



T 510.836.4200
F 510.836.4205

1939 Harrison Street, Ste. 150
Oakland, CA 94612

www.lozeaudrury.com
michael@lozeaudrury.com

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City of Elk Grove Office of Strategic Planning and Innovation
c/o Christopher Jordan
8401 Laguna Palms Way
Elk Grove, CA 95758
cjordan@elkgrovecity.org

Re: Comments Regarding Multi-Sport Complex and Southeast Industrial Annexation Area
Supplemental Environmental Impact Report

Dear Mr. Jordan,

I am writing on behalf of Laborers International Union of North America Local Union 185 (“LIUNA”) concerning the Draft Supplemental Environmental Impact Report (“SEIR”) prepared for the Multi-Sport Complex and Southeast Industrial Annexation Project (“Project”). The Project proposes changes to the proposed General Plan land use designations and pre-zoning designations for the 561-acre Project site. In particular, the Project proposes to change the designated use of a 100-acre City-owned parcel from Public Open Space/Recreation to Light Industrial Uses and to change the use of the parcels previously identified for Retail Commercial and Industrial Uses to expand the Industrial Uses and reduce the Commercial Uses. SEIR, p. ES-1. In addition, the SEIR reviews potential impacts of additional off-site drainage improvements for the Project. *Id.*, p. ES-2.

After reviewing the SEIR, we conclude the SEIR fails as an informational document, and that the SEIR is insufficient as a matter of law and not supported by substantial evidence. With the assistance of expert wildlife biologist Shawn Smallwood, Ph.D., and environmental consulting firm SWAPE, we have identified a number of significant omissions and flaws in the SEIR’s analysis of likely hazard, air quality, greenhouse gas (“GHG”) and biological resource impacts. SWAPE’s comments and curriculum vitae are attached hereto as Exhibit A. Dr. Smallwood’s comments and c.v. are attached as Exhibit B. Therefore, we request that the City of Elk Grove (“City”) revise the draft SEIR in order to address the following shortcomings prior to presenting it to the City Council. We reserve the right to supplement these comments during public hearings concerning the Project. *Galante Vineyards v. Monterey Peninsula Water Management Dist.*, 60 Cal. App. 4th 1109, 1121 (1997).

I. Legal Background.

The California Environmental Quality Act (“CEQA”) requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report (“EIR”) (except in certain limited circumstances). *See, e.g.* Pub. Res. Code § 21100. The EIR is the very heart of CEQA. *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. 14 Cal. Code Regs. (“CEQA Guidelines”) § 15002(a)(1). “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.” *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal. App. 4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures. CEQA Guidelines § 15002(a)(2) and (3); *see also, Berkeley Jets*, 91 Cal.App.4th at pp. 1344, 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564. The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.” CEQA Guidelines §15002(a)(2). If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.” Pub. Res. Code § 21081; 14 Cal.Code Regs. § 15092(b)(2)(A) & (B). The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 732.

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A ‘clearly inadequate or unsupported study is entitled to no judicial deference.’” *Berkeley Jets*, 91 Cal. App. 4th at p. 1355 (emphasis added) (quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 391 409, fn. 12). As the court stated in *Berkeley Jets*:

A prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946.)

More recently, the California Supreme Court has emphasized that:

When reviewing whether a discussion is sufficient to satisfy CEQA, a court must be satisfied that the EIR (1) includes sufficient detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues the proposed project raises [citation omitted], and (2) makes a reasonable effort to substantively connect a project's air quality impacts to likely health consequences.

Sierra Club v. Cty. of Fresno (2018) 6 Cal.5th 502, 510 (2018), citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 405. “Whether or not the alleged inadequacy is the complete omission of a required discussion or a patently inadequate one-paragraph discussion devoid of analysis, the reviewing court must decide whether the EIR serves its purpose as an informational document.” *Sierra Club v. Cty. of Fresno*, 6 Cal.5th at 516. Although an agency has discretion to decide the manner of discussing potentially significant effects in an EIR, “a reviewing court must determine whether the discussion of a potentially significant effect is sufficient or insufficient, i.e., whether the EIR comports with its intended function of including ‘detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’” 6 Cal.5th at 516, citing *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1197. “The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency’s factual conclusions.” 6 Cal.5th at 516. Whether a discussion of a potential impact is sufficient “presents a mixed question of law and fact. As such, it is generally subject to independent review. However, underlying factual determinations—including, for example, an agency’s decision as to which methodologies to employ for analyzing an environmental effect—may warrant deference.” *Sierra Club v. Cty. of Fresno*, 6 Cal.5th at 516. As the Court emphasized:

[W]hether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence.

Sierra Club v. Cty. of Fresno, 6 Cal.5th at 514.

II. DISCUSSION.

A. The SEIR Fails to Establish a Sufficient Baseline or Address the Potential Hazard Impacts Disclosed in the 2014 Phase I Environmental Site Assessment.

