

Comment Letter C
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February 26, 2018

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February 26, 2018

Via Email and Overnight Delivery

Erin Morris, Planning Manager
City of Napa Planning Department
1600 First Street, Napa, CA 94559
Email: emorris@cityofnapa.org

**Re: Comments on the Draft Environmental Impact Report for the
Trinitas Mixed-Use Project (SCH No. 2017072005)**

Dear Ms. Morris:

On behalf of **Napa Residents for Responsible Development** ("Napa Residents"), we submit these comments on the Draft Environmental Impact Report ("DEIR") for the Trinitas Mixed-Use Project, SCH #2017072005, ("Project"), proposed by Pacific Hospitality Group ("Applicant"). The Project proposes to construct a 4-story, 253-guestroom dual-branded Marriott Hotel, a 26,214-square-foot winery, and a 2-story office building with surface parking and associated outdoor space on 11.5 acres within Napa Valley Commons. The Project is proposed as an extension of an existing hotel development, the Meritage Resort and Meritage Commons, located on Bordeaux Way. The Project would be located on three vacant parcels along Highway 221 in the City of Napa ("City"). The Project includes a Major Design Review, Planned Development Overlay for over-height features and shared parking, a Conditional Use Permit ("CUP") for a hotel in IP-A zoning district, and a CUP for a winery in IP-B zoning district (collectively, the "Project Approvals").¹

Based upon our review of the DEIR, we conclude that the DEIR fails to comply with the California Environmental Quality Act² ("CEQA") in numerous aspects. As explained more fully below, the DEIR fails to provide an accurate and complete Project description; fails to accurately disclose the extent of the Project's

¹ DEIR, p. 2-5.

² Pub. Resources Code ("PRC") §§ 21000 et seq.
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potentially significant impacts on air quality, greenhouse gases (“GHG”), and biological resources; fails to support its findings with substantial evidence; fails to properly mitigate the Project’s potentially significant impacts. The City cannot approve the Project until the errors in the DEIR are remedied and a revised DEIR is circulated for public review and comment.

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We have reviewed the DEIR and its technical appendices with the assistance of our technical consultants, including air quality consultant Hadley Nolan of Soil Water Air Protection Enterprise (“SWAPE”)³, as well as expert biologist Scott Cashen, M.S.⁴ The attached expert comments require separate responses under CEQA. We reserve the right to supplement these comments at a later date, and at any later proceedings related to this Project.⁵

Furthermore, as discussed below, due to the City’s failure to provide Napa Residents with timely access to the documents referenced and relied upon in the DEIR (“DEIR Reference Documents”), we also request that the City extend the public review and comment period on the DEIR by an additional 45 days following the date on which Napa Residents is provided with access to the DEIR Reference Documents.⁶ We reserve the right to supplement these comments following our receipt and review of the DEIR Reference documents. Any such supplemental comments will require separate responses in the FEIR.⁷

I. STATEMENT OF INTEREST

Napa Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential environmental and public health impacts associated with Project development. Napa Residents includes the International Brotherhood of Electrical Workers Local 180, Plumbers & Steamfitters Local 343, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483 and their members and their families; and other individuals

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³ SWAPE’s technical comments and curriculum vitae are attached hereto as Exhibit A.

⁴ Mr. Cashen’s technical comments and curriculum vitae are attached hereto as Exhibit B.

⁵ Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield (“Bakersfield”)* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

⁶ PRC § 21092(b)(1) requires that “all documents referenced in the draft environmental impact report or negative declaration” be available for review and “readily accessible” during the entire comment period.

⁷ *Id.*

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that live and/or work in the City of Napa and Napa County. Napa Residents have a strong interest in enforcing the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members.

Individual members of Napa Residents and its member organizations include residents of the City of Napa and surrounding communities, including City of Napa resident Brett Risley and Napa County resident Steve McCall. The individual members of Napa Residents live, work, recreate, and raise their families in the City of Napa and surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist onsite.

In addition, Napa Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. LEGAL BACKGROUND

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances).⁸ The EIR is the very heart of CEQA.⁹ "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."¹⁰

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a

⁸ See, e.g., PRC § 21100.

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

¹⁰ *Comtys. for a Better Env' v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 ("CBE v. CRA").
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project.¹¹ “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’”¹² The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”¹³

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures.¹⁴ The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.”¹⁵ If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”¹⁶

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. *A clearly inadequate or unsupported study is entitled to no judicial deference.*”¹⁷ As the courts have explained, “a prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.”¹⁸

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¹¹ 14 CCR § 15002(a)(1).

¹² *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

¹³ *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.

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

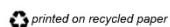
¹⁵ 14 CCR § 15002(a)(2).

¹⁶ PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

¹⁷ *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.

¹⁸ *Berkeley Jets*, 91 Cal.App.4th at 1355; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.

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III. THE CITY FAILED TO COMPLY WITH CEQA'S PROCEDURAL REQUIREMENTS

The City failed to comply with its statutory obligations under CEQA by failing to make all documents referenced or relied upon in the DEIR available to Napa Residents and other members of the public during the DEIR comment period. Accordingly, the City must extend the comment period on the DEIR for at least an additional 45 days beyond the date on which it makes the DEIR Reference Documents available for public review.

CEQA mandates that the City make the DEIR and all documents relied on in the DEIR available and “readily accessible” during the entire comment period.¹⁹ Access to these materials is essential to the public’s review and evaluation of the DEIR and the City’s mitigation plan. The courts have held that the failure to provide even a few pages of a CEQA documents for a portion of the CEQA review period invalidates the entire CEQA process, and that such a failure must be remedied by permitting additional public comment.²⁰ It is also well settled that a CEQA document may not rely on hidden studies or documents that are not provided to the public.²¹

On January 23, 2018, we submitted a letter to the City pursuant to CEQA Section 21092(b)(1) requesting “immediate access to any and all documents referenced or relied upon” in the DEIR. Almost two weeks later, on February 2 and 7, 2018, the City provided two sets of electronic documents in response to our request. On February 5, 2018, the City Clerk sent an email stating that the responsive documents contained the DEIR Reference Documents.

However, the City’s response failed to attach or provide access to several critical documents that are referenced in the DEIR, and which are not available on the City’s website, including, *inter alia*, the following documents:

¹⁹ See PRC § 21092(b)(1); 14 CCR § 15087(c)(5).

