



Via Email

May 24, 2016

Carol Miller, Principal Planner  
Town of Apple Valley  
14955 Dale Evans Parkway  
Apple Valley, CA 92307  
Email: cmiller@applevalley.org

**RE: Comment on the Notice of Intent to Adopt a Mitigated Negative Declaration for Project Jupiter Distribution Warehouse**

Dear Ms. Miller:

I am writing on behalf of **Laborers International Union of North America, Local Union No. 783** and its members living in San Bernardino County (collectively "LIUNA Local Union No. 783," "LIUNA" or "Commenters") regarding the Initial Study/ Mitigated Negative Declaration (IS/MND) prepared for Project Jupiter Distribution Warehouse (Site Plan Review 2015-001) ("Project").

We have reviewed the IS/MND with the assistance of:

1. Traffic Engineer, Daniel T. Smith Jr., P.E.,
2. Ecologist, Shawn Smallwood, Ph.D., and
3. Hydrogeologist, Matthew Hagemann, C.Hg., MS. and Environmental Scientist Jessie Jaeger of Soil/ Water/Air Protection Enterprise (SWAPE).

These experts have prepared written comments that are attached hereto, and which are incorporated in their entirety. The City of Apple Valley ("City") should respond to the expert comments separately.

After reviewing the IS/MND, together with our team of expert consultants, it is evident that the document contains numerous errors and omissions that preclude accurate analysis of the Project's environmental impacts. As a result of these inadequacies, the IS/MND fails as an informational document. In addition, Commenters ask the City of Apple Valley ("City") to prepare an environmental impact report ("EIR") for the Project because there is a fair argument that the Project may have significant unmitigated impacts, including impacts on air quality, traffic, and biological resources. An EIR is required to analyze these and other impacts and to propose feasible mitigation measures to reduce the impacts to the extent feasible.

## **I. PROJECT DESCRIPTION**

The Project will develop a 106.5 acre parcel to accommodate a 1,360,875 square foot distribution center and associated ancillary facilities. The distribution warehouse will consist of a single, 45-foot high building consisting primarily of warehouse space in addition to ancillary office space. The Project will also include a separate guard house (510 square feet), fire pump house (1,080 square feet) and parking areas to accommodate automobiles, tractors and trailers. The site plan has also been designed to include storm water retention facilities on the west side of the site.

The project also includes off-site improvements. These include roadway improvements to Navajo Road, Lafayette Street, and Dachshund Avenue; water main relocation and extensions on the frontage roadways; and undergrounding of power lines on Navajo Road.

## **II. STANDING**

Members of Local Union No. 783 live, work, and recreate in the immediate vicinity of the Project site and/or areas that will be affected by traffic and air pollution created by the Project. These members will suffer the impacts of a poorly executed or inadequately mitigated Project, just as would the members of any nearby homeowners association, community group, or environmental group.

In addition, construction workers will suffer many of the most significant impacts from the Project as currently proposed, such as from air pollution emissions from poorly maintained or controlled construction equipment, exposure to contaminated soil, noise impacts during construction, etc.. Therefore, LIUNA Local Union No. 783 and its members have a direct interest in ensuring that the Project is adequately analyzed and that its environmental and public health impacts are mitigated to the fullest extent feasible.

### III. LEGAL STANDARDS

#### A. Tiered EIRs

The EIR is the very heart of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.) As the California Supreme Court held, "[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." (*Communities for a Better Env't v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320, citing, *No Oil, Inc. v. City of Los Angeles* (1974)(*NRDC v. LA*) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504-505.) "Significant environmental effect" is defined very broadly as "a substantial or potentially substantial adverse change in the environment." Pub. Res. Code ["PRC"] § 21068; see also 14 CCR § 15382. An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial." *No Oil, Inc., supra*, 13 Cal.3d at 83. "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." (*CBE v. CRA* (2002) 103 Cal.App.4th at 109.)

CEQA permits agencies to 'tier' EIRs, in which general matters and environmental effects are considered in an EIR "prepared for a policy, plan, program or ordinance followed by narrower or site-specific [EIRs] which incorporate by reference the discussion in any prior [EIR] and which concentrate on the environmental effects which (a) are capable of being mitigated, or (b) were not analyzed as significant effects on the environment in the prior [EIR]." (Cal. Pub. Res. Code § 21068.5.) "[T]iering is appropriate when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous [EIRs]." (Cal Pub Resources Code § 21093.) The initial general policy-oriented EIR is called a programmatic EIR ("PEIR") and offers the advantage of allowing "the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts." (14 C.C.R. §15168.) CEQA regulations strongly promote tiering of EIRs, stating that "[EIRs] shall be tiered whenever feasible, as determined by the lead agency." (Cal Pub Resources Code § 21093.)

