

Comment Letter # 7

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August 20, 2018

Via Email and Overnight Mail

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AUG 20 2018

DUBLIN PLANNING

Re: Comments on the Draft Environmental Impact Report for the At Dublin Project, State Clearinghouse No. 2018012027

Dear Ms. Million:

We are writing on behalf of **Dublin Residents for Responsible Development** regarding the July 2018 Draft Environmental Impact Report (“DEIR”) prepared for the At Dublin Project (“Project”) proposed by Shea Properties, in partnership with SCS Development Company (“Applicant”). The Project involves developing a 76.2-acre Project site as a mixed-use development with up to 454,500 square feet of commercial uses and up to 680 residential units. The Project site is generally bound by Tassajara Road, Interstate 580, Brannigan Street and Gleason Drive.

According to the DEIR, the Project will require the following approvals from the City of Dublin (“City”): (1) EIR Certification; (2) General Plan Amendment; (2) Eastern Dublin Specific Plan Amendment; (3) Planned Development Rezone (Stage 1 and Stage 2 Development Plans); (4) Site Development Review; (5) Vesting Tentative Map; (6) Street Vacation (Northside Drive); (7) Development Agreement; and (8) Master Sign Program/Site Development Review.

As explained in these comments, the DEIR does not comply with the requirements of the California Environmental Quality Act (“CEQA”) in several respects.

First, the DEIR fails to properly analyze and mitigate impacts on air quality. The DEIR underestimated the Project’s emissions, and it lacks substantial evidence to support both its conclusion that significant impacts on air quality are

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unavoidable, as well as its conclusion that the Project will have a less than significant impact on public health.

Second, the DEIR lacks substantial evidence to support its conclusion that impacts from GHG emissions will be less than significant. The DEIR's analysis of the impact relies on methodology that was rejected by the Supreme Court and that is not backed by substantial evidence. A proper analysis shows that the Project may in fact result in a significant impact from GHG emissions, which must be mitigated.

Finally, the DEIR fails to adequately disclose, evaluate and mitigate impacts on biological resources at the Project site, including special status plants and animals. For each of these reasons, the City may not approve the Project until a revised environmental review document is prepared and re-circulated for public review and comment.

These comments were prepared with the assistance of air quality experts Matt Hagemann and Hadley Nolan of Soil Water Air Protection Enterprise ("SWAPE") and biological resources expert Scott Cashen. SWAPE's and Mr. Cashen's comments and curriculum vitae are attached hereto as Exhibit A and Exhibit B, respectively, and are fully incorporated herein and submitted to the City herewith. Therefore, the City must separately respond to the technical comments of SWAPE and Mr. Cashen, in addition to our comments.

I. STATEMENT OF INTEREST

Dublin Residents for Responsible Development ("Dublin Residents") is an unincorporated association of individuals and labor unions that may be adversely affected by the potential environmental impacts of the Project. The association includes: City of Dublin residents Kris Gallegos, Art Mayberry, Joe Steiner, and Francisco Rosa; the **International Brotherhood of Electrical Workers Local 595, Plumbers & Steamfitters Local 342, Sheet Metal Workers Local 104 and Sprinkler Fitters Local 483**, and their members and their families; and other individuals that live and/or work in the City of Dublin and Alameda County.

Individual members of Dublin Residents and the affiliated unions live, work, recreate and raise their families in Alameda County, including in the City of Dublin. These members would be directly affected by the Project's environmental and health and safety impacts. Members of Dublin Residents may also work on the

Project itself. Accordingly, these individuals will be first in line to be exposed to any health and safety hazards created by the Project. Dublin Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there.

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II. THE DEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE SIGNIFICANT IMPACTS ON AIR QUALITY, GHG AND BIOLOGICAL RESOURCES

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report (“EIR”) (except in certain limited circumstances).¹ The EIR is the very heart of CEQA.² “The foremost principle in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”³

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CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.⁴ “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR “protects not only the environment but also informed self-government.”⁵ The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”⁶

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and

¹ See, e.g., PRC § 21100.

² *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.

³ *Comtys. for a Better Env' v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 (“*CBEI v. CRA*”).

⁴ 14 CCR § 15002(a)(1).

⁵ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

⁶ *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal. App. 4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

all feasible mitigation measures.⁷ The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.”⁸ If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”⁹

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While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. *A clearly inadequate or unsupported study is entitled to no judicial deference.*”¹⁰ As the courts have explained, “a prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.”¹¹

III. THE DEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE SIGNIFICANT IMPACTS ON AIR QUALITY AND PUBLIC HEALTH

In the Air Quality section of the DEIR, the agency is required to disclose, analyze and propose mitigation to reduce the Project’s construction and operation emissions of pollutants to less than significant levels. However, as shown by SWAPE¹² and explained below, the DEIR analysis and conclusion are flawed.

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Specifically, SWAPE found that the project’s emissions were greatly underestimated. An updated emissions analysis, based on the Project’s data and

⁷ 14 CCR § 15002(a)(2) and (3); see also *Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.

⁸ 14 CCR § 15002(a)(2).

⁹ PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

¹⁰ *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.

¹¹ *Berkeley Jets*, 91 Cal.App.4th at 1355; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.

¹² Exhibit A: SWAPE comments.

agency-accepted methods for air quality evaluation, found significant impacts from NO_xs and ROG emissions. SWAPE also found that that no substantial evidence supports the City's conclusion that the Project's significant impacts on air quality are unavoidable, since the City failed to incorporate feasible mitigation measures. Finally, SWAPE found that the DEIR lacks substantial evidence to support a finding of less than significant impacts on public health, and that the Project will in fact result in such a significant impact.

7-4

1. The DEIR underestimated Project's emissions

As SWAPE explains in their comments, the DEIR greatly underestimates the Project's emissions.

First, According to the DEIR, the Project's 454,000 square feet of commercial uses include a theater, specialty restaurants, and general retail uses.¹³ However, the Project's CalEEMod output files reveal that the Project Applicant failed to model the theater or specialty restaurants that will be constructed; instead, the Applicant modeled all commercial uses as a hotel or strip mall. As a result, the emissions that would be produced during construction and operation of the Project's proposed land uses are unaccounted for and the Project's emissions are greatly underestimated.¹⁴

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Second, the DEIR incorrectly applied mitigation measures prior to disclosing construction emissions. Mitigation Measure AQ-2.2 (MM AQ-2.2) requires the Applicant to submit to the City documentation that "demonstrate[s] that all off-road diesel-powered construction equipment greater than 50 horsepower meets United States Environmental Protection Agency Tier 4 off-road emissions standards."¹⁵ SWAPE found that this measure was incorrectly applied in the CalEEMod for three reasons.

First, the model assumed that Tier-4 *Final* engines would be used even though the DEIR does not require engines that meet "Tier-4 Final" standards. As SWAPE explain, Tier-4 *final* is the cleanest burning equipment available, that has

¹³ At Dublin Draft EIR, July 2018, p. 3-6.

¹⁴ Exhibit A: SWAPE comments, p. 2-3.

¹⁵ At Dublin Draft EIR, p. 6-33.

the lowest emissions and emits less than the Tier-4 *interim* equipment.¹⁶ It is also the hardest equipment to procure out of all the clean-emission standard equipment available.¹⁷ MM AQ-2.2 does not state which Tier-4 standard it requires. Therefore, unless the DEIR is revised to specify that the City requires the Applicant to use Tier 4 *Final* equipment, the Project's potential impacts cannot be evaluated assuming the use of this cleaner burning equipment.

In addition, SWAPE found that while MM AQ-2.2 only applies to construction equipment greater than 50 horsepower, the CalEEMod applied the Tier-4 standard to three welders with less than 50 Horsepower, therefore further underestimating the construction emissions.¹⁸

Finally, with regard to the Tier-4 standard requirement in MM AQ-2.2, the DEIR fails to assess the feasibility of obtaining the necessary Tier-4 equipment. SWAPE explains that EPA's emission standards were gradually introduced into the market, and that they only apply to newly manufactured equipment. As a result, the vast majority of existing diesel off-road construction equipment in California is not equipped with Tier-4 engines. In fact, Tier-4 Interim and Tier-4 Final equipment only accounts for 18% and 4%, respectively, of all off-road equipment currently available in California.¹⁹ Despite that, the DEIR fails to evaluate the feasibility of procuring the required Tier-4 equipment. The City's significance determination, therefore, is not supported by substantial evidence.

7-5

The third cause SWAPE found for underestimation of the Project's emissions is the City's failure to account for all imported grading material, thereby underestimating emissions in the DEIR. The DEIR projected the Project will require net import of approximately 93,600 cubic yards of soil.²⁰ However, the DEIR's CalEEMod model estimated that only 50,000 cubic yards of soil will be imported to the Project site during the grading phase of construction, failing to account for another 43,000 cubic yards. As SWAPE explains,

This underestimation presents a significant issue, as the inclusion of the entire amount of material export and import within the model is necessary to

¹⁶ Exhibit A: SWAPE comments, p. 4-5.

¹⁷ Exhibit A: SWAPE comments, p. 8.

¹⁸ Exhibit A: SWAPE comments, p. 5-7.

¹⁹ Exhibit A: SWAPE comments, p. 7-8.

²⁰ At Dublin Draft EIR, p. 3-10.

calculate emissions produced from material movement, including truck loading and unloading, and additional hauling truck trips. As a result, emissions generated during Project construction are underestimated.²¹

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Therefore, the DEIR's analysis of the Project's air quality impacts underestimates emissions and fails to disclose the extent of the impact.