²⁰ *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

²¹ *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 (“Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.”).
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- Environmental Review documents prepared for the Meritage Resort and Meritage Commons projects.²²
- Botanical resources guidelines adopted by CNPS (2010) and CDFW by Nelson (1984) (updated by CNPS in 2001).²³
- Baldwin et al. (2012) (Jepson Manual: Vascular Plants of California, Second Addition).²⁴
- Clyde Eriksen and Denton Belk, 1999. Fairy shrimps of California's Puddles, Pools, and Playas. Mad River Pres, Eureka, CA. p. 93.²⁵
- Fish and Wildlife service, Survey Guidelines for the Listed Large Branchiopods, dated May 31, 2015.²⁶
- Wilson, Craig M. January 25, 2001. Memorandum addressed to State Board Members and Regional Board Executive Officers.²⁷

These outstanding DEIR Reference Documents include documents that are relevant to Napa Residents' and the public's review of the DEIR's biological resources, air quality, water quality, and the DEIR's other impact analyses for the Project. Moreover, the City's failure to provide access to all documents referenced or relied upon in the DEIR was prejudicial since it allowed insufficient time for a meaningful assessment of the DEIR and the Project's potentially significant impacts during the current public comment period.

Despite our efforts to obtain immediate access to all materials referenced in the DEIR early the public comment period, the City has not yet granted us access to all responsive materials. Consequently, the City may not close the public comment period on the DEIR, and must provide at least 45 additional days for public comment from the date that Napa Residents receives access to all outstanding DEIR Reference Documents. Napa Residents reserves the right to submit supplemental comments on the DEIR following receipt of the outstanding DEIR Reference Documents.

²² See DEIR, pp. 4-12 to 4-13 (The three hotels, the proposed AC Hotel and Residence Inn, the Meritage Resort and Meritage Commons will operate as one hotel..."Environmental impacts for TMR and MC were previously analyzed.").

²³ DEIR, p. 5.3-37.

²⁴ DEIR, p. 5.3-37.

²⁵ DEIR, p. 5.3-17.

²⁶ DEIR, p. 5.3-18.

²⁷ DEIR, p. 5.3-29.

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IV. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE PROJECT

The DEIR does not meet CEQA's requirements because it fails to include an accurate, complete and stable Project description, rendering the entire analysis inadequate. California courts have repeatedly held that "an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document]."²⁸ CEQA requires that a project be described with enough particularity that its impacts can be assessed.²⁹ Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate project description.³⁰

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It is impossible for the public to make informed comments on a project of unknown or ever-changing 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...."³¹ As articulated by the court in *County of Inyo v. City of Los Angeles*, "a curtailed, enigmatic or unstable project description draws a red herring across the path of public input."³² Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project's impacts and undermining meaningful public review.³³

A. The DEIR Improperly Piecemeals its Analysis of the Project from Its Other Components.

The DEIR improperly piecemeals its description of the Project from the other Meritage facilities which the DEIR explains are part of a single commercial development project by the Applicant ("Meritage Project"). As a result, the DEIR fails to analyze the full extent of the Project's environmental impacts, and artificially minimizes its analysis of potentially significant cumulative impacts.

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²⁸ *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.

²⁹ *Id.* at 192.

³⁰ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311 ("*Sundstrom*").

³¹ *Id.* at 192-193.

³² *Id.* at 197-198.

³³ See, e.g., *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.
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The Project is the third component in a series of adjacent commercial hotel developments by the Applicant that are designed to operate as a single project. The first component, the Meritage Resort, was approved in 2004.³⁴ The Applicant subsequently acquired the adjacent property directly across from the Meritage Resort, including the Project site, and a 9.3-acre parcel of land located at the southern boundary of Napa Valley Commons, which is planned as the second component, the Meritage Commons Project, a hotel expansion project.³⁵ The Meritage Commons Project was approved by the City in 2015. Meritage Commons is currently under construction, and is anticipated to open in 2018.³⁶ The Project is the third component, and proposes to expand existing Meritage hotel uses by adding an additional 4-story, 253-guestroom dual-branded hotel, winery and office complex to the Meridian site.

The DEIR states that the Meritage Resort, the Meritage Commons, and the Trinitas Mixed-Use Project are part of a single project, share the same ownership, and will operate with shared management, shared check-in services, shared facilities management and engineering, and shared guest-serving amenities, among other shared operations.³⁷ The DEIR states that “each component is part of the larger vision to provide a collection of brands and experiences that create a true destination.”³⁸

Although the DEIR makes numerous references to the common ownership and operation of the Meritage Project’s three components, the DEIR fails to describe the physical characteristics and impacts of the Meritage Project as a whole. Failure to include a component of the project in a project description renders the description inaccurate and inadequate under CEQA.³⁹

CEQA similarly requires that “[a]ll phases of a project must be considered when evaluating its impact on the environment.”⁴⁰ An EIR must analyze the environmental effects of other phases or future expansions of a project if (1) the

³⁴ DEIR, p. 3-1.

³⁵ DEIR, p. 3-1.

³⁶ DEIR, p. 3-1.

³⁷ DEIR, pp. 3-1, 4-12.

³⁸ DEIR, p. 3-1.

³⁹ Id. at 1147; 14 CCR § 15062(a).

⁴⁰ 14 CCR § 15126.

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other activities are reasonably foreseeable consequences of the initial project;⁴¹ (2) the other activities are a future expansion of the first activity that will change the scope of the first activity's impacts;⁴² or (3) the related activities are all integral parts of the same project.⁴³

In this case, the Meritage Resort was the first part of a three-part integrated hotel development. The Meritage Resort was approved in 2004, prior to the Applicant's purchase of the adjacent acres that are now planned for the Meritage Commons and the Trinitas Project. The Applicant then simultaneously purchased the adjacent Meritage Commons and Trinitas properties with the intent to develop the remainder of the resort.⁴⁴

In 2015, the City approved the construction of the Meritage Commons, the second Project component. Meritage Commons included the addition of an approximately 10,000-square-foot exhibition hall to the existing Meritage Resort.⁴⁵ The 2015 permitting and development of Meritage Commons therefore resulted in a direct physical "expansion of the first activity," the Meritage Resort, which changed the scope of the first activity's impacts.

