineers or inspectors to provide professional input and expertise to ensure all the safety aspects are in place. Such review has not occurred. See also, September 11, 2009 County Code Enforcement letter to Covert Canyon rejecting various uses, including firearms safety classes, within the A72 zone absent a discretionary permit.

[13] It should also be noted that Covert Canyon consistently sought to use the fact that its MUP project was restricted to military and law enforcement users as justification for less stringent fire safety requirements. (See e.g. Letter from RBF Consulting to DPLU, December 4, 2009).

the County served Covert Canyon with a Civil Penalty Notice and Order claiming that Covert Canyon was conducting activities in violation of the A72 zone restrictions (including section 1350 and section 2725(c), which precludes an outdoor shooting range without a Major Use Permit).[14]

The Director has not conducted CEQA, and has not even attempted to describe the extent of impacts that have occurred as a result of historic firearms training at Covert Canyon. The director has not identified how fire safety access would be any different than when staff recommended denial of the prior MUP application in 2010. In light of the plain reading of the statute, the history of Covert Canyon uses the County claimed would trigger a section 1350 use classification, and the actual historical classification of Covert Canyon's use as falling under section 1350, the County's currently proposed and horribly tortured analysis will never stand judicial scrutiny.

III. The proposed classification of use and SAEO are in conflict with the designated Agricultural Preserve and Williamson Act Contract applicable to the Covert Canyon parcels. Failure to account for Williamson Act compliance is an abuse of discretion.

The California Land Conservation act of 1965 (Williamson Act) allows the County to enter into contracts with private landowners to restrict certain lands for agricultural or related open space use. In return, landowners receive property tax assessments that are much lower than full market value. The Williamson Act contracts are intended as a way to protect agricultural resources, preserve open space land, and promote efficient urban growth patterns. Contracts are entered for minimum terms of ten years, renew automatically at the end of each term, and must be located within designated agricultural preserve areas. Contracts may be allowed to lapse with notice of intent not to renew, or under certain circumstances they may be terminated (contract cancellation).

Covert Canyon is located within the County of San Diego Japatul Agricultural Preserve No. 36, and since 1974 has been covered by Williamson Act Contract No. 74-29 (Contract). Exhibit B to the Contract limits the permitted uses for the land to include: the growing of crops, trees, flowers, and vegetables, the keeping of poultry and animals, and construction of buildings and structures "necessary and incidental to the agricultural use of the land." Certain additional uses are allowed if authorized by a County issued "special use permit," such as agriculture related packing or processing; aviaries, public stables, kennels, airport landing strips, animal waste processing. Certain recreational uses are also allowed by special use permit, such as walking, hiking, picnicking, camping, swimming, boating, fishing, and hunting.

The Covert Canyon Contract expressly states that "[d]uring the term of this Contract and any and all renewals thereof, the Premises shall be devoted to agricultural uses and compatible uses and

[14] Also relevant is the fact that the section 1346 requirement for a Site Plan review reflects concerns primarily with facility layout and construction logistics, whereas the section 1350 MUP requirement concerns a full array of impacts and conditions from the requested use. Thus, a typical public Police Station would not give rise to the same level of scrutiny and conditions as a firearms training facility, a paramilitary training camp, or any of the other 80+ uses found to fall under the 1350 use classification. The fact that the Director saw the need to condition Covert Canyon to the extent undertaken in the SAEO support the contention that a Major Use Permit review is more appropriate, and a Site Plan review would be inadequate.

shall not be used for any purpose other than agricultural uses or compatible uses as specified in Exhibit "B" attached hereto." County Board of Supervisor Policy I-38 requires that:

> Zoning regulations shall be applied to all lands included in an agricultural preserve and shall permit only agricultural uses, open space use, recreational use and other uses determined to be compatible with such uses.

Board of Supervisors Policy I-38 expressly requires the abatement and elimination of nonconforming uses on all lands under contract.

