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Jason Cashman
Environmental Manger
Port of Stockton
2201 West Washington Street
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Re: Comments Regarding T.C. No Cal. Development Warehousing and Distribution Facility Project Draft Environmental Impact Report

Dear Mr. Cashman,

LD-1

I am writing on behalf of Laborers International Union of North America Local Union 73 ("LIUNA") concerning the Draft Environmental Impact Report ("EIR") prepared for the T.C. No Cal. Development Warehousing and Distribution Facility Project ("Project"). The Project is located on a 102-acre stie at the Port of Stockton's West Complex (Rough and Ready Island) and involves the development of 655,200-square-foot (sf) warehouse, 293,951-sf outdoor storage area, employee parking, trailer parking, trailer storage, truck docks, rail service and spurs, detention ponds, water tank and pumphouse, guard house, and minor ancillary structures. (DEIR, p. 15.) The Project also includes remediation of existing contaminated sediment and soils at the site, including contamination by arsenic, PAHs, and OCPs, including DDT. (*Id*.)

Under the proposed project, the Port would issue a lease to TC NO. CAL. Development to construct and operate a new warehouse facility and associated infrastructure over approximately 60 acres of the project site to receive, store, and distribute bulk building products and consumer goods (warehousing or wholesaling/distribution). Operations are expected to begin following warehouse construction and would involve truck and rail deliveries of commercial products. Following construction, TC NO. CAL. Development would sublease the warehousing facility to a commercial operator for distribution services. The site is largely vacant except for five warehouses on a 26-acre parcel on the western side of the site.

After reviewing the DEIR, we conclude that it fails as an informational document, and that the EIR is insufficient as a matter of law and not supported by substantial evidence. We have identified a number of significant omissions and flaws in the EIR's analysis of energy and greenhouse gas ("GHG") impacts. Therefore, we request that the Port of Stockton ("Port")

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revised the EIR in order to address the following shortcomings. We reserve the right to supplement these comments during public hearings concerning the Project. *Galante Vineyards v. Monterey Peninsula Water Management Dist*., 60 Cal. App. 4th 1109, 1121 (1997).

**I. Legal Background.**

The California Environmental Quality Act ("CEQA") requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances). *See, e.g.* Pub. Res. Code § 21100. The EIR is the very heart of CEQA. *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. 14 Cal. Code Regs. ("CEQA Guidelines") § 15002(a)(1). "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'" *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs*. (2001) 91 Cal. App. 4th 1344, 1354 ("*Berkeley Jets*"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

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

While the courts review an EIR using an "abuse of discretion" standard, "the reviewing court is not to 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A 'clearly inadequate or unsupported study is entitled to no judicial deference.'" *Berkeley Jets*, 91 Cal. App. 4th at p. 1355 (emphasis added) (quoting *Laurel Heights*

*Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 391 409, fn. 12). As the court stated in *Berkeley Jets*:

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

More recently, the California Supreme Court has emphasized that:

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

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

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

*Sierra Club v. Cty. of Fresno*, 6 Cal.5th at 514.

## II. DISCUSSION.

### A. The EIR's Analysis of Energy Impacts Is Conclusory, Fails to Include Required Information, and Fails To Provide Substantial Evidence That The Project's Energy Impacts Are Less Than Significant.

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It is rather shocking that the EIR devoted barely two pages to its energy analysis for developing nearly 1 million square feet of warehousing and storage space that will rely on ships, trains, and diesel trucks to transport goods all over the region. (EIR, pp. 108-109.) The EIR is missing crucial information about the Project's energy use as well as an analysis of the ability to integrate renewable energy into the Project. As a result, the discussion is not supported by substantial evidence, violates CEQA's procedural requirements, and fails as an informational document.

