

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

lsobczynski@adamsbroadwell.com

SO. SAN FRANCISCO OFFICE

601 GATEWAY BLVD., SUITE 1000
SO. SAN FRANCISCO, CA 94080

TEL: (650) 589-1660
FAX: (650) 589-5082

MILA A. BUCKNER
DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
MARC D. JOSEPH
RACHAEL E. KOSS
NATALIE B. KUFFEL
LINDA T. SOBCZYNSKI

April 20, 2017

Via Email and U.S. Mail

Kerry Sullivan
Director, Community Development Department
San Joaquin County
1810 E. Hazelton Avenue
Stockton, CA 95205
Email: ksullivan@sjgov.org

Mimi Duzenski
Clerk of the Board
San Joaquin County
44 North San Joaquin Street
Sixth Floor Suite 627
Stockton, CA 95202
Email: mduzenski@sjgov.org

Via Email Only

Stephanie Stowers, stowers@sjgov.org

Re: Comments on the Initial Study/ Negative Declaration for the Proposed Delicato Vineyards Project: Use Permit # PA-1700032, SCH # 2017032056

Dear Ms. Sullivan, Ms. Duzenski, and Ms. Stowers:

We are writing on behalf of **San Joaquin County Residents for Responsible Development** ("San Joaquin Residents") to provide comments on the Initial Study/Negative Declaration ("IS/ND") prepared by San Joaquin County (the "County"), pursuant to the California Environmental Quality Act ("CEQA"),¹ for the

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

April 20, 2017

Page 2

Delicato Vineyards Project, Use Permit #PA-1700032 (UP), (“Project”). The Project seeks a Use Permit to expand an existing winery in three phases over fifteen years. Phase I includes construction of about 731,000 square feet of buildings, including bottling, warehouse, and administration buildings. Phase II, to be completed in ten years, includes the relocation of existing buildings, multiple tank farms, hoppers, and fermenter expansions, the construction of 40,000 square feet of buildings for maintenance, refrigeration plants, wine processing cellars, and ancillary expansion. Phase III, to be completed in 15 years, includes the construction of 80 additional wine storage tanks. The County issued an Initial Study and proposed Negative Declaration for the Use Permit application. The Project site is located on the west side of South State Route 99 West Frontage Road, 378 feet south of East French Camp Road, north of Manteca.

As explained more fully below, the IS/ND prepared for the Project does not comply with CEQA requirements. The County may not approve Use Permit #PA-1700032 (UP) until the County prepares an Environmental Impact Report (“EIR”) that adequately analyzes the Project’s potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to minimize these impacts.

I. INTRODUCTION

As an initial matter, the County failed to provide documents referenced in the IS/ND until Thursday, April 13, 2017. All documents referenced or relied upon in the ND must be made available to the public for the *entire* public comment period, as required by the California Environmental Quality Act (“CEQA”).² The County’s failure to provide access to all documents referenced or relied upon in the ND was prejudicial since it allowed insufficient time for a meaningful assessment of the Project and its potential impacts. The failure of the County to provide complete and timely information in response to our requests especially compromised the public review process in this case given the enigmatic Project description in the materials that were released.

² See Pub. Resources Code, § 21092, subd. (b)(1); CEQA Guidelines, § 15072, subd. (g)(4).

The courts have held that the failure to provide even a few pages of a CEQA document for a portion of the CEQA review period invalidates the entire CEQA process.³ As noted by leading CEQA commentators:

[CEQA] appears to compel agencies to make available for public review all documents on which agency staff or consultants expressly rely in preparing a negative declaration. In light of case law emphasizing the importance of ensuring that the public can obtain and review documents on which agencies rely for the environmental conclusions (*see, e.g., Emmington v. Solano County Redevelopment Agency* (1st Dist. 1987) 195 Cal.App.3d 491, 502-503), agencies, to be prudent, should ensure that they comply literally with this requirement.⁴

One of the most significant missing records was 2011 Use Permit No. PA-110024. The 2011 Use Permit No. PA-1100224 is critical for analyzing the currently proposed Project. In a letter from Ms. Stowers to the Development Committee, regarding Use Permit Application No. PA-1700032, she writes:

Upon the completion and circulation of the Initial Study, the Community Development Department will schedule the project to be heard at the Planning Commission and recommend approval subject to the following conditions. If any issues surface from the environmental review or other issues arise, the Community Development Department may schedule another Development Committee meeting to discuss all issues prior to attending a Planning Commission meeting.

[. . .]

