

RESPONSES TO PUBLIC COMMENTS

to the

**INITIAL STUDY/
MITIGATED NEGATIVE DECLARATION**

for

**550 Piercy Road
Industrial Development**

File Nos. H22-015, ER22-089, T22-015



**CITY OF SAN JOSE
CALIFORNIA**

October 2023

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Section 1. Summary of Comments

The project application is for a Site Development Permit and Vesting Tentative Map to allow the construction of two industrial buildings on a 28.9-acre single vacant parcel located at 550 Piercy Road in San José, California. The total square footage of the proposed industrial buildings would be 430,000 square feet, with 257,149 square feet for Building 1 and 172,851 square feet for Building 2. Additional improvements for site circulation, site access, drainage, and infrastructure are included in the proposed project.

An Initial Study/Mitigated Negative Declaration (IS/MND) was prepared to evaluate the environmental effects of the project in accordance with the California Environmental Quality Act (CEQA). The IS/MND was circulated for local public review from June 8, 2023, to June 28, 2023. In addition, a Notice of Intent was emailed to public and state agencies, nearby cities, school districts, and Native American tribes (as identified by California Native American Heritage Commission). The City of San José received six comment letters during the public review period, as presented in Table-1 below. Two additional letters were received after the close of public comment period. Letter from Advocates for the Environment was received on July 30, 2023. A second letter was received on August 31, 2023 from Mitchell M. Tsai, Attorney at Law on behalf of Carpenter’s Local Union 405.

Table-1: List of Comments Received on IS/MND		
Comment	Name	Date Received
A	Muwekama Tribe (Allen Leventhal)	6/9/2023
B	Usha Chandra	6/17/2023
C	Blum, Collins & Ho, LLP	6/26/2023
D	Pacific Gas & Electric	6/26/2023
E	Adams Broadwell Joseph & Cardozo	6/28/2023
F	Mitchell M. Tsai, Attorney at Law (on behalf of Carpenter’s Local Union 405)	6/28/2023
G	Advocates for the Environment*	7/30/2023*
H	Mitchell M. Tsai, Attorney at Law (on behalf of Carpenter’s Local Union 405)**	8/31/2023**
* Comment letter received 32 days after close of the public review period on June 28, 2023.		
** Comment letter received 63 days after close of the public review period on June 28, 2023.		

This document provides the responses to comments received on the IS/MND that address the contents of the environmental analysis. The specific comments have been excerpted from the letter and are presented as “Comment” with each response directly following as “Response.” Copies of the actual letters and emails submitted to the City of San José are provided in Attachment A.¹

In summary, the comments received on the IS/MND did not raise any new issues about the project’s environmental impacts or provide information indicating the project would result in new environmental impacts or impacts substantially greater in severity than disclosed in the IS/MND. CEQA does not require formal responses to comments on an IS/MND, only that the lead agency consider the comments received [CEQA Guidelines §15074(b)]. Nevertheless, responses to the comments are included in this document to provide a complete environmental record.

¹ Certain exhibits included in the Muwekama Tribe’s comment letter are considered confidential and are not reproduced in this document.

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Section 2. Responses to Comments

Where comments raise environmental issues that result in additions or deletions to the text, tables, or figures in the IS/MND, a brief description of the change is given and the reader is directed to Section 3, Revisions to the IS/MND. Where the same or similar related comments have been made more than once, a response may direct the reader to another numbered comment and response or to a topic response.

Some comments received do not raise environmental issues or do not comment on the analysis in the IS/MND and, thus, do not require a response. These comments generally express an opinion on whether the project should be approved. These comments are hereby part of the project record and will be available to decisionmakers in considering the project.

2.1 Topic Responses to Comments

Several recurring comments were raised during the public review process for the IS/MND. Topic responses for these comments are provided in the following section. The topic responses address comments raised by multiple commenters to minimize repetition and ensure that each comment is fully addressed.

2.1.1 Topic Response to Adequacy of IS/MND

Several comments question the adequacy of the IS/MND and call for requiring an EIR. None of the assertions presented in the comments provide substantial evidence supporting a fair argument and, in some cases, reflect misinterpretations of applicable CEQA thresholds for determining significance.

The assumptions and conclusions made in the IS/MND are supported by substantial evidence, and the assertions presented in the comment letters do not provide substantial evidence supporting a fair argument that the project would result in a new significant environmental impact or a substantial increase in the severity of an environmental impact than determined in the IS/MND. Specific responses are provided below in Section 2.2. None of the comments present new information that has not been previously analyzed nor do they provide substantial evidence supporting a fair argument that the project would result in significant unavoidable impacts requiring preparation of an EIR. Therefore, the City has determined that the conclusions in the IS/MND are valid and preparation of an EIR is not warranted.

2.1.2 Topic Response to Piecemealing

Several comments contend that the IS/MND for the project was required to consider the proposed industrial project located adjacent to the site at 644-675 Piercy Road as a reasonably foreseeable project because both projects propose substantially similar industrial uses, are located on adjacent lots, and are proposed by the same applicant.

To clarify, CEQA defines “project” to include “the whole of an action.” (CEQA Guidelines § 15378(a).) The failure to analyze the whole of an action is a violation of CEQA referred to as piecemealing. (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1222 [“Banning Ranch I”].)

Under the legal test for piecemealing, an environmental document must analyze a future expansion or other action if: 1) it is a reasonably foreseeable consequence of the initial project; and 2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 396.)

A fact-specific review is required to determine whether one action is a reasonably foreseeable consequence of another. “[T]wo projects may properly undergo separate environmental review when the projects have different proponents, serve different purposes, or can be implemented independently.” (*Banning Ranch I*, 211 Cal.App.4th at 1223.) Likewise, if the future proposal has “independent utility” it need not be considered as part of the “whole of the project,” even if the action will change the scope or nature of the initial project or its environmental effect (*Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712, 731–737). Conversely, where an individual project is a “necessary precedent” for action on a larger project or “commits the Lead Agency” to a larger project, then the CEQA document must evaluate the larger project. (CEQA Guidelines § 15165; *Banning Ranch I*, 211 Cal.App.4th at 1223 [collecting authorities].)

For the reasons detailed below, 644-675 Piercy is not a “reasonably foreseeable consequence” of the project and there is no evidence that environmental review for the project was improperly piecemealed. The project is independent of 644-675 Piercy in its location, structure, operation, and development.

First, the project is independent of 644-675 Piercy in its location. The project (APN 678-08-043) and 644-675 Piercy (APNs 678-08-045 and 678-08-055) have different legal lots and propose separate site improvements. For example, the proposed project and 644-675 Piercy project will each construct its own, separate and unconnected: internal roadways for site circulation, surface parking lots, stormwater treatment areas, landscaping, and site access improvements, including driveways for ingress and egress exclusive to each project. None of these site improvements would be shared by or otherwise physically connect the two projects. The project also proposes its own common amenity areas, which would not be shared with other properties or projects. Thus, there is no evidence of piecemealing. The two projects are located on adjacent parcels; however, geographic proximity alone does not demonstrate piecemealing. (*Banning Ranch I*, 211 Cal.App.4th at 1225–26 [rejecting piecemealing claim even where overlapping park and development proposals would use the same access road].)

Second, the existence of a common applicant or parent company for two or more projects does not prove piecemealing under CEQA (See *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004 [concluding that the identity of a prospective retail tenant is not relevant to CEQA review].) It is common practice for developers to develop multiple projects in various stages in one jurisdiction. This is particularly true where, as is the case here, the two projects have different timelines of acquisition and different marketing and branding. End users for each project will also have independent arrangements with the property owner (e.g., long-term or short-term lease, or option to purchase).

Third, the project and 644-675 Piercy are separate projects with independent utility because each project can operate successfully on its own, even if the other is not developed. (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 237 [no piecemealing where one proposed project would be implemented “regardless of the outcome” of another].) The two projects do not share any infrastructure or other features making them interdependent, and each project was designed independently without consideration of the other. If 644-675 Piercy does not move forward, or if the City disapproves its site development permit application, the project could still be constructed and implemented as proposed. Likewise, if the project

was not constructed, 644-675 Piercy could still proceed independently. Thus, the project and 644-675 Piercy are not dependent upon each other to proceed, and each has independent utility.

In addition, because no end users have been identified for the project or for 644-675 Piercy, the two projects will serve different purposes and users (and possibly different industrial use categories). This provides further evidence that the project and 644-675 Piercy are separate and distinct projects with independent utility. And even if the two projects did involve the same or similar industrial uses, this is not evidence of piecemealing. If anything, the respective industrial projects would compete with each other, rather than depend on each other. (Del Mar Terrace Conservancy, Inc., 10 Cal.App.4th at 731–73.) Accordingly, there is no evidence of piecemealing under these circumstances.

Relatedly, the two projects will be developed and implemented independently on different development timelines. The project and 644-675 Piercy each arose from a discrete opportunity and the two projects are not collectively designed at the outset. The application for the project was submitted to the City in April 2022 and the IS/MND was circulated in June 2023, whereas the application for 644-675 Piercy was submitted in August 2022 and preparation of its own environmental review document is currently in progress. Moreover, even after a project has been approved, successful development of an industrial project requires the existence of multiple conditions, including property rights, investors, management partners, and location-specific demand. Thus, 644-675 Piercy is not a “reasonably foreseeable consequence” of the project, which can (and likely will) commence construction and operate successfully on its own prior to the development of 644-675 Piercy.

In summary, the project is not a necessary “first step” or “catalyst” for 644-675 Piercy and it does not commit the City to approving the site development permit for 644-675 Piercy. The project has independent utility and can operate successfully on its own prior to, and without, development of 644-675. Accordingly, the project was properly evaluated under CEQA and there is no evidence of piecemealing.

2.1.3 Topic Response to Cumulative Impacts

The project would not result in a cumulatively considerable adverse environmental effect. In order to determine whether a cumulative effect requires an EIR, the lead agency shall consider whether the impact is significant and whether the effects of the project are cumulatively considerable (CEQA Guidelines §15064(h)(1)). The IS/MND contains mitigation to ensure that all project specific impacts would be minimized to a less-than-significant level.

The IS/MND included a cumulative analysis of Toxic Air Contaminant (TAC) pollutant emissions from all projects located within 1,000 feet of the project site on pages 52-53. This cumulative analysis therefore included the adjacent proposed development at 644-675 Piercy Road, which consists of a 225,000-sf industrial warehouse building. The IS/MND noted that these projects could overlap based on the proposed construction schedules for each project. Table 6 of the IS/MND presents the impacts from construction TAC emissions as a result of the combined sources. The health risks from project activities (construction and operation) were found not to exceed the maximum increased cancer risk single-source threshold or cumulative source threshold. Likewise, the maximum annual PM_{2.5} concentration and HI values were found not to exceed their respective single or cumulative thresholds. The proposed project was found to have a less than significant cumulative air quality impact.

Similarly, the proposed project was found to have a less than significant cumulative greenhouse gas emissions impact with adherence to the 2030 GHG Reduction Strategy (implementation of green building measures, energy conservation measures, enrollment in the SCJE GreenSource program, etc.), which is also proposed for the project at 644-675 Piercy Road. Both projects are compliant with the 2030 GHG Reduction Strategy and were found to have less than significant project-level impacts related to greenhouse gas emissions. Further, CEQA does not require GHG mitigation to be local, since the impact of GHG emissions on the environment through climate change is a global phenomenon.

The IS/MND evaluated cumulative impacts on biological resources. However, this was not stated clearly in the analysis. As a result, text edits to pages 64 and 191 of the IS/MND are identified in Section 3 of this Response to Comments to clearly define that the proposed project would not result in cumulative biological resources impacts. The cumulative biological analysis examined projects within 1,000 feet of the proposed project, which consisted of the adjacent development at 644-675 Piercy Road. Mitigation measures between the two projects are uniformly applied as applicable to shared biological resources between the two sites. The mitigation measures are consistent with the requirements of the Santa Clara Valley Habitat Plan, California Fish and Game Code, and other applicable regulations. The proposed project would have a less than significant impact on cumulative biological resources with incorporation of mitigation.

The IS/MND evaluated cumulative impacts for noise at sensitive receptors as discussed on pages 140-146. To be consistent with the air quality analysis, a 1,000-foot radius was established for the cumulative evaluation. This cumulative analysis therefore included the adjacent proposed development at 644-675 Piercy Road, which consists of a 225,000-sf industrial warehouse building. Construction and operational cumulative noise impacts were evaluated. The construction noise evaluation included all construction activities, including those requiring heavy, noise-generating equipment (excavation, trenching, and foundation work). The analysis noted that while construction of the two projects would likely be concurrent, work would be distributed throughout the site at any given time. The proposed project was found to have a less than significant cumulative impact for temporary construction noise with the incorporation of best management practices.

The cumulative operational noise analysis included an evaluation of traffic noise, mechanical equipment noise, parking lot noise, truck maneuvering noise, and truck pass-by noise from simultaneous operational noise at nearby residential receptors. The combined operation of both projects was found to potentially result in a noise increase of up to 3 dBA DNL at the industrial uses to the west of 550 Piercy Road and up to 1 dBA DNL at the existing residences to the north and to the east. Cumulative operational noise levels were found to be up to 60 dBA L_{eq} and 62 dBA DNL at the industrial uses to the west of 550 Piercy Road, and were found to be from 53 to 54 dBA L_{eq} and 54 dBA DNL at the residences to the north and to the east of the project sites. As a result, cumulative operational noise from the combined operation of both projects was found not to exceed the 55 dBA threshold at the property lines of the surrounding residential land uses or the 60 dBA threshold at the industrial site to the west. The proposed project was found to have a less than significant cumulative operational impact.

The IS/MND evaluated cumulative impacts for cumulative VMT as discussed on page 169. Per the VMT thresholds established by the City for cumulative impacts, projects must demonstrate consistency with the Envision San José 2040 General Plan. This is based on a project's density, design, and conformance to the goals and policies of the General Plan. If a project is determined to be inconsistent with the General Plan, a quantitative cumulative impact analysis is required as part of the City's Transportation Analysis Handbook. The proposed project consists of a future industrial use, which is

consistent with the General Plan designation of *Industrial Park*. As a result, the project was determined to be part of the cumulative impact with respect to conflicting or being inconsistent with CEQA Guidelines Section 15064.3. The project was found to have a less than significant cumulative VMT impact.

CEQA allows a lead agency to determine that a project's contribution to a potential cumulative impact is not considerable and thus not significant when mitigation measures identified in the Initial Study will render those potential impacts less than considerable (CEQA Guidelines 15064(h)(2)). The IS/MND contains numerous mitigation measures to minimize the project's potential impacts. The mere existence of significant cumulative impacts caused by other projects does not constitute substantial evidence that the proposed project's incremental effects are cumulatively considerable (CEQA Guidelines §15064(h)(4)).

2.2 Individual Comment Responses

Following are the responses to individual comments received on the IS/MND.

Comment Letter A: Muwekama Tribe (Allen Leventhal)

The comment letter from the Muwekama Tribe included several attachments that contain information on ancestral heritage sites. Since the attachments may contain sensitive information regarding tribal resources, they are not included here as appendices and can be requested from the City of San Jose Planning Building and Code Enforcement Department by qualified professionals.

Comment A-1: Please accept the attached previously submitted response letter from the Muwekma Ohlone Tribe as a formal response to this proposed project as well as to the adjacent parcels located on Piercy Road in south San Jose.

When we tried to review the on line information relative to the results of the Cultural Resources studies, we could not find any information relative to site sensitivity and the presence of ancestral heritage cemetery and villages sites within the region, that could contribute to predictive models about our ancestral settlement, mortuary and subsistence activities within the subject parcels.

The on-line Appendix C titled "Historical/Archaeological Literature Review and Assessment," informed us that "this report may discuss locations of specific archaeological sites and is confidential. For this reason, it is not included in this Initial Study. Qualified personnel, however, may request a copy of the report from the City's Planning Division." As a result of this recommendation, we are formally requesting a copy of this "Initial Study."

Response A-1: The commenter resubmitted a comment letter with several attachments that were submitted for a previous project proposed at 459 and 469 Piercy Road that is located approximately half a mile to the north of the proposed 550 Piercy Road project. The two projects are not associated and are not located on the same site. Nine documents were submitted with the email, listed by PDF file names:

1. Piercy Response.doc.pdf (comment letter)
2. Piercy Road Project.pdf (copy of map of resource locations)
3. Federal Court Opinion Muwekma-1 (1).pdf
4. CS-SCL-732 Three Wolves Final.compressed.pdf
5. Lt. Governor Letter 2002.pdf
6. Miller's Restoration Bill 2000.pdf
7. BIA Smith Letter 1998.pdf
8. Muwekma Elder Lucas Marine 1928 BIA.pdf
9. DC District Court Muwekma.pdf

Documents #3 through #9 are not relevant to this project area so no responses are necessary. Document #1, referred to as the "Comment Letter" does not provide any project specific comment. The Comment Letter notes there are numerous prehistoric archaeological sites in the vicinity of the proposed project, providing an attached topographic map (Document #2) marked with locations of sites within about one mile; when the sites were marked is not specified. However, the 1980 map does not indicate any resources inside the subject project's location.

In the Comment Letter that references the 459/469 Piercy Road site, the Muwekma Ohlone Indian Tribe recommends that excavations be monitored by a "...Muwekma Ohlone tribal monitor and tribal archaeologist" and "...the Muwekma Ohlone Tribal leadership expects a

comprehensive monitoring program be implemented that will offset any adverse impacts to any of the Tribe's ancestral heritage cemetery and historical era features and artifacts." Cultural resources impacts are site specific and the IS/MND for the subject project includes analysis for impacts to archaeological/tribal resources and includes mitigation measures and standard permit conditions to reduce impacts to less than significant (IS/MND pages 71-73). The mitigation measures note that a Native American representative registered with the Native American Heritage Commission for the City of San José and that is traditionally and culturally affiliated with the geographic be present. However, the City cannot make a recommendation for a specific tribe.

The Cultural Resources study was not made public for the CEQA process because it discusses specific locations of sensitive cultural resources. As stated in the Initial Study, the study is on-file with the City of San José Planning, Building, and Code Enforcement Department and can be viewed by qualified professionals. The City provided the Historical/Archaeological Literature Review and Assessment (CMAC, (July 2022) to the Muwekma Ohlone Tribe on June 23, 2023 via email.

Comment A-2: Furthermore, on the previous Notice of CEQA Posting for the 469 Piercy Road Site Development Project, City File Nos.: H22-014/ER22-075 which we received from you on May 9, 2023, the Notice posted that "The City has performed an environmental review of the project. The environmental review examines the nature and extent of any adverse effects on the environment that could occur if the project is approved and implemented. Based on the review, the City has prepared a **Draft Mitigated Negative Declaration (MND)** for this project. An MND is a statement by the City that the project will not have a significant effect on the environment because the project will include mitigation measures that will reduce identified project impacts to a **less than significant level**.

Response A-2: H22-014 469 Piercy Road is a separate project and the public review period for that project ended on May 29, 2023. See Response A-1.

Comment A-3: Just a reminder that a similar determination was issued for the 200 Park Avenue Project whereby, the Muwekma Tribe, as the Most Likely Descendant tribal group identified by the Native American Heritage Commission, ended up recovering over 45 ancestral remains which has continued into the 180 Park Avenue project, the THÁMIEN RÚMMEYTAK – THÁMIEN (GUADALUPE) RIVER SITE CA-SCL-128.

Therefore, we are formally requesting a copy of the Historical/Archaeological Literature Review and Assessment for this project.

Response A-3: Comment noted. See Response A-1.

Comment A-4: Finally, since the submittal of the Tribe's response by Chairwoman Charlene Nijmeh on January 31, 2019, we have not heard back from anyone in the City Planning Department, nor seen evidence that the Tribe's response was included in any published Notice.

Response A-4: The application for the H22-015 550 Piercy Road Project was submitted on April 22, 2022 and an IS/MND was circulated for public review from June 8, 2023 to June 28, 2023. Therefore, any communication in 2019 would not be associated with the proposed project.

Comment Letter B: Usha Chandra

Comment B-1: The land that is beside Tennant Ave the address of which I am not sure which includes 550 Piercy Road is overrun with tall weeds. The weeds have dried out in the hot weather. This poses a fire hazard especially to my home which is 6501 Gravina Loop. We are situated across the street from the empty lot. Please inform the department that is responsible to mow the land.

Response B-1: This comment does not refer to the adequacy of the Initial Study for the proposed project. The project applicant has confirmed that the tall weeds identified in this comment have since been removed from the project site at 550 Piercy as well as the neighboring parcels at 644-675 Piercy Road as of June 14, 2023.¹ No further response is required.

¹ Personal communication with Jeff Bean, June 30, 2023.

Comment Letter C: Blum, Collins & Ho, LLP

Comment C-1: Thank you for the opportunity to comment on the Mitigated Negative Declaration (MND) for the proposed 550 Piercy Road Industrial Development. Please accept and consider these comments on behalf of Golden State Environmental Justice Alliance (GSEJA). Also, Golden State Environmental Justice Alliance formally requests to be added to the public interest list regarding any subsequent environmental documents, public notices, public hearings, and notices of determination for this project. Send all communications to Golden State Environmental Justice Alliance P.O. Box 79222 Corona, CA 92877.

Response C-1: The specific concerns identified in this letter are addressed below. The City will add GSEJA to the public interest list for this project and continue to provide notification of any subsequent environmental documents, public notices, public hearings, and notices of determination per the commenter's request.

Comment C-2: The project proposes the construction and operation of two industrial warehouse buildings on a vacant 28.9 acre site. The total square footage of the proposed industrial buildings would be 430,000 square feet, with 257,149 square feet for Building 1 and 172,851 square feet for Building 2. The total square footage includes approximately 30,000 square feet of ground floor office and 13,985 square feet of mezzanine office, for a total of 43,985 square feet of office space across the two buildings. The proposed project includes 84 loading docks (46 for Building 1 and 38 for Building 2), 347 passenger car parking stalls, and 80 truck/trailer parking stalls.

Response C-2: The commenter accurately depicts the proposed project. The comment does not state any issues or concerns with the project. Therefore, no further response to this comment is required.

Comment C-3: The MND does not include a floor plan or detailed grading plan. The basic components of a Planning Application include a site plan, floor plan, grading plan, elevations, and written narrative. The figures labeled floor plans are actually site plans and do not provide information about the internal layout of the buildings. Additionally, Figure 8: Grading Plan has been edited for public review and does not provide any detailed information such as the earthwork quantity notes. The edited version of the grading plan inserted for public review is meaningless and provides no useful information. The MND has excluded these required application items in their whole and true form from public review, which does not comply with CEQA's requirements for adequate informational documents and meaningful disclosure (CEQA § 15121 and 21003(b)). Incorporation by reference (CEQA § 15150 (f)) is not appropriate as these documents in their whole and true form contribute directly to analysis of the problem at hand. Providing this information is vital as the Project Description states that "development of the project would involve the excavation of approximately 167,308 cubic yards (CY) of material to be excavated from the site and used as backfill on the site. No import or export of soil would occur as part of the proposed project," but there is no method for the public to verify this claim. The quantity of import/exported soil material directly informs the quantity of necessary truck hauling trips during the grading phase of construction. An EIR must be proposed to include all application items in their whole and true forms for review, analysis, and comment by the public and decision makers.

Response C-3: The comment states that the IS/MND does not include a detailed floorplan, or a grading plan. The comment also states that the site plan provided in Figure 8 does not provide any pertinent information such as earthwork quantity. The comment claims that the IS/MND has

excluded these details from public review, “which does not comply with CEQA’s requirements for adequate informational documents and meaningful disclosure.

The IS/MND includes a detailed project description on pages 5 through 23 that provides the necessary information to adequately evaluate the Project’s environmental impacts.

Floor plans are provided in Figures 5a and 5b and the Grading & Drainage Plan is presented in Figure 8 of the IS/MND. More specific floor plans are not available because, as stated in the IS/MND, an end user of the building has not yet been identified; therefore, the floor plan has not been finalized. The presentation of any floor plan also would not result in any a physical change that would result in impacts beyond what is evaluated in the IS/MND.

As described on page 5 of the IS/MND, the CEQA project description discloses that “The industrial use(s) of the proposed buildings is yet to be determined but would likely be utilized for industrial warehousing, light manufacturing, local industrial distribution, and/or research & development activities, as permitted by the zoning code.” The truck hauling trips during the grading phase of construction are disclosed and evaluated in the air quality assessment for the project contained in Appendix A of the IS/MND and also noted on page 44 of the IS/MND.

Finally, as presented in the responses below, the assumptions and conclusions made in the IS/MND are supported by substantial evidence, and the assertions presented in this comment letter do not provide substantial evidence supporting a fair argument that the project would result in a new significant environmental impact or a substantial increase in the severity of an environmental impact than determined in the IS/MND. Therefore, the City has determined that the conclusions in the IS/MND are valid and preparation of an EIR is not warranted.

Comment C-4: The MND does not include for analysis relevant environmental justice issues in reviewing potential impacts, including cumulative impacts from the proposed project. This is especially significant as the surrounding community is burdened by pollution. According to CalEnviroScreen 4.0², CalEPA’s screening tool that ranks each census tract in the state for pollution and socioeconomic vulnerability, the proposed project’s census tract (6085512001) is more polluted on several indicators compared to the rest of the state overall. The surrounding community, including residences adjacent to the north, bears the impact of multiple sources of pollution. For example, the project census tract ranks in the 85th percentile for traffic impacts. Major roads and highways can bring air pollutants and noise into nearby neighborhoods³. Exhaust fumes contain toxic chemicals that can damage DNA, cause cancer, make breathing difficult, and cause low weight and premature births⁴. Children who live or go to schools near busy roads have higher rates of asthma and other lung diseases than children in areas farther from roads⁵.

The project census tract also ranks in the 97th percentile for hazardous waste impacts. Hazardous waste generators and facilities contribute to the contamination of air, water and soil near waste generators and facilities can harm the environment as well as people⁶.

² CalEnviroScreen 4.0 <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-40>

³ OEHHA Traffic Impacts <https://oehha.ca.gov/calenviroscreen/indicator/traffic-density>

⁴ Ibid.

⁵ Ibid.

⁶ OEHHA Hazardous Waste Generators and Facilities <https://oehha.ca.gov/calenviroscreen/indicator/hazardous-waste-generators-and-facilities>

The project census tract bears more impacts from cleanup sites than 84% of the state. Chemicals in the buildings, soil, or water at cleanup sites can move into nearby communities through the air or movement of water⁷. When water is contaminated by pollutants, the water bodies are considered impaired⁸. These impairments are related to the amount of pollution that has occurred in or near the water body⁹.

The census tract also ranks in the 43rd percentile for drinking water, which indicates that it ranks with the worst quality drinking water in the state. Poor communities areas are exposed to contaminants in their drinking water more often than people in other parts of the state¹⁰.

Response C-4: Impacts of the project related to air pollution and hazardous materials are evaluated within their respective sections of the IS/MND (Sections 3.C and 3.I).

The IS/MND addresses air quality, including toxic air contaminants, in the Air Quality Assessment provided in Appendix A. As described in *Section C. Air Quality* of the IS/MND (pages 43-44), the BAAQMD CEQA Guidelines include screening levels and thresholds for evaluating air quality impacts in the San Francisco Bay Area Air Basin as part of an effort to attain and maintain ambient air quality standards to help attain and maintain ambient air quality standards for O₃, PM_{2.5} and PM₁₀ and their precursors. These thresholds apply to both construction period and operational period impacts. The air quality assessment concluded that project emissions would not exceed the established BAAQMD CEQA thresholds.

