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May 13, 2020

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Re: Rebuttal Comments to Responses to Public Comments Regarding Initial Study/Mitigated Negative Declaration for Hummingbird Energy Storage Project (File No. CP19-020)

Dear Honorable Planning Commission Members, Ms. Hawkins, and Ms. Hughey:

On behalf of **San José Citizens for Sensible Industry** (“Citizens”), we submit these comments in response to the Responses to Public Comments (“City Responses”) prepared by the City of San José (“the City”) in relation to the Initial Study/Mitigated Negative Declaration (“IS/MND”) for the Hummingbird Energy Storage Project (“Project”).¹

¹ Project File Number CP19-020.

The Project currently appears as item 4a on the agenda as part of the Consent Calendar for the May 13, 2020 Planning Commission Hearing. A representative for Citizens will appear at the Planning Commission Hearing to make public comment. We hereby request that the agenda item for approval of the MND be removed from the consent calendar and considered separately to allow for public comment.

The IS/MND was prepared by the City pursuant to the California Environmental Quality Act (“CEQA”).² The Project, proposed by esVolta, LP (“Applicant”), would allow an energy storage facility in an existing 102,462 square foot industrial building with a new substation of approximately 15,000 square feet at 6321 San Ignacio Avenue in southern San José.³ The energy storage facility will contain lithium-ion batteries with a total storage capacity of 75 MW/300 MWh.⁴ The IS/MND states that it is the purpose of the Project to store energy produced by intermittent renewable sources to assist the City and the State of California in meeting their carbon-free electricity goals.⁵ The Project requires a Conditional Use Permit from the City.⁶

In addition, the Project includes a 2.5-mile-long transmission line within the Monterey Road public right-of-way that would connect the energy storage facility and substation to the existing Pacific Gas & Electric Metcalf Substation.⁷ The transmission line would run underground for about two miles and then come aboveground for the final half a mile to traverse over Coyote Creek and connect to the Metcalf Substation.⁸ Three riser poles, each approximately 130 feet tall, would support the overhead transmission line crossing Coyote Creek.⁹ The IS/MND acknowledges that installation of the poles and overhead transmission line would disturb riparian habitat around the creek.¹⁰

² Public Resources Code § 21000 *et seq.*

³ Initial Study: Hummingbird Energy Storage Project prepared by City of San José in consultation with David J. Powers & Associates, Inc. (March 2020) (“IS/MND”), pp. 6–7.

⁴ IS/MND, p. 7.

⁵ IS/MND, p. 6.

⁶ IS/MND, p. 6.

⁷ IS/MND, p. 6.

⁸ IS/MND, p. 6.

⁹ IS/MND, p. 9.

¹⁰ IS/MND, p. 9.

Construction is anticipated to take approximately six months for the battery storage facility, substation, and transmission line.¹¹ This would entail some excavation, grading, and vegetation management in addition to building the substation and installing mechanical equipment.¹²

On April 7, 2020, we submitted comments on the Project's IS/MND. The City Responses attempt to rebut our comments, but ultimately fails to resolve the major issues we raised. As detailed below, our comments still provide substantial evidence supporting a fair argument of significant environmental impacts that must be analyzed in an environmental impact report ("EIR") under CEQA.

The City Responses fail to address the IS/MND's lack of an energy analysis required under CEQA or its incomplete analysis of greenhouse gas ("GHG") impacts resulting from the Project's transactions with the California Independent System Operator ("CAISO"). The City improperly concludes that the risk of battery fires and release of hazardous materials from a potential accident need not be analyzed because the City Responses describe safety measures. The City Responses also do not adequately resolve the Project's potential impacts to western pond turtles and golden eagles, nor does it show that construction noise impacts to residences along Monterey Road would be less than significant.

These comments were prepared with the assistance of energy expert David Marcus, M.A., health hazard and air pollution expert Phyllis Fox, Ph.D., senior biologist and wildlife ecologist Scott Cashen, M.S., and noise expert Derek Watry of Wilson Ihrig. Mr. Marcus' comments and curriculum vitae are attached to this letter as Exhibit A.¹³ Dr. Fox's comments and curriculum vitae are attached as Exhibit B.¹⁴ Mr. Cashen's comments and curriculum vitae are attached as Exhibit

¹¹ IS/MND, pp. 32, 110. Page 11 of the IS/MND refers to a nine-month construction period, but later analyses in the document refer several times to a total construction period of six months. We are operating under the assumption that the nine-month period is a typo.

¹² IS/MND, p. 11.

¹³ Exhibit A: Comments of David Marcus on the City of San Jose Planning Department responses to comments on the IS/MND for the Proposed Hummingbird Project (May 11, 2020) ("Marcus Response").

¹⁴ Exhibit B: Letter from Phyllis Fox to William Mumby re Hummingbird Energy Storage Project, File No. CP19-020, Initial Study/Mitigated Negative Declaration, City of San Jose Responses to Public Comments (May 12, 2020) ("Fox Response").

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C.¹⁵ Mr. Watry's comments and curriculum vitae are attached as Exhibit D.¹⁶ Exhibits A through D are fully incorporated herein and submitted to the City herewith. Therefore, the City must separately respond to the technical comments in Exhibits A through D. Exhibits and references to the expert comments are included by Dropbox.

For the reasons discussed herein, and in the attached expert comments, Citizens urges the City to postpone approval of the IS/MND at the Planning Commission hearing set for May 13, 2020 to allow it to remedy the deficiencies in the IS/MND by preparing a legally adequate environmental impact report ("EIR") pursuant to CEQA.

I. STATEMENT OF INTEREST

Citizens is an unincorporated association of individuals and labor organizations that are concerned about environmental and public health impacts from development in the region where the coalition's members and their families live, work, and recreate. The coalition is comprised of individuals and organizations, including California Unions for Reliable Energy ("CURE") and its local affiliates, and the affiliates' members and their families, as well as other individuals who live, work, and recreate in Santa Clara County.

Citizens has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working and living environment for its members. Environmental degradation jeopardizes future jobs by causing construction moratoriums, eliminating protected species and habitat, and putting added stresses on the environmental carrying capacity of the state. This reduces future employment opportunities. In contrast, well designed projects that reduce the environmental impacts of electricity generation and transmission improve long-term economic prospects and reduce adverse impacts on local communities.

¹⁵ Exhibit C: Letter from Scott Cashen to William Mumby re Comments on the Initial Study and Mitigated Negative Declaration for the Hummingbird Energy Storage Project (May 11, 2020) ("Cashen Response").

¹⁶ Exhibit D: Letter from Derek Watry to William Mumby re Hummingbird Energy Storage Project, San José, California – Comment on *Responses to Public Comments* (May 11, 2020) ("Watry Response").