APPROVED USE: This approval is to expand an existing large winery in three phases over fifteen years as shown on the site plan dated February 10, 2017. Phase 1 to include the construction of 731,128 square feet of buildings, including bottling, warehouse, and administration buildings. Phase 2, to be completed in ten years, includes the relocation of existing buildings, multiple tank farm,

³ *Ultramar v. South Coast Air Quality Management Dist.* (1993) 17 Cal.App.4th 689.

⁴ Remy, Thomas, Moose and Manley, *Guide to the California Environmental Quality Act*, p. 300 (Solano Press, 2007).

hopper, and fermenter expansions, the construction of 40,000 square feet of buildings to be utilized for maintenance, refrigeration plants, and wine processing cellars, and ancillary expansion. Phase 3, to be completed in 15 years, includes the construction of 80 additional wine storage tanks. (Use Type: Wineries and Wine Cellars - Winery, Large)

These Conditions of Approval are in addition to the *Conditions of Approval for Use Permit application No. PA-1100224 (UP)*.⁵

Use Permit No. PA-1100224 set Conditions of Approval, which are incorporated by reference for *this proposed Project's* Conditions of Approval.⁶

The very purpose of this Project's Initial Study/Negative Declaration is to review "A Use Permit application to expand an existing large winery in three phases over fifteen years. . . ." ⁷ The Use Permit application provides the following description of the proposed project: "Refer to Exhibit "1" and Use Permit Site Plan for detailed project description."⁸ In referring to Exhibit "1" the Project Description states that certain items were "APPROVED IN 2011 PHASE 2 ON APPLICATION PA-1100224" and "APPROVED IN 2011 PHASE 3 ON APPLICATION PA-1100224."⁹

In this proposed Project's Initial Study, the section on Utilities and Public Services once again *references* Use Permit Application No. PA-1100224.

The winery process water for the proposed project will drain to three sumps located in various areas of the cellar tank farms and pumped to a holding pond located on the northwest portion of the winery. The process water is aerated in the holding pond and pumped through a series of pipes to the land application areas on premise as approved on *Use Permit application no. PA- 1100224*.¹⁰

⁵ PRA Response, pdf. pp. 17-18 (emphasis added).

⁶ *Id.*

⁷ *Id.* pdf p. 32.

⁸ *Id.* pdf. p. 52.

⁹ *Id.* pdf. p. 60 (emphasis added).

¹⁰ *Id.* pdf p. 40 (emphasis added).

Use Permit No. PA-1100224 is irrefutably referenced — multiple times — in this proposed Project’s Initial Study/Negative Declaration. Yet we did not receive this document until April 13, 2017, and the 2011 Permit’s Initial Study/Negative Declaration that was provided on April 10, 2017, did not include sufficient information about what items were approved or what Conditions of Approval were included. Based on the County’s own description, the prior Use Permit is an integral part of the current Project approval and is essential to understanding the nature and scope of the current Project.

Other records referenced in the Initial Study include the “San Joaquin County Soil Survey” and the “Natural Diversity Database.”¹¹ No links, printouts, maps, or other materials related to these records were provided, making it impossible for the public review the basis for the County’s finding of no significant adverse impact.

Other than these missing documents, we asked the County to confirm that it had no other records related to the current proposed Project approval. The County responded that “[i]n fulfilling the previous request dated March 29, 2017 for this project’s file *and request for additional historical files dated April 7, 2017*, all documents related to this project and the subject parcels were provided via email.”¹² Additionally, the County stated that “while the County is unaware of an obligation to provide this confirmation in writing, please be assured that the County has complied with its obligations under the California Public Records Act.”¹³

Even with respect to those materials that were provided, the County acknowledges that it was not until it provided documents in response to our second request that the public records related to this Project were provided. Furthermore, as discussed, additional documents referenced in the Initial Study have still not been made available. This failure to make all referenced documents available violates CEQA.

¹¹ PRA Response, pdf. pp. 33-41 (“Initial Study”, p. 3).

¹² Project Staff Report, p. 5 (emphasis added).

¹³ Staff Report, p. 6.

A. Interest of San Joaquin Residents

San Joaquin Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. San Joaquin Residents includes Raul Hernandez, Jason Miranda, Steve Stevenson, and Matt Richard, Plumbers & Pipefitters Local 442, International Brotherhood of Electrical Workers Local 595, and Sheet Metal Workers Local 104, and their members and their families who live and/or work in San Joaquin County.