"Subsequent activities in the program must be examined in light of the program EIR to determine whether an additional environmental document must be prepared."

C.C.R. § 15168(c). A PEIR may only serve "to the extent that it contemplates and adequately analyzes the potential environmental impacts of the project." (*Sierra Nevada Conservation v. County of El Dorado* (hereinafter "*El Dorado*") (2012) 202 Cal.App.4th 1156). If the PEIR does not evaluate the environmental impacts of the project, a tiered EIR must be completed before the project is approved. (*Id.*)

In very limited circumstances, an agency may avoid preparing a tiered EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (14 Cal. Code Regs. § 15371), only if there is not even a "fair argument" that the project will have a significant environmental effect. PRC, §§ 21100, 21064.) Since "[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process," by allowing the agency "to dispense with the duty [to prepare an EIR]," negative declarations are allowed only in cases where "the proposed project will not affect the environment at all." *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440. For these inquiries, the "fair argument test" applies. (*Sierra Club v. County of Sonoma*, 6 Cal.App.4th 1307, 1318; *See also Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1164 ("when a prior EIR has been prepared and certified for a program or plan, the question for a court reviewing an agency's decision not to use a tiered EIR for a later project 'is one of law, i.e., the sufficiency of the evidence to support a fair argument.'")) Under the fair argument test, a new EIR must be prepared "whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact. (*Id.* at 1316 (quotations omitted).) When applying the fair argument test, "deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary." (*Sierra Club*, 6 Cal. App. 4th at 1312.) "[I]f there is substantial evidence in the record that the later project may arguably have a significant adverse effect on the environment which was not examined in the prior program EIR, doubts must be resolved in favor of environmental review and the agency must prepare a new tiered EIR, notwithstanding the existence of contrary evidence." (*Sierra Club*, 6 Cal.App.4th at 1319.)

**IV. A TIERED EIR IS REQUIRED BECAUSE THE PROJECT WILL RESULT IN NEW SIGNIFICANT ENVIRONMENTAL IMPACTS NOT EXAMINED IN THE NORTH APPLE VALLEY INDUSTRIAL SPECIFIC PLAN EIR.**

The IS/MND acknowledges that it is a tiered CEQA document from the programmatic EIR for the North Apple Valley Industrial Specific Plan ("Specific Plan"). LIUNA agrees that a tiered EIR is required for the Project. First, a tiered EIR is required because the Specific Plan EIR upon which the City relies explicitly stated that it was a

"programmatic" EIR and that additional environmental analysis would be conducted for new development applications. Because the City made this representation to the public, it is now bound by it. Indeed, courts have required subsequent CEQA review in cases where the programmatic EIR relied upon has informed the public that later environmental review would occur. (Remy, Thomas, *Guide to CEQA*, p. 653 (11th ed. 2007), citing, *NRDC v. LA* (2002) 103 Cal.App.4th 268.) Apple Valley's Specific Plan EIR made clear that it was intended to serve only as a general "program EIR," and clearly contemplates the development of "project level" environmental review for later projects in the Specific Plan area. The Specific Plan states:

***This EIR is meant to serve at a program level.*** Additional environmental documentation, such as environmental assessments and environmental impact reports, may be required for subdivisions, land use plans and other development applications that may be processed by the Town. (Specific Plan I-5) (emphasis added)

This point was reiterated by the City in the discussion of traffic impacts:

***Given the programmatic nature of the Specific Plan and the associated traffic analysis, updated site-specific traffic studies will be required on a project-by-project basis*** prior to the implementation of such projects as tentative tract maps, conditional land uses or plot plan approvals within the boundaries of the Specific Plan. Subsequent traffic studies shall analyses the-existing traffic conditions and potential traffic impacts from each project. The need for subsequent traffic analysis shall be made on a case-by-case [sic] basis by the Town Engineer. (*Id.* at III-46.) (emphasis added)

***The programmatic level of the Specific Plan study suggests that on-going and project specific traffic monitoring is required to assure adequate levels of service in the long-term.*** The Town shall periodically monitor conditions along roadway segments where General Plan and Specific plan level analyses indicate high levels of traffic congestion (*Id.* at III-47) (emphasis added)

Any member of the public reading the EIR would reasonably expect that the City would conduct project-level environmental review for a specific project within the Specific Plan area. Where the City represented that project level CEQA review would occur later, it must now follow through and conduct full and fair environmental review.