In addition, the air quality assessment evaluated toxic air contaminant (TAC) emissions from the project from new sources of TACs during construction (i.e., on-site construction and truck hauling emissions) and operation (i.e., trucks and other vehicle traffic). The TAC evaluation concluded that the health risks from project activities would not exceed the maximum increased cancer risk single-source threshold or cumulative source threshold. Likewise, the maximum annual PM_{2.5} concentration and HI values would not exceed their respective single or cumulative thresholds. The proposed project, therefore, would have a less than significant impact with respect to exposing sensitive receptors to substantial pollutant concentrations.

As described in *Section I. Hazards and Hazardous Materials*, Phase I and II Assessments were conducted for the project site to determine the potential for hazardous materials contamination. The results of the Phase II Assessment did not detect soil contaminants exceeding adopted thresholds and no recognized environmental conditions (RECs) were identified on the site. Evidence of naturally occurring asbestos (NOA) was detected in soil borings at depth of 19-20 feet. Mitigation MM HAZ-1 is identified in the IS/MND (pages 107-108), consisting of preparation and implementation of an Asbestos Dust Mitigation Plan (ADMP), to reduce potential impacts from NOA exposure to less than significant.

As stated in the IS/MND, with mitigation and standard permit conditions incorporated, the project would not result in significant environmental impacts to the community.

⁷ OEHHA Cleanup Sites <https://oehha.ca.gov/calenviroscreen/indicator/cleanup-sites>

⁸ OEHHA Impaired Water Bodies <https://oehha.ca.gov/calenviroscreen/indicator/impaired-water-bodies>

⁹ Ibid

¹⁰ OEHHA Drinking Water <https://oehha.ca.gov/calenviroscreen/drinking-water>

Comment C-5: California's Building Energy Code Compliance Software (CBECC) is the State's only approved energy compliance modeling software for non-residential buildings in compliance with Title 24¹¹. CalEEMod is not listed as an approved software. The CalEEMod-based modeling in the MND and appendices does not comply with the 2022 Building Energy Efficiency Standards and underreports the project's significant Energy impacts and fuel consumption to the public and decision makers. Since the MND did not accurately or adequately model the energy impacts in compliance with Title 24, a finding of significance must be made. An EIR with modeling using the approved software (CBECC) must be circulated for public review in order to adequately analyze the project's significant environmental impacts. This is vital as the MND utilizes CalEEMod as a source in its methodology and analysis, which is clearly not the approved software.

Response C-5: Comments were received regarding the California Emissions Estimator Model (CalEEMod) based modeling and that it does not comply with the 2022 Building Energy Efficiency Standards. However, as specifically identified in the CalEEMod User's Tips documentation, "Users are encouraged to understand the defaults and provide site specific data (e.g., construction schedule, construction equipment type, results of traffic study, predicted water usage, etc.), if available, for a more accurate analysis". As such, the changes to the default CalEEMod assumptions for the project emissions modeling were appropriate based on applicant input and project-specific information. The analysis of Energy on pages 80-82 of the IS/MND relied on the Air Quality Assessment. CalEEMod provides default values for input parameters such as for warehouse building square footage. After the minimum project characteristic and land use information is inputted, CalEEMod provides default values for energy consumption from a land use development project in the event that such detailed information is not yet known (for instance, for a project in the planning stage). Similarly, CalEEMod provided a host of default values where proposed project information was not readily available. The Project Applicant and their contractor(s) represent 'experts' in estimating construction activities for the project based on their experience with similar projects and their need to estimate construction activities, such as duration of construction and equipment needed, for budgeting. Because assumptions provided the Project Applicant and their team represent an expert opinion supported by facts, these assumptions constitute substantial evidence under CEQA that can be used to more accurately estimate project's energy demands. Therefore, CalEEMod is an appropriate program to determine project's impacts on energy. In addition, the energy evaluation also relied on the State's CALGreen code, Climate Smart San José, LEED green building rating system, traffic generation calculated in the Transportation Analysis, and the site's proximity to public transportation. Based on this analysis, the IS/MND concluded that the project would have a less than significant impact with respect to resulting in the wasteful, inefficient, or unnecessary consumption of energy resources during project construction or operation. No edits to the text of the IS/MND are required as a result of this comment.

Comment C-6: The MND does not provide a consistency analysis with all land use plans, policies, or regulations adopted for the purpose of avoiding or mitigating an environmental effect. The project has significant potential to conflict with many of these items, including but not limited to the following from the General Plan and an EIR must be prepared with a consistency analysis in order to provide an adequate and accurate environmental document:

¹¹ California Energy Commission 2022 Energy Code Compliance Software
<https://www.energy.ca.gov/programs-and-topics/programs/building-energy-efficiency-standards/2022-building-energy-efficiency-1>

1. TR-1.2 Consider impacts on overall mobility and all travel modes when evaluating transportation impacts of new developments or infrastructure projects.
2. TR-3.3 As part of the development review process, require that new development along existing and planned transit facilities consist of land use and development types and intensities that contribute toward transit ridership. In addition, require that new development is designed to accommodate and to provide direct access to transit facilities.
3. TR-5.5 Require that new development, which includes new public or private streets, connect these streets with the existing public street network and prohibit the gating of private streets with the intention of restricting public access. Furthermore, where possible, require that the street network within a given project consists of integrated short blocks to facilitate bicycle and pedestrian travel and access.
4. TR-6.1 Minimize potential conflicts between trucks and pedestrian, bicycle, transit, and vehicle access and circulation on streets with truck travel.
5. TR-6.4 Plan industrial and commercial development so that truck access through residential areas is avoided. Minimize truck travel on streets designated in the Envision General Plan as Residential Streets.
6. TR-7.1 Require large developments and employers to develop and maintain TDM programs with TDM services provided for their residents, full-time and subcontracted workers, and visitors to promote use of non-automobile modes and reduce the vehicle trips.
7. Goal TR-9 – Reduction of Vehicle Miles Traveled Reduce Vehicle Miles Traveled (VMT) per service population by 20% (2030 goal) and by 45% (2040 goal), from the 2017 levels.
8. MS-2.11 Require new development to incorporate green building practices, including those required by the Green Building Ordinance. Specifically, target reduced energy use through construction techniques (e.g., design of building envelopes and systems to maximize energy performance), through architectural design (e.g., design to maximize cross ventilation and interior daylight) and through site design techniques (e.g., orienting buildings on sites to maximize the effectiveness of passive solar design).
9. MS-3.1 Require water-efficient landscaping, which conforms to the State’s Model Water Efficient Landscape Ordinance, for all new commercial, institutional, industrial, and developer-installed residential development unless for recreation needs or other area functions.
10. MS-10.5 In order to reduce vehicle miles traveled and traffic congestion, require new development within 2,000 feet of an existing or planned transit station to encourage the use of public transit and minimize the dependence on the automobile through the application of site design guidelines and transit incentives.
11. MS-11.2 For projects that emit toxic air contaminants, require project proponents to prepare health risk assessments in accordance with BAAQMD-recommended procedures as part of environmental review and employ effective mitigation to reduce possible health risks to a less than significant level. Alternatively, require new projects (such as, but not limited to, industrial, manufacturing, and processing facilities) that are sources of TACs to be located an adequate distance from residential areas and other sensitive receptors.
12. MS-11.3 Review projects generating significant heavy duty truck traffic to designate truck routes that minimize exposure of sensitive receptors to TACs and particulate matter.
13. MS-11.8 For new projects that generate truck traffic, require signage which reminds drivers that the State truck idling law limits truck idling to five minutes.

14. MS-19.1 Require new development to contribute to the cost-effective expansion of the recycled water system in proportion to the extent that it receives benefit from the development of a fiscally and environmentally sustainable local water supply.
15. MS-21.6 As a condition of new development, require the planting and maintenance of both street trees and trees on private property to achieve a level of tree coverage in compliance with and that implements City laws, policies or guidelines.

Response C-6: This comment expresses a concern that the IS/MND did not include a consistency analysis with the City’s General Plan and lists several policies within the General Plan that are believed to be applicable to the Project. The thresholds used to determine the significance of a Project’s land use impacts (per Appendix G of the CEQA Guidelines) ask whether a project would “Cause a significant environmental impact due to a conflict with any applicable land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect”. Therefore, the IS/MND included an analysis of the project’s consistency with applicable General Plan goals and policies that have been adopted by the City to avoid or mitigate environmental effects of new development projects. Transportation, air quality, energy (including green building policies), and hazard/hazardous material are addressed within their respective sections of the IS/MND. As stated on page 121 of the MND, “In terms of physical impacts on the environment, this IS/MND analyzes the environmental impacts of the project within each resource section of the document and provides measures and conditions to reduce the physical impacts of the project...the project would have a less than significant impact related to conflicts with land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect.” As such, the IS/MND has evaluated the project’s consistency with all applicable General Plan land use policies and no revisions are necessary. Because no new environmental issues were identified, no further analysis is necessary.

Comment C-7: The MND concludes that impacts to Population and Housing will be less than significant because “employees would be sourced largely from the City’s existing population, as well as the populations of neighboring cities, and would not require the construction of additional housing to accommodate employees.” The geographic area of “neighboring cities” of the project site is undefined and relying on the entire labor force within an undefined distance, notably the greater Bay Area region, to fill the project’s construction and operational jobs will increase project VMT (that has already been determined to be a significant impact) and emissions during all phases of construction and operations. An EIR must be prepared to account for longer worker trip distances. Additionally, an EIR must also provide demographic and geographic information on the location of qualified workers to fill these positions in order to provide an accurate environmental analysis.

Response C-7: This comment expresses a concern regarding the IS/MND’s population and housing analysis. The analysis of demographic and geographic information regarding the location of workers for the proposed industrial project would be speculative as no end user has been identified. As stated in the IS/MND on page 150, these growth projections were based on existing and planned land use patterns noted in the City’s General Plan, which assumed that the Project site would be developed for industrial and employment generating uses. City of San José has a low jobs–housing ratio¹² (i.e., an area that has more potential workers living in a community than there are jobs for them), resulting in high numbers of residents commuting out of the region for work. A low jobs-to-housing ratio can result in adverse environmental and economic effects on

¹² [Economy: Jobs per Employed Resident | City of San José \(sanjoseca.gov\)](http://sanjoseca.gov)

local communities due to long-distance commutes resulting in increased traffic and air quality and greenhouse gas emissions. By developing an employment-generating use, the Project would provide job opportunities for those living in the area that may commute out of the area for work. Moreover, the applicable threshold of significance with regard to population and housing raises the question of whether a project would result in substantial unplanned population growth such that new housing would be required and the construction of such housing would result in environmental effects. Given the substantial jobs-housing imbalance and given that the Project site is designated for employment generating uses, the Project would not result in unplanned population growth and would not require the construction of new housing.

The VMT analysis for the project was completed utilizing the methodology and standards per the adopted City's transportation policies. As described on pages 166-169 of the IS/MND, Figure 15 shows the current VMT levels estimated by the City for industrial jobs based on their locations. The VMT threshold of 14.37 miles per employee for industrial employment was used for the VMT analysis. Per the City's VMT Evaluation Tool, the existing Area VMT for employment uses is 14.82 VMT per worker, which is above the existing regional average threshold of 14.37 VMT per worker. Based on the VMT reduction strategy tiers included in the VMT Evaluation Tool, the MND identified mitigation, including traffic calming measures, bike access improvements, and pedestrian network improvements to reduce the VMT impact to less than significant. A lower VMT would reduce impacts to air quality and greenhouse gas.

Comment C-8: The MND states that the proposed project “would generate approximately 160 new employees,” but does not provide the methodology for this calculation or the source of the employment generation. Additionally, the MND does not provide any calculation of the project's construction employees. The City's 2040 General Plan Draft EIR¹³ provides an employment generation calculation that industrial uses generate 1 employee per 1,000 square feet of building area. Application of this ratio results in the following calculation:

Total building area: 430,000 sf/ 1,000 = 430
Total: 430 employees

The MND does not meaningfully discuss the project's compliance with the Association of Bay Area Governments (ABAG) RTP/SCS (Plan Bay Area 2050). Plan Bay Area 2050's Growth Pattern¹⁴ notes that the East Santa Clara County area (portions of Milpitas and San Jose including the project site) will add 49,000 jobs between 2015 - 2050. Utilizing the General Plan employment generation calculation of 430 employees, the project represents 0.87% of the East Santa Clara County area employment growth from 2015 - 2050. A single project accounting for this amount of the projected employment and/or population over 35 years represents a significant amount of growth. An EIR must be prepared to include this analysis, and also provide a cumulative analysis discussion of projects approved since 2015 and projects “in the pipeline” in San Jose and Milpitas to determine if the project will exceed Plan Bay Area 2050's employment and/or population growth forecast for East Santa Clara County. For example, other recent industrial projects such as Qume and Commerce¹⁵ (714,491 sf warehouse; 715

¹³ City of San José. Envision 2040 General Plan Draft EIR
<https://www.sanjoseca.gov/home/showpublisheddocument/22041/636688304350830000>

¹⁴ Plan Bay Area 2050 Growth Pattern
https://www.planbayarea.org/sites/default/files/FinalBlueprintRelease_December2020_GrowthPattern_Jan2021Update.pdf

¹⁵ Qume and Commerce <https://ceqanet.opr.ca.gov/2022010603/3>

employees), 469 Piercy Road¹⁶ (134,605 sf warehouse; 135 employees), 350 West Trimble Road¹⁷ (208,000 sf warehouse; 208 employees), 1535-1575 Industrial Avenue¹⁸ (71,550 sf warehouse; 72 employees), Silver Creek Valley Road Warehouse¹⁹ (281,873 sf warehouse; 282 employees), 455 Piercy Road Industrial Warehouse²⁰ (121,580 sf warehouse; 122 employees), 1953 Concourse Drive Project²¹ (126,700 sf warehouse; 127 employees), 5853 Rue Ferrari²² (302,772 sf warehouse; 303 employees), and 650 North King Road Industrial²³ (225,280 sf warehouse; 226 employees) combined with the proposed project will cumulatively generate 2,620 employees, which is 5.3% of the area's employment growth forecast over 35 years accounted for by only ten recent industrial projects submitted in the past two years. The amount of growth accounted for by cumulative projects multiplies exponentially when other commercial and industrial development activity approved since 2015 are added to the calculation. An EIR must be prepared to include this information for analysis and also include a cumulative development analysis of projects approved since 2015 and projects in the pipeline" to determine if the proposed project exceeds ABAG s and/or the City's growth forecasts. Additionally, an EIR must also provide demographic and geographic information on the location of qualified workers to fill these positions in order to provide an accurate environmental analysis.

Response C-8: As described on page 150 of the IS/MND, the project would generate approximately 160 new employees based on information provided by the applicant in the project plan set. The estimated number of 160 employees is based on an average industrial user for a project of this size, type, and parking arrangement. The project site is part of the New Edenvale Area that has a planned employment growth of 10,000 jobs.²⁴ The proposed project (along with the other planned projects) would result in a fraction of the planned job growth and would not result in a cumulatively significant impact. In addition, this area is designated as a growth in the City's General Plan and the project would fulfill the planned growth. The project would be consistent with the General Plan designation of *Industrial Park* for the site. Thus, the potential for population growth induced as a result of the proposed development was accounted for in the City's General Plan. The development is consistent with the project site's General Plan land use designation and would not add growth beyond what was anticipated from buildout of the General Plan.

Comment C-9: Additionally, utilizing the City's February 2022 Development Activity Forecast²⁵ and the City General Plan EIR's employment generation ratio that industrial projects generate 1 employee per 1,000 square feet, it can be concluded that the City has forthcoming 920 employees from industrial projects constructed in 2020-21; 5,965 employees from industrial projects under construction; and 24,910 employees from industrial projects approved but not yet constructed for a total of 31,795 employees. Utilizing the cumulative industrial employment generated since 2020 and the proposed project, the City's 32,510 industrial employees represents 66.3% of its projected job growth from 2015-2050.

¹⁶ 469 Piercy Road <https://ceqanet.opr.ca.gov/2023050199>

¹⁷ 350 West Trimble Road <https://ceqanet.opr.ca.gov/2023040034>

¹⁸ 1535-1575 Industrial Avenue <https://ceqanet.opr.ca.gov/2022110172>

¹⁹ Silver Creek Valley Road Warehouse <https://ceqanet.opr.ca.gov/2022080654>

²⁰ 455 Piercy Road Industrial Warehouse <https://ceqanet.opr.ca.gov/2022070051>

²¹ 1953 Concourse Drive Project <https://ceqanet.opr.ca.gov/2022020541>

²² 5853 Rue Ferrari <https://ceqanet.opr.ca.gov/2022010266>

²³ 650 North King Road Industrial <https://ceqanet.opr.ca.gov/2021120434>

²⁴ [Appendix A - Revised Envision San José 2040 General Plan Appendix 5 Growth Areas Planned Capacity by Horizon \(sanjoseca.gov\)](#)

²⁵ San José February 2022 Development Activity Forecast
<https://www.sanjoseca.gov/home/showpublisheddocument/83462/637835432878970000>

Response C-9: See Response C-8.

Comment C-10: The MND concludes that the project generates 14.69 daily VMT per employee, which exceeds the regional threshold of 14.37 VMT per employee and the project would potentially have a significant transportation impact. To reduce the project's home-based work VMT to below the 14.37 VMT per employee regional threshold, the MND proposes mitigation measures to reduce the project's VMT by 4.8% to 14.11 VMT per worker:

1. Traffic Calming Measures and Bike Access Improvements
2. Pedestrian Network Improvements

However, the MND does not provide any meaningful evidence to support the conclusion that these TDM strategies will reduce the project's home-based work VMT by 4.8%. The mitigation measures are unenforceable mitigation in violation of CEQA § 21081.6 (b). The MND has not provided a quantified calculation of the reduced VMT as a result of the proposed mitigation measures. It is not possible for the City to ensure that the mitigation measures will result in reduced VMT by project employees and be implemented continuously, at all times, throughout the life of the project and maintain a VMT reduction to less than significant levels at all times. The efficacy of the proposed mitigation measures and reduction of VMT impacts below the applicable thresholds cannot be assured, the project's VMT impact is therefore considered significant and unavoidable. An EIR must be prepared to include a finding of significance because there is no possible assurance of the percentage of project employees that would utilize non-automobile travel associated with the mitigation measures and mitigation of the project's VMT impact to less than significant is not feasible.

Response C-10: The VMT analysis was completed utilizing the methodology and standards per the adopted City's Transportation Policy (Council Policy 5-1) and Transportation Analysis Handbook. The effectiveness of the identified mitigation measures in reducing VMT was estimated based on the City's VMT Evaluation Tool that is used throughout the City. Per the City's VMT tool, the identified mitigation measures, which include traffic calming measures, bike access improvements, and pedestrian network improvements, are estimated to reduce the project's VMT to below the City's threshold of 14.37 VMT per worker.

Comment C-11: Additionally, the MND has underreported the quantity VMT generated by the proposed project operations. The MND only includes home-based work trips for VMT analysis and excludes the project's truck/trailer/delivery van traffic. However, the MND does not provide a statutory source of exemption for medium/heavy trucks and/or VMT generated during the course of daily business operations.

The term "automobile" is not defined in the CEQA statute and excluding truck trips/trips generated by employees during the course of their work day at the proposed distribution facility does not provide an adequate or accurate analysis of the "worst-case scenario" for environmental impacts. Widespread public understanding and perception indicates that trucks, including medium/heavy-duty truck/trailer trips associated with the industrial nature of warehouse operations, are automobiles. An EIR must be prepared to include all truck/trailer activity for quantified VMT analysis. The operational nature of industrial/warehouse uses involves high rates of truck/trailer VMT due to traveling from large import hubs to regional distribution centers to their final delivery destinations. Once employees arrive at work, they will conduct their jobs by driving delivery vans and trucks across the region as part of the daily operations as a distribution facility, which will drastically increase project-generated VMT. The

project's truck/trailer and delivery van activity is unable to utilize public transit or active transportation and it is misleading to the public and decision makers to exclude this activity from VMT analysis. An EIR must be prepared to reflect a quantified VMT analysis that includes all truck/trailer and delivery van activity.

Response C-11: The VMT analysis was completed utilizing the City's methodology and standards. The City of San Jose's adopted VMT significance threshold for industrial uses is based on home-based work trips VMT per employee. The impact of the project VMT was evaluated based on the City's VMT Evaluation Tool. The same methodologies and standards set per Council Policy 5-1 are applied to other industrial developments (with high association of heavy truck and delivery trips) throughout the City.

The Governor's Office of Planning and Research (OPR) has issued a Technical Advisory on Evaluating Transportation Impacts In CEQA. This technical advisory is intended to provide advice and recommendations to professional planners, land use officials, and CEQA practitioners on issues that broadly affect the practice of land use planning and the California Environmental Quality Act (CEQA). OPR's Technical Advisory states that VMT refers to the amount and distance of automobile (cars and light trucks) travel attributable to a project. The objective of the SB 743 legislation is to reduce VMT for commuting to work, returning home or using retail services by encouraging alternative modes of travel such as walking, bicycling, transit, or carpool. VMT analysis is not intended to evaluate how goods and products are shipped and moved in the marketplace. Even though one particular project may generate a significant amount of truck trips, the number of truck trips and truck-generated VMT for an individual project is incidental when compared to the total VMT generated by residential, commercial, and office uses. Consequently, no changes to the IS/MND are required as a result of this comment.

Comment C-12: The MND has not adequately analyzed the project's potential to substantially increase hazards due to a geometric design feature (e.g., sharp curves or dangerous intersections) or incompatible uses; or the project's potential to result in inadequate emergency access. The Traffic Appendix includes Figure 13: Freight Truck Turning Template for Northern Driveway on Hellyer Avenue, Figure 14 Freight Truck Turning Template for Southern Driveway on Hellyer Avenue, and Figure 15 Freight Truck Turning Template for Northern Driveway on Piercy Road. Each Figure contains separate exhibits for inbound and outbound trucks at each of the truck access points. The exhibits are provided separately in order to avoid providing an exhibit that depicts two trucks simultaneously entering and exiting the site. The separate diagrams appear to show that the truck turning radii will overlap, meaning that two trucks cannot enter and exit the site simultaneously and there is not sufficient space available to accommodate heavy truck maneuvering. Additionally, Figure 16 Freight Truck Turning Template for On-Site Circulation depicts overlapping lines between inbound and outbound trucks, indicating that there is not sufficient circulation space and they will collide. An EIR must be prepared to include a finding of significance due to these significant and unavoidable impacts.

Response C-12: The Transportation Analysis for the project (Appendix H, pages 31-36) includes an evaluation of sight distance, site access, and on-site circulation for vehicles and trucks. The analysis shows that the sight distance is adequate for vehicles and trucks entering and exiting the project driveways to identify approaching vehicles or vehicles with opposing movements. The on-site drive aisles would have sufficient width for trucks to circulate within the site.

The Transportation Analysis indicates that freight trucks entering and exiting the site would encroach into the adjacent lane, which is common for large trucks. Trucks often use an adjacent lane in the same or the opposite direction of travel when maneuvering as described in page 36 of Appendix H. This condition is not unusual or considered unsafe as long as approaching vehicles can see each other in sufficient time to avoid a collision. As stated on page 33 of Appendix H, all project driveways would meet their respective Caltrans stopping sight distance requirements (250 feet for Piercy Road and 430 feet for Hellyer Avenue). The sight distance analysis confirms that trucks entering and exiting the site would be able to see if there are any vehicles in the adjacent lanes that would conflict with their turn movement and if so, would wait for conflicting vehicles to clear before initiating their turn. Likewise, the site plan would allow trucks maneuvering within the site to see any vehicles that would impede their pathway far enough in advance to allow them to avoid a collision.

Comment C-13: An EIR must be prepared to include a cumulative analysis discussion here to demonstrate the impact of the proposed project in a cumulative setting. For example, other recent industrial projects such as Qume and Commerce²⁶ (714,491 sf warehouse; 715 employees), 469 Piercy Road²⁷ (134,605 sf warehouse; 135 employees), 350 West Trimble Road²⁸ (208,000 sf warehouse; 208 employees), 1535-1575 Industrial Avenue²⁹ (71,550 sf warehouse; 72 employees), Silver Creek Valley Road Warehouse³⁰ (281,873 sf warehouse; 282 employees), 455 Piercy Road Industrial Warehouse³¹ (121,580 sf warehouse; 122 employees), 1953 Concourse Drive Project³² (126,700 sf warehouse; 127 employees), 5853 Rue Ferrari³³ (302,772 sf warehouse; 303 employees), and 650 North King Road Industrial³⁴ (225,280 sf warehouse; 226 employees) combined with the proposed project will cumulatively generate 2,620 employees, which is 5.3% of the area's employment growth forecast over 35 years accounted for by only ten recent industrial projects submitted in the past two years.

The amount of growth accounted for by cumulative projects multiplies exponentially when other commercial and industrial development activity approved since 2015 are added to the calculation. The MND has not provided evidence that the growth generated by the proposed project was anticipated by the General Plan, RTP/SCS, or AQMP. An EIR must be prepared to include this information for analysis and also include a cumulative development analysis of projects approved since 2015 and projects in the pipeline” to determine if the proposed project exceeds ABAG s and/or the City's growth forecasts.

Response C-13: Refer to Response C-8.

Comment C-14: For the foregoing reasons, GSEJA believes the MND is flawed and an EIR must be prepared for the proposed project and circulated for public review. Golden State Environmental Justice Alliance requests to be added to the public interest list regarding any subsequent environmental documents, public notices, public hearings, and notices of determination for this project. Send all communications to Golden State Environmental Justice Alliance P.O. Box 79222 Corona, CA 92877.

²⁶ Qume and Commerce <https://ceqanet.opr.ca.gov/2022010603/3>

²⁷ 469 Piercy Road <https://ceqanet.opr.ca.gov/2023050199>

²⁸ 350 West Trimble Road <https://ceqanet.opr.ca.gov/2023040034>

²⁹ 1535-1575 Industrial Avenue <https://ceqanet.opr.ca.gov/2022110172>

³⁰ Silver Creek Valley Road Warehouse <https://ceqanet.opr.ca.gov/2022080654>

³¹ 455 Piercy Road Industrial Warehouse <https://ceqanet.opr.ca.gov/2022070051>

³² 1953 Concourse Drive Project <https://ceqanet.opr.ca.gov/2022020541>

³³ 5853 Rue Ferrari <https://ceqanet.opr.ca.gov/2022010266>

³⁴ 650 North King Road Industrial <https://ceqanet.opr.ca.gov/2021120434>

Response C-14: The assumptions and conclusions made in the IS/MND are supported by substantial evidence, and the assertions presented in this comment letter do not provide substantial evidence supporting a fair argument that the project would result in a new significant environmental impact or a substantial increase in the severity of an environmental impact than determined in the IS/MND. Therefore, the City has determined that the conclusions in the IS/MND are valid and preparation of an EIR is not warranted. The comment is noted and the City has added the commenter to its list of parties to be notified for the Project.

Comment Letter D: Pacific Gas & Electric

Comment D-1: I wanted to notify you that PG&E has been working with the applicant on the design of this project around existing PG&E gas transmission lines, as well as relocating other PG&E facilities. I do not have any comments provide in relation to the CEQA posting. I hope this email is sufficient for your purposes. If not, please reach out to me and let me know what other correspondence or documentation I can provide.

Response D-1: Final utility placement will continue to be coordinated between PG&E and the project applicant. The comment does not identify any new or increased impacts from those analyzed in the IS/MND. Therefore, no further response to this comment is required.

