

Comment Letter O2

Comment Letter - O2

ADAMS BROADWELL JOSEPH & CARDOZO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
601 GATEWAY BOULEVARD SUITE 900
SOUTH SAN FRANCISCO CA 94080-7037
TEL (650) 589-1680
FAX (650) 589-5062
amarsh@adamsbroadwell.com

January 3, 2022

OF COUNSEL
MARC D. JOSEPH
DANIEL L. CARDOZO

Mr. Cardozo is a California
Licensed Attorney

SACRAMENTO OFFICE
521 CAPITOL MALL SUITE 350
SACRAMENTO CA 95814-4721
TEL (916) 444-6201
FAX (916) 444-6209

Via Email and Overnight Mail

Alexis Vaughn, Assistant Planner
City of Ontario Planning Department
303 East "B" Street
Ontario, CA 91764
(909) 395-2036
Email: avaughn@ontarioca.gov


**Re: Comments on the Draft Environmental Impact Report for the
South Ontario Logistics Center Specific Plan
(SCH No. 2021010318)**

Dear Ms. Vaughn:

We are writing on behalf of **Californians Allied for a Responsible Economy ("CARECA")**, to provide comments on the Draft Environmental Impact Report ("DEIR") prepared by the City of Ontario ("City") for the South Ontario Logistics Center Specific Plan (SCH No. 2021010318) ("Project"). The proposed Project site is on a total of 219.39-acre site bound by Eucalyptus Avenue to the north, Campus Avenue to the west, Merrill Avenue to the south, and Grove Avenue to the east.

The proposed Project consists of a General Plan Amendment, Specific Plan, Development Plan Review, Tentative Parcel Maps, and a Development Agreement to allow for the development of an industrial and business park encompassing 23 parcels totaling 219.39 acres in the City of Ontario, San Bernardino County, California. The Project is proposed in two phases. Phase 1, comprised of Planning Areas ("PAs") 1 and 2, would allow approximately 3,174,518 sf of industrial and business park uses. Phase 1 consists of the construction of Buildings 1 through 8 and includes the Development Plan for PAs 1 and 2. The EIR also evaluates, at a programmatic level, potential future development of Phase 2, comprised of three future planning areas (no specific development proposals have been identified for the Phase 2 area). Furthermore, pursuant to the Housing Accountability Act, or

5826-004j

 printed on recycled paper

January 3, 2022
Page 2

Senate Bill 330 (SB330), the Project will create an Overlay District on an “SB330 Replacement Site” to increase the residential zoning capacity by 1,352 units, which will offset the loss of residential zoning capacity within the Project site. In order for this Overlay District to be approved, a Zone Change and General Plan Amendment are required.

cont'd
a

We reviewed the DEIR and its technical appendices with the assistance of air quality and health risk experts Matt Hagemann, P.G., C.Hg. and Paul E. Rosenfeld, PhD from Soil / Water / Air Protection Enterprise (“SWAPE”).¹ We also received technical assistance from biological resources expert Scott Cashen,² and transportation expert Dan Smith.³ The City must separately respond to these technical comments.

Based upon our review of the DEIR and supporting documentation, we conclude that the DEIR fails to comply with the requirements of CEQA. As explained more fully below, the DEIR fails to provide an accurate environmental baseline upon which to measure the Project’s reasonably foreseeable impacts on biological resources. The consequences of these defects are far-reaching and require the City to revise the DEIR. The DEIR does not accurately disclose potentially significant air quality, public health, GHG, energy, transportation, and biological resources impacts. As a result of its shortcomings, the DEIR lacks substantial evidence to support its conclusions and fails to properly mitigate the Project’s significant environmental impacts. The City also fails to adopt all feasible mitigation to lessen the effect of impacts deemed significant and unavoidable. The City cannot approve the Project until the errors and omissions in the DEIR are remedied, and a revised DEIR is recirculated for public review and comment which fully discloses and mitigates the Project’s potentially significant environmental and public health impacts.

b

I. STATEMENT OF INTEREST

CARECA is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental impacts of the Project. The

c

¹ Mr. Hagemann’s and Dr. Rosenfeld’s technical comments and curricula vitae are attached hereto as **Exhibit A**.

² Mr. Cashen’s technical comments and curricula vitae are attached hereto as **Exhibit B**.

³ Mr. Smith’s technical comments and curricula vitae are attached hereto as **Exhibit C**.
5826-004j

January 3, 2022
Page 3

coalition includes Ontario residents Ricardo Cuevas, Irvin Cruise, Luis Garcia, Jaime Paredes, John Fierro, the District Council of Ironworkers, and Southern California Pipe Trades District Council 16, along with their members, their families, and other individuals who live and work in the City of Ontario.

CARECA advocates for protecting the environment and the health of their communities' workforces. CARECA seeks to ensure a sustainable construction industry over the long-term by supporting projects that offer genuine economic and employment benefits, and which minimize adverse environmental and other impacts on local communities. CARECA members live, work, recreate, and raise their families in the City of Ontario and surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist onsite.

In addition, CARECA has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. LEGAL BACKGROUND

CEQA has two basic purposes, neither of which the DEIR satisfies. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.⁴ CEQA requires that an agency analyze potentially significant environmental impacts in an EIR.⁵ The EIR should not rely on scientifically outdated information to assess the significance of impacts, and should result from "extensive research and information gathering," including consultation with state and federal agencies, local officials, and the interested public.⁶ To be adequate, the EIR should evidence the lead agency's good faith effort

⁴ CEQA Guidelines, § 15002, subd. (a)(1).

⁵ See Pub. Resources Code, § 21000; CEQA Guidelines, § 15002.

⁶ *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm.* ("Berkeley Jets") (2001) 91 Cal.App.4th 1344, 1367.; *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 620.
5826-004j

cont'd
C

d

January 3, 2022
Page 4

at full disclosure.⁷ 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.”⁸ “Thus, the EIR protects not only the environment but also informed self-government.”⁹

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.¹⁰ The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to “identify ways that environmental damage can be avoided or significantly reduced.”¹¹ If a project has a significant effect on the environment, the agency may approve the project only upon a finding that it has “eliminated or substantially lessened all significant effects on the environment where feasible,” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns” specified in CEQA section 21081.¹²

cont'd
d

As these comments will demonstrate, the DEIR fails to comply with the requirements of CEQA and may not be used as the basis for approving the Project. It fails in significant aspects to perform its function as an informational document that is meant “to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment” and “to list ways in which the significant effects of such a project might be minimized.”¹³ The DEIR also lacks substantial evidence to support the City’s proposed findings that the Project’s significant impacts are mitigated to the fullest extent feasible.

III. THE PROJECT DESCRIPTION IS INADEQUATE

The DEIR does not meet CEQA’s requirements because it fails to include an accurate and complete Project description, rendering the entire analysis inadequate.

e

⁷ CEQA Guidelines, § 15151; see also *Laurel Heights Improvement Assn. v. Regents of University of California* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 406.

⁸ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁹ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (citations omitted).

¹⁰ CEQA Guidelines, § 15002, subd. (a)(2)-(3); *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.*, 91 Cal.App.4th at 1354.

¹¹ CEQA Guidelines, § 15002, subd. (a)(2).

¹² *Id.*, subd. (b)(2)(A)-(B).

¹³ *Laurel Heights I*, *supra*, 47 Cal.3d at pg. 391.
5826-004j

January 3, 2022
Page 5

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.”¹⁴ CEQA requires that a project be described with enough particularity that its impacts can be assessed.¹⁵ Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project’s impacts and undermining meaningful public review.¹⁶ Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate project description.¹⁷

CEQA Guidelines section 15378 defines “project” to mean “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”¹⁸ “The term ‘project’ refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term project does not mean each separate governmental approval.”¹⁹ Courts have explained that a complete description of a project must “address not only the immediate environmental consequences of going forward with the project, but also all “*reasonably foreseeable* consequence[s] of the initial project.”²⁰ “If a[n]...EIR...does not adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project, informed decisionmaking cannot occur under CEQA and the final EIR is inadequate as a matter of law.”²¹

cont'd
e

A. The DEIR Fails to Disclose Whether the Project Will Require Backup Generators

An EIR must include an analysis of the environmental effects of a proposed future expansion or other future action at a project site if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action

f

¹⁴ *Stopthemillenniumhollywood.com v. City of Los Angeles* (2019) 39 Cal.App.5th 1, 17; *Communities for a Better Environment v. City of Richmond* (“CBE v. 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.

¹⁵ 14 CCR § 15124; see, *Laurel Heights I, supra*, 47 Cal.3d 376, 192–193.

¹⁶ *Id.*

¹⁷ *Sundstrom v. County of Mendocino* (“Sundstrom”) (1988) 202 Cal.App.3d 296, 311.

¹⁸ CEQA Guidelines § 15378.

¹⁹ *Id.*, § 15378(c).

²⁰ *Laurel Heights I*, 47 Cal. 3d 376, 398 (emphasis added); see also *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 449–50.

²¹ *Riverwatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal. App. 4th 1186, 1201.
5826-004j

January 3, 2022
Page 6

will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.²²

The DEIR states that the Project includes refrigerated storage.²³ A cold storage warehouse has the ability to keep temperature sensitive items in a temperature-controlled environment, which requires a constant energy supply to power refrigeration. Cold storage warehouses thus commonly utilize backup generators.²⁴ Backup generators commonly rely on fuels such as natural gas or diesel,²⁵ and thus can significantly impact air quality, GHG emissions, and public health through toxic diesel particulate (“DPM”) emissions.²⁶ Since the Project will include cold storage, it is reasonably foreseeable that the Project would require on-site backup generators. Therefore, the DEIR must disclose whether the Project will use generators, and, if so, analyze the effects of the Project’s use of generators. The DEIR’s failure to provide any information about the use of generators causes the DEIR to fail as an informational document.

cont'd
f

²² *Id.*

²³ DEIR, pg. 4.2-15.

²⁴ California Air Resources Board, Comments re: Notice of Preparation (NOP) for the United States Cold Storage Hesperia Project (Project) Draft Environmental Impact Report (DEIR), State Clearinghouse No. 2020069036 (July 24, 2020), available at <https://ww2.arb.ca.gov/sites/default/files/classic/toxics/ttdceqalist/uscoldstorage.pdf> (stating that the HRA prepared for the Project should account for all potential health risks from Project-related diesel PM emission sources such as backup generators, TRUs, and heavy-duty truck traffic).

²⁵ SCAQMD, Fact Sheet on Emergency Backup Generators, <http://www.aqmd.gov/home/permits/emergency-generators> (“Most of the existing emergency backup generators use diesel as fuel”).

²⁶ California Air Resources Board, Emission Impact: Additional Generator Usage Associated with Power Outage (January 30, 2020), available at <https://ww2.arb.ca.gov/resources/documents/emissions-impact-generator-usage-during-psps> (showing that generators commonly rely on gasoline or diesel, and that use of generators during power outages results in excess emissions); California Air Resources Board, Use of Back-up Engines for Electricity Generation During Public Safety Power Shutoff Events (October 25, 2019), available at <https://ww2.arb.ca.gov/resources/documents/use-back-engines-electricity-generation-during-public-safety-power-shutoff> (“When electric utilities de-energize their electric lines, the demand for back-up power increases. This demand for reliable back-up power has health impacts of its own. Of particular concern are health effects related to emissions from diesel back-up engines. Diesel particulate matter (DPM) has been identified as a toxic air contaminant, composed of carbon particles and numerous organic compounds, including over forty known cancer-causing organic substances. The majority of DPM is small enough to be inhaled deep into the lungs and make them more susceptible to injury. Much of the back-up power produced during PSPS events is expected to come from engines regulated by CARB and California’s 35 air pollution control and air quality management districts (air districts)”).

5826-004j

January 3, 2022
Page 7

IV. THE DEIR FAILS TO ADEQUATELY ANALYZE, QUANTIFY, AND MITIGATE THE PROJECT'S 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.²⁷ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.²⁸

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by law.²⁹ 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.³⁰ 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."³¹

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."³²

²⁷ 14 CCR § 15064(b).

²⁸ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

²⁹ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

³⁰ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

³¹ *Id.*; *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

³² *Berkeley Jets*, 91 Cal.App.4th at 1355.
5826-004j

January 3, 2022
Page 8

A. The DEIR Fails to Adequately Analyze and Mitigate Air Quality Impacts

i. The DEIR Fails to Require All Feasible Air Quality Mitigation

The DEIR concludes that the Project's operational emissions associated with Phase 1, Phase 2, and Project Buildout would be significant and unavoidable.³³ But while there is substantial evidence demonstrating that the Project's criteria air pollutant emissions would result in a significant air quality impact, the DEIR's conclusion that these impacts are "significant and unavoidable" is unsupported. CEQA prohibits public agencies from approving a project as proposed if there are any feasible alternative or feasible mitigation measures that would substantially lessen or avoid any significant effect the project would have on the environment.³⁴

Here, while the DEIR includes Mitigation Measures AQ-1 through AQ-5, as well as GHG-1, the DEIR fails to implement *all* feasible mitigation to reduce air quality and GHG impacts to the greatest extent feasible, as required by CEQA. SWAPE reviewed the Project and proposes numerous feasible air quality mitigation measures not considered by the DEIR.³⁵

For instance, MM AQ-2 requires the lease agreements with future warehouse/business tenants to use only electric-powered/zero emissions off-road equipment. This lease requirement can be expanded to require use of fuel-efficient mobile sources, which cause the bulk of the Project's emissions. SWAPE suggests requiring on-road heavy-duty haul trucks to be model year 2010 or newer if diesel-fueled. Or the lease agreement can require all heavy-duty vehicles entering or operated on the project site to be zero-emission beginning in 2030. A lease agreement can require tenants to use zero-emission light- and medium-duty vehicles as part of business operations. Requiring provisions like these in lease agreements are within the agency's and Applicant's powers, and would help reduce mobile source emissions. The City must consider the feasibility of these proposed mitigation measures in a revised DEIR.