2. Substantial Evidence Shows the Project May Result in Potentially Significant, Unmitigated Impacts on Air Quality from Construction Emissions

In light of the lack of substantial evidence to support the DEIR conclusion regarding impacts from construction and operational emissions, and to more accurately estimate the actual Project emissions, SWAPE prepared an updated CalEEMod model that includes more site-specific information and corrected input parameters, including the total amount of soil grading import and all the applicable land uses. SWAPE conducted their modeling using the most recent CalEEMod version and site-specific information provided within the DEIR and associated appendices to estimate emissions. SWAPE's assumptions for the modeling are detailed in their letter.²²

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SWAPE's revised analysis found that the Project's construction and operational criteria air pollutant emissions increase significantly when compared to the DEIR's model. SWAPE found that the Project's construction-related NOx emissions exceed the threshold set forth by the Bay Area Air Quality Management District ("BAAQMD") and that the Project's operational ROG and NOx emissions also exceed the thresholds set forth by the BAAQMD.²³

3. The DEIR Lacks Substantial Evidence to Support A Finding of Overriding Considerations for Significant and Unavoidable Impacts on Air Quality

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Before it can approve the Project, the City must certify the Project's Final EIR and make mandatory CEQA findings. Those findings must include (1) that the

²¹ Exhibit A: SWAPE comments, p. 8-9.

²² Exhibit A: SWAPE comments, p. 9-11.

²³ Exhibit A: SWAPE comments, p. 10.

Final EIR complies with CEQA, (2) that the City has mitigated all significant environmental impacts to the greatest extent feasible, and (3) that any remaining significant environmental impacts are acceptable due to overriding considerations.²⁴ Where, as here, the Project will have a significant effect on the environment, the City may not approve the Project unless it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”²⁵

The DEIR’s air quality analysis determines that the Project construction and operational emissions would exceed thresholds set forth by the BAAQMD and proposes several mitigation measures to reduce those emissions. It further concludes, however, that the Project’s construction-related air quality impacts would be significant with respect to NO_x and operational air quality impacts would be significant with respect to NO_x and ROG.²⁶ The City declares those impacts to be “significant and unavoidable.”²⁷ As SWAPE explains, while it is true that the Project would result in significant NO_x and ROG impacts (in fact, those impacts are more severe than disclosed by the City), the DEIR’s conclusion that these impacts are “significant and unavoidable” is entirely incorrect, because the DEIR fails to require all feasible mitigation available to reduce the Project’s impacts.

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SWAPE states that, in their expert opinion, additional, feasible mitigation is available to further reduce the Project’s emissions. To mitigate construction emission SWAPE propose, *inter alia*, the following feasible mitigation measures²⁸:

- Require implementation of diesel control measures recommended by The Northeast Diesel Collaborative (NEDC), including using emission control technology and retrofitting diesel generators on site to reduce PM emissions and fueling equipment with ultra-low sulfur diesel fuel (ULSD) or a biodiesel blend.
- Repower or replace older construction equipment engines.
- Use electric and/or hybrid construction equipment.

²⁴ 14 CCR § 15090 & 15091.

²⁵ PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

²⁶ At Dublin Draft EIR, p. 6-26, 6-32.

²⁷ At Dublin Draft EIR, p. 6-42.

²⁸ Exhibit A: SWAPE comments, p. 17-22.

- Implement a construction vehicle inventory tracking system to ensure compliances with construction mitigation measures.
- Implement the “Enhanced Exhaust Control Practices,” that are recommended by the Sacramento Metropolitan Air Quality Management District (SMAQMD) and is aimed at achieving NO_x and PM reductions.

As SWAPE explains, these measures offer a cost-effective, feasible way to incorporate lower-emitting equipment into the Project’s construction fleet, which subsequently reduces NO_x and DPM emissions released during Project construction.

To mitigate operational emission from NO_x, ROG and DPM, SWAPE proposes, *inter alia*, the following feasible mitigation measures²⁹:

- Use passive solar design, including orient buildings and incorporate landscaping to maximize passive solar, heating during cool seasons, and minimize solar heat gain during hot seasons.
- Reduce unnecessary outdoor lighting by utilizing design features such as limiting the hours of operation of outdoor lighting.
- Develop and follow a “green streets guide” that requires use of minimal amounts of concrete and asphalt; installation of permeable pavement to allow for storm water infiltration; and use of groundcovers rather than pavement to reduce heat reflection.
- Implement Project design features such as: Shade HVAC equipment from direct sunlight, Install high-efficiency HVAC with hot-gas reheat and provide education on energy efficiency to residents and customers.
- Meet “reach” goals for building energy efficiency and renewable energy use.
- Require all buildings to become “LEED” certified.
- Limit the use of outdoor lighting to only that needed for safety and security purposes.

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²⁹ Exhibit A: SWAPE comments, p. 27-32.

- **Require use of electric or alternatively fueled sweepers with HEPA filters.**
- **Include energy storage where appropriate to optimize renewable energy generation systems and avoid peak energy use.**
- **Plant low-VOC emitting shade trees, e.g., in parking lots to reduce evaporative emissions from parked vehicles.**
- **Use CARB-certified or electric landscaping equipment in project and tenant operations; and introduce electric lawn, and garden equipment exchange program.**
- **Install an infiltration basin to provide an opportunity for 100% of the storm water to infiltrate on-site.**

In addition to the measures discussed above, the Project could implement feasible mitigation measures recommended by SCAQMD for operational NO_x emissions that result primarily from truck activity emissions, which would also reduce the Project's operational GHG emissions. These feasible mitigation measures would include:

- **Provide electric vehicle charging stations that are accessible for trucks.**
- **Provide electrical hookups at the onsite loading docks and at the truck stops for truckers to plug in any onboard auxiliary equipment.**
- **Provide minimum buffer zone of 300 meters (approximately 1,000 feet) between truck traffic and sensitive receptors and prevent trucks from entering residential site.**
- **Limit the daily number of trucks allowed at the facility.**
- **On-site equipment should be alternative fueled.**
- **Improve traffic flow by signal synchronization.**

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Additional feasible mitigation measures can be found in CAPCOA's **Quantifying Greenhouse Gas Mitigation Measures**, which proposes measures that can reduce both GHG levels as well as NOx Emission and include, among others:

- **Limit Parking Supply** using various strategies, including reduction of spaces, shared parking and unbundled parking.
- **Implement Subsidized or Discounted Transit Program** to incentivize the use of public transport. Transit passes can be partially or wholly subsidized by the employer, school, or development.
- **Provide "end-of-trip" facilities** for bicycle riders including showers, secure bicycle lockers, and changing spaces.
- **Implement Commute Trip Reduction Marketing**, including New employee orientation of trip reduction and alternative mode options, event promotions and publications.
- **Provide preferential parking** in convenient locations for commuters who carpool, vanpool, ride-share or use alternatively fueled vehicles.
- **Implement Bike-Sharing Program**
- **Price Workplace Parking.** This may include: explicitly charging for parking for its employees, implementing above market rate pricing, validating parking only for invited guests, not providing employee parking and transportation allowances, and educating employees about available alternatives.
- **Provide Employer-Sponsored Shuttle.** The Project could implement an employer-sponsored shuttle to and from the Dublin/Pleasanton BART station located 1.5 miles from the Project site. A shuttle will typically service nearby transit stations and surrounding commercial centers. Scheduling is within the employer's purview, and rider charges are normally set on the basis of vehicle and operating cost.

SWAPE also proposes additional mitigation measures aimed at reducing operational ROG (also known as VOC) emissions. Such additional mitigation

measures include use of zero-VOC emissions paint, using materials that do not require painting and use of spray equipment with greater transfer efficiencies.³⁰

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With the extensive measures now available to reduce significant construction and operational impacts to air quality, it is clear that the City lacks substantial evidence to support its conclusion that the City eliminated or substantially lessened all significant effects on the environment where feasible, as required by CEQA.

4. The DEIR Lacks Substantial Evidence to Support the City's Conclusion that Impacts on Public Health Would be Less than Significant

The City evaluates the Project's health-related impact by preparing a health risk assessment ("HRA") that assesses diesel particulate matter ("DPM") emissions released during construction.³¹ The City determines that the Project would result in a less than significant impact with regard to exposing sensitive receptors to substantial pollutant concentrations.³² The City does not include any HRA to assess the impact of the Project's operation on such sensitive receptors, stating only:

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The project would not be considered a source of toxic air contaminants (TACs) that would pose a possible risk to off-site uses. The project involves the future development of mixed-use project that would include commercial and residential uses. The project would not include stationary sources that emit TACs and would not generate a significant amount of heavy-duty truck trips (a source of diesel particulate matter [DPM]). Therefore, no impacts to surrounding receptors associated with TACs would occur.³³

SWAPE explains that the City's conclusion in the DEIR regarding the Project's impacts on public health is not supported by substantial evidence, for the following reasons.

First, the HRA's analysis relies upon emissions estimates from a flawed CalEEMod model that underestimates the Project's emissions, as discussed in the

³⁰ Exhibit A: SWAPE comments, p 31-32.

³¹ At Dublin Draft EIR, Appendix B, pp. 309.

³² At Dublin Draft EIR, p. 6-34 to 6-36.