The Trinitas Project is now proposed as "an extension of an existing hotel development, [t]he Meritage Resort (TMR) and Meritage Commons (MC)."⁴⁶ Thus, it is clear on the face of the DEIR itself that the Trinitas Project is an "integral part of the same project," which includes all three Meritage Project components – Meritage Resort, Meritage Commons, and Trinitas. Since the Trinitas Project will physically increase the level of existing development and commercial operations at the Project site, there is substantial evidence demonstrating that the Trinitas Project "will change the scope of the first activity's impacts."⁴⁷

⁴¹ *Bozung*, 13 Cal.3d at 283–284.

⁴² *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 396.

⁴³ *Sierra Club v. West Side Irrigation Dist.* (2005) 128 Cal. App. 4th 690, 698, citing *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal. App. 3d 223.

⁴⁴ DEIR, p. 3-1.

⁴⁵ DEIR, p. 4-13.

⁴⁶ See DEIR Notice of Availability.

⁴⁷ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 396.

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The DEIR explains that the City conducted separate environmental reviews for the Meritage Resort and Meritage Commons prior to each of their respective approvals.⁴⁸ The DEIR further explains that “[t]his EIR does not provide additional environmental analysis for TMR [Meritage Resort], and MC [Meritage Commons].”⁴⁹ Thus, no single CEQA document has analyzed the impacts of all three components of the Meritage Project as a whole, allowing potentially significant impacts to escape disclosure and mitigation. This violates CEQA’s basic requirement that each CEQA document must analyze the “whole of the actions” and therefore constitutes illegal piecemealing of the Project’s environmental review under CEQA.⁵⁰ In particular, the DEIR must evaluate the impacts of: (1) operational air quality and GHG emissions as a whole; (2) traffic impacts as a whole; and (3) the impacts on biological resources as a whole – including lost Swainson’s hawk and other special status species habitat. By failing to disclose and evaluate the impact of the entire three-part project, the DEIR lacks substantial evidence to support its findings and fails to comply with the substantive and informational requirements of CEQA.

The DEIR must be revised and recirculated to include a thorough description and environmental impact analysis of all three integrated components of the Meritage Project.

V. THE DEIR FAILS TO ADEQUATELY ESTABLISH THE EXISTING BASELINE FOR BIOLOGICAL RESOURCES

The DEIR contains serious flaws in its disclosure of baseline environmental conditions related to sensitive plant, bird, and invertebrate species at the Project site. As a result, the DEIR lacks the necessary baseline information against which to measure the Project’s environmental impacts with regard to biological resources.

⁴⁸ DEIR, p. 4-13. The City failed to provide the CEQA documents for the Meritage Resort and Meritage Commons projects in response to commenters’ request for DEIR Reference Documents. Therefore, it is unclear, and the DEIR fails to explain, what form of CEQA review was performed for each of these Project components. Commenters are also unable to evaluate the combined impacts of the three Project components without access to the impact analysis that was performed for the earlier parts of the Project.

⁴⁹ DEIR, p. 4-13.

⁵⁰ 14 CCR § 15378(a).
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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.⁵¹ 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.⁵² Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The courts have clearly stated that, “[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”⁵³

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A. Special-Status Plants.

The DEIR failed to conduct botanical surveys for special-status plant species at the biologically appropriate time of year. As a result, the DEIR failed to identify several special-status plant species that are known to occur, or that have the potential to occur, in or near the Project site.

Napa County is a biodiversity hotspot which contains remarkably high levels of plant diversity and concentrations of special-status tax compared to other areas within California. Recent biological studies mapped and analyzed the distributions of globally rare plant species within Napa County, and identified 11 “global rarity hotspots” that collectively cover 2.4% of the County.⁵⁴ The Project site occurs within one of these hotspots, and is therefore recognized as high quality habitat for a number of rare and special-status plant species.⁵⁵

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The California Department of Fish and Wildlife (“CDFW”) submitted a comment letter in response to the DEIR’s Notice of Preparation (“NOP”) which

⁵¹ See, e.g., *Communities for a Better Env’t v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278 (“*Fat*”), citing Remy, et al., Guide to the Calif. Environmental Quality Act (1999) p. 165.

⁵² CEQA Guidelines §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 (“*Riverwatch*”).

⁵³ *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

⁵⁴ See Exhibit B, Cashen Comments, p. 2.

⁵⁵ See Exhibit B, Cashen Comments, p. 2.
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preliminarily identified three special-status plant species that are known to occur, or that have the potential to occur, in or near the Project site. CDFW explained that botanical surveys for special-status plant species, including those listed by the California Native Plant Society, “must be conducted during the blooming period for all sensitive plant species potentially occurring within the Project area and require the identification of reference populations” for all special status plants with potential to occur.⁵⁶ The CDFW letter referred the City to applicable CDFW protocols for surveying and evaluating impacts to rare plants.

The DEIR failed to conduct botanical surveys in compliance with the CDFW protocols. As explained by Mr. Cashen, the DEIR’s biological consultant did not visit reference populations, and limited its survey effort to a single “general field reconnaissance survey” on August 2, 2017 – outside the blooming period for the special-status plants identified by CDFW.⁵⁷ Because all of the special-status plant species with potential to occur at the Project site are annual herbs, Mr. Cashen explains that they would not have been present during the DEIR survey. The DEIR nevertheless incorrectly states that the DEIR’s Biological Report “is consistent with accepted scientific and technical standards of...CDFW.”⁵⁸

Based on this off-season survey, the DEIR concludes that “[n]o special-status plants were detected at the Study Site, and none are expected to occur.”⁵⁹ The DEIR’s conclusion that no special-status plans “are expected to occur” is both incorrect and unsupported since the DEIR failed to conduct botanical surveys in the manner required to identify the type of special-status plants that have the potential to occur at the Project site.

By contrast, Mr. Cashen reviewed publicly available botanical survey data on the Project site, and identified five special-status plant species that have the potential to occur at the Project site. The species identified by Mr. Cashen include the three species previously identified by CDFW, and two additional plant species that Mr. Cashen concludes are may occur due to the presence of potential habitat (i.e., vernal pools or surrogates).⁶⁰

⁵⁶ See CDFW NOP Comments, p. 1.

⁵⁷ DEIR, Appendix E (Biological Technical Report), p. 1.

⁵⁸ DEIR, p. 5.3-1.

⁵⁹ DEIR, p. 5.3-10.

⁶⁰ Cashen Comments, pp. 2-3.

