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June 16, 2020

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Re: Rebuttal Comments to Final Initial Study/Mitigated Negative Declaration for Lassen Road Residential Development Project (SCH #2019099018)

Dear Honorable Planning Commission Members and Mr. Ross:

On behalf of **Livermore Residents for Responsible Development** (“Livermore Residents”), we submit these comments in response to the Final Initial Study/Mitigated Negative Declaration (“Final IS/MND”) prepared by the City of Livermore (“the City”) for the Lassen Road Residential Development Project (“Project”).¹ The Final IS/MND includes responses to our initial Comments filed November 14, 2019.

The Project currently appears as item 5.03 on the agenda for the June 16, 2020 Planning Commission Hearing. A representative for Livermore Residents will appear at the Planning Commission Hearing to make public comment.

¹ First Carbon Solutions, Final Initial Study/Mitigated Negative Declaration Lassen Road Residential Development Project, City of Livermore, Alameda County, California (“Final IS/MND”).

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The IS/MND was prepared by the City pursuant to the California Environmental Quality Act (“CEQA”).² 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 bounded by the Livermore Valley Joint 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.³

On November 14, 2019, we submitted comments on the Project’s Draft IS/MND. The Final IS/MND attempts to rebut our comments, but ultimately fails to resolve major issues we raised. As detailed below, our comments still provide substantial evidence supporting a fair argument of potentially significant environmental impacts that must be analyzed in an environmental impact report (“EIR”) under CEQA.

The Final IS/MND fails to address significant air quality and health risk impacts from Project construction and operations and erroneously concludes that greenhouse gas (“GHG”) emissions impacts are less than significant by using an arbitrary significance threshold. It also fails to adequately analyze and mitigate impacts to biological resources including rare plants and special-status species

² Public Resources Code § 21000 *et seq.*

³ FirstCarbon Solutions, DRAFT Lassen Road Residential Development Project Initial Study/Mitigated Negative Declaration, City of Livermore, Alameda County, California (“Draft IS/MND”), p. 16.

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such as burrowing owls, California tiger salamanders, California red-legged frogs, and American badgers. Finally, the Final IS/MND fails to mitigate potentially significant construction noise impacts. These significant environmental impacts in turn result in inconsistencies with Livermore General Plan policies that preclude approval of the proposed General Plan Amendment necessary for this Project.

These comments were prepared with the assistance of senior biologist and wildlife ecologist Scott Cashen, M.S., 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”), and noise expert Derek Watry of Wilson Ihrig. Mr. Cashen’s rebuttal comments and curriculum vitae are attached as Exhibit A.⁴ SWAPE’s rebuttal comments and curricula vitae are attached to this letter as Exhibit B.⁵ Mr. Watry’s comments and curriculum vitae are attached as Exhibit C.⁶ These comments are fully incorporated herein and submitted to the City herewith. Therefore, the City must separately respond to the technical comments in Exhibits A through C. References to the expert comments are included by Dropbox.

For the reasons discussed herein, and in the attached expert comments, Livermore Residents urges the City to recommend against approval of the Final IS/MND at the Planning Commission hearing set for June 16, 2020 to allow for preparation of a legally adequate environmental impact report (“EIR”) pursuant to CEQA.

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

⁴ **Exhibit A:** Letter from S. Cashen to W. Mumby re Comments on the Final Initial Study and Mitigated Negative Declaration for the Lassen Road Residential Development Project (June 15, 2020) (“Cashen Rebuttal Comments”).

⁵ **Exhibit B:** Letter from SWAPE to C. Caro re Comments on the Lassen Road Residential Development Project (June 16, 2020) (“SWAPE Rebuttal Comments”).

⁶ **Exhibit C:** Letter from D. Watry to W. Mumby & C. Caro re Comments on Final IS/MND Responses to Previous Construction Noise Analysis (June 11, 2020) (“Watry Rebuttal Comments”).
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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.

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. THE STAFF REPORT FAILS TO ATTACH THE FINAL IS/MND AND PROVIDES MISLEADING SUMMARIES OF WHAT THE FINAL IS/MND REQUIRES

The Planning Commission Agenda Report released for the June 16, 2020 Planning Commission Meeting for Agenda Item 5.03 ("Staff Report") references that "[r]esponses to comments have been addressed and incorporated into the Final [IS/MND]."⁷ However, the Final IS/MND was not included in the online version of the Staff Report and is not listed among the attachments to the Staff Report.⁸ Therefore, it appears that the Commissioners have not been provided a copy of the Final IS/MND. This is particularly disconcerting given that the Staff Report misrepresents key information in the Final IS/MND, and incorrectly states that impacts will be mitigated to less than significant levels. For example, the Staff Report asserts that biological mitigation measures were modified to comply with California Department of Fish and Wildlife ("CDFW") requirements. But as

⁷ Planning Commission Agenda Report, Agenda Item 5.03 ("Staff Report"), p. 16.

⁸ Staff Report, p. 18.
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explained by Mr. Cashen and discussed in more detail below, the biological mitigation measures still fall far short of what is necessary to reduce impacts below significant levels.⁹

In order to adopt an MND, CEQA requires the decision making body to consider the “whole record before the lead agency” to assess whether any substantial evidence exists demonstrating that the Project, as revised by the mitigation measures in the MND, is likely to have a significant effect on the environment.¹⁰ If any substantial evidence exists, the lead agency must prepare an EIR.¹¹

III. THE FINAL IS/MND FAILS TO REMEDY ITS INACCURATE AND INCOMPLETE PROJECT DESCRIPTION

CEQA requires that an EIR “set forth a project description that is sufficient to allow an adequate evaluation and review of the environmental impact.”¹² Similarly, an IS/MND must present a complete and accurate description of the project under consideration.¹³ “The scope of the environmental review conducted for the initial study must include the entire project. . . . [A] correct determination of the nature and scope of the project is a critical step in complying with the mandates of CEQA.”¹⁴ A negative declaration is “inappropriate where the agency has failed either to provide an accurate project description or to gather information and undertake an adequate environmental analysis. An accurate and complete project description is necessary for an intelligent evaluation of the potential environmental impacts of the agency's action. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal . . . and weigh other alternatives in the

⁹ See, e.g., Cashen Rebuttal Comments, pp. 26–28.

¹⁰ Pub. Res. Code § 21080(c)(2).

¹¹ Pub. Res. Code § 21080(d).

¹² *San Joaquin Raptor Rescue Center v. County of Merced* 149 Cal.App.4th 645, 654 (citing 14 C.C.R. § 15124).

¹³ 14 C.C.R. § 15063(d)(1) (requiring an initial study to include a description of the project).

¹⁴ *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 267 (internal quotations and citations omitted).

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balance.”¹⁵ For purposes of the description, “Project’ means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”¹⁶ As explained below, the Final IS/MND still fails to provide a complete and accurate Project description.

A. The Final IS/MND Still Engages in Improper Piecemealing of Environmental Review Regarding the Project’s Connection to a Broader Trail Network

In our initial Comments, we explained that CEQA requires agencies to assess the environmental impacts of all reasonably foreseeable phases of the project.¹⁷ CEQA further forbids piecemealing of environmental analysis into separate environmental review documents where this process disguises the full impact of the proposed development by breaking it into smaller pieces.¹⁸ We identified that the Draft IS/MND discusses impacts associated with construction of portions of trails occurring on the Project site, but relegated discussion of the portions of the trail on the adjacent Archdiocese property to “a separate environmental review process.”¹⁹ This response is inadequate. The trail network is part of the Project which is intended to provide open space for Project residents and visitors. The Archdiocese MND addressed the impacts of a different project. By failing to consider the broader impacts of the entire trail network on biological resources in the Project area and adjacent habitat that will be caused by the Project, the City improperly piecemealed its analysis and obscured the extent of the environmental effects driven by the Project.²⁰

¹⁵ *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 406 (internal quotations and citations omitted).

¹⁶ 14 C.C.R. § 15378(a).

¹⁷ *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).

¹⁸ *Arviv Enterprises v. South Valley Area Planning Commission* (2002) 101 Cal.App.4th 1333, 1340–1341, 1346.

¹⁹ Draft IS/MND, p. 15 fn.2.

²⁰ Final IS/MND, AB.2-5.
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The Final IS/MND states that the City approved a conditional use permit and MND for the Catholic high school on the Archdiocese property in 2006, which included development of Regional Trail Segment J.²¹ The Final IS/MND then asserts that the City intends to connect Segment J with the proposed trail segment on the Project site and analyze the connection with an addendum to the Catholic high school MND—an approach it claims is consistent with CEQA Guidelines section 15006’s directive to reduce delay and paperwork by relying on previously adopted environmental review documents.²²

However, the City’s reference to the 2006 MND does not excuse failure to evaluate the cumulative impacts from the trail network’s connection to Regional Trail Segment J. CEQA requires analysis of cumulative impacts, defined as “two or more individual effects which, when considered together, are considerable.”²³ Such impacts may “result from individually minor but collectively significant projects taking place over a period of time.”²⁴ Cumulatively considerable means that “the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.”²⁵ CEQA Guidelines section 15130(b)(1) provides two options for analyzing cumulative impacts: (A) list “past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency, or” (B) summarize “projection contained in an adopted local, regional or statewide plan, or related planning document that describes or evaluates conditions contributing to the cumulative effect.”²⁶ Neither the Draft IS/MND nor the Final IS/MND satisfy either of these approaches.

The purported benefits of efficiency in referring to an older CEQA document do not override CEQA’s requirement to conduct thorough and transparent analysis

²¹ Final IS/MND, Response to AB.2-5, p. 2-175.