Furthermore, a tiered EIR is required because the PEIR did not analyze the environmental impacts of the Project that is now proposed. A PEIR may only "serve as the EIR for a subsequently proposed project to the extent it contemplates and adequately analyzes the potential environmental impacts of the project." (*El Dorado*, 202 Cal.App.4th at 11671.) The Specific Plan is only a general policy document intended to "guide the future development" of an approximately 4,937 acre tract of land through "development standards and guidelines for the eventual development of a master planned industrial Park." (Specific Plan, p.I-6&7.) The Specific Plan did not commit to any specific project uses or locations for those uses, merely limiting development to "a broad range of clean manufacturing and warehousing uses, ranging from furniture manufacture to warehouse distribution facilities." (*Id.* at p. I-7) This included three types of industrial designations (Industrial – Specific Plan, Industrial – General, and Industrial – Airport) and commercial development to support the industrial development. (*Id.* at III-5.)

Apple Valley's Specific Plan does not even specifically resolve to construct a distribution warehouse, but only lists distribution warehouses as one potential type of industrial use permitted within the area. Consequently, the PEIR for the Specific Plan lacked the specifics to meaningfully analyze the Project's environmental impacts. It therefore, may not relieve the City from conducting a review of the potential environmental impacts of the Project. (See *El Dorado*, (2012) 202 Cal.App.4th 1156, 1171; See also, *Save Our Neighborhood v. Lishman*, 14 Cal. App. 4th 12888 (finding that a proposed Project was a new Project even though planned for the same land and involving a similar mix of uses where they had different Project proponents and different configuration of uses.))

Given that the Specific Plan EIR does not fulfill the City's obligation to conduct CEQA review for the Project, it is subject to the "fair argument" standard in determining whether a full tiered EIR is required. (PRC, §§ 21100, 21064). Thus, a negative declaration is only allowed if "the proposed project will not affect the environment at all." (*Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440.) This means that a tiered EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency's decision. (14 C.C.R. § 15064(f)(1); *Sierra Club v. County of Sonoma*, 6 Cal.App.4th 1307, 1318; *Pocket Protectors v. City of Sacramento*, 124 Cal. App. 4th 903, 931 (Cal. App. 3d Dist. 2004); *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-15; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.) The "fair argument" standard creates a "low threshold" favoring environmental review through an EIR rather than



through issuance of negative declarations or notices of exemption from CEQA. *Pocket Protectors*, 124 Cal.App.4th at 928. The following discussion demonstrates that there is a fair argument that the Project will have significant and unmitigated environment impacts, including air, traffic and biological impacts. Therefore, a MND is insufficient to meet the City's obligations under CEQA, and the City must prepare a full EIR.

**A. The Initial Study Lacks Substantial Evidence to Support Conclusions Regarding the Baseline of Project Impacts**

Establishing an accurate baseline is the *sine qua non* to adequately analyzing and mitigating the significant environmental impacts of a project. (See 14 C.C.R. § 15125(a); *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 121-23 ("Save Our Peninsula.")) Every CEQA document must start from a "baseline" assumption. The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. Section 15125(a) of the CEQA Guidelines states in pertinent part that a lead agency's environmental review under CEQA:

...must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time [environmental analysis] is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant." (Emphasis added.)

(14 C.C.R. § 15125(a); See also, *Save Our Peninsula Committee* (2001) 87 Cal.App.4th at 124-25.) As the Court of Appeal has explained, "the impacts of the project must be measured against the 'real conditions on the ground,'" and not against hypothetical permitted levels. (*Save Our Peninsula Committee* (2001) 87 Cal.App.4th at 121-23.)

**1. The Baseline for Analyzing Traffic Impacts Does Not Reflect Current Conditions.**

Traffic Engineer Daniel Smith reviewed the MND and found that the traffic analysis conducted for the IS/MND failed to take into account current traffic and roadway conditions surrounding the Project. First, the traffic study relies on outdated traffic conditions. The MND's traffic analysis is based on tiering from the 2006 Specific Plan EIR. While the use of the Specific Plan's EIR is not inherently problematic, Mr. Smith concluded that the city failed to conduct the proper analysis to ensure that the conditions relied upon in the Specific Plan PEIR were still accurate. (See, Comment of Daniel Smith, p.2 attached hereto as Appendix A.) Specifically, he found that the IS/MND failed to consider changes since the PIER in traffic both from development within the Specific Plan boundaries and ambient traffic increases from new development

outside of the Specific Plan boundaries. (*Id.*) The City may not rely on a baseline derived from 10-year-old data without any consideration of its continued applicability.