³³ At Dublin Draft EIR, p. 6-39, 6-40.

sections above. Because the emissions estimates from the Project's CalEEMod model are underestimated, it is reasonable to assume that the Project's construction-HRA also underestimates the health risk posed to sensitive receptors near the Project site.³⁴

Second, the City relies on an analysis which improperly calculates the Project's construction-related health risk impact by underestimating the susceptibility of receptors to TAC emissions. As SWAPE explains, the Office of Environmental Health Hazard Assessment ("OEHHA"), the organization responsible for providing recommendations and guidance on how to conduct health risk assessments in California, provides guidance on how to use age-specific breathing rates in health risk assessments. SWAPE's review of the Project's health-risk calculations demonstrates that the DEIR applied incorrect daily breathing rates for each age group, which results in underestimation of the Project's construction-related health impact.³⁵

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And finally, SWAPE explains that the DEIR's omission of a quantified operational HRA is inconsistent with the most recent guidance published by OEHHA: The OEHHA document recommends that exposure from projects lasting more than 6 months should be evaluated for the duration of the project. The DEIR does not provide the expected lifetime of the Project, but it can reasonably be assumed that the Project will operate for at least 30 years if not more. Therefore, per OEHHA guidelines, health risk impacts from Project operation should have been evaluated by the DEIR.³⁶

Therefore, the City lacks substantial evidence to support its conclusion that the Project will result in less than significant impacts on public health.

5. Substantial Evidence Shows That The Project Will Result in a Significant Cancer Risk from Exposure to Contaminants Generated by Project Construction and Operation

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In an effort to demonstrate the potential risk posed by Project construction and operation to nearby sensitive receptors, SWAPE prepared a simple screening-

³⁴ Exhibit A: SWAPE comments, p. 12.

³⁵ Exhibit A: SWAPE comments, p. 12-13.

³⁶ Exhibit A: SWAPE comments, p. 13-14.

level HRA. The results of this assessment provide substantial evidence that the Project's construction and operational DPM emissions may result in a significant health risk impact that the City did not previously identify.

SWAPE used the AERSCREEN model for its assessment. AERSCREEN is recommended by OEHHA and the California Air Pollution Control Officers Associated ("CAPCOA") guidance as the appropriate air dispersion model for Level 2 health risk screening assessments ("HRSAs").³⁷ SWAPE evaluated the Project's construction-related impacts to sensitive receptors using the annual PM₁₀ exhaust estimates from the SWAPE annual CalEEMod output files. Consistent with recommendations set forth by OEHHA, SWAPE used residential exposure duration of 30 years, starting from the 3rd trimester stage of life.³⁸ SWAPE's assumptions are further detailed in their letter.³⁹

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SWAPE found that unmitigated DPM emissions released during Project construction and operation would result in an excess cancer risk beyond BAAQMD's significance threshold. The excess cancer risk to children at the MEIR located approximately 75 meters away, over the course of Project construction and operation is approximately 32 in one million.⁴⁰ Furthermore, the excess cancer risk over the course of a residential lifetime (30 years) at the MEIR is approximately 46 in one million.⁴¹ These risk levels are above the BAAQMD significance threshold for cancer of ten in one million, and are therefore a significant impact requiring mitigation. As noted by SWAPE, a screening-level HRA is known to be more conservative, and is aimed at health protection, but its purpose is to determine if a more refined HRA needs to be conducted. Here, a more refined HRA should be conducted by the City to properly analyze the Project's significant impacts on public health.

IV. THE DEIR'S DETERMINATION THAT GREENHOUSE GAS EMISSIONS IMPACTS WOULD BE LESS THAN SIGNIFICANT FAILS TO COMPLY WITH THE LAW AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

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³⁷ Exhibit A: SWAPE comments, p. 14.

³⁸ Exhibit A: SWAPE comments, p. 15.

³⁹ Exhibit A: SWAPE comments, p. 14-17.

⁴⁰ Exhibit A: SWAPE comments, p. 17.

⁴¹ Exhibit A: SWAPE comments, p. 17.

In an attempt to analyze the potential impacts of the Project's operational greenhouse gas ("GHG") emissions, the DEIR looks into two questions, derived from CEQA Guidelines Appendix G. The first, Impact GHG-1, looks at the question of "would the project generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment."⁴² The second, Impact GHG-2, looks at the question of "would the project conflict with an applicable plan, policy, or regulation adopted for the purpose of reducing the emissions of greenhouse gases?"⁴³ As described below, the City's analysis under both questions fails to comply with the law and is not supported by substantial evidence. In addition, substantial evidence supports the conclusion that the project will result in significant impacts from GHG emissions.

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A. The DEIR conclusion that Long-Term GHG Emissions Are Less Than Significant Is Not Supported by Substantial Evidence

Under GHG-1, the City uses as a threshold of significance the emission reduction goal codified by AB 197 and SB 32. SB 32 calls for a statewide 40 percent reduction in GHG emissions over 1990 levels by year 2030. The DEIR calculates the Project's GHG emissions and compares them to the emissions the Project would create if it was developed in 2000 (which is the nearest year to 1990 available in the CalEEMod model).⁴⁴ The DEIR then concludes:

[T]he project would generate 24,623 MTCO₂e per year for the year 2000 conditions and 13,150 MTCO₂e per year for the year 2030 conditions, which results in a 47 percent reduction in GHG emissions over what the project would create if it was developed in 2000, which is the nearest year to 1990 available in the CalEEMod model. The project would meet the 40 percent reduction requirement over year 1990 by 2030, as required by AB 197 and SB 32.⁴⁵

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This analysis employs the exact same methodology the California Supreme Court struck down in *Center for Biological Diversity v. California Department of Fish and Wildlife* ("Newhall").⁴⁶ In *Newhall*, the California Supreme Court

⁴² At Dublin Draft EIR, p. 10-19.

⁴³ At Dublin Draft EIR, p. 10-26.

⁴⁴ At Dublin Draft EIR, p. 10-22.

⁴⁵ At Dublin Draft EIR, p. 10-22.

⁴⁶ *Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal. 4th 204.

squarely addressed the issue of using statewide GHG emission reduction targets as a threshold of significance for purposes of CEQA.⁴⁷ In that case, the project at issue, Newhall Ranch, was a large development that included residential, community, and commercial uses to be developed on nearly 12,000 acres near the City of Santa Clarita. To assess the project's GHG emissions, the Newhall EIR considered whether the proposed Project's emissions would impede the State of California's compliance with the statutory 2020 emissions reduction mandate established by AB 32.⁴⁸ Relying on a similar "business-as-usual" or "BAU" methodology as the DEIR uses here, the Newhall EIR concluded that:

Because the EIR's estimate of actual annual project emissions . . . is 31 percent below its business-as-usual estimate . . . , exceeding the Air Board's determination of a 29 percent reduction from business as usual needed statewide, the . . . project's likely greenhouse gas emissions will not impede achievement of A.B. 32's goals and are therefore less than significant for CEQA purposes.⁴⁹

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In *Newhall*, the California Supreme Court concluded that assessing a project's consistency with statewide GHG reduction goals is not *per se* prohibited under CEQA, but that such an assessment required substantial evidence and analysis demonstrating that such a consistency comparison was applicable. The *Newhall* decision held that, in that case, the EIR failed to provide substantial evidence "that Newhall Ranch's *project-level* reduction of 31 percent in comparison to business as usual is consistent with achieving A.B. 32's *statewide* goal of a 29 percent reduction from business as usual"⁵⁰ The EIR provided no evidence to support finding that the "required percentage reduction from business as usual is the same for an individual project as for the entire state population and economy."⁵¹ The Court held that a straight-line comparison between statewide reduction goals and project-specific reductions from BAU, without more, does not support a conclusion that project emission will result in a less than significant impact:

⁴⁷ *Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal. 4th 20-1.

⁴⁸ *Id.* at p. 218.

⁴⁹ *Id.* The 2020 emission reduction target established by AB 32 has been superseded by the target in SB 32, which requires that statewide greenhouse gas emission are reduced to 40% below the 1990 level by 2030.

⁵⁰ *Id.* at 225.

⁵¹ *Id.* at 225-226.

At bottom, the EIR's deficiency stems from taking a quantitative comparison method developed by the Scoping Plan as a measure of the greenhouse gas emissions reduction effort required by the state as a whole, and attempting to use that method, without consideration of any changes or adjustments, for a purpose very different from its original design: To measure the efficiency and conservation measures incorporated in a specific land use development proposed for a specific location.⁵²

The DEIR suffers from the exact same deficiency, by drawing a straight line from the reduction goal of the state as a whole to a specific project in a specific location, without providing *any* discussion of the applicability of the statewide goal to this Project.

Both the California Air Resources Board⁵³ and the California Supreme Court have recognized that the percent reduction required to be made by specific projects in order for the state to achieve statewide GHG reduction goal is *not* the same as the statewide GHG reduction goal. In *Newhall*, the Supreme Court noted that a greater degree of reduction is likely to be needed from new land use projects as compared to the economy as a whole because it is impractical and infeasible to require or obtain uniform reductions from all sources of GHG emissions, regardless of size or type. The Court also cited California Attorney General's Office comments that "new development must be more GHG-efficient than [the statewide 'business as usual' reduction goals], given that past and current sources of emissions, which are substantially less efficient than this average, will continue to exist and emit."⁵⁴ New development, in particular, needs to be one of the primary sources of these greater reductions. This is because designing new buildings and infrastructure for maximum energy efficiency and renewable energy use is more feasible and more likely to occur than achieving the same savings by retrofitting older structures and systems.

Here, the City's conclusion in the DEIR that the Project will have a less than significant impact on GHG emission violates the Supreme Court ruling, and is not supported by substantial evidence. The DEIR must be revised to properly analyze the Project's impacts from GHG emissions.

⁵² *Id.* at 227.