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The DEIR's deficiencies in its baseline disclosures preclude a reliable impact analysis. As a result, its findings regarding the Project's impact on special-status plants are not supported by substantial evidence. The City must prepare a revised DEIR that includes adequate botanical surveys so that the Project's impacts on special-status plants can be accurately evaluated.

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B. Vernal Pools and Vernal Pool Fairy Shrimp.

The DEIR fails to identify vernal pools that are present on the Project site. The DEIR also fails to disclose that the Project site lies within the sensitive Lake-Napa vernal pool region,⁶¹ a habitat area which was established as part of a U.S. Fish and Wildlife Service ("USFWS") Recovery Plan for Vernal Pool Ecosystems of California and Southern Oregon.⁶² As a result of these deficiencies, the DEIR incorrectly concludes that the Project site does not provide suitable habitat for the federally threatened vernal pool fairy shrimp. This conclusion is not supported by substantial evidence.

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As Mr. Cashen explains, the DEIR's biological consultant surveyed for vernal pools in August 2017, when the pools were dry. As a result, the biologists did not encounter any active vernal pools during the DEIR site survey. On that basis, the DEIR concludes that there are no vernal pools present on the Project site, and dismisses past evidence of inundation of on-site vernal pools as caused by above-average rainfall during 2016/2017.⁶³ Because the DEIR relies on a survey conducted during the wrong time of year, its conclusion that no vernal pools are present is not supported by any substantial evidence.

In contrast, Mr. Cashen testifies that there is substantial, publicly available evidence demonstrating that the Project site contains active vernal pools.⁶⁴ Mr.

⁶¹ U.S. Fish and Wildlife Service. 2005. Recovery Plan for Vernal Pool Ecosystems of California and Southern Oregon. U.S. Fish and Wildlife Service, Portland, Oregon. Figure III-5c.

⁶² Cashen Comments, p. 5.

⁶³ DEIR, p. 5.3-20; DEIR, p. 5.3-8

⁶⁴ See Cashen Comments, p. 5; Keely JE, PII Zedler. 1998. Characterization and Global Distribution of Vernal Pools. In: Witham CW, editor. Ecology, Conservation, and Management of Vernal Pool Ecosystems. Proceedings from a 1996 Conference; 1996 Jun 19-21; Sacramento. Sacramento: California Native Plant Society. pp. 1-14. Available at: <http://vernalpools.ucmerced.edu/sites/vernalpools.ucmerced.edu/files/page/documents/1.1characterization_and_global_distribution_of_vernal_pools_by_jon_e_keely_and_paul_h_zedler_0.pdf>. 4140-003aep

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Cashen examined historical imagery available through Google Earth, and found evidence of vernal pools in several previous years, including in images taken in March 2010, May 2011, April 2012, Jan 2015, and March 2016.⁶⁵ The DEIR fails to disclose this critical baseline information.

The DEIR similarly discounts the potential for the vernal pool fairy shrimp to occur at the Project site due to the depth of the site's vernal pools. The DEIR estimates that pending depths at the historical vernal pools identified at the Project site, likely reached between 4 and 5 inches at one pool, and 2 to 3 inches at another.⁶⁶ The DEIR then concludes that these depths are inadequate to support vernal pool fairy shrimp.⁶⁷ As Mr. Cashen explains, readily available scientific information documents the occurrence of vernal pool fairy shrimp in pools as shallow as 1 inch, and publicly available Napa County evidence documents a shrimp population near the Napa Airport in a shallow pool with as little as 3.9-inch depth.⁶⁸ The depths of the Project site's historical vernal pools are therefore adequate to support a shrimp population.

The DEIR must be revised to inform the public of this critical information related to the presence of vernal pools, which may be subject to Water Board Section 401 jurisdiction, and the potential presence of the federally threatened vernal pool fairy shrimp.⁶⁹

C. Swainson's Hawk.

Swainson's hawk is a State-listed threatened avian species. The DEIR incorrectly concludes that, while Swainson's hawk is known to forage in vicinity of the Project site, there is no potential for Swainson's hawks to nest at the Project site

⁶⁵ Cashen Comments, p. 6.

⁶⁶ DEIR Appendix D, Section 4.5.2.

⁶⁷ *Id.*

⁶⁸ Cashen Comments, p. 7.

⁶⁹ The City may attempt to rely on Mitigation Measure MM Bio-6 to establish presence or absence of fairy shrimp after Project approval. DEIR, p. 5.3-51. However, MM Bio-6, which requires the Applicant to conduct protocol level surveys for fairy shrimp prior to Project construction, constitutes impermissible deferred analysis, and does not remedy the City's failure to disclose existing conditions regarding the potential presence of fairy shrimp in the DEIR. *See Madera Oversight Coalition, Inc. v. County Of Madera* (2011) 199 Cal. App. 4th 48 (mitigation measure that proposed to verify that certain archaeological sites were historical resources for purposes of CEQA constituted unlawful deferral of environmental analysis).

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due to a lack of suitable, large nesting trees. The DEIR's conclusion is not supported by substantial evidence because is contrary to readily available scientific information on Swainson's hawk nesting habitat, as well as evidence provided in the photographs and data contained in the DEIR's own Biological Report and Tree Report.

As Mr. Cashen explains, CDFW databases recently documented six Swainson's hawk nest sites within approximately 1.4 miles of the Project site. The CDFW data also indicates that at least four Swainson's hawk territories near the Project site were active in 2013.⁷⁰ In addition, the DEIR's Biological Report states that Swainson's hawk was one of the species that the City's biologist "either observed within or adjacent to the Study Area."⁷¹ Thus, there is ample evidence that the Project site provides suitable Swainson's hawk habitat.

The DEIR must be revised to correct its errors in failing to disclose the presence of Swainson's hawk in the vicinity of the Project site and the presence of foraging habitat on the Project site.

VI. THE DEIR FAILS TO ADEQUATELY ANALYZE, QUANTIFY, AND MITIGATE SIGNIFICANT AIR QUALITY IMPACTS

An EIR must fully disclose all potentially significant impacts of a Project, and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.⁷² An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁷³

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.⁷⁴ Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than

⁷⁰ Cashen Comments, p. 8.

⁷¹ *Id.*; DEIR Appendix D, Section B.

⁷² 14 CCR § 15064(b).