Comment Letter E: Adams Broadwell Joseph & Cardozo

Comment E-1: On behalf of Silicon Valley Residents for Responsible Development (“Silicon Valley Residents”), we submit these comments on the Initial Study and Mitigated Negative Declaration (collectively, “MND”)³⁵ prepared pursuant to the California Environmental Quality Act (“CEQA”)³⁶ by the City of San José (“City”) for the 550 Piercy Road Industrial Development Project (File Nos. H22-015, ER22-089, T22- 015) (“Project”), proposed by HUSPRF INVESTOR SPV I LP (“Applicant”).

The Project requests a Site Development Permit and Vesting Tentative Map to allow the construction of two industrial buildings on a 28.9-acre single parcel located at 550 Piercy Road in San José, California (Assessor’s Parcel Number (“APN”) 678-08-043).³⁷ The total square footage of the proposed industrial buildings would be 430,000 square feet, with 257,149 square feet for Building 1 and 172,851 square feet for Building 2.³⁸ The total square footage includes approximately 30,000 square feet of ground floor office and 13,985 square feet of mezzanine office, as well as other site improvements common amenity areas, internal roadways for site circulation, stormwater treatment areas, and landscaping.³⁹

The Project includes eighty-four (84) loading docks (forty-six (46) for Building 1 and thirty-eight (38) for Building 2), 347 automotive parking stalls (including twelve (12) accessible parking spaces, 140 electric vehicle capable parking spaces, thirty-six (36) spaces with Electric Vehicle Supply Equipment (“EVSE”) and eight (8) clean air spaces), twenty-eight (28) motorcycle stalls, thirty-six (36) bicycle spaces (ten (10) long-term spaces and twenty six (26) short-term spaces), and eighty (80) trailer parking stalls.⁴⁰ Access to the proposed development would be provided via four (4) access driveways, two (2) connecting to Piercy Road, and two (2) connecting to Hellyer Avenue.⁴¹ The exact usage of the proposed buildings is yet to be determined, but would likely be utilized for industrial distribution, manufacturing, and/or research & development activities.⁴² The Project site would also be subdivided into two lots, one for each of the proposed buildings.⁴³ The site is designated Industrial Park in the Envision 2040 San José General Plan and IP Industrial Park in the Zoning Ordinance.⁴⁴

Response E-1: The above description accurately depicts the proposed project. The comment does not identify any new or increased impacts from those analyzed in the IS/MND. Therefore, no further response to this comment is required.

Comment E-2: We prepared these comments with the assistance of biological resources expert, Dr. Shawn Smallwood, and noise expert, Jack Meighan. Dr. Smallwood’s technical comments and

³⁵ City of San José, Initial Study / Mitigated Negative Declaration for 550 Piercy Road Industrial Development (File Nos. H22-015, ER22-089, T22-015) (June 2023).

³⁶ Pub. Res. Code § 21000, et seq.; 14 C.C.R. §§ 15000, et seq.

³⁷ City of San José, Initial Study / Mitigated Negative Declaration for 550 Piercy Road Industrial Development at 5 (File Nos. H22-015, ER22-089, T22-015) (June 2023).

³⁸ Id. at 3.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

⁴³ Id.

⁴⁴ Id.

curriculum vitae are attached hereto as Exhibit A.⁴⁵ Mr. Meighan’s technical comments and curriculum vitae are attached hereto as Exhibit B.⁴⁶ These comment letters and all attachments thereto are incorporated by reference as if fully set forth herein.⁴⁷

Response E-2: Comment provides an introduction to the format of their comment letter. Specific responses to concerns identified in this comment letter are presented below.

Comment E-3: The MND fails as an informational document under CEQA due to improperly piecemealed review of this Project and the adjacent industrial development at 644-675 Piercy Road, an incomplete environmental setting, and lack of substantial evidence to support the determination that the Project’s significant impacts would be mitigated to less than significant levels, as asserted in the MND. First, the MND violates CEQA by improperly segmenting the environmental review of this Project from the 644-675 Piercy Road project, a 216,644-square foot distribution center building proposed by the same applicant on an adjacent site. Second, the MND fails to adequately describe the environmental setting against which the Project’s impacts on biological resources are to be measured. The environmental setting in the MND is deficient in failing to adequately disclose the existing habitat on the Project site as well as the presence or likelihood of occurrence of special-status species, including the threatened California tiger salamander (“CTS”).

There is also substantial evidence supporting a fair argument that the Project will have potentially significant environmental impacts on biological resources, noise, hazards, energy resources, and due to land use policy inconsistencies, that are not fully mitigated by the measures proposed in the MND. Comments by Dr. Smallwood provide substantial evidence supporting a fair argument that the Project will have significant impacts on biological resources due to habitat loss, restrictions on wildlife movement, wildlife injuries and mortality from Project-related traffic, and potentially significant cumulative impacts. Dr. Smallwood’s comments also provide substantial evidence that the City’s proposed mitigation measures will not reduce the Project’s significant impacts on the American badger, raptors and other migratory birds, and the Western burrowing owl to less-than-significant levels.

Response E-3: Specific responses to the above concerns with regard to environmental setting, biological resources (Responses E-11 and E-13 through E-23) noise, hazards, energy resources, and due to land use policy inconsistencies are addressed below. Also see Topic Response 2.1.2 regarding piecemealing.

Comment E-4: Mr. Meighan’s comments provide substantial evidence supporting a fair argument that the Project’s noise impacts may be significant and are not fully mitigated by the measures proposed in the MND. First, Mr. Meighan comments that the analysis of the Project’s construction noise impacts may be underestimated pursuant to the Federal Transit Administration’s (“FTA”) Transit Noise and Vibration Impact Assessment Manual relied upon in the MND. Second, Mr. Meighan explains in his comments that the Project’s operational noise impacts are unsupported given that the MND does not provide a comparison of ambient noise levels to Project noise levels, which is necessary information

⁴⁵ Dr. Shawn Smallwood, Comments on the Initial Study/Mitigated Negative Declaration (“Exhibit A”)(hereinafter “Smallwood Comments”).

⁴⁶ Jack Meighan, Comments on the Initial Study/Mitigated Negative Declaration (“Exhibit B”) (hereinafter “Meighan Comments”).

⁴⁷ Silicon Valley Residents reserves the right to supplement these comments, and to file further comments at any and all future proceedings and hearings related to the Project. Gov. Code § 65009(b); Pub. Res. Code § 21177(a); Bakersfield Citizens for Local Control v. Bakersfield (2004) 124 Cal.App.4th 1184, 1199-1203; see also Galante Vineyards v. Monterey Water Dist. (1997) 60 Cal.App.4th 1109, 1120-1121.

to determine if the Project would increase noise levels over the stated threshold. Finally, Mr. Meighan's comments demonstrate on the basis of substantial evidence that the noise source data in the MND is unsupported.

Response E-4: Commenter provides an introduction to their noise issues. Specific responses to the above concerns are addressed below in responses E-34 through E-36.

Comment E-5: Additionally, a fair argument can be made that the Project may cause significant impacts from hazards requiring the preparation of an Environmental Impact Report ("EIR"). The Phase II Environmental Site Assessment ("ESA") documented exceedances of Tier 1 environmental screening levels ("ESLs") for toxic chemicals DDD, DDE, DDT, and chlordane.⁴⁸ Despite these exceedances, neither the Phase II ESA nor the MND evaluates whether potential disturbance of this contamination during construction activities would "[c]reate a significant hazard to the public...through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment," as required by CEQA.⁴⁹ The MND also does not provide substantial evidence to support the conclusion that the Project would have a less than significant impact with respect to the wasteful, inefficient, or unnecessary consumption of energy resources. As supported by evidence in these comments, there is a fair argument that the Project may have significant energy impacts that are not mitigated and must be evaluated in an EIR. For example, although the Project includes a solar ready roof for the proposed buildings, the MND does not evaluate whether any renewable energy systems could be incorporated into the Project, which violates CEQA's requirements. Furthermore, the MND fails to analyze the Project's inconsistency with General Plan requirements limiting construction to certain hours.

Response E-5: As described in *Section I. Hazards and Hazardous Materials*, Phase I and II Assessments were conducted for the project site to determine the potential for hazardous materials contamination (see IS/MND, page 105). The results of the Phase II Assessment, which included soil sampling and testing, did not detect soil contaminants exceeding adopted thresholds and no recognized environmental conditions (RECs) were identified on the site (see page 105 of the IS/MND). Evidence of NOA was detected in soil borings at depth of 19-20 feet. Mitigation Measure MM HAZ-1 is included in the IS/MND on pages 107-108 and requires the applicant to prepare and implement an Asbestos Dust Mitigation Plan (ADMP), to reduce potential impacts from NOA exposure to less than significant. No further analysis is required and/or that an EIR is not required. Refer to Response C-5 for concerns raised regarding energy consumption.

Comment E-6: Based on the substantial evidence presented herein and attached in Dr. Clark and Mr. Smith's expert comments, the Project will have potentially significant impacts that the MND either mischaracterizes, underestimates, or fails to identify. The MND therefore fails to comply with CEQA due to improperly piecemealed review, inadequate description of the environmental setting, deficient environmental impact analysis, and insufficient mitigation measures. We respectfully request that further environmental analysis is completed in an EIR to ensure the Project's impacts are disclosed, analyzed, and mitigated to the maximum extent feasible.

Lastly, for the reasons stated herein, the findings cannot be made to approve the Project's Site Development Permit pursuant to section 20.100.630 in the City's Municipal Code. The findings to

⁴⁸ MND, Appendix F-2 at 4-5.

⁴⁹ MND at 106.

approve the Project's Vesting Tentative Map also cannot be made pursuant to the Subdivision Map Act.

Response E-6: Refer to Topic Response 2.1.1 regarding the adequacy of the IS/MND. Specific responses to the concerns in the comment letter are further addressed below in responses E-9 through E-12.

Comment E-7: Silicon Valley Residents 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 and public service impacts of the Project. Residents includes San José residents, the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483 and the District Council of Ironworkers, along with their members, their families, and other individuals who live and work in the City of San José and in Silicon Valley.

Individual members of Silicon Valley Residents live, work, recreate, and raise their families in the City and in the 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 on site.

In addition, Silicon Valley Residents 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 businesses and industries 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.

Response E-7: The commenter does not identify a specific issue regarding public health and safety. The IS/MND includes a comprehensive analysis and concludes the project would not result in significant environmental and health and safety impacts with implementation of standard permit conditions and mitigation measures. The proposed project is consistent with the City's General Plan land use designation and zoning that identifies the site suitable for an industrial use. Refer also to Response C-4.

Comment E-8: CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.⁵⁰ The purpose of the EIR "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.'"⁵¹ 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."⁵²

CEQA's purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances. CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the "fair argument" standard. Under that standard, a lead agency

⁵⁰ See Pub. Res Code § 21000; 14 C.C.R. § 15002.

⁵¹ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 [internal citations omitted].

⁵² *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

“shall” prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.⁵³

In contrast, a mitigated negative declaration may be prepared only when, after preparing an initial study, a lead agency determines that a project may have a significant effect on the environment, but:

(1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review **would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur**, and (2) there is **no substantial evidence** in light of the whole record before the public agency that the project, as revised, **may** have a significant effect on the environment.⁵⁴

Courts have held that “[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.”⁵⁵ The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.⁵⁶ An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.⁵⁷

“Substantial evidence” required to support a fair argument is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”⁵⁸

According to the CEQA Guidelines, when determining whether an EIR is required, the lead agency is required to apply the principles set forth in Section 15064, subdivision (g):

[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.⁵⁹

Furthermore, CEQA documents, including EIRs and MNDs, must mitigate significant impacts through measures that are “fully enforceable through permit conditions, agreements, or other measures.”⁶⁰

⁵³ Pub. Res. Code §§ 21080(d); 21082.2(d); 14 C.C.R. §§ 15002(k)(3), 15064(f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

⁵⁴ Pub. Res. Code § 21064.5 (emphasis added).

⁵⁵ See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

⁵⁶ *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754 [internal citations omitted].

⁵⁷ *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

⁵⁸ 14 C.C.R. § 15384(a).

⁵⁹ Id. at § 15064(g).

⁶⁰ Pub. Res. Code §21081.6(b).

Deferring formulation of mitigation measures to post-approval studies is generally impermissible.⁶¹ If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.⁶² Courts have held that simply requiring a project applicant to obtain a future report and then comply with the report's recommendations is insufficient to meet the standard for properly deferred mitigation.⁶³

With respect to this Project, the MND fails to satisfy the basic purposes of CEQA. The MND fails to adequately disclose, investigate, and analyze the Project's potentially significant impacts during construction and operation, and fails to provide substantial evidence to conclude that impacts will be mitigated to a less than significant level. Because the MND lacks basic information regarding the Project's potentially significant impacts, the MND's conclusion that the Project will have a less than significant impact on the environment is unsupported.⁶⁴ The City fails to provide the relevant data to support its finding of no significant impacts, and substantial evidence shows that the Project may result in potentially significant impacts. Therefore, a fair argument can be made that the Project may cause significant impacts requiring the preparation of an EIR.

Response E-8: This comment alleges that the IS/MND is inadequate and suggests that preparation of an EIR is required but does not state what the specific issues are or how the IS/MND failed to address the impacts. As presented in the responses to this letter below, the assumptions and conclusions made in the IS/MND are accurate, adequate, and supported by substantial evidence. Accordingly, pursuant to Section 15164 of the CEQA Guidelines, the City of San José prepared an MND because the project, as analyzed in the IS, did not raise any of the conditions or circumstances described in CEQA Guidelines Section 15162 calling for the preparation of an EIR.

Comment E-9: A project under CEQA means the “whole of an action which has the potential for resulting in either a direct physical change in the environment, or reasonably foreseeable indirect physical change in the environment.”⁶⁵ CEQA prohibits segmenting the review of the significant environmental impacts of a project.⁶⁶ CEQA mandates “that ‘environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.’”⁶⁷ Public agencies must construe the project broadly to capture the whole of the action and its environmental impacts.⁶⁸

Before undertaking a project, the lead agency must assess the environmental impacts of all reasonably foreseeable phases of a project and a public agency may not segment a large project into two or more smaller projects in order to mask serious environmental consequences.⁶⁹ As the Court of Appeals stated, “[t]he CEQA process is intended to be a careful examination, fully open to the public, of the

⁶¹ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Pub. Res. Code § 21064.5.

⁶⁵ 14 C.C.R. § 15378(a).

⁶⁶ *Laurel Heights Improvement Assn.*, 47 Cal. 3d at 396; *See also* Pub. Res. Code § 21002.1(d).

⁶⁷ *Id.*; *See also City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452; *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 165.

⁶⁸ 14 C.C.R. § 15378.

⁶⁹ *See Citizens Assn. for Sensible Development of Bishop Area*, 172 Cal. App. 3d at 165–168.

environmental consequences of a given project, covering the entire project, from start to finish.”⁷⁰ “[A]n EIR must include a [*sic*] analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.”⁷¹

The Applicant for this Project is also currently applying for a Site Development Permit to construct a 216,244 square foot distribution center building on the adjacent 15.92-gross acre site located at 644-675 Piercy Road (APNs 678-08-045 and -055).⁷² Both projects propose substantially similar industrial uses,⁷³ are located on adjacent lots, and are proposed by the same applicant, yet the projects are being processed by the City separately and the corresponding environmental review is likewise disjointed. CEQA requires that consideration be given to the whole of the action, which should include the reasonably foreseeable project located at 644-675 Piercy Road.

Response E-9: Refer to Topic Response 2.1.2 regarding piecemealing.

Comment E-10: As to the first inquiry in the *Laurel Heights* test, the project at 644-675 Piercy Road is imminent and reasonably foreseeable given that the applicant has applied for a Site Development Permit from the City (H22-035) and the City is performing environmental review pursuant to CEQA (ER22-219). “These specific, pending plans distinguish cases rejecting piecemealing claims on the ground the future actions were too speculative.”⁷⁴

As to the second part of the *Laurel Heights* test, the project located at 644-675 Piercy Road proposes to construct 216,244 square feet of industrial uses, thus increasing the square footage of industrial uses on the two project sites from 430,000 square feet to 646,244 square feet. The projects collectively will add more truck trips to the Project area than either project individually, increasing impacts on traffic, air pollution, and public health, and causing increased noise levels. The MND also states that “construction [of the two projects] could occur simultaneously,” which would likely change the scope and significance of the Project’s impacts during construction.⁷⁵ The City therefore acknowledges that the 644-675 Piercy Road project “will likely change the scope or nature of the initial project or its environmental effects.”⁷⁶

Response E-10: Refer to Topic Response 2.1.2 regarding piecemealing. Cumulative impacts associated with simultaneous construction of the 644-675 Piercy Project are addressed in the IS/MND for air quality on pages 52-53, for noise on pages 140-145, and for transportation on page 191.

⁷⁰ *Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268; See also *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 402 (EIR for an exploratory oil well that failed to analyze the impacts associated with an proposed pipeline was inadequate and violated CEQA).

⁷¹ *Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal. 3d 376, 396, as modified on denial of reh’g (Jan. 26, 1989).

⁷² City of San José, Community Meeting Notice, available at: <https://www.sanjoseca.gov/home/showpublisheddocument/93460/638088737169930000>.

⁷³ The 550 Piercy Project will be used for distribution, manufacturing, and/or research & development activities. MND at 3.

⁷⁴ *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal. App. 4th 1209, 1224.

⁷⁵ MND at 52.

⁷⁶ *Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal. 3d 376, 396, as modified on denial of reh’g (Jan. 26, 1989).

Comment E-11: The MND inconsistently analyzes some, but not all, of the impacts of the two projects as cumulative impacts, resulting in a skewed description of the two project components and of the severity of their combined impacts. For example, the MND analyzes the cumulative impacts of TAC emissions from construction of the two projects,⁷⁷ but not for biological impacts. The MND determines that the Project’s impacts on biological resources will be significant and proposed mitigation measures to reduce these impacts.⁷⁸ However, the MND does not evaluate the cumulative impacts on biological resources from both projects and also does not assess whether the mitigation measures are sufficient to reduce the impacts on biological resources from this Project in addition to the project located at 644-675 Piercy Road. The MND’s inconsistent treatment of the 644-675 Piercy Road project results in piecemealed review of the majority of project impacts.

Response E-11: Refer to Topic Responses 2.1.2 and 2.1.3. Regarding cumulative impacts to biological resources, CEQA allows a lead agency to determine that a project’s contribution to a potential cumulative impact is not considerable and thus not significant when mitigation measures identified in the IS/MND will render those potential impacts less than considerable (CEQA Guidelines 15064(h)(2)). The cumulative range for air quality impacts include substantial sources of TACs (i.e. rail lines, highways & busy roadways, stationary sources, etc.) that can affect sensitive receptors that are located within 1,000 feet of the project site. The cumulative range for biological resources impacts is also 1,000 feet from the project site. The text of the IS/MND (pages 64 and 191) has been amended to specifically identify this radius for cumulative impacts as identified in Section 3 Text Changes to the IS/MND. For the biological resources, as stated in the IS/MND, implementation of mitigation measures MM BIO-1 through MM BIO-3 will reduce impacts on biological resources to a less than significant level.

Comment E-12: The court in *Banning Ranch Conservancy v. City of Newport Beach* explained that the inquiry in *Laurel Heights* is not just whether the project may make reasonably foreseeable changes to the scope and nature of the project, but whether “it is a reasonably foreseeable *consequence* of the initial project.”⁷⁹ There, the court evaluated whether the Newport Banning Ranch development project and the Sunset Ridge Park Project were separate actions.⁸⁰ The court focused on the fact that the projects had different proponents, the projects “serve[d] different purposes,” the park project would go forward regardless of any development on Banning Ranch, “and importantly, [that] the City’s general plan call[ed] for construction of Bluff Road” regardless of whether the site would be annexed for the development project or not.⁸¹

As applied here, the projects at 550 Piercy Road and 644-675 Piercy Road have the same applicant and the projects’ purposes are both industrial. The project at 644-675 Piercy Road will involve distribution activities and although this Project’s specific uses are yet to be determined, potential uses may include industrial distribution, manufacturing, and/or research and development activities.⁸² Unlike in *Banning Ranch*, there is no requirement in the City’s General Plan or other planning policies requiring the construction of one project regardless of the other’s development. Moreover, the City fails to provide substantial evidence demonstrating that the projects could be implemented independently of each other.

⁷⁷ MND at 52.

⁷⁸ Id. at 60-64.

⁷⁹ *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal. App. 4th 1209, 1225.

⁸⁰ Id. at 1224-27.

⁸¹ Id. at 1226.

⁸² City of San José, *Community Meeting Notice*, available at: <https://www.sanjoseca.gov/home/showpublisheddocument/93460/638088737169930000>; MND at 137.

Therefore, the MND fails to fully disclose, analyze, and mitigate the full scope of the Project's potentially significant impacts given that the project located at 644-675 Piercy Road has been improperly segmented from this CEQA review.⁸³ The City must prepare an EIR to fully disclose, analyze, and mitigate the impacts of the current Project and the project located at 644-675 Piercy Road.

Response E-12: Refer to Topic Response 2.1.2 regarding piecemealing.

Comment E-13: The MND fails to adequately describe the environmental setting against which the Project's environmental impacts are to be measured for several critical aspects of the Project. This contravenes the fundamental purpose of the environmental review process, which is to determine whether there is a potentially substantial, adverse change compared to the existing setting.⁸⁴ The environmental setting is "a description of the physical environmental conditions in the vicinity of the project," and "will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant."⁸⁵ The purpose of establishing an accurate baseline is "to give the public and decision makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts."⁸⁶

The environmental setting in the MND is deficient because the discussion omits critical information about existing habitat on the Project site and the presence or likelihood of occurrence of special-status species. Absent an adequate environmental setting analysis, the MND is inadequate as a matter of law for failing to provide a baseline against which to measure project impacts. An EIR must be prepared that complies with CEQA's requirements.

Response E-13: The evaluation of biological resources is based on the Biological Resources Report prepared by Denise Duffy & Associates, Inc. (DD&A), which is included in the IS/MND as Appendix B. DD&A's Natural Resources Division (NRD) consists of a multi-disciplinary team of scientists that provide expertise in ecology, botany, wildlife biology, forestry and arboriculture, wetlands and hydrology, and restoration ecology. The NRD's trained environmental scientists are highly informed of biological resources and regulatory permitting on the California Central Coast and throughout California. Specifically, DD&A's Natural Resources Division has been preparing biological assessments in the City of San José for over 15 years. Mr. Matthew Johnson serves as Senior Environmental Scientist and is expert in conducting presence/absence surveys for several special-status species, and also holds a CDFW Scientific Collecting Permit allowing for collection and handling of mammals, reptiles, amphibians, and freshwater/terrestrial invertebrates. Therefore, DD&A's NRD meets the industry standard for a qualified biologist.

The project's biological resources analysis correctly identifies that habitats on the project site consist of developed/ruderal and annual grassland land cover types (see Appendix B of the IS/MND, pages 13-15). In addition, the analysis identifies the special-status species that may be present within the project site, including American badger, western burrowing owl, grasshopper sparrow, and raptors and other protected avian species, and identifies which habitat types these

⁸³ E.g., Pub. Resources Code, §21002, 21002.1(a); CEQA Guidelines, §§ 151363, 15121, 15140, 15151 (An EIR is informational document whose purpose is to disclose and mitigate impacts, analyze a reasonable range of alternatives, and select as the project any alternative which can achieve project objectives, but is more protective of the environment, consistent with CEQA's substantive mandate); CEQA Guidelines, § 15378 (project description must include all project components).

⁸⁴ 14 C.C.R. § 15063(d)(2).

⁸⁵ *Id.* at § 15125(a).

⁸⁶ *Id.*

species may use within the discussion for each species (see Appendix B of the IS/MND, pages 15-17). The analysis refers to the Biological Resources Report (Appendix B), which provides additional detail on each habitat type present, as well as a habitat map. Further, the biological resources analysis includes information regarding historic landcover, including row crops, and identifies sensitive habitat types on adjacent property. The project's biological resources analysis adequately describes the environmental setting of the project site and provides a baseline against which to measure project impacts.

Comment E-14: The environmental setting set forth in the MND is informed by the Biological Resources Memorandum in Appendix B completed by Denise Duffy & Associates, Inc.⁸⁷ The Biological Resources Memorandum concludes that the Project site consists of annual grassland (25.7 acres) and developed/ruderal (3.1 acres) habitat types.⁸⁸ While no sensitive habitats on the Project site are disclosed in the Biological Resources Memorandum, the MND mentions that “adjacent parcels contain Coyote Creek riparian woodlands and serpentine bunchgrass grasslands.”⁸⁹ Dr. Smallwood determines that the MND and Biological Resources Memorandum fail to adequately identify the existing habitat types on the Project site.⁹⁰ Dr. Smallwood comments that the Biological Resources Memorandum’s characterization of annual grassland as “an abundant habitat type with a statewide distribution,” is incorrect. According to Dr. Smallwood, “[a]nnual grassland continues to be lost at a rapid rate in California, which is why so many of California’s special-status species are grassland-adapted. These species include burrowing owl, American badger, San Joaquin kit fox, grasshopper sparrow, white-tailed kite, northern harrier and many others.”⁹¹

Response E-14: Please refer to response E-13 above regarding the adequacy of the biological resources analysis in identifying habitat types within the project site.

The biological analysis utilized the California Department of Fish and Wildlife’s (CDFW’s) *California Natural Communities List* and the Santa Clara Valley HCP to determine if the annual grassland habitat occurring within the project site, as identified in the Biological Resources Report in Appendix B. Neither resource identified the vegetation associations occurring within the project site as sensitive. As identified in the comment, the biological resources analysis identifies two sensitive habitats on adjacent parcels that would not be impacted by the proposed project as they are off-site and are not located within the project area. Therefore, the project’s biological resources analysis determination that the project would have a less than significant impact on riparian habitat or other sensitive natural communities is correct and adequate. This comment does not result in the identification of any new impacts and no additional mitigation is required.

Comment E-15: Dr. Smallwood also comments on inconsistencies in the MND’s “characterization of vegetation cover as part of the existing environmental setting.”⁹² The Biological Resources Memorandum identifies 27.8 acres of annual grassland and 3.0 acres of ruderal/developed habitat on the Project site.⁹³ However, the MND identifies only 25.7 acres of annual grassland and 3.1 acres of ruderal/developed habitat.⁹⁴ Dr. Smallwood comments that these inconsistencies with the acreage and

⁸⁷ MND at 57; *See also* Denise Duffy & Associates, Inc., *Appendix B; Biological Resources Memorandum* (February 2023).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Smallwood Comments at 1-2.

⁹¹ *Id.* At 2.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

the “typing of the grassland” results in a “classification error” of habitat types that may also cause “additional error in the analysis of occurrence likelihoods of special-status species of plants and wildlife.”⁹⁵ If the habitat types and acreages are incorrect, the assignment of species to certain habitat types by association will likewise be inaccurate, as discussed in Dr. Smallwood’s comments.⁹⁶ The environmental setting in the MND for existing habitat types is therefore unsupported and incomplete.

Response E-15: The IS/MND text has been revised to correct minor inconsistencies of the habitat type acreages within the project site, as presented in Section 3. The comment’s assertion that these minor errors in documentation may cause “additional error in the analysis of occurrence likelihoods of special-status plants and wildlife” is incorrect. The IS/MND clearly identifies suitable habitat for special-status species and provides adequate mitigation for potential impacts. This comment does not result in the identification of any new impacts and no additional mitigation is required.

