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April 5, 2019

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Debby Fernandez, dfernandez@santaclaraca.gov

Re: SV1 Data Center Project Initial Study and Mitigated Negative Declaration Comments (PLN2017-12535 and CEQ2017-01034)

Dear Mr. Haggag, Mr. Crabtree and Ms. Fernandez:

We are writing on behalf of **California Unions for Reliable Energy ("CURE")** to provide comments on the Initial Study and proposed Mitigated Negative Declaration ("IS/MND") prepared by the City of Santa Clara ("City") for the SV1 Data Center Project ("Project"). The 3.32-acre project site is located in the City of Santa Clara ("City"). The project site is within City limits north of Highway US 101 and west of the Norman Y. Mineta San Jose International Airport ("SJC"). Land use designations surrounding the Project site consist of light industrial, public/quasi-public, and low intensity office/research and development uses. The Project site is zoned Heavy Industrial (MH).

1577-008ncp

The site is currently developed by three currently vacant single-story light industrial buildings, paved surfaces, and surface parking areas. These elements would be removed and replaced with a new 67 foot-tall, four-story 160,450 square-foot data center. The data center would have 27-megawatt ("MW") connections to Silicon Valley Power ("SVP") service and would use a daily average of approximately 22 MW. The Project would also have one 1,000-kilowatt ("KW") backup diesel generator with an associated 2,000-gallon fuel tank, and ten 3,250-KW backup diesel generators with associated 6,500-gallon fuel tanks. The generators and fuel tanks will be placed outdoors on the eastern side of the data center. The Project will further include 18 chillers that will be located on the rooftop, and a new electrical substation to be constructed on the western portion of the Project site. Additionally, the Project would include uninterruptible power supplies (UPS) and deep-cycle (DC) plant energy equipment (lithium batteries) for additional backup power. Batteries would provide enough energy to cover the critical load of 16 MW in the event of a power failure. The Project is expected to be constructed over a period of 26 months.

Based on our review of the IS/MND, we conclude that the document fails to comply with the requirements of the California Environmental Quality Act ("CEQA"). First, as explained more fully below, the IS/MND fails to adequately describe several elements of the Project and as a result fails to disclose information that is necessary to meaningfully assess the impacts the Project may have on human health and the environment. Additionally, the IS/MND fails to identify all of the Project's potentially significant impacts and to propose mitigation to avoid or lessen impacts to a less than significant level. Third, the IS/MND fails to analyze impacts from all phases of the Project. Finally, the IS/MND completely fails to comply with CEQA as a matter of law by failing to analyze the Project's energy impacts as required by CEQA. As explained in these comments, there is more than a fair argument that the Project will cause significant air quality and greenhouse gas ("GHG") impacts. For each of these reasons, the City cannot approve the Project until an Environmental Impact Report ("EIR") is prepared that adequately discloses and analyzes the Project's potentially significant impacts and incorporates all feasible mitigation to avoid or lessen these impacts.

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These comments were prepared with the assistance of technical expert Dr. Phyllis Fox, Ph.D., CEQ, PE, DEE,¹ and Dr. Robert Earle Ph.D.² Dr. Fox's and Dr. Earle's technical comments and curriculum vitae are attached hereto as Exhibit A and Exhibit B, respectively, and are fully incorporated herein and submitted to the City herewith. Therefore, the City must separately respond to the technical comments of Dr. Fox and Dr. Earle, in addition to our comments.

I. STATEMENT OF INTEREST

These comments are submitted on behalf of CURE. CURE is a coalition of labor organizations whose members construct, operate, and maintain powerplants and other industrial facilities throughout California. CURE encourages sustainable development of California's energy and natural resources. Environmental degradation destroys cultural and wildlife areas, consumes limited water resources, causes air and water pollution, and imposes other stresses on the environmental carrying capacity of the State. Environmental degradation also jeopardizes future jobs by making it more difficult and expensive for industry to expand in Santa Clara, and by making it less desirable for businesses to locate and for people to live and recreate in the area. Continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities for CURE's participating organizations and their members. CURE therefore has a direct interest in enforcing environmental laws and minimizing project impacts that would degrade the environment.

CURE's participating organizations and their members also live, recreate, work, and raise families in the City of Santa Clara and Santa Clara County. Thus, CURE, its participating organizations and their members stand to be directly affected by the Project's adverse environmental and health impacts. Members may also work on the Project itself and would therefore be first in line to be exposed to any health and safety hazards that the Project may create.

¹ Exhibit 1. Dr. P. Fox, Comments on the Initial Study/Mitigated Negative Declaration (IS/MND) for the SV1 Data Center (April 5, 2019) ("Fox Comments").

² Exhibit 2. Dr. R. Earle, Comments on the Initial Study/Mitigated Negative Declaration (IS/MND) for the SV1 Data Center (April 3, 2019) ("Earle Comments")

II. APPLICABLE LEGAL STANDARD

The California Environmental Quality Act (“CEQA”) has two basic purposes, neither of which the IS/MND satisfies in this case.

First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.³ In the context of CEQA, “environment” means the physical conditions that exist within the affected area and include land, air, water, minerals, flora, fauna, noise, or objects of historic or aesthetic significance.⁴ Under CEQA and the CEQA Guidelines, if a project is not exempt and may cause a significant effect on the environment, the lead agency must prepare an EIR.⁵

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and the implementation of all feasible mitigation measures.⁶ 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.”⁷

CEQA requires that an agency analyze all the potential environmental impacts of its proposed actions in an EIR, except in certain limited circumstances.⁸ The EIR is the heart of CEQA⁹ and 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.”¹⁰ An EIR is required if “there is substantial evidence, in light of the whole record before the lead agency, that the project *may* have a significant effect on the

³ 14 C.C.R. § 15002(a)(1).

⁴ Pub. Resources Code (“PRC”) § 21060.5.

⁵ PRC §§ 21100, 21151; 14 C.C.R. § 15064(a)(1), (f)(1).

⁶ 14 C.C.R. § 15002(a)(2) and (3); see also, *Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

⁷ PRC § 21081; 14 C.C.R. § 15092(b)(2)(A)-(B).

⁸ See, e.g., PRC § 21100.

⁹ *Dunn-Edwards v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644, 652.

¹⁰ *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal. App. 4th 1344, 1354 (“*Berkeley Jets*”) (citing *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 392); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

environment.”¹¹ The EIR aids an agency in identifying, disclosing, analyzing, and, to the extent possible, avoiding the entire project’s¹² significant environmental effects through implementing feasible mitigation measures.¹³

In certain limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement indicating that a project will have no significant impact. However, because “[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process” by allowing the agency to dispense with the duty to prepare an EIR, negative declarations are allowed only in cases where there is not even a “fair argument” that the project will have a significant environmental effect.¹⁴

In some circumstances, a project with potentially significant impacts can be modified by the adoption of mitigation measures to reduce the impacts to a level of insignificance. In such cases, an agency may satisfy its CEQA obligations by preparing a mitigated negative declaration.¹⁵ However, a mitigated negative declaration is also subject to the same “fair argument” standard. Thus, an EIR is required whenever substantial evidence in the record supports a “fair argument” that significant impacts may occur as a result of the project even with the imposition of mitigation measures.

CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. The “fair argument” standard reflects this presumption. The fair argument standard is an exceptionally low threshold favoring environmental review in an EIR rather than a negative declaration.¹⁶ As noted above, this standard requires preparation of an EIR if any substantial evidence in the record indicates that a project may have an adverse environmental effect.¹⁷ As a matter of law, substantial evidence includes both expert and lay opinion based on fact.¹⁸ Even if

¹¹ PRC § 21080(d) (emphasis added); 14 C.C.R. § 15064; see also *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927; *Mejia v. City of Los Angeles* (2005) 13 Cal. App. 4th 322.

¹² 14 C.C.R. § 15378

¹³ PRC § 21002.1(a); 14 C.C.R. § 15002(a), (f).

¹⁴ *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440; PRC §§ 21100, 21064.

¹⁵ PRC § 21064.5; 14 C.C.R. § 15064(f)(2).

¹⁶ *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.

¹⁷ 14 C.C.R. § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931.

