

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062
agraf@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

KEVIN T. CARMICHAEL
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
RICHARD M. FRANCO
ANDREW J. GRAF
TANYA A. GULESSERIAN
RACHAEL E. KOSS
AIDAN P. MARSHALL
TARA C. RENGIFO

Of Counsel
MARC D. JOSEPH
DANIEL L. CARDOZO

December 12, 2023

VIA U.S. Mail, Email, and Hand Delivery

Chair Ivelina Popova
Planning Commission
City of Pittsburg
City Hall Council Chamber
65 Civic Avenue
Pittsburg, California 94565
PlanningCommissioner@pittsburgca.gov

Alice E. Evenson
City Clerk
City of Pittsburg
City Hall Council Chamber
65 Civic Avenue
Pittsburg, California 94565
aevenson@pittsburgca.gov

VIA Email Only

Maurice Brenyah-Addow, Senior Planner
Mbrenyah-addow@pittsburgca.gov

Re: **Agenda Item No. 2: Consideration of Resolution Granting a Use Permit, Design Review, and Variance and Adoption of an Initial Study / Mitigated Negative Declaration (IS/MND) and Mitigation Monitoring Reporting Program (MMRP) for the Linde Inc., Oakstone Northern California Expansion Project, AP-23-0046 (UP, DR, VA)**

Dear Chair Popova, Planning Commissioners and Mr. Brenyah-Addow:

We write on behalf of **Safe Fuel and Energy Resources California (“SAFER CA”)** regarding Agenda Item No. 2, the Oakstone Northern California Expansion Project (“Project”) proposed by Linde, Inc. (“Applicant”). SAFER CA objects to the Planning Commission’s proposed approval of the Project due to the City of Pittsburg’s (“City”) failure to comply with the California Environmental Quality Act (“CEQA”), Public Resources Code § 21100 *et seq.* Specifically, the Initial Study / Mitigated Negative Declaration¹ (“IS/MND”) fails as an informational document under CEQA and lacks substantial evidence to conclude that the Project’s potentially significant impacts would be adequately mitigated. Moreover, substantial evidence supports a fair argument that the proposed Project may cause

¹ City of Pittsburg, Oakstone Northern California Expansion Project: Draft Initial Study / Mitigated Negative Declaration (Oct. 2023), *available at* <https://www.pittsburgca.gov/home/showpublisheddocument/15486/638328001708630000>.

potentially significant, unmitigated impacts on public health, air quality, wetlands, and from hazardous materials which require an environmental impact report (“EIR”).

Given the deficiencies with the IS/MND as described below, SAFER CA respectfully requests that the Planning Commission continue the public hearing and direct City staff to prepare an EIR that fully discloses, analyzes, and mitigates the Project’s potentially significant environmental impacts before considering Project approval.

I. INTRODUCTION

The Applicant proposes to expand their existing industrial gas facility located at 2000 Loveridge Road, Pittsburg, California 94565 (APN No. 073-190-035).² The expanded facility would increase current production of liquid nitrogen, oxygen, and argon to be distributed via truck to the Bay Area, Central Valley, and nearby states by installing a new air separation unit system.³ The proposed expansion includes construction and operation of a second centralized atmospheric separation plant, which would include air compressors, pre-purifier vessels, an industrial class chiller, a distillation tower containing heat exchangers, booster compressor/turbine sets, and cryogenic distillation columns, three individual storage tanks, interconnecting piping, and a cooling tower.⁴ The expansion would also require electric substation upgrades to distribute the large amount electricity needed to operate the facility.⁵

The entire plant is outdoors, and no buildings are included with the Project.⁶ Construction of the Project would occur over approximately 13 months, including site preparation, grading, onsite utilities, paving, and equipment installation.⁷ The Applicant is seeking approval of the IS/MND, a use permit, design review, and variance from the Planning Commission.⁸

Based on our review of the IS/MND and available documents, we conclude the document fails to comply with CEQA. Specifically, the IS/MND does not adequately describe the current environmental setting and fails to disclose, analyze, and mitigate all potentially significant adverse impacts to air quality, hazards, and

² IS/MND at p. 1.

³ IS/MND at p. 1.

⁴ IS/MND at p. 2.

⁵ IS/MND at p. 8.

⁶ IS/MND at p. 2.

⁷ IS/MND at p. 9.

⁸ IS/MND at p. 9.

