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November 14, 2019

Via Email & Overnight Mail:

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Via Email Only:

Steve Stewart, Planning Manager planning@cityoflivermore.net

**Re: Comments on the Initial Study/Mitigated Negative Declaration
-- Lassen Road Residential Development Project**

Dear Mr. Ross and Mr. Stewart:

We are writing on behalf of **Livermore Residents for Responsible Development** (“Livermore Residents”) regarding the Initial Study and proposed Mitigated Negative Declaration (“IS/MND”) prepared by the City of Livermore (“City”) for the Lassen Road Residential Development Project (“Project”). Westgate Ventures (“Applicant”) proposes to construct a residential development of 186 townhomes. The Project will include 11.94 acres of residential development with 186 dwellings, 450 parking spaces, and 23.26 acres of open space development, including vineyards, native oaks, fruit orchards, and olive trees, a trail, and an overlook area with benches. The townhomes will be two- and three-story buildings ranging from 28 to 38 feet.

The Project site is in the City of Livermore. It is on the Altamont, California, United States Geographical Survey (USGS) 7.5-minute topographic quadrangle map, Township 3 South, Range 2 East, Unsectioned (Latitude 37°43’10” North; Longitude 121°43’48” West). The site is bounded by the Livermore Valley Joint

4710-003acp

November 14, 2019
Page 2

Unified School District corporation yard to the west, the Archdiocese of Oakland undeveloped property to the north, KinderCare Preschool, residential, and commercial uses to the east, and Interstate 580 to the south.

Implementation of the Project would require several discretionary entitlements and approvals, including: (1) General Plan Amendment authorizing residential uses; (2) Zoning Map Amendment and establishment of Planned Development-Residential; (3) Vesting Tentative Tract Map; (4) Site Plan Design Review; and (5) Development Agreement.¹

Based on our review of the IS/MND, we have concluded that the IS/MND fails to comply with the California Environmental Quality Act (“CEQA”) in several respects. The IS/MND improperly piecemeals its analysis of the Project’s open space development, fails to accurately disclose and evaluate the extent of the Project’s potentially significant impacts on air quality, public health, and greenhouse gas (“GHG”) emissions, understates the Project’s potentially significant impacts on biological resources, and overestimates the effectiveness of mitigation measures in reducing impacts to wildlife. The MND also fails to disclose and mitigate the full extent of the Project’s reasonably foreseeable impacts from construction noise. There is more than a fair argument that the Project may result in potentially significant impacts to air quality, public health, on GHG emissions, biological resources, and from noise. The City may not approve the Project until it prepares an environmental impact report (“EIR”) that adequately analyzes the Project’s potentially significant environmental and public health impacts and incorporates all feasible mitigation measures to avoid or lessen these impacts.

These comments were prepared with the assistance of environmental health, air quality, and GHG expert Paul E. Rosenfeld, Ph.D, and hazardous materials expert Matt Hagemann, P.G., C.Hg. of Soil Water Air Protection Enterprise (“SWAPE”), senior biologist and wildlife ecologist Scott Cashen, M.S., and noise expert Derek Watry of Wilson Ihrig. SWAPE’s comments and curricula vitae are attached to this letter as Exhibit 1.² Mr. Cashen’s comments and curriculum vitae

1
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¹ Initial Study/Mitigated Negative Declaration (“IS/MND”), p. 16.

² Exhibit 1: Letter from Matt Hagemann and Paul E. Rosenfeld to Christina Caro re: Comments on the Lassen Road Residential Development Project (November 14, 2019) (“SWAPE Comments”).
4710-003acp

November 14, 2019
Page 3

are attached as Exhibit 2.³ Mr. Watry’s comments and curriculum vitae are attached as Exhibit 3.⁴

1
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I. STATEMENT OF INTEREST

Livermore Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental impacts of the Project. The association includes City of Livermore residents Michael Keele, Brian Masters, and Brian Werner, the International Brotherhood of Electrical Workers Local 595, Plumbers & Steamfitters Local 342, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483 and their members and their families; and other individuals that live and/or work in the City of Livermore and Alameda County.

2

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

II. LEGAL BACKGROUND

A. CEQA

CEQA is intended to provide the fullest possible protection to the environment. CEQA requires that a lead agency prepare and certify an EIR for any discretionary project that may have a significant adverse effect on the environment.⁵ CEQA requires analysis of the “whole of an action,” including the

3

³ Exhibit 2: Letter from Scott Cashen to Christina Caro and William Mumby re: Comments on the Initial Study and Mitigated Negative Declaration for the Lassen Road Residential Development Project (November 7, 2019) (“Cashen Comments”).

⁴ Exhibit 3: Letter from Derek Watry to Christina Caro re Lassen Road Residential development Project Initial Study/Mitigated Negative Declaration (October 7, 2019) (“Watry Comments”).

⁵ Pub. Res. Code §§ 21002.1(a), 21100(a), 21151(a); 14 California Code of Regulations (“CCR”) §§ 15064(a)(1), (f)(1), 15367.

November 14, 2019
Page 4

“direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”⁶ “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.”⁷

In addition, public agencies must adopt feasible mitigation measures that will substantially lessen or avoid a project’s potentially significant environmental impacts and describe those mitigation measures in the EIR.⁸ A public agency may not rely on mitigation measures of uncertain efficacy or feasibility.⁹ “Feasible” means capable of successful accomplishment within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.¹⁰ Mitigation measures must be enforceable through permit conditions, agreements, or other legally binding instruments.¹¹

CEQA prohibits deferring identification of mitigation measures when there is uncertainty about the efficacy of those measures or when the deferral transfers authority for approving the measures to another entity.¹² An agency may only defer identifying mitigation measures when practical considerations prevent formulation of mitigation measures at the usual time in the planning process, 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.¹³

3
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⁶ Pub. Res. Code § 21065; 14 CCR § 15378(A).

⁷ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 (internal quotations omitted).

⁸ Pub. Res. Code §§ 21002, 21081(a), 21100(b)(3); 14 CCR § 15126.4.

⁹ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727–728.

¹⁰ 14 CCR § 15364.

¹¹ *Id.* § 15126.4(a)(2).

¹² *Id.* § 15126.4(a)(1)(B); *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 366; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308–309.

¹³ *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); see also *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).

4710-003acp

November 14, 2019
Page 5

B. An EIR Is Required

The EIR is the very heart of CEQA.¹⁴ A negative declaration is improper, and an EIR must be prepared, whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.¹⁵ “[S]ignificant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in the environment.”¹⁶ An effect on the environment need not be “momentous” to meet the CEQA test for significance; it is enough that the impacts are “not trivial.”¹⁷ Substantial evidence, for purposes of the fair argument standard, includes “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.”¹⁸

Whether a fair argument exists is a question of law that the court reviews de novo, with a preference for resolving doubts in favor of environmental review.¹⁹ In reviewing a decision to prepare a negative declaration rather than an EIR, courts “do not defer to the agency’s determination.”²⁰

The fair argument standard creates a “low threshold” for requiring preparation of an EIR and affords no deference to the agency’s determination.²¹ Where substantial evidence supporting a fair argument of significant impacts is presented, the lead agency must prepare an EIR “even though it may also be presented with other substantial evidence that the project will not have a significant effect.”²² A reviewing court must require an EIR if the record contains any “substantial evidence” suggesting that a project “may have an adverse

4

¹⁴ *Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App.4th 903, 926–927; *Sundstrom v. County of Mendocino* (1974) 202 Cal.App.3d 296, 304.

¹⁵ Pub. Res. Code § 21151; 14 CCR § 15064(f); *Citizens for Responsible Equitable Env’t Dev. v. City of Chula Vista* (“*CREED*”) (2011) 197 Cal.App.4th 327, 330–331; *Communities for a Better Env’t v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319 (“*CBE v. SCAQMD*”).

¹⁶ Pub. Res. Code § 21068; 14 CCR § 15382; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1581.

¹⁷ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83 fn. 16.

¹⁸ Pub. Res. Code § 21080(e)(1) (emphasis added); *CREED*, 197 Cal.App.4th at 331.

¹⁹ *CREED*, 197 Cal.App.4th at 331; *Pocket Protectors*, 124 Cal.App.4th at 927.

²⁰ *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 332; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318.

²¹ *Pocket Protectors*, 124 Cal.App.4th at 928.

²² Pub. Res. Code § 21151(a); 14 CCR § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 927; *County Sanitation Dist. No. 2*, 127 Cal.App.4th at 1579 (“where the question is the sufficiency of the evidence to support a fair argument, deference to the agency’s determination is not appropriate.”) (quoting *Sierra Club*).

4710-003acp

November 14, 2019
Page 6

environmental effect”—even if contrary evidence exists to support the agency’s decision.²³

Where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the effects to be significant and prepare an EIR.²⁴ In short, when “expert opinions clash, an EIR should be done.”²⁵ “It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project.”²⁶ In the context of reviewing a mitigated negative declaration, “neither the lead agency nor a court may ‘weigh’ conflicting substantial evidence to determine whether an EIR must be prepared in the first instance.”²⁷ Where such substantial evidence is presented, “evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact.”²⁸

4
CONT

The fair argument test requires the preparation of an EIR whenever “there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial.”²⁹

III. THE CITY HAS IMPROPERLY PIECEMEAELED ITS REVIEW OF THE PROJECT BY FAILING TO DESCRIBE AND ANALYZE OPEN SPACE CONSTRUCTION ON ADJACENT PROPERTY

5

A public agency may not segment a large project into two or more smaller projects in order to mask serious environmental consequences. CEQA prohibits such a “piecemeal” approach and requires review of all a project’s impacts.³⁰ Before approving a project, a lead agency must assess the environmental impacts of all

²³ *Mejia*, 130 Cal.App.4th at 332–333.

²⁴ *Pocket Protectors*, 124 Cal.App.4th at 935; *Sierra Club*, 6 Cal.App.4th at 1317–1318; CEQA Guidelines § 15064(f)(5).

²⁵ *Pocket Protectors*, 124 Cal.App.4th at 928; *Sierra Club*, 6 Cal.App.4th at 1317–1318.

²⁶ *Pocket Protectors*, 124 Cal.App.4th at 935.

²⁷ *Id.* at 935.

²⁸ *Sundstrom*, 202 Cal.App.3d at 310 (citation omitted).

²⁹ 14 CCR § 15063(b)(1) (emphasis added).

³⁰ *Arviv Enterprises v. South Valley Area Planning Commission* (2002) 101 Cal.App.4th 1333, 1340–1341, 1346.
4710-003acp

November 14, 2019
Page 7

reasonably foreseeable phases of a project.³¹ “The significance of an accurate project description is manifest, where, as here, cumulative environmental impacts may be disguised or minimized by filing numerous, serial applications.”³²

The IS/MND explains that the Project includes the construction of trails and overlook areas in the Project’s 23-acre open space area, including a trail that will extend into the adjacent Archdiocese property to the north of the Project site.³³ The IS/MND discusses the impacts associated with construction of the portions of the trails occurring on the Project site, but fails to describe or analyze the connecting portions of the Project’s trail network on the adjacent property. Instead, the IS/MND simply asserts that the Archdiocese component of the Project “is evaluated in a separate environmental review process.”³⁴ This approach, termed “piecemealing” or “segmenting,” violates CEQA, because it inhibits the full disclosure, analysis and mitigation of impacts, and discussion of alternatives.³⁵

An initial study, such as the one included the IS/MND, must consider the “whole of an action.”³⁶ In order to effectively evaluate the whole project, “the environmental review accompanying the first discretionary approval must evaluate the impacts of the ultimate development authorized by that approval...*Even though further discretionary approvals may be required before development can occur, the agency’s environmental review must extend to the development envisioned by the initial approvals.*”³⁷ Piecemeal environmental review that “ignores the environmental impacts of the end result will not be permitted.”³⁸

The IS/MND explains that the trail to be constructed as part of the open space portion of the Project will connect to a planned trail on the Archdiocese property to the north, creating a single open space trail intended for use by Project

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³¹ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396–397 (EIR held inadequate for failure to assess impacts of second phase of pharmacy school’s occupancy of a new medical research facility).

³² *Arviv Enterprises v. South Valley Area Planning Commission* (2002) 101 Cal.App.4th 1333, 1346.

³³ IS/MND, pp. 2, 15 fn.2.

³⁴ IS/MND, p. 15 fn. 2.

³⁵ E.g., Pub. Resources Code, §21002, 21002.1(a); CEQA Guidelines, §§ 151363, 15121, 15140, 15151 (An EIR is informational document whose purpose is to disclose and mitigate impacts, analyze a reasonable range of alternatives, and select as the project any alternative which can achieve project objectives, but is more protective of the environment, consistent with CEQA’s substantive mandate); CEQA Guidelines, § 15378 (project description must include all project components).

³⁶ 14 CCR § 15378(a).

³⁷ See Kostka, et al., *Practice Under the California Environmental Quality Act*, § 6.52, p. 298 (emphasis added).

