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May 3, 2021

**Via Email and U.S. Mail**

William He, Associate Planner  
City of American Canyon  
4381 Broadway, Ste. 201  
American Canyon, CA 94503  
Email: [whe@cityofamericancanyon.org](mailto:whe@cityofamericancanyon.org)

**RE: Comments on the Initial Study/Mitigated Negative Declaration  
for SDG Commerce 217 Distribution Center Project (Application  
PL20-0008; SCH Number 2020120302)**

Dear Mr. He:

We write on behalf of **American Canyon Residents for Responsible Development** (“Residents”) to provide comments on the Initial Study and Mitigated Negative Declaration (“MND”) prepared by the City of American Canyon (“City”) for the SDG Commerce 217 Distribution Center Project (Application PL20-0008; SCH Number 2020120302) (“Project”), proposed by SDG Commerce 217, LLC (“Applicant”).

The Applicant seeks a Conditional Use Permit (“CUP”) to construct a new 217,294 square foot wine warehouse distribution center with parking and landscaping at 1075 Commerce Court in the City of American Canyon, due north of the City of American Canyon Clarke Ranch open space/recreation area. The Project site is on the west side of Commerce Court and just south of the City’s Utility Access Easement No. 2002-31363 and 1155 Commerce Blvd. The property is generally trapezoidal in shape, approximately 10.39 acres, and is the north parcel of a recently approved tentative parcel map. Access to the Project site is from SR-29 via Green Island Road to Commerce Court.

The Project site was previously part of a 35.85-acre parcel (APN: 058-030-065). A tentative parcel map was adopted by the City of American Canyon on 5038-008acp

February 28, 2019, that split the 35.85-acre parcel into three parcels. The 15.24-acre south parcel was previously approved as Project SDG 330 for an approximately 330,000 square-foot wine distribution center, which is nearing completion. Commerce Court was improved along the property frontage, with work completed October 13, 2020. The remaining middle parcel is approximately 10.17 acres in size<sup>1</sup>. According to the MND, there are no current plans for development of that parcel.<sup>2</sup>

Based upon our review of the MND and supporting documentation, we conclude that the MND fails to comply with the requirements of the California Environmental Quality Act<sup>3</sup> (“CEQA”). The MND fails to accurately describe the Project by piecemealing the City’s environmental review of the Project from its related components. Additionally, it fails to identify the Project’s potentially significant environmental impacts and fails to propose enforceable measures that can reduce those impacts to a less than significant level, as required by CEQA.

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As explained in these comments, there is more than a fair argument that the Project will result in potentially significant impacts relating to air quality, public health, biological resources, energy, GHG, land use, noise, and transportation. The City may not approve the Project until it prepares an environmental impact report (“EIR”) that adequately analyzes the Project’s potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to avoid or minimize these impacts.

We prepared these comments with the assistance of air quality and hazards experts James Clark, Ph.D., of Clark and Associates, Neil Shaw, FASA, FAES, Scott Cashen, M.S., and Daniel Smith Jr., P.E., of Smith Engineering & Management. Dr. Clark’s technical comments and curricula vitae are attached hereto as **Attachment A**.<sup>4</sup> Mr. Shaw’s technical comments and curricula vitae are attached hereto as

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<sup>1</sup> MND, p. 4.

<sup>2</sup> MND, p. 4.

<sup>3</sup> Pub. Resources Code, §§ 21000 et seq.; 14 Cal. Code Regs. (“C.C.R”) §§ 15000 et seq. (“CEQA Guidelines”).

<sup>4</sup> **Attachment A**: Letter from James Clark re: Comments on the Initial Study/Mitigated Negative Declaration for SDG Commerce 217 Distribution Center Project (Application PL20-0008) May 3, 2021 (“Clark Letter”).

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**Attachment B.**<sup>5</sup> Mr. Cashen's technical comments and curricula vitae are attached hereto as **Attachment C.**<sup>6</sup> Mr. Smith's technical comments and curricula vitae are attached hereto as **Attachment D.**<sup>7</sup>

## I. STATEMENT OF INTEREST

American Canyon Residents for Responsible Development is an unincorporated associations of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. Residents includes American Canyon residents Robert Schwerin, Jason Moreno, and Anthony Ricker, the International Brotherhood of Electrical Workers Local 180, Plumbers & Steamfitters Union Local 343, Sprinkler Fitters Local 483, International Association of Sheet Metal, Air, Rail, Transportation Workers Local Union 104, and the District Council of Ironworkers, along with their members, their families, and other individuals who live and work in the City of American Canyon, and in Napa and Solano counties.

Individual members of Residents live, work, recreate, and raise their families in the City, in Napa and Solano counties, and in the surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist on site.

In addition, 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 businesses and industries to expand in the region, and by making the area less desirable for new businesses and

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<sup>5</sup> **Attachment B:** Letter from Neil Shaw re: Comments on the Initial Study/Mitigated Negative Declaration for SDG Commerce 217 Distribution Center Project (Application PL20-0008) May 3, 2021 ("Shaw Letter").

<sup>6</sup> **Attachment C:** Letter from Scott Cashen re: Comments on the Initial Study/Mitigated Negative Declaration for SDG Commerce 217 Distribution Center Project (Application PL20-0008) May 2, 2021 ("Cashen Letter").

<sup>7</sup> **Attachment D:** Letter from Daniel Smith Jr. re: Comments on the Initial Study/Mitigated Negative Declaration for SDG Commerce 217 Distribution Center Project (Application PL20-0008) April 29, 2021 ("Smith Letter").

new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

## II. AN EIR IS REQUIRED

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.<sup>8</sup> “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.”<sup>9</sup> The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”<sup>10</sup>

CEQA’s purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.<sup>11</sup> CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the “fair argument” standard. Under that standard, a lead agency “shall” prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.<sup>12</sup>

In contrast, a mitigated negative declaration may be prepared only when, after preparing an initial study, a lead agency determines that a project may have a significant effect on the environment, but:

- (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review

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<sup>8</sup> See Pub. Resources Code, § 21000; CEQA Guidelines, § 15002.

<sup>9</sup> *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (*Goletta Valley*), internal citations omitted.

<sup>10</sup> *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

<sup>11</sup> See Pub. Resources Code, § 21100.

<sup>12</sup> Pub. Resources Code, §§ 21080, subd. (d), 21082.2, subd. (d); CEQA Guidelines, §§ 15002, subd. (k)(3), 15064, subds. (f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123 (*Laurel Heights II*); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602 (*Quail Botanical*).

*would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.*<sup>13</sup>

Courts have held that if “no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.”<sup>14</sup> The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.<sup>15</sup> An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.<sup>16</sup>

“Substantial evidence” required to support a fair argument is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”<sup>17</sup> According to the CEQA Guidelines, when determining whether an EIR is required, the lead agency is required to apply the principles set forth in Section 15064, subdivision (f):

[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.

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<sup>13</sup> Pub. Resources Code, § 21064.5 (emphasis added).

<sup>14</sup> See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

<sup>15</sup> *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

<sup>16</sup> *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (*Friends of B Street*) (“If there was substantial evidence that the proposed project might have a significant environmental impact, 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”).

<sup>17</sup> CEQA Guidelines, § 15384, subd. (a).

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Furthermore, CEQA documents, including EIRs and MNDs, must mitigate significant impacts through measures that are “fully enforceable through permit conditions, agreements, or other legally binding instruments.”<sup>18</sup> Deferring formulation of mitigation measures to post-approval studies is generally impermissible.<sup>19</sup> Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.<sup>20</sup> If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.<sup>21</sup> Courts have held that simply requiring a project applicant to obtain a future report and then comply with the report’s recommendations is insufficient to meet the standard for properly deferred mitigation.<sup>22</sup>

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With respect to this Project, the MND fails to satisfy the basic purposes of CEQA. The MND fails to adequately disclose, investigate, and analyze the Project’s potentially significant impacts, and fails to provide substantial evidence to conclude that impacts will be mitigated to a less than significant level. Because the MND lacks basic information regarding the Project’s potentially significant impacts, the MND’s conclusion that the Project will have a less than significant impact on the environment is unsupported.<sup>23</sup> The City failed to gather the relevant data to support its finding of no significant impacts. Moreover, substantial evidence shows that the Project may result in potentially significant impacts. Therefore, a fair argument can be made that the Project may cause significant impacts requiring the preparation of an EIR.

### III. THE CITY FAILED TO PROVIDE TIMELY ACCESS TO MND REFERENCE DOCUMENTS

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The City violated CEQA and improperly truncated the MND’s public comment period by failing to make all documents referenced, incorporated by reference, and relied on in the MND available for public review during the public

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<sup>18</sup> CEQA Guidelines, § 15126.4, subd. (a)(2).

<sup>19</sup> *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code, § 21061.

<sup>20</sup> *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical*, *supra*, 29 Cal.App.4th at p. 1604, fn. 5.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Pub. Resources Code, § 21064.5.

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comment period.<sup>24</sup> As a result, Residents was unable to complete its review and analysis of the MND and its supporting evidence during the current public comment period. Our request for a further extension went unanswered, and was therefore presumptively denied. We therefore provide these preliminary comments on the MND and reserve our right to submit supplemental comments on the MND at a future date.

CEQA requires that all documents referenced, incorporated by reference, and relied upon in an MND be available for review and “readily accessible” during the entire comment period.<sup>25</sup> The courts have held that the failure to provide even a few pages of a CEQA document for a portion of the CEQA review period invalidates the entire CEQA process and that such a failure must be remedied by permitting additional public comment.<sup>26</sup> It is also well settled that a CEQA document may not rely on hidden studies or documents that are not provided to the public.<sup>27</sup> By failing to make all documents and underlying data referenced in the MND “readily available” during the current comment period, the City is violating the procedural mandates of CEQA.<sup>28</sup>

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On April 15, 2021, our office submitted two letters to the City, the first seeking immediate access to all MND reference documents pursuant to CEQA, and the second seeking immediate access to all public records referring or related to the Project pursuant to the California Public Record Act (“CPRA”).<sup>29</sup> We did not receive any response to the letters. On April 20, 2021, we followed up these letters with an email directed to Mr. He asking for an update on these document requests. On April 26, 2021, we filed a letter with the City again asking for immediate access to outstanding MND reference documents, and requesting an extension of the public comment period on the MND due to the City’s failure to provide timely access to the

<sup>24</sup> See PRC § 21092(b)(1); 14 C.C.R § 15072(g)(4).

<sup>25</sup> Pub. Resources Code §§ 21092(b)(1); 14 Cal. Code Regs. § 15072(g)(4).

<sup>26</sup> *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

<sup>27</sup> *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 (“Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.”).

<sup>28</sup> Pub. Resources Code § 21092(b)(1); 14 C.C.R § 15072(g)(4).

<sup>29</sup> Letter to William He, City of American Canyon from Darien Key, Adams Broadwell Joseph & Cardozo, Request for Immediate Access to Public Records – SDG Commerce 217 Distribution Center Project (SCH Number 2020120302; Application PL20-0008) (Apr. 15, 2021.); Letter to William He, City of American Canyon from Darien Key, Adams Broadwell Joseph & Cardozo, Request for Immediate Access to Documents Referenced in the MND for SDG Commerce 217 Distribution Center Project (Application PL20-0008) (Apr. 15, 2021.)

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reference documents during the public comment period.<sup>30</sup> We have received no response from the City regarding either of the record requests or the email as of the date of this comment letter, and still have not been given access to numerous MND reference documents that are relevant to our review of the MND.

In particular, the City has failed to provide access to the following MND reference documents that have delayed Residents' full analysis of issues addressed in this letter:

- GHD, Trip Generation Comparison Development Site Repurpose; Green Island Wine Warehouse, Design memorandum to Mr. Neil Thompson (Stravinski Development Group) from Mr. Kamesh Vedula (GHD), September 27, 2018.
- Email from Jeff Ballantine, Contract Project Planner, City of American Canyon, to Richard Grasseti, GECO, August 8, 2018 regarding Commercial Recreation Land Use in the General Plan.

Without this critical information, our clients and other members of the public are unable to meaningfully review and comment on the MND and are deprived of the opportunity to review the supporting information for the MND. The City's actions violate both CEQA and CPRA disclosure requirements, and have resulted in a violation of Resident's due process rights.

#### **IV. THE MND FAILS TO PROVIDE AN ACCURATE AND COMPLETE PROJECT DESCRIPTION**

An accurate and complete project description is necessary to perform an evaluation of the potential environmental effects of a proposed project.<sup>31</sup> Without a complete project description, the environmental analysis will be impermissibly narrow, thus minimizing the project's impacts and undercutting public review.<sup>32</sup> The courts have repeatedly held that "an accurate, stable and finite project description

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<sup>30</sup> Letter to William He, City of American Canyon from Darien Key, Adams Broadwell Joseph & Cardozo, Request for Immediate Access to Public Records – SDG Commerce 217 Distribution Center Project (SCH Number 2020120302; Application PL20-0008) (Apr. 26, 2021.)

<sup>31</sup> See, e.g., *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.

