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March 31, 2023

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Re: Notice of Appeal to City Council Heliogen R&D Facility Conditional Use Permit No. 22-11, Resolution No. 23-05, SCH #2023020184

Dear Mayor Parris, Vice Mayor Crist, Councilmembers: Mann, Malhi, Dorris, Ms. Swain, Mr. Hogan, and Ms. Stenback:

We are writing on behalf of **Citizens for Responsible Industry** (“Citizens”) to appeal the Lancaster Planning Commission’s March 20, 2023 approval of Resolution No. 23-05 approving Conditional Use Permit No. 22-11 for the Heliogen R&D Facility Project (“Project”) ¹ and approval of the Initial Study/Mitigated Negative Declaration (“MND”) (SCH #2023020184)² prepared for the Project pursuant to California Environmental Quality Act (“CEQA”) ³ (“Appeal”). The Project is proposed by Heliogen, Inc. (“Applicant”). The Project is located at 431 East Avenue K-4 in the Specific Plan 80-02 zone (APNs: 3126-031-901, 3126-031-902). This Appeal is filed pursuant to Lancaster Municipal Code which provides that an

¹ City of Lancaster, CA, Planning Commission Regular Meeting, March 20, 2023 Agenda Packet, <https://cityoflancasterca.primegov.com/Public/CompiledDocument?meetingTemplateId=6210&compileOutputType=1> (“Staff Report”).

² City of Lancaster, Community Development, Initial Study/Mitigated Negative Declaration, Conditional Use Permit No. 22-11, Heliogen R&D Facility <https://www.cityoflancasterca.org/home/showpublisheddocument/45067/638115454600670000>.

³ Pub. Resources Code §§ 21000 *et seq.*

appeal to the City Council may be filed within ten working days following Planning Commission Action.⁴ This Appeal is accompanied by payment of the required appeal fee of \$1,726 pursuant to the City’s fee schedule.⁵

Pursuant to Municipal Code Section 2.44.020, Citizens provides the following information related to this Appeal:

A.	Name, address and phone number of appellant	Citizens for Responsible Industry c/o Kelilah Federman Adams Broadwell Joseph & Cardozo 601 Gateway Blvd, Suite 1000 South San Francisco, CA 94080 Telephone: (650) 589-1660 Fax: (650) 589-5062 Email: kfederman@adamsbroadwell.com
B.	Name, address and phone number of applicant, if different from appellant	Heliogen, Inc. 130 West Union Street Pasadena, CA 91103 Telephone: (626) 720-4530
C.	Name(s) and address(es) for recipients of additional notice, if applicable	N/A
D.	Address and description of real property	431 East Avenue K-4 Lancaster CA in the Specific Plan 80-02 zone (APNs: 3126-031-901, 3126-031-902)
E.	Commission, board, officer or department whose action is being appealed	Planning Commission
F.	Date of action or decision being appealed	March 20, 2023
G.	Specific action or decision being appealed	Approval of Resolution No. 23-05 approving Conditional Use Permit No. 22-11 for the Heliogen R&D Facility Project (“Project”) and approval of the Initial Study/Mitigated Negative Declaration (SCH #2023020184)

⁴ Lancaster Municipal Code § 17.32.210.

⁵ Lancaster, CA, Citywide Fee Schedules, (Oct. 1, 2022),
<https://www.cityoflancastrca.org/home/showpublisheddocument/44872/638029018823170000>.

H.	Case number of item	CUP No. 22-11
I.	Grounds for appeal	See below

The Project consists of expansion of the existing Heliogen Research & Development facility at 431 East Avenue K4. The Project proposes installation of an additional 55-foot tower and receiver; a 100-kilowatt (kW) photovoltaic (“PV”) solar field (approximately 400 panels); a stationary electrolyzer cell power system; six 300 cubic foot (volume) hydrogen gas cylinders; a hydrogen transfer line; a hydrogen compression/storage/dispensing unit; a Thermal reactor for synthetic fuel production; and a Fischer Tropsch reactor for synthetic fuel production.

