

## 2.2.3 COMMENT LETTER #3:

### LABORERS INTERNATIONAL UNION OF NORTH AMERICA (LIUNA), LOCAL UNION NO. 185

#### Letter 3



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Re: Woodland Research & Technology Park Specific Plan and Draft Environmental Impact Report (SCH #2017062042)

Dear Ms. Bumgardner,

I am writing on behalf of Laborers International Union of North America, Local Union 185, regarding the proposed Woodland Research & Technology Park ("WRTP") Specific Plan and the accompanying draft Environmental Impact Report ("DEIR"). The proposal includes a specific plan that would authorize approximately 1,600 new residential units and 2.2 million square feet of non-residential development within a 350-acre plan area on the southern edge of Woodland. Currently the location of prime farmland, the plan would leave about 21.8 acres of park and other types of open space, including stormwater basins. Although noting a lack of information regarding specific commercial projects that would be proposed in the future, the proposed Specific Plan would make almost all of the authorized commercial uses permitted of right. The DEIR identifies a long list of substantial and unavoidable impacts that result from the proposed plan. These projected unavoidable impacts include obstructing implementation of the Yolo-Solano Air Quality Management District ("YSAQMD") air quality plan, construction and operational emissions of particulate matter and ozone precursors (ROGs and NOx) in excess of area air quality standards, and significant operational noise levels. Despite these significant and unavoidable impacts, the DEIR suggests that revisiting these findings as future development projects are permitted would be streamlined and would not reevaluate with the benefits of public comments whether additional mitigations should be required for future individual projects and whether these currently unavoidable impacts could, in the future, be reduced to less than significant. LIUNA believes this runs afoul of CEQA for several reasons and unnecessarily hampers the City and current and future residents to make sure additional mitigations of the significant impacts are assessed and required as development occurs over the next two decades.

First, in order for the City to certify the EIR, the City will need to make a finding that it has adopted all feasible mitigation measures addressing each of the significant and unavoidable impacts. One feasible mitigation measure must include maintaining the City's discretion to apply

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future, specific mitigation measures to development projects, in particular larger commercial developments, addressing the currently unavoidable impacts by requiring a discretionary conditional use permit ("CUP") rather than permitting those future developments of right. Consideration of this mitigation is required by CEQA because, where the City makes a finding of overriding considerations for a specific plan, it has a duty to revisit that finding as future development projects are considered and approved. (See *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 122-125.)

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The City also has an obligation to include one or more alternatives that would require CUPs and not permit certain uses of right. For example, by considering an alternative that would make any commercial development proposal in excess of 25,000 square feet subject to a CUP and not permitted of right, the City would reduce the significant impacts of the Specific Plan by ensuring consideration of additional feasible mitigation measures for those future developments that would be more readily apparent in the context of the proposed project. This also would ensure the ability of the public, including future residents of the W RTP, to provide meaningful comments on future large projects rather than the secretive and relatively closed process of over-the-counter permits.

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In addition to these overarching concerns, LIUNA has retained several experts to review the DEIR's air quality and health risk assessments, as well as the biological impacts of the proposed Specific plan. These comments have been prepared with the assistance of wildlife biologist Shawn Smallwood, Ph.D., and environmental consulting firm Soil/Water/Air Protection Enterprise ("SWAPE"). Dr. Smallwood's comment and curriculum vitae are attached as Exhibit A hereto and are incorporated herein by reference and entirety. SWAPE's comment and curriculum vitae are attached as Exhibit B hereto and are incorporated herein by reference in their entirety.

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#### LEGAL BACKGROUND

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances). See, e.g. Pub. Res. Code § 21100. The EIR is the very heart of CEQA. *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. "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 Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.

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CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. 14 Cal. Code Regs. ("CEQA Guidelines") § 15002(a)(1). "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'" *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. 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.” *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal. App. 4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures. CEQA Guidelines § 15002(a)(2) and (3); *see also, Berkeley Jets*, 91 Cal.App.4th at pp. 1344, 1354; *Citizens of Goleta Valley, supra*, 52 Cal.3d at 564. The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.” CEQA Guidelines §15002(a)(2). If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.” Pub. Res. Code § 21081; 14 Cal.Code Regs. § 15092(b)(2)(A) & (B). The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 732.

In general, mitigation measures must be designed to minimize, reduce or avoid an identified environmental impact or to rectify or compensate for that impact. 14 Cal.Code Regs. § 15370. Where several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. *Id.* at § 15126.4(a)(1)(B). A lead agency may not make the required CEQA findings unless the administrative record clearly shows that all uncertainties regarding the mitigation of significant environmental impacts have been resolved.

CEQA requires the lead agency to adopt feasible mitigation measures that will substantially lessen or avoid the Project’s potentially significant environmental impacts (Pub. Res. Code §§ 21002, 21081(a)), and describe those mitigation measures in the CEQA document. Pub. Res. Code § 21100(b)(3); CEQA Guidelines § 15126.4. Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments. *Id.* at § 15126.4(a)(2).

The feasibility of mitigation measures is addressed by a lead agency at two points in the EIR process. First, the EIR itself must disclose all potentially feasible mitigation measures, focusing on the question whether each mitigation measure is “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” Pub. Res. Code, § 21061.1. Once the final EIR is prepared and in the context of the lead agency deciding whether to proceed with a project in light of the EIR’s information and analysis, the lead agency again considers the feasibility of mitigation measures, with greater discretion to consider other factors.

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no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:

(a) The public agency makes one or more of the following findings with respect to each significant effect: ...

(3) Specific economic, legal, social, technological, *or other considerations*, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.