¹⁸ PRC § 21080(e)(1) (For purposes of CEQA, “substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.”); 14 C.C.R. § 15064(f)(5).

other substantial evidence supports a different conclusion, the agency nevertheless must prepare an EIR.¹⁹

With respect to the Project at hand, the IS/MND fails to satisfy either of CEQA's two most fundamental purposes. First, the IS/MND lacks critical information on several elements of the Project and thereby fails to inform the public and decisionmakers of the Project's potentially significant impacts on the environment and human health and fails to evaluate the Project's energy impacts. Second, substantial evidence demonstrates that the Project may cause significant air quality and GHG-related impacts, and the IS/MND fails to include sufficient measures to avoid or lessen these impacts to less than significant level. CEQA requires that these impacts be analyzed in an EIR in order to inform the public and decisionmakers of the potential impacts from the Project, to consider alternatives, and to identify and incorporate mitigation measures to reduce these and other harmful impacts.²⁰

III. THE IS/MND FAILS TO DESCRIBE CRITICAL PROJECT COMPONENTS AND IS INADEQUATE AS AN INFORMATIONAL DOCUMENT

The IS/MND violates CEQA because it fails to adequately describe several components of the Project, including the Project's aboveground storage tanks and batteries. The omission of this information renders the IS/MND inconsistent with CEQA's fundamental purpose of disclosure and inadequate as an informational document. It also prevents full consideration of the Project's potentially significant environmental impacts.

CEQA requires that before a negative declaration can be issued, the initial study must "provide documentation of the factual basis for the finding in a Negative Declaration that a project will not have a significant effect on the environment."²¹ Here, as Dr. Fox's comments explain, the IS/MND's failure to disclose information on several critical components of the Project makes it impossible for the public and

¹⁹ *Arvin Enterprises v. South Valley Area Planning Comm.* (2002) 101 Cal.App.4th 1333, 1346; *Stanislaus Audubon v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597.

²⁰ See *Security Environmental Systems v. South Coast Air Quality Management District* (1991) 229 Cal.App.3d 110.

²¹ 14 C.C.R. § 15063(c)(5).

decisionmakers to meaningfully evaluate the potential environmental impacts of the Project, to identify the required mitigation, and to assess the effectiveness of the mitigation measures proposed.

First, the IS/MND states that the Project will include ten (10) 6,000-gallon diesel fuel tanks associated with the ten 3,250 KW generators, and one 2000-gallon diesel fuel tank associated with the 1,000 KW generator. However, the IS/MND provides no detail about impacts from these storage tanks. For example, the IS/MND only provides that “[t]he above ground fuel storage tanks would be subject to all requirements set forth in Chapter 6.67 of the California Health and Safety Code (§ 25270 – 25270.13)”,²² and that for transport and handling of fuel, “Cal OSHA requirements include establishment of an Injury and Illness Prevention Program (CCR Title 8 § 6760) and also specify design requirements for underground fuel storage tanks (CCR Title 8 § 6807)”,²³ and that the installation of the above ground tanks would be subject to an inspection carried out by the Santa Clara Fire Department Hazardous Materials Division for compliance with applicable sections of the federal Spill Prevention, Control, and Countermeasure (“SPCC”) rule. However, without describing what those requirements might entail and how the Project will comply with these requirements, the public and decision-makers lack the sufficient information to fully consider the Project’s potentially significant environmental impacts.

Furthermore, the IS/MND reports that reactive organic gases (“ROG”) emissions during the operational phase would be less than significant, based on emissions from “engine operation during testing or maintenance” of the backup generators, and from “traffic and area sources associated with operation of the data center facilities.”²⁴ However, the IS/MND does not disclose fuel transfers as a source of emissions.²⁵ There is no information on how or how often diesel fuel will be delivered and transferred to the storage tanks, no discussion of the related potential impacts, and no discussion of what measures will be implemented to avoid such impacts from occurring. In addition, the IS/MND does not describe the type of diesel storage tanks to be used in the Project. Information on tank type, such as floating or

²² IS/MND, at p. 58.

²³ *Id.*, at p. 59.

²⁴ *Id.*, at p. 27.

²⁵ Fox Comments, at p. 11-12.

fixed roof, is critical because ROG emissions from different diesel storage tanks may vary, particularly on hot weather days.²⁶

Second, the Backup Energy Supply section states

[t]he project would include uninterruptable power supplies (UPS) and deep-cycle (DC) plant energy equipment (batteries) for additional backup power. Batteries would provide enough energy to cover the critical load of 16 MW in the event of a power failure. The quantity of batteries is dictated by the length of time the back-up generators need to start and reach full operating power. This is typically less than 1 minute, however a safety factor is added which results in an average of 5 to 6 minutes of battery power available.

Batteries would be located in the electrical rooms within the building. Battery technology for commercial UPS systems is lithium type. These batteries do not release gas nor would they spill in the unlikely event a case becomes damaged. The batteries would be placed in cabinets and installed in separate battery rooms. The battery rooms would be temperature controlled for optimum efficiency and battery life.²⁷

However, this brief section lacks an analysis of the potential impacts associated with large scale battery usage. First, the IS/MND does not describe what battery technology will be used for the Deep Cycle batteries, nor what proportion of the total batteries will be the UPS batteries vs. the Deep Cycle batteries. Furthermore, batteries can cause significant environmental and safety impacts depending on the type and arrangement of the batteries and on which electrolyte is used in the battery.²⁸ For example, it is widely known that lithium ion batteries pose serious and unique firefighting challenges.²⁹ Water is a poor retardant due to the chemicals present in lithium ion batteries, and facility layout may prevent adequate fire-fighting access.³⁰ Additionally, battery transport, use, and disposal may result in hazardous materials impacts which are compounded by the Project

²⁶ *Id.*, at p. 12.

²⁷ IS/MND, p. 8-9.

²⁸ Fox Comment, p. 41.

²⁹ *Id.*

³⁰ *Id.*

site's proximity to residences, places of work, and major roadways.³¹ None of these potential impacts are disclosed or evaluated in the IS/MND.

The paucity of information on the Project's diesel storage tanks and batteries makes the IS/MND's project description inadequate under CEQA. The City must disclose this information so that the public and decisionmakers can assess all of the Project's potentially significant impacts and ensure that the Project impacts are mitigated to a less than significant level.

IV. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT MAY RESULT IN SIGNIFICANT AIR QUALITY IMPACTS

The Project's air quality emissions during project construction and operations are underestimated. Dr. Fox's review found that they are significant and unmitigated. Project construction and operational emissions were calculated using California Emissions Estimator Model, Version 2016.3.2 ("CalEEMod").³² Dr. Fox reviewed the IS/MND's emissions calculations, including the CalEEMod outputs, and found that there are several major problems with the IS/MND emission calculations.

A. Construction Emissions

First, the inputs the IS/MND uses to estimate emissions are unsupported by evidence in the IS/MND. Appendix A states that since the construction schedule and project equipment usage, worker and vendor travel, and trip lengths, were not provided by the applicant, default values were used for the CalEEMod, as opposed to actual Project values.³³ For example, the default input for emissions from Land Uses and Schedule were "157,740 sf 'General Heavy Industry' and a 59-space 'Parking Lot' on a 3.32-acre site."³⁴ Similarly, even though "[t]he applicant indicated that the construction schedule would be completed in two phases over a total of 25 months,"³⁵ the "[c]onstruction schedule and projected equipment usage for these

³¹ *Id.*, at p. 42.

³² IS/MND, Appendix A, at p. 8.

³³ *Id.*, at p. 9.

³⁴ *Id.*

³⁵ *Id.*

phases were not available.”³⁶ Therefore, the model used a default construction schedule assuming “[t]hat the entire project was constructed all at once in 6 phases: Demolition, Site Preparation, Grading, Exterior Building Construction, Paving, and Interior Building Construction.”³⁷ Since the model is using these default values without providing validation for those input data, the assumptions for those values are not available for review, nor is it clear that those default values are even applicable to the Project. Therefore, the MND’s conclusion regarding construction emissions are not supported by the evidence.

Dr. Fox concludes that impacts to air quality from construction-generated particulate matter may be significant under NAAQS and CAAQS thresholds.³⁸ Therefore, the IS/MND fails to account for air quality impacts beyond the limits of the BAAQMD Guideline significance thresholds.