²² Final IS/MND, Response to AB.2-5, p. 2-175; see 14 C.C.R. § 15006 (recommending reduction in paperwork by relying on previously prepared CEQA document “when it adequately addresses the proposed project”).

²³ 14 C.C.R. § 15355.

²⁴ 14 C.C.R. § 15355(b).

²⁵ 14 C.C.R. § 15064(h)(1).

²⁶ 14 C.C.R. § 15130(b)(1).

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of environmental impacts associated with a given project. This obligation includes the requirement to describe how all components connected to the Project aggregate with past, current, and future projects to enhance the potential for cumulative impacts, such that an EIR may be necessary.²⁷ The Final IS/MND fails to disclose the nature and severity of the impacts on biological resources that would be inflicted by the Project's broader trail network, and fails to identify any such analysis in the 2006 MND or its addendum. Therefore, the Final IS/MND still fails to provide a full and accurate Project description and analysis of its impacts.

Furthermore, the CEQA Guidelines require an evaluation of whether a project will "include recreational facilities or require the construction or expansion of recreational facilities which might have an adverse physical effect on the environment."²⁸ Given that hiking or biking trails can be interpreted as recreational facilities, the City's failure to evaluate the environmental impacts of the expansion of the trail network in either the Draft IS/MND or the Final IS/MND for this Project violates CEQA. The Final IS/MND's deferral to an addendum of an earlier CEQA document that is not produced to the public with the IS/MND amounts to a circumvention of the requirement to analyze recreational impacts as listed in the CEQA Checklist.

While the City belatedly made the 2006 MND available to us in a response to our Public Records Act request on June 15, 2020, the addendum was not produced. Moreover, the 2006 MND acknowledges that the Catholic High School project "would result in impacts to alkali grasslands that could contribute to a cumulative loss of such grasslands should the Livermore Trails project and other potential development in the area proceed."²⁹ The 2006 MND claims that mitigation compensates for the loss of this grassland habitat and that similar mitigation on future projects could help keep cumulative impacts less than

²⁷ See 14 C.C.R. § 15065(a)(3) (requiring lead agency to find project may have a significant effect on the environment such that an EIR must be prepared if the project "has possible environmental effects that are individually limited but cumulatively considerable" when viewed in light of the effects of past projects, the effects of other current projects, and the effects of probable future projects").

²⁸ 14 C.C.R. Appendix G, § XVI(b). Recreation.

²⁹ Catholic High School Initial Study & Mitigated Negative Declaration (2006) ("2006 MND"), p. 35. 4710-005acp

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significant.³⁰ However, the 2006 MND fails to explain *how* mitigation accounts for this habitat loss and reduces it below significant levels. And, as explained later in these comments, a key flaw with this Project is its failure to commit to adequate compensatory mitigation to address loss of habitat for special-status species. Finally, the 2006 MND claims a less than significant impact to recreation on the basis that the Catholic High School project did not involve development of residential units that would increase demand for parks or other recreational facilities.³¹ This Project creates 186 new residential units and likely will increase demand for the trail network, which could further exacerbate environmental impacts. Therefore, the Draft IS/MND and Final IS/MND fail to provide adequate descriptions and analysis of the impacts associated with the trail.

B. The Final IS/MND Still Provides an Inaccurate and Incomplete Description of the Project’s Footprint Regarding its Non-Residential Features and its Stormwater Control System

In Response to CASHEN-2, the Final IS/MND takes issue with Mr. Cashen’s opinion that the Draft IS/MND’s description of the Project’s footprint is inaccurate.³² The City claims that Mr. Cashen’s explanation that the Draft IS/MND failed to evaluate impacts to the entire Project site are unsupported by evidence.³³

But this response misconstrues Mr. Cashen’s comment. As explained by Mr. Cashen, the comment indicated that the Draft IS/MND’s statement that “23 acres of the western portion of the site would remain undeveloped and preserved as open space” was misleading because part of this acreage would be subject to grading or otherwise affected by the proposed vineyard, bioretention basins, trails, and man-made berms.³⁴ As the City’s response now acknowledges, only 12 acres would be preserved.³⁵ Yet, the City still fails to quantify impacts associated with these non-

³⁰ 2006 MND, p. 35.

³¹ 2006 MND, p. 33.

³² Final IS/MND, Response to CASHEN-2, pp. 2-187–2-188.

³³ Final IS/MND, Response to CASHEN-2, p. 2-188.

³⁴ Draft IS/MND, p. 2; Cashen Rebuttal Comments, p. 31

³⁵ Final IS/MND, Response to CASHEN-2, p. 2-188.

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residential features, rendering the Final IS/MND deficient as an informational document under CEQA.

The City's Response to CASHEN-3 incorrectly asserts that there is no basis to conclude that the proposed overland release of stormwater would have substantial impacts to hydrology, soil stability, or the Arroyo Seco.³⁶ Specifically, the Final IS/MND claims that the basin would capture most of the runoff and allow it to either evaporate or percolate into the soil, and overland release would only occur in "peak storm event conditions, similar to what happens under existing conditions."³⁷ Mr. Cashen rebuts these arguments by explaining that the Project would create impervious surfaces that do not currently exist, thereby inhibiting the percolation described in the Final IS/MND.³⁸

As Mr. Cashen explains, the proposed stormwater basin would not mimic natural sheet flow, or "shallow, unconcentrated flow down a slope."³⁹ Rather, the basin would capture overland flow from a 273,393-square-foot area dominated with impervious surfaces, then funnel it through a pipe and release it in onto the slope of the open space area.⁴⁰ As he further explains, funneling water into a concentrated area without an existing channel has the potential to cause channelization and erosion.⁴¹ It also has the potential to cause mass wasting of the hillslope if the soils do not have adequate permeability.⁴² Mr. Cashen's well-supported explanation again demonstrates a potentially significant impact that the Final IS/MND fails to disclose.

The Final IS/MND incorrectly referenced Exhibits 3a and 3b of the Preliminary Geotechnical Exploration in an attempt to show that the upland portion of the site has stable soils. However, Mr. Cashen's comments did not pertain to the upland portion of the site.⁴³ Rather, his comments addressed

³⁶ Final IS/MND, Response to CASHEN-3, p. 2-188.

³⁷ Final IS/MND, Response to CASHEN-3, p. 2-188.

³⁸ Cashen Rebuttal Comments, p. 16.

³⁹ Cashen Rebuttal Comments, p. 16.

⁴⁰ Cashen Rebuttal Comments, p. 16.

⁴¹ Cashen Rebuttal Comments, p. 16.

⁴² Cashen Rebuttal Comments, p. 16.

⁴³ Final IS/MND, Response to CASHEN-3, p. 2-188; Cashen Rebuttal Comments. 4710-005acp

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potentially drastic hillslope erosion due to the outfall that would discharge onto the open space area near the Arroyo Seco.⁴⁴ As a result, the City fails to account for potential impacts of stormwater drainage with the introduction of this development to this open space area. Given that the 12 acres of open space are proposed as mitigation for Project impacts to special-status species, the failure to account for these impacts is significant.⁴⁵

In sum, the Project description is deficient for its failure to transparently account for the full impacts of the trail network connecting the site to adjacent properties, its failure to acknowledge the environmental impacts of other non-residential features, and its failure to analyze the potential detrimental effects of capturing stormwater, concentrating it, and releasing it in the downslope open space area near the Arroyo Seco. Therefore, a full EIR should be prepared to replace the Final IS/MND.

IV. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT AIR QUALITY AND HEALTH IMPACTS FROM PROJECT CONSTRUCTION AND OPERATIONS REMAIN SIGNIFICANT AND UNMITIGATED

A. The Final IS/MND Continues to Rely on Faulty Modeling Assumptions for Construction Emissions

As explained in SWAPE's initial Comments, the Draft IS/MND included an unsubstantiated reduction to the Project's off-round equipment unit amount for concrete/industrial saw equipment. This, SWAPE explained, yielded an underestimation of construction emission levels.

The Final IS/MND responded that the concrete saws were zeroed out because the undeveloped land would require no demolition activities requiring the use of this type of equipment.⁴⁶ However, the Draft IS/MND's Air Quality Assessment specifically stated that there would be minor demolition as part of

⁴⁴ Cashen Rebuttal Comments, p. 16.

⁴⁵ Cashen Rebuttal Comments, p. 16.

⁴⁶ Final IS/MND, Response to SWAPE-4, p. 2-179.
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Project construction.⁴⁷ The Final IS/MND's complete omission of emissions associated with demolition equipment is therefore unsubstantiated and, as SWAPE explains, the resulting modeling yields underestimated emissions.⁴⁸

The Final IS/MND claims that the model conservatively overstates emissions by assuming the construction of 196 dwelling units, even though the Project comprises 186 dwelling units.⁴⁹ Yet, the City fails to explain how much of a difference 10 additional units constructed makes compared to zeroing out a type of equipment.⁵⁰ Without a clear explanation of how this change in modeling assumptions impacted the IS/MND's emissions estimate, the City cannot rely on its CalEEMod calculations to determine the significance of air quality impacts from the Project.⁵¹

Our initial Comments also explained that the Draft IS/MND's air model included an overestimated 84 percent reduction in exhaust PM10 emissions for construction equipment, even though Mitigation Measure AIR-2 only committed to a 63 percent reduction. The Final IS/MND claims that the 84 percent reduction is correct, but as explained by SWAPE, the CalEEMod model underestimates enforceable emissions levels by 21 percentage points.⁵² "Until the Project commits to an 84% reduction in emissions, the model does not represent the emissions reductions that will actually be implemented, monitored, and enforced for the Project and should not be relied upon" to determine the significance of air quality impacts.⁵³

Relatedly, the Final IS/MND claims that Tier 4 diesel equipment is readily available and thus there are no feasibility concerns with including it as part of the mitigation for construction emissions.⁵⁴ However, as SWAPE explains, the Final IS/MND fails to support its claims that Tier 4 equipment is available locally and

⁴⁷ Draft IS/MND, Appendix B ("Air Quality Assessment"), p. 6.

