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July 20, 2022

Via Email and Overnight Mail

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Re: **Comments on the Draft Environmental Impact Report – Giovannoni Logistics Center Project proposed by Buzz Oates Construction, Inc. (PL20-0042, PL20-0043 and SCH #2021010104)**

Dear Mr. Cooper and Ms. Jones:

We are writing on behalf of the **Napa/Solano Residents for Responsible Development** (“Napa/Solano Residents”) to provide comments on the Draft Environmental Impact Report¹ prepared for the Giovannoni Logistics Center Project, PL20-0042, PL20-0043 and SCH #2021010104, (“Project”) prepared by the City of American Canyon (“City”) pursuant to the California Environmental Quality Act (“CEQA”)².

I. INTRODUCTION

The Project, proposed by Buzz Oates Construction, Inc. (“Applicant”), calls for development of up to 2.4 million square feet of cube warehouse space on a 208-acre project site located in the City of American Canyon (“City”), Napa County.³ Phase 1 of the Project would be built on 94.7 acres on the eastern portion of the site and

¹ City of American Canyon, Draft Environmental Impact Report-Giovannoni Logistics Center Project (May 20, 2022) (hereinafter, “DEIR”), *available at* <https://lf.cityofamericancanyon.org/WebLink/Browse.aspx?id=66927&dbid=1&repo=AmericanCanyon&cr=1>

² Pub. Resources Code (“PRC”) §§ 21000 *et seq.*

³ DEIR, pg. 2-4.

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would include two high-cube warehouse buildings totaling 1,069,904 square feet.⁴ One of the buildings would be rail-served by the adjacent Napa Branch Line and each building would provide docks, grade level roll-up doors and trailer parking stalls.⁵ Phase 2 consists of approximately 1.3 million square feet of high-cube warehouse on the 113.1 acre western portion of the site.⁶ No design-level site plans for Phase 2 have been prepared. The DEIR purports to analyze Phase 1 at a project level and Phase 2 at a program level.⁷

The Project site is currently undeveloped land; there are no structures on-site.⁸ Vegetation consists primarily of non-native grasslands, with seasonal wetlands and associated plant species scattered throughout the site.⁹ The headwaters of No-Name Creek are located in the northwestern corner of the property, and the Creek flows off the site at the northwestern corner of the property.¹⁰ The drainage is hydrologically connected to the Fagan Slough, which flows into the Napa River.¹¹ The Applicant proposes to preserve approximately 44.8 acres of the Project site as an open-space wetlands preserve to conserve and manage vernal pool and other wetland and grassland resources.¹² The preserve is intended to mitigate wetlands and habitat impacts caused by the development of the Project.¹³ The Project will also construct 110,766 square feet of storm drainage retention on-site, to include a network of underground piping to convey runoff to bioretention and detention basins in the northern portion of the site.¹⁴

The City owns an approximately 8 acre strip of land that bisects the site north to south, and an extension of Devlin Road is currently under construction on this parcel and is projected to be completed prior to Phase 1 of the Project.¹⁵ Vehicular access to Phase 1 would be via four driveways on Green Island Road and four driveways on Devlin Road.¹⁶ Two driveways on each road would be dedicated for truck access and the remaining two would be dedicated for passenger vehicle

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Id.*, pg. 2-1.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Id.*, pg. 2-6.

¹³ *Ibid.*

¹⁴ *Id.*, pg. 2-7.

¹⁵ *Id.*, pg. 2-1.

¹⁶ *Id.*, pg. 2-6.

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access.¹⁷ Each of the Phase 1 buildings would include 430 parking stalls, including 10 ADA stalls, 26 electric vehicle parking stalls and nine Clean Air stalls.¹⁸ Vehicular access to Phase 2 would also occur from both Green Island Road and Devlin Road.¹⁹

The DEIR fails to comply with CEQA’s basic requirement to act as an “informational document.” It lacks meaningful details in critical areas, such as air quality, health risk, biological resources, greenhouse gas (“GHG”) 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 City’s conclusions regarding the Project’s impacts and proposed mitigation. These deficiencies render the document inadequate for purposes of compliance with CEQA.

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., wetlands biologist Sarah Corbin, wildlife biologist Scott Cashen, and transportation expert Norman Marshall, whose comments and qualifications are included as Exhibit A, Exhibit B, Exhibit C, and Exhibit D, respectively.²⁰ The City must address and respond to their comments separately and fully.²¹

II. STATEMENT OF INTEREST

Napa/Solano Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential environmental impacts associated with Project development. Napa/Solano Residents includes American Canyon residents James Aken, Samantha Spangler, Evelyn Hernandez, and Alex Somodio, and members of the International Brotherhood of Electrical

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ **Exhibit A**, July 12, 2022 letter to Richard Franco from James Clark (hereinafter, “Clark Comments”); **Exhibit B**, July 19, 2022 letter to Richard M. Franco from Sarah Corbin (Shannon & Wilson) (hereinafter, “Corbin Comments”); **Exhibit C**, July 19, 2022 letter to Richard M. Franco from Scott Cashen (hereinafter, “Cashen Comments”); **Exhibit D**, July 19, 2022 letter to Richard M. Franco from Norman Marshall (hereinafter, “Marshall Comments”).

²¹ 14 Cal. Code Regs. (“CCR”) §§ 15088(a), (c).

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Workers Local 180, Plumbers & Steamfitters Local 343, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, District Council of Ironworkers and their members and their families, and other individuals that live and/or work in the City of American Canyon and Napa/Solano Counties.

Napa/Solano 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, biological resources, 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 Napa/Solano Residents and the members of the affiliated labor organizations live, work, recreate and raise their families in and around American Canyon and Napa 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.

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Napa/Solano 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 American Canyon and Napa 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.

Finally, Napa/Solano 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.²² It is in this spirit we offer these comments.

²² Pub. Resources Code § 21081(a)(3); *Citizens for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171.

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III. LEGAL BACKGROUND

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an EIR.²³ “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.”²⁴

CEQA has two primary purposes. First, CEQA is designed to inform decisionmakers and the public about the potential significant environmental effects of a project.²⁵ “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.’”²⁶ 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.”²⁷ 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.”²⁸

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.²⁹ 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.”³⁰ If the project will have a significant effect on

²³ PRC § 21100.

²⁴ *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 390 (internal quotations omitted).

²⁵ 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.”).

²⁶ *Citizens of Goleta Valley*, 52 Cal.3d at p. 564 (quoting *Laurel Heights I*, 47 Cal.3d at 392).

²⁷ *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).

²⁸ CEQA Guidelines § 15003(b).

²⁹ *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.

³⁰ CEQA Guidelines § 15002(a)(2).

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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.”³¹

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.’”³² 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.”³³ “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.’”³⁴

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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.”³⁵ CEQA requires that a project be described with

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³¹ 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.

³² *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (emphasis added) (quoting *Laurel Heights I*, 47 Cal.3d at 391, 409, fn. 12).

³³ *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).

³⁴ *Sierra Club*, 6 Cal.5th at p. 516 (quoting *Laurel Heights I*, 47 Cal.3d at 405).

³⁵ *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.

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enough particularity that its impacts can be assessed.³⁶ Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project’s impacts and undermining meaningful public review.³⁷

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Here, the DEIR’s description of the Project is inconsistent and unstable, in that the size of the Project and buildout horizon change depending on the impact being analyzed. Moreover, the DEIR does not consistently analyze both phases of the Project.

A. The DEIR Does Not Consistently Apply The Buildout Horizon Or Building Sizes Set Forth In The Project Description.

The DEIR describes the Project as an approximately 2.4 million square foot logistics center on approximately 163 acres of the approximately 208-acre Project site.³⁸ The Project is to be developed in two phases: Phase 1 would include two high-cube warehouse buildings totaling approximately 1.1 million square feet on the 94.7 acre eastern portion of the site, and Phase 2 would develop 1.3 million square feet of warehouse on the 113.1 acre western portion of the site.³⁹ With respect Project buildout horizon, the DEIR states, “For purposes of providing a conservative, worst-case scenario, this Draft EIR assumes that Phases 1 and 2 would be *developed concurrently over a period of 18 months. As a practical matter, the proposed project would buildout over a period of years or decades.* Phase 1 would be developed first, followed by Phase 2 [emphasis added].”⁴⁰

5a

As an initial matter, the DEIR’s project description is flawed in that it assumes (and purports to analyze) a buildout scenario that admittedly will not occur, i.e. concurrent development of both phases over an 18-month period. If, “as a practical matter, the project would buildout over a period of years or decades,” the DEIR’s analysis should not be based on the unrealistic assumption that both phases will be developed concurrently in a year and a half. The DEIR’s project description should set forth a buildout horizon that it reasonably expects to occur, so that the lead agency may properly assess the real-world expected impacts of the Project. The buildout horizon has important consequences for analyzing the Project’s

³⁶ CCR § 15124; see, *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 192–193.

³⁷ *Id.*

³⁸ DEIR, pg. 2-4.

³⁹ *Ibid.*

⁴⁰ *Id.*, pg. 2-9.

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significant impacts. For example, wetlands biologist Sarah Corbin notes that “a prolonged construction schedule that extends beyond 18 months and instead extends over several years (e.g., multiple nesting seasons and multiple “rainy seasons”) increases the potential for construction-related impacts to aquatic resources.”⁴¹

5a

Despite setting forth a specific assumption regarding buildout timeframe and purporting to use that assumption as the basis for its impacts analysis, the DEIR goes on to ignore its own “worst-case” assumption regarding Project buildout. Nowhere else in the DEIR is the Project described or analyzed as a concurrent (i.e., at the same time) buildout of both Phases over an 18-month period. For example, the DEIR’s air quality analysis assumes that Phase 1 construction will begin in early 2022 and be complete 10 months later, with Phase 2 construction, with Phase 2 to begin immediately following and be completed 10 months later.⁴² In other words, this analysis assumes a 20-month buildout of Phases 1 and 2 consecutively, rather than 18 months concurrently. Similarly, the DEIR’s Health Risk Assessment models diesel particulate matter (“DPM”) emissions assuming a 24-month buildout, i.e., 1 year of Phase 1 construction, immediately followed by 1 year of Phase 2 construction, followed by 30 years of operations for both Phases.⁴³ These inconsistencies matter because construction time frame is a key variable in the modeling used to estimate the Project’s construction emissions for purposes of analyzing air quality and greenhouse gas impacts.⁴⁴

5b

As with the Project’s buildout horizon, the DEIR contains inconsistent descriptions of the size of the buildings to be constructed. The Project description describes Phase 1 as consisting of two buildings totaling 1,069,904 square feet.⁴⁵ However, immediately following that description, Table 2-1 summarizes Phase 1 as including Building A (627,976 square feet) and Building B (469,512 square feet), for a total of 1,097,488 square feet.⁴⁶ For purposes of modeling air emissions, Appendix B assumes that Building A will be 601,383 square feet and Building B will be 469,521 square feet, for a total of 1,070,904 square feet.⁴⁷ By modeling air emissions using smaller building sizes than those set forth in the Project

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⁴¹ Corbin Comments, pg. 3.

⁴² DEIR, pgs. 3.2-35 and 3.2-47.

⁴³ *Id.*, pg. 3.2-60.

⁴⁴ *Id.*, Appendix B, pg. 2.

⁴⁵ *Id.*, pg. 2-4.

⁴⁶ *Id.*, pg. 2-5.

⁴⁷ DEIR, Appendix B at pg. 1.

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description, the DEIR's emissions calculations reflect lower, and potentially inaccurate, construction and operational emissions.

These discrepancies must be addressed in a revised and recirculated EIR with accurate, stable and realistic descriptions of the size and buildout horizon of the Project so that decisionmakers can adequately assess the Project's significant impacts in all impact areas.

B. The DEIR's Analysis Of Hydrological Impacts Fails To Consider Any Impacts Associated With Construction And Operation Of Phase 2 Of The Project.

Another example of the DEIR's analysis not matching the assumptions in the Project description (Phases 1 and 2 developed concurrently) is the analysis of hydrological impacts. This analysis focuses solely on Phase 1's impacts to runoff and downstream impacts, as if Phase 2 will never be constructed. While the DEIR purports to analyze stormwater and drainage impacts of both Phases, in reality only Phase 1 impacts are analyzed.

