



T 510.836.4200
F 510.836.4205

410 12th Street, Suite 250
Oakland, Ca 94607

www.lozeaudrury.com
richard@lozeaudrury.com

Via Email and Overnight Mail

March 30, 2018

City of Santa Clara
Community Development Department
Contact: Steve Le, Assistant Planner
1500 Warburton Avenue
Santa Clara, CA 95050
(408) 615-2450
sle@santaclaraca.gov

Re: Comments on Initial Study/Mitigated Negative Declaration for the 2305 Mission College Boulevard Data Center Project, CEQ2017-01034; File No(s): PLN2017-12535 (SCH2018032008). Request for Environmental Impact Report.

Dear Mr. Le:

I am writing on behalf of the **Laborers International Union of North America, Local Union 270** and its members living in Santa Clara County and the City of Santa Clara ("LIUNA"), regarding the 2305 Mission College Boulevard Data Center, PLN-2017-12535, CEQ2017-01034 and SCH2018032008, including all actions related or referring to the demolition of the current two-story 358,000 sf office/R&D building and development and construction of a two-story 495,610 sf data center building located at 2305 Mission College Boulevard on APN: 104-13-096 in the City of Santa Clara. ("Project").

We have prepared these comments with assistance from the expert consulting firm, Soil Water Air Protection Enterprise (SWAPE). Their expert comments are attached hereto and incorporated in their entirety. The expert comments establish a fair argument that the Project may have significant unmitigated impacts, including:

1. Significant unmitigated air quality impacts;

2. Significant unmitigated cancer risks:
3. Significant and unmitigated greenhouse gas impacts;

LIUNA requests that the City of Santa Clara ("City") withdraw the Initial Study/Mitigated Negative Declaration ("IS/MND") and instead prepare an environmental impact report ("EIR") for the Project, as there is substantial evidence that the Project will have significant unmitigated impacts on the environment as discussed below. An EIR is required to analyze these and other impacts and to adopt feasible mitigation measures to reduce the impacts to the extent feasible.

PROJECT DESCRIPTION

The Project seeks to demolish an existing 358,000 square foot office building and paved parking lot in order to develop a 495,610 square foot data center building. The data center building would house computer servers for private clients in a secure and environmentally controlled structure, and would be designed to provide 60 megawatts (MW) of information technology (IT) power. Standby backup emergency electrical generators would be installed to provide for an uninterrupted power supply. A total of 120 625-kW diesel-fueled engine generators would be located within a generator yard west of the data center building. The generators would provide 75 MW of backup power generation capacity. Additionally, the site will also construct a 90-megavolt amp electrical substation on-site and 75 parking stalls.

STANDING

Members of LIUNA live, work, and recreate in the vicinity of the Project site. 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. Hundreds of LIUNA members live and work in areas that will be affected by air pollution and traffic generated by the project. Therefore, LIUNA 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.

LEGAL STANDARD

As the California Supreme Court recently 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 Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320 [*"CBE v. SCAQMD"*], citing, *No Oil, Inc. v. City of Los Angeles* (1974) 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.) “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.” (*Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal.App.4th 98, 109 [“CBE v. CRA”].)

The EIR is the very heart of CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927.) The EIR is an “environmental ‘alarm bell’ whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return.” (*Bakersfield Citizens*, 124 Cal.App.4th at 1220.) The EIR also functions as a “document of accountability,” intended to “demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.” (*Laurel Heights Improvements Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.) The EIR process “protects not only the environment but also informed self-government.” (*Pocket Protectors*, 124 Cal.App.4th at 927.)

An EIR is required if “there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.” (Pub. Resources Code, § 21080(d); see also *Pocket Protectors*, 124 Cal.App.4th at 927.) In limited circumstances, an agency may avoid preparing an 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 [“CEQA Guidelines”]), only if there is not even a “fair argument” that the project will have a significant environmental effect. (Pub. Resources Code, §§ 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.)

Where an initial study shows that the project may have a significant effect on the environment, a mitigated negative declaration may be appropriate. However, a mitigated negative declaration is proper *only* if the project revisions would avoid or mitigate the potentially significant effects identified in the initial study “to a point where clearly no significant effect on the environment would occur, and . . . there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.” (Public Resources Code §§ 21064.5 and 21080(c)(2); *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 331.) In that context, “may” means a *reasonable possibility* of a significant effect on the environment. (Pub. Resources Code, §§ 21082.2(a),

21100, 21151(a); *Pocket Protectors*, 124 Cal.App.4th at 927; *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–905.)

Under the “fair argument” standard, an 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. (CEQA Guidelines, § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931; *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*, *supra*, 124 Cal.App.4th at 928.)

The “fair argument” standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

This ‘fair argument’ standard is very different from the standard normally followed by public agencies in making administrative determinations. Ordinarily, public agencies weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact. The lead agency’s decision is thus largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

(Kostka & Zishcke, *Practice Under CEQA*, §6.29, pp. 273-274.) The Courts have explained that “it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency’s determination. Review is *de novo*, with a **preference for resolving doubts in favor of environmental review.**” (*Pocket Protectors*, 124 Cal.App.4th at 928 [emphasis in original].)