⁴⁸ SWAPE Rebuttal Comments, p. 2.

⁴⁹ SWAPE Rebuttal Comments, p. 2.

⁵⁰ SWAPE Rebuttal Comments, p. 2.

⁵¹ SWAPE Rebuttal Comments, p. 2.

⁵² Final IS/MND, Response to SWAPE-5, p. 2-180; SWAPE Comments, p. 3.

⁵³ SWAPE Rebuttal Comments, p. 3.

⁵⁴ Final IS/MND, Response to SWAPE-5, p. 2-180.

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regularly required for construction projects in the Bay Area with evidence.⁵⁵ Furthermore, the Final IS/MND fails to account for how wide usage in the Bay Area could “put strain on the still relatively limited supply.”⁵⁶ As explained by SWAPE, “[w]ithout proof of the feasibility of this mitigation measure, it cannot be relied upon to conclude that health risk impacts will be insignificant.”⁵⁷

B. The Final IS/MND Still Relies on Unsupported Mitigation Measures for Operational Emissions and Still Fails to Include a Health Risk Analysis for Operational Emissions

Our IS/MND Comments identified unsubstantiated energy- and water-related operational mitigation measures. The Final IS/MND attempts to justify the inclusion of the measures by simply stating that the Project will be consistent with California’s 2019 Title 24 Building Code and City requirements.⁵⁸

However, the Final IS/MND fails to demonstrate how the lighting and water efficiency measures listed would actually achieve the reductions prescribed by State and City standards. SWAPE explains that, without a full and transparent explanation, it cannot verify that the required reductions would be achieved.⁵⁹

Relatedly, the Final IS/MND fails to demonstrate that the Project would implement several operational mitigation measures consistently with the guidance of the California Air Pollution Control Officers Association (“CAPCOA”).⁶⁰ SWAPE’s rebuttal comments include a table explaining how the City fails to include the CAPCOA mitigation measures or the necessary background information needed for SWAPE to verify the inclusion of those measures in the CalEEMod model.⁶¹ This constitutes substantial evidence that the Project’s

⁵⁵ SWAPE Rebuttal Comments, p. 11.

⁵⁶ SWAPE Rebuttal Comments, p. 11.

⁵⁷ SWAPE Rebuttal Comments, p. 11; see also *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727–728 (CEQA forbids relying on infeasible mitigation measures to show that impacts will be less than significant).

⁵⁸ Final IS/MND, Response to SWAPE-6, p. 2-181.

⁵⁹ SWAPE Rebuttal Comments, pp. 3–4.

⁶⁰ SWAPE Rebuttal Comments, pp. 4–9.

⁶¹ SWAPE Rebuttal Comments, pp. 4–9.

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operational air quality impacts are potentially significant and unmitigated, such that an EIR is necessary.

Our Comments also identified the Draft IS/MND’s omission of an operational health risk assessment (“HRA”) for diesel particulate matter (“DPM”) and other toxic air contaminants (“TACs”) emitted from vehicles associated with the residential development after it is constructed. The Final IS/MND attempts to justify this omission by contending that Project traffic would be distributed throughout the areas that vehicles travel, would not be concentrated at the Project site, and that residential traffic has relatively low emissions rates of TACs (only about 6 percent of region-wide travel is diesel).⁶² It also relies on its own irrelevant calculations of excess cancer risk from nearby roadways, which assumes 1,140 vehicle trips per day, and yields a negligible 0.17 per million for residences.⁶³

SWAPE rebuts these claims by pointing out that the Final IS/MND’s assertions about low emissions rates of TACs from residential traffic are unsupported by any evidence.⁶⁴ The City lacks substantial evidence to support its reliance on BAAQMD’s Roadway Screening Calculator to evaluate the Project’s operational health risk impacts. As explained by SWAPE, the calculator is not relevant to evaluating health risk posed by the Project’s operational emissions because the calculator “evaluates health risk impact on the Project site itself resulting from diesel emissions generated at nearby roadways, not the health risk impact resulting from trips generated by the Project itself.”⁶⁵

Moreover, even if the Project is unlikely to result in a significant operational health risk impact, that does not excuse the failure to conduct any quantified health risk analysis at all.⁶⁶ The omission of this analysis is particularly significant given that Office of Environmental Health Hazard Assessment (“OEHHA”) and Bay Area Air Quality District (“BAAQMD”) guidelines, which the

⁶² Final IS/MND, Response to SWAPE-9, pp. 2-183–2-184.

⁶³ Final IS/MND, Response to SWAPE-9, p. 2-184.

⁶⁴ SWAPE Rebuttal Comments, p. 9.

⁶⁵ SWAPE Rebuttal Comments, p. 11.

⁶⁶ See *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 523-524 (CEQA document must correlate the increase in emissions that a project will generate to the adverse impacts on human health).

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Final IS/MND purports to follow, recommend that such a study be done.⁶⁷ OEHHA recommends that exposure from projects lasting more than six months be evaluated for the duration of the project with an exposure duration of 30 years be used to estimate individual cancer risk for the maximally exposed individual resident (“MEIR”).⁶⁸ Furthermore, OEHHA guidance requires that excess cancer risk be calculated separately for all sensitive receptor age bins, then summed to evaluate the total cancer risk posed by all Project activities at the receptor location.⁶⁹ This value is then compared to the BAAQMD significance threshold of ten in one million excess cancer risk to determine whether a project has a significant health impact.⁷⁰ Finally, SWAPE explains that the City’s failure to prepare a quantified operational HRA results in a failure to comply with BAAQMD’s requirement to evaluate impacts of operational TACs and PM_{2.5} emissions on new receptors.⁷¹

The City’s failure to include an operational HRA renders the Final IS/MND deficient as an informational document under CEQA. An operational HRA must be conducted to evaluate the potential for significant health risk impacts that could trigger the need for an EIR.

C. The Final IS/MND Fails to Rebut SWAPE’s Conclusion that a Screening Level Assessment Indicates Significant Air Quality and Health Risk Impacts from Project Construction and Operation

The Final IS/MND attempts to discredit SWAPE’s screening level HRA, which demonstrated that the Project would have potentially significant operational health risk impacts, by claiming that the CalEEMod model is “far more

⁶⁷ SWAPE Rebuttal Comments, p. 10.

⁶⁸ SWAPE Rebuttal Comments, p. 10; “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>, pp. 8-6, 8-15.

⁶⁹ SWAPE Rebuttal Comments, p. 10.

⁷⁰ SWAPE Rebuttal Comments, p. 10.

⁷¹ SWAPE Rebuttal Comments, pp. 10–11.
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sophisticated.”⁷² However, this argument is a red herring, because the City did not conduct an operational health risk assessment for the Project.

As explained by SWAPE, the screening model used in SWAPE’s operational health risk assessment, AERSCREEN, is designed to show the possibility of an unacceptable air quality hazard that then triggers the need for further analysis before approving the Project.⁷³ SWAPE’s AERSCREEN modeling found that the Project’s 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, and that the excess cancer risk over the course of a residential lifetime (30 years) at the maximally exposed receptor (MEIR) would be approximately 24 in one million⁷⁴ The impacts to infants and lifetime exposure to the MEIR exceed the BAAQMD significance threshold of 10 in one million, providing substantial evidence demonstrating that the Project may cause a potentially significant health risk from operational emissions. Because the City did not analyze the Project’s operational health risk in the first place, it has no evidence to dispute SWAPE’s conclusion. Moreover, in the context of an MND, there is no requirement to use the most sophisticated model. Rather, it is only necessary to present evidence supporting a fair argument that impacts could be potentially significant.⁷⁵ SWAPE’s AERSCREEN modeling provides substantial evidence of a potentially significant impact which warrants preparation of an EIR.

The Final IS/MND also argues that SWAPE modeled an emission rate 140 percent higher than it should have been for construction.⁷⁶ However, SWAPE explains that it used the 532-day construction period from the MND itself to model the concentration of emissions over 1.5 years, rather than over 2 years as the Final IS/MND claimed was appropriate.⁷⁷ The Final IS/MND’s response is incorrect.

⁷² Final IS/MND, Response to SWAPE-10, p. 2-184.

⁷³ SWAPE Rebuttal Comments, p. 12.

⁷⁴ SWAPE Draft IS/MND Comments, pp. 14–15.

⁷⁵ See *Save the Agoura Cornell Knoll v. City of Agoura* (2020) 46 Cal.App.5th 665, 722 (“The fair argument standard . . . creates a low threshold for requiring an EIR, reflecting the legislative preference for resolving doubts in favor of environmental review.”) (internal citation omitted).

⁷⁶ Final IS/MND, Response to SWAPE-10, p. 2-185.

⁷⁷ SWAPE Rebuttal Comments, pp. 12–13.

