

Letter 4

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March 31, 2014

VIA E-MAIL AND OVERNIGHT MAIL

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**Re: Comments on the Draft Environmental Impact Report for the
UNFI Warehouse Project (SCH# 2013091002)**

Dear Mr. Butler:

On behalf of **Gilroy Citizens for Responsible Development** ("Gilroy Citizens"), we submit these comments on the Draft Environmental Impact Report ("DEIR") prepared by the City of Gilroy ("City") for the United Natural Foods, Inc. ("UNFI") Warehouse and Distribution Facility project ("Project") proposed by UNFI ("Applicant"). The Project requires a General Plan amendment, zoning amendment, parcel map, and associated approvals to allow for the development of a natural foods warehouse and distribution facility on 53 acres of undeveloped land. The main building will be approximately 800,000 square feet in size, which is roughly the size of 14 football fields. The Project will also include a separate truck maintenance and fueling facility, parking lots for employees and semi-trailer trucks, and the extension of roadways onto the Project site via two new bridges over the Princeville Drain.

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As explained more fully below, the DEIR does not comply with the requirements of the California Environmental Quality Act ("CEQA").¹ The City may not approve the Project until an adequate DEIR is prepared and circulated for public review and comment.

¹ Pub. Resources Code § 21000 *et seq.*

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Gilroy Citizens is a coalition comprised of individuals, including Craig Simmons, Mike Conti, Eric Coleman, William K. Bradley, William J. Culbertson, and John Sandoval, and groups, including Sheet Metal Workers Local 104, International Brotherhood of Electrical Workers Local 332, and Plumbers & Steamfitters Local 393, and their members and their families. Gilroy Citizens was formed to advocate for responsible and sustainable development projects that protect the environment where its members and their families live, work, and recreate. Its members have a personal interest in protecting against unnecessary impacts of projects that are detrimental to human health and the environment.

Additionally, environmental degradation destroys agricultural and wildlife areas, consumes limited fresh water resources, causes water and air pollution, and imposes other stresses on the environmental carrying capacity of the state. This in turn jeopardizes future development by causing construction moratoriums and otherwise reducing future employment opportunities for Gilroy Citizens' members. Gilroy Citizens therefore has a direct interest in enforcing environmental laws to minimize the adverse impacts of projects that would otherwise degrade the environment.

Finally, Gilroy Citizens' members are concerned about projects that risk serious environmental harm without providing countervailing economic benefits. The CEQA process allows for a balanced consideration of a project's socioeconomic and environmental impacts, and it is in this spirit that we offer these comments.

I. INTRODUCTION AND SUMMARY

The Project is located on agricultural land in the eastern part of the City. A number of commercial and industrial projects have been approved and constructed in this area, and together these projects will cause significant unavoidable cumulative impacts on the area's limited agricultural, water, air, and biological resources to a potentially significant cumulative extent. Now more than ever, it is essential that the City's DEIR adequately identify and analyze the Project's foreseeable direct, indirect and cumulative impacts. It is also imperative that any and all feasible mitigation measures be presented and discussed. Indeed, CEQA requires nothing less.

As explained below, the Project will generate a multitude of impacts in a number of impact areas, including agriculture, air quality, biological resources,

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greenhouse gasses, hazards, hydrological resources, and traffic, among others. The DEIR either mischaracterizes, incorrectly analyzes, underestimates, or fails to identify many of these impacts. Furthermore, many of the mitigation measures described in the DEIR will not in fact mitigate impacts to the extent claimed, and in some instances may generate additional impacts that are not evaluated. In particular:

- The DEIR's project description lacks any details about Phase 2 of the Project;
- The DEIR fails to follow basic protocols for establishing the existing environmental setting, including burrowing owl surveys and a jurisdictional wetland determination;
- The DEIR's justification for failing to require agricultural mitigation is completely inadequate, and an off-site conservation easement or payment of an in-lieu fee should be required;
- Additional construction-related air quality mitigation is available and feasible, and must be applied to the Project;
- The DEIR fails to require construction-related mitigation measures established by the Bay Area Air Quality Management District;
- The DEIR is lacking a Health Risk Assessment for community health impacts, and fails to even discuss, let alone incorporate, feasible mitigation measures to reduce the Project's significant contribution to cumulative impacts from toxic air contaminants;
- The DEIR greatly underestimates the percentage of truck traffic associated with Project operations, rendering its analysis of air quality, greenhouse gasses, and traffic inaccurate;
- The Project's contribution to cumulative nitrogen deposition that harms the bay checkerspot butterfly is a significant impact, and enforceable mitigation is required;

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- The Project does not qualify as a "pipeline project" exempt from mitigation under the Santa Clara Valley Habitat Conservation Plan;
- The DEIR underestimates the greenhouse gas emissions associated with Project operations, and fails to incorporate feasible mitigation measures to reduce greenhouse gas impacts to a less-than-significant level; and
- The DEIR fails to require soil testing and worker protections for residual agricultural chemicals associated with the former agricultural use of the Project site.

The DEIR must be revised to resolve its inadequacies and must be recirculated for public review and comment. CEQA requires recirculation of a DEIR for public review and comment when significant new information must be added to the DEIR following public review, but before certification.² The CEQA Guidelines clarify that new information is significant if "the DEIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the Project or a feasible way to mitigate or avoid such an effect."³

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The purpose of recirculation is to give the public and other agencies an opportunity to evaluate the new data and the validity of conclusions drawn from it.⁴ As discussed below, the DEIR fails to disclose and analyze all Project components, the DEIR does not adequately establish the environmental setting from which to analyze the Project's impacts, the Project will result in significant environmental impacts that are not analyzed in the DEIR, and there are feasible mitigation measures available to reduce significant impacts that have not been required in the DEIR. These changes must be addressed in a revised DEIR that is circulated for public review and comment.

² Pub. Resources Code § 21092.1.

³ CEQA "Guidelines," 14 Cal. Code Regs. § 15088.5.

⁴ *Save Our Peninsula Comm. v. Monterey City Bd. of Supervisors* (1981) 122 CalApp3d 813, 822.

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II. LACK OF TIMELY INFORMATION AND POTENTIAL NEED TO SUBMIT FURTHER COMMENTS

On March 14, 2014, members of Gilroy Citizens submitted a request for copies of documents related to the Project. The City indicated that it would respond by March 24th. On March 24th, the City indicated that it would provide a full response by April 3rd, but would make some documents available electronically by March 28th.

On March 26th, Gilroy Citizens requested all materials referenced or relied upon in the DEIR, including a list of documents from the "reference" section of the DEIR. Under CEQA, all documents referenced in an environmental document must be made available to the public for the entire public comment period.⁵ Gilroy Citizens for Responsible Development also requested an extension of the public comment period on the DEIR, in order to have adequate time to review the DEIR reference documents.

