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October 30, 2023

Via Email and Overnight Mail

Town of Apple Valley  
Attn: Daniel Alcayaga, AICP, Planning Manager  
Development Services Department, Planning Division  
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Email: [dalcayaga@applevalley.org](mailto:dalcayaga@applevalley.org); [planning@applevalley.org](mailto:planning@applevalley.org)

Re: Comments on the Draft Environmental Impact Report for the 1M Warehouse Project (SCH No. 2023020285)

Dear Mr. Alcayaga:

We are writing on behalf of **Californians Allied for a Responsible Economy ("CARE CA")** to provide comments on the Draft Environmental Impact Report ("DEIR") for the 1M Warehouse Project (SCH No. 2023020285) ("Project")<sup>1</sup> proposed by Uncommon Developers ("Applicant") and prepared by the Town of Apple Valley ("Town") pursuant to the California Environmental Quality Act ("CEQA").<sup>2</sup>

The Project proposes the construction and operation of a 1,080,125-square-foot industrial/warehouse building on a 67.3-acre undeveloped site located at the northeast corner of Central Road and Lafayette Street in the Town of Apple Valley, California.<sup>3</sup> The approximately 67.3-acre Project site is located in the northern part of the Town, which is within the Victor Valley region of San Bernardino County. The Project site is located south of Johnson Road, west of Sycamore Lane, north of Lafayette Street, and east of Central Road (Assessor's Parcel Numbers 0463-241-02

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<sup>1</sup> Town of Apple Valley, Draft Environmental Impact Report, 1M Warehouse Project (SCH No. 2023020285) (hereinafter "DEIR") (September 15, 2023) available at <https://ceqanet.opr.ca.gov/2023020285/2>.

<sup>2</sup> Pub. Resources Code (hereinafter "PRC") §§ 21000 et seq., 14 Cal. Code Regs (hereinafter "CEQA Guidelines") §§ 15000 et seq.

<sup>3</sup> DEIR, p. 1-1. 6756-006j

and 0463-241-03).<sup>4</sup> The Project also includes an approximately 1.75-mile off-site utilities alignment within developed roadways for proposed water and sewer lines. Regional access to the Project site is provided via Interstate 15, located approximately 4.6 miles west of the Project site.<sup>5</sup> Construction of the Project is anticipated to take 22 months, commencing in December 2023 and concluding in October 2025.<sup>6</sup> The Project requires approval of applications for Site Plan Review and a Lot Line Adjustment as well as certification of the EIR.<sup>7</sup>

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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 CEQA. The DEIR fails to adequately analyze many of the Project’s potentially significant environmental impacts and fails to propose enforceable mitigation measures that can reduce those impacts to a less than significant level, as required by CEQA. The Town therefore lacks substantial evidence to support the DEIR’s conclusions that Project impacts would be mitigated to the greatest extent feasible.

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As explained in these comments, there is substantial evidence that the Project will result in significant unmitigated impacts relating to air quality, health risk, greenhouse gas (“GHG”) emissions, noise, and transportation. The Project also conflicts with applicable land use plans and policies, resulting in land use inconsistencies as well as significant impacts under CEQA. The Town may not approve the Project until the Town revises and recirculates the Project’s DEIR to adequately analyze the Project’s significant direct, indirect, and cumulative impacts, and incorporates all feasible mitigation measures to avoid or minimize these impacts to the greatest extent feasible.

We reviewed the DEIR and its technical appendices with the assistance of traffic and transportation expert Norman Marshall of Smart Mobility<sup>8</sup>, health risk, air quality, GHG emissions and hazardous materials expert James Clark Ph.D.<sup>9</sup>,

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<sup>4</sup> DEIR, p. 1-1.

<sup>5</sup> DEIR, p. 1-1.

<sup>6</sup> DEIR, pp. 1-1 – 1-2.

<sup>7</sup> DEIR, p. 1-2.

<sup>8</sup> Mr. Marshall’s technical comments (hereinafter “Marshall”) and curricula vitae are attached hereto as Exhibit A.

<sup>9</sup> Dr. Clark’s technical comments (hereinafter “Clark”) and curricula vitae are attached hereto as Exhibit B.

and noise expert Luke Watry of Wilson Ihrig.<sup>10</sup> We reserve the right to supplement these comments at a later date, and at any later proceedings related to this Project.<sup>11</sup>

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## 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, Southern California Pipe Trades DC 16, along with their members, their families, and other individuals who live and work in the Town of 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 includes individuals who 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.

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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. Continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

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<sup>10</sup> Mr. Watry's technical comments (hereinafter "Watry Comments") and curricula vitae are attached hereto as Exhibit C.

<sup>11</sup> Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield ("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.<sup>12</sup> “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.”<sup>13</sup>

CEQA has two primary purposes. First, CEQA is designed to inform decisionmakers and the public about the potential significant environmental effects of a project.<sup>14</sup> “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.’”<sup>15</sup> 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.”<sup>16</sup> 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.”<sup>17</sup>

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.<sup>18</sup> 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.”<sup>19</sup> If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has

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<sup>12</sup> PRC § 21100.

<sup>13</sup> *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 390 (internal quotations omitted).

<sup>14</sup> 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.”).

<sup>15</sup> *Citizens of Goleta Valley*, 52 Cal.3d at p. 564 (quoting *Laurel Heights I*, 47 Cal.3d at 392).

<sup>16</sup> *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).

<sup>17</sup> CEQA Guidelines § 15003(b).

<sup>18</sup> 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.

<sup>19</sup> CEQA Guidelines § 15002(a)(2).

“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.”<sup>20</sup>

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.’”<sup>21</sup> 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.”<sup>22</sup> “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.’”<sup>23</sup>

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### III. THE DEIR FAILS TO ADEQUATELY ESTABLISH THE EXISTING BASELINE

The DEIR fails to accurately disclose the baseline environmental conditions related to the Project’s health risk impacts. As a result, the DEIR lacks the necessary information against which to measure the Project’s environmental impacts with regard to impacts on sensitive receptors from construction.

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The existing environmental setting is the starting point from which the lead agency must measure whether a proposed project may cause a significant environmental impact.<sup>24</sup> CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the

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<sup>20</sup> 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.

<sup>21</sup> *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (emphasis added) (quoting *Laurel Heights I*, 47 Cal.3d at 391, 409, fn. 12).

<sup>22</sup> *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 decisionmaking 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).

<sup>23</sup> *Sierra Club*, 6 Cal.5th at p. 516 (quoting *Laurel Heights I*, 47 Cal.3d at 405).

<sup>24</sup> See, e.g., *Communities for a Better Env’t v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316.

notice of preparation is published, from both a local and regional perspective.<sup>25</sup> Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The courts have clearly stated that, “[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”<sup>26</sup>

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**A. The DEIR Fails to Adequately Establish the Existing Baseline with Respect to Valley Fever**

The DEIR fails to include accurate information regarding the known presence/issue of *Coccidioides Immitis* (“Valley Fever Cocci”)<sup>27</sup> in the vicinity of the Project site, thereby failing to provide context on the environmental setting of the Project. This results in the failure to analyze the potential impacts of Valley Fever exposure on Project construction workers and sensitive receptors and a corresponding failure to mitigate its potentially significant impacts on human health.

