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**VIA E-MAIL**

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**RE: City of San Jose's 865 Embedded Way Industrial Project (Project File Nos. H22-022, ER22-113)**

Dear Nhu Nguyen,

**Comment D.1**

On behalf of **Carpenters Local Union 405 ("Local 405")** this office is submitting these comments on the Initial Study/Mitigated Negative Declaration ("IS/MND") for the City of San Jose's ("City") 865 Embedded Way Industrial Project ("Project").

The Project proposes a Site Development Permit (File No. H22-022) to allow the construction of a one-story, 121,400-square-foot industrial/manufacturing warehouse on a vacant 10.17-acre project site located at 865 Embedded Way in San Jose, California 95138 (APN 679-01-020) ("Site"). The Project also includes a connection to an existing 26-foot-wide drive aisle that extends from the eastern Embedded Way driveway through the adjacent eastern industrial property at 875 Embedded Way and currently terminates at the southeastern boundary of the Site. A total of 300 parking spaces would be provided in a surface parking lot surrounding the proposed building. The Project requires the removal of 11 trees on-site, two of which are ordinance-size.

Local 405 represents thousands of union carpenters in San Jose and has a strong interest in well-ordered land use planning and in addressing the environmental impacts of development projects. Individual members of Local 405 live, work, and recreate in the City and surrounding communities and would be directly affected by the Project's environmental impacts.

Local 405 expressly reserves the right to supplement these comments at or prior to hearings on the Project, and at any later hearing or proceeding related to the Project. Gov. Code, § 65009, subd. (b); Pub. Res. Code, § 21177, subd. (a); see *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1199-1203; see also *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal.App.4th 1109, 1121.

Local 405 incorporates by reference all comments related to the Project or its California Environmental Quality Act (“**CEQA**”) review, including the IS/MND. See *Citizens for Clean Energy v. City of Woodland* (2014) 225 Cal.App.4th 173, 191 (finding that any party who has objected to the project’s environmental documentation may assert any issue timely raised by other parties).

Moreover, Local 405 requests that the City provide notice for any and all notices referring or related to the Project issued under CEQA (Pub. Res. Code, § 21000 *et seq.*) and the California Planning and Zoning Law (“**Planning and Zoning Law**”) (Gov. Code, §§ 65000-65010). California Public Resources Code sections 21092.2 and 21167(f) and California Government Code section 65092 require agencies to mail such notices to any person who has filed a written request for them with the clerk of the agency’s governing body.

**I. THE CITY SHOULD REQUIRE THE USE OF A LOCAL WORKFORCE TO BENEFIT THE COMMUNITY’S ECONOMIC DEVELOPMENT AND ENVIRONMENT.**

**Comment D.2**

The City should require that the Project be built by contractors who participate in a Joint Labor-Management Apprenticeship Program approved by the State of California and make a commitment to hiring a local workforce.

Community benefits such as local hire can also be helpful to reduce environmental impacts and improve the positive economic impact of the Project. Local hire provisions requiring that a certain percentage of workers reside within 10 miles or less of the Site can reduce the length of vendor trips, reduce greenhouse gas (“**GHG**”) emissions, and provide localized economic benefits. As environmental consultants Matt Hagemann and Paul E. Rosenfeld note:

[A]ny local hire requirement that results in a decreased worker trip length from the default value has the potential to result in a reduction of construction-related GHG emissions, though the significance of the

reduction would vary based on the location and urbanization level of the project site.

March 8, 2021, SWAPE Letter to Mitchell M. Tsai re Local Hire Requirements and Considerations for Greenhouse Gas Modeling.

Workforce requirements promote the development of skilled trades that yield sustainable economic development. As the California Workforce Development Board and the University of California, Berkeley Center for Labor Research and Education concluded:

[L]abor should be considered an investment rather than a cost—and investments in growing, diversifying, and upskilling California’s workforce can positively affect returns on climate mitigation efforts. In other words, well-trained workers are key to delivering emissions reductions and moving California closer to its climate targets.<sup>1</sup>

Furthermore, workforce policies have significant environmental benefits given that they improve an area’s jobs-housing balance, decreasing the amount and length of job commutes and the associated greenhouse gas (GHG) emissions. In fact, on May 7, 2021, the South Coast Air Quality Management District found that that the “[u]se of a local state-certified apprenticeship program” can result in air pollutant reductions.<sup>2</sup>

Locating jobs closer to residential areas can have significant environmental benefits. As the California Planning Roundtable noted in 2008:

People who live and work in the same jurisdiction would be more likely to take transit, walk, or bicycle to work than residents of less balanced communities and their vehicle trips would be shorter. Benefits would

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<sup>1</sup> California Workforce Development Board (2020) Putting California on the High Road: A Jobs and Climate Action Plan for 2030 at p. ii, *available at* <https://laborcenter.berkeley.edu/wp-content/uploads/2020/09/Putting-California-on-the-High-Road.pdf>.

<sup>2</sup> South Coast Air Quality Management District (May 7, 2021) Certify Final Environmental Assessment and Adopt Proposed Rule 2305 – Warehouse Indirect Source Rule – Warehouse Actions and Investments to Reduce Emissions Program, and Proposed Rule 316 – Fees for Rule 2305, Submit Rule 2305 for Inclusion Into the SIP, and Approve Supporting Budget Actions, *available at* <http://www.aqmd.gov/docs/default-source/Agendas/Governing-Board/2021/2021-May7-027.pdf?sfvrsn=10>.

include potential reductions in both vehicle miles traveled and vehicle hours traveled.<sup>3</sup>

Moreover, local hire mandates and skill-training are critical facets of a strategy to reduce vehicle miles traveled (“**VMT**”). As planning experts Robert Cervero and Michael Duncan have noted, simply placing jobs near housing stock is insufficient to achieve VMT reductions given that the skill requirements of available local jobs must match those held by local residents.<sup>4</sup> Some municipalities have even tied local hire and other workforce policies to local development permits to address transportation issues. Cervero and Duncan note that:

In nearly built-out Berkeley, CA, the approach to balancing jobs and housing is to create local jobs rather than to develop new housing. The city’s First Source program encourages businesses to hire local residents, especially for entry- and intermediate-level jobs, and sponsors vocational training to ensure residents are employment-ready. While the program is voluntary, some 300 businesses have used it to date, placing more than 3,000 city residents in local jobs since it was launched in 1986. When needed, these carrots are matched by sticks, since the city is not shy about negotiating corporate participation in First Source as a condition of approval for development permits.

