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March 16, 2018

Via Email and Overnight Mail

Amy Million, Principal Planner
City of Dublin – Community Development Dept.
100 Civic Plaza
Dublin, CA 94568
Email: amy.million@dublin.ca.gov

Re: Comments on the Draft Supplemental Environmental Impact Report for the IKEA Retail Center Project (State Clearinghouse No. 2017082047)

Dear Ms. Million:

We are writing on behalf of Dublin Residents for Responsible Development regarding the January 2018 Draft Supplemental Environmental Impact Report ("DSEIR") prepared for the IKEA Retail Center Project ("Project"). The Project involves the development of approximately 432,099 square feet of commercial uses on 27.45 acres at 5344 and 5411 Martinelli Way. The Project would be anchored by an IKEA store of approximately 339,099 square feet and would feature up to 93,000 square feet of lifestyle retail-restaurant uses.

As explained in these comments, the DSEIR does not comply with the requirements of the California Environmental Quality Act ("CEQA") in several respects. First, DSEIR fails to adequately disclose, evaluate and mitigate impacts on biological resources at the project site, including special status plants and animals. Second, the DSEIR lacks substantial evidence to support its determination that air quality impacts from Nitrogen Oxide ("NOx") emission levels will be less than significant, as the DSEIR's emissions calculations underestimate the Project's construction and operational NOx emissions. Third, the DSEIR's determination that greenhouse gas emissions will be less than significant is not supported by substantial evidence, as the DSEIR relies on an unsubstantiated and improper methodology for determining the significance of long-term GHG emissions. For

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each of these reasons, the City of Dublin ("City") may not approve the Project until a revised document is prepared and recirculated for public review and comment.

These comments were prepared with the assistance of biological resources expert Scott Cashen and air quality experts Matt Hagemann and Hadley Nolan of Soil Water Air Protection Enterprise ("SWAPE"). Mr. Cashen's comments are attached to this letter as Exhibit A and his *curriculum vitae* is attached as Exhibit B. SWAPE's comments are attached to this letter as Exhibit C, and Mr. Hagemann's and Ms. Nolan's *curriculum vitae* are attached as Exhibit D. Mr. Cashen's and SWAPE's are submitted to the City in addition to the comments contained herein. The City must respond to these comments separately and individually. 1 CONT

I. Statement of Interest

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

Individual members of Dublin Residents and the affiliated unions live, work, recreate and raise their families in Alameda County, including in the City of Dublin. These members would be directly affected by the Project's environmental and health and safety impacts. Members of Dublin Residents may also work on the Project itself. Accordingly, these individuals will be first in line to be exposed to any health and safety hazards created by the Project. Dublin Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. 2

II. CEQA REQUIRES THE DISCLOSURE OF ALL POTENTIALLY SIGNIFICANT PROJECT IMPACTS AND THE INCORPORATION OF ALL FEASIBLE MITIGATION MEASURES NECESSARY TO REDUCE SUCH IMPACTS TO BELOW A LEVEL OF SIGNIFICANCE

CEQA has two basic purposes. First, CEQA is designed to inform decisionmakers and the public about the potential, significant environmental effects of a project.[1] Except in certain limited circumstances, CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR").[2] An EIR's purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. In this respect, an EIR "protects not only the environment but also informed self-government."[3]

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To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."[4] CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.[5] In addition, an adequate EIR must contain the facts and analysis necessary to support its conclusions.[6]

The second purpose of CEQA is to require public agencies to avoid or reduce environmental damage when possible by requiring appropriate mitigation measures and through the consideration of environmentally superior alternatives.[7] If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.[8] CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible

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[1] CEQA Guidelines § 15002, subd. (a)(1).
[2] See, e.g., Pub. Resources Code § 21100.
[3] *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.
[4] CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.
[5] Pub. Resources Code § 21100, subd. (b)(1); CEQA Guidelines § 15126.2, subd. (a).
[6] See *Citizens of Goleta Valley* 52 Cal.3d at 568.
[7] CEQA Guidelines § 15002, subds. (a)(2)-(3); see also, *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, 400.
[8] Pub. Resources Code §§ 21002.1, subd. (a), 21100, subd. (b)(3).

project alternatives or mitigation measures.[9] Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

As discussed in detail below, the DSEIR fails to meet either of these two key goals of CEQA. The DSEIR fails to adequately and completely describe the Project and the Project setting and fails to disclose and evaluate all potentially significant environmental impacts of the Project. In addition, it proposes mitigation measures that are unenforceable, vague or so undefined that it is impossible to evaluate their effectiveness. A revised DSEIR must be prepared and recirculated to comply with CEQA's most fundamental requirements. 3 CONT

III. THE DSEIR FAILLS TO ESTABLISH THE ENVIRONMENTAL SETTING AND TO ADEQUATELY DISCLOSE, EVALUATE, AND MITIGATE ALL POTENTIALLY SIGNFICANT IMPACTS TO BIOLOGICAL RESOURCES

A. The DSEIR Fails to Establish the Environmental Setting Resulting in an Inadequate Assessment of Potentially Significant Impacts to Biological Resources

The DSEIR is legally inadequate because it fails to establish the environmental setting of the Project, resulting in inadequate disclosure and assessment of the Project's potentially significant impacts on biological resources. 4

The environmental setting, or baseline, refers to the conditions on the ground and is a starting point to measure whether a proposed project may cause a significant environmental impact.[10] Describing the environmental setting is a prerequisite to an accurate and meaningful evaluation of the Project's environmental impacts. Without this information, an appropriate analysis cannot be performed, effective mitigation cannot be designed, and alternatives cannot be developed. Furthermore, the failure to provide a proper baseline precludes the public from evaluating the scope of potential biological impacts that may result from Project-related activities.

[9] Pub. Resources Code §§ 21002-21002.1.
[10] *Save Our Peninsula Com. v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.

Here, the City's biological resource analysis is based upon three "non-protocol" reconnaissance surveys of the project site. FirstCarbonSolution ("FCS") biologists visited the Project site two times: once in spring 2016 and once and 2017.[11] Additionally, the Biological Resources Assessment ("BRA") attached to DSEIR was prepared by WRA, Inc. following a single site visit in August 2013.[12] Neither the FCS nor the WRA visits included protocol-level surveys.[13] As discussed in the attached expert comments of biologist Scott Cashen, these not protocol reconnaissance surveys were not adequate to establish the biological resources that may reside on or rely upon the habitat present on the Project site.[14] As a result, the City lacks substantial evidence to support a determination that the proposed mitigation will be sufficient to reduce impacts to biological resources to a less than significant level. 4 CONT

CEQA requires that the City collect sufficient facts to enable a complete and accurate description of the Project and its impacts.[15] While a City has discretion to determine what surveys may be necessary to provide a complete and accurate description of the project setting, it must exercise that discretion such that its analysis and conclusions are supported by substantial evidence. In the case at hand, additional surveys are necessary to determine if the DSEIR's findings regarding the Project's biological impacts and the effectiveness of proposed mitigation are supported by substantial evidence.

1. The DSEIR Fails to Disclose the Potential Presence of Vernal Pool Fairy Shrimp

The Project site lies within the Livermore Vernal Pool Region.[16] Ephemeral pools in the Livermore Vernal Pool Region provide habitat for special-status branchiopods, including the vernal pool fairy shrimp and the California 5

[11] DSEIR at p. 3.2-15.
[12] DSEIR at Appendix C.1, p. iii (WRA, Inc. Biological Resources Assessment).
[13] *See* DSEIR at pp. 3.2-15 – 3.2-16; Exhibit A, Scott Cashen, Comments on the Draft Supplemental Environmental Impact Report Prepared for the "IKEA Retail Center Project"(March 15,2018) ("S. Cashen Comments"), p. 2.
[14] S. Cashen Comments at p. 2.
[15] *Sundstrom v. County of Mendocino* (1988) 22 Cal.App.3d 296, 311; see also *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 404-05.
[16] S. Cashen Comments at p. 5.

linderiella.[17] The DSEIR notes that the Project site contains seasonal wetlands or vernal pools.[18] Based upon the information provided in the Wetland Delineation data sheets provided, biologist Scott Cashen was able to determine that the wetlands at the project site hold water long enough to provide habitat for the federally threatened vernal pool fairy shrimp.[19]

The DSEIR does not evaluate, or even disclose, the potential presence of vernal pool fairy shrimp at the Project site. However, the Biological Resource Assessment notes that invertebrate shells from Ostracoda were detected in two of the wetlands in 2013.[20] As Mr. Cashen explains, the presence of these 'seed shrimp' at the Project site provides substantial evidence that vernal pool fairy shrimp also may occur at the Project site.[21] The failure to disclose the potential presence of vernal pool fairy shrimp thus amounts to a failure to establish the complete environmental setting for the Project, and prevents an evaluation of potential impacts to this special status species.