On March 28th, the City denied the request for an extension of the public comment period, and provided internet links to many of the requested reference documents. The City indicated that other reference documents, including prior CEQA documents for the Project site, were not available electronically. Gilroy Citizens promptly requested paper copies of these reference documents. On the afternoon of March 31, the public comment deadline for the DEIR, the City provided Gilroy Citizens with at least 30 additional documents.

Gilroy Citizens has not had time to review the DEIR reference documents and other public documents associated with the Project. Accordingly, its effort to fully understand the Project's environmental impacts and the City's analysis and mitigation of those impacts has been hindered. Gilroy Citizens also plans to review the DEIR reference documents with assistance from technical consultants. For this reason, we reserve the right to supplement these comments before the Project reaches the City Council for approval.

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⁵ Pub. Resources Code § 21092(b)(1); CEQA Guidelines § 15073.

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III. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE PROJECT

The DEIR does not meet CEQA's requirements because it fails to include an accurate and complete Project description, rendering the analysis inadequate. California courts have also repeatedly held that "an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document]."⁶ CEQA requires that a project be described with enough particularity that its impacts can be assessed.⁷ It is impossible for the public to make informed comments on a project of unknown description. "A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental costs."⁸ As articulated by the court in *City of Inyo v. City of Los Angeles*, "a curtailed, enigmatic or unstable project description draws a red herring across the path of public input."⁹ Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project's impacts and undermining meaningful public review.¹⁰

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The DEIR does not adequately describe the type of proposed uses for the expanded warehouse/distribution facility in Phase 2 of the Project.¹¹ Although the City has given specific estimates of the number of permanent jobs that will be created by Phase 2, the DEIR contains no description whatsoever of the features and characteristics of Phase 2, including the estimated number of truck bays, types of product storage (dry goods, refrigerated, or frozen), and whether Phase 2 will include offices and other basic features. Phase 2 is an important part of the Project and would have significant ongoing impacts on air quality, greenhouse gas emissions, and traffic, among others. The DEIR must be revised to better describe Phase 2 of the Project, and recirculated for public review and comment.

⁶ *City of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.

⁷ *Id.* at 192.

⁸ *Id.* at 192-193.

⁹ *Id.* at 197-198.

¹⁰ See, e.g., *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.

¹¹ See DEIR p. 3.0-18.

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IV. THE DEIR FAILS TO ADEQUATELY ESTABLISH THE EXISTING ENVIRONMENTAL SETTING AGAINST WHICH THE DEIR IS REQUIRED TO ANALYZE THE PROJECT'S POTENTIALLY SIGNIFICANT IMPACTS

The DEIR describes the existing environmental setting inaccurately and incompletely, thereby skewing the impact analysis. 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.¹² 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.¹³

Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate and meaningful evaluation of environmental impacts. The importance of having a stable, finite and fixed environmental setting for purposes of an environmental analysis was recognized decades ago.¹⁴ Today, the courts are clear that "[b]efore the impacts of a Project can be assessed and mitigation measures considered, an [EIR] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined."¹⁵ In fact, it is:

[a] central concept of CEQA, widely accepted by the courts, that the significance of a Project's impacts cannot be measured unless the DEIR first establishes the actual physical conditions on the property. In other words, baseline determination is the first rather than the last step in the environmental review process.¹⁶

The DEIR must also describe the existing environmental setting in sufficient detail to enable a proper analysis of Project impacts.¹⁷ The CEQA Guidelines

¹² 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. City of Sacramento* (2002) 97 Cal.App.4th 1270, 1278 ("Fat"), citing Remy, et al., Guide to the Calif. Environmental Quality Act (1999) p. 165.

¹³ CEQA Guidelines §15125(a); *Riverwatch v. City of San Diego* (1999) 76 Cal.App.4th 1428, 1453.

¹⁴ *City of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.

¹⁵ *City of Amador v. El Dorado City Water Agency* (1999) 76 Cal.App.4th 931, 952.

¹⁶ *Save our Peninsula Comm. v. Monterey City Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.

¹⁷ *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1121-22.

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provide that "[k]nowledge of the regional setting is critical to the assessment of environmental impacts."¹⁸ This level of detail is necessary to "permit the significant effects of the Project to be considered in the full environmental context."¹⁹

The DEIR fails to accurately and adequately describe the environmental setting for biological resources and jurisdictional waterways and wetlands. Without an accurate description of the environmental setting, there is no way to determine the Project's impacts to biological resources and jurisdictional waters, and therefore, no way to apply appropriate mitigation for those impacts. To comply with CEQA, the City must gather the relevant data and the DEIR must be revised to include accurate and complete descriptions of the existing environmental setting.

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A. Proper Burrowing Owl Surveys Were Not Conducted, Resulting in an Incomplete Environmental Setting and Inadequate Mitigation

The burrowing owl is a federal- and state-listed species of special concern. Current data suggests that burrowing owl populations are declining throughout the State. Burrowing owls are commonly associated with irrigated agriculture, particularly fields that are adjacent to canals. These conditions are present at the Project site. Owls associated with agricultural fields have some of the highest survival and reproductive rates among all burrowing owl populations.²⁰ As a result, the maintenance of suitable agricultural habitats is extremely important in the statewide conservation of the species.²¹

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The entire Project site and much of the land surrounding the site is suitable habitat for the burrowing owl.²² The DEIR indicates that a burrowing owl was observed on the Project site in 2009.²³ However, no pre-Project surveys for burrowing owls were conducted in accordance with the established survey protocols of the California Department of Fish and Wildlife ("CDFW"). The DEIR simply

¹⁸ CEQA Guidelines § 15125(d).

¹⁹ *Id.*

²⁰ D. DeSante, E. Ruhlen, and D. Rosenberg, *Density and abundance of burrowing owls in the agricultural matrix of the Imperial Valley, California*, Studies in Avian Biology No. 27: 116-119 (2004).

²¹ *Ibid.*

²² DEIR p. 4.4-19.

²³ *Ibid.*

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states that “surveys for this species (not protocol level) have been conducted, and no owls or signs of occupation were observed, although suitable habitat is present.”²⁴ No information is provided about when and how the non-protocol surveys were conducted, so it is impossible to discern whether they were adequate to establish that burrowing owls do not occupy the Project site. The only biological data attached to the DEIR are from an internet database search for species that may occur on the Project site.