³⁸ *Id.*

4710-003acp

November 14, 2019
Page 8

residents and other members of the public.³⁹ However, rather than analyze the Archdiocese trail component as part of the Project, as required by CEQA, the IS/MND vaguely states that the Archdiocese trail component is “evaluated in a separate environmental review process.”⁴⁰ The IS/MND fails to identify the type of environmental review process being conducted for the Archdiocese trail component, fails to attach the Archdiocese’s environmental review document, and fails to incorporate the Archdiocese’s environmental analysis into its own analysis of the Project’s open space development impacts.⁴¹ As a result, the IS/MND fails entirely to analyze the direct, indirect, and cumulative impacts of the Archdiocese trail components, as CEQA requires.⁴²

Mr. Cashen explains that the construction of the Project’s trails, including the Archdiocese trail component, is likely to result in new biological impacts due to increased human activity and recreation along the trails:

[O]ne of the reasonably foreseeable outcomes of the Project is a considerable increase in human activity within and adjacent to wildlands that provide habitat for various special-status plant and animal species. Recreation and human presence in general can have negative ecological impacts on ecosystems, plants, and wildlife. Those impacts can include: trampling, soil compaction, erosion, disturbance (due to noise and motion), pollution, nutrient loading, and the introduction of invasive plant species... The zone of influence of trails appears to be about 75 meters, although it may extend farther for some species.⁴³

Mr. Cashen concludes that the biological impacts associated with recreation and increased human activity from the Project’s open space development areas and trails are potentially significant and unmitigated.⁴⁴ The trail to be constructed on the Project site will form a single, connected trail with the Archdiocese trail component. The IS/MND notes that Archdiocese property is currently undeveloped land, but the IS/MND fails to evaluate the impacts of the full trail construction and

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³⁹ IS/MND, p. 15 fn.2.

⁴⁰ *Id.*

⁴¹ The IS/MND notes that the currently undeveloped land on the Archdiocese property is contemplated for a high school, but the IS/MND fails to explain whether the Archdiocese trail is related to the high school construction, and fails to evaluate the impacts of the trail construction on any other planned development on the Archdiocese property.

⁴² See generally, *Bozung v. LAFCO*, 13 Cal.3d 263, 283-84 (1975); *City of Santee v. County of San Diego*, 214 Cal.App.3d 1438, 1452 (1989); *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo*, 172 Cal.App.3d 151, 165 (1985).

⁴³ Cashen Comments, p. 8.

⁴⁴ *Id.*

November 14, 2019
Page 9

related work on the Archdiocese property. Because CEQA requires analysis of all stages of a project, this foreseeable open space construction should have been analyzed as part of the Project in a single CEQA document. This analysis is particularly important considering the discussion of the Project’s potentially significant cumulative effects related to habitat loss identified by Mr. Cashen and discussed in the biological impacts section of this letter. The City must prepare a single EIR which fully describes, analyzes, and mitigates the impacts of the Project’s entire open space development.

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IV. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT PROJECT CONSTRUCTION MAY RESULT IN POTENTIALLY SIGNIFICANT AIR QUALITY AND PUBLIC HEALTH IMPACTS THAT THE IS/MND FAILS TO DISCLOSE AND MITIGATE

A. The IS/MND’s Construction Emissions Modeling Is Not Supported by Substantial Evidence

The IS/MND explains that Project emissions were calculated using the California Emissions Estimate Model Version 2016.3.2 (“CalEEMod”).⁴⁵ “CalEEMod provides recommended default values based on site-specific information, such as land use type, meteorological data, total lot acreage, project type and typical equipment associated with project type.”⁴⁶ Under CEQA, the CalEEMod user should only change default values if the specific value inputs used to replace the defaults in the model are justified by substantial evidence.⁴⁷ Once all of the values are inputted into the model, the Projects construction and operational emissions are calculated.⁴⁸ CalEEMod produces output files which disclose what parameters were used in

6

⁴⁵ IS/MND, Appendix B (“Appendix B”), at p. 6; CAPCOA (November 2017) CalEEMod User’s Guide, http://www.aqmd.gov/docs/default-source/caleemod/01_user-39-s-guide2016-3-2_15november2017.pdf?sfvrsn=4.

⁴⁶ SWAPE Comments, p. 2.

⁴⁷ SWAPE Comments, p. 2; 14 CCR § 15064.4 (“The lead agency must support its selection of a model or methodology with substantial evidence.”); see also 14 CCR §§ 15369.5, 15384 (stating that an MND is only appropriate where there is no substantial evidence that the project may have a significant effect on the environment and defining “substantial evidence” as enough relevant information and reasonable inferences to make a fair argument to support a conclusion); Bay Area Air Quality Management District, California Environmental Quality Act: Air Quality Guidelines (May 2012) (“BAAQMD CEQA Air Quality Guidelines”), p. B-1, available at <http://www.cityoflivermore.net/civicax/filebank/documents/20120> (last accessed November 6, 2019) (indicating in Air Quality Modeling Instructions that modelers should use default values unless project-specific data is available and that the rationale for changing default values in models “should be disclosed in the CEQA document”).

⁴⁸ SWAPE Comments, p. 2.

November 14, 2019
Page 10

calculating emissions, which default values were changed, and how the values selected were justified.⁴⁹

SWAPE reviewed the CalEEMod output files generated for the Project's construction emissions, which are found in IS/MND Appendix B, the Air Quality Assessment ("Appendix B"). SWAPE concluded that the IS/MND's air modeling underestimates construction emissions because several of the values inputted into the model were unsubstantiated and inconsistent with information disclosed in the IS/MND.⁵⁰

The air quality analysis in Appendix B changed several of the default values for the Project's construction schedule with no evidentiary support, contravening CEQA's requirement that the City's air quality analysis be supported by substantial evidence.⁵¹ For example, the IS/MND's air modeling arbitrarily used a construction schedule that was shorter than the 17-month schedule generally described in the IS/MND. Appendix B states that the changes were made based on "provided construction information."⁵² However, the shortened construction schedule referenced in Appendix B was not provided anywhere in the IS/MND. As explained by SWAPE, "[w]ithout a Project-specific equipment list provided by the Project Applicant or an explanation in the IS/MND of how the necessary equipment amounts and types were determined, we are unable to evaluate whether the reduction is accurate and justified."⁵³ Therefore, the construction schedule relied upon to model construction emissions in the IS/MND is unsupported and unreliable.⁵⁴

6
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Similarly, the IS/MND claims to have used CalEEMod default assumptions for equipment type and quantity. However, review of Appendix B's emissions modeling demonstrates that the number of concrete/industrial saws was manually reduced from 1 to 0.⁵⁵ Because no construction equipment list was included with the IS/MND, this manually inputted equipment reduction was entirely unsupported.⁵⁶ The resulting emissions calculation contains a similarly

⁴⁹ SWAPE Comments, p. 2.

⁵⁰ SWAPE Comments, p. 2.

⁵¹ See BAAQMD CEQA Air Quality Guidelines, p. B-1 (indicating in Air Quality Modeling Instructions that modelers should use default values unless project-specific data is available and that the rationale for changing default values in models "should be disclosed in the CEQA document").

⁵² Appendix B, pp. 26, 58, 80.

⁵³ SWAPE Comments, p. 3.

⁵⁴ SWAPE Comments, p. 3.

⁵⁵ Appendix B, pp. 32, 61.

⁵⁶ SWAPE Comments, p. 3.

November 14, 2019
Page 11

unsubstantiated reduction in the Project’s construction emissions.⁵⁷ As a result, the IS/MND underreported the Project’s actual construction emissions, resulting in a failure to disclose the full extent of the Project’s construction air quality impacts.

6
CONT

B. The IS/MND’s Air Quality Mitigation Measures Fail to Reduce Potentially Significant Impacts from Construction Emissions to Less Than Significant Levels

Mitigation Measure MM AIR-2 requires a fleet-wide reduction of at least 63 percent in PM10 exhaust emissions.⁵⁸ To meet this requirement, MM AIR-2 suggests that all mobile and portable diesel-powered off-road equipment larger than 25 horsepower and operating on the site for more than two days continuously meet EPA particulate matter emissions standards for “Tier 2 engines or equivalent” and include diesel particulate filters (“DPF”)⁵⁹ MM AIR-2 also states that “meeting EPA Tier 4 engine standards would suffice,” but does not impose any binding requirement on the Applicant to use either Tier 2, Level 3 DPF, or Tier 4 equipment.⁶⁰ Nevertheless, the IS/MND’s mitigated emissions modeling assumes a best-case scenario of using three pieces of Tier 4 Interim equipment without actually requiring it, and relies on this assumption to conclude that the Project’s health risk impacts from human exposure to construction-related toxic air contaminants (“TACs”) would be less than significant.⁶¹ The IS/MND also fails to include an analysis of the feasibility of obtaining Tier 4 equipment for use on the Project site. The IS/MND therefore improperly assumes use of high-level Tier 4 engines in modeling the Project’s air emissions in reliance on an unenforceable and ineffective mitigation measure.⁶²

7

CEQA requires mitigation measures to be feasible and enforceable.⁶³ A public agency may not rely on mitigation measures of uncertain efficacy or feasibility.⁶⁴ Here, MM AIR-2 purports to require a 63 percent reduction in PM10 emissions, but

⁵⁷ SWAPE Comments, p. 3.

⁵⁸ IS/MND, p. 46.

⁵⁹ IS/MND, p. 46.

⁶⁰ IS/MND, p. 46.

⁶¹ See IS/MND, p. 40 (“The maximum excess preschool infant cancer risk from these construction activities would be 27.5 in one million for an infant exposure...The maximum preschool infant excess cancer risk would exceed the BAAQMD significance threshold of 10 in one million and would be considered a significant impact. Implementation of MM AIR-2 would reduce the maximum increased cancer risk for an infant at the KinderCare Preschool and the maximum residential childcare cancer risk to less than significant levels.”).

⁶² SWAPE Comments, pp. 5-7; Appendix B, pp. 27, 60.

⁶³ 14 CCR §§ 15126.4(a)(2), 15364.

⁶⁴ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727–728. 4710-003acp

November 14, 2019
Page 12

fails to mandate the use of the emissions control equipment that would actually achieve this reduction. The IS/MND also contains no evidence demonstrating that the Applicant can procure the necessary combination of Tier 2, Level 3 DPF, and Tier 4 equipment necessary to achieve the emissions reductions assumed in the IS/MND.

By contrast, there is substantial evidence demonstrating that Tier 4 equipment has limited availability in the market and is difficult to procure. SWAPE explains that Tier 4 Interim equipment only accounts for 8%, respectively, of all off-road equipment currently available in California.⁶⁵ As indicated by SWAPE, for the model to include Tier 4 engines, the IS/MND would need to evaluate the feasibility of obtaining this cleaner and more updated equipment, justify its use, and explain enforcement strategies.⁶⁶ Instead, MM AIR-2 merely states that the use of Tier 4 equipment “would suffice,” with no supporting analysis. The IS/MND therefore fails to address the difficulties posed by the relative scarcity of Tier equipment, and the air modeling performed in the IS/MND is unsupported. The IS/MND violates CEQA by relying on a mitigation measure that does not require the mitigation assumed in its analysis, thereby underestimating actual emissions.

7
CONT

The IS/MND concludes that the unmitigated health risk posed to infants at the nearby KinderCare Preschool from the Project’s construction activities would be 27.5 in one million.⁶⁷ The IS/MND acknowledges that this “preschool infant excess cancer risk would exceed the BAAQMD [Bay Area Air Quality Management District] significance threshold of 10 in one million and would be considered a significant impact.”⁶⁸ The IS/MND relies on implementation of MM AIR-2, including the use of Tier 2, Level 3 DPF, and Tier 4 Interim equipment, to reduce this significant cancer risk to less than significant levels.⁶⁹ However, since MM AIR-2 does not contain any binding requirement to use Tier 2, Level 3 DPF, and Tier 4 equipment, the IS/MND’s conclusion that this significant construction health risk impact will be less than significant with mitigation is entirely unsupported. The Project’s infant cancer risk remains significant and unmitigated.

In addition, review of the Project’s CalEEMod output files demonstrates that the Applicant applied several water- and energy-related mitigation measures to

⁶⁵ SWAPE Comments, p. 6.

⁶⁶ SWAPE Comments, pp. 6-7.

⁶⁷ IS/MND, p. 40.

⁶⁸ *Id.*

⁶⁹ *Id.* (finding mitigated infant health risk to be 3.1 in one million); Appendix B, pp. 11, 27, 60; SWAPE Comments, p. 10.