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biological resources that could result from construction and operation of the Project. There is substantial evidence supporting a fair argument that the Project may result in potentially significant, unmitigated impacts. To correct these flaws, the City must prepare an EIR that fully discloses, analyzes and mitigates the Project's potentially significant impacts and considers alternatives to the Project.

These comments were prepared with the assistance of Phyllis Fox, PhD, PE, whose comments and qualifications are attached as Attachment A.⁹ The City must respond to Dr. Fox's comments separately and fully.

I. STATEMENT OF INTEREST

SAFER CA advocates for safe processes at California's industrial facilities to protect the health, safety, standard of life and economic interests of its members. For this reason, SAFER CA has a strong interest in enforcing environmental laws, such as CEQA, which require the disclosure of potential environmental impacts of, and ensure safe operations and processes for, California's industrial projects. Failure to adequately address the environmental impacts of such projects poses a substantial threat to the environment, worker health, surrounding communities and the local economy.

The members represented by the participants in SAFER CA live, work, recreate and raise their families in Contra Costa County. Accordingly, these people would be directly affected by the Project's adverse environmental impacts. The members of SAFER CA's participating labor organizations could also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants, and other health and safety hazards, that exist onsite.

SAFER CA seeks to ensure a sustainable construction industry over the long-term by supporting projects that offer genuine economic and employment benefits while minimizing adverse environmental and other impacts on local communities. SAFER CA and its members are concerned about projects like this one that risk serious environmental harm without providing countervailing economic benefits. CEQA provides a balancing process whereby economic benefits are weighed against significant impacts to the environment.¹⁰ It is in this spirit we offer these comments.

⁹ **Attachment A**, Letter to Andrew J. Graf, Adams Broadwell Joseph & Cardozo from Phyllis Fox, Environmental Management re: Linde Oakstone NorCal Expansion Project Initial Study / Mitigated Negative Declaration (Dec. 12, 2023) (hereinafter "Fox Comments").

¹⁰ Pub. Res. Code § 21081(a)(3); *Citizens for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171.

II. THE CITY MUST PREPARE AN EIR

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR, except in limited circumstances.¹¹ The purpose of an EIR “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.”¹²

The presumption in favor of preparing an EIR, rather than a mitigated negative declaration, is reflected in the “fair argument” standard. Under that standard, the lead agency must prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that the project may have a significant effect on the environment.¹³ The fair argument standard creates a “low threshold” of favoring environmental review through an EIR, rather than through a mitigated negative declaration.

“Substantial evidence” required to support a fair argument is defined as “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.”¹⁴ “[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the lead agency shall treat the effect as significant and shall prepare an EIR.”¹⁵

As detailed below, substantial evidence supports a fair argument that the Project may result in significant, unmitigated impacts to air quality, hazards, and biological resources. The City must prepare an EIR that analyzes, discloses, and mitigates these impacts and considers less environmentally damaging alternatives.

¹¹ Pub. Res. Code § 21000; CEQA Guidelines § 15002.

¹² *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (internal citations omitted).

¹³ Pub. Resources Code §§ 21080(d), 21082.2(d); CEQA Guidelines §§ 15002(k)(3), 15064(f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 1501-51; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-02.

¹⁴ CEQA Guidelines § 15384(a).

¹⁵ CEQA Guidelines § 15064(g).

A. Substantial Evidence Supports a Fair Argument that Construction Health Risk Impacts Are Potentially Significant and Unmitigated

The IS/MND conducted a quantified health risk analysis (“HRA”) which evaluated cancer and chronic health impacts to offsite receptors from construction and operational emissions.¹⁶ However, the IS/MND fails to evaluate the acute health impacts from diesel particulate matter (“DPM”) to on-site and off-site construction workers.¹⁷

DPM is a potent human carcinogen that is chronically and acutely toxic.¹⁸ In fact, the California Office of Environmental Health Hazard Assessment (“OEHHA”) concludes that “[e]xposure to diesel exhaust can have immediate health effects immediate health effects.”¹⁹ Construction workers have the greatest risk when it comes to acute DPM exposure because they operate and maintain the equipment that emits DPM.²⁰

Here, the IS/MND acknowledges DPM emissions would occur during Project construction, but the HRA does not analyze the acute impacts to construction workers and workers at the adjacent business as sensitive receptors.²¹ Short-term exposures of 1-hour, known as acute exposures, are routinely evaluated in health risk assessments using Reference Exposure Levels (“RELs”).²² Dr. Fox recommends that the IS/MND utilize a significance threshold of 10 µg/m³ to protect against adverse effects on the respiratory system.²³ Based on her experience with other projects that have similar construction activities, Dr. Fox concludes health impacts to on-site construction workers from exposure to acute DPM emissions are potentially significant.²⁴ Therefore, substantial evidence supports a fair argument the proposed Project would result in potentially significant air quality impacts.

