LOZEAU DRURY LLP
T 510.836 4200
F 510 836 4205
1939 Harrison Street, Ste 150
Oakland, CA 94612
www.lozeaudrury.com
victoria@lozeaudrury.com

Via Email

October 22, 2025

Carl Durling, Chairperson
Wyatt Jenkins, Vice Chairperson
Natalie Sheard, Commissioner
Warren Jensen, Commissioner
Glenn Arace, Commissioner
Marissa Hallen, Commissioner
City of Oroville Planning Commission
1735 Montgomery Street
Oroville, CA 95965
publiccomment@cityoforoville.org

Wes Ervin, Planner
City of Oroville
1735 Montgomery Street
Oroville, CA 95965
wervin@cityoforoville.org

Brian Ring, City Clerk
City of Oroville
1735 Montgomery Street
Oroville, CA 95965
cityclerk@cityoforoville.org

Re: Comment on the Final Environmental Impact Report for the Ophir Road Warehouse Project, October 23, 2025 Planning Commission Agenda Item 1

Dear Chair Durling, Vice Chair Jenkins, Commissioners, Messrs. Ervin and Ring:

I am writing on behalf of the Laborers International Union of North America, Local Union 185 ("LIUNA") and its members living in Butte County and the City of Oroville ("City"), regarding the Final Environmental Impact Report ("FEIR") for the Ophir Road Warehouse Project, including all actions related or referring to the proposed development of four warehouse buildings on-site totaling approximately 3.2 million square feet ("Project").

LIUNA is concerned that the FEIR fails as an informational document and fails to impose all feasible mitigation measures to reduce the Project's impacts. LIUNA requests that the Planning Commission direct Planning staff to address these shortcomings in a Revised Draft Environmental Impact Report ("RDEIR") and recirculate the RDEIR prior to considering approvals for the Project.

LIUNA initially submitted comments on the DEIR on June 10, 2025, but the City thus far has opted to not provide any response to those comments. Many of the comments LIUNA made with regard to the DEIR remain the same for the FEIR.

PROJECT DESCRIPTION

The Project is set on a 170.21-acre site, made up of two parcels located southwest of the intersection of Ophir Road and Baggett Palermo Road (Assessor's Parcel Numbers ("APNs") 078-010-047, 078-020-035) in the City. The Project site consists of undeveloped grassland vegetation. Wetlands occur on-site primarily in the southern portion of the property. One of the parcels, APN 078-020-035, is within the South Ophir Specific Plan area. The City's General Plan designates both parcels as Industrial (M-2).

The Project would include the development of four warehouse buildings totaling a maximum of approximately 3.2 million square feet. Each of the buildings would consist of a five-story concrete tilt-up warehouse with depressed dock areas and would range from 774,000 sf to 869,200 sf; however, due to the inclusion of a 250,000-sf mezzanine in each building, the building footprints would range from 514,000 sf to 609,200 sf. Each building would also provide approximately 20,000-sf of office space, including 10,000 sf of office mezzanine space.

The Project would require construction of new driveways for site access, one off Ophir Road to the north and another off Baggett Palermo Road to the east. A total of 2,152 vehicle parking spaces would be provided on-site, including 530 parking spaces associated with building one, 483 parking spaces associated with building two, 526 parking spaces associated with building three, and 611 parking spaces associated with building four.

I. LEGAL STANDARD

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances). (*See, e.g.*, Pub. Res. Code ("PRC") § 21100.) "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Comms. for a Better Env't v. Calif. Resources Agency* (2002) 103 Cal.App.4th 98, 109.)

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

Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures. (CEQA Guidelines § 15002(a)(2) & (3); *see also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.) The EIR serves to provide agencies and the

public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced." (CEQA Guidelines § 15002(a)(2).) If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns." (PRC § 21081; CEQA Guidelines § 15092(b)(2)(A) & (B).)

The EIR is the very heart of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.) CEQA requires that a lead agency analyze all potentially significant environmental impacts of its proposed actions in an EIR. (PRC § 21100(b)(1); CEQA Guidelines § 15126(a); *Berkeley Jets*, 91 Cal.App.4th 1344, 1354.) The EIR must not only identify the impacts, but must also provide "information about how adverse the impacts will be." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.) The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692.)

While the courts review an EIR using an "abuse of discretion" standard, "the reviewing court is not to 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A 'clearly inadequate or unsupported study is entitled to no judicial deference.'" (*Berkeley Jets*, 91 Cal.App.4th at 1355 (quoting, *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 391 409, fn. 12).) A prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.) As discussed below and in the attached expert comment letters, the EIR for this Project fails to adequately analyze and mitigate the Project's impacts.

II. DISCUSSION

A. The Project Will Have Significant Adverse Biological Impacts that the EIR Fails to Adequately Disclose, Analyze, and Mitigate.

Wildlife ecologist Dr. Shawn Smallwood, Ph.D. reviewed the DEIR and prepared detailed comments concluding that the Project will have significant, unmitigated adverse biological impacts. Dr. Smallwood's comments are attached hereto as Exhibit A. After reviewing the FEIR, the comments that Dr. Smallwood raised on the DEIR still apply to the FEIR.

1. The FEIR fails to adequately disclose the Project's potentially significant impacts to numerous special status species.

The FEIR fails as an informational document because the FEIR fails to address numerous special status species identified by Dr. Smallwood using the site's existing habitat. By ignoring special status species either observed at the site or likely to be present, the FEIR fails as an informational document regarding the Project's biological impacts.

Appendix G of the Guidelines requires agencies to consider whether a project may "[h]ave a substantial adverse effect . . . on any species identified as . . . ***special status*** [] in local or regional plans, policies, or regulations, or by the California Department of Fish and Wildlife ["CDFW"] or the U.S. Fish and Wildlife Service ["USFWS"]." (CEQA Guidelines, App. G § (IV)(a) [emphasis added].) CDFW maintains a list of special status species known as the "Special Animals List," a copy of which is attached as Exhibit B. Other special status species are identified in CDFW's regulations identifying fully protected species in California. (Cal. Fish and Game Code, §§ 3503.5, 3511, 4700, 5050, 5515.) USFWS also maintains various lists of special status species, including not only the lists of endangered, threatened, and candidate species but also, specific to bird species, the "Birds of Conservation Concern" list, a copy of which is attached as Exhibit C.

