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May 19, 2023

Via Email and Overnight Mail

Steven Martinez, Planner
City of Fresno Planning and Development Department
City Hall
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Re: Comments on Draft Environmental Impact Report for the 2740 West Nielsen Avenue Office/Warehouse Project, Development Permit Application No. P21-02699 and Tentative Parcel Map No. P21-05930 (SCH 2022050265)

Dear Mr. Martinez:

We write on behalf of **Fresno Residents for Responsible Development** (“Fresno Residents”) to provide comments on the Draft Environmental Impact Report (“DEIR”) and Recirculated DEIR (“RDEIR”) prepared by the City of Fresno (“City”) for the 2740 West Nielsen Avenue Office/Warehouse Project, Development Permit Application No. P21-02699 and Tentative Parcel Map No. P21 05930 (SCH 2022050265) (“Project”), proposed by Scannell Properties (“Applicant”).¹

The Project proposes construction of four office/warehouse buildings that would be configured for heavy industrial uses.² The proposed buildings would result in a total gross floor area of approximately 901,438 square feet.³ The buildings’ exterior height would be up to 44 feet with an interior height of up to 36 feet and designed with a total of 201 loading dock doors on the north and south

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¹ City of Fresno, Draft Environmental Impact Report, 2740 West Nielsen Avenue Office/Warehouse Project (SCH: 2022050265) (hereinafter “DEIR”) (February 2023); and Recirculated Draft Environmental Impact Report, 2740 West Nielsen Avenue Office/Warehouse Project (SCH: 2022050265) (hereinafter “RDEIR”) (April 2023) available at <https://ceqanet.opr.ca.gov/2022050265/3>

² DEIR, p. 1-3.

³ DEIR, p. 1-3.
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sides of the buildings.⁴ The four buildings would be comprised of the following: Building 1 would be 468,812 square feet and would provide 122 loading dock doors; Building 2 would be 248,786 square feet and would provide 46 loading dock doors; Building 3 would be 93,074 square feet and would provide 18 loading dock doors; and Building 4 would be 90,766 square feet and would provide 15 loading dock doors.⁵ The Project site is located at 2740 West Nielsen Avenue, between North Marks and North Hughes Avenues in the City and County of Fresno.⁶ The 48.03-acre Project site is currently vacant but formerly consisted of an industrial warehouse that has since been demolished.⁷ The Project site is bounded to the north by partially developed land, to the east by North Hughes Avenue, to the south by West Nielsen Avenue, and to the west by North Marks Avenue.⁸ Regional access to the site is provided by State Route 180 (“SR-180”), which is located approximately 0.3 mile south of the project site, and State Route 99 (“SR-99”), which is located approximately 0.8 miles east of the project site.⁹

The Project proposes a total of 594 on-site parking spaces for vehicles and trucks.¹⁰ Of the 594 parking spaces, 385 spaces are allocated for passenger vehicles, 11 spaces for accessible vehicles, and 10 spaces for accessible vans.¹¹ The remaining 188 spaces are allocated for trailers and are proposed to be located along the eastern and western edges of the project site.¹²

The Applicant seeks the following approvals from the City in order to construct the Project: certification of the EIR; development permit; tentative parcel map; water connection permit; and sanitary sewer connection permit.¹³ The Project also requires approval from Pacific Gas & Electric (“PG&E”) for electrical and natural gas connections, Central Valley Regional Water Quality Control Board (“RWQCB”) for a Storm Water Pollution Prevention Plan, and San Joaquin Valley Air Pollution Control District (“SJVAPCD”) for a Dust Control Plan Approval letter and compliance with Rule 9510 – Indirect Source Review.¹⁴

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⁴ DEIR, p. 1-3.

⁵ DEIR, p. 1-3.

⁶ DEIR, p. 2-2.

⁷ DEIR, p. 3-5.

⁸ DEIR, pp. 2-1 – 2-2.

⁹ DEIR, p. 3-1.

¹⁰ DEIR, p. 1-3.

¹¹ DEIR, p. 1-3.

¹² DEIR, p. 1-3.

¹³ DEIR, p. 3-18.

¹⁴ DEIR, p. 3-18.

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Based upon our review of the DEIR and supporting documentation, we conclude that the DEIR fails to comply with the requirements of the California Environmental Quality Act¹⁵ (“CEQA”). The DEIR fails to adequately analyze many of the Project’s significant environmental impacts and fails to propose enforceable mitigation measures that can reduce those impacts to a less than significant level, as required by CEQA.

As explained more fully below, the DEIR fails to properly analyze and mitigate the Project’s transportation, air quality, health risk, GHG emissions, energy, and noise impacts. The DEIR fails to support its significant findings with substantial evidence, and fails to mitigate the Project’s significant impacts to the greatest extent feasible, in violation of CEQA. The Project also conflicts with applicable land use plans and policies, resulting in land use inconsistencies as well as significant impacts under CEQA. The City may not approve the Project until the City revises the DEIR to adequately analyze the Project’s significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to avoid or minimize these impacts to the greatest extent feasible.

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We reviewed the DEIR, technical appendices, and reference documents, with the assistance of our expert consultants, including air quality and hazardous materials expert James J.J. Clark, Ph.D. of Clark and Associates, noise expert Derek Watry of Wilson Ihrig, and transportation expert Normal Marshall of Smart Mobility whose comments and qualifications are included as Attachment A, Attachment B, and Attachment C respectively.¹⁶ Dr. Clark, Mr. Watry, and Mr. Marshall provide substantial evidence of potentially significant impacts that have not been adequately disclosed, analyzed, or mitigated. The City must address and respond to their comments separately and fully.¹⁷

I. STATEMENT OF INTEREST

Fresno Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. East Bay Residents includes the International Brotherhood of Electrical Workers Local 100, Plumbers and Pipefitters UA Local

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¹⁵ Pub. Resources Code (hereinafter “PRC”) §§ 21000 et seq.; 14 Cal. Code Regs (hereinafter “CEQA Guidelines”) §§ 15000 et seq.

¹⁶ **Exhibit A**, James J.J. Clark, Ph.D., Clark & Associates (hereinafter “Clark Comments”); **Exhibit B**, Derek Watry, Wilson Ihrig (hereinafter “Watry Comments”); **Exhibit C**, Norman Marshall, Smart Mobility (hereinafter “Marshall Comments”).

¹⁷ CEQA Guidelines §§ 15088(a), (c).

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442, Sheet Metal Workers Local 104, Sprinkler Fitters Local 669, District Council of Ironworkers their members and their families, and other individuals that live and/or work in the City of Fresno and Fresno County.

Fresno Residents support sustainable development in the City. Residents have a strong interest in enforcing the State’s environmental laws that encourage sustainable development and ensure a safe working environment for its members. Large warehouse projects like this Project should avoid adverse impacts to air quality, noise levels, transportation, biological resources, and public health, and should take all feasible steps to ensure unavoidable impacts are mitigated to the maximum extent feasible. Only by maintaining the highest standards can commercial and industrial development truly be sustainable.

The individual members of Fresno Residents live, work, recreate, and raise their families in the City of Fresno and surrounding communities. Accordingly, they would be directly affected by the Project’s environmental and health and safety impacts. Individual members may also work constructing the Project itself. They would be the first in line to be exposed to any health and safety hazards which may be present on the Project site. They each have a personal interest in protecting the Project area from unnecessary, adverse environmental and public health impacts.

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

Finally, Fresno Residents is concerned with projects that can result in serious environmental harm without providing countervailing economic benefits. CEQA provides a balancing process whereby economic benefits are weighed against significant impacts to the environment.¹⁸ It is in this spirit we offer these comments.

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¹⁸ PRC § 21081(a)(3); *Citizens for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171.
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II. LEGAL BACKGROUND

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an EIR.¹⁹ “The foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”²⁰

CEQA has two primary purposes. First, CEQA is designed to inform decisionmakers and the public about the potential significant environmental effects of a project.²¹ “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.’”²² 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.”²³ As the CEQA Guidelines explain, “[t]he EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected.”²⁴

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring consideration of environmentally superior alternatives and adoption of all feasible mitigation measures.²⁵ 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.”²⁶ If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has

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¹⁹ PRC § 21100.

²⁰ *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 390 (internal quotations omitted).

²¹ PRC § 21061; CEQA Guidelines §§ 15002(a)(1); 15003(b)-(e); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 517 (“[T]he basic purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect [that] a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”).

²² *Citizens of Goleta Valley*, 52 Cal.3d at p. 564 (quoting *Laurel Heights I*, 47 Cal.3d at 392).

²³ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; see also *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”) (purpose of EIR is to inform the public and officials of environmental consequences of their decisions *before* they are made).

²⁴ CEQA Guidelines § 15003(b).

²⁵ CEQA Guidelines § 15002(a)(2), (3); see also *Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at p. 564.

²⁶ CEQA Guidelines § 15002(a)(2).

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“eliminated or substantially lessened all significant effects on the environment” to the greatest extent feasible and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”²⁷

While courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.’”²⁸ As the courts have explained, a prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.”²⁹ “The ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail ‘to enable who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’”³⁰

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III. THE PROJECT DESCRIPTION IS INADEQUATE

The DEIR does not meet CEQA’s requirements because it fails to include an accurate and complete Project description, rendering the entire analysis inadequate. California courts have repeatedly held that “an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.”³¹ CEQA requires that a project be described with enough particularity that its impacts can be assessed.³² Without a complete project description, the

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²⁷ PRC § 21081(a)(3), (b); CEQA Guidelines §§ 15090(a), 15091(a), 15092(b)(2)(A), (B); *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883.

²⁸ *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (emphasis added) (quoting *Laurel Heights I*, 47 Cal.3d at 391, 409, fn. 12).

²⁹ *Berkeley Jets*, 91 Cal.App.4th at p. 1355; see also *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 (error is prejudicial if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process); *Galante Vineyards*, 60 Cal.App.4th at p. 1117 (decision to approve a project is a nullity if based upon an EIR that does not provide decision-makers and the public with information about the project as required by CEQA); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946 (prejudicial abuse of discretion results where agency fails to comply with information disclosure provisions of CEQA).