¹⁶ IS/MND at pp. 22-23; see also *id.*, appen. A.

¹⁷ Fox Comments at pp. 4-6.

¹⁸ Fox Comments at p. 4.

¹⁹ Fox Comments at pp. 4-5; California Office of Environmental Health Hazard Assessment, Health Effects of Diesel Exhaust, <https://oehha.ca.gov/air/health-effects-diesel-exhaust> (last updated May 21, 2001); see also Cal/EPA Office of Environmental Health Hazard Assessment and The American Lung Association of California, Health Effects of Diesel Exhaust (undated), available at <https://oehha.ca.gov/media/downloads/calenviroscreen/indicators/diesel4-02.pdf>.

²⁰ Fox Comments at p. 5.

²¹ Fox Comments at p. 5.

²² Fox Comments at pp. 5-6.

²³ Fox Comments at p. 6.

²⁴ Fox Comments at p. 6.

B. Substantial Evidence Supports a Fair Argument that the Project May Result in Potentially Significant Unmitigated Hazards Impacts

The IS/MND incorrectly concludes that the proposed Project would not create a significant hazard to the public or environment based on a Phase 1 Environmental Site Assessment (“ESA”).²⁵ As a threshold matter, the Phase 1 ESA was not attached to the IS/MND, not available on the City’s website or CEQAnet, and not included as part of the Planning Commission’s agenda packet. It is well settled that a CEQA document may not rely on hidden studies or documents that are not available to the public.²⁶ Courts have held that the failure to provide even a few pages of a CEQA document for a portion of the CEQA review period invalidates the entire CEQA process, and that such failure must be remedied by permitting additional public comment.²⁷

SAFER CA received a copy of the Phase I ESA in response to a Public Records Act Request. Based on SAFER CA’s review of the Phase 1 ESA and available evidence, the record demonstrates that it does not support the IS/MND’s conclusion that hazard impacts are less than significant. To the contrary, the Phase 1 ESA provides substantial evidence supporting a fair argument that the Project may cause potentially significant impacts due to disturbance of contaminated soils or other hazardous conditions that may be present at the Project site. These impacts are not adequately mitigated by the mitigation measures in the IS/MND and require preparation of an EIR.

The purpose of the Phase 1 ESA is to identify recognized environmental conditions (“RECs”) in connection with the Project site.²⁸ RECs include “the presence or likely presence of any hazardous substance or petroleum products in, on, or at a property: (1) due to any release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of future release to the environment. De minimis conditions are not recognized environmental conditions.”²⁹

²⁵ IS/MND at pp. 57-58.

²⁶ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442, as modified (Apr. 18, 2007) (EIR must transparently incorporate and describe the reference materials relied on in its analysis); *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 (“[W]hatever is required to be considered in an EIR must be in that formal report. . .”) (internal citations omitted).

²⁷ *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

²⁸ Civil & Environmental Consultants, Inc., Phase 1 Environmental Site Assessment Report: North Portion of Linde Inc Property 2000 Loveridge Road Pittsburg, California 94565 (Mar. 2023) p. 1 (hereinafter “Phase 1 ESA”).

²⁹ *Id.* at p. 1, fn. 2.

The Project's Phase 1 ESA identifies several hazards that potentially exist within the greater parcel. For example, soil samples that were excavated from a ditch displayed high concentrations for zinc, chromium, copper, lead, and nickel.³⁰ The Phase 1 ESA also identified two leaking underground storage tanks (USTs) which were removed in the late 1980s.³¹ Finally, the Phase 1 ESA identified approximately nine petroleum USTs with tank capacities ranging from 500 to 20,000 gallons containing waste oil, diesel, or gasoline as present within the parcel.³² However, the exact locations of the ditch cleanup and USTs are unknown based on the available records.³³

Given these significant data gaps, the Phase 1 ESA concludes the Project site contains a REC given the likelihood of residual impacts to soil and/or groundwater from the document ditch cleanup and former UST releases from the upgradient facility.³⁴ Despite this, the IS/MND misleadingly claims that there is no evidence indicating that the Project site has been involved in the storage, accidental release, or production of hazardous materials.³⁵ Because the Phase 1 ESA finds that the soil at the Project site is likely contaminated and does not rule out the existence of USTs or other hazardous conditions on the Project site, the IS/MND cannot conclude that the Project's impacts are less than significant without additional site-specific soil investigation and mitigation.