Dr. Smallwood visited the Project site for 3.4 hours from 05:55 to 09:20 on May 6, 2025, for 1.67 hours of daylight survey from 18:48 to 20:28 on May 7, 2025, and for 1.5 hours of nocturnal survey from 20:30 to 22:00 on May 7, 2025. Dr. Smallwood observed 59 species of vertebrate wildlife on the Project site, and 13 special status species, including the American white pelican, Osprey, White-tailed kite, Northern harrier, Bald eagle, Lewis's woodpecker, Nuttall's woodpecker, American Kestrel, Oak titmouse, Cassin's finch, Bullock's oriole, Tricolored blackbird, and Yuma myotis. (Smallwood, at 2-3, 16-17.) The American white pelican, Osprey, White-tailed kit, Northern harrier, Bald eagle, Lewis's woodpecker, Tricolored blackbird, and Yuma myotis are listed by CDFW as special status species on the Special Animals List. (CDFW Special Animals List, at 65, 67-68, 74, 80, 84.) Likewise, USFWS has identified the American white pelican, Northern harrier, Lewis's woodpecker, Nuttall's woodpecker, American kestrel, Oak titmouse, Cassin's finch, Bullock's oriole, and Tricolored blackbird as birds of conservation concern. (Birds of Conservation Concern, at 20-23, 27-29, 31-32, 35, 40-42, 44-45.)

The FEIR fails to analyze the occurrence potential of special status species in the Project area. Based on Dr. Smallwood's review of wildlife databases and his site visits, 104 special status species are known to occur near enough to the Project site to warrant analysis of occurrence potential. Of these species, 13 were recorded on or just off the Project site, 10 have been documented within 1.5 miles of the site, 39 have been documented between 1.5 and 4 miles, and 37 have been documented within 4 to 30 miles of the site. (Smallwood, at 25.) The EIR only analyzes the likelihood of 32 of these 104 species. Furthermore, out of the 71 special-status species whose occurrence potential the FEIR does not analyze, Dr. Smallwood detected 10 of them on or adjacent to the site. Given the documented presence of special-status species which were not analyzed in the FEIR, additional analysis and review is required in order for it to sufficiently address the Project's biological impacts to these special status wildlife species. An RDEIR should be prepared in order to adequately disclose, analyze and mitigate the Project's potentially significant impacts to special status species.

2. The FEIR's discussion of the lack of impacts to the burrowing owls is not supported by substantial evidence.

The DEIR shrugs off potential impacts to the special status burrowing owl based on insufficient site surveys. The FEIR makes no mention of burrowing owls. While the DEIR includes wildlife surveys from North Valley Environmental (2023) ("NVA") and ADEMA (2024) ("ADEMA"), these documents rely upon flawed analyses regarding impacts to special-status species. According to the DEIR, "[f]ive protocol-level special-status surveys of the project site were conducted to assess the suitability of habitats on-site to support special-status species." (DEIR, at 4.3-33.) NVA reports to have completed a Phase II survey for burrowing owls consistent with the guidelines of the California Burrowing Owl Consortium ("CBOC"), but those guidelines do not mention a Phase II survey, making it unclear what kind of survey, if any, was completed by NVA. (Smallwood, at 23.)

In addition, the burrowing owl survey relied upon by the DEIR and FEIR lacks substantial evidence because it was not conducted consistent with California Department of Fish and Wildlife ("CDFW") guidelines. The NVA survey claims that botanical surveys qualified as burrowing owl surveys. Likewise, the ADEMA survey claims that its wetland analysis doubles as a protocol-level detection survey for burrowing owls, despite the lack of support for such a conclusion in either the CDFW guidelines or the scientific community. (Smallwood, at 24.) Both surveys included in the DEIR and relied upon by the FEIR speculate that burrowing owls do not occur on the Project site due to cattle trampling their burrows. However, this assertion is controverted by the fact that burrowing owls have been found at the highest densities where cattle are grazed. (Smallwood, at 24.) The DEIR and FEIR omit meaningful survey efforts for burrowing owls, and relies on unsound justifications to assume their lack of presence the Project site. The DEIR and FEIR fail to analyze the potential impacts to burrowing owls.

As a result, the DEIR and FEIR's analysis and conclusion that impacts to burrowing owls will be less than significant is not supported by substantial evidence. Additional surveys consistent with CDFW's protocols should be conducted and the FEIR should be revised to analyze and mitigate any potential impacts to this fully protected species.

3. The FEIR's characterization of the environmental setting and environmental baseline is not supported by substantial evidence.

The DEIR and FEIR's description of the environmental setting for the project is inadequate. CEQA's primary objective is to disclose potential environmental impacts of a proposed project. However, the DEIR and FEIR fail to provide accurate information regarding the Project's environmental setting and baseline from which a sufficient assessment of wildlife impacts can be made.

Before analyzing a project's impacts, an EIR must first identify and describe "the physical environmental conditions in the vicinity of the project as they exist at the time the notice of preparation is published." (14 CCR § 15125(a).) This information is critical to the EIR's impact analysis because it serves as the baseline against which a project's predicted effects can

be described and quantified. (14 CCR § 15125(a); *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 447 (*Smart Rail*).) A description of important environmental resources that will be adversely affected by the project is critical to a legally adequate discussion of the environmental setting. (14 CCR § 15125(c); *San Joaquin Raptor/Wildlife Rescue Ctr. v County of Stanislaus* (1994) 27 Cal.App.4th 713, 722-30 (*San Joaquin Raptor*) [description of the environmental setting deficient because it did not disclose the specific location and extent of riparian habitat adjacent to the property, inadequately investigated the possibility of wetlands on the site, understated the significance of the project's location adjacent to a river, and failed to discuss a nearby wildlife preserve].) Courts have repeatedly held that where an EIR contains an "inadequate description of the environmental setting for the project, a proper analysis of project impacts [i]s impossible." *(Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1122 [invalidating EIR with only passing references to surrounding viticulture]; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 873-75.)

The DEIR and FEIR do not accurately identify and describe the physical and environmental conditions in the vicinity of the Project. First, the DEIR's characterization of the site's hydrology and ground cover is misleading. The NVA survey misstates wetland locations and fails to accurately describe the wetland cover, claiming that a small pond near the Project area is a "stock pond" and "devoid of vegetation." (NVA, at 16.) However, the opposite is true. The pond is not devoid of vegetation, rather, it is populated by cattails and willows. Further, Dr. Smallwood observes that the pond appears to be of natural origin as opposed to a "stock pond." (Smallwood, at 20.) The pond is fed by, and therefore dependent upon, multiple ephemeral drainages flowing off the Project site. (Smallwood, at 21.) This marks one of many examples of the DEIR and FEIR's mischaracterization of the environmental setting.