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Valley Fever is a disease that can spread when persons are exposed to *Coccidioides immitis* (“Cocci”) fungus spores during ground disturbance.<sup>28</sup> Impacts to human health from Valley Fever can be severe, cause long lasting health problems, and can even result in death.<sup>29</sup> The fungus lives in the top 2 to 12 inches of soil, and when disturbed by activities such as digging, construction activities (e.g. site preparation and grading), dust storms, or during earthquakes, the fungal spores become airborne.<sup>30</sup> The Project will disturb up to 45 acres of soil during the

<sup>25</sup> CEQA Guidelines §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 (“*Riverwatch*”).

<sup>26</sup> *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

<sup>27</sup> San Bernardino County, Public Health, Environmental Health Services, *Coccidioidomycosis* (February 2017) available at <http://www.sbcounty.gov/uploads/dph/dehs/Depts/EnvironmentalHealth/EHSDocuments/Coccidioidomycosis.pdf>

<sup>28</sup> Clark Comments, p. 5.

<sup>29</sup> California Department of Public Health (“CDPH”), Valley Fever Basics (May 7, 2020), available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/ValleyFeverBasics.aspx>.

<sup>30</sup> Clark Comments, p. 5.

site preparation phase, 135 acres of soil during the grading phase, and 24.7 acres during the off-site pipeline installation phase which may lead to the release of fungus spores resulting in impacts to Project workers and nearby sensitive receptors.<sup>31</sup>

The DEIR cites a 2017 report regarding Valley Fever rates in San Bernardino County, and misleadingly states that “the *latest* report from the California Department of Public Health (“CDPH”) listed San Bernardino County as having 1.8 cases of Valley Fever per 100,000 people.”<sup>32</sup> This figure is outdated and misleading because the 2017 report is not the latest report available from CDPH.

In fact, according to the CDPH, the Valley Fever case rate in San Bernardino County has steadily increased from a case rate of 1.4 cases per 100,000 residents in 2015 to 10.7 per 100,000 residents in 2020, and 11.4 per 100,000 residents in 2021.<sup>33</sup> In San Bernardino County, there were 233 and 250 cases in 2020 and 2021 respectively, and the County had the ninth highest number of cases among California’s 58 counties in 2020 and the eighth highest in 2021.<sup>34</sup> On August 1, 2023, CDPH published a press release (“CDPH Notice”) notifying the public of a potential increased risk for Valley Fever in the California due to high rates of precipitation over the 2022-2023 winter season.<sup>35</sup> The CDPH Notice states that “[c]ases of Valley fever in California have historically been lowest during years of drought and highest during years immediately after a drought. The wet winter season California experienced could lead to more Valley fever cases this summer and fall.”<sup>36</sup> Additionally, according to the National Oceanic and Atmospheric Administration (“NOAA”) current predictions for the 2023-2024 winter season forecast higher than average precipitation for Southern California due to the presence of El Niño.<sup>37</sup> According to the DEIR, site preparation, grading and

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<sup>31</sup> DEIR, Appendix B, p. 166, see also DEIR, p. 4.3-1.

<sup>32</sup> DEIR, p. 4.2-8. (Emphasis provided)

<sup>33</sup> California Department of Public Health, Epidemiologic Summary of Valley Fever (Coccidioidomycosis) in California, 2020-2021 (hereinafter “Valley Fever Report”) (December 2022) p. 5. Available at <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/CocciEpiSummary2020-2021.pdf>

<sup>34</sup> Valley Fever Summary, p. 5.

<sup>35</sup> California Department of Public Health, Potential Increased Risk for Valley Fever Expected (hereinafter “CDPH Notice”) (August 1, 2023) available at <https://www.cdph.ca.gov/Programs/OPA/Pages/NR23-023.aspx>

<sup>36</sup> CDPH Notice

<sup>37</sup> National Oceanic and Atmospheric Administration, June 2023 ENSO update: El Niño is here (June 8, 2023) available at <https://www.climate.gov/news-features/blogs/enso/june-2023-enso-update-el-nino-here>.

pipeline installation at the Project site are anticipated to take place between December 2023 and August 2024 and will coincide with the risk period identified in the CDPH Notice.<sup>38</sup>

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Despite the known presence of Valley Fever in the Project’s vicinity and the potential impacts posed by exposure to the fungus spores, the DEIR fails to provide accurate information regarding the prevalence of *Cocci* fungus spores in the Project’s vicinity, fails to discuss available construction worker Valley Fever training,<sup>39</sup> and fails to include any Valley Fever-specific mitigation in the Project’s Mitigation Monitoring and Reporting Program (“MMRP”). The lack of accurate information precludes meaningful analysis and mitigation of the potential health impacts the Project will cause to onsite construction workers and other individuals in close proximity to the Project site from disturbing soils which may be contaminated with *Cocci* spores site during Project construction.

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The Town must prepare and recirculate a revised DEIR which includes a discussion of the potential for the presence of *Cocci* fungus spores at the Project site in order to accurately analyze and mitigate the Project’s potentially significant health risk impacts from Valley Fever.

**B. The DEIR’s Noise Analysis Contains Inadequate Baseline Data.**

The CEQA Guidelines require an EIR to consider “whether a project would result in... a substantial permanent increase in ambient noise levels in the vicinity of the project” or a “temporary or periodic increase in ambient noise levels in the vicinity of the project . . .”<sup>40</sup> The DEIR’s Noise analysis fails to contain the baseline ambient noise data necessary to assess the significance of the Project’s estimated 22-month construction and permanent operational noise impacts on sensitive receptors in the vicinity of the Project.

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First, the DEIR’s noise measurements are inadequate to establish an ambient noise baseline on which to measure the potential operational and construction noise impacts of the Project. The DEIR relies on a total of five, 10-

<sup>38</sup> DEIR, p. 4.2-24.

<sup>39</sup> California Labor Code § 6709 mandates that employers at worksites in counties where Valley Fever is highly endemic (i.e. where the annual incidence rate is greater than 20 cases per 100,000 persons per year) provide effective awareness training on Valley Fever to all employees. Labor Code § 6709(a-d). Although San Bernardino County Valley Fever incidents have not yet reached 20 per 100,000, they are steadily rising, indicating that the Valley Fever worker awareness training described in Section 6709 should be used at the Project site.