As a matter of law, “substantial evidence includes . . . expert opinion.” (Pub. Resources Code, § 21080(e)(1); CEQA Guidelines, § 15064(f)(5).) CEQA Guidelines demand that where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the environmental effects to be significant and prepare an EIR. (CEQA Guidelines § 15064(f)(5); Pub. Res. Code § 21080(e)(1); *Pocket Protectors*, 124 Cal.App.4th at 935.) “Significant environmental effect” is defined very broadly as “a substantial or potentially substantial adverse change in the environment.” (Pub. Resources Code,

§ 21068; see also CEQA Guidelines, § 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.*, 13 Cal.3d at 83.) In *Pocket Protectors*, the court explained how expert opinion is considered. The Court limited agencies and courts to weighing the admissibility of the evidence. (*Pocket Protectors*, 124 Cal.App.4th at 935.) In the context of reviewing a negative declaration, “neither the lead agency nor a court may ‘weigh’ conflicting substantial evidence to determine whether an EIR must be prepared in the first instance.” (*Id.*) Where a disagreement arises regarding the validity of a negative declaration, the courts require an EIR. As the Court explained, “[i]t is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project.” (*Id.*)

DISCUSSION

A. The Project will have Significant Air Pollutant Emissions.

The environmental consulting firm, Soil, Water, Air Protection Enterprise (SWAPE), concludes that the Project will have very significant air quality impacts, far above applicable CEQA significance thresholds set by the Bay Area Air Quality Management District (BAAQMD). In particular the ***Project will create cancer risks more than twenty times above the Bay Area Air Quality Management District’s (BAAQMD’s) CEQA significance thresholds***, due largely to the close proximity of the Project to a residential neighborhood. The Project will also generate nitrogen oxides (NOx) and greenhouse gas (GHGs) far above significance thresholds. As such, an EIR is required to analyze these impacts, and to propose feasible mitigation measures and alternatives to reduce or eliminate the impacts.

Air districts’ air quality thresholds are treated as dispositive in evaluating the significance of a project’s air quality impacts. (See, e.g. *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (County applies BAAQMD’s “published CEQA quantitative criteria” and “threshold level of cumulative significance”). See also *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-111 (“A ‘threshold of significance’ for a given environmental effect is simply that level at which the lead agency finds the effects of the project to be significant”).) The California Supreme Court recently made clear the substantial importance that an air quality district significance threshold plays in providing substantial evidence of a significant adverse impact. (*CBE v. SCAQMD*, 48 Cal.4th at 327 (“As the [South Coast Air Quality Management] District’s established significance threshold for NOx is 55 pounds per day, these estimates [of NOx emissions of 201 to 456 pounds per day] constitute substantial evidence supporting a fair argument for a significant adverse impact”).)

Since there is a fair argument that the Project's air quality emissions exceed CEQA significance thresholds, an EIR is required to analyze and mitigate Project impacts.

1. The Project Will Create Significant Cancer Risks in the Nearby Residential Community Due to Diesel Engine Exhaust.

SWAPE concludes that the Project will create cancer risks in the nearby residential community more than **twenty times above the BAAQMD'S CEQA significance threshold**. The IS\MND erroneously concludes that the Project's cancer risks will be less than significant, but this is because the IS\MND fails to apply the proper cancer risk calculation methodology established by the California Office of Environmental Health Hazard Assessment ("OEHHA"), the California Air Resources Board (CARB) and by BAAQMD.

SWAPE conducts detailed calculations using OEHHA methodology and concludes, "the excess cancer risk over the course of a residential lifetime (30 years) at the MEIR is approximately **220 in one million**." (SWAPE, p. 9 (emphasis added)). The BAAQMD significance threshold for cancer risk is 10 in one million. Therefore, the Project will create a cancer risk in the adjacent residential neighborhood more than 20 times above the CEQA significance threshold. An EIR is required to analyze this risk and propose feasible mitigation measures.

SWAPE suggests numerous mitigation measures that could reduce the Project's cancer risks, including requiring the use of low-emission construction equipment, advanced particulate filters for diesel generators, idling restrictions and many other measures. (SWAPE, pp. 9-14). However, since the IS\MND erroneously concludes there is no significant risk, it fails to impose these feasible measures.

2. The Project will Have Significant Nitrogen Oxide (NOx) Impacts.

SWAPE concludes that the Project will generate significant nitrogen oxides (NOx) emissions, above the BAAQMD'S CEQA significance thresholds. NOx reacts in the atmosphere to create ground-level ozone. US EPA states that ozone has serious adverse health impacts:

Ozone in the air we breathe can harm our health. People most at risk from breathing air containing ozone include people with asthma, children, older adults, and people who are active outdoors, especially outdoor workers. In addition, people with certain genetic characteristics, and people with reduced

intake of certain nutrients, such as vitamins C and E, are at greater risk from ozone exposure.