B. Operational NOx Emissions Will Result in a Significant Impact

As shown below; operational NOx emissions were underestimated due to the use of an improper baseline, underestimation of emissions, and exclusion of diesel generator emissions during emergency operation.³⁹

The same is true for area and mobile services emissions modeled during the operational phase of the Project.⁴⁰ By using default values, the CalEEMod’s results are lower than if Project values were used.⁴¹

In addition, Dr. Fox points out several other issues in the MND’s selection of Nitrous Oxides (“NOx”) emissions sources during the operational period of the Project.⁴² The result, as shown below, is that NOx emissions from the Project are significant and unmitigated.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Fox Comments, at p. 25.

³⁹ *Id.*, at p. 3.

⁴⁰ IS/MND, Appendix A, p. 10.

⁴¹ Fox Comments, at p. 3.

⁴² *Id.*, at p. 3-7.

1. The IS/MND Uses an Unjustified Baseline

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. Courts are clear 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.”⁴³ CEQA Guidelines define 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.⁴⁴ In fact, it is:

a central concept of CEQA, widely accepted by the courts, that the significance of a Project’s impacts cannot be measured unless the DEIR first establishes the actual physical conditions on the property. In other words, baseline determination is the first rather than the last step in the environmental review process.⁴⁵

However, the IS/MND calculates NOx baseline values predicated on an existing 144,619 sq. ft. autobody shop. As stated in the IS/MND, the autobody shop and the two associated corrugated metal warehouses are “currently vacant”⁴⁶.⁴⁷ The Is/MND fails to state since when they are vacant. CEQA requires Environmental conditions will be described as they exist at the time the NOP is published or, when there is no NOP, “at the time environmental analysis is commenced”. That purpose of the baseline choice is “to give the public and decision makers the most accurate and understandable picture practically possible of the project’s likely near-term and long-term impacts.”⁴⁸ By including emission from vacant uses the IS/MND is artificially creating a higher baseline, thus artificially underestimating the Project’s impacts. The IS/MND fails to support the choice of its baseline with the appropriate data.⁴⁹

⁴³ *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

⁴⁴ CEQA Guidelines §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 (“Riverwatch”).

⁴⁵ *Save our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.

⁴⁶ IS/MND, at p. 1 “Project Description”.

⁴⁷ IS/MND, at p. 1, 35, and 57.

⁴⁸ CEQA Guidelines §15125.

⁴⁹ Fox Comments, at p. 3-4.

Finally, Dr. Fox points out a lack of support for subtracting “baseline NOx emissions of 0.3 ton/yr and 1.6 lb/day from Project increases.”⁵⁰

2. Model Inputs for Mobile, Area, and Energy Use Emissions are Misclassified, Underestimated, and Incomplete

The MND’s NOx emissions analysis uses an inappropriate baseline to calculate emissions from commuter vehicles, unidentified area sources, and emergency generators.

The IS/MND provides information on operational emissions, summarized in Table 3⁵¹ by using values from the CalEEMod model.⁵² Dr. Fox notes that the row in Table 3 provides emissions source of “data center mobile & area” category of emissions, comprising of 0.4 ton/yr and 2.2 lb/day of NOx, and that these numbers were taken directly from CalEEMod output.⁵³ However, the CalEEMod output indicates that the values in Table 3 for “data center mobile & area” are actually the sum of energy (0.2036 ton/yr) plus mobile (0.2034 ton/yr) plus area, and not energy (0.2036 ton/yr) and area (2.0E-5 ton/yr). Table 2.⁵⁴ Therefore, the value of 0.4 ton/yr doesn’t include the value provided for Area Emissions as provided in the CalEEMod, and thus these emissions are misclassified, underestimated, and fail to note area source emissions.⁵⁵

Second, Dr. Fox points out that the data used as input to generate the CalEEMod “data center mobile & area” emissions were underestimated. The mobile source emissions are based on a trip generation rate of 0.99 trips/day-1000 ft². Since the data center building size is 157,465 ft², the IS/MND calculates 156 trips/day. The CalEEMod output indicates that mobile source emissions are based on 455,138 mi/yr. Thus, each round trip was assumed to be 8 mi.⁵⁶ Dr. Fox’s letter points out that the IS/MND does not provide support for these estimates, and further that an 8-mile round trip assumption is very unrealistic for employees living in the Bay

⁵⁰ *Id.*, at p. 3.

⁵¹ IS/MND, Appendix A, at p. 11; Fox Comments, Table 1, at p. 3.

⁵² *Id.*, at p. 32; Fox Comments, Table 2, at p. 4.

⁵³ IS/MND, Appendix A, at p. 32.

⁵⁴ Fox Comments, at p. 4.

⁵⁵ *Id.*, at p. 4.

⁵⁶ *Id.*, at p. 5.

Area, who often must travel great distances from their homes to the place of work.⁵⁷ This leads to an underestimation of the Project's impacts on miles traveled and in turn, to an underestimation of its impacts on air quality

3. The IS/MND Underestimates the CalEEMod Project Energy Use Component

The IS/MND provides an estimate of energy used by the building for the purpose of estimating NOx emissions.⁵⁸ However, the energy use component was underestimated.⁵⁹ It was calculated in CalEEMod based on a building size of 144,619 sq. ft. as shown on page 29 of Appendix A. This figure is wrong: this is the area of the existing demolished building, not the Project building, which has an area of 160,450 sq. ft. The CalEEMod output indicates that mitigated NOx emissions from energy use are 0.2036 ton/yr.⁶⁰ Dr. Fox reanalyzed the NOx emissions from a building with the correct area of 160,450 sq. ft., and found that NOx emissions from energy use as estimated in the CalEEMod model are at least 0.23 ton/yr, which is higher than the MND acknowledges.⁶¹

4. The IS/MND Underestimates Emissions by Failing to Account for Emergency Generator Emissions

In addition, Dr. Fox notes that a significant omission in analysis is neglecting to account for actual, full load, use of the emergency generators. The IS/MND's air quality analysis assumes that the generator emissions would occur only during routine testing and maintenance for a planned total of 50 hour per year of each generator running under an average load of 73%.⁶² Dr. Fox notes that this assumption is unsupportable since "[t]he purpose of these generators is to supply power during emergencies when power from SVC is not available, it is reasonable to anticipate that emergencies will occur and that the generators will be used to supply any missing SVC power."⁶³ These anticipated emergency emissions would be *in addition* to testing and maintenance emissions.

⁵⁷ *Id.*

⁵⁸ IS/MND, Appendix A, at p. 11.

⁵⁹ Fox Comments, at p. 5.

⁶⁰ IS/MND, Appendix A, at p. 32.

⁶¹ Fox Comments, at p. 6.

⁶² IS/MND, Appendix A, p. 13-14.

⁶³ Fox Comments, at p. 6.

Dr. Fox calculates that based on data from the Annual Electric Power Industry Report, an average annual outage of 1.8 hour is appropriate for calculating annual NOx emissions, whereas 1.1 hours per years is appropriate for calculating daily NOx emissions, and further that calculating NOx emissions over 24-hour outages are also appropriate.⁶⁴ Using these values, Dr. Fox finds

[a]ssuming 1.8 hr/yr of emergency operation of the ten 3,250 kW generators and one 1,000 kW generator occur during a single year over the lifetime of the Project, the maximum annual NOx emissions from using the diesel generators to supply emergency power would be 0.36 ton/yr. I also note that an outage lasting 24 hours is justified because the diesel fuel storage tanks are sized to supply enough fuel for each generator to run for 24 hours in the event of a power failure. For a 24-hour outage, the increase in annual NOx emissions would be 4.8 ton/yr.⁶⁵

This shows that total NOx emissions of the Project are clearly underestimated, and that the IS/MND fails to provide comprehensive and accurate information.

5. The IS/MND Fails to Account for Off-Site Power Generation

Finally, Dr. Fox notes that in addition to NOx emissions at the Project site, the IS/MND must include emissions generated off-site and used by the data center.⁶⁶ Dr. Fox calculated that NOx emissions from other power facilities providing power to SVP would amount to 6.9 lb/day or 1.26 ton/yr,⁶⁷ and must be added to the amounts calculated by the CalEEMod output generated for the Project.