November 14, 2019
Page 13

reduce operational emissions that were not discussed anywhere in the IS/MND, and are not included in the IS/MND's three air quality mitigation measures.⁷⁰ SWAPE, therefore, could not verify these mitigation measures, which appear to be non-binding (or non-existent) and unenforceable.⁷¹ Similar to the IS/MND's reliance on Tier 4 mitigation for construction emissions, the IS/MND's reliance on unsubstantiated water and energy mitigation measures underestimates the Project's operational emissions, rendering the IS/MND's operational air quality analysis unsupported.⁷²

7
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C. The IS/MND Fails to Adequately Evaluate Health Risk from Construction and Operational Emissions

The IS/MND includes a health risk assessment ("HRA") which concludes that construction of the Project would result in a maximum residential cancer risk of 9.3 in one million for infant exposure and 0.2 in one million for adult exposure.⁷³ The IS/MND concludes that the impacts fall below BAAQMD's significance threshold of 10 in one million for cancer risk, and would therefore be less than significant.⁷⁴ However, as SWAPE explains, the IS/MND's conclusions are inaccurate and unsupported because the IS/MND relies on a flawed air model to estimate construction-related health risk posed to the nearest sensitive receptors and the fails altogether to perform an analysis of the health risk from the Project's operational emissions after it is constructed.⁷⁵

8

First, Appendix B's HRA fails to calculate the cancer risk posed during the third trimester of pregnancy, as the IS/MND admits is required by the health risk assessment guidance applied to the Project, the 2015 Office of Environmental Health Hazard Assessment's (OEHHA) risk assessment guidelines.⁷⁶ As Appendix B explains, the 2015 OEHHA guidelines "incorporate substantial changes designed to provide for enhanced protection of children, as required by State law, compared to previous published risk assessment guidelines" and recommend that cancer risk be calculated by age groups to account for different breathing rates and sensitivity to TACs, including "evaluating risks for the third trimester of pregnancy to age

⁷⁰ SWAPE Comments, p. 7; Appendix B, pp. 49, 53, 63, 67; IS/MND, pp. 46-47.

⁷¹ SWAPE Comments, p. 7.

⁷² SWAPE Comments, p. 7.

⁷³ IS/MND, p. 40; Appendix B, p. 10.

⁷⁴ IS/MND, p. 40.

⁷⁵ SWAPE Comments, p. 6.

⁷⁶ Appendix B, p. 2.

November 14, 2019
Page 14

zero, ages zero to less than two (infant exposure), ages two to less than 16 (child exposure), and ages 16 to 70 (adult exposure).”⁷⁷

Use of the 2015 OEHHA guidelines is required by BAAQMD and recommended by the California Air Resources Board (“CARB”).⁷⁸ Yet, as shown in the table from the IS/MND’s health risk below, the cancer risk for third trimester gestations was omitted from the IS/MND’s reported total excess cancer risk estimations, notwithstanding the IS/MND’s claim that it adhered to the OEHHA guidance.⁷⁹

8
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⁷⁷ Appendix B, p. 2.

⁷⁸ SWAPE Comments, pp. 7–8; “Air Toxics NSR Program Health Risk Assessment (HRA) Guidelines.” BAAQMD, January 2016, p. 1 *available at* http://www.baaqmd.gov/~media/files/planning-and-research/rules-and-regs/workshops/2016/reg-2-5/hra-guidelines_clean_jan_2016-pdf.pdf?la=en; “Overview of the Air Toxics “Hot Spots” Information and Assessment Act” CARB, August 2016, *available at* <https://www.arb.ca.gov/ab2588/overview.htm>

⁷⁹ SWAPE Comments, p. 7; Appendix B, p. 79; “Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments.” OEHHA, February 2015, *available at* <https://oehha.ca.gov/media/downloads/crnrr/2015guidancemanual.pdf>, p. 5-23; BAAQMD Recommended Methods, p. 85.

November 14, 2019
Page 15

Construction Cancer Risk by Year - Maximum Impact Receptor Location

Exposure Year	Exposure Duration (years)	Age	Infant/Child - Exposure Information			Infant/Child Cancer Risk (per million)	Adult - Exposure Information			Adult Cancer Risk (per million)
			DPM Conc (ug/m3)		Age Sensitivity Factor		Modeled		Age Sensitivity Factor	
			Year	Annual	Factor		Year	Annual	Factor	
0	0.25	-0.25 - 0*	-	-	10	-	-	-	-	
1	1	0 - 1	2019	0.0346	10	5.69	2019	0.0346	1	0.10
2	1	1 - 2	2020	0.0220	10	3.62	2020	0.0220	1	0.06
3	1	2 - 3		0.0000	3	0.00		0.0000	1	0.00
4	1	3 - 4		0.0000	3	0.00		0.0000	1	0.00
5	1	4 - 5		0.0000	3	0.00		0.0000	1	0.00
6	1	5 - 6		0.0000	3	0.00		0.0000	1	0.00
7	1	6 - 7		0.0000	3	0.00		0.0000	1	0.00
8	1	7 - 8		0.0000	3	0.00		0.0000	1	0.00
9	1	8 - 9		0.0000	3	0.00		0.0000	1	0.00
10	1	9 - 10		0.0000	3	0.00		0.0000	1	0.00
11	1	10 - 11		0.0000	3	0.00		0.0000	1	0.00
12	1	11 - 12		0.0000	3	0.00		0.0000	1	0.00
13	1	12 - 13		0.0000	3	0.00		0.0000	1	0.00
14	1	13 - 14		0.0000	3	0.00		0.0000	1	0.00
15	1	14 - 15		0.0000	3	0.00		0.0000	1	0.00
16	1	15 - 16		0.0000	3	0.00		0.0000	1	0.00
17	1	16-17		0.0000	1	0.00		0.0000	1	0.00
18	1	17-18		0.0000	1	0.00		0.0000	1	0.00
19	1	18-19		0.0000	1	0.00		0.0000	1	0.00
20	1	19-20		0.0000	1	0.00		0.0000	1	0.00
21	1	20-21		0.0000	1	0.00		0.0000	1	0.00
22	1	21-22		0.0000	1	0.00		0.0000	1	0.00
23	1	22-23		0.0000	1	0.00		0.0000	1	0.00
24	1	23-24		0.0000	1	0.00		0.0000	1	0.00
25	1	24-25		0.0000	1	0.00		0.0000	1	0.00
26	1	25-26		0.0000	1	0.00		0.0000	1	0.00
27	1	26-27		0.0000	1	0.00		0.0000	1	0.00
28	1	27-28		0.0000	1	0.00		0.0000	1	0.00
29	1	28-29		0.0000	1	0.00		0.0000	1	0.00
30	1	29-30		0.0000	1	0.00		0.0000	1	0.00
Total Increased Cancer Risk						9.3				0.16

* Third trimester of pregnancy

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Without this requisite component of the Project’s health risk analysis, the IS/MND’s conclusion of non-significance is unsubstantiated.

In addition, Appendix B adjusted the predicted cancer risk using a factor of 1.3744, which purportedly came from BAAQMD for use with its CEQA screening tools.⁸⁰ However, the cited email from Virginia Lau of BAAQMD sent to the consultant who prepared the Assessment contains no such multiplier and the Assessment fails to otherwise explain the origin of purpose of the 1.3744.⁸¹

The IS/MND also incorrectly concludes that operational impacts on the health of off-site sensitive receptors would be less than significant because “Project operation would not be a localized source of TACs or PM_{2.5}, and therefore,

⁸⁰ Appendix B, pp. 16–17.

⁸¹ Email from Virginia Lau to Bill Popenuck re OEHHA Exposure Factors, November 16, 2015, available at http://www.cityoflivermore.net/civicax/filebank/documents/20115_4710-003acp

November 14, 2019
Page 16

operational health risks are not quantified.”⁸² This conclusion is both unsupported and inconsistent with the OEHHA and BAAQMD health risk analysis recommendations which the IS/MND itself claims to have followed.

The 2015 OEHHA Guidance, which the IS/MND claims to have utilized in conducting its health risk analysis,⁸³ recommends that “exposure from projects lasting more than 6 months be evaluated for the duration of the project,” and “recommends that an exposure duration of 30 years be used to estimate individual cancer risk for the maximally exposed individual resident (MEIR).”⁸⁴ The IS/MND contains an analysis of “on-site community risk impacts” from exposure of future Project residents to highway and roadway emissions over the projected 30-year life of the Project, but fails to include any analysis of operational health risk posed to off-site sensitive receptors. It is improper for the City to claim that the Project would result in a less than significant health risk impact without assessing the actual risk posed to sensitive receptors as a result of the diesel particulate matter (“DPM”) emissions that will be emitted by Project-related activities throughout the life of the Project.⁸⁵

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Assuming the project will operate for at least 30 years, health risks from Project operation should have been evaluated by the IS/MND.⁸⁶ Then, in accordance with OEHHA guidance, excess cancer risk should have been calculated separately for all sensitive receptor age bins and summed to evaluate total cancer risk posed by all Project activities.⁸⁷ Finally, the City should have compared these values to the applicable BAAQMD cancer risk threshold of ten in one million.⁸⁸ Appendix B’s Air Quality Assessment supporting the IS/MND conducted such an analysis and comparison to significance thresholds in the context of construction emissions, but resorts to conclusory dismissal of the possible significance of operational health impacts with no analysis.⁸⁹ This violates CEQA’s requirement that a CEQA

⁸² IS/MND, p. 38; SWAPE Comments, p. 9.

⁸³ Appendix B, Attachment 2, p. 2 (Health Risk Assessment Methodology: “This HRA used the recent 2015 OEHHA risk assessment guidelines and CARB guidance.”).

⁸⁴ SWAPE Comments, p. 9-12.

⁸⁵ SWAPE Comments, p. 9-12.

⁸⁶ SWAPE Comments, p. 9-12.

⁸⁷ SWAPE Comments, p. 9-12; *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516, citing *Laurel Heights I*, 47 Cal.3d at 405.

⁸⁸ SWAPE Comments, p. 10; Bay Area Air Quality Management District, California Environmental Quality Act: Air Quality Guidelines (May 2017) (“BAAQMD CEQA Air Quality Guidelines 2017”), p. 2-5, available at http://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa_guidelines_may2017-pdf.pdf?la=en (last accessed November 7, 2019) (identifying significance threshold of excess cancer risk level of more than 10 in one million).

⁸⁹ Appendix B, pp. 9–10.

November 14, 2019
Page 17

document must make “a reasonable effort to substantively connect a project’s air quality impacts to likely health consequences.”⁹⁰

An EIR must be prepared to fully disclose and mitigate the Project’s potentially significant health risk impacts from construction and operation. Until the Project’s operational health risk impacts are quantified and compared to applicable thresholds, the City lacks substantial evidence on which to make any conclusions regarding the significance of the Project’s health impacts.⁹¹

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D. There Is Substantial Evidence Supporting A Fair Argument That The Project Is Likely to Result In Significant Health Risk Impacts

SWAPE prepared a screening-level HRA to demonstrate the potential health risk posed by Project construction and operation to nearby sensitive receptors.⁹² The results of the assessment provide substantial evidence demonstrating that the Project’s construction and operational DPM emissions may result in a potentially significant health risk impact that was not identified or addressed in the IS/MND.⁹³

9

SWAPE relied upon AERSCREEN, a screening level air quality dispersion model included in OEHHA and California Air Pollution Control Officers Associated guidance as the appropriate air dispersion model for Level 2 health risk screening assessments (“HRSAs”).⁹⁴ SWAPE identified the nearest sensitive receptor about 25 meters away and, consistent with OEHHA recommendations, SWAPE assumed residential exposure begins during the third trimester stage of life.⁹⁵ The SWAPE construction CalEEMod output files indicate that “construction activities will generate approximately 354 pounds of DPM over the approximately 532-day construction period.”⁹⁶ To account for the variability in equipment usage and truck trips over Project construction, SWAPE calculated an average DPM emission rate of 0.003497 grams per second by the following equation:

⁹⁰ *Sierra Club*, 6 Cal.5th at 516, citing *Laurel Heights I*, 47 Cal.3d at 405.

⁹¹ SWAPE Comments, p. 9.

⁹² SWAPE Comments, pp. 10–15.

⁹³ SWAPE Comments, p. 10.

⁹⁴ SWAPE Comments, p. 10. “A Level 2 HRSA utilizes a limited amount of site-specific information to generate maximum reasonable downwind concentrations of air contaminants to which nearby sensitive receptors may be exposed.” (*Id.*)

⁹⁵ SWAPE Comments, p. 10.

⁹⁶ SWAPE Comments, p. 10. This time runs for the entirety of the construction period, from the beginning to the end.