³⁰ *Sierra Club*, 6 Cal.5th at p. 516 (quoting *Laurel Heights I*, 47 Cal.3d at 405).

³¹ *County of Inyo v. County of Los Angeles* (1977) 71 Cal.App.3d 185, 193.

³² CCR § 15124; see, *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 192–193.

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environmental analysis under CEQA is impermissibly limited, thus minimizing the project’s impacts and undermining meaningful public review.³³ A lead agency may not hide behind its failure to obtain a complete and accurate project description.³⁴

CEQA Guidelines section 15378 defines “project” to mean “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”³⁵ “The term “project” refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term project does not mean each separate governmental approval.³⁶ Courts have explained that a complete description of a project must “address not only the immediate environmental consequences of going forward with the project, but also all “reasonably foreseeable consequence[s] of the initial project.”³⁷ “If a[n]...EIR...does not adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project, informed decisionmaking cannot occur under CEQA and the final EIR is inadequate as a matter of law.”

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A. The DEIR Fails to Identify the End Users of the Project

The Project description typically need not identify the end user for a project because CEQA is concerned with the project’s environmental impacts, not who uses it.³⁸ However, courts have held that where the tenant, or type of business, is known and there is evidence that an impact unique to that tenant or type of business will result, an EIR must disclose that information.³⁹ Here, the type of end users of the Project may have significant environmental impacts depending on the truck trips that those end users will generate.

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The DEIR assumes that the end users of the site will generate truck trips consistent with the average trip generation rate of 2.13 trucks per 1,000 square feet found in the Western Riverside Council of Governments (“WRCOG”) Transportation Uniform Mitigation Fee (“TUMF”) High-Cube Warehouse Trip Generation Study

³³ *Id.*

³⁴ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311 (“*Sundstrom*”).

³⁵ 14 C.C.R. 15378(a).

³⁶ CEQA Guidelines § 15378.

³⁷ *Laurel Heights*, 47 Cal.3d at p. 396 (emphasis added); *see also Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-50.

³⁸ *Maintain Our Desert Env’t v. Town of Apple Valley* (2004) 124 CA4th 430.

³⁹ *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 CA4th 1184, 1213. 6179-012j

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(“WRCOG Study”).⁴⁰ However, the WRCOG Study shows that trip generation rates can vary widely depending on the end user of a project. For example, the WRCOG Study found that an Amazon facility generated 4.5 daily trips per 1,000 square feet, twice the rate assumed in the DEIR.⁴¹ This approach is unsupported and is likely to underestimate impacts. Since the City lacks information about the type of end user that will ultimately occupy the Project warehouses after construction, the DEIR should have analyzed truck trips based on the *most intensive* reasonably foreseeable use of the site, not an average use, because the City has no evidence that Project truck trips will be less intensive, or “average,” when compared to other comparable facilities.

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The DEIR relies on average trip generation rates for its analysis of the Project’s operational air quality, health risk, GHG emissions, energy, noise, and vehicle miles traveled (“VMT”) impacts. The DEIR may therefore substantially underestimate the severity of each of these impacts of a more trip-intensive use occurs at the Project site. The DEIR should be revised to calculate impacts based on the most intensive foreseeable uses at the Project site.

B. The DEIR Fails to Disclose Whether the Project Will Require Use of Backup Generators

An EIR must include an analysis of the environmental effects of a proposed future expansion or other future action at a project site if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.⁴² Commercial and industrial businesses commonly rely on backup generators (“BUG”) to supply emergency power during project operations in order to limit downtime.

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A recent study of BUG use in California (“BUG Study”) found that backup generator use is sharply rising among commercial and industrial land uses, and are clustered in existing environmentally burdened communities.⁴³ For example, in the South Coast Air Quality Management District, BUG use significantly expanded between 2020 and 2021, growing from 12,104 in 2020 to 14,785 in 2021, a 22

⁴⁰ DEIR, 4.10-9.

⁴¹ Marshall, p. 4.

⁴² *Id.*

⁴³ M.Cubed, Diesel Back-Up Generator Population Grows Rapidly in the Bay Area and Southern California (“BUG Use Study”) (2021) p. 7. Available at 6179-012j

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percent increase.⁴⁴ The BUG Use Study found that forty-seven percent of generators are sited in communities classified as being in CalEnviroScreen’s 80th to 100th percentile for pollution burden, with 33 percent of BUGs located in communities above the 90th percentile.⁴⁵ Backup generators commonly rely on fuels such as natural gas or diesel,⁴⁶ and thus can significantly impact air quality, GHG emissions, and public health through toxic diesel particulate (“DPM”) emissions.⁴⁷ As the end users of the Project will likely not want to stop operations during power supply emergencies, it is reasonably foreseeable that the Project would use on-site BUGs. Therefore, the DEIR must disclose whether the Project will use BUGs, and, if so, analyze the effects of the Project’s use of generators. The DEIR’s failure to provide any information about the use of generators causes the DEIR to fail as an informational document.

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C. The DEIR Fails to Disclose Whether the Project Will Require Use of Diesel Fire Pumps

The DEIR fails to analyze the diesel emissions from routine testing and operation of fire pumps at the Project site. An email from the City Fire Department to the City Planning Department sent on September 16, 2022 explains that “warehouse developments of this [Project’s] size will typically have high demand fire sprinkler systems for high rack storage and fire sprinkler systems will be

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⁴⁴ BUG Use Study, p. 8.

⁴⁵ BUG Use Study, p. 7.

⁴⁶ SCAQMD, Fact Sheet on Emergency Backup Generators, <http://www.aqmd.gov/home/permits/emergency-generators> (“Most of the existing emergency backup generators use diesel as fuel”).

⁴⁷ California Air Resources Board, Emission Impact: Additional Generator Usage Associated with Power Outage (January 30, 2020), available at <https://ww2.arb.ca.gov/resources/documents/emissions-impact-generator-usage-during-psps> (showing that generators commonly rely on gasoline or diesel, and that use of generators during power outages results in excess emissions); California Air Resources Board, Use of Back-up Engines for Electricity Generation During Public Safety Power Shutoff Events (October 25, 2019), available at <https://ww2.arb.ca.gov/resources/documents/use-back-engines-electricity-generation-during-public-safety-power-shutoff> (“When electric utilities de-energize their electric lines, the demand for back-up power increases. This demand for reliable back-up power has health impacts of its own. Of particular concern are health effects related to emissions from diesel back-up engines. Diesel particulate matter (DPM) has been identified as a toxic air contaminant, composed of carbon particles and numerous organic compounds, including over forty known cancer-causing organic substances. The majority of DPM is small enough to be inhaled deep into the lungs and make them more susceptible to injury. Much of the back-up power produced during PSPS events is expected to come from engines regulated by CARB and California’s 35 air pollution control and air quality management districts (air districts)”).

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supplemented with private fire pumps as needed.”⁴⁸ However, the DEIR’s CalEEMod output sheets located in Appendix C, which show the results of the DEIR’s air quality impacts analysis, fail to include an output for the Project’s fire pumps.⁴⁹ The DEIR’s failure to provide any information about the Project’s use of fire pumps causes the DEIR to fail as an informational document.

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IV. THE DEIR FAILS TO ADEQUATELY ESTABLISH THE EXISTING BASELINE

The DEIR fails to accurately disclose the baseline environmental conditions related to the Project’s health risk impacts. As a result, the DEIR lacks the necessary baseline information against which to measure the Project’s environmental impacts with regard to impacts on sensitive receptors from construction.

The existing environmental setting is the starting point from which the lead agency must measure whether a proposed project may cause a significant environmental impact.⁵⁰ CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.⁵¹ Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The courts have clearly stated that, “[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”⁵²

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⁴⁸ DEIR, Appendix A: NOP Comments, pdf. p. 65. Email from Byron Beagles to Steven Martinez re Notice of Preparation (NOP) of an Environmental Impact Report (EIR) for 2740 W. Nielsen Office/Warehouse Project (September 16, 2022)

⁴⁹ DEIR, Appendix C: CalEEMod Output Sheets, p. 34 of 34.

⁵⁰ See, e.g., *Communities for a Better Env’t v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316.

⁵¹ CEQA Guidelines §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 (“*Riverwatch*”).

⁵² *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952. 6179-012j

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A. The DEIR Fails to Adequately Establish the Existing Baseline with Respect to Valley Fever

The DEIR includes a single paragraph describing the cause of Valley Fever and its impacts on health.⁵³ However, the DEIR fails to explain the significance of Valley Fever with regard to the Project site, thereby failing to provide context on the environmental setting of the Project. This results in the failure to analyze the potential impacts of Valley Fever exposure to Project construction workers and nearby sensitive receptors.

Valley Fever is a disease that can spread when persons are exposed to *Coccidioides immitis* (“Cocci”) fungus spores during ground disturbance.⁵⁴ Impacts to human health from Valley Fever can be severe, cause long lasting health problems, and can even result in death.⁵⁵ The fungus lives in the top 2 to 12 inches of soil, and when disturbed by activities such as digging, construction activities (e.g. site preparation and grading), dust storms, or during earthquakes, the fungal spores become airborne.⁵⁶ The Project will disturb up to 120 acres of soil during construction which may lead to the release of fungus spores resulting in impacts to Project workers and nearby sensitive receptors.⁵⁷

Valley Fever is highly endemic in Fresno County.⁵⁸ According to the California Department of Public Health, Fresno County had a Valley Fever case rate of 43.6 per 100,000 residents in 2020, and 39.8 per 100,000 residents in 2021.⁵⁹ The Valley Fever case rate in Fresno County was approximately double the statewide case rate averages in 2020 and 2021 of 18.2 and 20.1 respectively and the County has the fifth highest case rate among California’s 58 counties.⁶⁰ For this reason, the Legislature mandates that employers at worksites in Fresno County provide effective awareness training on Valley Fever to all employees.⁶¹

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⁵³ DEIR, pp. 4.2-5 – 4.2-6.

⁵⁴ Clark, p. 4.

