

Comment Letter 5

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**Re: Comments on the Draft Environmental Impact Report for the
14800 W. Schulte Road Logistics Center Project, PA-1900208
(SA) & PA-2000162 (ER) SCH: 2020110406**

Dear Ms. Goulart and Mr. Kwong

We write on behalf of **San Joaquin Residents for Responsible Development** ("San Joaquin Residents") to provide comments on the Draft Environmental Impact Report¹ ("DEIR") (SCH No. 2020110406) for the 14800 W. Schulte Road Logistics Center Project PA-1900208 (SA) and PA-2000162 (ER) ("Project") prepared by the County of San Joaquin ("County") pursuant to the California Environmental Quality Act ("CEQA").²

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¹ County of San Joaquin, Draft Environmental Impact Report: 14800 W. Schulte Road Logistics Center (Mar. 2021) (hereinafter "DEIR"), *available at* <https://www.sjgov.org/commdev/cgi-bin/cdyn.exe/file/Planning/Environmental%20Impact%20Reports/Schulte%20Road%20Logistics%20Center%20-%20Draft%20EIR.pdf>.

² Pub. Resources Code ("PRC") §§ 21000 *et seq.* 5199-005j



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I. INTRODUCTION

Applicant LBA RVI-Company XXXII, LLC (“Applicant”) proposes to develop a 37.96-acre site located at 14800 W. Schulte Road within southwestern unincorporated San Joaquin County, California.³ The Project site was formerly used as a biomass energy facility, which was decommissioned and demolished in 2019.⁴

The Applicant proposes to grade the site and construct three single-story industrial warehouse buildings to be used for light warehousing and distribution operations.⁵ Building A would be located within the northwestern one-third of the Project site and would include approximately 228,313 square-feet of warehouse space and 2,968 square-feet of office space for 231,281 square-feet of building area in total.⁶ Building B would be located within the southwestern one-third of the Project site and would include approximately 278,650 square-feet of warehouse space and 3,006 square-feet of office space for 281,656 square-feet of building area in total.⁷ Building C would be located within the eastern one-third of the Project site and would include approximately 163,012 square feet of warehouse space and 2,964 square feet of office space for 165,976 square-feet of building area in total.⁸ In total, the Project proposes approximately 678,913 square-feet of building construction as well as associated improvements, including loading docks, 111 tractor trailer stalls, 522 passenger vehicle parking spaces, and street, sidewalk, and landscape improvements.⁹ Regional access to the Project site is provided by Interstate (“I”)-580 and I-215 located approximately 1.5 miles to the southwest and north, respectively, and I-5 located approximately 8 miles to the east.¹⁰ Local access to the Project site is served by two driveways off of W. Schulte Road.¹¹ Off-site improvements include the addition of a right turn lane on eastbound Schulte Road, the addition of westbound turn lanes for both driveways and the widening of a portion of westbound Schulte Road.¹²

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³ DEIR, p.1-1.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Id.* p. 3-16.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Id.* p. 3-17.

¹⁰ *Id.* p. 1-1.

¹¹ *Id.* p. 3-17.

¹² *Ibid.*

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Project construction would also entail the installation of two on-site water wells, a 500,000-gallon aboveground water storage tank, on-site septic tanks and a stormwater drainage system including three below-grade detention basins.¹³

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Cont.

The DEIR fails to comply with CEQA's basic requirement to act as an "informational document." It is devoid of meaningful details in critical areas, such as air quality, health risk, noise, and transportation impacts, without which the public and decisionmakers cannot adequately assess the Project's significant impacts. Because of the DEIR's shortcomings, it is deficient as a matter of law because it fails to properly disclose and mitigate the Project's potentially significant impacts. The DEIR also lacks substantial evidence to support the County's conclusions regarding the Project's impacts and proposed mitigation. These deficiencies render the document inadequate for purposes of compliance with CEQA.

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We reviewed the DEIR, technical appendices, and reference documents, with the assistance of our expert consultants, including air quality and hazardous materials expert James J.J. Clark, Ph.D., noise expert Deborah A. Jue, M.S., and transportation expert Daniel T. Smith Jr., P.E., whose comments and qualifications are included as Attachment A, Attachment B, and Attachment C respectively.¹⁴ Dr. Clark, Ms. Jue, and Mr. Smith provide substantial evidence of potentially significant impacts that have not been adequately disclosed, analyzed, or mitigated. The City must address and respond to their comments separately and fully.¹⁵

II. STATEMENT OF INTEREST

San Joaquin Residents is an unincorporated association of individuals and labor organizations with members who may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of the Project. The association includes County residents: Steven M

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¹³ *Id.* p. 3-18.

¹⁴ **Exhibit A**, Letter to Kevin Carmichael, Adams Broadwell Joseph & Cardozo from James J.J. Clark, Ph.D., Clark & Associates re: Comment Letter on Draft Environmental Impact Report (DEIR) for 14800 West Schulte Road Logistics Center, Tracy, California (June 30, 2021) (hereinafter "Clark Comments"); **Exhibit B**, Letter to Kevin Carmichael, Adams Broadwell Joseph & Cardozo from Deborah A. Jue, Schulte Road Logistics Comments on the CEQA Document (June 30, 2021) (hereinafter "Jue Comments"); **Exhibit C**, Letter to Kevin Carmichael, Adams Broadwell Joseph & Cardozo from Daniel T. Smith Jr. 14800 W. Schulte Road Project DEIR (SCH 2020110406) (June 29, 2021) (hereinafter "Smith Comments").

¹⁵ 14 Cal. Code Regs. ("CCR") §§ 15088(a), (c).
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Dickinson, David Gracian and Tim Knoeb, the International Brotherhood of Electrical Workers Local 595, Plumbers & Steamfitters Local 442, Sheet Metal Workers Local 104, Sprinkler Fitters Local 669, District Council of Ironworkers and their members and their families, and other individuals that live, recreate and/or work in and around the County.

San Joaquin Residents supports the development of sustainable commercial and industrial centers where properly analyzed and carefully planned to minimize impacts on public health and the environment. Logistics centers like the Project should avoid adverse impacts to air quality, noise levels, transportation, and public health, and should take all feasible steps to ensure unavoidable impacts are mitigated to the maximum extent feasible. Only by maintaining the highest standards can commercial and industrial development truly be sustainable.

The individual members of San Joaquin Residents and the members of the affiliated labor organizations live, work, recreate and raise their families in and around the County. They would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work constructing the Project itself. They would be the first in line to be exposed to any health and safety hazards which may be present on the Project site. They each have a personal interest in protecting the Project area from unnecessary, adverse environmental and public health impacts.

San Joaquin Residents and its members also have an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for the members they represent. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for industry to expand in the County, and by making it less desirable for businesses to locate and people to live and recreate in the County, including the Project vicinity. Continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduces future employment opportunities.

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Finally, San Joaquin Residents is concerned with projects that can result in serious environmental harm without providing countervailing economic benefits. CEQA provides a balancing process whereby economic benefits are weighed against significant impacts to the environment.¹⁶ It is in this spirit we offer these comments.

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III. LEGAL BACKGROUND

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an EIR.¹⁷ “The foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”¹⁸

CEQA has two primary purposes. First, CEQA is designed to inform decisionmakers and the public about the potential significant environmental effects of a project.¹⁹ “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.’”²⁰ 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.”²¹ As the CEQA Guidelines explain, “[t]he EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected.”²²

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¹⁶ Pub. Resources Code § 21081(a)(3); *Citizens for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171.

¹⁷ PRC § 21100.

¹⁸ *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal (“Laurel Heights I”)* (1988) 47 Cal.3d 376, 390 (internal quotations omitted).

¹⁹ Pub. Resources Code § 21061; CEQA Guidelines §§ 15002(a)(1); 15003(b)-(e); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 517 (“[T]he basic purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect [that] a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”).

²⁰ *Citizens of Goleta Valley*, 52 Cal.3d at p. 564 (quoting *Laurel Heights I*, 47 Cal.3d at 392).

²¹ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; see also *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”) (purpose of EIR is to inform the public and officials of environmental consequences of their decisions *before* they are made).

²² CEQA Guidelines § 15003(b).

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Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring consideration of environmentally superior alternatives and adoption of all feasible mitigation measures.²³ The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.”²⁴ If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment” to the greatest extent feasible and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”²⁵

While courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.’”²⁶ As the courts have explained, a prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.”²⁷ “The ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail ‘to enable who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’”²⁸

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²³ *Id.* § 15002(a)(2), (3); *see also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at p. 564.

²⁴ CEQA Guidelines § 15002(a)(2).

²⁵ PRC § 21081(a)(3), (b); CCR §§ 15090(a), 15091(a), 15092(b)(2)(A), (B); *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883.

²⁶ *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (emphasis added) (quoting *Laurel Heights I*, 47 Cal.3d at 391, 409, fn. 12).

²⁷ *Berkeley Jets*, 91 Cal.App.4th at p. 1355; *see also San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 (error is prejudicial if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process); *Galante Vineyards*, 60 Cal.App.4th at p. 1117 (decision to approve a project is a nullity if based upon an EIR that does not provide decision-makers and the public with information about the project as required by CEQA); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946 (prejudicial abuse of discretion results where agency fails to comply with information disclosure provisions of CEQA).

²⁸ *Sierra Club*, 6 Cal.5th at p. 516 (quoting *Laurel Heights I*, 47 Cal.3d at 405).
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IV. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE PROJECT

The DEIR does not meet CEQA’s requirements because it fails to include an accurate, complete and stable description of key Project components, rendering the DEIR’s impact analysis inadequate. California courts have repeatedly held that “an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.”²⁹ CEQA requires that a project be described with enough particularity that its impacts can be assessed.³⁰ Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project’s impacts and undermining meaningful public review.³¹ A lead agency may not hide behind its failure to obtain a complete and accurate project description.³²

5-7

A. The DEIR Fails to Describe the Size of the Buildings to be Constructed

The DEIR contains conflicting and inconsistent descriptions of the size of the buildings to be constructed. This inconsistency skewed the results of the DEIR’s analysis of air quality impacts and noise impacts, rendering them both unsupported.

5-8

The description of the Project is inconsistent between the DEIR and Appendix B: Air Quality, Greenhouse Gas Emissions, and Energy Calculations and Health Risk Assessment section. In Appendix B the Project Description section states that the Project will include construction of the following: a 278,927 square-foot warehouse building and 2,968 square-foot office space, a 278,889 square-foot warehouse building and 3,006 square-foot office space, and a 163,523 square-foot warehouse building and 2,964 square-foot office space totaling 730,277 square feet and associated parking.³³ The 730,277 square foot estimate is 51,364 square feet larger than the project described in the DEIR by the County of 678,913 square-feet (an increase of 7.6%).³⁴ A larger building is likely to result in greater construction

²⁹ *Stoepthemillenniumhollywood.com v. City of Los Angeles* (2019) 39 Cal.App.5th 1, 17; *Communities for a Better Environment v. City of Richmond* (“*CBE v. City of Richmond*”) (2010) 184 Cal.App.4th 70, 85–89; *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.