<sup>32</sup> See *Id.*

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is the *sine qua non* of an informative and legally sufficient [CEQA document].”<sup>33</sup> Only through an accurate view of the project may affected outsiders and public decision makers balance the proposal’s benefit against its environmental costs.<sup>34</sup>

**A. The City Violated CEQA by Piecemealing its Review of the Project and Related Projects**

4 The Project is a component of a larger, phased warehouse development by the Applicant in the City. Yet, the MND does not include the Applicant’s other warehouse projects in its description and fails to analyze the direct, indirect, and cumulative impacts of the Applicants’ warehouse development project within the City as CEQA requires.<sup>35</sup> This approach, termed “piecemealing” or “segmenting,” violates CEQA, as it inhibits the full disclosure, analysis and mitigation of impacts, and discussion of alternatives.<sup>36</sup>

The City within the last 5 years has reviewed the Project, the SDG 330 Project, the SGE 258 Warehouse Project, and the 2019 tentative map approval.<sup>37</sup> A review of the MNDs for the adjacent SDG 217 and SDG 330 Projects shows marked similarities between the two projects such as (1) having the same applicant, (2) similar LLC’s who were organized by the same individual, (3) their Energy analysis in Appendix A-2 deferred actual analysis but instead stated the “CalEEMod default electrical usage was adjusted to be consistent with the SGE 258 Warehouse Project”

<sup>33</sup> *County of Inyo v. County of Los Angeles* (1977) 71 Cal.App.3d 185, 193.

<sup>34</sup> *Id.* at pp. 192-193.

<sup>35</sup> 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).

<sup>36</sup> E.g., Pub. Resources Code, §21002, 210021.1(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).

<sup>37</sup> SDG 330 Project MND, at Appendix A2,

<https://www.cityofamericancanyon.org/Home/ShowDocument?id=173075038-008acp>

because they were nearly identical<sup>38</sup>, (4) they are proposed every two years,<sup>39</sup> (5) previously in 2016 the three separate lots were combined into one single lot.<sup>40</sup>

These Projects should have been considered as one project because “piecemealing” or “segmenting” violates CEQA, as it inhibits the full disclosure, analysis and mitigation of impacts, and discussion of alternatives.<sup>41</sup>

A project under CEQA means the “whole of an action which has the potential for resulting in either a direct physical change in the environment, or reasonably foreseeable indirect physical change in the environment.”<sup>42</sup> CEQA prohibits a project proponent from seeking approval of a large project in a piecemeal fashion in order to take advantage of environmental exemptions or lesser CEQA review for smaller projects.<sup>43</sup> CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones - each with a minimal potential impact on the environment - which cumulatively may have disastrous consequences.”<sup>44</sup> Before undertaking a project, the lead agency must assess the environmental impacts of all reasonably foreseeable phases of a project and a public agency may not segment a large project into two or more smaller projects in order to mask serious environmental consequences. As the Court of Appeal stated, “[t]he CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, covering the entire project, from start to finish.”<sup>45</sup>

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(cont.)

<sup>38</sup> SDG 330 Project MND, at Appendix A2,  
<https://www.cityofamericancanyon.org/Home/ShowDocument?id=17307>

<sup>39</sup> CEQA Clearing House Projects in American Canyon,  
<https://ceqanet.opr.ca.gov/Search?City=American+Canyon>; Attachment E SDG 330 Project MND.

<sup>40</sup> CEQA SCH 2016012049, <https://ceqanet.opr.ca.gov/Project/2016012049>

<sup>41</sup> 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).

<sup>42</sup> CEQA Guidelines, § 15378(a).

<sup>43</sup> *Arviv Enterprises, Inc. v. South Valley Area Planning Com.*, 101 Cal.App.4th 1337, 1340 (2002).

<sup>44</sup> *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).

<sup>45</sup> *Natural Resources Defense Council v. City of Los Angeles*, 103 Cal.App.4th 268 (2002); see also *Whitman v. Board of Supervisors* (1979) (EIR for an exploratory oil well that failed to analyze the impacts associated with an proposed pipeline was inadequate and violated CEQA).

Here the Applicant every two years submits a nearly identical warehouse Project, with a nearly identical MND, in the exact same area in an apparent attempt to disguise the actual impacts on the environment of one large warehouse district.<sup>46</sup> The MND further explains that a tentative parcel map was adopted by the City on February 28, 2019, that split the previously 35.85-acre parcel into three separate parcels in order to facilitate the Project and the SDG 330 Project.<sup>47</sup> The 15.24-acre south parcel was approved for the approximately 330,000 square-foot SDG 330 wine distribution center, which was subsequently approved with a separate MND and is nearing completion.<sup>48</sup> The City failed to prepare a single EIR for the parcel map and subsequent warehouse projects on these parcels, despite the clear connection between these actions.

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(cont.)

The City should have required an EIR for SGE 258, the subdivision map, SDG 330, and the Project, to determine whether future expansion would have occurred, similar to what is currently happening, in order to provide proper review. It was reasonably foreseeable from SDG 330 and on that the Applicant planned to turn the area into a warehouse district and so far has been allowed to do so with separate MNDs as environmental review, rather than a single EIR. This violates CEQA and cannot be permitted to continue.

The City must prepare an EIR to fully disclose, analyze, and mitigate the impacts of the current Project in conjunction with the cumulative impacts of the previous projects. In particular, an EIR is required to review the cumulative impacts of all these warehouses being built in the same area since this will now be the third one, with space for potentially one more. The EIR must analyze the environmental effects of other phases or future expansions of a project if the other activities are reasonably foreseeable consequences of the initial project.<sup>49</sup>

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<sup>46</sup> *Arviv Enterprises, Inc. v. South Valley Area Planning Com.* (2002) 101 Cal. App. 4th 1333, 1340 (serial approval of multiple small housing and subdivision projects by same applicant in same location, leading to single large development project).

<sup>47</sup> MND, p. 12.

<sup>48</sup> *Id.*

<sup>49</sup> *Bozung*, 13 Cal.3d at 283–284.  
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**V. THERE IS A FAIR ARGUMENT THAT THE PROJECT MAY RESULT IN SIGNIFICANT IMPACTS THAT REQUIRE THE CITY TO PREPARE AN EIR**

Under CEQA, a lead agency must prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.<sup>50</sup> The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.<sup>51</sup> An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.<sup>52</sup> Substantial evidence can be provided by technical experts or members of the public.<sup>53</sup> “If a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.”<sup>54</sup>

As discussed below, there is a fair argument supported by substantial evidence that the Project may result in significant impacts relating to air quality, biological resources, energy, GHG, land use, noise, and transportation. The City is required to prepare an EIR to evaluate the Project’s impacts and propose mitigation measures to reduce those impacts to a less-than-significant level.

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<sup>50</sup> Pub. Resources Code, § 21082.2; CEQA Guidelines, § 15064, subs. (f), (h); *Laurel Heights II*, *supra*, 6 Cal. 4th at p. 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical*, *supra*, 29 Cal.App.4th at pp. 1601-1602.

<sup>51</sup> *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

<sup>52</sup> *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; *see also Friends of B Street*, *supra*, 106 Cal.App.3d at p. 1002 (“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an [environmental impact report] and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

<sup>53</sup> *See, e.g., Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340 (substantial evidence regarding noise impacts included public comments at hearings that selected air conditioners are very noisy); *see also Architectural Heritage Assn. v. County of Monterey*, 122 Cal.App.4th 1095, 1117-1118 (substantial evidence regarding impacts to historic resource included fact-based testimony of qualified speakers at the public hearing); *Gabric v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183, 199.

<sup>54</sup> CEQA Guidelines, § 15062, subd. (f).

**A. There is Substantial Evidence that the MND Underestimates and Fails to Properly Mitigate Air Quality Impacts**

**1. The City Failed to Update the MND’s Baseline Data and Relevant Analyses When It Revised and Recirculated the MND.**

CEQA requires the lead agency to describe the baseline physical conditions that exist at a project site at the time its notice of intent to adopt a CEQA document is issued.<sup>55</sup> CEQA also requires the environmental document to accurately describe the severity of a project’s impacts.<sup>56</sup>

The City issued its original Notice of Intent to adopt an MND on December 16, 2020. The City then decided to revise and recirculate the MND for a new round of public comment, and issued a new Notice of Intent on April 1, 2021.<sup>57</sup> When the City did this, it failed to update its baseline data and all the relevant timelines applicable to Project development, and rendering several of its analyses inaccurate and unsupported.<sup>58</sup>

For example, the MND’s CalEEmod analysis of construction and operational air emissions accounts for the seasons in which certain activities would take place to determine the proper emissions,<sup>59</sup> thus affecting the Air Quality analysis and the GHG analysis. The City’s failure to update the CalEEmod analysis resulted in an inaccurate and unsupported air quality analysis because the revised MND does not accurately reflect the severity of emissions that will occur at different phases of Project construction and operation. The City must prepare an EIR to correct these errors.

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<sup>55</sup> 14 C.C.R § 15125(a).

<sup>56</sup> 14 C.C.R §§ 15143, 15162.2(a); *Cal. Build. Indust. Ass’n v. BAAQMD* (2015) 62 Cal.4th 369, 388-90 (CEQA document must include sufficient discussion of significant impacts requires not merely a determination of whether an impact is significant, but some effort to explain the nature and magnitude of the impact”).

<sup>57</sup> MND, p. 1.

<sup>58</sup> MND, p. 13.

<sup>59</sup> Appendix B-2.

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**2. The City Failed To Perform A Project-Specific Traffic Impact Analysis (TIA) For The 217 Commerce Center Project And Is Relying On A TIA For Another Project**

The City has failed to perform a TIA for the 217 Commerce Center project. Rather than assess the impacts the City relies on the 2018 TIA performed for the SDG Commerce 330 Warehouse Project. According to the introductory paragraph of the TIA Memorandum, the TIA was prepared to present the results of an analysis performed by GHD for a proposed new wine storage facility development at 330 Commerce Boulevard Wine Storage Facility project in the City of American Canyon. The TIA assumed the construction of a 330,528 square foot wine storage warehouse. According to the TIA Memorandum, 9 projects were included in the traffic analysis along with the SDG Commerce 330 Warehouse Project. Those projects include<sup>60</sup>:

1. Napa Logistics Park Phase 1 and 2
2. Canyon Estates
3. Napa Airport Corporate Center
4. Napa Airport Corporate Center Phase 1
5. Napa Junction III
6. Napa Logistics Park Phase I
7. Valley View Senior Housing
8. Village at Vintage Ranch
9. Green Island 258 Warehouse Project

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The analysis showed that the conditions at State Route 29 and Green Island Road would drop from a Level of Service (LOS) C to LOS D in the AM peak hours.

The trip generation analysis used in the TIAM for the SDG Commerce 330 Warehouse assumed a generation rate of 1.69 vehicles for each 1,000 square feet of the wine warehouse constructed ( $1.69 * 330.528 = 558.59$  or 559 vehicles). Clearly, the 2018 analysis does not consider the impact from the additional 367 vehicle trips ( $217.294 * 1.69 = 367.22$  or 367), an increase of approximately 66 percent ( $65.74\% = ((367.22 + 558.59)/(558.59))$ ). In addition, the TIA fails to account for the additional

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<sup>60</sup> Clark Letter, p. 5.  
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(cont.)

traffic burden/vehicle trips associated with the opening of the New Napa Junction School located at the corner of Eucalyptus Drive and Commerce Boulevard. Given the significant increase in trips from the unaccounted projects identified herein, the City must re-evaluate the traffic impacts from the project in an environmental impact report (EIR).<sup>61</sup> Given the unaccounted for increase in trips, the MND has understated its mobile emissions and GHGs as well.

**3. The City Has Not Accurately Reported The Project’s Estimated Daily Construction Emissions and Failed to Disclose Significant Air Quality Impacts During The Construction Phase**

According to the MND, the Project’s construction emissions are less than significant because they do not exceed the Bay Area Air Quality Management District’s (“BAAQMD’s”) CEQA significance thresholds (See Table AQ-1) and because the proposed Project would also include Best Management Practices (“BMPs”) required per the BAAQMD’s CEQA Air Quality Guidelines.<sup>62</sup>

Table AQ-1: Estimated Daily Construction Emissions (pounds/day)

Construction Phase	Total Regional Pollutant Emissions (lbs/day)				
	ROG	NO <sub>x</sub>	CO	Exhaust PM <sub>10</sub>	Exhaust PM <sub>2.5</sub>
Proposed Project Unmitigated Emissions					
2021	13.6	24.6	19.5	1.0	0.9
BAAQMD Significance Threshold	54	54	--	82	54
Emissions Exceed Threshold?	No	No	No	No	No

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However, Dr. Clark explains that the City’s analysis assumes one continuous phase of construction, ignoring the substantial highs and lows in emissions which commonly occur during each phase of construction (site preparation, grading,

<sup>61</sup> Clark Letter, p. 5.

<sup>62</sup> MND, p. 31.



building construction, paving, and architectural coating).<sup>63</sup> The City has failed in its obligation to accurately report the Project’s construction emissions by failing to accurately quantify the Project’s emissions in each construction phase, and by misinterpreting guidance from BAAQMD which the City claims to follow.<sup>64</sup> The City is legally obligated to accurately disclose the nature and extent of project’s air quality impacts pursuant to CEQA which it failed to do here by failing to follow its own selected significance threshold.<sup>65</sup>

According to the 2017 CEQA Guidance From BAAQMD, “[t]he Air District recommends that for construction projects that are less than one year duration, Lead Agencies should annualize impacts over the scope of actual days that peak impacts are to occur, rather than the full year.”<sup>66</sup> This means that, for each phase of construction, the Project’s construction emissions should be presented and compared against the BAAQMD Significance Thresholds.<sup>67</sup>

As was previously pointed out in public comments on the original MND, the calculated daily construction emissions in the original MND were based on the total average emissions for the entire construction phase of the project. Dr. Clark explains that the City’s continued use of the total average daily emissions in the revised MND ignores the substantial impacts that are associated with the maximum daily emission rates calculated by the CALEEMOD model of the Project.<sup>68</sup>

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(cont.)