⁶⁴ *Id.*, at p. 6-7. "SVP-specific annual outage data, expressed as the average duration of outages cumulative for the year, averaged over all customers on the system (the System Average Interruption Frequency Index or SAIFI) for the years 2013 to 2017 were (in minutes per year): 50.5 in 2013, 56.6 in 2014, 74.0 in 2015, 36.3 in 2016, and 109.8 in 2017, for a 5-year average of 65.4 minutes per year, or 1.1 hours per year. Thus, for purposes of calculating the impact of outages on annual NOx emissions, the maximum outage over this period, or 1.8 hr/yr, is used because the annual NOx significance threshold is based on maximum annual emissions."

⁶⁵ Fox Comments, at p. 7.

⁶⁶ *Id.*, at p. 7.

⁶⁷ *Id.*, at p. 7-8.

The failure to add these emissions from local power generation facilities leads to an underestimate of the Projects impacts to air quality.

6. Substantial Evidence Supports a Fair argument that the Project's NOx Emission Will Result in a Significant Impact on Air Quality

In her conclusion, Dr. Fox conducted an analysis of the actual NOx emissions of the Project, and found a significant impact, as shown in Table 3 of her letter:⁶⁸

SOURCE	IS/MND Emissions		Revised Emissions	
	ton/yr	lb/day	ton/yr	lb/day
Baseline	0.3	1.6	0	0
Data Center				
Mobile + Area	0.4	2.2	2.0	11.1
Energy Use	0	0	0.2	1.2
Emergency Generators				
Maintenance & Testing	8.8	48	9.2	50.5
Emergency Operation	0	0	0.5	2.5
TOTAL	8.9	48.6	11.9	65.3
Significance Threshold	10	54	10.0	54.0
Significant?	No	No	Yes	Yes

Substantial evidence shows that the Project would exceed the MND's NOx emission estimates and would exceed BAAQMD's and the IS/MND's thresholds of significance. As a result, an EIR must be prepared to address and mitigate the impact.

7. The IS/MND Fails to Evaluate the Significance of Out-Of-Basin Emissions and Interbasin Pollutant Transport.

CEQA requires that impacts of the project as a whole be evaluated.⁶⁹ However, the IS/MND evaluates the Project's air quality impacts only within BAAQMD's boundary whereas emissions that are a direct result of the Project but occur outside of the BAAQMD boundary must also be evaluated. Silicon Valley

⁶⁸ *Id.*, at p. 8.

⁶⁹ Public Resource Code § 21065; 14 C.C.R. § 15378
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Power currently supplements its power needs from a number of facilities.⁷⁰ Since SVP's power comes from five NO_x-emitting sources (i.e. NCPA Lodi Energy Center, NCPA Combustion Turbine, G2 Landfill Gas, NCPA Geothermal, Ameresco Vasco Landfill Gas),⁷¹ in addition to intown sources, criteria pollutant emissions, such as NO_x, from these sources must be included in the Project's impacts.

Similarly, the IS/MND fails to account for emissions that may cross into other air quality basins. Dr. Fox states "[o]ut-of-basin emissions from electricity generation and material transport to support construction" must be evaluated since such emissions tend to get dispersed.⁷² Dr. Fox also points out that many areas located near SVP facilities experience poor ozone ambient air quality standards (both state and federal), and would be impacted by Project-related emissions.⁷³ The IS/MND fails to evaluate impacts of inter-basin, Project-generated emissions from outside the basin (out-of-basin emissions), on ozone concentrations within the BAAQMD boundary, failing to account for impacts from the whole of the Project, as required under CEQA.

V. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT'S GREENHOUSE GAS EMISSIONS MAY BE SIGNIFICANT AND UNMITIGATED

The IS/MND concludes that the Project's GHG emissions would have a less than significant impact on the environment because 1) GHG emissions from both the construction and operation phase would be below the threshold of significance,⁷⁴ and 2) the Project "[w]ould not conflict with an applicable local plan, policy, or regulation adopted for the purpose of reducing the emission of GHGs."⁷⁵ However, as explained more fully below, the IS/MND fails to show that GHG emissions are below the adopted threshold of significance, or establish that the Project's consistency with these plans and programs will ensure that the Project's reasonably

⁷⁰ Silicon Valley Power, 2018 Strategic Plan, December 4, 2018, Electric Resource Map, p. 7; available at: <http://www.siliconvalleypower.com/home/showdocument?id=62267>.

⁷¹ Fox Comments, at p. 9. Silicon Valley Power, 2018 Strategic Plan, December 4, 2018, Electric Resource Map, p. 7; available at: <http://www.siliconvalleypower.com/home/showdocument?id=62267>.

⁷² Fox Comments, at p. 9.

⁷³ *Id.*, at p.10-11.

⁷⁴ IS/MND, at p. 44, 50.

⁷⁵ *Id.*, at p. 51.

foreseeable incremental contribution to global climate change is not cumulatively considerable.⁷⁶

1. Construction Phase GHG Emissions Are Underestimated

The IS/MND evaluates the GHG emissions during the construction phase in one paragraph:

BAAQMD has not established a threshold for construction-period GHG emissions, therefore construction emissions are described in this section and compared to thresholds for air quality on an *informational basis in order to provide context*. As described in Section 2.3, Air Quality, construction-period emissions would be generally minor and would not exceed BAAQMD thresholds for localized air quality, including emission of NO_x and CO. Daily construction emissions of NO_x would be a maximum of 26 pounds per day (BAAQMD threshold for air quality impacts: 54 pounds per day), and there would be no notable sources of CO emissions. Total construction GHG emissions are estimated to be 589 metric tons of CO₂e. Amortized over the life of the project, which is assumed to be 30 years, this equates to 19.6 metric tons per year. Based on BAAQMD's guidelines and the project-specific information provided herein, GHG emissions during construction would be minor and temporary. Thus, GHG emissions from project construction are considered less than significant.⁷⁷

This analysis is problematic for several reasons. First, since the Air Quality ("AQ") section does not evaluate CO₂ then a comparison of CO₂ emissions to NO_x and CO emissions is not applicable because neither NO_x nor CO are GHG's. Second, if, as the IS/MND states, the AQ threshold is only used for context, then making a claim of a less-than-significant impact on climate change is not applicable since the AQ threshold is promulgated based on negative health effects of air-borne contaminants as opposed to GHG, which has a global cumulative impact. Third, the fact that BAAQMD did not set a threshold for construction period GHG emission does not relieve the City for its duty to analyze this impact. A common practice in

⁷⁶ 14 C.C.R. § 15064.4

⁷⁷ IS/MND, p. 48. Italics added.
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GHG analysis is to amortize construction emissions over the operational Lifetime.⁷⁸ Here, the GHG section does state that an additional 19.6 metric tons of CO₂ per year will be emitted by the Project, and that number must be added to the annual CO₂ emissions resulting from the Project.

2. The IS/MND Fails to Support its Conclusion with Substantial Evidence and Violates the Supreme Court Decision on GHG Analysis

In the GHG analysis, the IS/MND looks into the question of “Would the project generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment?” and concludes that the Project would result in a less than significant impact. This conclusion is not supported by the evidence.

The California Supreme Court created clear guidelines for agencies to follow when analyzing GHG impacts in *Center for Biological Diversity v. California Department of Fish and Wildlife* (“Newhall”).⁷⁹ 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.⁸⁰ 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 32.⁸¹ Relying on a similar “business-as-usual” or “BAU” methodology as the DEIR 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

⁷⁸ See, for example, AEP’s white paper: *Beyond Newhall and 2020: A Field Guide to New CEQA Greenhouse Gas Thresholds and Climate Action Plan Targets for California*, p. 36.

⁷⁹ *Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal. 4th 204.

⁸⁰ *Id.*

⁸¹ *Id.* at p. 218.

achievement of A.B. 32's goals and are therefore less than significant for CEQA purposes.⁸²

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"⁸³ 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."⁸⁴ 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:

At bottom, the EIR's deficiency stems from taking a quantitative comparison method developed by the Scoping Plan as a measure of the greenhouse gas emissions reduction effort required by the state as a whole, and attempting to use that method, without consideration of any changes or adjustments, for a purpose very different from its original design: To measure the efficiency and conservation measures incorporated in a specific land use development proposed for a specific location.⁸⁵

The IS/MND suffers from a similar deficiency, by drawing a line from the reduction goal of the state as a whole to a specific project in a specific location, without providing any substantial discussion of the applicability of the statewide goal to this Project. The short paragraph on p. 50 of the IS.MND merely states that:

the project's indirect GHG emissions from electricity under baseline conditions would be 28 percent below the 2016 statewide average rate of

⁸² *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.