The IS/MND also fails to adequately address issues raised by the Department of Toxic Substances Control ("DTSC"). Based on its review of the IS/MND, DTSC recommended additional investigation and sampling (if necessary) before any groundbreaking activities commenced because "[t]here may be unidentified environmental concerns at the site."³⁶ DTSC also recommended preparation of a Soil Management Plan ("SMP") in case unforeseen contaminants were discovered.³⁷ Lastly, DTSC recommended sampling be conducted on any imported soil to ensure it is free of contamination.³⁸

³⁰ *Id.* at p. 27.

³¹ *Id.* at p. 27 (a 1997 letter indicates that the two USTs contained 10,000-gallon diesel and 300-gallon waste oil).

³² *Id.* at pp. 27-28.

³³ *Ibid.*

³⁴ *Id.* at pp. 29-30.

³⁵ IS/MND at p. 58.

³⁶ Letter to Maurice Brenyah-Addow, City of Pittsburg from Dave Kereazis, Department of Toxic Substances Control re: Mitigated Negative Declaration (MND) for the Oakstone Northern California Expansion Project, Dated October 13, 2023 State Clearinghouse # 2023100371 (Nov. 13, 2023) p. 2.

³⁷ *Ibid.*

³⁸ *Ibid.*

In response to DTSC's comments, City staff did not revise the IS/MND or include additional mitigation measures addressing potential soil and/or groundwater contamination. Instead, the Staff Report included DTSC's three recommendations as conditions of approval.³⁹ This response does not alleviate the City from its obligations to disclose, analyze and mitigate potentially significant impacts in the IS/MND.

DTSC's comments demonstrate that the IS/MNDs fails to meaningfully analyze whether the proposed Project would create a significant hazard to the public or the environment through a reasonably foreseeable upset and accident conditions involving the release of hazardous materials to the environment. Moreover, inclusion of the DTSC's recommendations as conditions of approval further demonstrates that the Project could result in potentially significant hazard impacts requiring mitigation. Yet, the IS/MND lacks the requisite analysis, and as a result lacks substantial evidence to support the conclusion that the Project's hazard impacts are less than significant.

Moreover, neither the IS/MND, nor the Staff Report, address additional evidence produced after the release of the CEQA document that further supports the conclusion that there may be potentially significant hazard impacts resulting from the disturbance of existing soil contamination. Specifically, soil sampling at the Project site revealed hydrocarbon odors in several samples.⁴⁰ Testing of the soil detected low concentrations of diesel and motor oil in nearly all soil samples, and concentrations of arsenic and vanadium at levels above the San Francisco Regional Water Quality Control Board Tier 1 environmental screening levels ("ESLs") and commercial land use ESLs.⁴¹ These findings, coupled with the Phase 1 ESA's conclusion that contaminated soils are likely present at the Project site and DTSC's comments that additional investigation of the Project site is needed, provide substantial evidence to support a fair argument that Project's impacts are potentially significant.

Finally, Dr. Fox's comments constitute substantial evidence supporting a fair argument that the Project would result in potentially significant health impacts from the on-site soil contamination. Dr. Fox concludes that Project construction would disturb contaminated soils, releasing hazardous air pollutants, including

³⁹ Staff Report at p. 12.

⁴⁰ Letter to Manual Gonzalez, Linde Engineering Americas from Stefanie Parman-Ribeiro, Baez Geotechnical Group re: Limited Soil Sampling and Analytical Testing of Soil with Detected Odor: Proposed Linde Air Separation Unit Facility Expansion 2000 Loveridge Road Pittsburg, California (July 26, 2023) p. 1.