Breathing ozone can trigger a variety of health problems including chest pain, coughing, throat irritation, and airway inflammation. It also can reduce lung function and harm lung tissue. Ozone can worsen bronchitis, emphysema, and asthma, leading to increased medical care.

<https://www.epa.gov/ozone-pollution/ozone-basics#effects>.

SWAPE concludes that the Project will generate **268 pounds per day (ppd) of NOx – almost five times above the BAAQMD CEQA significance threshold of 54 ppd.**

Mitigated Maximum Daily Construction Emissions (lbs/day)	
Model	NOx
IS/MND	51
SWAPE	268
Percent Increase	425%
BAAQMD Regional Threshold (lbs/day)	54
<i>Exceed?</i>	<i>Yes</i>

The IS/MND concludes that the Project will generate 51 ppd of NOx – slightly below the significance threshold. However, SWAPE notes that the IS/MND made unauthorized adjustments and manipulated the air quality model without proper justification.

Most obviously, the model inputs supporting the IS/MND assumed that the Project size would be 400,000 square feet, but the actual Project size will be 495,610 square feet. This error alone understates Project emissions by 25%. The IS/MND makes several other errors, such as underestimating truck trip length by half or more, underestimating construction equipment usage by half, as well as several other obvious errors. None of these adjustments to the standard CalEEMod model are justified in the Initial Study.

When SWAPE corrected these errors, and conducted calculations in accordance with the required CalEEMod parameters, Project emissions increased to 268 ppd of NOx – far above the BAAQMD's 54 ppd CEQA significance threshold.

An EIR is required to analyze the Project's NOx impacts and to propose feasible mitigation measures. SWAPE proposes numerous mitigation measures to

reduce NOx impacts. None of these are analyzed since the City prepared an IS/MND rather than an EIR.

3. The Project Will Have Significant Greenhouse Gas Impacts.

SWAPE concludes that the Project will generate greenhouse gases (GHGs) emissions of 2,513 metric tons per year, more than double the BAAQMD CEQA significance threshold of 1,100 metric tons (MT/yr).per year. (SWAPE p. 19).

Estimated Annual Greenhouse Gas Emissions	
Emission Source	Proposed Project (MT CO₂E/year)
Construction (Amortized)	62.79
Area	0.01
Energy	1,751
Mobile	80.45
Waste	309.06
Water	310.58
Total	2,513
BAAQMD Significance Threshold	1,100
<i>Exceed?</i>	<i>Yes</i>

The IS/MND concludes that the Project would have less than significant GHG emissions, but conducts no calculations at all. In other words, there is no substantial evidence to support the IS/MND’s conclusion of less than significant impacts. The IS/MND merely states that the Project, “would not conflict with the Santa Clara Climate Action Plan or other plans, policies or regulations adopted for the purpose of reducing the emissions of GHG” (IS/MND p. 70). However, without any calculations, there is no way to determine if the Project would exceed the 1,100 MT/yr threshold.

SWAPE conducted calculations using standard methodologies, and concluded that the Project will generate GHGs at levels more than double the BAAQMD CEQA significance threshold. As such, an EIR is required to analyze the Project’s GHG impacts and to propose feasible mitigation measures.

SWAPE proposes numerous feasible mitigation measures, none of which are analyzed in the IS/MND. An EIR should be prepared to analyze and implement these and other GHG mitigation measures.

In addition, the IS/MND relies on deferred mitigation for GHG impacts. The IS/MND lists measures that “**could be included** as part of the TDM Plan to reduce vehicle trips by 10 percent consistent with the City’s CAP (Climate Action Plan)” (p.

March 30, 2018

LIUNA Comments on IS/MND for 2305 Mission College Boulevard Data Center Project

Page 9

67). However, the IS/MND fails to include these measures as mitigation or as a Project Design Feature (PDF). Therefore the Project is not consistent with the CAP. Also, it relies for mitigation on measures that are not set forth in the IS/MND and not required as mitigation measures. CEQA prohibits this type of "deferred mitigation."

"A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307.)

"[R]eliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking; and[,] consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92.)

The IS/MND relies on such "tentative plans for future mitigation" that were rejected the cases of *Sundstrom* and *CBE v. Richmond*. As such, the IS/MND fails to comply with CEQA. Also, since the IS/MND does not impose binding Transportation Demand Management (TDM) measures, it is not consistent with the Climate Action Plan. A new document must be prepared setting forth specific mitigation measures that will be implemented.

CONCLUSION

For the foregoing reasons, the IS/MND for the Project should be withdrawn. An EIR should be prepared and the draft EIR should be circulated for public review and comment in accordance with CEQA. An EIR is necessary to analyze the Projects significant adverse impacts on, cancer risk, ozone precursors (NOx), and greenhouse gases. The EIR must propose all feasible mitigation measures and alternatives to reduce the Project's significant impacts. Thank you for considering our comments.

Sincerely,

A large black rectangular redaction box covering the signature of Richard Drury.

Richard Drury
Lozeau | Drury LLP
Counsel for LIUNA Local 270