³⁰ CCR § 15124; see, *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 192–193.

³¹ *Id.*

³² *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311 (“*Sundstrom*”).

³³ DEIR, Appendix B, at pdf p. 18.

³⁴ DEIR, p. 3-16.

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and operational impacts from noise, truck trips, and on transportation, in addition to increased air quality and GHG impacts analyzed in Appendix B. Appendix B discloses a larger project than was analyzed elsewhere in the DEIR. As a result, these other impacts may not have been accurately analyzed.

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This discrepancy must be addressed in a revised and recirculated EIR with an accurate description of the size and scope of the project so that decisionmakers can adequately assess the Project’s significant impacts in all impact areas.

B. The DEIR Fails to Adequately Describe Project Grading

The DEIR states that 37.47 acres of the site will be graded prior to building construction through “balanced cut and fill”.³⁵ Despite the DEIR’s claim that its purpose is to “evaluate the potential environmental impacts associated with implementation of the project”, the description of the construction process is incomplete, rendering the evaluation of potential project impacts incomplete.³⁶

5-9

CEQA mandates that lead agencies must include the “whole of an action” that is being approved in the environmental review document’s project description, including *all* components and future activities that are reasonably anticipated to become part of the project.³⁷ The description must include, but is not limited to, “later phases of the project, and any secondary, support, or off-site features necessary for its implementation.”³⁸ The requirements of CEQA cannot be avoided by chopping a large project into many little ones or by excluding reasonably foreseeable future activities that may become part of the project.³⁹

The DEIR states that “it is anticipated” soil quantities on the Project site will be balanced on site during grading activities, but offers no support for this anticipated result.⁴⁰ The DEIR offers no discussion of the extent of the grading, measurement of the volume of soils to be balanced, or discussion of what will occur if soil must be removed or added to the site during the grading process despite the fact that a grading permit is required to implement the Project.⁴¹ The Project site

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³⁵ *Id.* at p. 3-18.

³⁶ *Id.* at p. 2-4.

³⁷ 14 California Code of Regulations (“CCR”) §15378 (emphasis added).

³⁸ *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283 - 84.

³⁹ PRC § 21159.27 (prohibiting piecemealing); *see also, Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370.

⁴⁰ DEIR, p. 3-18

⁴¹ *Id.* at p. 2-3.

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was previously used as a biomass energy facility which involved extensive disturbance to the soil.⁴² The prior use of the site involved grading and excavation which resulted in Project site surfaces that are highly variable, containing various depressions as deep as 20 feet below surface level.⁴³ The DEIR must present a clear picture of whether Project soils will be redistributed across the site, and, if soils will be removed, the additional air quality impacts associated with soil grading and removal, and the waste stream that soil removal is likely to generate. Because the DEIR fails to describe the full scope of the Project, it cannot be used as substantial evidence to support the conclusion that the Project’s impacts are less than significant.

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By failing to include details regarding the grading activities on the site, the County has omitted a discussion of a critical component of the construction process, in contravention of CEQA. This results in a failure to analyze potential environmental impacts.⁴⁴ The scope and scale of the grading phase of the Project must be described and analyzed in a revised and recirculated DEIR, with the fullest degree of detail available, in order to provide the public with sufficient information to permit “an intelligent evaluation of the potential environmental effects of [the] proposed activity.”⁴⁵

V. THE DEIR FAILS TO ADEQUATELY ESTABLISH THE EXISTING BASELINE

The DEIR fails to accurately disclose the baseline environmental conditions related to the Project’s construction noise and traffic impacts. As a result, the DEIR lacks the necessary baseline information against which to measure the Project’s environmental impacts with regard to impacts on sensitive receptors from construction noise and the Project’s long-term traffic impacts.

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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.⁴⁶ CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the

⁴² DEIR, p. 4.3-11.

⁴³ *Ibid.*

⁴⁴ CCR §15378.

⁴⁵ *San Joaquin Raptor vs. County of Stanislaus*, (1994) 27 Cal. App. 4th 713, 730.

⁴⁶ *See, e.g., Communities for a Better Env’t v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316.
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notice of preparation is published, from both a local and regional perspective.⁴⁷ 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.”⁴⁸

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A. The DEIR’s Noise Analysis Contains Inadequate Baseline Data.

The CEQA Guidelines require an EIR to consider “whether a project would result in... a substantial permanent increase in ambient noise levels in the vicinity of the project” or a “temporary or periodic increase in ambient noise levels in the vicinity of the project . . .”⁴⁹ Off-site operational noise from traffic caused by the Project and on-site operational noise are considered a permanent noise impact.⁵⁰ Construction noise is considered a temporary noise impact.⁵¹ The DEIR’s Noise Report fails to contain the baseline ambient noise data necessary to assess the significance of the Project’s estimated ten-month construction and operational noise impacts on sensitive receptors in the vicinity of the Project, .

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First, the DEIR’s noise measurements are inadequate to establish an ambient noise baseline on which to measure the potential operational and construction noise impacts of the Project. Table 4.6-1 the Draft EIR cites ten-minute short-term existing conditions that range from 54.3 to 64.6 Leq at six locations.⁵² No long-term measurement was taken. Ms. Jue explains in her comments that best practices call for measurement of ambient noise conditions over a period of several days because a noise environment that is dominated by transport uses, as the Project vicinity is, can change hour to hour and day to day.⁵³

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⁴⁷ CCR §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 (“*Riverwatch*”).

⁴⁸ *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

⁴⁹ CEQA Guidelines, Appendix G, Sec. XII(c)-(d).

⁵⁰ DEIR, pp. 4.6-14-17

⁵¹ DEIR, p. 4.6-13.

⁵² *Id.*, pp. 4.6-3-4.

⁵³ Jue Comments, p. 2.

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Second, the DEIR relies on the Traffic Noise Model (“TNM”) to establish the existing noise at the site. However, there is no evidence that the model was validated with noise measurements concurrent with the traffic counts at the site.⁵⁴ According to the field noise data sheets provided in the DEIR Appendix E, heavy trucks comprised less than four percent of the traffic observed during the noise measurements.⁵⁵ Yet, the traffic noise calculations used in the DEIR to establish the existing conditions indicate that 20 percent of the operational traffic are heavy trucks.⁵⁶ As Ms. Jue notes, the noise propagation and modeling patterns for heavy trucks differ from automotive sources in TNM.⁵⁷ Thus, given the unusually high volume of trucks modeled for the existing conditions of the operational traffic noise model it is essential that the noise measurements for validation be conducted during a similarly high period of truck use.⁵⁸ The short term noise measurements should have been at least 20 minutes long and taken concurrently with the traffic counts in order to validate the model that the DEIR relies on.⁵⁹

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Third, based on the TNM input reports in Appendix E, the TNM model did not include flow control or stop-and-go traffic.⁶⁰ Ms. Jue explains in her comments that the basic TNM model was developed for continuous freeway traffic and that without validation or comparison to actual noise measurements the TNM results have little to no connection to the actual conditions at the Project.⁶¹

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Fourth, as Ms. Jue points out, the DEIR lacks any discussion or analysis of the fact that the measurements were taken on October 14, 2020, during the COVID-19 global pandemic.⁶² According to the Institute of Transportation Engineers traffic volume dropped by roughly 40% on the San Francisco Bay Area urban freeways following the shelter in place orders.⁶³ The significant reduction in traffic volume corresponds with a reduction in traffic noise, which is not addressed or adjusted for in the DEIR’s analysis.

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⁵⁴ *Ibid.*

⁵⁵ Appendix E, pp.5-15.

⁵⁶ *Id.* pp.33-96.

⁵⁷ Jue Comments, p. 2.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² DEIR, p. 4.6-6

⁶³ Institute of Traffic Engineers, COVID-19 Traffic Volume Trends (Accessed June 21, 2021), <https://www.ite.org/about-ite/covid-19-resources/covid-19-traffic-volume-trends/>. 5199-005j

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A validated TNM is considered to be accurate within +/- 3 dBA of the actual noise condition, thus, the real life metrics could possibly be 6 dBA different than calculated.⁶⁴ Without a validated noise model, the DEIR fails to accurately establish the baseline ambient noise data that is necessary to assess the significance of the Project's construction and operational noise on sensitive receptors in the vicinity of the Project.

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The DEIR should be revised to include an updated baseline analysis that properly validates the TNM model with 20-minute noise and traffic measurements during periods where truck volumes are comparable to the actual peak noise hour conditions. The results of the revised noise calculations should be included in a recirculated DEIR.

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VI. THE DEIR FAILS TO ADEQUATELY DISCLOSE AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS

An EIR must fully disclose all potentially significant impacts of a Project and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.⁶⁵ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁶⁶

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Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.⁶⁷ Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.⁶⁸ In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will 'determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements.'⁶⁹

⁶⁴ Jue Comments, p. 2.

⁶⁵ 14 CCR § 15064(b).

⁶⁶ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

⁶⁷ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

⁶⁸ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁶⁹ *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102. 5199-005j

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Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.’”⁷⁰

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A. The DEIR Fails to Disclose, Analyze and Mitigate Potentially Significant Air Quality Impacts

The DEIR fails to disclose all potentially significant impacts of the Project and does not implement all feasible mitigation to reduce those impacts to less than significant levels, in violation of CEQA.

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1. The DEIR Omits Analysis and Mitigation of Potentially Significant Operational Health Risks from Diesel Particulate Matter

The County performed a Health Risk Assessment (“HRA”) to calculate the Maximum Individual Cancer Risk (“MICR”), Chronic Hazard Index, and Acute Hazard Index for residential receptors as a result of Toxic Air Contaminants (“TAC”) including Diesel Particulate Matter (“DPM”) emissions from the Project’s diesel yard truck and diesel forklifts; diesel-fueled fire pump; benzene, toluene, and xylene working and breathing loss emissions from the diesel fuel storage tank; truck trips; and truck idling emissions.⁷¹ The HRA found that the Project would result in a significant impact without mitigation as it would result in a MICR of 75.75 in 1,000,000 residents, in excess of SJVAPCD’s threshold of 20 in 1,000,000.⁷² The DEIR found that with the implementation of mitigation measure MM-AQ-1 – MM-AQ-3 the MICR would be reduced to 4.10 in 1,000,000.⁷³ Based on the implementation of the mitigation measures, the County determined that the impact of is less than significant with mitigation. However, in his review, Dr. Clark discovered that the County’s analysis failed to measure all the potential impacts of the project.

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⁷⁰ *Berkeley Jets*, 91 Cal.App.4th at 1355.

⁷¹ DEIR, p. 4.1-41.

⁷² *Ibid.*

⁷³ *Id.* pp. 4.1-44-45.

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As Dr. Clark explains in his comments, the description from the Air Quality and Greenhouse Gas Emissions Analysis Technical Report for the DEIR describes the modeling receptors in the operational scenarios as consisting of a coarse Cartesian receptor grid with 100-meter spacing out to 1,000 meters and a fine Cartesian receptor grid with 50-meter spacing out to 500 meters from the project site and either side of the line volume source.⁷⁴ Dr. Clark found that the area covered by the coarse grid are the homes 1.6 miles north-northwest of the project site near Lammersville Elementary School as seen in Figure 1 below, and not the residences to the east of the project site on S. Lammers Road which are much closer to the Project site.⁷⁵



Figure 1: County's Coarse Grid

5-20
Cont.