The DEIR and FEIR also underreport the trees located on the Project site. The DEIR reports five mature blue oaks at the site's northwest corner near Ophir road, but there are also nine more trees on the site or along the site's boundaries. (*Id.*) The FEIR does not fix this error.

Furthermore, NVA's survey underreports the species present on the Project site. NVA only detected 10 species of vertebrate wildlife during its survey, while Dr. Smallwood detected 59. (Smallwood, at 2-3.) NVA did not report the start time or duration of the survey, making the results more difficult to interpret. Regardless, NVA's survey yielded less than 17% of the total species detected by Dr. Smallwood.

The ADEMA survey has similar issues. ADEMA's report states that the biologist "evaluated potential habitat to determine the presence or absence of sensitive natural resources and to determine if these resources would be impacted by the proposed project." (ADEMA, at 1.) However, ADEMA fails to report wildlife species detected by the biologist and does not explain how the presence or absence of sensitive resources was determined. (Smallwood, at 23.) ADEMA also downgrades the occurrence likelihood of multiple special-status species of wildlife assessed by NVA without substantial evidence or explanation to support its analysis.

Neither the FEIR nor the DEIR include any information regarding the occurrence

potential of bats. However, Dr. Smallwood detected the Yuma myotis on the Project site, which is a special status species. (CDFW Special Animals List, at 84.) The FEIR should be revised to analyze the occurrence potential of special status bats on the property to accurately characterize the environmental setting of the Project site.

Both the DEIR and FEIR fail to characterize the environmental setting because its species occurrence potential analysis is not supported by substantial evidence. Despite having access to NVA's survey data, the ADEMA survey downgrades the occurrence likelihood of numerous special-status species assessed by NVA without explanation. The DEIR and FEIR's analysis of occurrence potentials differ drastically from Dr. Smallwood's survey findings and with existing occurrence records. (Smallwood, at 30.) Given the drastic differences between the DEIR and FEIR's and Dr. Smallwood's findings, more analysis is needed. For instance, the DEIR completely discounts the occurrence potential of the Monarch butterfly based on the lack of milkweed on the Project site. The Monarch butterfly is a special status species and listed as "Proposed Threatened" under the federal Endangered Species Act, (CDFW Special Animals List, at 28.) Dr. Smallwood notes that Monarch butterflies do not require the presence of milkweed, and that the species commonly migrates across areas like the Project site. (Smallwood, at 30.) The FEIR does not correct this failure. Therefore, the FEIR improperly ignored the occurrence potential of the Monarch butterfly. The DEIR presents similar flawed rationale for omitting analysis of occurrence potential of the Western pond turtle, Coast horned lizard, Northern harrier, and Loggerhead shrike, which are all special status species. (CDFW Special Animals List, at 56-57, 75; Smallwood, at 30-31.) The FEIR also fails to correct these errors.

The DEIR's overreliance on wildlife database results to omit analysis of species' occurrence potential results in an additional failure to evaluate the Project's potential impacts. The DEIR and FEIR completely dismiss occurrence potential of the Western spadefoot, Coast horned lizard, Tricolored blackbird, Greater sandhill crane, Golden eagle, Loggerhead shrike, Yellow-billed magpie, White-tailed kite, Prairie falcon, Peregrine falcon, Bald eagle, California black rail, Purple martin, Least Bell's vireo, Yellow-headed blackbird, Townsend's big-eared bat, Western mastiff bat, and Sacramento Valley red fox, which are all special status species. (CDFW Special Animals List, at 53, 57, 67-69, 75-76, 80, 83-84, 94.) However, Dr. Smallwood observed the tricolored blackbird (multiple large flocks totaling about 460 birds), white-tailed kite and bald eagle on the Project site. (Smallwood, at 31.) In addition, the CDFW has commented that "[t]he Project site contains suitable upland aestivation and aquatic breeding habitat for western spadefoot (*Spea hammondil*), a California Species of Special Concern and candidate for listing under the federal Endangered Species Act. Impacts to western spadefoot from ground disturbing activities onsite may be considered potentially significant unless adequate mitigation is incorporated. (FEIR, p. 2-9.) The FEIR inadequately responded:

> Potential for occurrence on-site of western spadefoot (WSF) is low, as identified by both the project BRA and BRA addendum. This is secondary to a lack of aquatic habitat on-site that maintains inundation for sufficient duration to fully develop the WSF to its non-aquatic state. As noted in both the 2023 BRA and 2024 BRA Addendum, the site is grazed by cattle which collapses existing mammal burrows

> and other soil cavities. Additionally, the site soil composition is high in sand content, which makes for poor burrow constructability. Thus, because the potential for occurrence of WSF on-site is low, additional mitigation is not warranted. (FEIR, p. 2-30.)

The FEIR should be revised to provide proper analysis of potential species present on the site to accurately describe the Project's environmental setting.

The FEIR fails to accurately describe the Project's environmental setting and baseline. The FEIR should be revised to update the environmental setting and baseline to allow for accurate analysis and mitigation of the Project's impacts.

4. The FEIR fails to analyze significant impacts to wildlife resulting from habitat loss.

Dr. Smallwood provides substantial evidence that the Project will result in significant impacts to wildlife due to habitat loss. Local bird populations will lose essentially all of the current habitat and nesting at the Project site. (Smallwood, at 35.) Dr. Smallwood calculates that the Project will result in the loss of 547 nest sites, 760 nest attempts, 2,204 fledglings, and 2,478 birds per year. (*Id.* at 36.) He further calculates that the Project will result in the loss of 2,478 birds per year. (*Id.*). Most of these birds are protected by the federal Migratory Bird Treaty Act and California Migratory Bird Protection Act. (*Id.*). Therefore, the FEIR should be revised to analyze the Project's impacts to birds due to habitat loss.