I. EXECUTIVE SUMMARY

This Appeal is based on this letter and attached expert report,⁶ on Citizens’ attached March 20, 2023 comments to the Planning Commission⁷, and on Citizen’s March 9, 2023 comments on the MND. These comments demonstrate that the Planning Commission’s March 20, 2023 decision to approve the Project violated CEQA, land use laws and the City’s municipal codes, and was not supported by substantial evidence in the record. Specifically, our prior comments identified several flaws in the City’s environmental analysis, and provided new information and substantial evidence demonstrating that the Project will result in significant, unmitigated environmental impacts and that the MND prepared by the City does not satisfy CEQA. Our comments demonstrated that the MND failed to accurately disclose the extent of the Project’s potentially significant impacts on air quality, public health, hazards, biological resources, and noise, and provided substantial evidence supporting a fair argument that the Project will result in significant, unmitigated environmental impacts in each of these areas. The Project is inconsistent with the General Plan and Specific Plan. The City thus cannot make the necessary findings to approve the Conditional Use Permit. These issues were not resolved by the Commission prior to its approval of the Project.

In particular, at the March 20, 2023 hearing approving the Project, the Planning Commission addressed *for the first time* the potentially significant impacts of decommissioning the Project and mitigation necessary to reduce impacts of decommissioning. At the hearing, the Applicant stated for the first time that mitigation will be necessary for decommissioning the Project, but mitigation measures were not included as binding measures in the MND, nor were impacts of

⁶ **Attachment A**, Letter from Phyllis Fox to Kelilah Federman, Re: IS/MND for the Heliogen, Inc. Research & Development Facility (March 29, 2023).

⁷ Citizens’ March 20, 2023 written comments to the Planning Commission are attached hereto as **Attachment B** and incorporate by reference.

decommissioning analyzed in the MND, as required by CEQA.⁸ The City included no analysis in the MND to support the Planning Commission's conclusion that the environmental impacts from decommissioning the Project will be less than significant. In fact, Citizens' air quality and health risk expert consultant Dr. Phyllis Fox found that environmental impacts associated with decommissioning the Project will be significant and remain unmitigated. Dr. Fox found that the air quality (PM2.5, PM10, NOx), public health (diesel particulate matter), and Valley Fever impacts of decommissioning would be substantially greater than the impacts of constructing the Project in the first place.⁹ The MND failed to adequately disclose and mitigate these and other impacts, in violation of CEQA and land use requirements.

The Commission failed to resolve these deficiencies in the MND, and failed to remand the Project to Staff to prepare an EIR prior to approving the Project. The Planning Commission therefore lacked substantial evidence to support its decision to approve the Project and to adopt CEQA and land use findings supporting approval. **As explained herein, the City Council should vacate the Planning Commission's approvals and remand the Project to Staff to prepare a legally adequate EIR, before the Project can be presented to City decision makers for approval.**¹⁰

Pursuant to the Municipal Code, a public hearing on appeal to the City Council shall be held de novo (as if no hearing has been previously held) and therefore the Council's decision need not be limited to the points appealed and may cover all phases of the matter including the addition or deletion of any condition.¹¹ Following the public hearing, the City Council may take one of the following actions:

- A. Deny the appeal thereby affirming the action of the commission, board or city official;
- B. Grant the appeal in its entirety or any portion thereof; or
- C. Refer the matter back to the commission, board or city official for further proceedings with or without instruction.¹²

⁸ 14 CCR § 21081.6.

⁹ Attachment A, p. 2.

¹⁰ PRC § 21094.5(a); 14 CCR § 15164(e); see *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515.

¹¹ Lancaster Muni Code § 2.44.060.

¹² Lancaster Muni Code § 2.44.060.

Citizens urges the City Council to grant this Appeal and remand the Project to City Staff to prepare an EIR for the Project. The Project should not be rescheduled for a further public hearing until these issues have been addressed. Citizens reserves the right to submit supplemental comments and evidence at any later hearings and proceedings related to the Project, in accordance with State law.¹³

II. APPELLANT BACKGROUND

The Lancaster Municipal Code grants any “interested citizen of the city” the opportunity to appeal an adverse determination made by a commission.¹⁴ Citizens brings this Appeal as an unincorporated association of individuals and labor organizations whose members live, recreate, work, and raise their families in the City of Lancaster and in communities near the Project site. The association also includes California Unions for Reliable Energy (“CURE”) and its local affiliates, whose members and their families stand to be directly affected by this Project’s impacts.

CURE supports the development of renewable energy and the critical role it plays in the effort to reduce greenhouse gas emissions. Since its founding in 1997, CURE has been committed to building a strong economy and healthier environment and it works to construct, operate, and maintain renewable energy power plants and other facilities throughout California. CURE supports the development of clean, renewable energy technology, including solar power generation, where properly analyzed and carefully planned to minimize impacts on public health and the environment. Development of all projects subject to CEQA should take all feasible steps to ensure unavoidable impacts are mitigated to the maximum extent feasible. Only by maintaining the highest standards can energy produced from the development of new solar installations truly be sustainable.