To mitigate for potentially significant impacts, the City has proposed to require a habitat assessment in the area surrounding the Project, followed by pre-construction surveys for burrowing owls if suitable habitat is found.²⁵ There are several problems with this approach. First, surveys should be conducted as part of the CEQA process, before a decision is made on the Project, and not as post-approval mitigation. CDFW’s survey protocol explains that there are three steps “in evaluating whether projects will result in impacts to burrowing owls”: habitat assessment, surveys, and impact assessment.²⁶ The DEIR makes a partial habitat assessment,²⁷ then jumps to an impact assessment, skipping the survey requirement. As explained by CDFW in its guidelines, however, “burrowing owl surveys provide information needed to determine the potential effects of proposed projects and activities on burrowing owls.”²⁸

Under CDFW’s guidelines, surveys are to be conducted by a qualified biologist, using specific methods, and a survey report then prepared that “will enable [CDFW], reviewing agencies and the public to effectively assess potential impacts and will guide the development of avoidance, minimization, and mitigation measures.”²⁹ Only after this is done does the lead agency proceed to the third step, the assessment of impacts and formulation of mitigation measures.³⁰

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²⁴ DEIR p. 4.4-28.

²⁵ *Ibid.*

²⁶ CDFW Staff Report on Burrowing Owl Mitigation, p. 5 (2012) (“CDFW Burrowing Owl Guidelines”), available at: <http://www.dfg.ca.gov/wildlife/nongame/docs/BUOWStaffReport.pdf>

²⁷ The assessment of habitat in the area surrounding the site is improperly deferred to a later date under Mitigation Measure 4.4.1.

²⁸ *Ibid.*

²⁹ *Ibid.*, p. 6.

³⁰ *Ibid.*

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The City must require that proper surveys be undertaken on the Project site and surrounding vicinity as part of the CEQA process, not after the Project is approved. Because CEQA places the burden of environmental investigation on the lead agency, rather than the public, an agency is not “allowed to hide behind its own failure to gather relevant data.”³¹ The failure to include relevant information is a prima facie violation of CEQA because it precludes informed decision-making and informed public participation. ***The City must immediately initiate protocol surveys by a qualified biologist, as the first required survey period ends on April 15th.***³²

The second problem is that the City’s proposed pre-construction mitigation is not consistent with CDFW survey protocol. As a preliminary matter, the Project site has already been identified as suitable burrowing owl habitat, and therefore protocol surveys should be conducted on the site, regardless of whether suitable habitat is found in the area surrounding the site. Furthermore, CDFW guidelines indicate that a complete burrowing owl survey consists of four site visits during the breeding season, spaced at least three weeks apart.³³ The City’s proposed requirement that “focused surveys must be performed by a qualified biologist within 30 days prior to construction initiation in accordance with the CDFW’s Staff Report on Burrowing Owl Mitigation” is inadequate, because such surveys would not be in accordance with CDFW’s Staff Report, and would be insufficient for documenting owl use of the Project site and surrounding lands.

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The third problem is that should owls be discovered on or near the Project site, the City’s proposed mitigation is inadequate. The DEIR requires: “If active burrowing owl nest sites are detected, the applicant shall implement the avoidance, minimization, and mitigation methodologies outlined in the CDFW’s Staff Report on Burrowing Owl Mitigation prior to initiating project related activities that may impact burrowing owls.”³⁴ First, the loss of any active owl burrow and its surrounding habitat must be the focus of the mitigation, not just “active nest sites.”³⁵ Second, mitigation measures must be enforceable, and their

³¹ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

³² CDFW Burrowing Owl Guidelines, Appendix D.

³³ *Ibid.*; see also California Burrowing Owl Consortium, *Burrowing Owl Survey Protocol and Mitigation Guidelines* (1993), available at: <http://www.dfg.ca.gov/wildlife/species/docs/boconsortium.pdf>

³⁴ DEIR p. 4.4.-28.

³⁵ See CDFW Burrowing Owl Guidelines.

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implementation must be overseen by a public agency through monitoring or reporting.³⁶ Allowing the Applicant to implement a non-specific set of mitigation measures, based on its own determination of what activities might impact burrowing owls, and with no oversight by an appropriate public agency, does not meet this standard.

Finally, the City may not put off an analysis of what mitigation measures will be required if burrowing owls are found on or near the Project site, or call for an unspecified, vague, and unenforceable mitigation plan to be devised in the future.³⁷ The referenced "mitigation methodologies outlined in the CDFW's Staff Report" include a range of potential options, from developing a "worker awareness program" to permanently conserving replacement habitat offsite.³⁸ Allowing the Applicant to determine which of these measures will appropriately mitigate the loss of burrowing owl habitat does not meet CEQA standards for legally valid mitigation.

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The failure to adhere to survey protocol on the Project site precludes informed decisionmaking and a meaningful analysis of impacts to western burrowing owls. In light of the fact that protocol surveys were not conducted, there is insufficient information to determine: (1) the actual number of burrowing owls onsite; (2) the number of owls living in the buffer areas; (3) the breeding status and the size of foraging territory of owls on and near the Project site; (4) the cumulative impact of the Project on burrowing owls in the region; and (6) the details of required mitigation. Without this information, an appropriate analysis cannot be made, effective mitigation cannot be designed, and the necessity of additional surveys cannot be determined.

B. The DEIR Fails to Describe the Function and Values of Potentially Jurisdictional Waterways and Wetlands

The DEIR acknowledges that the Project site contains "waters of the State" and "waters of the United States" that are jurisdictional under the state Porter-Cologne Act and federal Clean Water Act. The DEIR makes no attempt, however, to determine or disclose the total area of jurisdictional waters on the Project site,

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³⁶ CEQA Guidelines § 15097; CDFW Burrowing Owl Guidelines, p. 14.

³⁷ CEQA Guidelines § 15126.4(a)(1)(B); *City of Long Beach v. Los Angeles School Dist.* (2009) 179 Cal.App.4th 889, 915; *Communities for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70, 95; *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 669.

³⁸ CDFW Burrowing Owl Guidelines, pp. 8-14.

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nor does the DEIR disclose potential impacts that the Project may have on the ecological functions and values of those waters.³⁹ The DEIR's failure to establish the existing environmental setting prevented the City from analyzing the Project's impacts on potentially jurisdictional waters. The DEIR states:

[T]he project proposes to alter both flood control ditches along the west edge of the site, as both ditches will be turned into bioretention cells. Although no formal wetland delineation has been conducted for these features to date, there is no evidence that these ditches would be treated as jurisdictional in the professional opinion of the project biologist.

A review of historic aerial photographs shows that both ditches were created in 2002 when the northwest corner of the project site and the parcels north of the project site were graded. Both drainages are man-made, wholly constructed in and draining only upland areas, and do not carry a relatively permanent flow of water. As a result, the project is anticipated to have a less than significant impact on federally protected wetlands. *It is, however, recommended that the project applicant submit a Jurisdictional Determination to the USACE to obtain a formal determination regarding the jurisdictional status of the on-site drainages prior to initiation of construction activities.*⁴⁰

The DEIR then states that no mitigation is required. Whether a jurisdictional determination should be made is not a decision that should be left to the Applicant. The DEIR must be revised to include an actual disclosure and analysis of potential impacts on waters of the state, including wetlands and aquatic habitat resources.