Construction Phase	Total Regional Pollutant Emissions (lbs/day)				
	ROG	NO <sub>x</sub>	CO	Exhaust PM <sub>10</sub>	Exhaust PM <sub>2.5</sub>
Proposed Project Unmitigated Emissions					
Site Preparation	3.9558	40.5366	21.6621	2.04546	1.88178
Grading	2.5683	37.5613	17.7651	1.16798	1.07479
Building Construction	2.6831	24.2402	22.5509	0.9815	1.3558

<sup>63</sup> Clark Letter, p. 6.

<sup>64</sup> 14 C.C.R §§ 15143, 15162.2(a); *Cal. Build. Indust. Ass’n v. BAAQMD*, 62 Cal.4th at 388-90; *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 518–522; 14 C.C.R § 15064.7(b), (c).

<sup>65</sup> see 14 C.C.R § 15064.7.

<sup>66</sup> BAAQMD, CEQA Guidelines May 2017, p. 2-3.

<sup>67</sup> Clark Letter, p. 6.

<sup>68</sup> Clark Letter, pp. 6-7.



Paving	1.7638	12.952	15.0764	0.6785	0.62424
Architectural Coatings	155.629	1.5948	2.6922	0.09575	0.09562
	6				
BAAQMD Significance Threshold	54	54	--	82	54
Emissions Exceed Threshold?	Yes	No	No	No	No

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(cont.)

Dr. Clark concludes that the MND's failure to analyze construction emissions during the different phases of Project construction results in an underestimation of the Project's total construction emissions. As Dr. Clark explains, over the course of construction, the emissions of reactive organic gases ("ROGs"), precursors to the formation of ozone, increase substantially from a low of 1.76 lbs/day during the paving phase of the project to a high of 155.63 lbs/day during the Architectural Coatings phase of the project. The MND fails to reflect this increase.

While the MND's total averaged values over the whole construction period are lower than the BAAQMD Significance Threshold value of 54 lbs/day, the MND fails to describe the emissions fluctuations during different phases of construction. The City is obligated to assess impacts of emissions from each phase of the construction of the Project in order to accurately assess the nature and magnitude of the Project's construction emissions. The MND fails to comply with this basic CEQA requirement. The MND also fails to explain that short term exceedances of the significance thresholds may have significant local impacts on the air quality and the community at large.

The City must report the impacts from each step of the construction of the project in an EIR providing a clear analysis of the criteria and toxic air contaminants ("TACs") as well as the greenhouse gas ("GHG") emissions.<sup>69</sup>

<sup>69</sup> Clark Letter, p. 7.  
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**4. The City Fails To Quantify The Impact That Transportation Refrigeration Units (TRUs) Will Have On Air Quality Impacts From The Proposed Project.**

The MND fails to analyze the impacts from diesel particulate matter (“DPM”) emissions from transportation refrigeration units (“TRUs”) installed on insulated cargo vans and trucks that will be used to transport the temperature sensitive goods stored at the Project site. The MND explains that, because the Project’s warehouse building is proposed for warehousing and distribution of wine and/or other wine related products, it would be heavily insulated and refrigerated.<sup>70</sup> Dr. Clark explains that this use will also require TRU’s to transport refrigerated products, yet the MND fails to analyze any emissions from mobile refrigeration.<sup>71</sup>

In 2019, CARB released a health risk analysis that documented the significant impact of TRU’s. CARB calculated that the operation of one daily truck delivery, one daily trailer delivery, and one seasonal trailer TRUs for a total of 202 hours per week results in a cancer health risk of 190 in one million on site, 28 in one million at a residence 100 meters off-site, and 5 in one million at a residence 400 meters off site.<sup>72</sup>

The closest residence to the proposed Project site is identified by the City as being located 500 feet (approximately 150 meters off-site).<sup>73</sup> Dr. Clark concludes that, when the number of daily trucks is increased to 10 per day and daily trailers increased to 6 per day, the Project’s onsite cancer risk increases to 610 in one million, the 100-meter offsite risk increases to 92 in one million, and the 400-meter offsite risk increase to 16 in one million.<sup>74</sup> These impacts from the use of TRUs at the Project Site exceed BAAQMD’s cancer risk significance threshold of 10 in one million, resulting in a significant health risk and air quality impact for residents nearby to the Project site that the MND fails to disclose.<sup>75</sup>

The City must prepare an EIR to accurately disclose and mitigate these impacts. In addition to the health impacts from exposure to DPM that must be

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<sup>70</sup> MND, p. 9; Appendix B, p. 11.

<sup>71</sup> Clark Letter, p. 7.

<sup>72</sup> CARB, Preliminary Health Analyses: Transport Refrigeration Unit Regulation, p.26.

<sup>73</sup> MND, p. 35.

<sup>74</sup> Clark Letter, pp. 7-8.

<sup>75</sup> MND, p. 35.

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(cont.)

assessed in an EIR, the impacts on GHG emissions from TRUs must also be included in an EIR of the Project.<sup>76</sup>

**5. The City Failed To Quantify The Health Impacts From Emissions From The Project And Incorrectly Relies On A Non-Quantitative Analysis Performed For The SDG 330 Warehouse Project**

The City failed to perform a quantitative analysis of the emissions from construction and operational emissions from the Project. Instead, the MND incorrectly relies on a non-quantitative 2019 analysis performed for a different project, the SDG 330 Warehouse Project.<sup>77</sup> The City's approach lacks merit and fails to comply with CEQA's requirements to quantify the impacts of a project's air emissions on human health.

9

CEQA mandates discussion, supported by substantial evidence, of the nature and magnitude of a project's impacts of air pollution on public health.<sup>78</sup> A CEQA document must analyze the impacts from human exposure to toxic substances.<sup>79</sup> The Supreme Court has held that a CEQA document fails to comply with CEQA's mandate to protect public health and safety when it fails to disclose the public health impacts from air pollutants that would be generated by a development project.<sup>80</sup> A lead agency's significance determination must also be supported by accurate scientific and factual data that is specific to the project being analyzed.<sup>81</sup> An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.<sup>82</sup> The MND fails to quantify the Project's DPM emissions and instead relies on a qualitative analysis of health impacts prepared for a different project. The MND's discussion of the Project's health risk fails to meet CEQA's basic legal requirements.

The MND acknowledges that sensitive receptors are located in close vicinity to the Project site. On page 35 of the MND, the City states that the nearest sensitive receptors to the Project include homes that could potentially be within

<sup>76</sup> Clark Letter, pp. 7-8.

<sup>77</sup> MND, p. 33; See also Appendix B.

<sup>78</sup> *Sierra Club*, 6 Cal.5th at 518-522.

<sup>79</sup> *Berkeley Jets*, 91 Cal.App.4th at 1369-1371.

<sup>80</sup> *Sierra Club*, 6 Cal.5th at 518-522.

<sup>81</sup> 14 C.C.R. § 15064(b).

<sup>82</sup> *Kings County Farm Bureau*, 221 Cal.App.3d at 732.

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1,000 feet of certain Project construction phases (site preparation and grading activities) and a school under construction only 1,500 feet away.<sup>83</sup> Nevertheless, the MND fails to disclose the exposure levels at these receptor sites to the Project's DPM and other TAC emissions.

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The MND incorrectly attempts to justify this omission by relying on the SDG 330 Warehouse MND's claim that State health guidance does not require a health risk analysis of the Project's construction emissions because construction is a short-term impact. According to the City's analysis of the SDG 330 Warehouse Project, the "Office of Environmental Health Hazard Assessment (OEHHA) does not recommend assessing cancer risk for projects lasting less than two months (OEHHA, 2015). Site preparation and grading activities would last approximately 5 weeks and then subsequent construction phases (building construction and other construction activities) would be greater than 1,000 feet from the nearest sensitive receptor. Secondly, annual wind directions are frequently from the south-southwest (that is, wind blowing from the receptor towards the project site and rarely (northwesterly) from the project site towards the receptor).<sup>84</sup>

The SDG 330 Warehouse Project MND next adopted a mitigation measure requiring enhanced exhaust emissions to purportedly "ensure the proposed project's health impacts are less than significant" – Mitigation Measure AQ-4." Mitigation Measure AQ-4 assumed that all off-road equipment should have: <sup>85</sup>

"a. Engines that meet or exceed either USEPA or CARB Tier 2 off-road emission standards, and;

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b. Engines that are retrofitted with a CARB Level 2 Verified Diesel Emissions Control Strategy (VDECS). Acceptable options for reducing emissions include the use of late model engines, low-emission diesel products, alternative fuels, engine retrofit technology, after-treatment products, add-on devices such as particulate filters, and/or other options as such are available."

However, as explained below and by Dr. Clark, the use of Tier 2 equipment would not enhance exhaust emission reductions and would, in fact, **increase** the potential emissions from sources on site, resulting in increased health risk at the

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<sup>83</sup> MND, p. 35.

<sup>84</sup> See Clark Letter, p. 11.

<sup>85</sup> Clark Letter, p. 8.

⑩ (cont.) | SDG 330 project site, and at this Project site, if the same measure were adopted for the Project.<sup>86</sup>

The logic used by the City to justify not producing a dispersion model of the Project's toxic air emissions and a quantitative health risk analysis for the either this Project or the SDG Commerce 330 Warehouse project is flawed and fails to comply with CEQA. As explained by Dr. Clark, the City's reasoning also contradicts the BAAQMD CEQA guidance, on which the MND claims to rely.

Under Section 5.2.4, Sources Not Requiring A BAAQMD Permit, the BAAQMD states:

⑪ | For new land uses that would host a high number of non-permitted TAC sources, such as a distribution center, the incremental increase in cancer risk shall be determined by an HRA using an acceptable air dispersion model in accordance with BAAQMD's Recommended Methods for Screening and Modeling Local Risks and Hazards and/or CAPCOA's guidance document titled Health Risk Assessments for Proposed Land Use Projects. A Lead Agency may consult HRAs that have previously been conducted for similar land uses to determine whether it assesses the incremental increase in cancer risk qualitatively or by performing an HRA. This analysis shall account for all TAC and PM emissions generated on the project site, ***as well as any TAC emissions that would occur near the site as a result of the implementation of the project (e.g., diesel trucks queuing outside an entrance, a high volume of trucks using a road to access a quarry or landfill).***<sup>87</sup>

Clearly, the City failed to assess the TAC and PM emissions from the SDG 330 Warehouse Project, and is relying on the same lack of analysis to avoid analyzing health risks from the current Project. The City also incorrectly assumes that Mitigation Measure AQ-4 (which is only required for the SDG 330 Project, and not for this Project) would reduce any TAC and PM emissions to a level that would not produce a risk above 10 in one million, without any supporting evidence. This hand waving does not meet the obligations that the City has under CEQA to quantify the impacts of the Project on the community. Furthermore, relying on this

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<sup>86</sup> Clark Letter, p. 9.

<sup>87</sup> Clark Letter, p. 9.

unsupported analysis to support the assertion that the SDG Commerce 217 Distribution Center project will not have a significant impact is patently false.

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The City must perform quantified health risk analysis of the Project's construction and operational emissions and assess the impact of those emissions in an EIR, consistent with the requirements of CEQA, and applicable guidance from OEHHA.<sup>88</sup>

**6. The City Failed To Quantify The Health Impacts From Emissions From The Project On A New Elementary School (Sensitive Receptor) That Is Less Than 500 Meters Southeast of The Project Site.**

The City failed to assess the public health impacts from TACs that will be released during the construction and operational phases of the Project on the Napa Unified School District's new Napa Junction School, being constructed at the corner of Eucalyptus Drive and Commerce Boulevard.

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In the MND, the City states that there are no schools or daycare centers within 1,000 feet of the proposed project.<sup>89</sup> This is misleading. The new Napa Junction School is located approximately 450 meters (approximately 1500 feet) southeast of the Project site, and is scheduled to open in Fall 2021.<sup>90</sup> Schools are considered sensitive receptors for purposes of CEQA analysis, and the MND explains that some Project construction activities during approximately nine weeks of site preparation and grading could be within 1,000 feet of the school property boundary.<sup>91</sup> Students and staff at the school will therefore be exposed to emissions from the construction and operational phases of the Project. Those emissions will include known human carcinogens, yet were ignored in the MND. The City's failure to analyze the health risk of the Project's emissions on the school violates CEQA.<sup>92</sup>

The BAAQMD CEQA Guidance Appendix also states that the "lead agency should enlarge the 1,000-foot radius on a case-by-case basis if an unusually large source or sources of risk or hazard emissions that may affect a proposed project is

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<sup>88</sup> Clark Letter, p. 9.

<sup>89</sup> MND, p. 133.

<sup>90</sup> Clark Letter, p. 10.