November 14, 2019
Page 18

$$\text{Emission Rate} \left(\frac{\text{grams}}{\text{second}} \right) = \frac{354.4 \text{ lbs}}{532 \text{ days}} \times \frac{453.6 \text{ grams}}{\text{lbs}} \times \frac{1 \text{ day}}{24 \text{ hours}} \times \frac{1 \text{ hour}}{3,600 \text{ seconds}} = \mathbf{0.003497 \text{ g/s}}$$

SWAPE's updated model indicates that operational activities will generate approximately 70 pounds of DPM per year of operation.⁹⁷ Applying the same equation used to estimate the construction DPM rate, SWAPE estimated an emission rate of 0.001 g/s for Project operation:

$$\text{Emission Rate} \left(\frac{\text{grams}}{\text{second}} \right) = \frac{69.6 \text{ lbs}}{365 \text{ days}} \times \frac{453.6 \text{ grams}}{\text{lbs}} \times \frac{1 \text{ day}}{24 \text{ hours}} \times \frac{1 \text{ hour}}{3,600 \text{ seconds}} = \mathbf{0.00100 \text{ g/s}}$$

Using this data, the AERSCREEN model generated maximum reasonable estimates of single-hour DPM concentrations around the Project site.⁹⁸ SWAPE then calculated the excess cancer risk for each sensitive receptor location for adults, children, and infant receptors using applicable HRA methodologies prescribed by OEHHA.⁹⁹ Age Sensitivity Factors (ASFs) were employed to account for heightened susceptibility of young children to the carcinogenic toxicity of air pollution.¹⁰⁰ The results of the calculations are summarized in the tables below:¹⁰¹

9
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⁹⁷ SWAPE Comments, pp. 10–11.

⁹⁸ SWAPE Comments, p. 12.

⁹⁹ SWAPE Comments, p. 12.

¹⁰⁰ SWAPE Comments, pp. 13-14.

¹⁰¹ SWAPE Comments, pp. 14.

November 14, 2019
Page 19

The Closest Exposed Individual at an Existing Residential Receptor					
Activity	Duration (years)	Concentration (ug/m3)	Breathing Rate (L/kg-day)	ASF	Cancer Risk
Construction	0.25	0.03821	361	10	4.4E-07
3rd Trimester Duration	0.25			3rd Trimester Exposure	4.4E-07
Construction	1.21	0.03821	1090	10	6.4E-06
Operation	0.79	0.02964	1090	10	3.3E-06
Infant Exposure Duration	2.00			Infant Exposure	9.7E-06
Operation	14.00	0.02964	572	3	7.7E-06
Child Exposure Duration	14.00			Child Exposure	7.7E-06
Operation	14.00	0.02964	261	1	1.2E-06
Adult Exposure Duration	14.00			Adult Exposure	1.2E-06
Lifetime Exposure Duration	30.00			Lifetime Exposure	1.9E-05

The Maximum Exposed Individual at an Existing Residential Receptor (MEIR)					
Activity	Duration (years)	Concentration (ug/m3)	Breathing Rate (L/kg-day)	ASF	Cancer Risk
Construction	0.25	0.04816	361	10	5.6E-07
3rd Trimester Duration	0.25			3rd Trimester Exposure	5.6E-07
Construction	1.21	0.04816	1090	10	8.1E-06
Operation	0.79	0.03735	1090	10	4.1E-06
Infant Exposure Duration	2.00			Infant Exposure	1.2E-05
Operation	14.00	0.03735	572	3	9.7E-06
Child Exposure Duration	14.00			Child Exposure	9.7E-06
Operation	14.00	0.03735	261	1	1.5E-06
Adult Exposure Duration	14.00			Adult Exposure	1.5E-06
Lifetime Exposure Duration	30.00			Lifetime Exposure	2.4E-05

9
CONT

November 14, 2019
Page 20

SWAPE concludes that the excess cancer risk posed to adults, children, infants, and during the third trimester of pregnancy at the maximally exposed receptor, located at 275 meters away, over the course of Project construction and operation are approximately 1.5, 9.7, 12, and 0.56 in one million, respectively. The excess cancer risk over the course of a residential lifetime (30 years) at the maximally exposed receptor (MEIR), is approximately 24 in one million¹⁰² Consistent with the 2015 OEHHA guidance, SWAPE assumed exposure began in the third trimester to provide the most conservative estimate of air quality hazards.¹⁰³ Under this assumption, cancer risk exceeds the BAAQMD threshold of 10 in one million for the closest receptor and for the MEIR.¹⁰⁴ As a result, there is a fair argument of a potentially significant health impact left undiscussed and unmitigated by the IS/MND.¹⁰⁵

9
CONT

An EIR must be prepared with an updated air quality analysis and HRA to quantify and address the potentially significant health risks associated with both Project construction and operation.¹⁰⁶

V. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT MAY CAUSE POTENTIALLY SIGNIFICANT GREENHOUSE GAS (GHG) IMPACTS THAT THE IS/MND FAILS TO DISCLOSE AND MITIGATE

A. The IS/MND's GHG Significance Thresholds Are Not Supported By Substantial Evidence

The CEQA Guidelines authorize agencies to adopt “thresholds of significance” to assist in determining whether a project’s effect will be deemed significant.¹⁰⁷ However, CEQA requires that the selection of a threshold of significance must be supported by substantial evidence.¹⁰⁸ When an impact exceeds a CEQA significance threshold, the agency’s CEQA document must disclose that the impact

10

¹⁰² SWAPE Comments, pp. 14-15.

¹⁰³ The IS/MND explains that the 2015 OEHHA guidance adopted by the City and BAAQMD “recommend evaluating risks for the third trimester of pregnancy to age zero, ages zero to less than two (infant exposure), ages two to less than 16 (child exposure), and ages 16 to 70 (adult exposure).” Appendix B, p. 2.

¹⁰⁴ SWAPE Comments, p. 13.

¹⁰⁵ SWAPE Comments, p. 13.

¹⁰⁶ SWAPE Comments, p. 15.

¹⁰⁷ 14 CCR § 15064.7(a).

¹⁰⁸ 14 CCR § 15064(b).

November 14, 2019
Page 21

is significant.¹⁰⁹ The CEQA document must then analyze mitigation measures and alternatives to reduce the impact to the fullest extent feasible. The City failed to comply with these requirements in its analysis and mitigation of the Project's GHG emissions. The IS/MND relies on unsupported and inapplicable GHG thresholds of significance to evaluate the severity of the Project's GHG impacts. As a result, the IS/MND fails to disclose the Project's potentially significant GHG impacts, and fails to adequately mitigate them.

The IS/MND concludes that the Project will result in a less than significant impact on GHG emissions based on its claims that it is consistent with the City's Climate Action Plan ("CAP") and the 2017 CARB Scoping Plan.¹¹⁰ However, the City's CAP does not provide GHG reduction goals past the year 2020.¹¹¹ The Project has a projected 17-month construction schedule and has not begun construction yet, so it is reasonable to assume the project will not become operational until after 2020.¹¹² As a result, the City's CAP is not applicable to the proposed Project and cannot be used to determine the significance of the Project's impacts through GHG emissions.¹¹³

The IS/MND next relies on BAAQMD's 2020 service population efficiency threshold of 4.6 MT CO_{2e}/SP/year, but this threshold too is inapplicable because development would occur beyond 2020.¹¹⁴ BAAQMD's thresholds, included in the district's 2017 CEQA Air Quality Guidelines, were developed to comply with the state reduction target as it is embodied in AB 32,¹¹⁵ which mandates that statewide GHG emissions be reduced to 1990 levels by the target year 2020.¹¹⁶ But in 2016, the state passed SB 32,¹¹⁷ which codified a new statewide 2030 GHG emissions

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¹⁰⁹ *CBE v. CRA*, 103 Cal.App.4th at 110–111; *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (County applies BAAQMD's "published CEQA quantitative criteria" and "threshold level of cumulative significance"); *CBE v. SCAQMD*, 48 Cal.4th at 327 (impact is significant because exceeds "established significance threshold for NO_x ... constitute[ing] substantial evidence supporting a fair argument for a significant adverse impact").

¹¹⁰ IS/MND, p. 72.

¹¹¹ ICF International, City of Livermore Climate Action Plan (2012), at pp. ES-1–ES-4, available at <http://www.cityoflivermore.net/civicax/filebank/documents/9789/> (last accessed November 5, 2019).

¹¹² See IS/MND, p. 36. In fact, the Air Quality Assessment indicates that "Year 2021 would be the first full year of project occupancy..." (Appendix B, p. 14.)

¹¹³ SWAPE Comments, p. 16-18.

¹¹⁴ SWAPE Comments, p. 16-18.

¹¹⁵ See BAAQMD CEQA Air Quality Guidelines 2017, p. D-27.

¹¹⁶ California Air Resources Board, Assembly Bill 32 Overview; available at: <https://www.arb.ca.gov/cc/ab32/ab32.htm> (last accessed September 27, 2019).

¹¹⁷ Senate Bill 32, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB32 (last accessed October 28, 2019).

4710-003acp

November 14, 2019
Page 22

reduction target of 40% below 1990 levels. The IS/MND fails to mention these new requirements.

CEQA Guidelines and case law mandate consideration of the latest science and legislative goals in determining the significance of GHG emissions impacts.¹¹⁸ The IS/MND, therefore, should have used the BAAQMD 2030 substantial progress service population efficiency threshold of 2.6 MT CO₂e/SP/year to evaluate the Project’s 2021 emissions.¹¹⁹ While the IS/MND considers this standard for 2030 emissions projections, it is also the applicable standard for emissions in the preceding years.

10
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B. The IS/MND’s GHG Analysis is Inaccurate and Unsupported

As with other air quality modeling discussed above, the IS/MND relies upon a flawed CalEEMod model to determine GHG emissions.¹²⁰ The emissions per service population estimated by the IS/MND for 2030 is precisely at the 2030 BAAQMD threshold, which suggests that a change in modeling to avoid underestimating the emissions would yield emissions above the threshold and a potentially significant impact.¹²¹ Relatedly, while the IS/MND states elsewhere that it estimates the Project would add approximately 531 persons to the City’s population, the IS/MND fails to explicitly identify the value used for the Project’s service population in the air quality analysis.¹²² Confusingly, Appendix B uses a projected population of 549, but yields 2.5 MT CO₂e/capita for 2030 emissions, a different emissions estimate than the 2.6 MT CO₂e/capita discussed in the IS/MND.¹²³

11

Throughout the IS/MND and Appendix B various different service population estimates are used, rendering the IS/MND’s GHG analysis inconsistent and inaccurate. The GHG analysis also misleads the public, making it impossible to

¹¹⁸ 14 CCR § 15064.4 (declaring that lead agency should consider the extent to which the project may increase GHG emissions, whether project emissions exceed a threshold of significance, and consistency with statewide, regional, or local plans for reduction of GHG emissions, and justify decisions with substantial evidence); *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 519 (recognizing that SB 32 and CARB regulations could change what is needed under CEQA and requiring environmental impact analyses under CEQA to stay “in step with evolving scientific knowledge and state regulatory schemes”).

¹¹⁹ SWAPE Comments, p. 16-18.

¹²⁰ SWAPE Comments, p. 16-18.

¹²¹ SWAPE Comments, p. 16-18.

¹²² SWAPE Comments, p. 16-18.

¹²³ Compare Appendix B, p. 21 *with* IS/MND, p. 68.

November 14, 2019
Page 23

determine which calculation the IS/MND relies on for modeling GHG emissions.¹²⁴ SWAPE was unable to verify the IS/MND’s calculations.¹²⁵ The GHG emissions estimate in the IS/MND is therefore unsubstantiated and cannot be relied on to determine the significance of the Project’s impacts on climate change.¹²⁶ An EIR must be prepared to include an accurate GHG analysis.

11
CONT

C. The IS/MND Provides Substantial Evidence Demonstrating that the Project Has Significant GHG Emissions When Accurate Thresholds are Applied

SWAPE explains that, if the correct threshold had been used to evaluate Project emissions in 2021, the IS/MND would have identified a significant GHG impact.¹²⁷ Specifically, the IS/MND estimates GHG emissions to be 3.0 MT CO₂e/SP/year in 2021, which exceeds the threshold of 2.6 MT CO₂e/SP/year.¹²⁸ Similarly, the emissions estimates provided by the IS/MND of 1,647 MT CO₂e/year and 1,435 MT CO₂e/year for 2021 and 2030, respectively, each exceed the BAAQMD threshold of 1,100 MT CO₂e/year.¹²⁹ Thus, SWAPE’s analysis yields findings of significant impacts which the IS/MND fails to disclose.¹³⁰ An EIR must be prepared with an updated GHG analysis that evaluates and mitigates the impacts from these significant GHG emissions.

12

VI. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT MAY CAUSE POTENTIALLY SIGNIFICANT HEALTH IMPACTS FROM RESIDUAL PESTICIDES THAT THE IS/MND FAILS TO DISCLOSE AND MITIGATE

The 2017 Phase I Environmental Site Assessment attached to the IS/MND with Appendix F determined that the Project site has remained predominantly undeveloped with intermittent dry farming activities beginning around 1940.¹³¹ SWAPE reviewed the Appendix F and related historical soil data for the Project site. Based on their review, SWAPE concludes that historical agricultural practices at the Project site may have involved the use of pesticides such as DDT, DDE, and

13

¹²⁴ IS/MND, pp. 98, 100, 103–104 [population of 531]; IS/MND, p. 108 [population of 554]; Appendix B, p. 21 [population of 549]; Appendix B, Attachment 1 [population of 561].

