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**Re: Comments on the Draft Environmental Impact Report for the
Inland Empire North Logistics Center Apple Valley Project (SCH No.
2023090366)**

Dear Mr. Hirsch and Mr. Alcayaga:

We are writing on behalf of Californians Allied for a Responsible Economy (“CARE CA”) regarding the Draft Environmental Impact Report (“DEIR”) prepared by the Town of Apple Valley (“Town”) for the Inland Empire North Logistics Center Apple Valley Project (SCH No. 2023090366), proposed by FGFV IV, LLC (“Applicant”).

10-1

The Project would include construction of two warehouse buildings and associated improvements on approximately 178 acres of land in the Town of Apple Valley, San Bernardino County, California. Building 1 would be approximately 1,507,326 square feet (sf) while Building 2 would be approximately 1,097,120 sf. The Project site is located directly east of I-15, north of Falchion Road and south of Norco Street in the northwestern part of the Town of Apple Valley and consists of Assessor’s Parcel Number 0472-031-08.¹

10-2

¹ DEIR, p. 1-1.

We reviewed the DEIR and its technical appendices with the assistance of air quality and public health expert James Clark, Ph.D.,² and transportation expert Norm Marshall.³ The Town must separately respond to these technical comments.

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Based upon our review of the DEIR and supporting documentation, we conclude that the DEIR fails to comply with the requirements of the California Environmental Quality Act (“CEQA”).⁴ In summary, the DEIR’s project description is inadequate because the DEIR fails to analyze impacts from all reasonably foreseeable uses for the speculative warehouses proposed by the Project. The project description is also inadequate because the DEIR fails to analyze impacts from reasonably foreseeable backup generators. Next, the DEIR’s impacts analyses are not supported by substantial evidence. The DEIR underestimates the Project’s emissions of criteria air pollutants, toxic air contaminants (“TACs”), and greenhouse gases (“GHGs”) by failing to analyze emissions from stationary equipment. The DEIR fails to adequately analyze the Project’s cumulative health risk and air quality impacts in light of the community’s existing pollution burden resulting from similar warehouse projects. The DEIR claims that the Project’s air quality and greenhouse gas (“GHG”) impacts are significant and unavoidable, but fails to identify all feasible mitigation measures. The DEIR fails to adequately analyze and mitigate health risks from disturbance of Valley Fever cocci, which would result in potentially significant health risk impacts on construction workers and the community. The DEIR fails to analyze all impacts associated with construction of infrastructure improvements. As a result of its shortcomings, the DEIR lacks substantial evidence to support its conclusions, violates CEQA’s disclosure and analytical requirements, and fails to properly mitigate the Project’s significant environmental impacts.

10-3

CARE CA urges the Town to remedy the deficiencies in the DEIR by preparing a legally adequate revised DEIR and recirculating it for public review

² Dr. Clark’s technical comments and curricula vitae are attached hereto as **Exhibit A** (“Clark Comments”).

³ Mr. Marshall’s technical comments and curricula vitae are attached hereto as **Exhibit B** (“Marshall Comments”).

⁴ PRC § 21100 et seq.

and comment.⁵ CARE CA reserves the right to provide supplemental comments at any and all later proceedings related to this Project.⁶

I. STATEMENT OF INTEREST

CARE CA is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental impacts of the Project. The coalition includes the District Council of Ironworkers and Southern California Pipe Trades DC 16, along with their members, their families, and other individuals who live and work in Apple Valley and in San Bernardino County.

CARE CA advocates for protecting the environment and the health of their communities' workforces. CARE CA seeks to ensure a sustainable construction industry over the long-term by supporting projects that offer genuine economic and employment benefits, and which minimize adverse environmental and other impacts on local communities. CARE CA members live, work, recreate, and raise their families in the Town of Apple Valley and surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist onsite.

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

⁵ We reserve the right to supplement these comments at later hearings on this Project. Gov. Code § 65009(b); Public Resources Code § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1199–1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal.App.4th 1109, 1121.

⁶ Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

II. LEGAL BACKGROUND

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an EIR.⁷ “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.”⁸

CEQA has two primary purposes. First, CEQA is designed to inform decisionmakers and the public about the potential significant environmental effects of a project.⁹ “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’”¹⁰ The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”¹¹ As the CEQA Guidelines explain, “[t]he EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected.”¹²

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring consideration of environmentally superior alternatives and adoption of all feasible mitigation measures.¹³ The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.”¹⁴ If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment” to

⁷ PRC § 21100.

⁸ *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 390 (internal quotations omitted).

⁹ Pub. Resources Code § 21061; CEQA Guidelines §§ 15002(a)(1); 15003(b)-(e); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 517 (“[T]he basic purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect [that] a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”).

¹⁰ *Citizens of Goleta Valley*, 52 Cal.3d at p. 564 (quoting *Laurel Heights I*, 47 Cal.3d at 392).

¹¹ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; see also *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”) (purpose of EIR is to inform the public and officials of environmental consequences of their decisions *before* they are made).

¹² CEQA Guidelines § 15003(b).

¹³ CEQA Guidelines § 15002(a)(2), (3); see also *Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at p. 564.

¹⁴ CEQA Guidelines § 15002(a)(2).

the greatest extent feasible and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”¹⁵

While courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.’”¹⁶ As the courts have explained, a 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.”¹⁷ “The ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail ‘to enable who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’”¹⁸

III. THE PROJECT DESCRIPTION IS INADEQUATE

The DEIR does not meet CEQA’s requirements because it fails to include an accurate and complete Project description, rendering the entire analysis inadequate. California courts have repeatedly held that “an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.”¹⁹ CEQA requires that a project be described with enough particularity that its impacts can be assessed.²⁰ Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project’s impacts and undermining meaningful public review.²¹ Accordingly, a lead

¹⁵ PRC § 21081(a)(3), (b); CEQA Guidelines §§ 15090(a), 15091(a), 15092(b)(2)(A), (B); *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883.

¹⁶ *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (emphasis added) (quoting *Laurel Heights I*, 47 Cal.3d at 391, 409, fn. 12).

¹⁷ *Berkeley Jets*, 91 Cal.App.4th at p. 1355; see also *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 (error is prejudicial if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process); *Galante Vineyards*, 60 Cal.App.4th at p. 1117 (decision to approve a project is a nullity if based upon an EIR that does not provide decision-makers and the public with information about the project as required by CEQA); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946 (prejudicial abuse of discretion results where agency fails to comply with information disclosure provisions of CEQA).

¹⁸ *Sierra Club*, 6 Cal.5th at p. 516 (quoting *Laurel Heights I*, 47 Cal.3d at 405).

¹⁹ *Stopthemillenniumhollywood.com v. City of Los Angeles* (2019) 39 Cal.App.5th 1, 17; *Communities for a Better Environment v. City of Richmond* (“*CBE v. Richmond*”) (2010) 184 Cal.App.4th 70, 85–89; *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.

²⁰ 14 CCR § 15124; see, *Laurel Heights I*, *supra*, 47 Cal.3d 376, 192-193.

²¹ *Id.*

agency may not hide behind its failure to obtain a complete and accurate project description.²²

CEQA Guidelines section 15378 defines “project” to mean “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”²³ “The term “project” refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term project does not mean each separate governmental approval.”²⁴ Courts have explained that a complete description of a project must “address not only the immediate environmental consequences of going forward with the project, but also all “*reasonably foreseeable* consequence[s] of the initial project.”²⁵ “If a[n]...EIR...does not adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project, informed decision-making cannot occur under CEQA and the final EIR is inadequate as a matter of law.”²⁶

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A. The DEIR Fails to Analyze Reasonably Foreseeable Warehouse Uses

The DEIR explains that the Project is proposed as a speculative warehouse without specific end uses or tenants,²⁷ yet the DEIR fails to describe or analyze the Project’s reasonably foreseeable end uses, in violation of CEQA. In the absence of more specific information or restrictions on the types of warehouse uses that will occur after Project buildout, the Town has a duty to analyze the impacts of *all* reasonably foreseeable uses of the Project site.²⁸ Instead, the DEIR limits its analysis to low-intensity categories of warehouse use, thereby omitting an analysis of impacts from common warehouse uses that would result in more severe air quality, transportation, energy and noise impacts.