³³ DEIR, pg. pg. 4.2-22.

³⁴ Pub. Res. Code § 21002.

³⁵ SWAPE, pp. 9-11.
5826-004j

January 3, 2022

Page 9

The Project includes refrigerated storage, which has higher air quality impacts than unrefrigerated storage.³⁶ Cold storage warehouses commonly utilize backup generators.³⁷ Backup generators commonly rely on fuels such as natural gas or diesel,³⁸ and thus can significantly impact air quality, GHG emissions, and public health through toxic diesel particulate (“DPM”) emissions.³⁹ As mitigation for these impacts, SWAPE proposes requiring all stand-by emergency generators to be powered by a non-diesel fuel. This measure would substantially reduce DPM emissions.

j

In addition to backup generators, cold storage involves the use of transport refrigeration units, and consumes more electricity than unrefrigerated storage. The DEIR thus must consider a mitigation measure limiting how much of the Project can be used for cold storage, which would reduce the Project’s significant air quality impacts.

The DEIR did not evaluate these mitigation measures and others listed in SWAPE’s comments. Therefore, the DEIR’s conclusion that the Project’s air quality impacts are significant and unavoidable is unsubstantiated. To comply with CEQA, the City must adopt these measures to the extent feasible, or provide evidence that the measures are not feasible.

k

³⁶ DEIR, pg. 4.2-15

³⁷ California Air Resources Board, Comments re: Notice of Preparation (NOP) for the United States Cold Storage Hesperia Project (Project) Draft Environmental Impact Report (DEIR), State Clearinghouse No. 2020069036 (July 24, 2020), available at <https://ww2.arb.ca.gov/sites/default/files/classic/toxics/ttdceqalist/uscoldstorage.pdf> (stating that the HRA prepared for the Project should account for all potential health risks from Project-related diesel PM emission sources such as backup generators, TRUs, and heavy-duty truck traffic).

³⁸ SCAQMD, Fact Sheet on Emergency Backup Generators, <http://www.aqmd.gov/home/permits/emergency-generators> (“Most of the existing emergency backup generators use diesel as fuel”).

³⁹ California Air Resources Board, Emission Impact: Additional Generator Usage Associated with Power Outage (January 30, 2020), available at

<https://ww2.arb.ca.gov/resources/documents/emissions-impact-generator-usage-during-psps>; California Air Resources Board, Use of Back-up Engines for Electricity Generation During Public Safety Power Shutoff Events (October 25, 2019), available at <https://ww2.arb.ca.gov/resources/documents/use-back-engines-electricity-generation-during-public-safety-power-shutoff>.

5826-004j

January 3, 2022
Page 10

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

i. The Greenhouse Gas Analysis Relies on Inapplicable Thresholds, in Violation of CEQA

Under the CEQA Guidelines, a lead agency must analyze a project's impacts on GHG emissions.⁴⁰ The Guidelines provide that "[i]n determining the significance of impacts, the lead agency may consider a project's consistency with the State's long-term climate goals or strategies, **provided that substantial evidence supports the agency's analysis** of how those goals or strategies address the project's incremental contribution to climate change and its conclusion that the project's incremental contribution is not cumulatively considerable."⁴¹ The Guidelines explicitly mandate that the "analysis should consider a timeframe that is appropriate for the project... The agency's analysis also must reasonably reflect evolving scientific knowledge and state regulatory schemes."⁴² Here, the City's analysis does not consider the appropriate timeframe and updated regulatory scheme, and thus lacks substantial evidence to support its conclusions.

In 2006, California passed Assembly Bill 32, the California Global Warming Solutions Act of 2006. AB 32 instructed the California Air Resources Board ("CARB") to develop and enforce regulations for the reporting and verification of statewide GHG emissions. AB 32 also directed CARB to set a GHG emissions limit based on 1990 levels, to be achieved by 2020. It set a timeline for adopting a scoping plan for achieving GHG reductions in a technologically and economically feasible manner. CARB's 2008 Scoping Plan, developed to implement AB 32, set a GHG reduction target of 15 percent below "current" (2005-2008) levels to local communities by the year 2020.

To meet this 2020 emissions reduction goal, the City adopted the Community Climate Action Plan ("CAP") in November 2014. The primary purpose of the City's CAP was to achieve consistency with the 2008 Scoping Plan's 2020 GHG reduction target.⁴³ As part of the CAP, the City published a guidance document titled "Greenhouse Gas Emissions, CEQA Thresholds and Screening Tables" ("Screening

⁴⁰ 14 C.C.R. §15064.4

⁴¹ 14 CCR § 15064.4 (b)(3). [emphasis added]

⁴² 14 C.C.R. §15064.4(b)

⁴³ DEIR, pg. 4.6-12
5826-004j

January 3, 2022
Page 11

Tables”). As part of this guidance, the City determined that, if GHG emissions of a given project exceed 3,000 MTCO₂e/yr, then project emissions would need to be reduced by 25 percent when compared to year 2008 emissions levels. Alternatively, the Project would need to achieve a minimum of 100 points pursuant to measures identified in the Screening Tables. The Screening Tables include a variety of measures to choose from, including building energy efficiency, water conservation, and VMT reduction.

In 2016, the Legislature passed Senate Bill 32, which codifies a 2030 GHG emissions reduction target of 40 percent below 1990 levels. On December 14, 2017, CARB adopted a second update to the Scoping Plan. The 2017 Scoping Plan details how the State will reduce GHG emissions to meet the 2030 target codified by SB 32. The 2017 Scoping Plan explains that CAPs that meet emission reduction goals for 2020 must be updated in order to meet the state’s 2030 climate goals:

Numerous local governments in California have already adopted GHG emissions reduction goals for year 2020 consistent with AB 32. CARB advises that local governments also develop community-wide GHG emissions reduction goals necessary to reach 2030 and 2050 climate goals. [...] The recommendation for a community-wide goal expands upon the reduction of 15 percent from “current” (2005-2008) levels by 2020 as recommended in the 2008 Scoping Plan.⁴⁴

For this Project, the DEIR claims that it is consistent with all applicable plans, including the 2017 Scoping Plan.⁴⁵ The DEIR specifically states that due to compliance with the CAP, the Project would not impede Scoping Plan’s statewide GHG reduction goals for 2030 and 2050:

The Project’s long-term operational GHG emissions would exceed City’s threshold of 3,000 MTCO₂e per year despite the implementation of MM AQ-2 through MM AQ-5 (refer to Section 4.2, Air Quality), as well as MM GHG-1, which requires the Project to achieve a minimum of 100 points on the CAP

⁴⁴ CARB, California’s 2017 Climate Change Scoping Plan (November 2017), pg. 100, available at https://ww2.arb.ca.gov/sites/default/files/classic/cc/scopingplan/scoping_plan_2017.pdf.

⁴⁵ DEIR, pg. 4.6-32 (“impacts related to consistency with the Scoping Plan would be less than significant”), 4.6-35 (“the Project would be consistent with applicable plan goals”) 5826-004j

January 3, 2022
Page 12

Screening Threshold Checklist. Achieving 100 points ensures that the Project would not impede California's statewide GHG reduction goals for 2030 and 2050, but the potential Project GHG emissions remain a significant and unavoidable impact.⁴⁶

The DEIR lacks substantial evidence to support its reliance on consistency with the 2017 Scoping Plan as a relevant GHG threshold, as the CAP was only designed to achieve GHG reduction goals for 2020, not 2030 or 2050. As excerpted above, the 2017 Scoping Plan states that CAPs that meet the 2020 goals should be updated to meet the more stringent 2030 goals. Thus, meeting the CAP's threshold of 3,000 MTCO₂e per year does not demonstrate consistency with the 2017 Scoping Plan. Nor does achieving 100 points on the CAP Screening Threshold Checklist.

cont'd
n

As a result, the DEIR lacks a meaningful threshold against which to measure the significance of the Project's GHG impacts. The City must formulate, in a revised EIR, updated significance thresholds that meet the 2030 and 2050 GHG reduction targets, and assess the significance of the Project's GHG emissions against those thresholds. Mitigation measures should then be required to ensure impacts do not exceed these more stringent thresholds. The revised DEIR must support the revised thresholds and mitigation with substantial evidence.

o

ii. The DEIR's Greenhouse Gas Mitigation is Inadequate

EIRs must mitigate significant impacts through measures that are "fully enforceable through permit conditions, agreements, or other legally binding instruments."⁴⁷ Deferring formulation of mitigation measures is generally impermissible.⁴⁸ If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.⁴⁹ Mitigation that does no more than allow approval by a county department without setting enforceable standards is inadequate.⁵⁰

p

⁴⁶ *Id.*, pg. 4.6-36.

⁴⁷ CEQA Guidelines, § 15126.4, subd. (a)(2).

⁴⁸ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code, § 21061.

⁴⁹ *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical*, *supra*, 29 Cal.App.4th at pg. 1604, fn. 5.

⁵⁰ *Endangered Habitats League, Inc. v. County of Orange*, (2005) 131 Cal.App.4th 777, 794. 5826-004j

January 3, 2022
Page 13

Here, the Project's greenhouse gas mitigation measure, MM GHG-1, would require that "Project development proposals with building permit applications on file with the City prior to approval and adoption of updates to the December 16, 2014 CAP shall implement Screening Table Measures that achieve at least 100 points per the Screening Tables."⁵¹ It is not explained in the DEIR why this mitigation measure only applies to components of the Project with permit applications preceding the adoption of the 2014 CAP. And it is not apparent that any of the Project would be governed by MM GHG-1, as the Project application is only dated June 12, 2019, and development proposals for Phase 2 and the SB330 Replacement Site are not likely already on file with the City.⁵² Therefore, MM GHG-1 is not binding, enforceable mitigation that would mitigate the Project's greenhouse gas impacts.

MM GHG-1 also improperly defers mitigation. In *Golden Door Properties, LLC v. County of San Diego* ("Golden Door II")⁵³, the court concluded the GHG emission mitigation measure contained in a CAP violates CEQA because it "lacks objective criteria to ensure the [agency]'s exercise of that discretion will result in GHG reduction that is real, permanent, quantifiable, verifiable, enforceable, and additional." The court also held the measure violated CEQA because it improperly deferred mitigation. The court discusses the flawed mitigation in the following passage:

Here, the final EIR merely proposes a generalized goal of no net increase in greenhouse gas emissions and then sets out a handful of cursorily described mitigation measures for future consideration that might serve to mitigate the 898,000 metric tons of emissions resulting from the Project. No effort is made to calculate what, if any, reductions in the Project's anticipated greenhouse gas emissions would result from each of these vaguely described future mitigation measures. Indeed, the perfunctory listing of possible mitigation measures set out in Mitigation Measure 4.3-5e are nonexclusive, undefined, untested and of unknown efficacy. The only criteria for "success" of the ultimate mitigation plan adopted is the subjective judgment of the City Council, which presumably will make its decision outside of any public process a year after the Project has been approved.

⁵¹ DEIR, pg. 4.6-23.

⁵² Legislative Action Application Form, File No. PSP19-001, PGPA19-004.

⁵³ (2020) 50 Cal.App.5th 467, 525.
5826-004j

January 3, 2022
Page 14

The instant Project's greenhouse gas measure, MM GHG-1, is similarly flawed, providing:

Project development proposals with building permit applications on file with the City prior to approval and adoption of updates to the December 16, 2014, CAP shall implement Screening Table Measures that achieve at least 100 points per the Screening Tables. [...] **Multiple development proposals may, at the discretion of the City, be allowed to collectively demonstrate achievement of at least 100 points per the Screening Tables.** [emphasis added]

cont'd
r

MM GHG-1 defers development of specific mitigation measures until after project approval. This practice is legally adequate when these future mitigation measures are held to enforceable standards. However, the bolded text in the excerpt above makes this mitigation effectively nonbinding: if the City has discretion as to how many projects can collectively demonstrate 100 points of mitigation, nothing stops the City from distributing these points across a large number of projects which do not collectively reduce their GHG impacts. As in *Golden Door II*, the success of this mitigation relies too heavily on the subjective judgment of the City.