5. The FEIR fails to adequately analyze and mitigate the Project's interference with wildlife movement.

Dr. Smallwood provides substantial evidence that the DEIR and the FEIR fail to analyze the Project's potential to interfere with wildlife movement. While the DEIR acknowledges that the site *might* serve a corridor function to "common terrestrial species" (DEIR, at 4.3-43), there has not been a program of observation to characterize how wildlife uses the site for movement in the region. However, Dr. Smallwood observed wildlife movement at the Project site. (Smallwood, at 36-37.) The FEIR does not correct this issue. The potential interference with wildlife movement represents a significant impact which is not properly analyzed or mitigated in the FEIR. The FEIR should be revised to appropriately analyze and mitigate the Project's potential impacts to wildlife movement.

6. The FEIR does not adequately analyze the Project's potential impacts to wildlife from bird-window collision mortality.

The FEIR fails as an informational document because it does not include an adequate discussion of the impacts of bird-window collision mortality. Instead in response to CDFW's comments on bird-window strike, the FEIR states:

> The suggestions mentioned are noted, however, the generalized impact of bird

> collisions with future windows within the project is not sufficiently linked to a potentially significant environmental impact that would justify adding mitigation to the EIR.
>
> Some future instances of reflective windows on warehouse facades facing open space and areas that support nesting birds would likely occur. The most likely avian species to collide with windows are those that are most locally abundant, and windows that pose the most hazard are larger, reflective, and positioned to reflect outside vegetation. Therefore, such future bird collisions within the project would likely occur among the bird species observed during biological field survey (e.g., scrub jay, house finch, Brewer's blackbird, etc.), or the subset of those common species that remain following development of nearby residences. Because none of those bird species are deemed sensitive using the applicable EIR criteria, there is not sufficient justification to consider future bird collisions with buildings within the project a significant impact.
>
> The City would, however, encourage the applicant to include information to building design team to alert them of this concern and to encourage optimal land stewardship by using window treatments such as installing screens, window patterns, or new types of glass such as acid-etched, fritted, frosted, etc. that minimize bird collisions, especially on larger window panes that face open space areas. (FEIR, 2-24.)

The FEIR's response is inadequate and fails to properly mitigate this impact. Dr. Smallwood predicts 69 annual bird deaths from window collisions, the majority of which would involve birds protected under the Migratory Bird Treaty Act and under the California Migratory Bird Protection Act, thus resulting in significant unmitigated impacts. (Smallwood, at 33.) The DEIR and FEIR fail to properly analyze and mitigate this significant impact. Therefore, the FEIR should be revised to analyze and mitigate the impacts of bird-window collision mortality.

7. The FEIR fails to analyze the Project's potential traffic impacts to wildlife.

The FEIR fails as an informational document because it does not analyze or mitigate the Project's potential wildlife mortality and injuries caused by project-generated traffic. The DEIR predicts 18,553,315 annual vehicle miles traveled ("VMT") would be generated by the Project. (DEIR, at 4.2-61.) Based on the Project's VMT, Dr. Smallwood estimates 7,245 wildlife fatalities per year due to project-generated traffic. (Smallwood, at 39.) These potential wildlife fatalities represent a potential significant impact which is not analyzed or mitigated in the FEIR. Therefore, the FEIR should be revised to appropriately analyze the impact of wildlife collision mortality resulting from project-generated traffic.

8. The FEIR's cumulative biological resource impacts analysis is inadequate because it does not explain how the General Plan SEIR's cumulative impact mitigation will avoid or minimize the Project's cumulative impacts.

The DEIR and FEIR's misinterpretation of CEQA's cumulative impacts analysis is flawed in its application to potential impacts to wildlife on the Project site. Under CEQA, cumulative impacts "refer to two or more individual effects which, when considered together, are considerable of which compound or increase other environmental impacts." (Cal. Code Regs. Tit. 14, § 15355.) The individual effects may be changes from single or multiple projects, and the cumulative impact from several projects is the "change in environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probably future projects. Cumulative impacts can result from individual minor but collectively significant projects taking place over a period of years." (§ 15355 (a-b).) According to the DEIR, the mitigation for the Project's direct impacts precludes the need for mitigation for potential cumulative impacts. (DEIR, at 4.3-45.) The DEIR claims that a given impact is cumulatively considerable only when it is a significant project-level direct impact that has not been fully mitigated, hence leaving no residual impact, thus implying a standard that cumulative impacts are residual impacts left over by inadequate mitigation of Project impacts. However, individually mitigated projects do not negate the significance of cumulative impacts. The FEIR does not correct this error. As discussed *infra*, the DEIR and FEIR already fail to mitigate the Project's direct impacts. Because the purported standard is not CEQA-compliant, a revised analysis of the Project's cumulative impacts is required. Therefore, the FEIR should be revised to include accurate analysis and mitigation of the Project's cumulative impacts.

The DEIR also implies that the General Plan SEIR's cumulative impacts analysis is sufficient to analyze the Project's impacts. However, CEQA Guidelines section 15064(h)(3) states that "[w]hen relying on a plan, regulation or program, the lead agency should explain how implementing the particular requirements in the plan, regulation or program ensure that the project's incremental contribution to the cumulative effect is not cumulatively considerable." Neither the DEIR nor the FEIR explain how the General Plan SEIR would result in avoided or minimized cumulative impacts. (Smallwood, at 40.) In fact, the DEIR only refers to the SEIR's cumulative impact mitigation for the California black rail, a species which is not even identified as one of the 104 special status species likely to occur on the Project site. (Smallwood, at 25-29; DEIR, at 4.3-45–4.3-46.) The FEIR is further silent on the issue. Therefore, a cumulative impacts analysis is still required.

The DEIR's cumulative impacts analysis does not comply with CEQA. Even mitigated development results in a 66% loss of species on site, and 48% loss of species in similar Project areas. (Smallwood, at 40-41.) Given the lack of thorough analysis of the Project's impact to wildlife, and lack of feasible mitigation, similar declines in biodiversity are likely to occur. The FEIR does not correct the DEIR's flawed cumulative impact analysis. Therefore, the FEIR should be revised to analyze and mitigate the cumulative impacts of the Project.

9. The FEIR fails to implement all feasible mitigation measures to reduce impacts to wildlife below a significant level.

As discussed above, the DEIR's characterization of the Project's environmental setting is not supported by substantial evidence. To develop an appropriate mitigation strategy, the EIR should be revised to accurately characterize the existing environmental setting. However, even absent an accurate characterization of the environmental setting, the existing mitigation strategy is inadequate to reduce impacts below a significant level.