Furthermore, Mr. Smith concluded that the City used an improper baseline in its traffic analysis by relying on aspirational roadway conditions that do not yet exist. (*Id.* at 3.) As with the baseline traffic, the IS/MND relied on the Specific Plan EIR to determine baseline roadway conditions. However, instead of using the conditions in place when the Specific Plan EIR was drafted in 2006, which consisted of mostly unpaved local roads serving minimal traffic operations, the IS/MND relied on the upgraded road conditions which the Specific Plan intended to be implemented by 2030. Mr. Smith explains that the success of these planned improvements will depend on the course of development within the Specific Plan Boundaries:

Logically, if development takes place in a coordinated way, sub-area by sub-area, the improvements to the circulation system triggered by individual developments will be mutually supportive and satisfactory transportation service will be maintained throughout the Plan buildout period. However, if initial development is scattered over the entire Plan area, circulation system improvements made may not be mutually sustaining and significant traffic impacts may occur and may continue for years until the Plan nears full development. The IS/MND contains no quantified analysis demonstrating that there would not be traffic impacts with the land developments and circulation system upgrades that will have taken place by the date of completion of the Jupiter Project.

(*Id.*) Even assuming the upgrades are successfully accomplished by 2030, the IS/MND's traffic analysis still fails to take into account the roadway conditions from Project construction and operation (projected to occur in 2017 and 2018 respectively) through 2030. This means over a decade of traffic impacts were not properly considered. Because the roadway conditions utilized to analyze traffic impacts do not reflect conditions "as they exist at the time [environmental analysis] is commenced," the IS/MND violates CEQA. *Save Our Peninsula*, 87 Cal.App.4th at 124-25.

The traffic analysis downplayed the true extent of traffic impacts by using both aspirational roadway conditions and outdated traffic conditions. Therefore, the baseline from which the Project's traffic impacts were analyzed fails to represent accurate conditions presently surrounding the Project. This improper baseline ultimately "mislead(s) the public" by engendering skewed and inaccurate analyses of environmental impacts, mitigation measures and cumulative impacts for biological resources. See *San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at p. 656;



*Woodward Park Homeowners*, 150 Cal.App.4th at 708-711. Without an accurate baseline, the IS/MND's conclusion that the Project's traffic impacts will be less than significant are unsubstantiated. Proper analysis must be conducted to take into account present day conditions, and all impacts must be mitigated. An EIR must be prepared to remedy these deficiencies.

## **2. The Initial Study Lacked Substantial Evidence to Support a Conclusion Regarding the Baseline Presence of Special-Status Species**

Expert wildlife biologist Shawn Smallwood reviewed the IS/MND and the biological survey for the Project and concluded that the failure of the IS/MND (and supporting documents) to investigate and identify occurrences of sensitive biological resources at the Project site resulted in an inaccurate baseline, unsupported by substantial evidence. (See, Comment of Shawn Smallwood, p.2 attached hereto as Appendix B.)

First, an accurate environmental setting for biological resources was not established because the surveys dismissed the presence of special-status species without conducting adequate surveys. Mr. Smallwood found that the IS/MND inappropriately failed to account for a number of special-status species likely to be impacted by the Project given conditions of the Project site. (*Id.*) Mr. Smallwood explained that "[s]tandard scientific practice when assessing risk to rare or precious resources in the face of high uncertainty is to err on the side of caution," however, the IS/MND assumed no impacts to a number of protected species after only reconnaissance-level surveys. (*Id.*) There was no effort to detect bats even though multiple special-status species are likely to forage over the site. (*Id.* at 5.) Similarly the survey concluded that the Pallid San Diego pocket mouse and Southern grasshopper mouse were absent from the Project site without conducting any mammal trapping. (*Id.*) In total, Mr. Smallwood listed over thirty protected species that the survey concluded were not present at the Project site without conducting protocol-level surveys (*Id.* 2-3.) Unless protocol-level surveys are conducted, these species should be assumed to be likely present at the Project site so that potential impacts can be fully analyzed and mitigated.