⁷³ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

⁷⁴ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

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challenges to an agency's factual conclusions.⁷⁵ In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will 'determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements.'⁷⁶

Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.'⁷⁷

A. The DEIR Failed to Adequately Disclose and Mitigate the Project's Significant Cancer Risk from Operational Emissions.

The DEIR fails to include a health risk analysis ("HRA") to disclose the adverse health impacts that will be caused by exposure to toxic air contaminants ("TACs") from the Project's construction and operational emissions. As a result, the DEIR fails to disclose the potentially significant cancer risk posed to nearby residents and children from TACs, and fails to mitigate it. Because the DEIR fails to support its conclusion that the Project will not have significant health impacts from diesel particulate matter ("DPM") emissions with the necessary analysis, this finding is not supported by substantial evidence.

One of the primary emissions of concern regarding health effects for land development projects is DPM, which can be released during Project construction and operation.⁷⁸ The DEIR states that the Project will emit DPM from diesel equipment and trucks during the 19 months of Project construction, and from mobile sources during Project operation.⁷⁹ However, the DEIR fails to disclose that the Bay Area Air Quality Management District ("BAAQMD") perform a health risk assessment to evaluate the cancer risk from either the Project's construction or operational DPM emissions and fails to apply the BAAQMD significance threshold

⁷⁵ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁷⁶ *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

⁷⁷ *Berkeley Jets*, 91 Cal.App.4th at 1355.

⁷⁸ See DEIR, p. 5.2-2 and -3.

⁷⁹ *Id.*
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of an increase in cancer risks of 10 in one million for determining a project's health risk impact.

With regard to construction emissions, the DEIR incorrectly concludes, without analysis, that “diesel emissions resulting from the construction of the Project, including construction truck traffic, are not anticipated to be significant...due to the relatively short duration of construction compared with a 70-year lifespan.”⁸⁰ As discussed below, this conclusion lacks evidentiary support, is conclusory and contrary to the BAAQMD guidance. With regard to operational emissions, the DEIR attempts to justify the omission of an HRA by stating that a “review of the Project area did not reveal any sensitive receptors in the vicinity (within 1,000 feet) of the Project site.”⁸¹ This analysis fails to take into account sensitive receptors farther than 1,000 feet away that would still be significantly impacted by the project emissions.

BAAQMD guidance sets a numerical significance threshold for cancer risk of 10/million and recommends that agencies conduct an analysis of the health risk impacts from short-term projects, in addition to long-term projects:

To ensure that short-term projects do not result in unanticipated higher cancer impacts due to short-duration high-exposure rates, the Air District recommends that the cancer risk be evaluated assuming that the average daily dose for short-term exposure lasts a minimum of three years for projects lasting three years or less.⁸²

The Office of Environmental Health Hazard Assessment (“OEHHHA”) similarly recommends that all short-term projects lasting at least two months be evaluated for cancer risks to nearby sensitive receptors.⁸³ The DEIR ignores these basic health risk assessment parameters, which clearly obligate the City to perform an HRA for the Project.

⁸⁰ DEIR, p. 5.2-9.

⁸¹ DEIR, p. 5.2-11.

⁸² See http://www.baaqmd.gov/~media/files/planning-and-research/permit-modeling/hra_guidelines_12_7_2016_clean.pdf.pdf.

⁸³ “Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments.” OEHHHA, February 2015, available at:

http://oehha.ca.gov/air/hot_spots/2015/2015GuidanceManual.pdf, p. 8-18
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Finally, the closest sensitive receptor to the Project site is a residence located approximately 1,059 meters (3474 feet) away.⁸⁴ As discussed below, SWAPE's quantitative analysis discloses that sensitive receptors at this distance are likely to be exposed to a lifetime cancer risk that exceeds the BAAQMD significance threshold, resulting in a significant health impact. The DEIR fails to disclose this critical information, and fails to incorporate adequate mitigation to reduce the health risk to less than significant levels. The DEIR must be revised to perform a quantitative analysis of health risks from exposure to the Project's toxic DPM emissions.

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1. The Project Will Result in a Significant Lifetime Cancer Risk from Exposure to Contaminants Generated by Project Construction and Operation.

SWAPE performed a screening level health risk assessment of the Project's construction DPM emissions using the AERSCREEN model.⁸⁵ AERSCREEN is recommended by the Environmental Protection Agency ("EPA") as the leading air dispersion model to conservatively evaluate health risk from air emissions.⁸⁶ SWAPE evaluated the Project's construction-related impacts to sensitive receptors using the annual PM10 exhaust estimates from the DEIR's CalEEMod model. Assumptions included in the SWAPE model included the DEIR's construction duration estimate of 418 days, the DEIR's statement that the closest sensitive receptors to the Project site are located within 1,059 meters from the Project site, and the DEIR's CalEEMod modeling results, which indicated that Project construction activities will generate approximately 414 pounds of DPM over the 418-day construction period.⁸⁷

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Consistent with recommendations set forth by OEHHA, SWAPE used a residential exposure duration of 28.8 years, starting from the infantile stage of life.⁸⁸ Using these DEIR's air modeling input value factors SWAPE found that unmitigated DPM emissions released during Project construction and operation would result in an excess cancer risk over the course of a residential lifetime (30

⁸⁴ SWAPE Comments, p. 4.

⁸⁵ SWAPE Comments, p. 4.

⁸⁶ *Id.*; see AERSCREEN user guide, available at https://www3.epa.gov/scram001/models/screen/aerscreen_userguide.pdf/

⁸⁷ SWAPE Comments, p. 4.

⁸⁸ *Id.*
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years) of approximately 12 in one million.⁸⁹ This risk is above the BAAQMD significance threshold for cancer of ten in one million, and is therefore a significant impact requiring mitigation.⁹⁰

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**B. The DEIR Lacks Substantial Evidence To Support A Finding Of
Overriding Considerations for Significant and Unavoidable
Greenhouse Gas Impacts.**

The DEIR fails to adopt all feasible mitigation measures to reduce the Project's significant greenhouse gas ("GHG") impacts to less than significant levels before declaring the impacts "significant and unavoidable." This violates CEQA's requirement that the City mitigate all significant environmental impacts to the greatest extent feasible.