⁵⁵ California Department of Public Health (“CDPH”), Valley Fever Basics (May 7, 2020), available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/ValleyFeverBasics.aspx>.

⁵⁶ Clark Comments, p. 4.

⁵⁷ DEIR, Appendix C, CalEEMod Output Sheets, p. 9 of 34.

⁵⁸ Labor Code § 6709(b).

⁵⁹ California Department of Public Health, Epidemiologic Summary of Valley Fever (Coccidioidomycosis) in California, 2020-2021 (hereinafter “Valley Fever Report”) (December 2022) p. 5. Available at <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/CocciEpiSummary2020-2021.pdf>

⁶⁰ Valley Fever Summary, p. 5.

⁶¹ Labor Code § 6709(a)-(d).

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Despite the known presence of Valley Fever in the Project's vicinity and the potential impacts posed by exposure to the fungus spores, the DEIR fails to provide any information regarding the prevalence of *Cocci* fungus spores in the Project's vicinity, fails to discuss applicable construction worker Valley Fever training requirements and fails to include any Valley Fever-specific mitigation in the MMRP. This lack of information precludes meaningful analysis and mitigation of the potential health impacts the Project will cause to onsite construction workers and other individuals in close proximity to the Project site from disturbing soils which may be contaminated with Valley Fever spores site during Project construction.

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The City must prepare a revised DEIR which includes a proper discussion of the potential for the presence of *Cocci* fungus spores at the Project site in order to accurately analyze and mitigate the Project's potentially significant health risk impacts from Valley Fever.

V. THE DEIR FAILS TO DISCLOSE, ANALYZE AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS

An EIR must fully disclose all potentially significant impacts of a Project and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.⁶² An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁶³

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Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.⁶⁴ Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.⁶⁵ In reviewing challenges to an

⁶² CEQA Guidelines § 15064(b).

⁶³ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

⁶⁴ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

⁶⁵ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

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agency’s approval of an EIR based on a lack of substantial evidence, the court will ‘determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements.’⁶⁶

Additionally, CEQA requires agencies to commit to all feasible mitigation measures to reduce significant environmental impacts.⁶⁷ In particular, the lead agency may not make required CEQA findings, including finding that a project impact is significant and unavoidable, unless the administrative record demonstrates that it has adopted all feasible mitigation to reduce significant environmental impacts to the greatest extent feasible.⁶⁸

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Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.’⁶⁹

A. The DEIR Fails to Adequately Disclose, Analyze and Mitigate the Project’s Significant Transportation Impacts

The DEIR concludes that the transportation impacts of the Project will be less than significant.⁷⁰ However, the transportation impacts analysis is flawed in with respect to the analysis of the Project’s trip generation and the vehicle miles traveled (“VMT”) impacts. In addition, the DEIR’s incorrect and unsupported conclusions with respect to VMT and trip generation undermine the DEIR’s analyses of the Project’s air quality, health risk, energy, and GHG emissions impacts, which rely heavily on DEIR’s trip generation and VMT calculations in their respective analyses.

B3-12

1. The DEIR Incorrectly Calculates the Project’s Operational Trip Generation and Trip Length

The DEIR’s trip generation analysis is not supported by substantial evidence because it relies on unsupported assumptions which contradict assumptions made elsewhere in the DEIR.

B3-13

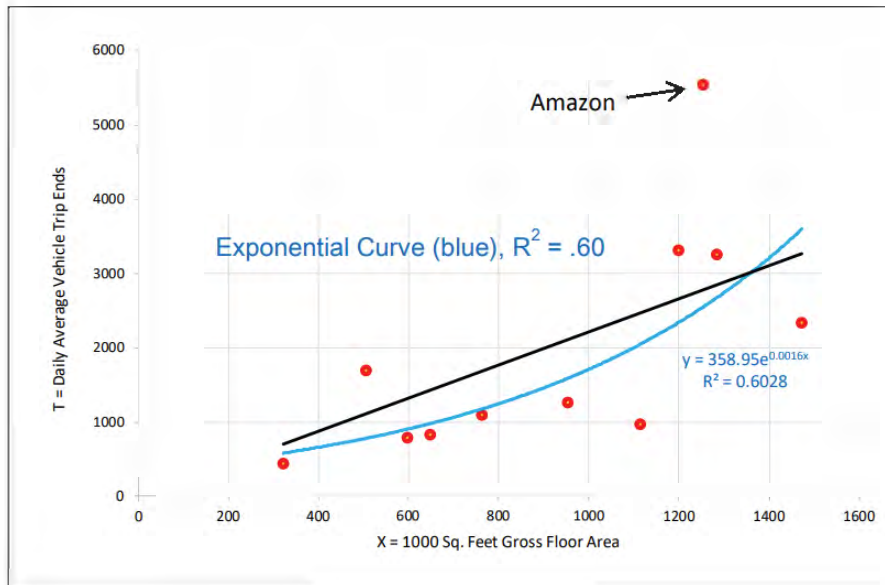
⁶⁶ *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.
⁶⁷ CEQA Guidelines § 15002(a)(2).
⁶⁸ PRC § 21081(a)(3), (b); CEQA Guidelines §§ 15090, 15091; *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883.
⁶⁹ *Berkeley Jets*, 91 Cal.App.4th at 1355.
⁷⁰ DEIR, p. 4.10-14.
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As described above, the DEIR’s transportation impacts analysis relies on the WRCOG Study to estimate the Project’s trip generation.⁷¹ The DEIR estimates that the Project would generate approximately 1,920 daily trips, with the AM and PM peak hours generating 110 and 148 trips respectively.⁷²

The DEIR lacks substantial evidence to support the estimated trip generation because the DEIR unreasonably and without justification relies on the average derived from the WRCOG study. Mr. Marshall explains that data in the WRCOG Study are much more variable than the average rates suggest.⁷³ The WRCOG Study is based on counts at 16 warehouses, segmented between 11 fulfillment centers and 5 parcel hubs. As seen in Figure 1 below, the fulfillment center sites studied exhibited a wide range of trip generation rates, with an Amazon facility having an especially high rate.

Figure 1: WRCOG Study Facility Trip Generation Measurements⁷⁴



B3-13
cont.

Based on the results of the WRCOG Study, it is clear that information regarding the future use of the Project site is crucial in understanding the trip generation rates of the Project. The DEIR admits that the future tenants of the

⁷¹ DEIR, p. 4.10-9.

⁷² DEIR, p. 4.10-9.

⁷³ Marshall Comments, p. 2.

⁷⁴ Marshall Comments, p. 2.

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Project site have not been identified.⁷⁵ Because the future tenants are unknown, the City lacks the justification to assume that the Project will generate the average rate determined in the WRCOG Study, and should instead analyze a more intensive trip rate to ensure that the severity of the Project’s potential transportation impacts is accurately disclosed. Mr. Marshall explains that, if the Amazon trip generation rate were applied to the Project, the Project would result in a trip generation rate twice as high as estimated in the DEIR.⁷⁶ Additionally, if the parcel hub rate of approximately 14 trips per 1,000 square feet were applied, the Project would generate over six times the number of trips estimated in the DEIR.⁷⁷

B3-13
cont.

Because the City does not have information on the future tenants of the Project site, nor what the eventual use of the Project buildings will be, the City’s reliance on the selected trip rates is unreasonable and unsupported. To reasonably analyze the full scope of the Project’s impacts related to future tenant uses, analysis of the Projects trip generation should use the most conservative estimate and present the data in a revised and recirculated DEIR for public review.

2. The DEIR Fails to Disclose and Analyze the Project’s Potentially Significant VMT Impacts

The City’s CEQA Guidelines for Vehicle Miles Traveled Thresholds (“VMT Guidelines”) establish the criteria for evaluating a project’s VMT impacts.⁷⁸ Specifically, the VMT Guidelines state that VMT per employee is the appropriate metric against which to measure a project’s impacts, and that a project would have a significant impact if it will generate 13 percent or greater employee VMT than the existing regional average for specific uses.⁷⁹ The DEIR’s transportation impact analysis relies on the Fresno Council of Governments (“COG”) Activity Based Model (“ABM”) and the trip generation rates discussed above to calculate the Project’s anticipated VMT.⁸⁰ The DEIR’s transportation analysis states that the existing regional average is 25.6 VMT per employee and that the Project will generate 19.8

B3-14

⁷⁵ DEIR, p. 1-3.
⁷⁶ Marshall Comments, p. 3.
⁷⁷ Marshall Comments, p. 3.
⁷⁸ City of Fresno, CEQA Guidelines for Vehicle Miles Traveled Thresholds (hereinafter “VMT Guidelines”) (June 18, 2020) available at <https://fresno.legistar.com/View.ashx?M=F&ID=8601948&GUID=9AEF1630-3BE3-45BF-9BB8-3D4BB9DB1677>
⁷⁹ VMT Guidelines, p. 26.
⁸⁰ DEIR, p. 4.10-14.
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VMT per employee.⁸¹ Based on these figures, the DEIR concludes that the Project's VMT per employee rate is 22.66 percent lower than the existing regional average and therefore will not result in a significant impact.⁸²

In his review, Mr. Marshall found that the Project's VMT analysis likely underestimates Project VMT. Mr. Marshall states that the DEIR estimates that 10.2% of daily trips are made by heavy trucks (5+ axles) and another 7.6% are made by medium trucks (2-4 axles) and that the average trip lengths are calculated to be 9.5 miles for work trips, and 7.3 miles for "other" trips.⁸³ However, these estimates are likely much lower than the actual average truck trip lengths that could be generated by the Project. Mr. Marshall notes that major intermodal facilities that would serve a warehouse distribution use at the Project site are located far away from the Project site, including:

- Rail intermodal facilities in Bakersfield 110 miles,
- Rail intermodal facilities in Stockton 120 miles,
- Port of Oakland 175 miles, and
- Port of Los Angeles 240 miles.

As explained above, without knowing what the eventual use of the Project site will be, it is impossible to fully evaluate trip lengths. However, until more is known about the facility operations the City must account for the possibility of much greater truck trip length generation by the Project. Additionally, Mr. Marshall found that the DEIR's VMT analysis fails to incorporate data regarding trips that originate from outside of the Fresno COG ABM region.⁸⁴ As discussed above, this failure to include out of region trips is particularly important to understanding truck trip lengths to intermodal facilities and ports.