<sup>91</sup> MND, p. 35; CEQA Appendix G, Section III.D.

<sup>92</sup> *Sierra Club*, 6 Cal.5th at 518–522; *Berkeley Jets*, 91 Cal.App.4th at 1369–1371. 5038-008acp

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beyond the recommended radius.”<sup>93</sup> Accordingly, in keeping with BAAQMD’s recommendation, the City should expand the radius of influence to be evaluated to include all impacts on the school (not just within the 1,000-foot radius that will be impacted by construction). In order to accurately analyze the Project’s health risk impacts on the school, Dr. Clark recommends that the City perform an EMFAC-compliant analysis of the increase in traffic from the project and the surrounding warehouses, perform dispersion model of the traffic emissions to determine the extent of DPM emissions that will impact the school, and perform a quantified health risk analysis to determine impacts on the staff and students of the school. The results of that analysis must be presented in a DEIR.<sup>94</sup>

**7. The SDG 330 Project’s Air Quality Mitigation Measure AQ-4 Is Insufficient To Reduce the Project’s Significant Health Risk to Less than Significant Levels**

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In the City’s analysis of air quality impacts for the SDG Commerce 330 Warehouse project, the preferred mitigation measure (AQ-4) for ensuring DPM emissions would remain below the significance thresholds was the use of U.S. EPA Tier 2 equivalent construction equipment. required ensure that the Project’s health risk impacts are less than significant levels. The City stated at the time of the SDG 330 Project’s MND release that the use of Tier 2 technology would keep emissions below a health risk of 10 in 1,000,000, without quantifying the actual health risk in the analysis. Tier 2 technology was first released in the mid-1990’s and is not currently the recommended standard for diesel powered equipment.<sup>95</sup>

Far more effective technology is currently available. As Dr. Clark explains, the United States Environmental Protection Agency (“U.S. EPA”) has slowly adopted more stringent standards to lower the emissions from off-road construction equipment since 1994. Since that time, Tier 1, Tier 2, Tier 3, Tier 4 Interim, and Tier 4 Final construction equipment has been phased in over time. Tier 4 Final represents the cleanest burning equipment and therefore has the lowest emissions compared to other tiers, including Tier 4 Interim equipment.<sup>1</sup> Dr. Clark concludes that requiring the use of Tier 2 or equivalent control technology for all equipment as

<sup>93</sup> BAAQMD, CEQA Guidelines May 2010, p. 2-5.

<sup>94</sup> Clark Letter, p. 10.

<sup>95</sup> Clark Letter, p. 10.



a mitigation measure does not provide the community with greatest level of protection possible.<sup>96</sup>

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(cont.)

For the operational phase of the Project, the City must promulgate mitigation measures to ensure that residents near the Project are not adversely affected by DPM emissions from any generator that may be installed onsite. Emissions from combustion engines for stationary uses, including diesel generators, are generally regulated by the U.S. EPA and CARB. Unlike Off-Road Diesel-Powered Engines for Mobile Sources (currently utilizing Tier 4 Interim and Final technology which reduce PM2.5 emissions by 90% and more), Dr. Clark explains that diesel back-up generators generally have U.S. EPA Tier II ratings and need to be outfitted with diesel particulate filters to achieve additional PM2.5 reductions. In addition, Dr. Clark recommends that diesel-powered generator engines should be fueled using ultra-low sulfur diesel fuel with a maximum sulfur content of 15 parts per million (ppm). If higher rated diesel generators are available, the City must require that the proponent purchase and maintain the generator that will achieve the highest amount of DPM reduction.

The City should prepare a DEIR which accurately discloses the extent of the Project's health risk from construction and operational DPM emissions, and which includes a Mitigation Monitoring and Reporting Program with enforceable mitigation measures to reduce the Project's health risk to the greatest extent feasible.<sup>97</sup>

#### **8. The City Failed To Perform A Cumulative Analysis Of The Impacts From The Proposed Project and Surrounding Projects.**

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The City must assess the cumulative impacts from the Project and the adjacent projects that are likely to have cumulatively considerable impacts.<sup>98</sup> The City has allowed a significant number of overlapping projects to be developed in the immediate vicinity of the SDG 217 Project without quantifying the impact of construction emissions and operation emissions from each of the projects on the surrounding community. Those projects include:<sup>99</sup>

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<sup>96</sup> Clark Letter, p. 10.

<sup>97</sup> Clark Letter, p. 10-11.

<sup>98</sup> PRC § 21083; 14 C.C.R. §15130(b)(1)(A); *CBE v. CRA*, 103 Cal.App.4th at 117.

<sup>99</sup> Clark Letter, pp. 13-15.

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1. Napa Logistics Park Phase 1 and 2
2. Canyon Estates
3. Napa Airport Corporate Center
4. Napa Airport Corporate Center Phase 1
5. Napa Junction III
6. Napa Logistics Park Phase I
7. Valley View Senior Housing
8. Village at Vintage Ranch
9. Green Island 258 Warehouse Project
10. SDG Commerce 330 Warehouse Project

The results of this cumulative analysis should then be presented in a DEIR.

**9. The MND Relies On Non-Binding Best Management Practices (BMPs) To Reduce Emissions Of Dust And Particulates.**

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Mitigation measures must be enforceable through conditions of approval, contracts or other means that are legally binding.<sup>100</sup> This requirement is intended to ensure that mitigation measures will actually be implemented, not merely adopted and then ignored.<sup>101</sup> The MND's reliance on BMPs fails to meet this threshold requirement because the measures are not incorporated as binding mitigation measures. As a result, the MND fails to include any binding mechanism to ensure that the Applicant will be required to implement these measures for the Project. This is exacerbated by the fact that the BMPs themselves are framed in a way that makes them unenforceable by using phrases such as "where and when possible".

<sup>100</sup> PRC § 21081.6(b); 14 C.C.R § 15126.4(a)(2); *Lotus v. Dep't of Transp.* (2014) 223 Cal. App. 4th 645, 651-52.

<sup>101</sup> *Fed'n of Hillside & Canyon Ass'n v. City of Los Angeles* (2000) 83 Cal. App. 4th 1252, 1261; *Anderson First Coal. v. City of Anderson* (2005) 130 Cal.4th 1173, 1186.

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Without an enforceable mechanism, the BMPs described in the MND are little more than wishful thinking, and the MND's conclusions that the Project's impacts will be less than significant with these measures incorporated are unsupported. If the City intends to rely on BMPs as listed on page 32 to reduce impacts to less than significant levels, these measures must be incorporated into the Project's MMRP and Conditions of Approval.<sup>102</sup>

**B. Substantial Evidence Supports a Fair Argument that the Project Will Have Significant, Unmitigated Impacts to Biological Resources**

**1. The MND Fails to Establish a Baseline Setting**

16

The existing environmental setting is the starting point from which the lead agency must measure whether a proposed project may cause a significant environmental impact.<sup>103</sup> CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.<sup>104</sup> Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The courts have clearly stated that, "[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined."<sup>105</sup> The City failed to establish a proper baseline setting by not performing detection surveys.<sup>106</sup>

The MND identifies five special-status species that could be impacted by the Project: western burrowing owl, Swainson's hawk, northern harrier, white-tailed kite, and western pond turtle.<sup>107</sup> The Applicant's biological resource consultant, Monk & Associates, did not conduct focused surveys to determine whether any of

<sup>102</sup> *Lotus v. Dep't of Transp.*, 223 Cal. App. 4th 645, 651-52.

<sup>103</sup> *See, e.g., Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316.

<sup>104</sup> CEQA Guidelines §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 ("*Riverwatch*").

<sup>105</sup> *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

<sup>106</sup> Cashen Letter, p. 2.

<sup>107</sup> MND, pp. 41 through 44.

these species use the Project site (or adjacent eucalyptus grove) as nesting habitat.<sup>108,109</sup>

Mr. Cashen notes that the California Department of Fish and Wildlife (“CDFW”) recommends two types of surveys to assess and mitigate a project’s impacts on special-status species: (1) “detection surveys,” and (2) “take avoidance” surveys.<sup>110</sup> Detection surveys are designed to maximize detection of a given species, and thus require implementation of specially-timed, species-specific survey techniques. The intent of detection surveys is to provide reliable information on the abundance, distribution, and seasonal (or life history) use patterns of a species within the area that would be directly or indirectly affected by the project. Detection surveys provide the information the lead agency, public, and natural resource agencies need to: (a) effectively assess potential impacts, and (b) formulate effective mitigation measures.<sup>111</sup>

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(cont.)

Take avoidance surveys are conducted immediately prior to implementation of the project. The intent of take avoidance surveys is to: (a) determine whether there have been any changes in baseline conditions that affect implementation of mitigation. For example, take avoidance surveys might reveal that burrowing owls that had nested on the north side of the site, are now nesting on the south side of the site. In summary, detection surveys are conducted to satisfy the requirements of CEQA (and other regulatory review processes), whereas take avoidance surveys are conducted to ensure take avoidance when the project is actually constructed.<sup>112</sup>

Detection surveys were not conducted for the Project. Instead, the MND requires detection surveys as “mitigation,” after the CEQA review process terminates. Mr. Cashen explains that this approach negates the value of detection surveys and is unacceptable because it precludes proper understanding of baseline conditions, and thus, the ability of the public and resource agencies to submit informed comments on the Project’s impacts and proposed mitigation. Assuming a species may be present at the Project site (the approach taken in the MND) is generally not an acceptable substitute for baseline survey data because it precludes

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<sup>108</sup> *Id.*, p. 44; Cashen Letter, p. 2.

<sup>109</sup> According to the Revised Biological Resource Analysis (“BRA”) prepared by Monk & Associates (March 2, 2020), the probability of western pond turtles on the Project site is “none” (*see* BRA, Table 4). However, according to the MND (p. 42): “there is a possibility of turtles nesting onsite.”

<sup>110</sup> Cashen Letter, p. 2.

<sup>111</sup> Cashen Letter, p. 2.

<sup>112</sup> Cashen Letter, p. 2.

understanding of the relative severity of the Project's impacts. For example, while the loss of nesting habitat for one pond turtle might not be significant, the loss of nesting habitat for five pond turtles would be very significant.<sup>113</sup>

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It is not possible to effectively assess Project impacts until focused detection surveys have been conducted. As a result, the City must require detection surveys that adhere to CDFW standards, and the results of those surveys need to be released in a revised CEQA document so they can be thoroughly vetted by the public, resource agencies, and decision makers during the CEQA review process.<sup>114</sup>

## 2. The MND Underestimates the Project's Impacts on Sensitive Species

### a) The MND Fails to Adequately Analyze and Mitigate Impacts to the Swainson's Hawk

Mr. Cashen explains that loss of foraging habitat is one of the primary threats to Swainson's hawks in California.<sup>115</sup> In addition to generating a potentially significant impact under CEQA, the loss of foraging habitat from the Project site may result in the take (killing) of Swainson's hawks, which would be a violation of Section 2080 of California Fish and Game Code.<sup>116</sup> The MND provides the following analysis of this issue:

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The loss of foraging habitat associated with the project is not considered substantial as the entire project site consisted of a eucalyptus grove until 2012, and thus did not historically provide potential foraging habitat; there are extensive foraging opportunities around the nesting location 2.6 miles north of the site and between this nesting location and the project site; and as the project site is essentially surrounded by eucalyptus forest, it is not a foraging destination which would likely attract foraging Swainson's hawks.<sup>117</sup>

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<sup>113</sup> Cashen Letter, p. 2.

<sup>114</sup> Cashen Letter, p. 3.

<sup>115</sup> California Department of Fish and Wildlife. 2016. Status Review: Swainson's Hawk (*Buteo swainsoni*) in California.

<sup>116</sup> California Department of Fish and Game. 1994. Staff report regarding mitigation for impacts to Swainson's hawks (*Buteo swainsoni*) in the Central Valley of California.

<sup>117</sup> MND, p. 43.

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Dr. Cashen identifies several flaws with the City’s analysis. First, the City’s analysis relies on California Natural Diversity Database (“CNDDDB”) data and assumes that the nearest nesting location is 2.6 miles north of the Project site.<sup>118</sup> However, the MND admits: “the nesting population appears to be increasing throughout its nesting range in northern California (recent CNDDDB records and G. Monk general observations) and the eucalyptus trees growing adjacent to the project site provide suitable nesting habitat.”<sup>119</sup> CNDDDB data on Swainson’s hawk nest locations in Napa County have not been updated since 2013,<sup>120</sup> and the Applicant did not conduct surveys to determine the current status of Swainson’s hawk nests in the vicinity of the Project site.<sup>121</sup> As a result, the City does not have the basis for its assumption that the nearest nesting location is 2.6 miles from the Project site, and thus, that the loss of foraging habitat from the Project site would not have a significant impact on the species.<sup>122</sup>

Second, the Project site may provide important foraging habitat for Swainson’s hawks even if the nearest nesting location is 2.6 miles away. Fleishman et al. (2016) found that the vast majority of adult Swainson’s Hawks in the Natomas Basin (northern Central Valley, California) traveled distances up to 6.2 miles from the nest to forage.<sup>123</sup> Mr. Cashen provides substantial evidence documenting the likelihood of Swainson Hawk foraging activities in and around the Project site. He explains that Babcock found that Swainson’s hawks in the Sacramento Valley foraged as far as 14 miles from the nest, and that ruderal fields was one of the vegetative cover types that ranked highest in foraging use.<sup>124</sup> Other studies have shown that Swainson’s hawks may travel up to 18 miles from the nest to forage.<sup>125</sup>

Third, the fact that the Project site did not historically provide foraging habitat is irrelevant to its current function as foraging habitat for Swainson’s

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<sup>118</sup> *Id.*, p. 42.