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Before it can approve the Project, the City must certify the Project's Final EIR and make mandatory CEQA findings. Those findings must include (1) that the Final EIR complies with CEQA, (2) that the City has mitigated all significant environmental impacts to the greatest extent feasible, and (3) that any remaining significant environmental impacts are acceptable due to overriding considerations.⁹¹ Where, as here, the Project will have a significant effect on the environment, the City may not approve the Project unless it finds that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns."⁹²

The DEIR estimates that the Project's operational GHG emissions would be approximately 2,058 metric tons of carbon dioxide equivalents per year (MT CO₂e/yr), with implementation of mitigation.⁹³ The DEIR therefore concludes that the Project's mitigated GHG emissions will exceed the BAAQMD's threshold of 1,100 MT CO₂e/yr, and will therefore remain significant and unavoidable.⁹⁴

⁸⁹ SWAPE Comments, p. 6.

⁹⁰ See DEIR, p. 4.B-23; *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (EIR must disclose an impact as significant when it exceeds a duly adopted CEQA significance threshold).

⁹¹ 14 CCR sections 15090, 15091.

⁹² PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

⁹³ DEIR, p. 5.6-14.

⁹⁴ DEIR, p. 5.6-11.
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SWAPE reviewed the Project's proposed GHG mitigation measures,⁹⁵ and concluded that the DEIR fails to require all feasible mitigation available to reduce the Project's GHG impacts. SWAPE testifies that, in their expert opinion, additional, feasible mitigation is available to further reduce the Project's GHG emissions, including, *inter alia*, the following:

- Use passive solar design, such as: ^{96,97}
 - Orient buildings and incorporate landscaping to maximize passive solar, heating during cool seasons, and minimize solar heat gain during hot seasons.
- Reduce unnecessary outdoor lighting by limiting the hours of operation of outdoor lighting.
- Develop and follow a "green streets guide" that requires:
 - Use of minimal amounts of concrete and asphalt;
 - Installation of permeable pavement to allow for storm water infiltration; and
 - Use of groundcovers rather than pavement to reduce heat reflection.⁹⁸
- Implement Project design features such as:
 - Shade HVAC equipment from direct sunlight;
 - Install high-albedo white thermoplastic polyolefin roof membrane;
 - Install high-efficiency HVAC with hot-gas reheat;
 - Install formaldehyde-free insulation; and
 - Use recycled-content gypsum board.
- Provide education on energy efficiency to residents, customers, and/or tenants. Provide information on energy management services for large energy users.
- Meet "reach" goals for building energy efficiency and renewable energy use.
- Require all buildings to become "LEED" certified.
- Limit the use of outdoor lighting to only that needed for safety and security purposes.
- Require use of electric or alternatively fueled sweepers with HEPA filters.

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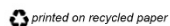
⁹⁵ DEIR, p. 2-16 – 2-17.

⁹⁶ Santa Barbara Air Pollution Control District, Scope and Content of Air Quality Sections in Environmental Documents, September 1997.

⁹⁷ Butte County Air Quality Management District, Indirect Source Review Guidelines, March 1997.

⁹⁸ See Irvine Sustainable Travelways "Green Street" Guidelines; www.ci.irvine.ca.us/civica/filebank/blobdload.asp?BlobID=8934; and Cool Houston Plan; www.harc.edu/Projects/CoolHouston.

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- Include energy storage where appropriate to optimize renewable energy generation systems and avoid peak energy use.
- Plant low-VOC emitting shade trees, e.g., in parking lots to reduce evaporative emissions from parked vehicles.
- Use CARB-certified or electric landscaping equipment in project and tenant operations; and introduce electric lawn, and garden equipment exchange program.
- Increase in insulation such that heat transfer and thermal bridging is minimized.
- Limit air leakage through the structure and/or within the heating and cooling distribution system.
- Installation of dual-paned or other energy efficient windows.
- Installation of automatic devices to turn off lights where they are not needed
- Provide electric vehicle charging stations that are accessible for trucks.
- Provide electrical hookups at the onsite loading docks and at the truck stops for truckers to plug in any onboard auxiliary equipment.
- Provide minimum buffer zone of 300 meters (approximately 1,000 feet) between truck traffic and sensitive receptors.
- Limit the daily number of trucks allowed at the facility.
- Design the site such that any check-in point for trucks is well inside the facility to ensure that there are no trucks queuing outside of the facility.
- On-site equipment should be alternative fueled.⁹⁹

The DEIR must be revised to consider these GHG mitigation measures and incorporate all feasible measures identified by SWAPE as binding mitigation for the Project. Only if the Project's GHG impacts remain significant after requiring all such feasible mitigation can the City consider declaring the Project's GHG impacts to be significant and unavoidable.

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⁹⁹ SWAPE Comments, pp. 12-14.
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VII. THE DEIR FAILS TO ADEQUATELY ANALYZE, QUANTIFY, AND MITIGATE SIGNIFICANT IMPACTS TO BIOLOGICAL RESOURCES

A. The DEIR Fails to Adequately Analyze and Mitigate Potentially Significant Impacts to Swainson's Hawk.

The DEIR relies on several erroneous and unsupported arguments to support its conclusion that Project impacts to Swainson's hawk foraging habitat would be less than significant. First, the DEIR contends that "[n]o substantial evidence exists that the Project site is subject to use by Swainson's hawks."¹⁰⁰ As Mr. Cashen explains, this claim lacks evidentiary support because the City's biological consultant made no attempt to assess Swainson's hawk use of the Project site. Mr. Cashen explains that assessments of raptor use of a project site typically include: (1) point count or other focused bird surveys, (2) migration counts, (3) a utilization distribution assessment, and (4) surveys of nesting territory occupancy in the project area.¹⁰¹ The DEIR did not conduct any of these surveys, and therefore lacks substantial evidence to conclude that Swainson's hawk will not be impacted by the Project.

Second, the DEIR relies on the erroneous claim that the nearest known Swainson's hawk nest is more than 5 miles from the Project site.¹⁰² As discussed above, this conclusion is contradicted by readily available CDFW public records which demonstrate that Swainson's hawk regularly frequent the Project vicinity within less than 2 miles of the Project site.

Third, the DEIR claims, without analysis or evidentiary support, that the Project site has limited habitat value, and that there is ample existing foraging habitat in the vicinity of the Project site to render the impact of removing the Project site habitat less than significant.¹⁰³ The DEIR fails to provide any scientific evidence to support these claims, and they are again contradicted by readily available scientific evidence. As Mr. Cashen explains, the DEIR describes the Project site as being predominantly characterized by a sparse covering of oat grass that is frequently mowed for fire control.¹⁰⁴ Foraging Swainson's hawks prefer

¹⁰⁰ DEIR, p. 5.3-47.