10-7

Transportation expert Norm Marshall explains that warehouse trip generation rates and air quality impacts vary greatly by type of warehouse.²⁹ In order to determine the trips generated by the proposed Project, the DEIR utilizes

²² *Sundstrom v. County of Mendocino* (“*Sundstrom*”) (1988) 202 Cal.App.3d 296, 311.

²³ CEQA Guidelines § 15378.

²⁴ *Id.*, § 15378(c).

²⁵ *Laurel Heights I*, 47 Cal. 3d 376, 398 (emphasis added); *see also Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 449-50.

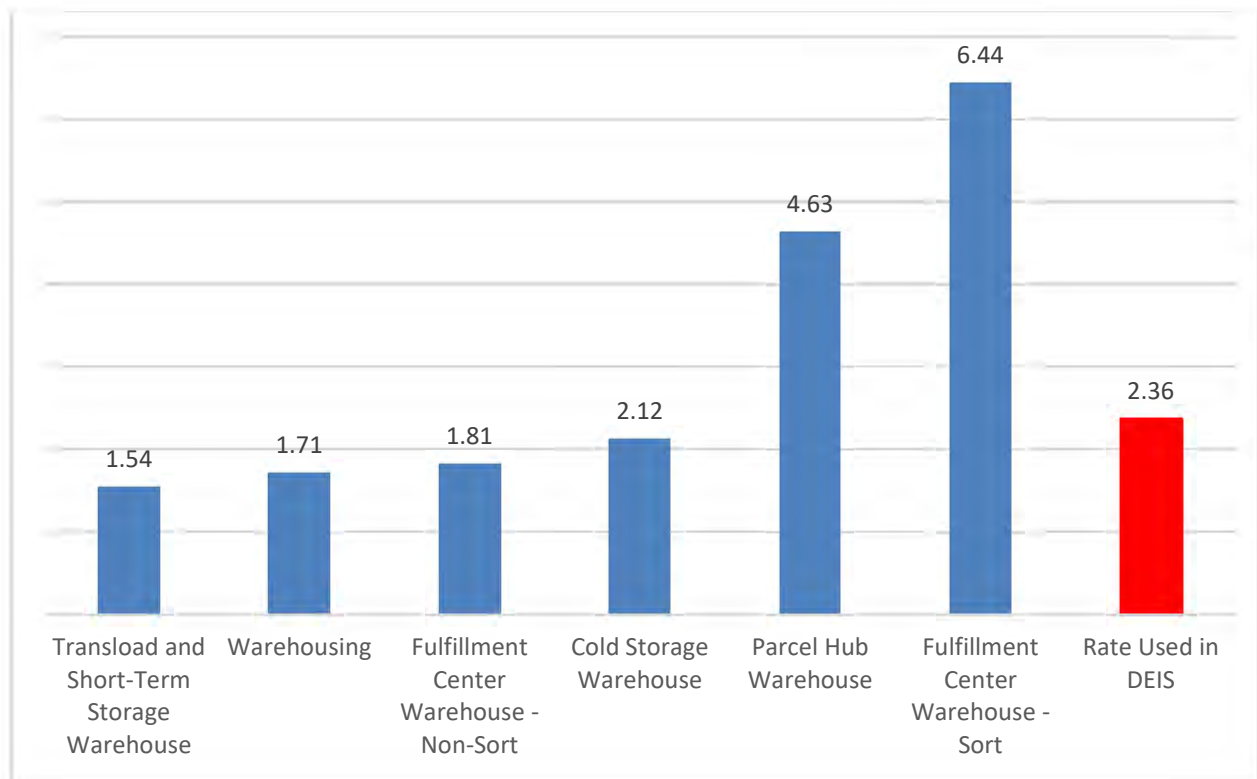
²⁶ *Riverwatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal. App. 4th 1186, 1201.

²⁷ DEIR, pg. 1-3.

²⁸ *Sundstrom*, 202 Cal.App.3d at 311.

²⁹ Marshall Comments, pg. 2.

statistics published in the Institute of Transportation Engineers (“ITE”) Trip Generation Manual for the proposed Project’s land uses.³⁰ The DEIR derived the daily trip generation rate for this Project by averaging several warehouse trip generation rates after excluding the highest rate (Fulfillment Center Warehouse – Sort).³¹ Mr. Marshall explains that because this Project is proposed as a speculative warehouse, the DEIR’s trip generation rate does not reflect all reasonably foreseeable uses of the Project.³² The figure below shows other warehousing land use codes and compares trips generated by each land use.³³



The DEIR lacks evidence to support the Town’s assumption that the Project could not be used as a fulfillment warehouse with sorting. The DEIR merely contends that use as a sort fulfillment center “is not expected.”³⁴ Mr. Marshall recommends that in the absence of definitive information about the Project’s future use, or a condition of approval restricting the project from operating as a sort

³⁰ DEIR, Appendix J, pg. 27.

³¹ *Id.*

³² Marshall Comments, pg. 2.

³³ *Id.* at 2.

³⁴ DEIR, Appendix J, pg. 27.

fulfillment center, it is inappropriate to rule out this scenario.³⁵ To reflect the Project's reasonably foreseeable use as a fulfillment center, Mr. Marshall explains that the DEIR should use a trip generation rate of 6.44 trips per 1000 sf per day.³⁶ The DEIR itself applied this reasoning in MM-AQ-3, which prohibits cold storage unless additional environmental review is conducted.³⁷

Courts have held in situations such as this that "the identity of a tenant is irrelevant to CEQA review."³⁸ In *Maintain Our Desert Environment v. Town of Apple Valley*, petitioners argued that an EIR should disclose the identity of the expected end user and evaluate that end user's specific environmental impacts. The court explained that an EIR does not generally need to disclose the specific end user of a project because "land use entitlements such as conditional use permits and development approvals run with the land and do not belong to the permittee.... had [the developer] developed the Project and then held it out for sale to any interested buyer, no additional CEQA review would have been necessary for the new owner so long as the use was consistent with that that had already been approved."³⁹ Rather, "CEQA is concerned solely with the potential environmental impacts of a project."⁴⁰ Here, the project analyzed in the DEIR is not a specific type of warehouse project – it is a Development Permit Review, General Plan Amendment, Tentative Parcel Map, and Development Agreement to develop a *speculative* warehouse, which could be used for many potential warehousing end uses. As such, the DEIR's claim that a sort fulfillment center "is not expected" is irrelevant to the scope of the analysis required in the DEIR. The DEIR's approach improperly limits the DEIR's analysis to subset of end users expected for the Project, which was disapproved of in *Maintain Our Desert*. As explained in *Maintain Our Desert*, even if the original end user may not be expected to be a sort fulfillment center, is it a use that is authorized by the entitlements and permits that are the subject of the DEIR. Because the DEIR fails to analyze the full range of uses that would be authorized under these entitlements, the DEIR's project description is inadequate.

The defects in the project description affect the Project's environmental impacts by substantially underestimating the number of car and truck trips generated by the Project, as well as other associated impacts from higher intensity use, such as air quality, health risk, GHG emissions, and energy consumption. With

³⁵ Marshall Comments, pg. 2.

³⁶ *Id.*

³⁷ DEIR, pg. 4.9-23.

³⁸ *Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430, 443–449) (cited by *Am. Canyon Cmty. United for Responsible Growth v. City of Am. Canyon* (2006) 145 Cal. App. 4th 1062, 1074).

³⁹ *Maintain Our Desert Environment v. Town of Apple Valley*, *supra*, 124 Cal.App.4th at 444.

⁴⁰ *Id.* 445.

regard to vehicle trips, Mr. Marshall calculates that applying the rate of 6.44 per 1000 sf to 2,604.45 sf results in 16,773 trips per day – **over 10,000 more trips per day** than the 6,146 trips per day calculated in the DEIR.⁴¹ By underestimating the overall trips generated by the Project, the DEIR also underestimates the Project’s health risk, air quality, GHG, energy, and VMT impacts.