⁵³ California Air Resources Board, California's 2017 Climate Change Scoping Plan, November 2017

⁵⁴ *Center for Biological Diversity v. California Dept. of Fish and Wildlife*, p. 226.

B. The Determination that GHG Impacts Are Less Than Significant Because the Project Will Not Conflict With Applicable Plans, Policies or Regulations Is Not Supported By Substantial Evidence

Under Impact GHG-2, the DEIR analyzes the following question: “Would the project conflict with an applicable plan, policy, or regulation adopted for the purpose of reducing the emissions of greenhouse gases.”⁵⁵ To answer the question, the DEIR analyzes the Project’s consistency with the City of Dublin Climate Action Plan (“CAP”) from 2013, as well as its consistency with the California Air Resources Board (“CARB”) Scoping Plan and with Plan Bay Area.⁵⁶ The DEIR’s analysis and conclusions are completely flawed for three main reasons. First, the DEIR relies on plans that are not applicable to the project. Second, the analysis fails to comply with CEQA requirement’s to ensure that measures to reduce GHG will be enforceable and binding. Finally, the DEIR fails to recognize that the Project conflicts with the City’s CAP.

7-12

1. The DEIR Analyzed Plans Which are Not Applicable to the Project

a. The City of Dublin CAP is Not Applicable to the Project

The DEIR analyzes the Project’s consistency with the City of Dublin CAP from 2013.⁵⁷ This plan consistency approach is based on CEQA Guidelines sections 15064, 15130, and 15183.5, which together provide that public agencies may analyze and mitigate significant GHG emissions in a qualified reduction plan and later tier from that analysis when considering individual projects. BAAQMD’s CEQA Guidelines also endorse the use of a GHG reduction plan consistency analysis where appropriate and “recommend[...] the Plan Elements in the state CEQA Guidelines as the minimum standards to meet the GHG Reduction Strategy Thresholds of Significance option.”⁵⁸

7-13

As explained in the DEIR, the City’s CAP satisfies the requirements set in CEQA for a qualified GHG reduction plan for purposes of CEQA for activities

⁵⁵ At Dublin Draft EIR, p. 10-26.

⁵⁶ At Dublin Draft EIR, p. 10-26 to 10-34.

⁵⁷ At Dublin Draft EIR, p. 10-26.

⁵⁸ California Environmental Quality Act Air Quality Guidelines, Bay Area Air Quality Management District, May 2017, p. 4-8.

through 2020.⁵⁹ However, activities and GHG emissions *after* 2020 are not covered by the City's CAP. Guidelines section 15183.5 subdivision (b)(1)(B) provides that consistency with GHG reduction plans may only be used as a threshold for "activities covered by the plan." Because the plan does not establish GHG reduction goals for emissions after 2020, it does not cover activities or emissions after 2020 and is not applicable to the Project's post-2020 operational emissions. Moreover, the CAP does not provide any evidence that compliance with the plan's measures will reduce the impact from covered activities to a less than significant level beyond 2020.

The City limits its consistency analysis to address potential impacts for 2020, stating that "if the project is consistent with the CAP, then the project would result in a less than significant cumulative impact to global climate change in 2020."⁶⁰ The City, however, ignores that fact that according to the DEIR itself, Project construction is set to begin in April 2020, and continue, in phases, at least until the year 2025.⁶¹ The City fails to state when it is expecting the Project, or parts of the Project, to become operational, but it is clear that the Project will not be fully operational until at least 2025.

7-13

Accordingly, the Project will have no 2020 operational emissions at all. Practically, all of the Projects emissions will, instead, occur from 2025 to 2055 (assuming a 30 year lifespan). As a result, the determination that the Project's operational GHG emissions in 2020 would be less than significant has no relevance to the significance of impacts from GHG emissions during the Project's operational life, and the DEIR analysis of the CAP does not constitute substantial evidence to support the conclusion that the Project will result in less than significant impacts.

b. The DEIR Analysis of Compliance with CARB Scoping Plan and Plan Bay Area is Irrelevant and Does Not Constitute Substantial Evidence

7-14

In addition to the analysis of the Project's compatibility with the City's CAP, the DEIR also purports to analyze the Project's compatibility with two other

⁵⁹ At Dublin Draft EIR, p. 10-15.

⁶⁰ At Dublin Draft EIR, p. 10-26.

⁶¹ At Dublin Draft EIR, p. 6-24. In another section, the DEIR states that "The project would be developed in several phases over a period of approximately six years" (DEIR, p. 5-17).

“climate plans” – CARB’s Scoping Plan from 2017, and the “Plan Bay Area 2040” Regional Transportation Plan/Sustainable Communities Strategy. However, these two plans cannot qualify as Climate Action Plans for the purpose of this analysis, and the DEIR conclusion is not supported by substantial evidence.

Guidelines section 15183.5 subdivision (b)(1) sets forth the required elements for a GHG reduction plan to qualify for CEQA analysis purposes. As is clear from the guidelines, one of the most important features of a qualified Climate Action Plan is the fact that it is specific to the jurisdiction. As such, it should apply to a “defined geographic area,” “[i]dentify and analyze the greenhouse gas emissions resulting from specific actions or categories of actions anticipated *within the geographic area*” and propose measures that, if implemented “on a *project-by-project basis*” would achieve a specified target.

ARB’s Scoping Plan is by no means a qualified plan under the guidelines, as it is the broadest climate plan in the state, covering the whole of California and setting a state-wide reduction goal and strategy. The Scoping Plan in fact includes a recommendation for local governments to adopt “geographically specific” GHG reduction plans to enable them achieve GHG reductions and comply with CEQA. Thus, the analysis of the Project’s consistency with the Scoping Plan does not, and cannot, constitute substantial evidence to support a conclusion regarding the Project’s GHG impacts.

7-14

The fact that the Scoping Plan is inapplicable to analyzing the Project’s impacts becomes even more apparent when looking at the analysis itself. The DEIR claims, for example, that the Project is consistent with the Scoping Plan transportation measure regarding California Light-Duty Vehicle Greenhouse Gas Standards (2012 LEV III standards) because “[p]assenger vehicles associated with the site would comply with LEV III standards.”⁶² This, of course, does not provide the public with any information about the Project’s geographic specific generation of GHG emissions from vehicle trips created by the Project.

The City’s analysis of the Project compatibility with Plan Bay Area is as irrelevant as its Scoping Plan analysis. CEQA section 21159.28 allows for limited streamlining of GHG analysis under CEQA for projects that comply with specific location or housing ratio requirements that are not applicable to the Project, and

⁶² At Dublin Draft EIR, p. 10-31.
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are not even analyzed in the DEIR. Beyond that, Sustainable Community Strategies are plans which are designed to meet *regional* targets set by the Air Board for greenhouse gas emissions from *cars and light trucks*⁶³ and by no means qualify under the CEQA guidelines as a Climate Action Plan. The DEIR analysis fails to even mention one specific goal or measure in Plan Bay Area and employs general statements such as “[t]he project would provide housing and mixed uses on an infill location near transit”⁶⁴ to argue consistency. Therefore, this analysis too fails to constitute substantial evidence to support the City’s conclusion in the DEIR.

7-14

2. The CAP Measures are Not Properly Incorporated in The Project

Even if the CAP was applicable to the Project (and it is not), the DEIR completely fails to demonstrate consistency with the CAP as required under CEQA, because it fails to incorporate the CAP measures as binding mitigation in the DEIR.

CEQA states that for a DEIR to rely on a CAP in its analysis, it must identify which requirements apply to the Project and make those requirements binding and enforceable to the Project by listing them as mitigation measures, if they are not already binding and enforceable in the City’s CAP:

7-15

An environmental document that relies on a greenhouse gas reduction plan for a cumulative impacts analysis must identify those requirements specified in the plan that apply to the project, and, if those requirements are not otherwise binding and enforceable, incorporate those requirements as mitigation measures applicable to the project.⁶⁵

As SWAPE demonstrates, the DEIR fails to include any of the measures set forth in the CAP as mitigation measures, despite the fact that many of them are clearly not binding on the Project.⁶⁶

3. The Project Would Not Be Consistent With a Transportation-Related Measure in The CAP

7-16

⁶³ Gov. Code §65080 (b)(2).

⁶⁴ At Dublin Draft EIR, p. 10-34.

⁶⁵ 14 CCR § 15183.5.

⁶⁶ Exhibit A: SWAPE comments, p. 24.

Review of the CAP's measures shows that no substantial evidence supports the City's conclusion that the Project is consistent with the CAP. Specifically, the DEIR argues the Project is consistent with a CAP measure called "Transit Oriented Development" ("TOD") because "[t]he project is located within 1.5 miles of the Dublin/Pleasanton BART station."⁶⁷

The City's CAP does not include a specific definition of TOD projects. However, Appendix C of the CAP includes a memorandum titled "City of Dublin Transit Oriented Development Transportation Impact Fee Assessment."⁶⁸ According to the memorandum, the City's consultants have "reviewed data from a variety of sources to develop a likely range of vehicle trip reductions for transit-oriented residential development (TOD) adjacent to the Bay Area Rapid Transit (BART) stations in the City of Dublin."⁶⁹ The recommendation in the memorandum is to consider "a reduction in vehicle trips of 25 percent for multi-family residential developments located in a mixed-use environment within a *barrier-free half mile walk* of a BART station."⁷⁰ There is no basis therefore for the DEIR conclusion that the Project, located at least 1.5 miles away from the station (and not at all barrier-free), is consistent with the CAP's measures.