Pub. Res. Code § 21081(a)(3) (emphasis added). Thus, the EIR itself cannot avoid addressing potential mitigation measures by asserting they are infeasible based on policy reasons. Policy reasons for rejecting a mitigation measure as infeasible can only be considered after the EIR is completed at the project approval stage. "Broader considerations of policy thus come into play when the decisionmaking body is considering actual feasibility than when the EIR preparer is assessing potential feasibility of the alternatives." *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 1000.

"One of [an EIR's] major functions ... is to ensure that *all reasonable alternatives* to proposed projects are thoroughly assessed by the responsible official." *Citizens of Goleta Valley*, 52 Cal.3d at 565. An EIR must describe a range of reasonable alternatives to the Project, or to the location of the Project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. "An EIR's discussion of alternatives must contain analysis sufficient to allow informed decision making." *Laurel Heights I*, 47 Cal.3d at 404. An EIR must also include "detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." *Id.* at 405.

Whether an alternative is feasible is considered in the same way as mitigation measures. A "feasible" alternative is one that is capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors. Pub. Res. Code § 21061.1; 14 Cal. Code Regs. § 15364. Only at the approval stage may the lead agency consider an alternative infeasible based on other policy considerations. Pub. Resources Code § 21081(a)(3). The lead agency is required to select the environmentally preferable alternative unless it is infeasible. "

While the courts review an EIR using an "abuse of discretion" standard, "the reviewing court is not to 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A 'clearly inadequate or unsupported study is entitled to no judicial deference.'" *Berkeley Jets*, *supra*, 91 Cal. App. 4th at p. 1355 (emphasis added) (quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 391 409, fn. 12). As the court stated in *Berkeley Jets*:

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A prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946.)

More recently, the California Supreme Court has emphasized that:

When reviewing whether a discussion is sufficient to satisfy CEQA, a court must be satisfied that the EIR (1) includes sufficient detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues the proposed project raises [citation omitted], and (2) makes a reasonable effort to substantively connect a project’s air quality impacts to likely health consequences.

*Sierra Club v. Cty. of Fresno* (2018) 6 Cal.5th 502, 510 (2018), citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 405. “Whether or not the alleged inadequacy is the complete omission of a required discussion or a patently inadequate one-paragraph discussion devoid of analysis, the reviewing court must decide whether the EIR serves its purpose as an informational document.” *Sierra Club v. Cty. of Fresno*, *supra*, 6 Cal.5th at 516. Although an agency has discretion to decide the manner of discussing potentially significant effects in an EIR, “a reviewing court must determine whether the discussion of a potentially significant effect is sufficient or insufficient, i.e., whether the EIR comports with its intended function of including ‘detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’” 6 Cal.5th at 516, citing *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1197. “The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency’s factual conclusions.” 6 Cal.5th at 516. Whether a discussion of a potential impact is sufficient “presents a mixed question of law and fact. As such, it is generally subject to independent review. However, underlying factual determinations—including, for example, an agency’s decision as to which methodologies to employ for analyzing an environmental effect—may warrant deference.” 6 Cal.5th at 516. As the Court emphasized:

[W]hether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence.

6 Cal.5th at 514.

**A. The EIR Fails to Discuss All Potentially Feasible Mitigation Measures Available to Address the Project’s Significant Air Quality Impacts Resulting From its Operation.**

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The DEIR finds that “[f]uture development in the W RTP Specific Plan Area would ... result in long-term emissions generated from day-to-day operational activities associated with residential and non-residential land uses.” DEIR, p. 0-11. “Operational emissions are anticipated to exceed YSAQMD thresholds of significance for ozone precursors, ROG, and NOX.” *Id.* These air pollutant emissions are significant and unavoidable. *Id.*

Because the EIR determines that the operation of the W RTP will have significant and unavoidable air quality impacts, it is incumbent that the EIR comply with the mandate that it identify all potentially feasible mitigation measures in an effort to reduce those air pollution impacts. However, there appears to be only one mitigation measure identified in the DEIR to address the Project operations’ significant air quality impacts. Mitigation Measure 3.3-2d bans wood-burning stoves and fireplaces in new development. DEIR, p. 0-12. All of the other mitigation measures only address air pollution impacts during construction. There do not appear to be any mitigation measures designed to address emissions of NOx and ROG from the Project’s research and tech park, including potential distribution and logistics activities, warehousing, and other industrial uses.

Up to half of the 2.2 million square feet of commercial development may include warehousing, storage, and distribution/logistics uses. Specific Plan, pp. 3-10; 3-13, Table 3.1, n. 11 (“Only permitted as incidental/ancillary to primary business/company operations; not more than 50 percent of primary building square footage”). As proposed, this use would be permitted of right. *Id.*, p. 3-10. Because the DEIR projects that the Specific Plan’s operation will exceed air quality standards applicable to NOx and ROG, the Project must include all feasible mitigation measures.

The California Department of Justice has issued guidance describing feasible mitigation measures to address air quality impacts from proposed warehousing projects. *See* California Department of Justice, “Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act” (attached as Exhibit C). In order to comply with CEQA’s mandate that the City evaluate all potentially feasible mitigation measures necessary to reduce a project’s potential significant impacts to less than significant, the City must amend and recirculate the EIR to evaluate, consider and, where feasible, adopt the following available mitigation measures identified by the Attorney General:

1. Requiring that all facility-owned and operated fleet equipment with a gross vehicle weight rating greater than 14,000 pounds accessing the site meet or exceed 2010 model-year emissions equivalent engine standards as currently defined in California Code of Regulations Title 13, Division 3, Chapter 1, Article 4.5, Section 2025. Facility operators shall maintain records on-site demonstrating compliance with this requirement and shall make records available for inspection by the local jurisdiction, air district, and state upon request.
2. Requiring all heavy-duty vehicles entering or operated on the project site to be zero-emission beginning in 2030.

