LETTER 2

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September 19, 2022

Via E-mail

Jay Paul, Senior Planner
Planning Division
City of Escondido
201 North Broadway
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Re: Meyers Avenue Industrial Project (Case No.: PL20-0654; APN Nos.: 228-312-05-00 and 228-312-06-00)

Dear Mr. Paul:

I am writing on behalf of Supporters Alliance for Environmental Responsibility ("SAFER") regarding the Initial Study and Mitigated Negative Declaration ("IS/MND" or "MND") prepared for the Meyers Avenue Industrial Project ("Project") (Case No.: PL20-0654), for Applicant Via West Group (VWP Escondido, LLP) (hereinafter the "Applicant"), including all actions related or referring to the proposed construction and operation of a 67,300-square-foot industrial building on a 4.26-acre vacant site, to be located at 2351 Meyers Avenue, within the City of Escondido, California (APN Nos.: 228-312-05-00 and 228-312-06-00). 1

SAFER is concerned that the IS/MND prepared for the Project is legally inadequate. SAFER's review of the Project has been assisted by wildlife biologist Dr. Shawn Smallwood, Ph.D; and air quality experts Matt Hagemann, P.G., C.Hg. and Paul E. Rosenfeld, Ph.D., of the environmental consulting firm, Soil/Water/Air Protection Enterprise ("SWAPE"). The expert comments of Dr. Smallwood and SWAPE are attached as Exhibit A and Exhibit B, respectively. 2

After reviewing the IS/MND, it is evident that it is inadequate and fails as an informational document. Also, there is a "fair argument" that the Project may have unmitigated adverse environmental impacts. Therefore, CEQA requires that the City of Escondido ("City") prepare an environmental impact report ("EIR") for the Project, pursuant to the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000, et seq. SAFER respectfully requests that you do not adopt the IS/MND and instead undertake the necessary efforts to prepare an EIR, as required under CEQA. 3

PROJECT DESCRIPTION

The Applicant proposes to construct a 67,300-square-foot industrial building on a 4.26-acre vacant site, located at 2351 Meyers Avenue. The proposed development includes 55,300 square feet of manufacturing/warehouse space, 6,000 square feet of office on the first floor and 6,000 square feet of office space on the mezzanine level. It is anticipated that grading will include a combination of cut and fill, retaining walls, and blasting. 4

LEGAL STANDARD

As the California Supreme Court has held, "[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." (*Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319-320 (*CBE v. SCAQMD*) (citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505).) "Significant environmental effect" is defined very broadly as "a substantial or potentially substantial adverse change in the environment." (Pub. Res. Code ("PRC") § 21068; *see also* 14 CCR § 15382.) An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial." (*No Oil, Inc.*, 13 Cal.3d at 83.) "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Communities for a Better Env't v. Cal. Res. Agency* (2002) 103 Cal.App.4th 98, 109 (*CBE v. CRA*).) 5

The EIR is the very heart of CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214 (*Bakersfield Citizens*); *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927.) The EIR is an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return." (*Bakersfield Citizens*, 124 Cal.App.4th at 1220.) The EIR also functions as a "document of accountability," intended to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (*Laurel Heights Improvements Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392.) The EIR process "protects not only the environment but also informed self-government." (*Pocket Protectors*, 124 Cal.App.4th at 927.) 6

An EIR is required if "there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment." (PRC § 21080(d); *see also Pocket Protectors*, 124 Cal.App.4th at 927.) In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (14 CCR § 15371), only if there is not even a "fair argument" that the project will have a significant environmental effect. (PRC §§ 21100, 21064.) Since "[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process," by allowing the agency "to 7

7 cont dispense with the duty [to prepare an EIR]," negative declarations are allowed only in cases where "the proposed project will not affect the environment at all." (*Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440.)

Mitigation measures may not be construed as project design elements or features in an environmental document under CEQA. The IS/MND must "separately identify and analyze the significance of the impacts … before proposing mitigation measures […]." (*Lotus vs. Department of Transportation* (2014) 223 Cal.App.4th 645, 658.) A "mitigation measure" is a measure designed to minimize a project's significant environmental impacts, (PRC § 21002.1(a)), while a "project" is defined as including "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." (CEQA Guidelines § 15378(a).) Unlike mitigation measures, project elements are considered prior to making a significance determination. Measures are not technically "mitigation" under CEQA unless they are incorporated to avoid or minimize "significant" impacts. (PRC § 21100(b)(3).)