¹⁰¹ Cashen Comments, p. 11.

¹⁰² DEIR, p. 5.3-47.

¹⁰³ DEIR, p. 5.3-47.

¹⁰⁴ DEIR, p. 2-5.

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fields with these characteristics.¹⁰⁵ Consequently, the City must assume the site provides high-quality foraging habitat. Additionally, Mr. Cashen's review of Google Earth imagery of the Project vicinity demonstrates that adjacent lands are primarily populated with vineyards, which provide low quality habitat for Swainson's hawk. Thus, Mr. Cashen concludes that replacement of the Project site's existing vegetation with commercial buildings and vineyards would significantly impact available Swainson's hawk habitat.¹⁰⁶

Fourth, the DEIR contends that the Project's impacts to 10.24 acres of suitable habitat at the Project site represents approximately 0.1% of the mean home range for Swainson's hawks, and thus, impacts to foraging Swainson's hawks would be less than significant. The DEIR's argument is inconsistent with CDFW mitigation guidelines, which finds that there may be a take and recommend imposition of compensatory mitigation, even for infill projects where the project will remove 5 or more acres of foraging habitat (or that are less than 5 acres but within 1/4 mile of an active nest tree).¹⁰⁷ Because the Project site would convert 10.24 acres of Swainson's hawk foraging habitat, a potentially significant impact would occur requiring mitigation. The DEIR's proposition that the Project site is merely a "drop in the bucket" as compared to Swainson's hawks' entire home range is therefore unsupported.

The DEIR must be revised to disclose and mitigate the Project's potentially significant impacts on Swainson's hawk.

B. The DEIR Fails to Adequately Analyze and Mitigate the Project's Potentially Significant Cumulative Impacts to Biological Resources.

CEQA requires the lead agency to include a reasonable and good faith analysis of cumulative impacts in an EIR.¹⁰⁸ The analysis must be sufficiently detailed to correspond to the severity of the impact and the likelihood that it will

¹⁰⁵ Estep JA. 1989. Biology, movements, and habitat relationships of the Swainson's Hawk in the Central Valley of California, 1986-87. Calif. Dept. Fish and Game, Nongame Bird and Mammal Section Report. pp. 33 and 34.

¹⁰⁶ Cashen Comments, p. 12-13.

¹⁰⁷ California Department of Fish and Game. 1994. Staff report regarding mitigation for impacts to Swainson's hawks (*Buteo swainsoni*) in the Central Valley of California. p. 13.

¹⁰⁸ 14 §§ CCR 15130(a); 15065(a); 15355(b); *Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 109.
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occur.¹⁰⁹ While an EIR may provide less detail in its cumulative impact analysis than for project-specific effects,¹¹⁰ the discussion must provide sufficient specificity to enable the agency to make findings that a project will, or will not, have a significant cumulative impact where the possible effects of the project are “individually limited but cumulatively considerable.”¹¹¹ Mere conclusory statements about cumulative impacts are inadequate, as are cumulative impact discussions that ignore or minimize a project’s cumulative impacts.¹¹² An agency’s determination that cumulative impacts of a project are, or are not, significant must be supported by substantial evidence and reasoned, good faith analysis.¹¹³

The DEIR fails to provide the fundamental information needed for a meaningful analysis of the Project’s cumulative impacts on biological resources. In particular, the DEIR fails to identify the geographic scope of the City’s cumulative impacts analysis, and it fails to identify the other projects that could contribute to cumulative impacts. This precludes the ability to independently analyze potentially significant cumulative impacts to biological resources.

The DEIR’s analysis of cumulative impacts to biological resources is limited to the following statements:

1. “The Project as currently proposed has no potential for significant impacts to special-status plants and, therefore, there is no potential contribution to cumulative impacts. No cumulative impacts to special-status plants will occur with Project implementation.”
2. “Potential cumulative impacts associated with the Project are limited to isolated wetlands. The Project could potentially contribute to cumulative impacts to isolated wetlands (Waters of the State) and mitigation has been included to purchase mitigation bank credits to reduce any potential impacts. However, because the potential wetlands are considered “isolated,” no

¹⁰⁹ 14 CCR § 15130(b); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 729 (“*Kings County*”) (EIR inadequate for failure to include “some data” on cumulative groundwater impacts).

¹¹⁰ 14 CCR § 15130(b).

¹¹¹ PRC § 21083(b)(2); 14 CCR §§ 15064(h)(1), 15065(a)(3).

¹¹² See *San Joaquin Raptor V. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 733-734; *Mtn. Lion Coal. V. Fish & Game Comm’n* (1989) 214 Cal. App. 3d 1043, 1052-53; *Kings County*, 221 Cal.App.3d at 729.

¹¹³ *Preserve Wild Santee* (2012) 210 Cal.App.4th 260, 276-80.
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downstream or adjacent cumulative impacts will occur. The proposed Project would not result in a cumulative impact.”¹¹⁴

As discussed above, the DEIR lacks data to support a conclusion that the Project would not impact special-status plants. As a result, the DEIR has no basis to conclude that “[n]o cumulative impacts to special-status plants will occur with Project implementation.”¹¹⁵ Similarly, the DEIR fails to disclose the presence of vernal pools at the Project site, which are subject to regulation as Waters of the State under Section 401 of the Clean Water Act. Thus, the DEIR’s conclusion that the Project would not result in any significant cumulative impacts to isolated wetlands is similarly unsupported.

This lack of analysis fails to comply with CEQA. In *San Bernardino Valley Audubon Soc. v. Metropolitan Water District*,¹¹⁶ the court held that a CEQA document prepared for a habitat conservation plan lacked an adequate cumulative impact analysis for biological resources where it vaguely concluded that the Project would have potentially significant cumulative impacts that would be mitigated by other mitigation plans.¹¹⁷ The DEIR’s cumulative impact analysis is similarly deficient. The DEIR must be revised and recirculated to include a legally adequate cumulative impact analysis, and to require all feasible mitigation necessary to reduce significant cumulative impacts to less than significant levels.