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CONT

Pursuant to mitigation incorporated into the Eastern Dublin General Plan Amendment and Specific Plan, species-specific surveys for special-status invertebrates in appropriate wetland habitats are required prior to approval of certain projects in the Reduced Planning Area.[22] Here, the Project site is within the Reduced Planning Area subject to the survey requirements. However, the required surveys have not been performed. Instead, the BRA simply concluded that vernal pool fairy shrimp are "unlikely to occur in the Project Area due to the lack of vernal pool habitat and the area's history of repeated discing, grading and leveling."[23] As a result, the DSEIR contains no discussion of vernal pool fairy shrimp.

As Mr. Cashen explains, the BRA's conclusion is not supported by evidence, and it is contradicted by scientific information on vernal pool fairy shrimp habitat.[24] First, vernal pool fairy shrimp are not limited to "vernal pool" habitat; they also

[17] Id.
[18] DSEIR at p. 3.2-1.
[19] S. Cashen Comments at p. 5.
[20] DSEIR, Appendix C.1, Appendix B (Wetland Delineation Data Form for sampling date 11/5/2013).
[21] S. Cashen Comments at p. 5.
[22] City of Dublin. 1993. Addendum to Eastern Dublin General Plan Amendment and Specific Plan Environmental Impact Report. p. 22.
[23] DSEIR, Appendix C.1 at p. 12.
[24] S. Cashen Comments at pp. 5-6.
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occur in vernal pool-like habitats.[25] Indeed, vernal pool fairy shrimp occur in a wide range of habitats, including degraded or otherwise poor-quality habitats such as pools created by tire tracks and roadside ditches. In this case, the seasonal wetlands at the Project site provide potential habitat for vernal pool fairy shrimp.[26]

Second, according to the Wetland Delineation, the wetlands at the Project site have experienced "little disturbance" since 2008.[27] This contradicts the statement in the BRA that the wetlands are unlikely to provide habitat because they have been subject to repeated disking, grading, and leveling.[28] Moreover, even disking, grading, and leveling do not preclude the potential presence of vernal pool fairy shrimp.[29] For example, in Contra Costa County, over 100 vernal pool fairy shrimp were documented occurring in a "non-vegetated depression in dirt road along tracks—partially scraped by bulldozer," and that had "routine vehicle traffic through [the] area."[30] 5 CONT

In sum, because substantial evidence shows that potential habitat for vernal pool fairy shrimp occurs on the Project site and no protocol-level surveys have been conducted to confirm or refute their presence, the DSEIR's failure to include vernal pool fairy shrimp as among the special-status species at the Project site is not supported. This omission amounts to a failure to establish an accurate environmental setting in violation of CEQA, and prevents evaluation of a potentially significant impact to vernal pool fairy shrimp resulting from Project-related fill activities.

2. The DSEIR Fails to Disclose the Potential Presence of California Linderiella

Like vernal pool fairy shrimp, the DSEIR fails to disclose the potential presence of California linderiella at the Project site, despite substantial evidence of their potential to occur. California linderiella occupy the same type of habitat as the vernal pool fairy shrimp.[31] They have also been detected in seasonal wetlands 6

[25] Id. at p. 6.
[26] Id. at p. 6.
[27] Id.
[28] See also DSEIR at p. 3.2-1; S. Cashen Comments at p. 6.
[29] S. Cashen Comments at p. 6.
[30] Id.
[31] Id. at p. 7.

similar to those at the Project site.[32] Mr. Cashen's comments explain that California linderiella have the potential to occur on the Project site and that their potential presence should be disclosed in DSEIR.[33]

The DSEIR's failure to disclose the potential presence of California linderiella violates CEQA by failing to establish an accurate and complete environmental setting. The failure to disclose the potential presence of California linderiella also results in a failure to evaluate potentially significant impacts to this species resulting from Project-related fill activities.

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CONT

3. The DSEIR Fails to Provide Critical Information Regarding Burrowing Owls at the Project Site

The DSEIR states that there is moderate potential for burrowing owls to occur at the Project site.[34] However, the DSEIR fails to establish the scope of the burrowing owl population on the Project site, and fails to disclose the status and demography of the local and regional burrowing owl populations that may be affected by loss of this potential breeding and foraging habitat. The DSEIR also fails to accurately disclose the amount of burrowing owl habitat on the Project site, preventing a contextual assessment of impacts due to potential habitat loss.

7a

CEQA requires a sufficient description of the Project setting to adequately inform the public and decisionmakers of the potential impacts of the Project. An accurate project setting is also necessary to permit meaningful assessment of the sufficiency of proposed mitigation measures. Here, the DSEIR acknowledges that the site provides potential burrowing owl habitat, but the surveys necessary to establish the scope of burrowing owl use of the site were never conducted.[35] Instead, the DSEIR's discussion is based on reconnaissance-level surveys by FCS and WRA.[36]

As Mr. Cashen's comments explain, burrowing owls are difficult to detect due to their cryptic coloration, extensive use of burrows, and tendency to flush (i.e., fly

[32] Id.
[33] Id.
[34] DSEIR at p. 3.2-6.
[35] S. Cashen Comments at p. 8.
[36] Id.

away) when approached.[37] Because of these characteristics, researchers and the California Department of Fish and Wildlife ("CDFW") have concluded that four independent surveys are necessary to provide reliable information on the presence of burrowing owls, and that data from the four surveys is essential to avoiding, minimizing, and properly mitigating the impacts of a project.[38]

For the Project here, Mitigation Measure BIO-1c requires the Applicant to retain a biologist to conduct two pre-construction surveys for burrowing owls prior to the first ground disturbing activities.[39] Although CDFW guidelines do recommend "take avoidance" (i.e., pre-construction) surveys, the guidelines make it clear that such surveys are no substitute for the four "detection surveys" that are required to fully assess a project's impacts and formulate appropriate mitigation.[40] Because both FCS and WRA failed to implement the CDFW survey protocol during their site visits, the City lacks the information needed to fully disclose and evaluate the Project's impacts to burrowing owls and to ensure effective mitigation.

7a
CONT

The need to establish the baseline population of burrowing owls on a site prior to assessing impacts and mitigation measures is emphasized in CDFW's 2012 *Staff Report on Burrowing Owl Mitigation*:

> Adequate information about burrowing owls present in and adjacent to an area that will be disturbed by a project or activity will enable the Department, reviewing agencies and the public to effectively assess potential impacts and will guide the development of avoidance, minimization, and mitigation measures.

In short, it is not possible to fully and effectively assess the extent of the Project's impacts on burrowing owls until surveys that adhere to CDFW guidelines have been conducted.[41] Accordingly, the City must require the Applicant to conduct the protocol surveys described in CDFW's 2012 Staff Report. The results of those surveys need to be released in a revised DSEIR so that they can be thoroughly

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[37] Id.
[38] Id.
[39] DSEIR at pp. 3.2-19 – 3.2-20.
[40] S. Cashen Comments at p. 8 (citing California Department of Fish and Game (2012) Staff Report on Burrowing Owl Mitigation).
[41] Id.

vetted by the public, resource agencies, and decisionmakers as a part of the CEQA review process. 7a CONT

Furthermore, the DSEIR's description of the environmental setting is inadequate because it fails to disclose the extent of burrowing owl habitat on the Project site, as well as the amount of habitat that would be eliminated by the Project.[42] Significantly, the DSEIR also fails to disclose the Project's proximity to the important Camp Parks burrowing owl population and its importance to the continuing viability of burrowing owls in the region.[43] This information is an essential component for the DSEIR because it, along with the scope of the population on the Project site, will enable the public and decisionmakers to evaluate the relative significance of the Project's impacts to the overall burrowing owl population and to evaluate the sufficiency of the proposed mitigation.