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To ensure that the project's potential environmental impacts are fully analyzed and disclosed, and that the adequacy of proposed mitigation measures is considered in depth, mitigation measures that are not included in the project's design should not be treated as part of the project description. (*Lotus*, 223 Cal.App.4th at 654-55, 656 fn.8.) Mischaracterization of a mitigation measure as a project design element or feature is "significant," and therefore amounts to a material error, "when it precludes or obfuscates required disclosure of the project's environmental impacts and analysis of potential mitigation measures." (*Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 185.)

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Where an initial study shows that the project may have a significant effect on the environment, a mitigated negative declaration may be appropriate. However, a mitigated negative declaration is proper *only* if the project revisions would avoid or mitigate the potentially significant effects identified in the initial study "to a point where clearly no significant effect on the environment would occur, and…there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (PRC §§ 21064.5, 21080(c)(2); *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 331.) In that context, "may" means a reasonable possibility of a significant effect on the environment. (PRC §§ 21082.2(a), 21100, 21151(a); *Pocket Protectors*, 124 Cal.App.4th at 927; *League for Protection of Oakland's etc. Historic Res. v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–05.)

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Under the "fair argument" standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency's decision. (14 CCR § 15064(f)(1); *Pocket Protectors,* 124 Cal.App.4th at 931; *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-51; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.) The "fair argument" standard creates a "low threshold" favoring environmental review through an EIR rather than through issuance of negative declarations or notices of

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exemption from CEQA. (*Pocket Protectors*, 124 Cal.App.4th at 928.)

The "fair argument" standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

> This 'fair argument' standard is very different from the standard normally followed by public agencies in their decision making. Ordinarily, public agencies weigh the evidence in the record and reach a decision based on a preponderance of the evidence. [Citation]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact.

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(Kostka & Zischke, *Practice Under the California Environmental Quality Act*, §6.37 (2d ed. Cal. CEB 2021).) The Courts have explained that "it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, with *a preference for resolving doubts in favor of environmental review*." (*Pocket Protectors*, 124 Cal.App.4th at 928 (emphasis in original).)

For over forty years the courts have consistently held that an accurate and stable project description is a bedrock requirement of CEQA—the *sine qua non* (that without which there is nothing) of an adequate CEQA document:

> Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the "no project" alternative) and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.

(*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185 at 192–93.) CEQA therefore requires that an environmental review document provide an adequate description of the project to allow for the public and government agencies to participate in the review process through submitting public comments and making informed decisions.

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Lastly, CEQA requires that an environmental document include a description of the project's environmental setting or "baseline." (CEQA Guidelines § 15063(d)(2).) The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. (*CBE v. SCAQMD*, 48 Cal.4th at 321.) CEQA Guidelines section 15125(a) states, in pertinent part, that a lead agency's environmental review under CEQA:

> …must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time [environmental analysis] is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead

Agency determines whether an impact is significant.

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(*See Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124-25 ("*Save Our Peninsula*").) As the court of appeal has explained, "the impacts of the project must be measured against the 'real conditions on the ground,'" and not against hypothetical permitted levels. (*Id.* at 121-23.)

I. The Project Will Result in Significant Impacts to Biological Resources.

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Expert wildlife biologist Dr. Shawn Smallwood, Ph.D., reviewed the IS/MND, as well as the July 2021 biological resources technical report, and the 2018 Focused California Gnatcatcher Survey Report for the adjacent Sunrise Specific Plan project (attached to the technical report as Appendix A), both prepared by Dudek, to inform his comments (hereinafter, "Dudek reports"). Dr. Smallwood's comments are attached as Exhibit A.