<sup>40</sup> CEQA Guidelines, Appendix G, Sec. XII(c)-(d).

minute measurements taken on September 27, 2022, between 3:21PM and 5:27PM.<sup>41</sup> No long-term measurement were taken. Mr. Watry explains that industry practices call for measurement of ambient noise conditions over a period of several days in order to provide substantial evidence of existing noise levels, because a noise environment that is dominated by transport uses, as the Project vicinity is, can change hour to hour and day to day.<sup>42</sup> Additionally, Mr. Watry states that the short term noise measurements should have been at least 15 minutes long and taken concurrently with the traffic counts in order to validate the model that the DEIR relies on.<sup>43</sup>

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Second, the noise model does not comply with the Federal Transit Authority’s 2018 Transit Noise and Vibration Impact Assessment Manual (“FTA Manual”) guidance which recommends a minimum of three one-hour Leq noise measurements, including during peak-hour roadway traffic, midday, and nighttime recordings, to estimate the Ldn/CNEL.<sup>44</sup>

Third, the DEIR’s noise analysis reports existing CNEL without specifying how the levels were calculated or their relationship to the direct Leq measurements in the DEIR.<sup>45</sup> Mr. Watry explains that the existing Ldn/CNEL cannot be determined based on the noise measurements collected for the DEIR.<sup>46</sup> Therefore, any analysis of increases to Ldn/CNEL from Project operation cannot be relied upon by the Town to determine the Project’s noise impacts.<sup>47</sup>

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The DEIR lacks substantial evidence to justify its reliance on a truncated ambient noise methodology which relies on incomplete noise measurements and does not inform the City or the public of the baseline against which noise levels will increase during Project construction and operation. The DEIR should be revised to include an updated baseline analysis that properly validates the model including 15-minute noise and traffic measurements during periods where truck volumes are comparable to the actual peak noise hour conditions, and a minimum of three one-hour Leq noise measurements, including during peak-hour roadway traffic, midday, and nighttime recordings, to estimate the Ldn/CNEL. The results of the revised noise calculations should be included in a recirculated DEIR.

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<sup>41</sup> DEIR, Appendix I, pp. 17-26.

<sup>42</sup> Watry Comments, p. 2.

<sup>43</sup> Watry Comments, p. 2.

<sup>44</sup> Watry Comments, p. 2.

<sup>45</sup> Watry Comments, p. 2.

<sup>46</sup> Watry Comments, p. 2.

<sup>47</sup> Watry Comments, p. 2.

#### 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.<sup>48</sup> An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.<sup>49</sup>

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.<sup>50</sup> 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.<sup>51</sup> 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.'<sup>52</sup>

Additionally, CEQA requires agencies to commit to all feasible mitigation measures to reduce significant environmental impacts.<sup>53</sup> 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.<sup>54</sup> Yet, as explained below, the DEIR falls far short of this mandate by adopting mitigation measures that are vague, ineffective, and unenforceable and by failing to commit to other feasible and effective mitigation strategies to address the significant transportation, air quality, GHG emissions and noise impacts of the Project.

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<sup>48</sup> CEQA Guidelines § 15064(b).

<sup>49</sup> *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

<sup>50</sup> *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

<sup>51</sup> *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

<sup>52</sup> *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

<sup>53</sup> CEQA Guidelines § 15002(a)(2).

<sup>54</sup> 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.

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.’<sup>55</sup>

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**A. The DEIR Fails to Adequately Disclose, Analyze and Mitigate the Project’s Significant Transportation Impacts**

The DEIR concludes that the transportation impacts of the Project will be significant and unavoidable. The transportation impacts analysis is flawed in numerous ways, most notably with respect to the Project’s trip generation and trip length and the resulting vehicle miles traveled (“VMT”) impacts. In addition, the DEIR’s incorrect and unsupported conclusions with respect to VMT and trip generation undermine the DEIR’s air quality and GHG analyses, which rely heavily on Project VMT in their respective analyses. As a result of these errors, the DEIR also fails to mitigate the Project’s significant VMT impacts to the greatest extent feasible, as required by CEQA.<sup>56</sup>

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**1. The DEIR Incorrectly Calculates the Project’s Operational Trip Generation**

The DEIR’s trip generation analysis is not supported by substantial evidence because it relies on unsupported assumptions regarding Project related truck trip generation.

The DEIR’s transportation impacts analysis relies on the trip generation rates available in the Institute of Transportation Engineers, Trip Generation Manual, 11<sup>th</sup> Edition (“ITE Manual”) for Category 155 – High-Cube Fulfillment Center Warehouse.<sup>57</sup> Based on the ITE Manual Category 155, the DEIR estimates that the Project will generate 1.81 vehicle trips per 1,000 square feet of building area, or 573 daily trips, with the AM and PM peak hours generating 162 and 173 trips respectively.<sup>58</sup>

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<sup>55</sup> *Berkeley Jets*, 91 Cal.App.4th at 1355.

<sup>56</sup> *Covington v Great Basin Unif. Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 879-883.

<sup>57</sup> DEIR, Appendix J, p. 23.

<sup>58</sup> DEIR, Appendix J, p. 23.

The DEIR lacks substantial evidence to support the estimated trip generation because the DEIR unreasonably and without justification relies on an unreasonably low trip generation rate in the ITE Manual for high-cube warehouse uses. Mr. Marshall explains that the ITE Manual provides a range of trip generation rates that are applicable to the Project.<sup>59</sup> The ITE Manual provides five separate categories that are applicable to high-cube warehouse, each with different trip generation rates per 1,000 square feet as follows<sup>60</sup>:

- 154 High-Cube Transload and Short-Term Storage Warehouse – 1.4 trips
- 155 High-Cube Fulfillment Center Warehouse
  - Non-Sort – 1.81 trips
  - Sort – 6.44 trips
- 156 High-Cube Parcel Hub Warehouse – 4.63 trips
- 157 High-Cube Cold Storage Warehouse – 2.12 trips

As Mr. Marshall explains, the DEIR’s project description is so general that the Project could fall within any of these categories. The DEIR states that “[a] tenant for the proposed industrial warehouse building has not yet been identified, but the Project would operate as an unrefrigerated warehouse and/or distribution facility.”<sup>61</sup> Based on the fact that the future tenants are not known, the DEIR lacks support for its assumption that the Project will generate the 1.81 trips provided under Category 155, which is one of the least trip intensive use of all ITE warehouse categories for high-cube warehouses.

Moreover, a 2019 study of warehouse trip generation rates completed for the Western Riverside Council of Governments (“WRCOG Study”)<sup>62</sup> analyzed actual trip generation rates from 16 warehouses in the Inland Empire region and found that the ITE Categories underestimate trip generation for fulfillment centers, finding an average trip generation for fulfillment centers of 2.2 trips per 1,000 square feet.<sup>63</sup> The WRCOG Study also details that the parcel hubs analyzed in the region generated as many as 14 trips per 1,000 square feet.<sup>64</sup>



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<sup>59</sup> Marshall, p. 6.

<sup>60</sup> Marshall, p. 3.

<sup>61</sup> DEIR, p. 1-2.