The individual members of Citizens would be directly affected by the Project and may also work constructing the Project itself. They would therefore be first in line to be exposed to any health and safety hazards that may be present on the Project site. The coalition includes members who live, recreate, work, and raise families in Los Angeles County and in communities near the Project site. They each have a personal stake in protecting the Project area from unnecessary, adverse environmental and public health and safety impacts. Citizens, its participating

¹³ Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield (“Bakersfield”)* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

¹⁴ Lancaster Municipal Code § 17.36.030.

organizations, and their members stand to be directly affected by the Project's impacts.

Finally, the organizational members of Citizens are concerned with projects that can result in serious environmental harm without providing countervailing economic benefits. CEQA provides a balancing process whereby economic benefits are weighed against significant impacts to the environment. It is in this spirit we bring this Appeal.

III. GROUNDS FOR APPEAL

First, CEQA requires that, when considering whether to approve a project, the lead agency must consider the comments received during its consultation and review periods for the ND or MND.¹⁵ In addition to Citizens' and their experts' MND comments, the Staff Report prepared for the March 20, 2023 hearing failed to mention or respond to MND comments received from the Antelope Valley Air Quality Management District (AVAQMD¹⁶), CalTrans, and a local resident. Based on the Staff Report's failure to include, or even mention, any comments received, there is no evidence in the record that the City considered Citizens' comments or any other comments received during the public comment period, as required by CEQA.¹⁶ Due to these and other procedural deficiencies, the City cannot approve the Project absent an EIR.

Second, there is substantial evidence supporting a fair argument in the record before the Council that the Project has several significant, unmitigated impacts that are not addressed by the MND. The City must therefore prepare a legally adequate EIR which adequately responds to public comments and adequately analyzes and mitigates the Project's potentially significant impacts, as required by CEQA. 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

¹⁵ PRC § 21092.5; 14 CCR § 15073(e).

¹⁶ In response to Citizen's Public Records Act records request, the City provided four comment letters received during the comment period, attached below as: **Exhibit A**, ABJC Comment Letter; **Exhibit E**, Letter from Antelope Valley Air Quality Management District to Jocelyn Swain City of Lancaster, Notice of Availability/Notice of Intent to Adopt a Mitigated Negative Declaration Pursuant to the California Environmental Quality Act (CEQA) for Conditional Use Permit (CUP) No. 22-11 (Feb. 16, 2023); **Exhibit F**, Letter from California Department of Transportation (CalTrans) to Jocelyn Swain, Conditional Use Permit No. 22-11 (Heliogen R&D – Mitigated Negative Declaration (MND) SCH # 2023020184 GTS# 07-LA-2023-04165 Vic. LA Multiple (Feb. 22, 2023); and **Exhibit G**, Letter from Homeowner 43458 5th St. East, Lancaster CA 93535 to State Clearinghouse, Agencies, Interested Parties and City of Lancaster Development Services Department Community Development Division, Conditional Use Permit (CUP) No. 22-11 (Feb. 18, 2023).

effect on the environment.”¹⁷ The EIR aids an agency in identifying, analyzing, disclosing, and, to the extent possible, avoiding a project’s significant environmental effects through implementing feasible mitigation measures.¹⁸ 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. Because “[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process” by allowing the agency to dispense with the duty to prepare an EIR, negative declarations are allowed only in cases where there is not even a “fair argument” that the project will have a significant environmental effect.¹⁹

Under the fair argument standard, a lead agency “shall” prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.²⁰ The phrase “significant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in the environment.”²¹ In certain circumstances, a project with potentially significant impacts can be modified by the adoption of mitigation measures to reduce the impacts to a level of insignificance. In such cases, an agency may satisfy its CEQA obligation by preparing a mitigated negative declaration.²² A mitigated negative declaration, however, is also subject to the fair argument standard. Thus, an MND is also inadequate, and an EIR is required, whenever substantial evidence in the record supports a “fair argument” that significant impacts may occur, even with the imposition of mitigation measures. The “fair argument” standard is an exceptionally “low threshold” favoring environmental review in an EIR rather than a negative declaration.²³ The “fair argument” standard requires the preparation of an EIR if any substantial evidence in the record indicates that a project may have an adverse environmental

¹⁷ Pub. Resources Code, § 21080, subd. (d) (emphasis added); CEQA Guidelines, § 15064; see also *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927; *Mejia v. City of Richmond* (2005) 13 Cal.App.4th 322.