¹²⁵ SWAPE Comments, p. 18.

¹²⁶ SWAPE Comments, p. 16-18.

¹²⁷ SWAPE Comments, pp. 16-18.

¹²⁸ SWAPE Comments, pp. 16-18.

¹²⁹ BAAQMD CEQA Air Quality Guidelines 2017, p. 3-1; IS/MND, p. 66.

¹³⁰ SWAPE Comments, pp. 17–18.

¹³¹ Appendix F: Phase I Environmental Site Assessment, pp. 1, 8.

4710-003acp

November 14, 2019
Page 24

chlordane that could still be present in the soils.¹³² Such pesticides pose serious health concerns such as headaches, nausea, and cancer.¹³³

Although construction workers and nearby residents may be exposed to pesticide-contaminated soils and dust during landscaping and construction, the IS/MND fails to even mention the risks of residual pesticides.¹³⁴ An EIR must be prepared to include soil sampling, testing, and analysis of the soils at the Project site for pesticides in compliance with guidance published by the Department of Toxic Substances Control.¹³⁵ The EIR would also need to evaluate the health risk associated with potential exposure to soil contaminants that may be released during Project construction, and incorporate effective mitigation to protect the health of constructions workers and residents living adjacent to the Project site from this exposure.¹³⁶

13
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VII. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT MAY CAUSE POTENTIALLY SIGNIFICANT IMPACTS TO BIOLOGICAL RESOURCES THAT THE IS/MND FAILS TO DISCLOSE AND MITIGATE

A. The IS/MND Fails to Adequately Describe the Project’s Open Space Elements

The Project description suggests that only one-third of the Project site (11.94 acres) acres will be developed. However, this is misleading as it does not account for the “Open Space” portions of the Project site that would need to be graded and landscaped to provide for the new vegetation, trail, and outlook area (23.26 acres).¹³⁷ As Mr. Cashen explains, such landscaping could disrupt habitat for wildlife likely to be found at the site.¹³⁸ As a result, the IS/MND fails to describe

14

¹³² SWAPE Comments, p. 1.

¹³³ SWAPE Comments, p. 1.

¹³⁴ SWAPE Comments, p. 2.

¹³⁵ SWAPE Comments, p. 2.

¹³⁶ SWAPE Comments, p. 2. The IS/MND currently has no mitigation soil contamination. The only mitigation measure recommended for hazardous materials is to implement the dust control measures required by MM AIR-2. MM AIR-2 does not require any analysis of residual contamination, and the IS/MND contains no evidence demonstrating that dust control would mitigate the release and dispersion of toxic soil contaminants.

¹³⁷ See IS/MND, pp. 2, 15, Exhibits 4a & 4b.

¹³⁸ See Cashen Comments, p. 2 (“Whereas approximately 12 acres of the site would contain ‘residential development’ in the form of dwelling units and parking spaces, additional portions of the Project site would be graded or otherwise impacted by the proposed vineyard, bioretention basins, trails, and man-made berms. The IS/MND fails to describe or quantify impacts associated with these features, which will eliminate habitat for special-status species.”).

4710-003acp

November 14, 2019
Page 25

how the “Open Space” portion of the Project could also have detrimental impacts on the biological resources that may be present. For example, grading activities could remove burrows—an essential habitat element for the burrowing owl and California tiger salamander.¹³⁹ Furthermore, vineyards proposed for the Project do not provide habitat for any special-status species.¹⁴⁰

Under CEQA, an initial study is legally defective if it fails to describe a proposed project accurately.¹⁴¹ The CEQA Guidelines define “project” broadly to encompass the “whole of the action.”¹⁴² This includes, but is not limited to, “later phases of the project, and any secondary, support, or off-site features necessary for its implementation.”¹⁴³ The Project’s Open Space elements are key features necessary for the Project’s implementation. As such, they must be fully described in the Project’s CEQA document. An EIR must be prepared to fully disclose the scope of the Project’s open space elements.

B. The IS/MND Fails to Establish an Accurate Baseline for its Biological Impact Analysis

CEQA requires that a lead agency include a description of the physical environmental conditions in the vicinity of the project as they exist at the time environmental review commences.¹⁴⁴ As various courts have held, the impacts of a project must be measured against the “real conditions on the ground.”¹⁴⁵ The description of the environmental setting constitutes the baseline physical conditions by which a lead agency may assess the significance of a project’s impacts.¹⁴⁶

The IS/MND fails to disclose that the Project site lies within the “Springtown Botanical Priority Protection Area” identified by the East Bay Chapter of the California Native Plant Society (“EBCNPS”).¹⁴⁷ The description of the Project site must account for this designation and the unique botanical resources this area is

¹³⁹ Cashen Comments, p. 2 fn. 4.

¹⁴⁰ Cashen Comments, p. 2 fn. 4.

¹⁴¹ *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 194–196; see also CEQA Guidelines, § 15071, subd. (a).

¹⁴² Pub. Resources Code, §§ 21065, 21080, subd. (a); CEQA Guidelines, §§ 15002, subd. (d), 15003, subd. (h), 15165, 15378, Appendix G.

¹⁴³ CEQA Guidelines, Appendix G.

¹⁴⁴ CEQA Guidelines, § 15125, subd. (a).

¹⁴⁵ *Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121-22; *City of Carmel-by-the-Sea v. Bd. of Supervisors of Monterey County* (1986) 183 Cal.App.3d 229, 246.

¹⁴⁶ CEQA Guidelines, § 15125, subd. (a).

¹⁴⁷ Cashen Comments, p. 8.

4710-003acp

14
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15

November 14, 2019
Page 26

created to protect. The failure to describe the existing setting precludes informed decision making and public participation, contrary to the goals of CEQA. The CITY must gather relevant data and provide an adequate description of the existing setting in an EIR.

15
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C. The IS/MND Fails to Disclose the Project’s Indirect Biological Impacts

Mr. Cashen explains that the IS/MND does not account for indirect impacts of the Project such as increases in human activity, domestic animals, and mesopredators.¹⁴⁸ Human presence within and adjacent to habitat can have negative ecological impacts through trampling, soil compaction, erosion, pollution, noise, and introduction of invasive plant species.¹⁴⁹ Dogs, and especially cats, can disrupt wildlife or cause direct mortality through predatory behavior.¹⁵⁰ The introduction of cats and attraction of mesopredators such as raccoons, skunks, foxes, and feral cats can potentially decimate bird communities and therefore should have been accounted for in the IS/MND.¹⁵¹

16

The IS/MND’s failure to mitigate for these impacts demonstrates that the City’s conclusion that impacts to birds and special-status animals would be less than significant is unsubstantiated.¹⁵²

D. The IS/MND Fails to Disclose and Mitigate the Project’s Potentially Significant Impacts on Special-Status Species

The City’s General Plan has an Open Space and Conservation Element that establishes various objectives for limiting impacts of development on special-status species. Objective OSC-1.1, Policy P4 requires all projects authorized by the City to mitigate impacts to special-status species such as threatened or endangered species or species of special concern.¹⁵³ The mitigation must be consistent with published state and federal requirements and incorporate monitoring.¹⁵⁴ Objective OSC-1.2, Policy P8 requires development to avoid take of species listed as threatened, endangered, or candidate under federal and state law.¹⁵⁵ Objective OSC-1.3, Policy P1 mandates new developments incorporate native vegetation into their landscape

17

¹⁴⁸ Cashen Comments, p. 8.

¹⁴⁹ Cashen Comments, pp. 8–9.

¹⁵⁰ Cashen Comments, pp. 9–10.

¹⁵¹ Cashen Comments, pp. 10–11.

¹⁵² Cashen Comments, pp. 10–11.

¹⁵³ City of Livermore, General Plan, Open Space and Conservation Element, p. 8-11.

¹⁵⁴ City of Livermore, General Plan, Open Space and Conservation Element, p. 8-11.

¹⁵⁵ City of Livermore, General Plan, Open Space and Conservation Element, p. 8-13.

November 14, 2019
Page 27

plans and prohibits use of invasive non-native plant species.¹⁵⁶ However, the IS/MND conflicts with these conservation directives of the City’s General Plan.

Given that the Project site is in Conservation Zone 4 of the East Alameda County Conservation Strategy (“EACCS”), the EACCS Guidance is used to provide a framework for protecting and restoring natural resources in eastern Alameda County.¹⁵⁷ Mitigation and avoidance measures recommended by federal and state resources agencies are provided in the EACCS.¹⁵⁸ The IS/MND relies upon a Biological Resources Assessment and Permitting Strategy Memorandum (“WRA Memo”) which acknowledges the need to provide habitat compensation to satisfy EACCS guidance and recommends consultation with federal agencies in accordance with Section 7 of the Endangered Species Act (“ESA”) if the Applicant does not seek coverage under the EACCS.¹⁵⁹ Although the IS/MND claims that its mitigation measures are consistent with EACCS guidance, Mr. Cashen identifies several reasons why this is incorrect.¹⁶⁰

First, as explained in the next section, the Applicant has not conducted protocol-level surveys or assumed the presence of any species with potential to occur at the site as required by EACCS.¹⁶¹ Second, the IS/MND does not require the Applicant to implement the “general” and “species-specific” avoidance and minimization measures outlined by EACCS to reduce effects on focal species.¹⁶² Third, the IS/MND fails to incorporate standardized mitigation ratios established in the EACCS guidance.¹⁶³ Adherence to these ratios is crucial to ensuring project impacts to focal species and their habitat are offset in a biologically effective

17
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¹⁵⁶ City of Livermore, General Plan, Open Space and Conservation Element, p. 8-14.

¹⁵⁷ Cashen Comments, p. 15.

¹⁵⁸ Cashen Comments, p. 17.

¹⁵⁹ See Memorandum from WRA Environmental Consultants to Jon Revells, Principal of WestGate Ventures re SCHMIDIG/LAM Property – Biological Resource Assessment and Permitting Strategy, April 14, 2017 (“WRA Memo”), pp. 4–5, available at <http://www.cityoflivermore.net/civicax/filebank/documents/20112> (last accessed November 7, 2019).

¹⁶⁰ Cashen Comments, pp. 15–16.

¹⁶¹ Cashen Comments, p. 16; ICF International, East Alameda County Conservation Strategy (October 2010), pp. 5-16, 5-17, available at http://www.eastalco-conservation.org/documents/eaccs_ch5_oct2010.pdf (last accessed November 8, 2019); *Biological Resources Assessment*, at p. 1.

¹⁶² Cashen Comments, p. 16; ICF International, East Alameda County Conservation Strategy (October 2010), pp. 3-1, 3-4, Tables 3-2 and 3-3, available at http://www.eastalco-conservation.org/documents/eaccs_ch3_oct2010.pdf (last accessed November 8, 2019).

¹⁶³ ICF International, East Alameda County Conservation Strategy (October 2010), pp. 3-22, 3-41, , available at http://www.eastalco-conservation.org/documents/eaccs_ch3_oct2010.pdf (last accessed October 3, 2019).

November 14, 2019
Page 28

manner.¹⁶⁴ In fact, the IS/MND does not require any compensatory mitigation for impacts to focal species and their habitat.¹⁶⁵ Therefore, the IS/MND’s statement that the proposed mitigation measures are consistent with EACCS guidance is not supported by substantial evidence and conflicts with the information provided in the WRA memo.¹⁶⁶ There is a fair argument that potentially significant biological impacts may persist.

17
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As discussed in more detail regarding the California tiger salamander and the California red-legged frog, the IS/MND fails to require implementation of measures to avoid take of species. The IS/MND also does not include a landscaping plan, so it is impossible to evaluate compliance with OSC-1.3, P1’s mandate to use only native plant species in development.

E. The IS/MND’s Survey Conclusions Ruling Out the Presence of Special-Status Species with Potential to Occur at the Project Site are not Supported by Substantial Evidence

Implementation of the EACCS requires the Applicant to conduct protocol surveys or, alternatively, to assume the presence of focal species.¹⁶⁷ The Applicant’s biological resources consultant, WRA, visited the Project site on November 15, 2017 and conducted a survey to evaluate habitat conditions and the potential for presence of listed species based on visual searches and “the professional expertise of the investigating biologists.”¹⁶⁸ However, as Mr. Cashen points out, the Biological Resources Assessment provides no information on the professional expertise of the investigating biologists or the number of hours devoted to assessing the habitat conditions.¹⁶⁹ Furthermore, the field survey conducted by the City’s CEQA consultant to corroborate the information in the Biological Resources Assessment did not seek to determine the presence or absence of any special-status species.¹⁷⁰ Because as reported in the Biological Resources Assessment, a site assessment “may not be sufficient to determine the presence or absence of a species to the specifications of regulatory agencies . . . a species may be assumed to be present.”¹⁷¹ Mr. Cashen concludes that, in the absence of further protocol-level special-status

18

¹⁶⁴ Cashen Comments, p. 16; U.S. Fish and Wildlife Service. 2012. Programmatic Biological Opinion for the Eastern Alameda County Conservation Strategy, pp. 8–9.