CURE is a coalition of labor organizations whose members encourage sustainable development of California's energy resources. CURE's members help solve the State's energy problems by building, maintaining, and operating conventional and renewable energy power plants and transmission facilities. Since its founding in 1997, CURE has been committed to building a strong economy and a healthier environment. CURE has helped cut smog-forming pollutants in half, reduced toxic emissions, increased the use of recycled water for cooling systems, and pushed for groundbreaking pollution control equipment as the standard for all new power plants, all while helping to ensure that new power plants and transmission facilities are built with highly trained, professional workers who live and raise families in nearby communities.

Individual members of Citizens, CURE, and its affiliated labor organizations live, work, recreate, and raise their families in Santa Clara County. They would be directly affected by the Project's environmental and health and safety impacts. Individual members of CURE's affiliates may also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants or other health and safety hazards that exist onsite. The members of Citizens have an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members.

II. THE CITY RESPONSES DO NOT ADDRESS THE PROJECT DESCRIPTION'S INCOMPLETE AND INACCURATE INFORMATION ABOUT FACILITY OPERATION AND BATTERY COMPOSITION

Our initial comments identified numerous deficiencies in the Project description that rendered the description incomplete and the IS/MND inadequate as an informational document under CEQA.¹⁷ "The scope of the environmental review conducted for the initial study must include the entire project. . . [A] correct determination of the nature and scope of the project is a critical step in complying with the mandates of CEQA."¹⁸

¹⁷ See 14 C.C.R. § 15063(d)(1) (requiring an initial study to include a complete and accurate description of the project under consideration).

¹⁸ *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 267 (internal quotations and citations omitted).

As explained by Mr. Marcus, many of those concerns remain unaddressed by the City Responses. Crucial information regarding the Project's operation is still missing: Comment A.34 is about "the lack of information on net or gross generation from the proposed project," but Response A.34 merely refers to Response A.6, which is about battery safety.¹⁹ "Neither this Response nor any other have any information about how often the project is expected to run, whether charging or discharging, or about how much electricity it will consume while charging and how much it will generate while discharging."²⁰ The absence of this information hinders the ability of the public and the City to fully comprehend the Project's greenhouse gas emissions impacts.

Relatedly, Dr. Fox explains that the IS/MND's reliance on the CalEEMod model is misguided given that it is not suited to estimating emissions from battery energy storage facilities.²¹ The electrical equipment required to operate a facility like the Project uses much more electricity than the conventional commercial buildings from 2002 that serve as the basis for the CalEEMod model.²² Thus, the provision of CalEEMod modeling data does not address our concerns.²³

Furthermore, most of the critical equipment specifications necessary to analyze the risks of battery accidents are still missing from the record.²⁴ Dr. Fox explains that the City Responses' explanation that the batteries are lithium ion batteries is too generic to be useful for the CEQA analysis.²⁵ Dr. Fox explains that the Material Safety Data Sheet ("MSDS") showing the chemical composition of the batteries should have been attached the IS/MND itself and its provision only in response to the Public Records Act request slowed down her ability to prepare a health risk analysis.²⁶ In addition, Dr. Fox explains that supplying the MSDS without an accompanying risk of upset analysis does not satisfy CEQA and does not excuse the City's omission error, because CEQA requires analysis of reasonably

¹⁹ Marcus Response, p. 8.

²⁰ Marcus Response, p. 8.

²¹ Fox Response, pp. 2–3.

²² Fox Response, p. 2.

²³ Fox Response, pp. 2–3.

²⁴ Fox Response, p. 2.

²⁵ Fox Response, p. 3.

²⁶ Fox Response, p. 3.

foreseeable accidents involving the release of hazardous materials into the environment.²⁷

Dr. Fox additionally explains that Response A.5 is misleading when it says that the batteries do not contain hazardous chemicals.²⁸ This response misconstrues our comments which primarily focus on how fires can trigger chemical reactions that then release hazardous gases that were not previously present in the batteries themselves.²⁹ Moreover, toxics chemicals are still present in various battery components even if cobalt and other toxic elements are not found in the electrolyte.³⁰ The MSDS itself actually reports a list of hazardous ingredients that is reproduced in the Fox Response Comments.³¹

Therefore, the IS/MND's project description is still incomplete and inaccurate in violation of CEQA. The Planning Commission should postpone any approvals until an EIR with the full and correct information can be prepared.

III. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT PROJECT OPERATIONS MAY RESULT IN POTENTIALLY SIGNIFICANT GREENHOUSE GAS (GHG) AND AIR QUALITY IMPACTS THAT THE IS/MND FAILS TO DISCLOSE AND MITIGATE

A. The City Responses Fail to Address Emissions of GHGs and Air Pollutants from the Project's Energy Use

As explained in our initial comments, CEQA requires agencies to analyze a project's energy impacts when "the project's energy use reveals that the project may result in significant environmental effects due to the wasteful, inefficient, or unnecessary use of energy...."³² The CEQA Guidelines also state that the analysis of a project's energy impacts "should include the project's energy use for all project phases and components," and that relevant considerations include "the project's size, location, orientation, equipment use and any renewable energy features that

²⁷ Fox Response, pp. 3–4; CEQA Guidelines, Appendix G, § IX(b): Hazards and Hazardous Materials.

²⁸ Fox Response, pp. 4–5.

²⁹ Fox Response, pp. 4–5.

³⁰ Fox Response, p. 5.

³¹ Fox Response, pp. 5–6.

³² 14 C.C.R. § 15126.2(b).

could be incorporated into the project.”³³ Further guidance for considering energy impacts is included in Appendix F of the Guidelines, which states that the energy analysis may include “[t]he effects of the project on peak and base period demands for electricity and other forms of energy,” as well as “the effects of the project on energy resources.”³⁴ The CEQA Guidelines also state that the energy analysis “may be included in related analyses,” such as the GHG impact analysis.³⁵

Yet, the City Responses do not address the IS/MND’s failure to comply with these requirements under CEQA. The City Responses say nothing about battery inefficiency and the risk this poses to achieving the Project’s stated goal of GHG emissions reductions if appropriate measures are not taken to ensure the batteries are charged with electricity from renewable generation.

Furthermore, the CEQA Guidelines state that lead agencies “shall make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project.”³⁶ The agency’s analysis “must reasonably reflect evolving scientific knowledge and state regulatory schemes.”³⁷ CEQA further requires agencies to consider both direct and indirect GHG emissions and air quality impacts associated with a project.³⁸

Response A.1 asserts that the project would store excess energy generated by intermittent resources such as wind and solar that would otherwise be curtailed

³³ *Id.*

³⁴ CEQA Guidelines, Appendix F: Energy Conservation, Section C(3); Section C(5).