A revised DEIR must be prepared that either analyzes the Project’s reasonably foreseeable fulfillment center uses or includes a binding mitigation measure or condition of approval ensuring that the property cannot be used for sort fulfillment center uses.⁴²

B. Use of Back-Up Generators is a Reasonably Foreseeable Consequence of the Project

The DEIR’s discussion of the Project’s air quality and health risk impacts fails to disclose that the Project is likely to include back-up generators. The DEIR’s CalEEMod analysis of criteria air pollutants fails to include emissions from backup generators,⁴³ and the DEIR’s quantitative and qualitative discussion of health risk impacts fails to disclose use of back-up generators. The use of backup generators is a reasonably foreseeable activity during Project operation due to the prevalence of power safety shutoffs, extreme heat events, and other emergencies which lead to temporary losses of power.

In *East Oakland Stadium Alliance v. City of Oakland*,⁴⁴ the Court of Appeal upheld an EIR’s analysis of emissions from backup generators. The EIR’s analysis assumed that generators would operate for 50 hours of testing and maintenance annually, while allocating no time for actual emergency use. In discussing the lead agency’s duty to analyze backup generator emissions, the Court stated that “if the annual need for emergency generator use is reasonably foreseeable, the EIR was not entitled to disregard such use merely because it would occur at unpredictable times.”⁴⁵ The Court explained that use of a generator was reasonably foreseeable

⁴¹ *Id.*; DEIR, Appendix J, Table 5-2, pg. 28.

⁴² *Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act (Updated September 2022)*, pg. 9, available at <https://oag.ca.gov/system/files/media/warehouse-best-practices.pdf> (“Unless the owner of the facility records a covenant on the title of the underlying property ensuring that the property cannot be used to provide refrigerated warehouse space, constructing electric plugs for electric transport refrigeration units at every dock door and requiring truck operators with transport refrigeration units to use the electric plugs when at loading docks.”).

⁴³ DEIR, Appendix B1, PDF pg. 166.

⁴⁴ (2023) 889 Cal. App. 5th 1226.

⁴⁵ *Id.* at 1252.

because, “[a]s noted in the EIR, some parts of the Bay Area are subject to predictable, sustained power outages undertaken to reduce the risk of fire.”⁴⁶ Thus, “[t]he EIR was required to make neither a generally applicable nor a worst-case assumption; rather it was required to make a reasonable estimate of likely annual use of the generators at the project site.”⁴⁷

Here, as in *East Oakland Stadium Alliance*, backup generator emissions are a reasonably foreseeable consequence of the Project due to increasingly common Public Safety Power Shutoff (“PSPS”) events and extreme heat events (“EHE”). EHEs are defined as periods where in the temperatures throughout California exceed 100 degrees Fahrenheit.⁴⁸ From January 2019 through December 2019, Southern California Edison reported 158 of their circuits underwent a PSP event.⁴⁹ In Los Angeles County, two circuits had 4 PSPS events during that period, lasting an average of 35 to 38 hours. The total duration of the PSPS events lasted between 141 hours to 154 hours in 2019. According to the California Public Utilities Commission (“CPUC”) de-energization report⁵⁰ in October 2019, there were almost 806 PSPS events that impacted almost 973,000 customers (~7.5% of households in California). The California Air Resources Board estimates that with 973,000 customers impacted by PSPS events in October 2019, approximately 125,000 back-up generators were used by customers to provide electricity during power outages.⁵¹ The widespread use of back-up generators to adapt to PSPS and EHE events suggests that back-up generators are a reasonably foreseeable consequence of the Project. In addition to emergency use, any generators included in the Project would be operated for routine testing.

Generators can emit criteria air pollutants, greenhouse gases, and toxic air contaminants. This equipment commonly relies on fuels such as natural gas or diesel,⁵² and thus can significantly impact public health through diesel particulate

⁴⁶ *Id.* at 1253.

⁴⁷ *Id.*

⁴⁸ Governor of California. 2021. Proclamation of a state of emergency. June 17, 2021.

⁴⁹ SCAQMD. 2020. Proposed Amendment To Rules (PARS) 1110.2, 1470, and 1472. Dated December 10, 2020. http://www.aqmd.gov/docs/default-source/rule-book/Proposed-Rules/1110.2/1110-2_1470_1472/par1110-2_1470_wgm_121020.pdf?sfvrsn=6.

⁵⁰ <https://www.cpuc.ca.gov/deenergization/> as cited in CARB, 2020. Potential Emission Impact of Public Safety Power Shutoff (PSPS), Emission Impact: Additional Generator Usage associated With Power Outage.

⁵¹ California Air Resources Board, Emission Impact: Additional Generator Usage Associated with Power Outage (January 30, 2020), available at <https://ww2.arb.ca.gov/resources/documents/emissions-impact-generator-usage-during-psps>.

⁵² SCAQMD, Fact Sheet on Emergency Backup Generators, <http://www.aqmd.gov/home/permits/emergency-generators> (“Most of the existing emergency backup generators use diesel as fuel”).

matter (“DPM”) emissions.⁵³ This equipment can emit significant amounts of NO_x, sulfur dioxides (“SO₂”), particulate matter (“PM₁₀”), carbon dioxide (“CO₂”), carbon monoxide (“CO”), volatile organic compounds (“VOC”), particulate matter less than 10 microns (“PM₁₀”), PM less than 2.5 microns (“PM_{2.5}”), and air toxins such as DPM.⁵⁴ The DEIR’s omission of an impact analysis for an onsite generator system thus results in an underestimation of the Project’s air quality, greenhouse gas, and health risk impacts.⁵⁵

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

An EIR must fully disclose all potentially significant impacts of a Project and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency’s significance determination with regard to each impact must be supported by accurate scientific and factual data.⁵⁶ An agency cannot

⁵³ California Air Resources Board, Emission Impact: Additional Generator Usage Associated with Power Outage (January 30, 2020), available at <https://ww2.arb.ca.gov/resources/documents/emissions-impact-generator-usage-during-psps> (showing that generators commonly rely on gasoline or diesel, and that use of generators during power outages results in excess emissions); California Air Resources Board, Use of Back-up Engines for Electricity Generation During Public Safety Power Shutoff Events (October 25, 2019), available at <https://ww2.arb.ca.gov/resources/documents/use-back-engines-electricity-generation-during-public-safety-power-shutoff> (“When electric utilities de-energize their electric lines, the demand for back-up power increases. This demand for reliable back-up power has health impacts of its own. Of particular concern are health effects related to emissions from diesel back-up engines. Diesel particulate matter (DPM) has been identified as a toxic air contaminant, composed of carbon particles and numerous organic compounds, including over forty known cancer-causing organic substances. The majority of DPM is small enough to be inhaled deep into the lungs and make them more susceptible to injury. Much of the back-up power produced during PSPS events is expected to come from engines regulated by CARB and California’s 35 air pollution control and air quality management districts (air districts)”).

⁵⁴ University of California, Riverside Bourns College of Engineering—Center for Environmental Research and Technology, Air Quality Implications Of Backup Generators In California, (March 2005), pg. 8, available at <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=84c8463118e4813a117db3d768151a8622c4bf6b>; South Coast AQMD, Fact Sheet on Emergency Backup Generators (“Emissions of Nitrogen Oxides (NO_x) from diesel-fired emergency engines are 200 to 600 times greater, per unit of electricity produced, than new or controlled existing central power plants fired on natural gas. Diesel-fired engines also produce significantly greater amounts of fine particulates and toxics emissions compared to natural gas fired equipment.”), available at <http://www.aqmd.gov/home/permits/emergency-generators#Fact2>.

⁵⁵ Clark Comments, pg. 9.