<sup>62</sup> Western Riverside Council of Governments Technical Advisory Committee, Staff Report, High-Cube Warehouse Trip Generation Study and Proposed TUMF Calculation Handbook Update (February 21, 2019) (hereinafter “WRCOG Study”) PDF, p. 53. *available at* <https://wrcog.us/AgendaCenter/ViewFile/Agenda/02212019-292>

<sup>63</sup> *Id.* PDF p. 43.

<sup>64</sup> *Id.* PDF p. 50.

As noted above, the future tenants of the Project are unknown, and based on the variability of trip generation rates for high-cube warehouses reported in the ITE Manual, and the results of the WRCOG Study, it is evident that the DEIR underestimated the Project's operational trips. If the Town does not know what tenants will occupy the Project, nor what the full range of uses of the Project will be, the Town must analyze the most intensive reasonably foreseeable uses of the Project site.

I-12  
Cont.

To reasonably analyze the full scope of the Project's impacts related to future tenant uses, analysis of the Projects trip generation should therefore use the most conservative estimate from the WRCOG Study and present the data in a revised and recirculated DEIR for public review.

**A. The DEIR Underestimates Project VMT and Mobile Source GHGs**

Transportation expert Norm Marshall explains that the DEIR potentially underestimates average trip lengths for both trucks and passenger vehicles.<sup>65</sup> Longer trip lengths results in greater impacts (including air quality, GHGs, and VMT). As a result, the analyses that rely on these trip lengths lack the support of substantial evidence. The DEIR's mobile source emissions analysis relies on the following reasoning to estimate the Project's trip lengths "truck trip lengths were based on the SCAQMD recommendation of 40 miles and assumed to be 100% of primary trips."<sup>66</sup> However, SCAQMD does not make a recommendation that a 40-mile trip length be assumed for warehouse project EIRs.<sup>67</sup> The DEIR's reference for the 40-mile figure is derived from SCAQMD's *Second Draft Staff Report Proposed Rule 2305 – Warehouse Indirect Source Rule – Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program And Proposed Rule 316 -Fees for Rule 2305*<sup>68</sup> which clarifies that the 40-mile figure was the average truck trip length assumed by SCAQMD to be used in the rulemaking process for the proposed Rule 2305.<sup>69</sup> The document provides no indication that the 40-mile estimate was

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<sup>65</sup> Marshall Comments, pp. 7-8.

<sup>66</sup> DEIR, p. 4.2-27 (

<sup>67</sup> Marshall Comments, p. 7.

<sup>68</sup> SCAQMD, *Second Draft Staff Report Proposed Rule 2305 – Warehouse Indirect Source Rule – Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program And Proposed Rule 316 -Fees for Rule 2305* (April 2021) available at [www.aqmd.gov/docs/default-source/planning/fbmsm-docs/pr-2305\\_sr\\_2nd-draft\\_4-7-21\\_clean.pdf](http://www.aqmd.gov/docs/default-source/planning/fbmsm-docs/pr-2305_sr_2nd-draft_4-7-21_clean.pdf)

<sup>69</sup> Id. p. 49

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intended to inform trip length estimates for any other purpose, and no evidence that the estimate applies to actual truck trip lengths for this Project. Additionally, the Attorney General’s (“AG”) guidance document for warehouse projects states:

CEQA requires full public disclosure of a project’s anticipated truck trips, which entails calculating truck trip length based on likely truck trip destinations, rather than the distance from the facility to the edge of the air basin, local jurisdiction, or other truncated endpoint. All air pollution associated with the project must be considered, regardless of where those impacts occur.<sup>70</sup>

In contrast to the approach recommended by the AG, the DEIR’s estimated trip distances did not account for the Project’s likely trip destinations. Mr. Marshall explains that, while it may be too early to determine specific truck trip origins and destinations, it is notable that important major freight origins and destinations are considerably further away than the 40-mile trip length assumed in the DEIR.<sup>71</sup> These include the Ports of Los Angeles and Long Beach – each approximately 110 miles away. The DEIR’s analysis thus likely underestimates trip distances resulting in underestimation of Project related air quality, transportation and GHG emissions impacts.

**B. The DEIR Improperly Defers VMT Mitigation and Fails to Identify All Feasible Mitigation Measures**

The DEIR concludes that the Project would result in a significant and unavoidable VMT impact despite mitigation included in the DEIR. Specifically, the DEIR estimates that the Project would exceed the VMT screening thresholds by a wide margin: 20.8% in the baseline year and 80.4% in the horizon year.<sup>72</sup> To mitigate this significant impact, the DEIR identifies the following mitigation measure to be implemented:

MM-AQ-1: Transportation Demand Management Plan. For occupants with more than 250 employees, a Transportation Demand management Program to reduce employee commute vehicle emissions shall be established, subject to review and approval by the Town of Apple Valley. The Transportation Demand Management Plan shall apply to Project tenants through tenant leases. The

<sup>70</sup> Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act (September 2022) pg. 7. available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/environment/warehouse-best-practices.pdf>

<sup>71</sup> Marshall Comments, p. 7.

<sup>72</sup> DEIR, p. 4.12-21.

I-13  
Cont.

I-14

TDM plan shall discourage single-occupancy vehicle trips and encourage alternative modes of transportation such as carpooling, taking transit, walking, and biking. Examples of trip reduction measures may include, but are not limited to:

- Transit passes
- Car-sharing programs
- Telecommuting and alternative work schedules
- Ride sharing programs<sup>73</sup>

This measure fails to meet CEQA’s standards for mitigation. CEQA provides that 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.”<sup>74</sup> Further, EIRs must mitigate significant impacts through measures that are “fully enforceable through permit conditions, agreements, or other legally binding instruments.”<sup>75</sup> Deferring formulation of mitigation measures is generally impermissible.<sup>76</sup> If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.<sup>77</sup> Mitigation that does no more than allow approval by a lead agency without setting enforceable standards is inadequate.<sup>78</sup>

I-14  
Cont.

Here, the measure improperly defers identification of specific VMT-reducing mitigation measures to a future date by allowing the future creation of a Transportation Demand Management (“TDM”) Program outside of the CEQA process and with no specific requirements. MM-AQ-1 does not commit to any particular measures to reduce VMT. Nor does the measure articulate specific

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<sup>73</sup> DEIR, p. 4.2-44.

<sup>74</sup> 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.

<sup>75</sup> CEQA Guidelines, § 15126.4, subd. (a)(2).

<sup>76</sup> *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code, § 21061.

<sup>77</sup> *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical, supra*, 29 Cal.App.4th at pg. 1604, fn. 5.

<sup>78</sup> *Endangered Habitats League, Inc. v. County of Orange*, (2005) 131 Cal.App.4th 777, 794. 6756-006j

performance criteria to ensure that impacts would be mitigated to the greatest extent feasible. Simply requiring the TDM Plan to be prepared and approved by the Town is not enough.<sup>79</sup>

As a result of this improper deferral of mitigation, the DEIR also fails to comply with CEQA's requirement to reduce all significant effects on the environment to the greatest extent feasible. Additional, feasible VMT-reducing measures must be adopted until the expected 20.8% excess VMT is mitigated.