A full VMT analysis should be completed for the Project, including explicit consideration of truck trip length and truck VMT, and included in a revised and recirculated DEIR for the Project.

B3-14
cont.

⁸¹ DEIR, p. 4.10-14.

⁸² DEIR, p. 4.10-14.

⁸³ Marshall Comments, p. 5.

⁸⁴ Marshall Comments, p. 6.

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3. The DEIR Fails to Require Mitigation Measures to Reduce the Project's Potentially Significant Impacts

As discussed above, the Project may result in significant transportation impacts. Pursuant to the City's VMT Guidelines, when a Project exceeds the threshold, the Project's environmental document must include a section that contains mitigation measures to reduce the VMT impacts.⁸⁵

As the VMT Guidelines note, the California Air Pollution Control Officers Association ("CAPCOA") *Handbook for Analyzing Greenhouse Gas Emission Reductions, Assessing Climate Vulnerabilities, and Advancing Health and Equity* ("Handbook")⁸⁶ includes various strategies to reduce VMT which should be considered for implementation where a project will have a significant VMT impact.⁸⁷ The Handbook includes data regarding GHG emissions and proven effective methods that a local agency can employ to reduce GHG impacts, including reduction in GHG impacts from VMT.⁸⁸

B3-15

The DEIR states that the Project may be subject to SJVAPCD Rule 9410 – Employer Based Trip Reduction, which requires employers with 100 or more eligible employees to establish employee trip reduction programs to reduce VMT, reducing emissions associated with work commutes.⁸⁹ However, compliance with this rule is not included in any mitigation measures for the Project. SJVAPCD Rule 9410 is similar to CAPCOA's measure "T-6 Implement Commute Trip Reduction Program (Mandatory Implementation and Monitoring)" which, according to CAPCOA, can result in up to 26 percent reduction in GHG emissions from VMT.⁹⁰ The Handbook states that the VMT reduction (and therefore, GHG emissions reduction) could be as great as 45 percent with the implementation of additional measures which include:

B3-16

- T-7 Implement Commute Trip Reduction Marketing
- T-8 Provide Riderssharing Program
- T-9 Implement Subsidized or Discounted Transit Program

⁸⁵ VMT Guidelines, p. 27.

⁸⁶ California Air Pollution Control Officers Association ("CAPCOA") *Handbook for Analyzing Greenhouse Gas Emission Reductions, Assessing Climate Vulnerabilities, and Advancing Health and Equity* (hereinafter "CAPCOA Handbook") (December 2021) available at https://www.airquality.org/ClimateChange/Documents/Final%20Handbook_AB434.pdf

⁸⁷ VMT Guidelines, p. 41.

⁸⁸ CAPCOA Handbook, p. 35.

⁸⁹ DEIR, p.

⁹⁰ CAPCOA Handbook, pp. 86-87.
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- T-10 Provide End-of Trip Bike Facilities
- T-11 Provide Employer-Sponsored Vanpool
- T-12 Price Workplace Parking
- T-13 Implement Employee Parking Cash-Out⁹¹

Many of the individual measures included in the Handbook offer high potential reductions *even if only one measure is used*. For example, the maximum reduction produced by “T-11 Provide Employer-Sponsored Vanpool” is 20.4 percent.⁹²

B3-16
cont.

The DEIR fails to include any mitigation measures to reduce the Project’s VMT impacts and fails to include analysis of the feasibility of the above methods, or any other methods, to reduce the Project’s potentially significant impacts. The City must evaluate the feasibility and effectiveness of mitigation measures to reduce the Project’s VMT impacts in a revised and recirculated DEIR for the Project.

B. The DEIR Fails to Disclose, Analyze, and Mitigate the Project’s Potentially Significant Health Risk Impacts

1. The DEIR Fails to Accurately Analyze the Project’s Operational Health Risk

In order to assess the impact of the Project’s operational emissions, the DEIR prepared a health risk assessment (“HRA”) using AERMOD, which is used to estimate exhaust concentrations based on site and source geometry, source emissions strength, distance from the source to the receptor, and meteorological data.⁹³ Here, AERMOD was used to calculate the ground level concentration of DPM emissions associated with the project.⁹⁴ However, Dr. Clark found that that the air dispersion model used to calculate the Project’s operational emissions has a structural flaw that results in inaccurate estimates of the Project emissions within the community.⁹⁵

B3-17

Dr. Clark reviewed the City’s AERMOD modeling and found that the City failed to account for the impact on emissions from building downwash, rendering the analysis incomplete. Dr. Clark explains that building downwash occurs as the wind flows over and around buildings and impacts the dispersion of pollution from

⁹¹ CAPCOA Handbook, pp. 89-115.
⁹² CAPCOA Handbook, p. 104.
⁹³ DEIR, p. 4.2-32.
⁹⁴ Clark Comments, p. 8.
⁹⁵ Clark Comments, p. 8.
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nearby stacks.⁹⁶ A plume caught in the path of this flow is drawn into the wake, temporarily trapping it in a recirculating cavity which leads to higher ground-level concentration of chemicals emitted from sources.⁹⁷ Furthermore, the downwash effect increases as the relative difference between the release height and top of the building increases.⁹⁸ This effect is well-understood and is commonly used in emissions modeling. For example, analysis and mitigation of downwash is discussed in Section 123 of the Clean Air Act.⁹⁹

The DEIR completely fails to account for this impact in its AERMOD modeling, nor does it provide any justification why. When a standard, accepted methodology is available to assess a significant impact, an EIR must evaluate the impact unless a reasoned basis for not doing so is provided.¹⁰⁰ In *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm'rs*, the court reviewed a DEIR's failure to analyze health risk from TAC exposure. The DEIR claimed that no methodology or standards of significance existed for assessing the health risk from TAC exposure.¹⁰¹ The court determined that the lead agency abused its discretion, reasoning that the lead agency failed to consider, in good faith, comments from the public showing that it was feasible to analyze health risk from TAC exposure.¹⁰²

B3-17
cont.

The Port has not cited us to any reasonably conscientious effort it took either to collect additional data or to make further inquiries of environmental or regulatory agencies having expertise in the matter....At the very least, the documents submitted by the public raised substantial questions about the project's effects on the environment and the unknown health risks to the area's residents...the Port has not offered any justification why more definitive information could not have been provided.

Here, the City failed to analyze a critical dispersion factor - building downwash – which affects the rate and severity of exposure to toxic air contaminants, without explaining why. The City's failure to include this emission

⁹⁶ Clark Comments, p. 8.

⁹⁷ Clark Comments, p. 8.

⁹⁸ Clark Comments, p. 8.

⁹⁹ 42 U.S. Code § 7423 - Stack heights ("For purposes of this section, good engineering practice means, with respect to stack heights, the height necessary to insure that emissions from the stack do not result in excessive concentrations of any air pollutant in the immediate vicinity of the source as a result of atmospheric downwash, eddies or wakes which may be created by the source itself, nearby structures or nearby terrain obstacles").

¹⁰⁰ *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm'rs* (2001) 91 CA4th 1344, 1370

¹⁰¹ *Id.* at 1369.

¹⁰² *Id.* at 1370.

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factor in its health risk analysis represents a failure to accurately analyze and disclose the ground level concentration of DPM emissions generated by the Project. The DEIR fails as an informational document in this respect, and must be revised.

B3-17
cont.

2. The DEIR Fails to Analyze and Mitigate Valley Fever Impacts from Project Construction

As explained above, the DEIR fails to disclose the potential presence of *Cocci* fungus spores and fails to discuss any Valley Fever employee training measures the Applicant intends to take to protect its construction workers from Valley Fever exposure. As a result, the DEIR fails to analyze the Project's threat of Valley Fever exposure to workers and sensitive receptors, and fails to include mitigation measures to reduce the health risk impacts of Valley Fever.

According to the DEIR's air quality analysis, Project construction will include 40 days of site preparation which will disturb 60 acres of soil, and 40 days of grading activities which will disturb 120 acres of soil at the Project site.¹⁰³ Dr. Clark explains that, when soil containing the spores are disturbed by construction activities, the spores become airborne, exposing construction workers and other nearby sensitive receptors to potential infection.¹⁰⁴ Sensitive receptors near the Project site, including workers and those who live nearby are at risk from exposure from disturbed dust during Project construction.¹⁰⁵

B3-18

Dr. Clark states that the most at-risk populations are construction and agricultural workers.¹⁰⁶ Additionally, he notes that the potentially exposed population in surrounding areas is much larger than construction workers because the nonselective raising of dust during Project construction will carry the very small spores which measure 0.002–0.005 millimeters into nonendemic areas, potentially exposing large non-Project-related populations.¹⁰⁷ According to the DEIR, the closest sensitive receptors to the Project site include the single-family residences located approximately 110 feet south of the project site across West Nielsen Avenue.¹⁰⁸ These sensitive receptors are at risk of Valley Fever infection from Project construction resulting in a significant health risk impact, and are not subject to the training requirements of Labor Code 6702. Furthermore, the small fungus spore particles will not be controlled by the conventional construction dust

¹⁰³ DEIR, Appendix C, CalEEMod Output Sheets, pp. 8 and 9 of 34.

¹⁰⁴ Clark Comments, p. 4.

¹⁰⁵ Clark Comments, p. 4.

¹⁰⁶ Clark Comments, p. 6.

¹⁰⁷ Clark Comments, p. 6.

¹⁰⁸ DEIR, p. 4.2-31.

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control mitigation measures proposed in the DEIR under Mitigation Measure (“MM”) Air-1.¹⁰⁹ Thus, off-site sensitive receptors may have a significant risk of exposure to Valley Fever spores with no mitigation.

The DEIR must be revised and recirculated to include an analysis of the Project’s significant Valley Fever impacts, and to require that any and all mitigation measures that will reduce Valley Fever risks are incorporated as binding mitigation in the Project’s Mitigation Monitoring and Reporting Program (“MMRP”).