⁸³ *Id.* at 225.

⁸⁴ *Id.* at 225-226.

⁸⁵ *Id.* at 227.

GHG emissions from electricity. Moreover, project emissions would be reduced by over 46 percent compared to baseline (2017) conditions by 2030⁸⁶

This analysis does not constitute substantial evidence. Both the California Air Resources Board⁸⁷ 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."⁸⁸ .

Here, the City's conclusion that the Project will have a less than significant impact on GHG emission violates the Supreme Court ruling and is not supported by substantial evidence. The IS/MND must be revised to properly analyze the Project's impacts from GHG emissions.

3. The IS/MND Lacks Analysis of GHG Emissions During Decommissioning Phase

The IS/MND does not apply any analysis of potential GHG that will be emitted during the decommissioning stage of the Project. According to the Project description, the anticipated operational life of the Project is 30 years. CEQA requires that environmental impacts of the entire project be analyzed to give decision-makers and the public sufficient information to appropriately evaluate the project. As such, the IS/MND must evaluate all of the Projects impacts during decommissioning as required by CEQA.

⁸⁶ IS/MND, p. 50.

⁸⁷ California Air Resources Board, California's 2017 Climate Change Scoping Plan, November 2017

⁸⁸ *Center for Biological Diversity v. California Dept. of Fish and Wildlife*, p. 226.

4. The IS/MND GHG Analysis Underestimates Emissions Rate

The IS/MND calculates GHG emissions during the operational phase of the project based on indirect emissions resulting from its reliance on power from SVP, and direct emissions from regular testing of the backup diesel generators. In its analysis of indirect emissions, the IS/MND relied on SVP's predicted rate of 348 lb/CO₂ per MW in the year 2020.⁸⁹ Under California Senate Bill 350 ("SB 350"), publicly owned utilities are required to submit an Integrated Resource Plan ("IRP")⁹⁰, detailing methods to meet the GHG reduction goals of SB 350.⁹¹ SVP's IRP is yet to be approved by the SVP board, and will be submitted to the California Energy Commission ("CEC") by April 30, 2019.⁹²

According to Dr. Earle, SVP relies on California Independent System Operator ("CAISO") market providers for some of its power, and to calculate SVP's emissions rates, the emissions rates from these outside suppliers must be added to SVP's emissions rates.⁹³ However, "[b]ecause purchases from the CAISO market cannot be traced to particular sources, it is necessary to use an averaged number for the market emissions rate."⁹⁴ The average number, mandated by the CEC is 944 lbs-CO₂/MWh (0.428 MT CO₂e/MWh).⁹⁵ As Dr. Earle points out, the IRP does not use this number, but uses only SVP-owned resources, since applying the CEC's rate of 0.428 MT CO₂e/MWh would "exceed the GHG target."⁹⁶ Dr. Earle recalculated the predicted 2020 emissions, adding emissions from SVP's resources to emissions from market purchases, determined that SVP's emission rate would be 465 lbs-CO₂/MWh, as opposed to the rate of 348 lbs-CO₂/MWh used by the IS/MND.⁹⁷

As such, there is a fair argument supported by substantial evidence that GHG emissions reported in the IS/MND have been underestimated and may have a significant impact. Therefore, the City must withdraw the IS/MND and re-evaluate the Projects impacts in an EIR.

⁸⁹ IS/MND, at p. 49.

⁹⁰ 2018 Final Integrated Resource Plan, SVP. Prepared by Black & Veatch Project No. 194535.

⁹¹ Robert Comments, at p. 1.

⁹² *Id.*

⁹³ Earle Comments, at p. 1-2.

⁹⁴ *Id.*, at p. 2.

⁹⁵ *Id.*, at p. 2.

⁹⁶ IRP, at p. 1-1.

⁹⁷ Earle Comments, at p. 2.

A. The IS/MND is Inconsistent with State, Regional, and Local Policies and Regulations

Since, as shown above, the Project cannot claim less than significant impacts based on the applicable numeric significance thresholds, the City must either provide further mitigation, or show consistency with an applicable plan, policy, or regulation adopted for the purpose of reducing greenhouse gas emissions, including a qualified GHG reduction plan to avoid producing an EIR. As shown below, substantial evidence supports a fair argument that the Project is not consistent with such plans and policies.

The CEQA Guidelines provide that a lead agency may analyze and mitigate GHG emissions resulting from certain activities in a defined geographic area in a qualified plan for the reduction of GHG emissions.⁹⁸ Lead agencies may then tier from or incorporate the analysis and mitigation contained in a GHG reduction plan when considering individual projects within the plan's scope. If the lead agency determines that an individual project is consistent with an adopted GHG reduction plan, it may be presumed that the Project's incremental contribution to climate change would be less than cumulatively considerable, or less than significant.⁹⁹

CEQA Guidelines § 15064 specifies how to demonstrate consistency with a greenhouse gas reduction plan. That section states: “[w]hen relying on a plan, regulation or program [for the reduction of GHG emissions], the lead agency should explain how implementing the plan, regulation or program ensures that the project’s incremental contribution to the cumulative effect is not cumulatively considerable.” Additionally, the consistency analysis “must identify those requirements specified in the plan that apply to the project, and if those requirements are not otherwise binding and enforceable, incorporate those requirements as mitigation measures applicable to the project.”¹⁰⁰ However, “[i]f there is substantial evidence that the effects of a particular project may be cumulatively considerable, notwithstanding the project’s compliance with the

⁹⁸ 14 C.C.R. § 15183.5; see also 14 C.C.R. §§ 15064(h)(3), 15064.4

⁹⁹ 14 C.C.R. § 15064.4(b); see also BAAQMD CEQA Guidelines (May 2017), pp. 4-4, 4-7.

¹⁰⁰ 14 C.C.R. § 15183.5(b)(2); BAAQMD CEQA Guidelines (May 2017), p. 4-4 (“A project must demonstrate its consistency by identifying and implementing all applicable feasible measures and policies from the GHG Reduction Strategy into the project.”).

specified requirements in the plan for the reduction of greenhouse gas emissions, an EIR must be prepared for the project.”¹⁰¹

The BAAQMD CEQA Guidelines provide “[a] project must demonstrate its consistency by identifying and implementing all applicable feasible measures and policies from the GHG Reduction Strategy into the project.”¹⁰²

In her comments, Dr. Fox highlights that the Project is inconsistent with the City’s 2020 Climate Action Plan (“CAP”), because it doesn’t address the CAP’s goals, but only provides a generalized discussion of four “focus areas” without identifying implementation measures.¹⁰³ Further, the Project fails to incorporate a strategy for reducing vehicle miles traveled,¹⁰⁴ incorporate parking for electrical vehicles,¹⁰⁵ use low-albedo materials in the parking lot,¹⁰⁶ or incorporate solar power technology.¹⁰⁷ In addition, the Project is inconsistent with the City of Santa Clara’s General Plan¹⁰⁸ because it doesn’t ensure that it will enroll in SVP’s Green Power program,¹⁰⁹ doesn’t require the maximum feasible use of solar PV panels,¹¹⁰ and fails to maximize use of recycled water by failing to incorporate recycled water for construction purposes.¹¹¹ Furthermore, Dr. Fox points out that the Project is inconsistent with, and does not consider, many of the measures available under the Bay Area Clean Air Program.¹¹²

Therefore, the Is/MND conclusion that the Project does not conflict with an applicable plan, policy, or regulation is not supported by substantial evidence.

¹⁰¹ 14 C.C.R. § 15183.5(b)(2).

¹⁰² Fox Comments, at p. 14. BAAQMD CEQA Guidelines, at p. 3-1.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*, at p. 15.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*, at p. 16.

¹¹² *Id.*

Furthermore, the Project fails to attempt reduction of GHG emissions during the construction phase despite BAAQMD's encouragement to incorporate best management practices to reduce construction GHG emissions.¹¹³

In addition to lack of consistency with plans or policies to reduce GHG emissions, the Project fails to incorporate many mitigation measures as required by the BAAQMD Guidelines that would maximize reductions in GHG emissions. Dr. Fox points out that the mitigation measures adopted by the Project "[a]ddress Project components that contribute very little of the total Project increase in GHG emissions."¹¹⁴ and goes on to provide a list of 15 possible GHG reduction measures that could be available to the Project that are suggested in the BAAQMD Guidelines.¹¹⁵ This failure to mitigate results in unmitigated significant impacts.