Mr. Marshall notes that, while MM-AQ-1 lists potential measures to reduce VMT, the measures are generic and are largely not applicable to the Project and that additional feasible mitigation measures are available in this case, including specific measures identified by the California Air Pollution Control Officers Association ("CAPCOA") in its *Handbook for Analyzing Greenhouse Gas Emission Reductions, Assessing Climate Vulnerabilities, and Advancing Health and Equity: Designed for Local Governments, Communities, and Project Developers* ("CAPCOA Handbook").<sup>80</sup> The Handbook includes data regarding GHG emissions and proven effective methods that a local agency can employ to reduce GHG impacts, including reduction in GHG impacts from VMT.<sup>81</sup>

The Handbook states that the VMT reduction (and therefore, GHG emissions reduction) could be as great as 45 percent with the implementation of additional measures which include:

- T-7 Implement Commute Trip Reduction Marketing
- T-8 Provide Ridersharing Program
- T-9 Implement Subsidized or Discounted Transit Program
- T-10 Provide End-of Trip Bike Facilities
- T-11 Provide Employer-Sponsored Vanpool
- T-12 Price Workplace Parking
- T-13 Implement Employee Parking Cash-Out<sup>82</sup>

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<sup>79</sup> *Id.* ("mitigation measure[s] [that do] no more than require a report be prepared and followed" do not provide adequate information for informed decision making under CEQA."); CEQA Guidelines § 15126.4(a)(1)(B).

<sup>80</sup> California Air Pollution Control Officers Association ("CAPCOA") Handbook for Analyzing Greenhouse Gas Emission Reductions, Assessing Climate Vulnerabilities, and Advancing Health and Equity (hereinafter "CAPCOA Handbook") (December 2021) available at [https://www.airquality.org/ClimateChange/Documents/Final%20Handbook\\_AB434.pdf](https://www.airquality.org/ClimateChange/Documents/Final%20Handbook_AB434.pdf)

<sup>81</sup> CAPCOA Handbook, p. 35.

<sup>82</sup> CAPCOA Handbook, pp. 89-115.

Many of the individual measures included in the Handbook offer high potential reductions *even if only one measure is used*.<sup>83</sup> For example, the maximum reduction produced by “T-11 Provide Employer-Sponsored Vanpool” is 20.4 percent.<sup>84</sup>

The DEIR fails to include any analysis of the feasibility of the above methods, or any other methods, to reduce the Project’s significant impacts and lacks substantial evidence to conclude that the Town has eliminated or substantially lessened all significant effects on the environment to the greatest extent feasible. Therefore, the DEIR violates CEQA, and the Town cannot conclude that the Project’s VMT impacts are significant and unavoidable.<sup>85</sup> The Town must evaluate the feasibility and effectiveness of additional mitigation measures in a revised and recirculated DEIR for the Project.

I-14  
Cont.

**B. The DEIR Fails to Disclose, Analyze or Mitigate the Project’s Significant Air Quality and Health Risk Impacts**

The DEIR’s air quality analysis concludes, with respect to air quality and health risks to sensitive receptors, that the Project’s construction and operation will cause a significant unavoidable impact.<sup>86</sup> However, the Town failed to account for the severity of the impacts and failed to consider feasible mitigation measures to reduce the impacts.

I-15

**1. The DEIR Fails to Analyze and Mitigate Potentially Significant Valley Fever Impacts from Project Construction**

As detailed above, the DEIR incorrectly characterizes the potential presence of *Cocci* fungus spores at the Project site and fails to discuss or require any Valley Fever employee training measures to protect Project construction workers from Valley Fever exposure. As a result, the DEIR fails to analyze the Project’s threat of Valley Fever exposure to workers and sensitive receptors, and fails to include critical mitigation measures to reduce the health risk impacts of Valley Fever.

I-16

<sup>83</sup> Marshall Comments, p. 4.

<sup>84</sup> CAPCOA Handbook, p. 104.

<sup>85</sup> CEQA Guidelines § 15002(a)(2).

<sup>86</sup> DEIR, p. 4-13.

According to the DEIR's air quality analysis, Project construction will include 30 days of site preparation which will disturb 45 acres of soil, 45 days of grading activities which will disturb 135 acres of soil at the Project site and 120 days of trenching for pipeline installation which will involve ground disturbing activities on 24.7 acres of dirt and paved roads.<sup>87</sup> Dr. Clark explains that, when soil containing Valley Fever spores is disturbed by construction activities, the spores become airborne, exposing construction workers and other nearby sensitive receptors to potential infection.<sup>88</sup> Sensitive receptors on and near the Project site, including workers and those who live or work nearby, are at risk from exposure from disturbed dust during Project construction.<sup>89</sup>

The most at-risk populations are construction and agricultural workers. Additionally, the potentially exposed population in surrounding areas is much larger than construction workers because the nonselective raising of dust during Project construction will carry the very small spores which measure 0.002–0.005 millimeters into nonendemic areas, potentially exposing large non-Project-related populations.<sup>90</sup> Furthermore, the small fungus spore particles will not be controlled by the conventional construction dust-control measures under the Mojave Desert Air Quality Management District ("MDAQMD") Rule 403.<sup>91</sup> Thus, off-site sensitive receptors may have a significant risk of exposure to Valley Fever spores with no mitigation.

The DEIR must be revised and recirculated to include an analysis of the Project's significant Valley Fever impacts, and to require that any and all mitigation measures that will reduce Valley Fever risks are incorporated as binding mitigation in the Project's MMRP.

## 2. Feasible Mitigation is Available to Reduce the Project's Significant Health Risk Impacts from Valley Fever

CEQA imposes a duty on the Town to adopt all feasible mitigation measures to reduce potentially significant health impacts from the Project. Yet here, the

<sup>87</sup> DEIR, Appendix B, pp. 166 and 221; see also DEIR, p. 4.3-1.

<sup>88</sup> Clark Comments, p. 5.

<sup>89</sup> Clark Comments, p. 5.

<sup>90</sup> Clark Comments, p. 5.

<sup>91</sup> Clark Comments, p. 5; Mojave Desert Air Quality Management District, Rule 403: Fugitive Dust

Control (October 26, 2020) available at <https://www.mdaqmd.ca.gov/rules/rule-book/regulation-iv-prohibitions>; DEIR, p. 5.2-8 (note: the DEIR incorrectly refers to MDAQMD Rule 403.2 -Fugitive Dust Control for the Mojave Desert Planning Area, which was rescinded on October 26, 2020)

1-16  
Cont.

1-17

DEIR fails to incorporate any mitigation measures that would address Valley Fever risks to construction employees and sensitive receptors.