The currently undeveloped Project site includes No-Name Creek, which runs from east to west along the northern portion of the property and eventually drains into the Napa River. The Project's Phase 1 plans include a stormwater management system to collect and store runoff from the more than one million square feet of newly impervious surfaces (i.e., buildings and parking lots) that will be constructed as part of the Project.

The DEIR's analysis of hydrological impacts is based on the Preliminary Hydrological and Hydraulic Modeling study ("Hydrological Study"),⁴⁸ which purports to "model, assess, and outline how the changes in existing, and proposed land cover, along with the proposed construction of Devlin Road, will impact the hydrology and hydraulics of the creek directly downstream of the Project area and along the reach to its confluence with the Napa River."⁴⁹ Notably, the DEIR purports to use this Study to analyze hydrological impacts of both Phase 1 and Phase 2.⁵⁰ However, the Hydrological Study expressly only analyzed hydrological impacts of the development of Phase 1: "The first phase of the Project, referred to as the Giovannoni Logistics Center East and covered herein, proposes the construction

⁴⁸ DEIR, Appendix F.

⁴⁹ *Id.*, pgs. 1-2.

⁵⁰ *Id.*, pgs. 3.8-10, 3.8-12, 3.8-13.

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of two warehouses (gross square footage of the two buildings is roughly one million square feet) along with parking lots...on roughly 70 acres.”⁵¹

The Hydrological Study divides the Project area into two drainage management areas (“DMAs”) comprised of a mix of parking lot, roof area and pervious landscaping.⁵² The two DMAs roughly correspond with the footprints of the two proposed Phase 1 buildings.⁵³ The modeling implicitly assumes no development of Phase 2 on the western portion of the Project site, although Phase 2 would add more than one million square feet of impervious surfaces. The hydrological impacts of Phase 1, i.e., whether the Project’s storm management system can adequately control runoff and whether there will be downstream impacts, cannot be assessed without consideration of the additive effects of Phase 2 development.

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V. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE EXISTING BASELINE

The DEIR fails to accurately disclose the baseline environmental conditions related to the Project’s biological impacts. As a result, the DEIR lacks the necessary baseline information against which to measure the Project’s environmental impacts with regard to impacts to wetlands and wildlife habitat.

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.⁵⁴ CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.⁵⁵ 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

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⁵¹ DEIR, Appendix F, pg. 1.

⁵² *Id.*, pg. 3.

⁵³ *Id.*, Figure 1.

⁵⁴ *See, e.g., Communities for a Better Env’t v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316.

⁵⁵ CCR §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 (“*Riverwatch*”).

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environment. It is only against this baseline that any significant environmental effects can be determined.”⁵⁶

7

A. The DEIR Fails To Accurately Delineate Or Provide Any Functional Assessment Of The Existing Wetlands.

As discussed above, the Project site is currently undeveloped and contains several acres of both grassland and wetlands, which include palustrine emergent wetlands, seasonal wetlands, and vernal pools. Development of the Project will directly impact, i.e., fill and pave over, more than 4 acres of wetlands. The DEIR undertakes to analyze and mitigate these impacts, but fails at the most basic level: it fails to accurately delineate the full extent of the existing wetlands and provides no assessment at all of the wetlands’ current functions. These errors and omissions make it impossible to adequately analyze the Project’s wetlands impacts or whether the proposed mitigation will be effective.

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1. The Project Site Wetlands Are Not Accurately Delineated.

Wetlands biologist Sarah Corbin reviewed the DEIR’s wetlands impact analysis, including the supporting technical appendices, and found numerous errors and discrepancies that undermine the Project site’s wetlands delineation report (“Delineation Report”), which provides the baseline against which the DEIR evaluates biological impacts.⁵⁷ For example, several of the wetland determination survey data sheets supporting the Delineation Report incorrectly failed to identify an observed plant species as a wetlands indicator species, meaning that the area surveyed was incorrectly classified as upland rather than wetland.⁵⁸ In addition, there is a glaring inconsistency with respect to a wetland area identified as Wetland IW-9 in the Delineation Report.⁵⁹ Wetland IW-9 is an isolated linear wetland in the southeast portion of the Project area that would partially coincide with or be immediately adjacent to the Project development footprint.⁶⁰ However, that wetland is absent from the October 2016 Confirmed Aquatic Resources Delineation Map, and this absence is carried through in the DEIR figures and analysis. Ms. Corbin finds that there “is no wetland determination data sheet to support the wetland’s inclusion or exclusion and no discussion of the change in the DEIR or supporting

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⁵⁶ *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

⁵⁷ Corbin Comments, pgs. 1-2.

⁵⁸ *Id.*, pg. 2.

⁵⁹ *Id.*, pg. 4.

⁶⁰ *Ibid.*

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documents.”⁶¹ These errors mean that more wetland was present on the Project site during the delineation report fieldwork than is reflected in the resulting report and ultimately in the DEIR.⁶²

The Delineation Report, and the required Army Corps of Engineers (“Corps”) Jurisdictional Determination approving it, are nearly six years old. Corps Jurisdictional Determinations are valid for five years, meaning it will need to be updated before the Project can obtain the necessary Corps permits to fill any wetlands. Even though the Jurisdictional Determination was still valid in January 2021 when the Notice of Preparation for the DEIR was published, the wetlands delineation on which the DEIR’s impact analysis is based is now out of date and does not accurately reflect current baseline conditions at the Project site. The Corps applies expiration dates to Jurisdictional Determinations because wetland boundaries are expected to change over time due to both natural (e.g., climate patterns) and human-caused activities.⁶³ Indeed, Ms. Corbin’s review of recent aerial imagery of the Project site appear to demonstrate potential wetlands that were not identified as such in the delineation report.⁶⁴ For all of the foregoing reasons, the wetlands delineation must be updated to provide a proper baseline against which the Project’s impacts can be accurately analyzed and the resulting analysis must be set forth in a revised and recirculated DEIR.

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2. The DEIR Lacks Any Assessment of Wetland Functions

Wetlands can serve a number of important functions, such as providing rest and foraging habitat for migratory waterfowl, breeding habitat for amphibians and invertebrates, flood storage potential, and filtration of pollutants and excess nutrients surface water and groundwater.⁶⁵ The DEIR does not include a functional assessment of the Project site’s existing wetlands and hence no functional impact analysis is provided (indeed, such analysis is not possible without the assessment). As Ms. Corbin explains, “[w]etlands impact analyses are incomplete without a functional assessment that evaluates hydrologic, water quality, and habitat functions of the site wetlands.”⁶⁶ Without knowing the specific functions of the wetlands being impacted, it is therefore impossible to accurately assess those

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⁶¹ *Ibid.*

⁶² *Id.*, pgs. 2-4.

⁶³ *Id.*, pg. 2.

⁶⁴ *Ibid.*

⁶⁵ *Id.*, pg. 3.

⁶⁶ *Ibid.*

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impacts or to evaluate whether mitigation will adequately replace or mitigate those lost functions. While the DEIR states that a functional assessment will be completed with the Project's Wetland Mitigation and Monitoring Plan at some later date, that will be too late for the decisionmakers to evaluate this Project's wetlands impacts or to determine whether the proposed mitigation is appropriate.

To assess the environmental impacts of a proposed project, CEQA requires that the lead agency examine the changes to existing environmental conditions that would occur if the project were implemented.⁶⁷ Because the DEIR lacks any baseline description of the existing wetlands functions, analysis of the Project's impacts and proposed mitigation measures is impossible.⁶⁸ The DEIR must be revised and recirculated after including an appropriate functional assessment and proper analysis of the Project's wetlands impacts.

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B. The DEIR Fails To Establish A Proper Baseline With Respect To Impacts To Biological Resources.

In addition to the DEIR's failure to provide a functional assessment of the Project site's wetlands, Mr. Cashen identifies additional deficiencies in the DEIR's description of the environmental setting.

First, the DEIR's conclusion that the Project would have no impact on the federally threatened vernal pool fairy shrimp is not supported by current scientific evidence. As Mr. Cashen explains, the Project site contains vernal pools and provides potential habitat for this species.⁶⁹ The DEIR relies on dry season vernal pool fairy shrimp surveys in summer of 2016 and wet season vernal pool fairy shrimp surveys in the winter of 2016-17.⁷⁰ Mr. Cashen states that the results of those surveys are outdated and can no longer be used to assume the absence of the species at the Project site.⁷¹ The DEIR provides no evidence supporting its assumption that these several years old surveys accurately describe the Project site's environmental setting as of the time the Notice of Preparation of the DEIR was posted.⁷²

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⁶⁷ See, e.g., 14 CCR § 15126.2(a).

⁶⁸ *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App. 4th 931, 953.

⁶⁹ Cashen Comments, pg. 2.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² See, 14 CCR § 15125.

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Vernal pool fairy shrimp disperse among individual pools through flooding, wind, birds, other vertebrates and various human activities.⁷³ This species can therefore rapidly colonize new pools or recolonize pools from which they have been extirpated.⁷⁴ Mr. Cashen cites several studies that recognize viable cysts can survive passage through the digestive tract of waterfowl, as well as attach to feathers of feet of wading birds, thus promoting long-distance dispersal of vernal pool fairy shrimp among pools. As thousands of vernal pool fairy shrimp were recently detected in a vernal pool near the Napa County Airport, approximately 2,700 feet from the Project site, and because waterfowl and shorebirds frequent the Napa County Airport site and the Project site, it reasonably foreseeable that birds have transported vernal pool fairy shrimp within the five years that have elapsed since the surveys supporting the DEIR were conducted. Negative results from five-year old surveys do not justify the DEIR's definitive determination that the Project will have no impact on vernal pool fairy shrimp.

The DEIR also relies on botanical field surveys conducted at the Project site in April-May 2021 and set forth in the Helm Biological Consulting report ("HBC report"). The DEIR states that based on these surveys, "no special-status plant species occur on the project site. Therefore, no impacts to special-status species would occur from construction of the proposed project. No mitigation is warranted for special-status plants."⁷⁵ Mr. Cashen explains why this conclusion is unsupported.

First, the surveys were conducted during a drought year. Many vernal pool plant species have seeds that can remain dormant for many years, an adaptation that allows them to survive drought periods.⁷⁶ The HBC report admits that nine of the rare plant species that could occur at the Project site are wetland-dependent and that below-average annual rainfall in 2020-21 could have affected the ability to detect the presence of such species.⁷⁷

Second, the HBC Report surveys did not encompass the blooming periods of all of the target species. Specifically, Napa bluecurls is an annual herb that blooms between June and October. Mr. Cashen cites evidence documenting that, of 19 specimens of Napa bluecurls collected in Napa County, all 19 were collected

⁷³ Cashen comments, pg. 2.

⁷⁴ *Ibid.*

⁷⁵ DEIR, pg. 3.3-23.

⁷⁶ Cashen Comments, pg. 4-5.

⁷⁷ DEIR, Appendix C-9, (HBC Report, App. A).

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between July and September. Pappose tarplant is an annual herb that blooms between May and November. Although the HBC Report included surveys performed on May 4 and May 17, 2021, Mr. Cashen cites evidence showing that it is extremely rare for pappose tarplant to bloom that early in Napa County; the vast majority of such specimens have been collected in September and October.⁷⁸

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Because the HBC Report surveys were not conducted when all potentially occurring rare plants would be both evident and identifiable (as required by California Department of Fish and Wildlife survey protocols), there is insufficient evidence to support the DEIR’s determination that “no special-status plan species occur on the project site.”⁷⁹

VI. THE DEIR FAILS TO DISCLOSE, ANALYZE 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.⁸⁰ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁸¹

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Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.⁸² 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.⁸³ 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.’⁸⁴

⁷⁸ Cashen Comments, pg. 4.

⁷⁹ DEIR, pg. 3.3-23.

⁸⁰ 14 CCR § 15064(b).

⁸¹ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

⁸² *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

⁸³ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁸⁴ *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

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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.’”⁸⁵

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A. The DEIR Fails To Disclose Or Adequately Analyze Transportation Impacts.

The DEIR concludes that the transportation impacts of the Project will be less than significant without mitigation. However, the transportation impacts analysis is flawed in numerous ways, most notably with respect to the Project’s vehicle miles traveled (“VMT”) impacts. In addition, the DEIR’s faulty and unsupported conclusions with respect to VMT and trip generation completely undermine the DEIR’s air quality and GHG analyses, which rely heavily on those same factors.