The failure of the IS/MND to adequately assess potential impacts on special-status species is demonstrated by its treatment of the burrowing owl. The IS/MND concluded that the burrowing owls would likely be absent from the project site because all of the kit fox burrows (in which they burrow) found on the Project site had been

collapsed. (*Id.* at 3.) However, the IS/MND failed to note that burrowing owls most often use ground squirrel burrows for nesting and refuge, which were also found onsite but were not collapsed. (*Id.*) Moreover, Mr. Smallwood challenged the IS/MND's conclusion that the creosote on the Project would render it unsuitable for burrowing owls. Based on personal observations and experience, he concluded that these conditions would in fact be suitable for burrowing owls. (*Id.*) Mr. Smallwood also noted that the surveys conducted did not comply with the California Department of Fish and Game protocol, which requires surveys to be conducted multiple times across seasons. This omission was particularly egregious because the surveys were "designed to meet burrowing owl . . . survey guidelines" and protocol-level surveys were a requirement established in the Specific Plan EIR. (*Id.*) Mr. Smallwood concluded that, "One-time survey efforts are unreliable for concluding absence of burrowing owl." (*Id.* at p.4.) As such, there was no substantial evidence to warrant the IS/MND's assumptions that the Project would not impact this protected species.

Mr. Smallwood found similar issues with the IS/MND as it pertained to additional protected bird species. Mr. Smallwood found that the failure to observe prairie falcons and golden eagles through reconnaissance surveys does not, as the biological surveys suggest, allow for the conclusion that these species do not rely on the Project site for foraging. (*Id.* at 4.) Given the scarceness of these species combined with their wide range, Mr. Smallwood concluded, "There should be no question that destroying foraging habitat on this site will cause **significant adverse impacts to prairie falcons and golden eagles.**" With respect to migratory birds, the IS/MND flatly dismisses the potential presence of migratory birds at the Project site because of the disturbed condition of the Project site and presence of creosote bushes without any evidence to support its claim. (*Id.* at 4.) To the contrary of this vague and unsubstantiated conclusion, Mr. Smallwood pointed to studies demonstrating that birds nest and forage in creosote shrubs, and therefore, concluded that the project would likely "have **significant adverse impacts on migratory birds.**" (*Id.*)

In sum, the City's conclusion that the Project's impact on biological resources will be less than significant cannot be supported without proper biological resource surveys having been conducted. Eliminating the possibility of protected species on site without conducting protocol-level surveys is unreasonable and fails to inform the public and decision makers of the Project's potential impacts on biological resources. Protocol-level surveys must be conducted or protected species likely to be present on the Project site must be assumed to be present to allow for full mitigation of potential impacts. An EIR must be prepared to remedy these deficiencies.

**B. An EIR is Required Because There is a Fair Argument that the Environmental Impacts from the Project will be Significant.**

As discussed above, a lead agency must prepare a tiered EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment. (Pub. Res. Code § 21082.2; *Sierra Club v. County of Sonoma*, 6 Cal.App.4th 1307, 1318; *El Dorado* (2012) 202 Cal.App.4th 1156; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1993) 6 Cal. 4th 1112, 1123.) Here, substantial evidence presented in this comment letter, and the supporting technical comments, supports a fair argument that the Project will have significant environmental impacts on air quality, traffic, and biological resources. As a result, the City should withdraw the IS/MND and prepare an EIR.

**1. The Project will have significant unmitigated air pollution impacts.**

SWAPE reviewed the Project and the IS/MND, and determined that the initial study failed to adequately evaluate the Project's air quality impacts because it relied on improper input parameters when modeling the Project's emissions. SWAPE "found that several of the assumptions used and values inputted into the model were not consistent with procedures and values used in other CEQA evaluations for high-cube warehouse projects, and were not consistent with information disclosed in the IS/MND." (SWAPE Comment, p.2, attached hereto as Appendix C.) Such assumptions included truck trips generated from the Project, projected fleet mix, trip length and unrefrigerated storage.