⁷⁴ Clark Comments, p. 9.

⁷⁵ *Ibid.*

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Dr. Clark replaced the coarse grid with a larger grid spaced 254 meters apart and covering an area 5000 meters in order to get a clearer picture of the impacts of the Project on the community as seen in Figure 2.



Figure 2: New Grid to Assess Community Impacts

5-20
Cont.

Using the same input values from the County's model, Dr. Clark found that the health impacts to the community are substantially higher than the DEIR assumed, and remain significant, even with the mitigation measures described in the DEIR.⁷⁶

Dr. Clark used the California Air Resources Board's HARP2 Standalone Risk Calculator and calculated the concentration of DPM that will result in a 20 in 1,000,000 risk for workers (0.328 ug/m³).⁷⁷ This same concentration would result in a risk of 290 in 1,000,000 for residents present for 30 years and 344 in 1,000,000 for residents over a 70 year lifetime.⁷⁸ In the graphics that follow, the red contours are equal to a health risk of 600 in 1,000,000 and orange contours are equal to a health risk of 20 in 1,000,000 for workers.

5-21

⁷⁶Clark Comments, p. 11.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

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Dr. Clark's modeling of the unmitigated Project is demonstrated in Figure 3 below. The concentrations of DPM in the red band exceed $13 \mu\text{g}/\text{m}^3$, a risk to workers at other locations in excess of 800 in 1,000,000. For any resident in the red band the cancer risk in excess of 1,000 in 1,000,000.⁷⁹

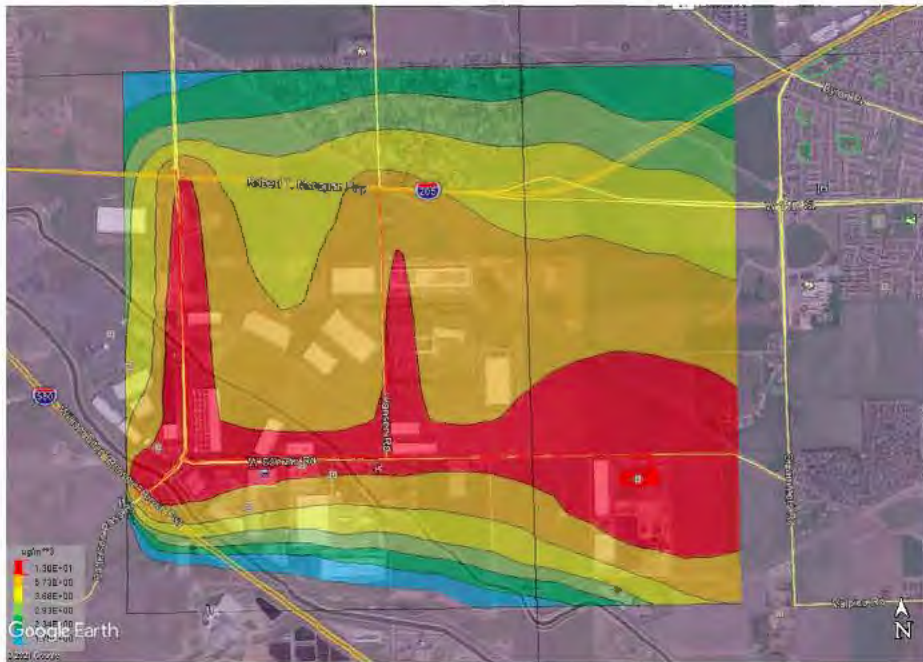


Figure 3: Modeled DPM Concentrations from Unmitigated Project

5-21
Cont.

⁷⁹ *Ibid.*
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Using the same inputs utilized by the County, Dr. Clark recreated the air model and found that the unmitigated emissions from onsite emissions would pose a risk to not only the nearest residence to the west but to the residences located approximately 0.3 miles to the east northeast of the site on South Lammers Road as well as the workers onsite.⁸⁰ The concentration of DPM from idling vehicles at the closest residence on South Lammers Road was $2.58 \mu\text{g}/\text{m}^3$, equal to a cancer risk of 2,000 in 1,000,000.⁸¹

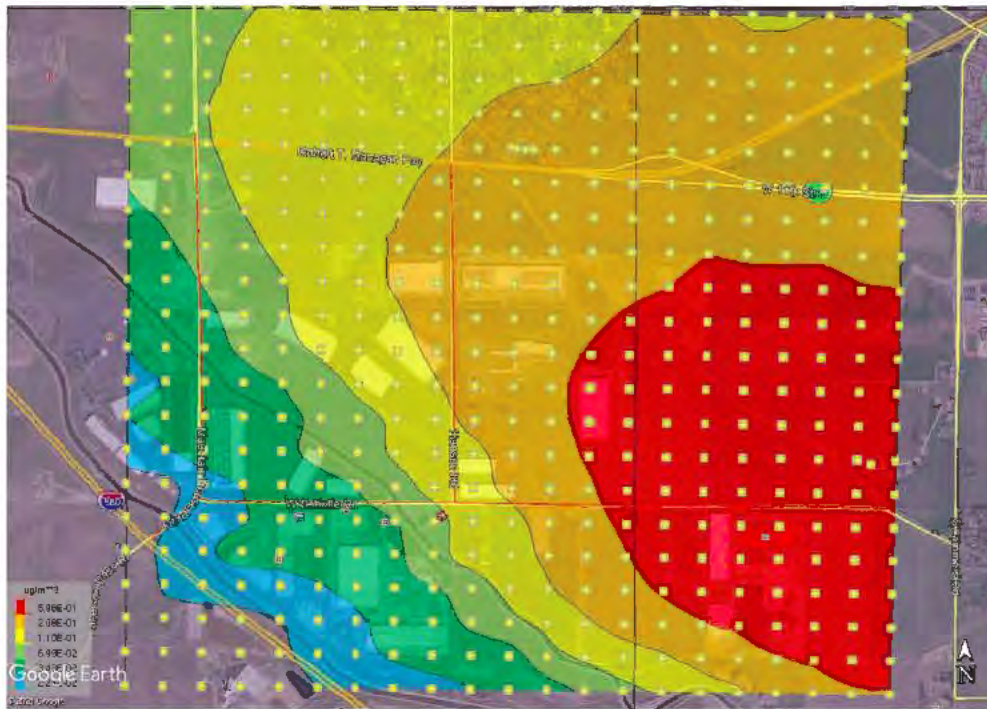


Figure 4: Health Risk From 15-Minute Maximum Idling

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Cont.

⁸⁰ *Id.* p. 12.
⁸¹ *Ibid.*
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Furthermore, Dr. Clark found that, even when the idling time on site is reduced to the 5-minute maximum per CARB guidance, the emissions still present a risk to the community.⁸² The concentration of DPM from idling vehicles at the closest residence on South Lammers Road was $0.861 \mu\text{g}/\text{m}^3$, equal to a cancer risk of 744 in 1,000,000.⁸³ Based on Dr. Clark's findings, the DEIR fails to adequately analyze the impacts of the Project and it is evident that the 5-minute maximum idling period will be insufficient to mitigate the impacts of the Project.

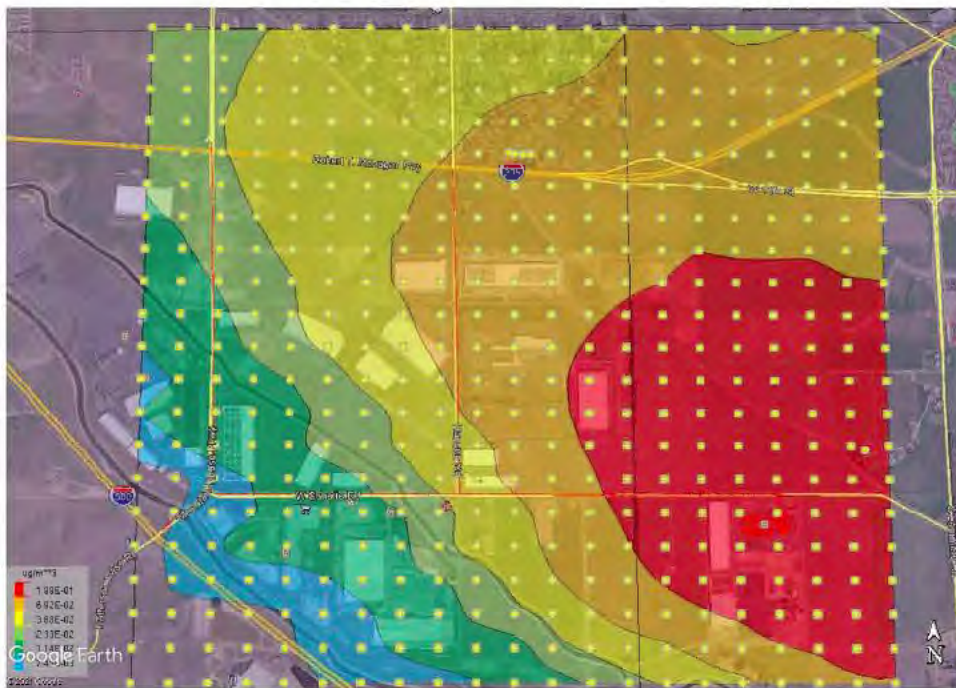


Figure 5: DPM Concentration Based on Maximum Total Idling Time of 5 Minutes

5-21
Cont.