In his comments, Dr. Clark proposes a variety of feasible mitigation measures the DEIR should consider and adopt in a revised DEIR to reduce potential health impacts from Valley Fever.<sup>92</sup> The following mitigation measures identified in Dr. Clark's comments are based on his experience during construction of projects in areas affected by the fungi that cause Valley Fever, these measures should be included in the DEIR's mitigation measures in addition to the requirements under MDAQMD Rule 403:

- Include specific requirements in the Project's Injury and Illness Prevention Program regarding safeguards to prevent Valley Fever.
- **Control dust exposure through the following methods:**
- Apply chemical stabilizers at least 24-hours prior to high wind event;
- Apply water to all disturbed areas a minimum of three times per day. Watering frequency should be increased to a minimum of four times per day if there is any evidence of visible wind-driven fugitive dust;
- Provide National Institute for Occupational Safety and Health (NIOSH)-approved respirators for workers with a prior history of Valley Fever.
- Half-face respirators equipped with a minimum N-95 protection factor for use during worker collocation with surface disturbance activities. Half-face respirators equipped with N-100 or P-100 filters should be used during digging activities. Employees should wear respirators when working near earth-moving machinery.
- Prohibit eating and smoking at the worksite, and provide separate, clean eating areas with hand-washing facilities.
- Avoid outdoor construction operations during unusually windy conditions or in dust storms.
- Consider limiting outdoor construction during the fall to essential jobs only, as the risk of cocci infection is higher during this season.
- **Prevent transport of cocci outside endemic areas:**
- Prevent spillage or loss of bulk material from holes or other openings in the cargo compartment's floor, sides, and/or tailgate;

I-17  
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<sup>92</sup> Clark Comments, pp. 6-8.  
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- Provide workers with coveralls daily, lockers (or other systems for keeping work and street clothing and shoes separate), daily changing and showering facilities.
- Clothing should be changed after work every day, preferably at the work site.
- Train workers to recognize that cocci may be transported offsite on contaminated equipment, clothing, and shoes; alternatively, consider installing boot-washing.
- Post warnings onsite and consider limiting access to visitors, especially those without adequate training and respiratory protection.
- **Improve medical surveillance for employees:**
- Employees should have prompt access to medical care, including suspected work-related illnesses and injuries.
- Work with a medical professional to develop a protocol to medically evaluate employees who have symptoms of Valley Fever.
- Consider preferentially contracting with 1-2 clinics in the area and communicate with the health care providers in those clinics to ensure that providers are aware that Valley Fever has been reported in the area. This will increase the likelihood that ill workers will receive prompt, proper and consistent medical care.
- Respirator clearance should include medical evaluation for all new employees, annual re-evaluation for changes in medical status, and annual training, and fit-testing.
- Skin testing is not recommended for evaluation of Valley Fever.
- If an employee is diagnosed with Valley Fever, a physician must determine if the employee should be taken off work, when they may return to work, and what type of work activities they may perform.

Any mitigation measures must be included in the DEIR and be fully enforceable through permit conditions, agreements or other legally binding instruments.<sup>93</sup> Failure to include enforceable mitigation measures is considered a failure to proceed in the manner required by CEQA.<sup>94</sup> In order to meet this requirement, mitigation measures must be incorporated directly into the EIR to be enforceable.<sup>95</sup>

I-17  
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<sup>93</sup> CEQA Guidelines § 15126.4(a)(2).

<sup>94</sup> *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 672.

<sup>95</sup> *Lotus v. Dept of Transportation* (2014) 223 Cal. App. 4th 645, 651-52.

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The DEIR must be revised and recirculated to include mitigation measures such as the those proposed by Dr. Clark to reduce the impacts of exposure to Valley Fever causing fungus spores and mitigate impacts to sensitive receptors.

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I-17  
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**3. The DEIR Fails to Require Effective Mitigation to Reduce the Project's Construction Air Quality Impacts**

In order to mitigate the Project's potentially significant construction air quality impacts, the DEIR includes in its mitigation monitoring and reporting program ("MMRP") PDF-AQ-1, which, among other provisions, requires that all heavy duty off-road construction equipment meet U.S. Environmental Protection Agency ("USEPA) certified Tier 4 Interim emissions standards, and includes an exception to allow the use of Tier 3 construction equipment if Tier 4 Interim equipment is not available.<sup>96</sup> Dr. Clark explains that the USEPA standards for construction equipment are designed to lower emissions from off-road construction equipment.<sup>97</sup> The USEPA standards specify that Tier 4 Final standards are the cleanest burning equipment and have the lowest emissions compared to the other tiers.<sup>98</sup> Dr. Clark explains that Tier 3 equipment puts out 80% to 89% more PM<sub>10</sub> than Tier 4 Interim equipment and 85% to 91% more PM<sub>10</sub> than Tier 4 Final equipment. Additionally, Tier 3 equipment puts out 81% to 89% more PM<sub>2.5</sub> than Tier 4 Interim equipment and 85% to 92% more PM<sub>2.5</sub> than Tier 4 Final equipment.

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I-18

The DEIR fails to provide justification why PDF-AQ-1 allows for the use of Tier 3 and Tier 4 Interim equipment during Project construction. By requiring the use of Tier 4 Final construction equipment, the Project would see significant reductions in emissions. Furthermore, requiring Tier 4 Final construction equipment at the site is feasible, including Tier 4 Final equipment, which produces the highest available emissions reductions from the Tier 4 equipment categories. The Town must revise PDF-AQ-1 to require the use of Tier 4 Final construction equipment in order to reduce the Project's air quality and GHG emissions impacts to the greatest extent feasible.

**C. The DEIR Fails to Analyze and Mitigate the Project's Significant GHG Emissions Impacts**

The DEIR states that the Project's unmitigated GHG emissions impacts of 37,982 MTCO<sub>2e</sub>/year would exceed the SCAQMD GHG threshold of 3,000 MTCO<sub>2e</sub>

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<sup>96</sup> DEIR, p. 4.2-21.  
<sup>97</sup> Clark Comments, p. 8.  
<sup>98</sup> Clark Comments, p. 8.  
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and would result in a considerable contribution to cumulative emissions related to global climate change and therefore result in a significant impact.<sup>99</sup> The DEIR includes mitigation measure MM-AQ-1 to reduce the Project's impacts.<sup>100</sup> Despite the proposed mitigation measures, the DEIR concludes that the Project will result in the release of 21,169.5 MGCO<sub>2</sub>e/year, exceeding SCAQMD's threshold of 3,000 MTCO<sub>2</sub>e/year and resulting in significant and unavoidable GHG emissions impacts.<sup>101</sup>

As discussed above, the DEIR's failure to adequately analyze the Project's transportation and air quality impacts results in a failure to analyze the Project's GHG emissions impacts. The DEIR's errors in the Project VMT analysis results in an underestimation of the Project's GHG emissions from mobile sources. The DEIR's GHG analysis and conclusions are therefore not based on substantial evidence, whereas Mr. Marshall and Dr. Clark provide substantial evidence showing that the Project's GHG emissions will likely be much higher than stated in the DEIR. The Town must correct the errors in the DEIR's transportation and air quality impacts analyses to accurately estimate the Project's significant GHG emissions impacts.