The IS/MND underestimated the number of truck trips likely to be generated by the Project by using default modeling data instead of more accurate project-specific data. In assessing the likely impacts of the Project, SWAPE noted that while the Mojave Desert Air Quality Management District (MDAQMD) does not have guidance with respect to high-cube warehouse distribution centers, South Coast Air Quality Management District (SCAQMD), which also governs the rest of San Bernardino County, has conducted extensive research on the issue and recommends the use of the Institute of Transportation Engineers (ITE) Trip Generation Manual. *Id.* at p.2-3. SWAPE concluded that given the proximity of the SCAQMD jurisdiction and the agency's expertise, it was reasonable and recommended to follow its recommendations. Use of ITE figures reveals that the IS/MND underestimates the number of daily truck and car trips by 273 trips per day, almost **100,000 trips per year**. *Id.* at 3. By underestimating the number of truck trips likely to be generated by the Project, the IS/MND's failed to take into account the full extent of air pollution likely to be emitted as a result of the Project.

The IS/MND also underestimated air impacts from the Project by using an inaccurate fleet mix. SWAPE explained that the IS/MND used the model's default fleet mix, which has only approximately 40% of trips by 4+ axle trucks and over 50% of trips by 2 axle trucks. *Id.* at 4. SCAQMD has also provided guidance on fleet mix based on analysis of other high-cube warehouse projects. It recommends a fleet mix of just over 60% 4+ axle trucks, with only 22% of trips from 2 axle trucks and 17.7% from 3 axle trucks. *Id.* Relying on a fleet mix comprised mostly of smaller vehicles results in lower emission levels because smaller vehicles are less fuel-intensive to operate. SWAPE concluded, "By failing to utilize the warehouse-specific truck trip fleet mix, the IS/MND underestimates the total number of heavy-duty and medium-duty truck trips the Project will generate during operation, and as a result, the Project's operational emissions are underestimated." *Id.* at 5

Further casting doubt on the IS/MND's conclusions, SWAPE concluded that, in using the default figures, the Project substantially underestimated the length of truck trips. The model assumes truck trip lengths of a mere 7.3 miles, a figure which would barely take trucks past the Apple Valley boundary. (*Id.* at 7.) SCAQMD has found that most industrial land use types haul consumer goods from the Ports of Long Beach and Los Angeles, which a simple Google map search reveals are over 100 miles from the Apple Valley. (*Id.* at 6.) SCAQMD has, therefore, recommended a 40-mile one way trip length, *Id.* SWAPE also noted recently proposed warehouse projects within the County of San Bernardino have adopted proposed trip lengths of 50 and 24.11 miles. (*Id.* at 5-6.) Moreover, SCAQMD took issue with the 24.11 proposal, a number that is three times that utilized in the IS/MND. (*Id.* at 6.) The IS/MND's reliance on a grossly unrealistic trip length resulted in the underestimation of air pollution impacts.

Finally, the IS/MND underestimated operational emissions by failing to consider any cold-storage warehouse uses even though the DEIR acknowledges that the specific tenants remain unknown. (*Id.* at p. 7.) If tenants do require refrigeration, it will change the scope of the Project's environmental effects because refrigerated warehouses release more air pollutants and greenhouse gas (GHG) emissions when compared to unrefrigerated warehouses. (*Id.* at 8) Refrigerated trucks tend to idle much longer than typical hauling trucks, even up to an hour. (*Id.*) Energy usage from warehouses equipped with industrial size refrigerators and freezers is also much greater when compared to unrefrigerated warehouses. (*Id.*) In addition, according to the July 2014 SCAQMD Warehouse Truck Trip Study Data Results and Usage presentation, trucks that require refrigeration resulted in greater truck trip rates when compared to non-refrigerated trucks. (*Id.*) By relying exclusively on unrefrigerated land use emissions, the air quality analysis greatly underestimates the Project's potential air quality and

climate change impacts. (*Id.*) Because it is reasonably foreseeable that one or more of the warehouse tenants will require refrigeration, an EIR should be prepared to account for the effects from refrigerated warehouse buildings. (*Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 396.)

In addition to the failure of the modeling to accurately project operational emissions, SWAPE determined that the model also underestimated construction emissions. SWAPE found that the modeling assumed that all off-road construction vehicles would be equipped with oxidation catalysts, which would reduce emissions from construction by 15%. (SWAPE Comment at p.8). However, SWAPE pointed out that the IS/MND does not contain any commitment to use of oxidation catalysts in construction equipment. *Id.* Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments. (14 C.C.R. § 15126.4(a)(2).) Consequently, if the IS/MND is going to rely on clean construction equipment to ensure that emissions impacts are not significant, it must commit to use of this equipment as a condition of approval for the Project. Without such enforceability, the IS/MND may not rely upon those reductions.