⁸² *Ibid.*
⁸³ *Ibid.*
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Finally, Dr. Clark explains that there is a substantial risk posed by diesel emissions from trucks moving through the community which the DEIR fails to address.⁸⁴ Using the same model outputs as described above Dr. Clark identified that, as seen in Figure 6, the businesses along West Schulte Road, Hanson Road, and Mountain House Parkway are in excess of 10 µg/m³, equal to a cancer risk of 618 in 1,000,000. These concentrations are well in excess of SJVAPCD's significance threshold of 20 in 1,000,000, resulting in significant impacts.⁸⁵

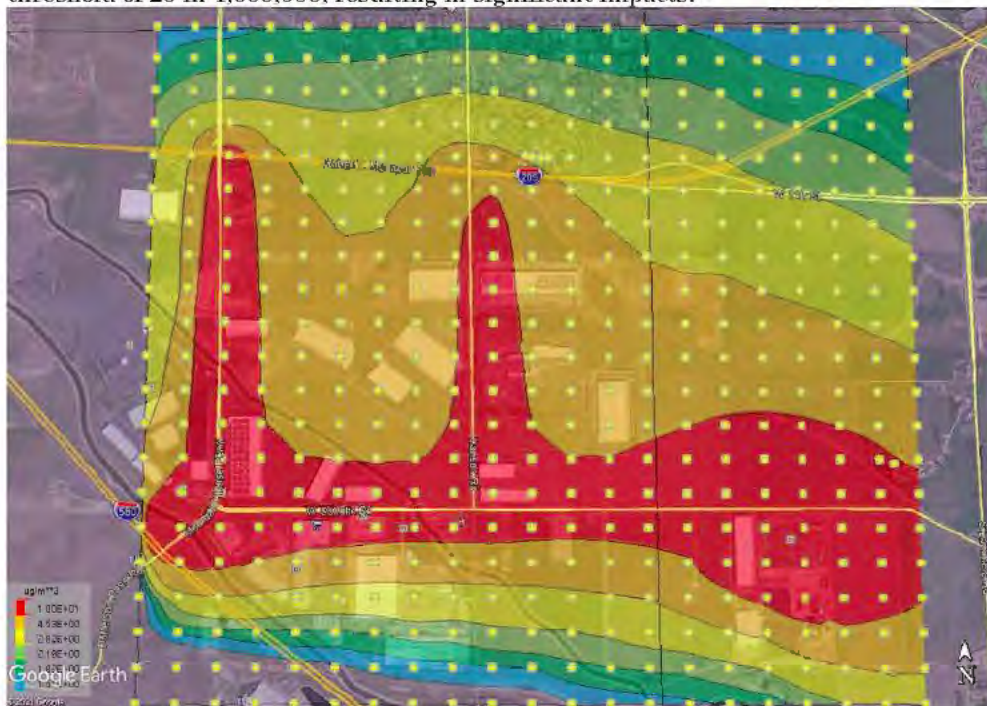


Figure 6: Concentration of DPM from Roadway Emissions Associated with Project

5-22

⁸⁴ *Id.* p. 13

⁸⁵ *Ibid.*; *Comtys. for a Better Env't v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 110-111 (when impact exceeds CEQA significance threshold, agency must disclose in the EIR that the impact is significant); *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960; *CBE v. SCAQMD*, 48 Cal.4th at 327 (impact is significant because exceeds "established significance threshold for NOx ... constitute[ing] substantial evidence supporting a fair argument for a significant adverse impact"). 5199-005j

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Dr. Clark’s research shows that the DEIR fails to analyze the substantial health risks posed by DPM emissions from the Project in violation of CEQA as the DPM concentrations modeled from offsite movement of trucks along West Schulte Road, Hansen Road, and Mountain House Parkway far exceed San Joaquin Valley Air Pollution Control District’s (“SJVAPCD”) significance threshold for TACs.

5-23

Additional mitigation measures are required to address the significant health impact that will result from the Project. Dr. Clark proposes that the County must reduce the number of vehicles that access the site and travel along the roadways, reduce the idling time even more than the proposed 5 minutes, and find alternative fuel sources for vehicles accessing the site.⁸⁶ The results of Dr. Clark’s research must be evaluated and addressed by the County in a revised EIR.

2. The DEIR Omits Analysis and Mitigation of Potentially Significant Valley Fever Exposure

The DEIR fails to properly address the Project’s threat of Coccidioidomycosis, commonly known as Valley Fever, to workers and sensitive receptors in the project area, and relies on unenforceable project design features (“PDFs”) to determine that there will not be a significant impact in violation of CEQA.

5-24

Valley Fever is a disease that can spread when persons are exposed to *Coccidioides immitis* fungus spores during ground disturbance, such as this Project’s construction.⁸⁷ Impacts to human health can be severe and cause long lasting health problems and can even result in death.⁸⁸ According to the San Joaquin County Public Health Services Department, Valley Fever cases in the County are highest in the 95377 Zip Code where the Project site is located, with a Valley Fever case rate from 8.4 – 42.8 cases per 10,000 persons each year between 2015 and 2017.⁸⁹ Sensitive receptors near the Project site, including workers and those who live nearby are at risk from exposure from disturbed dust during Project construction.⁹⁰

⁸⁶ *Ibid.*

⁸⁷ DEIR, p. 4.1-8.

⁸⁸ California Department of Public Health (“CDPH”), Valley Fever Basics (May 7, 2020), *available at* <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/ValleyFeverBasics.aspx>.

⁸⁹ San Joaquin Public Health Services, What you need to know about Valley Fever in San Joaquin County & California (June 2018), p. 1, *available at* http://www.sjphs.org/assets/20180620_HS_What%20You%20Need%20to%20know%20VF%20Brochure_Eng.pdf

⁹⁰ Clark Comments, p. 4.
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i. DEIR improperly relies on Project Design Features

The DEIR acknowledges the potential for Valley Fever exposure, however it concludes that there is a less than significant impact with respect to Valley Fever exposure and does not include enforceable mitigation measures to protect the construction workers or nearby sensitive receptors.⁹¹ The County relies on PDFs that are intended to reduce fugitive dust from Project construction to conclude that the emissions are less than significant. This approach incorrectly dismisses the significance of the Project’s actual, unmitigated Valley Fever exposure risk. With regard to Valley Fever exposure, the DEIR improperly relies on PDF-AQ-1 and PDF-AQ-2, which state that the Project requires a “fugitive Dust Control Plan” demonstrating compliance with the SJVAPCD rules and that the Project Applicant will provide all Project construction employees with a California Department of Public Health fact sheet on Valley Fever.⁹²

5-25

CEQA defines mitigation as including any measures designed to avoid, minimize, rectify, reduce, or compensate for a significant impact.⁹³ The PDFs described in the DEIR are mitigation measures because they perform these functions. For example, PDF-AQ-1’s requirement to implement a Fugitive Dust Control Plan is clearly designed as mitigation to reduce the Project’s fugitive dust impacts from grading and construction, which would serve to reduce the potential for Valley Fever exposure. Similarly, PDF-AQ-2’s requirement to distribute literature on Valley Fever risks is designed to educate construction employees of the risks of Valley Fever and thereby reduce the potential impact. While the DEIR initially recognizes the risk of Valley Fever exposure, it improperly applies PDFs prior to determining that the risk of Valley Fever is not significant thereby artificially reducing the significance.

5-26

The use of PDFs in the DEIR violates CEQA. CEQA requires that an EIR disclose the significance of an impact prior to mitigation.⁹⁴ The purpose of this analysis is both to require public disclosure of a project’s impacts, and to require the lead agency to “identify and focus on the significant environmental effects of the

5-27

⁹¹ DEIR, p. 4.1-42.

⁹² DEIR, p. 4.1-25-26; PDF-AQ-1 assumes compliance with San Joaquin Valley Air Pollution Control District Rules 8021-8071.

⁹³ 14 CCR § 15370.

⁹⁴ 14 CCR § 15126.2.

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proposed project.”⁹⁵ In evaluating the significance of an impact, an EIR must discuss the physical changes in the environment that the project will cause, including:

relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution, population concentration, the human use of the land (including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resource base such as water, historical resources, scenic quality, and public services.⁹⁶

Only after this discussion occurs may the agency identify and apply mitigation measures to reduce potentially significant impacts to less than significant levels.⁹⁷ The discussion is rendered meaningless if the EIR falsely concludes that a project’s impact is less than significant based on premature application of mitigation measures. In this case, the DEIR failed to undertake the requisite analysis required by CEQA Guidelines Section 15126.2 for the Project’s construction impacts because the DEIR did not disclose that the Project’s Valley Fever impacts were significant prior to incorporating PDF AQ-1 and PDF-AQ-2.

CEQA requires that mitigation measures be fully enforceable through permit conditions, agreements or other legally binding instruments.⁹⁸ Because the County has not characterized PDF-AQ-1 or PDF-AQ-2 as mitigation, they are not binding on the Applicant. Reliance on PDFs to reduce impacts therefore provides no assurance that the Applicant would later comply with the PDFs. The PDFs therefore fail to provide the binding mechanism required by CEQA to compel the Applicant’s compliance with mitigation following Project approval.

The Court of Appeal reiterated that mitigation must be incorporated directly into a project’s MMRP to be considered enforceable. In *Lotus v. Department of Transportation*,⁹⁹ an EIR approved by Caltrans contained several measures “[t]o help minimize potential stress on the redwood trees” during construction of a highway. Although those measures were clearly separate mitigation, the project proponents considered them “part of the project.” The EIR concluded that due to the planned implementation of those measures, the project would not result in

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⁹⁵ 14 CCR § 15126.2(a).

⁹⁶ 14 CCR § 15126.2(a).

⁹⁷ 14 CCR § 15126.4.

⁹⁸ 14 CCR §15126.4(a)(2).

⁹⁹ *Lotus v. Dep’t of Transp.* (2014) 223 Cal. App. 4th 645, 651-52. 5199-005j

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significant impacts. The Court disagreed, finding that the EIR had “disregard[ed] the requirements of CEQA” by “compressing the analysis of impacts and mitigation measures into a single issue.” The Court continued, stating “[a]bsent a determination regarding the significance of the impacts... it is impossible to determine whether mitigation measures are required or to evaluate whether other more effective measures than those proposed should be considered.”¹⁰⁰

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Similar to the inadequate analysis contained in the *Lotus* EIR, the DEIR asserts that incorporation of PDFs AQ-1 and AQ-2 would reduce the Project’s Valley Fever impacts to less than significant levels prior to mitigation. This approach improperly “compress[es] the analysis of impacts and mitigation measures into a single issue.” Even if the DEIR’s conclusions were accurate, which is unclear, the PDFs must be incorporated into the Project’s MMRP as formal mitigation measures in order to be factored into the County’s ultimate significance findings. “Simply stating that there will be no significant impacts because the project incorporates ‘special construction techniques’ is not adequate or permissible.”¹⁰¹

The County has a duty to disclose unmitigated impacts and analyze them before applying mitigation measures. As a result of its improper reliance on PDFs to achieve emissions reductions, the DEIR dismisses the potential risks to construction employees and nearby sensitive receptors that will be generated by the Project as less than significant. The DEIR must be revised and recirculated to include an accurate analysis of the Project’s potential Valley Fever impacts, and to require that any and all mitigation measures that are intended to reduce Valley Fever risks are incorporated as binding mitigation in the Project’s Mitigation Monitoring and Reporting Program (“MMRP”).

5-30

ii. Project Design Features do not address Valley Fever Risks

Even if the Fugitive Dust Control Plan under PDF-AQ-1 were included as an enforceable mitigation measure, it would not adequately mitigate the health impacts posed by Valley Fever. In his comments, Dr. Clark explains that the PDF fails to consider the potential for transmission of the fungus that cause Valley Fever.¹⁰² Since the fungus spores reside in soils and are not subject to degradation, conventional construction dust control mitigation measures do nothing to prevent

5-31

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Clark Comments, p. 4.