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³⁹ *Ibid.* p. 6.

⁴⁰ DEIR p. 4.4-30 (emphasis added); *see also ibid.*, p. 4.4-5 ("jurisdictional status can only be confirmed with a formal wetland delineation").

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V. THE CITY LACKS SUBSTANTIAL EVIDENCE TO SUPPORT ITS CONCLUSIONS IN THE DEIR REGARDING THE PROJECT'S SIGNIFICANT IMPACTS; THE DEIR FAILS TO INCORPORATE ALL FEASIBLE MITIGATION MEASURES NECESSARY TO REDUCE SUCH IMPACTS TO A LEVEL OF INSIGNIFICANCE

CEQA has two basic purposes, neither of which the DEIR satisfies. First, CEQA is designed to inform decision makers and the public about the potentially significant environmental impacts of a Project before harm is done to the environment.⁴¹ The DEIR is the “heart” of this requirement.⁴² The DEIR 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.”⁴³

To fulfill this function, the discussion of impacts in a DEIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”⁴⁴ An adequate DEIR must contain facts and analysis, not just an agency’s conclusions.⁴⁵ CEQA requires a DEIR to disclose all potential direct and indirect, potentially significant environmental impacts of a project.⁴⁶

Second, if a DEIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.⁴⁷ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.⁴⁸ Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the DEIR to meet this obligation.

⁴¹ CEQA Guidelines § 15002(a)(1); *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.

⁴² *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

⁴³ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁴⁴ CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

⁴⁵ See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

⁴⁶ Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

⁴⁷ Pub. Resources Code §§ 21002.1(a), 21100(b)(3); CEQA Guidelines § 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass’n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

⁴⁸ Pub. Resources Code §§ 21002-21002.1.

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Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements, or other legally binding instruments.⁴⁹ A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.⁵⁰ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”⁵¹

In this case, the DEIR fails to satisfy the basic purposes of CEQA. The DEIR’s conclusions regarding agricultural impacts, impacts to air, biological, hydrological and water resources, impacts from greenhouse gas emissions, impacts from the presence of hazards and hazardous materials, and traffic impacts, are not supported by substantial evidence. In preparing the DEIR, the City: (1) failed to provide sufficient information to inform the public and decision-makers about potential environmental impacts; (2) failed to accurately identify and adequately analyze all potentially significant environmental impacts; and (3) failed to incorporate adequate measures to mitigate environmental impacts to a less than significant level. The City must correct these shortcomings and recirculate a revised DEIR for public review and comment.

A. The DEIR Fails to Adequately Mitigate Significant Agricultural Impacts

The Project site is on agricultural land, which until recently was farmed in row crops.⁵² The City’s Notice of Preparation of an EIR for the Project initially stated that the “Project site consists only of non-prime agricultural land.” However, in response to comments from the USDA-NRCS, the DEIR disclosed that the site is actually comprised mostly of prime farmland, and also farmland of statewide importance. The DEIR contains a detailed “LESA” analysis, which is an approved

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⁴⁹ CEQA Guidelines, § 15126.4, subd. (a)(2).

⁵⁰ *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement was inadequate mitigation because there was no record evidence that replacement water was available).

⁵¹ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

⁵² DEIR p. 4.4-2; see also “Google Street View” of Project site from Venture Way, showing row crops in May 2011.

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CEQA method for determining significant impacts to agricultural resources. Based on the results of the LESA analysis, the DEIR concludes that the conversion of farmland on the Project site to urban use is considered a significant impact.

The DEIR concludes, however, that because the Project site is already zoned for industrial development, no agricultural mitigation is required. Most of the Project site was rezoned in 2000.⁵³ The DEIR concludes that there is no available mitigation for the loss of farmland on the Project site, and therefore the impact is “significant and unavoidable.” The only support provided for this conclusion is a reference to the City’s Agricultural Mitigation Policy, adopted in 2004.⁵⁴

The DEIR’s failure to require agricultural mitigation is a significant flaw that violates the requirements of CEQA. First, the City’s Agricultural Mitigation Policy should apply to this Project. The policy requires mitigation for the “loss of agricultural lands due to conversion to urban uses,” if the land to be converted is designated as prime farmland or farmland of statewide importance, and if the project site is deemed a significant impact based on a LESA evaluation.⁵⁵ The Project meets these criteria.

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Instead of imposing the required mitigation for agricultural land impacts, the DEIR relies on a sentence in the Agricultural Mitigation Policy that states “[o]ne time as many acres of agricultural land shall be protected *as was changed to a nonagricultural zoning classification* (1:1 ratio of land).”⁵⁶ However, the City’s policy does not categorically require a change in zoning at the time land is converted to urban use, or when mitigation is imposed. In fact, the policy gives specific examples of non-zoning related actions that qualify as conversion to urban use, including “extension of services” to an agricultural site.⁵⁷ The Project meets the criteria for a conversion from agricultural to urban uses that should be mitigated under the City’s policy.

⁵³ DEIR p. 3.0-2.

⁵⁴ DEIR p. 4.2-18.

⁵⁵ http://www.cityofgilroy.org/cityofgilroy_files/city_hall/community_development/planning/policy_handouts/AgPolicy505.pdf

⁵⁶ *Ibid.* (emphasis added); DEIR p. 4.2-18.

⁵⁷ http://www.cityofgilroy.org/cityofgilroy_files/city_hall/community_development/planning/policy_handouts/AgPolicy505.pdf

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Second, for CEQA purposes it is immaterial whether the City's policy applies to the Project site.⁵⁸ The DEIR should have discussed the feasibility of all forms of potential agricultural mitigation, including the voluntary dedication of an off-site agricultural conservation easement or payment of an in-lieu fee to either the City or a third party.⁵⁹ The City does not have substantial evidence that agricultural mitigation is legally or economically infeasible.⁶⁰

Third, the DEIR's explanation that the Project "is already located in an industrial zoning classification with the conversion of the land analyzed and recognized through a series of previous entitlement actions," and therefore the Project "will have no more impact than previously evaluated by the City of Gilroy for this location," is inadequate. CEQA does not allow a lead agency to simply compare a proposed project with the full extent of development allowed under existing entitlements. Instead, CEQA requires that the impacts of a project be compared with the existing state of development at the time the project is proposed.⁶¹ Moreover, the City cannot "tier" to prior CEQA documents that analyze the Project site, because the Project is not consistent with the City's General Plan, and in any case, the City has not invoked the tiering process in accordance with CEQA.⁶²

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Finally, under CEQA, it is the type of farmland being converted that matters, not its zoning classification.⁶³ Simply because the conversion of land may have been "analyzed and recognized" in previous CEQA documents does not mean that it was adequately mitigated, and the City provides no evidence to support such a claim.