³⁵ 14 C.C.R. § 15126.2(b).

³⁶ *Id.* § 15064.4(a).

³⁷ *Id.* § 15064.4(b); see also *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 504 (holding that lead agencies have an obligation to track shifting regulations and to prepare CEQA documents in a fashion that keeps “in step with evolving scientific knowledge and state regulatory schemes”).

³⁸ See 14 C.C.R. § 15064(d) (evaluating significance of the environmental effect of a project requires consideration of reasonably foreseeable indirect physical changes caused by the project); 14 C.C.R. § 15358(a)(2) (defining “effects” or “impacts” to include indirect or secondary effects caused by the project and are “later in time or farther removed in distance, but are still reasonably foreseeable” including “effects on air”); CEQA Guidelines, Appendix G, § VIII: Greenhouse Gas Emissions (stating agencies should consider whether the project would “generate greenhouse gas emissions, **either directly or indirectly**, that may have a significant impact on the environment.”) (emphasis added);

and cites to Pacific Gas & Electric advice letter 5322-E as evidence of the battery storage project's environmental benefits. However, as indicated by Mr. Marcus, the City Responses ignore the contents of California Public Utilities Commission ("CPUC") Resolution E-4949, which discussed and approved that advice letter.³⁹ Resolution E-4949 explicitly removed any finding that the Hummingbird project would reduce GHG emissions.⁴⁰ While the Independent Evaluator Report attached to the City Responses indicates that the amount of avoided curtailment was addressed by PG&E in its bid evaluation process that led to Hummingbird being selected for a contract, the results of that evaluation are largely redacted.⁴¹ Because "[t]here is no publicly available quantification of what, if any, avoided curtailment would result" from the Project, the City Responses' claim that the Project would store excess energy generated by intermittent sources lack support by substantial evidence.⁴² In the absence of any legally enforceable condition to charge only when there is curtailment on the CAISO system, Response A.1. is not supported by the evidence and our comment stands.⁴³

Response A.3 says that the stated purpose of the project is to store energy and not create additional energy demand. But as Mr. Marcus explains, the stated purpose does not matter if the actual result diverges from that purpose.⁴⁴ The City Responses fail to account for the fact that batteries cannot be perfectly efficient and thus the act of storing energy and then discharging results in energy waste.⁴⁵ This process thereby creates additional demand for energy.⁴⁶ As explained in our initial comments, Mr. Marcus calculates, based on CAISO data of battery round trip efficiency (80.7 percent) and capacity factor (9.7 percent), that the Project would have a net annual energy consumption of over 15 GWh.⁴⁷ Addressing Response A.8, Mr. Marcus explains that because the Project would increase demand while charging and decrease demand when discharging and because more energy is used for charging than released through discharging, the source of the energy matters

³⁹ Marcus Response, p. 1.

⁴⁰ Resolution E-4949 (November 8, 2018), p. 39.

⁴¹ Marcus Response, p. 1 (citing City Responses, pdf. Pages 164, 236–237).

⁴² Marcus Response, p. 1.

⁴³ Marcus Response, p. 1.

⁴⁴ Marcus Response, p. 1.

⁴⁵ Marcus Response, p. 1.

⁴⁶ Marcus Response, p. 1.

⁴⁷ Marcus Response, pp. 1–2.

for how GHG emissions are impacted.⁴⁸ Mr. Marcus explains that the Response “ignores the net demand of the project, and treats the project as if it has no net energy demand of its own.”⁴⁹

Response A.8 also asserts that the “point of the project is to allow future renewable sources to have a place to store excess” energy. However, Mr. Marcus clarifies that the contract between Applicant and PG&E is purely about providing Resource Adequacy capacity and says “nothing about the source of the energy to be used to charge the Hummingbird batteries.”⁵⁰ Moreover, there is nothing in the IS/MND that would require the actual fulfilment of the stated purpose of only using “excess” or “otherwise curtailed” renewable energy to charge the batteries.

The City argues that the batteries do not produce GHG emissions when charging or discharging and therefore the IS/MND needed only to evaluate the emissions that will be produced from operating the facility.⁵¹ However, as explained in our initial comments, while the batteries themselves do not emit pollutants, the choices made by Applicant in how it purchases electricity to charge the batteries matters for purposes of net GHG emissions. Buying from CAISO without considering what the marginal resource is runs a high risk of purchasing electricity generated from fossil fuel sources: As explained by Mr. Marcus, “[c]harging energy has to come from somewhere, and the ‘somewhere’ it will come from will be the marginal generating resource. Sometimes, when renewable resources are being curtailed, they are the marginal generating resources. But the rest of the time, the marginal generating resource is not a renewable generator. If no renewable resource is being curtailed at some particular time, then every renewable resource is already producing as much as it can at that time, and cannot increase its output to provide charging energy for Hummingbird.”⁵² Because CAISO data showed that the marginal resource can be assumed to be renewable only about 3.52 percent of the time in the year ending March 31, 2020, it is far more likely than not that the energy with which the Project will charge its batteries will come from GHG emitting sources unless the City incorporates permit conditions to ensure that only renewables will be used.⁵³ As observed by Mr.

⁴⁸ Marcus Response, p. 3.

⁴⁹ Marcus Response, p. 3.

⁵⁰ Marcus Response, p. 2.

⁵¹ Response A.8.

⁵² Marcus Response, p. 3.

⁵³ Marcus Response, p. 3.

Marcus, neither the current application to the City nor the Hummingbird contract with PG&E appear to contain any such condition.⁵⁴

Referencing Senate Bill 100 requirements to expand renewable energy in California, Response A.8 goes on to say that the proportion of renewable generation sources will increase in the years to come through 2045. Mr. Marcus notes that the 2045 goal is irrelevant given that the Project has a 15-year term. “The fact that increasing shares of California energy generation will come from renewable resources is not directly relevant either. What matters is the marginal source of generation that provides charging energy for Hummingbird, not the average source of generation during all hours of the year.”⁵⁵ Mr. Marcus explains that it is entirely possible for the SB 100 requirement to be met while all the incremental generation needed to meet the Project charging load comes from non-renewable sources.⁵⁶

Moreover, as Mr. Marcus explains “if the practicability of Hummingbird meeting its goals is dependent on as-yet-unbuilt projects, then one should also consider as-yet-unbuilt storage projects that will be competing with Hummingbird for the excess generation from those as-yet-unbuilt renewable projects.”⁵⁷ Mr. Marcus points to CPUC Resolution E-4949 to show that the other three energy storage projects approved alongside Hummingbird total 492.5 MW, six times larger than the 75 MW for Hummingbird.⁵⁸ Assuming these other projects will seek otherwise-curtailed renewable energy, it becomes questionable whether there will be enough such energy to go around.⁵⁹ The only way to ensure the Project will not increase net GHG emissions is to include binding measures to that effect.