As Mr. Cashen's comments explain, burrowing owl populations have declined dramatically in the San Francisco Bay Area since the Eastern Dublin Specific Plan EIR was prepared.[44] The species has been extirpated, or nearly extirpated, from six Bay Area counties (Napa, Marin, San Francisco, Santa Cruz, Sonoma, and San Mateo).[45] Although burrowing owls were once abundant throughout Alameda and Contra Costa counties, they are now primarily limited to the eastern portions of those counties.[46] Indeed, only two "large" breeding colonies of burrowing owls remain in Alameda County: one in the Altamont Hills, and the second in the Camp Parks area.[47] The Project site is located at the periphery of the Camp Parks burrowing owl population, which is the last remaining large population of burrowing owls in the Livermore-Amador Valley.[48] Because the Project would contribute to the further decline of burrowing owl habitat in the Camp Parks area – one of the few remaining core population areas in the region – the Project may have a significant effect on the overall persistence of burrowing owls in the region.[49] 7b

[42] *See* Id. at p. 9.
[43] Id. at pp. 7, 9.
[44] Id. at p. 7.
[45] Id.
[46] Id.
[47] Id.
[48] Id.
[49] Id. at pp. 7-8.

The City is required to disclose sufficient information to enable a complete assessment of whether additional mitigation is necessary due to the severity of impacts to a core population area. The DSEIR must be revised to establish and disclose the proximity and importance of the Camp Parks burrowing owl population so that the Project's potential impacts to this core population area may be evaluated and appropriate mitigation identified.

7b CONT

4. The DSEIR Fails to Provide Information Regarding Special Status Plant Species That is Necessary to Assess Potential Impacts and the Effectiveness of Mitigation

While the DSEIR acknowledges that Congdon's Tarplant is known to occur on approximately 6.81 acres of the Project site,[50] the document fails to disclose that other special status plant species may also occur. Because no protocol-level surveys were performed sufficient to determine whether other potentially-present special status plant species actually occur on the Project site, there is no basis to conclude that these other special status plants are not present.[51] The failure to disclose the potential presence of these other species and the failure to perform surveys adequate to confirm the presence or non-presence of these species is a violation of CEQA. The DSEIR failures to inform the public and decisionmakers which plants may be impacted by the Project, the scope and significance of the plant population that may be impacted, and whether effective mitigation may be designed or alternatives should be considered. The DSEIR must be revised to adequately identify what special-status plant species may occur on the site, incorporate the results of protocol-level surveys for these plants, and identify appropriate mitigation requirements.

8a

In Mr. Cashen's comments, he explains that at least two other special-status plant species are known occur at the Project site and neither are addressed in the DSEIR: (1) western dodder (*Cuscuta occidentalis*) and (2) Douglas' fiddleneck (*Amsinckia douglasiana*).[52] These two plants are listed as plants observed at the Project site at the time of the WRA wetland delineation.[53] Both of these species are locally rare (i.e., rank "A1" and "*A1x " by the East Bay Chapter of the California

[50] DSEIR at p. 2-1.
[51] S. Cashen Comments at p. 3.
[52] Id. at pp. 3-4.
[53] DSEIR, Appendix C.1, Appendix A (BRA List of Observed Plant and Wildlife Species).

Native Plant Society).[54] Locally rare plant species with an "A" designation are considered special-status species under Sections 15380 and 15125(c) of the CEQA Guidelines. The presence of Douglas' fiddleneck at the Project site is especially significant because—until now—it was believed to be extirpated from Alameda and Contra Costa counties.[55] 8a

Furthermore, the BRA dismissed the potential for saline clover (*Trifolium hydrophilum*) and hairless popcorn flower (*Plagiobothrys glaber*) to occur at the Project site, though its conclusions are unsupported.[56] According to the BRA, saline clover is unlikely to occur at the site because "[t]he existing grassland and seasonally wet depression habitat in the Project Area is heavily disturbed and of low quality."[57] Additionally, the BRA states that hairless popcorn flower is unlikely to occur at the Project site because "[t]his species is presumed extinct and has not been found since 1954."[58]

Contrary to the statements in the BRA, however, Mr. Cashen explains that Saline clover has been detected in disturbed areas and "low quality" habitats.[59] Saline clover is also known to occur in the Tassajara Area.[60] Additionally, the BRA's statement that hairless popcorn flower has not been found since 1954 is simply incorrect, as the species was rediscovered near Tassajara Road in Dublin during surveys conducted in 2002 and 2006.[61] Accordingly, the DSEIR's assumption that these plant species have no potential to be present on the Project site is not supported by substantial evidence. 8b

Data from focused surveys is necessary to fully disclose the existing conditions at the Project site, analyze the Project's impacts, formulate appropriate mitigation, and develop possible alternatives. Deferring the surveys until after completion of the CEQA review process fails to fully disclose potential Project impacts on special status plants and precludes the public, resource agencies, and

[54] S. Cashen Comments at p. 3.
[55] Id. at p. 4.
[56] DSEIR, Appendix C.1, Appendix B at pp. B-15, B-16 (Potential for Special-Status Species to Occur in the Project Area); *see also* S. Cashen Comments at p. 4.
[57] Id. at p. B-15.
[58] Id. at p. B-16.
[59] S. Cashen Comments at p. 4.
[60] Id. at p. 5.
[61] Id. at pp. 4-5.

scientific community from meaningful comment on these potential impacts, and precludes meaningful review of the Project's impacts by decisionmakers exercising their discretion in approving entitlements and permits. 8b CONT

5. The DSEIR Fails to Establish Baseline Conditions for Special Status Bats at the Project Site

The DSEIR identified three special-status bat species (pallid bat, Townsend's big-eared bat, and Yuma myotis) that have a moderate potential of roosting in the existing building at the Project site.[62] As with the other special-status species, the Applicant did not conduct the necessary surveys to determine whether any bat species were in fact using the building as a roost site.[63] The failure to establish baseline conditions precludes the public, resource agencies, and scientific community from being able to review and submit informed comments pertaining to the Project's impacts and the sufficiency of proposed mitigation. 9

B. The DSEIR Fails to Disclose, Evaluate, and Mitigate All Potentially Significant Impacts to Biological Resources

1. The DSEIR Fails to Evaluate and Mitigate Potential Impacts to Special Status Branchiopods

As discussed in subsection (a)(1) above, the DSEIR fails to disclose that special status branchiopods including vernal pool fairy shrimp and California linderiella may be present in the seasonal wetlands at the Project site.[64] As a result, the DSEIR also fails to evaluate the potential impacts that the Project may have on these special-status species and fails to identify any measures to mitigate potentially significant impacts. Because substantial evidence shows that potential habitat for vernal pool fairy shrimp and California linderiella exists on the Project site, the DSEIR must be revised to disclose this information and evaluate potential impacts to these special status species.[65] 10

[62] DSEIR at pp. 3.2-6, 3.2-11.
[63] S. Cashen Comments at p. 8.
[64] Id. at p. 9.
[65] Id.

2. The DSEIR Fails to Evaluate and Mitigate All Potential Impacts to Burrowing Owls

As discussed above, the DSEIR fails to adequately disclose the scope of burrowing owls and their habitat on the Project site. The DSEIR also fails to disclose the Project's proximity to the critical Camp Parks burrowing owl population. As a result of these critical omissions, the DSEIR has failed to meaningfully evaluate and disclose the scope of potential impacts to burrowing owls from Project construction. Without such evaluation, it is impossible to fully assess the adequacy of the proposed mitigation measures. Furthermore, as Mr. Cashen's comments demonstrate, the mitigation measures that are proposed are inadequate and do not support a finding that they would reduce Project impacts below a level of significance.[66] 11

i. The DSEIR Fails to Evaluate Impacts from Eviction

The DSEIR fails to evaluate the potential impacts to burrowing owls from the proposed eviction of burrowing owls from their burrows. Additionally, the DSEIR fails to identify mitigation measures to reduce the potential impacts of eviction to a less than significant level.