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1. The DEIR’s Significance Threshold For VMT is Not Based On Substantial Evidence.

The CEQA Guidelines authorize agencies to select “thresholds of significance” to assist in determining whether a project’s effect will be deemed significant.⁸⁶ Lead agencies may rely on a previously adopted regulatory threshold, or may use thresholds on a case-by-case basis.⁸⁷ In either case, the selection of a threshold of significance must be supported by substantial evidence.⁸⁸ When an impact exceeds a CEQA significance threshold, the agency must disclose in the EIR that the impact is significant.⁸⁹

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The DEIR’s VMT significance threshold is not supported by substantial evidence. The DEIR states that it relies on “established policies currently used by the OPR, Sacramento County, and the city of San Jose” in selecting its significance threshold: “a VMT impact would be identified at an industrial project if the project

⁸⁵ *Berkeley Jets*, 91 Cal.App.4th at 1355.

⁸⁶ 14 CCR § 15064.7(a); *CBIA v. BAAQMD* (2015) 62 Cal.4th 369.

⁸⁷ 14 CCR § 15064(b).

⁸⁸ 14 CCR § 15064(b).

⁸⁹ 14 CCR § 15064.3(b)(1) (vehicle miles traveled exceeding an applicable threshold of significance may indicate a significant impact); *Comtys. for a Better Env’t v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 110-111.

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VMT per employee is higher than the regional average VMT per employee.”⁹⁰ The DEIR defines “regional average VMT” as the nine county Bay Area average and asserts that this average is 23 miles per employee as reportedly stated by the City of Vallejo in its CEQA Transportation Impact Analysis Guidelines.⁹¹ However, this is the entire extent of the “analysis” performed by the City in adopting 23 miles per employee as the VMT significance threshold in this DEIR. The DEIR doesn’t make even the slightest effort to explain how Vallejo derived that number and whether it is an appropriate significance threshold for this Project. Nor is there any discussion as to why the nine county Bay Area—a region covering nearly 7000 square miles and including the full spectrum of land uses—provides a valid regional average against which to measure the impacts of this Project.

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As discussed below, the City recently applied a lower, data-based VMT threshold to analyze the impacts of a comparable commercial distribution center project located less than 2 miles from the Project site, resulting in a finding of significant VMT impacts. By contrast, the significance threshold applied to the Project lacks any supporting data or discussion, and resulted in an unsupported finding of less than significant VMT impacts. This fails to comply with CEQA’s requirements. The DEIR must be revised and recirculated to provide evidentiary support for the threshold selected for the Project, or the City must apply a more appropriate, data-based threshold to its VMT analysis.

2. The DEIR’s VMT Estimates For The Project Are Inadequate As A Matter Of Law.

Determining whether a project may have significant effects plays a critical role in the CEQA process; this determination calls for careful judgment by the lead agency, based on scientific and factual data.⁹² The CEQA Guidelines are explicit that, while the agency has discretion to choose the most appropriate methodology to evaluate a project’s VMT impacts, any assumptions used to estimate VMT “should be documented and explained in the environmental document prepared for the project.”⁹³ The Guidelines expressly apply section 15151’s standard of adequacy to the VMT analysis: “the EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision

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⁹⁰ DEIR, pg. 3.2-17.

⁹¹ *Ibid.*

⁹² 14 CCR § 15064(b)(1).

⁹³ 14 CCR § 15064.3(b)(4).

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which intelligently takes account of environmental consequences.”⁹⁴ The DEIR’s VMT analysis complies with none of these CEQA requirements, as there is essentially no analysis and its conclusions rely on wholly unsupported and unexplained assumptions. A conclusory discussion of a significant environmental impact can support a court’s determination that an EIR is inadequate as an informational document without reference to substantial evidence review.⁹⁵

The DEIR includes no analysis of the Project’s estimated VMT. Rather, it purports to pull a number from the California Statewide Travel Demand Model (“CSTDm”) with no explanation of what the model is, how the number was computed or whether it is appropriately adopted as the estimated VMT for the Project. The entirety of the VMT “analysis” for this 2.4 million square foot warehouse Project is as follows:

According to Statewide Travel Demand Model estimates, this project is located within a Traffic Analysis Zone (TAZ) with a projected VMT per employee of 16.24 miles. Because this per capita VMT rate is lower than the significance threshold of 23.0 miles, the project would be considered to have a less-than-significant impact.

The DEIR simply adopts the 16.24 number as the “Project VMT rate” with no further discussion.⁹⁶ No other information about the CSTDm is included in the DEIR; it is not even cited in the references for the Traffic Impact Study supporting the Transportation analysis.⁹⁷ The DEIR and supporting materials provide no information allowing the reader to verify the 16.24 number, and offer no explanation of what a TAZ is, what it purports to measure or why 16.24 miles per employee can simply be adopted as the estimated VMT for the Project. As transportation expert Norman Marshall states, “it is impossible to know how the DEIR arrived at 16.24 as the Project VMT using the CSTDm, because neither the DEIR nor the technical appendices contain any detail, analysis or calculations supporting that figure.”⁹⁸

⁹⁴ 14 CCR § 15064.3(b)(4), 14 CCR § 15151.

⁹⁵ *Sierra Club v. County of Fresno* (2018) 6 Cal. 5th 502, 514.

⁹⁶ *Id.*, Appendix H, pg. 20, Table 10.

⁹⁷ See DEIR, Appendix H.

⁹⁸ Marshall Comments, pg. 8.

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The California Department of Transportation (“Caltrans”), which developed the CSTDM, includes the following language on the model’s home webpage: “[t]he CSTDM provides an advanced tour/activity models to help Caltrans develop and evaluate transportation related policies and programs of projects that best meet our mobility goals. *This model is not an appropriate tool for individual project level analysis.*”⁹⁹ The DEIR does not discuss why, despite this admonition, it uses the CSTDM as the sole source for estimating this Project’s VMT impacts. As Mr. Marshall points out, regional travel models are commonly used to estimate VMT, but the statewide model is too coarse to reliably estimate VMT for any particular project.¹⁰⁰

In 2021, the City prepared an Initial Study/Mitigated Negative Declaration¹⁰¹ (“IS/MND”) for a 217,000 square foot wine distribution center located less than 2 miles from the Giovannoni Project site. In that IS/MND, the City assessed the potential VMT impacts as required by CEQA by performing data-based analyses, using multiple data sets, to estimate both the existing Napa County-wide average trip length/VMT per employee (which it adopted as the significance threshold) and the project area average trip length/VMT per employee. Notably, for that project the City used the same sets of data to derive both the significance threshold and the estimated project VMT. There, the City explained the nature of each of the data sets it utilized, the pros and cons of each, and the calculations used to derive a VMT significance threshold and project VMT. The City used CSTDM as one of several data points (while recognizing that TAZs’ imprecise geography masks localized variation) in estimating county-wide and project area VMT per employee. It found that based on the CSTDM, the Countywide average VMT per employee was estimated to be 23.7, the Citywide average VMT per employee was 38.7 and the TAZ where the project is located has a VMT per employee rate of 38.1. After its full analysis using multiple data points, however, the City found a countywide average of 12.85 miles average commute length per employee, reduced that figure by 15% consistent with OPR guidance to establish a significance threshold of 10.92 miles, and found a project area average commute length per employee of 16.28 miles. Based on those findings, the project’s VMT was a significant impact requiring mitigation.

⁹⁹ <https://dot.ca.gov/programs/transportation-planning/division-of-transportation-planning/data-analytics-services/statewide-modeling/california-statewide-travel-demand-model>

¹⁰⁰ Marshall Comments, pg. 6.

¹⁰¹ City of American Canyon, Recirculated Draft Initial Study for the SDG Commerce 217 Distribution Center Project (April 2021) (hereinafter IS/MND”), available at https://files.ceqanet.opr.ca.gov/266599-4/attachment/aVkmgEflxLtuZTq-6C_RV0W7gVOr14ykMtI6IpGrGiqEWWqdd33JzFQR6zE3azwdGO4aDixye5LNgU110.

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In stark contrast to the analysis performed for the wine distribution center IS/MND, the Giovannoni DEIR uses one data source to identify the significance threshold and another to estimate project VMT, and offers no explanation or analysis whatsoever of those numbers or whether the analyses from which they were derived are comparable. The DEIR is essentially asking the reader to compare one black box to another black box. It bears emphasizing that when the City actually performed a data-based VMT analysis of a similar project in a similar location, it came up with a significantly lower significance threshold (i.e., 10.92 miles per employee vs. 23 miles per employee.) But regardless of the actual numbers, it is clear that the Giovannoni DEIR doesn't come close to "including a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account" of the VMT impacts of the Project.¹⁰² The DEIR's discussion of VMT is so cursory that it fails to comply with the basic CEQA requirement to discuss and analyze transportation impacts and makes the DEIR invalid as an informational document as a matter of law.¹⁰³ This lack of analysis is a fatal flaw which must be addressed in a revised and recirculated EIR.

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3. The DEIR Underestimates Trip Length And Trip Generation, Which Leads To Underestimation Of GHG And Air Quality Impacts.

As explained above, the DEIR's conclusion that the Project will have no significant VMT impacts is not supported by substantial evidence, as the DEIR lacks any analysis or basis for that finding. As Mr. Marshall explains, the DEIR's chosen Project trip length (16.24 miles per employee) likely significantly underestimates average VMT per employee for the Project.¹⁰⁴ He explains why (consistent with Caltrans' admonition that the CSTDM is not appropriate for project level analysis) using large TAZs is not a reliable way of estimating average Project trip length.¹⁰⁵ He offers an alternative, more accurate method of estimating VMT per employee for this Project. He uses the U.S. Census Bureau's Longitudinal Employer-Household Dynamics ("LEHD") Origin-Destination Employment Statistics ("LODES") data that provide detailed geographic data about workers, jobs and commutes at the census block level.¹⁰⁶ Notably, the City also considered LODES data in the IS/MND discussed above. Census blocks are much smaller than

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¹⁰² See 14 CCR § 15151.

¹⁰³ *Sierra Club, supra*, 6 Cal. 5th at 514.

¹⁰⁴ Marshall Comments, pgs. 6-9.

¹⁰⁵ *Id.*, pgs. 6-8.

¹⁰⁶ *Id.*, pg. 8.

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the TAZs in the CSTDM; the City of American Canyon alone has 236 census blocks but only 2 TAZs. Therefore, the LODES data offer a more accurate look at actual commutes in the Project area than the DEIR's estimate purportedly derived from the CSTDM.

Using the LODES data, Mr. Marshall estimates average commute distances to American Canyon jobs by (1) calculating the direct ("as the crow flies") distance between the centers of each census block; (2) eliminating commutes of over 100 miles where the data may be spurious and inflate the average; and (3) multiplying by 110% to account for actual routing along roads.¹⁰⁷ The resulting average (mean) one way commute distance is 22 miles. To compare this average one-way commute distance to daily VMT per employee, the 22-mile average was further adjusted by (1) multiplying by 2 to account for round trips; (2) multiplying by 5/7 to account for a 5-day work week; and (3) multiplying by 95% to account for non-single occupant auto commutes.¹⁰⁸ The resulting daily mean VMT per employee is 29.9 which is significantly higher than the DEIR's estimate for the Project (16.24 VMT per employee) and exceeds the significance threshold adopted by the City for this Project (23.0 VMT per employee). Again, while CEQA gives lead agencies discretion to choose the most appropriate methodology to estimate a project's VMT, the assumptions underlying the analysis must be documented and explained in the EIR.¹⁰⁹ It also must contain a sufficient degree of analysis to enable decision makers to intelligently evaluate environmental impacts.¹¹⁰ The DEIR contains virtually no analysis or explanation of its VMT estimates and therefore violates CEQA because it lacks enough detail "to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project."¹¹¹

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Like the VMT analysis, the DEIR's trip generation analysis is not supported by substantial evidence, as it relies on unsupported assumptions which contradict assumptions made elsewhere in the DEIR.

First, the DEIR unreasonably and without justification assumes the lowest trip-generating uses for the Project. The DEIR estimates the number of vehicle

¹⁰⁷ *Id.*, pg. 9.