Dr. Smallwood's associate, Noriko Smallwood, a wildlife biologist, surveyed the Project site and took photos of existing wildlife and habitat there on August 26, 2022. (Ex. A., p. 1.) During her site visit, Ms. Smallwood "detected 13 species of vertebrate wildlife at or near the site (Table 1), 1 of which was a special-status species." (*Id.*, p. 1.) Among the species Ms. Smallwood identified on the Project site are western fence lizard, snowy egret, American crows, mourning doves, and burrows of Botta's pocket gopher. (*Id.*, pp. 1-2 [see photos 4-8].) "Fewer species than expected were detected," however, most likely because of "the construction activity at the Sunrise Project and the use of the southern half (ca. 60%) of the site of the proposed project as a construction staging area for the Sunrise Project." (*Id.*, p. 2.) Nonetheless, Dr. Smallwood observed, the site remains "inherently rich in wildlife." (*Id.*) Based on these observations, and his independent review of the IS/MND, Dr. Smallwood concluded that the Project would likely result in significant impacts to existing biological resources. CEQA requires the preparation of an EIR to fully assess and more extensively mitigate these impacts.

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Dr. Smallwood identified numerous areas of concern, including deep methodological flaws underlying the conclusions of the Dudek reports and likely impacts to biological resources which the IS/MND failed to consider or appropriately mitigate. Alarmingly, Dr. Smallwood also found that the Project would conflict with existing provisions of the North County Multiple Habitat Conservation Plan ("MHCP"), which protects threatened plant and animal species throughout Northwestern San Diego County. (*Id.*, pp. 19-20.) Dr. Smallwood identified additional likely impacts to wildlife, including habitat loss, interference with movement, traffic impacts, and cumulative impacts. (*Id.*, pp. 18-23). Finally, Dr. Smallwood proposed a comprehensive series of wildlife mitigation measures to minimize the Project's likely impacts on biological resources (*Id.*, pp. 23-25). Dr. Smallwood's findings constitute substantial evidence of a fair argument that the Project may have adverse, unmitigated environmental impacts to biological resources.

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A. The IS/MND Failed to Properly Analyze Scientific Database Records and Mischaracterized the Project's Current Environmental Setting.

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The Dudek report "inappropriately uses California Natural Diversity Data Base (CNDDB) to determine which species have potential to occur in the project area." (*Id.*, p. 11.) This database was "not designed to support absence determinations or to screen out species from characterization of a site's wildlife community." (*Id.*) As a result of its imprecise interpretation of CNDBB records, the "IS/MND neglects to analyze the occurrence potentials of 79 (64%) of the special-status species in Table 2, [the list compiled by Dr. Smallwood]. Of these, 10 were confirmed on site, and databases include occurrence records of 17 within 1.5 miles and 21 within 1.5 and 4 miles of the site. The IS/MND made insufficient use of the wildlife occurrence databases, and is not supported by due diligence." (*Id.*, p. 18.)

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The IS/MND's significant oversight here is problematic because, "under CEQA, the lead agency bears a burden to investigate potential environmental impacts. 'If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.'" (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 311; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal. App. 4th 1544.). Since the City has failed to sufficiently account for the presence of special-status species on the Project site and surrounding areas, a fair argument can be made that broader deficiencies underlie the IS/MND's assessment of the Project's likely impacts to biological resources.

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Dr. Smallwood concludes that the report's assumptions regarding the site's environmental baseline conditions are unsupported by scientific evidence. Therefore, a "fair argument can be made for the need to prepare an EIR to appropriately characterize existing conditions so that impacts analysis can proceed from a sound footing." (*Id.*)

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B. The Project Would Improperly Conflict with the North County Multiple Habitat Conservation Plan.

Dr. Smallwood found that the IS/MND fails to provide any compensatory mitigation to address the Project's substantial conflict with existing provisions of the North County Multiple Habitat Conservation Plan ("MHCP"). The MHCP "is a comprehensive conservation planning process that addresses the needs of multiple plant and animal species in North Western [*sic*] San Diego County[,]" and which "encompasses the cities of Carlsbad, Encinitas, Escondido, Oceanside, San Marcos, Solana Beach, and Vista."[1]

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The Dudek report notes that, while the City of Escondido "is no longer an active participant in the NCCP program and the subregional MHCP conservation planning effort," "it is the City's policy to comply with the conservation policies identified in the Draft Escondido

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[1] San Diego Association of Governments, *North County Multiple Habitat Conservation Program*, https://www.sandag.org/index.asp?projectid=97&fuseaction=projects.detail#:~:text=The%20Multiple%20Habitat%20Conservation%20Program.%2C%20Solana%20Beach%2C%20and%20Vista..