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With respect to operational traffic emissions, the Final IS/MND asserts that SWAPE improperly used CalEEMod's PM10 emission rates to estimate DPM emissions rates.⁷⁸ Yet, the CalEEMod emission rates employed by SWAPE are consistent with the Draft IS/MND's own methodology.⁷⁹ Therefore, as SWAPE explains, the Final IS/MND's claim that SWAPE's use of the total exhaust PM10 is incorrect is contradictory and unsubstantiated.⁸⁰

Finally, regarding SWAPE's HRA for both construction and operational emissions, the Final IS/MND argues that SWAPE should have assumed a further distance from the closest sensitive receptor.⁸¹ However, the Final IS/MND provides no evidence in support of its response. In order to assess the extent of health risk impacts posed by the Project, it is necessary to evaluate the health risk posed to sensitive receptors closest to the Project site, which are the most likely to be exposed to emissions generated by traffic entering and exiting the Project site. The methodology of modeling health risk from the roadway pertains to a different type of impact – the impact of roadway emissions on the Project, rather than the Project's impacts on off-site receptors, which is the requisite analysis missing from the Final IS/MND. Thus, the Final IS/MND fails to meaningfully respond to SWAPE's HRA modeling and fails to remedy its omission of an operational HRA. SWAPE's conclusion that there are potentially significant operational health risk impacts stands. The City must prepare an EIR to disclose and mitigate these impacts.

V. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT GREENHOUSE GAS IMPACTS ARE SIGNIFICANT AND UNMITIGATED

As explained in our initial Comments, CEQA Guidelines and case law mandate consideration of the latest science and legislative goals in determining the significance of greenhouse gas ("GHG") emissions impacts.⁸² Absent another

⁷⁸ Final IS/MND, Response to SWAPE-10, p. 2-185.

⁷⁹ SWAPE Rebuttal Comments, p. 13.

⁸⁰ SWAPE Rebuttal Comments, p. 13.

⁸¹ Final IS/MND, Response to SWAPE-10, p. 2-186.

⁸² 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 4710-005acp

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clearly supported threshold, the BAAQMD 2030 substantial progress service population efficiency threshold of 2.6 MT CO₂e/service population (“SP”)/year is therefore the appropriate threshold with which to evaluate the Project’s 2021 emissions.⁸³

The IS/MND originally relied on the 2020 4.6 MT CO₂e/SP/year threshold to evaluate the Project’s 2021 emissions.⁸⁴ The Final IS/MND creates a new 2021 significance threshold of 4.1 MT/SP, based on an apparent interpolation of the 2020 threshold of 4.6 MT/SP and the 2030 threshold. However, the Final IS/MND fails to fails to provide supporting evidence for its reliance on a new threshold, and fails to explain why the Final IS/MND adopts a new threshold that is different from the threshold used to evaluate 2021 GHG impacts in the IS/MND.⁸⁵ As SWAPE explains, the City provides no legal or evidentiary basis to support the validity of this threshold.⁸⁶ Absent substantial evidence to support the City’s switch to a new threshold, BAAQMD’s 2.6 MT threshold is the appropriate numeric threshold against which to evaluate Project GHG emissions in 2021.⁸⁷ As SWAPE states, the use of either the Substantial Progress threshold or the bright line threshold of 1,100 MT per year yields a significant impact under CEQA.⁸⁸ Therefore, an EIR is required.

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”).

⁸³ SWAPE Rebuttal Comments, p. 14.

⁸⁴ Draft IS/MND, p. 68 (“2021 Emissions. Threshold: 4.6 MT CO₂e/SP/year.”)

⁸⁵ Final IS/MND, Response to SWAPE-11, p. 2-186.

⁸⁶ SWAPE Rebuttal Comments, p. 14.

⁸⁷ SWAPE Rebuttal Comments, p. 14.

⁸⁸ SWAPE Rebuttal Comments, pp. 14–16.

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

A. The Final IS/MND Still Fails to Remedy Deficiencies in the Characterization of the Biological Baseline

CEQA requires lead agencies to include a description of the physical environmental conditions, or “baseline,” in the vicinity of the Project as they exist at the time environmental review commences.⁸⁹ The impacts of the Project must be measured against the “real conditions on the ground.”⁹⁰ “[A]n inappropriate baseline may skew the environmental analysis flowing from it, resulting in an [environmental review document] that fails to comply with CEQA.”⁹¹

Our initial Comments identified a series of problems with the Draft IS/MND’s biological baseline description. The Biological Resources Assessment included with the Draft IS/MND provided no information on the professional expertise of the investigating biologists or the number of hours devoted to assessing habitat conditions.⁹² Furthermore, the IS/MND improperly assumed the absence of special-status species without conducting protocol-level surveys and determined that rare plants would not be present without substantial evidence to support this conclusion.

The Final IS/MND fails to provide any evidence demonstrating that the City’s biologists followed regulatory survey protocols or devoted the level of effort necessary to make substantiated predictions about the presence or absence of various species at the Project site.⁹³ Mr. Cashen further illustrates with Table 1 in

⁸⁹ 14 C.C.R. § 15125(a); *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 321 (“*CBE v. SCAQMD*”).

⁹⁰ *CBE v. SCAQMD*, 48 Cal.4th at 321; *Save Our Peninsula Com. v. Monterey County Bd. Of Supervisors* (2001) 87 Cal.App.4th 99, 121; *City of Carmel-by-the-Sea v. Bd. of Supervisors of Monterey County* (1986) 183 Cal.App.3d 229, 246.

⁹¹ *San Franciscans for Livable Neighborhoods v. City & County of San Francisco* (“*SFLN*”) (2018) 26 Cal.App.5th 596, 615 (citations omitted).

⁹² Draft IS/MND, Appendix C (“Biological Resources Assessment”).

⁹³ Cashen Rebuttal Comments, p. 1.
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his comments that the Final IS/MND misrepresents information from the initial Biological Resources Assessment in order to discount the potential for occurrence of special-status species.⁹⁴

The Final IS/MND’s Response to CASHEN-4 asserts that the City “is not required to assume presence of all special-status species that have potential to occur at the project site.”⁹⁵ However, as Mr. Cashen explains, the City cannot assume the absence of such species if the appropriate surveys have not been conducted—if there is potential for a species to occur at the site, then there is potential for the Project to inflict significant impacts on that species.⁹⁶ The East Alameda County Conservation Strategy (“EACCS”) requires agencies to assume the presence of special-status species if protocol surveys—surveys by U.S. Fish and Wildlife Service (“USFWS”)- and CDFW-approved biologists using agency guidance—are not conducted.⁹⁷ The following subsections explain in more detail how the City fails to take appropriate measures to accurately capture the biological baseline as it pertains to several special-status animal and plant species.

1. *Burrowing Owls*

The Final IS/MND’s Response to CASHEN-27 claims that burrowing owls are not likely to occur on-site, and therefore full protocol-level surveys are not warranted, because the nearest documented occurrence of the species is approximately 1.2 miles north of the Project site.⁹⁸ Mr. Cashen explains that there are several flaws with this reasoning.

First, “the statement that the nearest documented occurrence is approximately 1.2 miles from the Project site has limited value without corresponding information on the number of surveys that have been conducted within 1.2 miles of the site.”⁹⁹ Because the Draft IS/MND and Final IS/MND

⁹⁴ See Cashen Rebuttal Comments, pp. 1–2 (Table 1. Potential for various special-status species, as reported in the BRA and Final IS/MND).

⁹⁵ Final IS/MND, Response to CASHEN-4, p. 2-188.

⁹⁶ Cashen Rebuttal Comments, p. 2.

⁹⁷ Cashen Rebuttal Comments, p. 21; EACCS, p. 3-53.

⁹⁸ Final IS/MND, Response to CASHEN-27, p. 2-200.

⁹⁹ Cashen Rebuttal Comments, p. 3.

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provide no evidence of surveys for burrowing owls closer to the Project site or on the Project site itself, the City lacks evidence to conclude that the species is absent.¹⁰⁰

Second, readily available public information demonstrates that burrowing owls are present near the Project site. As Mr. Cashen explains, the California Natural Diversity Database (“CNDDDB”) contains records of “many individual observations” of burrowing owls in the vicinity of Bluebell Drive near Lassen Road and the Project site.¹⁰¹ Mr. Cashen explains that given the relatively high site fidelity exhibited by burrowing owls—meaning that they tend to remain in or return to the same locations—it is probable that burrowing owls remain in the area wherever there is undeveloped land that could be suitable as habitat.¹⁰² The Project site therefore potentially functions as such habitat.¹⁰³

Third, 1.2 miles is “well within the post-breeding dispersal distance of burrowing owls,” so the distance between the Project site and nearest documented occurrence of burrowing owls is not evidence that the Project site is unlikely to have burrowing owls.¹⁰⁴

Finally, the Project site possesses characteristics of suitable burrowing owl habitat, such as burrows and relatively short vegetation with only sparse shrubs or taller vegetation.¹⁰⁵ Therefore, there is evidence of the potential presence of burrowing owls at the Project site. The City’s failure to conduct protocol surveys renders the IS/MND’s characterization of the biological baseline for burrowing owls wholly unsupported.

¹⁰⁰ Cashen Rebuttal Comments, p. 3.

¹⁰¹ Cashen Rebuttal Comments, p. 3.

¹⁰² Cashen Rebuttal Comments, p. 3.

¹⁰³ Cashen Rebuttal Comments, p. 3.

¹⁰⁴ Cashen Rebuttal Comments, p. 3.