B3-18
cont.

3. Feasible Mitigation is Available to Reduce the Project’s Significant Health Risk Impacts from Valley Fever

CEQA imposes the duty on the City to adopt all feasible mitigation measures to reduce significant health impacts from the Project. Yet here, the DEIR fails to incorporate any mitigation measures that would address Valley Fever risks to construction employees and sensitive receptors.

In his comments, Dr. Clark proposes a variety of feasible mitigation measures the DEIR should consider and adopt in a revised DEIR to reduce potential health impacts from Valley Fever.¹¹⁰ The following mitigation measures identified in Dr. Clark’s comments are based on actual experience during construction of projects in areas affected by the fungi that cause Valley Fever, these measures should be included in the DEIR’s mitigation measures in addition to the measures required under MM Air-1:¹¹¹

B3-19

- (1) Include specific requirements in the Project’s Injury and Illness Prevention Program regarding safeguards to prevent Valley Fever.
- (2) Control dust exposure through the following methods:
 - Apply chemical stabilizers at least 24-hours prior to high wind event;
 - Apply water to all disturbed areas a minimum of three times per day. Watering frequency should be increased to a minimum of four times per day if there is any evidence of visible wind-driven fugitive dust;
 - Provide National Institute for Occupational Safety and Health (NIOSH)-approved respirators for workers with a prior history of Valley Fever.
 - Half-face respirators equipped with a minimum N-95 protection factor

¹⁰⁹ Clark Comments, p. 6. *See also* DEIR, pp. 4.2-30 – 4.2-31.

¹¹⁰ Clark Comments, pp. 6-8.

¹¹¹ *Id.* pp. 4-8.
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for use during worker collocation with surface disturbance activities. Half-face respirators equipped with N-100 or P-100 filters should be used during digging activities. Employees should wear respirators when working near earth-moving machinery.

- Prohibit eating and smoking at the worksite, and provide separate, clean eating areas with hand-washing facilities.
- Avoid outdoor construction operations during unusually windy conditions or in dust storms.
- Consider limiting outdoor construction during the fall to essential jobs only, as the risk of cocci infection is higher during this season.

(3) Prevent transport of cocci outside endemic areas:

- Prevent spillage or loss of bulk material from holes or other openings in the cargo compartment's floor, sides, and/or tailgate;
- Provide workers with coveralls daily, lockers (or other systems for keeping work and street clothing and shoes separate), daily changing and showering facilities.
- Clothing should be changed after work every day, preferably at the work site.
- Train workers to recognize that cocci may be transported offsite on contaminated equipment, clothing, and shoes; alternatively, consider installing boot-washing.
- Post warnings onsite and consider limiting access to visitors, especially those without adequate training and respiratory protection.

(4) Improve medical surveillance for employees:

- Employees should have prompt access to medical care, including suspected work-related illnesses and injuries.
- Work with a medical professional to develop a protocol to medically evaluate employees who have symptoms of Valley Fever.
- Consider preferentially contracting with 1-2 clinics in the area and communicate with the health care providers in those clinics to ensure that providers are aware that Valley Fever has been reported in the area. This will increase the likelihood that ill workers will receive prompt, proper and consistent medical care.
- Respirator clearance should include medical evaluation for all new employees, annual re-evaluation for changes in medical status, and annual training, and fit-testing.

**B3-19
cont.**

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- Skin testing is not recommended for evaluation of Valley Fever.¹¹²
- If an employee is diagnosed with Valley Fever, a physician must determine if the employee should be taken off work, when they may return to work, and what type of work activities they may perform.

Any mitigation measures must be included in the DEIR and be fully enforceable through permit conditions, agreements, or other legally binding instruments.¹¹³ Failure to include enforceable mitigation measures is considered a failure to proceed in the manner required by CEQA.¹¹⁴ In order to meet this requirement, mitigation measures must be incorporated directly into the EIR to be enforceable.¹¹⁵

B3-19
cont.

The DEIR must be revised and recirculated to include mitigation measures such as the those proposed by Dr. Clark to reduce the impacts of exposure to Valley Fever causing fungus spores and mitigate impacts to sensitive receptors.

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

The DEIR's air quality modeling fails to account for the use of diesel fueled backup generators and fire pumps during Project operation, resulting in a failure to accurately analyze the Project's air quality impacts. Additionally, as discussed above, the Project's trip generation rates are unsupported and cannot be relied upon by the City to determine that the Project will not have significant transportation impacts. The unsupported trip generation and VMT calculations resulted in a failure to analyze the Project's GHG emissions and air quality impacts. The failure to analyze specific Project components, and the reliance on unsupported conclusions in the DEIR undermined the Project's air quality analysis and prevented the City from finding that the Project will not result in significant air quality impacts.

B3-20

¹¹² Short-term skin tests that produce results within 48 hours are now available. See Kerry Klein, NPR for Central California, *New Valley Fever Skin Test Shows Promise, But Obstacles Remain*, November 21, 2016; available at <http://kvpr.org/post/new-valley-fever-skin-test-shows-promise-obstacles-remain>.

¹¹³ CEQA Guidelines §15126.4(a)(2).

¹¹⁴ *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 672.

¹¹⁵ *Lotus v. Dept of Transportation* (2014) 223 Cal. App. 4th 645, 651-52.
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1. The DEIR Fails to Analyze Air Quality Impacts from the Operation of Backup Generators

The DEIR’s air quality analysis fails to account for the operation of backup generators (“BUGs”) during Project operation. Dr. Clark explains that diesel powered backup generators are commonly used in industrial warehouse Projects and would be operated during routine testing and in the event of a power failure.¹¹⁶ The operation of BUGs generates diesel particulate matter (“DPM”) which is identified as a toxic air contaminant, composed of carbon particles and numerous organic compounds, including over forty known cancer-causing organic substances.¹¹⁷

Additionally, by omitting BUGs from the air quality analysis, the DEIR fails to analyze all uses that stem from the reasonably foreseeable increase of generator use during Public Safety Power Shutoff (“PSPS”) events and extreme heat events.¹¹⁸ The recent rise of Extreme Heat Events (“EHEs”) in the State has increased the amount of PSPS events and thus increased the amount of time generators are used.¹¹⁹

EHEs “are defined as periods where in the temperatures throughout California exceed 100 degrees Fahrenheit.”¹²⁰ In 2021, the Governor released one Executive Order regarding EHEs and one Proclamation for a State of Emergency with the intention to help avoid PSPS events.¹²¹ CARB notes though that the number of Extreme Heat Events is likely to increase, and thereby PSPS events, with the continuing change in climate that the State is currently undergoing.¹²²

According to the California Public Utilities Commission (“CPUC”) de-energization report in October 2019, there were almost 806 PSPS events that impacted almost 973,000 customers (~7.5% of households in California) of which

¹¹⁶ Clark Comments, p. 14.

¹¹⁷ Clark Comments, p. 14.

¹¹⁸ Clark Comments, p. 15.

¹¹⁹ Clark Comments, p. 15.

¹²⁰ Governor of California. 2021. Proclamation of a state of emergency. June 17, 2021; Clark Comments p. 6.

¹²¹ Cal. Governor Executive Order N-11-21, <https://www.gov.ca.gov/wp-content/uploads/2021/07/EO-N-11-21-Extreme-Heat-Event-07.10.21.pdf>; Cal. Governor Proclamation of a State of Emergency, June 16, 2021, <https://www.gov.ca.gov/wp-content/uploads/2021/06/6.17.21-Extreme-Heat-proclamation.pdf>.

¹²² CARB 2017 Scoping Plan, p. 6, https://ww2.arb.ca.gov/sites/default/files/classic/cc/scopingplan/scoping_plan_2017.pdf 6179-012j

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~854,000 of them were residential customers, and the rest were commercial, industrial, medical baseline, and other customers.¹²³ CARB’s data also shows that on average each of these customers had about 43 hours of power outage in October 2019.¹²⁴ Dr. Clark notes that CARB concluded that PSPS events in October of 2019 alone generated 126 tons of NOx, 8.3 tons of particulate matter, and 8.3 tons of DPM.¹²⁵

Dr. Clark concludes that every EHE and PSPS that occurs during Project operation would result in increased DPM from the reasonably foreseeable operation of BUGs at the Project.¹²⁶ While the City is not required to analyze the worst-case scenarios, there is substantial evidence demonstrating that PSPS events and EHE are reasonably foreseeable events which will require the use of BUGs at the Project site.

B3-21
cont.

A detailed analysis of the emissions and noise from the hours of BUG testing and operation should be included in a revised EIR, including the extra time the BUG will need to run to account for EHEs and PSPS.

2. The DEIR Fails to Analyze Air Quality Impacts from the Project’s Truck Trips

As described above, the Project’s transportation impact analysis fails to accurately analyze the Project’s operational truck trip generation rates and likely underestimates the Project’s VMT. The Project’s air quality analysis relies on the transportation impact analysis’ trip generation numbers and VMT in order to calculate the Project’s air emissions and analyze the Project’s air quality and GHG emissions impacts.¹²⁷ The DEIR’s failure to accurately calculate the Project’s trip generation results in the failure to accurately calculate the emissions from truck traffic during Project operation. The Project’s transportation impact analysis must be corrected to accurately analyze the Project’s air quality impacts in a revised DEIR.

B3-22

¹²³ <https://www.cpuc.ca.gov/deenergization/> as cited in CARB, 2020. Potential Emission Impact of Public Safety Power Shutoff (PSPS), Emission Impact: Additional Generator Usage associated With Power Outage.

¹²⁴ CARB, 2020. Potential Emission Impact of Public Safety Power Shutoff (PSPS), Emission Impact: Additional Generator Usage associated With Power Outage.

¹²⁵ Clark Comments, p. 15.

¹²⁶ Clark Comments, p. 15.

¹²⁷ DEIR, Appendix C, CalEEMod Output Sheets, p. 1 of 34 (explaining that the vehicle trips and fleet mix used in the air quality analysis are “[b]ased on the trip generation prepared for the proposed project.”)