¹⁰⁸ *Ibid.*

¹⁰⁹ 14 CCR § 15064.3(b)(4).

¹¹⁰ 14 CCR § 15151.

¹¹¹ *Sierra Club, supra*, 6 Cal. 5th at 516, quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 405.

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trips using daily trip rates published in the *Trip Generation Manual* (10th Edition) (“Manual”).¹¹² However, as Mr. Marshall points out, the DEIR applies the lowest trip generation rate among several different types of high-cube warehouses.¹¹³ The DEIR uses the Manual rates of 1.4 total vehicle trips and 0.22 truck trips per day attributable to “transload and short-term storage warehouses.”¹¹⁴ The DEIR contains no information to validate the selection of transload and short-term warehouses, as opposed to fulfillment center or parcel hub warehouses which have trip generation rates several times higher. Indeed, it appears that specific tenants and uses for the Project are unknown, a fact that is accounted for elsewhere in the DEIR: “as the proposed project is a speculative warehouse development which could accommodate cold storage and accompanying TRUs, this analysis [i.e., air emissions and GHG emissions modeling] considers two project scenarios: a cold warehouse project scenario and a dry warehouse project scenario.”¹¹⁵ The DEIR’s Health Risk Assessment models cold storage uses only.¹¹⁶ Despite recognizing the uncertainty as to the type of warehouse uses the Project will ultimately employ, and specifically analyzing for cold storage uses in other parts of the DEIR, the DEIR offers no justification for assuming that the Project will employ the lowest trip-generating use (and no cold storage use) in its transportation analysis. At a minimum, the transportation analysis should have assumed the Manual’s trip generation rates for cold storage warehouses, which is 51% higher than the rate selected for total trips and more than 3 times higher than the rate for truck trips.¹¹⁷

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Second, the DEIR uses the Manual’s trip rates discussed above to project the Project’s daily trips for passenger cars (2,832 daily trips) and trucks (528 daily trips) at full buildout of the Project. However, like the prospective warehouse functions used for the trip generation rate, the daily trips estimate is inconsistent with assumptions made elsewhere in the DEIR. The DEIR estimates that the Project will employ 3,643 workers at full buildout.¹¹⁸ As Mr. Marshall points out, the employment estimate cannot be squared with the number of commute trips projected for the Project in the trip generation analysis.¹¹⁹ Mr. Marshall assumes that the 3,643 workers make two trips per day (multiply by 2 for round trip commutes), work five days a week (multiply by 5/7) and that 95% of workers

¹¹² DEIR, Appendix H, pg. 13.

¹¹³ Marshall Comments, pg. 3.

¹¹⁴ *Ibid.*

¹¹⁵ DEIR, pgs. 3.2-35 and 3.6-47.

¹¹⁶ *Id.*, pg. 3.2-60.

¹¹⁷ Marshall Comments, pgs. 3, 6.

¹¹⁸ DEIR, pg. 2-8.

¹¹⁹ Marshall Comments, pg. 5.

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commute alone (multiply by .95).¹²⁰ Using these assumptions, the Project would generate 4,944 daily commute trips, more than 2,000 trips over the number estimated by the DEIR using the unsupported trip rates in the trip generation analysis.

Finally, the DEIR claims that the truck trip rate assumed for the Project (.22 trips per 1,000 square feet) was estimated using the Manual rates and “validated using local vehicle classification counts conducted in June 2021.”¹²¹ As Mr. Marshall points out, though, the classification counts tell us only about the truck percentages in traffic in the vicinity of the proposed Project. “These percentages tell us nothing about truck trip generation for the proposed facility.”¹²²

Ultimately then, the trips lengths and trip generation rates used by the DEIR in its analysis of transportation impacts are unexplained, unsupported and/or contradicted by assumptions applied elsewhere in the DEIR. For all the reasons discussed above (and in the Marshall comments), the finding that the Project will not have significant transportation impacts—especially with respect to VMT—is not supported by substantial evidence. Moreover, these unsupported trip length and trip generation figures are key variables in the modeling used by the DEIR to analyze Project GHG and air quality impacts.¹²³ Given that the trip figures are unreasonably low, the modeling underestimates the Project’s emissions of air pollutants and GHG. The City must therefore revise and recirculate the EIR with valid, supported trip length and trip generation estimates and using those new figures, re-analyze VMT, air quality and GHG impacts.

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. *A clearly inadequate or unsupported study is entitled to no judicial deference.*”¹²⁴ 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.”¹²⁵ That is precisely the case here.

¹²⁰ *Ibid.*

¹²¹ DEIR, pg. 3.12-11.

¹²² Marshall Comments, pgs. 5-6.

¹²³ See e.g., DEIR at 3.2-50; App, B note 9, pg. 3.

¹²⁴ *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.

¹²⁵ *Berkeley Jets*, 91 Cal.App.4th at 1355; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water*

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B. The DEIR Fails to Adequately Analyze Greenhouse Gas Impacts.

The DEIR's GHG analysis states that the Project would have significant impacts if it would (1) generate GHGs, either directly or indirectly, that may have a significant impact on the environment (GHG-1), (2) conflict with any applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases (GHG-2), (3) result in potentially significant environmental impact due to wasteful, inefficient or unnecessary consumption of energy resources (GHG-3), or (4) conflict with or obstruct a state or local plan for renewable energy or energy efficiency.¹²⁶ Applying each of these significance criteria, the DEIR finds that the Project would not have significant impacts with respect to GHG emissions. As discussed below, these conclusions are not supported by substantial evidence.

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1. Impact GHG-1

The DEIR analyzes whether the Project would generate GHGs that may have a significant impact on the environment by applying the CEQA Thresholds for Evaluating the Significance of Climate Impacts, recently adopted by the Bay Area Air Quality Management District ("BAAQMD").¹²⁷ These thresholds set forth specific criteria for determining whether new land use development projects contribute their "fair share"¹²⁸ of what is required to meet California's goal of carbon-neutrality by 2045. BAAQMD's thresholds require that new projects must incorporate either A or B from the following:

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A. Projects must include, at a minimum, the following project design elements:

1. Buildings

- a. The project will not include natural gas appliances or natural gas plumbing (in both residential and nonresidential development).
- b. The project will not result in any wasteful, inefficient, or unnecessary energy usage as determined by the analysis required under CEQA Section 21100(b)(3) and Section 15126.2(b) of the State CEQA Guidelines.

Management Dist. (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.

¹²⁶ DEIR, pg. 3.6-40.

¹²⁷ [https://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa-thresholds-2022/justification-report-pdf.pdf?la=en](https://www.baaqmd.gov/~/media/files/planning-and-research/ceqa/ceqa-thresholds-2022/justification-report-pdf.pdf?la=en) ("BAAQMD Thresholds")

¹²⁸ See, *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal. 4th 204, 220-23.

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2. Transportation

a. Achieve a reduction in project-generated vehicle miles traveled (VMT) below the regional average consistent with the current version of the California Climate Change Scoping Plan (currently 15 percent) or meet a locally adopted Senate Bill 743 VMT target, reflecting the recommendations provided in the Governor’s Office of Planning and Research’s Technical Advisory on Evaluating Transportation Impacts in CEQA:

- i. Residential projects: 15 percent below the existing VMT per capita
 - ii. Office projects: 15 percent below the existing VMT per employee
 - iii. Retail projects: no net increase in existing VMT
- b. Achieve compliance with off-street electric vehicle requirements in the most recently adopted version of CALGreen Tier 2.

B. Projects must be consistent with a local GHG reduction strategy that meets the criteria under State CEQA Guidelines Section 15183.5(b).¹²⁹

In analyzing the Project’s operational GHG impacts (GHG-1), the DEIR adopts these thresholds of significance, “with minor refinements.”¹³⁰ The refinements recognize that, with respect to VMT, the BAAQMD Thresholds refer to residential, office or retail projects, but not industrial projects like this one. The DEIR adopts the BAAQMD approach used for office projects, i.e., whether the Project achieves a 15 percent reduction below the existing VMT per employee.¹³¹ In analyzing whether the Project satisfies this criterion, the DEIR relies solely on the VMT analysis contained in the Traffic Impact Study (“TIS”) prepared for the Project.¹³² The DEIR asserts a “29 percent reduction in employee VMT when compared to the existing regional VMT. As discussed [in the TIS], the region’s existing average daily employee VMT is 23 miles while the proposed project’s employee VMT would be 16.24 miles.”¹³³

As discussed in detail above, however, neither the DEIR’s VMT discussion nor the TIS on which it is based contain any analysis or information supporting the conclusion that the relevant regional average VMT is 23 miles per employee or that

¹²⁹ BAAQMD Thresholds, pg. 2.

¹³⁰ DEIR, pg. 3.6-44.

¹³¹ *Id.*, pg. 3.6-45.

¹³² *Id.*, pg. 3.6-56.

¹³³ *Ibid.*

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the Project VMT will be 16.24 miles per employee. Indeed, those conclusions are contradicted by the City’s own analysis of a similar project and by the analysis performed by transportation expert Norman Marshall. Because the DEIR’s claimed 29 percent reduction in VMT is totally unsupported, the conclusion that the Project complies with the modified BAAQMD significance thresholds adopted by the City is not supported by substantial evidence.

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2. Impact GHG-2

The DEIR purports to analyze the Project’s consistency with “the applicable plan adopted for the purpose of reducing GHG emissions.”¹³⁴ Citing BAAQMD’s CEQA Air Quality Guidelines, the DEIR states that for this impact to be less than significant, the Project must demonstrate consistency with the applicable GHG emissions reduction plan.¹³⁵ Like the BAAQMD Thresholds for evaluating climate impacts (set forth above), the BAAQMD CEQA Air Quality Guidelines define a qualified GHG reduction strategy by reference to State CEQA Guidelines section 15183.5.¹³⁶ Section 15183.5(b) sets forth specific elements for qualified GHG emissions reductions plans that may be used in later project level analysis of cumulative GHG impacts.¹³⁷ “An environmental document that relies on a greenhouse gas reduction plan for a cumulative impacts analysis must identify those requirements specified in the plan that apply to the project, and, if those requirements are not otherwise binding and enforceable, incorporate those requirements as mitigation measures...”¹³⁸

19a

The DEIR purports to assess the Project’s GHG impacts with respect to three “applicable plans adopted to reduce GHG emissions,” i.e., the California Air Resources Board (“CARB”) 2017 Scoping Plan, the Metropolitan Transportation Commission (“MTC”) Plan Bay Area 2050, and the City of American Canyon’s Energy Efficient Climate Action Plan (“EECAP”).¹³⁹ The DEIR makes no showing that any of these is a qualified GHG emissions reduction plan pursuant to CEQA Guidelines section 15183.5(b). Indeed, the DEIR expressly recognizes that American Canyon’s EECAP “does not meet the requirements to be considered a qualified GHG reduction strategy capable of being tiered from under CEQA

¹³⁴ *Id.*, pg., 3.6-46.

¹³⁵ *Ibid.*

¹³⁶ https://www.baaqmd.gov/~/media/files/planning-and-research/ceqa/ceqa_guidelines_may2017-pdf.pdf?la=en (“BAAQMD Air Quality Guidelines”), Appendix D, pg. D-25.

¹³⁷ 14 CCR § 15183.5(b)(1).

¹³⁸ 14 CCR § 15183.5(b)(2).

¹³⁹ DEIR, pg. 3.6-61.

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Guidelines section 15183.5(b).¹⁴⁰ Nor does the DEIR contain any discussion of the elements of a qualified GHG emissions reduction plan set forth in section 15183.5(b) with respect to the 2017 Scoping Plan or MTC Plan Bay Area 2040. The DEIR fails to explain why consistency with these plans is an appropriate significance threshold for GHG impacts, and the subsequent conclusion that the Project will have no significant impacts is not supported by substantial evidence.