I-19  
Cont.

#### **D. The DEIR Fails to Adequately Analyze Potentially Significant Noise Impacts**

CEQA requires agencies to conduct noise analyses for projects that consider both the absolute noise levels expected, and the degree noise levels are expected to increase. Noise studies that rely on a single measure that excludes possible significant impacts from noise increases or noise extremes do not receive deference by reviewing courts.

I-8 and I-9

In *King & Gardiner Farms, LLC v. County of Kern*, the Court of Appeal held that an agency cannot simply rely on compliance with local noise regulations to conclude there will be no significant noise impacts without considering the impacts of increases in noise.<sup>102</sup> The County approved an EIR for proposed zoning amendments to streamline oil and gas permitting.<sup>103</sup> The EIR included an analysis of noise impacts that determined significance based solely on whether the 65 decibel day-night average ("dBA DNL") threshold in the County General Plan would be

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<sup>99</sup> DEIR, p. 4.6-30.

<sup>100</sup> DEIR, pp. 1-4 – 1-8.

<sup>101</sup> DEIR, p. 4.6-31.

<sup>102</sup> *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 894.

<sup>103</sup> *Id.* at 829.

exceeded.<sup>104</sup> The Court of Appeal reasoned that the County General Plan did not conclude that all increases in the magnitude of noise are insignificant until the 65 dBA DNL threshold is exceeded, so the General Plan “does not constitute substantial evidence that the magnitude of an increase in ambient noise is irrelevant.”<sup>105</sup> Rather, an EIR’s noise analysis should consider both the increase in noise level and the absolute noise level associated with a project in determining the significance of the project’s noise impacts.<sup>106</sup> The Court of Appeal concluded that an agency cannot exclusively rely on “a single cumulative DNL metric for determining the significance of the project’s noise impacts” while deciding “the magnitude of the increase in ambient noise is irrelevant.”<sup>107</sup>

In *Berkeley Jets*, the Court of Appeal invalidated the Port of Oakland’s EIR for expansion of the Oakland Airport because of its reliance on an improper noise standard.<sup>108</sup> The EIR evaluated the significance of noise impacts based on whether the estimated level of sound would exceed 65 dB Community Noise Equivalent Level (“CNEL”).<sup>109</sup> However, as the Court of Appeal explained, the CNEL metric—which averages noise over the course of a day—could not be the sole indicator of significant effects from noise because it does not provide a meaningful analysis of the “degree single overflights will create noise levels over and above the existing ambient noise level at a given location, and the community reaction to aircraft noise, including sleep disturbance.”<sup>110</sup> Therefore, the Court concluded, a revised EIR with additional study of noise impacts from flights was necessary.<sup>111</sup>

Here, the DEIR states that construction and operational noise impacts would not be significant. However, as explained above, the DEIR relies on an inadequate noise study to inform the Project’s noise analysis, relies on improper thresholds of significance for construction and operational noise resulting in a failure to analyze and mitigate the Project’s potentially significant noise impacts to the greatest extent feasible.

I-8 and I-9  
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<sup>104</sup> *Id.* at 830, 889.

<sup>105</sup> *Id.* at 894.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Berkeley Jets*, 91 Cal.App.4th at 1381–1382.

<sup>109</sup> *Id.* at 1373.

<sup>110</sup> *Id.* at 1381–1382.

<sup>111</sup> *Id.* at 1382.

**1. The DEIR Fails to Analyze and Mitigate Potentially Significant Construction and Operational Noise Impacts**

CEQA does not set a numeric threshold for determining the significance of ambient noise increases. Lead agencies may select their own thresholds. The agency's selection of a threshold of significance must be supported by substantial evidence.<sup>112</sup>

The DEIR relies on the Town's noise ordinance, which sets a maximum noise level for construction and operational noise as its threshold of significance.<sup>113</sup> Reliance solely on the noise ordinance violates CEQA because it fails to consider whether the magnitude of changes in noise levels is significant.<sup>114</sup> The DEIR relies on the noise ordinance to determine the significance of the off-site construction noise, stating:

[N]oise levels from construction are predicted to range from approximately 48 dBA Leq (during the architectural coating phase) to 61 dBA Leq (during the grading phase) at the nearest noise-sensitive receiver (a single-family residence approximately 850 feet from the nearest construction work). These noise levels would be lower than the Town of Apple Valley's construction noise standard at single-family residences for temporary (i.e., mobile) equipment of 75 dBA Leq. [...] Therefore, noise from Project site construction would be less than significant. No noise mitigation is necessary.<sup>115</sup>

The DEIR's construction noise analysis omits a critical component, namely that the magnitude of the noise increase is not considered in the impact analysis.<sup>116</sup> The DEIR reports that the existing Leq at a nearby residence, receptor M1, is 39 dBA and that Project construction is expected to result in noise levels of 61 dBA Leq during the grading phase and noise levels of 57 dBA Leq during typical construction activity. Mr. Watry explains that this constitutes a four-fold increase of perceived noise levels at this receptor, resulting in a significant impact.<sup>117</sup>

I-8 and I-9  
Cont.

<sup>112</sup> 14 CCR § 15064(b); *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 884.

<sup>113</sup> AVMC, § 9.73.050.

<sup>114</sup> *King & Gardiner Farms*, 45 Cal.App.5th 814, 865.

<sup>115</sup> DEIR, p. 3.6-12.

<sup>116</sup> Watry Comments, p. 3.

<sup>117</sup> Watry Comments, p. 3.

The DEIR also fails to analyze the magnitude of the Project’s potentially significant operational noise impacts. Mr. Watry calculated that the Project will generate 38.3 dBA CNEL at receptor M1 during operation, resulting in an increase of 9 dBA over the DEIR’s reported ambient existing nighttime noise level of 29.8 dBA Leq.<sup>118</sup> Mr. Watry explains that this relative increase will be perceptible to the residents at receptor M1 and constitutes a significant impact. Mr. Watry states that the Project must employ additional mitigation measures, such as sound barriers to block line of sight from the operational noise sources in order to reduce the Project’s significant impacts.<sup>119</sup>

I-8 and I-9  
Cont.

The DEIR lacks substantial evidence to support its conclusion that the Project’s construction and operational noise impacts will be less than significant because it failed to analyze the magnitude of noise increase from the Project. As a result, the DEIR fails to analyze and mitigate the Project’s significant construction noise impacts. The DEIR must be revised and recirculated to analyze the Project’s construction and operational noise impacts.