The individual members of San Joaquin Residents live, work, and raise their families in San Joaquin County. They would be directly affected by the Project's impacts. Individual members may also work on the Project itself. They will therefore be first in line to be exposed to any health and safety hazards that may exist on the Project site.

The organizational members of San Joaquin Residents also have an interest in enforcing the County's planning and zoning laws and the State's 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. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, San Joaquin Residents' members are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

B. Summary of Comments

Based on our review of the IS/ND and its supporting documents, we have concluded that the IS/ND for Use Permit #PA-1700032 (UP) does not comply with CEQA's basic requirements. The IS/ND fails to adequately describe the Project, lacks substantial evidence supporting the County's finding of no significant adverse impact on the environment, and improperly includes mitigation measures in the Project design.

Further, substantial evidence exists to support a fair argument that significant impacts to air quality and greenhouse gas impacts, aesthetic impacts, public health risks, and Valley Fever, and on-site hazards and hazardous materials may occur. Because there is substantial evidence supporting a fair argument that the Project may have one or more significant effects on the environment, the County cannot approve an IS/ND for the Project and must instead prepare an EIR.

We reviewed the IS/ND for the Project with the help of independent environmental consultants Phyllis Fox¹⁴, and Matt Hagemann and Jessie Jaeger.¹⁵ Their attached technical comments are submitted in addition to the comments in this letter. Accordingly, they must be addressed and responded to separately. The curricula vitae of these experts are also attached as exhibits to this letter.

II. THE NEGATIVE DECLARATION FAILS TO COMPLY WITH CEQA

The County provides the following statement for why it prepared a Negative Declaration instead of an EIR: “Based on the attached Initial Study, it has been found that the project will not have a significant effect on the environment.”¹⁶ However, for the reasons described below, the Initial Study and Negative Declaration fail to comply with CEQA. Therefore the County may not adopt a Negative Declaration for this Project.

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an EIR, except in certain limited circumstances.¹⁷ The EIR is the very heart of CEQA.¹⁸ The EIR aids an agency in identifying, analyzing, disclosing, and, to the extent possible, avoiding a project’s significant environmental effects through implementing feasible mitigation measures.¹⁹ The Initial Study procedure implements CEQA’s requirement that the agency prepare an EIR if it

¹⁴ See Letter from Phyllis Fox, to Linda Sobczynski, re: Comments on Initial Study/Negative Declaration for the Delicato Vineyards Expansion Project, April 20, 2017 (hereinafter, “Fox Comments”), **Attachment A**.

¹⁵ Letter from Matt Hagemann and Jessie Jaeger, to Linda Sobczynski, re: Comments on Initial Study/Negative Declaration for the Delicato Vineyards Expansion Project, April 19, 2017 (hereinafter, “SWAPE Comments”), **Attachment B**

¹⁶ Negative Declaration for Use Permit application No. PA-1700032 (UP).

¹⁷ See, e.g., Pub. Resources Code, § 21100.

¹⁸ *Dunn-Edwards v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644, 652.

¹⁹ Pub. Resources Code, § 21002.1, subd. (a); CEQA Guidelines, § 15002, subd. (a) & (f).

finds that a proposed project may have a significant effect on the environment.²⁰ Information from the Initial Study provides the agency with information to use as the basis for deciding whether to prepare an EIR or a Negative Declaration.

CEQA creates a strong presumption in favor of preparing an EIR. 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.²¹ The phrase “significant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in the environment.”²²

The “fair argument” standard requires preparation of an EIR if any substantial evidence in the record indicates that a project may have an adverse environmental effect.²³ The CEQA Guidelines define the term “substantial evidence” to mean “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”²⁴ Substantial evidence includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts,” but does not include “argument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly erroneous or inaccurate.”²⁵

The “fair argument” standard is an exceptionally “low threshold” favoring environmental review in an EIR rather than a negative declaration.²⁶ Under the fair argument standard, even if other substantial evidence supports the opposite conclusion, the agency nevertheless must prepare an EIR because CEQA always resolves the benefit of the doubt in favor of the public and the environment.²⁷ A

²⁰ See Pub. Resources Code, § 21080(c)(2); CEQA Guidelines, § 15063.

²¹ *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440; Pub. Resources Code, §§ 21100, 21064.

²² Pub. Resources Code, § 21068.

²³ CEQA Guidelines, § 15064, subd. (f)(1); *Pocket Protectors v. City of Sacramento, supra*, 124 Cal.App.4th at 931.

²⁴ CEQA Guidelines, § 15384 (a).