VIII. THE DEIR IMPROPERLY RELIES ON “DESIGN FEATURES” AND NONBINDING MITIGATION MEASURES

The DEIR proposes to incorporate a number of mitigation measures which it calls “project design features” (“Design Features”), as well as the City’s Standard Mitigation Measures (“SMM’s”), into the MMRP.¹¹⁸ These features are intended to prevent the occurrence of or to minimize the significance of potential environmental effects. The DEIR incorrectly applies these mitigation measures to the Project’s unmitigated impacts on aesthetics, air quality, GHG emissions, hydrology and water quality, public services, traffic, and utilities and supply systems, in order to conclude that the impacts are less than significant, without disclosing the initial

¹¹⁴ DEIR, p. 5.3-52.

¹¹⁵ DEIR, p. 5.3-52.

¹¹⁶ (1999) 71 Cal.App.4th 382 (“*San Bernardino Audubon*”).

¹¹⁷ *Id.* at 399; see also *Preserve Wild Santee*, 210 Cal.App.4th at 276-280.

¹¹⁸ See e.g. DEIR, pp. 5.1-37 (Aesthetics), 5.2-15 (Air Quality); 4140-003aep

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severity of the impact prior to mitigation, and without incorporating the Design Features as binding mitigation measures.

For example, with regard to aesthetics, the DEIR states that, “with implementation of project design features and the City’s Standard Mitigation Measures, the proposed Project would not have a significant effect on aesthetics.”¹¹⁹ The DEIR then concludes that no mitigation is required for aesthetic impacts, without discussing whether the unmitigated impacts would be significant. With regard to GHG emissions, the DEIR relies on several “Design Features” to reduce operational GHG emissions, including “designate at least 53 clean air vehicle (i.e. electric vehicle) parking spaces; plant at least 430 new trees on the Project site; [and] expand a shuttle program that would reduce project trip generation by at least 180 trips per day.”¹²⁰ However, none of these measures are included as binding mitigation in the Project’s proposed Mitigation Monitoring and Reporting Plan (“MMRP”).¹²¹

The DEIR’s reliance on Design Features and SMMs violates CEQA in two ways – by failing to disclose the significance of the unmitigated impacts, and by failing to require enforceable mitigation to reduce potentially significant impacts to less than significant levels.

A. Failure to Disclose Potentially Significant Impacts Prior to Mitigation.

The application of mitigation to the Project’s unmitigated impacts violates CEQA’s requirement that the lead agency must first determine the extent of a project’s impacts before it may apply mitigation measures to reduce those impacts.¹²² Moreover, the CEQA Guidelines define “measures which are proposed by project proponents to be included in the project” as “mitigation measures” within the meaning of CEQA.¹²³

As described under CEQA Guidelines Section 15370, “Mitigation” includes:

¹¹⁹ DEIR, p. 5.1-37.

¹²⁰ DEIR, p. 5.6-13.

¹²¹ See DEIR, pp. 2-12 to 2-18.

¹²² 14 CCR § 15370; *Lotus v. Dep’t of Transp.* (2014) 223 Cal.App.4th 645, 651-52.

¹²³ 14 CCR 15126.4(a)(1)(A).
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- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

*Lotus v. Department of Transportation*¹²⁴ recently clarified the requirements of CEQA Guideline 15370. In *Lotus*, the court held that “avoidance, minimization and/or mitigation measures,” are not “part of the project.”¹²⁵ Rather, they are mitigation measures designed to reduce or eliminate environmental impacts of the Project, and must be treated as such. Mitigation measures cannot be incorporated in an EIR’s initial calculation of the Project’s unmitigated impacts because the analysis of unmitigated impacts, by definition, must accurately assess such impacts before any mitigation measures to reduce those impacts are applied.¹²⁶ An EIR that compresses the analysis of impacts and mitigation measures into a single issue disregards the requirements of CEQA. Because CEQA and *Lotus* prohibit the compressing of a mitigation measure with a Project, the DEIR’s lack of analysis of impacts caused by the Project’s air quality, traffic, and other impacts, violates CEQA. The DEIR should be revised to disclose the severity of all potentially significant impacts prior to mitigation.

B. Failure to Require Enforceable Mitigation.

Mitigation measures must be enforceable through conditions of approval, contracts or other means that are legally binding.¹²⁷ This requirement is intended to ensure that mitigation measures will actually be implemented, not merely

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¹²⁴ *Lotus v. Dept. of Transportation* (2013) 223 Cal.App.4th 650.

¹²⁵ *Id.* at 656.

¹²⁶ *Id.* at 651 - 52.

¹²⁷ PRC § 21081.6(b); 14 CCR § 15126.4(a)(2); *Lotus v. Dep’t of Transp.* (2014) 223 Cal. App. 4th 645, 651-52.

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adopted and then ignored.¹²⁸ The DEIR's reliance on Design Features and SMM's fails to meet this threshold requirement because the measures are not incorporated as binding mitigation measures in either the MMRP or proposed Conditions of Approval. As a result, the DEIR fails to include any binding mechanism to ensure that the Applicant will be required to implement these measures for the Project.

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Without an enforceable mechanism, the Design Features and SMM's described in the DEIR are little more than wishful thinking, and the DEIR's conclusions that the Project's impacts will be less than significant with these measures incorporated are unsupported. If the City intends to rely on Design Features and SMM's to reduce impacts to less than significant levels, these measures must be incorporated into the Project's MMRP and Conditions of Approval.¹²⁹

IX. CONCLUSION

The DEIR is inadequate as an environmental document because it fails to include a complete and accurate Project description, fails to adequately disclose the extent of the Project's environmental impacts without mitigation, and fails to fully disclose and mitigate the Project's potentially significant impacts on air quality and biological resources. Moreover, its findings regarding Project impacts are not supported by substantial evidence. The City cannot approve the Project until it prepares a revised DEIR that resolves these issues and complies with CEQA's requirements.

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Thank you for your attention to these comments. Please include them in the record of proceedings for the Project.

Sincerely,



Christina M. Caro

CMC:acp
Attachments

¹²⁸ *Fed'n of Hillside & Canyon Ass'n v. City of Los Angeles* (2000) 83 Cal. App. 4th 1252, 1261; *Anderson First Coal. v. City of Anderson* (2005) 130 Cal.4th 1173, 1186.

¹²⁹ *Lotus v. Dep't of Transp.*, 223 Cal. App. 4th 645, 651-52.
4140-003acp