19a

Even if the cited plans were qualified GHG emissions reduction plans, the DEIR’s analysis is riddled with holes and cannot support a finding of no significant impact. With respect to the MTC Plan Bay Area, the DEIR’s analysis simply makes no sense:

As part of the implementing framework for Plan Bay Area 2050, local governments have identified planned development areas to focus growth. The project site is within the Napa County Airport Land Use Compatibility Plan area. Thus, the proposed project would be consistent with the overall goals of Plan Bay Area, which include concentrating new investment in areas that would encourage job growth. In addition, the proposed project would be developed in an area with existing infrastructure. Therefore, the proposed project would generally not conflict with the land use concept plan in Plan Bay Area 2050.¹⁴¹

19b

What is missing from this series of seemingly unrelated sentences is any mention of GHG or any specific requirements in the plan to reduce GHG emissions. Vague assertions that the Project is “consistent with overall goals” and “generally would not conflict with land use concepts” clearly do not support a finding of consistency with an applicable plan adopted for the purpose of reducing GHG emissions.

The DEIR’s analysis of the Project’s consistency with the 2017 Scoping Plan is similarly specious. The DEIR identifies a series of nine specific emissions reduction measures from the Scoping Plan and purports to analyze the Project’s consistency with those measures.¹⁴² However, immediately before listing these measures, the DEIR states “[a]s shown in Table 3.6-6, *none of the measures are*

19c

¹⁴⁰ *Id.*, pg. 3.6-54; see also pg. 3.6-38.

¹⁴¹ DEIR, pg. 3.6-64.

¹⁴² *Id.*, Table 3.6-6 at pgs. 3.6-66—3.6-68.

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applicable to the proposed project [emphasis added].”¹⁴³ Following Table 3.6-6, the DEIR continues, “[a]s shown in Table 3.6-6, the proposed project’s implementation would not conflict with the reduction measures proposed in SB 32. As such, the proposed project would not conflict with any applicable plan, policy, or regulation adopted to reduce GHG emissions.”¹⁴⁴ The reader is left to guess how the lack of conflict with a series of inapplicable measures demonstrates consistency with an applicable plan adopted for the purpose of reducing GHG emissions.

19c

Finally, the DEIR analyzes the Project’s consistency with American Canyon’s EECAP which, again, is admittedly not a qualified GHG emissions reduction plan. Seven different GHG emissions reduction measures are identified, five of which are found to be inapplicable to the Project.¹⁴⁵ The two measures applicable to the Project are (1) new construction should have solar ready roofs that are pre-wired and ready for the installation of solar photovoltaic panels and solar water heating systems and (2) the project should reduce water use through building and landscape design and improvements.¹⁴⁶ The DEIR claims that the Project would include roof structures designed to accommodate additional weight for rooftop solar (not that it will be pre-wired and ready for installation) and would include water efficient landscaping and include water use reduction methods. The DEIR does not say that these measures will be binding and enforceable on the Project Applicant, nor are they included as mitigation measures. Unenforceable statements that the Project will comply with these two measures contained in a non-qualified GHG emissions reduction plan cannot and does not support a finding that the Project is consistent with a qualified GHG emissions reduction plan.¹⁴⁷

19d

3. Impact GHG-3

The DEIR asserts that a significant impact would occur if the Project would result in the inefficient, wasteful or unnecessary use of energy, i.e., if the Project would conflict with any of the following energy conservation goals: (1) decreasing overall per capita energy consumption, (2) decreasing reliance on fossil fuels, and (3) increasing reliance on renewable energy sources.¹⁴⁸ With respect to the first goal, the DEIR again cites the unsupported assumption that the Project will result in an

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¹⁴³ *Id.*, pg. 3.6-66.

¹⁴⁴ *Id.*, pg. 3.6-68.

¹⁴⁵ *Id.*, Table 3.6-5, pgs. 3.6-64—3.6-66.

¹⁴⁶ *Id.*, Table 3.6-5 at pg. 3.6-66.

¹⁴⁷ *Lotus v. Dep’t of Transp.* (2014) 223 Cal. App. 4th 645, 651-52.

¹⁴⁸ *Id.*, pg. 3.6-70.

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approximately 29 percent reduction in employee VMT from regional average estimates, and asserts that therefore overall energy consumption related to employee transportation would decrease from that experienced by the region's current average employee transportation behavior. Once again, the DEIR builds on its unsubstantiated VMT analysis, which undermines the conclusion that the Project will decrease overall energy consumption related to employee vehicle use. The DEIR's finding of no significant impact with respect to Impact GHG-3 is therefore not supported by substantial evidence.

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Because the DEIR's GHG analysis fails to employ appropriate significance thresholds and lacks substantial evidence supporting the finding of no significant GHG impacts, the DEIR must be revised and recirculated with an appropriate GHG analysis.

C. The DEIR Fails to Disclose, Analyze or Mitigate the Project's Potentially Significant Air Quality Impacts.

The DEIR's air quality analysis concludes, with respect to health risks to sensitive receptors, that neither the Project's construction or operation will cause a significant impact.¹⁴⁹ This conclusion is not supported by substantial evidence because the health risk assessment ("HRA") on which it is based fails to consider (1) impacts from exposure to all toxic air compounds ("TAC") in diesel exhaust, and (2) the effects on emissions from building downwash. In addition, the DEIR fails to consider and incorporate a number of feasible mitigation measures to reduce emissions of air pollutants and GHGs.

21

1. The Health Risk Assessment Fails To Consider Impacts Of TAC Emissions.

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.¹⁵⁰ 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.

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¹⁴⁹ DEIR, pg. 3.2-63.

¹⁵⁰ Clark Comments, p. 4.

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A lead agency's significance determination must be supported by accurate scientific and factual data.¹⁵¹ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.¹⁵² These standards apply to the DEIR's analysis of the air quality impacts of the Project.

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.¹⁵³ 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.¹⁵⁴ 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.”¹⁵⁵ 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.”¹⁵⁶ CEQA mandates discussion, supported by substantial evidence, of the nature and magnitude of impacts of air pollution on public health.¹⁵⁷

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¹⁵¹ 14 C.C.R. § 15064(b).

¹⁵² *Kings County Farm Bureau*, 221 Cal.App.3d at 732.

¹⁵³ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 518–522.

¹⁵⁴ *Id.* at 507–508, 518–522.

¹⁵⁵ *Id.* at 519, citing *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 514–515.

¹⁵⁶ *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).)

¹⁵⁷ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 518–522.

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In *Berkeley Jets*, the Court of Appeal held that an EIR must analyze the impacts from human exposure to toxic substances.¹⁵⁸ In that case, the Port of Oakland approved a development plan for the Oakland International Airport.¹⁵⁹ 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.¹⁶⁰ The Court held that mitigation alone was insufficient, and that the Port had a duty to analyze the health risks associated with exposure to TACs.¹⁶¹ 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."¹⁶²

The failure to provide information required by CEQA makes meaningful assessment of potentially significant impacts impossible and is presumed to be prejudicial.¹⁶³ 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.¹⁶⁴ 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."¹⁶⁵

CARB defines diesel exhaust as a complex mixture of inorganic and organic compounds that exists in gaseous, liquid, and solid phases.¹⁶⁶ 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.¹⁶⁷ The gas and particle components both contribute to health risks. 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

¹⁵⁸ *Berkeley Jets*, 91 Cal.App.4th at 1369–1371.

¹⁵⁹ *Id.* at 1349–1350.

¹⁶⁰ *Id.* at 1364–1371.

¹⁶¹ *Id.*

¹⁶² 14 C.C.R. § 15003(b).

¹⁶³ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236–1237.

¹⁶⁴ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

¹⁶⁵ *Id.* (internal quotations omitted).

¹⁶⁶ Clark Comments, p. 4.

¹⁶⁷ *Id.*, pgs. 4-5

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components identified by CARB and U.S. EPA.¹⁶⁸ Here, the City only used the DPM fraction of diesel exhaust in its analysis of the construction and operational emissions and ignores the presence of TACs being emitted with diesel exhaust.¹⁶⁹ By failing to include an analysis of the additional TAC components of diesel exhaust, the DEIR does not provide a full picture of the Project’s potential health 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.

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2. The Modeling Used For The Health Risk Assessment Failed To Account For Building Downwash.

Dr. Clark reviewed the AERMOD modeling used by the DEIR to support the HRA and found that the modeling has a significant flaw: it fails to account for the impact on air emissions from building downwash.¹⁷⁰ Building downwash occurs as wind flows over and around buildings and impacts the dispersion of pollution from nearby sources.¹⁷¹ A plume of contaminants caught in the path of this flow is drawn into the wake, temporarily trapping it in a recirculating cavity.¹⁷² This downwash effect leads to higher ground-level concentration of chemicals emitted from sources and increases as the relative difference between the release height and top of the building increases.¹⁷³ For the closest receptors to the Project site, the residences to the east of the Project, this difference will create an additional air quality impact that is not accounted for in the City’s analysis.¹⁷⁴ Omission of the building downwash effect underestimates the exposure point concentrations for receptors near the building(s). The City should update its HRA to account for this effect and include the results in a revised and recirculated EIR.

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3. The DEIR Fails to Consider and Implement All Feasible Mitigation Measures to Reduce Project Emissions.

In response to the Notice of Preparation of the DEIR for this Project, CARB provided a letter to the City stating that “the final design of the Project should include all existing and emerging zero-emission technologies to minimize diesel PM

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¹⁶⁸ *Id.*, pg. 5.

¹⁶⁹ *Id.*, pg. 5.

¹⁷⁰ *Id.*, pgs. 3-4.

¹⁷¹ *Id.*, pg. 4.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

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and oxides of nitrogen (NO_x) emissions, as well as the greenhouse gases that contribute to climate change.”¹⁷⁵ CARB also encouraged the City and the Applicant to implement the measures listed in Attachment A to its letter, in order to reduce the Project’s construction and operational air pollution emissions.¹⁷⁶ Dr. Clark echoes CARB’s suggestion, and provides his own list of mitigation measures that include CARB’s proposals and others proposed by Air Quality Management Districts in California:

1. Include contractual language in tenant lease agreements that requires tenants to use the cleanest technologies available, and to provide the necessary infrastructure to support zero-emission vehicles and equipment that will be operating on site.
2. Include contractual language in tenant lease agreements that requires all TRUs entering the project site be plug-in capable.
3. Include contractual language in tenant lease agreements that requires future tenants to exclusively use zero-emission light and medium-duty delivery trucks and vans.
4. Include contractual language in tenant lease agreements requiring all TRUs, trucks, and cars entering the Project site be zero-emission.
5. Include contractual language in tenant lease agreements that requires all heavy-duty trucks entering or on the project site to be model year 2019 or later, expedite a transition to zero-emission vehicles, and be fully zero-emission beginning in 2030.
6. Include contractual language in tenant lease agreements that requires the tenant be in, and monitor compliance with, all current air quality regulations for on-road trucks including CARB's Heavy-Duty (Tractor-Trailer) Greenhouse Gas Regulation,¹⁷⁷ Periodic Smoke Inspection Program (PSIP),¹⁷⁸ and the Statewide Truck and Bus Regulation.¹⁷⁹

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¹⁷⁵ DEIR, Appendix A, February 8, 2021 letter from Heather Arias to Brent Cooper.

¹⁷⁶ *Ibid.*, Attachment A.

¹⁷⁷ In December 2008, CARB adopted a regulation to reduce greenhouse gas emissions by improving the fuel efficiency of heavy-duty tractors that pull 53-foot or longer box-type trailers. The regulation applies primarily to owners of 53-foot or longer box-type trailers, including both dry-van and refrigerated-van trailers, and owners of the heavy-duty tractors that pull them on California highways. CARB's Heavy-Duty (Tractor-Trailer) Greenhouse Gas Regulation is available at: <https://www.arb.ca.gov/cc/hdghg/hdghg.htm>.

¹⁷⁸ The PSIP program requires that diesel and bus fleet owners conduct annual smoke opacity inspections of their vehicles and repair those with excessive smoke emissions to ensure compliance. CARB's PSIP program is available at: <https://www.arb.ca.gov/enf/hdvp/hdvp.htm>.

¹⁷⁹ The regulation requires that newer heavier trucks and buses must meet particulate matter filter requirements beginning January 1, 2012. Lighter and older heavier trucks must be replaced starting

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7. Include contractual language in tenant lease agreements restricting trucks and support equipment from idling longer than five minutes while on site.
8. Include rooftop solar panels for each proposed warehouse to the extent feasible, with a capacity that matches the maximum allowed for distributed solar connections to the grid.
9. Have truck routes clearly marked with trailblazer signs, so that trucks will not enter residential areas.
10. Limit the daily number of trucks allowed at the Proposed Project to levels analyzed in the CEQA document. If higher daily truck volumes are anticipated to visit the site, the Port as the Lead Agency should commit to re-evaluating the Proposed Project through CEQA prior to allowing this land use or higher activity level.
11. Ensure that any check-in point for trucks is well inside the Proposed Project site to ensure that there are no trucks queuing outside of the facility.
12. Establish overnight parking within the industrial building where trucks can rest overnight.
13. Establish area(s) within the Proposed Project site for repair needs.¹⁸⁰

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The DEIR fails to consider or implement these feasible mitigation measures.