⁵⁶ CEQA Guidelines § 15064(b).

conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁵⁷

Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.’”⁵⁸

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.⁵⁹ Challenges to an agency’s failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project’s environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency’s factual conclusions.⁶⁰ In reviewing challenges to an agency’s approval of an EIR based on a lack of substantial evidence, the court will “determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements.”⁶¹

Additionally, CEQA requires agencies to commit to all feasible mitigation measures to reduce significant environmental impacts.⁶² In particular, the lead agency may not make required CEQA findings, including finding that a project impact is significant and unavoidable, unless the administrative record demonstrates that it has adopted all feasible mitigation to reduce significant environmental impacts to the greatest extent feasible.⁶³

A. The DEIR Underestimates Significant Air Quality Impacts

The DEIR underestimates the Project’s emissions of criteria air pollutants during operations by failing to include emissions from stationary equipment, including fire pumps and backup generators, in its operational emissions assessment. Dr. Clark reviewed the CalEEMOD analysis contained in Appendix B of the DEIR and observes that no stationary sources of any kind are included in the

⁵⁷ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

⁵⁸ *Berkeley Jets*, 91 Cal.App.4th at 1355.

⁵⁹ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

⁶⁰ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁶¹ *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

⁶² CEQA Guidelines § 15002(a)(2).

⁶³ PRC § 21081(a)(3), (b); CEQA Guidelines §§ 15090, 15091; *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883.

analysis.⁶⁴ Fire pump emissions must be analyzed in the air quality analysis, as the DEIR states that the Project would operate one diesel-fueled 300-horsepower (hp) fire pump for a maximum of 50 hours per year for routine testing and maintenance.⁶⁵ Backup generator emissions must be included because installation and use of generators (during emergencies and routine testing) is a reasonably foreseeable consequence of the Project. Because these sources of criteria air pollutants were not included in the CalEEMOD analysis, the DEIR underestimates significant air quality impacts. The DEIR must be revised and recirculated to analyze all sources of emissions.

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The DEIR underestimates the Project's emissions during construction by failing to account for construction of off-site improvements. These improvements are listed in Table 4.13-1 of the DEIR.⁶⁶ Dr. Clark observes that construction of these off-site improvements is not included in the Project's construction schedule.⁶⁷ Dr. Clark also observes that there is no evidence that any off-site improvements were included in the CalEEMOD model contained in Appendix B1 of the DEIR.⁶⁸ As a result, the DEIR underestimates emissions of criteria air pollutants, toxic air contaminants, and GHGs associated with off-site improvements. The DEIR's analyses must be revised to reflect all Project components.

B. The DEIR Fails to Adopt All Feasible Air Quality and GHG Measures

The DEIR identifies several significant impacts relating to the Project's operational emissions of criteria air pollutants and GHGs, which it concludes are unavoidable. The DEIR acknowledges that the Project would result in significant air quality impacts due to emissions of oxides of nitrogen, and particulate matter with an aerodynamic diameter less than or equal to 10 microns. These emissions would exceed Mojave Desert Air Quality Management District ("MDAQMD") numeric thresholds and potentially result in adverse health effects associated with those pollutants.⁶⁹ Regarding GHGs, the DEIR acknowledges that construction and operation of the Project would result in the generation of approximately 79,045 metric tons of carbon dioxide (CO₂) equivalent, which would exceed the numerical GHG threshold established by the South Coast Air Quality Management District ("SCAQMD") of 3,000 metric tons of CO₂ equivalent per year.⁷⁰ The DEIR claims

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⁶⁴ Clark Comments, pg. 8-9.

⁶⁵ *Id.*; DEIR, pg. 4.2-26.

⁶⁶ DEIR, pg. 1-2.

⁶⁷ Clark Comments, pg. 8-9.

⁶⁸ *Id.* at 10.

⁶⁹ DEIR, pg. 1-35.

⁷⁰ *Id.*

that these impacts would remain significant despite the implementation of air quality mitigation measures MM-AQ-1 through MM-AQ-3 and GHG measures MM-AQ-2, MM-GHG-1, and MM-GHG-2. But the DEIR fails to identify all feasible mitigation measures that would reduce these impacts.

CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring consideration of environmentally superior alternatives and adoption of all feasible mitigation measures.⁷¹ A feasible mitigation measure is one that is capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, legal, and technological factors.⁷² If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment” to the greatest extent feasible and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”⁷³

Public Resources Code §21081(a)(3) provides that when an agency rejects any of the mitigation measures for a significant impact recommended in an EIR, it must make specific findings that the rejected measures are “infeasible.”⁷⁴ These findings must show the agency’s reasons for rejecting mitigation measures that the EIR recommends.⁷⁵ Section 15091(f) of the CEQA Guidelines provides that a statement of overriding considerations is not a substitute for the required findings on the feasibility of mitigation measures.⁷⁶ A finding that the project’s benefits override its environmental impacts is insufficient because such a finding has no bearing on whether it was infeasible to adopt the mitigation measures.⁷⁷

Here, the DEIR fails to consider feasible measures proposed in the Town’s Climate Action Plan,⁷⁸ the Attorney General’s guidance document for Warehouse

⁷¹ 14 C.C.R. § 15002(a)(2), (3); *see also Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (“*Berkeley Jets*” (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.

⁷² Pub. Resources Code, § 21061.1; Cal. Code Regs., tit. 14, § 15364.

⁷³ Public Resources Code § 21081(a)(3), (b); 15091(a), 15092(b)(2)(A), (B); *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565.

⁷⁴ Pub Res C §21081(a)(3); 14 Cal Code Regs §15091(a)(3).

⁷⁵ 14 Cal Code Regs §15091(c). *See Village Laguna of Laguna Beach, Inc. v Board of Supervisors* (1982) 134 CA3d 1022; *Burger v County of Mendocino* (1975) 45 CA3d 322.

⁷⁶ 14 Cal Code Regs §15091(f).

⁷⁷ *Village Laguna of Laguna Beach, Inc. v Board of Supervisors* (Cal. Ct. App. 1982) 134 Cal.App.3d 1022

⁷⁸ Town of Apple Valley, Climate Action Plan 2019 Update (Adopted May 2021), available at <https://www.applevalley.org/home/showpublisheddocument/31233/637623641454430000>.

Projects,⁷⁹ recommendations in Riverside County Board of Supervisor's "Good Neighbor" Policy for Logistics and Warehouse/Distribution Uses,"⁸⁰ and recommended measures in Dr. Clark's comments.⁸¹ The DEIR is also inconsistent with General Plan policies calling for certain air quality and GHG mitigation measures.

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1. The DEIR Fails to Require Feasible Measures from the Town of Apple Valley Climate Action Plan

The DEIR fails to implement policies contained in the Town's Climate Action Plan that would mitigate air quality and GHG impacts.⁸² Some of these policies include:

Policy ND-12. Building and site plan designs shall ensure that the project energy efficiencies meet applicable California Title 24 Energy Efficiency Standards. Verification of increased energy efficiencies shall be documented in Title 24 Compliance Reports provided by the applicant, and reviewed and approved by the Town prior to the issuance of the first building permit. Any combination of the following design features may be used to fulfill this measure provided that the total increase in efficiency meets or exceeds Title 24 standards:

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- Buildings shall meet or exceed California Title 24 Energy Efficiency performance standards for water heating and space heating and cooling.
- Increase in insulation such that heat transfer and thermal bridging is minimized.
- Limit air leakage through the structure or within the heating and cooling distribution system to minimize energy consumption.
- Incorporate dual-paned or other energy efficient windows.
- Incorporate energy efficient space heating and cooling equipment.

⁷⁹ State of California Department of Justice, Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act (updated September 2022), available at <https://oag.ca.gov/system/files/media/warehouse-best-practices.pdf>.

⁸⁰ County of Riverside, Board of Supervisors Policy F-3, "Good Neighbor" Policy for Logistics and Warehouse/Distribution Uses", available at <https://rivcocob.org/sites/g/files/aldnop311/files/migrated/wp-content/uploads-2020-01-Good-Neighbor-Policy-F-3-Final-Adopted.pdf>.

⁸¹ Clark Comments, pg. 10-12.

⁸² See DEIR, pg. 4.6-20 (The CAP was not subject to CEQA review and does not meet the requirements of Section 15183.5b of the State's CEQA guidelines.)