Under CDFW guidelines, passive relocation or eviction is a potentially significant impact under CEQA that must be analyzed.[67] The temporary or permanent closure of burrows may result in a variety of impacts to the species, including: (1) significant loss of burrows and habitat for reproduction and other life history requirements; (2) increased stress and reduced reproductive rates; (3) increased depredation; (4) increased energetic costs; and (5) risks posed by having to find and compete for available burrows.[68] 12

Moreover, because the DSEIR fails to provide a burrowing owl exclusion plan, or fundamental details contained in such plans (e.g., location of replacement burrows and compensation habitat, whether exclusion permitted during breeding season), it is not possible for the public, resource agencies, and decisionmakers to

[66] Id. at pp. 9-10.
[67] Id. at p. 10.
[68] Id.

evaluate the potential impacts to owls evicted from the Project site and the adequacy of the mitigation.[69]

The DSEIR must be revised to provide sufficient detail on proposed eviction activities to enable meaningful evaluation of impacts from these activities. 12 CONT

ii. Protective Buffer Requirements Are Vague and Unenforceable

In order for mitigation measures to be effective, they must be specific, enforceable, and feasible actions that will improve environmental conditions. In this case, the DSEIR's direction to avoid disturbing or otherwise impacting occupied burrows to mitigate impacts to burrowing owls is vague and unenforceable.[70] As result, the requirement does not provide substantial evidence that impacts will be mitigated below a level of significance. The DSEIR does not establish the minimum buffers that need to be implemented around burrows. Nor does the DSEIR establish monitoring that should be implemented to ensure burrowing owls are not disturbed by construction activities. 13

The DSEIR's direction to avoid burrowing owls should be revised to reflect CDFW guidelines, which indicate buffers may need to be up to 500 meters, depending on the time of year and level of disturbance.[71] In the absence of greater specificity, it is purely speculative to assume that the proposed mitigation will reduce impacts below a level of significance.

iii. The DSEIR Improperly Defers Mitigation

The DSEIR violates CEQA by deferring specification of critical elements of the mitigation measures needed to reduce the Project's potentially significant impacts to burrowing owls below a level of significance. Specifically, the DSEIR defers identifying: (1) a compensatory mitigation ratio; (2) the acceptable mitigation location and mechanism (e.g., habitat acquisition, purchase of credits at a mitigation bank, in-lieu fee, etc.);(3) site protection methods;(4) financial 14

[69] Id.
[70] DSEIR at p. 3.2-20.
[71] S. Cashen Comments at p. 17.

assurances;(5) performance standards; and (6) monitoring requirements.[72] Instead, the DSEIR relies on the establishment of mitigation requirements in a *future* Burrowing Owl Mitigation Plan, which is to be reviewed and accepted by CDFW and the City prior to the first ground-disturbing activities.[73]

Deferring formulation of mitigation measures to post-approval studies is generally impermissible.[74] Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.[75] Deferral of the specifics of mitigation is permissible only where the lead agency "commits itself to mitigation" and "lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan."[76] If identification of specific mitigation measures is impractical until a later stage in the project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.[77] The courts have held that simply requiring a project applicant to obtain a future report and then comply with any recommendations that may be based upon the report is insufficient to meet the standard for properly deferred mitigation.[78]

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CONT

Here, the DSEIR's proposed approach deprives the public of an opportunity to review and submit comments on fundamental aspects of the Project's mitigation strategy prior to Project approval. Furthermore, neither the CDFW nor the City has an oversight approach to ensure compensatory mitigation is occurring.[79]

As Mr. Cashen's comments explain, a 1:1 ratio is not likely to be sufficient to mitigate impacts below a level of significance in this case.[80] This is due to the rapid decline of the Camp Parks population and the limited availability of compensation habitat to support that population.[81] A project and region specific ratio is required

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[72] Id.
[73] DSEIR at p. 3.2-20.
[74] *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code § 21061.
[75] *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical Gardens Foundation v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1604, n. 5
[76] *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 793.
[77] Id.
[78] Id.
[79] S. Cashen Comments at p. 17.
[80] Id. at pp. 17-18.
[81] Id.
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in this case to support a finding that the mitigation ratio will reduce impacts below a significant level.

In this case, a regional specific mitigation ratio for loss of burrowing owl habitat has already been established, yet was never disclosed or applied in the DSEIR. The Eastern Alameda County Conservation Strategy ("EACCS") establishes the standard for mitigation needed to conserve species and habitat in Eastern Alameda County. The EACCS requires compensatory mitigation for impacts to burrowing owl habitat to be within one-half mile of a burrowing owl nest used within the previous three years.[82] Additionally, the EACCS establishes a standardized mitigation ratio of 3:1 (3.5:1 if the mitigation site is in a different core area).[83] Anything lower cannot be assumed to reduce regional impacts to a less than significant level.[84] 14

The EIR should be revised to include a provision that compensatory mitigation shall be required for Project impacts to burrowing owls and their habitat at a minimum of the EACCS compensatory mitigation ratio standard for burrowing owls of 3:1 (3.5:1 if the mitigation site is in a different core area). By failing to identify the applicability of the EACCS mitigation requirements and failing to establish a performance standard based on regional mitigation needs, the DSEIR's deferral of the specific mitigation ratio requirement violates CEQA and is not support by substantial evidence.

3. The DSEIR Fails to Adequately Evaluate and Mitigate Potential Impacts to Special Status Plants

The DSEIR requires the Applicant to conduct a focused survey to determine the presence of Congdon's tarplant prior to construction.[85] If no special-status plant species are found during this pre-construction survey, then no additional mitigation measures for special status plants will be implemented. If Congdon's tarplant is detected during the survey, additional mitigation requirements are triggered. 15

[82] Id. at p. 18.
[83] Id.
[84] Id.
[85] DSEIR at p. 3.2-18.

The DSEIR's proposed mitigation strategy is not sufficient to ensure impacts to special status plants species will be less than significant.[86] First, the DSEIR does not require focused surveys or specify mitigation for any other special-status plant species that occur, or could occur, at the Project site. As a result, potentially significant impacts to all special-status plants besides Congdon's tarplant remain unmitigated.[87]

Second, Congdon's tarplant is already known to occur at the Project site, thus compensatory mitigation should not be contingent on future surveys. This is especially true for annual plants such as Congdon's tarplant because the presence and abundance of annual plants can fluctuate dramatically from year to year due to climatic conditions.[88] The absence of Congdon's tarplant from the Project site during a preconstruction survey may be the result of adverse survey conditions rather than actual absence of the species, which may in turn cause potentially significant impacts to go unmitigated.

15 CONT

Third, the DSEIR indicates that compensatory mitigation would not be required if activity exclusion zones can be installed around habitat occupied by Congdon's tarplant during construction of the Project.[89] However, based on the site plan, Mr. Cashen states that all existing plants will be directly or indirectly affected by the Project.[90] Therefore, even if activity exclusion zones are feasible, the plant populations have no chance for long-term persistence at the site once the Project is operational.

The DSEIR must be revised to address these deficiencies in the proposed mitigation strategy and ensure all potentially significant impacts are mitigated to the extent feasible.

i. The DSEIR Defers Mitigation for Congdon's Tarplant Impacts

16

The DSEIR requires that the Applicant prepare a mitigation plan if impacts to Congdon's tarplant cannot be avoided. The DSEIR states:

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[86] *See* S. Cashen Comments at p. 14.
[87] Id.
[88] Id.
[89] DSEIR at pp. 3.2-18 – 3.2-19.
[90] S. Cashen Comments at p. 14.

> A mitigation plan may include but is not limited to the following: the acquisition of off-site mitigation areas presently supporting the Congdon's tarplant, purchase of credits in a mitigation bank that is approved to sell credits for the Congdon's tarplant, or payment of in-lieu fees to a public agency or conservation organization (e.g., a local land trust) for the preservation and management of existing populations of Congdon's tarplant.[91]

As proposed, the DSEIR improperly defers formulation of the mitigation plan without establishing fundamental aspects needed to ensure effectiveness and enforceability. Such fundamental aspects include: (1) the performance standards (or success criteria) for the proposed mitigation, (2) a definitive enforcement mechanism that ensures performance standards are met; (3) the contingency or remedial action measures that would be triggered if success standards are not achieved; (4) the measures that would be implemented to ensure the long-term protection and management of sensitive biological resources at mitigation sites; and (5) the required monitoring program, including the monitoring techniques, effort, and frequency.[92] Because the DSEIR lacks these fundamental details, the City has failed to ensure that Project impacts to sensitive botanical resources would be reduced to a less than significant level.[93] 16

Furthermore, the DSEIR's deferral of the mitigation plan is exacerbated by its failure to provide evidence that the proposed mitigation is feasible. As Mr. Cashen's comments note, there do not appear to be any mitigation banks that sell credits for impacts to Congdon's tarplant.[94] Additionally, there do not appear to be any in-lieu fee programs that cover impacts to Congdon's tarplant, and the DSEIR fails to provide evidence that sites suitable for acquisition exist.[95]

The City must produce a revised DSEIR to establish that the proposed mitigation is feasible. Specifically, the DSEIR should identify: (1) the potential mitigation sites, and status of Congdon's tarplant at those sites; (2) the actual mitigation ratio proposed; (3) performance standards for the mitigation sites; (4) the required monitoring program; and, (5) measures that will be implemented to ensure

[91] DSEIR at p. 3.2-19.
[92] S. Cashen Comments at pp. 14-15.
[93] Id.
[94] Id. at p. 15.
[95] Id.