D. The DEIR Fails to Disclose, Analyze or Mitigate Hydrological Impacts

Wetland biologist Sarah Corbin identifies several potentially significant hydrological impacts that are not disclosed and/or are inadequately analyzed. She also cites several ways in which the DEIR fails to demonstrate the efficacy of the proposed wetlands mitigation set forth in MM BIO-3a-3d.

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1. The DEIR Fails To Disclose Or Adequately Analyze Hydrologic Impacts.

First, as discussed above, the lack of an accurate wetlands delineation and the failure to perform any functional assessment means that the DEIR cannot and does not describe or analyze the nature and extent of wetlands impacts. This

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January 1, 2015. By January 1, 2023, nearly all trucks and buses will need to have 201 0 model year engines or equivalent. CARB's Statewide Truck and Bus Regulation is available at: <https://www.arb.ca.gov/msprog/onrdiesel/onrdiesel.htm>

¹⁸⁰ Clark Comments, pgs. 7-8.

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failure alone requires that the DEIR be revised and recirculated with a full disclosure and analysis of potentially significant wetlands impacts.

Second, the DEIR states that underground piping will convey stormwater from the Project's new pollution-generating impervious surfaces to bioretention and detention basins on the north boundary of the Project.¹⁸¹ The DEIR further identifies "passive or active control devise [sic] to allow treated stormwater to enter the wetland swale," i.e. the created wetlands in the wetland preserve area.¹⁸² However, the DEIR fails to discuss how drainage patterns to and hydrology sources in the unimpacted and created wetlands will be maintained. Without pre- and post-Project water budget analyses for the site wetlands, impacts to the "preserved" wetlands area cannot be properly evaluated and the DEIR's determination that additional wetlands will not be impacted is not supported by substantial evidence.¹⁸³

Third, the Project proposes use of a specialized biosoil in the bioretention facility to remove pollutants from stormwater runoff. However, the DEIR also states that "the wetland preserve would facilitate the natural sequestration of pollutants of stormwater leaving the project site."¹⁸⁴ Using the wetland preserve as part of the Project's post-construction stormwater management strategy (i.e., to filter pollutants) will have long term detrimental impacts to these wetlands.¹⁸⁵ CEQA requires that if a mitigation measure itself would create significant impacts, those impacts must be discussed in the EIR.¹⁸⁶ These impacts are neither described nor analyzed in the DEIR, in violation of CEQA.

Fourth, the DEIR fails to disclose or analyze potentially significant indirect impacts to the Project site wetlands. As Ms. Corbin explains, buffers around wetland areas are critical to ensuring the long-term viability of those sites and may provide habitat or corridors necessary for the ecological functioning of the wetlands.¹⁸⁷ The importance of such buffers are emphasized in the Army Corps of Engineers mitigation guidelines for vernal pools, which require at least 100 feet

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¹⁸¹ Corbin Comments, pg. 4; DEIR, pg. 3.8-13.

¹⁸² DEIR, Exh. 3.3-4.

¹⁸³ Corbin Comments, pg. 4.

¹⁸⁴ DEIR, pg. 3.8-11.

¹⁸⁵ Corbin Comments, pg. 4.

¹⁸⁶ 14 CCR § 15126.4(a)(1)(D).

¹⁸⁷ Corbin Comments, pg. 5.

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buffers “around all vernal pools and mitigation sites.”¹⁸⁸ Such buffers should consist of “native vegetation or regionally characteristic annual grassland without cut or fill as a result of adjacent development” and the “appropriate buffer width will depend on adjacent land uses.”¹⁸⁹

Here, buffer widths between wetlands and the Project footprint are not provided but the DEIR’s figure scales suggest they are less than 100 feet in many places, particularly adjacent to the Project footprint’s northern boundary.¹⁹⁰ In addition, buffers surrounding several wetland areas are identified in the DEIR as proposed landscape areas, which suggests they will not consist of “native vegetation or regionally characteristic annual grassland without cut or fill as a result of adjacent development,” per Corps guidelines. Indirect impacts to these wetland areas from disturbed or landscaped buffers are not disclosed or analyzed in the DEIR.

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Finally, the connections and corridor between the wetlands in the southeastern Project area (Wetlands IW-7 to IW-10) and the remaining wetland complex to the north and east will disappear once the Project is developed.¹⁹¹ This corridor disconnection, the overall reduction of undeveloped/unlandscaped buffer widths that will remain post-Project development and the indirect effects on the remaining site wetlands are not disclosed or analyzed in the DEIR. These potentially significant, unmitigated impacts must be fully analyzed in a revised and recirculated EIR.

2. The DEIR Contains No Evidence That Proposed Mitigation Will Be Effective.

In addition to the failure to describe and analyze potentially significant impacts to wetlands, the DEIR fails to demonstrate that the proposed mitigation measures will be effective in reducing the Project’s significant wetlands impacts. Courts do not defer to determinations 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 impact.¹⁹²

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¹⁸⁸ *Id.*, citing U.S. Army Corps of Engineers (Corps), 2016b, Draft mitigation and monitoring guidelines for vernal pools: U.S. Army Corps of Engineers South Pacific Division, November, 23 p.6, available: <https://www.spd.usace.army.mil/Portals/13/docs/regulatory/publicnotices/DVPGL.pdf>.

¹⁸⁹ *Id.*

¹⁹⁰ Corbin Comments, pg. 5.

¹⁹¹¹⁹¹ *Id.*, pg. 5.

¹⁹² *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 866

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The DEIR includes mitigation measures MM BIO-3a—BIO-3d, which would create a “wetland preserve” area adjacent to the northern boundary of the Project site.¹⁹³ This plan proposes to preserve 7.58 acres of existing seasonal wetlands and 0.13 acre of vernal pool, create 0.992 acre of seasonal wetlands in advance of or concurrent with Phase 1 development, and create 2.57 acres of seasonal wetlands and 1.13 acres of vernal pools in advance of Phase 2.¹⁹⁴ The DEIR concludes that implementation of these measures would offset impacts to the Project site wetlands “in-kind” and ensure that there is no net loss of wetland area, “thus reducing potential impacts to a level considered less than significant.”¹⁹⁵

As Ms. Corbin and Mr. Cashen explain, while the wetlands mitigation measures may result in no net loss of *wetland area*, there is no discussion, let alone evidence, to support the conclusion that the mitigation will replace lost wetland *functions and value*.¹⁹⁶ As discussed, neither the DEIR nor the supporting documentation contain any assessment of the wetland functions that will be lost by the development of the Project. Because of this failure, Ms. Corbin finds “we are unable to evaluate if the proposed mitigation will adequately replace lost wetland function.”¹⁹⁷

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Mr. Cashen echoes this criticism of the DEIR, noting that despite recognizing the impacts to several acres of wetland, “nowhere does the DEIR discuss the ecological functions of the wetlands at the Project site.”¹⁹⁸ The wetlands and surrounding grasslands on the site currently occupy more than 200 acres of undeveloped land, which provide habitat for a variety of plant and bird species. After development, the “wetland preserve” would be limited to a 44.8 acre area that would “(a) be located between the Project site and the Napa Logistics Center site [an adjacent large warehouse development]; (b) be bisected by the Devlin Road Vine Trail Extension Project, and (c) have no connectivity to any other open space lands. Thus, the preserve would function as a habitat “island” surrounded by urban (industrial) development.”¹⁹⁹ The preserve would be subject to ongoing disturbance caused by traffic, noise and human activity associated with Project operation, which would degrade the preserve's functions as wildlife habitat.²⁰⁰

¹⁹³ DEIR, pgs. 3.3-32—3.3-37

¹⁹⁴ *Id.*, pgs. 3.3-28—3.3-29.

¹⁹⁵ *Id.*, pg. 3.3-32.

¹⁹⁶ Corbin Comments, pgs. 5-9; Cashen Comments, pgs. 5-6.

¹⁹⁷ Corbin Comments, pg. 6.

¹⁹⁸ Cashen Comments, pg. 5.

¹⁹⁹ *Id.*, pg. 6.

²⁰⁰ *Ibid.*

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Given the foregoing, the failure to assess the existing wetlands functions or to analyze whether the wetland preserve will mitigate those functional losses is a glaring omission. “Although the proposed mitigation might ensure no net loss of *wetland area*, it would not ensure no net loss of wetland function and values.”²⁰¹ Without an understanding of existing wetland function, it is not possible to determine whether the proposed mitigation will in fact replace or mitigate those lost functions. The DEIR therefore lacks any evidence demonstrating that mitigation measures MM BIO-3a—3d will in fact mitigate the Project’s functional impacts to wetlands.

Ms. Corbin discusses several additional ways in which the DEIR fails to support the conclusion that the proposed wetland mitigation will actually be effective.

First, the DEIR lacks any evidence supporting the assumption that the proposed wetlands mitigation ratios will adequately mitigate the Project’s significant impacts. The Project proposes to mitigate for Phase 1 and Phase 2 impacts at 2:1 and 1:1 ratios, respectively. Both the Devlin Road and Green Island Biological Assessments, prepared for the City in connection with projects adjacent to this Project Site and included in supporting materials for the DEIR, identify 2:1 as the typical Corps and Regional Water Quality Control Board required mitigation ratios.²⁰² The Corps identifies vernal pools as “difficult to replace resources” and “regionally significant habitat types,” making vernal pool wetland creation an inherently high risk mitigation that warrants a higher than typical mitigation ratios.²⁰³ The Corps also states that mitigation ratios greater than 1:1 are typically required because “mitigation sites often provide reduced functions compared to the impacted aquatic resources.”²⁰⁴ The DEIR offers no evidence supporting the assumption that these mitigation ratios, particularly the 1:1 ratio for Phase 2, will effectively mitigate lost wetland area and functions.

Second, the DEIR lacks evidence supporting that the proposed new wetlands area can be created and maintained. Ms. Corbin cites evidence demonstrating the difficulty of wetlands creation, especially with respect to vernal pools.²⁰⁵ Successful

²⁰¹ *Ibid.*

²⁰² DEIR, Appendix C, C-6 and C-7.

²⁰³ Corbin Comments, pg. 6.

²⁰⁴ *Id.*, pg. 7, citing U.S. Army Corps of Engineers (Corps), 2015, Final 2015 regional compensatory mitigation and monitoring guidelines for South Pacific division: January, 70 p., available: <https://www.spd.usace.army.mil/portals/13/docs/regulatory/mitigation/mitmon.pdf>.

²⁰⁵ *Id.*, pg. 6.

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wetland creation is “largely driven by ability to provide appropriate hydrology,” i.e., it requires a source of water to create and maintain wetlands.²⁰⁶ The DEIR does not provide any hydrologic analysis demonstrating wetland creation potential in the proposed mitigation area. Such analysis should include a water budget analysis, typically supported by hydrology monitoring in the proposed wetland creation area.²⁰⁷ None of that analysis, crucial to assessing whether the proposed mitigation will be effective, is provided in the DEIR.

Finally, the wetland mitigation performance standards set forth in BIO MM 3-d will not ensure that such mitigation will be effective. This mitigation measure states that the basic objective of the Wetland Mitigation and Monitoring Plan is to “ensure that project wetland impacts, and compensatory mitigation proposed to offset the wetland impacts, shall provide a no-net-loss of area of wetlands, *and wetlands established/created shall be in-kind to the wetlands impacted* [emphasis added].”²⁰⁸ As previously discussed, though, the DEIR provides no assessment of the impacted wetlands’ functions. Nor is there a discussion of the impacted wetlands varied habitat conditions (e.g., isolated vs. non-isolated wetlands). Without an understanding of the impacted wetland functions, “there is no basis for establishing meaningful mitigation goals and associated meaningful performance standards to achieve no net loss.”²⁰⁹ By focusing on mitigation area size without replacing lost ecological function, the DEIR lacks any supporting evidence for its conclusion that the proposed wetland mitigation will be effective, and the plan does not comply with the State’s no net loss policy.²¹⁰

E. The DEIR Fails to Disclose, Analyze or Mitigate Biological Impacts.

1. The DEIR Fails To Adequately Analyze And Mitigate Impacts To The Swainson’s Hawk.

Mr. Cashen discusses in detail how the DEIR fails to adequately disclose or mitigate significant impacts to Swainson’s hawk, a California threatened species.²¹¹ The DEIR fails to accurately describe the Project’s significant impacts to Swainson’s

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ DEIR, pg. 3.3-33.