The court in *Golden Door II* also criticized the agency's failure to calculate what reductions would result from the city's vaguely described future mitigation measures. The vague measures included "Add/improve heat exchangers" and "Initiate carbon sequestration, capture and export." Another mitigation measure proposes "Replac[ing] stationary, non-emergency diesel internal combustion engines."⁵⁴ MM GHG-1 is similarly flawed: the CAP's Screening Table measures are also vaguely described. For instance, "using moderate water using plants" is worth 3 points, and "using low water using plants" is worth 4 points.⁵⁵ The difference between moderate- and low-water using plants is undefined, and thus left to the discretion of the City. *Golden Door II* determined such mitigation is impermissibly deferred mitigation.

s

⁵⁴ 184 Cal.App.4th 92

⁵⁵ City of Ontario, Greenhouse Gas Emissions CEQA Thresholds and Screening Tables, pg. 18, available at <https://www.ontarioca.gov/sites/default/files/Ontario-Files/Planning/Applications/Community%20Climate%20Action%20Plan%20-%20Appendix%20B.pdf>. 5826-004j

January 3, 2022
Page 15

Additionally, although each mitigation measure on the CAP Screening Tables is given a point value, this point value does not correspond to the actual reduction in emissions for a specific project. For instance, although “water efficient landscaping” can be worth up to 8 points for commercial/industrial developments, the actual GHG reduction from water efficient landscaping would vary depending on how much land a project would otherwise require for landscaping. The actual emissions reduction of MM GHG-1 is thus undefined, violating the holding of *Golden Door II*. As a result, the DEIR fails as an informational document, and lacks substantial evidence to conclude that the Project’s significant GHG impacts will be actually mitigated. MM GHG-1 must be revised to quantify emissions reductions, demonstrate efficacy, and be fully enforceable.

iii. The DEIR Fails to Require All Feasible Greenhouse Gas Mitigation

The DEIR concludes that the Project’s net annual GHG emissions associated with Phase 1, Phase 2, and Project Buildout would be significant and unavoidable.⁵⁶ CEQA prohibits public agencies from approving a project as proposed if there are any feasible alternative or feasible mitigation measures that would substantially lessen or avoid any significant effect the project would have on the environment.⁵⁷

The DEIR fails to adopt all feasible mitigation for GHG emissions, in violation of CEQA. The DEIR adopts MM GHG-1, which would require that the Project incorporate project design features to achieve a minimum score of 100 points on the City’s Community CAP Screening Tables.⁵⁸ The City acknowledges that this mitigation would not reduce the Project’s impacts to a less-than-significant level:

[A]t the time of this analysis, the City’s CAP update is underway and the potential timeframes for approval and adoption of the City CAP update are unknown. Once approved, the CAP may implement performance standards and GHG emissions reduction targets differing from the current CAP. There is the potential that even after achieving more than 100 points on the current Screening Tables, the Project may conflict with as-yet-unknown performance standards and GHG emissions reduction targets implemented under the anticipated CAP updates, and thereby result in GHG emissions that would be

⁵⁶ DEIR, pp. 4.6-18, 4.6-20, 4.6-22.

⁵⁷ Pub. Res. Code § 21002.

⁵⁸ DEIR, pg. 4.6-22.
5826-004j

January 3, 2022
Page 16

considered to represent a significant impact on the environment. Therefore, even with the implementation of MM AQ-2 through MM AQ-5 and MM GHG-1, this Project impact is conservatively considered significant and unavoidable.⁵⁹

The City is correct that achieving more than 100 points on the Screening Tables will not likely reduce impacts to a less-than-significant level. However, the City does not make clear that, not only does the Project conflict with “as-yet-unknown performance standards and GHG emissions reduction targets,” but it conflicts with current GHG emissions reduction targets. As discussed earlier, the City’s CAP was not designed to meet the 2030 emissions reduction goals. As a result, merely achieving 100 points on the Screening Tables does not represent the full extent of feasible mitigation measures available to reduce GHG impacts. Therefore, the City must adopt more stringent mitigation requirements in a revised EIR. In addition to the mitigation measures listed in the Screening Tables, SWAPE’s comments provide a list of mitigation measures the City should consider when revising the DEIR.⁶⁰

cont’d
U

C. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Health Risk Impacts from DPM Emissions

A lead agency’s significance determination must be supported by accurate scientific and factual data.⁶¹ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁶²

These standards apply to an EIR’s analysis of public health impacts of a 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.⁶³ 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

V

⁵⁹ *Id.*

⁶⁰ SWAPE, pg. 9-11.

⁶¹ 14 C.C.R. § 15064(b).

⁶² *Kings County Farm Bureau*, 221 Cal.App.3d at 732.

⁶³ *Sierra Club*, 6 Cal.5th at 518–522.
5826-004j

January 3, 2022
Page 17

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.⁶⁴ 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.”⁶⁵ 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. As the Court explained, the EIR failed to comply with CEQA because after reading the EIR, “the public would have no idea of the health consequences that result when more pollutants are added to a nonattainment basin.”⁶⁶ CEQA mandates discussion, supported by substantial evidence, of the nature and magnitude of impacts of air pollution on public health.⁶⁷

cont’d
v

Furthermore, in *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (“*Berkeley Jets*”), the Court of Appeal held that an EIR must analyze the impacts from human exposure to toxic substances.⁶⁸ In that case, the Port of Oakland approved a development plan for the Oakland International Airport.⁶⁹ 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.⁷⁰ 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.⁷¹ 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.”⁷²

w

⁶⁴ *Id.* at 507–508, 518–522.

⁶⁵ *Id.* at 519, citing *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 514–515.

⁶⁶ *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).)

⁶⁷ *Sierra Club*, 6 Cal.5th at 518–522.

⁶⁸ 91 Cal.App.4th at 1369–1371.

⁶⁹ *Id.* at 1349–1350.

⁷⁰ *Id.* at 1364–1371.

⁷¹ *Id.*

⁷² 14 C.C.R. § 15003(b).
5826-004j

January 3, 2022
Page 18

The failure to provide information required by CEQA makes meaningful assessment of potentially significant impacts impossible and is presumed to be prejudicial.⁷³ 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.⁷⁴

cont'd
W

Here, the DEIR determines that the proposed Project would result in a less-than-significant health risk impact based on quantified construction-related and mobile-source health risk assessments ("HRAs").⁷⁵ The DEIR estimates that the Project would result in construction-related and mobile-source operational cancer risks of 8.80- and 1.39-in one million, respectively.⁷⁶ The DEIR concludes these impacts are below the South Coast Air Quality Management District ("SCAQMD") threshold of 10 in one million.⁷⁷

The DEIR's approach masks the true health risks of this Project by failing to evaluate the *cumulative* lifetime cancer risk as a result of Project construction and operational emissions together. Since the Project's construction and operational emissions will be felt by sensitive receptors cumulatively, disclosing the cumulative lifetime cancer risk is necessary to comply with CEQA's informational requirements. As in *Sierra Club*, the City's disclosure of the Project's health risk impacts is deficient as a matter of law because it fails to adequately connect emissions to the adverse human health effects.⁷⁸ Furthermore, in as in *Berkeley Jets*, the DEIR fails to adequately quantify the impacts from human exposure to toxic substances.⁷⁹

X

The importance of analyzing the *cumulative* cancer risk, in order to adequately illustrate the health impacts of a project, is explained in guidance from the Office of Environmental Health Hazard Assessment ("OEHHA"), the

⁷³ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236–1237.

⁷⁴ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁷⁵ DEIR, pp. 4.2-35 - 4.2-38

⁷⁶ DEIR, pp. 4.2-36, 4.2-3

⁷⁷ DEIR, pg. 4.2-36

⁷⁸ *Id.* at 507–508, 518–522.

⁷⁹ 91 Cal.App.4th at 1369–1371.
5826-004j

January 3, 2022
Page 19

organization responsible for providing guidance on conducting HRAs in California.⁸⁰ OEHHA guidance provides, “the excess cancer risk is calculated separately for each age grouping and then summed to yield cancer risk at the receptor location.”⁸¹ Here, the DEIR’s HRAs fail to sum each age bin to evaluate the total cancer risk over the course of the Project’s total construction and operation. As a result, the DEIR fails to evaluate the cumulative lifetime cancer risk from Project construction and operation together.

The City’s failure to discuss the Project’s cumulative cancer risk results in a failure to identify a potentially significant health risk impact. SWAPE’s comments shows that when the construction and operational cancer risks are combined, the SCAQMD significance threshold is exceeded.

DEIR Cumulative Cancer Risk	
HRA	Cancer Risk (in one million)
Construction	8.80
Mobile-Source Operation	1.39
Total	10.19
SCAQMD Threshold	10
<i>Exceeds?</i>	Yes

SWAPE Comments, pg.4.

As a result of this analytical error, the DEIR’s significance finding is not supported by substantial evidence. And the failure to disclose a potentially significant impact makes the DEIR deficient as an informational document. The City must implement all feasible mitigation to reduce health risk impacts to a less-than-significant level.⁸²

conf'd
X

⁸⁰ SWAPE, pg. 4.

⁸¹ OEHHA, “Guidance Manual for Preparation of Health Risk Assessments” (February 2015), pg. 8-4.

⁸² CEQA Guidelines § 15096(g)(2)
5826-004j

January 3, 2022
Page 20

D. The DEIR Fails to Adequately Establish the Environmental Setting for Biological Resources and Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Impacts on Biological Resources

i. The DEIR Fails to Address Consistency with All Applicable Plans, Programs, and Policies

Appendix G of the CEQA Guidelines requires disclosure of conflicts with local policies or ordinances protecting biological resources, and provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan. In Section 4.3.2, the DEIR lists the various regulations the Project must comply with. However, the DEIR fails to disclose that the Project site is subject to a settlement agreement (“the Settlement Agreement”) that contains goals and policies which pertain to protecting biological resources on the Project site.⁸³

In 2001, the City, Endangered Habitats League, and Sierra Club signed a settlement agreement related to the City's adoption of the Final EIR for the Ontario Sphere of Influence (aka “SOI,” “New Model Colony” or “NMC”) General Plan Amendment. The New Model Colony area encompasses the Project site.⁸⁴ The General Plan Amendment prepared the NMC area for a range of urban and suburban uses, including residential, commercial, business park, industrial, and open space. Most of the NMC was then, and still is, in agricultural use.⁸⁵ The Ontario Plan (the City's general plan) DEIR explains:

A Settlement Agreement was reached and agreed to by all parties that set forth revised mitigation measures for potential impacts in the NMC (referred to as Annexation Area 163 in the agreement) to the burrowing owl, the DSFLF, raptor foraging and wildlife habitat, loss of open space, actual and potential habitat and agricultural land, and sensitive (listed and nonlisted)

⁸³ Endangered Habitats League, Inc. v. City of Ontario et al. Settlement and General Release Agreement (November 28, 2001), attached hereto as **Exhibit D**.

⁸⁴ DEIR, pg. 3-4 (“The Project area is located within the City's Ontario Ranch area (formerly known as New Model Colony”).

⁸⁵ Ontario Plan DEIR, pg. 5.4-4.
5826-004j

January 3, 2022
Page 21

species. These measures will be in effect until all of the developable acres in the NMC reach full buildout, as determined by the City. Further, a land trust, conservancy, or nonprofit corporation or nonprofit entity will be created or selected to carry out the responsibilities, goals, and objectives of the mitigation as set forth in the settlement agreement.⁸⁶

The terms of the Settlement Agreement, which will be discussed in more detail throughout these comments, apply to this Project because the DEIR acknowledges that the NMC area encompasses the Project site, and the NMC area has not been fully built out. By failing to disclose the Settlement's applicability to this Project, the DEIR fails to meet CEQA's informational requirements. And without analyzing consistency with these requirements, the DEIR lacks substantial evidence to conclude impacts to biological resources are less than significant. And as will be discussed below, the DEIR's mitigation fails to comply with the terms of the Settlement Agreement. As a result, the DEIR must be revised.

cont'd
y

ii. The DEIR Fails to Adequately Establish the Biological Resources Baseline

CEQA requires that a lead agency include a description of the physical environmental conditions in the vicinity of the Project as they exist at the time environmental review commences.⁸⁷ As numerous courts have held, the impacts of a project must be measured against the "real conditions on the ground."⁸⁸ The description of the environmental setting constitutes the baseline physical conditions by which a lead agency may assess the significance of a project's impacts.⁸⁹ Use of the proper baseline is critical to a meaningful assessment of a project's environmental impacts.⁹⁰ An agency's failure to adequately describe the existing setting contravenes the fundamental purpose of the environmental review process, which is to determine whether there is a potentially substantial, adverse change compared to the existing setting.

z

⁸⁶ *Id.* [emphasis added]

⁸⁷ CEQA Guidelines, § 15125, subd. (a).

⁸⁸ *Save Our Peninsula Com. v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121-22; *City of Carmel-by-the Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 246.

⁸⁹ CEQA Guidelines, § 15125, subd. (a).

⁹⁰ *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Ca.4th 310, 320.
5826-004j

January 3, 2022
Page 22

Baseline information on which a lead agency relies must be supported by substantial evidence.⁹¹ The CEQA Guidelines define “substantial evidence” as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion.”⁹² “Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts ... [U]nsubstantiated opinion or narrative [and] evidence which is clearly inaccurate or erroneous ... is not substantial evidence.”⁹³

cont'd
Z

a. The City’s 2001 Settlement with Endangered Habitats League and Sierra Club Requires Protocol Surveys

The Settlement Agreement requires biological surveys conducted for proposed development projects in the NMC area. These surveys must be conducted pursuant to formally adopted protocols:

For every residential, commercial, industrial or other development project in Annexation Area 163 requiring discretionary approval or permitting, Ontario shall require the real property owner or developer to **conduct a biological habitat assessment and when appropriate, biological surveys pursuant to formally adopted protocols**, by qualified biologists or pursuant to any subsequently adopted Habitat Conservation Plan or a similar planning mechanism as part of a subsequent CEQA environmental review process.⁹⁴

aa

The Settlement Agreement imposes a binding requirement for projects in the NMC area to undertake protocol-level surveys. The Settlement Agreement states that protocol surveys must be conducted under certain circumstances. The Ontario Plan Draft EIR, in its discussion of the Settlement Agreement, clarifies that focused protocol surveys are required “if a [habitat] assessment determines that there is potential habitat for sensitive species.”⁹⁵ Specifically, the Ontario Plan states:

⁹¹ *Id.* at 321 (stating “an agency enjoys the discretion to decide [...] exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence”); see *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁹² CEQA Guidelines §15384.