- Incorporate the use of tankless water heaters in all residential units and community buildings.
- Promote building design that will incorporate solar control in an effort to minimize direct sunlight upon windows. A combination of design features including roof eaves, recessed windows, “eyebrow” shades and shade trees shall be considered.
- Interior and exterior energy efficient lighting which exceeds the California Title 24 Energy Efficiency performance standards shall be installed, as deemed acceptable by Town. Automatic devices to turn off lights when they are not needed shall be implemented.
- To the extent that they are compatible with landscaping guidelines established by the Town, shade producing trees, particularly those that shade paved surfaces such as streets and parking lots and buildings shall be planted at the Project site.
- Paint and surface color palette for the Project shall emphasize light and off-white colors which will reflect heat away from the buildings.
- All buildings shall be designed to accommodate renewable energy sources, such as photovoltaic solar electricity systems, and wind energy systems on properties greater than 2 acres, appropriate to their architectural design.
- Consideration shall be given to using LED lighting for all outdoor uses (i.e. buildings, pathways, landscaping, carports).

ND-14. Use passive solar design by orienting buildings and incorporating landscaping to maximize passive solar heating during the winter, and minimize solar heating during the summer.

ND-15. To reduce energy demand associated with potable water conveyance:

- Landscaping palette emphasizing drought tolerant plants and exceeding Town standards for water conservation.
- For residential uses, limit turf areas to no more than 25% of all landscaped areas. Encourage limiting turf areas to no more than 20% for added water/energy savings. Turf is prohibited in public rights-of-way, including parkways, and in non-residential uses with the exception of Special Landscaping Areas. (Town Municipal Code Chapter 9.75 Water Conservation/Landscaping).
- Use of water-efficient irrigation techniques exceeding Town standards for water conservation.
- U.S. EPA Certified WaterSense labeled or equivalent faucets, high-efficiency toilets (HETs), and water-conserving shower heads.
- Consider use of artificial turf

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ND-17. Install all CFL or LED light bulbs.

ND-18. Install common area electric vehicle charging station(s) and secure bicycle racks.

ND-19. To reduce the project's energy use from the grid:

- Install solar panels/photovoltaic systems sufficient to provide electric power and heat water within the project, and/or
- Install other clean energy system sufficient to provide electric power and heat water within the project, and/or

ND-20. Install solar or photovoltaic systems on new roofs whether on residential, commercial or industrial buildings

The DEIR fails to include these measures as binding mitigation measures or demonstrate that these measures are infeasible. For example, the Project fails to implement measures called for in Policy ND-12 because although the DEIR states that the Project would meet California Title 24 Energy Efficiency performance standards,⁸³ the DEIR fails to require the Project to *exceed* the Title 24 standards, as discussed in Policy ND-12. The DEIR must identify and require specific measures enabling the Project to exceed Title 24 mandatory standards in order to comply with Policy ND-12 and satisfy CEQA's requirement to mitigate significant environmental impacts to the greatest extent feasible. For example, the Project could exceed Title 24 mandatory standards by implementing Tier 2 measures in Appendix A5, Nonresidential Voluntary Measures, of the 2022 California Green Building Standards Code.⁸⁴ Tier 1 adds additional requirements beyond the mandatory measures, and Tier 2 further increases the requirements. The Project must implement Tier 2 measures to reduce its significant impacts.

Pursuant to ND-12, ND-19, and ND-20, the DEIR must reduce its GHG impacts by installing solar or photovoltaic systems. MM GHG-1 specifies that the Project would commit to on-site solar generation to meet the Prescriptive Requirements for Photovoltaic Systems (Title 24, Part 6, Section 9.2), but does not require on-site solar generation in excess of the mandatory Title 24 requirements.⁸⁵ Because the DEIR identifies a significant GHG impact from Project operations, the Project should install on-site solar facilities capable of meeting 100% of the Project's

⁸³ DEIR, pg. 4.5-9.

⁸⁴ Appendix A5 is available at <https://codes.iccsafe.org/content/CAGBC2022P3/appendix-a5-nonresidential-voluntary-measures>.

⁸⁵ DEIR, pg. 4.6-28

building energy needs to further reduce GHG emissions. The DEIR does not include evidence demonstrating that this measure would be infeasible, in violation of CEQA.

To achieve consistency with CAP policies and meet CEQA's requirement to mitigate significant impacts to the greatest extent feasible, the DEIR must be revised to consider and include the measures above as binding mitigation.

2. The DEIR Fails to Require Feasible Measures from the Attorney General's Warehouse Guidance

The DEIR fails to implement several feasible air quality and GHG measures recommended in the Attorney General's guidance document for warehouse projects.⁸⁶ These measures include the following:

- Requiring tenants to use zero-emission light- and medium-duty vehicles as part of business operations
- Forbidding trucks from idling for more than three minutes and requiring operators to turn off engines when not in use
- Installing solar photovoltaic systems on the project site of a specified electrical generation capacity that is equal to or greater than the building's projected energy needs, including all electrical chargers.
- Designing all project building roofs to accommodate the maximum future coverage of solar panels and installing the maximum solar power generation capacity feasible.
- Constructing zero-emission truck charging/fueling stations proportional to the number of dock doors at the project.
- Oversizing electrical rooms by 25 percent or providing a secondary electrical room to accommodate future expansion of electric vehicle charging capability.
- Constructing and maintaining electric light-duty vehicle charging stations proportional to the number of employee parking spaces (for example, requiring at least 10% of all employee parking spaces to be equipped with electric vehicle charging stations of at least Level 2 charging performance)
- Running conduit to an additional proportion of employee parking spaces for a future increase in the number of electric light-duty charging stations.
- Requiring all stand-by emergency generators to be powered by a non-diesel fuel.

⁸⁶ State of California Department of Justice, Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act (updated September 2022).

- Requiring facility operators to train managers and employees on efficient scheduling and load management to eliminate unnecessary queuing and idling of trucks
- Requiring operators to establish and promote a rideshare program that discourages single-occupancy vehicle trips and provides financial incentives for alternate modes of transportation, including carpooling, public transit, and biking.
- Meeting CalGreen Tier 2 green building standards, including all provisions related to designated parking for clean air vehicles, electric vehicle charging, and bicycle parking.
- Designing to LEED green building certification standards.
- Providing meal options onsite or shuttles between the facility and nearby meal destinations.
- Improving and maintaining vegetation and tree canopy for residents in and around the project area.
- Requiring that every tenant train its staff in charge of keeping vehicle records in diesel technologies and compliance with CARB regulations, by attending CARB-approved courses. Also require facility operators to maintain records on-site demonstrating compliance and make records available for inspection by the local jurisdiction, air district, and state upon request.
- Requiring tenants to enroll in the United States Environmental Protection Agency's SmartWay program, and requiring tenants who own, operate, or hire trucking carriers with more than 100 trucks to use carriers that are SmartWay carriers.
- Providing tenants with information on incentive programs, such as the Carl Moyer Program and Voucher Incentive Program, to upgrade their fleets.

The DEIR fails to consider any of the measures listed above. For example, the DEIR fails to require future tenants to use zero-emission light- and medium-duty vehicles as part of business operations. The DEIR fails to require a three-minute idling limit. As discussed earlier, the DEIR also fails to require solar photovoltaic systems with capacity that is equal to or greater than the buildings' projected energy needs and fails to require CalGreen Tier 2 green building standards. MM-GHG-1 provides that the Project would meet LEED Silver standards, but LEED Silver is not the most energy efficient standard. The DEIR fails to evaluate the feasibility of LEED Gold and Platinum, which would achieve greater energy reductions.⁸⁷ The DEIR violates CEQA by failing to consider these measures without evidence in the record demonstrating that these measures are infeasible.

⁸⁷ LEED Rating System, <https://www.usgbc.org/leed>.

