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May 5, 2023

VIA EMAIL AND OVERNIGHT MAILDaniel Alcayaga, AICP, Planning Manager
Planning Division
Town of Apple Valley
14955 Dale Evans Parkway
Apple Valley, CA 92307
Email: dalcayaga@applevalley.org; planning@applevalley.org**Re: Comments on Draft Environmental Impact Report – The
Development at Dale Evans and Lafayette Project
(SCH No. 2022120356; Project No. SPR 2022-004)**

Dear Mr. Alcayaga:

We are writing on behalf of **Californians Allied for a Responsible Economy (“CARE CA”)** to comments on the Draft Environmental Impact Report (“DEIR”)¹ prepared by the Town of Apple Valley (“Town”) for the Development at Dale Evans and Lafayette Project (SCH No. 2022120356; Project No. SPR 2022-004) (“Project”), proposed by RW Apple Valley LLC (“Applicant”).

F.1

The Project proposes to develop a 1,207,544 square foot (“sf”) warehouse distribution center on a 77.95± acre parcel of land located on the Southeast corner of Lafayette Street and Dale Evans Parkway in the Town of Apple Valley, San Bernardino County, California. The Project building is proposed to include 1,147,167 sf of warehouse space, and 60,377 sf of office space. The Project site consists of 10 existing parcels, identified as Assessor’s Parcel Numbers 0463-231-11, -12, -13, -14, -15, -16, -34, -35, -36, and -37.

¹ Town of Apple Valley, Draft Environmental Impact Report (SCH No. 2022120356) for the Development at Dale Evans and Lafayette (March 2023), available at <https://ceganet.opr.ca.gov/2022120356/2>.

Based on our review of the DEIR and supporting documentation, we conclude that the DEIR fails to comply with the requirements of the California Environmental Quality Act (“CEQA”)². The DEIR fails to adequately analyze many of the Project’s significant environmental impacts and fails to propose feasible and enforceable mitigation measures to reduce those impacts to a less than significant level, as required by CEQA.

As explained in these comments, there is substantial evidence that the Project will result in significant unmitigated impacts relating to air quality, health risks 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 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.

F.2

We reviewed the DEIR and its technical appendices with the assistance of traffic and transportation expert Daniel Smith³ environmental health, air quality, GHG, and hazardous materials expert James Clark Ph.D.⁴ We reserve the right to supplement these comments at a later date, and at any later proceedings related to this Project.⁵

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 Apple Valley residents David Kimber, Brandon Walker and Greg Wright, the **District Council of Ironworkers and Southern California Pipe Trades DC 16**, along with their members, their families, and other individuals who live and work in Apple Valley and in San Bernardino County.

F.3

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

² Pub. Resources Code §§ 21000 et seq.; 14 Cal. Code Regs (“CEQA Guidelines”) §§ 15000 et seq. (“CEQA Guidelines”).

³ Mr. Smith’s technical comments and curricula vitae are attached hereto as Exhibit A.

⁴ Dr. Clark’s technical comments and curricula vitae are attached hereto as Exhibit B.

⁵ 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.

employment benefits, and which minimize adverse environmental and other impacts on local communities. CARE CA members live, work, recreate, and raise their families in the City 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. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. LEGAL BACKGROUND

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an EIR.⁶ "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."⁷

F.4

CEQA has two primary purposes. First, CEQA is designed to inform decisionmakers and the public about the potential significant environmental effects of a project.⁸ "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.'⁹ 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

⁶ PRC § 21100.

⁷ *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal* ("Laurel Heights I") (1988) 47 Cal.3d 376, 390 (internal quotations omitted).

⁸ 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.").

⁹ *Citizens of Goleta Valley*, 52 Cal.3d at p. 564 (quoting *Laurel Heights I*, 47 Cal.3d at 392).

reached ecological points of no return.”¹⁰ 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.”¹¹

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.¹² 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.”¹³ 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.”¹⁴

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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.’”¹⁵ 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.”¹⁶ “The ultimate inquiry, as case

¹⁰ *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).

¹¹ CEQA Guidelines § 15003(b).

¹² 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.

¹³ CEQA Guidelines § 15002(a)(2).

¹⁴ 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.

¹⁵ *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (emphasis added) (quoting *Laurel Heights I*, 47 Cal.3d at 391, 409, fn. 12).

¹⁶ *Berkeley Jets*, 91 Cal.App.4th at p. 1355; see also *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 (error is prejudicial if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process); *Galante Vineyards*, 60 Cal.App.4th at p. 1117 (decision to approve a project is a nullity if based upon an EIR that does not provide decision-makers and the public with information about the project as required by CEQA); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946 (prejudicial abuse of discretion results where agency fails to comply with information disclosure provisions of CEQA).