<sup>119</sup> *Id.*

<sup>120</sup> California Natural Diversity Database. 2021. RareFind 5 [Internet]. California Department of Fish and Wildlife [Apr 2, 2021].

<sup>121</sup> MND, p. 44.

<sup>122</sup> Cashen Letter, p. 4.

<sup>123</sup> Fleishman E, Anderson J, Dickson DG, Krolick D, Estep JA, Anderson RL, Elphick CS, Dobkin DS, Bell DA. 2016. Space Use by Swainson’s Hawk (*Buteo swainsoni*) in the Natomas Basin, California. *Collabra*, 2(1): 5, pp. 1–12.

<sup>124</sup> Babcock KW. 1995. Home Range and Habitat Use of Breeding Swainson’s Hawks in the Sacramento Valley of California. *Journal of Raptor Research* 29:193–197.

<sup>125</sup> California Department of Fish and Game. 1994. Staff report regarding mitigation for impacts to Swainson’s hawks (*Buteo swainsoni*) in the Central Valley of California; Cashen Letter, p. 4. 5038-008acp

hawks. Dr. Cashen explains that, to reverse the decline of Swainson’s hawk populations, it is CDFW’s policy that new development projects that adversely modify nesting or foraging habitat within 10 miles of an active nest should mitigate the project’s impacts by providing compensatory mitigation.<sup>126</sup> According to CDFW, the 10-mile foraging radius recognizes the need to strike a balance between the biological needs of reproducing pairs (including eggs and nestlings) and the economic benefit of development(s) consistent with Fish and Game Code Section 2053.<sup>127</sup>

Fourth, the MND claims: “there are extensive foraging opportunities around the nesting location 2.6 miles north of the site and between this nesting location and the project site.” However, the MND fails to provide evidence to support that claim or the implicit assumption that foraging habitats north of the Project site are sufficient to sustain the local Swainson’s hawk population. Based on Mr. Cashen’s review of Google Earth imagery, much of the open space that remains “around the nesting location 2.6 miles north of the site and between this nesting location and the project site” is comprised of vineyards or other land cover types that provide little to no value as foraging habitat for Swainson’s hawks.<sup>128</sup>

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Fifth, Mr. Cashen explains that there is no scientific evidence that the eucalyptus forest surrounding the Project site precludes the site from being “a foraging destination which would likely attract foraging Swainson’s hawks.” To the contrary, Mr. Cashen points to substantial evidence demonstrating that the Project site may attract foraging Swainson’s hawks because it contains California voles (*Microtus californicus*)—the Swainson’s hawk’s primary prey.<sup>129</sup>

Sixth, Mr. Cashen points to data demonstrating that Swainson’s hawks have consistently been detected approximately 2,200 feet south of the Project site.<sup>130</sup> In addition, two Swainson’s hawks were detected approximately 3,500 feet northeast of the Project site on April 16, 2021.<sup>131</sup> Therefore, Mr. Cashen concludes that either:

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*, p. 2; Cashen Letter, p. 4.

<sup>128</sup> California Department of Fish and Wildlife. 2016. Status Review: Swainson’s Hawk (*Buteo swainsoni*) in California; Cashen Letter, pp. 4-5.

<sup>129</sup> Monk & Associates. 2020 Mar 2. Biological Resource Analysis, pp. 6 and 12; Cashen Letter, p. 5.

<sup>130</sup> eBird. 2021. eBird: An online database of bird distribution and abundance [web application]. eBird, Ithaca, New York. Available at: <<http://www.ebird.org>>. (Accessed Apr 28, 2021). Swainson’s hawks detected on: 19 Apr 2015; 25 Aug 2016; 14 Jul 2017; 18 Aug 2018; and 13 Jul 2019.

<sup>131</sup> *Id.*

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(a) the Project site is within the foraging radius of the Swainson’s hawks that nest 2.6 miles north of the Project site, or (b) there is an undocumented Swainson’s hawk nest in the vicinity of the Project site. Both scenarios undermine the validity of the rationale for the City’s determination that impacts to foraging habitat would not be significant.<sup>132</sup>

The above reasons demonstrate substantial evidence that the MND failed to properly analyze impacts to the Swainson’s Hawk. An EIR must be prepared to fully disclose and mitigate the Project’s impacts on this special status species.

### 3. The MND Fails to Adequately Analyze and Mitigate Impacts to the Northern Harrier

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Mr. Cashen explains that one of the primary threats to northern harriers is the loss and degradation of nesting and foraging habitat.<sup>133</sup> According to the MND: “[s]hould northern harrier nest on or near the project site, nesting activities could be disrupted by construction activities. Therefore, impacts to northern harrier could be potentially significant.”<sup>134</sup> Although the MND acknowledges northern harriers may nest on the Project site, it fails to analyze the significance of the Project’s permanent impacts on nesting habitat (i.e., the analysis is limited to disturbance of nesting harriers).<sup>135</sup>

The MND states the following with respect to the loss of foraging habitat: “[t]he loss of foraging habitat associated with the project is not considered substantial as the entire project site consisted of a eucalyptus grove until 2012, and thus did not historically provide potential foraging habitat. Mitigation Measure BIO-3 would be implemented to reduce potential impacts to nesting northern harriers to a less-than-significant level.”<sup>136</sup> The MND’s statement regarding historic conditions is incorrect because historically the Project site provided habitat (for northern harriers) before the eucalyptus trees were planted (sometime between

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<sup>132</sup> Cashen Letter, p. 5.

<sup>133</sup> Shuford WD, Gardali T, editors. 2008. California Bird Species of Special Concern: A ranked assessment of species, subspecies, and distinct populations of birds of immediate conservation concern in California. Studies of Western Birds 1. Western Field Ornithologists, Camarillo, California, and California Department of Fish and Game, Sacramento. pp. 149 through 155.

<sup>134</sup> MND, p. 43.

<sup>135</sup> Cashen Letter, p. 6.

<sup>136</sup> *Id.*



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1916 and 1942).<sup>137</sup> Nevertheless, the significance of the impact under CEQA is dependent on the environmental conditions at the time the CEQA document was published,<sup>138</sup> *not* the environmental conditions in 2012. Mr. Cashen explains that Mitigation Measure BIO-3 is limited to measures designed to minimize disturbance to raptor nests during the avian nesting season; the mitigation measure does nothing to mitigate the Project's permanent impacts on northern harrier habitat. He concludes that, because habitat loss is a primary threat to the northern harrier, potentially significant impacts on the species remain unmitigated.<sup>139</sup>

The above reasons demonstrate substantial evidence that the MND failed to properly analyze impacts to the Northern Harrier. An EIR must be prepared to fully disclose and mitigate the Project's impacts on this special status species.

#### 4. The MND Fails to Adequately Analyze and Mitigate Impacts to the White-tailed Kite

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Mr. Cashen explains that the City's analysis suffers the same flaws as the analysis it provided for the northern harrier: (1) the Project site historically provided foraging habitat (i.e., before the eucalyptus trees were planted); and (2) the City's analysis fails to apply the proper baseline conditions. White-tailed kites have relatively small home ranges<sup>140</sup> and seldom hunt more than 0.5 mile from their nests when breeding.<sup>141</sup> Habitat quality for white-tailed kites in California is largely dependent on the abundance and availability of California voles,<sup>142</sup> which are known to occur at the Project site.<sup>143</sup> Hawbecker (1940) provided evidence that a high population of voles was necessary for successful kite nesting, and that a nearby source of suitable food is just as necessary as the nest tree.<sup>144</sup> Therefore, if white-tailed kites nest on or near the Project site, they would be significantly

<sup>137</sup> United States Geological Survey. 1916 and 1942. *Mare Island, CA*. Topographic map.1:63,000. U.S. Department of the Interior, Reston, Virginia.

<sup>138</sup> MND, p. 669.

<sup>139</sup> Cashen Letter, pp. 6-7.

<sup>140</sup> Dunk JR, Cooper RJ. 1994. Territory size regulation in Black-shouldered Kites. *Auk* 111:588-595.

<sup>141</sup> California Department of Fish and Wildlife. California Interagency Wildlife Task Group. 2005. CWHR version 9.0 personal computer program. Sacramento, CA.

<sup>142</sup> Dunk JR, Cooper RJ. 1994. Territory size regulation in Black-shouldered Kites. *Auk* 111:588-595. *See also*, Hawbecker AC. 1940. The Nesting of the White-Tailed Kite in Southern Santa Cruz County, California. *Condor* 42(2):106-111.

<sup>143</sup> MND, p. 38.

<sup>144</sup> Hawbecker AC. 1940. The Nesting of the White-Tailed Kite in Southern Santa Cruz County, California. *Condor* 42(2):106-111.

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impacted by the loss of foraging habitat (from the Project site). Mr. Cashen concludes that Mitigation Measure BIO-3 does not mitigate the impact because it is limited to actions designed to minimize construction-related disturbance to nests. As a result, potentially significant impacts on the white-tailed kite remain unmitigated.<sup>145</sup>

The above reasons demonstrate substantial evidence that the MND failed to properly analyze impacts to the White-tailed Kite. An EIR must be prepared to fully disclose and mitigate the Project's impacts on this special status species.

## **5. The MND Fails to Adequately Analyze and Mitigate Impacts to the Burrowing Owl**

### **a) The MND Fails to Adequately Analyze and Mitigate Impacts to Burrowing Owl Habitat**

“Essential Habitat” for burrowing owls includes nesting, foraging, wintering, and dispersal habitat.<sup>146</sup> Contrary to CDFW's guidance, the MND provides no analysis of impacts to satellite burrows, foraging habitat, dispersal and migration habitat, wintering habitat, and habitat linkages. The impact assessment in the MND is limited to the following:

the project site provides marginal nesting habitat for the western burrowing owl. Should burrowing owls occur on or near the project site, nesting activities and/or individual owls could be harmed by construction activities. Therefore, impacts to western burrowing owl could be potentially significant. Mitigation Measure BIO-1 would reduce this impact to a less-than-significant level.<sup>147</sup>

As Mr. Cashen explains, there are two problems with the City's analysis. First, Mitigation Measure BIO-1 would not reduce impacts on the nesting population to less-than-significant levels. Breeding burrowing owls are believed to be extirpated from Napa County.<sup>148</sup> Due to their strong site tenacity, burrowing owls rarely colonize new sites, or re-colonize historical sites from which they have

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<sup>145</sup> Cashen Letter, p. 6.

<sup>146</sup> California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, p. 24.

<sup>147</sup> MND, p. 42.

<sup>148</sup> Townsend SE, Lenihan C. 2003. Burrowing Owl Status in the Greater San Francisco Bay Area. Proceedings of the California Burrowing Owl Symposium. Bird Populations Monographs No. 1:60-70. 5038-008acp

been extirpated.<sup>149</sup> In other words, burrowing owls do not merely nest elsewhere when their nesting habitat is eliminated. As a result, the presence of nesting burrowing owls at the Project site would be extremely significant from a biological perspective, and elimination of the nesting habitat would be significant and unmitigable.<sup>150</sup>

Second, CDFW submitted comments on the first MND that was issued for the Project. CDFW's comment letter states: "[i]f the survey determines that the project site is actively being used by burrowing owl, or any owls are passively relocated as described above, then compensatory habitat mitigation shall be provided."<sup>151</sup> Thus, CDFW recommends compensatory mitigation if the Project site is actively being used by burrowing owls, irrespective of how the owls are using the site (e.g., nesting, foraging, sheltering), or the season of use. Mitigation Measure BIO-1, however, only requires compensatory mitigation if *nesting* burrowing owls are detected on the Project site; compensatory mitigation is not required if the site is being used to satisfy other life history requirements. Because the City's impacts analysis is limited to nesting habitat, and because MM BIO-1 only requires compensatory mitigation for nesting owls, Project impacts to foraging habitat, dispersal and migration habitat, and wintering habitat remain potentially significant.<sup>152</sup>

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#### **b) The MND Fails to Adequately Analyze and Mitigate Impacts From Passive Relocation**

The Project may involve excluding burrowing owls from their burrows in order to "passively relocate" them from the Project site and adjacent habitat.<sup>153,154</sup> The MND fails to evaluate impacts to burrowing owls due to burrow exclusion, or to identify mitigation measures sufficient to reduce such impacts below a level of significance. Consistent with CDFW guidelines, burrow exclusion is a potentially significant impact under CEQA that must be analyzed.<sup>155</sup> Specifically, burrow

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<sup>149</sup> Wilkerson RL, Siegel RB. 2010. Assessing changes in the distribution and abundance of burrowing owls in California, 1993-2007. *Bird Populations* 10:1-36.

<sup>150</sup> Cashen Letter, p. 7.

<sup>151</sup> See MND, p. 682.

<sup>152</sup> Cashen Letter, pp. 7-8.

<sup>153</sup> MND, p. 46 (MM BIO-1).