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the spread of Valley Fever.¹⁰³ Dr. Clark explains that the dust control techniques largely focus on visible dust or larger dust particles and not the very fine particles where the Valley Fever spores are found. PDF-AQ-1 fails to consider the size of the spores which are five times smaller than visible dust.¹⁰⁴ As Dr. Clark states in his comments, “[t]he larger PM₁₀ particles will settle out of the air column much quicker than the very fine spores. This fact allows the spores to spread in over a much greater area than the dust particles.”¹⁰⁵ The PDFs would not provide sufficient protection to on-site workers nor would they prevent the spread of Valley Fever from Project to off-site sensitive receptors.¹⁰⁶

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iii. Feasible mitigation available to reduce Valley Fever risks

CEQA imposes the duty on the County to adopt all feasible mitigation measures to reduce significant health impacts from the Project. Yet here, for the reasons discussed above, the DEIR fails to incorporate any mitigation measures that would address potential Valley Fever risks to construction employees and sensitive receptors.




In his comments, Dr. Clark proposes a variety of feasible mitigation measures the DEIR should consider and adopt in a revised DEIR to reduce potential health impacts from Valley Fever.¹⁰⁷ The following mitigation measures identified in Dr. Clark’s comments are based on actual experience during construction of projects in areas affected by the fungi that cause Valley Fever:¹⁰⁸

5-32

1. Creating a site specific work plan (SWP) as well as a sampling and analysis plan (SAP) to measure the amount of *Coccidioides immitis* present in soils at the Site prior to any soil disturbance on site. The SWP and SAP should detail the goals of the investigation(s), the collection methods, the number of samples to be collected, and the minimum detection requirements. The results of the investigation should be presented to the SJVAPCD to ensure compliance with the goals of the SAP and approval of the investigation results.

¹⁰³ *Ibid.*
¹⁰⁴ *Ibid.*
¹⁰⁵ *Ibid.*
¹⁰⁶ *Ibid.*
¹⁰⁷
¹⁰⁸ *Id.* pp. 4-8.
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|---|---|
| <p>2. Include specific requirements in the project Injury and Illness Prevention Program (as required by [California Code of Regulations] Title 8, Section 3203) regarding safeguards to prevent Valley Fever.</p> |  <p>5-33</p> |
| <p>3. Train all employees on the following issues:</p> <ul style="list-style-type: none"> • The soils may contain cocci spores; • Inhaling cocci spores may cause Valley Fever; • How to recognize symptoms of Valley Fever; these symptoms resemble common viral infections, and may include fatigue, cough, chest pain, fever, rash, headache, and body and joint ache; • Work with a medical professional with expertise in cocci as you develop your training program and consult information on public health department websites; • Workers must promptly report suspected symptoms of work-related Valley Fever to a supervisor; • Workers are entitled to receive prompt medical care if they suspect symptoms of work-related Valley Fever. Workers should inform the health care provider that they may have been exposed to cocci; • To protect themselves, workers should use control measures as outlined here. |  <p>5-34</p> |
| <p>4. Control dust exposure:</p> <ul style="list-style-type: none"> • Consult with the SJVAPCD and with California Occupational Safety and Health Administration (“Cal/OSHA”) compliance programs regarding meeting the requirements of dust control plans and for specific methods of dust control. These methods may include wetting the soil with water or a Dust Suppressant(s) to all unvegetated areas to limit visible dust emissions (VDE) to 20 percent opacity while ensuring that the wetting process does not raise dust, or adversely affect the construction process; • Apply water with a mixture of Chemical Stabilizer diluted to not less than 1/20 of the concentration required to maintain a Stabilized Surface for a period of six months only on the last day of Active Operations prior to a weekend, holiday, or any other period when Active Operations will not occur for not more than four consecutive days; • Apply Chemical Stabilizers prior to high wind event; |  <p>5-35</p> |

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- Apply water to all unstabilized Disturbed Areas three times per day. Watering frequency should be increased to a minimum of four times per day if there is any evidence of visible Wind-Driven Fugitive Dust;
- Establish a vegetative ground cover within 30 days after Active Operations have ceased. Ground cover must be of sufficient density to expose less than 30 percent of unstabilized ground within 90 days of planting, and at all times thereafter;
- Apply Chemical Stabilizers within seven working days of grading completion;
- Establish vegetation on all previously disturbed areas sufficient to limit VDE to 20 percent opacity;
- Pave, apply and maintain gravel, or apply and maintain chemical/organic stabilizers/suppressants sufficient to limit VDE to 20 percent opacity;
- Provide high-efficiency particulate (“HEP”)-filtered, air-conditioned enclosed cabs on heavy equipment. Train workers on proper use of cabs, such as turning on air conditioning prior to using the equipment and keeping windows closed.
- Provide communication methods, such as 2-way radios, for use in enclosed cabs.
- Employees should be medically evaluated, fit-tested, and properly trained on the use of the respirators, and a full respiratory protection program in accordance with the applicable Cal/OSHA Respiratory Protection Standard (8 CCR 5144) should be in place.
- Provide National Institute for Occupational Safety and Health (NIOSH)- approved respirators for workers with a prior history of Valley Fever.
- Half-face respirators equipped with a minimum N-95 protection factor for use during worker collocation with surface disturbance activities. Half-face respirators equipped with N-100 or P-100 filters should be used during digging activities. Employees should wear respirators when working near earth moving machinery.
- Prohibit eating and smoking at the worksite, and provide separate, clean eating areas with hand-washing facilities.
- Avoid outdoor construction operations during unusually windy conditions or in dust storms.



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- Consider limiting outdoor construction during the Fall to essential jobs only, as the risk of cocci infection is higher during this season. 5-35
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5. Prevent transport of cocci outside endemic areas:
- Thoroughly clean equipment, vehicles, and other items before they are moved off-site to other work locations.
 - Prevent spillage or loss of Bulk Material from holes or other openings in the cargo compartment's floor, sides, and/or tailgate;
 - Load all haul trucks such that the freeboard is not less than six inches when material is transported on any paved public access road, and apply water to the top of the load sufficient to limit VDE to 20 percent opacity; or cover haul trucks with a tarp or other suitable cover.
 - Provide workers with coveralls daily, lockers (or other systems for keeping work and street clothing and shoes separate), daily changing and showering facilities.
 - Clothing should be changed after work every day, preferably at the work site.
 - Train workers to recognize that cocci may be transported offsite on contaminated equipment, clothing, and shoes; alternatively, consider installing boot-washing.
 - Post warnings onsite and consider limiting access to visitors, especially those without adequate training and respiratory protection. 5-36
6. Improve medical surveillance for employees:
- Employees should have prompt access to medical care, including suspected work-related illnesses and injuries.
 - Work with a medical professional to develop a protocol to medically evaluate employees who have symptoms of Valley Fever.
 - Consider preferentially contracting with 1-2 clinics in the area and communicate with the health care providers in those clinics to ensure that providers are aware that Valley Fever has been reported in the area. This will increase the likelihood that ill workers will receive prompt, proper and consistent medical care.
 - Respirator clearance should include medical evaluation for all new employees, annual re-evaluation for changes in medical status, and annual training, and fit-testing. 5-37

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- Skin testing is not recommended for evaluation of Valley Fever.
- If an employee is diagnosed with Valley Fever, a physician must determine if the employee should be taken off work, when they may return to work, and what type of work activities they may perform.

5-37
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Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.¹⁰⁹ Failure to include enforceable mitigation measures is considered a failure to proceed in the manner required by CEQA.¹¹⁰ In order to meet this requirement, mitigation measures must be incorporated directly into the EIR to be enforceable.¹¹¹ The DEIR fails as an informational document for its lack of clear mitigation methods.¹¹²

5-38

The DEIR must be revised and recirculated to mitigate impacts to sensitive receptors. Additionally, the County should consider the additional feasible mitigation measures proposed by Dr. Clark in a revised EIR.

3. The DEIR Fails to Analyze All Potentially Significant Air Quality Impacts

The DEIR fails to analyze the potentially significant air quality impacts from the gaseous form of diesel exhaust. As Dr. Clark explains, diesel exhaust is composed of particulate matter as well as vapor.¹¹³ The DEIR does not account for the vapor components of diesel emissions in its HRA, and thus fails as an informational document as it does not provide an analysis of the full range of the Project's potential health impacts.

5-39

A lead agency's significance determination must be supported by accurate scientific and factual data.¹¹⁴ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.¹¹⁵ These standards apply to an EIR's analysis of the air quality impacts of a Project.

¹⁰⁹ CCR §15126.4(a)(2).

¹¹⁰ *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 672.

¹¹¹ *Lotus v. Dept of Transportation* (2014) 223 Cal. App. 4th 645, 651-52.

¹¹² *Id.*

¹¹³ Clark Comments, p. 18.

¹¹⁴ 14 C.C.R. § 15064(b).

¹¹⁵ *Kings County Farm Bureau*, 221 Cal.App.3d at 732.
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In *Sierra Club v. County of Fresno*, the California Supreme Court affirmed CEQA’s mandate to protect public health and safety by holding that an EIR fails as an informational document when it fails to disclose the public health impacts from air pollutants that would be generated by a development project.¹¹⁶ In *Sierra Club*, the Supreme Court held that the EIR for the Friant Ranch Project—a 942-acre master-planned, mixed-use development with 2,500 senior residential units, 250,000 square feet of commercial space, and open space on former agricultural land in north central Fresno County—was deficient as a matter of law in its informational discussion of air quality impacts as they connect to adverse human health effects.¹¹⁷ As the Court explained, “a 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.”¹¹⁸ The Court concluded that the County’s EIR was inadequate for failing to disclose the nature and extent of public health impacts caused by the project’s air pollution. The EIR failed to comply with CEQA because the public, after reading the EIR, “would have no idea of the health consequences that result when more pollutants are added to a nonattainment basin.”¹¹⁹ CEQA mandates discussion, supported by substantial evidence, of the nature and magnitude of impacts of air pollution on public health.¹²⁰

5-40

In *Berkeley Jets*, the Court of Appeal held that an EIR must analyze the impacts from human exposure to toxic substances.¹²¹ In that case, the Port of Oakland approved a development plan for the Oakland International Airport.¹²² The EIR admitted that the Project would result in an increase in the release of TACs and adopted mitigation measures to reduce TAC emissions, but failed to quantify the severity of the Project’s impacts on human health.¹²³ The Court held

¹¹⁶ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 518–522.

¹¹⁷ *Id.* at 507–508, 518–522.

¹¹⁸ *Id.* at 519, citing *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 514–515.

¹¹⁹ *Id.* at 518. CEQA’s statutory scheme and legislative intent also include an express mandate that agencies analyze human health impacts and determine whether the “*environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.*” (Public Resources Code § 21083(b)(3) (emphasis added).) Moreover, CEQA directs agencies to “take immediate steps to identify any critical thresholds for the *health and safety of the people* of the state and take all coordinated actions necessary to prevent such thresholds being reached.” (Public Resources Code § 21000(d) (emphasis added).)

¹²⁰ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 518–522.

¹²¹ *Berkeley Jets*, 91 Cal.App.4th at 1369–1371.

¹²² *Id.* at 1349–1350.

¹²³ *Id.* at 1364–1371.