⁵⁸ *Masonite Corporation v. County of Mendocino* (2013) 218 Cal.App.4th 230, 242 ("Masonite"); *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 359.

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354; CEQA Guidelines § 15125(e).

⁶² CEQA Guidelines § 15152(d) (tiering is "limited to situations where a project is consistent with the general plan and zoning of the city"); *id.* § 15152(g) (when tiering is used, the later EIR shall refer to the prior EIR, state where a copy can be examined, and state that the agency is using the tiering concept); DEIR p. 3.0-2 ("Through these prior approvals, the project site has been studied at great length and planned for development as a business park with industrial use for over a decade. To the extent the prior environmental documentation remains relevant and accurate, this information is included, as appropriate, within this Draft EIR.").

⁶³ *See Masonite* at 233 (involving 63 acres of prime farmland zoned industrial since 1982).

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B. The DEIR Fails to Adequately Disclose, Analyze and Mitigate Significant Air Quality Impacts

1. Construction related air quality impacts

Nitrogen oxides (“NOx”) are a precursor to ground-level ozone, one of the main components of smog, and also an acute respiratory irritant.⁶⁴ NOx is a byproduct of fuel combustion, and is “directly associated with the use of diesel-powered construction equipment.”⁶⁵ NOx is a primary criteria air pollutant under both federal and state law, and the San Francisco Bay Area Air Basin is designated as a “nonattainment” area because it suffers from unhealthy levels of ground-level ozone, and air inversions frequently trap pollution.⁶⁶

The Bay Area Air Quality Management District (“BAAQMD”) has therefore adopted CEQA thresholds of significance based on daily NOx emissions during construction of a new project, and daily and annual NOx emissions during project operation.⁶⁷ The BAAQMD CEQA Guidelines provide specific mitigation recommendations, including a list of “basic” measures required for all projects to reduce fugitive dust, and “additional” measures for projects that exceed the significance thresholds.⁶⁸

The DEIR concludes that Project-related NOx emissions will greatly exceed the threshold of significance during construction of both Phase 1 and Phase 2 of the Project.⁶⁹ The DEIR proposes to mitigate this significant impact through Mitigation Measure 4.3.1, which would require the use of “Tier 3” engines for certain diesel-powered construction equipment.⁷⁰ Tier 3 engines are manufactured in 2006 or later and are cleaner burning.⁷¹ Despite the use of Tier 3 engines for certain construction equipment, the DEIR concludes that construction-related NOx

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⁶⁴ DEIR pp. 4.3-6, 4.3-13.

⁶⁵ *Ibid.* pp. 4.3-6, 4.3-19.

⁶⁶ *Ibid.* pp. 4.3-3, 4.3-6, 4.3-13.

⁶⁷ *Ibid.* p. 4.3-14; BAAQMD CEQA Guidelines, p. 2, available at:

<http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines%20May%202011.ashx?la=en>

⁶⁸ BAAQMD CEQA Guidelines, pp. 8-3 and 8-4.

⁶⁹ DEIR p. 4.3-19.

⁷⁰ *Ibid.*, pp. 4.3-19 to 4.3-20.

⁷¹ *Ibid.*, p. 4.3-20.

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emissions will still exceed the BAAQMD significance thresholds, and therefore “this impact is significant and unavoidable.”⁷²

The DEIR fails to explore any additional measures for reducing NOx emissions. This is a significant flaw in the DEIR. CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring the imposition of mitigation measures.⁷³ If a DEIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize those impacts.⁷⁴ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible mitigation measures.⁷⁵ A determination that an impact is “significant and unavoidable” can only be based on a conclusion that further mitigation is “infeasible.”⁷⁶

There are feasible mitigation measures available to reduce the Project’s air quality impacts to a less-than-significant level, including the use of low-emission diesel products, alternative fuels, add-on devices such as air filters, and other “best available control technology.”⁷⁷ Moreover, it appears from the language of Mitigation Measure 4.3.1, and from the modeling data attached to the DEIR, that certain construction equipment, such as rollers, would not be required to use Tier 3 engines.⁷⁸ Other equipment that could be subject to mitigation include forklifts, welders, air compressors, and generator sets, all of which can be powered with alternative fuels, or in the case of generator sets, from the nearby electrical grid. The City cannot adopt a “significant and unavoidable” finding unless it provides substantial evidence that such additional mitigation measures are infeasible.

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⁷² *Ibid.*, p. 4.3-21.

⁷³ CEQA Guidelines §§ 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass’n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

⁷⁴ Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

⁷⁵ *Id.* § 21002 (“public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects”); § 21002.1 (each agency “shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so”).

⁷⁶ *Id.*

⁷⁷ See e.g. BAAQMD CEQA Guidelines, Table 8-2, p. 8-4. There are several diesel emissions control strategies verified by the California Air Resources Board as reducing NOx emissions by 15 to 40 percent: <http://www.arb.ca.gov/diesel/verdev/t/cvt.htm>

⁷⁸ DEIR pp. 4.3-19 to 4.3-20; DEIR Appendix C (listing nine types of heavy duty diesel-powered construction equipment, but only applying Tier 3 mitigation to eight).

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significance for TAC emissions.⁸³ The BAAQMD specifically recommends the preparation of HRAs for distribution centers.⁸⁴ An HRA prepared for the Project should also consider the potential health risks of anhydrous ammonia emissions, because the Project will use anhydrous ammonia for its cooling and refrigeration systems, and anhydrous ammonia "in an acutely hazardous material."⁸⁵

The BAAQMD also requires projects that exceed the threshold of significance for TACs to "recommend appropriate mitigation measures."⁸⁶ Mitigation may take the form of a "Community Risk Reduction Plan" to address cumulative emissions sources, and may also include project-specific measures such as redesigning the site layout to increase the distance between sources of emissions and sensitive receptors, re-routing heavy duty trucks, strictly enforcing truck parking and idling requirements, and requiring the tiered planting of trees between sources of emissions and sensitive receptors.⁸⁷ Once again, the DEIR's conclusion that the Project's cumulative impacts from TAC emissions will be "significant and unavoidable" is not supported by substantial evidence, because the City has not made findings on the feasibility of available and recommended mitigation measures to reduce such impacts.

The second problem with the DEIR's operational air quality impacts analysis is one that affects other subjects analyzed in the DEIR, including greenhouse gas emissions and traffic impacts. The estimated Project-level emissions of NO_x, particulate matter ("PM"), and other pollutants are *extremely* close to exceeding the CEQA thresholds of significance.⁸⁸ A closer look at the assumptions and calculations in the air quality and traffic modeling data attached to the DEIR

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⁸³BAAQMD CEQA Guidelines, p. 5-9;

http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/Updated%20Screening%20Approach%20Flow%20Chart_May%202012.ashx?la=en

⁸⁴ BAAQMD CEQA Guidelines, p. 5-7 ("For new land uses that would host a high number of non-permitted TAC sources, such as a distribution center, the incremental increase in cancer risk should be determined by an HRA").