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3. Requiring on-site equipment, such as forklifts and yard trucks, to be electric with the necessary electrical charging stations provided.
4. Requiring tenants to use zero-emission light- and medium-duty vehicles as part of business operations.
5. Forbidding trucks from idling for more than two minutes and requiring operators to turn off engines when not in use.
6. Posting both interior- and exterior-facing signs, including signs directed at all dock and delivery areas, identifying idling restrictions and contact information to report violations to CARB, the air district, and the building manager.
7. Installing and maintaining, at the manufacturer's recommended maintenance intervals, air filtration systems at sensitive receptors within a certain radius of facility for the life of the project.
8. Installing and maintaining, at the manufacturer's recommended maintenance intervals, an air monitoring station proximate to sensitive receptors and the facility for the life of the project, and making the resulting data publicly available in real time. While air monitoring does not mitigate the air quality or greenhouse gas impacts of a facility, it nonetheless benefits the affected community by providing information that can be used to improve air quality or avoid exposure to unhealthy air.
9. Constructing electric truck charging stations proportional to the number of dock doors at the project.
10. Constructing electric plugs for electric transport refrigeration units at every dock door, if the warehouse use could include refrigeration.
11. Constructing electric light-duty vehicle charging stations proportional to the number of parking spaces at the project.
12. Installing solar photovoltaic systems on the project site of a specified electrical generation capacity, such as equal to the building's projected energy needs.
13. Requiring all stand-by emergency generators to be powered by a non-diesel fuel.
14. Requiring facility operators to train managers and employees on efficient scheduling and load management to eliminate unnecessary queuing and idling of trucks.
15. Meeting CalGreen Tier 2 green building standards, including all provisions related to designated parking for clean air vehicles, electric vehicle charging, and bicycle parking. (Currently, the City is proposing that future development only comply with CalGreen Tier 1 energy efficiency standards, rather than the Tier 2 standards. "The Tier 1 optional requirements are more restricted than the basic code requirements and include requirements such as higher energy efficiency goals and reduced water consumption targets. The Tier 2 requirements up the ante with even higher, or more stringent, sustainable goals than Tier 1." <https://calgreenenergyservices.com/knowledge-center/calgreen-code/>).
16. Achieving certification of compliance with LEED green building standards.
17. Providing meal options onsite or shuttles between the facility and nearby meal destinations. Posting signs at every truck exit driveway providing directional information to the truck route.
18. Requiring that every tenant train its staff in charge of keeping vehicle records in diesel technologies and compliance with CARB regulations, by attending CARB-

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approved courses. Also require facility operators to maintain records on-site demonstrating compliance and make records available for inspection by the local jurisdiction, air district, and state upon request.

19. Requiring tenants to enroll in the United States Environmental Protection Agency's SmartWay program, and requiring tenants to use carriers that are SmartWay carriers.

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All of these mitigation measures are feasible for the Project within the Research and Tech Park areas of the Specific Plan. SWAPE Comments, pp. 21-22. Because the Project will have significant and unavoidable air quality impacts from its operation, all of these mitigation measures must be adopted and enforceable in order for the City to make a finding of overriding considerations.

**B. The EIR Fails to Discuss All Potentially Feasible Mitigation Measures Available to Address the Project's Significant Air Quality Impacts Resulting From its Construction.**

A similar shortcoming is true for the unmitigated air quality impacts identified for the Project's construction. The DEIR concludes that:

Construction associated with future development of the W RTP Specific Plan Area and off-site improvement areas would generate emissions of criteria air pollutants that could violate an ambient air quality standard or contribute substantially to an existing or predicted air quality violation through incremental emissions of PM and ozone precursors (ROG and NOX).

DEIR, p. 0-11. Mitigation Measure 3.3-2a includes eleven best management practices to be implemented for future construction projects. *Id.* at 0-11 – 0-12. Mitigation Measure 3.3-2b identifies three mobile emission measures to reduce NO<sub>x</sub> and PM<sub>10</sub> emissions during construction, including:

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- a. Maintain all construction equipment properly according to manufacturer's specifications.
- b. Fuel all off-road and portable diesel-powered equipment with CARB-certified motor vehicle diesel fuel (non-taxed version suitable for use off-road).
- c. Comply with the State On-Road Regulation by using on-road heavy-duty equipment that meet or exceed CARB's Tier 4 standard for on-road heavy-duty diesel engines.

*Id.*, p. 0-12. The measures identified in the DEIR do not include a number of additional feasible measures identified by the Attorney General. These include the following:

1. Requiring off-road construction equipment to be zero-emission, where available, and all diesel-fueled off-road construction equipment, to be equipped with CARB Tier 4 *Final* engines, and including this requirement in applicable bid documents,



- purchase orders, and contracts, with successful contractors demonstrating the ability to supply the compliant construction equipment for use prior to any ground-disturbing and construction activities.
2. Prohibiting off-road diesel-powered equipment from being in the "on" position for more than 10 hours per day.
3. Requiring on-road heavy-duty haul trucks to be model year 2010 or newer if diesel-fueled.
4. Providing electrical hook ups to the power grid, rather than use of diesel-fueled generators, for electric construction tools, such as saws, drills and compressors, and using electric tools whenever feasible.
5. Limiting the amount of daily grading disturbance area.
6. Prohibiting grading on days with an Air Quality Index forecast of greater than 100 for particulates or ozone for the project area.
7. Forbidding trucks from idling for more than two minutes and requiring operators to turn off engines when not in use. (Currently, Mitigation Measure 3.3-2a would allow up to five minutes of idling.)
8. Keeping onsite and furnishing to the lead agency or other regulators upon request, all equipment maintenance records and data sheets, including design specifications and emission control tier classifications.
9. Conducting an on-site inspection to verify compliance with construction mitigation and to identify other opportunities to further reduce construction impacts
10. Providing meal options onsite or shuttles between the facility and nearby meal destinations for construction employees.