7-16

Moreover, SWAPE notes that BART's Transit-Oriented Development Guide states that the proportion of transit riders walking to BART station becomes insignificant beyond half a mile.⁷¹ The DEIR therefore lacks substantial evidence to support the statement that the Project located 1.5 miles from the BART station is consistent with the CAP.

C. Substantial Evidence Shows That GHG Emissions from the Project Would Be Significant

One possible way the Supreme Court outlined in *Newhall* for compliance with CEQA in a GHG analysis is to "rely on existing numerical thresholds of significance for greenhouse gas emissions."⁷² The court gives as an example for such numerical

7-17

⁶⁷ At Dublin Draft EIR, p. 10-27.

⁶⁸ Kathrin Tellez and Rob Rees, Appendix C of the City of Dublin Climate Action Plan Update July 2013: Transit Oriented Development Memo, July 30, 2009. ("TOD Memo, 2009").

⁶⁹ TOD Memo, 2009, p.1.

⁷⁰ TOD Memo, 2009, p.1 (emphasis added) .

⁷¹ Exhibit A: SWAPE comments, p. 25.

⁷² *Center for Biological Diversity v. California Dept. of Fish and Wildlife*, p. 230.

thresholds the CEQA Guidelines developed by BAAQMD in 2010. BAAQMD published an updated version of its Guidelines in 2017, which contains the following thresholds for operational-related GHG emissions:

For land use development projects, the threshold is compliance with a qualified GHG Reduction Strategy; or annual emissions less than 1,100 metric tons per year (MT/yr) of CO₂e; or 4.6 MT CO₂e/SP/yr (residents + employees). Land use development projects include residential, commercial, industrial, and public land uses and facilities.⁷³

Even by the DEIR's own analysis, the Project's operational emissions will go significantly beyond the threshold of 1,100 MT/yr of CO₂e emissions: the DEIR states that yearly emissions for a 2030 project scenario will be 13,150 MT CO₂e per year. After deduction of construction emission, amortized over 30 years, the Project's operational emission is expected to be about 11,852 MT CO₂e per year. These emissions alone are enough to trigger a significant impact determination, which requires implementing mitigation measures. The City failed to use the proper threshold, and thus lacked substantial evidence to support a finding of less significant impacts, as required under CEQA.

7-17

The impact of the Project's GHG emissions, however, is even more severe than acknowledge by the DEIR. In order to properly evaluate the potential impact of the Project's GHG emissions, SWAPE performed an analysis of the Project's GHG emissions. SWAPE relied upon emissions estimates from SWAPE's updated CalEEMod model and compared these emissions to the BAAQMD's bright-line threshold of 1,100 MT CO₂e/year. SWAPE's analysis found that the Project's annual mitigated emissions will be 22,157 MT CO₂e/year, significantly above BAAQMD's significance threshold.⁷⁴

As SWAPE explains, when the Project's emissions exceed the 1,100 MT CO₂e/year screening-level threshold, BAAQMD recommends a more detailed review of the Project's GHG emissions. BAAQMD recommends a per service population (SP) efficiency threshold of 4.6 MT year per service population to conduct the

⁷³ California Environmental Quality Act Air Quality Guidelines, Bay Area Air Quality Management District, May 2017, p. 2-1.

⁷⁴ Exhibit A: SWAPE comments, p. 26.

detailed review. SWAPE conducted the detailed analysis,⁷⁵ and found that the Project's total GHG per service population emissions will be 5.52 MT CO₂e/sp/year.⁷⁶ This level of emissions exceeds the BAAQMD efficiency threshold of 4.6 MT CO₂e/sp/year, thus resulting in a potentially significant impact. Based on the results of this analysis, the City must revise its DEIR for the Project, and must require mitigation to reduce the Project's GHG impacts to below the level of significance, as mandated by CEQA.

7-17

D. Feasible Mitigation is Available to Mitigate the Project's GHG Impacts

In their letter, SWAPE include a list of feasible mitigation available to reduce impacts from GHG emissions.⁷⁷ These measures are similar to those the City should require the Applicant to employ to reduce operational emissions, discussed above. Specifically, it is worth noting that the proposed measure for providing shuttles to and from the BART station is such a feasible measure to address significant GHG emissions. Since the City's analysis relies heavily on the (unsubstantiated) claim that the Project is "Transit Oriented Development," the City should emphasize measures that will encourage and enhance transit use to reduce vehicle miles travelled.

7-18

V. THE DEIR FAILS TO ADEQUATELY ANALYZE, QUANTIFY AND MITIGATE THE PROJECT'S SIGNIFICANT IMPACTS ON BIOLOGICAL RESOURCES

According to the DEIR, the Project site consists of 76.24 acres of non-sensitive ruderal habitat and 0.66 acres of sensitive seasonal wetlands. Three special-status plant species and three special-status wildlife species were identified as having the potential to occur on the site, including the western burrowing owl and the Loggerhead shrike. The western burrowing owl is a California species of special concern, Federal bird of conservation concern and Final East Alameda County Conservation Strategy (2010) Proposed Focal Species. The loggerhead shrike is a California species of special concern and Federal bird of conservation concern. Despite special-status species on the Project site, the DEIR fails to properly address

7-19

⁷⁵ Exhibit A: SWAPE comments, p. 26.

⁷⁶ Exhibit A: SWAPE comments, p. 27.

⁷⁷ Exhibit A: SWAPE comments, p. 27-31.

the Project's impacts on many of the biological resources within the Project Site and vicinity. Specifically, the DEIR failed to properly establish the existing setting for some of the biological resources, and failed to adequately disclose and analyze the impacts on other biological resources. With regard to mitigation, many of the proposed mitigation measures fail to mitigate impacts on biological resources to a less than significant level, or improperly defer mitigation in violation of CEQA.

7-19

A. The DEIR Fails to Adequately Establish the Existing Setting for Biological Resources

The existing environmental setting is the starting point from which the lead agency must measure whether a proposed project may cause a significant environmental impact.⁷⁸ CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.⁷⁹ Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The courts have clearly stated that, “[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”⁸⁰

7-20

The DEIR, however, completely fails to properly describe the environmental setting for a number of special-status plants and wildlife species. As a result, the DEIR conclusions are not supported by substantial evidence. According to the Biological Resources Assessment (“BRA”) for the Project, the Applicant’s biological resources consultant, WRA, visited the Project site three times only: Once to determine the existence of plant communities, suitable habitat for special-status species and presence of sensitive habitats, and twice more to conduct a delineation of Waters of the U.S. and Waters of the State.

⁷⁸ See, e.g., *Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278 (“*Fat*”), citing Remy, et al., Guide to the Calif. Environmental Quality Act (1999) p. 165.

⁷⁹ CEQA Guidelines §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 (“*Riverwatch*”).

⁸⁰ *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

As Mr. Cashen explains, the surveys on the site do not constitute the protocol-level surveys needed to provide reliable information on the presence or absence of either San Joaquin spearscale and saline clover, and WRA did not conduct protocol-level surveys for burrowing owls, nor did it conduct focused surveys for the white-tailed kite and loggerhead shrike. Data from protocol surveys, which is used to establish the existing setting, is essential to a proper understanding of the magnitude and severity of a project's impacts to specific resources, and thus, the feasibility of various mitigation options.⁸¹ Specifically, the City failed to properly establish the existing conditions for the following special-status species and populations:

7-20

1. Core, Critical, and Unique Populations

The DEIR states that the City of Dublin “may also support core, critical, or unique populations essential to recovery and long term survival of” a number of special-status species, including Congdon’s tarplant, San Joaquin spearscale, saline clover, western burrowing owl, loggerhead shrike, and white-tailed kite.⁸² However, the DEIR provides *no further discussion or analysis* of these core, critical, or unique populations, including whether any would be affected by the Project. As Mr. Cashen points out, “[t]his precludes proper understanding of the environmental setting, Project impacts, and the adequacy of the City’s proposed mitigation.”⁸³

7-21

2. Burrowing Owl

The DEIR’s failure to properly establish the existing conditions is especially evident with regard to burrowing owl. As Mr. Cashen notes, once-abundant owl populations have declined dramatically in recent years and are now primarily limited to the eastern portions of Alameda and Contra Costa counties. By 2014, only two “large” breeding colonies of burrowing owls remained in Alameda County, and the Project site is located at the periphery of one of them – the Camp Parks site. As a result, “the loss of burrowing owls and habitat from the Project site heightens the potential that the breeding population will be extirpated from the entire Livermore-Amador Valley.”⁸⁴

7-22

⁸¹ Exhibit B: Cashen Comments, p. 2-3.

⁸² At Dublin Draft EIR, p. 7-21.

⁸³ Exhibit B: Cashen Comments, p. 6-7.

⁸⁴ Exhibit B: Cashen Comments, p. 7.

Despite the critical situation of the species, the DEIR fails to disclose the status and demography of the local and regional burrowing owl populations. According to the DEIR, burrowing owls were documented within the Project site in 2004 and 2009. The DEIR fails to disclose that nesting burrowing owls were also detected at the Project site in 2005, 2008, and 2010.⁸⁵

Except for one site visit, which the Applicant's biologists themselves state "do not constitute a protocol-level survey and are not intended to determine the actual presence or absence of a species,"⁸⁶ the Applicant failed to perform protocol-level surveys. The California Department of Fish and Wildlife ("CDFW") and burrowing owl researchers have concluded that *four independent breeding season surveys are necessary to provide reliable information on the presence of burrowing owls.*⁸⁷ As Mr. Cashen explains, data from those "detection surveys" are essential to avoiding, minimizing, and properly mitigating the direct and indirect effects of the Project on burrowing owls.⁸⁸ This was not done.