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that mitigation alone was insufficient, and that the Port had a duty to analyze the health risks associated with exposure to TACs.¹²⁴ As the CEQA Guidelines explain, “[t]he EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected.”¹²⁵

The failure to provide information required by CEQA makes meaningful assessment of potentially significant impacts impossible and is presumed to be prejudicial.¹²⁶ Challenges to an agency’s failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project’s environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency’s factual conclusions.¹²⁷ Courts reviewing challenges to an agency’s approval of an EIR based on a lack of substantial evidence will “determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements.”¹²⁸

CARB defines diesel exhaust as a complex mixture of inorganic and organic compounds that exists in gaseous, liquid, and solid phases.¹²⁹ CARB and the United States Environmental Protection Agency (“U.S. EPA”) identify 40 components of diesel exhaust as suspected human carcinogens, including formaldehyde, 1,3-butadiene, and benzo[a]pyrene.¹³⁰ The gas and particle components both contribute to health risks.¹³¹ The inhalation unit risk factor identified by OEHHA for use in risk assessments is for the DPM fraction of diesel exhaust and not the vapor phase components identified by CARB and U.S. EPA.¹³² Here, the County only used the DPM fraction of diesel exhaust in its analysis of the construction and operational emissions and failed to analyze the full range of TAC impacts from the Project.¹³³

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¹²⁴ *Id.*

¹²⁵ 14 C.C.R. § 15003(b).

¹²⁶ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236–1237.

¹²⁷ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

¹²⁸ *Id.* (internal quotations omitted).

¹²⁹ Clark Comments, p. 17.

¹³⁰ *Id.* p. 18.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

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By failing to include an analysis of the additional TAC components of diesel exhaust, the DEIR does not provide a full picture of the Projects potential impacts and fails as an informational document as required by CEQA. The County must update the HRA with the TAC impacts included and include the results in a revised and recirculated EIR.

5-42

4. The DEIR’s Air Quality Mitigation Measures are Insufficient to Reduce the Project’s Significant Impacts

The DEIR fails to demonstrate that the proposed mitigation measures will be effective in reducing the Project’s significant air quality impacts. The DEIR states that the Project would exceed the SJVAPCD threshold for NO_x during operation and concludes that the Project would potentially conflict with or delay implementation of the SJVAPCD attainment plans and would result in a potentially significant impact.¹³⁴ The DEIR explains further that the “[i]mplementation of Mitigation Measure (“MM”)-AQ-1 through MM-AQ3 would reduce the Project’s impacts; however, impacts would remain significant and unavoidable.” CEQA requires that an EIR discuss mitigation measures that can minimize a project’s significant environmental effects.¹³⁵ A reviewing court will not defer to an agency’s determination that mitigation measures will work when their efficacy is not apparent and there is no evidence in the record showing that they will be effective in remedying the identified environmental problem.¹³⁶ Here, the DEIR offers no evidence in support of the claim that the mitigation measures proposed would reduce the Project’s impacts.

5-43

i. Mitigation Measure MM-AQ-1 does not reduce the Project’s impacts

MM-AQ-1 requires that the Project implement a Transportation Demand Management (“TDM”) program to “facilitate increased opportunities for bicycling and pedestrian travel, as well as provide the resources, means, and incentives for ride-sharing and carpooling to reduce vehicle miles traveled and associated criteria air pollutant emissions.”¹³⁷ The DEIR requires that the following components be included in the TDM program:

5-44

¹³⁴ DEIR, p. 4.1-34.

¹³⁵ PRC §§ 21002, 21002.1(a), 21100(b)(3), 21151, *see also*, CCR § 15126.4

¹³⁶ *Sierra Club v. County of San Diego* (2014) 2321 Cal.4th 1152, 1168.

¹³⁷ DEIR, pp. 4.1-43-44

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“Bicycle and Pedestrian Travel

- a. Provide bicycle parking facilities of one bike rack space per 20 vehicle/employee parking spaces or to meet demand, whichever results in the greater number of bicycle racks.
- b. Provide shower and locker facilities to encourage employees to bike and/or walk to work of one shower and three lockers per every 25 employees.

Ride-Sharing and Commute Reduction

- c. Promote ridesharing programs through a multifaceted approach, such as designating a certain percentage of parking spaces for ridesharing vehicles; designating adequate passenger loading and unloading and waiting areas for ridesharing vehicles; or providing a website or message board for coordinating rides.

Implement marketing strategies to reduce commute trips. Information sharing and marketing are important components to successful commute trip-reduction strategies. Implementing commute trip-reduction strategies without a complementary marketing strategy would result in lower vehicle miles traveled reductions. Marketing strategies may include new employee orientation of trip reduction and alternative mode options, event promotions, or publications.¹³⁸

In his analysis of the DEIR, Dr. Clark found the assertion that MM-AQ-1 will have any significant impact on criteria pollutant emissions to be false. Dr. Clark points out in his comments that only 1.77 percent of the Project’s projected annual operational mobile source emissions will come from passenger vehicles, while the trucks using the site account for the remaining 98.23% of the NO_x emissions from mobile sources.¹³⁹

Mr. Smith separately points out why these measures would be ineffective in his comments.¹⁴⁰ As Mr. Smith explains, the Project location is immediately served by Schulte Road, a two-lane road with narrow shoulders, no sidewalks, no street lighting, and unimproved drainage that is not connected to residential areas within comfortable walking or bicycling range.¹⁴¹ Additionally, local weather patterns which include extremely high temperatures from late spring to early fall make cycling or walking an uncomfortable regular commute mode.¹⁴² Finally, Mr.

5-44
Cont.

5-45

¹³⁸ *Ibid.*

¹³⁹ Clark Comments, p. 15.

¹⁴⁰ Smith Comments

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

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Smith points out that warehouses generally operate on a two-shift or around-the-clock basis, resulting in employee shifts that begin and/or end in hours of darkness, further reducing the likelihood that employees will choose to cycle or walk to work.¹⁴³

5-45
Cont.

With regard to the ride-sharing components of MM-AQ-1, Mr. Smith observes that several issues limit the effectiveness of the measure. First, multiple shift work limits the pool of on-site workers who might have similar enough residence locations and commute times to enable carpooling, and limits the opportunity for pooling with workers at nearby employers since shifts may not match.¹⁴⁴ Second, truck drivers based at the site may have common start times, but due to variabilities in traffic conditions, service times at load/off-load points and differing route lengths on differing days, their variable return times further limit carpooling opportunities. Third, the inclusion of passenger spaces for loading and unloading and waiting, while important in urban settings for carpooling, do not serve any purpose in a highly dispersed non-urban setting such as the Project's location.¹⁴⁵

5-46

The above observations taken together show that MM-AQ-1 will have an insubstantial impact on the Project's Criteria Air Pollutant impacts, and will result in an insubstantial reduction in air quality impacts. The mitigation measure therefore does not minimize the increased impacts that would be created from implementation of the Project to less than significant levels. The County must address the MM-AQ-1's ineffectiveness in a revised DEIR.

5-47

5. The DEIR Fails to Evaluate Cumulative Air Quality Impacts

CEQA requires analysis of cumulative impacts, defined as "two or more individual effects which, when considered together, are considerable."¹⁴⁶ Such impacts may "result from individually minor but collectively significant projects taking place over a period of time."¹⁴⁷ Cumulatively considerable means that "the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."¹⁴⁸ CEQA Guidelines section 15130(b)(1)

5-48

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ CCR § 15355.

¹⁴⁷ CCR § 15355(b).

¹⁴⁸ CCR § 15064(h)(1).

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provides two options for analyzing cumulative impacts: (A) list “past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency, or” (B) summarize “projection contained in an adopted local, regional or statewide plan, or related planning document that describes or evaluates conditions contributing to the cumulative effect.”¹⁴⁹ “When relying on a plan, regulation or program, the lead agency should explain how implementing the particular requirements in the plan, regulation or program ensure that the project’s incremental contribution to the cumulative effect is not cumulatively considerable.”¹⁵⁰

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Cont.

Here, the County states that the cumulative impact of the Project will be significant and unavoidable, however the scope of the cumulative impacts are not analyzed fully. The cumulative impacts analysis states that the project’s maximum daily construction and operational emissions would be less than the SJVAPCD thresholds for ROG, NO_x, CO, SO_x, PM₁₀, or PM_{2.5}.¹⁵¹ As Dr. Clark explains, the County is ignoring the substantial risk posed by adjacent facilities and does not include them in the DEIR’s analysis.

5-49

The adjacent Owens-Brockway Glass Facility, located south of 148000 West Schulte Road, is a significant source of criteria pollutants in the immediate vicinity. Over the last three years of reporting to the California Air Resources Board (“CARB”) the Owens-Brockway facility released more than 88 tons of NO_x, 89.6 tons of SO_x; and 12.07 tons of particulate matter 10 microns or smaller (“PM₁₀”).¹⁵²

5-50

Reporting Year	2017	2018	2019	Average
Pollutant	tons/yr	tons/yr	tons/yr	tons/yr
ROG	0.76	0.74	0.76	0.76
CO	2.83	2.60	2.77	2.73
NO _x	90.56	85.01	89.30	88.29
SO _x	91.67	86.74	90.56	89.65
PM ₁₀	12.23	11.56	12.42	12.07
PM _{2.5}	5.89	5.72	5.89	5.83

¹⁴⁹ CCR § 15130(b)(1).

¹⁵⁰ *Id.*; see *id.* § 15130(a) (stating that the lead agency shall describe its basis for concluding that an incremental effect is not cumulatively considerable).

¹⁵¹ DEIR, p. 4.1-37.

¹⁵² Clark Comments, p. 19.

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The operational emissions from the DEIR show that the project would violate the SJVAPCD significance threshold for NO_x.¹⁵³

Reporting Year	CALEEMOD Operational Emissions	SJVAPCD Threshold
Pollutant	tons/yr	tons/yr
ROG	3.12	10
CO	8.43	100
NO _x	20.73	10
SO _x	0.09	27
PM ₁₀	11.97	15
PM _{2.5}	3.12	15

5-50
Cont.

Combining the operational emissions from these two adjacent facilities would result in violations of the NO_x, SO_x, PM₁₀ thresholds.¹⁵⁴ By ignoring the cumulative impact of adjacent facility, the County has not analyzed the full impact of the Project and the DEIR therefore fails as an informational document. The County must revise the cumulative impacts analysis in the DEIR and recirculate the DEIR for further review.

B. The DEIR Fails to Adequately Analyze Potentially Significant Noise Impacts

CEQA requires agencies to conduct noise analyses for projects that consider both the absolute noise levels expected, and the degree noise levels are expected to increase. Noise studies that rely on a single measure that excludes possible significant impacts from noise increases or noise extremes do not receive deference by reviewing courts.

5-51

In *King & Gardiner Farms, LLC v. County of Kern*, the Court of Appeal held that an agency cannot simply rely on compliance with local noise regulations to conclude there will be no significant noise impacts without considering the impacts of increases in noise.¹⁵⁵ The County approved an EIR for proposed zoning

¹⁵³ DEIR, p. 4.1-35

¹⁵⁴ Clark Comments p. 20.