⁹³ Pub. Resources Code § 21082.2(c).

⁹⁴ Settlement Agreement, pg. 7.

⁹⁵ Ontario Plan EIR, pg. 5.4-7.
5826-004j

January 3, 2022
Page 23

[C]urrent City procedure is to require a habitat assessment to determine existing habitat and biological resources on proposed development sites. If the assessment determines that there is potential habitat for sensitive species, focused protocol surveys are required. If potential DSFLF habitat is present, two-year (consecutive) protocol surveys per the USFWS Interim General Survey Guidelines for the Delhi Sands flower-loving fly are required.⁹⁶

cont'd
aa

Here, the City conducted a biological habitat assessment, but failed to conduct focused, protocol surveys for each present or potentially present species, despite meeting the standard for protocol surveys described in the settlement agreement. The City conducted protocol surveys for burrowing owls, but failed to conduct protocol surveys for the other species the DEIR determined have potential habitat on the Project site. And as will be discussed below, there are more species with potential habitat on the Project site than the DEIR discloses. As a result, the City's failure to conduct protocol surveys for all applicable species violates the terms of the Settlement Agreement.

b. The DEIR Fails to Adequately Describe Burrowing Owl Use of the Site

California Department of Fish and Wildlife ("CDFW") guidance provides that "essential habitat" for burrowing owls includes nesting, foraging, wintering, and dispersal habitat.⁹⁷ Thus, CDFW commented on the Project's Notice of Preparation ("NOP") that "[b]urrowing owl surveys should be conducted at various times in the year and the data used to assess the cumulative loss to not only breeding, but wintering and migratory stopover habitat."⁹⁸ Mr. Cashen similarly explains that an accurate assessment of Project-level and cumulative impacts to burrowing owls requires baseline data on burrowing owl use of the Project site during both the

bb

⁹⁶ *Id.*

⁹⁷ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, p. 24.

⁹⁸ CDFW, Comments re: Notice of Preparation of a Draft Environmental Impact Report South Ontario Logistics Center Specific Project State Clearinghouse No. 2021010318 (February 22, 2021) pg. 4.
5826-004j

January 3, 2022
Page 24

breeding and non-breeding seasons.⁹⁹ However, the City failed to conduct surveys during the non-breeding season (i.e., during migration and winter).¹⁰⁰ Therefore, the City fails to adequately describe the biological baseline regarding burrowing owls.

cont'd
bb

The City might argue that this failure is inconsequential because MM BIO-2 calls for take avoidance surveys 14 days before initiating ground disturbance activities. But these surveys would not evaluate the cumulative loss of wintering and migratory stopover habitat because they are focused on take avoidance. Thus, MM BIO-2 does not remedy the failure to describe the biological baseline.

The DEIR's failure to describe the environmental setting is even greater for the Project's *future development areas*. The DEIR claims that "BUOW Focused surveys were conducted for the entire Project site which includes both Phase I and future development areas."¹⁰¹ This claim is contradicted by the DEIR's burrowing owl survey report, which clearly states that the surveys were limited to the 130 acres that would be developed during Phase 1 of the Project, and that "the additional acreage [within the specific plan boundary] was not included in this focused BUOW study."¹⁰² As a result, the DEIR fails to adequately evaluate any aspect of essential habitat for burrowing owls (nesting, foraging, wintering, and dispersal habitat) on the future development areas.¹⁰³

cc

The City's approach also conflicts with the Settlement Agreement, which requires protocol surveys "if a [habitat] assessment determines that there is potential habitat for sensitive species."¹⁰⁴ The DEIR states that there is potential habitat for this species to be present on the fallow agricultural fields on the Project site.¹⁰⁵ Therefore, the Settlement Agreement requires protocol surveys on the whole site.

dd

⁹⁹ Cashen, pg. 2.

¹⁰⁰ DEIR, Appendix C3, pg. 7.

¹⁰¹ *Id.*, pg. 4.3-20.

¹⁰² *Id.*, Appendix C3, pg. 3.

¹⁰³ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, p. 24.

¹⁰⁴ Ontario Plan EIR, pg. 5.4-7.

¹⁰⁵ DEIR, pg. 4.3-6.

5826-004j

January 3, 2022
Page 25

c. The DEIR Fails to Adequately Survey for Swainson's Hawk

The DEIR's biological assessment determines that the Project site provides potential habitat for the Swainson's hawk (a threatened species), and that Swainson's hawks may be present at the Project site.¹⁰⁶ As discussed above, the Settlement Agreement requires a protocol survey when there is potential habitat. However, a protocol-level survey was not conducted for this species: the City only conducted a reconnaissance visit, and requires a pre-construction survey in MM BIO-1.

The City might argue that MM BIO-1 provides for a protocol study: "If vegetation removal will occur during the migratory bird nesting season, between February 1 and September 15, pre-construction nesting bird surveys shall be performed within three days prior to vegetation removal." But this mitigation measure lacks any requirement these surveys follow the necessary protocols recommended by scientific authorities, thereby failing to ensure their effectiveness.

Mr. Cashen explains that Swainson's hawk nests are especially difficult to survey, and thus are only effective if they closely follow certain protocols.¹⁰⁷ He and CDFW recommend project proponents implement the Swainson's hawk survey protocol developed by the Swainson's Hawk Technical Advisory Committee.¹⁰⁸ Without this protocol survey, the DEIR fails to describe baseline physical conditions by which the City can assess the significance of the Project's impacts.¹⁰⁹ Without an accurate baseline, the City's analysis and mitigation regarding Swainson's hawk are not based on substantial evidence. The DEIR must conduct protocol level surveys for Swainson's hawk, and disclose the findings in a revised EIR that is recirculated for public review.

d. The DEIR Fails to Accurately Characterize Potential for Western Spadefoot Habitat

The City's biological resources report provides the following assessment of the potential for the western spadefoot to occur at the Project site: "[v]ernal pools are

¹⁰⁶ DEIR, Appendix C1 (General Biological Assessment), pg. 10.

¹⁰⁷ Cashen, pg. 2.

¹⁰⁸ *Id.*

¹⁰⁹ CEQA Guidelines, § 15125, subd. (a).
5826-004j

January 3, 2022
Page 26

essential for breeding and egg laying. No habitat for this species present. Not present.”¹¹⁰ Mr. Cashen explains that this information is inconsistent with the biology of the species.¹¹¹ Western spadefoots are not limited to vernal pools for breeding and egg laying; they breed and lay their eggs in a variety of permanent and temporary pools, including pools that occur in highly disturbed environments (e.g., roadside ditches and stock ponds).¹¹² The Project site contains at least 19 acres of stock/retention ponds and channels.¹¹³ As a result, western spadefoots have the potential to occur at the Project site. The City’s conclusion thus lacks evidentiary support. Also, because western spadefoots have potential habitat on the Project site, protocol surveys are required by the Settlement Agreement. And because the DEIR does not incorporate mitigation for impacts on this species, the Project’s impacts remain potentially significant. Due to the far-reaching consequences of this inadequate environmental setting, the DEIR must be revised and recirculated.

cont’d
ff

e. The City Failed to Consult All Available Biological Resources Databases to Establish the Environmental Setting

The City relied on California Natural Diversity Data Base (“CNDDDB”) for determining occurrence likelihoods of special-status species. The City failed to consult other major databases such as eBird and iNaturalist. Mr. Cashen reviewed these databases, and found that the DEIR fails to address all the special-status bird species that have been detected at, or that have the potential to occur at, the Project site. These include the long-billed curlew, mountain plover, white-faced ibis, northern harrier, ferruginous hawk, white-tailed kite, and loggerhead shrike.¹¹⁴

gg

¹¹⁰ DEIR, Appendix B to Appendix C1 (General Biological Assessment).

¹¹¹ Cashen, pg. 6.

¹¹² United States Fish and Wildlife Service. 2005. Recovery Plan for Vernal Pool Ecosystems of California and Southern Oregon. Portland, Oregon. pp. II-226 through -232. *See also* Thomson RC, Wright AN, Shaffer HB. 2016. California Amphibian and Reptile Species of Special Concern. University of California Press, Oakland, California. pg. 133.

¹¹³ DEIR, pg. 4.3-23.

¹¹⁴ eBird. 2021. eBird: An online database of bird distribution and abundance [web application]. eBird, Ithaca, New York. Available at: <<http://www.ebird.org>>. (Accessed 23 Dec 2021). *See also* City of Ontario. 2009. The Ontario Plan Draft EIR, Section 5.4. 5826-004j

January 3, 2022
Page 27

Sole reliance on CNDDDB is not supported by substantial evidence. The California Department of Fish and Wildlife cautions that sole reliance on CNDDDB is inappropriate as a basis for narrowing a list of potentially occurring species:

“We work very hard to keep the CNDDDB and the Spotted Owl Database as current and up-to-date as possible given our capabilities and resources. However, we cannot and do not portray the CNDDDB as an exhaustive and comprehensive inventory of all rare species and natural communities statewide. Field verification for the presence or absence of sensitive species will always be an important obligation of our customers...”¹¹⁵

The Ontario Plan EIR identified additional species that are potentially present on the Project site:

The following sensitive species have been observed in the City of Ontario, and suitable habitat for each of these species is present in the City: **great egret (Ardea alba), great blue heron (Ardea Herodias), snowy egret (Egretta thula), sharp-shinned hawk (Accipiter striatus), tricolored blackbird (Agelaius tricolor), doublecrested cormorant (Phalacrocorax auritus), Cooper’s hawk (Accipiter cooperi), burrowing owl, Loggerhead shrike (Lanius ludovicianus), and long-billed curlew (Numenius americanus)**. Several additional species have been observed for which there is suitable foraging habitat in the City, but there is limited or no suitable nesting habitat: **ferruginous hawk, mountain plover (Charadrius montanus), northern harrier (Circus cyaneus), white-tailed kite (Elanus leucurus), merlin (Falco columbarius), prairie falcon (Falco mexicanus), Peregrine falcon, and white-faced ibis**. Several sensitive bat species are considered to have possible roosting opportunities in the City, and are listed above in Table 5.4-2.¹¹⁶ [emphasis added]

cont'd
99

This passage shows that there are several species present in the area that are not discussed or analyzed in the DEIR. And as discussed above, reliance on CNDDDB is not substantial evidence for concluding these species are not present. Therefore, the

¹¹⁵ California Department of Fish and Wildlife, About the CNDDDB – Disclaimer, <https://wildlife.ca.gov/Data/CNDDDB/About>.

¹¹⁶ Ontario Plan EIR, Section 5.4, pg. 5.4-26.
5826-004j

January 3, 2022
Page 28

DEIR should have disclosed the potential for these species to be present, and analyzed the Project's impacts on them. As it stands, the DEIR's environmental baseline – and the conclusions relying on that baseline – are incomplete.

cont'd
gg

f. The DEIR Fails to Accurately Describe Ponded Water on the Project Site

According to the DEIR, the Project site contains approximately 19 acres of stock/retention ponds and channels, but “the ponds are dry.”¹¹⁷ Whether the ponds are dry implicates the presence of potential habitat. However, the DEIR's claim is not supported by substantial evidence. Two of the site photographs in the biological resources report show ponded water in a stock pond and stock pond channel.¹¹⁸ And Mr. Cashen's comments contain time lapse imagery from Google Earth showing ponded water at various locations throughout the Project site during every year between 2002 and 2021. An accurate, consistent characterization of the ponded water on the Project site is necessary to evaluate impacts on wildlife habitat, as well meet jurisdictional requirements.

hh

g. The DEIR Fails to Identify Potential Jurisdictional Waters

The DEIR states that the Project site contains approximately 19 acres of stock/retention ponds and channels.¹¹⁹ The DEIR states that they are not considered Waters of the United States, nor considered jurisdictional under the CDFW Lake and Streambed Alteration Program. But Mr. Cashen's comments demonstrate that in addition to the 19 acres of stock/retention ponds and channels identified by the DEIR, there are several areas within the Project site that periodically contain ponded water.¹²⁰ Figures 1 and 2 below show that these aquatic features are distinct from the stock/retention ponds and channels discussed in the DEIR. As a result, the DEIR's environmental setting is inaccurate.

ii

¹¹⁷ DEIR, p. 4.3-2.

¹¹⁸ *Id.*, Appendix C (photographs) to Appendix C1 (General Biological Assessment).

¹¹⁹ *Id.*, pg. 4.3-23.

¹²⁰ Cashen, pg. 4, 5.
5826-004j

January 3, 2022
Page 29



Figure 1. Ponded water (blue arrows) at the Project site on January 31, 2009. Yellow polygons depict approximate boundaries of the stock/retention ponds mapped in the Applicant's biological resources report.

5826-004j

January 3, 2022
Page 30



cont'd
ii

Figure 2. Ponded water (blue arrows) at the Project site on April 15, 2020. Yellow polygons depict approximate boundaries of the stock/retention ponds mapped in the Applicant's biological resources report.