Recently, the State of California verified its commitment towards workforce development through the Affordable Housing and High Road Jobs Act of 2022, otherwise known as Assembly Bill No. 2011 (“**AB2011**”). AB2011 amended the Planning and Zoning Law to allow ministerial, by-right approval for projects being built alongside commercial corridors that meet affordability and labor requirements.

The City should consider utilizing local workforce policies and requirements to benefit the local area economically and to mitigate GHG emissions, improve air quality, and reduce transportation impacts.

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<sup>3</sup> California Planning Roundtable (2008) Deconstructing Jobs-Housing Balance at p. 6, available at <https://cproundtable.org/static/media/uploads/publications/cpr-jobs-housing.pdf>.

<sup>4</sup> Cervero, Robert and Duncan, Michael (2006) Which Reduces Vehicle Travel More: Jobs-Housing Balance or Retail-Housing Mixing? Journal of the American Planning Association 72 (4), 475-490, 482, available at <http://reconnectingamerica.org/assets/Uploads/UTCT-825.pdf>.

## II. THE PROJECT WOULD BE APPROVED IN VIOLATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

### Comment D.3

#### A. Background Concerning the California Environmental Quality Act.

The California Environmental Quality Act is a California statute designed to inform decision-makers and the public about the potential significant environmental effects of a project. 14 California Code of Regulations (“**CEQA Guidelines**”), § 15002, subd. (a)(1).<sup>5</sup> At its core, its purpose is to “inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made.” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

#### 1. *Background Concerning Environmental Impact Reports.*

CEQA directs public agencies to avoid or reduce environmental damage, when possible, by requiring alternatives or mitigation measures. CEQA Guidelines, § 15002, subds. (a)(2)-(3); see also *Berkeley Keep Jets Over the Bay Committee v. Board of Port Comes* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553; *Laurel Heights Improvement Assn.*, 47 Cal.3d at p. 400. The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to “identify ways that environmental damage can be avoided or significantly reduced.” CEQA Guidelines, § 15002, subd. (a)(2). If the project has a significant effect on the environment, the agency may approve the project only upon finding 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” specified in Public Resources Code section 21081. See CEQA Guidelines, § 15092, subds. (b)(2)(A)-(B).

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. *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (quoting *Laurel Heights Improvement Assn.*, 47 Cal.3d at pp. 391, 409 fn. 12) (internal quotations omitted). A clearly inadequate or unsupported study is entitled to no judicial

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<sup>5</sup> The CEQA Guidelines, codified in Title 14 of the California Code of Regulations, section 15000 et seq., are regulatory guidelines promulgated by the state Natural Resources Agency for the implementation of CEQA. Cal. Pub. Res. Code, § 21083. The CEQA Guidelines are given “great weight in interpreting CEQA except when . . . clearly unauthorized or erroneous.” *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 217.

deference. *Id.* Drawing this line and determining whether the EIR complies with CEQA’s information disclosure requirements presents a question of law subject to independent review by the courts. *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 515; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 102, 131. As the court stated in *Berkeley Jets*, prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process. 91 Cal.App.4th at p. 1355 (internal quotations omitted).

The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. *Communities for a Better Environment v. Richmond* (2010) 184 Cal.App.4th 70, 80 (quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-450). The EIR’s function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been considered. *Id.* For the EIR to serve these goals it must present information so that the foreseeable impacts of pursuing the project can be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made. *Id.*

A strong presumption in favor of requiring preparation of an EIR is built into CEQA. This presumption is reflected in what is known as the “fair argument” standard under which an EIR must be prepared whenever substantial evidence in the record supports a fair argument that a project may have a significant effect on the environment. *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602; *Friends of “B” St. v. City of Hayward* (1980) 106 Cal.3d 988, 1002.

The fair argument test stems from the statutory mandate that an EIR be prepared for any project that “may have a significant effect on the environment.” PRC, § 21151; see *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.App.3d 68, 75; accord *Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877, 884. Under this test, if a proposed project is not exempt and may cause a significant effect on the environment, the lead agency must prepare an EIR. PRC, §§ 21100 (a), 21151; CEQA Guidelines, § 15064 (a)(1), (f)(1). An EIR may be dispensed with only if the lead agency finds no substantial evidence in the initial study or elsewhere in the record that the project may have a significant effect on the environment. *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222

Cal.App.4th 768, 785. In such a situation, the agency must adopt a negative declaration. PRC, § 21080, subd. (c)(1); CEQA Guidelines, §§ 15063 (b)(2), 15064(f)(3).

“Significant effect upon the environment” is defined as “a substantial or potentially substantial adverse change in the environment.” PRC, § 21068; CEQA Guidelines, § 15382. A project may have a significant effect on the environment if there is a reasonable probability that it will result in a significant impact. *No Oil, Inc.*, 13 Cal.3d at p. 83 fn. 16; see *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309. If any aspect of the project may result in a significant impact on the environment, an EIR must be prepared even if the overall effect of the project is beneficial. CEQA Guidelines, § 15063(b)(1); see *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1580.

This standard sets a “low threshold” for preparation of an EIR. *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 207; *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928; *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 580; *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754; *Sundstrom*, 202 Cal.App.3d at p. 310. If substantial evidence in the record supports a fair argument that the project may have a significant environmental effect, the lead agency must prepare an EIR even if other substantial evidence before it indicates the project will have no significant effect. See *Jensen*, 23 Cal.App.5th at p. 886; *Clews Land & Livestock v. City of San Diego* (2017) 19 Cal.App.5th 161, 183; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491; *Friends of “B” St.*, 106 Cal.App.3d 988; CEQA Guidelines, § 15064(f)(1).

**Comment D.4<sup>2</sup>**      *Background Concerning Initial Studies, Negative Declarations and Mitigated Negative Declarations.*

CEQA and CEQA Guidelines are strict and unambiguous about when an MND may be used. A public agency must prepare an EIR whenever substantial evidence supports a “fair argument” that a proposed project “may have a significant effect on the environment.” Pub. Res. Code, §§ 21100, 21151; CEQA Guidelines, §§ 15002, subds. (f)(1)-(2), 15063; *No Oil, Inc.*, 13 Cal.3d at p. 75; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 111-112.

Essentially, should a lead agency be presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect. CEQA Guidelines, §§ 15064, subds. (f)(1)-(2); see *No Oil Inc., supra*, 13 Cal.3d at p. 75 (internal citations and quotations omitted). Substantial evidence includes “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” CEQA Guidelines, § 15384(a).