Comment E-16: The MND only identifies the following “special-status species that are known to or have been determined to have a moderate or high potential to occur within or immediately adjacent to the project site:” American badger, Western burrowing owl, grasshopper sparrow, and raptors and other protected avian species.⁹⁷ To identify the baseline for special-status species on the site, the Biological Resources Memorandum states that a reconnaissance-level habitat survey was completed on the Project site on June 24, 2022.⁹⁸ A focused survey for perennial and late spring-blooming special-status plant species was also performed.⁹⁹ Dr. Smallwood’s comments and his Table 1 provide substantial evidence showing that the survey efforts do not comply with the California Fish and Wildlife Department’s (“CDFW”) recommended survey protocols and guidance.¹⁰⁰ For example, Dr. Smallwood explains that the surveys “failed to achieve any of the burrowing owl survey guidelines (CDFW 2012),” and none of the “guidelines [were] followed for American badger, grasshopper sparrow, or any other special-status species of wildlife.”¹⁰¹ Of the CDFW botanical survey guidelines, Dr. Smallwood determines that the surveys only complied with five (5) standards in the guidelines.¹⁰² Dr. Smallwood explains that “determining presence of special-status species requires sufficient survey effort and adherence to survey protocols that have been formulated by experts on the species. And describing biological resources on and adjacent to the site must start with identifying those species actually detected at and adjacent to the site.”¹⁰³

Response E-16: The Biological Resources Report (pages 13-15) identifies potentially suitable habitat for special-status wildlife species within the project site based on the results of the reconnaissance survey and consideration of occurrence information within the project vicinity to determine the potential presence of special-status species within the project site. Protocol-level presence/absence surveys for special-status wildlife species were not conducted and are not necessary if a qualified biologist determines during the reconnaissance level survey that potentially suitable habitat for special-status wildlife species is not present within the project site.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ MND at 58-59.

⁹⁸ Denise Duffy & Associates, Inc., *Appendix B; Biological Resources Memorandum* at 6 (February 2023).

⁹⁹ *Id.*

¹⁰⁰ Smallwood Comments at 4-8.

¹⁰¹ *Id.* at 8.

¹⁰² *Id.* at 4-5.

¹⁰³ *Id.* at 2.

Mitigation is provided for potential impacts to these species that include pre-construction surveys in accordance with the Santa Clara HCP and guidance from CDFW (see IS/MND, pages 60-64).

The Biological Resources Report sufficiently outlines the survey methods implemented to determine presence or potential presence of special-status plant species within the project site, including focused surveys for perennial and late spring-blooming species, identifying that applicable survey guidelines were followed, and describing that all plant species observed were identified to the intraspecific taxon necessary to eliminate them as being special-status. The Biological Resources Report also identifies that species that could not be surveyed for at the time of the focused survey were determined to be unlikely to occur based on the lack of suitable habitat or other species-specific reasons presented in Appendix B.

This comment does not result in the identification of any new impacts and no additional mitigation is required.

Comment E-17: After completing the survey on June 24, 2022, the Biological Resources Memorandum states that “suitable animal burrows were observed within the project boundary,”¹⁰⁴ although Dr. Smallwood notes that “the species that excavated these burrows were not identified,” in the MND or Biological Resources Memorandum.¹⁰⁵ Furthermore, no other plants or wildlife observed by biologists during the reconnaissance-level surveys on the Project site are reported in the Biological Resources Memorandum.¹⁰⁶ Dr. Smallwood questions the legitimacy of the findings from the survey efforts based on his own experience conducting “hundreds of reconnaissance-level surveys throughout California.”¹⁰⁷ Moreover, Dr. Smallwood comments that the MND incorrectly asserts that “[t]he project is proposed in a semi-urbanized setting and has not been found to contain any native resident or wildlife species.”¹⁰⁸ This conclusion is not supported by the evidence in the Biological Resources Memorandum.

Response E-17: Existing land uses in the vicinity are described in *Section K. Land Use and Planning* of the IS/MND and include rural residential, commercial, and industrial, which is shown on the aerial imagery in Figure 3. This information supports the statement that the project site is located in a semi-urbanized setting. However, even though the project is in a semi-urbanized area, the site has been determined to only provide low-quality habitat for native resident or wildlife species. The analysis found that native wildlife species may move through the project site between the grassland and riparian habitat, but the use of the site as a wildlife corridor is limited due to the disturbed nature of the site, the surrounding development, and the presence of roadways separating the site on either side of the natural habitat areas.

The text on page 65 of the IS/MND has been clarified to describe the existing wildlife conditions within the project site, as shown in Section 3 of this document. This information does not result in the identification of any new impacts and no new mitigation is necessary.

¹⁰⁴ Denise Duffy & Associates, Inc., *Appendix B; Biological Resources Memorandum* at 16 (February 2023).

¹⁰⁵ Smallwood Comments at 3.

¹⁰⁶ *Id.* at 3.

¹⁰⁷ *Id.* at 3.

¹⁰⁸ MND at 65.

Comment E-18: Table 2 in Dr. Smallwood’s comments also demonstrates that “126 special-status species of wildlife are known to occur near enough to the site to warrant analysis of occurrence potential.”¹⁰⁹

In addition to the survey on June 24, 2022, the Biological Resources Memorandum states that “[p]ublished occurrence data within the project site and surrounding quadrangles were [also] evaluated....”¹¹⁰ Dr. Smallwood discusses in his comments that “[b]y including in the species’ likelihood of occurrence analysis only species whose documented occurrences within the nearest [California Natural Diversity Database (“CNDDB”)] quadrangles,” the analysis in the MND improperly “screen[s] out many special-status species from further consideration in their characterization of the wildlife community as a component of the baseline environmental setting.”¹¹¹ Dr. Smallwood explains that “CNDDB is not designed to support absence determinations or to screen out species from characterization of a site’s wildlife community.”¹¹² He recommends that this review also include information from “eBird and iNaturalist, which are useful species occurrence databases that are also readily available.”¹¹³

Response E-18: The eBird and iNaturalist species occurrence databases are open to public input and the available data is not verified by professionals and may be incorrect. As such, the Biological Resources analysis relies on verified occurrence data sources such as the CNDDB. In addition, as identified in the Biological Resources Report (Appendix B), multiple other resources were utilized to determine potential presence of special-status species within the project site. The use of U.S. Geologic Survey quadrangles to determine the extent of the database search is an industry standard. This comment does not result in the identification of any new impacts and no additional mitigation is required.

Comment E-19: Dr. Smallwood assesses the special-status species that are known to or have been determined to have a moderate or high potential to occur within or immediately adjacent to the Project site using eBird and iNaturalist.¹¹⁴ His review identifies “126 special-status species of wildlife [that] are known to occur near enough to the site to warrant analysis of occurrence potential (Table 2). Of these 126 species, 38 (30%) have been documented within 1.5 miles of the site (‘Very close’), another 29 (23%) within 1.5 and 4 miles (‘Nearby’), and another 52 (41%) within 4 to 30 miles (‘In region’). More than half (53%) of the species in Table 2 have been reportedly seen within 4 miles of the project site.”¹¹⁵ Based on this substantial evidence, Dr. Smallwood concludes that “[t]he site therefore carries the potential for supporting many special-status species of wildlife based on proximity of recorded occurrences.”¹¹⁶

The MND on the other hand only identifies twenty-five (25) of the special-status species listed in Dr. Smallwood’s comments (a mere 19.8%), and the MND finds that a only two (2) of those species have moderate occurrence likelihood.¹¹⁷ Dr. Smallwood explains that “[t]he IS/MND determines occurrence potential to be low for 13 of the species, unlikely for 8 species, and none for 2 species. Of the 10 species

¹⁰⁹ Smallwood Comments at 9.

¹¹⁰ *Id.* at 8; MND at 58.

¹¹¹ *Id.* at 8.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 9.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

assigned unlikely to no potential, 2 have been documented within 1.5 miles of the site, 5 have been documented within 1.5 and 4 miles of the site, and 2 have been documented within 4 and 30 miles of the site.”¹¹⁸ Dr. Smallwood comments that “the occurrence potentials the IS/MND assigns to special-status species fail to comport with documented occurrences in eBird and iNaturalist,” and are therefore unsupported by substantial evidence.¹¹⁹

For the grasshopper sparrow specifically, Dr. Smallwood concurs with the Biological Resources Memorandum’s conclusion that since this species was found to be “located approximately 3.8 miles southeast of the project site,” “this species has a moderate potential to occur within the project site.”¹²⁰ Despite adopting a standard for the grasshopper sparrow that deems “an occurrence record within 4 miles of the project site as indicative of a moderate occurrence likelihood on the project site,” this standard is not applied uniformly for other species, as discussed in Dr. Smallwood’s comments.¹²¹ For example, Dr. Smallwood points out that “in the case of tricolored blackbird, which was documented 0.87 miles from the site (eBird), the distance standard did not apply, as the IS/MND determines the species does not occur on the project site. Similarly, the IS/MND does not apply its distance standard to western pond turtle (0.11 miles, iNaturalist), California tiger salamander (1 mile, CNDDDB), golden eagle (0.14 miles), Cooper’s hawk (0.14 miles), northern harrier (0.14 miles), white-tailed kite (immediately adjacent), and Swainson’s hawk (1.82 miles).”¹²²

Response E-19: This comment asserts that potential presence of special-status wildlife species is/should be based solely on the distance of known occurrences; however, the project site must contain suitable habitat types and specific habitat features to support special-status species. The biological resources report analyzed all of these factors to determine the potential presence of special-status wildlife species. Species with occurrences in the vicinity were determined to have a low potential or unlikely to occur if no suitable habitat or specific habitat features were absent from the site, as identified on Page 15 and in Appendix D of the Biological Resources Report (see Appendix B of the IS/MND, pages 13-15). The comment does not present new information that has not been previously analyzed or provide substantial evidence supporting a fair argument that the project would result in significant unavoidable impacts requiring preparation of an EIR, therefore, no further analysis is required.

Comment E-20: The MND fails to provide a complete and accurate description of the Project’s environmental setting related to CTS and thus, the MND’s assessment of impacts on CTS is inadequate. CTS are listed as threatened both federally and at the state level.¹²³ The species’ habitat is “[a]nnual grassland and grassy understory of valley-foothill hardwood habitats in central and northern California. [CTS] [n]eed underground refuges and vernal pools or other seasonal water sources.”¹²⁴ The Biological Resources Memorandum determines that CTS “is unlikely to utilize the project site as a habitat corridor due to the adjacent interstate highway that separates the project site and Coyote Creek.”¹²⁵ To the contrary, Dr. Smallwood’s comments provide substantial evidence that CTS may occur on the Project site.¹²⁶ Dr. Smallwood comments that CTS “habitat is in grassland-wetland complexes where the

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Denise Duffy & Associates, Inc., *Appendix B; Biological Resources Memorandum* (February 2023).

¹²⁴ *Id.*

¹²⁵ *Id.* at Appendix D

¹²⁶ Smallwood Comments at 15.

wetlands consist of ponds that are not connected to any flowing water such as in Coyote Creek. [CTS] breed in vernal pools, small ponds, livestock stock ponds, and rain pools, and they spend about 95% of their lives within the burrows of ground squirrels and pocket gophers in grasslands up to 1.37 miles from their breeding pools (Orloff 2011).”¹²⁷ Utilizing Google Earth imagery, Dr. Smallwood identifies “potential breeding ponds 0.37 miles and 0.87 miles upslope from the project site,” which fall within the range of 1.37 miles that the species may travel from breeding pools to burrows in grasslands.¹²⁸

The presence of CTS on or around the Project site is not adequately analyzed as part of the environmental setting of the Project. Therefore, the corresponding impact analysis in the MND is inadequate. An EIR must be prepared with an updated environmental setting with respect to CTS to satisfy CEQA.

Response E-20: The text describing the potential for CTS to occur within the project site has been revised as presented in Section 3 (see Appendix D of the Biological Resources Report contained in Appendix B of the IS/MND). The revised text clarifies that no suitable breeding habitat is present on the site and that CTS is unlikely to utilize the project site as no breeding ponds are available on site. In addition, the project site is separated from the nearest recorded CTS occurrence by existing development and is outside the modeled habitat distribution for CTS as identified in the Santa Clara Valley HCP. The revised text bolsters the determination of a low potential for CTS to occur within the project site. This information does not result in the identification of any new impacts and no new mitigation is necessary. The comment does not present new information that has not been previously analyzed or provide substantial evidence supporting a fair argument that the project would result in significant unavoidable impacts requiring preparation of an EIR.

Comment E-21: An MND is improper, and an EIR must be prepared, whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.¹²⁹ “[S]ignificant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in the environment.”¹³⁰ An effect on the environment need not be “momentous” to meet the CEQA test for significance; it is enough that the impacts are “not trivial.”¹³¹ Substantial evidence, for purposes of the fair argument standard, includes “fact, a reasonable assumption predicated upon fact, or *expert opinion* supported by fact.”¹³²

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.¹³³ 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 MND 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.¹³⁴ Even when the substantial evidence standard is applicable to agency decisions to certify an MND and approve a project, reviewing courts will not

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Pub. Res. Code § 21151; 14 C.C.R. § 15064(f)(1); *Citizens for Responsible Equitable Env’tl Dev. v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 330-31; *Communities for a Better Env’t v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319.

¹³⁰ Pub. Res. Code § 21068; 14 C.C.R. § 15382.

¹³¹ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83.

¹³² Pub. Res. Code § 21080(e)(1) (emphasis added).

¹³³ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

¹³⁴ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

“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.”¹³⁵

Comments by Dr. Smallwood provide substantial evidence supporting a fair argument that the Project will have significant impacts on biological resources due to habitat loss, restrictions on wildlife movement, wildlife injuries and mortality from Project-related traffic, and potentially significant cumulative impacts. Dr. Smallwood’s comments also provide substantial evidence demonstrating that the City’s proposed mitigation measures will not reduce the Project’s significant impacts on the American badger, raptors and other migratory birds, and the Western burrowing owl to less-than-significant levels. For the reasons below, an EIR must be prepared to further evaluate and mitigate potentially significant impacts on biological resources.

Response E-21: Comment does not identify a specific issue. Specific responses to these concerns are addressed below in responses F-22 through F-32.

Comment E-22: The MND concludes that the Project would have significant impacts on the American badger, active nests of nesting raptors or other migratory birds, and the Western burrowing owl.¹³⁶ With the implementation of mitigation measures, the MND concludes that “the project’s impact to nesting birds and raptors, as well as western burrowing owls, would be less than significant.”¹³⁷ However, Dr. Smallwood states that the MND and Biological Resources Memorandum improperly fail to evaluate the potentially significant impacts of habitat loss from habitat fragmentation, which he concludes “poses serious problems to wildlife in the region.”¹³⁸ Dr. Smallwood explains that “[h]abitat fragmentation and habitat loss have been recognized as the most likely leading causes of a documented 29% decline in overall bird abundance across North America over the last 48 years (Rosenberg et al. 2019). Habitat loss not only results in the immediate numerical decline of wildlife, but it also results in permanent loss of productive capacity.”¹³⁹

For nesting birds, Dr. Smallwood estimates the loss of productive capacity from this Project based on studies in grassland-wetland-woodland complexes.¹⁴⁰ As supported by these studies, Dr. Smallwood calculates that the Project may result in “a loss of 330 bird nests,” which “would qualify as a potentially significant project impact, . . .”¹⁴¹ In addition to the loss of nest sites, Dr. Smallwood comments that “as nest substrate is removed and foraging grounds graded in preparation for impervious surfaces,” “[t]he reproductive capacity of the site would be lost.”¹⁴² Dr. Smallwood estimates that the lost capacity of both breeders and annual fledgling production based on the study cited to in his comments would result in a total of approximately “1,089 birds per year denied to California.”¹⁴³ As supported by substantial evidence in his comments, Dr. Smallwood concludes that the impacts to the productive capacity of birds from habitat loss would be a potentially significant impact that is not disclosed or analyzed in the MND.¹⁴⁴

¹³⁵ *Berkeley Keep Jets Over the Bay Committee v. Board of Port Com’rs* (2001) 91 Cal.App.4th 1344, 1355 [internal citations omitted].

¹³⁶ MND at 60-64.

¹³⁷ *Id.* at 64. This discussion in the MND does not also conclude that with the proposed mitigation, the Project’s significant impacts on the American badger would also be less-than-significant.

¹³⁸ Smallwood Comments at 15.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 16

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

For the foregoing reasons, the MND has not disclosed, analyzed, or mitigated the potentially significant impacts on species from habitat loss and habitat fragmentation, as demonstrated in Dr. Smallwood's comments, and therefore the MND fails to comply with CEQA's requirements. Further environmental analysis in an EIR must be conducted to ensure the Project's impacts are disclosed, analyzed, and mitigated to the maximum extent feasible.

Response E-22: The text of the IS/MND regarding the wildlife habitat and wildlife corridors discussion on Page 65 has been revised to further support the determination that impacts would be less than significant, as presented in Section 3. This information does not result in the identification of any new impacts and no new mitigation is necessary. The comment does not present new information that has not been previously analyzed or provide substantial evidence supporting a fair argument that the project would result in significant unavoidable impacts requiring preparation of an EIR.

Comment E-23: The MND concludes, absent substantial evidence, that the Project's impacts on wildlife movement would be less than significant.¹⁴⁵ The MND reasons that "[t]he project is proposed in a semi-urbanized setting and has not been found to contain any native resident or wildlife species. The southwestern adjacent parcel contains Coyote Creek riparian woodlands approximately 380 feet southwest of the Hellyer Avenue border of the project site. The northwestern adjacent parcel contains serpentine bunchgrass grasslands, located approximately 510 feet northwest of the Piercy Road border of the project site. There are no streams, creeks or wetlands located on the project site, which is largely dominated by nonnative annual forbs and dirt roads."¹⁴⁶ The MND fails to support this less-than-significant determination on the basis of substantial evidence, as discussed in Dr. Smallwood's comments.¹⁴⁷ According to Dr. Smallwood, the MND does not support its determination with survey data, "sampling regime," or "program of observation to quantitatively or to even qualitatively assess wildlife movement patterns."¹⁴⁸

Dr. Smallwood's comments, however, provide substantial evidence supporting a fair argument that the Project may have significant impacts on wildlife movement.¹⁴⁹ As detailed in Dr. Smallwood's comments, "the project site does support wildlife, ... and its nearness to Coyote Creek's riparian woodlands and serpentine bunchgrass grasslands should increase rather than diminish the likelihood that wildlife use the site to move through the region."¹⁵⁰ This is because "[i]t is well documented that migratory wildlife tend to channel their movements along natural stream corridors and valley features," as stated in Dr. Smallwood's comments.¹⁵¹

Thus, substantial evidence supports a fair argument that the Project will have a potentially significant and unmitigated impact on wildlife movement. An EIR must be prepared which adequately analyzes and mitigates these impacts.

Response E-23: The text of the IS/MND on page 65 has been revised to clarify that the use of the site as wildlife corridors is limited due to the disturbed nature of the site, surrounding

¹⁴⁵ MND at 65.

¹⁴⁶ *Id.*

¹⁴⁷ Smallwood Comments at 16.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

development, and presence of roadways. This revision bolsters the determination that impacts would be less than significant. The project would not result in impacts to the adjacent riparian corridor, nor would it isolate the riparian corridor from grassland habitat located northwest of the project site as connections between these two habitat areas are present both northwest and southeast of the project site within three miles or less. This information does not result in the identification of any new impacts and no new mitigation is necessary. The comment does not present new information that has not been previously analyzed or provide substantial evidence supporting a fair argument that the project would result in significant unavoidable impacts requiring preparation of an EIR.

Comment E-24: The MND entirely ignores the Project’s potentially significant impacts on wildlife mortality and injuries from Project-generated traffic. Dr. Smallwood’s comments provide substantial evidence supporting a fair argument that the Project may significantly impact wildlife due to increased rates of mortality and injuries from new traffic generated by the Project.¹⁵² Dr. Smallwood explains that “Project-generated traffic would endanger wildlife that must, for various reasons, cross roads used by the project’s traffic, including along roads far from the project footprint.”¹⁵³ Dr. Smallwood’s comments provide substantial evidence of significant wildlife mortality rates resulting from vehicle collisions; “Vehicle collisions have accounted for the deaths of many thousands of amphibian, reptile, mammal, bird, and arthropod fauna, and the impacts have often been found to be significant at the population level (Forman et al. 2003). Across North America, traffic impacts have taken devastating tolls on wildlife (Forman et al. 2003). In Canada, 3,562 birds were estimated killed per 100 km of road per year (Bishop and Brogan 2013), and the US estimate of avian mortality on roads is 2,200 to 8,405 deaths per 100 km per year, or 89 million to 340 million total per year (Loss et al. 2014). Local impacts can be more intense than nationally.”¹⁵⁴

Dr. Smallwood references a study of traffic-related wildlife mortality conducted along 2.5 miles of Vasco Road, which is approximately thirty-seven (37) miles from the Project site.¹⁵⁵ According to Dr. Smallwood, “[f]atality searches in this study found 1,275 carcasses of 49 species of mammals, birds, amphibians and reptiles over 15 months of searches (Mendelsohn et al. 2009).”¹⁵⁶ Dr. Smallwood notes that the study does not “adjust[] for the proportion of fatalities that were not found due to scavenger removal and searcher error.”¹⁵⁷ However, he identifies a “study next to Vasco Road (Brown et al. 2016)” that utilized “adjustment factors for carcass persistence...” and estimates that “the adjusted total number of fatalities [would be] 12,187 animals killed by traffic on the road.”¹⁵⁸

As supported by these studies, Dr. Smallwood concludes that “[t]he IS/MND fails to analyze whether increased traffic generated by the project site would similarly result in local impacts on wildlife,” and “[w]ithout this analysis, the IS/MND lacks evidence to support a finding of no significant impact.”¹⁵⁹ Moreover, based on the substantial evidence provided in Dr. Smallwood’s comments, he determines that “there is evidence of a potentially significant impact from the Project’s traffic-related wildlife mortality and this analysis should be set forth in an EIR.”¹⁶⁰

¹⁵² *Id.* at 17-18.

¹⁵³ *Id.* at 17.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 18.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

Dr. Smallwood also quantitatively analyzes Project-generated traffic impacts to wildlife using a rate of fatalities per VMT.¹⁶¹ Based on a 2009 study, Dr. Smallwood estimates that roughly 22,242,187.5 vehicle miles per 12,187 wildlife fatalities or 1,825 vehicle miles per fatality may occur, which would result in approximately 5,844 vertebrate wildlife fatalities per year for the Project.¹⁶² Dr. Smallwood discounts this figure by half given “that some of the landscape around the project site and through which project-generated traffic would pass through, ... would be lower than estimated at the Vasco Road study site.”¹⁶³ Ultimately, Dr. Smallwood concludes that “the project-generated traffic would cause 2,922 wildlife fatalities per year,” and “this number would qualify as a substantial and highly significant project impact.”¹⁶⁴ He explains that “[m]itigation measures to improve wildlife safety along roads are available and are feasible [], and [these measures] need exploration for their suitability with the proposed project in an EIR.”¹⁶⁵

Therefore, there is substantial evidence supporting a fair argument that impacts to biological resources from Project-generated traffic may be significant and unmitigated. An EIR must be prepared which adequately analyzes and mitigates these potentially significant impacts.

Response E-24: As described previously, mitigation is identified on pages 168-169 of the IS/MND for VMT impacts. With regards to traffic-related effects on wildlife, the text in *Section D. Biological Resources* of the IS/MND is revised to clarify the existing wildlife conditions within the project site, as presented in Section 3. The following discussion is paraphrased.

Native wildlife species may move through the project site between the grassland and riparian habitat; however, use of the site as a wildlife corridor is likely limited due to the disturbed nature of the site, the surrounding development, and the presence of roadways separating the site on either side from the natural habitat areas, especially Hellyer Avenue, which is a four-lane divided street. Further, the project site is not identified as a “natural landscape block” or “essential connectivity area” in the *California Essential Habitat Connectivity Project: A Strategy for Conserving a Connected California* (Caltrans and CDFW, 2010), and no special considerations for roadways are recommended in the report for areas outside of natural landscape blocks or essential connectivity areas. Riparian corridors, such as the adjacent Coyote Creek riparian corridor, are known to provide important wildlife corridors and therefore, animals within the vicinity are more likely to move along the adjacent riparian corridor than through the project site. In addition, the project would not isolate the riparian from the serpentine bunchgrass grassland from one another because they meet up with one another less than one mile southeast of the project site and approximately three miles northwest of the project site. The commenter’s reference to roadkill fatalities on Vasco Road is not relevant to the IS/MND as Vasco Road is approximately 37 miles from the project site and does not have any bearing on the conditions at the project site and immediate vicinity. Therefore, the proposed project would have a less than significant impact with respect to interfering substantially with the movement of wildlife.

Comment E-25: The MND’s analysis improperly omits an assessment of the Project’s potentially significant cumulative impacts on biological resources. The discussion in the MND’s Mandatory Findings of Significance concludes that the cumulative impacts would nevertheless be less than

¹⁶¹ *Id.* at 18-19.

¹⁶² *Id.* at 19.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

significant given the proposed mitigation measures and adherence to biological resources protection ordinances.¹⁶⁶ The conclusion in the MND is not supported by substantial evidence and, as stated in Dr. Smallwood's comments, "[t]he IS/MND lacks the evidence necessary to demonstrate that the project's incremental effect and the effects of other projects is not significant, especially with regards to the American badger, Western burrowing owl, and nesting birds."¹⁶⁷

If the MND included an analysis of the Project's potentially significant cumulative impacts on biological resources, it would have needed to evaluate the 644-675 Piercy Road project. This project adjoins the site to the east, consists of one single-story industrial building, and would involve 24-hour truck trips accessing Hellyer Avenue as well as mechanical equipment noise. As stated by Dr. Smallwood, "[g]iven that the two projects are on adjoining sites, the projects likely host the same or similar biological resources [] and may result in cumulatively considerable impacts on these resources that must be studied in an EIR."¹⁶⁸

Dr. Smallwood concludes that the adjacent "project would likely contribute substantially to cumulative impacts, and that these impacts are likely to be significant," based on the evidence demonstrating that there are numerous "special-status species that potentially occur on and around the project site, such as burrowing owl, [CTS], white-tailed kite, northern harrier and American badger;" "the rapid decline of burrowing owls despite the [Santa Clara Valley Habitat Conservation Plan ("SCVHP)];" and "the rapid urbanization and industrialization of Santa Clara Valley,...."¹⁶⁹ Dr. Smallwood emphasizes the dire state of the Western burrowing owl, which "is rapidly heading towards extirpation in the Bay area."¹⁷⁰ According to Dr. Smallwood, "[i]n 2022, there were only 17 known breeding pairs in Santa Clara County (Talon Ecological Research Group 2023). The latest burrowing owl monitoring report stated, 'the goal of establishing a stable, then increasing owl population is not being met' (Talon Ecological Research Group 2023). In fact, the burrowing owl population in the SCVHP study area has declined about 80% since 2006 (Talon Ecological Research Group 2023)."¹⁷¹

Thus, as supported by substantial evidence in Dr. Smallwood's comments, the Project's cumulative impacts on species may be significant and must be evaluated in an EIR.¹⁷²

Response E-25: Refer to Topic Response 2.1.3. Regarding cumulative impacts to biological resources, CEQA allows a lead agency to determine that a project's contribution to a potential cumulative impact is not considerable and thus not significant when mitigation measures identified in the IS/MND will render those potential impacts to less than considerable (CEQA Guidelines 15064(h)(2)). The cumulative range for biological resources impacts is also 1,000 feet from the project site. The text of the IS/MND (pages 64 and 191) has been amended to specifically identify this radius for cumulative impacts as identified in Section 3. Text Changes to the IS/MND. The IS/MND contains mitigation to minimize the project's potential impacts and avoid impacts to biological resources (see Mitigation Measures BIO-1 through BIO-3, pages 60-64 of the IS/MND).