"[M]itigation measure[s] [that do] no more than require a report be prepared and followed" do not provide adequate information for informed decisionmaking under CEQA. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794; Guidelines § 15126.4(a)(1)(B).) A lead agency's adoption of an EIR's proposed mitigation measure for a significant environmental effect that merely states a "generalized goal" to mitigate a significant effect without committing to any specific criteria or standard of performance violates CEQA by improperly deferring the formulation and adoption of enforceable mitigation measures. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 93 ["EIR merely proposes a generalized goal of no net increase in greenhouse gas emissions and then sets out a handful of cursorily described mitigation measures for future consideration that might serve to mitigate the [project's significant environmental effects.]"]; cf. *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029 [upheld EIR that set forth a range of mitigation measures to offset significant traffic impacts where performance criteria would have to be met, even though further study was needed and EIR did not specify which measures had to be adopted by city].)

LIUNA previously noted that the DEIR violates CEQA because it improperly defers the formulation and adoption of enforceable mitigation measures. Mitigation Measure 4.3-1 states that "[i]f special-status plants are impacted, a mitigation plan shall be developed and approved by the City of Oroville Community Development Department." However, a plan to mitigate impacts that have already occurred is unlikely to effectively mitigate the impacts. Furthermore, CDFW, in its February 21, 2025, letter regarding the Project, states that:

> "Mitigation Measure 4.3-1 fails to comply with CEQA Guidelines § 15126.4 by deferring mitigation to a future time by not including fully enforceable compensatory mitigation to offset potentially significant impacts to special-status plants. The measure mentions a "mitigation plan" but does not identify when the plant mitigation plan would be prepared, or who would be responsible for preparing, reviewing, or implementing it. The measure also does not define the plan area or establish criteria for plan success. Without goals, content, and enforceability in the plant management plan, this measure does not mitigate project impacts to a less than significant level."

We concur with CDFW's comment regarding the ineffectiveness of this mitigation measures. While the FEIR attempts to address the CDFW's comments on the deferred mitigation plan, it

fails to correct the issue. Instead, it simply adds the following emphasized text to the mitigation measure:

> The mitigation plan shall describe the proposed mitigation for impacts to the plant species, and include (at minimum) details regarding *the plan area, survey methods, surveyor qualifications, occurrence and species details, proposed relocation methods and locations, long-term monitoring,* success criteria, monitoring, reporting, and contingency in case of failure. *If the special-status plant species can be avoided, the mitigation plan shall include recommended protective buffers, construction monitoring,* and postconstruction monitoring. (FEIR, p. 2-20.)

However, this remains deferred mitigation. Moreover, the updated mitigation measure still fails to "identify when the plant mitigation plan would be prepared, or who would be responsible for preparing, reviewing, or implementing it," and fails to "define the plan area or establish criteria for plan success." The FEIR should be revised to mitigate these impacts below a significant level.

Measure 4.3-3(a) also improperly defers mitigation. The measure requires wetlands delineations, which should have already been completed pursuant to the DEIR's requirements to accurately characterize the existing environmental setting. Moreover, requiring the delineations after EIR certification would rob the public and decision-makers of the opportunity to understand what wetland features are at risk, and to analyze and mitigate to the extent feasible.

While the FEIR revised Mitigation Measure 4.3-2(a) to include implementation of surveys that are consistent with the updated protocols from 2000, rather than the 1994 protocols stated in the DEIR (Smallwood, at 42), the surveys required under this measure will still do nothing to prevent the permanent loss of 170.21 acres of the Swainson's hawk habitat. Therefore, Measure 4.3-2(a) is largely ineffective to reduce impacts below a significant level

CEQA does not relieve an agency of the need to provide performance specifications just because the mitigation is proposed as part of a first tier document. (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011,1028-1029.) For example, in *Rio Vista Farm Bureau Center v. County of Solano*, the Court upheld a hazardous waste facility siting plan because the plan provided "specific performance criteria" for future siting decisions. ((1992) 5 Cal.App.4th 351, 377.) Mitigation measure 4.3-2(c), which involves preconstruction surveying for nesting birds and raptors, lacks the specific performance criteria to make the measure enforceable. First, the surveying dates should be updated to correctly reflect the avian breeding season recognized by the CDFW, which is between February 1 and September 15. Second, a preconstruction survey conducted by a single biologist within 7 days of the start of construction would not detect the nest sites on the 170.21-acre Project site. The biologist would need to identify birds that are breeding and locate their nests. (*Id.* at 42-43.) Third, even if all the nests could be found, the mitigation measure would still only apply to the breeding season of the survey. The Project would still result in the loss of birds every subsequent year. Finally, the mitigation langnage allows a single biologist to make a subjective decision to determine the buffer area for any given species of bird. The decision would also be outside of public review. There is no evidence

provided or cited that the proposed buffers have been effective anywhere. (*Id.* at 43.) This mitigation measure lacks specific performance criteria to make it enforceable, and thus fails to reduce impacts below a significant level. The FEIR should be revised to make this measure enforceable in order to mitigate this impact to the extent feasible.

The FEIR lacks substantial evidence to conclude that the proposed 35-acre conservation easement would protect the wetland features within and downstream of the easement area. The Project would reduce inflows to wetlands on and around the site, and runoff from the Project would pollute and damage the wetlands. These issues were also raised by CDFW in its February 21, 2025, comment letter, but were not adequately addressed in the FEIR. This measure includes no performance standards to assess the measure's efficacy, nor are additional actions required if the measure fails to protect wetland features. The FEIR should be revised to properly mitigate the substantial impact to wetlands on and around the Project site.

Finally, Mitigation Measure 4.3-5 only requires that recommendations be made to retain oak trees, but such recommendations would be made outside of public participation and would not be required to be implemented. (Smallwood, at 44.) Like the DEIR, the FEIR's characterization of the Project site's oak trees is still inaccurate because it continues to fail to disclose the existence and locations of nine of the trees on the Project site. (*Id.*; FEIR, p. 2-23) Dr. Smallwood states that most of the trees on the site occur where grading would be required to construct the Project. (Smallwood, at 44.) This mitigation measure lacks objective criteria or commitment to implementation of the recommendations and is thus unenforceable.