These aquatic features occur on hydric soils and therefore may qualify as wetlands.¹²¹ The Ontario Plan EIR also states that such features (dairy manure water retention basins, irrigation ponds, livestock watering, and man-made lakes) might be jurisdictional.¹²² Because the City has not conducted a wetland delineation, there is no substantial evidence supporting the City's determination that the Project would have no adverse effects on State protected wetlands. The DEIR should be revised to provide a more complete survey of wetland conditions in the project area.

¹²¹ Soil Survey Staff, Natural Resources Conservation Service, United States Department of Agriculture. Web Soil Survey. Available at: <<http://websoilsurvey.sc.egov.usda.gov/>>. (Accessed 20 Dec 2021).

¹²² Ontario Plan EIR, pg. 5.4-25.
5826-004j

January 3, 2022
Page 31

iii. The DEIR Fails to Adequately Analyze the Project's Impacts on Biological Resources

The DEIR acknowledges that “[t]he Tricolored blackbird, Grasshopper sparrow, Great blue heron, Swainson's hawk, California glossy snake, Western Pond Turtle, Western mastiff bat, Yellow rail, California horned lark, and Merlin have the potential to be on-site due to suitable habitat for foraging and nesting purposes.”¹²³ But the DEIR fails to actually describe how these species might be impacted by the Project (e.g., direct mortality during construction, habitat loss, disturbance caused by noise and human activity, etc.).¹²⁴ The DEIR thus fails to satisfy the basic purpose of an EIR, which is to inform decision makers and the public about the potential, significant environmental effects of a project.¹²⁵

As a result, the DEIR does not provide the necessary information to evaluate the Project against significance thresholds listed in the DEIR. These thresholds are:

A substantial adverse effect to special-status species would occur if the Project would:

- 1) Reduce the population size or reduce the area of occupied habitat of a rare, threatened, or endangered species; or
- 2) Reduce the population size or reduce the area of occupied habitat of a locally uncommon species.

A substantial adverse effect on a special-status wildlife species occurs if the Project would:

- 1) Increase predation of a species, leading to population reduction;
- 2) Reduce habitat availability sufficiently to affect potential reproduction; or
- 3) Reduce habitat availability sufficiently to constrain the distribution of a species and not allow for natural changes in distributional patterns over time.¹²⁶

The DEIR's approach of merely stating how probable it is for a particular species to be present on the Project site does not address all of these thresholds. This approach precludes understanding of the Project's potentially significant

¹²³ DEIR, pg. 4.3-18.

¹²⁴ Cashen, pg. 6.

¹²⁵ CEQA Guidelines, § 15002, subd. (a)(1).

¹²⁶ DEIR, pg. 4.3-17.
5826-004j

jj

January 3, 2022
Page 32

impacts and whether the DEIR's mitigation would sufficiently mitigate those (unspecified) impacts to less-than significant levels. Currently, the City lacks substantial evidence that impacts on special-status species are less than significant. The DEIR must be revised.

cont'd
jj

a. The DEIR Fails to Disclose Impacts on Waterfowl

The Project site provides habitat for numerous waterfowl (and waterbird) species.¹²⁷ The Final EIR for the Ontario Sphere of Influence General Plan Amendment concluded that impacts to waterfowl habitat in the NMC would be significant before mitigation measures were implemented. Impacts were determined to be less than significant after implementation of Mitigation Measures BR-1 and BR-2.¹²⁸ Mitigation Measure BR-1 modified the General Plan to require the creation of new waterfowl habitat and specified a mitigation ratio of 2:1 for each acre of such habitat lost. Mitigation Measure BR-2 stipulated that the City shall create a Waterfowl and Raptor Conservation Area ("WRCA"), and included requirements and definitions for it.¹²⁹ The City prepared the NMC Final EIR as a program-level EIR with the intent that later environmental analysis of specific plans and individual development projects would be tiered from this document.¹³⁰

kk

Here, the DEIR fails to analyze impacts on waterfowl. And the DEIR does not require implementation of either of the above mitigation measures. As a result, the Project would have significant, unmitigated impacts on habitat for waterfowl.

iv. The DEIR Fails to Mitigate Habitat Loss

The DEIR does not incorporate mitigation for habitat loss, which is the primary threat to the special-status species that may occur at the Project site.¹³¹ The NOP comment letter issued by CDFW states: "[f]or unavoidable impacts, onsite habitat restoration and/or enhancement, and preservation should be evaluated and discussed in detail. Where habitat preservation is not available onsite, offsite land

ll

¹²⁷ Cashen, pg. 8.

¹²⁸ See City of Ontario. 2009. The Ontario Plan Draft EIR, pg. 5.4-29.

¹²⁹ *Id.*, pg. 5.4-4.

¹³⁰ NMC Final EIR, pg. 1-1, 1-4; CDFW Comments re: Notice of Preparation of a Draft Supplemental Environmental Impact Report Ontario Plan (TOP) 2050 Project (August 19, 2021), available at https://files.ceqanet.opr.ca.gov/271618-1/attachment/z-71n4BI-fGcSaU0zSQWOnkMqakfB0KGOrcWLPkFsMdTHc8q_PiFxU4LcuTu5X0JfaWkqxRBFPQ6oeW0.

¹³¹ Cashen, pg. 7.
5826-004j

January 3, 2022
Page 33

acquisition, management, and preservation should be evaluated and discussed in detail.”¹³² But the DEIR does not provide this evaluation and discussion, nor it does provide analysis demonstrating that the Project’s impacts on habitat would be less than significant. Regarding burrowing owls, CDFW’s NOP comment letter states that compensatory mitigation should be provided if burrowing owl habitat is impacted by the Project.¹³³ But MM BIO-1 and 2 do not require any compensatory mitigation for burrowing owls.

Should the City argue that development of compensatory mitigation is not feasible at this time, the City should note that CDFW has previously provided examples of compensatory mitigation measures in comments on previous Specific Plans in the City of Ontario. For instance, CDFW’s comments on the Merrill Commerce Center Specific Plan, which also is located in the NMC, recommended feasible compensatory mitigation measures tricolored blackbirds,¹³⁴ burrowing owls,¹³⁵ raptors,¹³⁶ bats,¹³⁷ and western pond turtle habitat, and other species.¹³⁸ In response to these comments, the City actually revised some of its mitigation to include compensatory mitigation. This demonstrates that compensatory mitigation is necessary and feasible to mitigate habitat loss impacts in the NMC.

For these reasons, the DEIR does not adequately mitigate the Project’s potentially significant impacts on special-status species.

v. The DEIR Fails to Mitigate the Project’s Impacts in Accordance with the Settlement Agreement and General Plan

As summarized by the Ontario Plan DEIR, the Settlement for the Ontario Plan Amendment requires the following:

¹³² DEIR, Appendix A, CDFW NOP comments, pg. 8.

¹³³ DEIR, Appendix A, CDFW NOP comments.

¹³⁴ Merrill Commerce Center Specific Plan Project Final EIR - SCH No. 2019049079, Comments and Responses, pg. 3-32, available at <https://www.ontarioca.gov/sites/default/files/Ontario-Files/Planning/Documents/CEQA/Merrill%20Commerce%20Center/Merrill%20Commerce%20Center%20Specific%20Plan%20Final%20EIR%2001.2021.pdf>.

¹³⁵ *Id.*, pg. 3-41 to 3-44.

¹³⁶ *Id.*, pg. 3-52.

¹³⁷ *Id.*, pg. 3-36.

¹³⁸ *Id.*, pg. 3-28, 3-29.

5826-004j

cont'd
II

mm

January 3, 2022
Page 34

- Prior to issuance of grading permits, Ontario shall impose a \$4,320 per net acre mitigation fee on proposed developments in Annexation Area 163 that require discretionary approval or permitting from the City.
- Ontario, in consultation with CDFG, will identify, through CEQA review, lands occupied by burrowing owl and suitable as long-term habitat. The City will require avoidance of those lands to maintain a viable territory and require long-term maintenance through dedication in fee or grant of easement to the Land Trust. If the site is not viable long-term habitat, the developer shall pay the mitigation fee and make provisions for relocation of the owls.
- Since habitat that benefits DSFLF can be expected to benefit burrowing owl, up to 25 percent of the mitigation fee maybe used by the City for DSFLF recovery.
- All mitigation fees collected shall be used for the above-described purposes and may be used to purchase property, conservation easements, or other land with long-term conservation value for the environmental impacts; enhance/restore lands with such values; maintain and operates these lands; and pay for related administrative costs (not to exceed 10 percent of the total fees).
- Land/easements dedicated, conveyed, or purchased to benefit wildlife, waterfowl, raptors, and/or burrowing owl must have long-term conservation value for those species and must be managed by the Land Trust. The parcels must be in the habitat area designated as part of the settlement agreement. Unacceptable properties are those that would otherwise be purchased by another entity or group as open space mitigation for environmental impacts.¹³⁹

cont'd
mm

As previously discussed, these mitigation measures are supposed to remain in effect until all of the developable acres in the NMC reach full buildout.¹⁴⁰ But the DEIR's environmental analysis and mitigation make no reference to these requirements. The DEIR fails to require payment of the \$4,320 mitigation fee, and fails to include any of the compensatory mitigation measures listed above. The DEIR's mitigation measures do not require protocol surveys for all species with potentially present habitat. As a result, the DEIR fails to mitigate the impacts identified in the DEIR and the New Model Colony Program EIR.

¹³⁹ Ontario Plan EIR, pg. 5.4-7.

¹⁴⁰ City of Ontario. 2009. The Ontario Plan Draft EIR. p. 5.4-4. 5826-004j

January 3, 2022
Page 35

vi. MM BIO-1 is Ineffective Mitigation

MM BIO-1 provides that vegetation removal is recommended to be conducted outside of the nesting season for migratory birds to avoid direct impacts. Mr. Cashen explains that removal of vegetation during the “off-season” would minimize direct impacts on nesting birds, but it would not mitigate the permanent loss of nesting habitat, nor would it mitigate impacts to birds that use the Project site for “foraging purposes.” Furthermore, it would not mitigate impacts to the western pond turtle, western mastiff bat, or California glossy snake. These are unmitigated significant impacts, requiring the DEIR to be revised and recirculated.

nn

oo

MM BIO-1 requires pre-construction nesting bird surveys within three days prior to vegetation removal, if vegetation removal will occur during the migratory bird nesting season. This measure lacks the specificity needed to ensure bird nests are actually detected. Specifically, MM BIO-1 fails to establish standards for (a) the nest searching techniques, (b) minimum level of effort (i.e., survey hours per unit area), and (c) qualifications of the individual conducting the surveys. As explained in Mr. Cashen’s comments, the ability to successfully locate nests in the Project area is dependent on these three variables.¹⁴¹ This mitigation measure is thus impermissibly vague, as a mitigation plan is only sufficient if it identifies methods that will be used to mitigate the impact and sets out standards that the agency commits to meet.¹⁴²

pp

MM BIO-1 does not require protocol-level surveys for Swainson’s hawk nests prior to vegetation removal. Mr. Cashen’s comments show it would not be possible for the surveyor to implement the survey protocol within the 3-day timeframe established in MM BIO-1.¹⁴³ As a result, MM BIO-1 does not ensure Swainson’s hawk nests would be detected, and thus, that Project impacts on the Swainson’s hawk would be reduced to less-than-significant levels. This provision is legally flawed because it does not comply with the terms of the Settlement, and its effectiveness is remote and speculative.¹⁴⁴

qq

¹⁴¹ Cashen, pg. 12.

¹⁴² *Sierra Club v. County of Fresno* (2018) 6 CA5th 502, 524; *Preserve Wild Santee v. City of Santee* (2012) 210 CA4th 260, 281 (plan for active habitat management did not describe anticipated management actions or include standards or guidelines for actions that might be taken).

¹⁴³ Cashen, pg. 13.

¹⁴⁴ *Federation of Hillside & Canyon Ass’n v. City of Los Angeles* (2000) 83 CA4th 1252, 1260. 5826-004j

January 3, 2022
Page 36

MM BIO-1 states that a 250-foot buffer shall be fenced around songbird nests and a 500-foot buffer shall be fenced around raptor nests. The DEIR fails to provide evidence that these buffers would be sufficient to prevent indirect impacts to nesting birds. Mr. Cashen explains that scientific authorities recommend a buffer of at least one kilometer (3,281 feet) or 1/2 mile.¹⁴⁵ Thus, the City's mitigation is legally flawed because its efficacy is not apparent and there is no evidence in the record showing it will be effective in remedying the identified environmental problem.¹⁴⁶ MM BIO-1's buffer zones must be expanded, or the DEIR must be revised to include facts and analysis supporting the effectiveness of the 250- and 500- foot buffers.¹⁴⁷

rr

MM BIO-1 states "[a] biological monitor shall visit the site once a week during ground disturbing activities to ensure all fencing is in place and no sensitive species are being impacted." But Mr. Cashen explains that MM BIO-1 fails to identify minimum qualifications for the monitor and the variables that would be monitored to determine whether sensitive species are being impacted by construction activities. This mitigation measure is thus impermissibly vague, as it fails to identify methods that will be used to mitigate the impact, and identify standards that the agency commits to meet.¹⁴⁸ Mr. Cashen also explains that there is no scientific basis to support the weekly monitoring frequency.¹⁴⁹ The DEIR thus fails to support this mitigation with substantial evidence or fulfill CEQA's informational requirements.

ss

MM BIO-1 purports to mitigate impacts on California glossy snake:

"Three days prior to any ground disturbing activities or vegetation removal, a qualified biological monitor should conduct a preconstruction survey to identify any sensitive biological resources. Any sensitive reptilian species that may be present within the Project area shall be relocated outside of the impact areas."

tt

¹⁴⁵ Cashen, pg. 13.