¹⁶⁵ Cashen Comments, pp. 16–17.

¹⁶⁶ Cashen Comments, p. 17; WRA Memo, p. 7.

¹⁶⁷ Cashen Comments, p. 16.

¹⁶⁸ IS/MND, Appendix C (“*Biological Resources Assessment*”), at pp. 1, 7.

¹⁶⁹ Cashen Comments, p. 3.

¹⁷⁰ Cashen Comments, p. 3.

¹⁷¹ *Biological Resources Assessment*, at p. 8.

November 14, 2019
Page 29

species surveys prior to Project construction, the following special-status species with potential to occur at the site must be assumed to be present:¹⁷²

- Various special-status plant species
- San Joaquin kit fox
- American badger
- Pallid bat (foraging habitat)
- Hoary bat (foraging habitat)
- Townsend's big-eared bat (foraging habitat)
- Western mastiff bat (foraging habitat)
- Western red bat (foraging habitat)
- Long-legged myotis (foraging habitat)
- Long-eared myotis (foraging habitat)
- Fringed myotis (foraging habitat)
- Golden eagle (foraging habitat)
- Ferruginous hawk (foraging habitat)
- Swainson's hawk (foraging habitat)
- Northern harrier (foraging habitat)
- White-tailed kite (breeding and foraging habitat)
- American peregrine falcon (foraging habitat)
- Burrowing owl (breeding and foraging habitat)
- Long-eared owl (breeding and foraging habitat)
- Allen's hummingbird (breeding and foraging habitat)
- Loggerhead shrike (breeding and foraging habitat)
- Tricolored blackbird (breeding and foraging habitat)
- Grasshopper sparrow (breeding and foraging habitat)
- Yellow warbler (breeding and foraging habitat)
- Yellow-billed magpie (foraging habitat)
- California red-legged frog (terrestrial and aquatic habitat for movement and shelter)
- Western spadefoot
- California tiger salamander (terrestrial and aquatic habitat for movement and shelter)
- Western pond turtle (terrestrial habitat for nesting, sheltering, and overwintering; aquatic habitat for foraging and sheltering).

18
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¹⁷² Cashen Comments, pp. 3–5. Mr. Cashen's comments also explain why the potential for certain species to occur cannot be eliminated even if their presence is unlikely based on the Biological Resources Assessment. (*Id.* at pp. 4–5 fn. 17–20.)
4710-003acp

November 14, 2019
Page 30

In addition, the Biological Resources Assessment indicates that fifty special-status plant species have been documented in the vicinity of the study area.¹⁷³ The Assessment determines that the bent-flowered fiddleneck has a moderate potential to occur within the study area but concludes—with inadequate explanation—that absence of serpentine components in the soil meant that this plant could not occur at the Project site.¹⁷⁴ Mr. Cashen explains that the IS/MND fails to identify the actions FCS biologists took to examine soil conditions and conclude the absence of serpentine components in the soil profile.¹⁷⁵ Furthermore, the bent-flower fiddleneck is not limited to serpentine substrates, meaning that the IS/MND failed to provide substantial evidence supporting FCS’s conclusion.¹⁷⁶

The Assessment also concluded that the other 49 special-status plant species are unlikely or have no potential to occur.¹⁷⁷ Mr. Cashen explains that these conclusions lack any support by scientific evidence.¹⁷⁸ Notably, the Assessment relies upon the faulty rationale that the study area does not contain alkaline clay soils.¹⁷⁹ WRA’s Wetland Delineation Report indicates that most of the study area contains soils comprised of alkaline clay.¹⁸⁰ Soil survey data provided by UC Davis and the USDA Natural Resources Conservation Service supports the conclusion that alkaline clay is present in the soils at the project site.¹⁸¹ Therefore, the IS/MND’s conclusion that the Project site lacks suitable habitat for special-status plants is not supported by evidence.¹⁸²

The WRA Memo concluded that two special-status plant species—Congdon’s tarplant and stinkbells—have potential to occur at the site and recommended a rare plant survey targeting these species in May or June preceding construction.¹⁸³ WRA warned that the rare plant surveys for the two species would likely need to be

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¹⁷³ *Biological Resources Assessment*, at p. 11.

¹⁷⁴ IS/MND, p. 49; Cashen Comments, p. 7.

¹⁷⁵ Cashen Comments, p. 7.

¹⁷⁶ Cashen Comments, p. 7.

¹⁷⁷ *Biological Resources Assessment*, at p. 11.

¹⁷⁸ Cashen Comments, p. 5.

¹⁷⁹ *Biological Resources Assessment*, at p. 11; Cashen Comments, p. 5.

¹⁸⁰ *Biological Resources Assessment*, at C-4: Wetland Delineation Report, Figure 2, p. 9 (showing almost all of the Project site containing Linne clay loam and describing this soil as “moderately alkaline”).

¹⁸¹ Cashen Comments, p. 5; University of California at Davis. SoilWeb [online application]. Available at <https://casoilresource.lawr.ucdavis.edu/gmap/> (last accessed November 8, 2019). This online application was referenced by the Biological Resources Assessment and incorporated by reference in the IS/MND as indicated by its inclusion with the reference materials at <http://www.cityoflivermore.net/civicax/filebank/documents/20084>.

¹⁸² Cashen Comments, p. 5.

¹⁸³ WRA Memo, p. 2.

November 14, 2019
Page 31

included in the CEQA document for the Project and yet the ensuing Biological Resources Assessment concluded that neither Congdon's tarplant nor stinkbells was likely to occur at the Project site and that no further actions were required.¹⁸⁴ The Assessment attempted to justify this about-face by claiming that these species are not compatible with the soil and habitat types at the Project site.¹⁸⁵ However, as Mr. Cashen demonstrates, WRA's rationale is undermined by its own evidence.¹⁸⁶

As discussed above, the Wetland Delineation Report and the soil survey data provided by UC Davis and USDA Natural Resources Conservation Service show soils comprised of alkaline clay. Thus, it is improper to dismiss the potential for Congdon's tarplant and stinkbells to occur at the site based on the soil substrate.¹⁸⁷ Furthermore, while WRA's Biological Resources Assessment indicates that stinkbells are associated with chaparral, cismontane woodland, pinyon and juniper woodland and that therefore, the species is not supported by the Project site, the Assessment also says that stinkbells are associated with valley and foothill grassland habitats.¹⁸⁸ Mr. Cashen shows that the California Natural Diversity Database says stinkbells are "mostly found in nonnative grassland or in grassy openings in clay soil" like the majority of the Project site.¹⁸⁹ In fact, both the tarplant and stinkbells have been detected in nonnative grasslands in the vicinity of the Project site.¹⁹⁰ Therefore, the potential for stinkbells to occur cannot be dismissed based on absence of the vegetation communities associated with the species.¹⁹¹

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F. There is Substantial Evidence Supporting a Fair Argument that the Project May Cause Potentially Significant Impacts to Western Pond Turtles

The IS/MND concludes that western pond turtles have the potential to occur at the Project site, but that the Project is unlikely to impact the turtle given the preservation of the riparian corridor of the Arroyo Seco.¹⁹² However, western pond

19

¹⁸⁴ WRA Memo, p. 2; *Biological Resources Assessment*, at pp. 11, B-6, B-8.

¹⁸⁵ *Biological Resources Assessment*, at pp. B-6, B-8.

¹⁸⁶ Cashen Comments, p. 6.

¹⁸⁷ Cashen Comments, p. 6.

¹⁸⁸ *Biological Resources Assessment*, at p. B-8.

¹⁸⁹ Cashen Comments, p. 6; California Natural Diversity Database. 2019 Nov 5. RareFind 5.

California Department of Fish and Wildlife; see also Holland RF. 1986. Preliminary Descriptions of the Terrestrial Natural Communities of California. California Department of Fish and Game. p. 36 (Valley and foothill grassland includes non-native grassland communities).

¹⁹⁰ California Natural Diversity Database. 2019 Nov 5. RareFind 5. California Department of Fish and Wildlife

¹⁹¹ Cashen Comments, p. 6.

¹⁹² IS/MND, p. 50; *Biological Resources Assessment*, at B-29.

4710-003acp

November 14, 2019
Page 32

turtles use terrestrial habitats for nesting, resting, refuge, and overland dispersal. In fact, the turtles are reported to range as far as 500 meters from a watercourse to find a suitable nesting habitat—typically an open, grassy area.¹⁹³ Areas within 500 meters of Arroyo Seco encompass most of the Project site.¹⁹⁴ Therefore, the Project itself could directly and indirectly impact pond turtles and their habitat and the IS/MND’s conclusion that will be no significant impacts is not supported by substantial evidence.¹⁹⁵

19
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G. There is Substantial Evidence Supporting a Fair Argument that the Project May Cause Potentially Significant Impacts to Burrowing Owls Despite Biological Mitigation Measure 1 (MM BIO-1)

Burrowing owls are species of special concern in California.¹⁹⁶ Mr. Cashen’s letter concludes that “Habitat loss caused by development is the most immediate threat to burrowing owls that reside in high growth areas of the San Francisco Bay Area.” However, the IS/MND fails to require any compensatory mitigation in accordance with EACCS or the California Department of Fish and Wildlife (“CDFW”) Staff Report on Burrowing Owl Mitigation (“CDFW Staff Report”).¹⁹⁷

Moreover, the IS/MND neglects to consider cumulative impacts on burrowing owls. CEQA Guidelines section 15130 requires environmental review documents to list past, present, and probable future projects producing related impacts or a summary of projections contained in a planning document, such as the General Plan.¹⁹⁸ Section 15130 further requires the lead agency to define and justify the geographic scope of the area affected by cumulative impacts, summarize the expected environmental effects to be produced by cumulative projects, and reasonably analyze those impacts.¹⁹⁹ The analysis in the IS/MND, however, contains no information about other projects that could contribute to cumulative effects and the proposed mitigation measure fails to address the availability of

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¹⁹³ Cashen Comments, p. 12.

¹⁹⁴ Cashen Comments, p. 12.

¹⁹⁵ Cashen Comments, p. 12.

¹⁹⁶ Cashen Comments, p. 17; California Department of Fish & Wildlife, California Bird Species of Special Concern (April 2018), available at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=84247&inline> (last accessed Oct. 7, 2019).

¹⁹⁷ East Alameda County Conservation Strategy, Chapter 3: Conservation Strategy, pp. 3-1, 3-4, 3-22 (October 2010), available at http://www.eastalco-conservation.org/documents/eaccs_ch3_oct2010.pdf (last accessed November 8, 2019); Department of Fish & Game, Staff Report on Burrowing Owl Mitigation (March 7, 2012) (“CDFW Staff Report”), p. 9.

¹⁹⁸ 14 CCR § 15130(b)(1).

¹⁹⁹ 14 CCR § 15130(b)(3)–(5).

4710-003acp

November 14, 2019
Page 33

alternative habitat should the need to relocation arise.²⁰⁰ The burrowing owl is already extirpated from western Alameda County and ongoing development projects threaten the persistence of the remaining burrowing owls in eastern Alameda County.²⁰¹ As such, Project impacts anticipated for burrowing owls remain significant despite the mitigation measures proposed by the IS/MND.²⁰²

MM BIO-1 incorporates three mitigation measures to reduce impacts to burrowing owls: (1) pre-construction surveys that would be conducted immediately before ground-disturbing activities; (2) spatial buffers for burrowing owls that are detected within or immediately adjacent to the Residential Development Area; and (3) passive relocation of burrowing owls according to a relocation plan prepared by a qualified biologist.²⁰³ As explained by Mr. Cashen, each of these proposed solutions fails to offset potentially significant impacts to burrowing owls.²⁰⁴

First, the survey fails to cover the whole site where impacts could be potentially significant. The impacts to burrowing owls are not limited to the proposed survey location of areas within 250 feet of the residential development, but rather have potential to appear in areas that will be graded to install the proposed vineyard, trails, overlook areas, bioretention basins, and tilted plane/meadow.²⁰⁵ Furthermore, the IS/MND does not require four “detection” surveys spread throughout the year, followed by two “take avoidance” surveys with one no less than 14 days prior to ground disturbance and the second within 24 hours of ground disturbance as required by CDFW.²⁰⁶ The surveys fail to account for seasonal use of habitat areas by burrowing owls, instead leaving to the Applicant’s discretion when to conduct surveys, so long as they are done within two weeks of the beginning of construction.²⁰⁷ As indicated by Mr. Cashen’s review of the scientific literature, this is problematic for burrowing owls as the owls wander during non-breeding season and surveys conducted at that time would not be representative of the owls use of the Project site.²⁰⁸ Relatedly, the adult birds tend to return to the same or nearby burrows to breed annually and usually do not colonize other areas if displaced.²⁰⁹ This trait, known as “site fidelity,” increases the likelihood of the Project disrupting

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²⁰⁰ Cashen Comments, pp. 19–20.