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D. The DEIR Fails to Adequately Analyze Potentially Significant Noise Impacts

The DEIR’s noise analysis concludes that Project construction and operational noise is significant but will be reduced to less than significant with mitigation measures included in the DEIR.¹²⁸ Additionally, the DEIR found that the noise impacts from project-related traffic on offsite sensitive receptors would be less than significant and does not require mitigation.¹²⁹ However, the DEIR relies on a faulty methodology to analyze the Project’s construction noise and improperly relies on a relative threshold of significance with regard to the Project’s operational noise from traffic. The DEIR therefore fails to properly analyze and mitigate the Project’s significant construction and operational noise impacts.

CEQA requires agencies to conduct noise analyses for projects that consider both the absolute noise levels expected, and the degree noise levels are expected to increase. Noise studies that rely on a single measure that excludes possible significant impacts from noise increases or noise extremes do not receive deference by reviewing courts.

In *King & Gardiner Farms, LLC v. County of Kern*, the Court of Appeal held that an agency cannot simply rely on compliance with local noise regulations to conclude there will be no significant noise impacts without considering the impacts of increases in noise.¹³⁰ The County approved an EIR for proposed zoning amendments to streamline oil and gas permitting.¹³¹ The EIR included an analysis of noise impacts that determined significance based solely on whether the 65 decibel day-night average (“dBA DNL”) threshold in the County General Plan would be exceeded.¹³² The Court of Appeal reasoned that the County General Plan did not conclude that all increases in the magnitude of noise are insignificant until the 65 dBA DNL threshold is exceeded, so the General Plan “does not constitute substantial evidence that the magnitude of an increase in ambient noise is irrelevant.”¹³³ Rather, an EIR’s noise analysis should consider both the increase in noise level and the absolute noise level associated with a project in determining the

B3-23

¹²⁸ DEIR, pp. 4.9-18 and 4.9-23.

¹²⁹ DEIR, p. 4.9-21.

¹³⁰ *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 894.

¹³¹ *Id.* at 829.

¹³² *Id.* at 830, 889.

¹³³ *Id.* at 894.

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significance of the project's noise impacts.¹³⁴ The Court of Appeal concluded that an agency cannot exclusively rely on “a single cumulative DNL metric for determining the significance of the project's noise impacts” while deciding “the magnitude of the increase in ambient noise is irrelevant.”¹³⁵

In *Berkeley Jets*, the Court of Appeal invalidated the Port of Oakland's EIR for expansion of the Oakland Airport because of its reliance on an improper noise standard.¹³⁶ The EIR evaluated the significance of noise impacts based on whether the estimated level of sound would exceed 65 dB Community Noise Equivalent Level (“CNEL”).¹³⁷ However, as the Court of Appeal explained, the CNEL metric—which averages noise over the course of a day—could not be the sole indicator of significant effects from noise because it does not provide a meaningful analysis of the “degree single overflights will create noise levels over and above the existing ambient noise level at a given location, and the community reaction to aircraft noise, including sleep disturbance.”¹³⁸ Therefore, the Court concluded, a revised EIR with additional study of noise impacts from flights was necessary.¹³⁹

B3-23
cont.

1. The DEIR Fails to Consider the Totality of Noise Impacts

With regard to the Project's traffic noise the DEIR relies only on a relative threshold to determine that the Project will not result in a significant impact. The DEIR states: “[b]ecause noise levels would increase less than 3.0 dBA, this is consistent with General Plan Policy NS-1-j: Significance Threshold which states that an increase of 3 dBA CNEL or more is considered significant.”¹⁴⁰ However, as Mr. Watry points out, this rationale ignores the absolute increase in the noise environment and the cumulative effects of noise on sensitive receptors.¹⁴¹

B3-24

The DEIR cannot solely rely on a relative threshold of significance when looking at the sum of all noise sources against absolute criteria would reveal a significant noise impact. Indeed, as the court in *King & Gardiner Farms* held, an EIR should evaluate both the noise level increase *and* the absolute noise level associated with a Project when determining the significance of noise impacts.¹⁴²

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Berkeley Jets*, 91 Cal.App.4th at 1381–1382.

¹³⁷ *Id.* at 1373.

¹³⁸ *Id.* at 1381–1382.

¹³⁹ *Id.* at 1382.

¹⁴⁰ DEIR, p. 4.9-21.

¹⁴¹ Watry Comments, p. 3.

¹⁴² *King & Gardiner Farms*, 45 Cal.App.5th at 894.
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Similarly, the DEIR should evaluate the total noise impacts from the Project on nearby residential receptors. CEQA Guidelines require EIRs to “analyze any significant environmental effects the project might cause or risk exacerbating by bringing development and people into the area affected.”¹⁴³

The City’s General Plan Policy NS-1-a establishes “65 dBA Ldn or CNEL as the standard for the desirable maximum average exterior noise levels for defined usable exterior areas of residential and noise-sensitive uses” such as those along Nielsen Avenue, south of the Project site.¹⁴⁴ Based on the data provided in the DEIR, the roadway segment on Nielsen Avenue between Marks and Hughs will see an increase from the existing 64.0 dBA CNEL to 66.1 dBA CNEL with Project construction.¹⁴⁵ Based on the DEIR’s own data, the Project will cause noise levels at nearby sensitive receptors to exceed the desirable maximum average exterior noise levels for defined usable exterior areas of residential and noise-sensitive uses of 65 dBA CNEL, resulting in a significant impact.

Mr. Watry notes that both Caltrans and the Federal Transit Administration (“FTA”) recognize the need for absolute thresholds of significance in addition to relative thresholds when determining the significance of noise impacts for projects.¹⁴⁶ The FTA’s noise impact assessment guidelines dictate that a 3 dBA Ldn increase in noise exposure at residences would only be allowed if the existing noise exposure is 55 dBA Ldn or less.¹⁴⁷ When the existing noise environment is above 55 dBA Ldn, the allowable increase is progressively smaller.¹⁴⁸ For example, under the FTA’s criteria, where the existing noise exposure is 64.0 dBA CNEL, as it is at the Project site along Nielsen Avenue, the allowable increase is 1.5 dBA.¹⁴⁹ Under the absolute threshold established by the FTA, the Project’s anticipated 2.1 dBA CNEL increase results in a significant impact.

**B3-24
cont.**

¹⁴³ CEQA Guidelines § 15126.2(a).

¹⁴⁴ City of Fresno, General Plan, Chapter 9: Noise and Safety, p. 9-19 available at https://www.fresno.gov/darm/wp-content/uploads/sites/10/2022/12/upload_temp_Consolidated-GP-10-13-2022.pdf

¹⁴⁵ DEIR, p. 4.9-19, Table 4.9.L.

¹⁴⁶ Watry Comments, p. 3.

¹⁴⁷ Watry Comments, p. 4.

¹⁴⁸ Watry Comments, p. 4.

¹⁴⁹ Watry Comments, p. 4.

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2. The DEIR Fails to Analyze and Mitigate Potentially Significant Construction Noise Impacts

The DEIR's construction noise analysis calculates the noise levels expected from Project construction based on the Federal Highway Administration's ("FHWA") Roadway Construction Noise Model ("RCNM").¹⁵⁰ The DEIR includes the equations used to calculate the composite average noise level for construction equipment which considers: the reference noise emission level, the amount of time each piece of equipment is typically used, distance, and the total amount of equipment anticipated to be used on site.¹⁵¹ However, as Mr. Watry states, the DEIR erroneously relies on FTA guidance which dictates that when specific information regarding Project construction is not known, construction noise may be calculated by combining the two loudest pieces of equipment assuming they are running at full power, 100 percent of the time.¹⁵² Here however, specific project construction information is available, and can be used to produce a detailed calculation of the Project's construction noise impacts.

Mr. Watry used the construction equipment inventory information contained in the DEIR's Appendix C: CalEEMod Output sheets to generate the list of equipment that will be used during each phase of Project construction. Using the reference noise emission levels and usage factors for the equipment from the DEIR in Table 4.9.K¹⁵³ Mr. Watry calculated the noise levels generated during each phase of construction combined with the existing ambient noise levels to determine the noise impacts on the closest residential receptors located south of the Project site.¹⁵⁴ Mr. Watry found that the Project's site prep phase will result in a noise level of 70.2 dBA Leq, while grading will result in noise levels of 71 dBA Leq, and building construction will result in noise levels of 69.0 dBA Leq.¹⁵⁵ When compared to the existing ambient noise level of 62.3 dBA Leq, Mr. Watry found that Project construction will result in noise exposure increases of 7.9, 8.7 and 6.7 dBA Leq during the Projects site prep, grading, and building phases respectively.¹⁵⁶ Therefore, the Project will exceed the DEIR's threshold of 5 dBA Leq during three phases of construction, resulting in a significant impact.

B3-25

¹⁵⁰ DEIR, p. 4.9-16.

¹⁵¹ Watry Comments, p. 5.

¹⁵² Watry Comments, p. 5.

¹⁵³ DEIR, p. 4.9-16.

¹⁵⁴ Watry Comments, p. 5.

¹⁵⁵ Watry Comments, p. 6.

¹⁵⁶ Watry Comments, p. 6.

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Finally, Mr. Watry notes that the requirements of MM NOI-1, which mandates the use of mufflers and the designation of a “disturbance coordinator” would not reduce the Project’s significant construction noise impacts. First, Mr. Watry explains that the noise calculations use reference levels from equipment that are already equipped with mufflers, and it is unreasonable to believe that a second muffler would be added to construction equipment.¹⁵⁷ Second, he notes that while having a disturbance coordinator may be helpful to resolve noise issues as they arise, a noise coordinator will not reduce the noise emitted from Project construction equipment.¹⁵⁸

B3-25
cont.

The City must revise the construction noise analysis in a recirculated DEIR and implement feasible construction noise mitigation measures to reduce the Project’s significant noise impacts.