Subarea Plan, including an assessment of designated BCLA [Biological Core Linkage Area] or MHCP Focused Planning Area (FPA) in the context of the proposed project." (Dudek report, p. 9.) It then asserts, however, that the "Project site is located in an area mapped as Developed and Disturbed Land and is located outside the BCLA or MHCP FPAs (Ogden 2001)." (*Id.*, pp. 9-10.)

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These conclusions are not supported by substantial evidence and directly conflict with Dr. Smallwood's findings. Notably, Dr. Smallwood writes, the Project "would potentially affect up to 21 special-status species of wildlife [shown] in Table 2 that are covered by the MHCP. Of these 21 species, 3 have been confirmed on the project site, and 5 have been documented within 1.5 miles of the site, 3 have been documented within 1.5 and 4 miles of the site, and 9 have been documented within 4 and 30 miles of the site." These are significant impacts that must be addressed in an EIR.

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Furthermore, where a local or regional policy of general applicability, such as the MHCP, is adopted to avoid or mitigate environmental effects, a conflict with that policy constitutes a potentially significant impact on the environment. (*Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903.) Indeed, any inconsistencies between a proposed project and applicable local or regional plans must be discussed in an EIR. (14 CCR § 15125(d); *City of Long Beach v. Los Angeles Unif. School Dist.* (2009) 176 Cal. App. 4th 889, 918; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 874 (EIR inadequate when Lead Agency failed to identify relationship of project to relevant local plans).) A project's inconsistencies with local plans prepared outside of the CEQA process may similarly constitute significant impacts and require the preparation of an EIR. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4.) More recently, in *Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358, 364, the court echoed this framework to hold that a "planning or zoning finding conducted outside the requirements of CEQA does not provide a substitute for CEQA review." In either scenario, the fair argument standard applies to the courts' evaluation of a project's potential inconsistencies with a previously adopted local plan or policy.

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Therefore, "a fair argument can be made for the need to prepare an EIR to address the impacts of project noise to wildlife." (*Id.*) Any future environmental analysis should identify habitat areas that will be impacted by the Project's excess noise levels as habitat losses and must include compensatory mitigation measures for all impacted special-status wildlife species.

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II. The Project Will have Significant Air Quality and Greenhouse Gas Impacts.

Air quality experts Matt Hagemann, P.G., C.Hg. and Dr. Paul E. Rosenfeld, Ph.D. of the environmental consulting firm SWAPE, reviewed the IS/MND and the associated Air Quality, Greenhouse Gas, and Energy Impact Study, attached as Appendix 3 to the IS/MND ("AQ Study"). SWAPE's comments are attached as Exhibit B.

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SWAPE's review identified numerous methodological flaws which call into question the IS/MND's conclusions and make clear that the Project is likely to result in significant air quality impacts. Additionally, SWAPE conducted its own modeling of the Project's air quality impacts and found that its emissions will far exceed applicable significance thresholds. Lastly, SWAPE produced a detailed list of comprehensive mitigation measures that go beyond the pollution reduction efforts proposed by the IS/MND. (Ex. B, pp. 15-17). SWAPE therefore concluded that an EIR "should be prepared to adequately assess and mitigate the potential air quality, health risk, and greenhouse gas impacts that the project may have on the environment." (*Id.*, p. 1.)

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A. The IS/MND Relies on Deeply Flawed Assumptions Regarding the Project's Likely Emissions.

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Upon reviewing the Project's CalEEMod output files – the underlying data files used to estimate a project's air emissions – SWAPE found that "several model inputs were not consistent with [the] information disclosed" in the IS/MND. (*Id.*, p. 2.) For instance, the AQ study ***failed to distinguish*** between the emissions that will likely result from future operation of the proposed warehouse space as distinguished from the proposed manufacturing space. (*Id.*) This is a substantial oversight which calls into question the AQ study's remaining findings.

