

2. Response to Comments

LETTER L1 – Adams Broadwell Joseph & Cardozo for Californians Allied for a Responsible Economy (CARE CA) (33 pages) – Resumes excerpted from Exhibits A and B are included as Appendix A to this FEIR because they do not contain any comments pertaining to the DEIR.

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April 6, 2023	
<u>VIA OVERNIGHT MAIL</u> Chaffey Community College District 5885 Haven Avenue Rancho Cucamonga, CA 91737-3002. ATTN: Measure P Bond Team – CEQA Fontana Comments <u>VIA EMAIL ONLY</u> Chaffey Community College District Email: CEQA@chaffey.edu Samir Shah, Bond Program Manager Email: samir.shah@chaffey.edu <u>Re: CEQA NOA Fontana – Comments on the Draft Environmental Impact Report for the New Fontana Campus Master Plan (SCH No. 2021100098)</u> Dear Mr. Shah: We are writing on behalf of Californians Allied for a Responsible Economy (“CARE CA”) to provide comments on the Draft Environmental Impact Report (“DEIR”) (SCH No. 2021100098) prepared by the Chaffey Community College District (“District”) for the New Fontana Campus Master Plan (“Project”), proposed by Chaffey College Rancho Cucamonga Campus (“Applicant”). The Project is located on an unimproved 14.3-acre lot at 11070 Sierra Avenue at the “T” intersection of Sierra Avenue and Underwood Drive in the City of Fontana, San Bernardino County (Assessor’s Parcel Numbers 0255-101-05 through 09).¹ The project site is currently vacant, containing trees, grasses, and other plants.² The project site is bordered by Sierra Avenue to the east, vacant lots and residential uses to the west, commercial uses to the north (animal hospital, beauty	
¹ DEIR, pg. 4-3. ² <i>Id.</i> 6568-004acp  printed on recycled paper	

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salon, The Home Depot, and a restaurant), and a detention basin to the south.³ Uses east across Sierra Avenue are residential and commercial.

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The Project proposes to relocate and expand its existing Fontana Campus to the project site.⁴ The new campus would be developed in two phases over approximately a 10-year period. The full buildout of the campus would comprise approximately 209,000 Gross Square Feet (GSF). Phase 1 would consist of a 137,000 GSF campus with a welcome center, library, instructional building, automotive technology building, and operations and maintenance building. Phase 2 would include approximately 72,000 GSF of additional campus development and includes a CTE and training building, additional instructional building, and a new student and community center. At buildout, the proposed project would accommodate 4,495 unduplicated students and 192 employees.

We reviewed the DEIR and its technical appendices with the assistance of air quality and health risk expert Dr. James Clark,⁵ and noise expert Ani Toncheva.⁶ The District must separately respond to these technical comments.

Based upon our review of the DEIR and supporting documentation, we conclude that the DEIR fails to comply with the requirements of CEQA. As explained more fully below, the DEIR fails to accurately analyze, disclose, and mitigate the Project's significant health risk, noise, hazardous materials, and biological resources impacts. As a result of its shortcomings, the DEIR lacks substantial evidence to support its conclusions and fails to properly mitigate the Project's significant environmental impacts. The District cannot approve the Project until the errors and omissions in the DEIR are remedied, and a revised DEIR is recirculated for public review and comment which fully discloses and mitigates the Project's potentially significant environmental impacts.

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

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³ *Id.*

⁴ DEIR, pg. 3-2.

⁵ Dr. Clark's comments and curricula vitae are attached hereto as **Exhibit A** ("Clark Comments").

⁶ Ms. Toncheva's comments and curricula vitae are attached hereto as **Exhibit B** ("Toncheva Comments").

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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 and around the City of Fontana.

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

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

II. LEGAL BACKGROUND

CEQA has two basic purposes, neither of which the DEIR satisfies. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.⁷ CEQA requires that an agency analyze potentially significant environmental impacts in an EIR.⁸ The EIR should not rely on scientifically outdated information to assess the significance of impacts, and should result from "extensive research and information gathering," including consultation with state and federal agencies, local officials, and the interested public.⁹ To be adequate, the EIR should evidence the lead agency's good faith effort

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⁷ CEQA Guidelines, § 15002, subd. (a)(1).