7-22

Mr. Cashen further explains that the two pre-construction surveys the DEIR requires the Applicant to conduct prior to ground-disturbing activities are not a substitute for the four "detection surveys" required to assess Project impacts and formulate appropriate mitigation. These pre-construction surveys are only intended to confirm no new owls have colonized the site since completion of the "detection" surveys.⁸⁹ Moreover, the pre-construction surveys follow the construction timetable and, therefore, they are not necessarily conducted during the breeding season, which is the crucial time to acquire reliable information on the presence of burrowing owls.⁹⁰ Mr. Cashen therefore concludes:

It is not possible to effectively assess Project impacts and the City's proposed mitigation until protocol surveys that adhere to CDFW guidelines have been conducted. As a result, the City must require the Applicant to conduct the detection surveys described in CDFW's Staff Report, and the results of those

⁸⁵ Exhibit B: Cashen Comments, p. 8.

⁸⁶ BRA, p. 11.

⁸⁷ See Appendix D *In*: California Department of Fish and Wildlife. 2012. Staff Report on Burrowing Owl Mitigation.

⁸⁸ Exhibit B: Cashen Comments, p. 8.

⁸⁹ Exhibit B: Cashen Comments, p. 17.

⁹⁰ See Appendix D *In*: California Department of Fish and Wildlife. 2012. Staff Report on Burrowing Owl Mitigation.

surveys need to be released in a revised CEQA document so that they can be thoroughly vetted by the public, resource agencies, and decision makers during the CEQA review process.⁹¹

7-22

3. Vernal Pool Branchiopods

The Project site provides potential habitat for the federally endangered longhorn fairy shrimp and the federally threatened vernal pool fairy shrimp, both of which have been documented in the vicinity of the Project site.⁹² However, the DEIR adopts the BRA conclusion that these endangered species are not likely to occur on the Project site. Mr. Cashen explains that this conclusion is erroneous for two main reasons.

First, the City's conclusion that these endangered species are not likely to occur on the Project site is inconsistent with the Eastern Dublin General Plan Amendment ("GPA") and Specific Plan, both applicable to the Project. Mitigation measures in those plans require species-specific surveys for special-status invertebrates in appropriate wetland habitats prior to approval of specific projects on specific locations, and do not relieve an applicant from conducting those species-specific surveys if its consultant concludes special-status invertebrates are "unlikely" to occur.⁹³

7-23

Second, as described below, the City's conclusion that these endangered species are not likely to occur on the Project site is not supported by substantial evidence.

Longhorn Fairy Shrimp

The DEIR erred in discounting the potential for the presence of the longhorn fairy shrimp at the Project site, based on the site characteristics, the fact it is not designated critical habitat and the fact that the nearest occurrence of the species is 5 miles away. As Mr. Cashen explains in his comments,⁹¹ none of these factors constitute substantial evidence for eliminating the potential for longhorn fairy

⁹¹ Exhibit B: Cashen Comments, p. 9.

⁹² At Dublin Draft EIR, p. 7-7.

⁹³ Exhibit B: Cashen Comments, p. 6.

⁹⁴ Exhibit B: Cashen Comments, p. 4.

shrimp to occur at the Project site. The DEIR must be revised to account for the potential presence of the species.

Vernal Pool Fairy Shrimp

The DEIR erred in discounting the potential for vernal pool fairy shrimp at the Project site based on “regular site disturbance,” development surrounding the site and lack of occurrences within the vicinity of the Project Area. As Mr. Cashen explains,⁹⁵ these are specious arguments that are not supported by scientific evidence. First, not all habitat on the site is disturbed. Second, ground disturbance activities do not preclude the potential for vernal pool fairy shrimp. Third, development surrounding the Project site and the lack of occurrences within the vicinity of the Project site do not preclude the potential for vernal pool fairy presence because this species populations are naturally isolated and distributed in discontinuous vernal pool systems.

7-23

California Linderiella

The DEIR also erred in completely failing to discuss the potential for the occurrence of the California Linderiella. This species, which is considered a special-status species, has a potential to occur on the Project site. It occupies the same types of habitat as the vernal pool fairy shrimp, and has been detected in seasonal wetlands comparable to those found on the Project site.⁹⁶

7-24

The DEIR must be revised to properly account for the potential occurrence of these species on the Project site in order to establish the existing setting upon which to assess the Project’s impacts and include mitigation to reduce any potentially significant impacts on those special-status branchiopods species.

B. The DEIR Fails to Adequately Disclose and Analyze Impacts on Biological Resources

An EIR must fully disclose all potentially significant impacts of a Project, and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency’s significance determination with regard to each impact

7-25

⁹⁵ Exhibit B: Cashen Comments, p. 5-6.

⁹⁶ Exhibit B: Cashen Comments, p. 6.

must be supported by accurate scientific and factual data.⁹⁷ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁹⁸ As explained by Mr. Cashen in his comments, the DEIR fails to comply with this duty regarding a number of biological resources and regarding the Project's cumulative impacts.

7-25

1. Burrowing Owl

In 2012, the CDFW published a Staff report ("CDFW Staff Report") to address the need for a comprehensive conservation and mitigation strategy for burrowing owls. Specifically, this report sets forth the Department's recommendations for

Developing more rigorous burrowing owl survey methods, working to improve the adequacy of impacts assessments; developing clear and effective avoidance and minimization measures; and developing mitigation measures to ensure impacts to the species are effectively addressed at the project, local, and/or regional level.⁹⁹

7-26

The DEIR relies on burrow exclusion as mitigation¹⁰⁰, yet fails to evaluate impacts to burrowing owls due to burrow exclusion, or to identify mitigation measures sufficient to reduce such impacts below a level of significance. The CDFW Staff Report states that burrow exclusion is a potentially significant impact under CEQA that must be analyzed¹⁰¹ due to the impacts it may have on the species habitat, stress, reproductive rates, energetic costs and more. Mr. Cashen also describes substantial scientific evidence showing that most relocation projects have resulted in fewer breeding pairs of burrowing owls at the mitigation site than at the original site, and that relocation projects generally have failed to produce self-sustaining populations.¹⁰² The DEIR's failure to analyze potential impacts associated with burrow exclusion is exacerbated by its deferral of the Burrowing Owl Relocation Plan, as described below.

⁹⁷ 14 CCR § 15064(b).

⁹⁸ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

⁹⁹ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, p. 1.

¹⁰⁰ At Dublin Draft EIR, p. 7-18, 7-19.

¹⁰¹ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, p. 10.

¹⁰² Exhibit B: Coshen Comments, p. 10-11.

In addition, the DEIR fails to analyze how the loss of burrowing owl habitat from the Project site may directly, indirectly, and cumulatively affect the local (Camp Parks) burrowing owl population, which, as Mr. Cashen notes, is the only breeding population remaining in the Livermore-Amador Valley. The DEIR conclusion that Mitigation Measure BIO-1.2 would reduce potential impacts to the species to a less-than-significant level¹⁰³ is not supported by evidence, as further discussed below.

7-26

2. Loggerhead Shrike and White-tailed Kite

Mr. Cashen explains how the DEIR fails to provide any specific analysis of Project impacts to loggerhead shrike and white-tailed kite, including how the loss of habitat might affect the local and regional populations, despite the fact the Project site provides nesting and/or foraging habitat for the species.¹⁰⁴

7-27

3. Cumulative Impacts

CEQA requires a lead agency to analyze a project's cumulative impacts.¹⁰⁵ The City fails to conduct a proper cumulative impact analysis in the DEIR in three ways.

First, the DEIR discussion of cumulative impacts does not include either a list of past, present, and probable future projects or a summary of projections contained in an applicable plan, as required by CEQA. This omission violates CEQA¹⁰⁶ and precludes meaningful discussion of cumulative impacts.

7-28

Second, CEQA requires¹⁰⁷ the a lead agency to define the geographic scope of the area affected by the cumulative effect *and* provide a reasonable explanation for the geographic limitation used. Although the DEIR defines the geographic scope as the City of Dublin, it fails to provide an explanation for limiting its scope to the City limits when impacts may occur in the County as well. This failure to justify its limited geographic scope violates CEQA.¹⁰⁸

¹⁰³ At Dublin Draft EIR, p. 7-15.

¹⁰⁴ Exhibit B: Cashen Comments, p. 11.

¹⁰⁵ 14 CCR § 15130.

¹⁰⁶ 14 CCR § 15130(b)(1).

¹⁰⁷ 14 CCR § 15130(b)(3)

¹⁰⁸ At Dublin Draft EIR, p. 7-21.

Finally, CEQA requires¹⁰⁹ a summary of the expected environmental effects to be produced by cumulative projects, and a reasonable analysis of the cumulative impacts of the relevant projects. As described below, the DEIR fails to satisfy these requirements regarding special-status species and wetlands.

7-28

a. Cumulative Impacts on Special-Status Species

The DEIR fails to provide any actual analysis of (a) the amount of habitat that existed prior to anthropogenic disturbance on the Project site and cumulative projects; (b) the amount of habitat that has been, or will be, affected by past, present, and probable future projects; or (c) the amount of habitat that is needed to maintain viable populations of the various special-status species that could be affected by the Project. Instead, the DEIR's analysis of cumulative impacts on special-status species relies solely on adherence to MM BIO-1.1, MM BIO-1.2, and MM BIO-1.3, to reduce the Project's cumulative impacts below level of significance. As Mr. Cashen explains, the DEIR's rationale is fundamentally flawed for the following reasons¹¹⁰:

7-29

First, Mr. Cashen explains that these mitigation measures lack any guarantee that mitigation will occur within the City of Dublin, which is the geographic area analyzed for cumulative impacts.