the long-term protection and management of Congdon's tarplant populations at the mitigation site(s).[96] Without such details, the DSEIR lacks substantial evidence to support a finding that the proposed mitigation will reduce impacts below a level of significance. 16 CONT

ii. The Proposed Compensatory Mitigation is Vague and Inconsistent with the EACCS

According to the DSEIR, the Congdon's tarplant mitigation plan should incorporate a compensatory mitigation ratio of at least 1:1.[97] However, the Eastern Alameda County Conservation Strategy ("EACCS") establishes the standard for mitigation needed to conserve species and habitat in Eastern Alameda County, and the proposed mitigation ratio does not adhere to EACCS standards.[98] The EACCS establishes a standardized mitigation ratio of 5:1 for impacts to focal plant species (e.g., Congdon's tarplant).[99]

Notably, the 1:1 ratio proposed in the DSEIR is not even consistent with other projects in the City of Dublin. For example, the City is requiring a 5:1 ratio for impacts to Congdon's tarplant at the nearby Zeiss Innovation Center Project site.[100] The DSEIR offers no explanation as to why a 5:1 ratio was needed to mitigate impacts at the Zeiss project site but the Project site here only requires a 1:1 ratio. 17

Because the DSEIR fails to include a sufficiently detailed mitigation strategy, and because the measures listed in the DSEIR do not comply with the EACCS, the City has failed to provide substantial evidence that the Project's impact to Congdon's tarplant and other special-status plant species would be reduced to a less than significant level.

4. The DSEIR Fails to Adequately Evaluate and Mitigation Potential Impacts to Special Status Bats

The DSEIR's proposed mitigation measures fail to ensure that the Project's impacts to special status bats are mitigated to a less than significant level. The 18

[96] Id.
[97] DSEIR at p. 3.2-19.
[98] S. Cashen Comments at p. 15.
[99] Id.
[100] Id.

DSEIR proposes the following mitigation for potentially significant impacts to special-status bat species:

> Pre-removal bat surveys of the existing on-site building shall occur no more than 30 days before its removal. If bats are found, then a qualified biologist shall develop an appropriate relocation plan consistent with USFWS, CDFW, and East Alameda County Conservation Strategy standards and policies.[101]

However, the DSEIR fails to identify the survey techniques that should be implemented for the pre-removal surveys, and it is unclear that the listed standards and policies even exist.[102]

As Mr. Cashen explains, establishing the required survey techniques for special status bat species is a necessary prerequisite to ensuring that potential impacts to bat species are identified and mitigated.[103] First, bat detection often requires specialized techniques, and a technique that is effective for one species may be completely ineffective for other species.[104] Second, pallid bats and Townsend's big-eared bats are extremely sensitive to human disturbance, and human disturbance may cause the colony to abandon the roost (which contributes to population declines).[105] Third, the establishment of minimum qualifications for the biologist conducting the pre-removal surveys fails is necessary to ensure the surveys will be effective and avoid additional impacts to the species.[106] Because the DSEIR fails to establish critical performance standards for ensuring future surveys will be effective, the DSEIR's conclusion that such surveys will reduce impacts below a level of significance is not supported by substantial evidence. 18 CONT

Suitable roost sites are the limiting factor for most bat populations.[107] The DSEIR does not require the Applicant to provide replacement roosts as compensation for impacts to potential roosts at the Project site. Therefore, even if the bats are properly excluded from the existing on-site building, they may not have a suitable alternate roost in the vicinity, and the local population may be

[101] DSEIR at p. 3.2-20 – 3.2-21.
[102] *See* S. Cashen Comments at p. 19.
[103] Id. at pp. 18-19.
[104] Id. at p. 18.
[105] Id.
[106] Id.
[107] Id. at p. 19.

extinguished.[108] This constitutes a potentially significant impact that remains unmitigated. Without ensuring that suitable replacement roosts will be available, the DSEIR lacks substantial evidence to support its finding that the proposed mitigation strategy will reduce impacts below a level of significance.

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5. The DSEIR Fails to Adequately Evaluate Cumulative Impacts of the Project

The DSEIR's analysis of cumulative impacts to biological resources fails to satisfy the requirements of CEQA for several reasons.

First, the DSEIR fails to define the geographic scope of the City's cumulative impacts analysis beyond that it includes "the region surrounding the project site." This description is too vague to understand the geographic scope of the analysis and prevents the public from assessing the conclusions presented in the DSEIR.

Second, the list of cumulative projects provided in the DSEIR omits the Zeiss Innovation Center Project, which is located approximately 700 feet north of the Project site. The Zeiss Innovation Center Project would impact many of the same biological resources as the proposed Project, including Congdon's tarplant, seasonal wetlands, burrowing owl (and other raptor) habitat, and potential habitat for the vernal pool fairy shrimp and California linderiella.

19

Third, the DSEIR concludes the Project's contribution to any significant cumulative impact on special-status plant species would be less than cumulatively considerable because Congdon's tarplant would be relocated if it is found on the Project site during preconstruction surveys. However, there is no basis for this conclusion because the DSEIR does not require (or propose) relocation of Congdon's tarplant as mitigation. Further, the DSEIR's conclusion is not justified because the DSEIR fails to incorporate mitigation for the numerous other special-status plant species that occur, or could occur, at the Project site.

Fourth, the DSEIR acknowledges the Project would (or could) impact wetlands, special-status plants (Congdon's tarplant), and special-status animals (nesting birds, burrowing owl, bats). However, the DSEIR fails to provide any actual

[108] Id.

analysis of cumulative impacts to these resources, including whether cumulative impacts to these specific resources would be significant. As Mr. Cashen points out:

> 1. None of the biological resource mitigation measures are designed to alleviate the cumulative impact; all three mitigation measures are specific to the Project site and to Project activities and do not address the cumulative impact posed by other projects.
>
> 2. Habitat loss, including the incremental loss of habitat from numerous small projects, is the greatest threat to most special-status species. The DSEIR does not require habitat compensation for all of the special-status species that would (or could) be affected by the Project. As a result, the Project's contribution to the cumulatively significant loss of habitat would not be mitigated.[109]

19 CONT

Mr. Cashen concludes that the Project's incremental contribution to cumulative impacts to the burrowing owl and Congdon's tarplant would be cumulatively considerable.[110] Furthermore, the Project may have cumulatively considerable impacts to other species as well (e.g., vernal pool fairy shrimp, special-status bats), but DSEIR's omission of baseline data pertaining to the presence of such species on the Project site prevents such a determination.[111]

C. The DSEIR Fails to Adequately Mitigate Potential Impacts to Wetlands and Improperly Defers Mitigation

The DSEIR includes two measures to mitigate potential impacts to wetlands. First, Mitigation Measure BIO-3a requires the Applicant to complete an updated wetland delineation to determine if the wetlands at the Project are subject to jurisdiction under Section 404 of the Clean Water Act.

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Second, Mitigation Measure BIO-3b requires the Applicant to acquire appropriate permits under Section 404 of the Clean Water Act from the USACE if the wetlands are determined to be subject to USACE jurisdiction, and to obtain Section 401 certification from the Regional Water Quality Control Board

[109] Id. at p. 13.
[110] Id. at pp. 13-14.
[111] Id.

("RWQCB"). BIO-3b further requires the Applicant to prepare a wetland mitigation plan to be approved by the USACE and RWQCB. Specifically:

> A mitigation plan shall be prepared that will establish suitable compensatory mitigation based on the concept of no net loss of wetland habitat values or acreages, to the satisfaction of the regulatory agencies. Specifically, a wetland mitigation plan shall be developed and implemented that includes creation, restoration, and/or enhancement of off-site wetlands prior to project ground disturbance. Mitigation areas shall be established in perpetuity through dedication of a conservation easement (or similar mechanism) to an approved environmental organization and payment of an endowment for the long-term management of the site.83

On the basis of these two mitigation measures, the DSEIR concludes the Project's impacts to wetlands would be reduced to a less-than-significant level.

The DSEIR's conclusion that impacts would be mitigated to below a level of significance is not supported by substantial evidence for two reasons: 20 CONT

First, the DSEIR impermissibly defers analysis and critical aspects of the wetlands mitigation strategy. Under CEQA, the City is obligated to identify the specific mitigation needed to mitigate Project impacts to less-than-significant levels. This includes the specific mitigation strategy, mitigation ratio, monitoring program, and performance standards and that will be implemented to ensure the Project would have less-than-significant impacts on the environment. Contrary to what the DSEIR suggests, the City cannot rely on deferred mitigation and the permitting requirements of other agencies to conclude impacts to wetlands would be mitigated to less-than-significant levels.