The City has previously been apprised of the likelihood that the areas slated for development within the Project area may be contaminated with persistent residual pesticides and herbicides from historic applications of DDT and pesticides containing heavy metals including arsenic and lead. SEIR, p. 3.9-1. Despite that likelihood, the City makes no effort to further investigate or identify any areas of potential contamination, disclose the extent of such contamination and devise meaningful mitigations or a Project alternative that responds to any contamination found on the site. The SEIS purports to address this potential impact by noting that, should evidence of contamination come to light, the relevant site would adhere to any requirements of the California Occupational Safety and Health Administration and General Plan Policy ER-1-5b addressing a general goal of addressing sites suspected or known to contain hazardous materials. SEIR, p. 3.9-7. The SEIR's reliance on future, vague actions to identify contamination at the site and provide for clean-up is contrary to CEQA because it fails to provide a necessary baseline regarding the presence of soil contamination and fails to develop enforceable mitigation measures to address the Project's disturbance of any such areas, instead deferring mitigation until a future date.

Every CEQA document must start from a "baseline" assumption. The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. Section 15125(a) of the CEQA Guidelines (14 C.C.R., § 15125(a)) states in pertinent part that a lead agency's environmental review under CEQA:

must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time [environmental analysis] is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant. (Emphasis added.)

See, Save Our Peninsula Committee v. County of Monterey (2001) 87 Cal.App.4th 99, 124-125. As the court of appeal has explained, "the impacts of the project must be measured against the 'real conditions on the ground,'" and not against hypothetical permitted levels. *Save Our Peninsula, supra*, 87 Cal.App.4th 99, 121-123.

"[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts." *Cty. Sanitation Dist. No. 2 v. Cty. of Kern* (2005) 127 Cal.App.4th 1544, 1597. "[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. *There must be good faith, reasoned analysis in response.*" *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm'rs* (2001) 91 Cal.App.4th 1344, 1371, *as modified on denial of reh'g* (Sept. 26, 2001). Likewise, simply labeling an environmental effect as "significant" "without accompanying analysis of the

project's impact ... is inadequate to meet the environmental assessment requirements of CEQA.” *Berkeley Keep Jets*, 91 Cal.App.4th at 1371.

As the Court of Appeal has stated, “[a] new project located in an area that will expose its occupants to preexisting dangerous pollutants can be said to have substantial adverse effect on human beings.” *Cal. Building Industry Assn. v. Bay Area Air Quality Mgm’t Dist.* (“*CBIA v. BAAQMD*”) (2013) 218 Cal.App.4th 1171. The existence of toxic soil contamination at a project site is a significant impact requiring review and mitigation in an EIR. *McQueen v. Bd. of Dirs.* (1988) 202 Cal.App.3d 1136, 1149; *Assoc. For A Cleaner Env’t v. Yosemite Comm. College Dist.* (“*ACE v. Yosemite*”) (2004) 116 Cal.App.4th 629. This mitigation may not be deferred until a future time after Project approval. *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 306; *Citizens for Responsible Equitable Env’t Dev. v. City of Chula Vista* (“*CREED*”) (2011) 197 Cal.App.4th 327, 330-31.

As SWAPE points out, in order to properly assess this potential impact, representative soil sampling throughout the site must be conducted. SWAPE Comment, p. 2. The sampling should adhere to protocols relating to agricultural fields identified by the Department of Toxic Substances Control. *Id.* The results should be used to evaluate health risks to construction workers and nearby residents. *Id.* The data and resulting evaluation should be fully disclosed and discussed in a revised SEIR. The SEIR also should develop actual mitigation measures that would apply to all future projects within the area to address the possible soil contamination present within the area.

B. The EIR Fails to Identify All Feasible Mitigations To Address the Project’s Acknowledged Significant and Unavoidable Impacts on Farmland.

The SEIR acknowledges that the Project will have significant and unavoidable impacts on farmland. SEIS, p. ES-5. Most of the Project site consists of Farmland of Statewide and Local Importance. *Id.*, p. 3-3.1. Despite that significant impact, the mitigation proposed in the EIR only requires the protection of one acre of farmland for every acre of farmland destroyed by the project. *Id.* There is no explanation describing why the ratio of protected farmland is limited to 1:1. There is no evidence that it is not feasible for future projects to increase the acreage of farmland that must be conserved in exchange for farmland loss to the Project’s future development. Although requiring additional farmland to be conserved in exchange for destroying farmland on the Project site would not completely offset those significant impacts, it plainly would further mitigate those impacts beyond the proposed 1:1 ratio.

Under CEQA, when an agency approves a project with significant environmental impacts that will not be fully mitigated, it must adopt a “statement of overriding considerations” finding that, because of the project’s overriding benefits, it is approving the project despite its environmental harm. 14 Cal. Admin. Code §15043; Pub. Res. Code §21081(b); *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222. A statement of overriding considerations expresses the “larger, more general reasons for approving the project, such as the need to create new jobs, provide housing, generate taxes and the like.” *Concerned Citizens of*

South Central LA v. Los Angeles Unif. Sch. Dist. (1994) 24 Cal.App.4th 826, 847.