⁴¹ *Id.* at p. 2.

arsenic.⁴² As a result, the Project could cause potentially significant health hazard to on-site construction workers as well as nearby residents.⁴³ Dr. Fox bases her conclusion on the many inconsistencies between the IS/MND's summary of the Phase 1 ESA and the findings and conclusions contained in the Phase 1 ESA and findings from the soil analytical testing.⁴⁴

In sum, the IS/MND ignores evidence showing that the Project site may contain hazardous conditions which could be disturbed by construction and operation activities. As a result, the IS/MND fails to meaningfully disclose, analyze, and mitigate the Project's potentially significant hazard impacts. Furthermore, substantial evidence supports a fair argument that the proposed Project would result in potentially significant health impacts from disturbance of on-site soil contamination.

C. The IS/MND Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Impacts to Wetlands and Riparian Habitat

The proposed Project intends to receive take authorization coverage under the state and federal East Contra Costa County Habitat Conservation Plan and Natural Community Conservation Plan ("HCP/NCCP").⁴⁵ The HCP/NCCP provides a framework to protect natural resources in eastern Contra Costa County, while improving and streamlining the environmental permitting process for impacts on endangered species.⁴⁶ If wetlands or other waters are present on the project site, the HCP/NCCP requires that a delineation of jurisdictional wetlands and waters be conducted to document the expected impacts that would result from the project.⁴⁷ A project will not receive coverage under the HCP/NCCP until it has properly mitigated the impacts on jurisdictional waters according to the terms of the HCP/NCCP, including compliance with Conservation Measure 2.12.⁴⁸

⁴² Fox Comments at p. 3.

⁴³ Fox Comments at p. 4.

⁴⁴ Fox Comments at pp. 3-4.

⁴⁵ IS/MND at pp. 25-26.

⁴⁶ IS/MND at p. 25; *see also* East Contra Costa County Habitat Conservation Plan Association, Final East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan (Oct. 10, 2007) (hereinafter "HCP/NCCP") p. ES-1, *available at* <https://www.cocohep.org/DocumentCenter/View/1411/ECCC-HCP-NCCP---Vol-1-PDF-565-MB?bidId=>.

⁴⁷ HCP/NCCP at p. 6-12.

⁴⁸ HCP/NCCP at p. 6-12.

Conservation Measure 2.12 requires that all projects implement the following measures to avoid and minimize impacts of land disturbing activities on wetlands, ponds, streams, and riparian woodland/scrub:⁴⁹

1. Applicants with streams on site must follow the stream setback requirements in Conservation Measure 1.7.
2. Applicants for coverage under the HCP/NCCP must follow the guidelines in Conservation Measure 1.10 to minimize the effects of urban development on downstream hydrology, streams, and wetlands.
3. All wetlands, ponds, streams and riparian woodland/scrub to be avoided by covered activities will be temporarily staked in the field by qualified biologists.
4. Buffer zones should be established where feasible between the aquatic resource and development. Required setbacks for streams are described in Conservation Measure 1.7. Credit for preservation of aquatic habitat will be given only if these features meet minimum distances from dense urban development.
5. Fencing will be erected between the outer edge of the buffer zone and the project area. The type of fencing will match the activity and impact types. For example, projects that have the potential to cause erosion will require erosion control barriers, and projects that may bring more household pets to a site should be fenced to keep the pets out. The temporal requirements for fencing also depend on the activity and impact type. For example, fencing for permanent impacts should be permanent, and fencing for short term impacts should be removed after the activity is completed.
6. Personnel conducting ground-disturbing activities within or adjacent to the buffer zone of wetlands, ponds, streams, or riparian woodland/scrub will be trained by a qualified biologist in these avoidance and minimization measures and permit obligations of the project proponents working under this HCP/NCCP. Vehicles and equipment will be parked on pavement, existing roads, and previously disturbed areas.
7. Trash generated by covered activities will promptly and properly be removed from the site.
8. No construction or maintenance vehicles will be refueled within 200 feet of wetlands, ponds, streams, or riparian woodland/scrub unless a bermed lined refueling area is constructed and hazardous material absorbent pads are available in the event of a spill.
9. Appropriate erosion-control measures (e.g., fiber rolls, filter fences, vegetative buffer strips) will be used on site to reduce siltation and runoff

⁴⁹ HCP/NCCP at pp. 6-33 to 6-35.