Response A.8 further insists that the IS/MND does not need any binding measures to ensure the batteries are charged with renewable energy to eliminate the risk of additional GHG emissions because using and storing renewable energy is “the project objective.”⁶⁰ Putting aside the fact that the contract with PG&E says nothing about renewable energy, the Project objective does not provide any true

⁵⁴ Marcus Response, p. 4.

⁵⁵ Marcus Response, p. 4.

⁵⁶ Marcus Response, p. 4.

⁵⁷ Marcus Response, p. 5.

⁵⁸ Marcus Response, p. 5.

⁵⁹ Marcus Response, p. 5.

⁶⁰ Response A.8, p. 14.

reassurances about what will actually happen.⁶¹ Irrespective of the Project's intentions, leaving to the CAISO market the type of electricity that will be used to charge the batteries with no restrictions on when Applicant will opt to buy or sell presents a major loophole to the stated goal. As Mr. Marcus aptly puts it, "good intentions are neither necessary nor sufficient for mitigation conditions."⁶² Moreover, if the Applicant's objective is truly to charge the batteries with renewable energy in an effort to reduce GHG emission, why not accept a permit condition requiring as much for the Project's operation?

Mr. Marcus also explains why Response A.8's claim that mitigation is not possible is wrong.⁶³ CPUC Resolution E-4949, approving the Hummingbird contract with PG&E, requires PG&E to track GHG emissions impacts from operation of the Project and submit annual reports to the CPUC Energy Division.⁶⁴ Furthermore, Mr. Marcus provides examples of other online tools that can be used to track GHG emissions and CAISO prices that act as a proxy for when the marginal resources are renewables.⁶⁵ Therefore, emissions tracking and other measures to limit the GHG emissions resulting from the Project are clearly possible.

Likewise, Response A.9's claim that the Project will operate depending on CAISO's needs and market conditions is misleading. Except for the Project's reliability obligations, the hour-by-hour operations of the Project will be economic decisions of the Project owners, not of CAISO. Mr. Marcus explains that CAISO operates the grid, not power plants or energy storage facilities. "The owners of Hummingbird, either acting as their own scheduling coordinator (SC) or through an SC operating on their behalf, will tell the CAISO at what market prices they will operate, whether as a resource or as a load, and thus will have a great deal of control over which hours they will operate in. Thus, any implication that the owners have no operational control of Hummingbird, and thus cannot be subjected to conditions constraining their operations, is false."⁶⁶

⁶¹ Marcus Response, p. 4.

⁶² Marcus Response, p. 4.

⁶³ Marcus Response, pp. 4–5.

⁶⁴ Marcus Response, p. 5.

⁶⁵ Marcus Response, p. 5.

⁶⁶ Marcus Response, p. 6.

In *Covington v. Great Basin Unified Air Pollution Control District*, the California Court of Appeal held that the lead agency's failure to show that air quality mitigation measures proposed by the petitioners for a geothermal plant were not feasible required revisions to the CEQA document to address the issue.⁶⁷ Similarly, here, the City has failed to fully grapple with the evidence presented showing that there are feasible mitigation measures that could reduce the GHG impacts from operation of the battery storage facility.

Because CEQA requires an energy analysis that considers issues of waste and impacts on demand and a GHG analysis that keeps pace with the latest science, the City should have analyzed the issues described in our comments. The failure of the IS/MND or the City Responses to do so means that the City violates CEQA. Moreover, the City has not shown that the mitigation measures proposed by Mr. Marcus are infeasible. An EIR must be prepared.

B. There Is Substantial Evidence Supporting a Fair Argument that GHG and Energy Impacts are Significant and Unmitigated

Response A.10 claims that pursuant to CPUC Resolution E-4909, the Project will not promote GHG emissions elsewhere.⁶⁸ We do not dispute the CPUC's conclusion that energy storage *can be* a valuable clean energy resource, but as explained above, it depends on how it is used. In fact, CPUC Resolution E-4949, which approved the contracts authorized by Resolution E-4909, including the one between Applicant and PG&E for the Hummingbird Project, expressly removed the finding that the contracts would reduce GHG emissions and required PG&E track and report the GHG emissions impact of Hummingbird and other energy storage projects.⁶⁹ As Mr. Marcus explains, the Hummingbird-PG&E contract is a pure Resource Adequacy contract and "contains no obligation whatsoever for Hummingbird to provide energy."⁷⁰ Also, nothing in the contract requires Calpine,

⁶⁷ *Covington v. Great Basin Unified Air Pollution Control District* (2019) 43 Cal.App.5th 867, 881–883.

⁶⁸ Response A.10, p. 17.

⁶⁹ Marcus Response, pp. 6–7; see also CPUC Resolution E-4949 (November 8, 2018) (opting to "remove reference to the overall GHG benefits of the procurement and . . . require PG&E to report annually on the estimated GHG impact of the portfolio of projects.")

⁷⁰ Marcus Response, p. 6.

the San José-based owner of the three natural gas powerplants at issue in the CPUC proceedings, to shut down the powerplants.⁷¹

Response A.11 claims that the charging energy would not come from fossil fuel energy because the Moss Landing power plant is “slated to close in 2023.”⁷² This argument is a red herring. First, the Project is planned to be operational before 2023, so the closure is not evidence that Moss Landing power plant would never be the marginal source of CAISO electricity when the Project is charging.⁷³ Second, as Mr. Marcus explains, “Moss Landing is just one of many combined cycle plants in California, and the Response does not address the main point of the original comments, that combined cycles are the most likely plants to be the marginal sources of CAISO generation.” Response A.11 improperly assumes that once Moss Landing power plant is decommissioned, no other fossil-fuel power plant will be the marginal source of charging energy for the Project.⁷⁴ In fact, the IS/MND itself assumed a rate of GHG emissions indicative of fossil-fuel generation when it calculated GHGs for energy consumption of the building.⁷⁵

Although Response A.11 cites to a U.S. Energy Information Administration (“EIA”) document to argue that the 15.2 GWh of annual net energy consumption is “vastly overstated,” the source the City relies on has nothing to do with the accuracy of this number.⁷⁶ All the EIA source says is that 15.2 GWh corresponds to the average annual use of 3200 households; this in no way rebuts the calculation for the net battery energy consumption.⁷⁷ Mr. Marcus’ calculations using the 75 MW of capacity, assuming 80.7 percent efficiency, 9.7 percent capacity factor, and year-round operation remain unrefuted by the Responses.⁷⁸

⁷¹ Marcus Response, pp. 6–7.

⁷² Response A.11, p. 18.