²⁵ CEQA Guidelines, § 15384 (a)-(b).

²⁶ *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.

²⁷ Pub. Resources Code, § 21080, subd. (e)(1); CEQA Guidelines, § 15064, subd. (f)(5); *Arviv Enterprises v. South Valley Area Planning Comm.* (2002) 101 Cal.App.4th 1333, 1346; *Stanislaus*

court reviewing an agency's decision not to prepare an EIR must set aside the decision if the administrative record contains substantial evidence that a proposed project might have a significant environmental impact.²⁸ "[D]eference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary."²⁹

The County's decision to prepare a Negative Declaration for this Project violates CEQA for the following reasons: (1) the agency failed to comply with the substantive requirements of an Initial Study to show that a Negative Declaration is appropriate because there is no substantial evidence that the project may have a significant effect on the environment, and (2) substantial evidence exists supporting a fair argument that the Project may have a significant effect on the environment, requiring the preparing on an EIR.³⁰

A. The County Failed to Comply with the Informational Requirements of an Initial Study Rendering the Negative Declaration Invalid.

With respect to a Negative Declaration, a properly prepared Initial Study shows that there is no substantial evidence, in light of the whole record before the agency, that the project may have a significant effect on the environment.³¹ Thus, it documents the reasons to support the Negative Declaration's proposed finding that the project will not have a significant effect on the environment.³² The Initial Study must also identify the environmental setting.³³ Establishing the environmental

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.

²⁸ *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1317.

²⁹ *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1317.

³⁰ CEQA Guidelines, § 15064(f)(1) & (3); *El Dorado County Taxpayers for Quality Growth v. County of El Dorado* (2004) 122 Cal.App.4th 1591, 1597 [20 Cal.Rptr.3d 224, 227], as modified (Oct. 14, 2004).

³¹ CEQA Guidelines, § 15070.

³² CEQA Guidelines, § 15071.

³³ CEQA Guidelines, § 15063(d)(2)

setting is necessary to determine the environmental baseline against which the project's changes to the environment are measured.³⁴

“Where an agency fails to provide an accurate project description, or fails to gather information and undertake an adequate environmental analysis in its initial study, a negative declaration is inappropriate.³⁵ “Once the informational requirements of a complete initial study have been met, the [agency] may again determine whether a negative declaration, a mitigated negative declaration, or an EIR is appropriate.”³⁶

The County's decision to prepare a Negative Declaration is based on a deficient Initial Study. The Initial Study for this Project lacks an accurate project description and setting, fails to provide evidentiary support and undertake an adequate environmental analysis.³⁷ This Project may not be approved until the informational requirements of a complete initial study are met.

1. *The Initial Study Failed to Provide an Adequate Description of the Project, its Setting.*

The substantial deficiencies in the Initial Study's description of the Project and the environmental setting discussed below preclude a meaningful assessment of impacts and violates CEQA.

The Staff Report recommends that the Planning Commission (1) approve the Negative Declaration; and (2) approve Use Permit application No. PA-1700032 with the Findings and Conditions of Approval contained in the Staff Report. The Project's Use Permit Application describes the proposed Project as follows:

³⁴ CEQA Guidelines, § 15125; *Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 322 (“Like an EIR, ‘an initial study or negative declaration ‘must focus on impacts to the existing environment, not hypothetical situations.’”)

³⁵ *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1202

³⁶ *Id.*

³⁷ *Id.*

Refer to Exhibit “1” and Use Permit Site Plan for detailed project description[.] Marketing events are not proposed with this application.³⁸

Exhibit “1” is one of four exhibits. Exhibit “1” is titled “Project Description.” Exhibit “2” is titled “Employee Census.” Exhibit “3” is titled “Truck Census.” Exhibit “4” is titled “2017/2011 Use Permit Traffic Comparison.”

Exhibit “1” outlines in greater specificity the three phases of the proposed Project. Some of the components in Phase 2 are annotated with either one or two asterisks. These asterisks indicate that those items were previously approved in 2011 Phase 2 on Application PA-1100224 (one asterisk), or in 2011 Phase 3 on Application PA-1100224 (two asterisks).³⁹ The Initial Study does not provide specifications or any description of the Project components listed in Exhibit “1”. Nor does it indicate if some of the asterisked components are already operational. Without this information, it is impossible for the public or the Lead Agency decision-maker to identify or establish the existing environmental setting or baseline for the proposed Project.