An agency may adopt a statement of overriding considerations only *after* it has imposed all feasible mitigation measures to reduce a project's impact to less than significant levels. 14 Cal. Admin. Code §§ 15126.4, 15091. CEQA prohibits agencies from approving projects with significant environmental impacts when feasible mitigation measures can substantially lessen or avoid such impacts. Pub. Res. Code § 21002. As explained in CEQA Guidelines § 15092(b)(2), an agency is prohibited from approving a project unless it has "[e]liminated or substantially lessened all significant effects on the environment where feasible."

A statement of overriding considerations must be supported by substantial evidence in the record. 14 Cal. Admin. Code §15093(b); *Sierra Club v. Contra Costa Co.*, 10 Cal.App.4th at 1223. The agency must make "a fully informed and publicly disclosed" decision that "specifically identified expected benefits from the project outweigh the policy of reducing or avoiding significant environmental impacts of the project." 14 Cal. Admin. Code. §15043(b). As with all findings, the agency must present an explanation to supply the logical steps between the ultimate finding and the facts in the record. *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.

In order to comply with these mandates, the SEIR must identify the highest farmland mitigation ratio that is feasible. In order to do that, the SEIR should be revised to identify the costs of the conservation easements it identifies and the feasibility of requiring a higher ratio of preserved acres to offset future development at the site. As it stands, there is no substantial evidence to show that a 1:1 ratio is the feasible limit on conserving farmland acreage to offset the Project's unavoidable impacts to farmland.

C. The SEIR's Discussion of the Project's Air Quality Impacts is not Supported by Substantial Evidence.

The modeling done in support of the SEIR's discussion of air quality impacts is inconsistent with the Project description and relies on inputs that have not been substantiated. As a result, the SEIR's discussion of air quality impacts is not supported by substantial evidence.

The SEIR for the Project relies on emissions calculated from the California Emissions Estimator Model Version CalEEMod.2016.3.2 ("CalEEMod"). This model relies on recommended default values, or on site-specific information related to a number of factors. The model is used to generate a project's construction and operational emissions. SWAPE reviewed the Project's CalEEMod files and found that the values input into the model were inconsistent with information provided in the SEIR. This results in an underestimation of the Project's emissions. As a result, the SEIR's discussion of air quality impacts is not supported by substantial evidence.

The inconsistencies include the omission of any modeling inputs to account for the extensive parking areas anticipated by the Project. SWAPE Comments, p. 3. "By completely omitting the proposed parking land use, the models fail to account for all of the emissions that

would be produced during construction and operation of the Project and should not be relied upon to determine Project significance.” *Id.*

The modeling inputs reduced the default input for the “CO2 Intensity Factor” by about 100 pounds per megawatt hour. SWAPE Comment, p. 4. The model notes claim that the reduction was based on an unsourced average CO² Intensity Factor for all of California. *Id.* There is no information regarding where this number came from or whether it is applicable to the Sacramento region. *Id.*

There is a significant discrepancy in the potential footprint of development identified in the SEIR and the amount input to the CalEEMod model. SWAPE Comments, p. 4. The SEIR states that the Project site will support up to 5.6 million square feet of light and heavy industrial uses. The model input reduces this number by about 44,000 square feet. That discrepancy should be reviewed.

The SEIR and the model assume that 25 percent of the land uses allowed by the project would be constructed in a single year. SEIR, pp. 3.4-10 – 3.4-11. The SEIR cites the Sacramento Metropolitan Air Quality Management District (“SMAQMD”) as the source of this recommendation but does not provide a reference to the document substantiating such a recommendation. SWAPE Comment, p. 5. Given the demand for large distribution centers and warehouses, this estimate could very well be an underestimate. Without a substantial basis for this figure, it is not substantial evidence.

The inputs for recreational uses are “User Defined.” SWAPE Comments, p. 6. However, the model has left out data inputs for a number of relevant fields for this use, including trip rates. As a result, the model underestimates emissions associated with that use.

The construction schedule inputs also are not substantiated in the modeling document. SWAPE Comments, p. 8. The models default values are assumed to be the same for all construction phases and spread out for some construction phases thus arbitrarily altering the modeling inputs. *Id.*, pp. 8-9. As SWAPE notes:

by *disproportionately* altering individual construction phase lengths without proper justification, the model’s calculations are altered and underestimate emissions. Thus, by including unsubstantiated changes to the Project’s anticipated individual construction phase lengths, the model may underestimate the Project’s maximum daily construction-related emissions and should not be relied upon to determine the significance of the Project’s air quality impacts.

Id.