The fair argument standard is a “low threshold” test for requiring the preparation of an EIR. *No Oil Inc., supra*, 13 Cal.3d at p. 84; *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1579. It “requires the preparation of an EIR where there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial[.]” *County Sanitation, supra*, 127 Cal.App.4th at p. 1580 (quoting CEQA Guidelines, § 15063(b)(1)). A lead agency may adopt an MND only if “there is no substantial evidence that the project will have a significant effect on the environment.” CEQA Guidelines, § 15074(b).

Evidence supporting a fair argument of a significant environmental impact triggers preparation of an EIR regardless of whether the record contains contrary evidence. *League for Protection of Oakland’s Architectural and Historical Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904-905. “Where the question is the sufficiency of the evidence to support a fair argument, deference to the agency’s determination is not appropriate[.]” *County Sanitation*, 127 Cal.App.4th at 1579 (quoting *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317-1318).

Further, it is the duty of the lead agency, not the public, to conduct the proper environmental studies. “The agency should not be allowed to hide behind its own failure to gather relevant data.” *Sundstrom*, 202 Cal.App.3d at p. 311. “Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.” *Id.*; see also *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1382 (lack of study enlarges the scope of the fair argument which may be made based on the limited facts in the record).

Thus, refusal to complete recommended studies lowers the already low threshold to establish a fair argument. The court may not exercise its independent judgment on the



omitted material by determining whether the ultimate decision of the lead agency would have been affected had the law been followed. *Environmental Protection Information Center v. Cal. Dept. of Forestry* (2008) 44 Cal.4th 459, 486 (internal citations and quotations omitted). The remedy for this deficiency would be for the trial court to issue a writ of mandate. *Id.*

Both the review for failure to follow CEQA's procedures and the fair argument test are questions of law, thus, the de novo standard of review applies. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435. "Whether the agency's record contains substantial evidence that would support a fair argument that the project may have a significant effect on the environment is treated as a question of law. *Consolidated Irrigation Dist.*, 204 Cal.App.4th at p. 207; Kostka and Zischke, *Practice Under the Environmental Quality Act* (2017, 2d ed.) at § 6.76.

In an MND context, courts give no deference to the agency. Additionally, the agency or the court should not weigh expert testimony or decide on the credibility of such evidence—this is one of the EIR's functions. As stated in *Pocket Protectors v. City of Sacramento* (2004):

Unlike the situation where an EIR has been prepared, neither the lead agency nor a court may "weigh" conflicting substantial evidence to determine whether an EIR must be prepared in the first instance. Guidelines section 15064, subdivision (f)(1) provides in pertinent part: if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect. Thus, as *Claremont* itself recognized, [c]onsideration is not to be given contrary evidence supporting the preparation of a negative declaration.

124 Cal.App.4th 903, 935 (internal citations and quotations omitted).

In cases where it is not clear whether there is substantial evidence of significant environmental impacts, CEQA requires erring on the side of a "preference for resolving doubts in favor of environmental review." *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 332. "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. *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.

**Comment D.5**

As explained below, the IS/MND fails to make certain essential findings. Further, for a number of findings that the IS/MND does make, it fails to support such findings with sufficient analysis and substantial evidence, or it fails to incorporate adequate mitigation measures. Therefore, there is a fair argument that the Project will have a significant effect on the environment, triggering the “low threshold” standard for preparation of an EIR.

B. There Is a Fair Argument that the Project May Have a Significant Traffic Impact.

**Comment D.6**

The very nature of the Project—a 121,400-square-foot building with 300 parking spaces on roughly 10 acres of land—indicates that it may have significant and severe traffic impacts, thus requiring the preparation of an EIR. This is further supported by the fact that the Project will generate an estimated 1,350 net daily trips per the Institute of Transportation Engineers (“**ITE**”) *Trip Generation Manual*, 11th Edition (2021). IS/MND, pp. 163-164.<sup>6</sup>

**Comment D.7**

Furthermore, the IS/MND acknowledges that the Project’s daily Vehicle Miles Traveled (“**VMT**”) would be 15.12 per industrial employee, which exceeds the City’s VMT Evaluation Tool’s industrial threshold of 14.37 daily VMT per worker:

The proposed Research & Development project, which would support both office and industrial uses, would have 15.12 vehicles miles traveled (VMT) per industrial employee which would exceed the 14.37 VMT per industrial employees and would have 14.95 VMT per office employee which would exceed the 12.21 VMT per office employee threshold.

IS/MND, pp. 10, 160.

Thus, the IS/MND admits that the project’s generated VMT would exceed the significance threshold for industrial employment and therefore result in a significant transportation impact on VMT. *Id.*

To dispose of the need to prepare an EIR, the IS/MND relies on mitigation measure MM TRAN-1.1 to support its contention that the Project would have a less than

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<sup>6</sup> The IS/MND contends that, after “all applicable trip reductions and credits,” the Project would generate a “net new total of 1,269 additional daily trips.” IS/MND, p. 164.

significant impact with mitigation incorporated as it pertains to CEQA Guidelines Section 15064.3 and its required VMT evaluation of a project's transportation impacts. IS/MND, p. 161. Yet, mitigation measure MM TRAN-1.1 is inadequate for an EIR, given that it is unenforceable, illusory, and infeasible. It also improperly delegates the City's affirmative duty to ensure the reduction of traffic impacts onto the Project's Applicant and further improperly delegates the approval of any traffic mitigation plans to the City's Public Works department, rather than the elected decision-makers. MM TRAN-1.1 also improperly defers mitigation.

Specifically, mitigation measure MM TRAN-1.1 states:

MM TR-1.1: Prior to the issuance Certificate of Occupancy, the project shall implement the following multi-modal infrastructure improvements to incentivize alternative modes of travel and reduce VMT generation for the site:

- The project shall remove the pork-chop islands on the southwest and northwest corners of the Embedded Way and Hellyer Avenue intersection to improve pedestrian safety and access. This improvement shall require a signal modification at this intersection that shall include the relocation of signal poles, heads, and crosswalks.
- The project shall install raised median islands along Embedded Way consisting of a 120-foot segment at its western terminus and a 190-foot segment near the Embedded Way and Hellyer Avenue intersection for traffic calming purposes.

The multi-modal infrastructure improvements shall be part of a Public Improvement Plan that demonstrates how the multi-modal improvements will be implemented and the schedules for completing the improvements. The Public Improvement Plan shall be reviewed and approved by the Director of Public Works or the Director's designee. The implementation of the multimodal improvements shall be verified by the Director of Public Works or the Director's designee.