Exhibit “2” is an employee census chart. The chart purports to show a “new total” of 391 staff. In contradictory fashion, however, the Initial Study indicates that there will be no increase in employees.⁴⁰ If the “new” number of staff is greater than the existing number of employees, that is a critical fact in the Project description and is relevant to establishing the environmental setting. The number of employees that would result from the proposed Project as compared to existing employees must be clarified, disclosed and the related environmental impacts assessed in accordance with CEQA.

Exhibit “3” provides two charts indicating current truck trips per day and future truck trips per day. Exhibit “3” states that truck trips will increase after completion of Phase 3. The Exhibit indicates that the increase in truck trips is due to an increase in winery production from 15 million (140,000 Tons) to 20 million (200,000 Tons) noted in the Exhibit. An increase in production at the facility is not identified or discussed anywhere else in the Project description or Project documents. The Initial Study includes no information or evaluation of

³⁸ PRA Response, pdf. pp. 52-62 (“Application Use Permit PA-1700032”, p. 1.)

³⁹ Use Permit Application No. PA-1700032 at Exhibit “1”.

⁴⁰ Initial Study, p. 8.

environmental impacts associated with increases in truck trips or facility production.

Exhibit “4” provides a traffic comparison between 2011 and 2017. The Exhibit provides data suggesting that the proposed Project will reduced traffic intensity. However, the Initial Study must still evaluate and analyze this information. This data is also inconsistent with other information indicating that the Project will increase employees, truck trips and production levels.

The Project’s Use Permit Site Plan also reflects the uncertain scope of this Project. Some components are noted on the Site Plan, but are not listed in Exhibit “1”. Conversely there are some components listed in Exhibit “1”, but that are not included in the Site Plan. It is unclear, and unexplained, whether Exhibit “1” or the Use Permit Site Plan for PA-1700032 governs. The Initial Study must disclose what components this Project will consist of, and evaluate and analyze those components’ impacts.

The Initial Study also fails to include all phases of this Project. CEQA mandates that lead agencies must include the “whole of an action” that has the potential to result in a direct or reasonably foreseeable indirect physical change to the environment.⁴¹ The project description must include, but is not limited to, “later phases of the project, and any secondary, support, or off-site features necessary for its implementation.”⁴² This ensures that the agency identifies and examines all potential impacts of the proposed project before it is approved.

In this case, the Project will have three distinct phases: construction, operation/maintenance, and decommissioning. The decommissioning phase would consist of, for example, dismantling, salvaging/recycling, or disposing of the winery process equipment and on-site buildings, and potential revegetation on the approximately 64-acre Project site. These decommissioning activities are a part of the “whole of an action,” and as a matter of common sense they will result in environmental impacts, including impacts to air quality and public health. Yet, the Initial Study leaves the public and decision makers in the dark as to the specific

⁴¹ CEQA Guidelines, §15378 (emphasis added).

⁴² *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283 - 84.

impacts of decommissioning and are thus unable to fully assess the whole of the Project.

2. The Initial Study Failed to Provide an Adequate Factual Basis for the Project's Impact Findings.

A conclusory, bare-bones Initial Study is insufficient to support a Negative Declaration.⁴³ The Initial Study provides little to no support in its impact findings determination. There must be some evidence to support the entries.⁴⁴ Yet some entries have no evidentiary support, such as “Hazards,”⁴⁵ even though hazardous and acutely hazardous materials are on site.⁴⁶ In most cases, the document does not even describe the changes in the environment that are expected from the Project.

Additionally, the Initial Study concludes in several sections that the Project's compliance with laws and regulations are sufficient to reduce potentially significant impacts to a level of insignificance.⁴⁷ However, compliance with a regulation or law is not an indication of the sufficiency of mitigation measures where there is substantial evidence that the project may result in significant impacts.⁴⁸ CEQA requires an agency to fully assess the significance of a Project's impacts in light of substantial evidence “notwithstanding compliance with the adopted regulations or requirements.”⁴⁹

The Initial Study's conclusion that impacts from fugitive dust emissions and hazardous air pollutants will be less than significant because the Project will comply with Air District rules and regulations lacks evidentiary support. The Initial

⁴³ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

⁴⁴ CEQA Guidelines, § 15063(d)(3).

⁴⁵ Initial Study, at p. 4.

⁴⁶ PRA Response, pdf. p. 73 (Hazardous Materials Disclosure Survey); see also SWAPE Comments, p. 2.