¹⁰⁵ Cashen Rebuttal Comments, pp. 3–4.
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2. *California Tiger Salamander*

The Final IS/MND removed the pre-construction survey requirement for California tiger salamanders by revising Mitigation Measure BIO-3.¹⁰⁶ The City argues that there is “low potential” for California tiger salamanders to occur at the site, even though the Draft IS/MND reported a “moderate potential” and CDFW recommended consultation to obtain a California Endangered Species Act permit.¹⁰⁷ This shift in reasoning is apparently based on a determination that breeding will not occur in the Arroyo Seco and that the nearest pond habitat is at least 0.5 mile away, beyond the median dispersal distance for the salamander.¹⁰⁸

Mr. Cashen provides two key pieces of evidence demonstrating why the City’s conclusion is unsupported. First, the City’s own Biological Resources Assessment concluded that there is moderate potential for occurrence of the California tiger salamander and the Final IS/MND fails to provide any new evidentiary basis for its opposite conclusion of “low potential.”¹⁰⁹ Second, a scientific study relied upon by the Final IS/MND itself yields data demonstrating that more than a third of salamanders studied dispersed more than 0.5 mile from the breeding pond.¹¹⁰ Therefore, Mr. Cashen explains that the presence of California tiger salamander cannot be ruled out. CDFW also stated in its comments that the City should assume the presence of the California tiger salamander.¹¹¹ The Final IS/MND lacks any evidence to dispute Mr. Cashen and CDFW’s conclusions.

Without pre-construction surveys, there is potential for significant impacts to the salamanders in violation of the Endangered Species Act and the California

¹⁰⁶ Final IS/MND, Response to CASHEN-4, p. 2-190.

¹⁰⁷ Cashen Rebuttal Comments, p. 27.

¹⁰⁸ Final IS/MND, Response to CDFW-5, p. 2-25.

¹⁰⁹ Cashen Rebuttal Comments, p. 4.

¹¹⁰ Cashen Rebuttal Comments, p. 4.

¹¹¹ Letter from CDFW to A. Ross re Lassen Road Residential Development Project, Initial Study/Mitigated negative Declaration, SCH #2019099018, City of Livermore, Alameda County (October 9, 2019) (“CDFW Comments”), p. 4. The Final IS/MND labeled relevant portion of the comment as CDFW-5.

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Endangered Species Act.¹¹² This, in turn, requires the preparation of an EIR to analyze and mitigate these potential impacts.

3. *California Red-Legged Frog*

The Draft IS/MND claimed that the lack of significant vegetation meant that California red-legged frogs would not breed at the Project site.¹¹³ CDFW commented that the red-legged frogs are known to breed in streams with little to no vegetation.¹¹⁴ As the wildlife agency with regulatory expertise in the biological resources at the Project site, CDFW's comments provide substantial evidence demonstrating that the frogs have potential to occur at the Project site.

In response, the Final IS/MND argues that high flows in the Arroyo Seco preclude breeding of California red-legged frogs.¹¹⁵ However, Mr. Cashen explains that this claim is unsubstantiated given that the Final IS/MND does not include any data on water flow volumes in the Arroyo Seco.¹¹⁶ Moreover, Mr. Cashen cites to a USFWS plan, Google Earth imagery, and CNDDDB data to show that deep pools and backwaters connected to the Arroyo Seco could be suitable for California red-legged frog breeding.¹¹⁷ CDFW's comments and Mr. Cashen's comments provide substantial evidence demonstrating that the Project may have potentially significant impacts on California red-legged frogs. By contrast, the Final IS/MND lacks substantial evidence to support its opposite conclusion. Without appropriate surveys, the City cannot claim that this species will be absent from the Project site.¹¹⁸ There is therefore substantial evidence supporting a fair argument that the Project may adversely impact California red-legged frogs. An EIR is required to fully disclose and mitigate this impact.

¹¹² Cashen Rebuttal Comments, p. 4.

¹¹³ Draft IS/MND, p. 50.

¹¹⁴ CDFW Comments, pp. 4–5. The Final IS/MND labeled relevant portion of the comment as CDFW-6.

¹¹⁵ Final IS/MND, Response to CASHEN-19, p. 2-197.

¹¹⁶ Cashen Rebuttal Comments, p. 5.

¹¹⁷ Cashen Rebuttal Comments, p. 5.

¹¹⁸ Cashen Rebuttal Comments, p. 5.

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4. *American Badger*

Despite the Biological Resource Assessment’s acknowledgement of moderate potential of occurrence of the American badger due to the presence of large burrows, the Final IS/MND fails to commit to further surveys and investigation of the burrows.¹¹⁹ Mr. Cashen explains that signs of occupancy of burrows are not always evident.¹²⁰ Moreover, given that potential occupants include the American badger (California species of special concern) and the San Joaquin kit fox (federally and state listed), the failure to further investigate means potential for significant environmental impacts that are not reflected in the MND.¹²¹

5. *Special-Status Plants*

In addition to mischaracterizing the risks posed to wildlife by the Project, the Final IS/MND fails to remedy the deficiencies in its evaluation of the presence of rare plants at the site, such as bent-flowered fiddleneck or Congdon’s tarplant.

The Final IS/MND points to literature review and field surveys by its biologists as evidence that the City properly ruled out the possibility of suitable habitat for various rare plants.¹²² It also asserts that the California Native Plant Society (“CNPS”) Guidebook shows that the Project site does not include any suitable alkali soils for such plant species.¹²³ However, Mr. Cashen explains that the City’s determinations are not truly supported by evidence. The City fails to cite the specific literature included in its review that support its determinations.¹²⁴ And the City’s consultants acknowledged that the field surveys conducted were not designed to determine the presence or absence of plant species.¹²⁵ As indicated by Mr. Cashen, many special-status plants are annuals that can only be identified during the appropriate growing season such that “it is impossible for a botanist (no

¹¹⁹ Cashen Rebuttal Comments, p. 5.

¹²⁰ Cashen Rebuttal Comments, p. 5.

¹²¹ Cashen Rebuttal Comments, pp. 5–6.

¹²² Final IS/MND, Response to CASHEN-5, p. 2-191.

¹²³ Final IS/MND, Response to CASHEN-5, p. 2-191.

¹²⁴ Cashen Rebuttal Comments, p. 6.

¹²⁵ Cashen Rebuttal Comments, p. 6.

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matter how qualified) to know what annual plants will be present at a site based on a survey outside of the growing season.”¹²⁶

Moreover, both the CNPS Guidebook and the Biological Resources Assessment rely on soil data from the Natural Resources Conservation Service Soil Survey Geographic Database (“SSURGO”).¹²⁷ After evaluating the source data from SSURGO, Mr. Cashen explains that the CNPS Guidebook elected to include only high alkalinity soils even though there are moderately alkaline soils at the Project site that could be suitable for special-status plants.¹²⁸ Thus, the pH of soils at the Project site is not a proper basis to assume the absence of rare plants.¹²⁹

The Final IS/MND also argued that “an abundance of yellow star thistle, regular disturbance, and grazing” precluded the site from support special-status plant species.¹³⁰ Yet, the Biological Resources Assessment indicated that the site contained a variety of vegetation types and was not dominated by yellow star thistle.¹³¹ More importantly, the City provides no evidence that the presence of yellow star thistle precludes the potential for rare plants. In fact, Mr. Cashen explains, by referencing the Manual of California Vegetation, that the presence of yellow-star thistle *does not* preclude the potential for special-status plants.¹³²

Regarding “regular disturbance,” the Biological Resources Assessment only refers to disturbance by cattle, suggesting that the “regular disturbance” and “grazing” issues identified by the City are one in the same.¹³³ Mr. Cashen explains that cattle grazing does not preclude the presence of special-status plants. He points to studies showing that grazing can, in fact, increase potential for rare plants by altering the competitive balance between native and non-native species.¹³⁴

¹²⁶ Cashen Rebuttal Comments, p. 6.

¹²⁷ Cashen Rebuttal Comments, pp. 6–7.

¹²⁸ Cashen Rebuttal Comments, pp. 6–7.

¹²⁹ Cashen Rebuttal Comments, p. 7.

¹³⁰ Final IS/MND, Response to CASHEN-5, p. 2-191.

¹³¹ Biological Resources Assessment, p. 10.

¹³² Cashen Rebuttal Comments, p. 8.

¹³³ Biological Resources Assessment, p. B-2; Cashen Rebuttal Comments, p. 8.

¹³⁴ Cashen Rebuttal Comments, pp. 8–9.

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Finally, Comment CASHEN-9 exposed the Draft IS/MND's failure to disclose the Project site's inclusion in the Springtown Botanical Priority Protection Area and to evaluate the significance of Project impacts to this area. The Final IS/MND fails to provide a meaningful response to this comment by simply responding that being located within the boundaries of the protection area "does not preclude development of the project site."¹³⁵ As explained by Mr. Cashen, the CNPS Guidebook to Botanical Priority Protection Areas states that the entire Springtown area supports a unique diversity of natural communities and state- and federally-listed rare plants.¹³⁶ Mr. Cashen highlights that, despite this significant designation, the City's consultants did not make a single site visit during the growing season.¹³⁷ In the absence of protocol surveys ruling out the presence of special-status plants, there remains the potential for significant impacts to sensitive botanical resources.

Therefore, the City lacks sufficient evidence to support its conclusion that there would be no adverse impacts to special-status plants. Until protocol-level surveys are conducted and circulated for public review in an EIR, the City cannot rule out the presence of plants such as bent-flowered fiddleneck or Congdon's tarplant.