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All of these mitigation measures are feasible for the entire Project area. SWAPE Comments, pp. 20-21. Because the Project will have significant and unavoidable air quality impacts from its construction, all of these mitigation measures must be adopted and enforceable in order for the City to make a finding of overriding considerations.

**C. The EIR Fails to Discuss All Potentially Feasible Mitigation Measures Available to Address the Project's Significant Noise Impacts Resulting From its Construction and Operation.**

The DEIR suffers from similar defects in addressing the significant noise impacts anticipated by the project. The DEIR identifies several noise mitigation measures but nevertheless concludes that construction and operation of the project will have significant and unavoidable noise impacts. DEIR, pp. 0-23 – 0-24. The mitigation measures include "limiting" the hours of construction activities to "7:00 A.M. and 6:00 P.M. on Monday through Saturday and between 9:00 A.M. and 6:00 P.M. on Sunday and federal holidays; limiting idling time of noise-generating equipment to 5 minutes, and; various efforts to reduce noise from construction activities within 445 feet of properties with noise-sensitive receptors. *Id.*, p. 0-23 (Mitigation Measure 3.11-1).

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Additional feasible mitigation measures that must be included to further reduce this significant impact include further limiting idling time of noise-generating vehicles and equipment to 2 minutes, rather than 5 minutes. The construction hours proposed in the DEIR would appear to maximize the noise impacts by including weekends and holidays as well as a 7 a.m. start time. To reduce the Project's noise impacts, where construction work is within 445-feet of a residence, including new residences developed pursuant to the Specific Plan, the measures should prohibit construction work on weekends and holidays and construction should start no earlier than 8 a.m. Likewise, where construction work is within 445-feet of a residence, the mitigation measures should require the installation of continuous noise curtains between the construction site and those residences.

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**D. The EIR Fails to Disclose the Potentially Feasible Mitigation Measure That Large Commercial Development Projects Within the W RTP be Conditioned on Obtaining a CUP and Ensure the City and the Public Have an Opportunity to Review Additional Feasible Mitigation Measures to Address Unavoidable Significant Impacts Identified in the DEIR.**

Another overarching mitigation measure that is not addressed in the DEIR and which would further reduce the significant air quality and noise impacts from the Project would be for the City to ensure the future discretionary review of specific proposed developments within the Specific Plan area. This measure could consist of requiring commercial projects involving development greater than 25,000 square feet within the Specific Plan to obtain a conditional use permit. This mitigation should apply to Light Industrial, Medium Industrial, Research and development, Specialty Food Processing, and Warehouse, Storage and Distribution/Logistics, all of which are currently proposed as permitted of right or, in the case of Medium Industrial, a Zoning Administrator permit. *See* Specific Plan, pp. 3-9 – 3-10.

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Requiring a CUP for these larger commercial developments is essential in order for the City to address the significant and currently unavoidable air quality and noise impacts for the Project. Given the pace of technology, the growing commitments of many businesses to installing solar power, electrifying their fleets, and the opportunities for development of specific mitigation measures to further reduce the impacts calculated by the DEIR for the Project, a discretionary review of these larger commercial projects is a feasible mitigation measure to ensure further reductions in the Project's significant impacts. In addition, it would ensure that the City has an opportunity to update its finding that no additional feasible mitigation measures for these impacts are available for specific future development proposals.

**E. The EIR Fails to Consider an Alternative to the Proposed Specific Plan That Requires Large Commercial Development Projects Within the W RTP be Conditioned on Obtaining a CUP.**

Alternatively, it is incumbent on the City to evaluate an alternative version of the Project which includes requiring CUPs and future environmental reviews pursuant to CEQA for various uses and future development projects proposed to be allowed in the Specific Plan. An alternative should be based on requiring CUPs and additional environmental review related to the

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significant air quality and noise impacts identified by the DEIR for the non-residential uses identified in Section D above. Alternative versions of the proposed Specific Plan exploring whether the use of additional CUPs for various future development projects and uses would result in additional mitigation measures being applied to address the Project's significant air quality and noise impacts must be included in order for the DEIR to evaluate a reasonable range of alternatives that would lessen the Project's significant impacts and allow for informed decision making.

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**F. The DEIR Does Not Address Adequately the Project's Impacts on Wildlife.**

Dr. Smallwood has significant experience reviewing the biological baseline and project impacts on wildlife in the area of the Project, having contributed to the scientific research in the mid-1990s on which the original habitat conservation plan for the area was established. Exhibit A, p. 1. Dr. Smallwood performed three recent site visits to the Project site on June 28, 29 and 30, 2021. Ex. A, p. 2. He detected 39 species of vertebrate wildlife, 7 of which are special-status species, including 2 listed species – Swainson's hawks and tricolored blackbirds, a California Fully Protected Species—white tailed kite, and a USF&WS Bird of Conservation Concern – yellow-billed magpie. *Id.*, pp. 2-3, 5 (photos of tricolored blackbird flock at site and Swainson's hawk nest and chick next to Project site). Dr. Smallwood explains that, if he had more time to conduct additional reconnaissance or protocol-level surveys at different times of year, he would have detected many more species, including sensitive wildlife species. *Id.*, pp. 11-13. Publicly available databases reviewed by Dr. Smallwood indicated that at least 66 special status species of vertebrates are found in the Project area. *Id.*, p. 18. A full list of the species observed by Dr. Smallwood can be found in Table 1 of his attached comment. *Id.*, pp. 15-17.