⁴⁷ See e.g., Initial Study, Biological Resources (compliance with San Joaquin County Multi-Species Habitat Conservation and Open Space Plan; see also Initial Study, Transportation/Circulation (compliance with the rules and regulations of the Airport Land Use Commission to reduce the impact to airport flight paths to less than significant).

⁴⁸ *Keep our Mountains Quiet v. County of Santa Clara* (2015) Case No. H039707; *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441.

⁴⁹ CEQA Guidelines § 15064.4.

Study provides no factual basis to support this conclusion. The Initial Study did not quantify or evaluate the Project's potential emissions.⁵⁰

The County cannot rely on purported mitigation measures without first identifying and assessing the potential impacts. Only then can it evaluate the efficacy or feasibility of possible mitigation measures and explain how such measures would reduce impacts to a less-than-significant level. Moreover, compliance with Air District rules and regulations does not necessarily render the Project's impacts less than significant. Additional mitigation would likely be required to reach a less than significant level. Finally, reliance on mitigation is itself evidence that a significant impact may occur and that the proposed Negative Declaration is improper.

The Initial Study fails to describe the Project and its setting, and it lacks foundation for its conclusion that the Project will not have any significant environmental impacts. In failing to meet these basic CEQA requirements, the Negative Declaration is invalid.⁵¹

B. Substantial Evidence Supports a Fair Argument that the Project Will Have a Significant Effect on the Environment Triggering the Preparation of an Environmental Impact Report.

While the lack of an adequate Initial Study makes an accurate environmental impacts analysis impossible at this time, this deficiency in the record enlarges the scope of fair argument by lending a logical plausibility to an inference that such impacts may be significant.⁵² “[T]he agency should not be allowed to hide behind its own failure to gather relevant data.”⁵³

As detailed in the following sections, there is a fair argument supported by substantial evidence that the Project may result in significant impacts to air quality and greenhouse gas impacts, aesthetic impacts, public health risks, Valley Fever,

⁵⁰ See also *Lotus v. Department of Transportation*, 223 Cal.App.4th at 650.

⁵¹ *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 267 (“[A] correct determination of the nature and scope of the project is a critical step in complying with the mandates of CEQA.”)

⁵² See *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

⁵³ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

and on-site hazards and hazardous materials. Because the Project will have significant impacts that cannot be fully mitigated, an EIR is required and a Negative Declaration is not appropriate. The County is required to prepare an EIR to evaluate the Project's potentially significant impacts and propose all feasible mitigation measures that are necessary to reduce those impacts to less than significant levels.

1. *Substantial Evidence Supports a Fair Argument That the Project's Air Quality and Greenhouse Gas ("GHG") Impacts are Significant*

Our air quality consultant, Ms. Jaeger, calculated the Project's air quality impacts using the California Emissions Estimator Model Version CalEEMod.2016.3.1 ("CalEEMod"). Substantial evidence supports Ms. Jaeger's conclusion that the Project's construction-related criteria air pollutant emissions, specifically NO_x, would be significant.⁵⁴ As a result, she concludes, a Draft EIR should be prepared to adequately assess the Project's air quality impacts and identify additional mitigation measures to effectively reduce the Project's emissions to the maximum extent feasible.⁵⁵

Similarly, Ms. Jaeger calculated the Project's total GHG emissions and compared them to the South Coast Air Quality Management District's ("SCAQMD") screening threshold of 10,000 metric tons of carbon dioxide equivalents per year for industrial projects. She found that the Project's GHG emissions from construction and operation would exceed the SCAQMD's screening threshold and therefore could result in a potentially significant impact. The Initial Study however did not address or evaluate this impact.⁵⁶

Ms. Jaeger states that because the Project's construction and operational NO_x emissions and greenhouse gas emissions exceed applicable thresholds, additional mitigation measures must be identified and incorporated into an EIR to reduce these impacts to a less than significant level.⁵⁷ These additional feasible mitigation measures which attempt to reduce GHG emissions as well as Criteria Air Pollutants, such as NO_x, include, among others: requiring implementation of

⁵⁴ SWAPE Comments, p. 10.

⁵⁵ SWAPE Comments, p. 2.

⁵⁶ SWAPE, p. 12.

⁵⁷ SWAPE, p. 12.

diesel control measures, repowering or replacing older construction equipment engines, installing retrofit devices, instituting a heavy-duty off-road vehicle plan.⁵⁸ These measures are cost effective, feasible ways to reduce NO_x and GHG emissions released during Project activities.