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.’”¹⁷

III. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE PROJECT

The DEIR does not meet CEQA’s requirements because it fails to include an accurate, complete and stable description of key Project components, rendering the DEIR’s impact analysis inadequate. California courts have repeatedly held that “an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.”¹⁸ CEQA requires that a project be described with enough particularity that its impacts can be assessed.¹⁹ Without a complete, stable and accurate project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project’s impacts and undermining meaningful public review.²⁰

Here, many of the DEIR’s impact analyses are based on unenforceable assumptions regarding future uses of the warehouse. The DEIR’s project description states that “no user has been identified for this space [and for] purposes of this analysis, it has been assumed that 85% of the space would be used for dray warehousing, and 15% for cold storage.”²¹ This “assumption” is repeated throughout the DEIR, including in the analysis of air quality, energy, and greenhouse gas (“GHG”) impacts.²² While the DEIR assumes for purposes of the CEQA analysis that the warehouse will be limited to 15% cold storage, there is no condition of approval, mitigation measure, or other Project provision restricting cold storage to 15%, and therefore nothing in the record to ensure that cold storage will be so limited if the Project is constructed. Because “no user has been identified” for this warehouse space and because there are no conditions or other mechanism to ensure that the warehouse will be limited to 15% cold storage in practice, it is reasonable to expect that actual cold storage uses may exceed 15%. Depending on the actual percentage of cold storage uses, the Project’s air quality, greenhouse gas, and energy impacts could be significantly higher than estimated in the DEIR, as explained below.

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¹⁷ *Sierra Club*, 6 Cal.5th at p. 516 (quoting *Laurel Heights I*, 47 Cal.3d at 405).

¹⁸ *Stopthemillenniumhollywood.com v. City of Los Angeles* (2019) 39 Cal.App.5th 1, 17; *Communities for a Better Environment v. City of Richmond* (“*CBE v. City of Richmond*”) (2010) 184 Cal.App.4th 70, 85–89; *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.

¹⁹ CEQA Guidelines § 15124; see, *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 192–193.

²⁰ *Id.*

²¹ DEIR, pg. 1-1.

²² DEIR, pgs. 2.4-12, 2.7-8, 2.7-10 and 2.9-9; see also, DEIR Appendix B (Air Quality and Greenhouse Gas Report), pgs. 5, 21 and 41.

The DEIR's air quality and greenhouse gas analysis uses CalEEMod, a statewide land use emissions model, to estimate Project construction and operational emissions.²³ The model output is based on a number of assumptions about the Project, including that only 15% of the warehouse space will be used for cold storage and 85% for dry storage.²⁴ Changing these assumptions directly affects the Project's estimated emissions. For example, the DEIR estimates that the Project's operation will generate a daily maximum of 86.20 lbs/day of CO₂ and 127.32 lbs/day of N_{ox}, assuming 15% cold storage.²⁵ The DEIR also analyzes a Project alternative in which the only difference from the proposed Project is 100% dry storage and no cold storage.²⁶ Under this alternative, the DEIR finds that the Project's operation will generate a daily maximum of 82.41 lbs/day of CO₂ and 122.51 lbs/day of N_{ox}.²⁷ The DEIR makes clear that eliminating cold storage from the analysis decreases emissions. Conversely, if the Project were to have in excess of 15% cold storage uses, emissions would increase. This is especially relevant with respect to N_{ox}, given that the DEIR's estimates of the Project's operational N_{ox} emissions are close to the Mojave Desert Air Quality Management District's ("MDAQMD") daily threshold of 137 lbs/day.

F.6

Similarly, the DEIR finds that the Project's operational GHG emissions (assuming 15% cold storage) will be 17,768.97 metric tons/year of CO_{2e}.²⁸ The "high-cube only" alternative (i.e., no cold storage) is estimated to generate 16,084.87 metric tons/year of CO_{2e}.²⁹ Reducing the amount of the Project's cold storage uses demonstrably reduces GHG emissions, and increasing the amount of cold storage beyond the DEIR's 15% assumption will likewise increase GHG emissions.

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Finally, the amount of the Project's cold storage usage will have a significant impact on the Project's energy usage. "In addition to standard warehouse and office energy uses, such as space heating and cooling, **the refrigerated warehouse component of the proposed development will be considerably more energy intensive.** While the cold storage portion of the warehouse is assumed to occupy 15% of the floorspace, it will be responsible for approximately 75% of the building's electricity consumption and 82% of the natural gas consumption [emphasis added]."³⁰ With respect to the "no cold storage" alternative, the DEIR states that this alternative "would use 30% of the electricity used by the proposed Project and

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²³ DEIR, Appendix B, pg. 4.

²⁴ *Id.*, pg. 21.

²⁵ *Id.*, Table 3-2 at pg. 23.

²⁶ DEIR, pg. 3.4-2.

²⁷ DEIR, Appendix B, Table 6-2 at pg. 50.

²⁸ DEIR, Table 2.9-2 at pg. 2.9-11.

²⁹ *Id.*, Table 3.9-1 at pg. 3.9-3.

³⁰ *Id.*, pg. 2.7-11.