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His review of the DEIR and relevant documents indicates that the efforts to identify a meaningful baseline of wildlife values in and adjacent to the Specific Plan are woefully inadequate. Dr. Smallwood also identifies significant gaps in the DEIR and its failure to address significant direct and cumulative impacts of habitat loss from the Project, impacts to wildlife from the Project's water demands, impacts on wildlife movement currently occurring through the site, impacts from collisions between the Project's traffic and wildlife, and impacts to avian wildlife from collisions with the Project's windows and other structures. (Exhibit A.)

**1. The wildlife baseline described in the DEIR is inadequate and omits numerous special status species observed by Dr. Smallwood on and adjacent to the Project site.**

The DEIR reports that no detection-level surveys were conducted to determine the wildlife baseline at and adjacent to the Project site. Smallwood Comments, p. 13. Two field reconnaissance surveys for wildlife are mentioned by the DEIR, one on August 31, 2017 and another on November 8, 2019. *See* DEIR, pp. 3.4-2, 3.4-4, 3.4-19. City staff has confirmed that there are no reports documenting the two reconnaissance visits mentioned in the DEIR. Dr. Smallwood points out numerous flaws in the survey information provided in the DEIR:

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Unfortunately, the DEIR reports nothing more about these surveys, such as who performed them, what methods were used, what times the surveys began, and how long the surveys lasted. Nothing is said about the fact that neither of the surveys were performed during the breeding season. Nothing was mentioned about the second survey having occurred after Swainson's hawks have left on migration to Mexico. No mention was made of both surveys having been performed outside the winter migration season when one can expect to detect merlin, ferruginous hawk, and multiple additional special-status species. The DEIR provides no list of wildlife species that were detected. The basic information a biologist would expect to see reported about these surveys is, unfortunately, not reported.

*Id.*, p. 13. It is the City's duty to investigate the Project, including assuring the identification of baseline conditions at the site from which to disclose and gauge the Project's impacts. *See County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1597-98 ("[U]nder CEQA, the lead agency bears the burden to investigate potential environmental impacts."). Two casual, undocumented site visits do not meet this duty. Dr. Smallwood's recent site visits confirm the inadequacies of the City's efforts to properly identify the baseline wildlife conditions at the site. As a result, the DEIR significantly understates the wildlife values at stake and is insufficient as an information document pursuant to CEQA.

Among other concerns identified by Dr. Smallwood, the EIR fails to identify the significant wildlife habitat values that are provided by alfalfa fields, currently present at the site. Ex. A, p. 14.

Dr. Smallwood notes that the loggerhead shrike, a special status species, relies on agricultural lands as habitat. Ex. A, p. 14. The DEIR eliminates this species for review. DEIR, p. 3.4-9. Dr. Smallwood also points out that yellow warblers will use the site as stopover habitat and that there is no substantial evidence for the EIR to eliminate this species as potential affected by the Project. Ex. A, p. 14. Similarly, the DEIR asserts there is no suitable nesting habitat at the Project site for northern harriers. DEIR, p. 3.4-10. However, Dr. Smallwood's expert assessment of the habitat he observed at the site indicates that it is suitable nesting habitat for this species of special concern.

The DEIR incorrectly identifies the tricolored blackbird as a candidate species for listing under the California Endangered Species Act. However, this species has been listed under CESA as threatened since 2018. In addition, the DEIR downplays the foraging habitat currently existing on the Project site for the tricolored blackbird. Ex. A, p. 18. Rather than potential, Dr. Smallwood observed tricolored blackbirds actively foraging at the site. *Id.*, pp. 5, 18. Likewise, the DEIR incorrectly asserts that tricolored blackbirds only nest in wetland habitat. DEIR, p. 3.4-30. However, Dr. Smallwood has recorded tricolored blackbird nests in grasslands and agricultural fields. Ex. A, p. 18.

The DEIR also understates the occurrence of the Modesto song sparrow at the site as unlikely to occur. DEIR, p. 3.4-11. However, this assessment is demonstrable incorrect because Dr. Smallwood observed this species of special concern during his visits. Ex. A, p. 18.

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(Cont'd)

As Dr. Smallwood summarizes:

Of the 66 special-status species of vertebrate wildlife for which I found records in the project area (Table 2), the DEIR addresses occurrence likelihoods of only 16 (24%). The DEIR determines only 1 species is known to occur on site (Swainson's hawk), whereas data bases and site visits have recorded 11 special-status species occurrences on the site, 7 within a quarter mile of the site, another 10 within a half mile, another 12 within 1 mile, and another 8 within 2 miles. Special-status species the DEIR determines as unlikely have been seen right there (Table 2). I saw some of them. The DEIR has grossly underestimated the importance of the site to special-status species of wildlife.

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(Cont'd)

Ex. A, p. 18. As a result, the EIR is inadequate as an information document to disclose the potential impacts to wildlife from the Project.

**2. The DEIR fails to address impacts of habitat loss to bird species.**

Dr. Smallwood identifies the impact of habitat loss on productive capacity of the Project site. (Ex. A, p. 19.) He estimates there is likely a density of 8.6 bird nests per acre at the site which equates to about 3,300 bird nests supported annually on the Project site. (*Id.*) The Project will remove a fair number of these nests from the area. Dr. Smallwood estimates that the Project would prevent the production of over 9,600 fledglings from the Project area. (*Id.*) This loss of productivity is not discussed in the DEIR.