In order to account for the numerous errors in the modeling relied upon in the IS/MND, SWAPE reran the model with corrected parameters and found that "the Project will have a potentially significant impact on regional air quality." (*Id.* at 10.) Specifically, the Project's NO<sub>x</sub> emissions exceeded the MDAQMD significance threshold of 137 pounds/day, even after the implementation of mitigation. (*Id.* at 11.) This significant impact must be analyzed in an EIR and fully mitigated. SWAPE's letter details a number of mitigation measures for operational NO<sub>x</sub> that could be incorporated into the Project. (*Id.* at 11-12.)

## **2. The Project will have significant unmitigated traffic impacts.**

The Traffic Impact Analysis ("TIA") does not support the findings of not significant in the IS/MND. Traffic engineer Dan Smith's analysis of the TIA revealed that the traffic generation study performed in support of the IS/MND fails to take into account the severity of the traffic impacts expected from the Project. Mr. Smith explains that while the analysis correctly determined that the Project as proposed would generate less overall traffic in the peaks than the PEIR had originally assumed, it failed to mention that the Project would result in **more** traffic in the peak direction in both the AM and PM peaks (AM inbound, PM outbound) than assumed for the Specific Plan. Mr. Smith explains, "This concentration of traffic in the peak direction would tend to place greater



stress on the transportation system." Therefore, the IS/MND failed to consider this potentially significant impact.

**3. The Project will have significant unmitigated impacts on wildlife movement.**

The biological survey's dismissal of the Project's impacts of wildlife movement (relied upon for the IS/MND) is based on vague, unsubstantiated, and misleading rationales. The survey vaguely refers to the "disconnected nature of ... barriers" and "varying degrees of terrestrial exclusion" without providing enough detail to allow even an expert such as Mr. Smallwood to understand the analysis. (Smallwood Comment, p. 5.) Moreover, Mr. Smallwood notes that the biological survey makes broad and optimistic assertions, such as that culverts, bridges and drainage features will act as wildlife travel corridors without any evidentiary support. (*Id.* at 5.)

In addition, the biological survey underestimates impacts on wildlife movement by only asking whether Project would interfere with a specific wildlife movement corridor, instead of wildlife movement in the region as a whole. (*Id.* at 6.) Mr. Smallwood concluded that, given that the Project would block much of the remaining passage space along the valley floor of northern Apple Valley, the Project would "cause a **significant impact on wildlife movement in the region.**" (*Id.*) Because the Project is likely to have a significant biological impact, the City must prepare a full EIR to analyze the extent of the impacts and mitigate to the extent feasible.

**C. An EIR is Required Because the Project Will Have Significant Cumulative Impacts**

**1. Given the PEIR's finding of significant cumulative air pollution impacts, an EIR is required to evaluate and mitigate those impacts.**

An IS must discuss a Project's significant cumulative impacts. (14 CCR § 15130(a).) This requirement flows from CEQA section 21083, which requires a finding that a project may have a significant effect on the environment if "the possible effects of a project are individually limited but cumulatively considerable . . . . 'Cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."

"Cumulative impacts" are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." 14 C.C.R. § 15355(a). "[I]ndividual effects may be changes

resulting from a single project or a number of separate projects." *Id.* "The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." *Comm. for a Better Env't v. Cal. Resources Agency ("CBE v. CRA")* (2002) 103 Cal.App.4th 98, 117; 14 C.C.R. § 15355(b). A legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable probable future projects whose impacts might compound or interrelate with those of the project at hand.

The IS/MND only addresses cumulative impacts briefly, labeling the cumulative impacts as "less than significant with mitigation incorporated" without any underlying analysis. The IS/MND dismisses any need to consider the issue because of the Specific Plan EIR:

The project will . . . contribute to cumulative impacts to air quality, which will potentially impact human beings at Specific Plan build out. The Town Council, however, when it adopted the Specific Plan and certified the EIR, determined that the benefits of build out of the Specific Plan outweighed the potential impacts associated with air quality, and adopted Findings and a Statement of Overriding Considerations as described above. There is no evidence that the proposed project would result in impacts that are any greater than those already disclosed in the EIR. Accordingly, no further analysis is required under State CEQA Guidelines § 15162."

(Specific Plan EIR p. 57.)