¹⁸ Pub. Resources Code, § 21002.1, subd. (a); CEQA Guidelines, § 15002, subd. (a) & (f).

¹⁹ *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440; Pub. Resources Code, §§ 21100, 21064.

²⁰ Pub. Res. Code §§21080(d), 21082.2(d); 14 Cal. Code Reg. §§ 15002(k)(3), 15064(f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Richmond* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

²¹ Pub. Resources Code, § 21068.

²² Pub. Resources Code, § 21064.5; CEQA Guidelines, § 15064, subd. (f)(2).

²³ *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.

effect.²⁴ As a matter of law, substantial evidence includes both expert and lay opinion.²⁵ Even if other substantial evidence supports the opposite conclusion, the agency nevertheless must prepare an EIR.²⁶ Under the “fair argument” test, CEQA always resolves the benefit of the doubt in favor of the public and the environment.

The MND failed to adequately disclose, investigate, and analyze the Project’s potentially significant impacts, and failed to provide substantial evidence to conclude that impacts will be mitigated to a less than significant level. Because the MND lacks basic information regarding the Project’s potentially significant impacts, the MND’s conclusion that the Project will have a less than significant impact on the environment is unsupported.²⁷ Moreover, substantial evidence shows that the Project may result in potentially significant impacts. Therefore, a fair argument can be made that the Project may cause significant impacts requiring the preparation of an EIR.

A. Impacts from Decommissioning May be Significant and Unmitigated

At the Planning Commission Hearing on March 20, 2023, in response to a question from the Commission, the Applicant stated that decommissioning the Project will require mitigation. Specifically, the Applicant stated “[w]ithin the Project document we did not specifically address mitigation at end of life, however, it’s a relatively simple straightforward project to mitigate. You’d have to look at the specific technology and it’s basically steel mirrors and concrete that would have to be removed but it’s not a tremendous amount relative to the size of the site.”²⁸ At the Planning Commission hearing on March 20, 2023, the Applicant admitted that mitigation will be required for decommissioning the Project. But, mitigation measures required for decommissioning the Project were not analyzed in the MND, as required by CEQA. CEQA requires MNDs include measures to mitigate or avoid significant effects on the environment that are fully enforceable through permit conditions, agreements, or other measures.²⁹ Here, the Applicant stated that mitigation will be required for Project decommissioning, but does not include such

²⁴ CEQA Guidelines, § 15064, subd. (f)(1); *Pocket Protectors v. City of Sacramento*, *supra*, 124 Cal.App.4th at 931.

²⁵ Pub. Resources Code, § 21080, subd. (e)(1); CEQA Guidelines, § 15064, subd. (f)(5).

²⁶ *Arviv Enterprises v. South Valley Area Planning Comm.* (2002) 101 Cal.App.4th 1333, 1346; *Stanislaus Audubon v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597.

²⁷ PRC § 21064.5.

²⁸ City of Lancaster Planning Commission Meeting, March 20, 2023, <https://www.youtube.com/watch?v=O68eP8Jtq-Y>.

²⁹ 14 CCR § 21081.6.

measures as enforceable conditions within the MND, in violation of CEQA. The impacts of decommissioning must be analyzed and mitigated in an EIR before the City can lawfully approve the Project.

Air quality and health risk expert Dr. Phyllis Fox determined that Project decommissioning will result in even more significant environmental impacts than construction the Project.³⁰ Dr. Fox found that the air quality (PM2.5, PM10, NO_x), public health (diesel particulate matter), and Valley Fever impacts of decommissioning would be substantially greater than the impacts of constructing the Project as documented in her March 8, 2023 comments for several reasons. First, the entire site would have to be graded and revegetated, rather than the portion disturbed by the proposed Project. Second, Project facilities, which contain hazardous materials, would have to be disassembled on-site and transported to distant disposal or reuse facilities.³¹

Decommissioning would require the removal and disposal of all hydrogen production facilities, heliostats, solar panels, underground infrastructure, fencing, roads, and foundations including the following tasks:

1. Remove rack wiring
2. Dismantle racks
3. Remove panels and racks
4. Remove electrical equipment
5. Remove pipelines
6. Breakup and remove concrete pads or ballasts
7. Remove racks
8. Remove cable
9. Remove ground screws and power poles
10. Remove fencing
11. Grading
12. Seed/replant disturbed area
13. Truck wiring, panels, racks, equipment, concrete, and other removed materials to recycling or disposal facilities.