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**3. The DEIR's sole reliance on the Yolo County HCP to mitigate wildlife impacts is not supported by substantial evidence.**

The DEIR relies extensively on the Yolo Habitat Conservation Plan ("Yolo HCP") as mitigation for impacts to various wildlife species. However, Dr. Smallwood's expert review establishes that the HCP does not address a number of the species of concern he observed at the site. As he explains:

The DEIR essentially relies on the Yolo County HCP as an excuse to bypass analysis of potential cumulative impacts. This approach poses multiple shortfalls to the required cumulative impacts analysis. One flaw derives from the many special-status species that would be affected by the project but which are not covered by the HCP. The HCP only covers 10 species of vertebrate wildlife, only 6 of which face substantial direct interface with potential development projects. Most of the species in Table 2 lack coverage under the HCP, and are undergoing substantial declines that could soon result in extirpation. One example is yellow-billed magpie, which underwent a >90% decline within only a few years due to West Nile Virus (Smallwood and Nakamoto 2009). The yellow-billed magpie has continued to decline in Yolo County since 2009 (Smallwood unpublished data) and could be nearing extirpation. Potential cumulative impacts to these non-covered species need to be analyzed in a revised DEIR.

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Ex. A, p. 33. Dr. Smallwood also decries the absence of any information explaining the status of implementation of the HCP, whether it is achieving its habitat goals, and other relevant information necessary to understand if the HCP is actually working. Dr. Smallwood states:

Another shortfall derives from the absence of any monitoring reports associated with the HCP. I could not locate any documentation of the performance of the HCP to date. The HCP provides no information about the trends of the species it covers, nor about whether and to what degree mitigation has conserved any of its covered species.

*Id.* As a result, it is anybody's guess whether the HCP is an effective mitigation even for those species it covers, never mind the many species it does not address.

Dr. Smallwood points out that, despite the presence of the HCP, even species covered by that plan are plummeting towards extirpation. These include burrowing owls. Based on his monitoring of burrowing owls in the Davis area for the last 25 years, Dr. Smallwood observes that:

The last known pair of burrowing owls to successfully breed in the Davis area was last year. No burrowing owl breeding attempts were detected this year. I am aware of only one burrowing owl sighting in all of Yolo County this year. Throughout the month of June – the height of the breeding season – not a single sighting of burrowing owls was reported to eBird this year. This outcome is significant because the burrowing owl is one of the most -- if not *the* most -- popular bird species among bird enthusiasts in Yolo County. 'Birders' drive around searching for this species, and when it is found word travels fast about where burrowing owls are located and other attributes of the discovery. But this year none were found. The year 2021 might be the first year of the species' extirpation from Yolo County, despite whatever it is that the HCP is accomplishing.

*Id.*, pp. 33-34. This is substantial evidence that the HCP is not a sufficient mitigation measure to address the Project's cumulative impacts on burrowing owls. Moreover, the DEIR's failure to report on the dire status of burrowing owls fails further to disclose the existing baseline for this species of special concern.

Dr. Smallwood also points out the lack of any positive effect of the HCP on cumulative impacts to the white-tailed kite. "Last year I repeated the surveys for this species that were performed 27 years earlier, in 1993, within 10 miles of Davis (Erichsen et al. 1995). I confirmed 7 breeding pairs of white-tailed kites in the same study area where 22 were documented in 1993. This 67% decline has happened despite whatever mitigation was provided by the Yolo County HCP." Ex. A, p. 33. Thus, again there is no substantial evidence supporting the assumption that implementation of the HCP will mitigate the Project's cumulative impacts on this species.

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The lack of effectiveness of the HCP may be due to the absence of any meaningful wildlife protection goals in the plan. As Dr. Smallwood notes, its goals are so slight that it is not likely to address any impacts of the Project:

A factor that diminishes the HCP as a buffer against significant cumulative impacts is its conservation goals, which are so meager that they look to me more like guarantors of extirpation. One of the HCP's conservation goals is to preserve 2 pairs of burrowing owls. Two pairs in the entire County would have been last year's situation, which one year later looks like extirpation. Another HCP goal is to protect 2 nest sites of white-tailed kite. Such a small number all but assures extirpation. Similarly, a goal is to protect 20 nest trees of Swainson's hawks in a County that recently supported 300 nest sites. The HCP's goals are empty conservation goals; they cannot prevent significant cumulative impacts to its covered species, let alone to the many special-status species that the HCP does not cover.

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*Id.*, p. 34. For these reasons, the DEIR's reliance on the HCP as mitigation is not supported by substantial evidence and is insufficient as a matter of law.

**4. The DEIR fails to adequately analyze the Project's impacts on wildlife movement.**

According to the DEIR, the Project will not have a significant impact on wildlife movement because it "would not create a barrier to movement of migratory species or alter the character of existing habitat available to migrating birds such that it would no longer function as a migratory corridor" and "[t]he W RTP Specific Plan Area and off-site improvement areas do not currently provide an important connection between any areas of natural habitat that would otherwise be isolated." DEIR, p. 0-19. However, the CEQA standard is whether a project would interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors. Ex. A, p. 22. "The primary phrase of the standard goes to wildlife movement regardless of whether the movement is channeled by a corridor." *Id.* Wildlife movement includes stopover habitat used by birds and bats, and staging habitat during dispersal, and migration or home range patrol. *Id.* Dr. Smallwood notes that many species of wildlife likely use the Project site for movement across the region and the Project would cut wildlife off from stopover and staging habitat, lengthening the distances wildlife must travel before finding alternate stopover habitat. *Id.* The DEIR's cursory consideration of this potential impact is insufficient.