The model exaggerates the expected use of Tier 4 equipment for the entire Project. SWAPE Comments, pp. 9-10. Mitigation Measure TACM-8 only requires that at least 25 percent of the Project’s off-road construction fleet shall use EPA certified Tier 4 diesel engines. SEIR, p. ES-44. However, the CalEEMod modeling is based on 100 percent of the off-road construction

fleet utilizing Tier 4 diesel engines. SWAPE Comments, pp. 9-12. Hence, the model does not reflect the likely fleet mix used to construct projects at the site. In addition, Mitigation Measure TACM-8 does not specify which of the two Tier 4 levels are required – Tier 4 Interim or Tier 4 Final. *Id.*, p. 11. The Tier 4 Interim equipment emissions are higher than Tier 4 Final. However, the air modeling assumes all of the equipment will use Tier 4 Final equipment. That assumption is not supported by the SEIR's Project description and Mitigation Measure TACM-8. *Id.*

The CalEEMod inputs for vehicle trip lengths also are inconsistent with what is described in the SEIR and appear to underestimate the longer trips associated with industrial uses that are expected to occur at the site. SWAPE Comments, pp. 12-13. Thus, while the SEIR informs a reader that the modeling was adjusted to account for longer truck trips between the Project site and regional ports and distribution centers, the modeling actually reduces several of the default trip lengths for industrial uses. *Id.*, p. 13. These unexplained inputs contribute to the modeling's failure to achieve the substantial evidence standard.

For all of these reasons, the CalEEMod modeling should be carefully reviewed and adjusted to reflect a more reliable and realistic projection of emissions from the Project. Until that effort is made and the SEIR's discussion of air quality impacts and other related issues updated accordingly, those discussions relying upon the CalEEMod modeling are not supported by substantial evidence.

D. The SEIR's Conclusion That Pollution Emissions from the Project's Construction Would Have Less Than Significant Impacts After Mitigation is Not Supported by Substantial Evidence.

The SEIR concludes that, with mitigations, the Project's construction-related pollution emissions will be less than significant. SEIR, p. 3.5-16. The SEIR bases this conclusion on the flawed CalEEMod modeling. SWAPE has rerun the CalEEMod modeling to omit the unsubstantiated and inconsistent inputs discussed above. Rather than no impact, the modeling indicates that the Project will have significant air quality impacts from the emission of both NO_x and PM₁₀. SWAPE Comment, p. 16. The SEIR should be revised to acknowledge these significant impacts and set forth the requisite mitigation measures that will address these emissions.

E. The SEIR Fails to Identify All Feasible Mitigation Measures and Improperly Defers the Development of Mitigations to Offset the Project's Significant and Unavoidable NO_x Emission Impacts.

The SEIR's response to addressing the significant and unavoidable impacts identified for the Project's emissions of ozone precursors, including NO_x, falls short of complying with CEQA by deferring the establishment of mitigation measures for the Project until after the Project is approved and not establishing now all feasible mitigation measures that are available.

Feasible mitigation measures for significant environmental effects must be set forth in an EIR for consideration by the lead agency's decision makers and the public before certification of

the EIR and approval of a project. The formulation of mitigation measures generally cannot be deferred until after certification of the EIR and approval of a project. “A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA.” *Sundstrom*, 202 Cal.App.3d at 307. Withholding the specific details of mitigation prior to approval of a project is prohibited unless identifying such details are impractical or infeasible. 14 Cal. Admin. Code § 15126.4(a)(1)(B). If substantial evidence establishes that developing the details of a mitigation measure is impractical and infeasible, the agency can then develop the details after approval if it “(1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will [be] considered, analyzed, and potentially incorporated in the mitigation measure. *Id.* However, a lead agency’s adoption of an EIR’s proposed mitigation measure for a significant environmental effect that merely states a “generalized goal” to mitigate a significant effect without committing to any specific criteria or standard of performance violates CEQA by improperly deferring the formulation and adoption of enforceable mitigation measures. *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670; *Communities for a Better Env’t v. City of Richmond* (2010) 184 Cal.App.4th 70, 93 (rejecting EIR that “merely proposes a generalized goal of no net increase in greenhouse gas emissions and then sets out a handful of cursorily described mitigation measures for future consideration that might serve to mitigate the [project’s significant environmental effects”). In addition, an agency may adopt a statement of overriding considerations only *after* it has imposed all feasible mitigation measures to reduce a project’s impact to less than significant levels. 14 Cal. Admin. Code §§ 15126.4, 15091.

Nothing precludes the City from adopting additional feasible mitigation measures addressing ozone precursor emissions applicable to future projects on the site. The SEIR proposes Mitigation Measure 3.4-2 as the only response to the Project’s significant and unavoidable impacts to air quality from its operational emissions of ozone precursors, claiming it is the only feasible measure at this time. SEIR, p. 3.4-18. Mitigation Measure 3.4-2 would require future developments within the Project site to prepare an Air Quality Mitigation Plan (“AQMP”) which would be submitted to the Sacramento Metropolitan Air Quality Management District (“SMAQMD”) for review and approval. *Id.* The Measure states that “[t]he performance standard for the AQMP is to achieve a reduction in, or offset of operational ozone precursor emissions.” *Id.* The Measure then refers to a list of General Plan policies that would guide an AQMP. *Id.*

The Measure assumes that SMAQMD is available to review and “approve” the future AQMDs. Although SMAQMD does provide guidance on the preparation of AQMDs for local lead agency’s CEQA proceedings, LIUNA is unaware of, and the SEIR does not disclose, any program that provides for SMAQMD to be volunteered by a lead agency to play the role of reviewing and approving AQMD’s on the lead agency’s behalf. This alone calls into question whether Mitigation Measure 3.4-2 is enforceable.