The City's reasoning flips the requirements of CEQA on its head. In the case of *CBE v. CRA*, the Court of Appeal held that when a "first tier" EIR admits a significant, unavoidable environmental impact, then the agency must prepare second tier EIRs for later projects to ensure that those unmitigated impacts are "mitigated or avoided." ((2002) 103 Cal.App.4th at 122-125 (citing CEQA Guidelines §15152(f)).) The court reasoned that the unmitigated impacts was not "adequately addressed" in the first tier EIR since it was not "mitigated or avoided." (*Id.*) Thus, significant effects disclosed in first tier EIRs will trigger second tier EIRs unless such effects have been "adequately addressed," in a way that ensures the effects will be "mitigated or avoided." (*Id.*) In fact, a second tier EIR is required, even if the impact still cannot be fully mitigated and a statement of overriding considerations will be required. The court explained, "The

requirement of a statement of overriding considerations is central to CEQA's role as a public accountability statute; it requires public officials, in approving environmental detrimental projects, to justify their decisions based on counterbalancing social, economic or other benefits, and to point to substantial evidence in support." (*Id.* at 124-125)

Thus, since the Specific Plan EIR admitted that the Specific Plan would result in significant, unmitigated air impacts, a second tier EIR is now required to determine if mitigation measures can now be imposed to reduce or eliminate those impacts as they pertain to the Project. If the impacts still remain significant and unavoidable, a statement of overriding considerations will be required

**2. The IS/MND may not rely on the Specific Plan EIR to avoid a full cumulative impacts analysis taking into account the new development proposed or constructed subsequent to the Specific Plan EIR.**

The IS/MND makes a second mistake in its reliance on the cumulative impacts analysis conducted for the Specific Plan EIR. The IS/MND states, "There is no evidence that the proposed project would result in impacts that are any greater than those already disclosed in the EIR. Accordingly, no further analysis is required under State CEQA Guidelines § 15162." This conclusion is flawed and misinterprets the requirements of CEQA. As discussed in Section IV, the Project requires a full tiered EIR because it includes new information not available at the time the Specific Plan EIR was drafted and there is a "fair argument" that the Project impacts will be significant even after mitigation. The requirement to conduct a new tiered EIR extends to cumulative impacts analysis just as it does to direct Project impacts. Therefore, the City must consider environmental impacts resulting from the Project in light of the development in the Specific Plan and separate Projects. 14 C.C.R. § 15355(a).

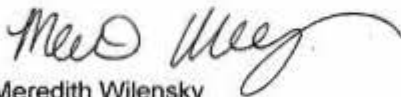
There have been significant changes in the development of the area since the Specific Plan was drafted that may result in significant cumulative environmental impacts when considered with the Project. For example, Desert Renewable Energy Conservation Plan (DRECP) has resulted in a multi-agency effort to develop thousands of acres of industrial-scale wind and solar energy generation. (Smallwood Comment p. 7.) Mr. Smallwood explained that the DRECP would have substantial impacts on wildlife habitat in the region and could extirpate the burrowing owl from the Mojave Desert due to cumulative impacts with industrial development. (*Id.*)

In addition, SWAPE noted that the City's Commercial and Residential Activity Report reported approximately 57 development projects that are or will be developed within the City, five of which are in a three-mile radius of the Project with many more nearby. (SWAPE Comment, p. 13.) SWAPE opined that, taking into account these other projects, there is the potential for the Project to have significant cumulative health impacts. (*Id.* at p.16.) The City may not rely on an outdated PEIR to evade its obligation to conduct a proper cumulative impacts assessment for the Project. An EIR should be prepared taking into account the DRECP and other proposed and approved development efforts that may result in cumulative environmental impacts.

#### V. CONCLUSION

Apple Valley's 2006 Specific Plan is a broad policy document intended to be used as a guide in the development of future industrial development through 2030. While the Project may have used the Specific Plan to guide its design, the project goes well beyond the scope of Specific Plan, providing new information about the nature of the Project allowing for more in-depth environmental review than would have been possible at the time the Specific Plan EIR was developed. While the City admits that the Project tiers off of the Specific Plan EIR, it fails to acknowledge the full scope of biological, traffic and air pollution impacts that will result from the project, including cumulative impacts. Furthermore, the IS/MND used an inaccurate baseline which precluded it from properly assessing those impacts. Because there is a fair argument that the Project will result in significant impacts on the environment, the City must conduct a full EIR and fully mitigate all environmental impacts to the extent feasible. Thank you for your attention to these comments.

Sincerely,



Meredith Wilensky  
Richard Drury  
Lozeau Drury LLP