The implementation of the multimodal infrastructure improvements described above would reduce the VMT generated by the industrial uses to 14.52 VMT per R&D employee and to 114.36 [sic] VMT per office employee which would both still be greater than the established impact

thresholds in the City's Transportation Analysis Policy. The project's VMT could be reduced further with the implementation of Travel Demand Management (TDM) measures.

*Id.*

As can be evinced from the above-quoted IS/MND statements, the proposed plans are aimed to reduce *industrial* and *employee* VMT, yet, critically, the VMT "would still be greater than the established impact thresholds in the City's Transportation Analysis Policy." Mitigation measure MM-TRAN-1.1 then concludes that "[t]he project's VMT could be reduced further with the implementation of Travel Demand Management (TDM) measures." *Id.*

Specifically, MM-TRAN-1.2 states:

Prior to the issuance of the Planning Site Development Permit, the project applicant shall submit a final TDM Plan, approved by the Director of Department of Public Works or Director's designee and the Director of Planning, Building and Code Enforcement, or Director's designee, that shall include implementation of the following TDM measures to reduce the project's VMT.

- Commute Trip Reduction Marketing/Education: Implement marketing/educational campaigns that promote the use of transit, shared rides, and travel through active modes for 25 percent of the project employees. Strategies may include the incorporation of alternative commute options into new employee orientations, event promotions, and publications.
- Subsidize Vanpool: Provide subsidies for individuals forming new vanpools for their commute. This encourages the use of vanpools, reducing drive-alone trips, and thereby reducing VMT. The project shall be required to subsidize 100 percent of the cost of the vanpool and achieve at least 25 percent employee participation.

The TDM plan shall be submitted to the Director of Public Works or Director's designee and the Director of Planning, Building and Code Enforcement or the Director's designee and shall include a trip cap for VMT monitoring purposes. The trip cap shall be prepared by a traffic

engineer. The monitoring shall be based on annual trip generation counts that demonstrate the vehicle trips generated by the project are within 10 percent of an established peak hour trip cap that is prepared by a traffic engineer. The annual trip monitoring reports shall be submitted that demonstrate that project-generated VMT is below the significance threshold. If the annual trip monitoring report finds that the project is exceeding the established trip cap, the project shall be required to submit a follow-up report that demonstrates compliance with the trip cap requirements within a period not to exceed six months.

IS/MND, pp. 161-162.

The IS/MND concludes that, through the implementation of both MM TRAN-1.1 and MM TRAN-1.2, the Project's VMT would be reduced to 14.36 per employee for research and development (R&D) uses and 12.18 per employee for office uses.

IS/MND, p. 162.

**Comment D.8**  
First, the proposed mitigation measures are illusory given they only require that the Project Applicant submit plans at some future point which the City may then review. These measures further place the burden on the Applicant to "ensure" that the proposed changes result in a reduction of VMT. Simply put, there is no definitive and measurable commitment to mitigation at all. Even under the EIR-related CEQA Guidelines section 15126.4(a)(1)(B), this is improper since, *inter alia*, the City does not commit to mitigation but rather relies on the applicant to mitigate.

**Comment D.9**  
Second, the proposed mitigation measures are illusory because of their timing (i.e., prior to the issuance of the Certificate of Occupancy and the Planning Site Development Permit) and they do not provide for any *discretionary approval* or hearing. As related, the proposed mitigation measures provide for "approval" of plans regarding multi-modal infrastructure improvements which *may* incentivize alternative modes of travel, and such approval will be by the Public Works department, apparently without any public hearing.

**Comment D.10**  
Third, the proposed mitigation measures improperly and speculatively conclude that they will *necessarily* reduce the traffic impacts to a sufficient level of significance without any assurances, figures, or evidence. The IS/MND fails to offer any evidence showing that Applicant's removal of the pork-chop islands on the southwest and northwest corners of the Embedded Way and Hellyer Avenue and installation of

raised median islands along Embedded Way will reduce VMT from 15.12 to 14.52 per industrial employee and 14.95 to 14.36 per office employee. IS/MND, pp. 160-161. Further, the IS/MND fails to offer evidence showing that commute trip reduction marketing techniques, worker education, and vanpool subsidies will so successfully incentivize alternative commute options and promote employee participation to such a degree that VMT will be further reduced from 14.52 to 14.37 for industrial employees and 14.36 to 12.21 for office employees. IS/MND, pp. 161-162.

**Comment D.11**

Fourth, based on these mitigation measures, it is the Public Works department, if at all, that will be making the finding that the Project's mitigation plans, as proposed by the Applicant, will indeed reduce traffic impacts to the requisite level of insignificance. This violates CEQA's non-delegation provision. See CEQA Guidelines, § 15025, subd. (b)(2) (Delegation of Responsibilities).

**Comment D.12**

Fifth, the mitigation measures are infeasible and illusory given that they are based on the speculation and assumption that the Project's *employees* will be so motivated and incentivized as to adopt alternative commuting options to get to the Site. There are no assurances that employees will indeed do so. The measures also propose to *add* and *remove* components of nearby roads to "to improve pedestrian safety and access" and "for traffic calming purposes." IS/MND, p. 161. Yet, at the same time, the IS/MND elsewhere acknowledges that the Project site will attract heavy-duty trucks: "Based on the 12 truck loading docks, it was assumed that the project would generate 24 trucks or 48 truck trips daily." IS/MND, pp. 38-39. The IS/MND further states that "[a]ll trucks were assumed to be heavy-duty diesel-powered trucks and a source of long-term [diesel particulate matter] emissions." *Id.* The IS/MND then contends that "[t]hese trucks would travel to and from the site and are anticipated to idle at loading docks for 5 minutes for each trip." IS/MND, p. 39.

It is also reasonably foreseeable that employees will not choose to ride bikes or walk to the Project Site at a minimum due to the road safety concerns as well as concerns about being exposed to a high level of diesel emissions and air and GHG impacts from such heavy trucks on the road and regularly visiting the Site. CEQA requires that in such cases of doubt, the agency should resolve such issues in favor of an EIR. *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 282.

The above-noted and critical flaws violate CEQA's standard for IS/MNDs under Public Resources Code section 21064.5 to show that:

**Comment D.13**

(1) [R]evisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.

Clearly, here, the Project may have significant effects on the environment at least in the context of traffic.