For the Project to implement all feasible mitigation at least for the potential impacts currently acknowledged in the DEIR, Dr. Smallwood suggested the DEIR be revised to include the following mitigation measures:

- **Burrowing owl**: Now that the burrowing owl is a candidate species for listing under the California Endangered Species Act, consultation with the CDFW is going to be necessary. Furthermore, it is likely that the CDFW will require mitigation for loss of foraging habitat.
- **Crotch's bumble bee and short eared owl**: I concur with the CDFW's comments in its letter to the City of 21 February 2025 that detection surveys should have been completed in support of the DEIR to disclose potential impacts to these species and to formulate appropriate mitigation. Based on my reading of the DEIR, no such surveys have been completed, and there is no mitigation measure directed to Crotch's bumble bee or short-eared owl.
- **Westen spadefoot**: The project site looks to me like western spadefoot habitat. I therefore agree with CDFW's comments in its letter to the City of 21 February 2025 that the site has yet to be surveyed for the presence of western spadefoot. Although a detection survey is not a legitimate mitigation measure, but rather an essential means to gather information needed to characterize the existing environmental setting and to disclose potential impacts, I concur with the CDFW's recommendation to conduct the appropriate surveys according to the available protocol.

- **Wildlife Movement**: During my surveys, multiple listed and other special-status species of birds made use of the project site for movement. Hundreds of tricolored blackbirds, did so, and so did bald eagle, white-tailed kite, northern harrier, osprey and American white pelicans, and the vast majority of these birds moved north-south. These movement directions would be impeded by the 65-foot-tall buildings that would span the east-west width of the project site. A reasonable mitigation measure would be to reduce the footprint of the project to leave at least half of the east-west span of the property in its present state.
- **Road Mortality**: Compensatory mitigation is needed for the increased wildlife mortality that would be caused by bird-window collisions and the project-generated road traffic in the region. I suggest that this mitigation can be directed toward funding research to identify fatality patterns and effective impact reduction measures such as reduced speed limits and wildlife under-crossings or overcrossings of particularly dangerous road segments. Compensatory mitigation can also be provided in the form of donations to wildlife rehabilitation facilities (see below).
- **Fund Wildlife Rehabilitation Facilities**: Compensatory mitigation ought also to include funding contributions to wildlife rehabilitation facilities to cover the costs of injured animals that will be delivered to these facilities for care. Many animals would likely be injured by collisions with the building's windows and with automobiles traveling to and from the building. (Smallwood, at 44-45).

However, none of these mitigation measures were included in the FEIR. Given the deficiencies in identifying special status species using the Project site's habitat and other shortcomings described above, the FEIR also will need to include additional mitigations for those unaddressed impacts. Even for the species addressed, the FEIR does not implement all feasible mitigation measures to reduce the Project's wildlife impacts below a significant level. Therefore, the FEIR should be revised to ensure the effectiveness of the current mitigation measures and adopt additional measures to reduce the Project's significant impacts to wildlife.

B. There is Substantial Evidence that the Project Will Have Significant Adverse Impacts Regarding Air Quality, Health Risks, and Energy that the FEIR Fails to Disclose, Analyze and/or Mitigate

Air quality expert and environmental engineer, Patrick Sutton of environmental consulting firm Baseline has prepared his expert evaluation of the DEIR's discussion of potential air quality impacts and concludes that the DEIR's analysis is insufficient or not supported by substantial evidence, in particular, its assessment of emissions for the carcinogen diesel particulate matter ("DPM"). Mr. Sutton's comment letter and curriculum vitae are attached as Exhibit D. After reviewing the FEIR, the comments that Mr. Sutton raised on the DEIR still apply to the FEIR.

1. The FEIR's air quality analysis is not based on substantial evidence because it underestimates the Project's emissions.

The DEIR did not adequately analyze impacts to air quality because it underestimates the Project's maximum daily emissions of reactive organic gases (ROG), nitrogen oxides (NOx), and coarse particulate matter (PM10). Neither does the FEIR. According to the default model assumptions, the duration for construction of the proposed buildings would be 740 workdays. The DEIR assumes that construction would be completed within 266 workdays, which is roughly one third of the default model's assumptions. (DEIR, Appendix C; Sutton, at 1.) The FEIR also adopts these assumptions. Meeting the shorter timeline would require the Project to increase the amount or intensity of construction activity. However, the DEIR and FEIR do not increase the amount of off-road equipment or vehicles needed to expedite the construction schedule. Neither the DEIR nor the FEIR provides an explanation for reducing the building construction schedule without increasing the intensity of daily construction activities. (Sutton, at 1.) As a result, the DEIR and FEIR underestimate the daily emissions of criteria pollutants. The FEIR should be revised to analyze and mitigate air quality impacts based on an accurate estimate.

The DEIR also completely omits analysis of the Project's emissions from the architectural coating phase. The default values for total lot acreage and building area of the proposed warehouse were changed to zero without explanation. These values are used to estimate emissions of ROG. Consequently, the DEIR assumed there would be no emissions associated with the painting of over 6 million square feet of interior and exterior surface areas during construction. (*Id.*) However, the FEIR included a minor clarification:

> [B]ased on typical construction practices, the architectural coating phase of construction was assumed to begin two weeks after the commencement of the building construction phase and occur over a similar number of days. (FEIR, p. 2-243.)

The FEIR explains that these "minor text revisions clarify the inputs used in the emissions modeling and reproduces information that was available in Appendix C of the Draft EIR. The foregoing changes do not affect the conclusions presented within the Draft EIR." (*Id.*) However, this minor addition to the text does not justify changing the default totals to zero in the air modeling. These emissions represent a potential significant impact which was ignored in the DEIR and FEIR. The FEIR should be revised to include an analysis of the ROG emissions from the Project's architectural coating phase.

Additionally, the DEIR estimated that the unmitigated maximum daily emissions of ROG, NOx, and PM10 would exceed the Butte County Air Quality Management District's ("BCAQMD") significance thresholds. (DEIR, at 4.2047.) Even if Mitigation 4.2-2(a) were implemented to remove emissions from off-road equipment, the estimated emissions of ROG and NOx will still exceed the applicable BCAQMD significance thresholds. Based on Mr. Sutton's calculations, the ROG and NOx emissions are also approximately 160% and 400% higher than the emissions estimated in the DEIR. (Sutton, at 4.) The FEIR contains no updated air analysis to fix these errors or justify its ROG and NOx calculations in the DEIR. Therefore,

the FEIR is not supported by substantial evidence because it has significantly underestimated criteria air pollutants that would be generated by the Project. The FEIR should be revised to analyze and mitigate the Project's air quality impacts below a significant level.