The removal and disposal and repurposing of these materials would generate emissions from the disassembly process and from transporting the removed materials to disposal and/or recycling facilities.³² The MND does not contain any of the information required to evaluate the impacts of removing and disposing of these

³⁰ Attachment A, Fox Comments, p. 2.

³¹ *Id.*

³² *Id.* at 1.

materials. Dr. Fox concluded that solar panels and heliostats contain metals in the semiconductors and solder, including lead and cadmium, which could classify them as hazardous waste.³³ Testing must be required to identify safe disposal options.³⁴

Dr. Fox therefore found that impacts from decommissioning would be more significant than disclosed in the MND because the Project evaluated in the MND relied on existing facilities, the heliostats and fencing and a graded site.³⁵ Decommissioning would require removal of Project facilities plus facilities currently present at the site, such as the heliostats. Further, the entire site would have to be graded, rather than the portion disturbed by the instant Project. The MND therefore does not contain substantial evidence showing that impacts from decommissioning are less than significant. In fact, there is substantial evidence in the record supporting a fair argument that impacts from decommissioning are significant, unmitigated, and require preparation of an EIR.

The City must prepare an EIR which includes a decommissioning plan that defines the obligations of the Project developer to remove all Project facilities and restore the land to its original condition when the Project is completed. The decommissioning plan should include timelines for completion of tasks, a provision that the Project owner is responsible for the costs of decommissioning, and a requirement to recycle or repurpose Project components rather than disposal in landfills.³⁶ Further, Lancaster should require a financial mechanism to assure appropriate decommissioning and reclamation of the site, such as a security bond or other financial instrument.³⁷ Absent adequate mitigation to reduce impacts of decommissioning to less than significant levels, the City cannot lawfully approve the Project. The City must prepare an EIR which adequately analyzes and mitigates impacts of decommissioning before the Project can be approved.

B. The MND Failed to Adequately Analyze the Project's Environmental Setting

The City cannot approve the Project because the MND failed as an informational document under CEQA for failing to adequately describe the environmental setting against which the Project's environmental impacts are to be measured for several critical aspects of the Project, including noise and biological resources. CEQA requires that a lead agency include a description of the physical

³³ Attachment A, p. 1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 2.

environmental conditions, or “baseline,” in the vicinity of the project as they exist at the time environmental review commences.³⁸ An Environmental Setting is required “to give the public and decision makers the most accurate and understandable picture practically possible of the project’s likely near-term and long-term impacts.”³⁹

Absent an accurate baseline analysis, the public and the City cannot fully determine “the conditions of the environment that preceded the project [as] the baseline against which to measure the adverse environmental change.”⁴⁰ As shown in our prior comments, the MND is inadequate as a matter of law for failure to provide an accurate baseline against which to measure project impacts related to biological resources and noise. An EIR must be prepared which adequately analyzes the Project’s environmental setting with respect to baseline noise levels and biological resources.

C. The MND Failed to Provide a Complete Project Description

As described in our prior comments and in the expert consultants’ reports, the MND’s failure to provide an accurate Project Description precludes the public from understanding the Project in its entirety, and precludes a complete understanding of the Project’s resultant impacts on biological resources and public health. The MND provides only a vague Project Description which does not provide the public with sufficient information to adequately weigh the environmental consequences of the Project.

Dr. Fox demonstrated that the Project Description underestimated the full scope of the Project and failed to analyze the whole of an action which includes future development on the site over the next ten years. Dr. Fox noted that Heliogen indicated that the demonstration project evaluated in the MND is the first step to develop a pipeline for approximately three million barrels of fuel over ten years. As such, the MND failed to adequately analyze the full scope of the Project and failed to include an adequate Project Description.

The MND’s analysis of the Project also resulted in impermissible piecemealing of the Project components and resulted in a failure to analyze the full scope of resultant impacts. CEQA forbids piecemealed review of the significant

³⁸ CEQA Guidelines, § 15125(a); *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal. 4th 310, 321 (“*CBE v. SCAQMD*”).

³⁹ 14 CCR § 15125(a).