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Next, the AQ study improperly reduced the "default architectural and area coating emission factors" values in CalEEMod, the air modeling tool used to prepare its analysis. (*Id.*, p. 3.) This is notable because the CalEEMod User Guide expressly "requires any changes to model defaults to be justified." (*Id.*, p. 4.) Instead, the AQ study merely pointed to planned compliance with the San Diego County Air Pollution Control District's ("SDAPCD") Rule 67.0.1, which limits volatile organic compound ("VOC") contents in architectural coating materials. However, because it "fails to explicitly require the use of a specific type or types of coating," SWAPE was "unable to verify the revised emission factors assumed in the model." (*Id.*, p. 4.) SWAPE similarly found that the AQ study improperly modeled the Project's emissions using the incorrect number of proposed parking spaces—by a reduction of 21 spaces from the number cited in the IS/MND—thus rendering its estimates of construction and operational emissions inaccurate. (*Id.*, p. 3.)

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Lastly, following its detailed review of the AQ study's modeling errors, SWAPE conducted an updated CalEEMod analysis of the Project's likely air emissions, determining the input values based on information presented in the IS/MND. Upon concluding its analysis, SWAPE found that the Project's construction-related VOC emissions exceed the SDAPCD significance threshold of 75 pounds per day. (*Id.*, p. 5.) Notably, SWAPE's analysis found that the Project's emissions would be approximately ***320% greater*** than the AQ study estimates provided in support of the IS/MND. (*Id.*)

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This finding makes clear that there is a fair argument that Project will have highly significant air quality impacts. Therefore, "an EIR should be prepared to adequately assess and mitigate the potential air quality impacts that the Project may have on the environment." (*Id.*)

B. The IS/MND Failed to Conduct a Health Risk Assessment to Evaluate the Project's Likely Impact on Human Health.

The IS/MND violates CEQA by failing to prepare a quantified construction and
30 operational Health Risk Assessment ("HRA"). (*Id.*, p. 6.) CEQA requires "a reasonable effort to substantively connect a project's air quality impacts to likely health consequences." (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 510.) According to SWAPE's analysis, the "IS/MND fails to evaluate the TAC [toxic air contaminant] emissions associated with Project construction and operation or indicate the concentrations at which such pollutants would trigger adverse health effects." (*Id.*, p. 7.)

Additionally, the AQ study failed to comply with applicable guidance by the Office of Environmental Health Hazard Assessment ("OEHHA") indicating when an HRA is required. Namely, current OEHHA guidance recommends that an HRA be conducted to assess cancer risks for any Project lasting a minimum of two months, and that the HRA analysis for a Project
31 that will last six months or longer correspond to the entire expected "lifetime" of the Project. (*Id.*, p. 8.) Lastly, because the AQ study failed to conduct an HRA, it did not present an estimated cancer risk associated to the Project. As such, it did not—and could not—determine whether the Project would exceed the SDAPCD's significance threshold of 10 per million. (*Id.*) The IS/MND's failure to account for – or even consider these risks – is a significant oversight.

"[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts. 'If the local agency has failed to study an area of possible environmental impact, a fair
32 argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.'" (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App. 4th 1544, 1597 (citing *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311).)

Furthermore, "CEQA places the burden of environmental investigation on government rather than the public. If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record." (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1378–79 [quotations omitted].) Indeed, "[d]eficiencies in
33 the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." (*Id.*; *See* also, *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 197 [holding that city's failure to undertake adequate environmental analysis further supported fair argument that project would have significant impacts].) Since the IS/MND fails to conduct a proper health risk assessment, a fair argument may be based on the inadequate analysis.