**Comment D.13**

Sixth, the proposed mitigation measures are improperly deferred and vague as they defer the formulation of mitigation measures or final design thereof to a later time, shift that burden to the Applicant, and further do not adequately explain how removing the pork-chop islands or installing raised median islands will improve pedestrian safety and calm traffic to such a degree that such measures will “clearly” reduce VMT to the requisite level of insignificance, as required for an IS/MND.

**Comment D.14**

As stated previously, the IS/MND fails to meet CEQA’s pre-conditions and requirements even in the case of an EIR. CEQA forbids deferred mitigation. CEQA Guidelines, § 15126.4, subd. (a)(1)(B). CEQA allows deferral of details of mitigation measures only “when it is impractical or infeasible to include those details during the project’s environmental review.” **Comment D.30** CEQA further requires that the lead agency:

(1) [C]ommits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard[.]

CEQA Guidelines, § 15126.4, subd. (a)(1)(B).

Here, the City failed each of these preconditions and requirements, as the IS/MND fails to show why the development of the traffic calming plans or pedestrian improvements could not be developed before the issuance of the IS/MND, what impacts they will have individually or cumulatively, if such plans would indeed be feasible, and the specific performance criteria that Applicant will have to meet.

Moreover, as noted previously, the City clearly did not commit to mitigation, since all it would do, per the mitigation measures, is review and approve Applicant’s proposed plans.

**Comment D.15:** Furthermore, mitigation measure MM TRAN-1.1 relies on some future coordination with other public entities aside from the City to implement the measure and does not show how it will be enforced nor what the outcome will be. **Comment D.16** For example, there is no requirement that Applicant report the number of employee trips after the pork-chop islands are removed and median islands installed or to ensure that the VMTs are indeed reduced to the requisite level of insignificance such that an IS/MND would suffice to bring the Project in compliance with CEQA. Yet again, this mitigation measure fails to explain how simply encouraging pedestrian travel will actually discourage vehicle travel and thus cause an actual decrease in VMT resulting from the Project and thus result in a less than significant impact on traffic and transportation.

**Comment D.17** The foregoing measure is impermissibly vague and improperly defers the actual reduction in VMT to some later unspecified date without showing *how* these proposed measures would reduce VMT.

**Comment D.18:** Yet another flaw in the City's traffic impact analysis is its reliance on Senate Bill 743 ("SB 743") to disregard traffic congestion. The City claims it provides a level of service analysis for information purposes only. IS/MND, p. 164. And yet, SB 743 on its face does not apply to *industrial* projects here, but rather to commercial and residential projects only. Further, the IS/MND fails to include an Intersection Level of Service, as is required under existing, background, and background plus project conditions, yet the City claims the traffic impacts will be less than significant despite that certain intersection levels may worsen after implementation of the Project.

**Comment D.19** Finally, also given that construction of the Project itself may result in road closures and detours, there is a fair argument that the Project may have significant traffic impacts which should be assessed in an EIR pursuant to CEQA.

**Comment D.20** For the reasons set forth above, the IS/MND fails to prove that the Project's traffic impacts will be mitigated to a less than significant level with the incorporation of the proposed mitigation measures. In fact, the IS/MND shows the opposite, necessitating the preparation of an EIR.

- Comment D. 21**
- C. There Is a Fair Argument that the Project May Have Significant Air Quality, GHG Emission, Water, Noise, Hazards, Human Health, and Wildlife/Biological Impacts, and Cumulative Impacts, Requiring Mandatory Findings of Significance and the Preparation of an EIR.



**Comment D.22**

Given that the Project may have significant traffic impacts that are not accurately disclosed or mitigated against in the IS/MND, then its traffic-related impacts are also derivatively understated and may be significant, thereby requiring the preparation and circulation of an EIR.

There is an acknowledged direct correlation between the increase in traffic impacts and an increase in the associated air quality, GHG emission, and noise impacts. See e.g., *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 413 (“it is reasonable to assume” that a project enabling physical residential development would have reasonably foreseeable indirect air and other impacts).

As stated in the Office of Planning Research’s (“**OPR**”) technical advisory in 2018:

VMT and Greenhouse Gas Emissions Reduction. Senate Bill 32 (Pavley, 2016) requires California to reduce greenhouse gas (GHG) emissions 40 percent below 1990 levels by 2030, and Executive Order B-16-12 provides a target of 80 percent below 1990 emissions levels for the transportation sector by 2050. The transportation sector has three major means of reducing GHG emissions: increasing vehicle efficiency, reducing fuel carbon content, and reducing the amount of vehicle travel.

Similarly, there is an acknowledged nexus between the increase in traffic and in related air quality, GHG impacts, noise, water/flooding impacts, and impacts on human health and the natural environment, including wildlife and waterways. As described in the 2018 OPR Technical advisory:

VMT and Other Impacts to Health and Environment. VMT mitigation also creates substantial benefits (sometimes characterized as “co-benefits” to GHG reduction) in both in the near-term and the long-term. Beyond GHG emissions, increases in VMT also impact human health and the natural environment. Human health is impacted as increases in vehicle travel lead to more vehicle crashes, poorer air quality, increases in chronic diseases associated with reduced physical activity, and worse mental health. Increases in vehicle travel also negatively affect other road users, including pedestrians, cyclists, other motorists, and many transit users. The natural environment is impacted as higher VMT leads to more collisions with wildlife and fragments habitat. Additionally, development that leads to more vehicle travel also tends to consume more energy,

water, and open space (including farmland and sensitive habitat). This increase in impermeable surfaces raises the flood risk and pollutant transport into waterways.

As such, there is a fair argument that the Project here may have significant GHG emissions, air quality, energy, water, noise and other impacts, including impacts on human beings and the natural environment.

1. *GHG Emissions and Air Quality Impacts*

**Comment D.23**

The IS/MND ultimately concludes that the Project will have a less than significant impact with regards to GHG emissions based only on the contention that “Project construction would occur over a period of approximately 10 months and would result in the release of 140 MTCO<sub>2</sub>e.” IS/MND, p. 99. The IS/MND then contends that the Project construction activity and resulting GHG emissions “would not interfere with the implementation of Senate Bill 32. *Id.*”

The IS/MND completely fails to analyze, to any degree sufficient to constitute compliance with CEQA, the Project’s potential GHG emissions impacts, and instead offers a conclusory statement that because construction emissions would occur over a certain period and result in a certain tonnage of CO<sub>2</sub>, that the Project will not result in a significant impact with regards to GHG emissions. Consequently, the IS/MND requires substantial revisions or an EIR must be prepared.