¹⁴⁶ *King v. Gardiner Farms, LLC v. County of Kern* (2020) 45 CA5th 814, 866 (EIR discussion of mitigation measure that has uncertain effect must identify and explain the uncertainty in measure's effectiveness and the reasons for that uncertainty).

¹⁴⁷ *Sierra Club v. County of Fresno* (2018) 6 CA5th 502, 522.

¹⁴⁸ *Id.* at 524; *Preserve Wild Santee v. City of Santee* (2012) 210 CA4th 260, 281 (plan for active habitat management did not describe anticipated management actions or include standards or guidelines for actions that might be taken).

¹⁴⁹ Cashen, pg. 13.

5826-004j

January 3, 2022
Page 37

But relocation of snakes outside of the impact areas does not mitigate the Project's potentially significant impact on habitat for the California glossy snake. And BIO-1 cannot claim, with substantial evidence, to mitigate direct impacts on individual snakes because most reptile translocation projects are unsuccessful.¹⁵⁰ Also, because the California glossy snake is active only at night and hides underground in daytime,¹⁵¹ a standard visual survey would be unsuccessful in locating California glossy snakes that could be impacted by construction activities. Thus, MM BIO-1's measures are ineffective. Mr. Cashen explains that the ineffectiveness of this type of mitigation is exacerbated by the DEIR's failure to establish: (a) the survey methods, (b) potential receptor sites, and (c) procedures for handling and releasing snakes to maximize survivorship. This mitigation measure is thus impermissibly vague, as it fails to identify methods that will be used to mitigate the impact and set out standards that the agency commits to meet.¹⁵² Additional details are necessary to substantiate the effectiveness of this mitigation.

cont'd
tt

MM BIO-1 states that a preconstruction survey will be conducted to detect roosting bats in the Project site's agricultural buildings. But Mr. Cashen explains that reliable detection of western mastiff bat roosts requires acoustic monitoring.¹⁵³ Because MM BIO-1 does not require acoustic monitoring, and because it fails to establish standards (minimum qualifications) for the "qualified biologist" conducting the survey, MM BIO-1 does not ensure that bat roosts would be successfully located prior to demolition of the agriculture buildings. Thus, the effects of this mitigation measure are not supported by substantial evidence.

uu

MM BIO-1 incorporates the following mitigation for the removal of bat roosts from the Project site:

"The removal of the roosting sites shall occur during the time of day when the roost is unoccupied. The loss of each roost will be compensated for by the construction and installation of two bat boxes suitable to the bat species and colony size excluded from the original roosting site. The bat boxes shall be installed in the vicinity prior to removal of the original day/maternity roost

vv

¹⁵⁰ Cashen, pg. 13.

¹⁵¹ Cashen, pg. 14.

¹⁵² *Sierra Club v. County of Fresno* (2018) 6 CA5th 502, 524.

¹⁵³ Cashen, pg. 14; Merrill Commerce Center Specific Plan FEIR, pg. 3-35 (recommending acoustic monitoring).
5826-004j

January 3, 2022
Page 38

sites... Performance standards will be developed based on the results of the bat survey consistent with CDFW recommendations such that no residual significant impacts would remain.”

Mr. Cashen's comments show that because MM BIO-1 does not (1) identify methods for confirming roosts are unoccupied, (2) require installation of exclusion devices for at least 7 days prior to removal of the roosts (3) identify how bat boxes would be located, monitored, and maintained, (4) adopt performance standards, or (5) require contingency measures should the bat boxes fail, Project impacts to bat roosts remain potentially significant. As a result, this mitigation is too undefined for the City to conclude it is effective.¹⁵⁴

cont'd
VV

Also, the DEIR provides no evidence that western mastiff bats (the species potentially present on the Project site) use artificial roosts (e.g., bat boxes). Mr. Cashen explains that very few bat species have been documented to use artificial roosts.¹⁵⁵ His comments demonstrate that the ability of artificial roosts to mitigate impacts to occupied roosts has had limited success. Because a reviewing court will not defer to a lead agency's determination that mitigation measures will work when their efficacy is not apparent and there is no evidence in the record showing they will be effective in remedying the identified environmental problem, this mitigation is legally inadequate.¹⁵⁶

WW

In addition, the bat mitigation improperly defers performance standards for the mitigation. As a result, there are no assurances that MM BIO-1 would mitigate significant impacts to the western mastiff bat.¹⁵⁷ In *Preserve Wild Santee v. City of Santee* (“*Preserve Wild Santee*”), the city impermissibly deferred mitigation where the EIR did not state why specifying performance standards for mitigation measures “was impractical or infeasible at the time the EIR was certified.”¹⁵⁸ This

XX

¹⁵⁴ *Preserve Wild Santee v. City of Santee* (2012) 210 CA4th 260, 281 (plan for active habitat management did not describe anticipated management actions or include standards or guidelines for actions that might be taken).

¹⁵⁵ Cashen, pg. 14-15.

¹⁵⁶ *King v. Gardiner Farms, supra*, 45 CA5th at 866 (EIR discussion of mitigation measure that has uncertain effect must identify and explain the uncertainty in measure's effectiveness and the reasons for that uncertainty).

¹⁵⁷ Cashen, pg. 15.

¹⁵⁸ 210 Cal.App.4th 260, 281.

5826-004j

January 3, 2022
Page 39

constitutes both a lack of substantial evidence and an informational defect. Here, the DEIR is legally inadequate because it does not explain why it cannot specify performance standards for mastiff bat mitigation.

cont'd
xx

MM BIO-1 provides: “[w]ithin 14 days prior to the onset of construction activities, a qualified biologist shall conduct pre-construction surveys for western pond turtle within all areas that fall within 100 feet of any suitable aquatic and upland nesting habitat for this species (stock/retention ponds).” Mr. Cashen’s comments show that western pond turtles travel as far as *500 meters* from a watercourse to find suitable nesting or over-wintering habitat.¹⁵⁹ As a result, a survey that is confined to areas within 100 feet of “suitable aquatic and upland nesting habitat” does not ensure reliable detection of pond turtles that may be impacted by the Project. Thus, the DEIR’s mitigation is not supported by substantial evidence.

yy

MM BIO-1 provides: “[i]f western pond turtles are observed in the construction area at any time during construction, the on-site biological monitor shall be notified and construction in the vicinity of the sighting shall be halted until such a time as a turtle has been removed from the construction zone and relocated by an approved biologist.” Mr. Cashen’s comments demonstrate that the success of this mitigation is heavily dependent on the procedures and performance standards governing the mitigation – the feasibility of relocating turtles and turtle nests is highly uncertain. But MM BIO-1 fails to specify any such procedures and standards, in violation of CEQA.¹⁶⁰ Additionally, even if turtles are successfully moved out of the construction zone, MM BIO-1 would not mitigate the Project’s significant impact on pond turtle habitat.

zz

vii. MM BIO-2 is Ineffective Mitigation

MM BIO-2 states:

“The Project Applicant shall complete an initial BUOW take avoidance survey no less than 14 days prior to initiating ground disturbance activities. Implementation of avoidance and minimization measures (e.g., eliminating actions that reduce burrowing owl forage and burrowing surrogates (e.g., ground squirrel), or introduce/ facilitate burrowing owl predators) would be

aaa

¹⁵⁹ Cashen, pg. 15.

¹⁶⁰ *King v. Gardiner Farms, supra*, 45 CA5th at 866; *Preserve Wild Santee*, 210 Cal.App.4th 260, 281. 5826-004j

January 3, 2022
Page 40

triggered by positive owl presence on the site where Project activities would occur. The development of avoidance and minimization approaches would be evaluated by monitoring burrowing owls (if present on-site)."

This mitigation measure is impermissibly vague. Mr. Cashen observes that the DEIR fails to identify the specific avoidance and minimization measures that the Applicant would need to implement if burrowing owls are present on the site.¹⁶¹ In addition, the DEIR fails to identify: (a) the monitoring requirements, (b) how monitoring would dictate the avoidance and minimization approaches, and (c) the parties responsible for selecting the appropriate avoidance and minimization measures. As in *Preserve Wild Santee*, the City impermissibly defers mitigation because the DEIR does not state why specifying these details is impractical or infeasible.¹⁶² The DEIR is inadequate because "[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR."¹⁶³

cont'd
aaa

As mentioned earlier, MM BIO-2 is inconsistent with the terms of the Settlement Agreement. Per the terms of the Agreement, if burrowing owls occur at a development site that is not viable long-term habitat for burrowing owls, the developer must make provisions for the relocation of the owls in a manner that is consistent with CDFW guidelines and protocols.¹⁶⁴ Because MM BIO-2 fails to require relocation in a manner consistent with CDFW guidelines, it violates the Settlement Agreement.

bbb

MM BIO-2 also fails to discuss how impacts to burrowing owls would be avoided or minimized if owls at the site are year-round residents. If burrowing owls would be evicted from their burrows to enable construction activities, MM BIO-2 must require implementation of a Burrowing Owl Exclusion Plan that is approved by CDFW.¹⁶⁵

ccc

¹⁶¹ Cashen, pg. 16.

¹⁶² 210 Cal.App.4th 260, 281.

¹⁶³ 210 Cal.App.4th 260, quoting *Communities for a Better Environment v. City of Richmond* (2010)

184 Cal.App.4th 70, 92, quoting *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 670.

¹⁶⁴ Settlement Agreement, pp. 3 and 4.

¹⁶⁵ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation.

Appendix E.
5826-004j

January 3, 2022
Page 41

Mr. Cashen explains that CDFW and the scientific community have concluded that compensatory habitat (with an equivalent or greater habitat area) is needed to mitigate for permanent habitat loss.¹⁶⁶ But the DEIR does not require compensatory habitat – even if burrowing owls are detected during the preconstruction survey. Consequently, MM BIO-2 does not ensure Project impacts on the burrowing owl would be mitigated to less-than-significant levels. The DEIR must be revised and recirculated.

cont'd
CCC

viii. The DEIR Fails to Adequately Evaluate Cumulative Impacts on Biological Resources

The DEIR's analysis of cumulative impacts fails to comply with CEQA Guidelines § 15130(b)(4) (which requires a summary of the expected environmental effects to be produced by cumulative projects) and CEQA Guidelines § 15130(b)(5) (which requires a reasonable analysis of the cumulative impacts of the relevant projects). The DEIR concludes that due to implementation of mitigation measures MM BIO-1 and -2, cumulative impacts would be less than significant.¹⁶⁷ But this conclusion is not supported by substantial evidence.¹⁶⁸

ddd

First, the mitigation measures in the DEIR are limited to actions designed to avoid or minimize direct take of individual animals. The measures do not mitigate the Project's residual impacts or its contribution to habitat loss. Mr. Cashen's review of scientific literature shows that habitat loss is a primary threat to the special-status species analyzed in the DEIR.¹⁶⁹ Because the DEIR does not incorporate compensatory habitat as a required mitigation measure, the Project's contribution to significant cumulative impacts remains cumulatively considerable.

Second, substantial evidence shows that cumulative impacts to habitat are potentially significant, especially given the scarcity of habitat for the special-status species that may occur at the Project site. Indeed, the Agriculture and Forestry Resources section of the DEIR concludes that the Project would result in a cumulatively considerable impact to agricultural resources, and that the impact

eee

¹⁶⁶ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, pg. 8. See also DEIR, Appendix A, CDFW NOP comments.

¹⁶⁷ DEIR, p. 4.3-27.

¹⁶⁸ *Id.*

¹⁶⁹ Cashen, pg. 11.
5826-004j

January 3, 2022
Page 42

would be significant and unavoidable. If the cumulative impact to agricultural resources would be significant and unavoidable, the cumulative impact to agricultural *habitat* also would be significant and unavoidable.

cont'd
eee

Third, the DEIR fails to disclose that the Project site contains raptor foraging habitat:

“The Project would remove potential raptor foraging habitat through development of the warehousing and business park structures. Although the existing agriculture may provide foraging habitat for raptors, it is not expected to be valuable, as the lands are actively maintained to minimize use by small mammals (prey for raptors) and active ground squirrel management programs are continually implemented. This loss of potential raptor foraging habitat would not make a cumulatively considerable contribution to the regional decline of raptors.”¹⁷⁰

This determination conflicts with the Final EIR for the NMC General Plan Amendment. The NMC FEIR explains that windrows and open fields are valuable foraging habitat for raptors. And because windrows and open fields are associated with agricultural operations, preservation of those areas would provide mitigation for the loss of raptor habitat.¹⁷¹ Conversely, the NMC FEIR concludes, conversion of the NMC from agricultural uses to developed urban and suburban uses would have a significant impact on raptor habitat.¹⁷²

fff

This determination also conflicts with the Ontario Plan EIR, which explains that agricultural fields in the NMC are valuable foraging habitat for raptors:

“The open water areas of dairy runoff retention ponds, reservoirs, drainages, and low areas subject to flooding are the preferred locations for migratory birds in the NMC...The 1996 Envicom surveys found 49 species in the NMC areas. Nearly half (21 species) were found in open water and wet areas. Numerous raptor species are attracted to windrows, including red-tailed hawk (*Buteo jamaicensis*), American kestrel (*Falco sparverius*), and white-tailed kite (*Elanus leucurus*) (EIP 1999). **Raptors use agricultural fields**

¹⁷⁰ DEIR, pg. 4.3-27.