The claimed “performance standard” which the Measure 3.4-2 identifies is vague and is not sufficient to justify deferring mitigation measures for the Project. The loose directive to “achieve a reduction in, or offset of operational ozone precursor emissions” provides no standard that could be enforced or understood by either the City or a future project applicant. The measure does not specify a specific amount of reduction future projects must achieve. It does not provide a clear baseline from which such reductions would be compared.

The SEIR focuses on MOB-1-1, suggesting that Mitigation Measure 3.4-2 would achieve results similar to the VMT reduction goal of 15% for new development projects. This comparison encounters a few insurmountable difficulties. First, according to the City’s traffic analysis guidelines, it is unclear whether any future projects within the Project site are excluded from VMT. City of Elk Grove, Transportation Analysis Guidelines (“TAG”) (Feb. 2019) http://www.elkgrovecity.org/UserFiles/Servers/Server_109585/File/Departments/Planning/Projects/General%20Plan/GPU/Adopted_2019-02/EG_Traffic_Analysis_Guidelines_CC%20Final_Adopted_2019-02-27.pdf. The Project site is immediately adjacent to areas within the City limit that have been “pre-screened” as already being 15 percent or below the average service population VMT established for the applicable land use designations. TAG, p. 13. Given the existing lack of development on the site, it is likely the Project-site may also be pre-screened to exclude it from the VMT analysis. If that is the case, there may well be no future VMT analyses for the future projects proposed within the project area. Hence, any comparison assuming an AQMD may resemble a VMT analysis is not supported by the Measure’s language or the City’s procedures.

Second, the Project would authorize any number of large-scale distribution centers within the Project site’s industrial areas. The VMT analyses referenced by the City would only apply to the passenger vehicles. VMT analysis would not address the major pollution increases from, for example, a distribution center, which would be attributable to diesel trucks. *See* 14 Cal. Admin. code § 15064.3 (““vehicle miles traveled” refers to the amount and distance of automobile travel attributable to a project”).

Lastly, MOB-1-1 does not prevent projects with excessive VMT. SEIR, p. 3.4-6. It simply kicks the can down the road and would allow the City to make a determination of overriding considerations if a project exceeded the referenced VMT thresholds. Thus, the SEIRs assumption that future projects within the project site would expect reductions in ozone precursor emissions of 15 percent similar to MOB-1-1 is not sufficiently explained and not supported by the City’s existing guidance. SEIR, p. 3.4-19.

The SEIR paraphrases the numeric VMT targets included in the City’s General Plan, mentioning these “performance metrics” but not evaluating how the Project may or may not be consistent with the identified VMT limits. The SEIR is incomplete without this analysis.

Reviewing each of the other cited General Plan policies further demonstrates how the proposed AQMP requirement is vague and unenforceable. MOB-3-1 cannot be implemented by

an individual project because it focuses on the implementation of a “balanced transportation system” involving how streets are designed.

MOB-3-2 merely admonishes the City to support strategies to reduce single occupancy vehicles and promote alternative modes of transport. SEIR, p. 3.4-7. How this policy informs a future AQMP that is identifiable or enforceable is not apparent. MOB-3-2-a does obligate the City to require new development “to install conduits for future installation of electric vehicle charging equipment.” *Id.* How mere conduits will reduce any air pollution is not clear. Rather than mere conduits, actual mitigation could include the City requiring a minimum number of EV charging stations keyed to the future number of employees or parking spaces.

MOB-3-7 provides for “complete and connected” sidewalks and other pathways for bikes and pedestrians. *Id.* This policy, applied at a project level, may compliment a few bike riders commuting to an industrial or warehouse job. MOB-4-1 and NR-4-4 largely reiterate the same general concepts of promoting or providing well-designed bike and pedestrian routes also loosely provided for by MOB-3-7. But there is no evidence or indication that a few bike riders and likely fewer pedestrians would offset the emissions of a fleet of trucks, delivery vehicles or commuter automobiles. Nothing in the SEIR corroborates whether reduced parking requirements will be “appropriate” on these outlying parcels of Elk Grove, a prominent contingency in MOB-3-15. *Id.* MOB-3-16’s acknowledgment of the need for bike parking is logical but, again, there is no evidence or indication that a few bike riders would offset the emissions of a fleet of trucks, delivery vehicles or commuter automobiles. MOB-4-5’s policy to “encourage employers” to offer incentives for reducing vehicle use hardly assures any mitigation will occur. An actual mitigation measure would be for the City to condition the Project on requiring future projects and tenants to include bike storage, shower rooms, lockers, cash incentives not to drive, or other specific measures.

NR-4-1 calls for a reduction in emissions of 15 percent compared to the same project with no emission mitigation measures. This only applies to future projects that are not exempt and are found to have potential significant air quality impacts. Nothing in the SEIR indicates whether any of the future individual projects contemplated for the Project site will themselves be subject to CEQA and not exempt. It also does not explain how the admitted impact identified in the SEIR will be addressed if the future projects, taken individually, do not exceed the applicable thresholds.