¹⁵⁵ *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 894. 5199-005j

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amendments to streamline oil and gas permitting.¹⁵⁶ The EIR included an analysis of noise impacts that determined significance based solely on whether the 65 decibel day-night average (“dBA DNL”) threshold in the County General Plan would be exceeded.¹⁵⁷ The Court of Appeal reasoned that the County General Plan did not conclude that all increases in the magnitude of noise are insignificant until the 65 dBA DNL threshold is exceeded, so the General Plan “does not constitute substantial evidence that the magnitude of an increase in ambient noise is irrelevant.”¹⁵⁸ Rather, an EIR’s noise analysis should consider both the increase in noise level and the absolute noise level associated with a project in determining the significance of the project’s noise impacts.¹⁵⁹ The Court of Appeal concluded that an agency cannot exclusively rely on “a single cumulative DNL metric for determining the significance of the project’s noise impacts” while deciding “the magnitude of the increase in ambient noise is irrelevant.”¹⁶⁰

5-51
Cont.

In *Berkeley Jets*, the Court of Appeal invalidated the Port of Oakland’s EIR for expansion of the Oakland Airport because of its reliance on an improper noise standard.¹⁶¹ The EIR evaluated the significance of noise impacts based on whether the estimated level of sound would exceed 65 dB Community Noise Equivalent Level (“CNEL”).¹⁶² However, as the Court of Appeal explained, the CNEL metric—which averages noise over the course of a day—could not be the sole indicator of significant effects from noise because it does not provide a meaningful analysis of the “degree single overflights will create noise levels over and above the existing ambient noise level at a given location, and the community reaction to aircraft noise, including sleep disturbance.”¹⁶³ Therefore, the Court concluded, a revised EIR with additional study of noise impacts from flights was necessary.¹⁶⁴

5-52

Here, the DEIR explains that the Project will result in a less than significant noise impact, thus no mitigation is required. However, as detailed above, the DEIR fails to establish the existing environmental setting and bases its conclusion on the equivalent continuous sound level (“Leq”) and fails to explain how the CNEL/Ldn

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¹⁵⁶ *Id.* at 829.

¹⁵⁷ *Id.* at 830, 889.

¹⁵⁸ *Id.* at 894.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Berkeley Jets*, 91 Cal.App.4th at 1381–1382.

¹⁶² *Id.* at 1373.

¹⁶³ *Id.* at 1381–1382.

¹⁶⁴ *Id.* at 1382.

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results included in the DEIR's analysis were calculated.¹⁶⁵ This is a fatal flaw in the County's noise impact analysis, as the entire basis of the significance determination is based on unsubstantiated data. As explained in Ms. Jue's comments, the results of the County's analysis of existing and future noise levels are wholly unsupported and must be revised to provide appropriate calculations for the CNEL/Ldn figures relied on in the DEIR.¹⁶⁶

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Cont.

1. The DEIR's Significance Threshold for Construction Noise is Not Based on Substantial Evidence.

CEQA does not set a numeric threshold for determining the significance of ambient noise increases. Lead agencies may select their own thresholds. The agency's selection of a threshold of significance must be supported by substantial evidence.¹⁶⁷

The DEIR incorrectly relies on the County's Noise Ordinance, which sets a maximum noise level for construction and operational noise, as its threshold of significance. Reliance on the Noise Ordinance violates CEQA because it fails to consider whether the magnitude of changes in noise levels is significant.¹⁶⁸ The DEIR relies on a single noise threshold to determine the significance of the off-site operational noise, stating that "Project would not result in an exceedance of the County of San Joaquin noise standard for transportation sources of 65 dBA Ldn or of other applicable noise standards."¹⁶⁹

5-54

Ms. Jue explains that the DEIR's exclusive reliance on the numeric limit established in the County's standard does not provide a complete picture of the noise impacts that may result from the Project, particularly to the most sensitive receptors near the Project site, whose noise exposure will be exacerbated during the Project's operational period.¹⁷⁰ This is because the quantitative method of calculating ambient noise under on Noise Ordinance limits does not consider the magnitude of the ambient increase in noise caused by the Project on local receptors during actual construction hours. As Mr. Watry explains, by specifying the construction noise limit in terms of a 12-hour average, the effective noise "limit" for

5-55

¹⁶⁵ Jue Comments, p. 2.

¹⁶⁶ *Id.*

¹⁶⁷ 14 CCR § 15064(b); *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 884.

¹⁶⁸ *Id.* at 865.

¹⁶⁹ DEIR, p. 4.6-14

¹⁷⁰ Jue Comments, p. 3.

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an 8-hour period under the Noise Ordinance becomes 76.8 dBA, because 4 hours of “construction silence” will be averaged along with the 8 hours of construction noise.¹⁷¹ This creates an illusory threshold which fails to measure the actual human impacts that noise exposure that would cause during the Project’s construction hours.

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Cont.

The courts have held that reliance on a maximum noise level as the sole threshold of significance for noise impacts violates CEQA because it fails to consider whether the magnitude of changes in noise levels is significant.¹⁷² In *Keep our Mountains Quiet v. County of Santa Clara*,¹⁷³ neighbors of a wedding venue sued over the County of Santa Clara’s failure to prepare an EIR for a proposed project to allow use permits for wedding and other party events at a residential property abutting an open space preserve. Neighbors and their noise expert contended that previous events at the facility had caused significant noise impacts that reverberated in neighbors’ homes and disrupted the use and enjoyment of their property.¹⁷⁴ Similar to the EIR in this case, the County’s CEQA document relied on the noise standards set forth in its noise ordinance as its thresholds for significant noise exposure from the project, deeming any increase to be insignificant so long as the absolute noise level did not exceed those standards.¹⁷⁵

5-56

The Court examined a long line of CEQA cases which have uniformly held that conformity with land use regulations is not conclusive of whether or not a project has significant noise impacts.¹⁷⁶ In particular, citing *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.*, the Court explained that “the fact that residential uses are considered compatible with a [County noise ordinance maximum] noise level of 65 decibels for purposes of land use planning is not determinative in setting a threshold of significance under CEQA.”¹⁷⁷ The Court further explained that, as required by CEQA Guidelines Appendix G, § XII, subd.

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¹⁷¹ *Id.*

¹⁷² *King & Gardiner Farms, LLC*, 45 Cal.App.5th at 865.

¹⁷³ *Keep our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714.

¹⁷⁴ *Id.* at 724.

¹⁷⁵ *Id.* at 732.

¹⁷⁶ *Id.*, citing *Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1338; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881–882; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1416 (project’s effects can be significant even if “they are not greater than those deemed acceptable in a general plan”); *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354, (“CEQA nowhere calls for evaluation of the impacts of a proposed project on an existing general plan”).

¹⁷⁷ *Id.*, citing (2001) 91 Cal.App.4th 1344, 1381, 111 Cal.Rptr.2d 598 (“*Berkeley Jets*”).

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(d), the CEQA lead agency is required to “consider both the increase in noise level and the absolute noise level associated with a project” in evaluating whether a project has significant noise impacts. The Court held that evidence submitted by local residents and an expert attesting to potentially significant noise impacts amounted to substantial evidence demonstrating that the project would have potentially significant noise impacts, notwithstanding the Project’s compliance with existing noise regulations. Moreover, the Court held that the County’s reliance on the project’s compliance with noise regulations did not constitute substantial evidence supporting the County’s finding of no significant impacts.¹⁷⁸

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Cont.

Similarly here, the County relies on the Project’s purported compliance with a single numeric limit of 65 dBA from the County’s noise standard to conclude that the Project will not result in significant operational noise impacts. As in *Keep Our Mountains Quiet*, the County’s reliance on noise regulations does not provide substantial evidence to support the DEIR’s conclusion that the Project will not have significant noise impacts. The DEIR must be revised and recirculated to analyze the Project’s operational noise impacts against a meaningful significance threshold.

C. The DEIR Fails to Disclose, Analyze and Mitigate Potentially Significant Hazardous Materials Impacts

As detailed above, a lead agency’s significance determination must be supported by accurate scientific and factual data.¹⁷⁹ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.¹⁸⁰ These standards apply to an EIR’s analysis of public health impacts of a Project.

5-58

The failure to provide information required by CEQA makes meaningful assessment of potentially significant impacts impossible and is presumed to be prejudicial.¹⁸¹ Challenges to an agency’s failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project’s environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency’s factual conclusions.¹⁸² Courts reviewing challenges to an agency’s approval of an EIR based

¹⁷⁸ *Id.* at 732-734.

¹⁷⁹ CCR § 15064(b).

¹⁸⁰ *Kings County Farm Bureau*, 221 Cal.App.3d at 732.

¹⁸¹ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236–1237.

¹⁸² *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.
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on a lack of substantial evidence will “determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements.”¹⁸³

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5-58
Cont.

1. The DEIR Fails to Inform Decisionmakers and the Public About the Extent of Soil Contamination at the Site

DEIR fails to include a chapter on Hazardous Materials or any meaningful discussion of the Project’s soil contamination impacts, as required by CEQA.¹⁸⁴ Instead, the DEIR discusses the soil contamination at the site in Chapter 5: Effects Not Found to Be Significant and incorrectly defers any analysis or mitigation of potentially hazardous levels of heavy metals until after Project approval.

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5-59

An EIR must fully disclose all potentially significant impacts of a Project, and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency’s significance determination with regard to each impact must be supported by accurate scientific and factual data.¹⁸⁵ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.¹⁸⁶

Here, Project construction and operation will require grading and redistribution of soils on site that were found to contain “various metals” through a Phase II subsurface investigation.¹⁸⁷ The DEIR does not elaborate on the various metals found in the soil, however the Phase II report details the metals found on site near an ash pile leftover from the site’s prior use as a biomass energy facility.¹⁸⁸ The soil sample showed concentrations of arsenic, copper, lead, molybdenum and zinc exceeding the levels in soil commonly found in the area.¹⁸⁹ Additionally, the concentration of arsenic in the soil exceeds the Environmental Screening Levels

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¹⁸³ *Id.* (internal quotations omitted).

¹⁸⁴ CEQA Appendix G, Section IX.

¹⁸⁵ CCR § 15064(b).

¹⁸⁶ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

¹⁸⁷ DEIR, p. 5-7.

¹⁸⁸ Partner Engineering and Science, Inc., Phase II Subsurface Investigation Report, Project No. 18-217440.1, July 18, 2018, p. 2.

¹⁸⁹ *Id.* at p. 7.

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(“ESL”) identified by the San Francisco Bay Regional Water Quality Control Board (“SFBRWQCB”).¹⁹⁰ The Phase II concluded that there is evidence of various metals impacts to shallow soil beneath the subject property, but that it is not considered hazardous waste under California Code of Regulations Title 22, Division 4.5, Chapter 11 Identification and Listing of Hazardous Waste.¹⁹¹ The Phase II also states that, if the constituents of the ash pile found on site were moved off site, it may be considered hazardous; however, the soil in the area of the ash pile could be mixed with onsite soil and be reused on site.¹⁹² The Phase II recommends implementation of a soil management plan during future redevelopment activities.¹⁹³ The DEIR fails to meaningfully analyze the information found in the Phase II report, devoting only two paragraphs in the DEIR to the findings of the Phase II without accurately disclosing the severity of the impacts that the Project’s soil disturbance will cause.¹⁹⁴

5-60
Cont.