⁸ See Pub. Resources Code, § 21000; CEQA Guidelines, § 15002.

⁹ *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm.* ("Berkeley Jets") (2001) 91 Cal.App.4th 1344, 1367.; *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 620.

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at full disclosure.¹⁰ The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”¹¹ “Thus, the EIR protects not only the environment but also informed self-government.”¹²

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Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.¹³ The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to “identify ways that environmental damage can be avoided or significantly reduced.”¹⁴ If a project has a significant effect on the environment, the agency may approve the project only upon a finding that it has “eliminated or substantially lessened all significant effects on the environment where feasible,” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns” specified in CEQA section 21081.¹⁵

As these comments will demonstrate, the DEIR fails to comply with the requirements of CEQA and may not be used as the basis for approving the Project. It fails in significant aspects to perform its function as an informational document that is meant “to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment” and “to list ways in which the significant effects of such a project might be minimized.”¹⁶ The DEIR also lacks substantial evidence to support the District’s proposed findings that the Project will not result in any significant, unmitigated impacts.

III. THE DEIR FAILS TO ADEQUATELY ANALYZE, QUANTIFY, AND MITIGATE THE PROJECT’S 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

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¹⁰ CEQA Guidelines, § 15151; *see also* *Laurel Heights Improvement Assn. v. Regents of University of California* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 406.

¹¹ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

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

¹³ CEQA Guidelines, § 15002, subd. (a)(2)-(3); *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.*, 91 Cal.App.4th at 1354.

¹⁴ CEQA Guidelines, § 15002, subd. (a)(2).

¹⁵ *Id.*, subd. (b)(2)(A)-(B).

¹⁶ *Laurel Heights I*, *supra*, 47 Cal.3d at pg. 391.

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levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.¹⁷ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.¹⁸

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Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by law.¹⁹ 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.²⁰ 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."²¹

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.'²²

A. The DEIR Fails to Analyze Cumulative Health Risk Impacts from Construction Emissions of TACs

The District prepared a construction health risk assessment, which concludes that the cancer risk for the maximum exposed off-site resident from construction activities would be 15.8 in a million and would exceed the 10 in a million-significance threshold.²³ The DEIR concludes that the construction health risk is individually and cumulatively significant.²⁴ The DEIR claims to mitigate this impact to a less-than-significant level by requiring use of Tier 4 Interim equipment (Mitigation Measure AQ-1). But the DEIR's analysis of the cumulative construction

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¹⁷ 14 CCR § 15064(b).

¹⁸ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

¹⁹ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

²⁰ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

²¹ *Id.*; *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

²² *Berkeley Jets*, 91 Cal.App.4th at 1355.

²³ DEIR, pg. 1.5-34, Table 5.1-16.

²⁴ DEIR, pg. 5.1-37.

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health risk did not include the emissions of cumulative projects. According to the DEIR, other nearby developments will have overlapping construction schedules, include the Courtplace at Fontana Project, an affordable housing project directly south of the project site.²⁶ This project was identified as a cumulative project in the DEIR's analysis of the Project's cumulative construction *noise* impacts. But neither this project, nor others nearby, were included in the analysis of the Project's cumulative construction health risk.

L1-5
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CEQA requires the lead agency to analyze cumulative impacts. Section 15355 of the State CEQA Guidelines defines a cumulative impact as the condition under which "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts... The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects."²⁶ Here, the Courtplace at Fontana Project must be considered a cumulative project with regard to construction health risk: the construction sites are close in proximity, will have overlapping construction schedules, and will both emit Toxic Air Contaminants ("TACs") including Diesel Particulate Matter ("DPM"). These factors will result in increased health risks during construction.