⁴⁰ *Fat v. County of Sacramento* (2002) 97 Cal.App4th 1270, 1279, quoting *Lewis v. Seventeenth Dist. Agricultural Assn.* (1985) 165 Cal.App.3d 823, 836.

environmental impacts of a project.⁴¹ Agencies cannot allow “environmental considerations [to] become submerged by chopping a large project into many little ones-each with a minimal potential impact on the environment-which cumulatively may have disastrous consequences.”⁴² CEQA prohibits a project proponent from seeking approval of a large project in smaller pieces in order to take advantage of environmental exemptions or lesser CEQA review for smaller projects.⁴³ This “segmenting” violates CEQA, as it inhibits the full disclosure, analysis and mitigation of impacts, and discussion of alternatives.⁴⁴ CEQA prohibits such a piecemeal approach and requires review of a Project’s impacts as a whole.⁴⁵ Here, the MND’s failure to provide an accurate Project Description resulted in impermissible piecemealing, in violation of CEQA.

D. Substantial Evidence Supports a Fair Argument that the Project May Result in Significant Air Quality and Public Health Impacts Requiring an EIR

As discussed in our prior comments impacts from construction wind erosion fugitive PM2.5 and PM10 emissions from graded but undeveloped portions of the Projects site are significant and unmitigated.⁴⁶ Dr. Fox’s comments demonstrated that acute health impacts from diesel particulate matter (“DPM”) to on-site construction workers, off-site workers, and nearby residents during construction are significant and unmitigated. Further, Valley Fever impacts during construction are significant and insufficiently mitigated, and cumulative air quality impacts are significant and unmitigated.⁴⁷

Dr. Fox demonstrated that the MND failed to comply with CEQA for failure to analyze construction worker health impacts from pesticides in soils from historical agricultural uses of the site which are potentially significant and may pose severe health risks to construction workers and nearby residents and

⁴¹ 14 CCR § 15165; *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1222; *Berkeley Jets*, 91 Cal.App.4th at 1358.

⁴² *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284.

⁴³ *Arviv Enterprises, Inc. v. South Valley Area Planning Com.*, 101 Cal. App. 4th 1337, 1340 (2002).

⁴⁴ E.g., Pub. Resources Code, §21002, 210021.1(a); CEQA Guidelines, §§ 151363, 15121, 15140, 15151 (An EIR is informational document whose purpose is to disclose and mitigate impacts, analyze a reasonable range of alternatives, and select as the project any alternative which can achieve project objectives, but is more protective of the environment, consistent with CEQA’s substantive mandate); CEQA Guidelines, § 15378 (project description must include all project components).

⁴⁵ 14 Cal. Code Reg. § 15378, subd. (a); *Burbank- Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.

⁴⁶ See Attachment B, p. 8.

⁴⁷ Fox Comments March 19, 2023, p. 1.

workers.⁴⁸ Dr. Fox concluded that the MND failed to provide sufficient information on the process that will be used to generate hydrogen which bars the City from accurately estimating operational impacts.⁴⁹ Further, the MND failed to accurately analyze the impacts from solar panel washing emissions which are significant and unmitigated.⁵⁰ Moreover, the MND failed to include a risk of upset analysis to analyze the risk of upset impacts from hydrogen production and storage which are potentially significant.⁵¹

Citizens' prior comments, and those of Dr. Fox, demonstrated that the Project will result in potentially significant construction emissions impacts requiring preparation of an EIR. Dr. Fox demonstrated that Project construction will result in significant and unmitigated PM2.5 and PM10 emissions from previously graded areas and graded undeveloped portions of the site that will be developed under the proposed Project.⁵² Project construction will also result in significant acute health impacts to on-site construction workers and off-site workers and residents.⁵³ The Conditions of Approval⁵⁴ and MMRP⁵⁵ fail to provide mitigation to sufficiently reduce these impacts to less than significant levels. The MND therefore failed to consider or remedy these potentially significant impacts and cannot be approved by the Council.

Operation of the Project will also result in potentially significant air quality and public health impacts which the MND failed to adequately analyze and mitigate, and the Staff Report failed to address. Dr. Fox concluded that emissions of particulate matter from mirror washing and noise and criteria pollutant emissions from the washing vehicle will adversely impact adjacent residents and workers.⁵⁶ The MND fail to identify, analyze, and mitigate these impacts.⁵⁷

⁴⁸ Fox Comments March 19, 2023, p. 1.

⁴⁹ *Id.* at 2.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 2.