E. The DEIR Fails to Disclose, Analyze, and Mitigate the Project’s Potentially Significant Energy Resources Impacts

1. The DEIR Lacks Evidentiary Support for the Determination that the Project Would Not Result in a Significant Environmental Impact Due to Wasteful, Inefficient, or Unnecessary Consumption of Energy Resources During Project Construction and Operation

B3-26

CEQA Guidelines Appendix F identifies the following means to achieve the goal of conserving energy: decreasing overall per capita energy consumption, decreasing reliance on fossil fuels, and increasing reliance on renewable energy sources.¹⁵⁹ In order to ensure that energy impacts are considered in project decisions, CEQA requires that EIRs include a discussion of the potential energy impacts of proposed projects and a detailed statement of mitigation measures designed to “minimize significant effects on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy.”¹⁶⁰

¹⁵⁷ Watry Comments, p. 5.

¹⁵⁸ Watry Comments, p. 5.

¹⁵⁹ Appendix F at § I.

¹⁶⁰ PRC § 21100(b)(3); CEQA Guidelines, Appendix F, Energy Conservation (“Appendix F”), § I. Appendix F defines “Unavoidable Adverse Effects” as “wasteful, inefficient and unnecessary consumption of energy during the project construction, operation, maintenance and/or removal that cannot be feasibly mitigated.”

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Appendix F directs an EIR to consider the energy impacts of project operation, the effects on local and regional energy supplies, the effects on peak and base electricity demand, compliance with existing energy standards, and other effects on energy resources.¹⁶¹ Further, Appendix F notes an EIR should consider whether the project involves “Unavoidable Adverse Effects” such as “wasteful, inefficient and unnecessary consumption of energy during the project construction, operation, maintenance and/or removal that cannot be feasibly mitigated.”¹⁶² Without the requisite energy analysis, the DEIR falls short of the mandates of Appendix F.

B3-26
cont.

First, the DEIR fails to adequately analyze the significance of the Project’s energy impacts related to the Project’s use of fossil fuels consumed by Project related vehicle trips. One of the stated goals in Appendix F is to *decrease* reliance on fossil fuels.¹⁶³ The DEIR states that the Project will increase gasoline consumption in the City of Fresno by 0.11 percent and diesel consumption by 0.5 percent and concludes that the increased fuel consumption from the Project is minimal and therefore not significant.¹⁶⁴ However, the DEIR fails to establish a threshold for fossil fuel consumption that would be significant. Therefore, the conclusion that the increased fuel consumption resulting from Project operation would not be significant is unsupported.

B3-27

The City must determine the appropriate threshold against which to measure the Project’s fossil fuel consumption in order to determine whether the Project will result in a significant impact to energy resources. The analysis in the DEIR is deficient insofar as it does not assess or consider the significance of the increase in fossil fuel usage for the Project on energy resources consistent with Appendix F and does not consider mitigation to “minimize significant effects on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy.”¹⁶⁵

Additionally, as detailed in the analysis of the Project’s transportation impacts above, the DEIR fails to accurately account for the Project’s trip generation, which Mr. Marshall found could exceed the DEIR’s estimate by 100% or more. Increased trip generation would lead to increased fossil fuel use, and therefore, energy use, from Project related vehicle trips.

B3-28

¹⁶¹ Appendix F §§ I, II.C, II.D.

¹⁶² Appendix F § II.F.

¹⁶³ *Id.*

¹⁶⁴ DEIR, p. 4.5-9.

¹⁶⁵ PRC § 21100(b)(3).

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Second, another stated goal for conserving energy set forth in Appendix F is “increasing reliance on renewable energy sources.”¹⁶⁶ Appendix F further states that “Mitigation Measures may include: ... 4. Alternate fuels (particularly renewable ones) or energy systems.”¹⁶⁷ In line with Appendix F, the Fresno 2020 Greenhouse Gas Reduction Plan Update includes a Solar Assistance Policy intended to “[i]dentify and publicize information about financial mechanisms for private solar installations and provide over-the-counter permitting for solar installations meeting specified standards, which may include maximum size (in kV) of units that can be so approved.”¹⁶⁸

Here, the DEIR’s discussion of renewable energy generation is virtually non-existent and fails to provide a meaningful “investigation into renewable energy options that might be available or appropriate for the project.”¹⁶⁹ In *California Clean Energy Comm. v. City of Woodland*, the court held that the city’s EIRs failed to comply with the requirements of Appendix F by not discussing or analyzing renewable energy options.¹⁷⁰ The court determined that “the City’s EIRs omit any discussion or analysis of renewable energy options for Gateway II. CEQA is violated when an EIR contains no discussion of a potentially significant environmental consideration.”¹⁷¹

Here, the DEIR states that the Project would “comply with the “CALGreen Code (CCR Title 24, Part 11) and the California Energy Code (CCR Title 24, Part 6), which includes provisions related to insulation and design aimed at minimizing energy consumption.”¹⁷² However, the DEIR quickly dismisses any examination of further energy use reduction strategies by stating “[t]he California Energy Code includes solar photovoltaic system requirements for all newly constructed low-rise residential buildings; however, it currently does not include solar requirements for nonresidential buildings.”¹⁷³ The DEIR must be revised to adequately analyze potential renewable energy generation for the Project and sufficiently analyze the related energy impacts.

B3-29

¹⁶⁶ Appendix F § I.

¹⁶⁷ Appendix F § II.D.4.

¹⁶⁸ City of Fresno, Greenhouse Gas Reduction Plan Update (March 2020) p. 5-16. Available at https://www.fresno.gov/darm/wp-content/uploads/sites/10/2020/03/Appendix_G-GHG_Reduction_Plan_Update.pdf

¹⁶⁹ *California Clean Energy Comm. v. City of Woodland* (2014) 225 Cal. App. 4th 173, 213.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² DEIR, p. 4.5-11.

¹⁷³ DEIR, p. 4.5-11.

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Finally, compliance with the Building Code and other energy efficiency requirements does not, by itself, constitute an adequate assessment of measures that can be taken to address the energy impacts during construction and operation of the Project. In *Ukiah Citizens for Safety First v. City of Ukiah*, the court held that the EIR inadequately described the energy impacts of a Costco project where the EIR relied on the project's compliance with energy conservation standards to conclude that energy consumption would be less than significant, and did not separately evaluate energy impacts from transportation, construction, or operation.¹⁷⁴ Here, the DEIR relies on the California Building Code and Title 24 energy efficiency standards, CALGreen code, green building practices, and a number of green building measures and design features, consistent with the Fresno General Plan and GHG Reduction strategy to support the less than significant determination.¹⁷⁵ However, as described above, additional analysis is necessary under the requirements of Appendix F to support a determination that the Project would not result in the wasteful, inefficient, and unnecessary consumption of energy during construction and operations.

B3-29
cont.

Therefore, the DEIR fails to comply with Appendix F energy analysis requirements.

F. The DEIR Fails to Disclose the Project's Inconsistencies with Land Use and Planning Laws and Regulations

Pursuant to Appendix G of the CEQA Guidelines, a project will have a significant adverse environmental impact on land use and planning if it will cause a significant environmental impact due to a conflict with any land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect.¹⁷⁶ Here, the DEIR fails to disclose inconsistency with the City's General Plan which result in a significant adverse environmental impact on land use and planning.

B3-30

1. The DEIR Fails to Disclose the Project's Inconsistencies with the Noise Element of the City's General Plan

Under California law, a general plan serves as a "charter for future development"¹⁷⁷ and embodies "fundamental land use decisions that guide the

B3-31

¹⁷⁴ *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal. App. 4th 256, 263-266.

¹⁷⁵ DEIR, p. 4.5-11.

¹⁷⁶ CEQA Guidelines, Appendix G §X(b).

¹⁷⁷ *Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 54.
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future growth and development of cities and counties.”¹⁷⁸ The general plan has been aptly described as “the constitution for all future developments” within a city or county.¹⁷⁹ Further, the “propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.”¹⁸⁰ The consistency doctrine has been described as the “linchpin of California’s land use and development laws; it is the principle which infuses the concept of planned growth with the force of law.”¹⁸¹

The City of Fresno’s General Plan Noise Element includes objectives and policies that work to protect the citizens of the City from the harmful and annoying effects of exposure to excessive noise. The Noise Element includes the following policy to guide development:

NS-1-a Desirable and Generally Acceptable Exterior Noise Environment. Establish 65 dBA Ldn or CNEL as the standard for the desirable maximum average exterior noise levels for defined usable exterior areas of residential and noise sensitive uses for noise, but designate 60 dBA Ldn or CNEL (measured at the property line) for noise generated by stationary sources impinging upon residential and noise sensitive uses. Maintain 65 dBA Ldn or CNEL as the maximum average exterior noise levels for non-sensitive commercial land uses, and maintain 70 dBA Ldn or CNEL as maximum average exterior noise level for industrial land uses, both to be measured at the property line of parcels where noise is generated which may impinge on neighboring properties.¹⁸²

As demonstrated above, the Project will result in significant noise impacts during Project operation that will violate Policy NS-1-a. Mr. Watry provides substantial evidence that the Project will exceed the desirable and generally acceptable noise thresholds established in Policy NS-1-a, and as a result, the DEIR fails to demonstrate consistency with the General Plan.

**B3-31
cont.**

¹⁷⁸ *City of Santa Ana v. City of Garden Grove* (1979) 100 Cal.App.3d 521, 532.

¹⁷⁹ *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors of El Dorado County* (1998) 62 Cal.App.4th 1334, 1335.

¹⁸⁰ *Citizens of Goleta Valley v. Board of Supervisors of County of Santa Barbara* (1990) 52 Cal.3d 553, 570.

¹⁸¹ *Corona-Norco Unified School District v. City of Corona* (1993) 17 Cal.App.4th 985, 994.