Second, compliance with regulatory permits provides no assurances that Project impacts to jurisdictional wetlands would be less-than-significant.[112] To the contrary, numerous studies have demonstrated that many compensatory mitigation projects permitted under Sections 401 and 404 of the Clean Water Act are not achieving the goal of "no overall net loss" of wetland acres and functions.[113]

[112] Id. at pp. 20-21.
[113] Id.

IV. THE DSEIR'S CONCLUSION THAT AIR QUALITY IMPACTS WOULD BE LESS THAN SIGNIFICANT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The DSEIR explains that Project emissions were quantified using the California Emissions Estimator Model Version CalEEMod.2016.3.2 ("CalEEMod").[114] When modeling a project's emissions, CalEEMod provides the user with recommended default values based on information such as land use type, meteorological data, project type, and typical equipment associated with the project type.[115] The user may replace default values when more site-specific information is available. However, CEQA requires that any changes to CalEEMod defaults must be supported by substantial evidence.[116]

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CalEEMod generates "output files" for each model that reveal to the viewer the parameters used when creating a given model. We retained SWAPE to review the CalEEMod output files generated for the Project. In reviewing the CalEEMod output files, SWAPE found several of the input parameters used to be inconsistent with information disclosed in the DSEIR.[117] As further explained in the attached SWAPE letter, these changes resulted in an underestimation of the Project's construction and operational emissions.[118]

Because the DSEIR fails to accurately disclose and analyze the Project's air quality impacts, the DSEIR's conclusions that air quality impacts from Nitrogen Oxides ("NOx") emissions during Project construction and operations will be less than significant are not supported by substantial evidence. A revised DSEIR must be prepared to include an air quality analysis that accurately discloses and evaluates the air quality impacts of the Project.

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[114] DSEIR at p. 3.1-1.
[115] SWAPE Comments at p. 2
[116] *See* CalEEMod 2012.2.2 User's Guide, p. 9 (July 2013), *available at* http://www.aqmd.gov/docs/default-source/caleemod/usersguideSept2016.pdf?sfvrsn=6; SWAPE Comments at p. 2.
[117] SWAPE Comments at p. 2.
[118] Id.

A. The DSEIR Emission Estimates Fail to Account for Materials Export Hauling Trips

In reviewing the CalEEMod output files, SWAPE first found that the DSEIR's emissions estimates do not account for emissions from materials hauling trips that the DSEIR states will occur during the grading phase.[119] According to the DSEIR, the proposed project's grading activities would involve 95,000 cubic yards of cut and 73,700 cubic yards of fill. Thus, 21,300 cubic yards would be exported off-site." However, SWAPE's review of the CalEEMod output files found that the Project's construction-related emissions assume zero hauling truck trips will occur during the grading phase.[120]

In CalEEMod modeling, hauling truck trips are estimated based on the total amount of material that will be imported or exported and assuming that a single hauling truck can transport 16 cubic yards of material per trip.[121] CalEEMod calculates the number of hauling truck trips assuming that each hauling truck will have 2 one-way trips (e.g., a hauling truck importing material will have a loaded arrival trip and an empty return trip, while a hauling truck exporting material will have an empty arrival trip but a loaded departure trip).[122] Accordingly, the DSEIR should have modeled the Project's emissions assuming that there would be a total of 2,662 (2 x 1,331 hauling trips) trips in order to account for the 2 one-way truck trips.[123] As noted above, SWAPE's review of the output files found that zero hauling truck trips are accounted for in the DSEIR's CalEEMod model, and no explanation is provided as to why hauling trips would not occur for the off-site soil exports.[124]

Because the Project's CalEEMod model assumes no hauling truck trips would occur during the grading phase of construction, SWAPE explains that that the DSEIR's CalEEMod model underestimates the actual emissions that will be generated during construction activities.[125] NOx and fugitive dust emissions are generated as a result of haul truck trips.[126] In this case, the DSEIR's air quality

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[119] Id. at pp. 2-3.
[120] Id. at p. 2.
[121] Id. at p. 3.
[122] Id.
[123] Id.
[124] Id. at p. 2.
[125] Id. at pp. 3-4.
[126] Id. at p. 3.
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analysis shows that the Project's construction NOx emissions are just below the BAAQMD threshold of significance (52.44 lbs/day compared to 54 lbs/day) after mitigation.[127] SWAPE concludes that the inclusion of the omitted haul truck trips would very likely result in Project construction emissions exceeding the BAAQMD threshold of significance for NOx based on the total number of truck trips excluded.[128]

22 CONT

Because the DSEIR's emission model fails to account for the haul truck trips disclosed in the DSEIR, the Project's construction emissions are underestimated and the City's conclusion that impacts will be mitigated to below a level of significance is not supported by substantial evidence. Moreover, substantial evidence supports a finding that the Project's construction emissions will exceed the BAAQMD threshold of significance. A revised DSEIR should be prepared to accurately disclose, evaluate, and mitigate the Project's construction emission impacts.

B. The DSEIR Emission Estimates Fail to Account for All Daily Vehicle Trips

In reviewing the CalEEMod output files, SWAPE found that the DSEIR's emissions calculations underestimate the number of daily vehicle trips during Project operations.[129] As a result of this miscalculation, the Project's operational emissions are underestimated and not supported by substantial evidence, and therefore cannot be relied on to determine the significance of the Project's air quality impacts.[130]

23

According to DSEIR Appendix B, the Project would generate a total of 16, 898 vehicle trips per day.[131] However, Appendix B Table 10 erroneously represents that the total number of project vehicle trips would be 16,840 per day.[132] The latter figure was used in the CalEEMod model to estimate emissions from Project operations.[133] As a result of this miscalculation, SWAPE found that the emissions

[127] DSEIR at pp. 3.1-44 – 3.1-45.
[128] SWAPE Comments at p. 4.
[129] Id. at pp. 6-7.
[130] SWAPE Comments at p. 8.
[131] DSEIR, Appendix B, p. 29, Table 10; see also SWAPE Comments at pp. 6-7.
[132] Id.
[133] SWAPE Comments at p. 7.

model underestimates the number of daily trips by approximately 60 trips per day, or 21,900 vehicle trips per year.[134]

As SWAPE explains by underestimating the total number of vehicle trips expected to occur during Project operations, the DSEIR underestimates the Project's operational mobile-source emissions.[135] Moreover, this underestimation is important because the CalEEMod files demonstrate that the Project's mitigated emissions are close to the BAAQMD's significance threshold for operational NOx emissions.[136] The DSEIR shows that the Project's mitigated operational emissions would result in a maximum daily emission of approximately 51.54 lbs/day of NOx, or approximately 2.5 pounds below the BAAQMD's NOx significance threshold of 54 lbs/day.[137] However, because the DSEIR's CalEEMod model underestimates the number of operational daily vehicle trips by 60 trips per day or 21,900 trips per year, SWAPE concludes it is possible that the Project's NOx emissions would in fact exceed this threshold.[138] 23 CONT

By failing to include total number of vehicle trips expected to occur during Project operations, the DSEIR underestimates the Project's operational mobile source emissions.[139] For this reason, the DSEIR's emissions estimates are inaccurate and not supported by substantial evidence. New modeling must be performed to accurately disclose and evaluate the Project's operational emissions, and to evaluate compliance with the applicable thresholds of significance.

V. THE DSEIR'S DETERMINATION THAT GLOBAL WARMING IMPACTS WOULD BE LESS THAN SIGNIFICANT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In an attempt to analyze the potential impacts of the Project's operational greenhouse gas ("GHG") emissions, the DSEIR employs two thresholds of significance – one for operational emissions in the year 2020, and another for operational emissions after the year 2020.[140] For the Project's anticipated opening 24

[134] Id.
[135] Id.
[136] Id.
[137] DSEIR at p. 3.1-46.
[138] SWAPE Comments at p. 8.
[139] Id. at p. 6.
[140] DSEIR, pp. 3.1-59 – 3.1-67.

year, 2020, the DSEIR relies on an assessment of the Project's consistency with the City of Dublin's 2013 Climate Action Plan Update ("CAP"). Under this threshold, the DSEIR concludes that GHG emissions from operation of the project in the year 2020 will be less than significant because the Project complies with the applicable CAP measures for meeting 2020 GHG reduction goals. It is estimated that the Project will not commence operations until at least *December* 2020, however, meaning that the DSEIR's CAP analysis only supports a determination for one month of operations and does not address operational emissions for the whole of the Project's expected lifespan.[141]

Because the CAP does not provide a plan for meeting GHG reduction goals beyond 2020, the DSEIR uses a separate "business as usual" ("BAU") GHG threshold for Project emissions after 2020 that is based on the Senate Bill ("SB") 32 2030 statewide GHG reduction goal. This secondary threshold, however, is identical to the threshold of significance that was struck down by the California Supreme Court struck down in *Center for Biological Diversity v. California Department of Fish and Wildlife* ("*Newhall*") and is not supported by substantial evidence.[142]

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CONT

The DSEIR's BAU threshold assumes that operational emissions after 2020 would not be significant if the Project's 2030 emissions would be "40 percent below 1990 levels consistent with SB 32."[143] The DSEIR concludes that the Project's 2030 operational GHG emissions would be more than 40 percent below 1990 business as usual emissions and thus operational emissions after 2020 would have a less than significant impact on global climate change.[144] The DSEIR, however, offers no evidence to support its conclusion that impacts would be less than significant solely because the Project will reduce emissions from a business-as-usual scenario by a percentage that exceeds the *statewide* emissions targets in SB 32. Because the DSEIR's use of the SB 32 2030 statewide GHG BAU reduction goal as a threshold of significance for project-level impacts is not supported by substantial evidence, its finding that the Project's post 2020 operational emissions would be less than significant also is not supported by substantial evidence.