The Director has made no determination that law enforcement and military firearms training is consistent with the uses allowed in the Japatul Agricultural Preserve No. 36, is allowed under Contract No. 74-29, or is consistent with Policy I-38. On the other hand, substantial evidence exists to support Appellants' claim that firearms training is not consistent with the Williamson Act program applicable to these parcels.[15] Any classification of use or discretionary permit that seeks to authorize firearms training at Covert Canyon therefore cannot be approved unless and until the current term of the Contract expires (in 2018) and the County Board of Supervisors agrees to amend the boundary of the Preserve.[16]

IV. Appellants' evidence

Attached hereto is a compendium of documents and photographs that add to the body of administrative record documents showing likely environmental impacts of firearms training at Covert Canyon. The documents generally show the following to be historically true, or likely to occur as a result of this and future approvals:

- Marc Halcon and Covert Canyon (collectively hereafter, "Halcon") have a long history of non-compliance with the Zoning Ordinance.
- Halcon has conducted commercial firearms training periodically since 2006 in violation of the Zoning Ordinance and multiple Administrative Enforcement Orders.
- Halcon has trained law enforcement, government, and or military personnel at Covert Canyon periodically since 2006.
- Halcon has trespassed onto Cleveland National Forest lands and denuded such lands without appropriate permits. Halcon did not comply with conditions of the order purporting to resolve the trespass. County staff only followed up when notified by the Williamses' counsel.

[15] The County's own May 28, 2010 Covert Canyon staff report to the Planning Commission notes that "the proposed use would be incompatible with the existing Agricultural Preserve #36."

[16] Williamson Act Contract cancellation is a CEQA triggering event. Because approval of a permanent firearms training facility at Covert Canyon under SDCZO 1346 or 1350 would require Contract cancellation and CEQA review, issuance of the SAEO conditioned on future permit application would constitute additional inappropriate piecemealing as to Williamson Act impacts.

- Halcon has illegally graded sensitive wetland resources and habitat in violation of the State and Federal Clean Water Acts. The soil dredged from the ponds has been used to create his firing ranges.

- Outdoor shooting ranges have been found to cause impacts to land use, wildlife and biological resources generally, habitat, drinking and natural water quality, air quality, aesthetics, archeological resources, and humans due to noise, traffic, increased wildfire danger, and accidental bullet deflection.

Please see the attached index and exhibits for further information regarding likely and potential impacts that will result from the temporary and permanent uses proposed at Covert Canyon.

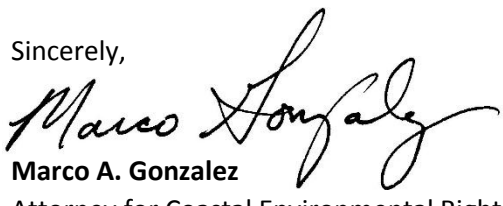
V. Conclusion

The Director's decision to reclassify uses at Covert Canyon is troubling, to say the least. When the 2010 Planning Commission hearing was held on the prior MUP application, the project was slated to be denied based on inability to comply with various fire safety requirements. Nothing in the record suggest that compliance with such fire safety regulations was a result of the enhanced uses the Director now claims brought it within the Major Impact Services and Utilities Use. In fact, a reasonable reading of the record and evidence makes clear it has always been the firearms training that posed the greatest fire safety risk, and resulted in the MUP denial.

With this in mind, and without significant additional mitigating evidence in the record to the contrary, it is an abuse of discretion for the Director to imply that reclassifying the use to Law Enforcement Services somehow eliminates the previously determined failure to comply with numerous fire safety regulations. It was a fire risk then, it is a fire risk now. The classification of use does not change this fact.

Because the temporary uses approved by the SAEO are allowed to continue while this appeal is processed, the County and Covert Canyon are at risk of being sued today. Should the appeal be denied, please be advised that the Environmental Groups and Appellants intend to file suit and seek injunctive relief before the matter is heard by the Board of Supervisors.

Sincerely,



Marco A. Gonzalez
Attorney for Coastal Environmental Rights Foundation,
Save Our Forests and Ranchlands, and
Cleveland National Forest Foundation