⁵³ *Id.*

⁵⁴ Lancaster CA, Attachment to PC Resolution No. 23-05 Conditional Use Permit No. 22-11 Conditions List (March 20, 2023), <https://cityoflancasterca.primegov.com/meeting/attachment/3242.pdf?name=CUP%2022-11%20Conditions%20of%20Approval>.

⁵⁵ Lancaster CA, Mitigation Monitoring and Reporting Program, Conditional Use Permit No. 22-11, <https://cityoflancasterca.primegov.com/meeting/attachment/3243.pdf?name=CUP%2022-11%20MMRP>.

⁵⁶ Fox Comments March 19, 2023, p. 4.

⁵⁷ *Id.*

The Project will generate, store, transport, use, and dispose of hazardous materials, including six 300-cubic foot cylinders and one 1,000 kg storage unit of hydrogen gas and 50 gallons of synthetic crude.⁵⁸ Dr. Fox explained that leakage of these materials from cylinders, pipelines, and fugitive components can result in fires and explosions that would pose significant health risks to on-site workers and nearby off-site workers and residents at and beyond the property boundary. The MND failed to identify, analyze, and mitigate these impacts, and the Staff Report failed to remedy these deficiencies.⁵⁹ The Staff Report also asserted that the proposed use is consistent with Policy 4.7.2 of the General Plan: “Ensure that the design of new development minimizes the potential for fire.”⁶⁰ The Project will generate, store, transport, and use hydrogen, which is highly flammable.⁶¹ Leakage of hydrogen from cylinders, pipelines, and fugitive component can result in catastrophic fires. Thus, the Project will increase the potential for fires at the site, rendering the Project inconsistent with Policy 4.7.2. Neither the MND nor the Staff Report adequately address or mitigate these risks.

Further, Dr. Fox found that the measures included in the MMRP attached to the Staff Report are incomplete and inadequate to control potential Valley Fever impacts from Project construction.⁶² Dr. Fox’s comments provided effective Valley Fever mitigation measures to reduce Valley Fever risk to the greatest extent feasible, but the Staff Report failed to include them in the MMRP or Conditions of Approval. Absent the inclusion of these measures in an MMRP of an EIR, the Project’s Valley Fever risk remains significant and unmitigated.

The City must circulate an EIR which adequately analyzes the Project’s impacts from construction and operational air quality, Valley Fever, public health, and hazards impacts and mitigates such impacts to the greatest extent feasible before the Project can be approved.

A. Substantial Evidence Supports a Fair Argument that the Project May Result in Significant Impacts to Biological Resources Requiring an EIR

As shown in Citizen’s prior comments and expert consultant reports, substantial evidence supports a fair argument that the significant risk to avian mortality posed by solar PV facilities, combined with the Project’s location, size, and

⁵⁸ Fox Comments March 19, 2023, p. 4.

⁵⁹ *Id.*

⁶⁰ Staff Report, p. 5.

⁶¹ Fox Comments March 19, 2023, p. 5.

⁶² *Id.*

technology, is significant and insufficiently mitigated.⁶³ Mr. Cashen's comments on the MND and comments in response to the Staff Report provided substantial evidence demonstrating an increased risk to biological resources as a result of the Project's location near the intersection of two major avian migration routes, its relatively large size, and the use of PV technology, which is especially hazardous to birds.⁶⁴

Substantial evidence also supports a fair argument that the Project would have significant, unmitigated cumulative impacts on biological resources. As Mr. Cashen explained in his comments, the Project may result in a significant and cumulatively significant impact to biological resources, through mortality associated with bird strikes on the PV and heliostats on the Project site.⁶⁵ Mr. Cashen wrote that "[b]ecause the IS/MND does not incorporate mitigation, the Project's contribution to cumulatively significant impacts on bird populations remain considerable."⁶⁶ The City must prepare an EIR which adequately analyzes and mitigates potentially significant impacts to avian mortality from Project components.

B. Substantial Evidence Supports a Fair Argument that the Project May Result in Significant Noise Impacts Requiring an EIR

As shown in Citizen's prior comments, substantial evidence supports a fair argument that noise impacts from construction and operation of the Project remain significant and unmitigated. Mr. Derek Watry's MND comments confirmed that 400 heliostats will be installed by driven piles, yet the MND's construction noise analysis did not include an analysis of the noise which will result from pile driving nor the significant vibration impacts that will result from pile driving on nearby residents and the nearby radio station studio.⁶⁷ Mr. Watry's comments provided substantial evidence that both pile driving noise and non-pile driving noise exceed the established threshold of significance and that noise from project construction will significantly impact the nearest residents.⁶⁸ Neither the Staff Report nor the MND address these issues, and the City failed to prepare an EIR before presenting the Project to decision makers for approval, in violation of CEQA.