**Comment D.24**

In terms of the Project’s operational emissions, the IS/MND too heavily depends on the Project’s consistency with the General Plan land use designation for the Site and planned growth from build out of the General Plan and that “the project’s GHG emissions are accounted for in the citywide GHG emissions inventory addressed in the GHGRS, *provided the project complies with applicable GHG reduction measures identified in the GHGRS.*” IS/MND, p. 99. The IS/MND’s reliance on the Project’s consistency with the City’s 2030 GHG Reduction Strategy (“**GHGRS**”), i.e., the hope that the Project “complies with applicable GHG reduction measures,” cannot constitute as mitigation nor a determination that the Project will have less than significant impacts for purposes of CEQA compliance.

The IS/MND concludes that the Project will have less than significant GHG emissions impacts due to the Project’s adoption of certain measures of the GHGRS, including consistency with the Land Use/Transportation Diagram designation of the General Plan and enrollment in the SJCE TotalGreen program. IS/MND, p. 100.

According to the IS/MND, the Project will be designed and constructed in compliance with the City of San Jose Council Policy 6-32, the City’s reach code, and the City’s Green Building Ordinance. IS/MND, p. 101. However, the Project’s mere implementation of GHG reduction strategies, compliance with city initiatives, and reliance on regulations is insufficient to conclude that the Project will have less than significant GHG emissions impacts, as these measures are not specific to *this* Project.

That the Project may have air quality and GHG emissions impacts is also evidenced by the recent BAAQMD thresholds, according to which “[i]f the project includes any of the operational screening criteria above [including industrial sources or activities], then the lead agency would need to perform a detailed assessment of the project’s criteria air pollutant and precursor emissions.”<sup>7</sup> Yet, the IS/MND concludes that the Project will have *neither* GHG emissions nor air quality impacts.

The Project may further have severe GHG emissions and air quality impacts in light of its traffic mitigation measure which assumes that the employees will choose to bike or walk to the Project Site and thereby be exposed to the high level of diesel emissions of heavy trucks both at the Project Site and the nearby industrial sites. Such increased GHG emissions and air quality impacts may also occur in light of the fact that the Project proposes traffic-calming alterations to nearby roads, which reasonably foreseeably—along with the trucks and bikes riding on the same roads—will create congestion on the roads and idling of the heavy-duty trucks, as well as other vehicles.

## 2. Hazards Impacts

### Comment D.25

The Project may also have hazards impacts, in light of potential soil contamination due to prior agricultural work and use of pesticides. The Project’s Phase I ESA, for this purpose, discloses such potential. Phase I ESA, p. 10. And yet, the Phase I ESA does not adequately study that potential as, *inter alia*, it concludes, without supporting evidence, that “the potential for residual pesticides, if any, at these locations to significantly impact the planned commercial use of the Site appears low.” *Id.* It reaches this conclusion despite admitting that “residual pesticide concentrations could remain in on-Site soil.” *Id.* The Phase I ESA also recommends that soil sampling be conducted in order to determine if naturally occurring asbestos (“**NOA**”) is present at the Site and whether an asbestos dust mitigation plan (“**ADMP**”) and associated air

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<sup>7</sup> BAAQMD, Chapter 4, p. 4-3; see available at: [Bay Area Air Quality Management District California Environmental Quality Act Air Quality Guidelines \(baaqmd.gov\)](https://www.baaqmd.gov/California-Environmental-Quality-Act-Air-Quality-Guidelines).

monitoring is required. Phase I ESA, p. 11. Fatally, the timing of such study and determination of the need for mitigation should have been conducted prior to and in preparation of the IS/MND, not at some future date considering that the Site is located within an area of mapped ultramafic rock outcrops in which asbestos occurs naturally. Phase I ESA, p. 10. Further, Phase I ESA prepared in 2021 uses the *older* ASTM standard. *Id.* (“Cornerstone performed this Phase I ESA in general accordance with ASTM E1527-13”).

This omission is particularly critical and constitutes the Phase I ESA as tellingly inaccurate given that as of 2021—post-dating the October 17, 2021, ESA Phase I Environmental Site Assessment—ASTM has revised its standards, and as of 2022, EPA<sup>8</sup> has adopted ASTM’s new and more expansive definition of REC. Thus:

“Under **ASTM E1527-13**, a REC is defined as the **presence** or **likely presence** of **any hazardous substances** or petroleum products in, on, or at a property: (1) due to **release** to the environment; (2) under **conditions indicative** of a release to the environment; or (3) under conditions that **pose a material threat** of a future release to the environment.

Under **ASTM E1527-21**, a REC means (1) the **presence** of hazardous substances or petroleum due to a release to the environment; (2) the **likely presence** of hazardous substances or petroleum products due to a **likely release** to the environment; or (3) the presence of hazardous substances or petroleum products under conditions that pose a material threat of a future release to the environment. Further, the new standard provides clarifying discussion notes and examples to assist the environmental professional in applying the definition. Together, the new definition and interpretations direct a consultant to rely on the environmental professional’s experience regarding the **likelihood** of certain conditions resulting in releases, such as the long term operation of a dry cleaner, instead of discounting that professional experience based on the lack of current “indications of a release.”<sup>9</sup> (ital. original, bold emphasis added.)

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<sup>8</sup> <https://www.govinfo.gov/content/pkg/FR-2022-03-14/pdf/2022-05259.pdf>.

<sup>9</sup> <https://www.quarles.com/publications/epa-approves-astm-e1527-21-phase-i-esa-standard-for-all-appropriate-inquiry/>.

**Comment D.26**

Lastly, the Phase I ESA is silent on vapor intrusion REC, which study is specifically mandated by ASTM and the Environmental Protection Agency (“**EPA**”) since 2013 under the EPA Final Rule.<sup>10</sup> Thus, in its Final Rule in 2013, the EPA states:

EPA believes that ASTM E1527–13 improves upon the previous standard and reflects the evolving best practices and level of rigor that will afford prospective property owners necessary and essential information when making property transaction decisions and meeting continuing obligations under the CERCLA liability protections.

In particular, the new ASTM E1527–13 standard enhances the previous standard with regard to the delineation of historical releases or recognized environmental conditions at a property and makes important revisions to the standard practice to clarify that all appropriate inquires and **phase I environmental site assessments must include**, within the scope of the investigation, an **assessment of the real or potential occurrence of vapor migration and vapor releases on, at, in or to** the subject property.