⁷³ Marcus Response, p. 7.

⁷⁴ Marcus Response, p. 7.

⁷⁵ Marcus Response, p. 7; Comment A.43. The IS/MND calculated 125 MT CO₂e/year based on an underestimated amount of electricity usage of 0.36359 GWh/year. When the electricity consumption from battery inefficiency of 15.2 GWh/year is accounted for this yields 5,240 MT CO₂e/year. Thus, our assumption about fossil fuel GHG emissions is aligned with the IS/MND’s own assumptions.

⁷⁶ Marcus Response, p. 7.

⁷⁷ Marcus Response, p. 7.

⁷⁸ See Marcus Response, p. 7 (“75 MW x 8760 hours/year x 9.7% capacity factor x 1/.807 efficiency x (100%-80.7) x 1GWh/1000 MWh = 15.2 GWh/year.”)

As a result, the initial comments still constitute substantial evidence of potentially significant GHG and energy impacts that the IS/MND failed to adequately analyze. Failure to include any permit conditions to ensure reliance on renewable generation and to limit GHG emissions means these impacts remain unmitigated and an EIR must be prepared.

C. Substantial Evidence Supports a Fair Argument that The Project's Cumulative GHG and Air Quality Impacts May be Significant

CEQA requires analysis of cumulative impacts, defined as “two or more individual effects which, when considered together, are considerable.”⁷⁹ Such impacts may “result from individually minor but collectively significant projects taking place over a period of time.”⁸⁰ Cumulatively considerable means that “the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.”⁸¹

Dr. Fox explains that her cumulative impacts analysis was informed by these provisions of the CEQA Guidelines, as she considered a variety of sources of air pollutants within the San Francisco Bay Area Air Basin (“SFBAAB”).⁸² She used a list-based approach authorized under CEQA Guidelines section 15130(b)(1)(a) to analyze past, present, and reasonably foreseeable future projects producing related or cumulative impacts.⁸³ While Response A.15 argued that there are “no other cumulative projects on or near the project site, nor along the Monterey Road corridor, with the potential to combine with the project to result in significant cumulative impacts,” Dr. Fox explains that emissions released anywhere within the SFBAAB contribute cumulatively to regional air quality and must be considered.⁸⁴

She further elaborates in response to Response A.16 that data centers were suitable projects to consider in her cumulative air quality impacts analysis because

⁷⁹ 14 C.C.R. § 15355.

⁸⁰ 14 C.C.R. § 15355(b).

⁸¹ 14 C.C.R. § 15064(h)(1).

⁸² Fox Response, pp. 9–11.

⁸³ Fox Response p. 10; 14 C.C.R. § 15130(b)(1)(a).

⁸⁴ Response A.15; Fox Response, p. 9.

both the Project and the data centers emit the same pollutants—namely, NO_x, ROG, and GHGs.⁸⁵ Mr. Marcus adds that Response A.16’s claim about the Project consuming far less energy than data centers is erroneous given energy losses for charging and discharging, and in fact, “both require substantial energy generation on the grid in order to supply the power that makes them operate.”⁸⁶

Furthermore, Response A.16 is incorrect when it says the failure of the Project to individually exceed the significance threshold means the Project necessarily has no significant cumulative air quality impacts.⁸⁷ This assertion is not supported by the language of the BAAQMD CEQA Guidelines, which merely say that if a project’s emissions exceed the significance threshold, the air quality impacts are presumed significant.⁸⁸ The City cannot attempt to foreclose the assessment of cumulative impacts by arguing that the BAAQMD significance thresholds bar a fair argument of cumulatively considerable impacts if the individual Project does not exceed the thresholds.⁸⁹ CEQA expressly allows for introduction of evidence to show cumulatively considerable effects notwithstanding compliance with a plan or threshold.⁹⁰

In fact, case law says that even individually insignificant incremental contributions to air pollution can still be part of a cumulatively considerable impact requiring analysis in an EIR.⁹¹ In *Kings County Farm Bureau v. City of Hanford*, the city prepared an EIR for a 26.4-megawatt coal-fired cogeneration plant.⁹² Notwithstanding the fact that the EIR found that the project region was out of attainment for PM10 and ozone, the City failed to incorporate mitigations for the project’s cumulative air quality impacts from project emissions because it

⁸⁵ Fox Response, p. 10.

⁸⁶ Marcus Response, p. 8.

⁸⁷ Response A.16.

⁸⁸ BAAQMD CEQA Guidelines, p. 2-1.

⁸⁹ See *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342 (“A public agency cannot apply a threshold of significance or regulatory standard in a way that forecloses the consideration of any other substantial evidence showing there may be a significant effect.”) (internal quotations omitted).

⁹⁰ 14 C.C.R. § 15064(h)(3) (“If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding that the project complies with the specified plan or mitigation program addressing the cumulative problem, an EIR must be prepared for the project.”)

⁹¹ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692.

⁹² *Id.* at 706.

concluded that the Project would contribute “less than one percent of area emissions for all criteria pollutants.”⁹³ The Court held that it was an error for the City to not take into account the nonattainment with air quality standards.⁹⁴ Regarding ozone, the Court reasoned that “[t]he relevant question to be addressed in the EIR is not the relative amount of [ozone] precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin.”⁹⁵ In addition, the Court generally held that the EIR improperly sidestepped the cumulative impacts analysis when it “focused on the individual project’s relative effects and omitted facts relevant to an analysis of the collective effect this and other sources will have upon air quality.”⁹⁶

Here, BAAQMD acknowledges that the SFBAAB is in nonattainment for federal and state air quality standards for ozone.⁹⁷ NO_x and ROG, two of the pollutants resulting from the Project and analyzed by Dr. Fox in her cumulative impacts discussion, are ozone precursors that react in the presence of sunlight and heat to form ozone.⁹⁸ The Santa Clara Valley, where the project will be built, is an area with “[h]igh summer temperatures, stable air and mountains surrounding the valley” which “combine to promote ozone formation.”⁹⁹ Dr. Fox explains that “[t]hese background air quality conditions illustrate that even incremental contributions to NO_x and ROG pollution can have cumulatively considerable effects by promoting the formation of yet more ozone, pushing the SFBAAB further into nonattainment with its air quality obligations.”¹⁰⁰ Thus, under *Kings County*, the assertion that the Project will be a mere “drop in the bucket” of air pollution in the SFBAAB must be understood in the context of poor air quality that currently exists.¹⁰¹ Under those circumstances, there is a fair argument of cumulatively considerable air quality effects that demands preparation of an EIR.

⁹³ *Id.* at 719.

⁹⁴ *Id.* at 718–721.

⁹⁵ *Id.* at 718.

⁹⁶ *Id.* at 721.