²⁰⁹ Corbin Comments, pg. 8.

²¹⁰ *Ibid.*

²¹¹ Cashen Comments, pgs. 7-9, 14-15.

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hawk foraging habitat, the loss of which is one of the primary threats to the species in California.²¹² The DEIR provides the following analysis of this issue:

“Based upon the limited number of Swainson’s hawk records within a 10-mile radius of the project site, there is sufficient foraging habitat in and within the vicinity of the project site. Based upon the limited number of known Swainson’s hawk to occur within a 10 mile radius of the project site and the acreage of existing foraging habitat currently protected, the proposed project would not result in significant impacts to foraging habitat directly, indirectly, or cumulatively, therefore no mitigation is warranted for Swainson’s hawk foraging habitat.”²¹³

Mr. Cashen identifies numerous flaws in this analysis.

First, while the DEIR asserts that the Project would “provide and preserve in perpetuity approximately 45 acres of open space that would include habitat currently suitable for foraging by the Swainson’s hawk,”²¹⁴ it neglects to mention or analyze the fact that the Project will also result in the net *loss* of 163 acres of foraging habitat.²¹⁵ Moreover, the DEIR’s discussion of habitat preservation fails to address that the Project will contain features (including landscaping and on-site drainage facilities) “designed and managed to discourage wildlife use of the site.”²¹⁶ Nor does this discussion address mitigation measure MM LU-3, which would incorporate measures “to reduce the bird attractant potential of the wetland area, consistent with the [Airport Land Use Compatibility Plan] policies.”²¹⁷ The DEIR’s analysis of impacts to Swainson’s hawk foraging habitat is incomplete without reconciling the attempts to preserve habitat with simultaneous efforts to discourage wildlife uses, and specifically bird uses, of the Project site.

Second, the DEIR fails to substantiate the assertion that there are only a “limited number” of Swainson’s hawk records within a 10-mile radius of the Project site. Mr. Cashen provides evidence showing numerous records of Swainson’s hawk in the vicinity of the Project site.²¹⁸

²¹² *Id.*, pg. 7.

²¹³²¹³ DEIR, pg. 3.3-24.

²¹⁴²¹⁴ *Ibid.*

²¹⁵ *Id.*, pg. 3.9-51.

²¹⁶ *Id.*, pg. 3.9-52.

²¹⁷ *Ibid.*

²¹⁸ Cashen Comments, pgs. 7-9.

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Third, the DEIR's biological survey to locate Swainson's hawk nests was limited to a single survey on April 16, 2021, during which the Applicant's biologist drove roads within one mile of the Project site to inspect trees for raptor nest structures.²¹⁹ This survey did not conform to Swainson's hawk survey protocol requiring at least three independent surveys between April 5 and April 20, and therefore provides incomplete baseline data.²²⁰ As Mr. Cashen explains, following the protocol is crucial to locating Swainson's hawk nests, because the nests are often not visible from ground level and is only detectable when one of the birds flies to or from the nest site (i.e., through extensive "sit and watch" surveying).²²¹

Fourth, the DEIR claims, without any supporting data or other evidence, that "there is sufficient foraging habitat in and within the vicinity of the project site." Mr. Cashen's analysis finds that "much of the open space that remains in the vicinity of the Project is comprised of vineyards, marshlands, or other land cover types that provide little to no value as foraging habitat for Swainson's hawk."²²²

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In an attempt to reverse the decline of California's Swainson's hawk population, California Department of Fish & Wildlife's ("CDFW") policy is that new development projects that adversely modify nesting or foraging habitat within 10 miles of an active nest should provide compensatory mitigation.²²³ Mr. Cashen cites evidence of active Swainson's hawk nests within 5 miles of the Project site,²²⁴ which triggers the need for mitigation consistent with CDFW mitigation guidelines.²²⁵

Because the Project site is known to provide foraging habitat for Swainson's hawks and because the DEIR does not require compensatory mitigation for impacts to that habitat, the Project would have unmitigated significant impacts.

Unrelated to mitigation of impacts to Swainson's hawk foraging habitat, MM BIO-1 purports to establish pre-construction survey requirements to prevent potential construction-related impacts to Swainson's hawk nesting areas. This mitigation measure contains conflicting requirements and lacks substantial

²¹⁹ DEIR, Appendix C-1, pgs. 21 and 29.

²²⁰ Cashen Comments, pg. 8.

²²¹ *Ibid.*

²²² *Ibid.*

²²³ California Department of Fish and Game. 1994. Staff report regarding mitigation for impacts to Swainson's hawks (*Buteo swainsoni*) in the Central Valley of California.

²²⁴ Cashen Comments, pg. 8, fn. 54.

²²⁵ See *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal. App. 4th 899, 947 (mitigation that requires compliance with USFWS and/or CDFW approved protocols is adequate)

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evidence demonstrating that it will be effective. MM BIO-1a states that preconstruction surveys “shall be completed for at least two survey periods immediately prior to commencement of project construction.”²²⁶ This is consistent with Swainson’s hawk survey protocols which state that “[t]o meet the minimum level of protection for the species, surveys should be completed for at least the two survey periods immediately prior to a project’s initiation.”²²⁷ However, MM BIO-1a goes on to state that “[i]f no nesting Swainson’s hawk are found during the first non-optional survey period starting March 20, then project construction may commence.”²²⁸ Allowing construction to commence during the first non-optional survey period would violate the protocol and would not ensure protection of the species.

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MM BIO-1a also requires a 1,000-foot buffer around any Swainson’s hawk nesting sites. This conflicts with CDFW mitigation guidelines that call for a ¼ mile buffer.²²⁹ The DEIR provides no evidence that a 1,000-foot buffer would be sufficient to prevent impacts, nor does it require monitoring to validate the adequacy of the reduced buffer.

For all the foregoing reasons, Project impacts on Swainson’s hawks remain potentially significant and unmitigated, and the DEIR must be revised and recirculated to fully disclose, analyze and mitigate these impacts.

2. The DEIR Fails To Adequately Analyze And Mitigate Impacts To The Golden Eagle.

A golden eagle was observed foraging at the Project site during the wildlife survey for the HBC Report in support of the DEIR.²³⁰ However, the DEIR offers no analysis of potential impacts of the Project to golden eagle foraging habitat. As discussed above, the Project will result in the net loss of more than 160 acres of potential foraging habitat, and will include features to discourage wildlife use and reduce bird attractant potential of the preserved open space. The DEIR fails to even acknowledge, let alone analyze or attempt to mitigate, Project impacts to golden eagle foraging habitat.

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²²⁶ DEIR, pg. 3.3-26.

²²⁷ Swainson’s Hawk Technical Advisory Committee. 2000 May 31. Recommended Timing and Methodology for Swainson’s Hawk Nesting Surveys in California’s Central Valley. p. 2.

²²⁸ DEIR, pg. 3.3-26.

²²⁹ California Department of Fish and Game. 1994. Staff report regarding mitigation for impacts to Swainson’s hawks (*Buteo swainsoni*) in the Central Valley of California. p. 11.

²³⁰ DEIR, pg. 3.3-25 and Appendix C-1, pg. 30.

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The DEIR does consider the possibility that Project construction activities may disturb golden eagle nests and includes MM BIO-1b to mitigate these potential impacts. As Mr. Cashen points out, however, MM BIO-1b does not require pre-construction surveys that adhere to U.S. Fish and Wildlife Service (“USFWS”) survey protocol, nor does it establish any standards for survey techniques or level of effort.²³¹ This matters because “golden eagle nests may be difficult to detect unless special techniques (e.g., aerial surveys) are implemented.”²³² In addition, MM BIO-1b provides for a 1,000-foot buffer from any golden eagle nest, which is inconsistent with USFWS guidelines which recommend a one-mile no-disturbance buffer surrounding golden eagle nesting sites. As Mr. Cashen explains, golden eagles are known to be highly sensitive to many types of disturbance and may react to human activity as far as 1,500 meters (4,921 feet) from nesting sites.²³³ While the species can develop tolerance to some forms of disturbance (e.g., hikers), there is no evidence that golden eagles can tolerate the high levels of disturbance that Project construction and operations would cause.²³⁴ The DEIR provides no evidence that a 1,000-foot buffer would adequately mitigate impacts to golden eagles nesting near the Project site.

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3. The DEIR Fails To Adequately Analyze And Mitigate Impacts To The Northern Harrier.

Northern harriers were observed foraging at the Project site during both winter and spring (breeding) seasons during surveys for the HBC Report and the DEIR recognizes that there is suitable nesting habitat throughout the Project site.²³⁵ As with Swainson’s hawk and golden eagle, the DEIR offers no analysis of the significance of up to 163 acres of habitat loss to the northern harrier, nor does it recognize the potential for lost breeding territory. As Mr. Cashen points out, the wetland preserve area would not mitigate such impacts as it does not provide suitable habitat for this species.²³⁶ Northern harriers “require a mosaic of large undisturbed habitats for nesting and foraging” while the proposed wetlands

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²³¹ Cashen Comments, pg. 16.

²³² *Ibid*, citing Pagel JE, Whittington DM, Allen GT. 2010 Feb. Interim Golden Eagle inventory and monitoring protocols; and other recommendations. Division of Migratory Birds, United States Fish and Wildlife Service. *See also* U.S. Fish and Wildlife Service. n.d. Updated Eagle Nest Survey Protocol. Available at: <<https://www.fws.gov/sites/default/files/documents/eagle-nest-survey-guidance-updated-protocol.pdf>>

²³³ Cashen Comments, pg. 16.

²³⁴ *Ibid*.

²³⁵ DEIR, pg. 3.3-25.

²³⁶ Cashen Comments, pg. 10-11.

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preserve “would be a habitat ‘island’ subject to various forms of disturbance associated with the Project.”²³⁷ While MM BIO-1c attempts to mitigate direct harms to the northern harrier via pre-construction surveys and nest buffers, it does nothing to address potential loss of foraging and breeding habitat. Nor is there any evidence in the DEIR that the required 500-foot buffer zone around northern harrier nests would be sufficient to mitigate impacts. For these reasons, the Project’s impacts on the northern harrier remain potentially significant and unmitigated.

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4. The DEIR Fails To Analyze And Mitigate Impacts To The Merlin And Ferruginous Hawk.

The merlin and ferruginous hawk have been detected immediately north of the Project site²³⁸ and the DEIR acknowledges that the Project site provides suitable foraging habitat for both species.²³⁹ The Project would directly (via loss of 163 acres of undisturbed land) and functionally (via implementation of MM LU-3) eliminate habitat for these two species. The DEIR fails to disclose, analyze or incorporate mitigation for these potentially significant impacts.

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5. The DEIR Fails To Adequately Mitigate Impacts To Breeding Birds (MM BIO-4).

The DEIR includes mitigation measure MM BIO-4, which requires a pre-construction breeding bird survey of the Project site and installation of “appropriate” buffer zones around all active nests. Mr. Cashen identifies three reasons why MM BIO-4 does not ensure that the Project’s impacts to nesting birds will be mitigated to less than significant levels.²⁴⁰

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First, MM BIO-4 fails to establish standards for: (a) nest searching techniques, (b) minimum level of effort (i.e., survey hours per unit area), and (c) qualifications of the biologist conducting the survey. As Mr. Cashen explains, the ability to successfully locate nests in the Project area is dependent on these three variables.

²³⁷ *Ibid.*

²³⁸ *Id.*, pg. 12.

²³⁹ DEIR, Appendix C-1, Table 2.

²⁴⁰ Cashen Comments, pgs. 18-20.