CEQA requires analysis of human health impacts. CEQA Guidelines Section 15065(a)(4) provides that the District is required to find a project will have a significant impact on the environment and require an EIR if the environmental effects of a project will cause a substantial adverse effect on human beings.²⁷ The Supreme Court has also explained that CEQA requires the lead agency to disclose the health consequences that result from exposure to a project's air emissions.²⁸ To meet CEQA's informational standards, the District must disclose and analyze the cumulative projects' construction emissions in the DEIR.

Additionally, the DEIR's conclusion that Mitigation Measure AQ-1 would reduce the significant cumulative construction health risk to a less-than-significant level is not supported by substantial evidence. Without including the emissions of cumulative projects in the model, the District underestimates the cumulative emissions of DPM. The District thus lacks substantial evidence to conclude that the

²⁶ DEIR, pg. 4-13, 5.6-21.

²⁶ C.C.R. Section 15355.

²⁷ 14 CCR § 15065(a)(4); PRC § 21083(b)(3), (d).

²⁸ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516, 523.

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cancer risk would be reduced below the 10 in a million-significance threshold. The Project's cumulative construction health risk thus remains potentially significant.

B. The DEIR Fails to Disclose Significant Construction Noise and Vibration Impacts

i. The DEIR Fails to Disclose Significant Construction Noise Impacts on Residential Receptors

The DEIR states: "[a] significant impact would occur if construction noise would exceed 80 dBA Leq at residential receptors."²⁹ The DEIR's construction noise threshold is not supported by substantial evidence because it fails to reflect significant noise increases over existing levels. The CEQA Guidelines state that a project would normally have a significant effect on the environment if the project would result in "generation of a substantial temporary or permanent increase in ambient noise levels."³⁰

L1-6

In *King and Gardiner Farms, LLC v. County of Kern et al.*,³¹ the Fifth District Court of Appeal held that the County inappropriately applied a single threshold for determining the significance of the project's noise impacts. To determine whether implementation of an ordinance would cause significant noise impacts, the County used a quantitative threshold of 65 dBA DNL, meaning that the ordinance would not cause a significant noise impact if noise levels stayed below that threshold. The court held that the County's use of a single threshold violated CEQA because the threshold did not measure the increase in noise levels over ambient levels. Comments on the EIR, as well as the County's own noise report that was appended to the Draft EIR, suggested using an increase of 5 dBA to determine whether the increase in noise above ambient levels constituted a significant impact. But the County did not do so. Instead, the County argued that it was entitled to substantial deference in selecting the significance thresholds. Although the court agreed that the County is entitled to deference in its choice of significance thresholds, the court held that the County's use of an absolute noise threshold for evaluating all ambient noise impacts violated CEQA because it did not provide a "complete picture" of the noise impacts that may result from implementation of the ordinance.

²⁹ DEIR, pg. 5.6-13.

³⁰ DEIR, pg. 5.6-12.

³¹ (2020) 45 Cal.App.5th 814.

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Here, the DEIR similarly relies on a single quantitative threshold to determine the significance of construction noise. As in *King and Gardiner Farms*, this approach is inadequate. Therefore, in order to evaluate construction noise impacts, a revised EIR should be prepared to consider an ambient-based threshold in addition to the 80 dBA criteria.

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Substantial evidence shows that construction noise impacts are significant when an adequate threshold is applied that considers increase over ambient noise levels. As stated in the DEIR, a change in 5 dB over ambient is readily discernible to most people in an exterior environment.³² Ms. Toncheva presents evidence showing that construction noise could exceed 5 dB above the 58 dBA ambient, resulting in a substantial increase in the ambient noise environment.³³ This impact could last over months, and could be louder if additional equipment is used.³⁴ Thus, substantial evidence shows that the project would result in "generation of a substantial temporary or permanent increase in ambient noise levels."³⁵

This significant impact must be mitigated in a revised EIR. Ms. Toncheva explains that constructing a temporary 10-foot high noise barrier around the perimeter of the construction site would reduce construction noise levels at these homes by 10 dB.³⁶

ii. The DEIR Fails to Disclose Significant Construction Noise Impacts on an Animal Hospital

The DEIR fails to analyze construction noise impacts on the Prestige Animal Hospital, located 50 feet to the north of the project site boundary. The DEIR only measures construction noise impacts on residences to the East (447 ft away), and residences to South (525 ft away).³⁷ These residential receptors are located further away from the Project's construction activities than the hospital, so the DEIR's analysis does not capture the extent of the impacts on the hospital.