B. The Final IS/MND Fails to Meaningfully Respond to Evidence Demonstrating that the Project could Lead to Indirect Impacts and Edge Effects from Human and Pet Activity and Promotion of Invasive Plants

CEQA requires agencies to consider indirect environmental impacts associated with a Project.¹³⁸ Our initial Comments identified several indirect impacts that could result from residential developments like the Project that the

¹³⁵ Final IS/MND, Response to CASHEN-9, p. 2-193; Cashen Rebuttal Comments, p. 9.

¹³⁶ Cashen Rebuttal Comments, pp. 9–10.

¹³⁷ Cashen Rebuttal Comments, pp. 9–10.

¹³⁸ See 14 C.C.R. § 15064(d) (evaluating significance of the environmental effect of a project requires consideration of reasonably foreseeable indirect physical changes caused by the project); 14 C.C.R. § 15358(a)(2) (defining "effects" or "impacts" to include indirect or secondary effects caused by the project and are "later in time or farther removed in distance, but are still reasonably foreseeable").
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Draft IS/MND neglected to consider.¹³⁹ These impacts can be characterized as “edge effects,” which Mr. Cashen explains as impacts that flow from abrupt transitions between different habitats, particularly between natural communities and human developments.¹⁴⁰

The Final IS/MND’s Response to CASHEN-24 asserts that indirect edge effects would be less than significant because there is already a freeway and a residential neighborhood nearby.¹⁴¹ However, Mr. Cashen explains that the presence of some edge effects is not a justification to introduce new ones, which would exacerbate existing impacts.¹⁴² Construction of the Project would compound the edge effects currently impacting the Project site and lead to even more considerable impacts.¹⁴³ Specific examples of edge effects improperly ignored or discounted by the City include human activity on trails, domestic animals, night lighting, and inadvertent introduction invasive plants. Mr. Cashen provides additional evidentiary support for the potential significance of these impacts on the biological community at the Project site and explains why the impacts are not speculative in his rebuttal comments.¹⁴⁴

C. The Final IS/MND Fails to Analyze Cumulative Impacts of Habitat Loss

As explained above, CEQA requires agencies to evaluate cumulative impacts by considering past, current, foreseeable future projects that may be individually small but collectively considerable.¹⁴⁵ Beyond the combined impacts of the trail network discussed earlier, construction of the Project may exacerbate cumulative impacts to burrowing owls through habitat loss. As discussed below, the Final IS/MND improperly brushes these concerns aside without fully considering them.

¹³⁹ Cashen Rebuttal Comments, pp. 10–11.

¹⁴⁰ Cashen Rebuttal Comments, pp. 10–11.

¹⁴¹ Final IS/MND, Response to CASHEN-24, p. 2-200.

¹⁴² Cashen Rebuttal Comments, p. 11.

¹⁴³ Cashen Rebuttal Comments, p. 11.

¹⁴⁴ Cashen Rebuttal Comments, pp. 11–16, 34–35.

¹⁴⁵ 14 C.C.R. §§ 15064(h)(1), 15130(b)(1), 15355.
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Regarding scientific evidence presented by Mr. Cashen that the Project has potential to restrict the range of the burrowing owl at local and regional levels, the Final IS/MND responds by stating that the study is limited to the context of windfarms and habitat east of the Altamont Hills.¹⁴⁶ Mr. Cashen explains that the study concluded that *habitat loss* and wind turbine strikes are key threats to burrowing owls.¹⁴⁷ He also clarifies that nowhere in the scientific paper do the authors restrict the implications of their conclusions to windfarms and habitat east of the Altamont Hills.¹⁴⁸ Contrarily, the authors conclude that habitat loss from spreading development in the San Francisco Bay Area is the most immediate threat to burrowing owls.¹⁴⁹ City limits are “irrelevant from a biological perspective” and development of the Project could easily combine with past and future development to pose cumulatively considerable threats to burrowing owls.¹⁵⁰ The City fails to consider these potential impacts—impacts that are likely significant and require preparation of an EIR.

Furthermore, the City provides no basis for its argument that habitat for burrowing owls is “ubiquitous” throughout North Livermore such that the owls would be unaffected by development of the Project site.¹⁵¹ As explained by Mr. Cashen, “[a] landscape’s ability to provide habitat for a given species is dependent on a suite of biotic and abiotic variables beyond vegetation type.”¹⁵² Moreover, burrowing owl populations have been extirpated from most of Alameda County—important context for consideration of cumulative impacts.¹⁵³

Yet, the City fails to provide any cumulative impacts analysis for habitat loss. CEQA Guidelines section 15130(b)(1) requires a listing of past, present, and probable future projects producing related impacts or a summary of projects contained in an adopted planning document.¹⁵⁴ The Final IS/MND does neither. An

¹⁴⁶ Final IS/MND, Response to CASHEN-24, p. 2-200.

¹⁴⁷ Cashen Rebuttal Comments, p. 23.

¹⁴⁸ Cashen Rebuttal Comments, pp. 23–24.

¹⁴⁹ Cashen Rebuttal Comments, p. 24.

¹⁵⁰ Cashen Rebuttal Comments, p. 24.

¹⁵¹ Cashen Rebuttal Comments, p. 25.

¹⁵² Cashen Rebuttal Comments, p. 25.

¹⁵³ Cashen Rebuttal Comments, p. 25.

¹⁵⁴ 14 C.C.R. § 15130(b)(1).

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EIR should be prepared to evaluate the cumulative impacts of habitat loss on special-status species such as the burrowing owl.

D. The Final IS/MND Fails to Remedy Its Inadequate Mitigation of Potentially Significant Construction Impacts to Burrowing Owls

In response to our comments that the Draft IS/MND failed to address impacts to burrowing owls, the Final IS/MND claims that the Project will be consistent with EACCS Guidance for mitigation measures for burrowing owls.¹⁵⁵ Mr. Cashen explains that this is “a spurious claim” because EACCS calls for protocol-level surveys so that direct impacts to owls, their nests, and their foraging habitat can be avoided during construction and post-project activities.¹⁵⁶ The CDFW Staff Report on burrowing owl mitigation explains that typical pre-construction surveys are not good enough because they do not provide sufficient data needed to understand presence, distribution, and seasonal use patterns of owls at the site.¹⁵⁷ Without a full understanding of the nature of burrowing owl use of the Project site, the IS/MND’s analysis of possible impacts and its conclusions regarding the efficacy of burrowing owl mitigation remain speculative, which in turn results in a failure to comply with CEQA.¹⁵⁸

While the City claims that a conservation easement on 12 acres of grassland habitat at the site will offset potential habitat loss for the burrowing owl, the City fails to disclose the terms of that conservation easement.¹⁵⁹ Without this information, “there are no assurances that it would be preserved and managed in perpetuity to provide habitat for burrowing owls and other special-status

¹⁵⁵ Final IS/MND, Response to CASHEN-17, p. 2-196.

¹⁵⁶ Cashen Rebuttal Comments, p. 17; EACCS, p. 3-66.

¹⁵⁷ Cashen Rebuttal Comments, p. 17; California Department of Fish and Wildlife. 2012. Staff Report on Burrowing Owl Mitigation. p. 5.

¹⁵⁸ See *San Franciscans for Livable Neighborhoods v. City & County of San Francisco* (“SFLN”) (2018) 26 Cal.App.5th 596, 615 (“[A]n inappropriate baseline may skew the environmental analysis flowing from it, resulting in an [environmental review document] that fails to comply with CEQA.”).

¹⁵⁹ Cashen Rebuttal Comments, p. 17.
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species.”¹⁶⁰ Moreover, the EACCS Guidance recommends a 3:1 mitigation ratio, and the proposed 12-acre preserve would not satisfy this ratio.¹⁶¹

The Final IS/MND and Staff Report claim that mitigation measure BIO-1 requires the necessary avoidance and minimization measures to protect burrowing owls in compliance with CDFW requirements.¹⁶² However, Mr. Cashen explains that this is false for several reasons. First, CDFW recommends at least four surveys during breeding season and additional surveys during the winter months, but BIO-1 was revised to require one winter survey and no surveys during breeding season.¹⁶³ Second, while CDFW recommends surveys that extend 500 feet from the Project area, BIO-1 only requires pre-construction surveys within 250 feet of the residential development area, even though ground disturbing activities are anticipated in areas approximately 720 feet from the residential development area.¹⁶⁴ Third, BIO-1 does not require compensatory habitat mitigation in accordance with the recommended 3:1 ratio in Table 3-10 of the EACCS Guidance, even though CDFW recommended this table be used.¹⁶⁵ Fourth, EACCS also requires implementation of 17 avoidance and minimization measures outlined in Table 3-2, but BIO-1 does not commit to implementing any of those measures.¹⁶⁶

Finally, BIO-1 also improperly defers preparation of a Relocation Plan until after work on the Project has begun.¹⁶⁷ Mr. Cashen explains that the public has a right to evaluate the effectiveness of this mitigation measure and it is impossible to do so without more data and criteria about how relocation would be conducted.¹⁶⁸ Without information about adjacent burrowing owl habitat and specifics regarding

¹⁶⁰ Cashen Rebuttal Comments, p. 17.

¹⁶¹ Cashen Rebuttal Comments, p. 18.

¹⁶² Final IS/MND, Response to CASHEN-17, p. 2-196; Staff Report, p. 16.

¹⁶³ Cashen Rebuttal Comments, p. 26. BIO-1 was revised to require “a breeding season survey if construction is not initiated between April 1 and June 30, and a 24-hour prior survey,” but as Mr. Cashen explains, the peak of burrowing owl breeding season occurs between April 15 and July 15. (*Id.* at 29.) Allowing Applicant to forgo a breeding survey increases the risk of significant impacts to burrowing owls. (*Id.*)

¹⁶⁴ Cashen Rebuttal Comments, p. 26.