3. The DEIR Fails to Require Feasible Measures from the “Good Neighbor” Policy for Logistics and Warehouse/Distribution Uses

The DEIR fails to implement air quality and GHG measures recommended in Riverside County Board of Supervisors Policy F-3.⁸⁸ These measures include the following:

- 2.1 During construction of the warehouse/distribution facility, all heavy duty haul trucks accessing the site shall have CARB-Compliant 2010 engines or newer approved CARB engine standards.
- 2.2 All diesel fueled off-road construction equipment greater than 50 horsepower, including but not limited to excavators, graders, rubber-tired dozers, and similar “off-road” construction equipment shall be equipped with CARB Tier 4 Compliant engines. If the operator lacks Tier 4 equipment, and it is not available for lease or short-term rental within 50 miles of the project site, Tier 3 or cleaner off-road construction equipment may be utilized subject to County approval.
- 2.3 The maximum daily disturbance area (actively graded area) shall not exceed 10 acres per day. Non-Grading construction activity in areas greater than 10 acres is allowed.
- 4.1 Facility operators shall maintain records of their facility owned and operated fleet equipment and ensure that all diesel-fueled Medium-Heavy Duty Trucks (“MHDT”) and Heavy-Heavy Duty (“HHD”) trucks with a gross vehicle weight rating greater than 19,500 pounds accessing the site use year CARB compliant 2010 or newer engines. The records should be maintained on-site and be made available for inspection by the County.
- 4.8 Facility operators for sites that exceed 250 employees shall establish a rideshare program, in accordance with AQMD rule 2202, with the intent of discouraging single-occupancy vehicle trips and promote alternate modes of transportation, such as carpooling and transit where feasible.

The DEIR fails to consider or require the measures listed above. Use of CARB-compliant 2010 engines or newer approved CARB engine standards would reduce mobile emissions of criteria air pollutants and GHGs. Use of Tier 4 equipment during construction would reduce the Project’s overall emissions of NO_x, diesel particulate matter, and other criteria pollutant emissions.⁸⁹ A measure

⁸⁸ County of Riverside, Board of Supervisors Policy F-3, “Good Neighbor” Policy for Logistics and Warehouse/Distribution Uses”.

⁸⁹ <https://ww2.arb.ca.gov/sites/default/files/2023-10/%232%20Proposed%20Emission%20Standards-ADA-10232023-revised.pdf>;

requiring future tenants to establish a rideshare program in accordance with SCAQMD rule 2202 would reduce GHG and criteria pollutant emissions from employee commutes.⁹⁰ The DEIR violates CEQA by failing to identify these measures without evidence in the record demonstrating that these measures are infeasible.

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4. The DEIR Fails to Impose Feasible Measures Consistent with General Plan Policies

The Town's General Plan includes policies designed to reduce emissions of criteria air pollutants and GHGs. Table 4.9-1 of the DEIR addresses the Project's consistency with General Plan policies, but the DEIR fails to demonstrate consistency with the following policies:

Policy 1.E: The use of clean and/or renewable alternative energy sources for transportation, heating and cooling, and construction shall be encouraged by the Town.

Policy 1.F: The Town shall support, encourage, and facilitate the development of projects that enhance the use of alternative modes of transportation, including pedestrian-oriented retail and activity centers, dedicated bicycle paths and lanes, and community-wide multi-use trails.

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Policy 1.G: Future residential, commercial, and industrial development and remodeling projects, shall strive to exceed Title 24 standards by 15% and/or achieve LEED certification or similar performance standards for buildings.

Policy 1.H: Residential, commercial, and industrial projects that reduce vehicle miles traveled (VMTs) by providing alternative transportation options, home office and live/work spaces, and/or promote employees living close to work are preferred.

Policy 1.J: The Town shall promote the use of solar and alternative energies and give priority to projects that include the use of solar cells and other alternative energy sources in their designs.

The DEIR fails to establish consistency with these policies in light of its failure to identify or require all feasible air quality and GHG mitigation measures.

⁹⁰ SCAQMD, Rule 2202 – On-Road Motor Vehicle Mitigation Options Employee Commute Reduction Program Guidelines, available at <https://www.aqmd.gov/docs/default-source/transportation/ecrp-guidelines.pdf?sfvrsn=6>, <https://www.aqmd.gov/home/programs/business/r2202-forms-guidelines>.

By not requiring installation of renewable energy facilities with capacity equal to or greater than the Project's energy demands, the Project is inconsistent with Policies 1.E, 1.G, and 1.J. The Project is not fully consistent with Policy 1.G because although the Project would be required to meet LEED Silver standards, there is no requirement for the Project to exceed Title 24 standards by 15%. The Project is inconsistent with Policy 1.H by failing to require transportation demand management measures. The DEIR must be revised and recirculated to ensure that the Project adopts all feasible air quality and GHG mitigation measures, consistent with General Plan policies.

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C. The DEIR Fails to Include Sufficient Investigation into Energy Conservation Measures

The DEIR does not include sufficient investigation into energy conservation measures that might be available or appropriate for the Project, in violation of CEQA. The DEIR concludes that operational energy impacts of the Project would be less than significant because the buildings would be designed and constructed in accordance with the State's Title 24 guidelines and regulations.⁹¹ However, compliance with Title 24 regulations alone does not support a conclusion that energy impacts are less than significant, and the DEIR does not sufficiently consider energy conservation measures like solar facilities, use of alternate fuel sources, or passive energy efficiency measures to ensure the Project's energy consumption would not be wasteful, inefficient, or unnecessary. This lack of analysis violates CEQA.

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CEQA requires an environmental document to discuss mitigation measures for significant environmental impacts, including "measures to reduce the wasteful, inefficient, and unnecessary consumption of energy."⁹² The CEQA Guidelines require discussion of energy conservation measures when relevant, and provide examples in Appendix F:⁹³

- 1) Potential measures to reduce wasteful, inefficient and unnecessary consumption of energy during construction, operation, maintenance and/or removal. The discussion should explain why certain measures were incorporated in the project and why other measures were dismissed.

⁹¹ DEIR, pg. 4.5-8 - 4.5-10.

⁹² Pub. Resources Code, § 21100(b)(3); *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 930.

⁹³ 14 Cal. Code Regs., § 15126.4(a)(1)(C) (stating "Energy conservation measures, as well as other appropriate mitigation measures, shall be discussed when relevant.").

- 2) The potential of siting, orientation, and design to minimize energy consumption, including transportation energy, increase water conservation and reduce solid waste.
- 3) The potential for reducing peak energy demand.
- 4) Alternate fuels (particularly renewable ones) or energy systems.
- 5) Energy conservation which could result from recycling efforts.

Courts have rejected CEQA documents that fail to include adequate analysis investigation into energy conservation measures that might be available or appropriate for a project.⁹⁴ In *California Clean Energy Commission v. City of Woodland* (“CCEC”),⁹⁵ the Court of Appeal reviewed an EIR for a shopping center on undeveloped agricultural land. Similar to the DEIR here, the EIR in *CCEC* concluded that, due to the proposed project’s compliance with Title 24 guidelines and regulations, the project would be expected to have a less-than-significant impact regarding the wasteful, inefficient, or unnecessary consumption of energy. But the lead agency’s EIR did not include discussion regarding the different renewable energy options that might be available or appropriate for the project. The Court held “the City’s EIRs failed to comply with the requirements of Appendix F to the Guidelines by not discussing or analyzing renewable energy options.”⁹⁶ The lead agency argued that compliance with the Building Code sufficed to address energy impact concerns for the project.⁹⁷ But the Court explained:

Although the Building Code addresses energy savings for components of a new commercial construction, it does not address many of the considerations required under Appendix F of the CEQA Guidelines... These considerations include whether a building should be constructed at all, how large it should be, where it should be located, whether it should incorporate renewable energy resources, or anything else external to the building’s envelope. Here, a requirement that Gateway II comply with the Building Code does not, by itself, constitute an adequate assessment of mitigation measures that can be taken to address the energy impacts during construction and operation of the project.⁹⁸

The Supreme Court of California agreed with the *CCEC* court’s decision in *League to Save Lake Tahoe Mtn. Area Preservation Found. v County of Placer*,

⁹⁴ *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 CA4th 256; *Spring Valley Lake Ass’n v. City of Victorville* (2016) 248 CA4th 91.