Second, Mr. Cashen explains that these measures do not provide any evidence or assurances they would offset cumulative impacts to these "core, critical, or unique populations" that the City acknowledges exist within the cumulative impact area.¹¹¹

Third, the DEIR fails to provide evidence that "adherence to similar standard mitigation"¹¹² in other projects has, and would, mitigate significant impacts to less-than-significant levels. Mr. Cashen explains that, in fact, substantial evidence shows that mitigation required by the City of Dublin for other projects has been ineffective in preventing significant impacts to special-status species, most notably

¹⁰⁹ 14 CCR §15130(b)(4), 15130(b)(5).

¹¹⁰ Exhibit B: Cashen Comments, p. 12-13.

¹¹¹ At Dublin Draft EIR, p. 7-21.

¹¹² At Dublin Draft EIR, p. 7-21.

burrowing owls. As a result, the Project's contribution to potentially significant cumulative impacts remains unmitigated.

7-29

b. Cumulative Impacts on Wetlands

The DEIR's analysis is limited to the statements that:

1. [t]he project would affect 0.66 acres of seasonal wetlands, which would considerably contribute to the significant cumulative biological impacts associated with past, present, and reasonably future projects. Implementation of MM BIO-3.1 would reduce the project's contribution to less-than-cumulatively considerable; and
2. [t]he required mitigation would reduce the project's contribution to any significant cumulative impact on wetlands to less than cumulatively considerable.¹¹³

7-30

As Mr. Cashen explains,¹¹¹ the City's conclusions in the DEIR are not supported by evidence because MM BIO-3.1 does not identify how the City would mitigate the Project's impacts on wetlands. Instead, it simply requires the preparation of a wetland mitigation plan after the CEQA review process terminates. Moreover, MM BIO-3 does not require the compensatory mitigation to be within the City of Dublin which is the area analyzed for cumulative impacts. Thus, cumulative impacts to wetlands within the City of Dublin would remain significant.

C. The Mitigation Measures Proposed in the DEIR Fail to Adequately Mitigate Impacts on Biological Resources

An EIR must identify and describe any feasible measure that can be implemented to reduce or avoid each potentially significant environmental effect of the project.¹¹⁵ The DEIR proposes a list of mitigation measures, concluding that compliance with these measures would reduce all project impacts to less than significant.¹¹⁶ As explained below, however, the mitigation measures proposed in the DEIR fail to properly mitigate the Project's potentially significant impacts with regard to a number of special-status species and wetlands.

7-31

¹¹³ At Dublin Draft EIR, p. 7-21.

¹¹⁴ Exhibit B: Cashen Comments, p. 14.

¹¹⁵ PRC §21100(b)(3), 14 CCR §15126.4(a)(1).

¹¹⁶ At Dublin Draft EIR, p. 7-22.

1. MM BIO-1.1: Special-Status Plants

The DEIR requires the Applicant to conduct a focused survey prior to construction to determine the presence of Congdon's tarplant or other special-status species on the Project site. If no special-status plant species are found during the survey, then no additional mitigation measures would be implemented. However, if Congdon's tarplant or any other special-status plant species are detected during the survey, additional mitigation measures would be required.¹¹⁷ As Mr. Cashen explains, this measure fails to mitigate the impacts below the level of significance, for several reasons.

First, Congdon's tarplant is known to occur at the Project site. Therefore, "there is no basis for making additional mitigation contingent on the results of a future survey of unknown quality, and conducted by a biologist with uncertain qualifications."¹¹⁸ This is especially true for annual plants, such as Congdon's tarplant, for which, as acknowledged by the applicant's biologist, failure to locate their presence during one season is not evidence they do not occur on the site.¹¹⁹

Second, this measure relies on activity exclusion zones, which, based on the site plan, will not be able to protect the species, as all existing plants will be directly or indirectly affected by the Project. Moreover, the DEIR fails to incorporate performance standards for special-status plants that are "protected" by activity exclusion zones and fails to incorporate measures to protect the plants from human disturbance and other indirect effects (e.g., altered hydrology) *after* the Project is built.¹²⁰

Compensatory Mitigation Strategy is Improperly Deferred

The DEIR requires the Applicant to prepare a mitigation plan if impacts to Congdon's tarplant or other special-status plant species cannot be avoided. According to the DEIR: "[a] mitigation plan may include but is not limited to the following: the acquisition of off-site mitigation areas presently supporting the Congdon's tarplant or other special-status species, purchase of credits in a

¹¹⁷ At Dublin Draft EIR, p. 7-16, 7-17.

¹¹⁸ Exhibit B: Cashen Comments, p. 14.

¹¹⁹ Exhibit B: Cashen Comments, p. 14.

¹²⁰ Exhibit B: Cashen Comments, p. 15.

mitigation bank that is approved to sell credits for special-status plants, or payment of in-lieu fees to a public agency or conservation organization (e.g., a local land trust) for the preservation and management of existing populations of special-status plants.”¹²¹

Deferring formulation of mitigation measures is generally impermissible.¹²² Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.¹²³ If identification of specific mitigation measures is impractical until a later stage in the project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.¹²⁴

Here, for the mitigation plan to be consistent with CEQA, the DEIR must first establish fundamental aspects of that plan. Mr. Cashen explains these measures should include, at the minimum, performance standards, a definitive enforcement mechanism, the contingency or remedial action measures that would be triggered if success standards are not achieved, measures for long-term protection and the required monitoring program, including the monitoring techniques, effort, and frequency.¹²⁵ The deficiency in the City’s mitigation plan as described in the DEIR is further exacerbated by the City’s failure to demonstrate that the future mitigation is feasible – the DEIR does not identify any applicable mitigation bank, in-lieu fee program or proper mitigation sites that can be used for the plan.¹²⁶

In addition, this mitigation measure is flawed as it fails to require a proper compensatory mitigation ratio. The DEIR states that the compensatory mitigation ratio for Project impacts to special-status plants would be at least 1:1 but that the forthcoming mitigation plan, which would be approved by the CDFW and the City would identify “the appropriate mitigation ratios.”¹²⁷ This mitigation is not only improperly deferred, leaving the formulation of critical details to some future time,

¹²¹ At Dublin Draft EIR, p. 7-17.

¹²² *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code § 21061.

¹²³ *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical*, *supra*, 29 Cal.App.4th at p. 1604, fn. 5.

¹²⁴ *Id.*

¹²⁵ Exhibit B: Cashen Comments, p. 15.

¹²⁶ Exhibit B: Cashen Comments, p. 15-16.

¹²⁷ At Dublin Draft EIR, p. 7-17.

it is also improper for two other reasons.

First, it fails to identify whether the compensatory mitigation ratio would be based on the number of plants impacted by the Project or the total amount of special-status plant habitat impacted by the Project. Second, it does not adhere to the Eastern Alameda County Conservation Strategy ("EACCS"). The EACCS establishes the standard for mitigation needed to conserve species and habitat in Eastern Alameda County, with a standardized mitigation ratio of 5:1 for impacts to focal plant species (e.g., Congdon's tarplant).¹²⁸ Similar ratios were required in other Projects in the City (such as Zeiss) and the DEIR fails to provide any explanation as to why this ratio is not required here.¹²⁹

7-32

Because the mitigation proposed by the City is improperly deferred, lacks fundamental details and does not meet the standards of even the EACCS, the DEIR lacks substantial evidence to support the conclusion that impacts to special-status plants would be reduced to a less-than-significant level. The City must prepare a revised DEIR that identifies the required elements of the mitigation plan and demonstrates its feasibility.

2. MM BIO-1.2: Burrowing Owl

The DEIR incorporates the following mitigation measures for Project impacts to burrowing owls: (1) pre-construction surveys that would be conducted immediately before ground-disturbing activities; (2) avoidance measures; (3) burrow exclusion; and (4) preparation and implementation of a mitigation plan if avoidance is not possible. As Mr. Cashen explains, these measures fail to properly address and mitigate the impacts on burrowing owls.

7-33

Burrowing Owl Survey

The DEIR requires a pre-construction survey no more than 14 days prior to ground-disturbing activities, and a second survey within 48 hours of initial ground disturbance. As Mr. Cashen explains, and as discussed under "existing conditions" above, two pre-construction surveys that would be conducted during any time of the

¹²⁸ ICF International. 2010. Final Draft East Alameda County Conservation Strategy. Prepared for East Alameda County Conservation Strategy Steering Committee. October 2010. Table 3-12.

¹²⁹ Exhibit B: Cashen Comments, p. 16.

year do not provide reliable information on burrowing owls that may be impacted by the Project.¹³⁰ Moreover, Mr. Cashen points out that according to the CDFW's Staff Report: "[a]ny new burrowing owl colonizing the project site after the CEQA document has been adopted may constitute changed circumstances that *should be addressed in a re-circulated CEQA document.*"¹³¹ The City would evade this requirement since there would be no future environmental review for the Project and this DEIR is the review process for evaluating this Project's impacts. Despite that, the DEIR fails to incorporate any provisions for re-circulation of the DEIR should owls be detected during the pre-construction surveys.

Because the Project could have severe consequences on persistence of the local and regional burrowing owl populations, it is imperative that the City provide the public an opportunity to review and comment on the mitigation, and that the City formulate clear, enforceable mitigation that would actually reduce significant impacts. The City must revise the DEIR to disclose the information during the environmental review process.