¹⁶⁵ Cashen Rebuttal Comments, p. 26.

¹⁶⁶ Cashen Rebuttal Comments, p. 30.

¹⁶⁷ Cashen Rebuttal Comments, p. 18.

¹⁶⁸ Cashen Rebuttal Comments, p. 18.

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techniques for minimizing impacts during relocation and monitoring post-relocation, BIO-1 lacks adequate performance standards, and Mr. Cashen and other members of the public cannot tell if this mitigation will reduce impacts to below significant levels.¹⁶⁹

CEQA forbids deferral of formulation of mitigation plans without concrete performance criteria.¹⁷⁰ Moreover, reliance on unclear or ineffective mitigation measures violates CEQA.¹⁷¹ The City must prepare an EIR with legally adequate mitigation measures to reduce burrowing owl impacts to less than significant levels.

E. The Final IS/MND Fails to Remedy Its Inadequate Mitigation of Potentially Significant Construction Impacts to California Red-Legged Frogs and California Tiger Salamanders

As referenced earlier, the Final IS/MND removed the pre-construction survey requirement for California tiger salamanders by revising Mitigation Measure BIO-3.¹⁷² Rather, a biological monitor or environmentally trained construction personnel would watch the site for tiger salamanders during construction and halt work and contact appropriate agencies if a salamander is sighted.¹⁷³ Mr. Cashen points out a key flaw in this change to mitigation: that salamanders spend a majority of their lifespan underground and would be very

¹⁶⁹ Cashen Rebuttal Comments, p. 18.

¹⁷⁰ *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).

¹⁷¹ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727–728.

¹⁷² Final IS/MND, Response to CASHEN-4, p. 2-190.

¹⁷³ Final IS/MND, Response to CASHEN-4, p. 2-190.
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difficult to detect.¹⁷⁴ Close monitoring itself may constitute a harassing form of “take” under the Endangered Species Act that would require permitting and in turn constitute evidence of significant environmental impacts requiring preparation of an EIR.¹⁷⁵

Ultimately, Mr. Cashen explains that, in accordance with USFWS guidance, “take” minimization designed to reduce potential harm to salamanders as much as possible would require a four-part strategy: (1) preconstruction surveys to remove salamanders from the construction site; (2) installation of an exclusion fence to prevent salamanders from entering the site; (3) daily inspection of the exclusion fence to make repairs and locate any salamanders missed during pre-construction survey; and (4) presence of a biological monitor on-site during all construction activities that occurs around salamander habitat.¹⁷⁶ The City improperly swapped items (1) and (2) for item (4), when all four components are necessary to protect the California tiger salamander.¹⁷⁷ The fact that CDFW commented that exclusion fencing could be a form of take does not justify the City turning a blind eye to potential harm to salamanders.

Not only will the Project risk proceeding without a full understanding of the presence of tiger salamanders on the site, it will move forward with no accountability that they will be identified and protected before it is too late. CEQA forbids reliance on mitigation measures that are ineffective or unenforceable.¹⁷⁸ The City’s alteration of its approach to addressing potential impacts to salamanders therefore violates CEQA. With uncertain and unenforceable measures in place, potential for significant impacts to salamanders remains and an EIR must be prepared.

¹⁷⁴ Cashen Rebuttal Comments, p. 32.

¹⁷⁵ 16 U.S.C. § 1532(19) (“The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”).

¹⁷⁶ Cashen Rebuttal Comments, p. 32.

¹⁷⁷ Cashen Rebuttal Comments, p. 32.

¹⁷⁸ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727–728; see 14 C.C.R. § 15126.4(a)(2) (mandating that mitigation measures be enforceable through “legally-binding instruments”).

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Regarding California red-legged frogs, the exclusion fencing once required for salamanders is still included as part of mitigation measure BIO-4.¹⁷⁹ Mr. Cashen explains that the exclusion fence is just as likely to cause take of frogs as it is of salamanders.¹⁸⁰ CDFW focused on the salamander because it is a state listed species, but it noted that take authorization from USFWS would likely be required for California red-legged frogs.¹⁸¹ Also, it is unclear how the City will feasibly allow use of exclusion fencing for frogs without inadvertently causing take of salamanders, given how difficult the salamanders can be to detect.¹⁸² Finally, use of funnels or doors in exclusion fencing are a minimization technique but do not ensure take avoidance.¹⁸³ Therefore, it is clear that the City should commit to obtaining incidental take permits in advance of beginning construction and the associated impacts should be evaluated in an EIR.

F. The Final IS/MND Fails to Remedy Its Inadequate Mitigation of Potentially Significant Construction Impacts to American Badgers

In response to our Comments about potential impacts to American badgers, the Final IS/MND argues that the EACCS Guidance does not require mitigation of impacts to badgers unless a den is documented on the project site.¹⁸⁴ However, as explained with regard to baseline, potential badger dens were not fully investigated. Moreover, Mr. Cashen explains that the EACCS Guidance requires compliance with habitat mitigation ratios in the event impacts to a den cannot be avoided.¹⁸⁵ Because mitigation measure BIO-2 does not require avoidance of impacts to dens or habitat mitigation consistent with EACCS Guidance, there remains potential for significant impacts that would be unmitigated.¹⁸⁶ Therefore, an EIR is necessary to evaluate the impacts.

¹⁷⁹ Cashen Rebuttal Comments, p. 32.

¹⁸⁰ Cashen Rebuttal Comments, p. 32.

¹⁸¹ Cashen Rebuttal Comments, p. 32.

¹⁸² Cashen Rebuttal Comments, p. 32.

¹⁸³ Cashen Rebuttal Comments, p. 33.

¹⁸⁴ Final IS/MND, Response to CASHEN-20, p. 2-197.

¹⁸⁵ Cashen Rebuttal Comments, p. 19.

¹⁸⁶ Cashen Rebuttal Comments, p. 19.
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Although the City claims that it will utilize a typical badger survey up to 14 days prior to ground disturbance, the City fails to rebut Mr. Cashen’s evidence that the mitigation measure BIO-2 will not reduce impacts to less than significant levels because some badgers dig a new den as frequently as each night.¹⁸⁷ Therefore, impacts to American badgers remain potentially significant.

G. The Final IS/MND Conflicts with EACCS Guidance and Livermore General Plan Policies

As referenced several times above, the Final IS/MND conflicts with the EACCS Guidance for assessing and minimizing biological impacts. Response to CASHEN-22 asserts that compliance with the EACCS Guidance is voluntary.¹⁸⁸ However, as Mr. Cashen explains, the Final IS/MND’s dismissal of the EACCS illustrates that the City and Applicant are ignoring the advice of the preliminary constraints memorandum prepared by its biological consultant, which recommended either seeking coverage under the EACCS or undergoing consultation with wildlife agencies under Section 7 of the Endangered Species Act.¹⁸⁹ While the City further argues that its mitigation measures are consistent with EACCS Guidance, Mr. Cashen provides numerous examples of why that is not true, including the failure to require protocol-level surveys and habitat mitigation consistent with recommended ratios.¹⁹⁰ The failure to comply with the EACCS or any other conservation recommendations are “evidence that potentially significant impacts to sensitive biological resources remain unmitigated.”¹⁹¹ This argument is even stronger when considered in light of the fact that the City has required as part of its EIR for the Isabel Neighborhood Plan that project proponents comply with the EACCS.¹⁹² The City’s website even suggests that the City relies on the EACCS for guidance on how all development projects should avoid, minimize, and mitigate project impacts on biological resources in East Alameda County.¹⁹³

¹⁸⁷ Final IS/MND, Response to CASHEN-30, p. 2-201; Cashen Rebuttal Comments, p. 31.

¹⁸⁸ Final IS/MND, Response to CASHEN-22, p. 2-198.

¹⁸⁹ Cashen Rebuttal Comments, p. 19.

¹⁹⁰ Cashen Rebuttal Comments, pp. 20–22.

¹⁹¹ Cashen Rebuttal Comments, p. 20.

¹⁹² Cashen Rebuttal Comments, p. 28.

¹⁹³ Cashen Rebuttal Comments, p. 28.

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In addition, our Comments explained that the Project failed to comply with policies in the Livermore General Plan. The Final IS/MND's insistence that these policies are not violated is baseless.¹⁹⁴

The Project does not comply with Objective OSC-1.1, Policy 4, requiring mitigation of impacts to special-status species, because the proposed mitigation is not consistent with the guidance of federal and/or state resource agencies. CDFW's comments also clearly show that the mitigation measures are not consistent with EACCS and do not mitigate impacts to less than significant levels.¹⁹⁵

Plan Objective OSC-1.2, Policy 8 requires avoidance of take of special-status species by consulting with USFWS and CDFW. But the Final IS/MND fails to even incorporate the "General Avoidance and Mitigation Measures" in the EACCS.¹⁹⁶ There is no evidence of consultation with USFWS or CDFW.¹⁹⁷ Moreover, CDFW specifically commented that the mitigation measures are insufficient to avoid take of the California tiger salamander.¹⁹⁸

Therefore, there is substantial evidence supporting a fair argument that the City has failed to comply with applicable plans and policies related to conserving biological resources and protecting special-status species. Either mitigation measures must be improved or an EIR must be prepared.