<sup>154</sup> Although not discussed in the MND, burrow exclusion entails the installation of one-way doors on occupied burrows so owls can exit, but not re-enter, the burrows.

<sup>155</sup> California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, p. 10. 5038-008acp

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 available burrows.<sup>156</sup> Consequently, the City must disclose and analyze impacts associated with the “passive relocation” of burrowing owls.<sup>157</sup>

As Mr. Cashen explains, the need for full analysis of potential impacts associated with passive relocation (i.e., burrow exclusion) of burrowing owls is further supported by research that indicates most relocation projects have resulted in fewer breeding pairs of burrowing owls at the mitigation site than at the original site, and that relocation projects generally have failed to produce self-sustaining populations.<sup>158</sup> Investigators attribute the limited success of relocation to: (a) strong site tenacity exhibited by burrowing owls, and (b) potential risks associated with forcing owls to move into unfamiliar and perhaps less preferable habitats.<sup>159</sup>

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## 6. The MND Fails to Adequately Analyze and Mitigate Cumulative Impacts

The MND indicates there are only four projects that are proposed or under construction in the City of American Canyon.<sup>160</sup> This does not comport with the “Active Project List” (dated March 2021) available on the City’s website.<sup>161</sup> According to the Active Project List, there are several additional projects that would contribute to cumulative impacts on biological resources. These include the Giovannoni Logistics Center, Oat Hill Multi-Family, Canyon Estates, and Watson Ranch Specific Plan projects. Cumulatively, these projects would impact several hundred acres of habitat for special-status species (e.g., Swainson’s hawk). The MND fails to disclose or analyze cumulative impacts due to *all* past, present, and probable future projects in American Canyon.<sup>162</sup>

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<sup>156</sup> *Id.*, pp. 10 and 21.

<sup>157</sup> Cashen Letter, p. 8.

<sup>158</sup> Smith BW, Belthoff JR. 2001. Burrowing owls and development: short-distance nest burrow relocation to minimize construction impacts. *J. Raptor Research* 35:385-391.

<sup>159</sup> *Id.*; Cashen Letter, p. 8.

<sup>160</sup> *Id.*

<sup>161</sup> See <<https://www.cityofamericancanyon.org/government/community-development/projects>>.

<sup>162</sup> Cashen Letter, p. 9.

CEQA Guidelines § 15130(b)(3) state that lead agencies should define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used. The geographic scope of the City's cumulative impacts analysis was the City of American Canyon.<sup>163</sup> The MND fails to provide an explanation for this geographic limitation. Moreover, the cumulative impacts analysis is fundamentally flawed because the City applied two different geographical scales to its analysis. The MND states:

With respect to cumulative biological resources, over the past few decades the City of American Canyon has been transitioning from agricultural use to residential development. However, there are many open space preserves and parks that have become established to preserve and protect open space habitats within the City limits and in this region, as illustrated in Exhibit A of the Monk letter. The Jack & Bernice Newell Wilderness Preserve (Newell Preserve), the Lynch Canyon Preserve, Canyon Estates Preserve (proposed) and the CDFW California Red-Legged Frog Preserve represent over 2,000 acres of permanently protected contiguous open space east of the project site. The Wetlands Open Space, Napa River Bay Trail, Clark Ranch and the Napa Plant Site Restoration Project represent several hundred additional acres of preserved open space and valuable wildlife habitats that will be preserved in perpetuity.<sup>164</sup>

The Lynch Canyon Preserve (1,039 acres) and the CDFW California Red-Legged Frog Preserve (317 acres) are not located within the City of American Canyon. It is not possible to accurately analyze cumulative impacts by using one geographic scope for open space preserves, but a smaller geographic scope for development projects. Furthermore, the MND misrepresents the functions of the Wetlands Open Space, Napa River Bay Trail, Clark Ranch and the Napa Plant Site Restoration Project as habitat. The Clark Ranch Project is designed to be a multi-use community park with a bike skills loop, dog park, equestrian riding area, and several buildings (among other features that are incompatible with wildlife conservation).<sup>165</sup> Therefore, the Clark Ranch Project would contribute to cumulative impacts (that were not contemplated in the MND). The other three

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<sup>163</sup> MND, p. 119.

<sup>164</sup> *Id.*

<sup>165</sup> City of American Canyon. 2017 Nov 7. Clarke Ranch Master Plan. Exhibit A. 5038-008acp

open space areas are negatively impacted by recreation activities,<sup>166</sup> are comprised primarily of salt ponds or wetlands, and generally do not provide habitat for the same suite of species as those that would be impacted by the Project.<sup>167</sup>

The MND provides the following analysis of cumulative impacts to biological resources:

Implementation of the proposed project would result in cumulative impacts to ruderal habitats and less than significant impacts to common plant and animal species. While the project-related impacts would be considered cumulative with other projects in the region, the mitigation measures prescribed in the Mitigated Negative Declaration would offset cumulative impacts to special-status species and plant communities/wildlife habitats to levels regarded as less than significant. Therefore, conversion of 10.39 acres of ruderal habitat on the project site to commercial development would have a less-than-significant (not cumulatively considerable) cumulative impact in this regional context.

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Although the MND states the Project would result in cumulative impacts to ruderal habitats, and that Project-related impacts would be considered cumulative with other projects, it fails to provide the City's determination on the significance of the cumulative impacts. In addition, the MND fails to identify what type(s) of Project-related impacts would be considered cumulative, and which species would be subject to the cumulative impacts.<sup>168</sup>

The City's determination regarding the significance of cumulative impacts to biological resources is vague and not supported by substantial evidence. On the CEQA Environmental Checklist Form, the City indicates the impact would be "Less Than Significant." However, the subsequent text in the MND states "[i]mplementation of the proposed project would result in cumulative impacts to ruderal habitats," but that "mitigation measures prescribed in the Mitigated Negative Declaration would offset cumulative impacts to special-status species and plant communities/wildlife habitats to levels regarded as less than significant."<sup>169</sup>

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<sup>166</sup> See California Fish and Wildlife, Recreation Special Issue 2020.

<sup>167</sup> Cashen Letter, pp. 9-10.

<sup>168</sup> Cashen Letter, p. 10.

<sup>169</sup> Cashen Letter, p. 10.

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The City's determination that mitigation measures prescribed in the MND would offset cumulative impacts to special-status species to less-than-significant levels is not supported by evidence or analysis. The Project would eliminate 10.39 acres of habitat. Mr. Cashen explains that habitat loss is the primary threat to special-status species that occur in the Project area. However, the mitigation measures proposed in the MND are almost entirely limited to measures (e.g., seasonal buffers) designed to avoid or minimize direct impacts to individual animals. Although the MND requires compensatory mitigation if nesting burrowing owls are detected onsite, it does not require compensatory mitigation if non-nesting burrowing owls are detected onsite, nor does it require compensatory mitigation if any other special-status species are detected onsite. Mr. Cashen concludes that this mitigation is inadequate to reduce impacts to less than significant levels. As a result, the City's determination that the proposed mitigation would offset cumulative impacts to less-than-significant levels is not supported by evidence.<sup>170</sup>

**7. The MND Provides Inadequate Compensatory Mitigation for Potentially Significant Impacts to Biological Resources.**

**a) Mitigation Measure BIO-1 (Burrowing Owl)**

Mitigation Measure BIO-1 states: “[i]f passive relocation of non-nesting burrowing owls is necessary; a qualified biologist shall prepare a Relocation Plan and submit it to CDFW.” The proposed mitigation is vague because it does not establish minimum standards for the content of the Relocation Plan, nor does it require CDFW's approval of the Relocation Plan. According to CDFW's Staff Report on Burrowing Owl Mitigation: “burrowing owls should not be excluded from burrows unless or until:

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- A Burrowing Owl Exclusion Plan (see Appendix E) is developed and approved by the applicable local DFG office;
- Permanent loss of occupied burrow(s) and habitat is mitigated in accordance with the Mitigating Impacts sections below. Temporary exclusion is mitigated in accordance with the item #1 under Mitigating Impacts below.
- Site monitoring is conducted prior to, during, and after exclusion of burrowing owls from their burrows sufficient to ensure take is avoided.

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<sup>170</sup> Cashen Letter, p. 10.  
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Conduct daily monitoring 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).<sup>171</sup>

Mitigation Measure BIO-1 does not require these elements, nor does it establish success criteria for burrowing owls that are relocated from the Project site.<sup>172</sup>

Mitigation Measure BIO-1 further states:

If a nesting season survey determines that a burrow or refugia on the project site is occupied by nesting burrowing owls, then compensatory mitigation in the form of a permanently protected, deed restricted set aside on open space land owned or obtained by the applicant shall be provided if such a protected area makes sense for protection of nesting owls. This permanently protected area would be recorded within 90 days after commencement of project construction. If burrowing owls are observed during surveys, notification shall also be submitted to the CNDDDB.

As described below, the compensatory mitigation requirements of Mitigation Measure BIO-1 are far too vague to ensure impacts on nesting burrowing owls are reduced to less-than-significant levels.<sup>173</sup>

First, the MND fails to identify how much compensatory mitigation would be required. Mitigating Project impacts to burrowing owl habitat requires compensatory mitigation at a ratio of at least 1:1. As stated in CDFW's Staff Report on Burrowing Owl Mitigation:

As set forth in more detail in Appendix A, the current scientific literature supports the conclusion that mitigation for permanent habitat loss necessitates replacement with an equivalent or greater habitat area for breeding, foraging, wintering, dispersal, presence of burrows, burrow surrogates, presence of fossorial mammal dens, well

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<sup>171</sup> California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, p. 11.

<sup>172</sup> Cashen Letter, p. 11.

<sup>173</sup> Cashen Letter, p. 11.



drained soils, and abundant and available prey within close proximity to the burrow.<sup>174</sup>

Second, the MND fails to establish any criteria for selection of the compensatory mitigation site. These include: (a) geographic location, (b) habitat conditions, and (c) the status of burrowing owls at the site. These variables are critical to the mitigation site's ability to reduce Project impacts to less-than-significant levels. Most notably, permanent protection of a site that is not occupied by burrowing owls would not mitigate the Project's impacts to occupied nesting habitat.<sup>175</sup>

Third, the MND fails to establish a mechanism that would ensure the mitigation site is maintained and managed in perpetuity to conserve burrowing owls and their habitat. Burrowing owls are limited to habitats with relatively short vegetation and only sparse shrubs or taller vegetation.<sup>176</sup> Therefore, even if the Applicant acquires a mitigation site that currently contains burrowing owls, the site would not offset Project impacts unless the Applicant implements a mechanism (e.g., grazing or mowing) for maintaining short vegetation at the site. In addition, deed restrictions do not ensure habitat conservation in perpetuity because: (a) they can be changed or eliminated,<sup>177</sup> and (b) do not have a third party that can be designated to monitor and enforce the restriction.<sup>178</sup>

Fourth, the MND fails to establish performance standards or monitoring and reporting requirements for the mitigation site. Thus, Mitigation Measure BIO-1 provides no assurances that the mitigation site would effectively compensate for the loss of burrowing owl habitat from the Project site.<sup>179</sup>

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<sup>174</sup> *Id.*, p. 8.

<sup>175</sup> Cashen Letter, pp. 11-12.

<sup>176</sup> Gervais JA, Rosenberg DK, Comrack LA. 2008. Burrowing Owl (*Athene cunicularia*). Pages 218-226 *In*: Shuford WD, Gardali T, editors. California Bird Species of Special Concern: A ranked assessment of species, subspecies, and distinct populations of birds of immediate conservation concern in California. Studies of Western Birds 1. Western Field Ornithologists, Camarillo, California, and California Department of Fish and Game, Sacramento.

<sup>177</sup> County of Kern. 2016. Willow Springs Solar Array Project. Comment 1-Q from the California Department of Fish and Wildlife (dated 1 October 2015).

<sup>178</sup> Land Trust Alliance. 2001. LTA Fact Sheet: Conservation Easement v. Deed Restriction. Available at: [https://conservationtools.org/library\\_items/203-LTA-Fact-Sheet-Conservation-Easement-vs-Deed-Restriction](https://conservationtools.org/library_items/203-LTA-Fact-Sheet-Conservation-Easement-vs-Deed-Restriction); Cashen Letter, p. 12.

<sup>179</sup> Cashen Letter, p. 12.



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Finally, Mitigation Measure BIO-1 requires compensatory mitigation only “if such a protected area makes sense for protection of nesting owls.” This condition is vague and confusing. The MND fails to explain the factors that the City would evaluate to determine whether a protected area “makes sense,” nor does it explain how significant impacts to nesting burrowing owls would be mitigated if a protected area does not “makes sense.”<sup>180</sup>

### b) Mitigation Measure BIO-2 (Swainson’s Hawk)

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CDFW has determined that compensatory mitigation is not required for projects in areas that have less than 5 acres of foraging habitat and are surrounded by existing urban development, unless the project area is within 1/4 mile of an active nest tree.<sup>181</sup> For all other projects, the CDFW has concluded that the loss of foraging habitat may lead to the “take” of Swainson’s hawks and that mitigation is required. According to CDFW mitigation guidelines, projects within five miles of an active nest tree shall provide habitat compensation at a 0.75:1 ratio.<sup>182</sup> Even if the City determines the Project would not cause a significant reduction in available foraging habitat for the Swainson’s hawk territories that occur north of the Project site, habitat compensation is required to support the needs of additional territories as the population recovers.<sup>183</sup>

### c) Mitigation Measure BIO-3 (Nesting Raptors)

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Mitigation Measure BIO-3 states: “[i]f nesting raptors are identified during the [pre-construction] surveys, a qualified biologist shall determine appropriate, species-specific no-disturbance buffers around all active nests...To ensure the no-disturbance buffers are adequate, a qualified biologist shall monitor the active nests within and adjacent to the project site daily for a minimum of one week and then weekly during construction.”<sup>184</sup>

Mitigation Measure BIO-3 defines a qualified biologist as “a biologist with at least 2 years’ experience conducting surveys for nesting raptors with detections.” The response of nesting birds to human-related disturbance activities is dependent

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<sup>180</sup> Cashen Letter, p. 12.