The standard under CEQA is whether the Project would result in wasteful, inefficient, or unnecessary consumption of energy resources. Failing to undertake "an investigation into renewable energy options that might be available or appropriate for a project" violates CEQA. (*California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 213.) Energy conservation under CEQA is defined as the "wise and efficient use of energy." (CEQA Guidelines, app. F, § I.) The "wise and efficient use of energy" is achieved by "(1) decreasing overall per capita energy consumption, (2) decreasing reliance on fossil fuels such as coal, natural gas and oil, and (3) increasing reliance on renewable energy resources." (*Id.*)

According to the DEIR, "Construction of the proposed project would use equipment that consumes fossil fuels but would not require any unusual or excessive equipment or practices compared to projects of similar type and size." (DEIR, 108.) It also found that "energy use associated with the distribution facility would be comparable to similar warehouse structures." (*Id.*) This, in addition to a statement that the Project will comply with all mandatory green building code standards under Title 24, leads the EIR to conclude that the Project will not "result in potentially significant environmental impact due to wasteful, inefficient, or unnecessary consumption of energy resources, during project construction or operation." (DEIR, 108.) However, neither compliance with Title 24 standards nor the generic comparison of Project's energy use compared to "similar warehouse structures" provide substantial evidence that the Project's energy impacts are less than significant.

Numerous courts have rejected nearly identical analyses. (See *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 264-65 (*Ukiah Citizens*) [noting compliance with Building Energy Efficiency Standards (Cal.Code Regs., tit. 24, part 6 (Title 24) does not constitute an adequate analysis of energy]; see also *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 213 (*City of Woodland*).) As such, the EIR's reliance

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on Title 24 compliance does not satisfy the requirements for an adequate discussion of the Project's energy impacts.

1. **Failure to discuss whether the Project could increase reliance on renewable energy sources to meet its energy demand as part of determining if its energy impacts are significant.**

An EIR's analysis of a project's impacts on energy resources must include a discussion of whether the project could increase its reliance on renewable energy sources to meet its energy demands as part of determining if energy impacts are significant. (*League to Save Lake Tahoe Mountain Preservation Foundation v. County of Placer* 2022 WL 442815, *61 [citing *California Clean Energy Com. v. City of Woodland* (2014) 225 Cal.App.4th 173, 209].)

In *League to Save Lake Tahoe*, the EIR at issue noted that project construction and operation would be comparable to similar types of uses and similar construction projects, and that the project would be required to comply with the Title 24 building efficiency standards. (*League to Save Lake Tahoe Mountain Preservation Foundation v. County of Placer* 2022 WL 442815, *61.) According to the EIR, on this basis, the EIR found the project would not result in an inefficient or wasteful consumption of energy, and the impact would be less than significant. (*Id*. at *62.) The court determined this was not enough, explaining:

> Guidelines section 15126.2, subdivision (b), and Appendix F to the Guidelines thus indicate an EIR should address the project's potential to increase its use of renewable energy sources for at least two purposes. First, when the EIR analyzes the project's energy use to determine if it creates significant effects, it should discuss whether any renewable energy features could be incorporated into the project. (Guidelines, § 15126.2, subdivision (b).) The EIR's determination of whether the potential impact is significant is to be based on this discussion. Second, if the EIR concludes the project's impact on energy resources is significant, it should consider mitigating the impact by requiring uses of alternate fuels, particularly renewable ones, if applicable. (Guidelines, Appendix F., II. D. 4.)

(*Id*. at *63 [emphasis added].)

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Similarly, in *California Energy Commission v. City of Woodland*, the court held that an EIR's discussion of a large retail project's energy impacts did not comply with CEQA because it omitted an analysis of renewable energy options that may have been available for the project. (*California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 213.) The court reached this conclusion despite the EIR finding the impact on energy resources to be less-than-significant. (*Id*. at 208.)

Here, the 655,200 square feet of warehouse roof space, 293,951 square feet of storage space, plus an dozens of additional acres of remediated land provide ample space for solar panels

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that could power the Project. Because the EIR does not address whether any renewable energy features could be incorporated into the project as part of determining if the Project's impacts on energy resources is significant, it did not comply with CEQA's procedural requirements. (*League to Save Lake Tahoe*, at *63.)

In addition to improperly relying on compliance with Title 24, and failing to analyze renewable energy impacts, the EIR's analysis omits vital elements of the Project, its energy requirements.

**2. Transportation Energy Impacts.**

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Guidelines Appendix F states that environmental impacts subject to the EIR process include "[t]he project's projected transportation energy use requirements and its overall use of efficient transportation alternatives." (Guidelines, appen. F, § II, subd. C.6.) Here, the EIR discloses that Project operation will generate 1,024 daily vehicle trips, 624 of which would be truck trips. (DEIR, p. 196.) Project construction will also involve vehicle trips, and Project operation includes ships and rail. Yet in concluding the Project's energy impacts will not be significant, the EIR's energy analysis does not include energy required by any of the Project-related transportation. The EIR's analysis is deficient insofar as it does not assess or consider mitigation for transportation energy impacts of the project. (*California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 210.)