VII. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT CONSTRUCTION MAY RESULT IN SIGNIFICANT NOISE IMPACTS THAT REMAIN UNMITIGATED

Using data from the Draft IS/MND and its accompanying noise study, Mr. Watry commented that average Project construction noise levels experienced at KinderCare Learning Center would be 25 dBA above the existing ambient.¹⁹⁹ The

¹⁹⁴ Final IS/MND, Response to CASHEN-23, p. 2-199.

¹⁹⁵ Cashen Rebuttal Comments, p. 22; CDFW Comments, p. 2.

¹⁹⁶ Cashen Rebuttal Comments, p. 23.

¹⁹⁷ Cashen Rebuttal Comments, p. 23.

¹⁹⁸ Cashen Rebuttal Comments, p. 23; CDFW Comments, pp. 3-5.

¹⁹⁹ Watry Rebuttal Comments, p. 1.

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average construction noise levels experienced at the nearest residence would be 14 dBA above the existing ambient.²⁰⁰

The Final IS/MND's Response to WI-3 argues that Mr. Watry incorrectly compared worst-case peak construction noise levels to 10-minute short-term ambient noise levels instead of comparing to maximum or hourly average noise levels recorded in the vicinity.²⁰¹ It also asserts that the 10-minute average ambient noise levels measured near the KinderCare facility should not be used as the basis for comparison as Mr. Watry did.²⁰² Rather, the Final IS/MND says the comparison should be made to hourly average data collected elsewhere on the Project site.

However, Mr. Watry explains that he relied on the hourly average of 84.4 dBA from the Draft IS/MND, not the peak level of 88.4 dBA.²⁰³ Furthermore, Mr. Watry argues that it makes little sense to discount the value of measurements made for the Draft IS/MND just because they were made for 10 minutes, especially when the measurements occurred near the KinderCare building in locations over 500 feet from I-580, partially shielded from freeway noise by berms.²⁰⁴ The location of the long-term measurement, on the other hand, was about 180 feet from I-580 and had a clear view of the freeway, meaning it represents a higher ambient noise level than typically experienced at KinderCare.²⁰⁵ This difference in measurement location relative to the freeway, account for why the average noise levels measured near KinderCare were about 14 dB lower than the hourly average levels. Mr. Watry explains that the fact that the City's consultant took short-term measurements close to KinderCare does not minimize their evidentiary value.²⁰⁶ In an area where the dominant noise source is a freeway, irrespective of whether a noise sample is averaged across an hour or 10 minutes, the result should be

²⁰⁰ Watry Rebuttal Comments, p. 1.

²⁰¹ Final IS/MND, Response to WI-3, p. 2-203.

²⁰² Final IS/MND, Response to WI-3, p. 2-203.

²⁰³ Watry Rebuttal Comments, p. 2.

²⁰⁴ Watry Rebuttal Comments, p. 2.

²⁰⁵ Watry Rebuttal Comments, p. 2.

²⁰⁶ Watry Rebuttal Comments, p. 2.

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similar, barring some major event such as the shutdown of the freeway.²⁰⁷ There is no evidence such an event that would skew the data occurred.

As Mr. Watry puts it, the City should not use data collected farther away from the KinderCare facility just because the data measured near the noise-sensitive receptor is “inconveniently low” for the Project’s impacts.²⁰⁸ The data measured near KinderCare and the closest residence on Spring Valley Common are “perfectly appropriate” and establish that construction noise levels will exceed the existing ambient by the levels described in Mr. Watry’s original comments.²⁰⁹

The Final IS/MND further claims that Mr. Watry improperly assumed that multiple pieces of the loudest construction equipment would operate simultaneously at full power within 50 feet of a single point on the Project site.²¹⁰ The Response to WI-3 states that grading and site preparation work would occur as far away as 1,200 feet.²¹¹

However, as Mr. Watry explains, he reasonably relied on statements from the Draft IS/MND itself stating that multiple pieces of heavy machinery could potentially operate close to the acoustic center and yield average noise levels up to 84.4 dBA L_{eq} at the nearest façade of the KinderCare building.²¹² Replicating the calculation methodology of the Draft IS/MND, Mr. Watry shows that, even at a distance of 615 feet from KinderCare—a distance which accounts for over half of the Project site—the calculations show noises of 5 or 6 dBA above the ambient.²¹³ Mr. Watry explains that an increase of 5 dBA is readily perceptible and causes a clearly noticeable change in loudness.²¹⁴ And for work done within 346 feet of KinderCare—a distance that covers a quarter of the Project site—the noise level is calculated to be 10 dBA above ambient, often considered a significant increase for

²⁰⁷ Watry Rebuttal Comments, p. 2.

²⁰⁸ Watry Rebuttal Comments, p. 3.

²⁰⁹ Watry Rebuttal Comments, p. 3.

²¹⁰ Final IS/MND, Response to WI-3, p. 2-204.

²¹¹ Final IS/MND, Response to WI-3, p. 2-204.

²¹² Watry Rebuttal Comments, p. 3.

²¹³ Watry Rebuttal Comments, p. 4.

²¹⁴ Watry Rebuttal Comments, p. 4.
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construction noise.²¹⁵ Mr. Watry further notes that the character of diesel engines revving for power is distinctive when the background noise is typically freeway traffic and thus the noise increase would be even more noticeable.²¹⁶

While the Response to WI-3 calculates the day-night equivalent of construction noise to compare with existing ambient and suggest the noise levels are insignificant, Mr. Watry explains that day-night equivalent is a non-standard methodology that improperly waters down the construction noise levels.²¹⁷ Averaging noise levels over 24 hours when the City Municipal Code requires that no construction will occur at night, results in a mischaracterization of the noise levels that will be experienced during the day.²¹⁸ As Mr. Watry puts it, the absence of construction noise in the middle of the night does not offset the potential annoyance at its peak during the day.²¹⁹ Therefore, this method should not be used except for around-the-clock construction projects or construction that will only occur at night.²²⁰ This is not such a Project.

Moreover, in *King and Gardiner Farms, LLC v. County of Kern*, the Court of Appeal reaffirmed our argument from the Comments on the Draft IS/MND that the City cannot simply rely on compliance with local noise regulations to conclude there will be no significant noise impacts without considering the impacts of increases in noise.²²¹ In fact, the court concluded that an agency cannot exclusively rely on “a single cumulative [day-night] metric for determining the significance of the project's noise impacts” while deciding “the magnitude of the increase in ambient noise is irrelevant.”²²² The City commits this precise error in its Final IS/MND as it tries to rely on the day-night average to make the overall cumulative noise appear less significant, while ignoring the increase from ambient noise. Therefore, the Final IS/MND fails to comply with CEQA and an EIR is required.

²¹⁵ Watry Rebuttal Comments, p. 4.

²¹⁶ Watry Rebuttal Comments, p. 4.

²¹⁷ Final IS/MND, Response to WI-3, pp. 2-204–2-205; Watry Rebuttal Comments, pp. 4–5.

²¹⁸ Watry Rebuttal Comments, p. 5.

²¹⁹ Watry Rebuttal Comments, p. 5.

²²⁰ Watry Rebuttal Comments, p. 5.

²²¹ *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 894.

²²² *Id.*

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Finally, the City offers no meaningful response to Mr. Watry's assertion that the proposed mitigation measures in NOI-1 would be ineffective. The contention that noise will not disturb people while they are sleeping simply ignores the fact that during the day KinderCare may be full of children and some people will be home. Mufflers and limitations on idling would not offer any additional noise reductions. Moreover, as explained by Mr. Watry, a noise coordinator does not actually help with any noise reductions.²²³ They simply document complaints. This measure provides no concrete noise reductions on which to conclude that construction noise impacts would be reduced to less than significant levels. The City must prepare an EIR to fully disclose and mitigate the Project's potentially significant noise impacts.

VIII. THE PLANNING COMMISSION CANNOT MAKE THE FINDINGS NECESSARY TO RECOMMEND APPROVAL OF THE REQUIRED GENERAL PLAN AMENDMENT

Section 9.14.060 of the Livermore Development Code lists the findings necessary to approve a General Plan Amendment. This includes the requirement that the amendment is consistent with all other provisions of the General Plan and the requirement that the proposed amendment not be "detrimental to the public interest, health, safety, convenience, or welfare of the City."²²⁴ As discussed above, the proposed Project conflicts with multiple General Plan policies, including Objective OSC-1.1, Policy 4, requiring mitigation of impacts to special-status species and Objective OSC-1.2, Policy 8 requiring avoidance of take of special-status species by consulting with USFWS and CDFW.

Furthermore, evidence showing potential for significant environmental impacts and various conflicts with conservation objectives undermine the ability of the Planning Commission to find that the proposed amendment will not be detrimental to the public interest, health, and safety. As a result, the Planning Commission should not recommend approval of the Project to the City Council and should instead recommend preparation of an EIR before the Project may be approved.

²²³ Watry Rebuttal Comments, pp. 5–6.

²²⁴ Livermore Development Code § 9.14.060(A)(1), (2).
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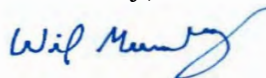
IX. CONCLUSION

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.²²⁵ As discussed herein, there is substantial evidence supporting a fair argument that the Project would result in significant adverse impacts that were not identified and that are not adequately analyzed or mitigated. The Final IS/MND omits basic information and analysis required by CEQA, deficiencies which “cannot be dismissed as harmless or insignificant defects.”²²⁶

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

Thank you for your attention to these comments.

Sincerely,



William Mumby

Attachments

WM:acp

²²⁵ Pub. Res. Code § 21151; 14 CCR §15063(b)(1).

²²⁶ *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1220. 4710-005acp