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[141] See CEQA Guidelines §15378(a) (requiring evaluation of all impacts that make up the "whole" of the project); see also *Natural Resources Defense Council v. City of Los Angeles ("NRDC v. LA")* (2002) 103 Cal.App.4th 268. (CEQA requires examination of the environmental impacts of "the entire project, from start to finish").
[142] *Center for Biological Diversity v. California Department of Fish and Wildlife* (2015) 62 Cal.4th 204.
[143] DSEIR, p. 3.1-61.
[144] DSEIR, p. 3.1-63.
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Rather than using inapplicable and disapproved thresholds of significance, the DSEIR should have applied the GHG thresholds set by the Bay Area Air Quality Management District ("BAAQMD"). As discussed below, the project's operational emissions greatly exceed the BAAQMD threshold of significance for operational GHG emissions. Accordingly, the DSEIR must be revised to disclose this impact and to impose all feasible mitigation. 24 CONT

A. The Determination that GHG Impacts Are Less Than Significant Because the Project Will Comply with the City of Dublin CAP Is Not Applicable to the Whole of the Project

In Impact Air-7, the DSEIR considers whether the Project is consistent with the City of Dublin CAP to assess the significance of the Project's GHG emissions for its opening year, 2020.[145] This plan consistency approach is based on CEQA Guidelines sections 15064, 15130, and 15183.5, which together provide that public agencies may analyze and mitigate significant GHG emissions in a qualified reduction plan and later tier from that analysis when considering individual projects. Lead agencies may determine that an individual project's contribution to global climate change is not cumulatively significant if the project complies with an adopted GHG reduction plan under specified circumstances.[146] Guidelines section 15183.5 subdivision (b)(1) sets forth the recommended steps for agencies preparing such plans: 25

(A) Quantify greenhouse gas emissions, both existing and projected over a specified time period, resulting from activities within a defined geographic area;

(B) Establish a level, based on substantial evidence, below which the contribution to greenhouse gas emissions from activities covered by the plan would not be cumulatively considerable;

(C) Identify and analyze the greenhouse gas emissions resulting from specific actions or categories of actions anticipated within the geographic area;

[145] DSEIR, pp. 3.1-65-3.1-67.
[146] Guidelines §15183.5(b)

(D) Specify measures or a group of measures, including performance standards, that substantial evidence demonstrates, if implemented on a project-by-project basis, would collectively achieve the specified emissions level;

(E) Establish a mechanism to monitor the plan's progress toward achieving the level and to require amendment if the plan is not achieving specified levels;

(F) Be adopted in a public process following environmental review.

BAAQMD's CEQA Guidelines also endorse the use of a GHG reduction plan consistency analysis where appropriate and "recommend[] the Plan Elements in the state CEQA Guidelines as the minimum standards to meet the GHG Reduction Strategy Thresholds of Significance option."[147] Finally, Guidelines section 15064 subdivision (h)(3) specifies that such GHG reduction plans "must be specified in law or adopted by the public agency with jurisdiction over the affected resources through a public review process . . . ." 25 CONT

As explained in the DSEIR, the City's CAP satisfies the above requirements and constitutes a qualified GHG reduction plan for purposes of CEQA for activities through 2020.[148] However, activities and GHG emissions after 2020 are not covered by the City's CAP. Guidelines section 15183.5 subdivision (b)(1)(B) provides that consistency with GHG reduction plans may only be used as a threshold for "activities covered by the plan." Because the plan does not establish GHG reduction goals for emissions after 2020, it does not cover activities or emissions after 2020 and is not applicable to the Project's post-2020 operational emissions.

The current CAP includes a total of 45 measures that the City determined would achieve its 2020 target of "15% below 2010 emissions levels by 2020."[149] The CAP explains that implementation of the plan's measures and the reduction target will reduce the impact from covered activities to a less than significant level.[150]

[147] BAAQMD CEQA Guidelines (May 2017) p. 4-8.
[148] DSEIR at p. 3.1-65.
[149] City of Dublin Climate Action Plan Update (July 2013), p. 24 ("CAP").
[150] CAP at p. 6.

However, because the current CAP was prepared to achieve the City's 2020 reduction target only, it does not address activities, emission levels or reductions required beyond that year. More importantly, the CAP does not provide any evidence that compliance with the plan's measures will reduce the impact from covered activities to a less than significant level beyond 2020. For that reason, the DSEIR correctly finds that the current CAP "does not contain adequate reduction measures to reduce California's GHG emissions to the AB197 and SB32 targets of 40 percent below 1990 levels by 2030."[151]

Reliance on a CAP consistency threshold for post-2020 emissions would also be flawed because the CAP no longer reflects prevailing scientific knowledge on climate change. CEQA requires a lead agency to evaluate effects based to the extent possible on scientific and factual data.[152]

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As stated above, the DSEIR acknowledges that the current CAP does not include sufficient measures to ensure reductions consistent with SB 32.[153] The targets of SB 32 were adopted in accordance with current scientific understanding of human contributions to climate change. , "They represent benchmarks, consistent with prevailing climate science, charting an appropriate trajectory forward that is in line with California's role in stabilizing global warming below dangerous thresholds."[154] The "2030 target reflects the same science that informs the agreement reached in Paris by the 2015 Conference of Parties to the United Nations Framework Convention on Climate Change (UNFCCC), aimed at keeping the global temperature increase below 2 degrees Celsius (°C)."[155] These targets are set to avoid California's activities "contributing to an escalation of serious problems, including raging wildfires, coastal erosion, disruption of water supply, threats to agriculture, spread of insect-borne diseases, and continuing health threats from air pollution" that rising temperatures create. [156]

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[151] DSEIR at p. 3.1-60.
[152] *See* 14 C.C.R. § 15064.4; *see also Cleveland National Forest Foundation v. San Diego Assoc. of Govts.* (2017) 3 Cal. 5th 497, 518-519.
[153] DSEIR, p. 3.1-60.
[154] California's 2017 Climate Change Scoping Plan, California Air Resources Board (Nov. 2017) p. ES3.
[155] Id. at 2.
[156] Id. at p. ES2.
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Because the CAP is based on meeting pre-AB 32 2020 GHG reduction targets, the CAP fails to incorporate sufficient measures to ensure covered projects do not contribute to the significant effects the targets of SB 32 were adopted to prevent.[157]

For the above reasons, consistency with the CAP was not relied upon (and could not be relied upon) by the DSEIR to support a finding that the Project's post-2020 GHG operational emissions would be less than significant.

The DSEIR states that the Project is scheduled to open in December 2020 – but this assumes no unexpected delays. Accordingly, the Project will only have one month of 2020 operational emissions at the most, and potentially no 2020 emissions at all. Practically all of the Projects emissions will, instead, occur from 2021 to 205 (assuming a 30 year lifespan).[158] The Project will continue to operate and contribute to GHG emissions for decades to come. As a result, the determination that the Project's operational GHG emissions in 2020 would be less than significant has no relevance to the significance of impacts from GHG emissions during the overwhelming majority of the Project's operational life.

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CEQA requires that lead agencies consider long term impacts for projects with long term operations, particularly in the context of GHG emissions.[159] Relying on a project's emissions at one point in time does not meet CEQA's requirement to assess all foreseeable impacts. Indeed, the California Supreme Court addressed this point in *Newhall*, noting that "over time consistency with the year 2020 goals will become a less definitive guide, especially for long term projects that will not begin operations for several years." Here, the DSEIR's conclusion that the Project will not result in significant impacts *for the year 2020* on the grounds it is consistent with the City's CAP does not support a determination that the Project will not result in significant greenhouse gas impacts over its operational lifespan.