⁹⁵ (2014) 225 CA4th 173.

⁹⁶ *Id.* at 213.

⁹⁷ *Id.* at 210, 211.

⁹⁸ *CECC* (2014) 225 CA4th 173, 213.

holding that even projects that find a less-than-significant energy impact must “discuss whether any renewable energy features could be incorporated into the project.”⁹⁹ In *Save Lake Tahoe*, the Court considered an EIR for a land use specific plan and rezoning to permit residential and commercial development and preserve forest land near Truckee and Lake Tahoe. The EIR did not consider whether it was feasible to power the project on 100 percent renewable electrical energy or some lesser percentage, nor evaluate strategies for reducing reliance on fossil fuels, increasing reliance on renewable resources, reducing peak loads, and reducing the impacts of relying on remote generation facilities. The lead agency reasoned that this analysis was not required because energy impacts would be less than significant. Citing CEQA Guidelines Section 15126.2, subdivision (b) and the decision in *CCEC*, the Court held that when an EIR analyzes the project’s energy use to determine if it creates significant effects, it should discuss whether any renewable energy features could be incorporated into the project. The Court found that the EIR violated CEQA for not discussing whether the project could increase its reliance on renewable energy sources to meet its energy demand.

Here, the DEIR lacks basic analysis of energy consumption measures in violation of CEQA Guidelines Appendix F. The DEIR states that “the Project would support increased usage of renewable electricity through the installation of on-site solar panels to meet the Prescriptive Requirements for Photovoltaic Systems (Title 24, Part 6, Section 9.2) at a minimum.”¹⁰⁰ But the DEIR fails to adequately analyze the feasibility of installing onsite solar facilities *in excess* of the Title 24 mandatory standards. The DEIR fails to analyze which aspects of the Project could support solar facilities, such as rooftop, parking lot, or ground-level solar photovoltaics. The DEIR’s analysis must address considerations such as the technical and economic feasibility of installing solar facilities on the Project site, the potential size of the Project’s solar zone, and the potential magnitude of mitigation provided by installing solar facilities.

The DEIR also fails to evaluate the extent to which mobile source energy consumption could be reduced during Project operations through electric vehicle charging infrastructure (above what is required by existing regulations). Increased provision of EV charging infrastructure is required by the Tier 2 measures in Appendix A5, Nonresidential Voluntary Measures, of the 2022 California Green Building Standards Code.¹⁰¹ The DEIR also fails to consider a transportation demand management program to reduce energy consumption from commuter trips.

⁹⁹ (2022) 75 CA5th 63, 167–68.

¹⁰⁰ DEIR, pg. 4.6-32

¹⁰¹ *see* CALGreen Section A5.106.5.1.2 (Tier 2 standards require 50% of spaces to be reserved for clean air vehicles, and Tier 1 standards require 35%); *see* Section A5.106.5.3.2 (Tier 2 standards

In sum, the DEIR's energy analysis fails adequately analyze measures to reduce the wasteful, inefficient, and unnecessary consumption of energy, and fails to meaningfully address Appendix F's considerations of whether a building should be constructed at all, how large it should be, where it should be located, whether it should incorporate renewable energy resources, or anything else external to the building's envelope.¹⁰² This analysis must be provided in a revised and recirculated EIR.

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D. The DEIR Fails to Adequately Disclose, Analyze and Mitigate the Project's Cumulative Impacts

An EIR must evaluate a cumulative impact if the project's incremental effect combined with the effects of other projects is "cumulatively considerable."¹⁰³ This determination is based on an assessment of the project's incremental impacts "viewed in connection with the effects of past project, the effects of other current projects, and the effects of probable future projects."¹⁰⁴ Proper cumulative impact analysis is vital because "the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact."¹⁰⁵

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1. The DEIR's Cumulative Air Emissions Analysis Does Not Comply with CEQA or Attorney General Warehouse Guidance

The DEIR fails to adequately analyze the significance of the Project's cumulative air quality emissions. The DEIR asserts that, under MDAQMD guidance, any exceedance of a project-level threshold for criteria pollutants also is considered to be a cumulatively-considerable effect, while air pollutant emissions that fall below applicable project-level thresholds are not considered cumulatively-considerable.¹⁰⁶ The DEIR concludes that this Project's construction emissions of criteria air pollutants would be less-than-significant because they would not exceed

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require large projects with 201 or more parking spaces to provide 45% to be EV capable, and Tier 1 standards would require 30% of the total spaces to be EV capable.)

¹⁰² *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 CA4th 256, 264.

¹⁰³ CEQA Guidelines § 15130(a).

¹⁰⁴ *Id.*, §§ 15065(a)(3), 15355(b).

¹⁰⁵ *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 114.

¹⁰⁶ DEIR, pg. 4.2-40 – 4.2-41.

the project-level thresholds.¹⁰⁷ The DEIR's analysis of cumulative health risks is flawed for the same reason as the air quality analysis. The DEIR reasons that health risk impacts from exposure to toxic air contaminants during construction and operation would be less than significant because project-level thresholds would not be exceeded.¹⁰⁸ This approach is inadequate because it fails to analyze the Project's cumulative effects with the existing and proposed warehouses surrounding the Project site.

The DEIR's approach has been rejected by the courts for failing to comply with CEQA's requirement that a project mitigate impacts that are "cumulatively considerable."¹⁰⁹ The leading case on this issue is *Kings County Farm Bureau v. City of Hanford*.¹¹⁰ In *Kings County*, the city prepared an EIR for a 26.4-megawatt coal-fired cogeneration plant. Notwithstanding the fact that the EIR found that the project region was out of attainment for PM₁₀ and ozone, the city failed to incorporate mitigation for the project's cumulative air quality impacts from project emissions because it concluded that the Project would contribute "less than one percent of area emissions for all criteria pollutants."¹¹¹ The city reasoned that, because the project's air emissions were small in ratio to existing air quality problems, that this necessarily rendered the project's "incremental contribution" minimal under CEQA. The court rejected this approach, finding it "contrary to the intent of CEQA." The court stated:

We find the analysis used in the EIR and urged by GWF avoids analyzing the severity of the problem and allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling. Under GWF's "ratio" theory, the greater the over-all problem, the less significance a project has in a cumulative impacts analysis. We conclude the standard for a cumulative impacts analysis is defined by the use of the term "collectively significant" in Guidelines section 15355 and the analysis must assess the collective or combined effect of energy development. The EIR improperly focused upon the individual project's relative effects and omitted facts relevant to an analysis of

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¹⁰⁷ *Id.*

¹⁰⁸ DEIR, pg. 4.2-39.

¹⁰⁹ PRC § 21083(b)(2); 14 CCR § 15130; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 719-21.

¹¹⁰ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692 ("Kings County"); see also, *Friends of Oroville v. City of Oroville* (2013) 219 Cal. App. 4th 832, 841-42.

¹¹¹ *Kings County*, *supra*, at 719.

the collective effect this and other sources will have upon air quality.¹¹²

This DEIR's analysis is also flawed because it improperly focuses upon the individual project's relative effects and omits facts relevant to an analysis of the collective effect this and other sources will have upon air quality. Dr. Clark identifies nine existing warehouse projects within 10 kilometers of the Project, and five proposed warehouse projects, including this Project, which would add 15.777 million square feet of warehouse space.¹¹³ Data from the Redford Conservancy at Pitzer College and Radical Research LLC shows that the existing projects generate 6,000 daily truck trips, producing 8.3 pounds (lbs) of diesel particulate matter (DPM) and 935 lbs of oxides of nitrogen (NOx) per day.¹¹⁴ The two approved projects will add 5,000 daily truck trips, contributing 6.9 lbs of DPM and 779 lbs of NOx per day. Dr. Clark calculates that the projects under review, inclusive of the Project, will add 11,000 daily truck trips, contributing 15.2 lbs of DPM and 1,714 lbs of NOx per day.¹¹⁵ Dr. Clark calculates that the amount of DPM that will be released in the community will increase DPM in the community by a factor of 3.66 (a 366 percent increase).¹¹⁶ This cumulative impact is not disclosed in the DEIR, in violation of the principles articulated in *Kings County*.