²⁰¹ Cashen Comments, pp. 12–13, 18–20.

²⁰² Cashen Comments, pp. 12–13, 18–20.

²⁰³ IS/MND, p. 53.

²⁰⁴ Cashen Comments, p. 20.

²⁰⁵ Cashen Comments, p. 20; IS/MND, Figures 4a and 4b.

²⁰⁶ Cashen Comments, p. 20.

²⁰⁷ Cashen Comments, p. 20–21.

²⁰⁸ Cashen Comments, pp. 21–22.

²⁰⁹ Cashen Comments, p. 21.

November 14, 2019
Page 34

breeding habitat and affecting the persistence of the breeding population that remains in the Livermore-Amador Valley.²¹⁰ Therefore, there is a fair argument that the surveys as described by MM BIO-1 will not be conducted in a manner likely to detect and prevent harm to burrowing owls. These uncertainties regarding the threshold issue of how surveys of the site will be conducted before implementing the mitigation measure, render MM BIO-1 deficient under CEQA.²¹¹

Second, there is a fair argument that the construction buffers proposed to be established around owl nests will not adequately minimize the impact of the Project on burrowing owls. The IS/MND proposes using construction-free buffers of up to 250 feet around all active owl nests—suggesting that the Applicant would be allowed to implement a buffer that is less than 250 feet with no apparent floor on how small the buffer could be.²¹² However, the CDFW Staff Report recommends buffers of 500 *meters* (about 1640 feet) between occupied burrows and activities causing a high level of disturbance such as construction activities regardless of season.²¹³ The CDFW Staff Report represents a key benchmark in evaluating the effectiveness of mitigating impacts to burrowing owls.²¹⁴ Therefore, MM BIO-1, providing for a buffer 85 percent less than the buffer recommended by CDFW, clearly fails to provide sufficient protection for burrowing owl nests that may be discovered at the Project site.²¹⁵

Finally, MM BIO-1 discusses the use of passive relocation as a mitigation measure to help avoid harm to burrowing owls.²¹⁶ However, as discussed by Mr. Cashen, burrow exclusion—the act of keeping burrowing owls from returning to their burrows so that they decide to move to a new location—carries with it its own detrimental impacts that should be analyzed and discussed.²¹⁷ Specifically, passive relocation via burrow exclusion may result in: “(a) significant loss of habitat for reproduction, refuge from predators, and shelter from weather; (b) increased stress on burrowing owls and reduced reproductive rates; (c) increased depredation; (d) increased energetic costs; and (e) risks posed by having to find and compete for

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²¹⁰ Cashen Comments, p. 21.

²¹¹ See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727–728 (a public agency may not rely on mitigation measures of uncertain efficacy).

²¹² IS/MND, p. 53; Cashen Comments, p. 22.

²¹³ CDFW Staff Report, p. 9; Cashen Comments, p. 22.

²¹⁴ *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 947 (reasoning that the burrowing owl mitigation plan included with EIR was sufficient to address impacts to the burrowing owls because it followed official protocols of U.S. Fish and Wildlife Service and CDFW).

²¹⁵ Cashen Comments, p. 22.

²¹⁶ IS/MND, p. 53.

²¹⁷ Cashen Comments, p. 13.

November 14, 2019
Page 35

available burrows.”²¹⁸ In accordance with the CDFW Staff Report, burrowing owls should not be excluded from burrows unless or until:

- A Burrowing Owl Exclusion Plan is developed and approved by the applicable local CDFW office;
- Permanent loss of occupied burrow(s) and habitat is mitigated in accordance with the *Mitigating Impacts* section of the CDFW Staff Report.
- Temporary exclusion is mitigated by restoring the disturbed area to pre-project conditions (including decompacting soil and revegetating).
- Site monitoring is conducted prior to, during, and after exclusion of burrowing owls from their burrows sufficient to ensure take is avoided. Daily monitoring is conducted for one week to confirm young of the year have fledged if the exclusion will occur immediately after the end of the breeding season.
- Excluded burrowing owls are documented using artificial or natural burrows on an adjoining mitigation site (if able to confirm by band re-sight).²¹⁹

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As explained above, the IS/MND does not require compensatory mitigation and MM BIO-1 is inconsistent with CDFW guidelines. Therefore, the IS/MND fails to provide substantial evidence supporting the City’s conclusion that impacts to burrowing owls would be mitigated to less than significant levels.²²⁰

Furthermore, MM BIO-1 improperly defers preparation of a relocation plan until burrowing owls are discovered at the site.²²¹ The IS/MND says that if passive relocation is unavoidable, “resident owls may be passively relocated according to a relocation plan prepared by a qualified biologist.”²²² This mitigation measure therefore suffers from three additional defects spelled out in CEQA Guidelines and case law.²²³

²¹⁸ *Id.*

²¹⁹ CDFW Staff Report, p. 11

²²⁰ Cashen Comments, pp. 23.

²²¹ Cashen Comments, p. 14.

²²² See IS/MND, p. 53.

²²³ See 14 CCR 15126.4(a)(1)(B) (“Formulation of mitigation measures shall not be deferred until some future time. The specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project’s environmental review provided that the agency (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.”); *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* 4710-003acp

November 14, 2019
Page 36

First, because the IS/MND frames this component of the mitigation as permissive with the use of “may,” there is no clear commitment from the City to ensure that any relocation efforts adhere to a plan prepared by a biologist. In *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, the Court of Appeal reasoned that although the EIR expressed a generalized goal of “maintaining the integrity of vernal pool habitats” and burrowing owl habitat, there was no express commitment to follow any specific plan of action.²²⁴ Here, MM BIO-1 states a goal of limiting impacts on burrowing owls, but it similarly fails to commit the Applicant to action when it suggests that owls “may be passively relocated.”²²⁵

Second, there is no apparent reasoning for why a relocation plan cannot be developed at this time prior to the discovery of burrowing owls at the site. As in *Preserve Wild Santee*, the environmental review document does not explain “why specifying performance standards or providing guidelines for the [management of species at the site] was impractical or infeasible at the time the [environmental review document] was certified.”²²⁶

Third, and perhaps most importantly, the IS/MND is vague about what a relocation plan might look like and provides no specific performance criteria against which to measure the success of the mitigation measure. This is akin to the decision in *San Joaquin Raptor* in which the Court of Appeal determined that the failure of the County to commit to specific criteria or standards of performance in the EIR and deference to plans that had not yet been formulated rendered the EIR defective under CEQA.²²⁷ MM BIO-1 fails to commit the Project to specific criteria to ensure the impacts to burrowing owls are mitigated by any relocation plan implemented after work on the Project begins. It is unclear where the owls would be relocated and under what conditions. Moreover, it is unclear who is a biologist qualified to develop and approve such a relocation plan—another omission that undermines the clarity and effectiveness of this mitigation measure. To minimize impacts to burrowing owls, any relocation plan should be approved by CDFW and adhere to conditions established in the CDFW Staff Report.²²⁸ Specifically, the City must provide critical details such as “(a) information on the artificial burrows that would be installed prior to burrow exclusion; (b) a description of the artificial burrow

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denied (Nov. 20, 2013) (generalized goal of “no increase in NOx” without formulating specific performance criteria is not sufficient for purposes of CEQA).

²²⁴ *San Joaquin Raptor Rescue*, 149 Cal.App.4th at 670–671.

²²⁵ IS/MND, p. 53.

²²⁶ *Preserve Wild Santee*, 210 Cal.App.4th at 281.

²²⁷ *San Joaquin Raptor Rescue*, 149 Cal.App.4th at 670–671.

²²⁸ CDFW Staff Report, Appendix E.

November 14, 2019
Page 37

maintenance program; (c) a description of the monitoring program, including the frequency of monitoring and the information that will be provided in monitoring reports; (d) the success criteria; and (e) the contingency measures that will be implemented if success criteria are not achieved.”²²⁹

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H. There is Substantial Evidence Supporting a Fair Argument that the Project May Cause Potentially Significant Impacts to the California Tiger Salamander and Red-Legged Frog Despite Biological Mitigation Measures 3 and 4 (MM BIO-3 and MM BIO-4)

The California tiger salamander is listed by the State of California as a threatened species.²³⁰ The California red-legged frog is listed as federally threatened.²³¹ The IS/MND acknowledges that the Project has the potential to impact the dispersal and refuge habitat for the California tiger salamander and the California red-legged frog, but it fails to analyze the significance of these impacts or explain how the mitigation measures reduce the impacts.²³²

Because California tiger salamanders spend a lot of time underground and can therefore be difficult to detect, the U.S. Fish and Wildlife Service (“USFWS”) established guidelines for the determining whether salamanders are present at a project site.²³³ Similarly, California red-legged frogs are difficult to detect as they hide in heavy vegetation, under banks, and in holes, so USFWS issued guidelines for this species as well.²³⁴ However, the IS/MND does not require Project surveys to adhere to USFWS guidelines.²³⁵ In fact, the IS/MND does not even establish standards for the preconstruction survey, the clearance surveys required if the California tiger salamander is detected at the site, or the “qualified biologist” that would be responsible for conducting the surveys and determining when it is safe to continue construction.²³⁶ Nor does the IS/MND require any nocturnal surveys, which are the most efficacious method to determine the presence of the California red-legged frog.²³⁷ Without these critical details, MM BIO-3 and MM BIO-4 lack adequate performance standards to ensure that preconstruction surveys will be effective at mitigating the Project’s potentially significant risks to these species.

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²²⁹ Cashen Comments, p. 14.

²³⁰ https://www.dfg.ca.gov/wildlife/nongame/t_e_spp/amphibian.html

²³¹ https://www.dfg.ca.gov/wildlife/nongame/t_e_spp/amphibian.html

²³² IS/MND, p. 50.

²³³ Cashen Comments, p. 24.

²³⁴ Cashen Comments, p. 25.

²³⁵ Cashen Comments, pp. 24–25.

²³⁶ Cashen Comments, p. 24.

²³⁷ Cashen Comments, p. 25.

November 14, 2019
Page 38

In the Livermore Valley, the EACCS calls for compensatory mitigation ratios of 2.5:1 to 4:1 for impacts to California tiger salamander habitat and compensatory mitigation ratios of 2.5:1 to 3.5:1 for impacts to California red-legged frog habitat.²³⁸ Yet, the IS/MND does not require any compensatory mitigation for impacts to either species. Thus, MM BIO-3 and MM BIO-4 fail to mitigate Project impacts to these species to less than significant levels.²³⁹ Moreover, because the surveys are not rigorous enough to assume the absence of each species, and because the IS/MND does not require the Applicant to obtain incidental take permits, the IS/MND fails to ensure compliance with the California Endangered Species Act and the federal Endangered Species Act.²⁴⁰ For all of these reasons, the IS/MND is improper under the circumstances and an EIR should be prepared.

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I. There is Substantial Evidence Supporting a Fair Argument that the Project May Cause Potentially Significant Impacts to the Nesting Birds Despite Biological Mitigation Measure 5 (MM BIO-5)

As explained by Mr. Cashen, finding bird nests can be extremely difficult and labor intensive.²⁴¹ MM BIO-5 fails to establish any standards for the nest searching techniques, number of survey hours needed per unit area, or the qualifications of the biologist responsible for the surveys.²⁴² Moreover, the IS/MND does not require any mechanism to ensure the adequacy of the surveys prior to construction activities that may impact nesting birds.²⁴³ As a result, MM BIO-5 is ineffective at reducing the Project's potentially significant impacts on nesting birds to less than significant levels.

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MM BIO-5 includes the following language: "If nesting raptors or other migratory birds are detected on the site during the survey, a suitable construction-free buffer shall be established around all active nests. The precise dimension of the buffer, which is typically up to 250 feet, would be determined at that time and may vary depending on such factors as location, species, topography, and line of sight to the construction area."²⁴⁴

²³⁸ Cashen Comments, pp. 24–25.

²³⁹ Cashen Comments, pp. 24–26.

²⁴⁰ See Cal. Fish & Game Code § 2081(b) (authorizing California Department of Fish & Wildlife to issue incidental take permits); 16 U.S.C. § 1539 (authorizing Secretary of Interior to issue incidental take permits via the U.S. Fish & Wildlife Service).

²⁴¹ Cashen Comments, p. 26.

²⁴² Cashen Comments, p. 26.

²⁴³ Cashen Comments, p. 26.

²⁴⁴ IS/MND, p. 55.