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**5. The DEIR fails to address the impacts on wildlife from additional traffic generated by the Project.**

The DEIR does not address the impacts on wildlife mortality from traffic generated by the Project. Ex. A, p. 24. According to the DEIR, "[t]he project would generate a total of approximately 49,700 daily trips...." DEIR, Appendix D, p. 26. The DEIR does not disclose the

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miles this number of vehicles will travel. Despite this significant addition of vehicles to area roads, the DEIR provides no analysis of the impacts on wildlife that will be caused by an increase in traffic on the roadways servicing the Project. *Id.*

Vehicle collisions with special-status species is not a minor issue, but rather results in the death of millions of species each year. Dr. Smallwood explains:

Across North America traffic impacts have taken devastating tolls on wildlife (Forman et al. 2003). In Canada, 3,562 birds were estimated killed per 100 km of road per year (Bishop and Brogan 2013), and the US estimate of avian mortality on roads is 2,200 to 8,405 deaths per 100 km per year, or 89 million to 340 million total per year (Loss et al. 2014). Local impacts can be more intense than nationally.

*Id.* at 21. Dr. Smallwood estimates that the Project's additional traffic would cause 46,665 wildlife fatalities per year, and 2,333,264 wildlife fatalities over 50 years of operations. *Id.* at 23. The DEIR must be amended and recirculated with an analysis of this potentially significant impact on wildlife.

**6. The Project may have significant environmental impacts by causing fatal bird strikes on its structure and windows.**

In addition to conflicts with increased vehicle traffic from the Project, the proposed buildings and other structures also pose a significant threat to birdlife. Dr. Smallwood has reviewed the Project's potential impacts to birds from collisions with windows and other structures associated with the Project. Ex. A, pp. 23-31.

Full disclosure of the potential impact on wildlife of window collisions is especially important because "[w]indow collisions are often characterized as either the second or third largest source of human-caused bird mortality." Ex. A, p. 23. Dr. Smallwood extensively summarizes the science establishing the significant bird mortality resulting from collisions with windows. *Id.*, pp. 23-26. Based on his extensive review of the available science, Dr. Smallwood expects an average of 0.073 bird deaths per m<sup>2</sup> of glass per year. *Id.*, p. 26.

The Project as designed does not incorporate any meaningful bird safe design features nor does the DEIR evaluate the proposed building's impacts from bird strikes. Because of the lack of any analysis, the DEIR does not provide any information regarding the extent of glass facades and windows within the Specific Plan.

According to Dr. Smallwood's calculations, the Project may have about 112,804 m<sup>2</sup> of glass on the façades of the project's building's which would result in approximately 8,206 bird deaths per year. *Id.*, p. 27. Looking ahead, Dr. Smallwood notes that "[t]he 100-year toll from this average annual fatality rate would be 824,997 bird deaths" at a confidence level of 95 percent. *Id.* These potential impacts were not considered in the DEIR. To be legally sufficient,

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the DEIR must discuss the likely magnitude of bird collisions with the Project as well as the particular species that would be most likely to collide with the Project and evaluate the direct and cumulative impacts of those bird fatalities.

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**7. The DEIR fails to analyze the impacts of house cats on wildlife.**

The residential component of the Project will likely introduce house cats to the Project site that will prey upon birds and small mammals, yet the DEIR does not address this issue. Ex. A, p. 32. Dr. Smallwood explains that house cats are one of the largest sources of avian mortality in North America. *Id.* In addition, cats contribute to downstream loading of *Toxoplasma gondii*, which is a “parasite that can infect virtually all warm-blooded animals, but the only known definitive hosts are cats.” *Id.* Based on his review of numerous cited scientific papers, Dr. Smallwood calculates that the Project’s 4,386 new residents will add about 1,930 cats to the Specific Plan area. Dr. Smallwood then calculates that those cats will kill about 235,460 vertebrate wildlife per year. The DEIR must analyze this potentially significant impact.

3-18

**G. The DEIR Relies on Unsubstantiated Input Parameters to Estimate Project Emissions and Thus Fails to Provide Substantial Evidence of the Project’s Air Quality Impacts.**

Matt Hagemann, P.G., C.Hg., and Paul E. Rosenfeld, Ph.D., of the Soil/Water/Air Protection Enterprise (“SWAPE”) reviewed the air quality analysis in the DEIR. SWAPE’s comment letter and CVs are attached as Exhibit B and their findings are summarized below.

The DEIR relies on emissions calculated from the California Emissions Estimator Model Version CalEEMod.2016.3.2 (“CalEEMod”). This model relies on recommended default values based on site specific information related to a number of factors. The model is used to generate a project’s construction and operational emissions. SWAPE reviewed the Project’s CalEEMod output files and found that the values input into the model were inconsistent with information provided in the DEIR, resulting in an underestimation of the Project’s emissions. Ex. B, pp. 1-8. As a result, the DEIR’s air quality analysis fails to provide substantial evidence as to the Project’s air quality impacts. As such, the City must revise the DEIR adequately evaluate the impacts that construction and operation of the Project will have on local and regional air quality.

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**1. The DEIR’s air quality models use unsubstantiated reductions to land use sizes.**

SWAPE’s review of the Project’s CalEEMod output files found that the air model made unsubstantiated reductions to land use sizes. Ex. B, p. 2. The default floor surface area for the proposed non-residential building space was manually reduced by 27,831 SF compared to the total allowed square footage described in the DEIR. *Id.* Without providing justification for the reductions, the reductions are unsubstantiated and may underestimate the Project’s emissions. As such, the DEIR’s conclusions are not supported by substantial evidence and cannot be relied upon to determine the Project’s actual air quality impacts.