¹⁷¹ NMC Final DEIR, pg. 5.8-14.

¹⁷² See City of Ontario. 2009. The Ontario Plan Draft EIR. p. 5.4-4; NMC Final EIR, pg. 5.8-13 to 5.8-15.
5826-004j

January 3, 2022
Page 43

as foraging habitat, where small rodents or birds are most likely to be visible. The raptors may perch on trees in windrows, and on utilities poles and transmission lines overlooking open fields or may soar over the fields to forage. In open fields, ferruginous hawks (*Buteo regalis*) may roost on the ground where vegetation is low.”¹⁷³ [emphasis added]

The Project site contains all of the features (i.e., open water areas, windrows, and utility poles and transmission lines overlooking open fields) that attract raptors. And although the DEIR claims the Project site is managed to minimize small mammals, the Project site in fact continues to provide prey for raptors. According to the Applicant’s burrowing owl survey report: “[m]ammal species directly observed, or of which sign was detected, included California ground squirrel (*Spermophilus beecheyi*), desert cottontail (*Sylvilagus auduboni*), and pocket gopher (*Thomomys bottae*).”¹⁷⁴ Thus, loss of the Project site would result in loss of valuable foraging habitat for raptors.

cont’d
fff

Fourth, CDFW’s comments on the Merrill Commerce Center Specific Plan state that CDFW believes the loss of NMC agricultural lands for foraging, individually and cumulatively, is significant and should be mitigated:

CDFW is concerned that similar projects that have undergone prior environmental review (i.e., Ontario Ranch [aka the NMC Final EIR] and PSP) could come to substantially different conclusions regarding the significance of impacts related to the loss of raptor foraging habitat. CDFW believes the loss of these areas for foraging, individually and cumulatively, is significant and should be mitigated. Thus, the Project DEIR should reassess its findings for the continued loss of raptor habitat within the Dairy Preserve, and provide appropriate mitigation in the form of habitat acquisition and preservation. Therefore, CDFW advises the City to integrate into the DEIR the following measure:

ggg

4.8.9 If surveys determine that the Project supports special-status raptors, the Applicant shall mitigate the loss through the perpetual conservation

¹⁷³ Ontario Plan Draft EIR, pg. 5.4-13.

¹⁷⁴ DEIR, Appendix C3, p. 11.
5826-004j

January 3, 2022
Page 44

and management of foraging habitat, approved by CDFW, at a minimum 1:1 ratio.¹⁷⁵

Since the circumstances of this Project are the same to those of the Merrill Commerce Center Specific Plan, the City should revise its significance finding, and adopt the recommended mitigation.

Overall, the City's cumulative impacts discussion fails to meet CEQA's informational standards, and is not supported by substantial evidence.

E. The DEIR Fails to Adequately Analyze and Mitigate the Project's Transportation Impacts

i. The DEIR's Mitigation of VMT Impacts is Nonbinding and Improperly Deferred

The DEIR determines that the Project's VMT impacts will be significant and unavoidable. Reductions in commute VMT through feasible TDM measures would be implemented as part of future Certificates of Occupancy for future tenants, as noted in MM TRANS-1. However, the DEIR states that as future Project design features and building tenants are not yet known, reductions in VMT from implementation of MM TRANS-1 cannot be accurately estimated or guaranteed.¹⁷⁶ MM TRANS-1 provides:

At the time of Certificate of Occupancy for future tenants, the future tenant shall demonstrate implementation of reasonable and feasible VMT reduction measures to the satisfaction of the City of Ontario Planning Director. Measures to be considered include, but are not limited to VMT measures 1, 6 and 7 as described in EIR Appendix I2.¹⁷⁷

MM TRANS-1 is nonbinding and improperly deferred.

cont'd
ggg

hhh

¹⁷⁵ Merrill Commerce Center Specific Plan Project Final EIR - SCH No. 2019049079, Comments and Responses, pg. 3-52.

¹⁷⁶ DEIR, pg. 4.13-30.

¹⁷⁷ *Id.*, pg. 1-28.
5826-004j

January 3, 2022
Page 45

In *City of Hayward v. Board of Trustees of the California State University*,¹⁷⁸ the court considered whether a project's TDM program constituted improperly deferred mitigation. The project was a master plan to guide development of a college campus for the next 20–30 years. The master plan anticipated a significant increase in traffic and parking demand. Because the master plan covered a long-range development program and was based on projections of growth that may or may not occur, the lead agency fashioned mitigation that would allow it to retain the flexibility to select specific mitigation measures in the future. The EIR consequently designated, as mitigation measure "TRANS 1a," the requirement that the lead agency "prepare a comprehensive TDM Implementation Plan that includes steps necessary to plan for, fund, implement, and monitor the effectiveness of the measures outlined in the Master Plan TDM section." The TDM incorporated in the EIR detailed a range of sustainable transit policies that can be utilized to reduce single-occupancy. The TDM set minimum performance goals of reducing the percentage of single driver vehicle trips onto campus from the existing 79 percent to 64 percent, and increasing present transit use by 50 percent. The TDM also included a detailed monitoring program. The EIR concluded that while implementation of these mitigation measures will reduce the level of significance, the traffic and parking impacts will remain significant and unavoidable.

The court held that the TDM program was not improperly deferred, because the lead agency committed to perform the feasible mitigation measures included in the TDM:

While the Trustees have not committed to implementation of any particular measure that is specified in the TDM plan, the TDM is not illusory. The plan enumerates specific measures to be evaluated, it incorporates quantitative criteria and it sets specific deadlines for completion of the parking and traffic study and timelines for reporting to the city on the implementation and effectiveness of the measures that will be studied. The monitoring program which is an integral part of the plan ensures that the public will have access to the information necessary to evaluate compliance with the Trustees' obligations.

The instant Project is similar to the project in *Hayward* in that (1) it is an EIR for a long-term development, (2) the mitigation measure allows for flexibility in selecting TDM measures due to the uncertainty of future development, and (3) the

¹⁷⁸ (2012) 207 Cal.App.4th 446.
5826-004j

January 3, 2022
Page 46

EIRs conclude impacts will remain significant and unavoidable. However, this Project's mitigation, MM TRANS-1, lacks the quantitative criteria and monitoring program of the project in *Hayward*. As a result, this mitigation is nonbinding, and improperly defers mitigation.

cont'd
iii

ii. The DEIR Fails to Adopt All Feasible Mitigation for VMT Impacts

CEQA prohibits public agencies from approving a project as proposed if there are any feasible alternative or feasible mitigation measures that would substantially lessen or avoid any significant effect the project would have on the environment.¹⁷⁹ The DEIR's VMT mitigation, MM TRANS-1, does not include all feasible mitigation measures.

jjj

Transportation expert Dan Smith discusses VMT mitigation approaches not considered in the DEIR. One approach he recommends would be to impose annual excess VMT penalty fees, with the proceeds going to fund increased transit services in the existing or new route corridors that appear likely to be most productive in attracting new riders, and thereby reduce overall VMT in the City. Another approach would be using excess VMT penalty fees to create and maintain Park-and-Ride facilities near major interchanges or major transit stops. These are feasible mitigation measures that would help reduce the Project's significant VMT impacts. Therefore, the DEIR must be revised to include consideration of these measures.

iii. The Project Fails to Comply with Local Land Use Policies in Violation of CEQA

Public Resources Code § 21099, enacted by SB 743, provides that Level of Service ("LOS") impacts are not considered significant environmental impacts under CEQA. However, the statute specifies in Sections 21099(b)(4) that "[t]his subdivision does not preclude the application of local general plan policies, zoning codes, conditions of approval, thresholds, or any other planning requirements pursuant to the police power or any other authority." Further, § 21099(e) provides: "[t]his section does not affect the authority of a public agency to establish or adopt thresholds of significance that are more protective of the environment."

kkk

¹⁷⁹ Pub. Res. Code § 21002.
5826-004j

January 3, 2022
Page 47

The City's General Plan ("TOP") includes a Mobility Element. The Mobility Element states that LOS E or better must be maintained at all road intersections in peak hours. San Bernardino County also has a Congestion Management Plan ("CMP") applicable to some City and surrounding area roadways. The CMP also requires meeting certain LOS standards. The adjacent City of Chino and Caltrans also have adopted LOS standards.

Appendix G of the CEQA Guidelines provides that a project would normally have a significant effect on the environment if the project would "[c]onflict with a program, plan, ordinance, or policy addressing the circulation system, including transit, roadway, bicycle, and pedestrian facilities."¹⁸⁰ Since CEQA does not preclude local land use plans from using LOS as a significance threshold, and Appendix G requires that inconsistency with local plans constitutes a significant effect on the environment, the City must analyze and mitigate the Project's LOS.

The DEIR's Transportation Impact Study in Appendix I includes a conventional traffic LOS study. But the DEIR narrative states that this material is provided for information purposes, implying that it is not subject to comment under CEQA. However, given the foregoing, this statement is incorrect. In order to substantiate the DEIR's determination that the Project would not conflict with a program, plan, ordinance, or policy addressing the circulation system, the Appendix I LOS analysis and mitigation must be subject to CEQA review.

a. Mitigation Measures to Comply with the TOP Mobility Element May Not be Implemented in a Timely Manner, Hence Constituting a Failure to Mitigate Under CEQA

The DEIR's Appendix I study identifies locations where, without mitigation, the Project would significantly impact intersection LOS and hence not conform to the Mobility Element or other relevant transportation plans and policies. In the Existing + Project Condition, a total of 15 intersections impacted by the Project are identified. In the 2024 cumulative scenario with build-out of both phases of the Project, 21 impacted intersections are identified. By the 2040 cumulative scenario, 41 intersections are impacted by the Project.

¹⁸⁰ DEIR, pg. 4.13-8.
5826-004j

cont'd
kkk

III

January 3, 2022
Page 48

Mr. Smith explains that while the Appendix I study purports to mitigate these impacts, the study lacks evidence substantiating that these road improvements can or will be implemented in a timely manner.¹⁸¹ He explains that although some improvements can be made by direct Project action, some improvements are funded by payment of Development Impact Fees (“DIF”) to the City. But since the City has discretion when to implement specific local improvements covered by DIF fees, there is no guarantee that the improvements will be made in time to mitigate the Project’s impacts. Clear, enforceable criteria for spending Development Impact Fees on the Project’s improvements is required for mitigation of the Project’s traffic impacts to be considered effective.

cont’d
III

Further, Mr. Smith states that because funding depends in part on streams of DIF paid by other projects, there is no guarantee whether enough other anticipated DIF funds will be realized.¹⁸² The DEIR must substantiate whether this funding will be sufficient to implement the necessary mitigation measures.¹⁸³

As a result, the City lacks substantial evidence to conclude that the Project would not conflict with a program, plan, ordinance, or policy addressing the circulation system. The City must, in a revised EIR, commit to enforceable standards and scheduling for the implementation of improvements.

F. The DEIR Fails to Analyze Energy Impacts

The DEIR states that the Project’s energy impact is not significant. Pursuant to CEQA Guidelines § 15128, the DEIR only briefly explains why in-depth discussion of this impact was not provided.¹⁸⁴ Although the Project is estimated to consume 267,476 gallons of gasoline and 349,054 gallons of diesel fuel over the entire construction period, the DEIR reasons that this impact is insignificant because “the construction fuel demands would account for 0.04% of the San Bernardino County annual gasoline consumption and 0.14% of San Bernardino County annual diesel fuel consumption.”¹⁸⁵ Consumption would not be wasteful because “[c]onstruction equipment would comply with the latest United States

mmm

¹⁸¹ Smith, pg. 4.

¹⁸² *Id.*, pg. 5.

¹⁸³ *Napa Citizens for Honest Government v. Board of Supervisors* (2001) 91 Cal.App.4th 342 (the court of appeal found that a pre-existing traffic fee program failed to provide the “mitigation cover” to avoid a determination that a project impact may be cumulatively significant).

¹⁸⁴ DEIR, pg. 7-1.

¹⁸⁵ *Id.*, pg. 7-5.
5826-004j

January 3, 2022
Page 49

Environmental Protection Agency and California Air Resources Board engine emission standards designed to reduce pollutants and minimize unnecessary fuel consumption.” And while operations would consume approximately 24,111,453 kWh/year of electricity and 21,637,730 kBTU/year of natural gas, the operational demand only “would result in an 0.16% increase in electricity consumption and 0.04% increase in natural gas consumption for the County of San Bernardino.”¹⁸⁶ Consumption would not be wasteful because the “Project [when operational] would be required to comply with California Building Energy Efficiency Standards (Title 24).”

cont'd
mmm

CEQA provides that when the basis for an EIR’s finding that an impact is less than significant is not apparent from the facts and circumstances, the EIR must explain the reasons for the finding. An unsubstantiated conclusion that an impact is not significant, without supporting information or explanatory analysis, is insufficient; the reasoning supporting the determination of insignificance must be disclosed.¹⁸⁷ The caselaw provides that the key factor is not the length of the EIR’s analysis, but whether the analysis provides enough detail for the public to discern the analytic basis for the agency’s determination.¹⁸⁸

Here, the DEIR does not provide enough detail for the public to discern the basis for the City’s conclusion. To begin with, the DEIR’s analysis, summarized above, does not address the significance thresholds in Appendix G of the California Environmental Quality Act (CEQA) Guidelines. According to the Guidelines, a project will normally have a significant adverse environmental impact on energy if it will:

nnn

- Result in a potentially significant environmental impact due to wasteful, inefficient, or unnecessary consumption of energy resources, during project construction or operation.
- Conflict with or obstruct a State or local plan for renewable energy or energy efficiency.