The DEIR is not supported by substantial evidence justifying its estimation of mobile emissions of criteria air pollutants during operation of the Project. The default VMT and associated emissions from the warehouse and office land uses were reduced by roughly 19 percent. (DEIR, at 4.2-40.) However, the project-specific VMT estimates were limited to a study area boundary within Butte county, (DEIR, Appendix L), which does not account for the total VMT and associated emissions that would be generated by the project within the Sacramento Valley Air Basin. Similarly, the fleet mix used in the DEIR does not account for heavy-duty truck trips that would be generated by the proposed warehouses. (Sutton, at 4.) Adjusting the model for these emissions, Mr. Sutton's analysis provides substantial evidence that the Project's air pollution emissions and VMT increases exceed the applicable thresholds. (*Id.*, at 3-5.) The FEIR continues to rely on the calculations provided in the DEIR and its appendices. Therefore, the FEIR should be revised to analyze and mitigate the Project's air quality and VMT impacts below a significant level.

The FEIR's underestimations of the Project's ROG, NOx, and PM10 emissions render the air pollution analysis inaccurate because it is not based on substantial evidence. In addition, the Project's VMT analysis is flawed because it fails to account for the total VMT that would be generated in the Sacramento Valley Air Basin. The FEIR should be revised to analyze and mitigate these potentially significant impacts and impose sufficient mitigation requirements.

2. The FEIR failed to adequately analyze the health risk impacts resulting from the Project's construction and operational emissions and lacks substantial evidence to conclude that the Project will not result in significant impacts to human health.

Neither the DEIR nor the FEIR adequately analyzes the Project's potential impacts to human health. The Project would generate DPM emissions from the exhaust of off-road diesel equipment that could pose a health risk to nearby sensitive receptors. The California Air Resources Board has identified DPM as a toxic air contaminant (TAC) based on its potential to cause cancer and other adverse health effects. Adverse health effects associated with particulate matter can vary based on factors such as particle size, source, and chemical composition. DPM is typically composed of carbon particles and a variety of organic compounds including more than 40 known cancer-causing organic substances. (Sutton, at 5.)

The DEIR states that:

> Due to the temporary nature of construction and the relatively short duration of potential exposure to associated emissions, the potential for any one sensitive receptor in the area to be exposed to concentrations of pollutants for a substantially extended period of time would be low. In addition, as discussed above, the nearest sensitive receptors to the project site are the rnral residences located west of the

> project site, with the nearest residence located approximately 500 feet from the site. DPM is a highly dispersive gas, and concentrations of DPM decline rapidly with distance. Prevailing winds are from the south and southwest. As a result, construction-related emissions would primarily flow towards the north and northeast, away from the nearest sensitive receptors. Therefore, construction associated with the proposed project would not be expected to expose any sensitive receptors to substantial pollutant concentrations. (DEIR, at 4.2-51.)
>
> The FEIR also states that:
>
> Because DPM is highly dispersive, the fact that construction equipment would operate intermittently throughout the entire approximately 170.21-acre project site would have a large effect on the potential for project construction to result in health-related impacts through emissions of DPM. The large area of the project site would allow DPM to disperse and concentrations to decrease prior to exposure of receptors at the nearest residence located approximately 500 feet from the site. Such dispersal reduces the likelihood that the proposed project would result in health-related impacts. (FEIR, p. 2-133.)

The DEIR and FEIR's assertions contradict the Office of Environmental Health Hazard Assessment's (OEHHA) guidance for health risk assessments, which states that uncertainty in assessing short-term exposure to TACs only applies to construction activities lasting less than two months. (Sutton, at 6; Office of Environmental Health Hazard Assessment (OEHHA), AirToxics Hot Spots Program Guidance Manual for Preparation of Health Risk Assessments (February 2015).) A copy of OEHHA's guidance is attached hereto as Exhibit E. Here, the Project's construction is estimated to occur over 20 months, which is 10 times the limit for short term exposures recommended by OEHHA. The FEIR must be revised to analyze the DPM exposure risk of the Project.

Moreover, OEHHA states that there is valid scientific concern regarding the health effects on children exposed to airborne carcinogens such as DPM. OEHHA estimates that the cancer risk for a child can be up to 48 times higher than an adult exposed to the same concentration of DPM. (*Id.*; Sutton, at 6.) Given the long-term nature of constrnction and the underestimation of air pollutants during Project construction, the cancer risks to nearby sensitive receptors should be evaluated and added to the other cancer risks associated with Project operation.

Furthermore, DEIR's analysis of operational health risks to nearby sensitive receptors lacks substantial evidence to conclude that there is no significant impact. (Sutton, at 6.) Even the FEIR, states that "DPM exposure that would occur during operation of the proposed project, and the subsequent cancer risk, is anticipated to be greater than the DPM exposure and associated cancer risk that would occur during project constrnction activities," but still concludes that the operational health risks to nearby sensitive receptors would result in no significant impact. (FEIR, p. 2-134.) The estimated cancer risk to the most exposed receptor would be 14.5 in one million, which exceeds the BCAQMD threshold of 10 in one million. Furthermore, the sensitive

receptor measurements are taken from the center of the Project site, rather than the area of the Project site that will be a source of emissions that is nearest to sensitive receptors. It is unlikely that Project emissions would be confined to this area, therefore the cancer risk is likely even higher than reported. This represents a significant impact which needs to be addressed in a revised DEIR.

The FEIR fails to analyze the Project's impacts to human health through construction and operational health risk assessments, as well as omitting analysis of health impacts from DPM emissions. The FEIR should be revised to conduct this analysis and mitigate the Project's impacts to human health.

3. The FEIR fails to mitigate the Project's air quality impacts below a significant level.

As demonstrated *supra*, the DEIR and FEIR fail to adequately analyze the Project's significant air quality impacts and Mr. Sutton has presented substantial evidence that the Project will result in significant air quality impacts. The FEIR states:

> The Draft EIR determined that with implementation of Mitigation Measures 4.2-1(a) and 4.2-1(b), impacts related to construction emissions of criteria pollutants would be less than significant. Thus, additional mitigation measures are not required to be implemented to further reduce construction-related ROG and NOX emissions beyond what is presented in the Draft EIR. (FEIR, 2-136.)