¹⁶⁶ MND at 191.

¹⁶⁷ Smallwood Comments at 19.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 19-20.

¹⁷⁰ *Id.* at 20.

¹⁷¹ *Id.*

¹⁷² *Id.* at 19-20.

Comment E-26: The MND sets forth mitigation measures to reduce the Project’s significant impacts on the American badger (MM BIO-1a through MM BIO-1b); nesting raptors and other migratory birds, like the grasshopper sparrow (MM BIO-2); and the Western burrowing owl (MM BIO-3a through MM BIO-3c).¹⁷³ However, Dr. Smallwood’s comments identify major deficiencies with these measures and stated that additional mitigation measures are feasible to reduce the Project’s significant impacts on the species.¹⁷⁴

Response E-26: Specific responses to the above concerns are addressed below.

Comment E-27: With regards to MM BIO-1a through MM BIO-1b addressing the Project’s significant impacts to the American badger, Dr. Smallwood comments that the MND lacks specific performance criteria to ensure that the proposed Employee Education Program for the construction crew would effectively mitigate the Project’s significant impacts.¹⁷⁵ These specific measures could include, but are not limited to, “candidate access routes to the project site, detailed measures to ensure the safety of the biological monitor, descriptions of special-status species that would be provided to the construction crew, the specific measures that would be incorporated into the construction effort to minimize impacts, and the procedures that would be implemented to manage situations in which members of special-status species are encountered during grading or construction.”¹⁷⁶

Dr. Smallwood also explains that the requirement for focused preconstruction surveys for badger dens under MM BIO-1b must be preceded by detection surveys, which have not yet been completed.¹⁷⁷ According to Dr. Smallwood, “[p]reconstruction surveys are not designed to detect the target species with anywhere close to the same likelihood as are protocol-level detection surveys, and so are intended as follow-up surveys to detection surveys, the latter of which are needed to inform the CEQA impacts analysis and identification of feasible mitigation measures to reduce the project’s significant impacts on this species.”¹⁷⁸ Moreover, if potential dens are observed, MM BIO-1b provides for specific scenarios based on the judgment of a qualified biologist.¹⁷⁹ Dr. Smallwood expresses serious concerns with the lack of objective criteria under MM BIO-1b and the failure of the measure “to identify guidance or criteria on the appropriate buffer, such as whether and how it should be adjusted based on the type of construction activity underway nearby.”¹⁸⁰ Dr. Smallwood thus concludes that “[t]his measure will not reduce the project’s significant impacts on the species and must be evaluated in an EIR.”¹⁸¹

Response E-27: Mitigation Measure MM BIO-1a sufficiently outlines the required content for the Employee Education Program and includes all but one of the mitigation measures that are identified in the comment (see page 60 of the IS/MND). While important, biological monitor safety is not relevant to reducing impacts to special-status species and, therefore, is not a required component of the Employee Education Program. No changes to MM BIO-1a or new mitigation are warranted.

¹⁷³ MND at 60-64.

¹⁷⁴ Smallwood Comments at 20-26.

¹⁷⁵ *Id.* at 21.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ MND at 61.

¹⁸⁰ Smallwood Comments at 22.

¹⁸¹ *Id.*

Please refer to response E-16 above regarding the adequacy of the reconnaissance-level survey in identifying potentially suitable habitat for special-status species within the project site, including American badger, and the associated mitigation. Further, the discussion of American badger in the IS/MND (page 58) and Biological Resources report (Appendix B of the IS/MND, page 15) identifies that burrows of sufficient size to support the species were not observed during the reconnaissance survey.

Comment E-28: Regarding MM BIO-2 for the Project’s significant impacts on nesting birds and raptors, Dr. Smallwood notes that “[t]he avian breeding season recognized by the California Department of Fish and Wildlife is now 1 February through 15 September,” not February 1 through August 31 as identified in MM BIO-2.¹⁸² Additionally, Dr. Smallwood concludes that while the “measure might prevent the direct destruction of nests,” “this measure would fail to avoid the takings of 28.9 acres of avian breeding habitat, thereby denying Californians another 1,089 birds per year (see earlier comment under Habitat Loss).”¹⁸³

The measure for pre-construction surveys for nesting birds under MM BIO-2 to “minimize or reduce potential impacts to nesting birds to less-than-significant is [also] unsubstantiated,” according to Dr. Smallwood.¹⁸⁴ Dr. Smallwood’s comments detail his own experience surveying for grassland nesters, during which he has “found that the nests of grassland birds are the most difficult to locate.”¹⁸⁵ He explains that “[g]round nesters, which are the types of birds that occur on the project site, are highly adept at concealing their nests both physically and behaviorally. Based on [Dr. Smallwood’s] experience, it is highly likely that preconstruction survey would fail to find any of the nests of ground-nesting birds that truly occur on the project site.”¹⁸⁶ Finally, if an active nest is found, MM BIO-2 states that “the ornithologist, in consultation with [CDFW] (only if needed), shall determine the extent of a construction free buffer zone to be established around the nest,”¹⁸⁷ Dr. Smallwood comments that this requirement “lacks objective criteria, and is unenforceable,” particularly since consultation with CDFW is “only if needed” and no criteria is established to determine when such consultation would be “needed.”¹⁸⁸

Response E-28: California Fish and Game code (Section 3503) provides for the protection of raptors and other native birds and their nests but does not protect “breeding habitat.” MM BIO-2 (pages 61-62 of the IS/MND) is the City of San José standard mitigation for nesting birds and is consistent with industry standard for avoidance of impacts to nesting birds. CDFW does not publish standard mitigation measures; however, the nesting season identified in MM BIO-2 is consistent with the nesting season identified in mitigation measures included recent Lake and Streambed Alteration Agreements issued by CDFW for other projects. Therefore, no changes to MM BIO-2 or new mitigation are warranted.

Comment E-29: Finally, MM BIO-3a requires preconstruction surveys for burrowing owls in all suitable habitat areas.¹⁸⁹ However, Dr. Smallwood comments that “[p]reconstruction surveys are not designed to detect the target species with anywhere close to the same likelihood as are protocol-level

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 22-23.

¹⁸⁵ *Id.* at 22.

¹⁸⁶ *Id.* at 22-23.

¹⁸⁷ MND at 62.

¹⁸⁸ Smallwood Comments at 23.

¹⁸⁹ MND at 62.

detection surveys, and so are intended as follow-up surveys to detection surveys per CDFW (2012), the latter of which are needed to inform the impacts analysis and feasible mitigation measures.”¹⁹⁰ Since detection surveys have not yet been completed and MM BIO-3a does not follow CDFW burrowing owl protocols, Dr. Smallwood determines that this mitigation measure is deficient.¹⁹¹

Response E-29: Refer to response E-16 above regarding the adequacy of the reconnaissance-level survey in identifying potentially suitable habitat for special-status species within the project site, including western burrowing owl. Mitigation Measure MM BIO-3a (pages 62-63 of the IS/MND) follows the pre-construction survey measures outlined for western burrowing owl in Section 6.6.1 of the Santa Clara Valley HCP, which incorporates survey, avoidance, and minimization guidelines from various western burrowing owl conservation plans (including the 2012 CDFW Staff report on Burrowing Owl Mitigation) and other sources pertaining to the HCP study area (which includes the project site). Therefore, no changes to MM BIO-3a or new mitigation are warranted.

Comment E-30: MM BIO-3b sets forth requirements based on the mitigation guidance in the SCVHCP.¹⁹² Dr. Smallwood does not recommend that a Western burrowing owl mitigation plan “be based solely on guidance provided by the [SCVHCP],” because “[a]ccording to the latest burrowing owl monitoring report, ‘the goal of establishing a stable, then increasing owl population is not being met’ (Talon Ecological Research Group 2023). In fact, the burrowing owl population in the SCVHP study area has declined about 80% since 2006 (Talon Ecological Research Group 2023).”¹⁹³ Since “the SCVHP is clearly failing to meet its conservation objectives related to burrowing owls,” according to Dr. Smallwood, “[t]he SCVHP presently provides an unreliable framework for mitigating potential project impacts to burrowing owls.”¹⁹⁴ Dr. Smallwood also comments that “the excavation of burrowing owl burrows for the purpose of passive relocation would not be consistent with the CDFW (2012) mitigation guidelines. In fact, CDFW (2012) warns that passive relocation can be interpreted as take.”¹⁹⁵

Response E-30: Evaluating the adequacy of the SCVHCP is outside of the scope of this project or CEQA review. Moreover, the Habitat Plan, was developed in collaboration with the U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Wildlife (CDFW), the two agencies responsible for applicable state and federal laws pertaining to endangered species. Mitigation Measure MM BIO-3b (pages 63-64 of the IS/MND) follows the breeding and non-breeding season avoidance measures outlined for western burrowing owl in Section 6.6.1 of the Santa Clara Valley HCP, which incorporates survey, avoidance, and minimization guidelines from various western burrowing owl conservation plans (including the 2012 CDFW Staff report on Burrowing Owl Mitigation) and other sources pertaining to the HCP study area (which includes the project site). Therefore, no changes to MM BIO-3b or new mitigation are warranted.

Comment E-31: MM BIO-3c requires “the project applicant [to] establish and maintain the non-disturbance buffer zones throughout the construction period,” and “conduct training with construction

¹⁹⁰ Smallwood Comments at 23-24.

¹⁹¹ *Id.*; see *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal. App. 4th 899, 947 (burrowing owl mitigation adequate if complies with USFWS and CDFW “officially approved” protocols).

¹⁹² MND at 63-64.

¹⁹³ Smallwood Comments at 25.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

personnel on the avoidance procedures, buffer zones, and protocols....”¹⁹⁶ Dr. Smallwood comments that “[r]egardless of how the project would attempt to minimize impacts to burrowing owls breeding on or near the project site at the time of construction, burrowing owls would lose the most critically important asset needed for persistence, and that is their habitat. The IS/MND proposes no compensatory mitigation for habitat loss, which is a major deficiency of the IS/MND.”¹⁹⁷

Response E-31: MM BIO-3c (page 64 of the IS/MND) follows the construction monitoring measures outlined for western burrowing owl in Section 6.6.1 of the Santa Clara Valley HCP, which incorporates survey, avoidance, and minimization guidelines from various western burrowing owl conservation plans (including the 2012 CDFW Staff report on Burrowing Owl Mitigation) and other sources pertaining to the HCP study area (which includes the project site). Therefore, no changes to MM BIO-3c or new mitigation are warranted.

Burrowing owl fee zones have been established in the Santa Clara Valley HCP to compensate for loss of western burrowing owl habitat. However, the project site is outside of the occupied nesting habitat areas identified in the Santa Clara Valley HCP and burrowing owl fees are not required for the project area. Therefore, no additional mitigation is necessary.

Comment E-32: Taken together, Dr. Smallwood’s comments provide substantial evidence supporting a fair argument that the mitigation measures proposed for the Project’s significant impacts on the American badger, raptors and other migratory birds, and the Western burrowing owl are insufficient to reduce the Project’s impacts to less-than-significant levels. Dr. Smallwood identifies the following feasible mitigation measures to reduce the Project’s significant impacts on biological resources:

- **Detection Surveys:** Dr. Smallwood comments that “[p]rotocol-level detection surveys are needed to (1) support negative findings of species when appropriate, (2) inform preconstruction surveys to improve their efficacy, (3) estimate project impacts, and (4) inform compensatory mitigation and other forms of mitigation. Detection survey protocols and guidelines are available from resource agencies for most special-status species. Otherwise, professional standards can be learned from the scientific literature and species’ experts. Survey protocols that need to be implemented include CDFW (2012) for burrowing owls. The guidelines call for multiple surveys throughout the breeding season.”¹⁹⁸
- **Detection Surveys for Bats:** Dr. Smallwood concludes on the basis of substantial evidence that “[m]ultiple special-status species of bats likely occur on and around the project site.”¹⁹⁹ As a result, he comments that “[a] qualified bat biologist should be tasked with completing protocol-level detection surveys for bats. It needs to be learned whether bats roost in the area and whether bats forage on site.”²⁰⁰
- **Preconstruction surveys:** Dr. Smallwood states that “[c]ompletion of reports of the methods and outcomes of preconstruction surveys for nesting birds and other wildlife should be required. The reports should be made available to the public.”²⁰¹
- **Construction Monitoring:** Dr. Smallwood recommends in his comments that “two or more qualified biologists need to serve as construction monitors. They should have the authority to

¹⁹⁶ MND at 64.

¹⁹⁷ Smallwood Comments at 25.

¹⁹⁸ *Id.* at 26.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

stop construction when construction poses a threat to wildlife, and they should have the authority to rectify situations that pose threats to wildlife. The events associated with construction monitoring, such as efforts to avoid impacts and findings of dead and injured wildlife, need to be summarized in a report that is subsequently made available to the public.”²⁰²

- **Habitat Loss:** Dr. Smallwood’s comments provide substantial evidence to support that “compensatory mitigation would be warranted for habitat loss.” In his opinion, “[a]t least an equal area of land should be protected in perpetuity as close to the project site as possible, but a larger area is likely warranted to mitigate for the impacts to so many special-status species of wildlife as likely occur on the site. And additional compensatory mitigation should be linked to impacts identified in construction monitoring.”²⁰³
- **Road Mortality:** Dr. Smallwood concludes that “[c]ompensatory mitigation is needed for the increased wildlife mortality that would be caused by the project-generated road traffic in the region.”²⁰⁴ He recommends “that this mitigation can be directed toward funding research to identify fatality patterns and effective impact reduction measures such as reduced speed limits and wildlife under-crossings or overcrossings of particularly dangerous road segments. Compensatory mitigation can also be provided in the form of donations to wildlife rehabilitation facilities...”²⁰⁵
- **Fund Wildlife Rehabilitation Facilities:** Dr. Smallwood states that “[c]ompensatory mitigation ought also to include funding contributions to wildlife rehabilitation facilities to cover the costs of injured animals that will be delivered to these facilities for care. Many animals would likely be injured by collisions with automobiles.”²⁰⁶

In conclusion and based on the substantial evidence provided in Dr. Smallwood’s comments, there is a fair argument of potentially significant impacts on biological resources, and the mitigation measures proposed in the MND are insufficient to reduce these impacts to less-than-significant levels. Additional feasible mitigation measures are available to reduce these significant impacts, as identified in Dr. Smallwood’s comments.²⁰⁷

Response E-32: Please see responses E-14, E-16 through E-20, and E-22 through E-31. The project’s potential impacts on the American badger, raptors and other migratory birds, and the Western burrowing owl are sufficient to reduce the impacts to less than significant, based on the analysis provided in the IS/MND (see page 60) and Appendix B.

Comment E-33: The MND concludes that the Project would not have any significant impacts from noise levels during construction or operations and therefore no mitigation measures were required.²⁰⁸ Mr. Meighan’s comments provide substantial evidence supporting a fair argument that the Project’s noise impacts may be significant. First, Mr. Meighan comments that the analysis of the Project’s construction noise do not comply with the FTA’s Transit Noise and Vibration Impact Assessment Manual, as referenced in the MND, and as a result, the Project’s impacts may be underestimated. Second, Mr. Meighan explains in his comments that the Project’s operational noise impacts are unsupported. Since the MND fails to disclose the ambient noise levels, the analysis is unable to provide

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ MND at 131-140.

a comparison of ambient noise levels to Project noise levels, which is necessary to determine if the Project would increase noise levels over the stated threshold. Finally, Mr. Meighan’s comments demonstrate, on the basis of substantial evidence, that the noise source data in the MND is unsupported. An EIR must be prepared that analyzes the potentially significant impacts on noise.

Response E-33: Specific responses regarding noise and vibration are addressed below.

Comment E-34: The MND’s construction noise analysis “uses the noise limits established by the [FTA] to identify the potential for impacts due to substantial temporary construction noise. The FTA identifies construction noise limits in the Transit Noise and Vibration Impact Assessment Manual. During daytime hours, an exterior threshold of 80 dBA Leq shall be applied at residential land uses and 90 dBA Leq shall be applied at commercial and industrial land uses.”²⁰⁹ Based on these thresholds, the MND concludes that “construction noise levels would not exceed the exterior threshold of 80 dBA Leq at residential land uses. The 90 dBA Leq threshold would not be exceeded at commercial land uses in the project vicinity during project construction.”²¹⁰

However, Mr. Meighan’s comments provide substantial evidence that the MND’s use of the FTA methodology to perform a “general assessment while incorporating usage factors significantly underestimates the potential impact of construction noise.”²¹¹ According to Mr. Meighan, “usage factors are only utilized in the detailed assessment” in accordance with the FTA methodology and “using [a general assessment] with usage factors greatly underestimates noise,” as is the case here.²¹² Mr. Meighan explains that “[u]sage factors are defined as the percentage of time a piece of construction equipment is used during an hour. After breaks, adjustments, coordination, many pieces of loud construction equipment are only used 20-40% of the time. When using these with a general assessment, it then reduces and underestimates the amount of time of sound exposure by 60-80%.”²¹³

Mr. Meighan provides an example to demonstrate how the MND may have underestimated the Project’s construction noise impacts.²¹⁴ He states that “if we consider the grading phase and use only the two loudest pieces of construction equipment (Excavator and Grader) with the proper usage factors at 70 feet, the predicted noise level is 84 dBA. This exceeds the provided threshold of 80 dBA, rendering the conclusion that ‘the temporary construction noise impact would be reduced to a less than significant level’ incorrect.”²¹⁵ Therefore, as supported by substantial evidence in Mr. Meighan’s comments, an EIR must be prepared that adequately evaluates the Project’s construction noise impacts.

Response E-34: The Noise and Vibration Assessment used the noise limits established by the Federal Transportation Authority (FTA) to identify the potential for impacts due to substantial temporary construction noise in conjunction with Policy EC-1.7 of the City’s General Plan, since the City does not provide quantitative noise level thresholds for construction activities. The noise consultant also concluded that construction noise levels presented in the noise assessment, which were estimated from the center of the nearest project buildings, would not exceed the FTA thresholds. The noise consultant further concluded that while the FTA thresholds would at times exceed the thresholds (i.e., when activities would occur within about 50 feet of the receiving

²⁰⁹ MND, Appendix G at 17.

²¹⁰ MND at 133.

²¹¹ Meighan Comments at 2.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 2-3.

property lines), the thresholds would not be exceeded for more than 12 months. The distance from the nearest residential property line (i.e., north residences) to the nearest project site boundary would be about 50 feet, and the distance from the nearest residential property line to the nearest location of heavy construction activity, according to the site plan, would be about 100 feet. At this distance, all construction activities would be below 80 dBA L_{eq}. Therefore, the exposure of construction noise exceeding the FTA thresholds would be minimal. Additionally, Policy EC-1.7 of the City’s General Plan considers construction projects occurring for more than one year to result in a significant impact and require a construction noise control plan, which would help to reduce the limited exposure of the nearest residences to construction noise below 80 dBA L_{eq}. Since this project is expected to last for a maximum of 12 months, the threshold identified in Policy EC-1.7 would not be exceeded. Therefore, any temporary construction noise exceedances would be less than significant.

In addition, the City of San José requires that reasonable noise reduction measures be incorporated into all construction projects as part of their standard permit conditions, as stated in the noise assessment. No further measures would be required according to Policy EC-1.7.

Comment E-35: The MND states that “[a]ccording to Policy EC-1.2 of the City’s General Plan, a significant permanent noise increase would occur if the project would increase noise levels at noise-sensitive receptors by 3 dBA DNL or more where ambient noise levels exceed the ‘normally acceptable’ noise level standard. Where ambient noise levels are at or below the ‘normally acceptable’ noise level standard, noise level increases of 5 dBA DNL or more would be considered significant.”²¹⁶ The MND concludes that the Project’s operational noise levels, e.g., from traffic noise, mechanical equipment noise, parking lot noise, and noise from truck deliveries, would be less than significant based on this standard.²¹⁷

However, Mr. Meighan’s comments demonstrate that the City fails to support these less-than-significant determinations with substantial evidence because the MND does not disclose the ambient sound levels to allow for “a comparison [to] be made between predicted noise levels and measured ambient levels.”²¹⁸ For example, “in Table 14, the estimated future DNL is 61 dBA. Table 14 also states that this is 2 dB over the ambient levels. This implies an ambient level of 59 dBA, which is not included at all in the document, either in the discussion or in the ambient measurements.”²¹⁹ Mr. Meighan therefore concludes that “[c]onsidering that the threshold of significance is based on predicted noise from the project over the existing ambient, using a misrepresented level could underestimate any potential noise impact.”²²⁰ As stated by Mr. Meighan in his comments, “an EIR must provide sound levels at each sensitive receiver and explicitly disclose each calculated level and criteria at each location to ensure that the impacts analysis clearly evaluates noise level increase over ambient levels.”²²¹

Response E-35: Mr. Meighan, the noise expert attained by Adams Broadwell, asserts that the MND did not disclose the ambient noise levels. The noise consultant conducted a noise monitoring survey starting on Wednesday, July 6, 2022, and concluding on Friday, July 8, 2022, which included two long-term and two short-term noise measurements (as discussed in pages 127-128

²¹⁶ MND at 136.

²¹⁷ *Id.* at 136-38.

²¹⁸ Meighan Comments at 1.

²¹⁹ *Id.*

²²⁰ *Id.* at 2.

²²¹ *Id.*

of the IS/MND). Both long-term noise measurements, which were located on the project site along Piercy Road directly opposite the residences to the north (identified as LT-1) and east of Tennant Avenue near the boundary of the residences to the east (identified as LT-2). The noise report provides a detailed account of the monitoring survey, which defines the ambient noise environment. As stated in the noise report, the ambient day-night average noise levels (DNLs) at both long-term measurements were 62 dBA DNL.

All DNLs estimated for operations, which are summarized in Tables 10 through 13 of the noise report (Appendix G pages 26-28), were logarithmically added to the ambient DNLs to estimate the future DNL expected with the inclusion of the project. For example, Table 10 of the noise report estimates 61 dBA DNL for mechanical equipment noise at the west industrial property line. This operational noise level is provided in the table for comparison to the City's DNL thresholds summarized in the General Plan and Municipal Code for residential and nonresidential uses, respectively. This noise level does not include existing ambient noise in the project vicinity, only noise levels generated by the proposed project.

To determine permanent noise level increase, the project's operational noise level of 61 dBA DNL is added to existing ambient noise level of 62 dBA DNL. This would estimate the future ambient noise level for the existing noise environment with the addition of the project's operational noise level. The future ambient noise level was calculated to be 64 dBA DNL for this example, and therefore, the noise level increase would be 2 dBA DNL. This level of detail was not included in the table to avoid confusion due to too much information.

Additionally, Policy EC-1.2 of the City's General Plan states the following:

Policy EC-1.2 Minimize the noise impacts of new development on land uses sensitive to increased noise levels (Categories 1, 2, 3 and 6) by limiting noise generation and by requiring use of noise attenuation measures such as acoustical enclosures and sound barriers, where feasible. The City considers significant noise impacts to occur if a project would:

- Cause the DNL at noise sensitive receptors to increase by five dBA DNL or more where the noise levels would remain "Normally Acceptable;" or
- Cause the DNL at noise sensitive receptors to increase by five dBA DNL or more where the noise levels would remain "Normally Acceptable;" or

Categories 1, 2, 3, and 6 include residential land uses, hotels, motels, hospitals, and residential care facilities (Category 1, according to Table EC-1 of the City's General Plan); outdoor sports and recreation, neighborhood parks and playgrounds (Category 2); schools, libraries, museums, meeting halls, and churches (Category 3); and public and quasi-public auditoriums, concert halls, and amphitheaters (Category 6). Therefore, existing industrial buildings, commercial buildings, and offices would not be subject to the permanent noise level increase threshold established by the City of San José.

Comment E-36: Mr. Meighan explains that the MND provides noise levels for future operational sources, such as rooftop mechanical equipment, parking lot noise, truck engine noise, and truck back up alarms, without providing evidentiary support for the selected noise levels.²²² For example,

²²² *Id.* at 3.

according to Mr. Meighan, “a backup alarm can have an L_{max} as high as 88 dBA at 50 feet, which exceeds the levels used in the report by ten decibels. If this value is used instead of the one provided in Table 12 for the West Industrial receiver, the resultant noise level would be 67 dBA at 570 feet, with a DNL of 66 dBA (assuming a Leq-DNL correction factor of 1, as seems to be used throughout the report). This represents levels 7 dBA over the assumed ambient of 59 dBA DNL (extrapolating from the West Industrial Receiver in Table 10), which would result in a potentially significant noise impact that was undisclosed in the MND.”²²³ The MND is therefore deficient in failing to support the stated noise levels for future operational sources and, as such, the less-than-significant determination is unsupported.

Response E-36: Source levels were not provided by the applicant, as the specific usage of the proposed buildings is not yet known. However, the noise consultant has an internal database of source levels for various types of developments that have been acquired over the years. For this noise assessment, measurements made at previous project sites were utilized, including a WalMart Expansion project in Antioch,²²⁴ a Lucky Sav-On and K-Mart Environmental Noise Assessment Project in Concord,²²⁵ a Tractor Supply Co. Commercial Project in Windsor,²²⁶ Landing Way Aggregate Distribution Facility in Petaluma,²²⁷ and a Shoe Palace Distribution Center Expansion project in Morgan Hill.²²⁸ Data collected over the years from projects such as these have provided I&R with a wealth of real-world mechanical equipment and truck maneuvering noise source levels that we utilize as practical, reasonable source levels in our on-going studies.

For mechanical equipment noise, the noise assessment also assumed up to five units to be operating simultaneously at any given time in close proximity, further increasing the source levels used in the calculation. It should also be noted that specific locations of the equipment were not available at the time of the noise study, and the noise consultant used the worst-case rooftop location for mechanical equipment, which was 10 feet from the nearest façade (minimal setback reasonably possible). With greater setbacks from the edge of the rooftop, such as towards the center of the buildings or in the loading dock areas, the shielding effects and/or distance attenuation would potentially be greater and further reduce noise levels at the receiving property lines.

For truck maneuvering noise, 70 to 75 dBA L_{max} is considered representative of most maneuvering noise, outside of air brake release. Similarly, there may be individual trucks that have backup alarms reaching noise levels up to 88 dBA L_{max}; however, it would be unreasonable to assume that every truck maneuvering activity at the project site would reach these excessive noise levels. Not all truck noise sources, such as fan noise or exhaust noise, backup alarms, or air brake release, occur during every truck maneuver. The noise consultant uses typical noise source levels based on reasonable assumptions.

Comment E-37: The MND states that a Phase I ESA was conducted in 2020 on the Project site and “determined that there was evidence of a single [Recognized Environmental Conditions (“RECs”)] in

²²³ *Id.*

²²⁴ Illingworth & Rodkin, Inc., Wal Mart Expansion, Williamson Ranch Plaza EIR Noise Section, August 2005.

²²⁵ Illingworth & Rodkin, Inc., Lucky Sav-On and K-Mart Environmental Noise Assessment, Vineyard Shopping Center, August 1998.

²²⁶ Illingworth & Rodkin, Inc., Tractor Supply Co. Commercial Project Noise Assessment of Truck and Forklift Operations, February 2009.

²²⁷ Illingworth & Rodkin, Inc., Landing Way Aggregate Distribution Facility Noise Assessment, November 2003.