<sup>181</sup> California Department of Fish and Game. 1994. Staff report regarding mitigation for impacts to Swainson’s hawks (*Buteo swainsoni*) in the Central Valley of California. p. 13.

<sup>182</sup> *Id.*, p. 12.

<sup>183</sup> Cashen Letter, p. 12.

<sup>184</sup> Cashen Letter, p. 13.

on numerous site-specific and species-specific variables. Consequently, determining the appropriate buffer distance requires knowledge of species-specific responses to various types of disturbance in various settings. Many biologists that have experience conducting raptor surveys have no experience with (or knowledge of) avian responses to disturbance. As a result, Mitigation Measure BIO-3 lacks assurances that the “qualified biologist” would establish appropriate, species-specific no-disturbance buffers around all active nests.<sup>185</sup>

For buffer zones to be effective, they need to be based on empirical evidence of avian responses to disturbance. There is an overall lack of this type of empirical evidence.<sup>186</sup> As a result, monitoring is critical to validating the adequacy of a buffer. The MND fails to identify the variables the biologist would monitor to ensure the adequacy of the no-disturbance buffers. Nevertheless, there is no scientific basis for the assumption that a nesting raptor can tolerate an inadequate nest buffer for one week (i.e., the proposed interval of construction monitoring), especially without adverse effects to reproductive success and productivity. This issue is compounded by the absence of any success standards, or monitoring and reporting requirements, for Mitigation Measure BIO-3. For these reasons, the actions proposed in Mitigation Measure BIO-3 do not ensure significant impacts to nesting raptors are avoided. To rectify this issue, the City must require nest buffers consistent with the best available scientific information.<sup>187</sup>

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Suter and Jones (1981) surveyed 74 raptor researchers to derive recommendations for nest site protection.<sup>188</sup> Based on the survey results, Suter and Jones (1981) recommended a buffer distance of at least one kilometer (3,281 feet) to prevent raptors from abandoning their nests in response to construction and similar noisy, extended activities.

#### **d) Mitigation Measure BIO-4 (Nesting Passerines)**

Mitigation Measure BIO-4 suffers the same flaws as Mitigation Measure BIO-3: (1) the mitigation measure fails to ensure that the biologist has the expertise needed to determine appropriate, species-specific no-disturbance buffers for active

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<sup>185</sup> Cashen Letter, p. 13.

<sup>186</sup> Richardson CT, Miller CK. 1997. Recommendations for Protecting Raptors from Human Disturbance: A Review. *Wildlife Society Bulletin* 25(3):634-638.

<sup>187</sup> Cashen Letter, p. 11.

<sup>188</sup> Suter GW III, Jones JL. 1981. Criteria for Golden Eagle, Ferruginous Hawk and Prairie Falcon Nest Site Protection. *Raptor Research* 15(1):12-18.  
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26 (cont.) | nests; and (2) weekly monitoring during construction is not sufficient to ensure significant impacts to nesting birds are avoided.<sup>189</sup>

**e) Mitigation Measure BIO-5 (Pond Turtle)**

27 | Mitigation Measure BIO-5 requires a pre-construction survey for western pond turtles. If western pond turtle nests are found during the survey: “the nest site plus a 50-foot buffer around the nest site shall be fenced with orange construction fence until eggs hatch and young turtles disperse to the adjacent North Slough.” Mr. Cashen explains that the proposed measure would be sufficient for turtle nests located less than 50 feet from the Project boundary. However, he explains that it would not be effective for turtle nests located in interior portions of the Project site. After traveling 50 feet, the turtles would need to travel through the construction zone to reach North Slough. These turtles would be subject to being killed or injured by construction activities. To rectify this issue, Mitigation Measure BIO-5 needs to be modified such that it requires installation of a no-disturbance dispersal corridor between the nest site and North Slough.<sup>190</sup>

Pursuant to Mr. Cashen’s recommendations, the City must analyze the Project’s significant impacts to Biological Resources the City must prepare an EIR.

**C. Substantial Evidence Supports a Fair Argument that the Project May Result in Potentially Significant Energy Impacts**

28 | The MND fails to perform its own energy analysis and instead relies on the SGE 258 analysis.<sup>191</sup> Recent cases interpreting Appendix F hold that, to comply with CEQA, the lead agency must not only describe a project’s energy impacts in a CEQA document, it must also quantify them.<sup>192</sup> This is consistent with

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<sup>189</sup> Cashen Letter, p. 13.

<sup>190</sup> Cashen Letter, p. 14.

<sup>191</sup> Appendix B, p. 11.

<sup>192</sup> *Ukiah Citizens for Safety First v. City of Ukiah* (“*Ukiah Citizens*”) (2016) 248 Cal.App.4th 256, 264-65 (energy impact analysis requires clarification and technical information regarding project-related energy usage and conservation features); *Spring Valley Lake Association v. City of Victorville* (“*Spring Valley*”) (2016) 248 Cal.App.4th 91, 103 (CEQA doc must show factual basis of its assumptions that both energy use and greenhouse gas emissions will be reduced); *California Clean Energy Committee v. City of Woodland* (“*CCEC*”) (2014) 225 Cal.App.4th 173, 210 (“CEQA EIR requirements are not satisfied by saying an environmental impact is something less than some previously unknown amount”).

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longstanding precedent which holds that unsupported conclusions are entitled to no judicial deference.<sup>193</sup>

Here the City did not quantify the energy uses from the Project but instead relied on an MND analysis that was not provided. This Project's analysis of energy is at best superficial and merely puts forth the conclusion that because this Project is similar to others in the past, no energy analysis is required.<sup>194</sup> Even if the analysis under SGE 258 were appropriate here, it is impossible to tell from the face of this MND because that analysis can only be found after looking the MND of SGE 258 which is not part of the MND for this Project and was not included in the MND. The MND should have provided the analysis under SGE 258 in the discussion of Energy and the CalEEMod analysis under SGE 258.

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**D. Substantial Evidence Supports a Fair Argument that the Project May Result in Potentially Significant Impacts from Greenhouse Gas Emissions**

**1. The GHG Analysis Relies on Inapplicable Thresholds In Violation of CEQA**

Under the CEQA Guidelines, which have been recently updated, a lead agency must analyze a project's impacts on GHG emissions.<sup>195</sup> The Guidelines allow for several approaches to this analysis, both qualitative and quantitative. The Guidelines explicitly mandate, however, that the "analysis should consider a timeframe that is appropriate for the project. The agency's analysis also must reasonably reflect evolving scientific knowledge and state regulatory schemes."<sup>196</sup>

The MND's GHG analysis relies on the outdated tiered approach developed by BAAQMD for assessing the impacts of land use development projects. Under this approach, projects are first analyzed using a "bright-line" screening threshold of

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<sup>193</sup> *Comtys. for a Better Env't v. City of Richmond* ("CBE v. Richmond") (2010) 184 Cal.App.4th 70, 85; *Topanga*, 11 Cal.3d at 515 (CEQA document must provide reader with analytic bridge between ultimate findings and the facts in the record).

<sup>194</sup> *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442 (quoting *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1239.).

<sup>195</sup> 14 C.C.R §15064.4.

<sup>196</sup> 14 C.C.R §15064.4(b)

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1,100 metric tons of carbon dioxide-equivalents per year (“MTCO<sub>2</sub>e/year”).<sup>197</sup> If the project’s annual emissions go beyond this threshold, it should be analyzed under an efficiency threshold.<sup>198</sup> The MND analyzed the Project’s annual emissions and found they were below the “bright-line” threshold, ending the analysis there.<sup>199</sup>

BAAQMD’s bright-line threshold, however, is not applicable to the Project, and relying on it violates CEQA. BAAQMD’s thresholds, included in the district’s 2017 CEQA Guidelines, were developed to comply with the state reduction target as it is embodied in AB 32,<sup>200</sup> which mandates that statewide greenhouse gas emissions be reduced to 1990 levels by the target year 2020.<sup>201</sup> In 2016, the state passed SB32,<sup>202</sup> which codified a new statewide 2030 GHG emissions reduction target of 40% below 1990 levels. Following the new legislation, CARB adopted in December 2017 a new scoping plan to outline the strategy needed to achieve SB 32 GHG targets. These are the binding “state regulatory scheme” that the CEQA Guidelines require agencies to account for.

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The BAAQMD Guidelines do not account for or include any numeric threshold for compliance with SB 32 or the scoping plan and are therefore not applicable to projects that will be built and operated beyond the AB 32 target year.<sup>203</sup> Because the Project’s first fully operational year would be 2021, and it would continue to operate many years beyond that, the City must analyze the Project for its compatibility with the state’s mandated goals for, at the very least, the year 2030.<sup>204</sup>

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<sup>197</sup> MND, p. 61.

<sup>198</sup> The Guidelines also allow for a CAP consistency analysis, but it is not applicable here.

<sup>199</sup> MND, pp. 61-62.

<sup>200</sup> See, California Environmental Quality Act Air Quality Guidelines, Bay Area Air Quality Management District, May 2017, at p. D-27.

<sup>201</sup> California Air Resources Board, Assembly Bill 32 Overview; available at: <https://www.arb.ca.gov/cc/ab32/ab32.htm>, accessed April 3, 2019.

<sup>202</sup> [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160SB32](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB32)

<sup>203</sup> See also *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497.

<sup>204</sup> The MND contains a single paragraph which purports to analyze the Project’s consistency with SB 32. MND, p. 62. However, the section lacks any detailed discussion of how the City asserts the Project would comply with SB 32 goals, stating merely that “[t]he assumption is that SB 32 and associated regulations will be successful in reducing GHG emissions and reducing the cumulative GHG emissions Statewide to meet 2030 goals and post-2030 goals,” and that, for this reason, the Project’s GHG impacts would be less than significant under a qualitative plan-based approach. This analysis is inadequate.

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BAAQMD *itself* advises lead agencies not to rely on its numeric significance thresholds and instead advises they make significance determinations based on the most recent state greenhouse gas reduction targets. For example, in recent comment letters to lead agencies, BAAQMD stated as follows:

The Air District encourages the City to make a significance determination for greenhouse gas impacts based on the most recent State greenhouse gas targets and CEQA guidance. The Air District's 2010 CEQA guidelines are based on the State's 2020 greenhouse gas targets. These targets have been superseded by the State's 2030 and 2050 climate stabilization goals and by the most recent draft of the AB 32 Scoping Plan written by the California Air Resources Board.<sup>205</sup>

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The GHG impact analysis should include an evaluation of the Plan's consistency with the California Air Resources Board 2017 Scoping Plan and State and Air District climate stabilization goals for 2030 and 2050. Please be advised that the Air District is in the process of updating the CEQA guidelines/thresholds and current thresholds for GHGs should not be used for this plan.<sup>206</sup>

BAAQMD is in the process of updating its current CEQA Guidelines and thresholds of significance.<sup>207</sup> This is yet another reason why the MND cannot rely on BAAQMD's bright-line threshold.

The MND must be revised to include a detailed analysis of the Project's compatibility with the reduction targets set in SB 32, which go beyond those set in AB 32. As it is now, the MND's analysis violates both CEQA and the Supreme Court rulings on GHG analysis.

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<sup>205</sup> Greg Nudd, BAAQMD, Letter to Joshua McMurray, Oakley, CA, Oakley Logistics Center Project, March 21, 2019; available at: [http://www.baaqmd.gov/~media/files/planning-and-research/ceqa-letters/2019/2019\\_03\\_21\\_city\\_of\\_oakley\\_oakley\\_logistics\\_center\\_nop-pdf.pdf?la=en](http://www.baaqmd.gov/~media/files/planning-and-research/ceqa-letters/2019/2019_03_21_city_of_oakley_oakley_logistics_center_nop-pdf.pdf?la=en), accessed April 12, 2019.

<sup>206</sup> Greg Nudd, BAAQMD, Letter to Alicia Parker, City of Oakland, RE: Downtown Oakland Specific Plan - Notice of Preparation of a Draft Environmental Impact Report, February 15, 2019; available at: [http://www.baaqmd.gov/~media/files/planning-and-research/ceqa-letters/2019/downtown\\_oakland\\_specific\\_plan\\_eir\\_notice\\_of\\_preparation\\_021519-pdf.pdf?la=en](http://www.baaqmd.gov/~media/files/planning-and-research/ceqa-letters/2019/downtown_oakland_specific_plan_eir_notice_of_preparation_021519-pdf.pdf?la=en)

<sup>207</sup> BAAQMD, CEQA Guidelines Update Underway; available at: <http://www.baaqmd.gov/plans-and-climate/california-environmental-quality-act-ceqa/updated-ceqa-guidelines>, accessed April 9, 2019.