⁹⁷ BAAQMD, Air Quality Standards and Attainment Status, available at <https://www.baaqmd.gov/about-air-quality/research-and-data/air-quality-standards-and-attainment-status> (last accessed May 12, 2020); BAAQMD CEQA Guidelines, p. 2-1.

⁹⁸ Fox Response, p. 11; BAAQMD CEQA Guidelines, p. C-15.

⁹⁹ Fox Response, p. 11; BAAQMD CEQA Guidelines, p. C-11.

¹⁰⁰ Fox Response, pp. 11–12.

¹⁰¹ *Kings County*, 221 Cal.App.3d at 718–721.

IV. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT CONSTRUCTION HEALTH RISK AND HAZARD IMPACTS ARE SIGNIFICANT

Response A.17 primarily takes issue with two aspects of our construction health risk analysis: (1) significance thresholds are not exceeded for any sensitive receptors; and (2) a longer timeframe or works hours for construction would result in lower emissions than were modeled.¹⁰² First, Dr. Fox explains that the BAAQMD CEQA Guidelines do not say that the significance thresholds for construction emissions do not apply to commercial receptors—they provide standards for general “receptors.”¹⁰³ Second, Dr. Fox explains that the CalEEMod model assumed an eight-hour workday rather than the 12-hour workday supplied by the Applicant.¹⁰⁴ The CalEEMod analysis did not “cram emissions from a 12-hour workday” into eight hours, but merely estimated emissions directly assuming an eight-hour workday with a six-month construction schedule.¹⁰⁵ Therefore, the actual emissions and impacts are “at least 1.5 times higher than disclosed in the IS/MND” and an EIR should be prepared.¹⁰⁶

V. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT OPERATIONAL HEALTH RISKS FROM HAZARDOUS MATERIALS IMPACTS ARE SIGNIFICANT AND UNMITIGATED

A. The IS/MND and the City Responses Fail to Analyze the Hazardous Nature of the Materials Used in the Energy Storage Batteries or Conduct a Health Risk Assessment for a Possible Battery Accident

Appendix G of the CEQA Guidelines provides a list of potential hazards and hazardous materials impacts agencies should analyze, including the potential for “reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment.”¹⁰⁷ Therefore, the City was required to

¹⁰² Response A.17.

¹⁰³ BAAQMD CEQA Guidelines, Table 2-6.

¹⁰⁴ Fox Response, p. 13.

¹⁰⁵ Fox Response, p. 13.

¹⁰⁶ Fox Response, p. 13.

¹⁰⁷ CEQA Guidelines, Appendix G, § IX(b): Hazards and Hazardous Materials.

consider and analyze the types of battery fires and accidents that have occurred in similar circumstances and that we raised in our initial comments.

Response A.18 argues that the citation in our comments to CEQA Guidelines section 15126.2(d) renders the comment ignorable under CEQA because that provision only requires analysis of significant irreversible environmental change in EIRs, not in MNDs.¹⁰⁸ This is a red herring. The Environmental Checklist Form in Section IX(b) of Appendix G of the CEQA Guidelines clearly requires the City to analyze battery accidents like those we highlighted in our comments, regardless of the type of CEQA document they are preparing and putting forth for approval. CEQA Guidelines section 15126.2(d) merely provides additional context and guidance regarding what can be considered in such an analysis.

As explained with regard to the Project Description, the City Responses fail to accurately reflect the toxic nature of battery components and analyze the risks associated with an accident such as a fire that could release hazardous gases.¹⁰⁹ Response A.5 attempts to dodge the requirement to analyze a potential accident by saying that the “phosphate-based chemistry” of lithium iron phosphate batteries “virtually eliminates risk of battery fire propagation or explosion because of its very high thermal runaway point.”¹¹⁰ However, Dr. Fox explains that the cited article merely describes the batteries strong thermal stability among commercially available batteries; it does not say that the risk of fire is virtually eliminated.¹¹¹

Dr. Fox explains that battery accidents in batteries of all types are still very possible from overcharge, over-discharge, short-circuiting, and external factors such as seismic events, vehicle crashes, or wildfire.¹¹² While the City Responses describe design features and claim adherence to codes and regulations, these are no guarantees of safety from accidents.¹¹³ Moreover, the City Responses fail to demonstrate with substantial evidence that the Project’s compliance with the California Fire Code would reduce impacts associated with the release of hazardous materials.¹¹⁴

¹⁰⁸ Response A.18.

¹⁰⁹ Fox Response, pp. 4–6.

¹¹⁰ Response A.5.

¹¹¹ Fox Response, pp. 6–7.

¹¹² Fox Response, pp. 7–8.

¹¹³ Fox Response, pp. 7–8.

¹¹⁴ Fox Response, pp. 7–8.

Notably, Response A.18 claims that the Project will be reviewed by the City's Department of Fire for compliance with fire codes and other regulations.¹¹⁵ Dr. Fox explains that the types of accidents described in her initial comments cannot be prevented through compliance with these types of requirements.¹¹⁶ Moreover, the IS/MND and City Responses fail to identify any fire codes that could mitigate the significant public health impacts identified by Dr. Fox.¹¹⁷ In the absence of clear performance standards to ensure the effectiveness of this review, the Department of Fire's review amounts to improperly deferred formulation of mitigation under CEQA.¹¹⁸ Furthermore, CEQA prohibits reliance on ineffective mitigation measures, so the City must explain how this process will ensure hazardous impacts will be mitigated below significant levels to comply with CEQA.¹¹⁹

Response A.18 in part argues that fires at battery facilities can be "controlled with application of water" through a fire-sprinkler system.¹²⁰ Dr. Fox explains that this might be useful for controlling a fire in the battery building but not in the batteries themselves.¹²¹ As suggested in our initial comments, and reiterated by Dr. Fox in her Response to the City, "the use of water to control a fire at these batteries could aggravate fire impacts."¹²² The National Fire Protection

¹¹⁵ Fox Response, p. 15.

¹¹⁶ Fox Response, p. 15.

¹¹⁷ Fox Response, p. 15.

¹¹⁸ See *POET, LLC v. California Air Res. Bd.* (2013) 218 Cal.App.4th 681, 736, 739–740, as modified on denial of reh'g (Aug. 8, 2013), review denied (Nov. 20, 2013) (an agency may only defer identifying mitigation measures when the agency commits to formulating mitigation measures in the future and that commitment can be measured against specific performance criteria the ultimate mitigation measures must satisfy); *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281 (EIR deficient for failure to specify performance standards in plan for active habitat management of open space preserve); *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 (EIR's deferral of acoustical report demonstrating structures designed to meet noise standards without setting the actual standards is inadequate for purposes of CEQA); *Gentry v. Murrieta* (1995) 36 Cal.App.4th 1359, 1396 (negative declaration's deferral of mitigation measure improper where the measure required applicant to comply with recommendations of a report that did not exist yet with no further guidance on what mitigation was necessary).