⁸⁵ DEIR p. 4.8-13.

⁸⁶ *Ibid.*, p. 5-9.

⁸⁷ *Ibid.*, p. 5-17.

⁸⁸ DEIR p. 4.3-22, Table 4.3-8 (emissions of NO_x will be 98.4% of the daily threshold level in winter, and 98.2% of the annual threshold level; emissions of "coarse" PM will be 99.2% of the daily threshold level and 99.4% of the annual threshold level; emissions of "fine" PM will be 98% of the daily and annual threshold levels); DEIR p. 4.3-31, Table 4.3-12 (mitigated project-level TAC emissions will be just at the threshold level for cancer risk).

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reveals that Project emissions have been underestimated, and in fact, the Project is very likely to exceed these thresholds. The biggest flaw in the modeling data is the assumption that only 21 percent of vehicle trips associated with Project operations would be truck trips, while 79 percent would be passenger vehicles.⁸⁹ The only information to support this assumption is a trip generation estimate provided by the Applicant.⁹⁰

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The Traffic Analysis Report attached to the DEIR improperly tries to mix “apples and oranges” when calculating Project vehicle trips. First, to calculate total vehicle trips, the report uses the default assumptions for a high-cube warehouse from the Institute of Traffic Engineers (“ITE”) Trip Generation Manual, which is commonly used to estimate project traffic for CEQA purposes.⁹¹ The report chooses to use the ITE default assumptions, and not the total number of vehicle trips estimated by the Applicant, because the Applicant’s estimate was 55% lower than the ITE estimate.⁹²

The report chooses the Applicant’s estimate, however, over the ITE default assumption, for the breakdown between auto trips and truck trips associated with the Project. The default assumption in the ITE Trip Generation Manual is 40 percent truck trips and 60 percent auto trips, and this assumption has been recommended for project analyses in large air districts in California.⁹³ Instead of using this assumption, the Traffic Analysis Report uses the Applicant’s estimate of a 21/79 percent split between trucks and autos. There is no substantial evidence to support such a large deviation from the 40/60 percent split recommended by the ITE. Instead, it is reasonable to assume that the Applicant grossly underestimated the percentage of truck trips associated with the Project, particularly because the Applicant grossly underestimated the total number of vehicle trips associated with the Project. The Traffic Analysis Report must be revised to reflect a more realistic proportion of operational truck traffic. This flaw affects multiple portions of the DEIR and renders them inaccurate and inadequate.

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⁸⁹ DEIR p. 4.3-22, Table 4.3-8, footnote 2.

⁹⁰ DEIR, Appendix J, p. 1, and Appendix A to Appendix J (“Applicant-Provided Traffic Information”).

⁹¹ DEIR, Appendix J, p. 1.

⁹² Compare *ibid.* (ITE default estimate is 732 total daily trips for Phase I) with Applicant-Provided Traffic Information (estimating 409 total daily trips for Phase 1).

⁹³ <http://www.aqmd.gov/ceqa/Warehouse/WarehouseMSC31612.pdf> (noting that project specific data can only be used “with substantial evidence”).

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C. The DEIR Fails to Adequately Disclose, Analyze and Mitigate Significant Impacts to Biological Resources

1. The DEIR's conclusion that the Project's cumulative impacts on the bay checkerspot butterfly from nitrogen deposition is "minor" and therefore less than significant is in error

The DEIR attempts to have it two ways: first, it makes a non-significance determination regarding the Project's cumulative contribution to nitrogen deposition that harms the bay checkerspot butterfly, and second, it promises to condition the Project by requiring a "voluntary" mitigation payment for nitrogen deposition under the Santa Clara Valley Habitat Conservation Plan ("SCVHP").⁹⁴ As discussed in the next section below, it appears that the DEIR characterizes this impact as less than significant in order to help qualify the Project as a "pipeline project" that is exempt from the SCVHP. The DEIR's conclusion is improper under CEQA.

The deposition of atmospheric nitrogen is by its very nature a cumulative problem, and no one source will itself be the sole cause. The DEIR characterizes the traffic associated with the Project as "minor" when compared with all traffic in the region. The DEIR fails to acknowledge, however, that a significant portion of Project traffic will be diesel trucks, which is the type of vehicles that contributes a large portion of total nitrogen emissions to the air basin. The DEIR also fails to note that even the initial air quality modeling shows that Project operations will be on the verge of exceeding the threshold of significance for nitrogen oxide emissions.⁹⁵

Even if Project emissions are relatively minor in comparison with all traffic in the region, the "de minimus" argument has been rejected by numerous courts when reviewing cumulative impacts analyses under CEQA.⁹⁶ The relevant question is not how the effect of the Project compares to the preexisting cumulative effect, but whether "any additional amount" of effect should be considered significant in

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⁹⁴ DEIR pp. 4.4-32 to 4.4-33.

⁹⁵ DEIR p. 4.3-22 (estimating that Project operations will emit 90% of the annual amount of NOx that is considered significant under CEQA, and in winter months, 94% of daily NOx emissions).

⁹⁶ See, e.g., *Communities for a Better Env't. v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 117-120 (and cases cited therein).

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the context of the existing cumulative effect. In this case the Project's nitrogen emissions should certainly be considered significant.

Finally, the DEIR's proposed "voluntary" mitigation payment, by way of a Project condition, rather than a mitigation measure, is not allowed under CEQA. Payment to the SCVHP is not "part of the project" but is instead a mitigation measure "designed to reduce or eliminate" Project impacts. "By compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA."⁹⁷ Accordingly, the City must treat the payment as though it was required, i.e., as though it was "adopted following a finding of significance in accordance with CEQA Guidelines section 15091(a)(1) and Public Resources Code section 21081(a)(1)."⁹⁸

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2. The Project is not a "pipeline project" exempt from the Santa Clara Valley Habitat Conservation Plan

The SCVHP took effect in October 2013.⁹⁹ The Project is covered by the SCVHP because it is located in an identified private development area ("urban development") and is over two acres in size.¹⁰⁰ The DEIR concludes, however, that the Project "will likely be considered a 'pipeline project' and will not be subject to the SCVHP."¹⁰¹ To qualify for a pipeline project exemption from the SCVHP, a project must meet three criteria:

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1. The project received at least one of the following approved development entitlements with a specified expiration date (including allowed renewals/extensions) prior to Habitat Plan adoption on October 14, 2013: site and architectural permit/approval, planned development approval, conditional use approval, or a tentative map; and
2. The project will obtain a grading or building permit within 1 year* of issuance of the Habitat Plan's state and federal incidental take permits, which is July 31, 2014; and

⁹⁷ *Lotus v. Dep't. of Transportation* (2014) 223 Cal.App.4th 645, 656.