**E. Substantial Evidence Supports a Fair Argument that the Project May Result in Potentially Significant Land Use Impacts.**

The MND notes that the City Attorney has reviewed the allowed uses in the Recreation zone (which includes the proposed Distribution Center use) and determined they are consistent with the Commercial Recreation Land Use in the General Plan.<sup>208</sup>

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While this may be substantial evidence of that fact, given the City's failure to provide said email, it is merely a conclusory statement and evidence of nothing. "Substantial evidence" includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.<sup>209</sup> A legal opinion alone does not constitute substantial evidence.<sup>210</sup>

Since the email is not made available for review the City cannot rely on it in support of this MND.

**F. Substantial Evidence Supports a Fair Argument that the Project May Result in Potentially Significant Noise Impacts**

**1. The New Building Will Form A Canyon With The Existing Building To The North.**

31

Mr. Shaw concludes that the Project may have significant noise impacts because it will create a canyon noise effect on the north side since there will be two concrete walls now facing each other. The MND fails to describe or analyze this effect in its current calculations thus resulting in an underestimate for the test samples located in Table Noise-1. The MND needs to include analysis regarding how the ambient levels would change with this canyon effect.<sup>211</sup>

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<sup>208</sup> MND, Land Use, p. 2.

<sup>209</sup> 14 C.C.R § 15384 (b).

<sup>210</sup> Id.; See *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841-842 (conclusory statements unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind are insufficient to support a finding of insignificance.)

<sup>211</sup> Shaw Letter, p.1.

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**2. The Project Does Not Account for the Truck Routes and Noise as a Result of those Routes.**

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The MND accounts for noise on site due to truck traffic, but does not account for any along the routes the trucks must take enter and exit the to the Project. The MND states there will be 35 peak hour trips in the morning which means there will be an average of 1.7 minutes between trips. For the 28 peak hour PM trips there will be an average of 2.1 minutes between trips. With the transit around the building as noted in Figure 2, Site Plan on page 14/701, this means there will be a continuous parade of trucks around the building. The MND fails to analyze noise during operations, except for those on the North side.<sup>212</sup> An EIR must be prepared to correct this omission.

**3. The Project Does Not Properly Account for Noise as a Result of Night Time Construction**

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There will be construction activities at night for 15 nights. The MND fails to describe how many concrete trucks will be necessary to complete the night time pours and whether the noise created from them would stay under 65dB as required by American Canyon Municipal Code, Chapter 8.12. The MND should have provided this information along with noise levels from the previous night time pour since the last pour resulted in calls to the City regarding noise.<sup>213</sup> The impact from the concrete activities is thus not disclosed, rendering the MND significance conclusions unsupported.<sup>214</sup>

**G. Substantial Evidence Supports a Fair Argument that the Project May Result in Potentially Significant Transportation Impacts**

**1. Potential Warehousing Uses of the Project Building May Result in Significantly Higher Trip Generation than Assumed in the MND**

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The MND and its Appendix F rely on studies of trip generation at six existing wine storage/distribution facilities in the Project's vicinity to estimate the proposed

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<sup>212</sup> Shaw Letter, p.2

<sup>213</sup> MND p. 88.

<sup>214</sup> Shaw Letter, p. 2  
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Project's motor vehicle trip generation. While Mr. Smith finds the MND's trip generation measurements performed at the nearby buildings to be reasonably consistent with the Institute of Transportation Engineer's authoritative publication *Trip Generation, 10<sup>th</sup> Edition* data for Land Use Category 150-Warehouse and for Category 154-High Cube Logistics Warehouse, he explains that the MND's trip generation fails to consider that the type of warehouse building planned for the Project is readily adaptable to much more traffic-intensive types of warehousing than calculated.

Mr. Smith explains that this type of building could easily be used as what *Trip Generation, 10<sup>th</sup> Edition* characterizes as Land Use Category 156 – Parcel Hub Warehouse or, to use the terminology of a major operator of such facilities, Amazon, a “Last Mile” facility.<sup>215</sup> These are facilities where goods are brought in directly from “fulfillment centers” or air freight terminals by heavy tractor-trailer truck rigs and trans-loaded to van-type vehicles for actual delivery to consumers. As Mr. Smith explains, the difference in trip generation of a “parcel hub warehouse” and a “wine warehouse” as analyzed in the MND is highly significant.

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The MND estimates the trip generation for a wine warehouse in vehicles per thousand square feet of floor area as 1.69 daily, 0.16 in the AM peak and 0.125 in the PM peak. *Trip Generation, 10<sup>th</sup> Edition* indicates the trip generation for a “parcel hub warehouse” in vehicles per thousand square feet of floor area as 7.75 daily, 0.7 in the AM peak and 0.64 in the PM peak.<sup>216</sup> In other words, if used as a parcel hub instead of a wine warehouse, which is reasonably foreseeable, the Project's warehouse building would generate 4.6 times as much traffic daily, 4.4 times as much traffic in the AM peak and 5.1 times as much traffic in the PM peak as what is disclosed in the MND.<sup>217</sup>

The MND contains no condition or mitigation measures which would restrict the Project's warehouse use to the less trip-intensive use analyzed in the MND. Indeed, the fact that the proposed warehouse is apparently a ‘spec’ building (the MND says it could be occupied by up to 3 tenants implying that there were no tenant commitments at the time of writing) and its proximity to heavy jet-capable Napa County Airport, strengthen the possibility that the Project could end up being used as a parcel hub. Hence, to be adequate, the MND must consider the possibility

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<sup>215</sup> Smith Letter, p. 1

<sup>216</sup> Smith Letter, p. 1.

<sup>217</sup> Smith Letter, p. 1.

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of this plausible and more traffic intense use, or the Conditional Use Permit must limit the warehouse to being used solely as a wine storage warehouse.<sup>218</sup>

## 2. The MND's Transportation Section Fails To Address the Serious Operations and Safety Problems on S.R. 29 in the Project Vicinity

Because of its location, most motor vehicle traffic to and from the Project must ultimately use parts of State Highway 29 ("SR 29").<sup>219</sup> This State Highway experiences considerable operational and safety problems, as is well documented in the *State Route 29 Comprehensive Multimodal Corridor Plan* dated May 2020.<sup>220</sup>

Mr. Smith explains that the City and its consultants, GHD, who prepared the transportation work supporting the MND, know this as they both were participants in the above-referenced SR 29 study.<sup>221</sup> Yet, the MND utterly fails to address the SR 29 issues or how the Project and others like it in the area contribute to the problem and can contribute to implementing the corridor study recommendations. Instead, the MND devotes much attention to studies of level of service, traffic signal warrants and right-turn lane warrants at a single local intersection, that of Commerce Boulevard with Green Island Road. Mr. Smith concludes that the MND's lack of analysis of the Project's impacts on SR29 is a major omission which leaves out a critical component of the Project's transportation impacts.<sup>222</sup>

The MND is defective in failing to acknowledge and address the problems in the SR 29 corridor and the Project as a cumulative contributor to them.<sup>223</sup> As a result, the MND's conclusion that the Project will have less than significant impacts on traffic and transportation is not supported by substantial evidence. The City must prepare an EIR to fully disclose and mitigate the Project's traffic and transportation impacts from all reasonably foreseeable uses and on all reasonably foreseeable major thoroughfares.

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<sup>218</sup> Smith Letter, pp. 1-2.

<sup>219</sup> MND, p. 12.

<sup>220</sup> *State Route 29 Comprehensive Multimodal Corridor Plan* dated May 2020, <https://www.nvta.ca.gov/sites/default/files/SR%2029%20Final%20Report.pdf>

<sup>221</sup> Smith Letter, p. 2.

<sup>222</sup> Smith Letter, p. 2.

<sup>223</sup> Smith Letter, p. 2.

### 3. The MND Assumes Implausible Mitigation of the Project's Significant VMT Impacts

After considering highly disparate data sources regarding average employee trip lengths, the MND's transportation analysis finds that the Project, without mitigation, would generate an average of 16.28 daily vehicle miles traveled ("VMT") per employee compared to an impact significance threshold of 10.92 VMT per employee, resulting in a significant impact.<sup>224</sup> Hence, without mitigation, the Project would have significant transportation impacts. Translated to aggregate VMT numbers, the MND finds that the Project's employees would generate 2214 VMT each weekday, exceeding the significance threshold of 1485 VMT and requires mitigation that eliminates 729 VMT daily in order for the Project to be said to have no significant impact with mitigation.<sup>225</sup>

36 The MND goes on to assume that, because the Project is committed to pave what the MND claims is an 800 foot gap in the area bikeway network. This action, based on a theoretical formulation, would induce commuters on between 76 and 310 daily commute trips<sup>226</sup> to shift from commuting by auto to bicycle (or splitting the difference between the high and low estimate a so-called average of 193 trips) resulting in a purported daily VMT saving of between again splitting the difference between high and low estimates) of 733 to 1004 miles.<sup>227</sup> The MND asserts these theoretical VMT savings would be sufficient to fully mitigate the Project's the significant VMT impacts. However, Mr. Smith explains that the MND's analysis is flawed because it fails to consider what underlies the high and low estimates, and fails to justify the reasonableness of the MND's approach of just averaging between them.<sup>228</sup>

As Mr. Smith explains, both the high and low estimates in the MND are generated by a theoretical formula estimating the number of commuters who would be induced to travel by bike, instead of auto, as the result of a bikeway of certain length. The MND's low estimate reflects only the commuters induced to travel by bike solely by the 800 feet of paved path the Project proposes to provide. The high estimate credits the Project with the commute attractiveness of the entire 1.85 mile bikeway that has already existed for a number of years to the south of the 800 feet

<sup>224</sup> MND Appendix F, GHD Memorandum, p. 4.

<sup>225</sup> Smith Letter, p. 3.

<sup>226</sup> Commuters to the general area, not just to the Project itself.

<sup>227</sup> MND, p. 102.

<sup>228</sup> Smith Letter, pp. 3-4.

of bikeway the Project will pave.<sup>229</sup> Mr. Smith concludes that averaging between an estimate that just reflects the length of bikeway the Project will pave and one that credits the Project with the entire 1.85 miles of bikeway that already existed is not supported by substantial evidence and is simply not reasonable.<sup>230</sup>

Mr. Smith further explains that the MND's high VMT-reduction estimate reflects a limited localized study by an Oregon research cooperative that found the average commute bike trip length was 5.2 miles, whereas the low estimate reflects a national study by the American Association of State Highway and Transportation Officials (AASHTO) that found the average bike commute trip length was 3.8 miles.<sup>231</sup> Mr. Smith opines that splitting differences is, in essence, placing equal credence on a limited local study as on one with a national data base. This assumption is unsupported. The MND also discloses by footnote that it assumes the bike commuters would do so 5 days per week for 47 weeks per year.<sup>232</sup> This is in essence every single work day per year, discounting vacation, sick leave and holidays. It leaves no allowance for days of substantial rain or when rain is forecast to fall before quitting time, days of high winds, very cold days or extreme summer heatwaves, or days where the commuter intends to make a trip at lunch hour or immediately after work for which travel by bike may be unsuitable.<sup>233</sup>

Finally, the MND's notion that the Project is "filling a gap" in the area bikeway network is an exaggeration. Mr. Smith identified aerial photo evidence which shows that a bikeable path has existed on the alignment of Commerce Boulevard at the supposed gap since the mid-1990s, if not before.<sup>234</sup> The aerial photos provide substantial evidence demonstrating that the Project's bike path is a minor addition to existing bike access, and is therefore not likely to produce significantly higher VMT reductions than currently provided by the existing bike lanes. Mr. Smith concludes that the Project is not supplying a missing link, it is just improving the pavement.<sup>235</sup>

It is unreasonable for the MND to assume that the Project's significant VMT impacts will be mitigated by simply paving a few hundred feet of bikeway. The

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<sup>229</sup> Smith Letter, pp. 3-4.

<sup>230</sup> Smith Letter, pp. 3-4.

<sup>231</sup> Smith Letter, pp. 3-4; citing MND p. 701.

<sup>232</sup> MND, Appendix F, p. 256, FN 2.

<sup>233</sup> Smith Letter, pp. 3-4.

<sup>234</sup> Smith Letter, pp. 3-4.

<sup>235</sup> Smith Letter, pp. 3-4.

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(cont.)

Project cannot be approved under an MND. <sup>236</sup> An EIR must be prepared to incorporate additional mitigation to reduce the Project's VMT impacts to less than significant levels.

## VI. CONCLUSION

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There is substantial evidence supporting a fair argument that the Project may result in potentially significant adverse impacts that were not identified in the MND, and thus have not been adequately analyzed or mitigated. We urge the City to fulfill its responsibilities under CEQA by withdrawing the MND and preparing a legally adequate EIR to address the potentially significant impacts described in this comment letter and the attached expert comments. This is the only way the City and the public will be able to ensure that the Project's significant environmental impacts are mitigated to less than significant levels.

Thank you for your attention to these comments.

Sincerely,



Darien K. Key  
Associate

DKK:acp  
Attachment

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<sup>236</sup> Smith Letter, pp. 3-4.  
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