The DEIR does not fully disclose all potentially significant impacts of the Project, and does not implement any feasible mitigation to reduce those impacts to less than significant levels. Here, the DEIR’s discussion of impacts is cursory at best, and does not “reflect a good faith effort at full disclosure” as is required by CEQA.¹⁹⁵ The DEIR must fully disclose all potentially significant impacts of a Project, and implement all feasible mitigation to reduce those impacts to less than significant levels.

The DEIR must be revised and recirculated to include an analysis of existing soil contamination levels at the Project site, and to implement all necessary mitigation measures to ensure that Project construction will not expose construction employees and nearby sensitive receptors to hazardous materials.

5-61

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at p. 8. *See also*, 22 CCR § 66261

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ DEIR, p. 5-7; CEQA requires that an EIR disclose the severity of a project’s impacts and the probability of their occurrence before a project can be approved. 14 CCR §§ 15143, 15162.2(a); *CBIA v. BAAQMD*, 62 Cal.4th at 388; *Sierra Club*, at 520-21 (“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”)

¹⁹⁵ DEIR, p. 5-14. CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

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D. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate the Project’s Potentially Significant Transportation Impacts

The DEIR concludes that the transportation impacts of the Project will be less than significant. However, the analysis does not consider the full range of possible uses for the site and thus fails as an informational document.

5-62

1. The DEIR Fails to Consider Reasonably Foreseeable Traffic-Intensive Uses of the Project

The DEIR’s transportation section relies on the assumption that the warehouse will be a conventional warehouse use and does not consider other reasonably foreseeable uses for the Project that would result in significantly greater traffic intensive uses of the site. However, the DEIR is clear that the eventual tenant at the building is unknown, which means that future tenants may reasonably include high intensity warehouse uses. By disregarding reasonably foreseeable uses that would result in significantly higher traffic from the Project, the DEIR thus fails to “reflect a good faith effort at full disclosure” as is required by CEQA.¹⁹⁶

5-63

Mr. Smith identified that the DEIR evaluated the Project’s transportation impacts based on the Institute of Transportation Engineers’ publication *Trip Generation, 10th Edition* trip rates for Land Use Category 150, Warehousing and not Category 154, High Cube Transload and Short Term Storage Warehouse.¹⁹⁷ The County claims that the use of Category 150 is the more conservative because it is a higher traffic trip generating land use category than Category 154. However, Mr. Smith found this assumption to be false.¹⁹⁸

5-64

Mr. Smith explains that High Cube Logistics Warehouse building types can also be used for uses in Land Use Category 155, High Cube Fulfillment Center Warehouse and Land Use Category 156, High Cube Parcel Hub Warehouse, both of which have significantly higher trip generation rates than Categories 150 and 154.¹⁹⁹ The trip generation rates of the four land use categories named above are detailed in the table below.

¹⁹⁶ CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

¹⁹⁷ Smith Comments, p. 1.

¹⁹⁸ *Id.* p. 2.

¹⁹⁹ *Ibid.*

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USE TYPE / TIME	Trip Rate /1,000 SF	Trips at 678,900 SF	% Above LU Cat. 150 trips
150 Conventional WH	-	-	-
Daily	1.74	1181	0
AM Peak	0.17	115	50
PM Peak	0.19	129	10
154 Hi Cube Logistics WH	-	-	-
Daily	1.4	950	-20.4%
AM Peak	0.08	54	-.50%
PM Peak	0.10	68	-.47%
155 Hi Cube Fulfillment Center	-	-	-
Daily	8.19	5560	471%
AM Peak	.59	401	357 %
PM Peak	1.37	930	721%
156 Parcel Hub	-	-	-
Daily	7.75	5262	445%
AM Peak	0.70	475	412%
PM Peak	0.64	435	337%

5-64
Cont.

The table above shows is that the possible uses of the buildings could generate approximately 4.5 to 4.75 times more gross traffic (more when truck passenger car equivalencies are considered) than what was assumed in the DEIR's traffic analysis.²⁰⁰ Additionally, it could generate between more than 4.45 and 7.21 times more peak hour traffic than what was considered in the DEIR's traffic analysis.²⁰¹ The DEIR states that the eventual tenants are unknown and the potential use of the site could be warehouse, distribution and/or logistics.²⁰² Categories 155 and 156 are both reasonably foreseeable land uses based on the variety of potential future warehouse tenants at the Project site, and as such, should have been included in the DEIR's transportation analysis. As a result of the failure to analyze the significantly higher trip generation numbers, the Project's air quality and noise impact analyses underestimate impacts and are based on incomplete data. This prohibits both the decisionmakers and the public from evaluating the extent of the Project's environmental impacts. This is a fatal flaw in the DEIR's validity which must be addressed in a revised and recirculated EIR.

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²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² DEIR, p. 5-14.
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A. The DEIR Relies on Unadopted and Unverified VMT Criteria and Data

The DEIR relies on a *draft* of San Joaquin County’s Vehicle Miles Travelled (“VMT”) Thresholds Study (“Daft Study”) to show that the Project is in a low VMT area and therefore does not require further VMT analysis.²⁰³ This assertion is based on a map labeled Figure 4.7-1 in the DEIR that is reproduced from a map in the Draft Study.²⁰⁴ Mr. Smith points out two significant flaws with the use of Draft Study to justify the DEIR’s significance finding.

First, the following disclaimer is included in the Draft Study:

“This document is in draft form. A final version of this document may differ from this draft. As such, the contents of this draft document shall not be relied upon. GHD [the consulting firm performing the Thresholds Study for the County] disclaims any responsibility or liability arising from decisions made based on this draft document.”²⁰⁵

This disclaimer is clear in its wording that the data contained in the Draft Study is not to be relied on to make decisions by any agency, as was done here by the County. Additionally, the PDF version of the Draft Study that the County relied on includes unresolved review comments indicating that the Draft Study was not finalized.

Second, in his analysis, Mr. Smith discovered that the underlying data in the Draft Study is inconsistent.²⁰⁶ The mapped data relied upon in the DEIR from the San Joaquin Council of Governments (“SJCOG”) transportation model is inconsistent with tabular data in the Draft Thresholds Study from the SJCOG model.²⁰⁷ While the mapped data shows that employee VMT in the immediate area where the Schulte Project is located is at least 15 percent below the countywide average (16.19 as compared to 19.05), the tabular data from the SJCOG model represented on Thresholds Study Table 2.15 indicates that in the Tracy/Mountain House area, the employee VMT average is 24.62.²⁰⁸ As Mr. Smith explains, this means that the per employee VMT in the zone where the Project is located would

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²⁰³ Smith Comments, p. 3.

²⁰⁴ DEIR, p. 4.7-8.

²⁰⁵ County of San Joaquin, VMT Thresholds Study (July 17, 2020) p.1.

²⁰⁶ Smith Comments, p. 3.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid*

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have to be 44 percent or more *lower* than in the immediate surrounding area.²⁰⁹ There is no plausible reason for this to be the case, as the Project area is devoid of transit service, the surrounding land is either in agriculture or fallow (very few employees in either case), or developed in warehouse/distribution, agricultural processing and trucking facilities.²¹⁰ The DEIR does not address this inconsistency and bases its analysis on inconsistent and counter-intuitive data.

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Cont.

In order to rectify these errors, Mr. Smith recommends that the County obtain actual employee residence data from businesses in the area to confirm or disprove the SJCOG model results. The County must revise the DEIR to address the unsubstantiated and inadequate data and recirculate the DEIR.

VII. THE COUNTY LACKS SUBSTANTIAL EVIDENCE TO APPROVE THE PROJECT'S LOCAL LAND USE PERMITS

The Project requires a discretionary Site Approval and related ministerial approvals under local plans and codes.²¹¹ The Site Approval requires the County to make findings regarding land use consistency and environmental factors. As discussed above, the DEIR fails to disclose the Project's potentially significant, unmitigated impacts on air quality, public health, noise, and traffic. These impacts also create inconsistencies with General Plan policies which the DEIR fails to disclose and mitigate. The DEIR fails to disclose these inconsistencies. As a result of these impacts, the County is unable to make the necessary findings to approve the Project's local land use permits.

5-68

A. The County Cannot Make the Required Findings for a Site Approval Permit

The County's Site Approval process is set forth in the County Code.²¹² The County Code explains that Site Approvals are subject to specific findings prior to approval.²¹³ In order for the Development Director to approve the Site Approval application they must make the following five findings:

5-69

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ DEIR, p. 3-27.

²¹² San Joaquin Code §9-818.

²¹³ San Joaquin Code §9-818.6.

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- (a) **Consistency.** The proposed use is consistent with the goals, policies, standards, and maps of the General Plan, any applicable Master Plan, Specific Plan, and Special Purpose Plan, and any other applicable plan adopted by the County;
- (b) **Improvements.** Adequate utilities, roadway improvements, sanitation, water supply, drainage, and other necessary facilities have been provided, and the proposed improvements are properly related to existing and proposed roadways;
- (c) **Site Suitability.** The site is physically suitable for the type of development and for the intensity of development;
- (d) **Issuance Not Detrimental.** Issuance of the permit will not be significantly detrimental to the public health, safety, or welfare, or be injurious to the property or improvements of adjacent properties; an
- (e) **Compatibility.** The use is compatible with adjoining land uses.²¹⁴

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Cont.

The Project's potentially significant, unmitigated impacts on air quality, public health, noise, and traffic render the Project inconsistent with finding (d) above. Additionally, our analysis of the DEIR shows that the Project conflicts with critical elements of the County's General Plan including:

- **Public Health and Safety Element:** The Public Health and Safety Element, Air Quality Goal is intended to protect public health and welfare by implementing measures that allow the SJVAPCD to attain federal and state air quality standards.²¹⁵ The Project's unmitigated impacts render it inconsistent with the policies related to minimizing TAC emissions.
- **Noise Element:** The Noise Element establishes the County's noise land use compatibility guidelines.²¹⁶ As discussed above, the DEIR does not adequately analyze the Project's noise impacts and thus cannot be found to be consistent with any standards set forth by the General Plan.

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The County cannot make the necessary findings to approve the Project's Site Approval permit until the deficiencies in the DEIR are corrected.

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²¹⁴ San Joaquin Code §9-818.6
²¹⁵ DEIR, p. 4.1-18.
²¹⁶ DEIR, p. 4.6-8.
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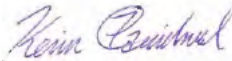
VIII. CONCLUSION

For the reasons discussed above, the DEIR for the Project is wholly inadequate under CEQA. It must be thoroughly revised to provide legally adequate analysis of, and mitigation for, all of the Project's potentially significant impacts. These revisions will necessarily require that the DEIR be recirculated for additional public review. Until the DEIR has been revised and recirculated, as described herein, the County may not lawfully approve the Project.

5-73

Thank you for your attention to these comments. Please include them in the record of proceedings for the Project.

Sincerely,



Kevin T. Carmichael

KTC:ljl

Exhibits

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