Policies NR-6-5 and NR-6-7 merely admonish the City to promote energy conservation measures and encourage the use of solar energy systems. How these measures would reduce NOx emissions from trucks and vehicles is unclear. Moreover, the benefits of installing solar panels or other energy conservation measures not already required by the CalGreen Code are not realized by their mere encouragement or promotion. The measures need to be required and enforceable to qualify as mitigation measures under CEQA.

Even if specified mitigations were adopted, it likely would still be true that, given the remaining uncertainties of future projects, the SEIR would still need to acknowledge the

significant and unavoidable air quality impacts of the annexation Project. However, it is incumbent and required by CEQA that the City eliminate as much of the unavoidable impact by identifying and requiring mitigation measures now for those future projects.

F. The SEIR's Conclusion That Health Risks From Diesel Emissions Associated With the Project's Construction and Operation Will Be Less Than Significant Is Not Supported by Substantial Evidence Because No Health Risk Assessment Has Been Prepared.

The SEIR lists various rules that will be implemented by the California Air Resources Board in the future, including the so-called Tier 4 diesel standards. Which the SEIR claims will mitigate any possible health risks from construction activities at the Project site. SEIR, 3.4-24. As for operational emissions from, for example, diesel emissions from distribution centers that would be allowed within the Project site, the SEIR defers mitigation of future assessments of individual projects and identification of future measures to address any health risks. SEIR, p. 3.4-27 – 3.4-28. The deferral of mitigation to the future is inappropriate under CEQA. This deferred project level review improperly piecemeals the City's consideration of mobile source health risks and fails to comply with the City's duty to investigate the Project's potential impacts. In effect, the City breaks up the Project into a myriad of smaller, individual future projects that only address their individual truck impacts rather than the Project's foreseeable truck impacts as a whole.

The City is aware of the existing sensitive receptors as well as potential receptors in the residential portion of the Project site. Nothing is preventing the City from evaluating a likely scenario of uses relying on diesel trucks or other TAC sources and evaluating an appropriate buffer zone excluding such uses in proximity to sensitive receptors. The number of trucks expected from warehousing, distribution centers and other industrial uses are readily available from ITE's Trip Generation Manual. <https://www.ite.org/technical-resources/topics/trip-and-parking-generation/trip-generation-10th-edition-formats/>. It is entirely feasible for the City to determine as part of the SEIR process which specific types and extent of uses are being authorized. Given that the City is unclear what type of warehouse projects may be proposed in the future, the EIR can readily identify a reasonable mix that, like the square footage limit, would establish the outer bounds of warehousing and distribution that were actually addressed in the SEIR. The health risk results of various scenarios would allow the City to further refine the square footage limits for certain uses or further refine their allowed locations within the Project site. These discussions and analyses also would identify reasonable alternatives that should have been considered in the SEIR. Absent that discussion and analysis, the SEIR fails to address the health risks of these proposed uses. As a result, the SEIR is insufficient as a matter of law. The City has failed to identify any substantial evidence indicating that identifying specific details of a mitigation measure to address mobile source health risks is either impractical or infeasible. Nor does the open ended, piecemealed modeling by future projects, if any, establish a performance standard sufficient enough to postpone developing a clear mitigation measure.

G. The SEIR Fails to Identify All feasible Mitigation Measures.

The SEIR acknowledges that the Project will have significant and unavoidable GHG emission impacts. SEIR, p. 3.8-18. Although the SEIR identifies mitigation measures, it does not identify all of the feasible mitigation measures that are available and must be incorporated into the Project.

The SEIR does not consider requiring all projects within the Project site to comply with mitigation measures equivalent to SMAQMD BMP-1 and BMP-2. These measures would “require all projects to be designed without natural gas and meet CalGreen Tier 2 standards with electric vehicle ready parking spaces....” SEIR, p./ 3.8-14. The SEIR claims that these measures cannot be required now because that “can only be considered in the context of development proposals since these BMPs relate to design details.” *Id.* Contrary to this assertion, the City can adopt these requirements now and future projects would propose designs that implement these requirements. If adopted by the SEIR, future projects would not propose the use of natural gas and they would need to include the requisite number of electric vehicle charging stations.

Given the significant and unavoidable GHG emission impacts, the City must consider additional feasible mitigations. These should include for example a requirement that 100 percent of the residential units include all electric appliances and HVAC systems (rather than the 10 percent currently proposed), that 100 percent of the off-construction use Tier 4 Final equipment (rather than the 25 percent currently proposed); mandated EV charging equipment for the industrial uses as well as the commercial and residential standards identified in the SEIR; and the installation of solar panels on all buildings sufficient to meet the Project’s electrical demands, in particular any industrial buildings. SWAPE also identifies many other mitigations that should be considered by the City to further reduce the Project’s GHG emissions. SWAPE Comments, pp. 24-26.