21% of the natural gas, due to the elimination of refrigerated storage, which generates high demand for energy.”³¹ Due to the outsized effect on energy consumption of refrigerated storage, any increase in cold storage use over the assumed 15% will cause a significant increase in energy consumption which is not considered in the DEIR and may require additional mitigation. Without some enforceable mechanism to limit the Project to 15% cold storage, the DEIR’s energy use analysis is unreliable and may significantly underestimate the Project’s actual energy use.

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Ultimately, the DEIR’s estimated emissions and energy usage are dependent on the assumption that 15% of the Project’s warehouse space will be used for cold storage. Absent any mechanism to enforce that assumption, the DEIR cannot accurately assess the Project’s air quality, GHG and energy impacts, and the DEIR’s conclusions regarding the significance of the Project’s operational emissions and energy use are not supported by substantial evidence. The Town must prepare a revised EIR that clearly defines the Project’s uses with respect to cold storage.

F.9

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.³² An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.³³

F.10

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.³⁴ 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.³⁵ In reviewing challenges to an

³¹ *Id.*, pg. 3.7-3.

³² CEQA Guidelines § 15064(b).

³³ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

³⁴ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

³⁵ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

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.”³⁶

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Additionally, CEQA requires agencies to commit to all feasible mitigation measures to reduce significant environmental impacts.³⁷ 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.³⁸ 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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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.”³⁹

A. The DEIR Fails to Adequately Disclose, Analyze and Mitigate Air Quality and Health Impacts

1. Valley Fever

The DEIR fails to acknowledge, let alone analyze and mitigate, the potentially significant health impacts from Valley Fever associated with Project construction. Valley Fever is a disease that can infect people when they are exposed to fungal spores during ground disturbance, such as the site preparation and grading associated with this Project’s construction. Symptoms include fever, cough, headache, rash, muscle aches, or joint pain. In severe cases, patients develop

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³⁶ *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

³⁷ CEQA Guidelines § 15002(a)(2).

³⁸ 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.

³⁹ *Berkeley Jets*, 91 Cal.App.4th at 1355.

pneumonia or meningitis, sometimes resulting in death.⁴⁰ Valley Fever is endemic in the Southwestern United States, including San Bernardino County and the Mojave Desert.⁴¹ Dr. Clark's comments describe the increasing incidence of Valley Fever in San Bernardino County over the last several years.⁴²

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As discussed in detail in Dr. Clark's comments, there is a significant risk of Valley Fever to both workers constructing the Project and employees at the adjacent existing warehouses. Dr. Clark describes the known presence of Valley Fever spores in the soils of the Southern California high desert and San Bernardino County, where the Project site is located. Workers involved in soil-disturbing activities, such as grading, can be exposed to Valley Fever in disturbed and windblown dust containing Valley Fever spores. Nearby workers and other receptors downwind of disturbed soils are also at risk.

Dr. Clark points out that standard fugitive dust mitigation measures are inadequate to protect construction workers and other nearby receptors from the risk of Valley Fever, and identifies several mitigation measures that can actively suppress the spread of Valley Fever. These include:

(1) including Valley Fever-specific requirements in the Project's Injury and Illness Prevention Program;

F.13

(2) controlling dust exposure with specific measures that exceed conventional dust control, such as (a) applying chemical stabilizers at least 24 hours prior to high wind events, (b) applying water to all disturbed areas a minimum of three times per day, and at least four times per day if there is any evidence of visible wind-driven fugitive dust, (c) providing National Institute for Occupational Safety and Health (NIOSH) approved respirators for workers with a history of Valley Fever, (d) half-face respirators equipped with a minimum N-95 protection factor for use by workers in areas of ground disturbing activities and half-face respirators equipped with N-100 or P-100 filters for use during digging activities, (e) prohibiting eating and smoking at the worksite and providing separate, clean eating areas with hand-washing facilities, (f) avoiding outdoor construction operations during unusually windy conditions or in dust storms, and (g) limiting outdoor construction during the fall to essential jobs only, as the risk of infection is higher during this season;

⁴⁰ See County of San Bernardino Environmental Health Services Fact Sheet: Coccidioidomycosis, available at <https://wp.sbcounty.gov/dph/wp-content/uploads/sites/7/2017/06/News-Coccidioidomycosis-6.1.17.pdf> (last visited 10/29/22).

⁴¹ *Id.*; see also, *Valley Fever: Environmental Risk Factors And Exposure Pathways Deduced From Field Measurements In California*, Int J Environ Res Public Health 2020 Jul 22;17(15):5285, abstract available at <https://pubmed.ncbi.nlm.nih.gov/32707996/> (last visited 12/10/2022).

⁴² Clark Comments, pg. 5.