Ms. Jaeger concludes that “[a] DEIR must be prepared to include additional mitigation measures, as well as include an updated air quality and GHG assessment to ensure that the necessary mitigation measures are implemented to reduce NO_x and GHG emissions to below thresholds.”⁵⁹

2. *Substantial Evidence Supports a Fair Argument That the Project’s Air Quality Impacts, Specifically Reactive Organic Gas (“ROG”) Emissions are Significant and Unmitigated*

In her expert letter, Dr. Phyllis Fox states that the Initial Study fails to describe the proposed Project in sufficient detail to allow an independent analysis by reviewers, it fails to include an estimate of air quality emissions, it fails to evaluate the significance of emissions from the Project on air quality, and it fails to mitigate the resulting significant impacts.⁶⁰ Moreover, contrary to the statement in the Initial Study, compliance with San Joaquin Air Pollution Control District rules does not constitute compliance with CEQA.⁶¹ The Initial Study fails as an informational document under CEQA and fails to identify and mitigate significant air quality impacts.

Dr. Fox calculated the air quality impacts of the Project, specifically of ROG emissions. The Project’s wine production increase will result in a significant increase in ROG emissions. Based on her calculations, which are supported by substantial evidence, the increase in ROG emissions would exceed the CEQA significance threshold of 10 tons/year “by nearly a factor of three.”⁶² The operation of the Project would result in a significant ROG air quality impacts not disclosed in the Initial Study, thus requiring the preparation of an EIR and the imposition of

⁵⁸ SWAPE, pp. 12-18.

⁵⁹ SWAPE, p. 18.

⁶⁰ Fox Comments, p. 6.

⁶¹ Fox Comments, p. 6.

⁶² Fox Comments, p. 9.

mitigation. Her calculations also demonstrate that even assuming compliance with SJVAPCD regulations, air quality impacts are significant.⁶³

3. *Substantial Evidence Supports a Fair Argument that the Project's Aesthetic Impacts are Significant*

Dr. Fox explains that the Initial Study fails to evaluate aesthetic impacts. The Initial Study includes a mitigation measure, which would confine direct light rays to the premises. Yet, this confinement “would not make the invisible to impacted parties,” according to Dr. Fox.⁶⁴ But by including this mitigation measure, the County acknowledges that the Project will have a significant aesthetic impact.

Because this Project will have a significant aesthetic impact that cannot be fully mitigated, an EIR is required. “In sum,” she states, “the County issued a Negative Declaration that included mitigation for a significant impact. The imposition of mitigation is an admission that the Project would result in a significant impact without mitigation.”⁶⁵ Dr. Fox also states “My analyses indicate air quality and public health impacts are also significant.”⁶⁶

4. *Substantial Evidence Supports a Fair Argument That the Project's Public Health Risks During Project Construction and Operation Are Significant*

Dr. Fox provides substantial evidence in her expert letter that during both Project construction and operation, heavy-duty diesel powered construction equipment and trucks would release considerable amounts of diesel particulate matter (“DPM”), measured as PM2.5 emissions.⁶⁷ Diesel exhaust contains nearly 40 toxic substances.⁶⁸

Although the San Joaquin Air District does not have a CEQA significance threshold for DPM, the San Luis Obispo County Air Pollution Control District has

⁶³ Fox Comments, p. 9.

⁶⁴ Fox Comments, p. 10.

⁶⁵ Fox Comments, p. 11.

⁶⁶ Fox Comments, p. 10.

⁶⁷ Fox Comments, p. 12.

⁶⁸ Fox Comments, p.12

developed one for DPM that is widely used in California. Dr. Fox used Ms. Jaeger's emissions estimates to conclude that emissions during Project construction and operation would exceed San Luis Obispo Air District's significance threshold for DPM. San Luis Obispo Air District's CEQA Guidance explains that if a Project exceeds the threshold, then "Best Available Control Technology" measures are required and if sensitive receptors are nearby, a health risk assessment must be prepared. The Initial Study failed to disclose the location of sensitive receptors (1,000 feet east of the Project), estimate DPM emissions (including from equipment and truck exhaust), require DPM controls, or prepare a health risk assessment.⁶⁹

Dr. Fox highlights the risk for public and worker health risks and this Initial Study's unacceptable dismissal of this risks. She notes, "projects much smaller in scope than the Project often result in significant impacts from construction diesel exhaust."⁷⁰ She concludes that the Initial Study should be revised to quantify health risks associated with construction equipment and operational truck exhaust, both on a project as well a cumulative basis, and require all feasible mitigation. "The health impacts of DPM emissions during both Project construction and operation are significant, requiring the preparation of an EIR."⁷¹