²²⁸ Illingworth & Rodkin, Inc., Shoe Palace Expansion Project Noise and Vibration Assessment, September 2018.

connection with the site...related to the historical agricultural use of the site, and previous soil samples testing positive for DDE.”²²⁹ The Phase I ESA “recommend[ed] conducting additional soil sampling and laboratory analysis to test for DDE contamination...prior to development of the site.”²³⁰ A Phase II ESA was completed in December of 2021.²³¹ Critical findings from the September 2021 sampling event include, but are not limited to:

- DDD concentrations were less than the commercial direct exposure [Environmental Screening Levels (“ESLs”)], however, the sample collected from location SS-9 at a depth of approximately the upper ½ foot exceeds the Tier 1 ESL (2.7 mg/kg).
- DDE concentrations were less than the commercial direct exposure ESL, however, 11 of 15 soil samples collected from the approximately upper ½ foot exceed the Tier 1 ESL (0.33 mg/kg).
- DDT concentrations were less than the commercial direct exposure ESL, however, the detected concentrations exceed the Tier 1 ESL (0.0011 mg/kg).
- Sample SS-6 collected from the approximately upper ½ foot detected a concentration of chlordane that exceeds the Tier 1 ESL (0.0085 mg/kg) but is less than the commercial direct exposure ESL (2.2 mg/kg).²³²

The San Francisco Bay Regional Water Quality Control Board sets ESLs to “provide conservative screening levels for over 100 chemicals found at sites with contaminated soil and groundwater.”²³³ ESLs “are intended to help expedite the identification and evaluation of potential environmental concerns at contaminated sites.”²³⁴ Here, the Phase II ESA documents exceedances of Tier 1 ESLs for DDD, DDE, DDT, and chlordane.²³⁵ Although the Phase II ESA concludes that the “soil does not appear significantly impacted by historical agricultural use,” neither the Phase II ESA nor the MND evaluates whether this contamination would “[c]reate a significant hazard to the *public*...through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment,” as required by CEQA.²³⁶ Project construction will involve grading and excavation activities, which could result in disturbance of contaminated soil or groundwater. The omission of this analysis is therefore a major deficiency in violation of CEQA. Furthermore, the mitigation measure proposed in the MND for significant impacts from hazards is limited to the preparation of an Asbestos Dust Mitigation Plan.²³⁷ This plan will not mitigate potentially significant impacts on workers and the general public from hazards created by disturbing soil contamination from historic agricultural operations.

Therefore, a fair argument can be made that the Project may cause significant impacts from hazards requiring the preparation of an EIR.

Response E-37: The mitigation presented in the IS/MND is consistent with the conclusions of the Phase II soil sampling, which indicated that the soils on the site do not appear to be

²²⁹ MND at 105.

²³⁰ *Id.*

²³¹ MND, Appendix F-2.

²³² *Id.* at 4-5.

²³³ San Francisco Bay Regional Water Quality Control Board, Environmental Screening Levels, available at: https://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/esl.html.

²³⁴ *Id.*

²³⁵ MND, Appendix F-2 at 4-5.

²³⁶ MND at 106.

²³⁷ *Id.* at 107.

significantly impacted by historical agricultural use. As the site soils were found not to possess levels exceeding the direct exposure ESLs for the tested pollutants. With incorporation of Mitigation Measure HAZ-1 (see pages 107-108 of the IS/MND), which addresses potential impacts from NOA, the proposed project would not result in a significant impact related to the exposure of the public due to the release of hazardous materials into the environment. See also Response E-5.

Comment E-38: Appendix F to the CEQA Guidelines provides guidance on information that may be included in an analysis of a project’s energy use.²³⁸ Appendix F states, “[t]he goal of conserving energy implies the wise and efficient use of energy. The means of achieving this goal include: (1) decreasing overall per capita energy consumption, (2) decreasing reliance on fossil fuels such as coal, natural gas and oil, and (3) increasing reliance on renewable energy sources.”²³⁹ Appendix F lists possible environmental impacts and mitigation measures for the lead agency to consider.²⁴⁰ Environmental impacts may arise from such things as “[t]he project’s energy requirements and its energy use efficiencies;” the project’s effects on local and regional energy supplies, requirements for additional capacity, and peak and base period demands for electricity and other forms of energy; “[t]he degree to which the project complies with existing energy standards;” the project’s effects on energy resources; and “[t]he project’s projected transportation energy use requirements and its overall use of efficient transportation alternatives.”²⁴¹ If the project’s energy impacts are significant, Appendix F suggests types of mitigation measures which a lead agency may consider.²⁴² These include, among others, “measures to reduce wasteful, inefficient and unnecessary consumption of energy during construction, operation, maintenance and/or removal[;]” and “[a]lternate fuels (particularly renewable ones) or energy systems.”²⁴³

Here, the MND’s analysis of the Project’s energy impacts is deficient for three reasons.²⁴⁴

Response E-38: Specific responses to the above concerns are addressed below in responses E-39 through E-41.

Comment E-39: First, the MND’s estimated annual energy use of the Project during operations in Table 8 states that “[a]ll project natural gas use was set to zero and assigned to electricity use in CalEEMod in accordance with Climate Smart San José.”²⁴⁵ Yet, in the preceding paragraph, the MND states, “[o]peration of the proposed project would consume energy, in the form of electricity *and natural gas*, primarily for building heating and cooling, lighting, cooking, and water heating.”²⁴⁶ The MND must clearly state whether the Project would use natural gas during Project operations and, if so, must include the natural gas usage in the energy impacts analysis to accurately reflect the Project’s energy mix. The MND must also evaluate compliance with the City’s ordinance banning natural gas if the Project will in fact use natural gas during operations.

²³⁸ 14 C.C.R. § 15126.2(b).

²³⁹ *Id.* at Appendix F, I(1)-(3).

²⁴⁰ *Id.* at II.C-D.

²⁴¹ *Id.* at II.C.

²⁴² *Id.* at II.D.

²⁴³ *Id.*

²⁴⁴ MND at 80-82.

²⁴⁵ MND at 80-82.

²⁴⁶ *Id.* (emphasis added).

Response E-39: No natural gas connection or use is proposed as part of the project. The reference to energy being consumed in the form of natural gas has been removed from the text of page 81 of the IS/MND as shown in Section 3 of this document. No natural gas connection or use is proposed as part of the project. The reference to energy being consumed in the form of natural gas has been removed from the text of the IS/MND as shown in Section 3 of this document.

Comment E-40: Second, although the MND states that the “project includes a solar ready roof for each of the proposed buildings to facilitate future development of renewable energy on the site,” the MND does not consider whether any renewable energy systems could be incorporated into the Project, which violates CEQA’s requirements.²⁴⁷ The court in *League to Save Lake Tahoe Mountain etc. v. Cnty. Of Placer* held that the EIR failed to adequately consider renewable energy features.²⁴⁸ The court reasoned that “[b]ecause the EIR did not address whether any renewable energy features could be incorporated into the project as part of determining whether the project’s impacts on energy resources were significant, it did not comply with CEQA’s procedural requirements, a prejudicial error.”²⁴⁹ The court determined that CEQA required consideration of renewable energy features not only as mitigation measure if project had significant impact on energy resources, but also during initial analysis of whether project had a significant impact on energy resources.²⁵⁰

Here, there is no mention of on-site renewable energy systems to increase the Project’s reliance on renewable energy and decrease the Project’s reliance on fossil fuels, as intended by Appendix F. For the foregoing reasons, there is substantial evidence supporting a fair argument that the Project may have a significant impact due to the wasteful, inefficient, or unnecessary consumption of energy resources.

Response E-40: As stated in this comment, the project includes solar ready roofs for future installation of solar panels (see page 99 of the IS/MND). However, the responsibility for installation of solar panels on the roofs of the proposed building is not proposed as part of the project and would lie with the future user of the facility. As a result, it would be inappropriate under CEQA to factor in potential generation of renewable energy on-site in determining the energy consumption impacts for the proposed project. It should also be noted that Appendix F to CEQA, as written, applies only to Environmental Impact Reports, and is not a required component of a Mitigated Negative Declaration. In addition, the energy consumption for the proposed project was found to be less than significant without including on-site generation of renewable energy, which represents a conservative analysis. Including potential future on-site renewable energy generation in energy consumption calculation would not alter this conclusion.

Comment E-41: Finally, the MND states that “[t]he project would be enrolled in and receive energy from the [San José Clean Energy (“SJCE”)] program at the GreenSource level,” which only provides 60 percent greenhouse gas (“GHG”) emission-free electricity.²⁵¹ However, the MND discloses that SJCE also offers its customers the opportunity to enroll in the TotalGreen program, which receives 100 percent GHG free electricity from entirely renewable energy sources.²⁵² The MND is deficient in failing to evaluate whether the Project could enroll in SJCE’s TotalGreen program to ensure 100

²⁴⁷ *Id.*

²⁴⁸ *League to Save Lake Tahoe Mountain etc. v. Cnty. of Placer* (2022) 75 Cal. App. 5th 63, 168.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ MND at 78.

²⁵² *Id.*

percent of the electricity is sources from renewable energy resources, especially given that the Project does not include the installation and operation of any renewable energy technologies.

Response E-41: The decision for level of enrollment in the SCJE program rests with the project applicant. The project applicant has elected to enroll in SCJE at the GreenSource level. Since enrollment in TotalGreen is not proposed, the MND is not required to address a hypothetical scenario in which the project would enroll in the TotalGreen program. SJCE's GreenSource program provides 95 percent carbon free energy. In addition, it should be noted that all energy calculations performed for the proposed project did not account for renewable energy use during operation of the proposed project, which represents a conservative analysis related to energy consumption. No text edits to the IS/MND are required as a result of this comment.

Comment E-42: For the foregoing reasons, the MND does not provide substantial evidence to support the conclusion that the Project would have a less than significant impact with respect to the wasteful, inefficient, or unnecessary consumption of energy resources during Project construction or operation.²⁵³ To the contrary, based on the substantial evidence provided herein, there is a fair argument that the Project may have significant energy impacts that are not mitigated and must be evaluated in an EIR.

Response E-42: As stated above, the IS/MND sufficiently addressed potential impacts to energy consumption resulting from the proposed project on pages 80-82 of the IS/MND. Energy calculations for the proposed project represent a conservative approach and only accounted for energy sources within the scope of the proposed project.

Comment E-43: Where a local or regional policy of general applicability, such as an ordinance, is adopted in order to avoid or mitigate environmental effects, a conflict with that policy constitutes a significant land use impact and, in itself, indicates a potentially significant impact on the environment.²⁵⁴ Any inconsistencies between a proposed project and applicable plans must be discussed in the project's CEQA document.²⁵⁵ A project's inconsistencies with local plans and policies also constitute significant impacts under CEQA.²⁵⁶

Policy EC-1.7 of the City's General Plan requires all construction operations within the City to use "best available noise suppression devices and techniques and to limit construction hours near residential uses per the Municipal Code allowable hours, which are between the hours of 7:00 a.m. and 7:00 p.m. Monday through Friday when construction occurs within 500 feet of a residential land use."²⁵⁷ Moreover, the MND explains that "Chapter 20.100.450 of the Municipal Code establishes allowable hours of construction within 500 feet of a residential unit between 7:00 AM and 7:00 PM Monday through Friday unless permission is granted with a development permit or other planning approval. No construction activities are permitted on the weekends at sites within 500 feet of a residence."²⁵⁸

²⁵³ *Id.* at 82.

²⁵⁴ See *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903.

²⁵⁵ 14 C.C.R. § 15125(d); *City of Long Beach v. Los Angeles Unif. School Dist.* (2009) 176 Cal. App. 4th 889, 918; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 874 (EIR inadequate when Lead Agency failed to identify relationship of project to relevant local plans).

²⁵⁶ *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4; see also, *County of El Dorado v. Dept. of Transp.* (2005) 133 Cal.App.4th 1376.

²⁵⁷ MND at 131.

²⁵⁸ *Id.* at 127.

Here, the MND states that “[t]he [P]roject proposes extended construction hours, which would occur Monday through Saturday from 7 AM to 10 PM,” but “[t]o comply with Policy EC-1.7, no construction work would occur on Saturdays within 500 feet of residential uses.”²⁵⁹ As disclosed in the MND, standard permit conditions for the Project would include “[l]imit[ing] construction to the hours of 7:00 a.m. to 7:00 p.m. Monday through Friday for any on-site or off-site work within 500 feet of any residential unit.”²⁶⁰ As written, this condition is insufficient to ensure compliance with Policy EC-1.7 of the City’s General Plan and Chapter 20.100.450 of the Municipal Code. The MND fails to disclose any criteria to ensure that construction can actually be limited within areas of 500 feet from residences between the hours of 7:00 pm to 10:00 pm Monday through Friday and from 7:00 am to 10:00 pm on Saturdays.

Single-family residences 400 feet north of the Project site are located along Piercy Road, which is an access route for construction trucks during the estimated 12 months of construction.²⁶¹ The MND fails to assess how, if at all, construction-related trucking activities along Piercy Road will cease during the hours of 7:00 pm to 10:00 pm Monday through Friday and from 7:00 am to 10:00 pm on Saturdays to comply with Policy EC-1.7 of the City’s General Plan and Chapter 20.100.450 of the Municipal Code. The MND also fails to disclose any monitoring requirement for this condition to ensure compliance, nor does the MND provide contact information that residents may use to complain about noise issues after the permitted hours.

Residents along Tennant Avenue²⁶² raised concerns about the Project’s construction noise in an e-mail communication dated December 15, 2022, and requested that construction be limited to “reasonable daytime hours- Say 7.00 AM to 3,00 PM [sic] and night time construction work should not be permitted.”²⁶³

CEQA case law is clear that public comments on matters within ordinary experience may constitute “substantial evidence.”²⁶⁴ Given public comments from local residents expressing concerns about the Project’s potentially significant construction noise impacts, additional measures are necessary to ensure that work within 500 feet of any residential unit does not occur on weekends and after 7:00 pm on weekdays.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 135.

²⁶¹ MND at 40.

²⁶² Although residential development by Tennant Avenue is approximately 845 feet from the Project site, courts have held that neighbors’ statements and testimony may constitute substantial evidence supporting a fair argument that a project may result in a significant unmitigated noise impact. See *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 732–735 (an EIR is required if substantial evidence supports a fair argument that the Project may have significant unmitigated noise impacts, even if other evidence shows the Project will not generate noise in excess of the local agencies’ noise ordinance and general plan).

²⁶³ Email from Usha Chandra, resident, to Rina Shah, City of San José, and Tina Garg, City of San José (December 15, 2022)(“Exhibit C”).

²⁶⁴ See *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 937 (“As on other CEQA topics, the opinions of area residents, if based on direct observation, may be relevant as to aesthetic impact and may constitute substantial evidence in support of a fair argument; no special expertise is required on this topic”); *Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340 (same regarding noise); *Protect Niles v. City of Fremont* (2018) 25 Cal.App.5th 1129, 1152 (“Residents’ personal observations of traffic conditions where they live and commute may constitute substantial evidence even if they contradict the conclusions of a professional traffic study. This is especially true where, as here, residents cite specific facts that call into question the underlying assumptions of a traffic study.”).

The MND fails to analyze the Project's inconsistency with Policy EC-1.7 of the City's General Plan and Chapter 20.100.450 of the Municipal Code, which limit construction to certain hours within 500 feet of residences, as discussed above. An EIR must be prepared to adequately disclose and mitigate the potentially significant environmental impacts.

Response E-43: Refer to Response E-34. The project would not exceed a 12-month construction duration. The project includes standard permit conditions related to compliance with Policy EC-1.7 and Chapter 20.100.450 of the Municipal Code. Notably, noise outside of the standard construction hours of 7:00 a.m. to 7:00 p.m. Monday through Friday would be contingent on preparation of a construction noise mitigation plan and a finding by the Director of Planning, Building and Code Enforcement that the construction noise mitigation plan is adequate to prevent noise disturbance of affected residential use. If the Director of Planning, Building and Code Enforcement found that said plan would be inadequate to prevent noise, extended construction hours would not be permitted. The project is therefore consistent with Policy EC-1.7 and Chapter 20.100.450 of the Municipal Code.

Comment E-44: To approve a Site Development Permit, the following findings must be made pursuant to the City's Code of Ordinances:

- The site development permit, as approved, is consistent with and will further the policies of the general plan and applicable specific plans and area development policies.
- The site development permit, as approved, conforms with the zoning code and all other provisions of the San José Municipal Code applicable to the project.
- The site development permit, as approved, is consistent with applicable city council policies, or counterbalancing considerations justify the inconsistency.
- The interrelationship between the orientation, location, and elevations of proposed buildings and structures and other uses on-site are mutually compatible and aesthetically harmonious.
- The orientation, location and elevation of the proposed buildings and structures and other uses on the site are compatible with and are aesthetically harmonious with adjacent development or the character of the neighborhood.
- ***The environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, even if insignificant for purposes of the California Environmental Quality Act (CEQA), will not have an unacceptable negative affect on adjacent property or properties.***
- Landscaping, irrigation systems, walls and fences, features to conceal outdoor activities, exterior heating, ventilating, plumbing, utility and trash facilities are sufficient to maintain or upgrade the appearance of the neighborhood.
- Traffic and pedestrian access are adequate.²⁶⁵

If “the information submitted by the applicant or presented at the public hearing fails to satisfactorily substantiate such findings,” the Site Development Permit application must be denied.²⁶⁶ Here, the Site Development Permit application must be denied because the finding cannot be made that the environmental impacts of the Project, including, but not limited to, noise, hazards, biological resources, and energy impacts, will not have an unacceptable negative affect on adjacent property or properties.²⁶⁷

²⁶⁵ City of San José Code of Ordinances § 20.100.630(A)(1)-(8) (emphasis added).

²⁶⁶ *Id.* at § 20.100.630(B).

²⁶⁷ *Id.* at § 20.100.630(A)(6).

Based on the substantial evidence set forth herein and in the attached expert comments, a fair argument can be made that the Project may have significant impacts on noise, biological resources, hazards, and energy impacts.²⁶⁸ For example, Mr. Meighan's comments provide substantial evidence that the Project's construction noise impacts may be significant, especially at adjacent properties.²⁶⁹ Mr. Meighan explains in his comments that "if we consider the grading phase and use only the two loudest pieces of construction equipment (Excavator and Grader) with the proper usage factors at 70 feet, the predicted noise level is 84 dBA. This exceeds the provided threshold of 80 dBA, rendering the conclusion that 'the temporary construction noise impact would be reduced to a less than significant level' incorrect."²⁷⁰

For the foregoing reasons, the findings to support approval of the Project's Site Development Permit cannot be made unless the City fully discloses and mitigates the Project's potentially significant impacts pursuant to CEQA, as required by the Municipal Code.

Response E-44: The IS/MND discloses the project's potentially significant impacts and includes mitigation measures, pursuant to CEQA as follows:

- The project's impacts related to noise, vibration, dust, drainage, erosion, storm water runoff, and odor are addressed within their respective sections of the IS/MND and will not have an adverse effect on adjacent property or properties with implementation of identified standard permit conditions and mitigation measures.
- The project is consistent with the General Plan designation and policies for the site (see *Section K. Land Use and Planning*).
- The project is consistent with the zoning of the site (see *Section K. Land Use and Planning*).
- The project would have less than significant impacts on aesthetics (see *Section A. Aesthetics*).

The IS/MND is an informational document to inform the hearing body about the project's impacts and does not include a recommendation for either approval or denial of the project. The authority to approve or deny the Site Development Permit rests with the hearing body which is the Director of Planning Building and Code Enforcement for this project and that decision would be made at the public hearing scheduled for the project.

Comment E-45: The Project seeks approval of a Vesting Tentative Map (T22-015).²⁷¹ A vesting tentative map of any subdivision must be disapproved if any of the findings described in Section 66474 of the Subdivision Map Act are made.²⁷² Specifically, a vesting tentative map must be denied if any of the following findings can be made: "(a) That the proposed map is not consistent with applicable general and specific plans as specified in Section 65451. (b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans. (c) That the site is not physically suitable for the type of development. (d) That the site is not physically suitable for the

²⁶⁸ See Smallwood Comments and Mr. Meighan Comments.

²⁶⁹ Meighan Comments at 2.

²⁷⁰ Id. at 2-3.

²⁷¹ MND.

²⁷² Gov't Code § 66474; see also City of San José Code of Ordinances § 19.12.130(A).

proposed density of development. (e) That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat. (f) That the design of the subdivision or type of improvements is likely to cause serious public health problems.²⁷³

As a result of the Project's ongoing unmitigated significant impacts discussed above, the City lacks substantial evidence to support the findings required under the Subdivision Map Act to approve the Project's Vesting Tentative Map. In particular, a finding that the Project is not likely to cause substantial environmental damage would not be supported by substantial evidence for the reasons set forth above and in the expert comments attached hereto.

Response E-45: Refer to Response E-44.

Comment E-46: For the reasons discussed above, the MND for the Project is wholly inadequate under CEQA. An EIR must be circulated to provide a legally adequate analysis of, and mitigation for, all of the Project's potentially significant impacts. Until an EIR is prepared and circulated, as described herein, the Project may not lawfully be approved.

Response E-46: See above responses and Topic Response 2.1.1, and E-44.

²⁷³ *Id.* at § 66474(a)-(f).

Comment Letter F: Mitchell M. Tsai, Attorney at Law (on behalf of Carpenter’s Local Union 405)

Comment F-1: On behalf of the Carpenters Local Union 405 (“**Local 405**”), our Office is submitting these comments on the Initial Study and Mitigated Negative Declaration (“**IS/MND**”) for the City of San Jose’s (“**City**”) 550 Piercy Road Industrial Development Project (“**Project**”).

Per the City’s description, including in the Notice of Intent to Adopt the MND:

“The project application is for a Site Development Permit and Vesting Tentative Map to allow the **construction of two industrial buildings** on a **28.9-acre** single **vacant** parcel located at 550 Piercy Road in San José, California. The **total** square footage of the proposed industrial buildings would be **430,000 square feet**, with **257,149 square feet** for **Building 1** and **172,851 square feet** for **Building 2**. **Additional improvements** for **site circulation, site access, drainage, and infrastructure** are included in the proposed project.”²⁷⁴ (Emph. added.)

Response F-1: The above description accurately depicts the proposed project. It doesn’t provide specific issues regarding the analysis contained in the IS/MND. No further response to this comment is required.

Comment F-2: Local 405 is a labor union that represents over 4,000 members who live and work in Santa Clara County and has a strong interest in well-ordered land use planning and in addressing the environmental impacts of development projects.

Individual members of Local 405 live, work, and recreate in the City and surrounding communities and would be directly affected by the Project’s environmental impacts.

Local 405 expressly reserves the right to supplement these comments at or prior to hearings on the Project, and at any later hearing and proceeding related to this Project. Gov. Code, § 65009, subd. (b); Pub. Res. Code, § 21177, subd. (a); see *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1199-1203; see also *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal.App.4th 1109, 1121.

Local 405 incorporates by reference all comments related to the Project or its CEQA review, including the Initial Study/Mitigated Negative Declaration. See *Citizens for Clean Energy v City of Woodland* (2014) 225 Cal.App.4th 173, 191 (finding that any party who has objected to the project’s environmental documentation may assert any issue timely raised by other parties).

Moreover, Local 405 requests that the City provide **advance notice** of any upcoming hearings, as well as for any and all notices referring or related to the Project, as required by the Municipal Code, as well as under the California Environmental Quality Act (**CEQA**) (Pub. Res. Code, § 21000 *et seq.*), and the California Planning and Zoning Law (“**Planning and Zoning Law**”) (Gov. Code, §§ 65000–65010). California Public Resources Code Sections 21092.2, and 21167(f) and California Government Code Section 65092 require agencies to mail such notices to any person who has filed a written request for

²⁷⁴ See, <https://www.sanjoseca.gov/your-government/departments-offices/planning-buildingcode-enforcement/planning-division/environmental-planning/environmentalreview/negative-declaration-initial-studies/h22-015-550-piercy-rd-industrial-developmentproject>; see also the NOI, available at: <https://www.sanjoseca.gov/home/showpublisheddocument/99164/638218069370970000>

them with the clerk of the agency’s governing body. We request that such notice be *both* mailed and e-mailed to us.

Response F-2: The City will add Local 405 to the public interest list for this project and continue to provide notification (by mail and email) of any subsequent environmental documents, public notices, public hearings, and notices of determination per the commenter’s request.

Comment F-3: The City should require the Project to be built by contractors who participate in a Joint Labor-Management Apprenticeship Program approved by the State of California and make a commitment to hiring a local workforce.

Community benefits such as local hire can also be helpful to reduce environmental impacts and improve the positive economic impact of the Project. Local hire provisions requiring that a certain percentage of workers reside within 10 miles or less of the Project site can reduce the length of vendor trips, reduce greenhouse gas emissions, and provide localized economic benefits. As environmental consultants Matt Hagemann and Paul E. Rosenfeld note:

[A]ny local hire requirement that results in a decreased worker trip length from the default value has the potential to result in a reduction of construction-related GHG emissions, though the significance of the reduction would vary based on the location and urbanization level of the project site.

March 8, 2021, SWAPE Letter to Mitchell M. Tsai re Local Hire Requirements and Considerations for Greenhouse Gas Modeling.

Workforce requirements promote the development of skilled trades that yield sustainable economic development. As the California Workforce Development Board and the University of California, Berkeley Center for Labor Research and Education concluded:

[L]abor should be considered an investment rather than a cost—and investments in growing, diversifying, and upskilling California’s workforce can positively affect returns on climate mitigation efforts. In other words, well-trained workers are key to delivering emissions reductions and moving California closer to its climate targets.²⁷⁵

Furthermore, workforce policies have significant environmental benefits given that they improve an area’s jobs-housing balance, decreasing the amount and length of job commutes and the associated greenhouse gas (GHG) emissions. In fact, on May 7, 2021, the South Coast Air Quality Management District found that that the “[u]se of a local state-certified apprenticeship program” can result in air pollutant reductions.²⁷⁶

Response F-3: This comment does not pertain to the contents and findings of the IS/MND for the proposed project. No further response is required.

²⁷⁵ California Workforce Development Board (2020) Putting California on the High Road: A Jobs and Climate Action Plan for 2030 at p. ii, available at <https://laborcenter.berkeley.edu/wp-content/uploads/2020/09/Putting-California-on-the-High-Road.pdf>.

²⁷⁶ South Coast Air Quality Management District (May 7, 2021) Certify Final Environmental Assessment and Adopt Proposed Rule 2305 – Warehouse Indirect Source Rule – Warehouse Actions and Investments to Reduce Emissions Program, and Proposed Rule 316 – Fees for Rule 2305, Submit Rule 2305 for Inclusion Into the SIP, and Approve Supporting Budget Actions, available at <http://www.aqmd.gov/docs/defaultsource/Agendas/Governing-Board/2021/2021-May7-027.pdf?sfvrsn=10>.

Comment F-4: Locating jobs closer to residential areas can have significant environmental benefits. As the California Planning Roundtable noted in 2008:

People who live and work in the same jurisdiction would be more likely to take transit, walk, or bicycle to work than residents of less balanced communities and their vehicle trips would be shorter. Benefits would include potential reductions in both vehicle miles traveled and vehicle hours traveled.²⁷⁷

Moreover, local hire mandates and skill-training are critical facets of a strategy to reduce vehicle miles traveled (VMT). As planning experts Robert Cervero and Michael Duncan have noted, simply placing jobs near housing stock is insufficient to achieve VMT reductions given that the skill requirements of available local jobs must match those held by local residents.²⁷⁸ Some municipalities have even tied local hire and other workforce policies to local development permits to address transportation issues. Cervero and Duncan note that:

In nearly built-out Berkeley, CA, the approach to balancing jobs and housing is to create local jobs rather than to develop new housing. The city's First Source program encourages businesses to hire local residents, especially for entry- and intermediate-level jobs, and sponsors vocational training to ensure residents are employment-ready. While the program is voluntary, some 300 businesses have used it to date, placing more than 3,000 city residents in local jobs since it was launched in 1986. When needed, these carrots are matched by sticks, since the city is not shy about negotiating corporate participation in First Source as a condition of approval for development permits.