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[157] *Cleveland National Forest Foundation,* 3 Cal. 5th at 519 ("CEQA requires public agencies . . . to ensure that [greenhouse gas impact] analysis stay in step with evolving scientific knowledge and state regulatory schemes.")

[158] The IKEA store in Emeryville, California, for example, is already in its 19th year of operation with no announced plans for closure anytime soon. Emeryville Today – 1990s to 2000s, City of Emeryville, https://www.ci.emeryville.ca.us/663/Emeryville-Today-1990s-to-2000s (Noting Emeryville IKEA opened in April 2000).

[159] *See* CEQA Guidelines, § 15126.2 (discussing impacts both during the "initial and continued phases of the project"); s*ee also Natural Resources Defense Council v. City of Los Angeles ("NRDC v. LA")* (2002) 103 Cal.App.4th 268 (CEQA requires examination of the environmental impacts of "the entire project, from start to finish").

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B. The Determination that Long-Term GHG Emissions Are Less Than Significant Is Not Supported By Substantial Evidence

In recognition of the limits of a CAP consistency analysis is this case, the DSEIR uses a second threshold of significance for operational GHG emissions after 2020. While the DSEIR's characterizes the analysis for 2030 as a "City of Dublin CAP Consistency Analysis," the threshold it applies is a SB 32 2030 statewide GHG BAU reduction goal consistency threshold. The DSEIR bases this analysis on a direct comparison of the Project's estimated reductions from a 2000 BAU scenario to the 2030 statewide emission reduction target set in SB 32.[160] In this respect, the DSEIR employs the exact same methodology the California Supreme Court struck down in *Center for Biological Diversity v. California Department of Fish and Wildlife* ("*Newhall*"). Furthermore, like in that case, the DSEIR's assumption that impacts would be less than significant based on consistency with a statewide (rather than a project-specific) goal is not supported by substantial evidence. 26

In *Newhall*, the California Supreme Court squarely addressed the issue of using statewide GHG emission reduction targets as a threshold of significance for purposes of CEQA.[161] In that case, the project at issue, Newhall Ranch, was a large development that included residential, community, and commercial uses to be developed on nearly 12,000 acres near the City of Santa Clarita. To assess the project's GHG emissions the Newhall EIR considered whether the proposed Project's emissions .would impede the State of California's compliance with the statutory 2020 emissions reduction mandate established by AB 32.[162] Relying on a similar "business-as-usual" or "BAU" methodology as the DSEIR uses here, the Newhall EIR concluded that:

> Because the EIR's estimate of actual annual project emissions . . . is 31 percent below its business-as-usual estimate . . . , exceeding the Air Board's determination of a 29 percent reduction from business as usual needed statewide, the . . . project's likely greenhouse gas emissions will not impede

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[160] DSEIR, p. 3.1-63, Table 3.1-21: City of Dublin CAP Consistency Analysis – Operational Year 2030. The statewide targets of AB 197 and SB32 are not a climate action plan or a qualified greenhouse reduction plan and a direct comparison between anticipated project emissions and the reduction targets is not a "CAP Consistency Analysis." *See* Guidelines § 15183.5. Furthermore, the City of Dublin CAP only addresses a 2020 reduction target.

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

[162] Id. at p. 218.

achievement of A.B. 32's goals and are therefore less than significant for CEQA purposes.[163]

In *Newhall*, the California Supreme Court concluded that assessing a project's consistency with statewide GHG reduction goals is not *per se* prohibited under CEQA, but that such an assessment required substantial evidence and analysis demonstrating that such a consistency comparison was applicable. The *Newhall* decision held that, in that case, the EIR failed to provide substantial evidence "that Newhall Ranch's *project-level* reduction of 31 percent in comparison to business as usual is consistent with achieving A.B. 32's *statewide* goal of a 29 percent reduction from business as usual . . . ."[164] The EIR provided no evidence to support finding that the "required percentage reduction from business as usual is the same for an individual project as for the entire state population and economy."[165] The Court held that a straight-line comparison between statewide reduction goals and project-specific reductions from BAU, without more, does not support a conclusion that project emission will result in a less than significant impact.

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Here, the DSEIR employs the exact same unsubstantiated methodology that the Court struck down in *Newhall*. The DSEIR states that "[t]he proposed project would meet the 40 percent reduction requirement over year 1990 by 2030, as required by AB 197 and SB 32."[166] Because of the Project's estimated reduction over the BAU scenario, the DSEIR concludes that impacts from GHG emissions would be less than significant for the year 2030. The DSEIR's analysis thus completely ignores the Supreme Court's guidance in *Newhall* and employs the same flawed approach of directly comparing the Project's anticipated reduction from BAU to the percentage of statewide reductions required under SB32. Furthermore, the DSEIR makes no attempt to determine the level of reduction an individual project must achieve to stay consistent with achieving statewide goals, as the Supreme

[163] Id. The 2020 emission reduction target established by AB 32 has been superseded by the target in SB 32, which requires that statewide greenhouse gas emission are reduced to 40% below the 1990 level by 2030.
[164] Id. at 225.
[165] Id. at 225-226.
[166] DSEIR, p. 3.1-63.

Court instructed would be required.[167] The DSEIR simply assumes, without any evidence, that the Project must meet the same level of reduction set forth in statewide targets to avoid a significant impact.

Both the California Air Resources Board and the California Supreme Court have recognized that the percent reduction required to be made by specific projects in order for the state to achieve statewide GHG reduction goal is *not* the same as the statewide GHG reduction goal. In *Newhall*, the Supreme Court noted that a greater degree of reduction is likely to be needed from new land use projects as compared to the economy as a whole because it is impractical and infeasible to require or obtain uniform reductions from all sources of GHG emissions, regardless of size or type. The Court also cited California Attorney General's Office comments that "new development must be more GHG-efficient than [the statewide 'business as usual' reduction goals], given that past and current sources of emissions, which are substantially less efficient than this average, will continue to exist and emit."[168] New development, in particular, needs to be one of the primary sources of these greater reductions. This is because designing new buildings and infrastructure for maximum energy efficiency and renewable energy use is more feasible and more likely to occur than achieving the same savings by retrofitting older structures and systems.

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In sum, the DSEIR's determination that impacts from the Project's GHG emissions will be less than significant for operational emissions after 2020 is not supported by substantial evidence. The DSEIR employs the same approach and reasoning the Supreme Court considered in *Newhall*, yet it ignores the Court's clear direction regarding the use of statewide targets as a threshold for project level analysis. The City cannot use statewide GHG emission goals in the absence of an analysis of how those targets translate to an individual project, and no such analysis is included in the DSEIR here.

[167] *See Newhall* 62 Cal. 4th at 229 (explaining that a BAU comparison may be appropriate where the lead agency determines what level of reduction a particular project at the proposed location must contribute in order to comply with statewide goals.).
[168] Id. at p. 226.

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

In order to properly evaluate the significance of the Project's GHG emissions, SWAPE performed an analysis of the Project's GHG emissions using BAAQMD's threshold of 1,100 metric tons of carbon dioxide equivalents per year ("MTCO2e").[169] Relying on the City's CalEEMod model, SWAPE explains that Project construction would generate 63 MTCO2e per year (amortized over 30 years).[170] Additionally, Project operations would generate 13,634 MTCO23 per year after mitigation.[171] Combined, the Project's annual GHG emissions amount to 13,697 MTCO2e per year, which exceeds BAAQMD's threshold of significance by approximately 12,597 MTCO2e per year.[172] 27

SWAPE's analysis of the Project's GHG emissions demonstrates that when using a legally valid threshold of significance, established by BAAQMD, substantial evidence shows that the Project would result in a cumulatively significant contribute to global climate change.[173] Until an updated GHG analysis is prepared in a revised DSEIR that adequately evaluates the Project's total GHG impact consistent with a legally valid threshold of significance, the DSEIR determination that the Project would not result in a significant GHG impact is not supported by substantial evidence.

For each of these reasons, the City of Dublin ("City") may not approve the Project until a revised document is prepared and recirculated for public review and comment. 28

Sincerely,

Collin S. McCarthy

CSM:acp

[169] SWAPE Comments at pp. 12-13.
[170] Id. at p. 13.
[171] Id.
[172] Id.
[173] Id.
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