⁹⁸ *Id.* at 652.

⁹⁹ DEIR p. 4.4-25; see <http://www.scv-habitatplan.org/www/default.aspx>

¹⁰⁰ Map: <http://www.hcpmaps.com/habitat/>; SCVHP Coverage Screening Form:

http://scv-habitatplan.org/www/Portals/default/FinalPvtScreening%20Form_103113.pdf

¹⁰¹ DEIR p. 4.4-31.

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3. The project review process identified no impacts to any of the Habitat Plan's covered species.¹⁰²

*This provision applies only to the portion of a project that is issued grading and/or building permit(s) within the 1-year period.

Despite the DEIR's conclusion that the Project will likely meet these criteria, the Project does not meet the criteria. First, it does not appear that *this* Project received a tentative map, conditional use permit, architectural or site permit approval, or planned development approval before October 14, 2013, let alone one with "a specified expiration date." In fact, this Project requires the City to approve a new parcel map, site plan, and architectural plan, along with other approvals including a General Plan amendment and rezoning.¹⁰³

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Second, it is unlikely that the Project will receive grading or building permits in the next four months, as the City's DEIR is only the first step in the permit approval process, and there are a number of flaws in the DEIR that require revision. Phase 2 of the Project will certainly not receive grading and building permits within four month. As the SCVHP specifically notes, the pipeline-project exemption does not apply to phases of a project that will receive permits after July 2014. Third, the Project will impact both the burrowing owl and the bay checkerspot butterfly, as discussed above and as noted in comments from the U.S. Fish and Wildlife Service and in the DEIR itself.¹⁰⁴ The DEIR must require enforceable mitigation measures in the form of in-lieu fees payable under the SCVHCP for the bay checkerspot butterfly, burrowing owl, and possibly other species of concern.

¹⁰² *Ibid.*; SCVHP, p. 2-37, available at:

[http://scv-habitatplan.org/www/Portals/default/Pipeline Projects Definition102913.pdf](http://scv-habitatplan.org/www/Portals/default/Pipeline%20Projects%20Definition102913.pdf)

¹⁰³ DEIR p. 1.0-2.

¹⁰⁴ DEIR pp. 2.0-12 ("implementation of project-related activities could result in potentially significant impacts to nesting burrowing owls"), 4.4-10 (bay checkerspot butterfly "may be cumulatively impacted by nitrogen deposition"); DEIR, Appendix A, e-mail from Joseph Terry dated September 5, 2013 ("Thus the project should mitigate for the effects of elevated N deposition by paying the appropriate N deposition fee to the Santa Clara Valley Habitat Plan (SCVHP). The project should also mitigate for effects to other SCVHP covered species by paying the appropriate development fees to the SCVHP.")

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D. The DEIR Fails to Adequately Disclose, Analyze and Mitigate Significant Impacts from Greenhouse Gas Emissions

As a preliminary matter, as described above under “operational air quality impacts,” the Traffic Analysis Report underestimates the percentage of truck trips associated with the Project, and consequently, the DEIR’s estimate of the Project’s greenhouse gas (“GHG”) emissions is too low.¹⁰⁵

Second, when calculating the Project’s operational GHG emissions, the DEIR also makes an unexplained deviation from the “PG&E CO2 intensity factor” that is used for all other Project-related emissions calculations. The CO2 intensity factor is an estimate of the GHG emissions associated with the production of electric energy by the Project’s energy provider, PG&E. Almost all of the emissions calculations in the DEIR use the current PG&E CO2 intensity factor of 641.35 pounds of CO2 per megawatt of energy generated, which is the intensity factor recommended by the BAAQMD as recently as July 2013.¹⁰⁶ The DEIR’s calculation of operational GHG emissions, however, uses a CO2 intensity factor of only 431 pounds per megawatt, a 33 percent reduction.¹⁰⁷ This reduced intensity factor comes from a document published by PG&E in 2013, which is specifically “not to be used” for “regulatory compliance” purposes, and which estimates a 2013 intensity factor of 431 pounds.¹⁰⁸

4-11

The PG&E intensity factor of 641.35 pounds is the most accurate, verified, and up-to-date number that has been reported to the BAAQMD by PG&E, and it is the number that is used and recommended in the most recent 2013 CalEEMod

¹⁰⁵ See DEIR p. 4.6-17, Table 4.6-5, footnote 3 (the GHG analysis is based on a 21/79 percent split between trucks and autos).

¹⁰⁶ DEIR, Volume II, Appendices C and G (a search of these appendices for “641.35” revealed 20 Project-specific calculations using that PG&E CO2 intensity factor); <http://www.baaqmd.gov/Divisions/Planning-and-Research/CEQA-GUIDELINES.aspx> (BAAQMD requires that the “CalEEMod” model be used to calculate emissions); 2013 CalEEMod “Users Guide,” Appendix D, Table 1.2: <http://www.caleemod.com/> (find link under “Users Guide”) (stating that the listed intensity factors for each specific utility should be used when modeling GHG emissions); 2013 CalEEMod “List of Revisions,” p. 2: <http://www.caleemod.com/> (find link under “Download Model”) (the PG&E CO2 intensity factor of 641.35 pounds reflects “the latest inventory reporting year”).

¹⁰⁷ DEIR, Appendix G, calculation for “UNFI Buildout Operations” on page 239 of DEIR Volume II.

¹⁰⁸ *Ibid.*; PG&E’s “Greenhouse Gas Emission Factors: Guidance for PG&E Customers” (April 2013), available at: http://www.pge.com/includes/docs/pdfs/shared/environment/calculator/pge_ghg_emission_factor_info_sheet.pdf

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program.¹⁰⁹ As described in the CalEEMod User's Guide, this intensity factor is "based on Table G6 of the California Air Resources Board (ARB) Local Government Operation Protocol version 1.1 or the latest public utilities inventory reports," and "is consistent with recommendations in the California Air Pollution Control Officer Association (CAPCOA) Quantifying Greenhouse Gas Mitigation Measures document."¹¹⁰

There is no substantial evidence to support using a 33 percent reduction in electricity-related GHG emissions. PG&E's CO₂ intensity factor rises and falls from year to year, based primarily on customer demand and the availability of clean hydropower.¹¹¹ For example, 2011 was an extremely wet year, and PG&E reported that it was able to achieve its lowest CO₂ intensity factor yet, at 393 pounds.¹¹² During the dry years of 2007 and 2008, however, PG&E's CO₂ intensity factor rose to over 600 pounds.¹¹³

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The DEIR's significant reduction from the default assumption for PG&E is unsupported. PG&E's intensity factor changes each year, and even PG&E acknowledges that its reports should not be relied upon until "a thorough, third-party verification" is conducted.¹¹⁴ California is currently facing a severe drought, and hydropower resources have become less reliable. PG&E's current CO₂ intensity factor is likely close to or above the 641 pounds used in the CalEEMod model. There is no substantial evidence for deviating from this default intensity factor. The DEIR relies purely on speculation in an attempt to avoid an accurate calculation of its significant GHG emissions.