¹¹⁹ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727–728.

¹²⁰ Response A.18.

¹²¹ Fox Response, p. 14.

¹²² Fox Response, pp. 14–15.

Association standard 855 (“NFPA 855”) states that some batteries contain water-reactive material that can react violently when in contact with moisture.¹²³

B. Health Risk Modeling by Dr. Fox and Mr. Kapahi Constitutes Substantial Evidence Supporting a Fair Argument that a Battery Accident During Operation of the Project Could Produce Significant Health and Hazardous Materials Impacts

Response A.19 argues that the modeled accident scenarios prepared by Dr. Fox and Mr. Kapahi have “no relevance to the project.”¹²⁴ Dr. Fox responds that the modeling is relevant because it is based on the MSDS obtained from the City through a PRA request and uses toxic pollutant emissions that emanate from similar batteries during accidents.¹²⁵ She provides a list of toxic chemicals that could be formed in a fire involving the Powin batteries and explains that she and Mr. Kapahi conservatively evaluated only two of the chemicals in their health risk assessment: hydrogen fluoride (“HF”) and hydrogen cyanide (“HCN”).¹²⁶ As an example, Dr. Fox explains that when LiPF₆, a major component of the Powin electrolyte, reaches 70 degrees Celsius, it hydrolyzes and produces HF.¹²⁷ Furthermore, HCN is a “well-known combustion byproduct that forms in fires when carbon, hydrogen, and nitrogen are present” as acknowledged by NFPA 855.¹²⁸

Dr. Fox further explains that the modeling itself was founded on data and scientific studies involving lithium ion batteries.¹²⁹ Therefore, the health risk modeling demonstrates that an accident involving the Powin batteries at the Project could result in significant acute health impacts and significant mortality.¹³⁰ This un rebutted analysis is substantial evidence supporting a fair argument that a

¹²³ NFPA 855, Annex B, Section B.4.2: Chemical Hazards, p. 855-35 (Exhibit 5 to Fox Response); Fox Response, p. 14. For example, LiPF₆, a major component of the Powin batteries, comprises 14% of the battery electrolyte and is “explosively reactive to water due to the presence of lithium ion.” (*Id.*)

¹²⁴ Response A.19.

¹²⁵ Fox Response, p. 16.

¹²⁶ Fox Response, p. 16.

¹²⁷ Fox Response, p. 16.

¹²⁸ Fox Response, p. 17.

¹²⁹ Fox Response, p. 17–18.

¹³⁰ Fox Response, p. 17–18.

battery accident could produce significant impacts warranting discussion in an EIR.

VI. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT MAY HAVE SIGNIFICANT IMPACTS ON BIOLOGICAL RESOURCES

A. The City Responses Fail to Rectify the Inadequate Mitigation of Potentially Significant Construction Impacts to Western Pond Turtles

Response A.20 states that the Santa Clara Valley Habitat Plan (“VHP”) had its own EIR that accounted for impacts to western pond turtles and set out conditions for projects in the area to follow to comply with the VHP and ensure less than significant environmental impacts.¹³¹ Therefore, the Response argues, the lack of specific measures to avoid trampling or crushing pond turtles does not show there will be significant impacts because the Project will comply with Conditions 3, 7, and 11 of the VHP.¹³² As Mr. Cashen explains, however, the Response suffers from a “fundamental flaw” in that the Project does not comply with Condition 11.¹³³

Condition 11 requires a 150-foot stream setback within which “covered activities” such as development that may impact the stream are not permitted.¹³⁴ Yet, as described in our initial comments, construction for the overhead transmission line will encroach upon the setback from Coyote Creek. Specifically, the Biological Resources Report describes the installation of a riser pole, vegetation clearing, minor tree trimming, light grading, installation of a temporary ballast rock pad for supporting the excavator/auger, and staging of equipment and materials within the stream setback.¹³⁵

Without adherence to the VHP Condition 11, the Project cannot rely on the conclusions of the VHP EIR to declare that there will not be a significant impact. Mr. Cashen explains that “[b]ecause the Project involves ground disturbance activities within the stream setback, and because the IS/MND does not include any

¹³¹ Response A.20.

¹³² Response A.20.

¹³³ Cashen Response, p. 1.

¹³⁴ VHP, p. 6-51.

¹³⁵ Biological Resources Report, p. 60.

mitigation measures to prevent those ground disturbance activities from having significant impacts on western pond turtles and their nests, potentially significant impacts on the western pond turtle remain unmitigated.”¹³⁶ Therefore, the City must prepare an EIR to analyze these impacts and consider feasible mitigation measures like those proposed by Mr. Cashen in his initial comments.

B. The City Responses Fail to Address the IS/MND’s Mischaracterization of the Likelihood of Occurrence of Golden Eagles and Fails to Demonstrate that Potentially Significant Transmission Line Collision Impacts to Various Bird Species Will Be Mitigated

Response A.21 concedes that golden eagles have been present at the site, in contradiction of the claims of the Biological Resources Report.¹³⁷ However, it also says that the Dr. Rottenborn, the biological expert supporting the IS/MND, has never observed a golden eagle nest within miles of the site, claims that no one else has ever reported a nest in the area, and indicates that the only sightings of golden eagles were at altitudes higher than the proposed power lines.¹³⁸ Mr. Cashen responds that the absence of evidence of nests does not mean that golden eagles never perch, roost, or forage over the location.¹³⁹ In addition, the claims that the eagles were only observed flying higher than 120-feet up are not supported by substantial evidence because eBird records describe perched eagles in the area.¹⁴⁰ These records directly contradict the claims advanced in the IS/MND and this Response. Therefore, there is substantial evidence of the presence of the golden eagle and, as explained below, there is an unanalyzed and unmitigated risk to it and other species of birds.¹⁴¹

Even if the risk of collisions and electrocutions is low because of the altitude of some eagle flights, the risk is not zero.¹⁴² The IS/MND and Responses fail to provide *any* analysis of electrocutions and the City Responses fail to rebut Mr. Cashen’s evidence that mitigation measures are feasible and necessary to reduce

¹³⁶ Cashen Response, p. 1.

¹³⁷ Cashen Response, p. 2.

¹³⁸ Response A.21.

¹³⁹ Cashen Response, p. 2.

¹⁴⁰ Cashen Response, p. 2.

¹⁴¹ Cashen Response, p. 2.