In conclusion, the IS/MNDs conclusions regarding GHG impacts are not supported by the evidence, and there's a fair argument supported by substantial evidence that the Project may result in significant GHG impacts. The City must withdraw the MND and prepare an EIR that properly addresses and mitigates the Project's impacts.

VI. THE IS/MND FAILS TO ACCOUNT FOR DECOMMISSIONING IMPACTS ON THE ENVIRONMENT

CEQA requires the City to evaluate "[t]he whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment,"¹¹⁶ Appropriate analysis, therefore, must include impacts that may result during the decommissioning phase of a project. The IS/MND states that the Project's anticipated life is 30 years.¹¹⁷ However, the IS/MND fails completely to discuss or analyze what will happen with the Project after 30 years, nor what possible environmental impacts may result from decommissioning of the Project.

¹¹³ Fox Comments, at p. 22-23.

¹¹⁴ *Id.*, at p. 17.

¹¹⁵ *Id.*, at p. 21-22.

¹¹⁶ 14 C.C.R. § 15378(a)

¹¹⁷ IS/MND, p. 48.

Such an oversight precludes effective evaluation of the Project's impacts over its lifetime, preventing decision-makers and the public from understanding the Project's environmental ramifications.

VII. AMBIENT AIR QUALITY IMPACTS WERE NOT EVALUATED

A. The IS/MND Fails to Evaluate Project Impacts on Ambient Air Quality

As discussed above, CEQA requires analysis of all environmental impacts resulting from a project to provide decision-makers and the public information to properly evaluate the project. The IS/MND provides an analysis of the Project's compliance with BAAQMD CEQA Guidelines operational thresholds of significance using maximum annual emissions and average daily emissions, and construction thresholds based on daily average emissions.¹¹⁸ As Dr. Fox explains, these averages do not reflect all potential air quality impacts,¹¹⁹ since short-term spikes in emissions can also have significant environmental impacts.¹²⁰ In addition, the IS/MND fails as an informational document by failing to analyze Project impact contributions relative to the National Ambient Air Quality Standards ("NAAQS") and California Ambient Air Quality Standards ("CAAQS") attainment standards.¹²¹ The ambient air quality standards provided in both the NAAQS and CAAQS are measured as concentrations over a 1-hour or 8-hour period, as well as annual arithmetic means,¹²² whereas the IS/MND significance thresholds are measured in MT/yr or lb/day.¹²³ Calculating emissions on a MT/yr or lb/day basis obscures peak emissions, such as might occur when multiple pieces of construction equipment operate over the same 1-hour period. Therefore, the IS/MND fails to disclose the Project's impacts on ambient air quality.

B. The IS/MND Failed to Evaluate Ozone Impacts

The Bay Area Air Basin, the air basin in which the Project would be located, is designated as a serious nonattainment area for the state 1-hour ozone standard

¹¹⁸ Fox Comments, at p. 18-19.

¹¹⁹ *Id.*, at p. 19.

¹²⁰ *Id.*, at p. 21.

¹²¹ *Id.*, at p. 20.

¹²² *Id.*, at p. 20, Table 4.

¹²³ IS/MND, at p. 50.

and as nonattainment for the federal 8-hour ozone standard.¹²⁴ As Dr. Fox's comments explain, increases in ozone precursor emissions from the Project, coupled with emissions from other projects in the area, may aggravate existing exceedances of ozone standards or result in additional exceedances. This is a potentially significant impact of the Project that is undisclosed in the IS/MND.

Ground-level ozone is not emitted directly into the air but is created by chemical reactions between NO_x and VOCs.¹²⁵ The NO_x and VOCs react in the presence of sunlight, creating ozone.¹²⁶ Ozone at high levels can have an adverse impact on people's health,¹²⁷ as well as on the environment.¹²⁸ The public health impacts resulting from Ozone include:

- making it more difficult to breathe deeply and vigorously;
- causing shortness of breath and pain when taking a deep breath;
- causing coughing and sore or scratchy throat;
- inflaming and damaging the airways;
- aggravating lung diseases such as asthma, emphysema, and chronic bronchitis;
- increasing the frequency of asthma attacks;
- making the lungs more susceptible to infection;
- continuing to damage the lungs even after symptoms have disappeared; and
- causing chronic obstructive pulmonary disease (COPD).¹²⁹

Ozone also affects sensitive vegetation and ecosystems, including forests, parks, wildlife refuges, and wilderness areas, and can cause significant damage during the growing season.¹³⁰ However, none of these impacts were considered in the IS/MND.¹³¹

¹²⁴ Fox Comments, at p. 25.

¹²⁵ *Id.*, at p. 25; IS/MND, Appendix A, at p. 4.

¹²⁶ *Id.*, at p. 25.

¹²⁷ IS/MND, Appendix A, at p. 4.

¹²⁸ Fox Comments, at p. 25.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

Sources of VOCs and NOx from the proposed Project include exhaust from construction equipment and direct, induced increases in traffic from the Project, and the generation of electricity to support the data center.¹³² Emissions of NOx and VOCs from these sources will increase ambient ozone concentrations, may aggravate existing exceedances of ozone standards and may cause additional exceedances. These exceedances translate directly into adverse health impacts on the affected population and environment.

Dr. Fox points out that the IS/MND failed to take account of emissions from the diesel storage tanks in estimating the Project's NOx and Volatile Organic Compounds ("VOC") emissions and thus underestimated total NOx and VOC emissions. In addition, the IS/MND does not provide adequate ozone impact analysis, failing to discuss whether increases in ozone precursors, such as NOx and VOC, would impair BAAQMD's ability to comply with state ozone standards in the Bay Area Air Basin, or how such increases may impact air quality resources.¹³³ These increases in ozone precursors "[s]hould have triggered an analysis of their impact on the ambient ozone concentrations and the Bay Area Basin's attainment status."¹³⁴

C. The IS/MND Fails to Evaluate the Project's Particulate Matter Emissions

Appendix A of the IS/MND recognizes that particulate matter is a health issue in the Bay Area, where high levels of respirable particulate matter or particles that have a diameter of 10 micrometers or less (PM10) and fine particulate matter where particles have a diameter of 2.5 micrometers or less (PM2.5) "[a]ggravate respiratory and cardiovascular diseases, reduce lung function, increase mortality (e.g., lung cancer), and result in reduced lung function growth in children."¹³⁵ However, there are multiple issues with the IS/MND's analysis of the Project's PM10 and PM2.5 impacts.

First, the IS/MND calculates PM10 and PM2.5 emissions only from equipment exhaust,¹³⁶ even though there are other sources of emissions of these

¹³² Fox Comments, at p. 26.

¹³³ *Id.*, at p. 25-26.

¹³⁴ *Id.*, at p. 26.

¹³⁵ IS/MND, Appendix A, at p. 4.

¹³⁶ Fox Comments, at p. 27.

particulates. Further, the model used by the IS/MND to calculate PM10 and PM2.5 emissions, the CalEEMod, is not reliable for calculating fugitive dust emissions because the model a) “[g]roups the output by site location, activity, and year without disclosing any emissions calculations.”; b) “[l]acks the ability to calculate fugitive dust emissions from wind erosion.”; c) uses “[i]nappropriate unpaved road emission factor in calculating fugitive dust emissions from onsite hauling, grading, and other activities.”; d) “[d]oes not include any fugitive PM2.5 or PM10 emissions from unpaved on-site haul roads.”; and e) “[d]oes not estimate emissions from supplying electricity to the data center, which is the major source of criteria pollutant emissions from the Project.”¹³⁷ The IS/MND analysis also failed to use the model suggested by BAAQMD (the URBEMIS model) without providing any justification.¹³⁸

Second, PM10 and PM2.5 emissions are underestimated and significant because it does not account for fugitive dust from vehicles travelling off-road, such as on-site haul trucks, which according to Dr. Fox’s calculations could emit as much as 3.18 lbs. of PM10 and 0.32 lbs. of PM2.5 for every Vehicle Mile Traveled (VMT).¹³⁹ However, Dr. Fox points out that because there is no information from the applicant about projected VMT by haul trucks on unpaved roads, the total amount of such emissions cannot be known, and the IS/MND fails as an informational document.¹⁴⁰ For PM10 and PM2.5 emissions from demolition Dr. Fox estimates 75 lbs. of PM10 per day and 7.6 lbs. of PM2.5 per day.¹⁴¹ Since these emissions are not reported in the IS/MND, it again fails to inform the decision makers and the public of the potentially significant impacts of the Project.