**3. Construction and Operational Impacts.**

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Guidelines Appendix F states that when relevant to a project, an EIR should consider: "Energy consuming equipment and processes which will be used during *construction, operation* and/or removal of the project. If appropriate, this discussion should consider the energy intensiveness of materials and equipment required for the project." (Guidelines, appen. F, § II subd. A.1, italics added.) 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." (*Id.,* subd. F.)

The EIR summarily concludes that the project would not result in the inefficient, wasteful and unnecessary consumption of energy. There is no discussion of the project's cost effectiveness in terms of energy requirements. There is no discussion of energy consuming equipment and processes that will be used during the construction or operation of the project, including the energy necessary to transport goods to, from, and at the Port and warehouses. The Project's energy use efficiencies by amount and fuel type for each stage of the project including construction, operation, and maintenance were not identified. The effect of the project on peak and base period demands for electricity has not been addressed. The greenhouse gas (GHG) discussion in the EIR does not analyze energy conservation. As such, the EIR's conclusions are unsupported by the necessary discussions of the Project's energy impacts under CEQA.

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Guidelines Appendix F also requires discussion of "Total energy requirements of the project by fuel type and end use." (Guidelines, Appendix F, II.A.2.) For construction-related energy use, the EIR provides in full that:

> Construction of the proposed project would use equipment that consumes fossil fuels but would not require any unusual or excessive equipment or practices compared to projects of similar type and size. The proposed project would comply with all federal, state, and local regulations related to energy usage and fuel consumption.

(DEIR, p. 108.) The EIR does not disclose the energy requirements for: 1) project-related transportation, 2) the remediation portion of the project, or 3) total operational energy over the life or the project, or 4) total energy requirements of the project.

Guidelines Appendix F also requires discussion of "Energy conservation equipment and design features." (Guidelines, Appendix F, II.A.3.) The most the EIR discloses here is that "Mandatory requirements involve water and energy efficiencies, indoor air quality, and the use of sustainable building materials. The proposed design will also include energy-efficient lighting fixtures." (DEIR, p. 108.) The EIR's vague statements on energy efficient features is insufficient to meet CEQA's information disclosure requirements.

The EIR must be revised that discloses the Project's energy use, analyzes the signficance of the energy impact, and mitigates significant impacts.

**B. Mitigation Measures to Reduce GHG Emissions Violate CEQA.**

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The EIR's response to addressing the significant and unavoidable impacts identified for the Project's emissions of GHGs falls short of complying with CEQA by deferring the establishment of mitigation measures for the Project until after the Project is approved and not establishing now all feasible mitigation measures that are available.

Lead agencies may defer formulating mitigation until after project approval only "when it is impractical or infeasible to include those details during the project's environmental review." (CEQA Guidelines § 15126.4(a)(1)(B); *see also POET, LLC v. State Air Res. Bd.* (2013) 218 Cal.App.4th 681, 736.) An EIR must also explain an agency's decision to defer finalizing the specifics of mitigation. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.) In the limited circumstances where deferring mitigation is justified, the EIR must (1) commit itself to the mitigation, (2) adopt specific performance standards the mitigation will achieve, and (3) identify the types of potential actions that can feasibly achieve that performance standard. (Guidelines § 15126.4, subd. (a)(1)(B).)

Here, the Project's GHG emissions will be nearly three times the threshold of significance. (DEIR, p. 138.) To reduce this impact, the EIR proposes Mitigation Measure MM-

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GHG-1: Energy Audit. (*Id.*) This measure would require that, 9-months after a lease has been signed with for an operator of the warehousing and distribution operation, "TC NO. CAL. Development will conduct an energy audit and develop a plan for reducing overall terminal energy from 2021 levels by within 5 years of the effective date of the lease. The plan must be submitted to the Port for review and approval." (DEIR, p. 138.) The measure goes on to state that the plan will incorporate the following measures at a minimum:

- Evaluate the level of solar panels that are required to meet the facility's electrical needs, both on buildings and for high mast lighting. Based on the evaluation, TC NO. CAL. Development will install solar unless a technical feasibility issue is identified.
- Replace less-efficient bulbs with energy-efficient light bulbs, where applicable and safe. Lighting within the interior of buildings on the premises and outdoor high mast terminal lighting will be replaced with LED lighting or a technology with similar energy saving capabilities within 2 years after the effective date of a new lease.