(3) preventing transport of Valley Fever spores outside endemic areas by (a) thoroughly cleaning equipment, vehicles and other items before they are moved offsite to other work locations, (b) preventing spillage or loss of bulk material from holes or other openings in the cargo compartment's floor, sides, and/or tailgate, (c) loading all haul trucks such that the freeboard is not less than six inches when material is transported on any paved public access road and applying water to the top of the load sufficient to limit VDE to 20 percent opacity, or covering haul trucks with a tarp or other suitable cover, (d) providing workers with coveralls daily, lockers (or other systems for keeping work and street clothing and shoes separate), daily changing and showering facilities, (e) training workers to recognize that cocci may be transported offsite on contaminated equipment, clothing, and shoes, and ; and (f) posting warnings onsite and consider limiting access to visitors, especially those without adequate training and respiratory protection;

**F.13
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(4) providing medical surveillance for employees, such as (a) prompt access to medical care, (b) working with a medical professional to develop protocols to evaluate employees who have Valley Fever symptoms.⁴³

Dr. Clark's comments and analysis provide substantial evidence that the Project may have significant unmitigated health risks to Project construction workers and nearby receptors, risks which are completely unexamined in the DEIR. The City must prepare a revised EIR that evaluates the risk of Valley Fever and includes appropriate mitigation measures.

2. Operational Emissions

The DEIR's analysis of the Project's operational emissions fails to consider potentially significant sources of emissions, which means that Project emissions are underestimated.

As discussed above, the DEIR assumes that the Project will include cold storage for 15% of the warehouse space. As Dr. Clark points out, the CalEEMOD outputs provided in the air quality analysis show that no backup generators were included in the analysis.⁴⁴ For a warehouse like this one that includes refrigerated storage, a backup generator will be required for emergency situations including power outages at the Project site.⁴⁵

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⁴³ *Id.*, pgs. 5-7.

⁴⁴ Clark Comments, pg. 11.

⁴⁵ *Id.*

Even more glaring is the failure to consider emissions from Transport Refrigeration Units (“TRUs”) that will serve the refrigerated components of the Project warehouse. While the DEIR’s emissions analysis assumes the use of 15% of the warehouse space for cold storage, it completely omits any emissions from the refrigerated trucks that will serve the warehouse. TRUs are refrigeration systems powered by diesel internal combustion engines designed to refrigerate perishable products transported in various containers, including truck vans, semi-truck trailers, shipping containers, and rail cars.⁴⁶ The CalEEMOD modeling fails to include any emissions from TRUs associated with the trucks and trailers coming to the Project site.⁴⁷ This leads to an underestimation of the Project’s operational emissions, including PM_{2.5} and GHG emissions from operation of TRUs on the Project site. For example, the DEIR’s CalEEMod analysis shows that 780.7 trucks per day will utilize the Project site; assuming 15% of the trucks have TRUs (consistent with the DEIR’s assumption of 15% cold storage usage in the warehouse), there would be 117 TRUs onsite each day.⁴⁸ The TRUs would generate an additional 1.3 lbs/day of PM_{2.5} as diesel exhaust that is unaccounted for in the DEIR.⁴⁹

F.15

Because the DEIR completely omits any analysis of TRU use on the Project site, it underestimates the Project’s GHG emissions and air quality impacts, including PM_{2.5} emissions and potential health risks from TRU diesel exhaust. The Town therefore must prepare a revised DEIR that includes the impacts of TRU use, and include mitigation measures for any significant air quality impacts.

F.16

3. Cumulative Emissions

The DEIR recognizes that the Project is within a non-attainment area for PM₁₀ and ozone, but concludes that Project-related impacts with respect to non-attainment pollutants will not be cumulatively considerable.⁵⁰ However, the DEIR fails to actually analyze the Project’s cumulative air quality emissions, instead relying on the following conclusion: “The MDAQMD does not currently provide thresholds of significance for the cumulative emissions of multiple projects. A project’s potential cumulative contributions can instead be analyzed using the criteria for project-specific impacts, assuming that if an individual development generates less than significant construction and operational emissions, then it would not generate a cumulatively considerable increase in non-attainment criteria

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⁴⁶ *Id.*, pg. 9.

⁴⁷ *Id.*

⁴⁸ *Id.*, pg. 10.

⁴⁹ *Id.*

⁵⁰ DEIR, pg. 2.4-17.

pollutants.”⁵¹ The MDAQMD’s approach is not authorized by law and has been rejected by the Courts for failing to comply with CEQA’s requirement that a project mitigate impacts that are "cumulatively considerable.”⁵² The MDAQMD’s failure to set a threshold for cumulative project emissions does not authorize the City to ignore CEQA’s requirement to analyze cumulative impacts.