CEQA requires that when analyzing Project impacts, the lead agency "should normally limit its examination to changes in the existing physical conditions in the affected area *as they exist at the time the notice of preparation is published*."¹¹⁵ This

¹⁰⁹ See CalEEMod User's Guide, Appendix D, Default Data Tables, Table 1.2, *available at*: <http://www.caleemod.com/>

¹¹⁰ *Ibid.*, Appendix A, Calculation Details, p. 2.

¹¹¹ PG&E article dated February 20, 2013, *available at*: <http://www.pgecurrents.com/2013/02/20/pge%E2%80%99s-clean-energy-reduces-greenhouse-gas-emissions/>

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ See footnote 110, *supra*.

¹¹⁵ CEQA Guidelines § 15126.2 (emphasis added); *see also id.* § 15125(a).

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language has been interpreted to mean that the lead agency does not have "carte blanche to select the conditions on some future, post-approval date."¹¹⁶ The estimated GHG emissions from Project operations should be much higher than reported in the DEIR.

Third, the DEIR concludes that the Project's GHG emissions will be "significant and unavoidable" because the BAAQMD threshold of significance will still be exceeded, even with the DEIR's proposed mitigation measures.¹¹⁷ The mitigation measures that are proposed, however, do not go very far in attempting to reduce GHG emissions. They include basic water and energy-saving measures, participation in the City's recycling program, and "solar panel ready rooftops."¹¹⁸

Once again, an agency may not approve a project under CEQA unless it has "[e]liminated or substantially lessened all significant effects on the environment where feasible."¹¹⁹ "An EIR is required to consider feasible means, supported by substantial evidence and subject to monitoring or reporting, of mitigating the significant effects of [GHG] emissions."¹²⁰ Once it is acknowledged in the EIR that a project would "result in significant adverse impacts to global warming, the EIR [is] . . . legally required to describe, evaluate and ultimately adopt feasible mitigation measures which mitigate or avoid those impacts."¹²¹

As stated in the BAAQMD CEQA Guidelines, "[w]here operational-related emissions exceed applicable thresholds, lead agencies are responsible for implementing *all feasible mitigation measures* to reduce the project's GHG emissions."¹²² The Guidelines go on to state that if mitigation "does not bring a project back within the threshold requirements, the project could be cumulatively significant and could be approved only with a Statement of Overriding

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¹¹⁶ *Sunnyvale W. Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1379.

¹¹⁷ DEIR pp. 4.6-18 to 4.6-20.

¹¹⁸ *Ibid.*, Mitigation Measures 4.6.1a and 4.6.1b.

¹¹⁹ CEQA Guidelines § 15092(b)(2).

¹²⁰ *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 650 (quoting CEQA Guidelines § 15126.4(c)).

¹²¹ *Communities for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70, 91; *see also* Pub. Resources Code § 21002.1(b); CEQA Guidelines §§ 15126.4(a)(1), 15091.

¹²² BAAQMD CEQA Guidelines, pp. 4-6 to 4-7.

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Considerations and a showing that all feasible mitigation measures have been implemented.”¹²³

The BAAQMD recommends that mitigation measures first focus on reducing GHG emissions on-site, and the list of BAAQMD-recommended mitigation measures is extensive, including everything from installing rooftop solar panels to providing an employee car-sharing program.¹²⁴ Both the State CEQA Guidelines and the BAAQMD CEQA Guidelines also provide that “measures to mitigate the significant effects of greenhouse gas emissions may include, among others . . . off-site measures, including offsets that are not otherwise required, to mitigate a project’s emissions.”¹²⁵ The DEIR must be revised to correctly calculate the Project’s GHG emissions and to incorporate all feasible mitigation to reduce GHG emissions to a less-than-significant level.

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E. The DEIR Fails to Adequately Disclose, Analyze and Mitigate Significant Impacts from Hazardous Materials

The DEIR acknowledges that the Project site has been in agricultural use for over 50 years, and “the possibility exists that pesticides, herbicides, and/or fertilizers have been applied, which may have impacted the project site.”¹²⁶ The DEIR goes on to conclude, however, that Project construction “would not be expected to expose the public or the environment to hazardous materials,” and therefore this impact “would be less than significant.”¹²⁷

4-12

It is commonplace in Santa Clara County for lead agencies to require soil testing for residual agricultural chemicals on former agricultural land, and to require mitigation in the form of worker protections and soil removal and remediation where necessary.¹²⁸ Residual agricultural chemicals can include DDT,

¹²³ *Ibid.* p. 4-12.

¹²⁴ *Ibid.* pp. 4-12 to 4-19.

¹²⁵ CEQA Guidelines § 15126.4(c)(3); BAAQMD Guidelines, p. 4-12.

¹²⁶ DEIR p. 4.8-3.

¹²⁷ *Ibid.* p. 4.8-13.

¹²⁸ See e.g. recent Mitigation Monitoring and Reporting Program for the “45 Buckingham” Project in the City of Santa Clara, Mitigation Measures 4.2-1 through 4.2-3, available on page 20 of the following document:

<http://sireweb.santaclaraca.gov/sirepub/cache/2/bnckoo55fq0tlp4501thpz45/67791203312014042511308.PDF>

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DDT substitutes such as dieldren, endrin, and toxaphene, and other persistent chemicals that carry significant health risks to construction workers and others when soils are disturbed. Without requiring shallow soil testing to confirm the absence of such chemicals, the DEIR's less-than-significant conclusion is not supported by substantial evidence.

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F. The DEIR Fails to Adequately Disclose, Analyze and Mitigate Significant Traffic Impacts

As discussed above under "operational air quality impacts," the Traffic Analysis Report is flawed because it underestimates the proportion of truck trips associated with Project traffic. This flaw renders almost all of the conclusions in the Traffic Analysis Report invalid. The report must be revised, and the DEIR's conclusions about traffic impacts must reflect the conclusions from the revised report.

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VI. CONCLUSION

The Project presents significant environmental issues that must be addressed prior to Project approval. The DEIR's Project description is improperly truncated. The DEIR fails to adequately establish the existing setting upon which to measure impacts to biological and aquatic resources. The DEIR also fails to include an adequate analysis of and mitigation measures for the Project's potentially significant impacts. Finally, the DEIR's conclusions lack substantial evidence as required by CEQA. The DEIR must be revised and recirculated.

Sincerely,


Ellen L. Trescott

ELT:ljl

* Internet links to referenced documents are provided herein, and these documents will also be provided to the City on a compact disc. Hard copies of referenced documents will be promptly provided to the City upon request.

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