5. *Substantial Evidence Supports a Fair Argument That the Project's Valley Fever Impacts are Significant*

Valley Fever is contracted by inhaling Cocci spores, which become airborne during earth moving construction, which increases PM10 and PM2.5. San Joaquin County, where the Project is located, is within the established endemic range of Valley Fever.⁷² Construction workers who would be exposed to land disturbance activities would be at considerable risk of catching Valley Fever.⁷³

The Initial Study makes no mention of the existence of Valley Fever in the area or the potential health risks posed by Valley Fever from construction or operation of the Project. Dust exposure is one of the primary risk factors. Construction workers, alongside agricultural workers, are the most at-risk

⁶⁹ Fox Comments, p. 13

⁷⁰ Fox Comments, p. 13.

⁷¹ Fox Comments, p. 14.

⁷² Fox Comments, p. 17.

⁷³ Fox Comments, p. 15.

populations.⁷⁴ This is because these labor groups are in intimate contact with soil in a Valley Fever endemic area and many may be from non-endemic zones or may have never worked in an endemic area.

The IS/ND fails to inform the public of the potential significant consequences of Project construction and operation and associated environmental justice issues. It also does not require any mitigation to limit the public's or workers' exposure to the spores. "An IS/ND is not appropriate given that the Project site is located in an endemic area, indicating impacts are per se significant."⁷⁵The County must recirculate a CEQA document that adequately assesses Valley Fever and proposes adequate mitigation.⁷⁶

6. *Substantial Evidence Supports a Fair Argument That the Project May Result in a Significant Public Health Risk Due to Hazardous Soil Conditions*

The IS/ND is further deficient because it fails to evaluate and analyze the presence of hazardous conditions at the Project site using standard environmental due diligence practices.⁷⁷ Mr. Hagemann suggests that a Phase I Environmental Site Assessment should be prepared for the Project to ensure that hazardous soil or groundwater conditions do not exist that would pose a risk to construction workers or the public.⁷⁸

In particular, this Project poses the potential risk that workers may be exposed to residual pesticides in the soil due to historic agricultural use.⁷⁹ The potential for historic use of organochlorine and arsenic-based pesticides needs to be evaluated in an EIR in two ways: (1) identification of historic crop and pesticide use through a thorough review of historic aerial photos, records from the San Joaquin County Agricultural Commissioner and other historic records documenting past use of the Project sites; and (2) soil sampling of the Project site for the presence of

⁷⁴ Fox Comments, p. 18.

⁷⁵ Fox Comments, p. 17.

⁷⁶ Fox Comments, p. 19.

⁷⁷ SWAPE Comments, p. 2.

⁷⁸ SWAPE Comments, p. 2.

⁷⁹ SWAPE Comments, p. 3.

pesticide residues.⁸⁰ Soil sampling at the Project site should be governed by the use of California Department of Toxic Substances Control guidance for agricultural sites.⁸¹ An adequate evaluation should also include identification and soil sampling of any areas where pesticides may have been mixed and stored.

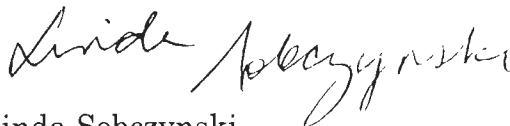
C. CONCLUSION

This IS/ND is inadequate because it fails to include a complete and accurate Project description, set forth the existing environmental setting and identify, analyze, and mitigate the Project's potentially significant impacts.⁸² Due to these significant deficiencies, the IS/ND is fatally flawed.

CEQA requires that an EIR be prepared if there is substantial evidence supporting a fair argument that any aspect of a project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial.⁸³ As discussed in detail above, there is substantial evidence that the Project would result in significant adverse impacts that were not identified, adequately analyzed, or mitigated to a less-than-significant level in the IS/ND.

We urge the County to fulfill its responsibilities under CEQA by withdrawing the IS/ND and preparing an EIR.

Sincerely,



Linda Sobczynski

LTS:acp

⁸⁰ SWAPE Comments, pp. 3-5.

⁸¹ SWAPE Comments, p. 5.

⁸² *El Dorado County Taxpayers for Quality Growth v. County of El Dorado* (2004) 122 Cal.App.4th 1591, 1597 [20 Cal.Rptr.3d 224, 227], as modified (Oct. 14, 2004).

⁸³ CEQA Guidelines § 15063, subd. (b)(1).