The leading case on this issue is *Kings County Farm Bureau v. City of Hanford*.⁵³ In *Kings County*, the city prepared an EIR for a 26.4-megawatt coal-fired cogeneration plant. Notwithstanding the fact that the EIR found that the project region was out of attainment for PM₁₀ and ozone, the city failed to incorporate mitigations for the project’s cumulative air quality impacts from project emissions because it concluded that the Project would contribute “less than one percent of area emissions for all criteria pollutants.”⁵⁴ The city reasoned that, because the project’s air emissions were small in ratio to existing air quality problems, that this necessarily rendered the project’s “incremental contribution” minimal under CEQA. The court rejected this approach, finding it “contrary to the intent of CEQA.” The court stated:

We find the analysis used in the EIR and urged by GWF avoids analyzing the severity of the problem and allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling. Under GWF's "ratio" theory, the greater the over-all problem, the less significance a project has in a cumulative impacts analysis. We conclude the standard for a cumulative impacts analysis is defined by the use of the term "collectively significant" in Guidelines section 15355 and the analysis must assess the collective or combined effect of energy development. The EIR improperly focused upon the individual project's relative effects and omitted facts relevant to an analysis of the collective effect this and other sources will have upon air quality.⁵⁵

F.17

The Town made the same error here. While the DEIR admits that the Project region is out of attainment for ozone and PM₁₀, the City fails to analyze or mitigate the Project’s emissions’ cumulative air quality impacts. Given that there

⁵¹ *Id.*, pg. 2.4-16.

⁵² PRC § 21083(b)(2); 14 CCR § 15130.

⁵³ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692 (“Kings County”); *see also, Friends of Oroville v. City of Oroville* (2013) 219 Cal. App. 4th 832, 841-42.

⁵⁴ *Id.* at 719.

⁵⁵ *Id.* at 721.

are two existing large warehouses immediately adjacent to the proposed Project site, as well as the proliferation of warehouse projects in the region and San Bernardino County, the DEIR is woefully inadequate in its analysis of the Project's potentially significant cumulative air quality impacts.

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Moreover, the Town's approach directly conflicts with the California Attorney General's recent guidance document setting forth best practices for evaluating the environmental impacts of warehouse projects like this one under CEQA.⁵⁶ With respect to cumulative air quality and GHG emissions analysis, the Attorney General's guidance states that best practices include "[w]hen analyzing cumulative impacts, thoroughly considering the project's incremental impact in combination with past, present, and reasonably foreseeable future projects, *even if the project's individual impacts alone do not exceed the applicable significance threshold* [emphasis added]."⁵⁷

F.18

The DEIR's cumulative impacts analysis with respect to air quality and GHG emissions does not comply with CEQA and is in direct conflict with the Attorney General's suggested best practices, and the Town must prepare a revised EIR that properly evaluates and mitigates such impacts.

B. The DEIR Fails to Adequately Disclose, Analyze and Mitigate Transportation Impacts

The DEIR's analysis of the Project's impacts on vehicle miles traveled ("VMT") concludes that, even with the inclusion of a handful of mitigation measures, the Project's VMT impacts will be significant and unavoidable.⁵⁸ This conclusion is based on the technical VMT analysis performed by the Town's consultant, finds that the Project would, in the current baseline condition, generate 39.72 VMT per unit service population and in the cumulative General Plan buildout condition, generate 56.77 VMT per unit service population.⁵⁹ These levels are well in excess of the Town's adopted VMT significance threshold of 26.41 VMT per unit service population. While the DEIR proposes some VMT mitigation measures, the VMT analysis concludes "[i]mplementation of feasible VMT reduction measures would not definitively reduce Project VMT or Project VMT impacts. Therefore, even with implementation of these measures, the Project VMT impact is assumed to

F.19

⁵⁶ *Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act* (Updated September 2022), available at <https://oag.ca.gov/system/files/media/warehouse-best-practices.pdf>.

⁵⁷ *Id.*, pg. 7.

⁵⁸ DEIR, pg. 2.17-20.

⁵⁹ Smith Comments, pg. 1.

exceed the Town VMT threshold. The Project VMT is therefore considered significant and unavoidable.”⁶⁰

**F.19
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With respect to VMT mitigation measures, the DEIR states “[a]s the future building tenants are not known for the Project, the effectiveness of each commute trip reduction measure may be limited. The Project shall implement the following measures that have the potential to reduce VMT, although no quantified benefit can be taken at this time.”⁶¹ The DEIR does not even attempt to quantify the effects of the proposed mitigation measures on Project VMT, yet concludes that VMT impacts will be significant and unavoidable with mitigation incorporated.

F.20

Transportation expert Dan Smith explains why the DEIR’s proposed VMT mitigation measures are “unusually weak, low cost and unresponsive to the nature of the Project.”⁶² For example, mitigation measure VMT-1 provides:

“The Project shall implement a Voluntary Commute Trip Reduction (CTR) measure. The purpose of the CTR would be to encourage alternative modes of transportation such as carpooling, which would reduce VMT. A proposed CTR program for this project could include providing on-site and/or online commute information services including information on available transit and ride coordination for employees.”

This measure requires a CTR for the purpose of encouraging alternative transportation modes for Project employees, but contains no specifics of what must be included in the program, other than that it “could include” provision information on transit and ride coordination. Mitigation measure VMT-1 violates CEQA as improperly deferred mitigation, as it fails to include specific performance standards for reducing VMT impacts or to specify actions that may achieve those standards.⁶³ In addition, Mr. Smith notes that, because warehouse projects like this one normally operate around the clock, transit information is useless to workers whose shifts start or end during the night when transit is inoperative.⁶⁴ He also cites evidence that the maximum ride share potential is about 4 percent of workers in suburban areas and 0 in rural areas, and that participation in carpooling is close to zero among night shift workers.⁶⁵

F.21

⁶⁰ DEIR, Appendix I.b.