- of contaminants into wetlands, ponds, streams, or riparian woodland/scrub. Filter fences and mesh will be of material that will not entrap reptiles and amphibians. Erosion control blankets shall be used as a last resort because of their tendency to biodegrade slowly and trap reptiles and amphibians. Erosion-control measures will be placed between the outer edge of the buffer and the project site.
10. Fiber rolls used for erosion control will be certified as free of noxious weed seed.
 11. Seed mixtures applied for erosion control will not contain invasive nonnative species, and will be composed of native species or sterile nonnative species.
 12. Where feasible, stream crossings will be located in stream segments without riparian vegetation, and bridge footings will be built outside the stream banks (i.e., clear span structures).
 13. Herbicide will not be applied within 100 feet of wetlands, ponds, streams, or riparian woodland/scrub; however, where appropriate to control serious invasive plants, herbicides that have been approved for use by EPA in or adjacent to aquatic habitats may be used as long as label instructions are followed and applications avoid or minimize impacts on covered species and their habitats. In seasonal or intermittent stream or wetland environments, appropriate herbicides may be applied during the dry season to control nonnative invasive species (e.g., yellow star-thistle). Herbicide drift should be minimized by applying the herbicide as close to the target area as possible.

The HCP/NCCP explains that these avoidance and minimization measures are required to meet the biological objectives of the HCP/NCCP to avoid and minimize effects on wetlands, ponds, streams, and riparian woodland/scrub.⁵⁰ Because of the sensitivity of these aquatic land cover types, special avoidance and minimization measures are necessary.⁵¹

The IS/MND acknowledges that seasonal and perennial wetlands, drainage features, and riparian woodland are within the property lines, but claims the proposed Project would avoid impacts to these sensitive areas because they occur outside the permanent and temporary impact areas.⁵² The IS/MND's discussion and analysis suffers from several fatal flaws.

⁵⁰ HCP/NCCP at p. 6-35.

⁵¹ HCP/NCCP at p. 6-35.

⁵² IS/MND at p. 31 ("No formal delineation covers the area west of the railroad tracks, which includes potential temporary impact area (staging area).").

First, the IS/MND relies on an outdated delineation study that does not accurately define all potential jurisdictional wetlands in and around the Project site. An initial study must include a description of the project's environmental setting.⁵³ The description of the environmental setting constitutes the baseline physical conditions by which a lead agency may assess the significance of a project's impacts.⁵⁴ "The purpose of this requirement is to give the public and decision makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts."⁵⁵

While preparing an IS/MND necessarily involves some degree of forecasting, an agency must use its best efforts to find out and disclose all that it reasonably can.⁵⁶ If a lead finds that a particular impact is too speculative for evaluation after a thorough investigation, the agency should note its conclusion and terminate discussion of the impact.⁵⁷ But an agency is not allowed to hide behind its own failure to gather relevant data.⁵⁸

Here, the City failed to perform a jurisdictional delineation survey for the entire Project site as required by the HCP/NCCP. While a jurisdictional delineation survey was performed in 2018 for portions of the site, a 2023 reconnaissance-level survey and habitat assessment acknowledge that the previously documented wetlands have likely increased over time.⁵⁹ Moreover, the IS/MND admits that no formal delineation survey covers the western portion of the Project site, which includes a proposed staging area, despite potential wetlands identified adjacent to the staging area.⁶⁰ Without a detailed inventory of current wetland boundaries, the IS/MND lacks substantial evidence to conclude that the Project entirely avoids impacts on wetlands.

Second, the IS/MND's impact analysis is misleading because it fails to identify and describe potential indirect impacts to wetlands and riparian habitat. When evaluating the significance of the environmental effect of a project, the lead agency must consider reasonably foreseeable indirect physical changes in the

⁵³ CEQA Guidelines § 15063(d)(2).

⁵⁴ *Id.* § 15125(a); *see also* *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 38 Cal. 4th 310, 320-21 (CEQA Guidelines § 15125(a) applies to an initial study).

⁵⁵ CEQA Guidelines § 15125(a).

⁵⁶ *Id.* § 15144 (emphasis added).

⁵⁷ *Id.* § 15145 (emphasis added).

⁵⁸ *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 408.

⁵⁹ IS/MND, appen. C, Application Form and Planning Survey Report: Oakstone Northern California Expansion Project (undated) p. 6.