Recently, the State of California verified its commitment towards workforce development through the Affordable Housing and High Road Jobs Act of 2022, otherwise known as Assembly Bill No. 2011 (“**AB2011**”). AB2011 amended the Planning and Zoning Law to allow ministerial, by-right approval for projects being built alongside commercial corridors that meet affordability and labor requirements.

The City should consider utilizing local workforce policies and requirements to benefit the local area economically and to mitigate greenhouse gas, improve air quality, and reduce transportation impacts.

Response F-4: This comment does not pertain to the contents and findings of the IS/MND for the proposed project. No further response is required.

Comment F-5: The California Environmental Quality Act is a California statute designed to inform decision-makers and the public about the potential significant environmental effects of a project. 14 California Code of Regulations (“**CEQA Guidelines**”), § 15002, subd. (a)(1).²⁷⁹ At its core, its purpose is to “inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made.” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

²⁷⁷ California Planning Roundtable (2008) Deconstructing Jobs-Housing Balance at p. 6, available at <https://cproundtable.org/static/media/uploads/publications/cpr-jobshousing.pdf>

²⁷⁸ Cervero, Robert and Duncan, Michael (2006) Which Reduces Vehicle Travel More: Jobs-Housing Balance or Retail-Housing Mixing? *Journal of the American Planning Association* 72 (4), 475-490, 482, available at <http://reconnectingamerica.org/assets/Uploads/UTCT-825.pdf>.

²⁷⁹ The CEQA Guidelines, codified in Title 14 of the California Code of Regulations, section 15000 et seq., are regulatory guidelines promulgated by the state Natural Resources Agency for the implementation of CEQA. Cal. Pub. Res. Code, § 21083. The CEQA Guidelines are given “great weight in interpreting CEQA except when . . . clearly unauthorized or erroneous.” *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 217.

1. Background Concerning Environmental Impact Reports

CEQA directs public agencies to avoid or reduce environmental damage, when possible, by requiring alternatives or mitigation measures. CEQA Guidelines, § 15002, subds. (a)(2)-(3); see also *Berkeley Keep Jets Over the Bay Committee v. Board of Port Comes* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553; *Laurel Heights Improvement Assn.*, 47 Cal.3d at p. 400. 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.” CEQA Guidelines, § 15002, subd. (a)(2). If the project has a significant effect on the environment, the agency may approve the project only upon 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 Public Resources Code section 21081. See CEQA Guidelines, § 15092, subds. (b)(2)(A)-(B).

While the courts review an EIR using an ‘abuse of discretion’ standard, the reviewing court is not to *uncritically* rely on every study or analysis presented by a project proponent in support of its position. *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (quoting *Laurel Heights Improvement Assn.*, 47 Cal.3d at pp. 391, 409 fn. 12) (internal quotations omitted). A clearly inadequate or unsupported study is entitled to no judicial deference. *Id.* Drawing this line and determining whether the EIR complies with CEQA’s information disclosure requirements presents a question of law subject to independent review by the courts. *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 515; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 102, 131. As the court stated in *Berkeley Jets*, 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. 91 Cal.App.4th at p. 1355 (internal quotations omitted).

The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. *Communities for a Better Environment v. Richmond* (2010) 184 Cal.App.4th 70, 80 (quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-450). The EIR’s function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been considered. *Id.* For the EIR to serve these goals it must present information so that the foreseeable impacts of pursuing the project can be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made. *Id.*

A strong presumption in favor of requiring preparation of an EIR is built into CEQA. This presumption is reflected in what is known as the “fair argument” standard under which an EIR must be prepared whenever substantial evidence in the record supports a fair argument that a project may have a significant effect on the environment. *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602; *Friends of “B” St. v. City of Hayward* (1980) 106 Cal.3d 988, 1002.

The fair argument test stems from the statutory mandate that an EIR be prepared for any project that “may have a significant effect on the environment.” PRC, § 21151; see *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.App.3d 68, 75; accord *Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877, 884. Under this test, if a proposed project is not exempt and may cause a significant effect on the environment, the lead agency must prepare an EIR. PRC, §§ 21100 (a), 21151; CEQA Guidelines, §

15064 (a)(1), (f)(1). An EIR may be dispensed with only if the lead agency finds no substantial evidence in the initial study or elsewhere in the record that the project may have a significant effect on the environment. *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 785. In such a situation, the agency must adopt a negative declaration. PRC, § 21080, subd. (c)(1); CEQA Guidelines, §§ 15063 (b)(2), 15064(f)(3).

“Significant effect upon the environment” is defined as “a substantial or potentially substantial adverse change in the environment.” PRC, § 21068; CEQA Guidelines, § 15382. A project may have a significant effect on the environment if there is a reasonable probability that it will result in a significant impact. *No Oil, Inc.*, 13 Cal.3d at p. 83 fn. 16; see *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309. If any aspect of the project may result in a significant impact on the environment, an EIR must be prepared even if the overall effect of the project is beneficial. CEQA Guidelines, § 15063(b)(1); see *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1580.

This standard sets a “low threshold” for preparation of an EIR. *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 207; *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928; *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 580; *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754; *Sundstrom*, 202 Cal.App.3d at p. 310. If substantial evidence in the record supports a fair argument that the project may have a significant environmental effect, the lead agency must prepare an EIR even if other substantial evidence before it indicates the project will have no significant effect. See *Jensen*, 23 Cal.App.5th at p. 886; *Clews Land & Livestock v. City of San Diego* (2017) 19 Cal.App.5th 161, 183; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491; *Friends of “B” St.*, 106 Cal.App.3d 988; CEQA Guidelines, § 15064(f)(1).

2. Background Concerning Initial Studies, Negative Declarations and Mitigated Negative Declarations

CEQA and CEQA Guidelines are strict and unambiguous about when an MND may be used. A public agency must prepare an EIR whenever substantial evidence supports a “fair argument” that a proposed project “may have a significant effect on the environment.” Pub. Res. Code, §§ 21100, 21151; CEQA Guidelines, §§ 15002, subds. (f)(1)-(2), 15063; *No Oil, Inc.*, 13 Cal.3d at p. 75; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 111-112.

Essentially, should a lead agency be presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect. CEQA Guidelines, §§ 15064, subds. (f)(1)-(2); see *No Oil Inc., supra*, 13 Cal.3d at p. 75 (internal citations and quotations omitted). Substantial evidence includes “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” CEQA Guidelines, § 15384(a).

The fair argument standard is a “low threshold” test for requiring the preparation of an EIR. *No Oil Inc., supra*, 13 Cal.3d at p. 84; *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1579. It “requires the preparation of an EIR where there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or

beneficial[.]” *County Sanitation, supra*, 127 Cal.App.4th at p. 1580 (quoting CEQA Guidelines, § 15063(b)(1)). A lead agency may adopt an MND only if “there is no substantial evidence that the project will have a significant effect on the environment.” CEQA Guidelines, § 15074(b).

Evidence supporting a fair argument of a significant environmental impact triggers preparation of an EIR regardless of whether the record contains contrary evidence. *League for Protection of Oakland’s Architectural and Historical Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904-905. “Where the question is the sufficiency of the evidence to support a fair argument, deference to the agency’s determination is not appropriate[.]” *County Sanitation*, 127 Cal.App.4th at 1579 (quoting *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317-1318).

Further, it is the duty of the lead agency, not the public, to conduct the proper environmental studies. “The agency should not be allowed to hide behind its own failure to gather relevant data.” *Sundstrom*, 202 Cal.App.3d at p. 311. “Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.” *Id.*; see also *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1382 (lack of study enlarges the scope of the fair argument which may be made based on the limited facts in the record).

Thus, refusal to complete recommended studies lowers the already low threshold to establish a fair argument. The court may not exercise its independent judgment on the omitted material by determining whether the ultimate decision of the lead agency would have been affected had the law been followed. *Environmental Protection Information Center v. Cal. Dept. of Forestry* (2008) 44 Cal.4th 459, 486 (internal citations and quotations omitted). The remedy for this deficiency would be for the trial court to issue a writ of mandate. *Id.*

Both the review for failure to follow CEQA’s procedures and the fair argument test are questions of law, thus, the de novo standard of review applies. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435. “Whether the agency’s record contains substantial evidence that would support a fair argument that the project may have a significant effect on the environment is treated as a question of law. *Consolidated Irrigation Dist.*, 204 Cal.App.4th at p. 207; Kostka and Zischke, *Practice Under the Environmental Quality Act* (2017, 2d ed.) at § 6.76.

In an MND context, courts give no deference to the agency. Additionally, the agency or the court should not weigh expert testimony or decide on the credibility of such evidence—this is one of the EIR’s functions. As stated in *Pocket Protectors v. City of Sacramento*:

Unlike the situation where an EIR has been prepared, neither the lead agency nor a court may “weigh” conflicting substantial evidence to determine whether an EIR must be prepared in the first instance. Guidelines section 15064, subdivision (f)(1) provides in pertinent part: if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect. Thus, as *Claremont* itself recognized, [c]onsideration is not to be given contrary evidence supporting the preparation of a negative declaration.

(2004) 124 Cal.App.4th 903, 935 (internal citations and quotations omitted).

In cases where it is not clear whether there is substantial evidence of significant environmental impacts, CEQA requires erring on the side of a “preference for resolving doubts in favor of environmental

review.” *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 332. “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. *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.

Response F-5: See responses below and Topic Response 2.1.3.

Comment F-6: The very nature of the Project, with its substantial proposed construction of two (2) industrial buildings on a 28.9-acre single vacant parcel²⁸⁰ indicates that the Project may have significant and severe traffic impacts, thus requiring an Environmental Impact Report. This is further supported by the fact that the Project will generate an estimated 1,989 net daily trips per the Institute of Transportation Engineers (“ITE”) Trip Generation Manual, 10th Edition (2017).²⁸¹

Furthermore, the IS/MND acknowledges that the Project’s daily Vehicle Miles Traveled (“VMT”) would be 14.69 per worker, which is above the City’s VMT Evaluation Tool’s 14.37 daily-VMT-per-worker industrial threshold:

“Impact TR-1: The project daily Vehicle Miles Travelled (VMT) generated by the project would be 14.69 per worker, which exceeds the City of San José VMT Evaluation Tool’s industrial threshold of 14.37 daily VMT per worker.”²⁸²

Thus, the IS/MND admits that the project’s generated VMT would exceed the significance threshold for industrial employment and therefore result in a significant transportation impact on VMT.²⁸³

To dispose with an EIR, the IS/MND relies on mitigation measure MM TR-1.1 to support its conclusion that the Project would have a less than significant impact with mitigation incorporated as it pertains to CEQA Guidelines Section 15064.3 and its required VMT evaluation of a project’s transportation impacts.²⁸⁴ Yet, the mitigation measure MM TR-1.1 is inadequate for an EIR, since it is unenforceable, illusory, and infeasible. It also improperly delegates the City’s duty to ensure the reduction of traffic impacts to the Project’s Applicant and further improperly delegates the approval of any traffic mitigation plans to the City’s Public Works department, rather than the elected decisionmakers. MM TR-1.1 also improperly defers mitigation.

Specifically, mitigation measure MM TR-1.1 states, in full:

“ MM TR-1.1: Prior to the issuance of any grading or building permits, the project applicant shall prepare plans that illustrate the design of the site enhancements, and shall coordinate with the City’s Department of Parks, Recreation, & Neighborhood Services, Department of Transportation, and the Department of Public Works to incorporate the following:

- Traffic Calming Measures and Bike Access Improvements. The project development shall include narrowing of the existing roadway lane widths along Silicon Valley Boulevard to implement Class IV protected bikeways in both directions between Hellyer Avenue and Eden Park Place. The project also includes the installation of the on-street Class IV bikeway per City

²⁸⁰ City of San José, Initial Study / Mitigated Negative Declaration (June 2023), p. 1.

²⁸¹ Id. at pp. 173-175.

²⁸² Id. at pp. 1 & 168.

²⁸³ Id.

²⁸⁴ Id. at pp. 166, 168.

standards along the project's frontage along Hellyer Avenue. The bike lanes would connect the existing Coyote Creek Trailheads and encourage the use of bicycles (see Appendix H, Figure 6 for conceptual designs of the planned improvements).

- Pedestrian Network Improvements. The pork-chop island on the southwest corner at the Hellyer Avenue and Silicon Valley Boulevard intersection shall be removed (see Appendix H, Figure 6). The improvement shall require tightening the corner radius at the southeast corner and modifying the signal to accommodate pork chop island removals. This shall improve the multi-modal environment by eliminating unsignalized pedestrian/vehicle conflict points, increasing visibility of pedestrians at the intersection corner, and providing a safer refuge for pedestrians waiting to use the crosswalks. Final plans shall be submitted and reviewed as part of the Public Improvement Plan submitted to the City of San Jose Public Works prior to the issuance of development permits for the proposed project. Per City specifications, the Public Improvement Plan shall describe all public improvements in the public right-of-way included under the proposed project. All identified improvements shall be constructed prior to the issuance of the final occupancy permit.

Final plans shall be submitted and reviewed as part of the Public Improvement Plan submitted to the City of San Jose Public Works prior to the issuance of development permits for the proposed project. Per City specifications, the Public Improvement Plan shall describe all public improvements in the public right-of-way included under the proposed project. All identified improvements shall be constructed prior to the issuance of the final occupancy permit.

Based on the City's VMT Evaluation Tool, the project applicant shall ensure that implementation of the multimodal infrastructure improvements described above shall lower the project VMT to 14.11 per worker (a reduction of about 4.8 percent), which would reduce the project's VMT to below the City's threshold of 14.37 VMT per worker.

Prior to the issuance of any grading or building permits, the project applicant shall submit the project design plans showing enhancements to the City's Department of Parks, Recreation, & Neighborhood Services, Department of Transportation, and the Department of Public Works for review and approval.” (MND, p. 8, *emph. added.*)²⁸⁵

As can be evidenced from the above-quoted and emphasized MND statements, the proposed plans are aimed to reduce *employee* VMT and are solely “traffic calming measures and bike access improvements” which involve narrowing existing roadway lane widths to implement protected bikeways in both directions and connecting the bike lanes on existing streets in order to encourage bicycle use.²⁸⁶

Response F-6: As described in the Transportation Analysis and IS/MND (page 169), the proposed off-site improvements would reduce the project's VMT below the City's threshold of 14.37 VMT per worker. The recommended Class IV protected bikeway on Silicon Valley Boulevard would close a gap in the existing bicycle network and improve bike access to the project area thereby promoting biking as an alternative to driving and reducing VMT. The City of San Jose's VMT Evaluation Tool estimates the reduction in VMT for bike access improvements based on research

²⁸⁵ Id.

²⁸⁶ Id.

published in a peer-reviewed, international scientific journal²⁸⁷. The recommended pedestrian improvements at the intersection of Hellyer Avenue and Silicon Valley Boulevard would encourage people to walk instead of drive and thus reduce VMT. Similarly, traffic calming measures such as reduced lane widths and pedestrian crossing enhancements also promote walking and biking and reduce VMT. VMT reductions due to pedestrian network improvements and traffic calming measures were estimated using the City's VMT Evaluation Tool based on research conducted by Cambridge Systematics for the Urban Land Institute²⁸⁸. Based on the VMT analysis conducted using the City's VMT Evaluation Tool, the recommended multimodal improvement would satisfactorily mitigate the project's impact on VMT. While the project applicant will be required to construct these multimodal improvements, the City will ensure that the project's impact on VMT is satisfactorily mitigated by requiring these multimodal improvements be constructed prior to the issuance of the final occupancy permit. The City of San José Public Works Department will have the responsibility for reviewing the project's public improvement plan to ensure that the design of the recommended multimodal improvements meets City standards. Because the City of San José is the lead agency with jurisdiction over the project, the City of San José Planning Director will review the IS/MND as part of the development review process and may modify, approve or disapprove of the project's mitigation monitoring and reporting program. Therefore, MM TR-1.1 is enforceable and feasible. See also response F-12.

Comment F-7: First, the proposed mitigation measure is illusory, since it only requires the Project Applicant to submit plans and requires the City to review those. It further puts the burden on the Applicant to “ensure” that the proposed changes result in reduction of VMT. Simply put, there is no commitment to mitigation at all. Even under the EIR-related CEQA Guidelines § 15126.4, subd (a)(1)(B), this is improper since, *inter alia*, the City does not commit to mitigation but rather relies on the Applicant to mitigate.

Response F-7: While the project applicant will be required to construct these multimodal improvements, the City will ensure that the project's impact on VMT is satisfactorily mitigated by requiring these multimodal improvements be constructed prior to the issuance of the final occupancy permit as identified on page 168 of the IS/MND. This will ensure that VMT impacts are reduced appropriately. No changes to the text of the IS/MND are required.

Comment F-8: Second, the proposed mitigation measure is illusory also because of its timing: prior to the issuance of permits and does not provide for any *discretionary approval* or hearing. As related, the proposed mitigation measure provides for “approval” of only the enhancement plans, and such approval will be by the Public Works department, apparently without any public hearing.

Response F-8: As described in the Transportation Analysis and IS/MND, the proposed off-site improvements would reduce the project's VMT below the City's threshold of 14.37 VMT per worker. The offsite improvements would be subject to discretionary approval at the time of adoption of the IS/MND alongside the rest of the proposed project. Further approval of the final plans for offsite improvements would occur prior to the issuance of grading or building permits as stated in the IS/MND page 169.

²⁸⁷ Seyed Amir H. Zahabi, Annie Chang, Luis F. Miranda-Moreno, Zachary Patterson. Exploring the link between neighborhood typologies, bicycle infrastructure and commuting cycling over time and the potential impact on commuter GHG emissions. Transportation Research Part D: Transport and Environment Volume 47, August 2016, Pages 89-103.

²⁸⁸ Cambridge Systematics. Moving Cooler: An Analysis of Transportation Strategies for Reducing Greenhouse Gas Emissions. Technical Appendices. Prepared for the Urban Land Institute.

Comment F-9: Third, the proposed mitigation measure improperly finds that the mitigation measures will necessarily reduce the traffic impacts to the level of significance *without* even knowing what those enhancements would be.

Response F-9: Mitigation Measure TR-1.1 identifies specific traffic calming measures, including “narrowing of the existing roadway lane widths along Silicon Valley Boulevard to implement Class IV protected bikeways in both directions between Hellyer Avenue and Eden Park Place.” VMT calculations with incorporation of the proposed mitigation measure produced VMT levels below the threshold of 14.37 VMT per worker.

Comment F-10: Fourth, based on the mitigation measure, it is the Public Works department, if at all, that will be making the finding that the Project’s enhancements proposed by the Applicant will indeed reduce traffic impacts to the level of insignificance. This violates CEQA’s non-delegation provision. Guidelines § 15025(b)(2) (shall not delegate).

Response F-10: As described in the IS/MND (see page 169), the finding that the proposed off-site traffic improvements would reduce the project’s VMT levels below the threshold of 14.37 VMT per worker are supported by the Transportation Analysis and based on calculations from the City of San José VMT Evaluation Tool. The off-site traffic improvements have been confirmed by the City’s Department of Public Works.

Comment F-11: Fifth, the mitigation measures are infeasible and illusory since they are based on the assumption that the Project’s *employees* will be taking bikes or just walking to the Project site. It also proposes to *narrow* or *tighten* the roads to accommodate or install bike lanes. Yet, at the same time, the MND elsewhere acknowledges that the Project site will attract heavy-duty trucks:

“The project’s trip generation estimates include 258 daily truck trips generated from operating the proposed project, which are assumed to be heavy-duty diesel-powered trucks and a source of long-term DPM emissions. These trucks would travel to and from the site and are anticipated to idle onsite for 5 minutes for each trip. Daily passenger vehicle trips generated by the project would not generate a significant amount of TAC emissions and were not included in the analysis.” (MND, p. 48.)

In addition, the MND speaks about the need for wider roads to accommodate the passage or turns of such trucks:

“Both driveways on Hellyer Avenue would be 45 feet wide and have been designed to accommodate large freight trucks turning in and out of the driveways. Due to the turn restriction at the southern driveway on Hellyer Avenue, it is expected that the majority of project traffic would access the project site from Hellyer Avenue using the northern driveway. The northern/western driveway on Piercy Road would be 45 feet wide and the southern driveway would be 26 feet wide. The wider northern driveway would be able to accommodate large freight trucks. Based on the distribution of the proposed on-site vehicle parking (see Figure 4), it is assumed both driveways on Piercy Road would be used by vehicles equally.” (MND, p. 170, *emph. added.*)

As such, the MND’s sole traffic mitigation measure *assumes* that the Project’s future-employees will ride bikes or walk to the Project site on roads that will be also used by large freight trucks. There is no assurance that employees will indeed do so. It is also reasonably foreseeable that employees will not take bikes or walk to the Project site at a minimum due to the road safety concerns as well as concerns

about being exposed to a high level of diesel emissions, air and GHG impacts from such heavy trucks on the road. CEQA requires that in such cases of doubt the agency should resolve those in favor of an EIR. *Nelson v. County of Kern* (2010) 190 CaLApp.4th 252, 282.

The above-noted flaws violate CEQA's standard for MNDs under PRC § 21064.5 to show that: "(1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (Emph. added.)

Response F-11: See above responses and Topic Response 2.1.1. The methodology and findings of the Transportation Analysis are consistent with the requirements stated in the City of San José Transportation Analysis Handbook.²⁸⁹

The Commenter states that the IS/MND bases its traffic findings on the assumption that all employees would be walking or bicycling to the project site. The VMT mitigation measure does not assume all of the project's employees will be taking bikes or just walking to the project site. The mitigation measures consist of the implementation of off-site multi-modal transportation infrastructure improvements, which would provide better multi-modal transportation facilities and encourage project employees as well as employees and residents at other nearby sites to take alternative transportation modes. This mitigation would offset the VMT generated by the project and reduce the project's VMT. According to the City's VMT Evaluation Tool, the identified mitigation measures are estimated to reduce the project's VMT to below the City's threshold of significance. Refer to Response F-6 for further information about the City's VMT Evaluation Tool and the sources used by the VMT Evaluation Tool to estimate the reduction in VMT due to the bike, pedestrian, and traffic calming improvements.

There is no evidence to support the supposition that truck traffic generated by the project would render the identified mitigation measures ineffective. The project would not widen the public streets to accommodate trucks. The project driveways would provide adequate width for vehicles and trucks to turn into and out of the site without encroaching on the bike lanes or sidewalks. The Transportation Analysis report includes an evaluation of truck turning templates and sight distance at the project driveways, which is also discussed in pages 169-173 of the IS/MND. The analysis shows that that the sight distance is adequate for vehicles and trucks entering and exiting the project driveways would enable drivers to identify approaching bicycles and pedestrians on the sidewalks. No changes to the text of the IS/MND are required.

Comment F-12: Sixth, the proposed mitigation measure is improperly deferred and vague as it defers the formulation of mitigation measures or final design thereof to a later time, shifts that burden to the Applicant, and further does not explain how providing bikeways will in fact "clearly" reduce VMT to the level of insignificance, as required for an MND. As stated earlier, the MND fails to meet CEQA's pre-conditions and requirements even in case of an EIR. CEQA forbids deferred mitigation. Guidelines § 15126.4(a)(1)(B). CEQA allows deferral of details of MMs only "when it is impractical or infeasible to include those details during the project's environmental review." (*Id.*) CEQA further requires: "that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard..." Guidelines § 15126.4(a)(1)(B). City failed all these preconditions and

²⁸⁹ City of San José, Transportation Analysis Handbook, April 2023. Available at: [showpublisheddocument \(sanjoseca.gov\)](https://www.sanjoseca.gov/showpublisheddocument)

requirements, as its MND failed to show why the development of the traffic calming plans or pedestrian improvements cannot be developed before the issuance of the MND, what impacts they will have individually or cumulatively, if those would indeed be feasible, and the specific performance criteria the Applicant will have to meet. Moreover, as noted earlier, the City clearly did not commit to mitigation, since all it would do, per the mitigation measure, is review and approve the proposed plans of the Applicant.

Furthermore, the mitigation measure relies on some future coordination with other public entities aside from the City to implement the mitigation measure and does not show how this measure will be enforced. For example, there is no requirement that the Applicant report the number of employee trips after the bike lanes and pedestrian improvements are in place and ensure that the VMTs are indeed reduced to the level of insignificance.

In addition, the mitigation measure calls for “pedestrian network improvements” which involve:

“[t]he pork-chop island on the southwest corner at the Hellyer Avenue and Silicon Valley Boulevard intersection [to] be removed . . . The improvement shall require tightening the corner radius at the southeast corner and modifying the signal to accommodate pork chop island removals. This shall improve the multi-modal environment by eliminating unsignalized pedestrian/vehicle conflict points, increasing visibility of pedestrians at the intersection corner, and providing a safer refuge for pedestrians waiting to use the crosswalks.”²⁹⁰

However, yet again, this mitigation measure fails to explain how simply encouraging pedestrian travel will actually discourage vehicle travel and thus cause an actual decrease in VMT resulting from the Project and thus result in a less than significant impact on traffic and transportation.

Even further, the IS/MND states that, per the City’s VMT Evaluation Tool, the Project Applicant will then “ensure that implementation of the multimodal infrastructure improvements described above shall lower the project VMT to 14.11 per worker (a reduction of about 4.8 percent), which would reduce the project’s VMT to below the City’s threshold of 14.37 VMT per worker.”

However, the foregoing measure is impermissibly vague and improperly defers the actual reduction in VMT to some later unspecified date without showing *how* these proposed measures would reduce VMT.

Response F-12: Refer to Response F-11. Mitigation TR-1.1 is not deferred mitigation. As described on pages 168-169 of the IS/MND, final plans for the site enhancements, including the traffic calming measures, bike access, and pedestrian network improvements, shall be submitted and reviewed as part of the Public Improvement Plan provided to the City of San José Public Works for approval prior to the issuance of development permits for the proposed project. In addition, all identified improvements shall be constructed prior to the issuance of the final occupancy permit.

Comment F-13: Yet another flaw in the City’s traffic impact analysis is its reliance on SB 743 to disregard traffic congestion. The City claims it provides level of service analysis for information purposes only. (MND, p. 173-176.) And yet, SB 743 on its face does not apply to *industrial* projects here, but rather to commercial and residential projects only. Further, as evidenced by the MND, the

²⁹⁰ MND, pp. 1 & 168.

level of service will definitely deteriorate with the Project and at least two intersections will go from Level C to Level D, i.e., worsen. (MND, p. 176.) Yet, the City claims the traffic impacts will be less than significant.

Response F-13: As described on page 157 of the IS/MND, SB 743 requires “the replacement of automobile delay—described solely by level of service or similar measures of vehicular capacity or traffic congestion—with VMT as the recommended metric for determining the significance of transportation impacts.” SB 743 is intended to replace LOS with VMT for evaluating transportation impacts for new development projects, including industrial projects. The LOS evaluation is related to project operations and not considered a CEQA impact as further described on pages 173 of the IS/MND. As stated on page 175 of the IS/MND, a significant adverse impact would occur if an intersection degrades from an acceptable LOS D or better under background conditions to an unacceptable LOS E or F under background plus project conditions. The degradation of LOS at the two intersections from LOS C to LOS D would, therefore, not be considered a significant adverse impact.