⁶¹ DEIR, pg. 2.17-21.

⁶² Smith Comments, pg. 2.

⁶³ CEQA Guidelines § 15126.4(a)(1)(B).

⁶⁴ Smith Comments, pg. 2.

⁶⁵ *Id.*

As with mitigation measure VMT-1, Mr. Smith's comments explain why the DEIR's other proposed mitigation measures are completely ineffectual in reducing the Project's recognized significant VMT impacts.⁶⁶ He also proposes several feasible mitigation measures that could reduce such impacts, such as:

- Provide free parking in designated spaces for employees who carpool while charging daily or monthly fees for parking for employees who commute by driving alone.
- Give an electric bicycle to any employee who a) commits to commuting by that means at least 3 times per week while remaining employed at the Project for a period of, say, 2 years and b) commits to returning the bicycle in good working order or pay for it if they leave employment at the Project before the specified period or fail to commute by bike at the specified frequency.
- Make a cash payment to employees who agree to purchase a zero-emissions vehicle and use it for commute purposes at an agreed-upon frequency and for an agreed-upon period of time with further agreement by the employee to reimburse the payment if they fail to purchase the vehicle, fail to commute by it at the specified frequency and period of time or if they leave employment at the Project before the specified period of time.
- Pay an excess VMT mitigation fee established by the Town to be used by the Town to fund transportation infrastructure such as active transportation linkages and transit route extensions and service frequencies in areas where they would be most productive in reducing area VMT. This is similar to off-site transportation improvement development fees.
- Or the excess VMT mitigation fee could be utilized to subsidize development of owner-purchased or rental housing at sites close to the Project site or in low VMT areas of the Town. Specific terms for Project employees to have priority in purchase or rental of said units would be established.

F.22

The DEIR fails to include any analysis of the feasibility of the above methods, or any other methods, to reduce the Project's significant VMT impacts and lacks substantial evidence to conclude that the City has eliminated or substantially lessened all significant effects on the environment to the greatest extent feasible. Therefore, the DEIR violates CEQA and the City cannot conclude that the Project's VMT impacts are significant and unavoidable.⁶⁷

⁶⁶ *Id.*, pgs. 2-4.

⁶⁷ CEQA Guidelines § 15002(a)(2).

The City must evaluate the feasibility and effectiveness of additional mitigation measures in a revised and recirculated DEIR for the Project, including the measures proposed by Mr. Smith.⁶⁸

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Cont.

C. The DEIR Fails to Adequately Disclose, Analyze and Mitigate Noise Impacts

The DEIR's noise analysis does not comply with CEQA, because it lacks the noise analysis required by CEQA.⁶⁹ Instead, the DEIR impermissibly defers analysis and mitigation of the Project's potentially significant noise impacts, including impacts to future residential receptors located directly across the street from the Project site. Though currently vacant, lands immediately to the west of the Project across Dale Evans Parkway are designated medium density residential in the Town's General Plan.⁷⁰ The DEIR recognizes that "multi-family residential development will occur in the future on the west side of Dale Evans Parkway, immediately west of the proposed Project."⁷¹

F.23

The DEIR's noise analysis asserts that the Project site is "currently surrounded by properties that are either vacant or occupied by similar industrial uses."⁷² It cites the standards in the Town's General Plan, which provide in part that noise levels of up to 75 CNEL dBA are "normally acceptable" for industrial uses.⁷³ Based on noise contours expected from buildout of the General Plan, noise levels would be 74.1 dBA CNEL at the center line of Dale Evans Parkway.⁷⁴ And based on the North Apple Valley Industrial Specific Plan ("NAVISP"), noise levels would be 71.7 dBA at 100 feet from the center line of the segment in the immediate area of the Project site.⁷⁵ Therefore, the DEIR finds, the Project will not result in significant noise impacts based on the Town's 75 CNEL dBA standard for industrial uses.

F.24

However, the Town's General Plan also has a limit for outdoor noise levels in multi-family residential areas of 65 CNEL dBA.⁷⁶ Based on setback requirements, residential development on the west side of Dale Evans Parkway "would occur at a

⁶⁸ *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal. App. 5th 867, 879.

⁶⁹ CEQA Guidelines, Appendix G, section XII.

⁷⁰ DEIR, pg. 1-2.

⁷¹ *Id.*, pg. 2.13-12

⁷² DEIR, pg. 2.13-11.

⁷³ *Id.*

⁷⁴ *Id.*, pg. 2.13-12.