¹⁸² City of Fresno, General Plan, Chapter 9: Noise and Safety, p. 9-19 available at [https://www.fresno.gov/darm/wp-content/uploads/sites/10/2022/12/upload temp Consolidated-GP-10-13-2022.pdf](https://www.fresno.gov/darm/wp-content/uploads/sites/10/2022/12/upload_temp_Consolidated-GP-10-13-2022.pdf)
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VI. THE DEIR FAILS TO CONSIDER THE OFFICE OF THE ATTORNEY GENERAL'S BEST PRACTICES AND MITIGATION MEASURES FOR WAREHOUSE PROJECTS

In September 2022, the California Office of the Attorney General (“OAG”) released an updated version of its guidance document titled “*Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act*” (“Best Practices”).¹⁸³ The Best Practices were developed to aid local agencies to achieve CEQA compliance, and promote environmentally-just development when they are considering warehouse project proposals.¹⁸⁴ The OAG developed the Best Practices based on knowledge gained from monitoring, providing comments on, and litigating, warehouse development projects in California.¹⁸⁵ The Best Practices state that while CEQA analysis is necessarily project-specific, the document provides feasible best practices and mitigation measures which were adapted from actual warehouse projects in California.¹⁸⁶ The purpose of the Attorney General’s guidance is to ensure that warehouse projects reduce their individual and cumulative impacts on the communities in which they are located to the greatest extent feasible.

B3-32

The Best Practices provides examples of environmentally superior methods of developing warehouse projects and offers sample mitigation measures that a local agency should consider when faced with a project such as the Project proposed here. For example, the Best Practices encourage local governing bodies to proactively plan for logistics projects by establishing industrial districts near major highway and rail corridors but away from sensitive receptors in order to help attract investment while avoiding conflicts between warehouse facilities and residential communities.¹⁸⁷

Here, the proposed Project defies many of the recommendations in the Best Practices. For example:

- Per CARB guidance, siting warehouse facilities so that their property lines are at least 1,000 feet from the property lines of the nearest sensitive receptors.

¹⁸³ California Office of the Attorney General, Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act (hereinafter “Best Practices”) (September 2022) available at <https://oag.ca.gov/system/files/media/warehouse-best-practices.pdf>

¹⁸⁴ Best Practices, p. 1.

¹⁸⁵ Best Practices, p. 1

¹⁸⁶ Best Practices, p. 1.

¹⁸⁷ Best Practices, p. 3.
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- Placing facility entry and exit points from the public street away from sensitive receptors, e.g., placing these points on the north side of the facility if sensitive receptors are adjacent to the south side of the facility.

¹⁸⁸

As noted above, the closest receptor is 110 feet to the south of the project site, considerably closer than what is recommended by the Best Practices. Additionally, the entry and exit point to the Project site on Nielsen Avenue faces the sensitive receptors to the south, increasing the likelihood of causing significant impacts to those receptors.

The Best Practices also recommend that local jurisdictions take care when considering potential impacts from air quality and GHG emissions from project construction and operation. The DEIR does not comply with many of the recommendations and fails to include mitigation measures that conform with the Best Practices, which for construction include:

- 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 IV-compliant engines or better, 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.
- Prohibiting grading on days with an Air Quality Index forecast of greater than 100 for particulates or ozone for the project area.
- Limiting the amount of daily grading disturbance area.
- 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.¹⁸⁹

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For operational air quality and GHG emissions impacts, the Best Practices recommend:

- Requiring all heavy-duty vehicles entering or operated on the project site to be zero-emission beginning in 2030.
- Requiring on-site equipment, such as forklifts and yard trucks, to be electric with the necessary electrical charging stations provided.

¹⁸⁸ Best Practices, p. 6.

¹⁸⁹ Best Practices, p. 8.

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- Requiring tenants to use zero-emission light- and medium-duty vehicles as part of business operations.
- Forbidding trucks from idling for more than two minutes and requiring operators to turn off engines when not in use.

The DEIR fails to demonstrate conformance with any of the above recommendations. The Best Practices also include several recommendations and suggested mitigation measures regarding warehouse noise and transportation impacts that the DEIR fails to take into account.

The City must consider all of the recommendations of the OAG and incorporate any feasible measures recommended in the Best Practices as mitigation measures in the DEIR to further reduce the Project's potentially significant air quality, GHG emissions, transportation, energy, and noise impacts.

VII. THE CITY CANNOT MAKE THE FINDINGS REQUIRED FOR PROJECT APPROVAL

The Project requires approval of a Development Permit and a Tentative Parcel Map by the City. Pursuant to the Fresno City Code ("Code") the City Planning Director ("Director") has the authority to approve, conditionally approve, or deny the Project's applications based on specific sets of findings applicable to each permit.¹⁹⁰ In order to approve the Development Permit for the Project, the Director must find that the Project is consistent with the following:

1. The applicable standards and requirements of [the City] Code.
2. The [City's] General Plan and any operative plan or policies the City has adopted.
3. Any applicable design guidelines adopted by the City Council.
4. Any approved Tentative Map, Conditional Use Permit, Variance, or other planning or zoning approval that the project required.
5. Fresno County Airport Land Use Compatibility Plan (as may be amended) adopted by the Fresno County Airport Land Use Commission pursuant to California Public Utilities Code Sections 21670—21679.5.¹⁹¹

¹⁹⁰ Fresno City Code ("FCC") § 15-5203 (Development Permit); *see also* FCC § 15-3308 (Tentative Parcel Map).

¹⁹¹ FCC § 15-5206.
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Additionally, pursuant to the Code, the Director may approve or conditionally approve a Tentative Parcel Map based on the following findings:

1. The proposed subdivision, together with the provisions for its design and improvement, is consistent with the General Plan, any applicable operative plan, adopted policies or guidelines, and the Municipal Code.
2. A subdivision for which a Tentative Map is required shall provide pursuant to the Map Act (Section 66473.1), to the extent feasible, for future passive or natural heating or cooling opportunities in the subdivision.
3. Water will be available and sufficient to serve a proposed subdivision with more than 500 dwelling units in accordance with the Map Act (Section 66473.7).
4. There exists sufficient infrastructure capacity for water, runoff, storm water, wastewater, and solid waste systems to serve the proposed subdivision. In cases where existing infrastructure is found to be deficient, plans shall show how sufficient capacity will be provided.
5. The proposed subdivision is compliant with the City of Fresno Floodplain Management Ordinance and the State of California Code of Regulations Title 23, as well as any other applicable State or federal law.¹⁹²

B3-33
cont.

The City cannot make all of the above findings for the Project, thereby precluding approval of the Project's land use permits. As demonstrated in the foregoing comments, the Project is inconsistent with the General Plan's Noise and Safety Element. Therefore, the Director cannot find that the Project is consistent with the General Plan, precluding finding No. 2 for the Development Permit and Finding No. 1 of the Tentative Parcel Map and cannot make the necessary findings to approve the Project's entitlements until the deficiencies in the DEIR are corrected.

VIII. THE PROJECT FAILS TO COMPLY WITH THE SUBDIVISION MAP ACT

B3-34

As explained above, the Project requires the approval of a Tentative Parcel Map to subdivide the existing two parcels into four parcels.¹⁹³

¹⁹² FCC § 15-3309.

¹⁹³ DEIR, pg. 3-13.
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The DEIR fails to analyze this component of the Project. The DEIR therefore lacks substantial evidence to support the Map Act's required factual findings to approve the Tentative Parcel Map, which require the City to find that a proposed subdivision is consistent with the general plan/specific plan, and does not have any detrimental environmental or public health effects.¹⁹⁴ In addition, as discussed above, there is substantial evidence demonstrating that the Project is likely to have, potentially significant impacts related to transportation, air quality, health risk, GHG emissions, noise, energy, and land use and planning. These impacts are not adequately mitigated in the DEIR. As a result of these unmitigated impacts, the Project fails to comply with mandatory Map Act requirements and the City cannot make the requisite findings to approve the Project's Tentative Parcel Map.

The purpose of the Map Act is to regulate and control design and improvement of subdivisions with proper consideration for their relation to adjoining areas, to require subdividers to install streets and other improvements, to prevent fraud and exploitation, and to protect both the public and purchasers of subdivided lands.¹⁹⁵ Before approving a tentative map, the Map Act requires the agency's legislative body to make findings that the proposed subdivision map, together with the provisions for its design and improvement, is consistent with the general plan and any specific plan.¹⁹⁶ The Map Act also requires the agency's legislative body to deny a proposed subdivision map in any of the following circumstances:¹⁹⁷

- a) The proposed map is ***not consistent with applicable general and specific plans*** as specified in Section 65451.
- b) The design or improvement of the proposed subdivision is ***not consistent with applicable general and specific plans***.
- c) The site is not physically suitable for this type of development.
- d) The site is not physically suitable for the proposed density of development.
- e) The ***design of the subdivision or the proposed improvements are likely to cause substantial environmental damage*** or substantially and avoidably injure fish or wildlife or their habitat.
- f) The ***design of the subdivision or type of improvements is likely to cause serious public health problems***.

B3-34
cont.

¹⁹⁴ Gov Code §§66473.5, 66474.

¹⁹⁵ *Pratt v. Adams* (1964) 229 Cal.App.2d 602.

¹⁹⁶ Gov Code § 66473.5.

¹⁹⁷ Gov. Code § 66474 (emphasis added).
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- g) The design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of property within the proposed subdivision.

Residents' experts provide substantial evidence demonstrating that the Project is likely to have significant, unmitigated impacts to public health from exposure to Valley Fever causing fungus spores; on the environment and public health from construction and operational noise; and on the climate from excess GHG emissions and energy consumption. These impacts demonstrate that the Project, as analyzed in the DEIR, fails to comply with the General Plan, is "likely to cause substantial environmental damage," and "is likely to cause serious public health problems."¹⁹⁸ These unmitigated impacts render the Project inconsistent with Map Act requirements. The Map Act therefore requires the City to deny the Project's Tentative Parcel Map pursuant to Government Code Sections 66473.5 and 66474(a), (b), (e), and (f).

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cont.

IX. CONCLUSION

For the foregoing reasons, we urge the City to fulfill its responsibilities under CEQA by preparing a legally adequate EIR that sufficiently addresses the potentially significant impacts described in this comment letter and the attached expert comments. A revised EIR is necessary to ensure that the Project's significant environmental impacts are mitigated to less than significant levels.

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Thank you for your attention to these comments.

Sincerely,



Kevin Carmichael

KTC:lj1

¹⁹⁸ Gov. Code §§ 66474(a), (b), (e), and (f).
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