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**2. The DEIR's air quality model made unsubstantiated reductions related to parking.**

SWAPE's review of the Project's CalEEMod output files found that, although the DEIR mentions that future projects will include parking, neither the DEIR nor the CalEEMod output files provide an estimate of the extent of that parking. Ex. B, pp. 2-3. Including the expected parking areas in the modeling is important to estimated VOC emissions as well as energy impacts. *Id.*, p. 3. As a result, the model underestimates the Project's construction-related and operational emissions and cannot be relied upon to determine the Project's actual air quality impacts.

3-21

**3. The Modeling Does Not Include An Adequate Basis for Changing the Default Percent Paved Values.**

Adjustments to the model's default values for percent paved values assumes that future hauling, vendor, and worker trips will only travel on paved surfaces, increasing the default value during construction for 94 to 99 percent and during operation from 94 to 100 percent. Ex. B, pp. 3-4. These values are critical to properly estimating the Project's fugitive dust emissions. *Id.*, p. 4. Given the siting of the Project on farmland, the construction percentage appears highly optimistic. Unless these changes are substantiated, the model should be run using the default value.

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**4. The air quality model improperly assumes reductions to default values for energy usage.**

SWAPE's review indicates there is an absence of a sufficient explanation of the reductions to the default energy usage values in the model. Ex. B, pp. 4-5. The DEIR should be supplemented to provide a more detailed explanation justifying these reductions for the Project's air modeling.

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**5. The DEIR's air quality model improperly assumed that off-road construction equipment would meet Tier 4 Interim standards.**

SWAPE's review of the Project's CalEEMod output files found that the DEIR's air model assumed that off-road construction equipment would meet Tier 4 Final emission standards. Ex. B, pp. 6-8. However, the justification for this assumption states that "Construction mitigation of equipment that meets Tier 3 or better emissions standards..." *Id.*, p. 6. Mitigation Measure 3.3-2b does require Tier 4 for on-road heavy-duty equipment but only mentions using CARB-certified fuel for off-road equipment. DEIR, p. 0-12; Ex. B, p. 7. Hence, there is nothing in the explanation or DEIR to support an assumption that all of the Project's off-road construction equipment will meet the Tier 4 Final standard. As a result, the air model underestimates the Project's construction-related emissions and the DEIR fails to provide substantial evidence of the Project's actual air quality impacts.

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**H. The DEIR Failed to Disclose a Significant Air Quality Impact from Construction-Related NO<sub>x</sub> Emissions.**

In an effort to accurately determine the proposed Project's construction emissions, SWAPE prepared an updated CalEEMod model that corrected the existing and proposed land use types and sizes; omitted unsubstantiated changes to the default values and applied the Tier 3 standard to off-road construction requirement. Ex. B, p. 10.

3-25

Rather than the no significant effect identified in the DEIR, SWAPE's updated modeling found that the Project's construction-related NO<sub>x</sub> emissions exceed BAAQMD's threshold of 10 tons/year. Ex. B, p. 10. Due to the inaccuracies in the DEIR's air model discussed above, the DEIR failed to provide substantial evidence that the Project's NO<sub>x</sub> emissions would be less than significant. The DEIR failed to disclose, discuss, or mitigate the Project's significant NO<sub>x</sub> emissions. When new information demonstrates, as here, that "[a] new significant environmental impact would result from the project," the DEIR must be updated and recirculated for public review and comment. 14 CCR 15088.5.

**I. The DEIR Fails to Adequately Evaluate Health Risks from Diesel Particulate Matter Emissions**

The DEIR's analysis of the Project's emission of toxic air contaminants ("TACs") due to construction and operational activities over the next two decades also provides a strong reason for ensuring public review of future development project's health risks by requiring a CUP for commercial projects with greatest likelihood of posing health risks from extensive grading or TAC-emitting operations.

The DEIR's conclusion that the project's TAC emissions will not result in significant health risks is based entirely on future health risk analyses of specific projects. However, whether any health risks analyses would be conducted remains unclear because the triggering criteria are entirely subjective and undefined. The DEIR qualifies in undefined and expansive terms the City's future determination whether or not a specific project will need to prepare a TAC health risk analysis:

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For projects with the *potential* to generate *substantial* TAC emissions or expose sensitive receptors to *substantial* TAC pollutant concentrations, the City will require a site-specific analysis for construction and/or operational activities, and appropriate mitigation, as necessary, to ensure that sensitive receptors are not exposed to substantial pollutant concentrations.

DEIR, p. 3.3-41 (emphasis added). It makes little sense to require an analysis to determine whether a future project will exceed the identified health risks thresholds if the initial trigger to require the analysis is qualified by a subjective decision by City staff that TAC emissions be potentially substantial. A more objective criteria for requiring site specific health risk assessments should be based on location relative to any residence at the time of the project or

category of uses for operational TAC emissions. For construction TAC emissions, the mitigation measure should be amended to require a site specific health risk analysis applying the health risk thresholds identified in the DEIR for any future projects that include construction activities within 1,000 feet of any residence existing at the time of construction. For operational TAC emissions of future projects, a health risk assessment should be required for any future commercial project within 1,000 feet of any existing or potential future residence.

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**J. The DEIR's Reliance on the City's Climate Action Plan to Find That the Project's GHG Emissions Will be Less Than Significant is in Error Because the Project Does Not Comply With A Number of Measures Set Forth in the CAP.**

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SWAPE's review has identified a number of inconsistencies or omissions between the Project and the City's Climate Action Plan. Ex. B, pp. 12-19. The City should review these comments and ensure that GHG reduction measures are binding and enforceable on future projects prior to approving the Specific Plan.

**CONCLUSION**

For the foregoing reasons, LIUNA requests that the City amend and supplement the DEIR and recirculate it for additional public comment prior to considering the approvals for the Project.

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Sincerely,



Michael R. Lozeau  
Lozeau Drury LLP