C. The IS/MND Improperly Estimated the Project's Likely Greenhouse Gas Emissions.

34 SWAPE rejects the IS/MND's unfounded assertion that the Project's greenhouse gas ("GHG") emissions will be less than significant. (*Id.*, p. 14.) Specifically, SWAPE found that because the "IS/MND's quantitative GHG analysis relies upon an incorrect and unsubstantiated

34 cont air model," an "EIR should be prepared that adequately assesses the potential GHG impacts that construction and operation of the proposed Project may have on the environment." (*Id.*)

Next, SWAPE notes, the IS/MND incorrectly asserted that the Project would be consistent with the California Air Resources Board's ("CARB") 2017 Climate Change Scoping Plan. (*Id.*) This claim is unfounded, however, because the IS/MND failed to implement
35 CARB's *performance-based standards* for estimating emissions from daily per capita vehicle miles traveled ("VMT") when estimating the Project's GHG emissions. (*Id.* pp. 14-15.) Because the IS/MND's GHG emissions estimates are unfounded, and not supported by substantial evidence, an "EIR should be prepared for the proposed Project to provide additional information and analysis to conclude less-than-significant GHG impacts." (*Id.*, p. 15.)

III. The Project's Energy Analysis Is Insufficient and Improperly Relies on Legally Unenforceable Mitigation Measures.

CEQA provides that all Projects must include "measures to reduce the wasteful,
36 inefficient, and unnecessary consumption of energy." (PRC § 21100(b)(3).) Energy conservation under CEQA is defined as the "wise and efficient use of energy." (CEQA Guidelines, app. F, § I.) The "wise and efficient use of energy" is achieved by "(1) decreasing overall per capita energy consumption, (2) decreasing reliance on fossil fuels such as coal, natural gas and oil, and (3) increasing reliance on renewable energy resources." (*Id.*) The IS/MND's analysis of the Project's energy impacts is conclusory and fails to provide the necessary analysis.

A failure to undertake "an investigation into renewable energy options that might be available or appropriate for a project" violates CEQA. (*California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 213 ("*Clean Energy*.") Additionally, compliance with the California Building Energy Efficiency Standards (Cal. Code Regs., tit. 24, part 6 ("Title 24")) does not, in and of itself, constitute an adequate energy analysis under CEQA. (*Ukiah*
37 *Citizens for Safety First v. City of Ukia*h (2016) 248 Cal.App.4th 256, 264-65.) For instance, in *Clean Energy*, the court held unlawful an energy analysis which relied solely on a project's compliance with Title 24, but which failed to assess the project's transportation energy impacts and lacked any discussion regarding possible uses of renewable energy. (225 Cal.App.4th at pp. 209, 213.) Therefore, the IS/MND's reliance on Title 24 compliance does not satisfy CEQA's requirement to provide a detailed assessment of the Project's likely energy impacts. (IS/MND, p. 45)

The IS/MND provides ***no details whatsoever*** regarding the Project's planned renewable energy use—if any—as required under *Clean Energy*. Instead, it refers to planned compliance with Title 24 and with the "reduction strategies of the City of Escondido Climate Action Plan
38 (CAP)." (*Id.*, p. 46.) These vague commitments fall far short of the robust energy analysis which CEQA requires. Instead, mitigation measures be fully enforceable through permit conditions, agreements, or other legally binding instruments. 14 CCR § 15126.4(a)(2). (*See* also, *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683,

730 [project proponent's agreement to a mitigation by itself is insufficient; mitigation measure must be an enforceable requirement].) Similarly, a CEQA lead agency may not rely on mitigation measures to reduce a project's impacts if the measures are not enforceable. (*Id.*) Because the proposed CAP strategies are not formally adopted by the IS/MND as mitigation measures, there is no guarantee that they "would be implemented, monitored, and enforced" at the Project site.

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An EIR is therefore required to evaluate the Project's likely energy impacts, including by providing a more detailed quantitative analysis of the Project's planned use of renewable and/or fossil-fuel-derived energy resources. Legally enforceable mitigation measures must also be properly adopted to reduce the Project's likely energy impacts.

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IV. CONCLUSION

For the foregoing reasons, the IS/MND for the proposed Project fails to comply with CEQA. Substantial evidence supports a fair argument that the Project may have significant impacts on biological resources and energy. Moreover, the IS/MND failed to adequately investigate baseline conditions or mitigate the Project's likely impacts. SAFER therefore respectfully requests that you decline to adopt the IS/MND and instead undertake the necessary efforts to prepare an EIR for the proposed Project. Thank you for considering these comments.

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Sincerely,

Adam Frankel
LOZEAU | DRURY LLP