H. The SEIR’s Analysis of Biological Resource Impacts is Inadequate And Not Supported by Substantial Evidence.

Expert biologist Shawn Smallwood, Ph.D., has reviewed the SEIR’s discussion of biological resources. *See* Smallwood Comments, attached hereto as Exhibit B. Drawing on his familiarity with the project area and decades of studying and surveying many of the species encountered at the site, Dr. Smallwood has prepared a critique of the SEIR, pointing out numerous shortcomings in the baseline assessment of the presence of species at the site, failures to evaluate impacts that will result from the Project, and numerous instances where the SEIR’s assertions are insufficient or not supported by substantial evidence.

1. The EIR fails to identify the likely presence of sensitive and other wildlife species at the Project site.

The SEIR admits that because “[t]he proposed project does not result in any physical development; therefore, no specific surveys were conducted to assess potential impacts.” SEIR,

p. 3.4-35. Dr. Smallwood points out the inadequacies of this effort at the Project site to establish a baseline from which to assess impacts to wildlife. Smallwood Comments, p. 8. He notes that, given the reconnaissance level of surveys conducted to date, the results are wildly erratic with each subsequent survey identifying new and different special status species occurring on the site. *Id.* Indeed, during his three past surveys from the edge of the site, he observed 12 special status species that were unaddressed in the 2019 SOIA EIR and earlier surveys. *Id.* During a brief site visit adjacent to a portion of the Project site on December 4, 2020, Dr. Smallwood observed 29 species of vertebrate wildlife. Smallwood Comments, p. 1. Dr. Smallwood observed thousands of blackbirds from a distance. In his expert opinion those blackbirds likely included the threatened tricolored blackbird. *Id.*, p. 3. His past surveys in the vicinity of the site have detected breeding pairs of Swainson's hawks. *Id.* Based on his research of available databases, Dr. Smallwood identifies 69 special status species that may occur at the site – significantly more than the 25 special status species acknowledged by the SEIR. *Id.* As Dr. Smallwood explains, “[n]o serious effort has been made to characterize the environmental setting, resulting in the 2020 SEIR’s false and entirely unbelievable determination that a 572-acre site composed of irrigated pasture, thickly vegetated hedges, Valley oaks, and wetlands, and situated along Deer Creek, supports only a few special-status species of wildlife.” *Id.* Dr. Smallwood notes that, if the City were to perform the detection level surveys applying scientific-based protocols identified by the wildlife resource agencies, the City undoubtedly would detect many more special status species at the Project site. *Id.*, pp. 8-11.

Dr. Smallwood notes the presence of ground squirrels on the Project site. The presence of ground squirrel burrows is closely associated with the presence of burrowing owls that frequently use the squirrel burrows. Smallwood Comments, p. 15. Nevertheless, the SEIR does not document any effort to perform the necessary protocol level surveys at the site to determine whether owls are present and, if so, fully documenting the Project’s impacts on those birds of special concern. *Id.*

Establishing an accurate baseline is the sine qua non to adequately analyzing and mitigating the significant environmental impacts of the Project. *See* CEQA Guidelines, § 15125(a); *Save Our Peninsula*, 87 Cal.App.4th at 121-123. Unfortunately, the SEIR’s failure to investigate and identify the occurrences of sensitive biological resources at the Project site results in a skewed baseline. Such a skewed baseline ultimately “mislead(s) the public” by engendering inaccurate analyses of environmental impacts, mitigation measures and cumulative impacts for biological resources. *See San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at 656; *Woodward Park Homeowners*, 150 Cal.App.4th at 708-711. By failing to conduct sufficient surveys, disregarding the absence of key species from the project site, and ignoring numerous other species likely to be present, the SEIR fails to establish and otherwise skews the entire biological resources baseline for the Project.

2. The SEIR does not sufficiently disclose the Project's impacts on habitat loss and the Project's cumulative effects on wildlife.

The SEIR assumes that by simply looking for nests and avoiding construction of nest sites during the breeding season is sufficient to disclose and address impacts to special status birds using the site. SEIR, pp. 3.5-35 – 3.5-39. Some additional efforts are made regarding the Swainson's hawk's foraging habitat. *Id.*, p. 3.5-39. Dr. Smallwood explains that merely avoiding nests does not disclose or address all of the permanent impacts that result when a nest location is destroyed. Smallwood Comments, pp. 15-16. As he states, “[h]abitat loss not only results in the immediate numerical decline of wildlife, but also in permanent loss of productive capacity.” *Id.* With the implementation of the Project, the habitat located on the site would be prevented from producing thousands of birds per year and millions over the next century:

The whole of the action would take 572 acres of habitat. Based on the preceding assumptions, the project would prevent the production of 50,382 fledglings the first year and would deny this level of productivity every year thereafter. After 100 years and assuming an average generation time of 5 years and the project site is 50% as productive as Yahner's (1982) and Young's (1948) sites, the lost capacity of both breeders and annual fledgling production would total 5,733,520 birds $\{(nests/year \times chicks/nest \times number\ of\ years) + (2\ adults/nest \times nests/year) \times (number\ of\ years \div years/generation)\}$.

Id.