Federal Register, Vol. 78, No. 250, December 30, 2013, p. 3 (emph. added).

**Comment D.27**

As such, the Phase I ESA’s reliance on a soil sample to be collected at some future date with the expectation that it may produce asbestos results given the Site’s location within an area of mapped, asbestos-containing ultramafic rock outcrops, and failure to consider a more comprehensive ASTM E1527-21 suggests that the Project Site may have hazards impacts that have not been studied and accounted for. Needless to say that, per the Phase I ESA, the Project had to be a *commercial* one—rather than industrial. All of these factors suggest the Project may have hazards impacts, which may also translate into adverse impacts to human beings, including employees of the Project Site as well as other human beings and sensitive receptors, including during the Project’s construction, grading, and dirt-hauling phase.

**Comment D.28**

Lastly, the IS/MND acknowledges the potential for significant hazards impacts including on human health, yet concludes, without evidentiary support, that “[c]ompliance with the broad array of existing regulations from state and local governments noted above in Section 4.9.1.1 Regulatory Framework would ensure the

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<sup>10</sup> <https://www.epa.gov/ust/petroleum-vapor-intrusion>;  
<https://www.govinfo.gov/content/pkg/FR-2013-12-30/pdf/2013-31112.pdf>.

project would result in less than significant impacts related to the potential routine transport, use, or disposal of hazardous materials.” IS/MND, p. 109. Again, the Project’s mere implementation of hazards reduction strategies, compliance with city initiatives, and reliance on regulations is insufficient to conclude that the Project will have less than significant hazards impacts, as these measures are not specific to *this* Project.

### 3. *Water Quality Impacts*

#### Comment D.29

As for water impacts, the IS/MND acknowledges that the Project site soils may be contaminated, including with NOA and due to the presence of agricultural chemicals. IS/MND, p. 109. As such, to the extent the Project’s grading affects the underground waters, there is a reasonable foreseeability that the Project may have water impacts. Moreover, based on the IS/MND, the Project will require disturbance of soil on 10.1 acres of land, permanent conversion of 0.4 acres of mixed oak woodland to suburban land uses, permanent impacts on one acre of serpentine bunchgrass grassland and approximately 6.6-acres of California annual grassland (IS/MND, p. 59), removal of at least 11 trees including approximately nine mature native oak trees (IS/MND, pp. 50, 58), and removal of Santa Clara Valley dudleya (a federally endangered species and a Habitat Plan covered species) (IS/MND, p. 49). As such, the Project may affect the natural drainage patterns and thus have water/hydrology impacts.

### 4. *Wildlife and Biological Impacts*

#### Comment D.30

Lastly, as for wildlife and biological impacts, the IS/MND discloses that the Project site may have various protected species but proposed inadequate mitigation measures, suffering from the same flaws as the traffic mitigation measures above. To name a few problems, the IS/MND acknowledges that the Project site may accommodate the western bumble bee, California tiger salamander, California red-legged frog, foothill yellow-legged frog, Swainson’s hawk, bald eagle, least Bell’s vireo, San Joaquin kit fox, burrowing owl, loggerhead shrike, San Francisco dusky-footed woodrats, and Townsend’s big-eared bat, yet concludes that all are absent from the Site due to a lack of observance during the May 2022 field survey. IS/MND, p. 50. The IS/MND is silent on whether these species were observed at any point after May 2022. Additional site surveys must be completed prior to the Project’s building phase to adequately determine whether and to what extent protected species may be present on the Site.

Comment D.31  
Further, the IS/MND acknowledges that:

The only special-status wildlife species that can potentially breed or occur on or immediately adjacent to the project site are the Bay checkerspot butterfly, Crotch's bumble bee, yellow warbler, and white-tailed kite. Of these species, only the Bay checkerspot butterfly is covered under the Habitat Plan. During a survey conducted in April 2023, no Bay checkerspot butterfly adults or Crotch's bumble bees were observed. While the Bay checkerspot butterfly and Crotch's bumble bee are unlikely to be present, it is possible that individuals may occasionally forage or breed on the site and, therefore, the species cannot be deemed absent.

*Id.*

That the federally threatened Bay checkerspot butterfly and Crotch's bumble bee were not observed during a single survey conducted in April 2023 says little about whether the Site hosts or is suitable to host the Bay checkerspot butterfly, which live an average of just 10 days as adults, and emerge during a six-week period from late February to early May. The IS/MND acknowledges that “[w]hile the Bay checkerspot butterfly and Crotch's bumble bee are unlikely to be present, it is possible that individuals may occasionally forage or breed on the site and, therefore, the species cannot be deemed absent.” *Id.*

The IS/MND provides that the “preparation of a Habitat Plan application for the project and payment of Habitat Plan impact fees (including the serpentine specialty fee) pursuant to the City's standard permit condition would reduce impacts to the Bay checkerspot butterfly.” IS/MND, p. 59. The IS/MND is silent on the mechanism by which such measure will reduce impacts to the Bay checkerspot butterfly. Further, this measure defers mitigation in violation of CEQA. **Comment D.32** The MND's mitigation measures for nesting raptors, other migratory birds, or Western burrowing owls are similarly inadequate, unenforceable, and illusory. MND, pp. 60-63.

**Comment D.33**

In sum, the MND's findings of no impacts, including but not limited to impacts in air quality and GHG emissions, are clearly erroneous, and an EIR is required to not only disclose the Project's respective impacts, but also relate those to the adverse health impacts and impacts to the human beings that the Project may have. *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502.

Further, the above-noted impacts to human beings, as well as the fact that the Project may have cumulative impacts with related projects, these impacts by themselves

require mandatory findings of significance and the preparation of an EIR under CEQA Guidelines section 15065. The City’s summary denial of such mandatory significance impacts is conclusory and unsupported, in light of the above-mentioned evidence.

**Comment D.34** <sup>5.</sup> *Noise Impacts*

The Project proposes to construct a one-story 121,850-square-foot industrial/manufacturing warehouse. IS/MND, p. 1. Yet, while the IS/MND ultimately concludes that the Project will have a less than significant impact on noise and therefore no mitigation is required (IS/MND, p. 10), the IS/MND fails to actually conduct any analysis of the Project’s potential noise impacts which would show that such impacts may occur. In fact, the Noise Assessment in Appendix G (“**Noise Assessment**”) of the IS/MND explicitly concludes that no mitigation is required with regards to each impact discussed.