⁷⁵ *Id.*

⁷⁶ *Id.*

distance of at least 96 feet from centerline at this location, and would have unmitigated noise levels of about 71.7 dBA CNEL at the closest point.”⁷⁷

The Town’s General Plan establishes goals and policies to “assure a controlled noise environment as the Town grows.”⁷⁸ These policies include the following:

- Program 1.B.5- “Residential projects proposed adjacent to any street where the build out noise level at 50 feet from centerline is expected to exceed 65 dBA shall be required to submit a noise analysis in conjunction with entitlement applications.”
- Program 1.B.6- “Commercial and industrial projects proposed adjacent to sensitive receptors, or lands designated for sensitive receptors, including residential, school or hospital sites, shall be required to submit a noise analysis in conjunction with entitlement applications.”⁷⁹

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The DEIR cites Program 1.B.5, and states that “[g]iven that residential projects proposed in the area immediately west of Dale Evans Parkway would be required to submit noise analysis, appropriate measures to mitigate by design could be identified at this stage, ensuring that the exterior noise standard for residential sites is met.”⁸⁰

The DEIR, however, ignores the requirement in Program 1.B.6 that commercial or industrial projects, like this one, proposed adjacent to sensitive receptors, or *lands designated for sensitive receptors*, shall be required to submit a noise analysis. The DEIR contains no noise analysis; it provides no baseline ambient noise measurements, nor does it attempt to estimate project operational noise. Rather, it relies on the noise contours from buildout of the General Plan and NAVISP. “Given that the Project is consistent with the land uses accounted for in the NAVISP and GP, the noise contours used in the NAVISP and GP EIRs would account for buildout of the Project on the subject site.”⁸¹

The DEIR also fails to address the statement in the General Plan EIR’s discussion of noise impacts that the “General Plan is a program-level document and **F.25**

⁷⁷ *Id.*

⁷⁸ *Id.*, pg. 2.13-5.

⁷⁹ *Id.*

⁸⁰ DEIR, pg. 2.13-12.

⁸¹ *Id.*, pg. 2.13-11.

site-specific development is not within the scope of this EIR, but will be analysed and impacts mitigated on a project-by-project basis at the time such development is proposed.”⁸² The General Plan EIR also includes general mitigation measures for noise, including that “the Town shall require an acoustical analysis for all commercial and industrial projects that are proposed adjacent to residential land uses or land use designations. The acoustical analysis shall evaluate potential noise impacts of the project and provide mitigation measures that are adequate to meet Town noise standards for residential land uses.”⁸³

F.25
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Rather than analyzing and mitigating the Project’s noise impacts as required by CEQA and the Town’s General Plan, the DEIR improperly defers such analysis and mitigation to a later date and a different project applicant (i.e., the developer of a future residential project west of Dale Evans Parkway.) Deferring the noise analysis in this way violates the CEQA requirement that the DEIR disclose the severity of the Project’s impacts and the probability of their occurrence *before* the Project is approved.⁸⁴

This deferred analysis also precludes formulation of feasible mitigation measures that could be included in the Project now, to reduce future noise impacts to the reasonably foreseeable adjacent residential uses. The Town has the ability now, during the Project’s CEQA review and permitting stage, to require that the Project implement mitigation on the Project site to reduce potentially significant operational noise impacts to future adjacent residential uses. Once the Project is approved, it will be too late to require the Project to include noise mitigation as the Town will lack the authority to require mitigation on the Project site based on a future noise study performed for a residential project on a different site. At that point, noise mitigation will be limited to measures that can be imposed on the residential development to avoid noise impacts from the Project’s warehouse operations. The Town will lack jurisdiction to impose mitigation on the Project site.⁸⁵

F.26

The Town’s effort to pass off the requirement to analyze and mitigate this Project’s potentially significant noise impacts to a future adjacent project violates the basic CEQA mandate to disclose, analyze and mitigate the Project’s impacts

F.27

⁸² Apple Valley General Plan and Annexations 2008-001 & 2008-002/Environmental Impact Report (“AV GP EIR”), pgs. III-224-225.

⁸³ AV GP EIR, pg. III-226.

⁸⁴ 14 CCR §§ 15143, 15126.2(a); *Cal. Build. Indust. Ass’n v. BAAQMD* (2015) 62 Cal.4th 369, 388-90; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307 (environmental review should be performed at earliest feasible stage in the planning process).

⁸⁵ *Tracy First v. City of Tracy* (2009) 177 Cal. App. 4th 912, 937-38 (agency cannot enforce mitigation over which it lacks jurisdiction).

before it can be approved. The Town therefore must revise and recirculate the DEIR to include a noise analysis and all feasible mitigation to reduce noise impacts.

**F.27
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D. The DEIR Fails to Adequately Disclose, Analyze and Mitigate Biological and Hydrological Impacts

The DEIR does not comply with CEQA as it impermissibly defers analysis and mitigation of the Project’s potentially significant hydrological and biological impacts.