L1-7

The animal hospital is a sensitive receptor. The DEIR acknowledges that "[n]oise- and vibration-sensitive receptors include land uses where quiet

³² DEIR page 5.6-16; Toncheva Comments, pg. 1.

³³ Toncheva Comments, pg. 2.

³⁴ *Id.*

³⁵ DEIR, pg. 5.6-12.

³⁶ Toncheva Comments, pg. 2.

³⁷ DEIR, pg. 5.6-16.

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environments are necessary for enjoyment and public health and safety... Residences, schools, motels and hotels, libraries, religious institutions, **hospitals**, and nursing homes are examples" [emphasis added].³⁸ Since the DEIR fails to quantify construction noise impacts on this sensitive receptor, the DEIR fails to meet the informational and analytical standards of CEQA. A revised EIR must be prepared to analyze this impact.

L1-7
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Substantial evidence demonstrates that construction impacts on the hospital would be significant. Calculations in Ms. Toncheva's comments show that construction impacts on this sensitive receptor would be significant. The DEIR adopts a significance threshold for construction noise of 80 dBA Leq.³⁹ Ms. Toncheva explains that the estimated construction noise levels for the three noisiest pieces of equipment are as high as 85 dBA for grading and paving work – more than 10 dB over existing ambient noise levels at the animal hospital.⁴⁰ Ms. Toncheva explains that this noise increase would be perceived as twice as loud as existing levels. Since construction noise would exceed the DEIR's chosen thresholds and would increase noise levels more than 10 dB over ambient levels, there is substantial evidence that the Project's construction noise generates a significant impact requiring mitigation.

The DEIR must be revised to include adequate mitigation. Ms. Toncheva explains that a noise barrier would be an efficient noise mitigation measure here due to the proximity of the hospital: constructing a 10-foot noise barrier around the perimeter of the construction site would reduce levels by 15 dB, below ambient-based threshold of significance.⁴¹

iii. The DEIR Fails to Disclose Significant Vibration Impacts

The DEIR concludes that vibration annoyance impacts from Project construction would be less than significant.⁴² This conclusion is not supported by substantial evidence because the DEIR fails to analyze the impact of vibration from construction activities on the neighboring animal hospital.⁴³ As detailed in Ms. Toncheva's comments, this impact is potentially significant.

L1-8

³⁸ DEIR, pg. 5.6-2.

³⁹ DEIR, pg. 5.6-13.

⁴⁰ Tocheva Comments, pg. 3.

⁴¹ *Id.*

⁴² DEIR, pg. 5.6-20.

⁴³ DEIR page 5.6-2.

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The DEIR states that “[n]oise- and **vibration-sensitive** receptors include land uses where quiet environments are necessary for enjoyment and public health and safety... Residences, schools, motels and hotels, libraries, religious institutions, **hospitals**, and nursing homes are examples” [emphasis added].⁴⁴ The animal hospital is a vibration-sensitive receptor. Ms. Toncheva explains that Prestige Animal Hospital services include surgery procedures, which makes it vibration sensitive.⁴⁵

L1-8
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Substantial evidence shows that vibration impacts on the hospital are significant. Ms. Toncheva explains that the Federal Transit Administration (“FTA”) Manual provides criteria for buildings where vibration would interfere with interior operations of 65 VdB and criteria for institutional daytime uses of 75 VdB.⁴⁶ Ms. Toncheva reasons that the 65 VdB criteria would apply to sensitive surgical procedures or use of lab equipment. Ms. Toncheva’s comments show that grading and building construction work within 131 feet of the receptor would generate vibration above 65 VdB, and paving work within 281 feet would exceed 65 VdB.⁴⁷ This significant vibration impact must be analyzed and mitigated in revised EIR.