**V. THE DEIR FAILS TO CONSIDER THE OFFICE OF THE ATTORNEY GENERAL’S BEST PRACTICES AND MITIGATION MEASURES FOR WAREHOUSE PROJECTS**

In September 2022, the California Office of the Attorney General (“AG”) released an updated version of its guidance document titled “*Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act*” (“Best Practices”).<sup>120</sup> The Best Practices were developed to aid local agencies to achieve CEQA compliance, and promote environmentally-just development when they are considering warehouse project proposals.<sup>121</sup> The AG developed the Best Practices based on knowledge gained from monitoring, providing comments on, and litigating, warehouse development projects in California.<sup>122</sup> The Best Practices state that while CEQA analysis is necessarily project-specific, the document provides feasible best practices and mitigation measures which were adapted from actual warehouse projects in California.<sup>123</sup>

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<sup>118</sup> Watry Comments, p. 3.

<sup>119</sup> Watry Comments, p. 3.

<sup>120</sup> California Office of the Attorney General, Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act (hereinafter “Best Practices”) (September 2022) available at <https://oag.ca.gov/system/files/media/warehouse-best-practices.pdf>

<sup>121</sup> Best Practices, p. 1.

<sup>122</sup> Best Practices, p. 1

<sup>123</sup> Best Practices, p. 1.

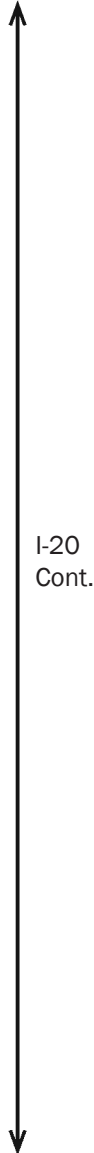
The Best Practices provide examples of environmentally superior methods of developing warehouse projects and offers sample mitigation measures that a local agency should consider when faced with a project such as the Project proposed here. For example, the Best Practices encourage local governing bodies to proactively plan for logistics projects by establishing industrial districts near major highway and rail corridors but away from sensitive receptors in order to help attract investment while avoiding conflicts between warehouse facilities and residential communities.<sup>124</sup>

Here, the proposed Project defies many of the recommendations in the Best Practices. For example, with regard to the above recommendation to site projects close to freeways and away from sensitive receptors, the proposed Project site is located approximately 5-miles away from the closest freeway onramp onto Interstate 15 (“I-15”). The following excerpts from the Best Practices are included to demonstrate that the proposed Project is at odds with the guidance provided by the OAG.

The Best Practices recommend that local jurisdictions take care when considering potential impacts from air quality and GHG emissions from project construction and operation. The DEIR does not comply with many of the recommendations and fails to include mitigation measures that conform with the Best Practices, which for construction include:

- Requiring off-road construction equipment to be zero-emission, where available, and all diesel-fueled off-road construction equipment, to be equipped with CARB Tier IV-compliant engines or better, and including this requirement in applicable bid documents, purchase orders, and contracts, with successful contractors demonstrating the ability to supply the compliant construction equipment for use prior to any ground-disturbing and construction activities.
- Prohibiting grading on days with an Air Quality Index forecast of greater than 100 for particulates or ozone for the project area.
- Limiting the amount of daily grading disturbance area.<sup>125</sup>

For operational air quality and GHG emissions impacts, the Best Practices recommend:



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<sup>124</sup> Best Practices, p. 3.

<sup>125</sup> Best Practices, p. 8.

- Requiring all heavy-duty vehicles entering or operated on the project site to be zero-emission beginning in 2030.
- Requiring tenants to use zero-emission light- and medium-duty vehicles as part of business operations.
- Forbidding trucks from idling for more than two minutes and requiring operators to turn off engines when not in use.

The DEIR fails to demonstrate conformance with the above recommendations. The Best Practices also include several recommendations and suggested mitigation measures regarding warehouse noise and transportation impacts that the DEIR fails to take into account. The Town must consider all of the recommendations of the AG and incorporate any feasible measures recommended in the Best Practices as mitigation measures in the DEIR to further reduce the Project's significant (and in some cases significant and unavoidable) air quality, GHG emissions, transportation, and noise impacts.

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## **VII. THE TOWN MAY NOT MAKE THE REQUIRED FINDINGS TO APPROVE THE PROJECT'S LOCAL LAND USE PERMITS**

The Project requires approval of Site Plan Review, Lot Line Adjustment and certification of the Environmental Impact Report. The Town cannot make the findings necessary to approve the Project's entitlements because the Project will result in significant environmental impacts that the Town has failed to analyze and mitigate.

In order to approve the Project's Site Plan Review Permit pursuant to the North Apple Valley Industrial Specific Plan, the Town must find that proposed Project is consistent with the following findings:

1. That the location, size, design, density, and intensity of the proposed development is consistent with the General Plan, the North Apple Valley Industrial Specific Plan, the Development Code, and the development policies and standards of the Town.
2. That the location, size and design of the proposed structures and improvements are compatible with the site's natural landforms, surrounding sites, structures, and streetscapes.
3. That the materials, textures, and details of the proposed construction are compatible with the adjacent and neighboring structures.
4. That quality in architectural design is maintained in order to enhance the visual environment of the Town and protect the economic value of existing structures.

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5. That there are public facilities, services, and utilities available at the appropriate levels or that these shall be installed at the appropriate time to serve the project.
6. That access to the site and internal circulation are safe.
7. That the project is consistent with the uses described in the North Apple Valley Industrial Specific Plan, and analyzed in the North Apple Valley Industrial Specific Plan Environmental Impact Report (SCH No. 2006031112).<sup>126</sup>

The Town is precluded from making finding one above because it cannot find that the Project’s location, size, design, density, and intensity is consistent with the Town’s General Plan. The Project is inconsistent with the General Plan’s Air Quality Element, Policy 1.D. which states that “[a]ll proposals for development activities within the Town shall be reviewed for their potential to adversely impact local and regional air quality and shall be required to mitigate any significant impacts.”<sup>127</sup>

As explained in detail above, the DEIR fails to effectively mitigate the Project’s significant VMT, air quality, and health risk impacts to the greatest degree feasible. We provide several feasible mitigation measures that would further reduce the Project’s significant impacts in these comments that the Town must consider prior to finding that the Project is consistent with Policy 1.D.

The Project’s significant VMT, health risk, air quality and GHG impacts preclude the Town from making the findings required under the NAVISP to approve the Project’s Site Plan Review. The Town must prepare a revised DEIR which adequately analyzes the significant impacts of the Project and adopts feasible mitigation measures to reduce the Project’s impacts.

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Cont.

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<sup>126</sup> Town of Apple Valley, North Apple Valley Industrial Specific Plan (Adopted October 24, 2006, Last Amended January 24, 2012) available at <https://www.applevalley.org/home/showpublisheddocument/18587/636149111285930000>

<sup>127</sup> Town of Apple Valley, 2009 General Plan, Air Quality Element (Adopted August 11, 2009) p. III-79. available at <https://www.applevalley.org/services/planning-division/2009-general-plan>. 6756-006j

## VI. CONCLUSION

For the reasons discussed above, the DEIR for the Project is wholly inadequate under CEQA. It must be thoroughly 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.

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

Sincerely,



Kevin Carmichael

KTC:ljl