7-33

Mr. Cashen explains that this measure also fails to properly address the impacts because it does not guarantee proper timing for surveys, which is crucial to the success of the mitigation. Specifically, it does not require any breeding season surveys to ascertain the importance of the site to breeding burrowing owls. Because burrowing owl's attachment to the site is greatly reduced outside the breeding season, pre-construction surveys that are conducted during the non-breeding season would not provide reliable information on owls that use the site, especially for breeding.¹³²

Avoidance Measures

CDFW's Staff Report lists several measures that should be implemented to avoid and minimize impacts to burrowing owls. These measures include, among others, the implementation of buffers to avoid disturbances and direct destruction of burrows and ongoing surveillance of the site during project activities. The DEIR, however, fails to incorporate any of the avoidance measures listed in CDFW's Staff

¹³⁰ Exhibit B: Cashen Comments, p. 17.

¹³¹ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, p. 10. [emphasis added].

¹³² Exhibit B: Cashen Comments, p. 17-18.

Report.

Instead, as Mr. Cashen explains, “avoidance” measures incorporated into the DEIR are limited to measures that would eliminate habitat from the Project site (i.e., the destruction of burrows) and in themselves may have significant impacts on burrowing owls.¹³³ The DEIR, however, fails to clarify that true avoidance should occur first, namely implementation of buffers to avoid disturbances and direct destruction of burrows and that destruction of burrow should only be implemented during the non-breeding season, and only after implementation of the Burrowing Owl Relocation Plan.

This issue is exacerbated because the avoidance measures incorporated into the DEIR lack crucial details for proper implementation. For example, they fail to require the specialized equipment with which burrows should be inspected to reliably determine presence of owls. The lack of important measure from the CDFW Staff Report and the lack of important details within the avoidance measures means that these measures would not mitigate potentially significant impacts to burrowing owls.

7-33

Burrowing Owl Relocation Plan

The DEIR requires the Applicant, in consultation with the CDFW, to prepare a Burrowing Owl Relocation Plan “if avoidance of burrowing owls or their burrows is not possible.” As Mr. Cashen explains, this means that the Applicant would only be required to prepare a Burrowing Owl Relocation Plan if it is unable to eliminate all potential habitat from the Project site using “avoidance measures.” Mr. Cashen further explains that the DEIR should clarify that the CDFW must approve the Applicant’s Burrowing Owl Relocation Plan prior to any ground-disturbing activities.

Mitigation Plan

MM BIO-1.2 states that if avoidance of owls or burrows is not possible and the Project may result in impacts to owls or their habitat, the Applicant shall prepare a “detailed mitigation plan that shall include replacement of impacted

¹³³ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation. pp. 8 through 10.
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habitat, number of burrows, and burrowing owl at a ratio approved by CDFW." The plan will be approved by the CDFW and the City prior to first ground-disturbing activities.¹³⁴

As with the Congdon's tarplant mitigation plan, this measure constitutes impermissible deferral of mitigation.¹³⁵ Here, specific information pertaining to the City's mitigation strategy is especially important given the fragile status of the burrowing owl population that remains in the Livermore-Amador Valley. Mr. Cashen explains that this is extremely important here because neither the CDFW nor the City has an effective oversight approach that ensures compensatory mitigation efforts are effective in reducing impacts to burrowing owls, as was exemplified by the failure of mitigation measures in other projects approved by the City.¹³⁶

The DEIR also fails to identify the compensatory mitigation ratio that would be applied for Project impacts to burrowing owl habitat. Mr. Cashen notes that the 1:1 mitigation ratio contained in CDFW's Staff Report is not likely to be sufficient to mitigate impacts below a level of significance in this case due to the rapid decline of the Camp Parks population and the limited availability of compensation habitat to support that population.¹³⁷ A proper mitigation would be adhering to the more specifically developed EACCS ratio of 3:1 (3.5:1 if the mitigation site is in a different core area).¹³⁸ Mr. Cashen notes that the City cannot assume that a ratio less than 3:1 would mitigate impacts to a less-than-significant level unless it provides scientific analysis justifying that determination.

The DEIR must be revised to include critical components of the burrowing owl mitigation plan, including (1) compensatory mitigation ratio; (2) habitat replacement strategy (e.g., preservation, enhancement, or creation); (3) habitat replacement mechanism (e.g., habitat acquisition, purchase of credits at a mitigation bank, or in-lieu fee); (4) acceptable locations for habitat compensation (e.g., Livermore-Amador Valley); (5) site protection methods; (6) financial assurances; (7) performance standards; and (8) monitoring and reporting

¹³⁴ At Dublin Draft EIR, p. 7-19.

¹³⁵ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code § 21061.

¹³⁶ Burrowing Owl Preservation Society. 2017. Burrowing Owl Mitigation in California. pp.43.

¹³⁷ Exhibit B: Cashen Comments, p. 20.

¹³⁸ ICF International. 2010. Final Draft East Alameda County Conservation Strategy. Prepared for East Alameda County Conservation Strategy Steering Committee. October 2010. p. 3-65 and Table 3-10.

requirements.¹³⁹ Until this is done, the DEIR's deferral of these components effectively robs the public from being able to submit comments on fundamental aspects of the mitigation strategy and violates CEQA.

7-33

3. MM BIO-1.3: Nesting Birds

Mitigation Measure BIO-1.3 requires that before ground disturbing activities during nesting seasons, the Applicant will retain a qualified biologist to perform pre-construction breeding bird surveys. If nests are found they will be protected by "a suitable buffer," which will "vary based on species and conditions, but is typically at least 50 feet, and up to 250 feet for raptors."¹⁴⁰

As Mr. Cashen explains, this mitigation measure lacks crucial details necessary to ensure it will be effective in mitigating the impacts. It fails to specify the techniques that should be applied to nest surveys, the minimum level of effort required (i.e., hours per unit area), the search area, and the time of day surveys will be permitted, all proven to be crucial aspects of mitigation success.¹⁴¹

7-34

In addition, the DEIR suggests the Applicant's biologist would be responsible for determining the size of any nest buffers. Mr. Cashen explains that "this is not a reliable mitigation strategy because construction contractors often pressure biologists into making decisions based on the contractor's needs, rather than the needs of the bird."¹⁴² Therefore, the DEIR must establish a mechanism that ensures the buffer size selected by the Applicant's biologist is sufficient to prevent impacts to bird nests based on the City's analysis in the DEIR.

Moreover, Mr. Cashen states that the DEIR fails to support its statement that a nest buffer "is typically at least 50 feet, and up to 250 feet for raptors" with substantial evidence. Based on the noise construction projection contained in the DEIR, and recommendations by the CDFW for other projects, Mr. Cashen concludes that a minimum no-disturbance buffer of 500 feet for unlisted raptors, and 250 feet for other non-listed bird species is required. Otherwise, the DEIR will fail to mitigate the impacts on nesting birds below the level of significance.¹⁴³

¹³⁹ Exhibit B: Cashen Comments, p. 19.

¹⁴⁰ At Dublin Draft EIR, p. 7-19.

¹⁴¹ Exhibit B: Cashen Comments, p. 20-21.

¹⁴² Exhibit B: Cashen Comments, p. 21.

¹⁴³ Exhibit B: Cashen Comments, p. 21.

4. MM BIO-3.1 Wetland Mitigation Plan

MM BIO-3.1 requires the Applicant to acquire the “appropriate applicable permit(s)” for impacts to the site's wetlands. It further requires the Applicant to prepare a wetland mitigation plan that is approved by the City and applicable regulatory agency (USACE and/or RWQCB). The DEIR concludes these actions would reduce Project impacts to wetlands to a less-than-significant level. As Mr. Cashen explains, the City's conclusion is not supported by evidence for two main reasons.

First, requiring a wetland mitigation plan for approval by other agencies is an impermissible deference of mitigation. Under CEQA, the City must, at least, define the specific mitigation strategy (e.g., creation, restoration, or enhancement), mitigation ratio, monitoring program, and performance standards that will be implemented to ensure the Project would have less-than-significant impacts on the environment (i.e., independent of analysis conducted by the USACE and RWQCB designed to ensure compliance with state and federal wetland regulations). Mr. Cashen notes that the RWQCB itself recently stated in a letter regarding another project that it is inappropriate to rely upon agency regulations for determining that impacts will be at insignificant levels.¹¹⁴

7-35

Second, no substantial evidence supports the assumption that compliance with regulatory permits provides assurances that Project impacts to jurisdictional wetlands would be less-than-significant. To the contrary, Mr. Cashen points out to numerous studies which have demonstrated that many compensatory mitigation projects permitted under Sections 401 and 404 of the Clean Water Act are not achieving the goal of “no overall net loss” of wetland acres and functions.¹¹⁵

The DEIR must be revised to properly include all the required details to ensure mitigation of all potentially significant impacts on wetland will be effective.

VI. CONCLUSION

The DEIR is inadequate as an environmental document because the City fails to adequately describe the environmental baseline upon which to measure impacts

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¹¹⁴ Exhibit B: Cashen Comments, p. 21-22.

¹¹⁵ Exhibit B: Cashen Comments, p. 22-23.

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and fails to properly disclose, analyze and mitigate the Project's significant impacts on air quality, GHGs and biological resources. The City cannot approve the Project until it prepares and re-circulates a revised DEIR that resolves these issues and complies with CEQA's requirements.

7-36

Thank you for your consideration of these comments.

Sincerely,

Tanya A. Gulesserian
Nirit Lotan

A handwritten signature in blue ink, appearing to be 'Nirit Lotan', written over the printed name.

NL:acp