¹⁸⁶ *Id.*

¹⁸⁷ *City of Maywood v. Los Angeles Unif. Sch. Dist.* (2012) 208 CA4th 362, 393; *Protect the Historic Amador Waterways b. Amador Water Agency* (2004) 116 CA4th 1099, 1111.

¹⁸⁸ *Id.*, 116 CA4th 1099.
5826-004j

January 3, 2022
Page 50

The City's analysis does not contain enough information for the public to discern whether the Project's energy consumption would be wasteful. The City states that Project would be required to comply with Title 24 Efficiency Standards. But caselaw provides that an EIR should not rely solely on compliance with Title 24 standards to mitigate operational and construction energy impacts, and should not assume that mitigation for greenhouse gas emissions will serve as a substitute for an analysis of energy use impacts.¹⁸⁹ Even if compliance with Title 24 standards was sufficient evidence to conclude a project would not be wasteful, caselaw provides that a finding of compliance with Title 24 must be supported by substantial evidence.¹⁹⁰ Therefore, the City's bare conclusion that the Project will not be wasteful is unsupported by substantial evidence. Also, since the City does not discuss features of the Project that would avoid energy waste, the DEIR fails as an informational document.

cont'd
nnn

The City's analysis does not contain enough information for the public to discern whether the Project would conflict with or obstruct a state or local plan for renewable energy or energy efficiency. The Project would include eight concrete tilt-up buildings totaling up to 5,333,518 SF of business park, warehouse and ancillary office space, consuming approximately 24,111,453 kWh/year of electricity. The construction and operations of the Project thus implicate numerous state plans for renewable energy or energy efficiency. These include the Integrated Energy Policy Report ("IEPR"), the State of California Energy Plan, Title 24, Part 6, Energy Efficiency Standards and California Green Building Standards, AB 1493 Payley Regulations and Fuel Efficiency Standards, California's Renewable Portfolio Standard ("RPS"), Clean Energy and Pollution Reduction Act of 2015 (SB 350). The DEIR fails to evaluate the Project's consistency with any of these plans. The DEIR does not disclose any facts showing why consistency with these plans is guaranteed. The DEIR's conclusion thus lacks substantial evidence, and the DEIR fails as an informational document.

ooo

¹⁸⁹ *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 CA4th 256, 264; *Cal. Clean Energy Comm. v. City of Woodland* (2014) 225 CA4th 173, 208.

¹⁹⁰ *Spring Valley Lake Ass'n v. City of Victorville* (2016) 248 CA4th 91, 103.
5826-004j

January 3, 2022
Page 51

The construction and operations of the Project also implicate local plans for renewable energy or energy efficiency. The TOP includes the following energy policies:

- *ER3-1 Conservation Strategy.* We require conservation as the first strategy to be employed to meet applicable energy-saving standards.
- *ER3-2 Green Development– Communities.* We require the use of best practices identified in green community rating systems to guide the planning and development of all new communities.
- *ER3-3 Building and Site Design.* We require new construction to incorporate energy efficient building and site design strategies, which could include appropriate solar orientation, maximum use of natural daylight, passive solar and natural ventilation.
- *ER3-4 Green Development– Public Buildings.* We require all new and substantially renovated City buildings in excess of 10,000 square feet achieve a LEED Silver Certification standard, as determined by the U.S. Green Building Council.
- *ER3-5 Fuel Efficient and Alternative Energy Vehicles and Equipment.* We purchase and use vehicles and equipment that are fuel efficient and meet or surpass state emissions requirements and/or use renewable sources of energy.
- *ER3-6 Generation- Renewable Sources.* We promote the use of renewable energy sources to serve public and private sector development.

ppp

The DEIR briefly discusses the Project's consistency with these policies in its Land Use and Planning section. However, the DEIR's discussion is conclusory, and simply mirrors the language of the policies. For instance, the DEIR claims the Project is consistent with ER3-3 because "the Project's Sustainable Design Strategies include the use of passive design to improve building energy performance through skylights, building orientation, landscaping, and use of select colors." This conclusory discussion provides no information to the public about whether and how the Project will actually comply with ER3-3. The DEIR fails as an informational document and fails to substantiate its conclusions with substantial evidence.

5826-004j

January 3, 2022
Page 52

In addition, Appendix F of the CEQA Guidelines states that the means of achieving the goal of energy conservation include the following:

- Decreasing overall per capita energy consumption;
- Decreasing reliance on fossil fuels such as coal, natural gas, and oil; and
- Increasing reliance on renewable energy sources.

The DEIR fails to explain how the Project, which consumes large amounts of energy during construction and operation, would assist in decreasing per capita energy consumption, decreasing reliance on fossil fuels, and increasing reliance on renewable energy. The City's analysis does not provide enough detail for the public to discern the analytic basis for the agency's determination.¹⁹¹

Overall, due to the large amount of energy the Project's operation and construction will require, and due to the DEIR's failure to show energy impacts will be less than significant, the DEIR must be revised to include a full energy analysis.

G. The DEIR Fails to Require Mitigation for the Project's Significant Agricultural Impacts

The DEIR states that the Project's conversion of Prime Farmland, Unique Farmland, or Farmland of Statewide Importance is a significant and unavoidable impact.¹⁹² The DEIR also states that the Project would conflict with existing zoning for agricultural use or a Williamson Act contract. And the Project would involve other changes in the existing environment which, due to their location or nature, could result in conversion of Farmland, to nonagricultural use or conversion of forest land to non-forest use.

The DEIR claims that no feasible mitigation measures have been identified to substantially lessen the Project's significant impacts related to the loss of Prime Farmland and conversion of farmland to non-agricultural use. The DEIR discusses

¹⁹¹ *Ukiah Citizens for Safety First v. City of Ukiah* ("Ukiah Citizens") (2016) 248 Cal.App.4th 256, 264-65 (energy impact analysis requires clarification and technical information regarding project-related energy usage and conservation features); *Spring Valley Lake Association v. City of Victorville* ("Spring Valley") (2016) 248 Cal.App.4th 91, 103 (CEQA doc must show factual basis of its assumptions that both energy use and greenhouse gas emissions will be reduced).

¹⁹² DEIR, pg. 1-11.
5826-004j

January 3, 2022
Page 53

six types of mitigation measures, and concludes that none of them are feasible.¹⁹³ These measures include deed disclosure, retention of on-site agricultural uses, replacement of agricultural uses offsite, relocation of prime farmland topsoil, establishment of conservation easement or preserves, and payment in lieu or transfer of development rights. However, the DEIR generally fails to actually address the technical feasibility of these mitigation measures. Instead, the DEIR reasons that because agriculture in the City is declining and is becoming economically unsustainable, mitigating impacts to agriculture is undesirable. “Ontario’s future development emphasizes mixed-use, commercial, industrial, and residential projects rather than supporting the continuation of agricultural uses, which are becoming less economically viable.”¹⁹⁴

For example, the DEIR states that establishment of conservation easements is infeasible because it is contrary to the City’s policies and vision providing for transition of agricultural uses to urban uses.¹⁹⁵ The DEIR states relocation of prime farmland topsoil is infeasible because it “would promote creation of new or additional Farmland status properties in the City, rather than provide for their transition to urban uses.”¹⁹⁶

The City’s approach is to claim that because local policy discourages mitigation of a certain type of environmental impact (agricultural impacts), mitigation of that impact is infeasible. This approach violates basic principles of CEQA – that an EIR propose and describe mitigation measures to minimize the significant environmental effects identified in the EIR.¹⁹⁷ And when it approves a project, the agency must adopt any feasible mitigation measures identified in the EIR that would mitigate or avoid the project’s significant environmental impacts.¹⁹⁸

The City’s refusal to consider mitigation of agricultural impacts also conflicts with Appendix G of the CEQA Guidelines, which provides that agricultural impacts are significant environmental impacts, and that such impacts must be mitigated. The City’s approach also undermines state policy of preserving agricultural land.¹⁹⁹

cont’d
rrr

SSS

¹⁹³ *Id.*, pg. 4.1-12.

¹⁹⁴ DEIR, pg. 4.1-3.

¹⁹⁵ *Id.*, pg. 4.1-14.

¹⁹⁶ *Id.*

¹⁹⁷ Pub. Resources Code §§21002(a), 21061, 21100(b)(3); 14 Cal Code Regs § 15126.4(a)(1).

¹⁹⁸ Pub. Resources Code §§21002.1(b), 21081(a)(1); 14 Cal Code Regs § 15021(a)(2), (3).

¹⁹⁹ See, e.g., California Land Conservation Act of 1965 (“Williamson Act”), Gov. Code 51200 et seq.; California Farmland Conservancy Program Act, Pub. Res. Code, § 10201 et seq.; Farmland 5826-004j

January 3, 2022
Page 54

For instance, Civil Code § 815 is a legislative declaration that preservation of agricultural lands “is among the most important environmental assets of California.”

cont'd
SSS

The City’s approach also violates CEQA’s informational requirements by failing to determine whether mitigation measures are actually technically feasible. The DEIR does not provide decisionmakers with sufficient information to determine whether, regardless of a mitigation measure’s consistency with local policy, mitigation of agricultural impacts can be achieved.

t t t

Overall, the City must revise its discussion of agricultural mitigation measures. Because these measures were incorrectly analyzed for their consistency with the City’s policy preferences, the DEIR fails as an informational document, and the City’s conclusion that mitigation is infeasible is not supported by substantial evidence. As a result, the City’s conclusion that agricultural impacts are significant and unavoidable is also not supported by substantial evidence.

U U U

H. The Statement of Overriding Consideration Must Consider Whether the Project Provides Employment Opportunities for Highly Trained Workers

The City concluded in the DEIR that the Project will have significant and unavoidable environmental impacts on agriculture, air quality, greenhouse gas emissions, and transportation.²⁰⁰ Therefore, in order to approve the Project, CEQA requires the City to adopt a statement of overriding considerations, providing that the Project’s overriding benefits outweigh its environmental harm.²⁰¹ An agency’s determination that a project’s benefits outweigh its significant, unavoidable impacts “lies at the core of the lead agency’s discretionary responsibility under CEQA.”²⁰²

v v v

Protection Policy Act, 7 U.S.C., § 4201, et seq.; *see also* Gov. Code, § 815 et seq. (encouraging preservation of agricultural land through conservation easements).

²⁰⁰ DEIR, pg. 5-3.

²⁰¹ CEQA Guidelines, § 15043.

²⁰² *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.
5826-004j

January 3, 2022
Page 55

The City must set forth the reasons for its action, pointing to supporting substantial evidence in the administrative record.²⁰³ This requirement reflects the policy that public agencies must weigh a project's benefits against its unavoidable environmental impacts, and may find the adverse impacts acceptable only if the benefits outweigh the impacts.²⁰⁴ Importantly, a statement of overriding considerations is legally inadequate if it fails to accurately characterize the relative harms and benefits of a project.²⁰⁵

In this case, the City must find that the Project's significant, unavoidable impacts outweigh the Project's benefits to the community. CEQA specifically references employment opportunities for highly trained workers as a factor to be considered in making the determination of overriding benefits.²⁰⁶ Currently, there is not substantial evidence in the record showing that the Project's significant, unavoidable impacts are outweighed by benefits to the community. For example, there is no evidence in the record that the Applicant has made any commitments to employ graduates of state approved apprenticeship programs or taken other steps to ensure employment of highly trained and skilled craft workers on Project construction, an action contemplated by CEQA Section 21081. Absent substantial evidence in the record demonstrating that the Project's benefits outweigh its environmental costs, the City would not fulfill its obligations under CEQA if it adopted a statement of overriding considerations and approved the Project.

We urge the City to prepare and circulate a revised DEIR which identifies the Project's potentially significant impacts, requires all feasible mitigation measures and analyzes all feasible alternatives to reduce impacts to a less than significant level. If a Statement of Overriding Considerations is adopted for the Project, we urge the City to consider whether the Project will result in employment opportunities for highly trained workers.

cont'd
VVV

WWW

²⁰³ Pub. Resources Code, § 21081, subd. (b); CEQA Guidelines, § 15093, subds. (a) and (b); *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 357.

²⁰⁴ Pub. Resources Code, § 21081(b); CEQA Guidelines, § 15093, subds. (a) and (b)

²⁰⁵ *Woodward Park Homeowners Association v. City of Fresno* (2007) 150 Cal.App.4th 683, 717.

²⁰⁶ Pub. Resources Code, § 21081, subds. (a)(3) and (b).
5826-004j

January 3, 2022
Page 56

V. CONCLUSION

The DEIR is inadequate and must be withdrawn. We urge the City to prepare and circulate a revised DEIR which accurately sets for the existing environmental setting, discloses all of the Project's potentially significant impacts, and requires all feasible mitigation measures to reduce the Project's significant environmental and public health impacts. We thank you for the opportunity to provide these comments on the DEIR.

xxx

Sincerely,



Aidan P. Marshall

APM:lj

Exhibits

5826-004j