C. The DEIR Fails to Adequately Analyze and Mitigate Health Risks from Disturbance of Contaminated Soils

The DEIR’s pesticide report states that arsenic levels in the Project’s surface soil was detected at concentrations ranging from 4.4 to 8.1 milligrams per kilogram (mg/kg).⁴⁸ The report shows that these concentrations exceed the risk-based screening levels from DTSC’s Screening Level for residential land use of 0.11 mg/kg and commercial/industrial land use of 0.36 mg/kg.⁴⁹ But the DEIR concludes that because arsenic concentrations are below the upper bound of background arsenic levels, the health risk impact to workers and future occupants of the Project site is less than significant.⁵⁰ This claim is not supported by substantial evidence, as background and ambient arsenic levels are known to often exceed the risk-based screening levels.⁵¹ The DEIR’s approach thus fails to satisfy CEQA’s requirements

L1-9

⁴⁴ DEIR, pg. 5.6-2.

⁴⁵ Toncheva Comments, pg. 4.

⁴⁶ *Id.*

⁴⁷ *Id.*, pgs. 3-4.

⁴⁸ DEIR, Appendix O, pg. O-8.

⁴⁹ *Id.*

⁵⁰ DEIR, Appendix O, pg. O-3, 4.

⁵¹ California Department of Toxic Substances Control, Determination of a Southern California Regional Background Arsenic Concentration in Soil,

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to analyze and mitigate health impacts from human exposure to toxic substances, which apply regardless of the origin of the substances.

L1-9
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In *Cal. Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.*,⁵² the California Supreme Court held that the disturbance of contaminated soil is a potentially significant impact which requires disclosure and analysis of health and safety impacts in an EIR.⁵³ The Court explained that “when a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users.”⁵⁴

And in *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (“*Berkeley Jets*”), the Court of Appeal held that a CEQA document must analyze the impacts from human exposure to toxic substances.⁵⁵ In that case, the Port of Oakland approved a development plan for the Oakland International Airport.⁵⁶ The EIR admitted that the Project would result in an increase in the release of TACs and adopted mitigation measures to reduce TAC emissions, but failed to quantify the severity of the Project’s impacts on human health.⁵⁷ The Court held that mitigation alone was insufficient, and that the Port had a duty to analyze the health risks associated with exposure to TACs.⁵⁸ 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.”⁵⁹

<https://www.sandiegocounty.gov/content/dam/sdc/pds/ceqa/Bagley-Major-Grading-Plan-Change/Determination-of-Background-Arsenic.pdf> (“Arsenic is especially problematic since the risk-based soil concentration is 1 00-times [check this number] below typical ambient concentrations.”); DTSC (December 28, 2020), Human Health Risk Assessment (HHRA) Note Number 11 – Southern California Ambient Arsenic Screening Level, available at <https://dtsc.ca.gov/wp-content/uploads/sites/31/2018/01/Background-Arsenic.pdf> (“Background and ambient concentrations of some inorganic elements can exceed risk-based concentrations. This includes arsenic, where background as well as ambient concentrations exceed the risk-based soil concentration of 0.11 mg/kg”).

⁵² (2015) 62 Cal.4th 369.

⁵³ 62 Cal.4th at 388-90; 14 CCR § 15126.2(a).

⁵⁴ 62 Cal.4th at 377.

⁵⁵ 91 Cal.App.4th at 1369–1371.

⁵⁶ *Id.* at 1349–1350.

⁵⁷ *Id.* at 1364–1371.

⁵⁸ *Id.*

⁵⁹ 14 C.C.R. § 15003(b).