The FEIR's mitigation measures do not reduce the Project's air quality impacts below a significant level. The DEIR states that the maximum daily unmitigated emissions of NOx during project construction would exceed the BCAQMD's significance threshold. The DEIR and FEIR claim that implementing Mitigation Measures 4.2-1(a)-(b) will reduce NOx emissions below the significance threshold. However, Mitigation Measure 4.2-1(a) does not support this determination.

Mitigation Measure 4.2-1(a) requires the Project to use "Tier 3 or Tier 4 off-road construction equipment, or hybrid, electric, or alternatively fueled equipment (or any combination of the above), and/or all on-road heavy-duty haul trucks be model year 2010 or newer, sufficient to achieve a fleet-wide average reduction in construction-related NOx emissions to below the applicable BCAQMD thresholds of significance (137 lbs./day and 4.5 tons/yr)." However, the use of off-road equipment with Tier 3 engines has not been evaluated in the DEIR or FEIR. In addition, Mitigation Measure 4.2-1(a) does not establish a performance standard for ensuring that the measure can be enforced. Mr. Sutton suggests a variety of performance standards which would allow the City to inspect the Project during construction to ensure the mitigation measure is being completed. (Sutton, at 3.) This measure should be revised to require Tier 4 construction equipment and ensure that NOx emissions are reduced to below a significant level.

Furthermore, Mitigation Measure 4.2-3 restricts the Project to allow for only two of the

warehouses to be occupied by tenants with fleets primarily comprised of diesel-powered heavy-duty trucks, it also includes the following exception:

> In the event that there is a disruption in the manufacturing of zero emission heavy-duty trucks or that sufficient vehicles are not commercially available, implementation of this mitigation measure would be rendered infeasible, and further pursuit of implementation shall not be required.

Although the DEIR and FEIR acknowledge that the Project's operational contribution to cumulative health risks would remain significant and unavoidable even with implementation of Mitigation Measure 4.2-3, the measure itself remains highly disingenuous and speculative. (See, FEIR, p. 2-135.)

Mitigation Measure 4.2-3 does not address DPM emissions for trucks not owned or operated by the warehouse tenants that may deliver goods to or from the Project site. Nor does it stipulate how often the warehouse tenants need to submit documentation of their heavy-duty truck fleets to the City for review. It is unclear whether there are any enforcement measures the City can apply to address potential noncompliance with Mitigation Measure 4.2-3. Nor is it clear whether City staff has the professional expertise to be able to effectively determine whether cumulative cancer risk from operation of all the warehouses would exceed BCAQMD's threshold based on a health risk assessment. Finally, the DEIR and FEIR do not evaluate health risks to nearby sensitive receptors exposed to DPM emissions from emergency diesel generators on the Project site. (Sutton, at 7-8.) Therefore, Mitigation Measure 4.2-3 is ineffective and does not reduce the Project's DPM emissions and associated health risks to the maximum extent feasible. The FEIR should be revised to evaluate more effective mitigation measures.

The FEIR fails to implement all feasible mitigation measures, and several of the mitigation measures in the FEIR are largely toothless. Therefore, the FEIR should be revised to include all feasible mitigation measures, based on a more thorough analysis of the Project's air quality impacts.

4. The FEIR fails to adequately disclose, analyze and/or mitigate the Project's potentially significant impacts on energy resources.

Contrary to the FEIR, the construction and operation of the Project could potentially cause wasteful, inefficient, and unnecessary consumption of energy.

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

Noting compliance with the California Building Energy Efficiency Standards (Cal. Code Regs., tit. 24, part 6 (Title 24)) and CALGreen Code does not constitute an adequate analysis of energy. (*Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 264-65.) Similarly, the Court in *City of Woodland* held as unlawful an energy analysis that relied on compliance with Title 24, that failed to assess transportation energy impacts, and that failed to address renewable energy impacts. (*City of Woodland*, 225 Cal.App.4th at pp. 209-13.) The FEIR states:

> The Draft EIR considered the construction energy use, building energy demand, and transportation energy demand associated with the proposed project, as well as consistency with the applicable State and local plans, including the CARB In-Use Off-Road Diesel Vehicle Regulation, the CARB Diesel Off-road Online Reporting System, applicable BCAQMD rules and regulations, the CALGreen Code, and the Building Energy Efficiency Standards. (FEIR, p. 2-140.)

As such, the FEIR's reliance on Title 24 and CALGreen compliance and other State and local plans does not satisfy the requirements for an adequate discussion of the Project's energy impacts.

The DEIR and FEIR summarily conclude that the Project would not result in significant impacts due to the inefficient, wasteful, and unnecessary consumption of energy. There is no discussion of the Project's cost effectiveness in terms of energy requirements.. The greenhouse gas (GHG) discussion in the DEIR fails to address GHG emissions resulting from energy production and energy savings measures, as well as energy conservation. As such, the FEIR conclusions are unsupported by the necessary discussions of the Project's energy impacts under CEQA.

Under *League to Save Lake Tahoe*, the agency has to implement all feasible energy mitigation measures unless it has substantial evidence to show that the proposed measures are infeasible. (*Save Lake Tahoe*, 75 Cal.App.5th at 166-168; see also, *id.*, pp. 159-163.) An example of a feasible mitigation measure would be the installation of solar panels on the Project that produce sufficient energy to cover the Project's and its future tenants' power needs. Because such equipment is technically feasible and likely cost efficient over time, the FEIR must implement it as an energy efficient mitigation measure, or at minimum, provide substantial evidence that implementing such a mitigation measure is unfeasible, which the FEIR fails to do. Instead, the FEIR states that solar is infeasible because "the proposed buildings are speculative, and future tenants are unknown at this time." (FEIR, p. 2-140.) This does not constitute substantial evidence. As such, the FEIR's conclusion is unsupported by the necessary discussions of the Project's energy impacts under CEQA.

In conclusion, because the FEIR failed to adequately analyze and mitigate the Project's potentially wasteful, inefficient, and unnecessary consumption of energy, an RDEIR should be prepared to address the Project's potential significant energy impacts, and to mitigate those impacts accordingly.

III. CONCLUSION

LIUNA requests that the Planning Commission refrain from approving of the FEIR and Project to allow staff additional time to address the concerns raised herein in a RDEIR. Please include this letter in the record of proceedings for this project. Thank you for your attention to these comments.

Sincerely,

Victoria Yundt
Lozeau | Drury LLP