In addition to violating CEQA, the MDAQMD approach used in the DEIR also directly conflicts with the recent Attorney General guidance document setting forth best practices for evaluating the environmental impacts of warehouse projects like this one under CEQA.¹¹⁷ With respect to cumulative air quality and GHG emissions analysis, the Attorney General's guidance states that best practices include "[w]hen analyzing cumulative impacts, thoroughly considering the project's

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¹¹² *Id.* at 721; see also *People of the State of California v. City of Fontana*, Case No. CIVSB2121829, Petition for Writ of Mandate, available at https://climatecasechart.com/wp-content/uploads/case-documents/2021/20210723_docket-CIVSB2121829_petition-for-writ-of-mandate.pdf ("The MND's cumulative air quality impact analysis does not account for—or even acknowledge—the multitude of other warehouses near the Project. Rather than consider the environmental setting within which the Project will be situated, the MND simply states that the Project will not result in a cumulatively considerable increase in emissions because the Project's individual air quality impacts will be less than significant. The MND even applies this reasoning to its analysis of health impacts from localized emissions, despite making no attempt to determine or disclose the severity of the existing health impacts from localized emissions in the community")

¹¹³ Clark Comments, pg. 5.

¹¹⁴ *Id.* at 6.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 7.

¹¹⁷ *Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act* (Updated September 2022), available at <https://oag.ca.gov/system/files/media/warehouse-best-practices.pdf>.

incremental impact in combination with past, present, and reasonably foreseeable future projects, *even if the project's individual impacts alone do not exceed the applicable significance threshold* [emphasis added].”¹¹⁸

In sum, the DEIR’s cumulative air quality impacts analysis fails to comply with CEQA. The Town must prepare a revised EIR that properly evaluates and mitigates such impacts.

E. The Project May Result in Potentially Significant Public Utilities Impacts.

Under CEQA, a public utilities impact is considered significant if a project would “[r]equire or result in the relocation or construction of new or expanded water, wastewater treatment or storm water drainage, electric power, natural gas, or telecommunications facilities the construction or relocation of which could cause significant environmental effects.”¹¹⁹ The DEIR states that “[f]ire water would be provided to the Project site via the 8-inch mains along Norco Road and Falchion Road.”¹²⁰ The DEIR claims that “[t]he water pipeline improvements have been considered as part of the Project, and their disturbance footprints and construction techniques, as well as their associated impacts, have been accounted for within this Draft EIR.”¹²¹ The DEIR concludes that, as a result, impacts associated with water facilities would be less than significant.¹²² This conclusion is not supported by substantial evidence because the DEIR fails to analyze the Project’s fire flow requirement or the ability of existing infrastructure to supply adequate fire flow. If the 8-inch mains relied on by the Project are inadequate to provide the requisite fire flow, the 8-inch mains may need to be upsized. These improvements would result in construction-related impacts greater than analyzed in the DEIR. Without an evaluation of the Project’s fire flow requirement or the ability of existing infrastructure to supply adequate fire flow, this Project’s public utility impact remains unanalyzed and potentially significant.

F. The DEIR Fails to Disclose and Mitigate Potentially Significant Valley Fever Impacts

The DEIR fails to disclose, analyze, and mitigate exposure to *Coccidioides Immitis* (Valley Fever cocci) on the Project site. Dr. Clark explains that when soil

¹¹⁸ *Id.*, pg. 7.

¹¹⁹ DEIR, pg. 4.14-12.

¹²⁰ DEIR, pg. 4.14-3.

¹²¹ DEIR, pg. 4.14-13.

¹²² *Id.*

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containing the cocci spores are disturbed by construction activities, the fungal spores become airborne, exposing construction workers and other nearby sensitive receptors.¹²³ Valley fever is the initial form of coccidioidomycosis infection, and can develop into a more serious disease, including chronic and disseminated coccidioidomycosis.¹²⁴

The DEIR argues, without supporting evidence, that construction activities would not likely result in increased incidence of Valley Fever:

Valley Fever is not highly endemic to San Bernardino County with an incident rate of 1.8 cases per 100,000 people (CDPH 2022). In contrast, in 2016 the statewide annual incident rate was 13.7 per 100,000 people. The California counties considered highly endemic for Valley Fever include Kern (251.7 per 100,000), Kings (157.3 per 100,000), San Luis Obispo (82.8 per 100,000), Fresno (60.8 per 100,000), Tulare (45.3 per 100,000), Madera (31.5 per 100,000), and San Joaquin (25.3 per 100,000), and accounted for 70% of the reported cases in 2016 (CDPH 2022).¹²⁵

But the DEIR relies on outdated data from 2016. The DEIR unjustifiably cites a 2016 incident rate of 1.8 cases per 100,000 when more recent data shows that the number of cases of Valley Fever in San Bernardino County has increased significantly.¹²⁶ This data is contained in the same 2022 California Department of Public Health (“CDPH”) document cited in the DEIR. Dr. Clark’s review of this data shows that since 2016, the number of cases of Valley Fever in San Bernardino County has increased from 1.8 per 100,000 in 2016 to 10.5 in 2022 (an increase of 583%).¹²⁷ In 2021, the number of cases of Valley Fever in San Bernardino County reached a high of 250 cases. In the first 8 months of 2024, San Bernardino County reported 210 cases, representing a nearly 552% increase over the baseline year of 2016 in only three quarters of the year.

Because Valley Fever incident rates are far higher than assumed in the DEIR, the DEIR fails to accurately describe the environmental setting. CEQA requires that a lead agency include a description of the physical environmental conditions in the vicinity of the Project as they exist at the time environmental

¹²³ Clark Comments, pg. 12.

¹²⁴ *Id.* at 15.

¹²⁵ DEIR, pg. 4.2-39.

¹²⁶ Epidemiologic Summary Of Valley Fever (Coccidioidomycosis) In California, 2022, pg. 5, available at <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/CocciEpiSummary2022.pdf>.

¹²⁷ Clark Comments, pg. 13.

review commences.¹²⁸ Use of the proper baseline is critical to a meaningful assessment of a project's environmental impacts.¹²⁹ By analyzing outdated baseline conditions, the DEIR fails to accurately evaluate the likelihood of exposure to Valley Fever cocci on the Project site. The DEIR's conclusion that this impact would be less than significant is not supported by substantial evidence.

The DEIR also fails to mitigate this potentially significant impact. The DEIR states that the Project would employ dust control measures in accordance with the MDAQMD Rules 401 and 403.2, which limit the amount of fugitive dust generated during construction.¹³⁰ Dr. Clark explains that the Town cannot assume that compliance with standard fugitive dust mitigation measures is adequate to protect construction workers and nearby sensitive receptors from Valley Fever.¹³¹ Conventional dust control measures do not prevent the spread Valley Fever because they largely focus on visible dust or larger dust particles—the PM₁₀ fraction—not the very fine particles where the Valley Fever spores are found.¹³² Dr. Clark proposes feasible and effective mitigation measures that must be considered in a revised DEIR that acknowledges the potentially significant risk of exposure to Valley Fever.¹³³

V. CONCLUSION

For the reasons discussed above, the DEIR for the Project is inadequate under CEQA. It must be revised to provide legally adequate analysis of, and mitigation for, all of the Project's potentially significant impacts. These revisions will necessarily require that the DEIR be recirculated for additional public review. Until the DEIR has been revised and recirculated, as described herein, the Town may not lawfully approve the Project.

¹²⁸ CEQA Guidelines, § 15125, subd. (a).

¹²⁹ *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Ca.4th 310, 320.

¹³⁰ DEIR, pg. 4.2-40.

¹³¹ DEIR, pg. 13.

¹³² Clark Comments, pg. 16.

¹³³ *Id.* at 17-19.

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Thank you for your consideration of these comments. Please include them in the record of proceedings for the Project.

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Sincerely,



Aidan P. Marshall

Attachments

APM:acp

****Comments
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