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Here, the DEIR acknowledges that the arsenic concentrations exceed the risk-based screening levels of 0.11 mg/kg and 0.36 mg/kg, but claim health risk impacts would be less-than-significant because arsenic concentrations are less than the upper bound of background concentrations. This approach fails to disclose the health impacts on workers and future occupants of the Project site by exposure to the elevated arsenic levels present at the site. The proposed construction activities may disturb and expose contaminated soil, increasing the likelihood that workers or neighbors will breathe in contaminated dust or otherwise be exposed to contaminated soil that would previously have been encased underground. In addition, the Project may increase the health risks posed by this contaminated soil by inviting students and other members of the public to occupy open space proposed in the Project's Open Space Plan.⁶⁰

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CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.⁶¹ Here, despite arsenic levels exceeding residential and commercial health risk thresholds, no mitigation for workers or future occupants is provided. A revised EIR must be prepared that discloses, analyzes and mitigates health impacts from human exposure to arsenic on the Project site.

i. Substantial Evidence Shows that Arsenic Concentrations on the Project Site Exceed Background Concentrations

The DEIR claims that arsenic concentrations on the Project site are below background concentrations because arsenic detected in the seven composite soil samples was below the upper bound background concentration for Southern California, and San Bernardino County.⁶² Dr. Clark's comments discuss authority showing that rather than comparing the Project site's arsenic concentrations to "upper bound" background concentrations, the Project site's arsenic concentrations should be compared to the 95 percent upper confidence limit (UCL) of the arithmetic mean.⁶³ DTSC guidance on the estimated risk associated with the upper-bound arsenic screening level states:

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⁶⁰ DEIR, pg. 3-25, Figure 3-10.

⁶¹ CEQA Guidelines, § 15002, subd. (a)(2)-(3); *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.*, 91 Cal.App.4th at 1354.

⁶² DEIR, Appendix O, Pg O-3

⁶³ Clark Comments, pg. 7-9.

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Southern California site-specific soil concentrations which exceed 12 mg/kg may be indicative of releases of arsenic. Comparison of a site-specific 95% UCL of the mean to the 12 mg/kg upper bound concentration are statistically incorrect. The comparison, or statistical test, of site-specific 95% UCL of the mean should be to the southern California 95%UCL of the mean arsenic soil concentration of 3.1 mg/kg.⁶⁴

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This guidance suggests that although exceedance of the upper bound concentration may be indicative of releases of arsenic, the site-specific 95% UCL of the mean should be compared to the southern California 95% UCL of the mean arsenic soil concentration of 3.1 mg/kg. Dr. Clark's analysis of the data, using ProUCL 5.2 software, shows that the 95% UCL for arsenic across the site is 6.925 mg/kg.⁶⁵ This level of arsenic exceeds the background concentration level of 3.1 mg/kg for arsenic. Thus, the Project's construction phase, which will disturb soils and may release residual contamination present at the Project site, is a significant impact. The DEIR must analyze and mitigate this impact in a revised EIR.

D. The DEIR Fails to Adequately Analyze and Mitigate Significant Impacts to Biological Resources

i. The DEIR Fails to Adequately Mitigate the Significant Impact on DSF Habitat

The proposed project would disturb onsite unconsolidated Delhi sands that provide "moderate quality" Delhi Sands Flower-Loving Fly ("DSF") habitat."⁶⁶ The DSF is a federally endangered species.⁶⁷ The Project site is in the general overlay of the Jurupa Recovery Unit for the DSF, as identified by the USFWS Recovery Plan for the Delhi Sands Flower-Loving Fly.⁶⁸ The DEIR's habitat report acknowledges that DSF habitat is rapidly diminishing:

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More than 95% of known DSF habitat was considered eliminated by development, agriculture, and other land management practices by 1993

⁶⁴ California Department Of Toxic Substances Control Human And Ecological Risk Office (HERO), Human Health Risk Assessment (HHRA) Note Number 11: Southern California Ambient Arsenic Screening Level (December 28, 2020), pg. 7, available at <https://dtsc.ca.gov/wp-content/uploads/sites/31/2018/01/Background-Arsenic.pdf>.

⁶⁵ Clark Comments, pg. 9.

⁶⁶ DEIR, pg. 5.2-16.

⁶⁷ *Id.*

⁶⁸ DEIR, pg. 5.2-21.