⁶⁰ IS/MND at p. 31.

environment which may be caused by the project.⁶¹ An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project.⁶² If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment.⁶³

For example, construction activities such as grading, land clearing, or installation of drainage systems can alter water flow patterns, potentially affecting the natural water supply to wetlands. Construction sites also generate increased sedimentation and runoff, which can be carried into nearby wetlands and degrade water quality. Excessive sedimentation can smother aquatic habitats and negatively impact wetland vegetation. Increased truck traffic can also result in altered hydrology and increased potential for pollution runoff. Finally, excessive noise and vibrations from plant equipment may disrupt wildlife behavior and stress sensitive species in and around wetlands.

The IS/MND does not include any discussion or analysis of these potential indirect impacts despite construction and operational activities anticipated to occur only feet from protected wetlands and riparian habitat.⁶⁴ The lack of analysis is especially concerning given the Phase 1 ESA's conclusion that the Project site may contain contaminated soils or other hazards (such as USTs),⁶⁵ which could negatively impact nearby wetlands and riparian habitat if disturbed during Project construction and operation.

Third, the IS/MND lacks adequate mitigation measures to reduce the Project's impacts on wetlands to less than significant. Unlike other HCP/NCCP measures which were incorporated into the IS/MND as mitigation,⁶⁶ none of the measures listed in Conservation Measure 2.12 were included as mitigation for the proposed Project. While the Planning Commission Staff Report identifies some (but not all) of the conservation measures,⁶⁷ none of the measures are included as conditions of approval or in the Mitigation Monitoring Reporting Program.

Instead, the IS/MND concludes that impacts to riparian habitat and protected wetlands are less than significant with Mitigation Measure ("MM") BIO-

⁶¹ CEQA Guidelines § 15064(d).

⁶² CEQA Guidelines § 15064(d)(2).

⁶³ CEQA Guidelines § 15064(d)(2).

⁶⁴ See IS/MND, appen. C, fig. 3 (Land Cover Map) (Agenda Packet, p. 368).

⁶⁵ Phase 1 ESA at pp. 27-28.

⁶⁶ Compare IS/ND at pp. 27-28 (Mitigation Measure BIO-1) with HCP/NCCP at pp. 6-40 to 6-41.

⁶⁷ See Staff Report at pp. 7-8.

6.⁶⁸ MM BIO-6 states: “Prior to ground disturbing activities, a qualified biologist shall conduct an aquatic resources delineation covering the Project area to confirm current wetland boundaries and ensure avoidance of these features.⁶⁹ MM BIO-6 constitutes improperly deferred mitigation.

Generally, it is inappropriate to defer formulation of mitigation measures to the future.⁷⁰ Deferred mitigation is only acceptable when the measure commits to implement the mitigation, adopts specific performance standards, and identifies the types of actions that may achieve compliance with the performance standards.⁷¹ MM BIO-6 does not include any performance standards, nor does it identify the types of actions that may achieve compliance.

Moreover, future studies are only permissible when coupled with mitigation measures designed to address impacts identified by the study.⁷² However, MM BIO-6 does not specify the conditions that would trigger the need for further mitigation should the aquatic resources delineation survey identify wetlands within permanent and temporary impact areas. Nor does the measure describe the steps that will be taken if further mitigation is required. As a result, the IS/MND lacks substantial evidence to conclude impacts to wetlands and riparian habitat are less than significant.

In sum, the IS/MND lacks substantial evidence to support the conclusion that the Project’s impacts on riparian habitat and protected wetlands are less than significant and that the proposed Project does not conflict with the HCP/NCCP given the inadequate discussion of the existing environmental setting. Moreover, the IS/MND fails as an informational document because it fails to disclose potentially significant indirect impacts to wetlands and riparian habitat. Finally, the IS/MND lacks adequate mitigation measures to reduce the Project’s impacts on wetlands and riparian habitats to less than significant.

III. CONCLUSION

There is substantial evidence supporting a fair argument that the Project may result in significant, unmitigated impacts to public health, on air quality and wetlands, and from hazardous materials. The Planning Commission should

⁶⁸ IS/MND at p. 31.

⁶⁹ IS/MND at p. 31.

⁷⁰ CEQA Guidelines § 15126.4(a)(1)(B).

⁷¹ CEQA Guidelines § 15126.4(a)(1)(B).

⁷² *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275; *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 524.

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continue the public hearing and direct City staff to prepare an EIR that discloses, analyzes, and mitigates the Project's potentially significant environmental impacts.

Thank you for consideration of these comments.

Sincerely,



Andrew J. Graf

AJG:acp