(DEIR, p. 138-39.) There are numerous reasons why MM-GHG-1 does not comply with CEQA.

First, it constitutes deferred mitigation, but the EIR provides no explanation or evidence that it is impractical or infeasible to conduct the energy audit now, and include the details in the EIR. Indeed, the information that would be contained in the energy audit is <u>mandatory information</u> required to analyze the project's energy impacts, as just discussed in Section I.A. The information the measure claims would be obtained by the energy audit must be obtained now, and disclosed to the public and decision makers as part of the EIR's analysis of the Project's energy impacts. Making the mitigation measure even more inappropriate is the arbitrary delay of the energy audit – not just to a time after project approval, but to 9 months after a new lease is signed. And once the energy audit occurs, any plan would not need to be implemented for another 5 years. In other words, the Project's massive GHG emissions would go unmitigated for a minimum of 5 years. CEQA does not permit this.

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Second, MM-GHG-1 does not include any specific performance standards the Project would be required to achieve, including a level of GHG reductions or an amount of solar installation. Instead, it required TC No. CAL. to come up with a "plan for reducing overall terminal energy from 2021 levels" but does not specify an amount of reduction from those levels. Similarly, while the measure required an evaluation of the level of solar required to meet the facility's electrical needs," it does not require TC No. Cal. to install that level of solar. It merely requires TC No. Cal. to "install solar" of an unspecified amount.

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Third, MM-GHG-1 does not require any solar panels if "a technical infeasibility issue is identified." (*Id.* at 138.) Solar panels are not new technology, and placing solar panels on top of warehouses, high mast lighting, or anywhere else on the property is not a new concept. There is no reason the technical feasibility of installing solar panels to meet and/or offset the Project's energy needs cannot be determined now, at a time when the public has an opportunity to review

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and comment on that determination. Solar should also be evaluated as a means of offsetting the Project's transportation-related GHG emissions by selling excess solar production back to the grid, and a combination of solar and battery storage should be evaluated as well.

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Fourth, MM-GHG-1's requirement to "[r]eplace less-efficient bulbs with energy-efficient light bulbs" is at odds with the EIR's section on energy which states that the Project will be using energy efficient light bulbs already. (DEIR, p. 108 [The proposed design will also include energy-efficient lighting fixtures."]) The measure's further requirement that "Lighting within the interior of buildings on the premises and outdoor high mast terminal lighting will be replaced with LED lighting or a technology with similar energy saving capabilities within 2 years after the effective date of a new lease." Is similarly flawed. If the Project will not be using energy efficient light bulbs from day one, this is clearly <u>not</u> a wise and efficient use of energy and must be documented, disclosed, and mitigated in the energy impacts section. Further, there is no justification for waiting 2 years after a new lease to install energy efficient light bulbs. This is a basic requirement and there is no reason or evidence that energy efficient lighting cannot be used from day one. The fact that such a basic feature as energy efficient lighting is not already part of the Project design of a massive new development such as this is extremely troubling.

Mitigation Measure MM-GHG-2: Waste Reduction is equally improper. That measure requires that:

> Within 9 months of the effective date of the new lease, TC NO. CAL. Development will perform an audit of its waste stream to identify areas for total waste reduction, including reductions of single use products and details for transitioning to a procurement process that prioritizes recycled goods and products. For resultant waste, TC NO. CAL. Development will develop a plan to ensure waste is recycled where available.

(DEIR, p. 139.)

As with MM-GHG-1, there is no reason the EIR cannot study and determine at this point in time the waste streams generated by the Project, and to determine and disclose which waste will and will not be recycled. The measure contains no performance standard. It does not require any reduction in single use products or a procurement process that prioritizes recycled goods and products, but merely requires it be studied. It does not commit the applicant to any reduction in GHGs at all.

A revised EIR is needed to address these issues.

Sincerely,

Rebecca L. Davis