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(USFWS 1993; USFWS 1996 in Kingsley 1996); however, this proportion is now nearer 98 to 99% due to these ongoing processes. Many of the last remaining fragments of DSF habitat are currently under pressure by land management efforts such as heavy disking, irrigation, manure dumping, and gravel dumping. There is currently an estimated 1,200 acres of habitat that can support this species (USFWS 1997), but this estimate likely includes lands needing extensive habitat restoration.⁶⁹

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The Project proposes to develop a 14.3 acre site. When compared to the estimated remaining DSF habitat above, this Project could remove over 1% of the remaining DSF habitat. The actual impact on DSF habitat would be greater than 1%, as the Final Recovery Plan For The Delhi Sands Flower-Loving Fly states, “[a]lthough several hundred potentially restorable acres exist, restoration is expensive and not without unresolved problems.”⁷⁰ Accordingly, the DEIR recognizes that disturbance of the onsite Delhi sands would cause potentially significant impacts.⁷¹

MM Bio-2 purports to mitigate these impacts by providing two options. In the first option, the District would conduct a second protocol survey to confirm whether the DSF is present onsite, and if so, prepare a Habitat Conservation Plan. In the second option, the District would, without conducting a protocol survey, calculate fees to purchase mitigation bank credits from an existing DSF conservation bank (Vulcan Materials Company or other approved mitigation sites).

L1-12

This mitigation is inadequate. Option 1 fails to adequately address habitat loss because it does not require habitat compensation if no DSF is detected. This is contrary to the Jurupa Recovery Unit’s purpose: “[t]he intent of Recovery Units (RUs) is to identify and protect areas without which, the target species could not be recovered.”⁷² The Final Recovery Plan For The Delhi Sands Flower-Loving Fly

⁶⁹ DEIR, Appendix E, pg. E-2.

⁷⁰ Final Recovery Plan For The Delhi Sands Flower-Loving Fly (1997), pg. 9, https://ecos.fws.gov/docs/recovery_plan/970914.pdf.

⁷¹ DEIR, pg. 5.2-16.

⁷² Draft Amendment 1 to the Final Recovery Plan For The Delhi Sands Flower-Loving Fly (December 2008), <https://www.endangeredspecieslawandpolicy.com/assets/html/documents/blog/4/2019/06/Revised-Recovery-Plan-for-Delhi-Sands-Flower-Loving-Fly.pdf>; see Final Recovery Plan For The Delhi Sands Flower-Loving Fly (1997), https://ecos.fws.gov/docs/recovery_plan/970914.pdf.

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(1997) includes conservation and restoration of unoccupied DSF habitat as Task number 1.6.2.⁷³ The Plan explains:

L1-12
Cont'd

The survival and recovery of the Delhi Sands flower-loving fly is dependent on protection of occupied and restorable habitat. Occupied habitat contains individuals of the species and associated habitat used for breeding, feeding, shelter, and/or as a dispersal corridor. Restorable habitat consists of areas that contain Delhi series soil and are not currently occupied by the animal, but could be managed for the species.⁷⁴

Therefore, even if no DSF are detected currently, the habitat must be protected for the species to recover. Because Option 1 does not protect the DSF habitat if no DSF is detected, it is not effective mitigation.

Option 2 is flawed because the mitigation measure is of unclear efficacy. CEQA requires evidence in the record that mitigation measures will be effective in remedying the identified environmental impact where the efficacy of the mitigation is not apparent.⁷⁵ The Vulcan Materials Company mitigation bank is apparently located in a different recovery unit (Colton, as opposed to Jurupa). The Final Recovery Plan For The Delhi Sands Flower-Loving Fly states that the three Recovery Units (RUs) are based on geographic proximity, similarity of habitat, and potential genetic exchange – they must each be conserved: “[t]he three Recovery Units (RUs) must be conserved to maintain the species’ distribution and its genetic diversity throughout its present range.”⁷⁶ “At least eight populations across the three RUs are needed to reduce the risk of extinction from random events that may affect any one local area.”⁷⁷ By failing to require compensatory habitat to be provided in the same RU, the Project’s significant impact on the Jurupa RU remains unmitigated. Thus, the mitigation measure must be revised to ensure that compensatory mitigation is provided in the same recovery unit.

L1-13

⁷³ Final Recovery Plan For The Delhi Sands Flower-Loving Fly (1997), pp. 21, 23, 36.