¹⁴² Cashen Response, p. 2.

the risk of collisions.¹⁴³ Response A.22 essentially reiterates the IS/MND’s faulty reasoning that the overhead transmission lines will be placed “relatively close” to existing lines and dismisses Mr. Cashen’s comments as “erroneous” without explanation.¹⁴⁴

Mr. Cashen’s comments were based on information provided in the Avian Power Line Interaction Committee (“APLIC”) guidelines, which come from scientific publications.¹⁴⁵ Response A.22 concedes that “birds moving along Coyote Creek likely collide with these lines periodically” and Mr. Cashen describes the APLIC “risk situation” posed by power lines not clustered together.¹⁴⁶ Given that at least some birds fail to detect the existing power lines, the City has no basis for assuming that all species in all scenarios will simply fly at a higher altitude than two sets of power lines.¹⁴⁷ Rather, as Mr. Cashen explains, the spacing of the two sets of power lines means that birds that do not strike the first set of lines would remain susceptible to colliding with the second set of lines.¹⁴⁸ Without following APLIC guidelines such as siting the lines closer together or using line markers to make the lines more visible to birds, these potentially significant impacts remain unmitigated and an EIR must be prepared to analyze and mitigate them.¹⁴⁹

VII. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT CONSTRUCTION MAY RESULT IN SIGNIFICANT NOISE IMPACTS THAT THE IS/MND FAILS TO DISCLOSE AND MITIGATE

A. The City Responses Fail to Rebut Mr. Watry’s Arguments Regarding the Infeasibility or Ineffectiveness of the Proposed Mitigation Measures

Response A.28 asserts that the Comments do not establish that the plywood barrier is infeasible, but it does not present its own evidence that the barrier is, in

¹⁴³ Cashen Response, pp. 2–3.

¹⁴⁴ Response A.22.

¹⁴⁵ Cashen Response, p. 3.

¹⁴⁶ Response A.22; Cashen Response, p. 3.

¹⁴⁷ Cashen Response, p. 3.

¹⁴⁸ Cashen Response, p. 3.

¹⁴⁹ Cashen Response, p. 3.

fact, feasible.¹⁵⁰ As Mr. Watry explains there was “no analysis associated with the solid plywood fence in either the IS/MND or the Noise Study” regarding either its “effectiveness as a noise mitigation measure or as to the feasibility of constructing it along Monterey Road.”¹⁵¹

Federal Highway Administration guides for noise control indicate that an effective barrier must block the “line of sight” between “the highest point of a noise source, such as a truck’s exhaust stack, and the highest part of the receiver.”¹⁵² Furthermore, the barrier must be “long and continuous to prevent sounds from passing around the ends” and it must be solid, strong, and flexible enough to stay up in windy conditions.¹⁵³ Mr. Watry explains that exhaust stacks of construction equipment and diesel trucks are typically seven to eight feet off the ground to minimize construction worker exposure to exhaust fumes, but this means that a sound wall would need to be at least eight feet tall.¹⁵⁴ Based on his experience analyzing construction noise, Mr. Watry assumes the active construction site would be about 100 feet long. As a result, “the question of feasibility turns on the practicality of building a temporary 8-ft by 100-ft solid plywood wall between the active construction site and the residences” which in turn raises issues of “clearance and structural adequacy.” Mr. Watry argues that the City must include an explanation supported by a civil engineer that this is both structurally, logistically, and financially feasible for construction.¹⁵⁵ In the absence of such analysis, the City cannot properly rely on this mitigation measure to conclude that noise impacts will be less than significant.

Furthermore, Mr. Watry highlights that the City Responses fail to address his claims about the ineffectiveness of other proposed mitigation measures, including the use of mufflers, prohibition on unnecessary idling, moving stationary equipment away from sensitive receptors, and use of quiet compressors.¹⁵⁶ As

¹⁵⁰ Response A.28; Watry Response, p. 1.

¹⁵¹ Watry Response, p. 1.

¹⁵² Watry Response, p. 2 (quoting *The Audible Landscape: A Manual for Highway Noise and Land Use*, Ch. 4 – Physical Techniques to Reduce Noise Impacts, available at https://www.fhwa.dot.gov/ENVIRONMENT/noise/noise_compatible_planning/federal_approach/audible_landscape/al04.cfm (last accessed May 12, 2020).)

¹⁵³ *Id.*

¹⁵⁴ Watry Response, p. 2.

¹⁵⁵ Watry Response, p. 3.

¹⁵⁶ Watry Response, p. 4.

explained in the initial comments, CEQA prohibits reliance on infeasible and ineffective mitigation measures.¹⁵⁷ Because the City fails to rebut Mr. Watry's arguments about feasibility and effectiveness (including double counting noise reductions and some measures that will not reduce noise levels at all), a revised CEQA document must be prepared to properly evaluate significant noise impacts.

B. The City Responses Improperly Claim that Mr. Watry Cannot Rely on Calculations in the IS/MND as Substantial Evidence

Mr. Watry cited the IS/MND's own noise study to support his argument that noise impacts would potentially be significant.¹⁵⁸ Response A.24 says that the noise estimates are "conservative" and do not account for sound walls located at the property lines for residences along Monterey Road.¹⁵⁹ As Mr. Watry explains, it is "ironic for the Responses to dismiss citations of the IS/MND's own Noise Study because they are not representative of the project noise levels." Furthermore, the City Responses incorrectly assert that Mr. Watry did not account for the sound barrier walls along Monterey Road. Rather, in footnote 2 of his initial letter he explained that even assuming a 5 dBA reduction in noise due to the sound walls, the noise levels would still vastly exceed existing ambient levels.¹⁶⁰ An EIR should be prepared to analyze the significant noise impacts from construction.

VIII. CONCLUSION

CEQA requires that an EIR be prepared if there is substantial evidence that any aspect of a project, either individually or cumulatively, may cause a significant effect on the environment.¹⁶¹ As discussed herein, there is substantial evidence supporting a fair argument that the Project would result in significant adverse impacts that were not identified and that are not adequately analyzed or mitigated. The IS/MND omits basic information and analysis required by CEQA, deficiencies which "cannot be dismissed as harmless or insignificant defects."¹⁶²

¹⁵⁷ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727–728.

¹⁵⁸ Watry Response, p. 3.

¹⁵⁹ Watry Response, p. 3.

¹⁶⁰ Watry Response, p. 3.

¹⁶¹ Pub. Res. Code § 21151; 14 CCR §15063(b)(1).

¹⁶² *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1220.

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We urge the City to fulfill its responsibilities under CEQA by withdrawing the IS/MND and preparing a legally adequate EIR to address the potentially significant impacts described in this comment letter. Only by complying with all applicable laws will the City be able to ensure that the Project's environmental impacts are mitigated to less than significant levels, as required under CEQA.

Thank you for your attention to these comments.

Sincerely,



William Mumby

Attachments

WM:acp

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