Third, the IS/MND fails to evaluate PM10 and PM2.5 emissions from wind erosion. The CalEEMod User’s Guide states that the model does not evaluate “fugitive dust generated by wind over land and storage piles,” due, in part, to the high number of inputs required.¹⁴² As such, the IS/MND does not evaluate these emissions in its impact analysis, thereby underestimating Project impacts, and failing to provide information, as required by CEQA. Wind-generated dust emission

¹³⁷ Fox Comments, at p. 28.

¹³⁸ *Id.*

¹³⁹ *Id.*, at p. 31.

¹⁴⁰ *Id.*, at p. 32.

¹⁴¹ *Id.*, at p. 33.

¹⁴² *Id.*, at p. 33.

can be quite high in the Bay Area where winds of up to 50 miles can occur.¹⁴³ Dr. Fox estimated that wind erosion could generate an additional 9 lbs. of PM10 emissions per day, and 2.2 lbs. of PM2.5 emissions per day.¹⁴¹

Dr. Fox estimated that in total, in combination with exhaust emissions provided by the IS/MND, the Project could generate 87 lbs. of PM10, and 11 lbs. of PM2.5 emissions, per day.¹⁴⁵

D. The Project Fails to Mitigate PM10 and PM2.5 Emissions to a Less Than Significant Level.

According to the BAAQMD thresholds for particulate matter, a project's impacts would be less than significant if it implements certain Best Management Practices ("BMPs") provided in its CEQA Guidelines.¹⁴⁶ The CEQA Guidelines provide that the construction threshold of significance for PM10 and PM2.5 is "Best Management Practices."¹⁴⁷ This is not a quantitative threshold, and not even a qualitative one. The BAAQMD's Guidelines provide that if a project exceeds these thresholds, it must adopt further mitigation measures.¹⁴⁸ This is clearly problematic since it is impossible to determine whether a project exceeds the significance threshold. Nonetheless, Mitigation Measure AQ-1 of the IS/MND adopts this proposed mitigation measure. Dr. Fox notes that these mitigation measures would not be effective in controlling fugitive dust because, for example, two of them are related to exhaust emissions. Further, implementing AQ Mitigation Measure #1, requiring watering all exposed surfaces two times a day, would not address night time wind erosion, the method of application provided, nor would it be sufficient during very hot, dry days.¹⁴⁹ In addition, Dr. Fox finds that most of the measures are un-enforceable, such as limiting idling times to 5 minutes (AQ Mitigation Measure #5), which is rarely enforced.¹⁵⁰

¹⁴³ *Id.*, at p. 33.

¹⁴⁴ Fox Comments, at p. 34.

¹⁴⁵ *Id.*, Table 5, at p. 35.

¹⁴⁶ BAAQMD May 2017, Table 8-2, at p. 8-4.

¹⁴⁷ *Id.*, Table 2-1, at p. 2-2.

¹⁴⁸ *Id.*, Table 8-3, at p. 8-5.

¹⁴⁹ Fox Comments, at p. 38.

¹⁵⁰ *Id.*, at p. 38.

Since there is no quantitative threshold for these emission types, an absurd situation can arise where, as long as the BMPs are utilized, it does not matter how much fugitive dust is emitted from the Project, those impacts would still be considered less than significant. Thus, this mitigation measure is meaningless to reduce potentially significant impacts to a less than significant level.

In conclusion, the IS/MND underestimates potentially significant ambient air quality impacts by underestimating emissions, omitting ozone and fugitive dust from its analysis, and failing to mitigate potentially significant impacts. Therefore, the City must prepare an EIR to account for these potentially significant impacts.

VIII. THE IS/MND FAILED TO EVALUATE ENERGY IMPACTS

CEQA § 21100(a) requires agencies to prepare an environmental impact report on any project which may have a significant impact on the environment.¹⁵¹ Subdivision (b)(3) requires that the EIR must include mitigation measures to, among others, “[r]educe the wasteful, inefficient, and unnecessary consumption of energy.”¹⁵² In order to determine whether a project may have significant energy impacts, the lead agency must conduct an energy study. Section 15126.2 subd. (b) of the CEQA Guidelines requires that “[t]his analysis should include the project’s energy use for all project phases and components, including transportation-related energy, during construction and operation.”¹⁵³ CEQA Guidelines also include Appendix G, which lists all the environmental factors that may be affected; this appendix includes an energy section.

This is particularly important in the context of data centers, such as this Project because of their heavy energy consumption.

The energy use impact analysis in the IS/MND fails to comply with the law in several ways.

First, the IS/MND fails to compare the Project’s energy use to energy use associated with the existing environmental setting – the vacant auto body shop and associated buildings. Before the impacts of a project can be assessed and mitigation

¹⁵¹ 14 PRC § 21100.

¹⁵² 14 PRC § 21100, subd. (b)(3).

¹⁵³ 14 C.C.R. § 15126.2(b)

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measures considered, the IS/MND must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.¹⁵⁴ Therefore, it is a central concept of CEQA, widely accepted by the courts, that the significance of a project's impacts cannot be measured unless the IS/MND first establishes the actual physical conditions on the property. In other words, baseline determination is the first rather than the last step in the environmental review process.¹⁵⁵

In this case, the IS/MND provides no analysis whatsoever of the energy impacts of the Project. The only information on energy usage is provided in the Project Operation section of the IS/MND

Major sources of energy demand for project operations would be client servers and the cooling system. The project would use an average of 22 MW for a maximum load of 480,000 kilowatt (KW) hours daily. Overall, the daily power usage would vary depending on how many servers are up and running and how intensely the data center's clients are running their servers. The building would require very little lighting. Lighting would be used to support the lobby, corridors, office/conference room, and parking area.¹⁵⁶

However, this does not provide any discussion of the project's energy impacts.

Second, the IS/MND failed to compare the Project energy use to CEQA's thresholds for measuring wasteful, uneconomic, inefficient or unnecessary consumption of energy in Appendix F and to the more recent threshold set forth in Governor Brown's Executive Order B-55-18. Under CEQA, wasteful, uneconomic, inefficient or unnecessary consumption of energy means exceeding a threshold of significance in the energy use impact areas identified in Appendix F. This includes asking whether the project's energy requirements by amount and fuel type during construction, operation, maintenance and/or removal and from materials is significant, whether the project comply with existing energy standards, whether the project will have a significant effect on energy resources and whether the project

¹⁵⁴ *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. Ap. 4th 931, 952.

¹⁵⁵ *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 125; see *Communities for a Better Environment v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal. 4th 310, 321 ("the impacts of a proposed project are ordinarily to be compared to the actual environmental conditions existing at the time of CEQA analysis").

¹⁵⁶ IS/MND, at p. 8.

will have significant transportation energy use requirements, among other questions. For each of these questions, CEQA Guidelines Appendix F asks whether the project decreases overall per capita energy consumption, decreases reliance on fossil fuels, and increases reliance on renewable energy sources. Appendix F explains that these are the means to ensure wise and efficient use of energy. If a project does not decrease overall per capita energy consumption, decrease reliance on fossil fuels, and increase reliance on renewable energy sources, then the Project does not ensure wise and efficient use of energy and, therefore, results in a wasteful, inefficient and unnecessary consumption of energy. Furthermore, the IS/MND contains no analysis of whether the Project's energy use is carbon neutral under Governor Brown's Executive Order B-55-18. The question is, for example, whether the project's energy requirements by amount and fuel type during construction, operation, maintenance and/or removal and transportation is carbon neutral. This analysis of carbon neutrality is consistent with Appendix F's explanation of the means to ensure wise and efficient use of energy. The IS/MND contains no such analyses.