⁷⁴ *Id.* at 13.

⁷⁵ *League to Save Lake Tahoe Mtn. Area Preservation Foundation v. County of Placer* (2022) 75 Cal.App. 5th 63,121; *see also, Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1168 (no evidence that greenhouse gas emission reduction measures would function as enforceable or effective mitigation measures).

⁷⁶ *Id.* at 15.

⁷⁷ *Id.* at 15.

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ii. The DEIR Fails to Adequately Analyze and Mitigate Cumulative Impacts on DSF Habitat

The DEIR's environmental setting section shows that the surrounding area is planned to be developed.⁷⁸ These developments may have the same adverse impacts on DSF habitat as the Project by eliminating DSF habitat. These developments, and others in the region, must be considered cumulative projects.

L1-14

The DEIR concludes that cumulative impacts will be less than significant because "as with the proposed project, other development projects in the District are also required to provide appropriate mitigation if it is determined that development sites provide suitable DSF habitat." This reasoning would lead to the erasure of the Jurupa Recovery Unit, as the mitigation proposed by the DEIR is ineffective at mitigating the Project's habitat impacts. Specifically, if each cumulative project were to adopt similar mitigation measures to MM BIO-2, they could develop suitable DSF habitat so long as no DSF were detected (Option 1). And under Option 2, other projects could purchase mitigation bank credits in other regions. Since the DSF is extant through much of the Jurupa RU, much of the Jurupa Recovery Unit would be lost. This outcome would be contrary to the purpose of the RU to protect habitat through the DSF's present range.

iii. The DEIR Fails to Mitigate Loss of Foraging Habitat

The DEIR fails to provide compensatory habitat mitigation for burrowing owl. MM BIO-4 – Burrowing Owl Preconstruction Surveys – requires preconstruction surveys, but fails to require habitat compensation in the event burrowing owl is detected. Leading authority on burrowing owl mitigation states that compensatory habitat (with an equivalent or greater habitat area) is needed to mitigate for permanent habitat loss.⁷⁹ The DEIR conflicts with this guidance by failing to require compensatory habitat in the event burrowing owls are detected during the preconstruction survey. Consequently, MM BIO-4 does not ensure Project impacts on the burrowing owl would be mitigated to less-than-significant levels. The DEIR must be revised and recirculated to address these deficiencies.

L1-15

Regarding other sensitive avian species, the DEIR acknowledges that the Project site contains foraging habitat for sensitive avian species: "[t]he Suitable

⁷⁸ DEIR, pg. 4-11; 4-3, fn 1-4.

⁷⁹ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, pg. 8. See also DEIR, Appendix A, CDFW NOP comments.

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nesting habitat for the Cooper's hawk (*Accipiter cooperii*), a state species of special concern (SSC) is in the mature ornamental trees. Suitable foraging habitat for the California horned lark (*Eremophila alpestris actia*), an SSC; white-tailed kite (*Elanus leucurus*), a state fully protected (SFP); and loggerhead shrike (*Lanius ludovicianus*), an SSC, is in the disturbed/nonnative grasslands.⁸⁰ But the DEIR's nesting bird mitigation (MM BIO-3), fails to include any habitat mitigation, merely calling for preconstruction surveys to avoid an incidental taking.⁸⁰ The DEIR's assumption that migratory birds would occupy the nearby Jurupa Hills habitat following the Project's direct impacts to 13.52 acres of foraging habitat is unsupported by any evidence. The failure to analyze or mitigate the loss of foraging habitat must be remedied in a revised DEIR.

L1-15
Cont'd

IV. CONCLUSION

The DEIR is inadequate and must be withdrawn. We urge the District to prepare and circulate a revised EIR which discloses all of the Project's potentially significant impacts and requires all feasible mitigation measures to reduce the Project's significant environmental and public health impacts. We thank you for the opportunity to provide these comments on the DEIR.

L1-16

Sincerely,



Aidan P. Marshall

Attachments

APM:acp

⁸⁰ DEIR, pg. 1-15.

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