⁶³ Cashen Comments, p. 3.

⁶⁴ *Id.*; Walston LJ Jr, KE Rollins, KE LaGory, KP Smith, SA Meyers. 2016. A preliminary assessment of avian mortality at utility-scale solar energy facilities in the United States. *Renewable Energy* 92:404-414.

⁶⁵ Cashen Comments, p. 4.

⁶⁶ *Id.*

⁶⁷ Watry Comments March 20, 2023, p. 2.

⁶⁸ *Id.*

The MND also failed to analyze the noise from cleaning the solar panels⁶⁹, nor does it appear to account for the noise from all 500 heliostats operating simultaneously.⁷⁰ Mr. Watry's confirmed that the MND failed as an informational document under CEQA for failing to establish an adequately baseline to accurately analyze noise impacts. This results in a failure to analyze potentially significant noise impacts from Project construction and operation which the Staff Report failed to resolve. The City must prepare an EIR which adequately analyzes and mitigates the Project's potentially significant noise and vibration impacts before the Project can be approved.

C. Substantial Evidence Supports a Fair Argument that the City Cannot Make the Necessary Findings to Approve the Conditional Use Permit

In order to deny this Appeal, the City Council would have to conclude that the Project conforms with the requirements of the Municipal Code for approval of a Conditional Use Permit. The City Council cannot make such a finding.

The Lancaster Municipal Code provides that in order to receive a Conditional Use Permit approval, the applicant shall substantiate to the satisfaction of the zoning board and/or the commission the following facts:

- A. That the requested use at the location proposed will not:
 - 1. Adversely affect the health, peace, comfort or welfare of persons residing or working in the surrounding area, or
 - 2. Be materially detrimental to the use, enjoyment or valuation of property of other persons located in the vicinity of the site, or
 - 3. Jeopardize, endanger or otherwise constitute a menace to the public health, safety or general welfare.⁷¹

As shown herein, in Citizens' prior comments, and in our expert consultant reports, the Project will result in significant unmitigated health risk impacts from construction and operational air emissions and potential risk of upset. Dr. Fox demonstrated that that Project operation will generate, store, transport, use, and dispose of hazardous materials, including hydrogen gas and synthetic crude.⁷²

⁶⁹ This impact was briefly mentioned elsewhere in the project documents but not in the Noise analysis.

⁷⁰ Watry Comments March 20, 2023, p. 2.

⁷¹ Lancaster Municipal Code § 17.32.040.

⁷² Fox Comments March 19, 2023, p. 5.

Impacts of a hydrogen accident would be significant due to the proximity of numerous sensitive receptors including a multi-family residential development immediately adjacent to the site on the northeast and single family residential uses to the east and north across 5th Street East and Avenue K.⁷³

Thus, based on the substantial evidence in the record, that the Project would: **(1) adversely affect the health, peace, comfort or welfare of persons residing or working in the surrounding area; (2) be materially detrimental to the use, enjoyment or valuation of property of other persons located in the vicinity of the site; and (3) jeopardize, endanger or otherwise constitute a menace to the public health, safety or general welfare.**

The MND failed to evaluate these impacts, and thus failed as an informational document under CEQA. As such, the City cannot make the necessary finding that the Project will not adversely affect the health, peace, comfort, or welfare of persons residing or working in the surrounding area, as required by the Municipal Code.⁷⁴ On this basis, the City Council should grant this appeal and remand the Project to staff to prepare a legally adequate EIR in conformance with CEQA.

IV. CONCLUSION

For the reasons stated herein, we urge the City Council to uphold this Appeal, vacate the Planning Commission's approval of the Project, and remand the Project to Staff to prepare a revised environmental analysis in an EIR, as required by CEQA. The new analysis must identify and implement all feasible mitigation measures available to reduce the Project's potentially significant site-specific impacts to less than significant levels before the City reconsiders approving the Project.

Thank you for your consideration of this Appeal. Please include this letter and all attachments in the City's record of proceedings for the Project.

Sincerely,



Kelilah D. Federman

Attachments
KDF:acp

⁷³ Fox Comments March 19, 2023, p. 5.

⁷⁴ Lancaster Municipal Code § 17.32.040.