The Project site is currently undeveloped, and has two unnamed drainages running through it from north to south.⁸⁶ These drainages have a defined bed and bank in the northern portion of the site and become areas of sheet flow toward the southern portion of the site.⁸⁷ Development of the Project will include the relocation and re-routing of these drainages; nearly 2 acres of the Project site will be comprised of stormwater diversion and detention, with planned overflow discharge on the south end of the property that purportedly will be similar to existing conditions.⁸⁸

Portions of both drainages are under Regional Water Quality Control Board (“RWQCB”) and California Department of Fish and Wildlife (“CDFW”) jurisdiction, and authorization to disturb them requires a Water Quality Certification from RWQCB and a Section 1602 Streambed Alteration Agreement⁸⁹ from CDFW. The DEIR includes mitigation measures BIO-13 and BIO-14 to “ensure that impacts to the drainages during the development of the proposed Project will not cause adverse effects to associated sensitive communities and habitat.”⁹⁰ The DEIR concludes that with this mitigation, impacts will be less than significant.”⁹¹

F.28

The relevant mitigation measures are as follows:

- BIO-13: “The Project proponent will obtain a CWA 401 Certification from the RWQCB. In addition to the formal application materials and fees (based on area of impact), a copy of the EIR and other appropriate California

⁸⁶ DEIR, pg. 2.5-10.

⁸⁷ *Id.*

⁸⁸ *Id.*, pg. 2.5-12.

⁸⁹ California Fish and Game Code § 1602.

⁹⁰ DEIR, pg. 2.5-16.

⁹¹ *Id.*

Environmental Quality Act (CEQA) documentation shall be included with the application.”⁹²

- BIO-14: “The CDFW will require a 1602 Streambed Alteration Agreement (SSA) for activities that alter on-site drainages. In addition to the mitigation measures provided in BIO-1 through BIO-13, the SSA may include avoidance and minimization measures such as the monitoring of the site by a qualified biologist with stop-work authority; the use of Best Management Practices; restrictions on work activities within the wash to dry weather only; storm event inspections; protection measures relating to vegetation removal and habitat restoration; and/or the acquisition of habitat off-site at a ratio of up to 3:1.”⁹³

The DEIR recognizes that diverting the drainages may have significant impacts, and that RWQCB certification and CDFW agreement “may involve mitigation measures for permanent impacts at a ratio of up to 3:1.”⁹⁴ Authorization from these agencies will be required prior to Project construction, which “would ensure that construction and operation of the Project complies with the RWQCB and CDFW, and if needed, appropriate measures would be identified and implemented to avoid any adverse effects through direct removal, filling, hydrological interruption, or other means. Overall, provided the Project obtains the applicable permits as provided in the mitigation measures below, impacts will be less than significant.”

The finding that simply by obtaining the applicable permits, the Project’s impacts will be less than significant is unsupported by substantial evidence and violates CEQA. The DEIR makes no effort to evaluate the Project’s potentially significant impacts that may be caused by diversion and relocation of the existing stormwater drainage. As with noise impacts discussed above, the DEIR violates the CEQA requirement that the DEIR disclose the severity of the Project’s hydrologic

**F.28
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⁹² *Id.*, pg. 2.5-21.

⁹³ *Id.*

⁹⁴ *Id.*, pg. 2.5-17.

and biological resources impacts and the probability of their occurrence *before* the Project is approved.⁹⁵ The Town must prepare and circulate a revised EIR that fully discloses, analyzes, and mitigates such impacts before the Project can be approved.

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V. THE TOWN MAY NOT APPROVE THE PROJECT'S SITE PLAN REVIEW PERMIT

The Project requires approval by the Director of Economic and Community Development of a Site Plan Review ("SPR") permit; site plan review is a process unique to the NAVISP.⁹⁶ The Director may approve, approve with conditions, or deny an SPR permit, and this decision is appealable to the Planning Commission.⁹⁷ In order to approve an SPR permit, the Director must make a series of findings, including 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."⁹⁸

F.29

As discussed above, the Town has failed to conduct a noise analysis evaluating the Project's potential noise impacts on future residents west of Dale Evans Parkway as required by the Town's General Plan. Because the Project is to be located adjacent to lands designated for sensitive receptors (i.e., residential uses), the General Plan requires that the Town perform such an analysis. Because the Town failed to "evaluate potential noise impacts of the project and provide mitigation measures that are adequate to meet Town noise standards for residential land uses,"⁹⁹ the Director may not make the necessary finding that the location and intensity of the Project is consistent with the General Plan, the development code and the development policies and standards of the Town. An SPR permit may not be approved unless and until the Town conducts a proper acoustical analysis of the Project's potential noise impacts on future residents west of Dale Evans Parkway.

F.30

⁹⁵ 14 CCR §§ 15143, 15126.2(a); *Cal. Build. Indust. Ass'n v. BAAQMD* (2015) 62 Cal.4th 369, 388-90; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307 (environmental review should be performed at earliest feasible stage in the planning process).

⁹⁶ Town of Apple Valley NAVISP pg. II-13.

⁹⁷ *Id.*, pg. III-52.

⁹⁸ *Id.*, pg. III-53.

⁹⁹ AV GP EIR, pg. III-226.

VI. CONCLUSION

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

F.31

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

Sincerely,



Richard M. Franco

RMF:lj1