Third, the IS/MND fails to comply with CEQA's requirement to evaluate the environmental impacts of "[t]he project's projected transportation energy use requirements...".¹⁵⁷ The Project will provide 40 parking spaces, four of which would be clean air vehicle spaces, as well as a minimum of 20 Class I bicycle locker spaces and 7 Class II bicycle rack spaces.¹⁵⁸ However, the IS/MND completely omits any discussion about the energy use associated with the vehicles that will be induced to the Project site. For example, the IS/MND doesn't discuss what impact having four clean air vehicle spaces as well as 27 bicycle locker spaces would have on the Project's transportation energy use requirements.

Fourth, the IS/MND failed to evaluate whether it will enroll in SVP's Green Power Program which allows their customers to "[m]atch up to 100% of their monthly electric use with renewable energy."¹⁵⁹ Additional renewable energy resources, such as solar PV panels, might be available or appropriate and must be incorporated into the Project, as required by CEQA.¹⁶⁰

¹⁵⁷ CEQA, Appendix F, § II, C.6.

¹⁵⁸ IS/MND, at p. 7.

¹⁵⁹ 2018 Strategic Plan, December 4, 2018, at p. 8.

¹⁶⁰ *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 211.

Fifth, and as mentioned above in the discussion on the CalEEMod emissions modeling, the IS/MND fails to provide any information of vehicle miles traveled, the type and quantity of equipment that will be used. Therefore, the IS/MND underestimates construction energy use.

In sum, the IS/MND is inadequate as an environmental document because it fails to comply with the law and fails to properly disclose, analyze and mitigate the Project's significant impacts on air quality, public health and energy use. Therefore, the City cannot approve the Project until it prepares a full EIR that resolves these issues and complies with CEQA's requirements.

IX. CITY FAILED TO PROVIDE DOCUMENTS REFERENCED IN MND DURING PUBLIC REVIEW PERIOD

During the public comment period, CURE submitted requests to access documents referenced in the MND. By failing to provide access to all the documents referenced in the MND, the City violated the clear mandate of CEQA to provide access to documents referenced in the MND during the entire comment period.

On March 11, 2019, we requested immediate access to any and all documents referenced or relied upon in the MND. Not receiving a response from the City, on March 20, 2019, we requested an extension of the public review period for 30 days following the date that City “[m]akes all documents referenced in the [Mitigated Negative Declaration] available for public review.” On March 25, 2019, we submitted a follow-up letter requesting that the public comment period be extended 30 days after the date that the City provides us with all of the documents referenced in the MND, which includes the 2018 Arborist Report cited in the reference section of the MND.

On March 26, 2019, we received a letter from the City (“City Letter” exhibit includes PRA requests) providing the Arborist report but denying our request for an extension. In the City’s letter, the City argued that our letters cited a section of the CEQA Guidelines which changed in December 28, 2018. The City’s letter then referenced the amended subdivision (g)(4) of § 15072 of the CEQA Guidelines, requiring notice of an MND to provide the address where “all documents referenced incorporated by reference” are available for review. The City’s letter also stated “[t]he IS/MND for the SV1 Data Center Project incorporated seven

documents by reference, which are the technical reports contained in appendices A through G.”¹⁶¹

The City violated CEQA § 21092 by refusing to provide all documents referenced in the MND and made an arbitrary decision during the review period that some documents are not part of the City’s overall analysis in the MND. Also, as a result, the MND is missing evidence to support the City’s conclusions in the MND.

First, our extension request cited to subdivision (b)(1) of § 21092 of the Public Resources Code, which has not changed and states in relevant part:

The notice ... shall include the ... address where copies of the draft environmental impact report or negative declaration, and all documents referenced in the draft environmental impact report or negative declaration, are available for review... .

The courts have highlighted the importance of compliance with all notice provisions to ensure maximum public comment and involvement.¹⁶² In *Ultramar v. South Coast Air Quality Management District*, the Court cited to section 21091 of the Public Resources Code requiring a public review period not less than 30 days,¹⁶³ and, relying on § 21168.9 of the Public Resource Code, held that the failure to provide even a few pages of a CEQA document for even 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.¹⁶⁴ It is also well settled that an environmental review document may not rely on hidden studies or documents that are not provided to the public since such omissions can cause important ramifications of proposed projects to remain hidden from view, frustrating the core informational goals of CEQA.¹⁶⁵ Therefore, the Public Resources Code continues to require all documents referenced in the MND, not only those incorporated by reference, be available for public review during the comment period.

¹⁶¹ Exhibit 3 City Letter, at p. 2.

¹⁶² *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 616 (“[w]e cannot overemphasize the importance of full compliance with all notice provisions of applicable law, so that there will be maximum public comment and involvement.” at 616)

¹⁶³ *Id.*, at 698-699.

¹⁶⁴ *Id.*, at 704-705.

¹⁶⁵ *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 829-831.
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Second, the Natural Resources Agency (“Agency”) is authorized to certify and adopt a regulation only if it is consistent and not in conflict with CEQA.¹⁶⁶ The City’s argument that an amendment to section subdivision (g)(4) of § 15072 of the CEQA Guidelines means that the City need not provide documents that the MND does not explicitly state are incorporated by reference is inconsistent with the plain language of the statute. The City’s interpretation of § 15072 of the CEQA Guideline as only requiring disclosure of certain documents incorporated by reference in the MND is inconsistent with § 21092(b)(1) of the Public Resources Code, which requires disclosure of documents referenced in a CEQA document. Under the City’s interpretation of § 15072(g)(4) of the CEQA Guideline, the Guideline section is invalid as a matter of law.

Third, the City’s argument that the amendment means the City need not provide documents that the MND does not explicitly state are incorporated by reference is inconsistent with the intent of the amendment. In November of 2018, the California Natural Resources Agency published the Final Statement of Reasons for Regulatory Action Amendments to the State CEQA Guidelines (“Statement”),¹⁶⁷ in part to provide the purpose of specific amendments to the Guidelines. The Statement explains that “[d]ocuments that are ‘incorporated by reference’ provide a portion of the document’s overall analysis, and because the final initial study must reflect the independent judgment of the lead agency, one would expect a copy of the incorporated document to actually be among the lead agency’s files.”¹⁶⁸ Therefore, documents that are incorporated by reference are those that provide substantial evidence in supporting the lead agency’s independent judgement regarding impacts of a Project.

The City states that the only documents incorporated by reference in the MND are “[t]he technical reports contained in appendices A through G.”¹⁶⁹ However, nowhere is this stated in the MND itself. The City does not provide any reasoning why it now considers the appendices the only documents incorporated by reference, whereas other documents are only referenced. The MND does not include

¹⁶⁶ Gov. Code §11342.2; see also *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 108.

¹⁶⁷ http://resources.ca.gov/ceqa/docs/2018_CEQA_Final_Statement_of%20Reasons_111218.pdf. Accessed March 28, 2019.

¹⁶⁸ Statement, at p. 23. Italics added.

¹⁶⁹ City Letter, at p. 2.
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any language specifically indicating that the appendices are incorporated by reference, whereas other documents are not. Therefore, the City's belated decision to provide only some of the documents referenced in the MND during the public comment period is arbitrary. If an agency could simply decide at the end of the public comment period what documents are incorporated and what documents are not, the public would never be able to ascertain the basis for a particular decision with enough time to evaluate the agency's support and provide informed comments.

If, as the City suggests, the only documents incorporated by reference in the MND are appendices A through G, then the public must assume that all documents, other than appendices A through G, that are referenced in the MND, but not incorporated by reference, as indicated in the City's letter, are not part of the overall analysis used to support the independent judgment of the City in making its conclusions regarding the impacts of the Project in the MND.

In conclusion, the City violated CEQA section 21092 by refusing to provide all documents referenced in the MND to the public during the public review period made an arbitrary decision during the review period that some documents are not part of the City's overall analysis in the MND. The City's interpretation of section 15072(g)(4) of the CEQA Guideline is inconsistent with the statute and would render section 15072(g)(4) invalid as a matter of law. Finally, as a result of the City's interpretation of the CEQA Guideline, the MND lacks substantial evidence to support the City's conclusions in the MND. The City's actions in violating the clear procedural mandates of CEQA are detrimental to CURE and other members of the public who wish to meaningfully review and comment on the MND.

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X. CONCLUSION

For the foregoing reasons, we urge the City to withdraw the MND. The potentially significant environmental impacts of the Project must be evaluated by the City in an EIR, as required by CEQA.

Sincerely,



Yair Chaver

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