Recognizing that several projects may together have a considerable impact, CEQA requires an agency to consider the “cumulative impacts” of a project along with other projects in the area. Pub. Res. Code § 21083(b); 14 Cal. Code Regs. §15355(b). If a project may have cumulative impacts, the agency must prepare an EIR, since “a project may have a significant effect on the environment if ‘[t]he possible effects of a project are individually limited but cumulatively considerable.’” *CBE*, 103 Cal.App.4th at 98, 114; *Kings County Farm Bur.*, 221 Cal.App.3d at 721. It is vital that an agency assess “the environmental damage [that] often occurs incrementally from a variety of small sources . . .” *Bakersfield Citizens For Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214.

Dr. Smallwood points out the lack of any serious effort by the SEIR to identify and quantify the Project's cumulative wildlife impacts, including no effort to identify the magnitude of those impacts and the failure to acknowledge the long-term loss of productivity the Project will have on the existing habitat. For these reasons, the SEIR's evaluation of cumulative impacts to wildlife from the project is insufficient.

3. The SEIR fails to address the Project's impacts on wildlife movement.

The SEIR asserts that “[n]o established migratory routes have been identified within the Project site and converting land in the Project site from agricultural to urban land uses would not cause any areas of natural habitat to become isolated.” SEIR, p. 3.5-52. Noting the presence of

sandhill cranes, Swainson's hawks and other hawks that migrate through this area and nest in the area of the Project, Dr. Smallwood takes issue with the generalized dismissal the SEIR makes of the importance of this area as a migratory route. Smallwood Comments, p. 16. Notably, Dr. Smallwood notes the SEIR's failure to acknowledge and evaluate a scientific report studying an area near the site that was commissioned by the City of Elk Grove. Applying data from that study and his own surveys, Dr. Smallwood notes the density of Swainson's hawk nest sites in the area of the Project is one of the highest densities he has encountered. *Id.* "This high-density cluster of Swanson's hawk nest sites easily qualifies as a very important nursery site." *Id.*

In addition, the SEIR fails to address the complete threshold of significance for wildlife movement impacts. As the SEIR states, the question is will the project "[i]nterfere substantially with the movement of any native resident or migratory wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?" SEIR, p. 3.5-31. However, the SEIR's response to this question focuses almost exclusively on impacts to wildlife corridors. *Id.*, pp. 3.5-52 – 3.5-53. The SEIR translates interfering with the movement of species to be limited to the Project acting as a "barrier" to movement. *Id.*

As Dr. Smallwood points out, this is a significant omission in the MND's analysis. Dr. Smallwood notes that the Project may have significant impacts on wildlife movement without also affecting a discrete corridor or erecting a barrier. Smallwood Comments, pp. 16-17. Dr. Smallwood also notes that the likely development would have effects on wildlife movement off-site due to collisions between wildlife and vehicles, including trucks, using the likely development. *Id.*, p. 17. As a result, the SEIR discussion of movement impacts is insufficient and not supported by substantial evidence.

4. The SEIR fails to address the Project's significant impacts on wildlife from increased traffic.

Dr. Smallwood describes the significant role increased traffic plays in wildlife mortality. Smallwood Comments, pp. 17-18. Despite this scientific evidence of wildlife impacts from traffic, no attempt is made by the SEIR to identify or evaluate this impact from the Project's increased traffic. Dr. Smallwood identifies numerous studies and his own experience in evaluating the rate of traffic collisions with wildlife. *Id.*, p. 18. Focusing on collision with birds alone, Dr. Smallwood estimates that close to 100,000 birds per year would be hurt or killed by collisions involving the over 200,000 daily vehicle miles to be generated from the Project. *Id.* He further concludes that "the project-generated traffic would cause substantial, significant impacts to wildlife." *Id.* Dr. Smallwood's expert analysis, combined with the SEIR's failure to collect information or address traffic impacts to wildlife, is substantial evidence that the Project may have significant wildlife impacts associated with vehicle collisions and these impacts are not addressed in the SEIR.

5. The MND fails to analyze the Project's impacts from the use of pest control measures.

The SEIR does not discuss the potential impact of using pesticides inside and outside of

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the proposed industrial use areas. Whatever the likely development is at the site, there will likely be steps taken to abate pests. There are many businesses that provide services for controlling stored products pests, perching birds, and rodents and other mammal pests within and around the uses anticipated in the City's industrial zone. Pest control measures include glue boards for rodents and other measures including anticoagulant poisons and acute toxicants. The use of these methods can harm non-target wildlife through direct exposure and indirect exposure via predation and scavenging. Pest control involving toxicants can result in the spread of toxicants beyond the warehouse. The SEIR fails to analyze the potential impacts of animal damage control associated with the proposed Project. Anticipated animal control strategies at the Project should be detailed, and impacts mitigated.

I understand that these comments are being submitted subsequent to the close of the City's announced comment period. Nevertheless, as the final EIR has not yet been released, LIUNA asks that you take these comments into account before releasing the final EIR. In any event, LIUNA reserves its right to supplement these comments up until the close of the public hearings on the Project. *Galante Vineyards*, 60 Cal.App.4th at 1121. For all of the above reasons, the City should amend the SEIR to address the above concerns and recirculate it for additional public review and comment.

Sincerely,



Michael R. Lozeau