Furthermore, where the Noise Assessment does find that there will be a significant noise impact, it relies on the Project’s “implementation of GP Policy EC-1.7, Municipal Code requirements, and the City’s Standard Permit Conditions” to conclude that the Project’s “temporary construction noise impacts would be reduced to a less-than-significant level.” However, it is improper for the IS/MND to merely rely on Applicant’s compliance with regulatory measures to conclude that the Project will have less than significant impacts for a number of reasons. For example, noise regulations do not capture all the noise impacts of the Project, including construction and operation. Moreover, the regulatory measures are not Project-specific and are focused on the Project itself—as such, they fail to consider issues specific to the Project, such as location, size, proposed mitigation measures, as well as the Project’s *cumulative* impacts along with other related projects. Further, the IS/MND’s traffic impacts are understated, and therefore traffic noise is understated and left unaccounted for. Thus, an EIR is required to study the Project’s noise impacts and to determine whether those will be significant.

As stated in CEQA, Guidelines section 15126.4(a)(1)(B), “[c]ompliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measures that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards.” See also *Californians for Alternatives to Toxics v. Department of Food & Agric.* (2005) 136 Cal.App.4th 1 (the court set aside an EIR for a statewide crop



disease control plan because it did not include an evaluation of the risks to the environment and human health from the proposed program but simply presumed that no adverse impacts would occur from use of pesticides in accordance with the registration and labeling program of the California Department of Pesticide Regulation); *Ebbetts Pass Forest Watch v Department of Forestry & Fire Protection* (2008) 43 Cal. App. 4th 936, 956 (fact that Department of Pesticide Regulation had assessed environmental effects of certain herbicides in general did not excuse failure to assess effects of their use for specific timber harvesting project).

In addition, the Project's reliance on regulatory compliance with the referenced regulations is misplaced because there is no evidence that such ordinances were to control noise outside of the building's envelope, such as, for example, traffic noise or increase in ambient noises due to the Project's construction and operation. *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 210 (the building codes do not address the question of whether the Project is even *safe* to build, "whether a building should be constructed at all, how large it should be, where it should be located, whether it should incorporate certain resources, or anything else external to the building's envelope.")

Accordingly, there is a fair argument that the Project may have a significant noise impact and as such, the Project's potential noise impacts should be thoroughly analyzed and evaluated in an Environmental Impact Report pursuant to CEQA.

### **III. THE CITY MUST, AT THE VERY LEAST, REVISE AND RECIRCULATE THE IS/MND.**

#### **Comment D.35**

Section 15073.5 of the CEQA Guidelines provides that a negative declaration must be recirculated whenever the document must be substantially revised. A substantial revision includes the identification of new, avoidable significant effects requiring mitigation measures or project revisions to be added to reduce the effect to less than significant levels or upon the agency determining that a proposed mitigation measure or project change would not reduce a potential impact to insignificance.

Additionally, when new information is brought to light showing that an impact previously discussed in an IS/MND and found to be insignificant with or without mitigation in the IS/MND's analysis has the potential for a significant environmental impact supported by substantial evidence, the IS/MND must consider and resolve the conflict in the evidence. See *Visalia Retail, L.P. v. City of Visalia* (2018) 20 Cal. App.

5th 1, 13, 17; see also *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, 1109.

Here, in light of the IS/MND's failure to substantiate all of its findings, provide adequate mitigation measures, and fully assess all relevant factors, the Project requires significant revisions and resolution of conflicts in evidence. Therefore, at a minimum, the City must revise and recirculate the IS/MND if it does not prepare an EIR.

A. The IS/MND's Project Description Is Insufficient.

**Comment D.36**

"[A]n accurate, stable and finite project description is the sine qua non of an informative and legally sufficient" environmental document. *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 200. "A curtailed or distorted project description may stultify the objectives of the reporting process" as an accurate, stable, and finite project description is necessary to allow "affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal. *Id.* at 192-93.

Here, as a preliminary matter, the IS/MND is insufficient and requires revision given that it fails to specify the Project's objective and intended usage. Rather, the MND provides that "the exact usage of the proposed building is yet to be determined, but would likely be utilized for industrial distribution, manufacturing, and/or research & development activities." IS/MND at 1. Such lack of specification does not provide the public or City with a meaningful understanding of the intent of the Project and why it is warranted. The IS/MND must be revised to conclusively establish why the Project is needed and what exactly it intends to achieve before the City blanketly signs off on an unspecified industrial development.

B. The IS/MND Fails to Mitigate the Project's Significant Impacts.

**Comment D.37**

If a project has a significant effect on the environment, an agency may approve the project only upon finding 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." CEQA Guidelines, § 15092, subds. (b)(2)(A)-(B).

CEQA mitigation measures proposed and adopted are required to describe what actions will be taken to reduce or avoid an environmental impact. CEQA Guidelines, § 15126.4, subd. (a)(1)(B) (providing "[f]ormulation of mitigation measures should not be deferred until some future time"). While the same Guidelines section

15126.5(a)(1)(B) acknowledges an exception to the rule against deferrals, such exception is narrowly proscribed to situations where it is impractical or infeasible to include those details during the project’s environmental review. Moreover, CEQA allows deferral of details of mitigation measures only “when it is impractical or infeasible to include those details during the project’s environmental review.” *Id.* CEQA further requires “that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard[.]” CEQA Guidelines, § 15126.4, subd. (a)(1)(B).

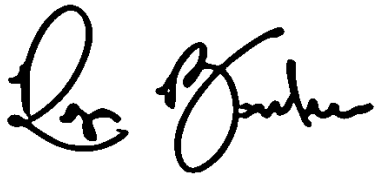
As discussed above, the Project fails to mitigate its significant impacts. Therefore, at minimum, the IS/MND must be revised or otherwise an EIR prepared.

#### IV. CONCLUSION

##### Comment D.38

Based on the foregoing, the City should prepare an EIR for the Project given that there is a fair argument that the Project will result in significant environmental impacts. However, at the very least, the City must revise the IS/MND to address the aforementioned concerns. Should the City have any questions, it should feel free to contact this office.

Sincerely,



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Reza Mohamadzadeh  
Attorneys for Carpenters Local Union 405

#### Attached:

March 8, 2021, SWAPE Letter to Mitchell M. Tsai re Local Hire Requirements and Considerations for Greenhouse Gas Modeling (Exhibit A);

Air Quality and GHG Expert Paul Rosenfeld CV (Exhibit B);

Air Quality and GHG Expert Matt Hagemann CV (Exhibit C).