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While the Project site lacks trees, it provides potential habitat and nesting materials for ground-nesting birds.²⁴¹ Most ground-nesting birds construct nests that are inconspicuous and thus hard to find.²⁴² As a result, successfully locating nests of ground-nesting birds requires special techniques.²⁴³ Because MM BIO-4 does not require implementation of such techniques, it provides no assurances that the Project would avoid take of nesting birds. In addition, locating all nests within the 200+ acres Project site may require a considerable level of effort. To ensure all bird nests that may be affected by the Project are located, the DEIR must establish standards for the survey effort (e.g., minimum number of survey hours per unit area). The success of any nest-searching method depends on the surveyor's knowledge of where birds nest, how nesting birds behave, and the best time of day to search for nests, knowledge which requires training and experience.²⁴⁴ Because MM BIO-4 fails to establish standards for the "qualified biologist" that would conduct the nesting bird survey, it does not ensure the biologist would have the qualifications needed to successfully locate all nests within the Project area prior to construction.

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Second, the DEIR fails to provide evidence that the buffer sizes proposed in MM BIO-4 would prevent negative impacts to nesting birds. Mr. Cashen opines that, based on his review of the literature, the 50-foot buffer proposed for passerines and other non-raptors is grossly deficient for almost all species. Construction noise levels associated with the Project may reach 90 dBA at a distance of 50 feet.²⁴⁵ Noise at that level far exceeds the level that is deleterious to most breeding birds.²⁴⁶ Consequently, a 50-foot buffer would be insufficient to avoid significant impacts to nesting birds. For other projects, the CDFW has recommended a minimum no-disturbance buffer of 500 feet for unlisted raptors and 250 feet for other non-listed bird species.²⁴⁷

Third, there are no performance standards, or monitoring and reporting requirements, for MM BIO-4. Monitoring is essential for two reasons: (1) to validate the adequacy of the nest buffers (and implement remedial actions if

²⁴¹ *Id.*, pg. 18.

²⁴² *Ibid.*

²⁴³ *Id.*, pgs. 18-19.

²⁴⁴ *Id.*, pg. 19. *See also* Martin TE, Geupel GR. 1993. Nest-Monitoring Plots: Methods for Locating Nests and Monitoring Success. *J. Field Ornithol.* 64(4):507-519.

²⁴⁵ DEIR, p. 3.10-17.

²⁴⁶ Cashen Comments, pg. 19.

²⁴⁷ *Ibid.*

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necessary), and (2) to ensure construction workers comply with the nest buffers. Mr. Cashen states that, based on his experience, it is very difficult to ensure compliance with nest buffers unless a full-time biological monitor is present on site.

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6. The DEIR's Mitigation Measures to Mitigate Wetlands Loss are Undermined by and in Conflict with MM LU-3.

As discussed, the DEIR fails to assess existing wetland functions (including habitat function) and therefore cannot demonstrate the efficacy of wetlands mitigation. However, any efforts to use the wetland preserve area to replace lost habitat functions will also be completely undermined by the application of a separate mitigation measure, MM LU-3.

Mitigation measure MM LU-3 seeks to address potential conflicts with the Napa County Airport Land Use Compatibility Plan ("ALUCP"). The ALUCP includes provisions seeking to avoid hazards to airplanes using the Napa County Airport, which is approximately 3,000 feet from the Project's proposed wetlands preserve area. Wetlands are attractive to many types of wildlife, including birds which can pose hazards to airplanes taking off and landing at nearby airports. As a result, the FAA recommends that wetland mitigation projects be sited at least 10,000 feet from the nearest aircraft operations area (for airports serving turbine-powered aircraft).²⁴⁸

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To address this issue, MM LU-3 includes a provision requiring an assessment by a wildlife biologist of potential wildlife hazards to aviation. This assessment must "evaluate the characteristics of the emergent wetlands, drainages, other potential wildlife attractant features (i.e., ponded water) located within the open space area [i.e., the wetland preserve required by MM BIO-2 and BIO-3]."²⁴⁹ MM LU-3 specifically requires that this assessment identify management practices to "prevent the creation of attractants for large flocks or [sic] birds or other wildlife species that may present safety hazards to aviation activities."²⁵⁰ In discussing this measure, the DEIR notes that the Project will include "features that would be designed and managed to discourage wildlife use of the site."²⁵¹

²⁴⁸ Cashen Comments, pg. 14.

²⁴⁹ DEIR, pg. 3.9-52.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

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The DEIR fails to acknowledge the contradiction between, on the one hand attempting to mitigate the Project's significant impacts to wetlands by creating a wetland preserve, while on the other hand actively seeking to degrade the preserve as wildlife habitat. This conflict is yet another reason why the DEIR fails to establish that MM BIO-2 and MM BIO-3 will effectively mitigate the Project's wetlands impacts. Moreover, MM LU-3 may itself cause potentially significant impacts to wildlife, requiring that the DEIR separately disclose and analyze those impacts.²⁵²

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7. The DEIR Fails To Adequately Analyze Or Mitigate Cumulative Impacts To Biological Resources.

CEQA requires that an EIR include consideration of cumulative impacts when a project's incremental effects are cumulatively considerable.²⁵³ Among other requirements, the lead agency must define the geographical scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographical limitation used.²⁵⁴

The DEIR states "[t]he geographical scope of the cumulative biological resources analysis is a 0.5-mile radius of the project site."²⁵⁵ The DEIR provides no explanation for this 0.5-mile limitation, other than that the "project site is located at this transition between urban development and the marshes associated with the Napa River; accordingly, habitats in these areas tend to be disrupted and impacts would be localized."²⁵⁶ The DEIR also states "[a]lthough there would be loss of foraging habitat, the cumulative loss of this resource would not be considerable due to the abundance of habitat in the American Canyon area."

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There are several problems with the DEIR's analysis of cumulative impacts to biological resources. First, the DEIR fails to provide a reasonable explanation or any supporting evidence for limiting the geographical scope to 0.5 miles, offering only the conclusory statement that habitats in areas like the Project site "tend to be disrupted and impacts would be localized." Second, in finding that the loss of foraging habitat would not be cumulatively considerable, the DEIR relies on the "abundance of habitat in the American Canyon area." Again, there is no evidence

²⁵² 14 CCR § 15126.4(a)(1)(D).

²⁵³ 14 CCR § 15130.

²⁵⁴ 14 CCR § 15130(b)(3).

²⁵⁵ DEIR, pg. 4-5.

²⁵⁶ *Ibid.*

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for this assertion as the DEIR doesn't even attempt to describe where this abundant habitat is located, or what it is defining as the "American Canyon area." Nor does the DEIR attempt to square this assertion with the Biological Resources Analysis prepared for the City for the adjacent Green Island Road Widening Project, which states "the Giovannoni property is the only remaining, undisturbed habitat located in the vicinity of the project site."²⁵⁷

Furthermore, as Mr. Cashen points out, the DEIR's rationale is flawed as it applies two different geographic scales to the analysis. "It is not possible to accurately analyze cumulative impacts by using one geographic scale (i.e., the "American Canyon area") to analyze the abundance of remaining habitat, but a much smaller scale (i.e., 0.5-mile) to analyze other projects that would impact foraging habitat."²⁵⁸

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VII. THE CITY MAY NOT MAKE THE REQUIRED FINDINGS TO APPROVE THE PROJECT'S LOCAL LAND USE PERMITS.

The Project requires that the City issue discretionary approvals, including a Use Permit and a Design Permit.²⁵⁹ The Design Permit requires that the City make certain findings, including that the Project complies with all applicable General Plan policies.²⁶⁰ The Use Permit requires that the City find that the Project is consistent with the policies and programs of the General Plan and will not be materially detrimental to the general health, safety and welfare of the public and residents in the vicinity of the Project.²⁶¹ As discussed above, the DEIR fails to disclose, analyze or effectively mitigate the Project's potentially significant impacts on air quality, public health, biological resources and transportation. These impacts also create inconsistencies with the General Plan policies which the DEIR fails to disclose and mitigate. As a result of these inconsistencies, the City is unable to make the necessary findings to approve the Project's local land use permits.

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As an initial matter, the City may not make the required finding, pursuant to Municipal Code section 19.42.202 D.5., that the Project will not be materially detrimental to the general health, safety or general welfare of the public and residents in the vicinity of the Project. As discussed above, the Health Risk

²⁵⁷ DEIR, Appendix C.7, pg. 8.

²⁵⁸ Cashen Comments, pg. 14.

²⁵⁹ DEIR, pg. 2-11.

²⁶⁰ American Canyon Municipal Code § 19.41.050 C.

²⁶¹ American Canyon Municipal Code § 19.42.020 D.1 and D.5.

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Assessment performed for the Project has serious flaws which prevent it from adequately analyzing health risks to sensitive receptors from the Project's air emissions.

35a

The City is also precluded from making required findings pursuant to Municipal Code sections 19.41.050 C (for issuance of a Design Permit) and 19.42.020 D.1 (for issuance of a Conditional Use Permit) because it cannot find that the Project complies with and is consistent with applicable General Plan policies. Our analysis of the DEIR reflected in these comments show that the Project fails to comply with several key policies in the General Plan, including the following.

(a) Circulation Element. Guiding Policy 1.11 calls for the reduction of total vehicle miles traveled by City residents, and Policy 1.24 states that new development will be responsible for mitigation of transportation impacts. As explained in detail above, the DEIR's VMT analysis is completely unsupported and does not demonstrate that the Project will reduce VMT as compared to existing averages. To the contrary, transportation expert Norm Marshall provided evidence showing that the Project's VMT is likely to exceed applicable existing averages and therefore requires mitigation. Because the Project will not reduce VMT and will not mitigate potentially significant traffic impacts, the City cannot make the required finding of consistency with the General Plan's Circulation Element.

35b

(b) Natural and Historic/Cultural Resources Element. The General Plan includes several applicable policies with respect to the Project's impacts to biological resources.

- Policy 8.21 provides that land use applications for developments located within sensitive habitats, including riparian habitats or habitats within areas occupied by vernal pools, shall be accompanied by sufficient technical background data to enable an adequate assessment of the potential for impacts on these resources and possible measures to reduce any identifiable impacts. As discussed herein, the DEIR lacks sufficient technical background data to assess impacts to wetlands or to mitigate such impacts because it lacks any functional assessment of the existing wetlands on the Project site. Moreover, the DEIR completely fails to examine the Project's impacts on foraging habit for several special status bird species.
- Policy 8.31 requires that for developments in wetlands and riparian habitats, retained riparian corridors "shall be protected by an adequate

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buffer with a minimum 100 foot protection zone...” The Project’s proposed buffer zones associated with No-Name Creek and the associated wetlands are not discussed in the DEIR or supporting technical documents, nor are they labeled in figures. Using the figure scales strongly suggests that buffer widths adjacent to Project development will be less than 100 feet in many places.²⁶²

35d

- Policy 8.41 requires that development plans incorporate all reasonable mitigation measures to avoid significantly impacting vernal pools. As discussed herein, the DEIR’s lack of a functional assessment of the Project site’s wetlands, including vernal pools, makes it impossible to evaluate the efficacy of the proposed mitigation measures.

35e

- Policy 8.42 requires preservation, where possible, of the habitat of rare, threatened or endangered species, specifically including the northern harrier and golden eagle. Both of those species have been observed foraging at the Project site, and as discussed in detail above, the DEIR fails to evaluate the loss of foraging habitat, let alone make any efforts to preserve such habitat.

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- Policy 8.43 encourages activities that improve the biological value and integrity of the City’s natural resources through, *inter alia*, control of alien plants. The Project has the potential to introduce invasive plant species and to facilitate their spread.²⁶³ Construction vehicles and equipment are common vectors for transporting invasive plant seeds or spores from one place to another, and soil and vegetation disturbance associated with construction creates suitable conditions for establishment of invasive plants.²⁶⁴ The DEIR fails to include any mitigation to minimize the Project’s potential to introduce invasive plant species or facilitate their spread.

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The DEIR fails to address or remedy these inconsistencies with General Plan policies, and the City accordingly may not make the necessary findings to support the required discretionary approvals for the Project.

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

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²⁶² Corbin Comments, pg. 8.

²⁶³ Cashen Comments, pg. 12.

²⁶⁴ *Ibid.*

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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.

36

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

Sincerely,



Richard M. Franco

Attachments
RMF:acp