November 14, 2019
Page 39

As Mr. Cashen explains, the measure omits key information about what constitutes a suitable buffer and what minimum qualifications the biologist who determines this must have. MM BIO-5 also fails to provide any evidence supporting its conclusion that a 250-foot buffer is enough to protect nests. Noise levels 250 feet from construction activities are expected to be about 72 dBA (L_{eq}) to 76 dBA (L_{max}), a marked increase from the existing noise levels of approximately 50 dBA (L_{eq}) to 62 dBA (L_{eq}).²⁴⁵ Therefore, the 250-foot buffer proposed in MM BIO-5 would expose nesting birds to sound pressure levels that are “at least 10 times, and possibly over 100 times, more intense than existing conditions.”²⁴⁶ Mr. Cashen concludes that, even if impacts to nests are avoided, construction activities could eliminate foraging habitat used to provision chicks for several special-status bird species and could therefore have a significant impact on nesting success.²⁴⁷ As a result, MM BIO-5 is ineffective at reducing impacts, and the Project’s impacts on nesting birds remain significant and unmitigated.

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

A. The IS/MND Fails to Disclose Potentially Significant Construction Noise Impacts

The IS/MND relies on the Project’s compliance with local noise regulations to conclude that the Project will not result in significant construction noise impacts. However, City noise regulations do not limit noise levels during regular construction hours, and therefore do nothing to reduce the potentially significant short-term construction noise levels disclosed in the IS/MND. Local noise regulations fail to provide an accurate threshold to measure the significance of the Project’s noise impacts. As a result, the Project’s construction noise levels remain significant and unmitigated.

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The IS/MND states that noise impacts from Project construction would be “less than significant” based on the Project’s compliance with the MM NOI-1, which incorporates City’s Municipal Code section 9.36.080.²⁴⁸ Section 9.36.080 places

²⁴⁵ IS/MND, Appendix G, Table 4, p. 93.

²⁴⁶ Cashen Comments, pp. 26–27.

²⁴⁷ Cashen Comments, pp. 15; *Biological Resources Assessment*, at Appendix B.

²⁴⁸ IS/MND, p. 97.

4710-003acp

November 14, 2019
Page 40

restrictions on hours during which construction equipment may be used.²⁴⁹ As Mr. Watry explains, “this position is untenable because it implies that construction noise at any level, including levels that could potentially lead to hearing damage, would be ‘less than significant’ as long as it occurred during certain prescribed hours.”²⁵⁰

In addition to being technically inaccurate, the City’s reliance on noise standards is also legally insufficient. In *Keep our Mountains Quiet v. County of Santa Clara*,²⁵¹ neighbors of a wedding venue sued over the County of Santa Clara’s failure to prepare an EIR for a proposed project to allow use permits for wedding and other party events at a residential property abutting an open space preserve. Neighbors and their noise expert contended that previous events at the facility had caused significant noise impacts that reverberated in neighbors’ homes and disrupted the use and enjoyment of their property.²⁵² Similar to the IS/MND in this case, the County’s CEQA document relied on the noise standards set forth in its local noise ordinance as its thresholds to evaluate significant noise exposure from the project, deeming any increase to be insignificant so long as the absolute noise level did not exceed those standards.²⁵³

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Here, the City similarly, and unreasonably, relies on the Project’s purported compliance with local noise regulations to conclude that the Project will not result in significant construction noise impacts. However, as Mr. Watry explains, “[b]y the flawed logic employed by the City, no construction noise level could ever be deemed significant as long as it occurred during the prescribed hours.”²⁵⁴ As in *Keep Our Mountains Quiet*, the City’s reliance on MM NOI-1’s requirement to comply with this local noise regulations does not provide substantial evidence to support the IS/MND’s conclusion that the Project will have less than significant noise impacts with this mitigation incorporated. An EIR must be prepared to analyze the Project’s construction noise impacts against a meaningful significance threshold, and disclose and mitigate all potentially significant noise impacts.

²⁴⁹ Municipal Code section 9.36.080 prohibits construction noise “between the hours of 6:00 p.m. Saturday to 7:00 a.m. Monday; 8:00 p.m. to 7:00 a.m. on Monday, Tuesday, Wednesday and Thursdays; 8:00 p.m. Friday to 9:00 a.m. on Saturday or at all on city-observed holidays.” Municipal Code section 9.36.080; Watry Comments, p. 2.

²⁵⁰ Watry Comments, p. 2.

²⁵¹ *Keep our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714.

²⁵² *Id.* at 724.

²⁵³ *Id.* at 732.

²⁵⁴ Watry Comments, p. 2.

November 14, 2019
Page 41

B. There is Substantial Evidence Supporting a Fair Argument That the Project Will Have Significant Construction Noise Impacts on Nearby Sensitive Receptors

Mr. Watry reviewed the IS/MND’s construction noise calculations, and concludes the noise calculations disclosed in the IS/MND demonstrate that the Project will result in a significant noise impact to at least two sensitive receptors – the nearby KinderCare Learning Center preschool and Spring Valley Common Residences.²⁵⁵

Mr. Watry summarizes the expected increases in noise from ambient levels during construction disclosed in the IS/MND in the following table and explains why sensitive receptors at the KinderCare Learning Center are plausibly put at risk by the noise levels that will be generated by Project construction.²⁵⁶

SUMMARY OF CONSTRUCTION AND EXISTING NOISE LEVELS (dBA)

Noise Level	KinderCare Learning Center	Spring Valley Common Residences	Reference
Maximum	88	76	IS/MND, p. 93
Average	84	72	IS/MND, p. 93
Existing Ambient	59	58	I&R, Table 4
Increase	25	14	

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These noise levels exceed the existing ambient levels around the Project site by 25 dBAs at the KinderCare Learning Center, and 14 dBA at the Spring Valley Residents.²⁵⁷ Mr. Watry concludes that these increases constitute a substantial temporary increase in ambient noise levels which exceed the City’s adopted significance threshold for traffic noise, and should therefore be considered a significant impact.²⁵⁸ Mr. Watry also explains that construction noise levels at the KinderCare preschool are also likely to exceed the health-based noise exposure standards set by the National Institute for Occupational Safety and Health

²⁵⁵ Watry Comments, pp. 1-2, 4.

²⁵⁶ Watry Comments, pp. 1-2.

²⁵⁷ *Id.*

²⁵⁸ Watry Comments, p. 3.

November 14, 2019
Page 42

(“NIOSH”).²⁵⁹ The IS/MND states that the average construction noise level at KinderCare Learning Center caused by Project construction will be 84 dBA, very near the NIOSH limit, and that maximum construction noise levels at the same location may reach as high as 88, dBA, exceeding the NIOSH limit.²⁶⁰ Mr. Watry concludes that the particularly large increases in noise levels to sensitive receptors at the Kindercare preschool also supports a finding of significance.²⁶¹ The IS/MND’s decision to address these noise levels increases by limiting construction to certain hours is clearly ineffective because children will be at KinderCare during the very hours proposed for construction.²⁶² This impact therefore remains significant and unmitigated.

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C. MM NOI-1 Fails to Mitigate the Potentially Significant Impacts of Construction Noise on Surrounding Sensitive Receptors

Mr. Watry concludes that the other proposed mitigation measures included in MM NOI-1 will not reduce the construction noise impacts below significant levels.

First, MM NOI-1 requires that construction equipment “be equipped with mufflers.”²⁶³ The IS/MND does not provide a reference for the construction equipment noise reference levels it uses to deem a noise impact “muffled.”. However, Mr. Watry concludes that it is likely that any data collected within the past 20 years comes from equipment that was already equipped with mufflers.²⁶⁴ As Mr. Watry explains, after CEQA was enacted, mufflers became standard on construction equipment.²⁶⁵ Therefore, while the use of mufflers is important for noise reductions, the use of muffled construction equipment cannot be relied upon to reduce construction noise levels beyond the levels disclosed in the IS/MND because muffled equipment is already incorporated into the IS/MND’s noise analysis.²⁶⁶

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Similarly, MM NOI-1 requires the Project’s construction contractor to prohibit “unnecessary idling.”²⁶⁷ As Mr. Watry explains, while avoiding unnecessary idling is important for mitigating noise impacts, the IS/MND calculations have already accounted for this reduction by basing its numbers on full-

²⁵⁹ Watry Comments, p. 2.

²⁶⁰ MND, p. 92; Watry Comments, pp. 1-2.

²⁶¹ Watry Comments, pp. 2-3.

²⁶² IS/MND, p. 97; Watry Comments, p. 2.

²⁶³ Is/MND, p. 97.

²⁶⁴ Watry Comments, p. 3.

²⁶⁵ Watry Comments, p. 3.

²⁶⁶ Watry Comments, p. 3.

²⁶⁷ IS/MND, p. 97.

November 14, 2019
Page 43

power time and excluding time that the equipment is at a low power setting or turned off.²⁶⁸ Thus, inclusion of avoiding “unnecessary idling” as a mitigation measure is misleading and suggests that the average noise levels could be further reduced when that is not the case.²⁶⁹

The IS/MND also failed to explain where equipment would be placed to extend the distance from noise-sensitive receptors and failed to explicitly consider the noise from air compressors and other stationary noise-generating equipment.²⁷⁰ Finally, MM NOI-1 requires the Project’s construction contractor to designate a noise disturbance coordinator to handle noise complaints.²⁷¹ As Mr. Watry explains, while a noise disturbance coordinator could help ensure that the Applicant adheres to the above mitigation measures, this “mitigation” offers no actual reductions in noise that would avoid significant impacts.²⁷²

As a result, MM NOI-1 fails to reduce the noise impacts to less than significant levels. An EIR must be prepared to fully disclose and mitigate the Project’s potentially significant noise impacts.²⁷³

IX. THE IS/MND FAILED TO ACCURATELY DISCLOSE THE PROJECT’S IMPACTS ON FIRE PROTECTION SERVICES

While, the IS/MND indicates that the Project will be designed to comply with the Fire Code and to accommodate access of firefighting vehicles, the IS/MND fails to disclose that the Project, and the corresponding increase in population, is likely to increase demand for fire protection services. This demand is likely to strain the already short-staffed fire department in the City. It is therefore likely that additional firefighters would need to be hired to meet the heightened demand, especially considering the recently intensified wildfire risk throughout the Bay Area.

The City and the City of Pleasanton have a joint fire department—Livermore-Pleasanton Fire Department (LPFD).²⁷⁴ LPFD operates 10 fire stations and has 121 full-time equivalent employees to serve what it reports is a combined

²⁶⁸ Watry Comments, p. 3.

²⁶⁹ Watry Comments, pp. 3–4.

²⁷⁰ Watry Comments, p. 4.

²⁷¹ IS/MND, p. 97.

²⁷² Watry Comments, p. 4.

²⁷³ See Watry Comments, p. 4–5.

²⁷⁴ Livermore-Pleasanton Fire Department, Year End Report—2018, p. 1, available at <http://www.cityoflivermore.net/civicax/filebank/documents/18999/4710-003acp> (last accessed October 30, 2019).

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November 14, 2019
Page 44

population of 171,385 for the two cities.²⁷⁵ The National Fire Protection Association (NFPA)'s U.S. Fire Department Profile in 2017 found that fire departments tasked with protecting populations of 100,000 to 249,999 had a median ratio of 1.41 career firefighters per 1,000 residents.²⁷⁶ Even assuming all 121 of LPFD's employees are career firefighters, LPFD falls well short of the median presented by the NFPA study at 0.706 firefighters per 1,000 residents.

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Adding another 531 persons to the population of the City, as the Project estimates it will do, would only exacerbate the existing strain on the City's fire protection services. This, in turn, could cause direct harms to the City's residents and the City's structures and natural environment by increasing the risk that LPFD will not have the resources to quickly respond to fires. An EIR must be prepared to fully disclose and mitigate the Project's potentially significant impact on fire protection services.

X. 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.²⁷⁷ As discussed herein, there is substantial evidence supporting a fair argument that the Project would result in significant adverse impacts that were not identified in the IS/MND, and that are not adequately analyzed or mitigated. The IS/MND also fails to contain the basic information and analysis required by CEQA, deficiencies which "cannot be dismissed as harmless or insignificant defects."²⁷⁸

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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 and the public be able to ensure that the Project's environmental impacts are mitigated to less than significant levels.

²⁷⁵ *Id.*

²⁷⁶ NFPA Research, U.S. Fire Department Profile 2017 (March 2019), p. 7, available at <https://www.nfpa.org/-/media/Files/News-and-Research/Fire-statistics-and-reports/Emergency-responders/osfdprofile.pdf> (last accessed October 30, 2019).

²⁷⁷ Pub. Res. Code § 21151; 14 CCR §15063(b)(1).

²⁷⁸ *Bakersfield Citizens for Local Control v. Bakersfield* ("Bakersfield") (2004) 124 Cal. App. 4th 1184, 1220.
4710-003acp

November 14, 2019
Page 45

Thank you for your attention to these comments.

Sincerely,



William Mumby

27
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WM:acp

Attachments

4710-003acp