Comment F-14: A related flaw in the City’s analysis is that it appears to rely on some 2006-year approved *related* project and traffic study, without even disclosing what kind of CEQA clearance did the prior project have:

“City staff have determined that the project is not required to analyze any signalized intersections for potential adverse effects since the amount of industrial development proposed for the site (which is located in Edenvale Sub-Area 3) has already been approved as part of the EADP. The project is, however, required to report intersection levels of service under existing, background, and background plus project conditions for informational purposes. The results of the intersection level of service evaluation (see Table 25) show that all of the signalized study intersections are currently operating at acceptable levels of service during the AM and PM peak hours of traffic and would continue to operate acceptably under background and background plus project conditions. The following eight intersections were studied:” (MND, p. 175, *emph. added.*)

Elsewhere, the MND explains about the EADP as being approved in 2006:

The project site is located within the Edenvale Area Development Policy (EADP) boundaries. With approval of the nearby iStar development proposal in 2006, additional 494,000 square feet of potential industrial development was approved for future industrial/R&D/office development within Edenvale Sub-Areas 1 and 3. The 494,000 square feet of potential industrial development is an addition to the approximately 2.9 million square feet of existing capacity remaining for Sub-Areas 1, 3, and 4 per the original EADP. The project site is located in Edenvale Sub-Area 3, which means the site already has approval for industrial development as part of the EADP. The traffic study that was completed for the iStar development identified intersection improvements based on full buildout of the 494,000 square feet of industrial development. The necessary intersection improvements that were identified have already been completed. For this reason, the project is not required to analyze any signalized intersections for potential adverse effects due to the project. The project is, however, required to report the intersection levels of service under existing, background, and background plus project conditions for informational purposes. Under the EADP, the site would have a maximum of 530,554 square feet of industrial space.” (MND, p. 161, *emph. added.*)

As evidenced above, the City relies on a 2006 traffic study and an unidentified CEQA clearance for the 2006 EADP approval to find the Project will have no traffic impacts or no further analysis of

signalized intersections is required. The MND must disclose what CEQA clearance was used for the EADP approval, and – to the extent it seeks to tier off of that CEQA review – it also must disclose any subsequent changes that should trigger and additional analysis.

In addition, the City must analyze the *cumulative impact* of the iStar development proposal and the feasibility of the traffic mitigation measures, in light thereof.

Response F-14: The reference to EADP is for background purposes. However, the IS/MND does not tier off the previous CEQA document and a project level analysis is prepared for the project. The evaluation of transportation impacts under CEQA has changed subsequent to the EADP transportation analysis. New CEQA guidelines established according to SB 743 remove automobile vehicle delay and other similar measures of vehicular capacity or traffic congestion from CEQA transportation analysis and instead use vehicle miles traveled (VMT) to determine significant transportation impacts. Per City of San José Council Policy 5-1, the CEQA transportation analysis evaluated project-level VMT impacts and identified measures to mitigate the project’s VMT impact. Furthermore, because the proposed project was determined to be consistent with the Envision San José 2040 General Plan and would not require a General Plan Amendment (GPA), the project was found to result in a less-than-significant cumulative impact. The CEQA transportation analysis conducted for the proposed project does not rely on the EADP impact analysis, which was conducted prior to Council Policy 5-1 and is therefore based on intersection levels of service. A non-CEQA traffic operations analysis of intersection levels of service was conducted for information only. The analysis shows all of the signalized study intersections are currently operating at acceptable levels of service (LOS D or better) during the AM and PM peak hours of traffic and would continue to operate acceptably under background and background plus project conditions. No changes to the text of the IS/MND are required.

Comment F-15: Finally, also given that construction of the Project itself may result in road closures and detours, there is a fair argument that the Project may have significant traffic impacts which should be assessed in an EIR pursuant to CEQA.

For the reasons set forth above, the IS/MND fails to actually show that the Project’s traffic impact will actually be mitigated to a less than significant level with the incorporation of the proposed mitigation measure. In fact, the MND shows the opposite, necessitating an EIR.

Response F-15: As stated in the IS/MND page 16, all construction staging areas, including parking for construction workers, would be located on the site; no off-site staging of equipment or materials is proposed. If needed, construction traffic management plans would be required by the Department of Public Works to address any road closures/detours temporarily required during construction.

Comment F-16: Since the Project may have significant traffic impacts that are not accurately disclosed in the MND, then its traffic-related impacts are also derivatively understated and may be significant, requiring an EIR.

There is an acknowledged direct correlation between the increase in traffic impacts and an increase in their associated air quality, greenhouse gas emission (“GHG”), and noise impacts. See e.g., *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 413, “it is reasonable to assume” that a project enabling physical residential development would have reasonably foreseeable indirect air and other impacts.

As stated in the Office of Planning Research’s (“OPR”) technical advisory in 2018:

“VMT and Greenhouse Gas Emissions Reduction. Senate Bill 32 (Pavley, 2016) requires California to reduce greenhouse gas (GHG) emissions 40 percent below 1990 levels by 2030, and Executive Order B-16-12 provides a target of 80 percent below 1990 emissions levels for the transportation sector by 2050. The transportation sector has three major means of reducing GHG emissions: increasing vehicle efficiency, reducing fuel carbon content, and reducing the amount of vehicle travel.”

Similarly, there is an acknowledged nexus between the increase of traffic and an increase in related air quality, GHG impacts, noise, water/flooding impacts and impacts on human health and natural environment, including wildlife and waterways. As described in the 2018 OPR Technical advisory:

“VMT and Other Impacts to Health and Environment. VMT mitigation also creates substantial benefits (sometimes characterized as “co-benefits” to GHG reduction) in both in the near-term and the long-term. Beyond GHG emissions, increases in VMT also impact human health and the natural environment. Human health is impacted as increases in vehicle travel lead to more vehicle crashes, poorer air quality, increases in chronic diseases associated with reduced physical activity, and worse mental health. Increases in vehicle travel also negatively affect other road users, including pedestrians, cyclists, other motorists, and many transit users. The natural environment is impacted as higher VMT leads to more collisions with wildlife and fragments habitat. Additionally, development that leads to more vehicle travel also tends to consume more energy, water, and open space (including farmland and sensitive habitat). This increase in impermeable surfaces raises the flood risk and pollutant transport into waterways.”

As such, there is a fair argument that the Project here may have significant traffic, air, GHG, energy, water, noise and other impacts, including impacts on human beings and natural environment.

The IS/MND ultimately concludes that the Project will have a less than significant impact with regards to GHG emissions based on the IS/MND’s reliance on the Project’s consistency with the City’s 2030 GHG Reduction Strategy, inclusion of a designated rooftop space and conduit infrastructure on the industrial buildings for solar panels, participation in the City’s Zero Waste Strategic plan, installation of high-efficiency appliances and fixtures, utilization of water efficiency landscaping species and equipment, and its consistency with the General Plan and compliance with green building ordinances and energy efficiency measures.²⁹¹ However, the Project’s mere implementation of GHG reduction strategies and reliance on regulations is insufficient to conclude that the Project will have a less than significant GHG emission impact, as these measures are not specific to *this* Project.

That the Project may have air quality and GHG emission impacts is also evidenced by the recent BAAQMD thresholds, according to which “If the project includes any of the operational screening criteria above [including industrial sources or activities], then the lead agency would need to perform a detailed assessment of the project’s criteria air pollutant and precursor emissions.”²⁹² Yet, the MND concludes that the Project will have *neither* GHG nor air quality impacts.

²⁹¹ IS/MND, *supra*, at pp. 98-99.

²⁹² BAAQMD, Chapter 4, p. 4-3; see available at: Bay Area Air Quality Management District California Environmental Quality Act Air Quality Guidelines (baaqmd.gov)

The Project may further have severe GHG and air quality impacts, in light of its traffic mitigation measure which assumes that the employees will have to bike or walk to the Project site and thereby be exposed to the high level of diesel emissions of heavy trucks both at the Project site and the nearby industrial sites, such as the iStar development project the MND mentions. Such increased GHG emissions and air quality impacts may also occur in light of the fact that the Project proposes narrowing roads as traffic calming methods, which reasonably foreseeably – along with the trucks and bikes riding on the same roads – will create congestion on the roads and idling of the heavy-duty trucks, as well as other vehicles.

Response F-16: As described in *Section C. Air Quality* (pages 41-53) and *Section H. Greenhouse Gas* (pages 98-100) of the IS/MND, the project would have a less than significant impact on these resources based on methodologies and evidence provided in the analyses. The City of San José has prepared an updated Greenhouse Gas Reduction Strategy in response to Senate Bill 32 that establishes an interim GHG reduction goal for 2030 and proposes strategies designed to reduce the City’s greenhouse gas emissions levels to 40 percent below 1990 levels by the year 2030 to meet the long-term target of carbon neutrality by 2045 [Executive Order B-55-18]. The 2030 GHGRS serves as a Qualified Climate Action Plan for purposes of tiering and streamlining under the CEQA. The Development Compliance Checklist developed to apply the relevant General Plan policies and the 2030 GHGRS provides for a streamlined review process for proposed new development projects subject to discretionary review and that trigger the environmental review under CEQA). The commenter accurately describes concerns with regard to high VMT resulting in air quality and greenhouse gas impacts. However, MM TR-1 includes measures that would reduce the VMT below the threshold and thereby reduce air quality and greenhouse gas impacts.

Comment F-17: The Project may also have hazards impacts, in light of potential soil contamination due to prior agricultural work and use of pesticides. The Project’s Phase I ESA, for this purpose, discloses such potential. (Phase I ESA, p. 10.) And yet, Phase I ESA does not adequately study that potential as, *inter alia*, it relies on some “[s]oil samples [that] were collected in 2000 from 38 borings that were advanced on-Site and on adjacent property to the southwest (Clayton, 2000).” (Phase I ESA, p. 10.) Phase I ESA also found traces of asbestos in the soil and, for that purpose, proposed a limited Phase II ESA. (Phase I ESA, p. 11.) Further, Phase I ESA prepared in 2021 uses the older ASTM standard: “The scope of work presented in the Agreement was prepared in general accordance with ASTM E 1527-13...” (Phase I ESA, p. 1.)

This omission is particularly critical and makes the Phase I ESA tellingly inaccurate and erroneous, since as of 2021 (post-dating the September 10, 2020 ESA Phase I assessment), ASTM has revised its standards, and as of 2022, EPA²⁹³ has adopted ASTM’s new and more expansive definition of REC. Thus:

- “Under **ASTM E1527-13**, a REC is defined as the **presence** or **likely presence** of **any hazardous substances** or petroleum products in, on, or at a property: (1) due to **release** to the environment; (2) under **conditions indicative** of a release to the environment; or (3) under conditions that **pose a material threat** of a future release to the environment.
- Under **ASTM E1527-21**, a REC means (1) the **presence** of hazardous substances or petroleum due to a release to the environment; (2) the **likely presence** of hazardous substances or petroleum products due to a **likely release** to the environment; or (3) the presence of hazardous

²⁹³ <https://www.govinfo.gov/content/pkg/FR-2022-03-14/pdf/2022-05259.pdf>

substances or petroleum products under conditions that pose a material threat of a future release to the environment. Further, the new standard provides clarifying discussion notes and examples to assist the environmental professional in applying the definition. Together, the new definition and interpretations direct a consultant to rely on the environmental professional's experience regarding the *likelihood* of certain conditions resulting in releases, such as the long term operation of a dry cleaner, instead of discounting that professional experience based on the lack of current "indications of a release."²⁹⁴ (ital. original, bold emphasis added.)

Response F-17: As described in *Section I. Hazards and Hazardous Materials* of the IS/MND (page 105), Phase I and Phase II Environmental Site Assessments were conducted by Cornerstone Earth Group in October and December 2021, respectively, for the project site to determine the potential for hazardous materials contamination. The results of the Phase II Environmental Site Assessment did not detect soil contaminants exceeding adopted regulatory thresholds and no recognized environmental conditions (RECs) were identified on the site. Evidence of NOA was detected in soil borings at depth of 19-20 feet. Mitigation measure MM HAZ-1 is identified in the IS/MND, that requires the applicant to prepare and implement an Asbestos Dust Mitigation Plan (ADMP) prior to issuance of any demolition or grading permits, to reduce potential impacts from NOA exposure to less than significant.

Comment F-18: Lastly, Phase I ESA is silent on vapor intrusion REC, which study is specifically mandated by ASTM and EPA since 2013 under the EPA Final Rule.²⁹⁵, ²⁹⁶. Thus, in its Final Rule in 2013, EPA states:

EPA believes that ASTM E1527–13 improves upon the previous standard and reflects the evolving best practices and level of rigor that will afford prospective property owners necessary and essential information when making property transaction decisions and meeting continuing obligations under the CERCLA liability protections.

In particular, the new ASTM E1527–13 standard enhances the previous standard with regard to the delineation of historical releases or recognized environmental conditions at a property and makes important revisions to the standard practice to clarify that all appropriate inquires and **phase I environmental site assessments must include**, within the scope of the investigation, an **assessment of the real or potential occurrence of vapor migration and vapor releases on, at, in or to** the subject property.

Federal Register, Volume 78, No. 250, December 30, 2013, p. 3 (Emph. Added).

As such, the Phase I ESA's reliance on a soil sample in 2000 and failure to consider a more comprehensive ASTM E1527-21 suggests that the Project site may have hazards impacts that have not been studied and accounted for. Needless to say that, per the Phase I ESA, the Project had to be a commercial one – rather than industrial. Also, to the extent the Phase I ESA relies on the 2000-year boring studies, it must be missing the potential impacts from the nearby industrial developments post year 2000. All of these factors suggest the Project may have hazards impacts, which may also translate into adverse impacts to human beings, including employees of the Project site as well as other human

²⁹⁴ <https://www.quarles.com/publications/epa-approves-astm-e1527-21-phase-i-esa-standard-for-all-appropriate-inquiry/>

²⁹⁵ <https://www.epa.gov/ust/petroleum-vapor-intrusion>

²⁹⁶ <https://www.govinfo.gov/content/pkg/FR-2013-12-30/pdf/2013-31112.pdf>

beings and sensitive receptors, including during the Project's construction, grading, and dirt-hauling phase.

Response F-18: Refer to Response F-17. As stated in Appendix F-1, based on the information presented in the agency database report, no off-site spill incidents were reported that appear likely to significantly impact soil, soil vapor or groundwater beneath the project site. The Phase I did not identify any current or historic businesses that appeared to use or store hazardous materials on the site. In addition, no hazardous materials release incidents had been reported on-site or in the site vicinity that appeared likely to significantly impact the site, including soil vapor quality. Therefore, vapor migration and vapor releases were not identified as a concern requiring further evaluation.

Comment F-19: As for **water impacts**, the MND acknowledges that the Project site soils may be contaminated, including with asbestos. As such, to the extent the Project's grading affects the underground waters, there is a reasonable foreseeability that the Project may have water effects. Moreover, based on the MND, the Project will require disturbance of soil on 28.9 acres of land, and include removal of trees. As such, the Project may affect the natural drainage patterns and thus have water/hydrology impacts.

Response F-19: As stated on pages 16-17 of the IS/MND, the maximum excavation depth associated with the proposed project would be 29 feet. NOA was detected at a maximum depth of 20 feet as stated on page 107 of the IS/MND (Cornerstone Earth Group, Soil Quality Evaluation, 550 Piercy Road, December 2021). As described on page 114 of the IS/MND, groundwater depth was estimated at 38 feet below ground surface, and was not encountered during the 40-foot deep test borings conducted on the site (Cornerstone Earth Group, Preliminary Geotechnical Investigation and Geologic Hazards Evaluation, 550 Piercy Road, May 2022). As a result, excavations associated with the project would not result in groundwater contamination by asbestos. Excavation and grading associated with the proposed project would not reach a depth where groundwater would be encountered and result in impacts to groundwater. Furthermore, the project applicant is required to prepare and implement a stormwater control plan (described on page 17 of the IS/MND) that includes measures to reduce operational impacts on hydrological features at the site and would not affect the natural drainage patterns.

Comment F-20: Lastly, as for **wildlife and biological impacts**, the MND discloses that the Project site may have various protected species but proposed inadequate mitigation measures, suffering from the same flaws as the traffic mitigation measures above. To name a few problems, the MND acknowledges that the Project site may accommodate American badger species, and yet its proposed mitigation measure MM-BIO-1a only requires that a Qualified Biologist – unclear when – shall conduct an Employee Education Program for the construction crew and educate the construction workers on identifying the special-status species and applying unidentified mitigation measures. (MND, p. 2.) Further, the MND provides that the Qualified Biologist will check if the site has active dens for the American badger, and if no active dens are found, then no mitigation is required. There is no enforcement mechanism by the City – all that the City must do is to review the Qualified Biologist's provided documentation of the education to construction workers and findings. It is even unclear if the Qualified Biologist will be identified by the Applicant or the City. The MND's mitigation measures for nesting raptors, other migratory birds, or Western burrowing owls are similarly inadequate, unenforceable, and illusory. (MND, pp. 2-5.)

Response F-20: Refer to Responses to Letter E (Responses E-11 and E-13 through E-23) regarding biological resources.

Comment F-21: In sum, the MND’s findings of no impacts, including but not limited to impacts in air quality and GHG emissions, are clearly erroneous, and an EIR is required to not only disclose the Project’s respective impacts, but also relate those to the adverse health impacts and impacts to the human beings that the Project may have. *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502.

In addition, the above-noted impacts to human beings, as well as the fact that the Project may have cumulative impacts with related projects, such as the iStart Development identified in the EIR, these impacts by themselves require mandatory findings of significance and an EIR under CEQA Guidelines 15065. The City’s summary denial of such mandatory significance impacts (MND, p. 9) is conclusory and unsupported, in light of the above-mentioned evidence.

Response F-21: Refer to above responses and Topic Response 2.1.1.

Comment F-22: The Project proposes to construct two (2) industrial buildings totaling approximately 430,000 square feet.²⁹⁷ Yet, while the IS/MND ultimately concludes that the Project will have a less than significant impact on noise or a less than significant impact on noise with mitigation incorporated, the IS/MND fails to actually incorporate any mitigation measures in its noise analysis.²⁹⁸ In fact, the Noise Assessment in Appendix G (“**Noise Assessment**”) of the IS/MND explicitly concludes that no mitigation is required with regards to each impact discussed.²⁹⁹

Furthermore, where the Noise Assessment does find that there will be a significant noise impact, it relies on the Project’s “implementation of GP Policy EC-1.7, Municipal Code requirements, and the City’s Standard Permit Conditions” to conclude that the Project’s “temporary construction noise impacts would be reduced to a less-than-significant level.” However, it is improper for the Project Applicant to merely rely on its compliance with regulations to conclude that the Project will have a less than significant impact for a number of reasons. For example, noise regulations do not capture all the noise impacts of the Project, including construction and operation. Moreover, the regulatory measures are not Project-specific and are focused on the Project itself – as such, they fail to consider the Project-specific issues (such as location, size, proposed mitigation measures) as well as the Project’s cumulative impacts along with other related projects. Also, the MND’s traffic impacts are understated, and therefore traffic noise is understated and left unaccounted for. Thus, an EIR is required to study the Project’s noise impacts and to determine whether those will be significant.

As stated in CEQA, Guidelines 15126.4(a)(1)(B), “[c]ompliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measures that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards.” See also, *Californians for Alternatives to Toxics v. Department of Food & Agric.* (2005) 136 Cal.App.4th 1 (the court set aside an EIR for a statewide crop disease control plan because it did not include an evaluation of the risks to the environment and human health from the proposed program but simply presumed that no adverse impacts would occur from use of pesticides in accordance with the registration and labeling program

²⁹⁷ Id. at p. 1.

²⁹⁸ Id. at pp. 130-148.

²⁹⁹ See, IS/MND Appendix G Noise/Vibration Assessment (May 4, 2023), pp. 23, 29, and 31-32 (concluding no further mitigation required for each impact listed).

of the California Department of Pesticide Regulation); *Ebbetts Pass Forest Watch v Department of Forestry & Fire Protection* (2008) 43 Cal. App. 4th 936, 956 (fact that Department of Pesticide Regulation had assessed environmental effects of certain herbicides in general did not excuse failure to assess effects of their use for specific timber harvesting project).

In addition, the Project's reliance on regulatory compliance with the referenced regulations is misplaced because there is no evidence that such ordinances were to control noise outside of the building's envelope, such as e.g., traffic noise or increase in ambient noises due to the Project's construction and operation. *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 210 (the building codes do not address the question of whether the Project is even *safe* to build, "whether a building should be constructed at all, how large it should be, where it should be located, whether it should incorporate certain resources, or anything else external to the building's envelope.")

Accordingly, there is a fair argument that the Project may have a significant noise impact and as such, the Project's potential noise impacts should be thoroughly analyzed and evaluated in an Environmental Impact Report pursuant to CEQA.

Response F-22: The noise and vibration assessment prepared for the project concluded that no significant noise or vibration impacts would be generated by the proposed project. The letter provided by the commenter states that the IS/MND "concludes that the Project will have a less than significant impact on noise or a less than significant impact on noise with mitigation incorporated" yet does not provide such mitigation. The IS/MND identifies standard permit conditions for construction noise (pages 135-136) and conditions of approval for operational noise (page 138). These standard permit conditions and conditions of approval are required by the City of San José for all projects that exceed City ordinance or regulatory thresholds and for purposes of the analysis are not considered mitigation measures.

As stated previously, the noise consultant uses the noise limits established by the FTA to identify the potential for impacts due to substantial temporary construction noise in conjunction with Policy EC-1.7 of the City's General Plan since the City does not provide quantitative noise level thresholds for construction activities. However, the City's policy states the following:

EC-1.7 Require construction operations within San José to use best available noise suppression devices and techniques and limit construction hours near residential uses per the City's Municipal Code. The City considers significant construction noise impacts to occur if a project located within 500 feet of residential uses or 200 feet of commercial or office uses would:

- Involve substantial noise generating activities (such as building demolition, grading, excavation, pile driving, use of impact equipment, or building framing) continuing for more than 12 months.

For such large or complex projects, a construction noise logistics plan that specifies hours of construction, noise and vibration minimization measures, posting or notification of construction schedules, and designation of a noise disturbance coordinator who would respond to neighborhood complaints will be required to be in place prior to the start of construction and implemented during construction to reduce noise impacts on neighboring residents and other uses.

The project would not require any substantial noise-generating activities continuing for more than one year; therefore, the City of San José does not consider construction of the project to be a significant impact.

The noise consultant used the traffic volumes provided in the transportation analysis to estimate the noise level increases along surrounding roadways, and the ambient noise measurements obtained in the noise monitoring survey, as well as existing ambient noise levels included in the City's *Envision San José 2040 General Plan Update EIR*, to determine the significance of project-generated traffic noise increases. The noise assessment evaluated the traffic noise increases along the roadway segments included in the traffic study.

Comment F-23: Based on the foregoing, the City should deny the Project's proposed entitlements and require that an Environmental Impact Report be prepared pursuant to CEQA, consistent with the comments and issues identified in this comment letter.

Response F-23: See above responses and Topic Response 2.1.1.

Comment Letter G: Advocates for the Environment

Comment G-1: Advocates for the Environment submits the comments in this letter regarding the proposed 550 Piercy Road Industrial Project (**Project**), located at the intersection of Piercy Road and Hellyer Avenue. The Project would construct two warehouse buildings totaling 430,000 square feet on a 28.9-acre vacant parcel. We have reviewed the Mitigated Negative Declaration (**MND**) released in June 2023 and submit comments regarding the sufficiency of the MND's Greenhouse-Gas (**GHG**) analysis under the California Environmental Quality Act (**CEQA**).

Response G-1: The above description accurately depicts the proposed project. Responses to specific comments identified in this comment letter are provided below. No further response to this comment is required.

Comment G-2: The MND derived its GHG significance thresholds from the CEQA Appendix G Guidelines and concluded that the Project's GHG emissions would be less than significant, claiming the Project would be consistent with plans, policies, and regulations for the reduction of GHG emissions because of adherence to the City of San José 2030 Greenhouse Gas Reduction Strategy (GHGRS) Compliance Checklist. Although the MND included precise quantifications for the construction emissions, totaling 276.04 metric tons carbon dioxide equivalent (**MTCO_{2e}**), there was no quantification for the operational emissions included in the MND itself. Yet, Appendix A: Air Quality Assessment included CalEEMod outputs which include a category for CO_{2e}, which was quantified as 3,282.3207 MTCO_{2e} per year. While CEQA does not require that GHG emissions be quantified, the fact that the City conducted modelling to estimate this number yet failed to include it for easy access and reference in the MND itself is misleading and confusing.

Response G-2: CalEEMod automatically generates MT CO_{2e} for the year assigned as the operational year of the project but does not generate CO_{2e} in per year data. The ISMND contains substantial evidence supporting its conclusion that the Project's GHG emissions would not be cumulatively considerable. State CEQA Guidelines Section 15064.4 states that a lead agency shall make a good-faith effort, based on available information, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project. A lead agency has the discretion to determine, in the context of a particular project, whether to: (1) quantify greenhouse gas emissions resulting from a project; and/or; or (2) rely on a qualitative analysis or performance based standards. The City has exercised its discretion to utilize qualitative thresholds and compliance with the City's Greenhouse Gas Reduction Strategy, which is stated on pages 98 and 99 of the ISMND.

As discussed on pages 98 and 99, Greenhouse Gas Emissions, of the ISMND, in the absence of any adopted thresholds of general application, the City as Lead Agency has determined that the Project's net GHG emissions would not be cumulatively considerable and therefore would not have a significant cumulative effect on the environment if the Project is found to be consistent with the applicable regulatory plans and policies including the City's Greenhouse Gas Reduction Strategy to reduce GHG emissions. Therefore, if the Project would not conflict with these plans, the City would be able to achieve its GHG reduction goals, and, therefore, these plans can be used at a project level to show a projects consistency with the plans.

Comment G-3: The City analyzed consistency with the City of San José 2030 Greenhouse Gas Reduction Strategy (**GHGRS**) Compliance Checklist, as detailed in Appendix E. However, the Project

would be inconsistent with the GHGRS, as well as some of unmentioned applicable plans, and therefore this discussion of consistency is inaccurate. Further, the language of the adopted threshold demands that the EIR analyze the Project's consistency with all applicable plans, not just a select number of plans that the lead agency prefers. Overall, the City should have concluded that the impact would be significant under and the City must adopt mitigation to the fair share extent.

Response G-3: See Response F-16. The proposed project relies on the GHG Reduction Strategy Checklist to demonstrate compliance with the 2030 GHG Reduction Strategy Plan, which represents San José's qualified climate action plan in compliance with CEQA. The 2030 GHG Reduction Strategy was prepared in alignment with Senate Bill 32, which itself is an expansion of Assembly Bill 32, the Global Warming Solutions Act of 2006. The 2030 Greenhouse Gas Reduction Strategy is intended to streamline a project's compliance with all applicable greenhouse gas plans and policies, therefore, a separate discussion of compliance with each applicable plan and policy is not required under CEQA. No changes are required to the text of the IS/MND as a result of this comment.

Comment G-4: The discussion of whether the Project exceeds the GHG significance thresholds was centered on the GHGRS as an applicable plan. The GHGRS consistency analysis exclusively focused on a brief procedure, consistency checklist (**Checklist**), contained in the GHGRS which purportedly analyzes a project's consistency with the GHGRS to bypass the consistency analysis required by the dual threshold that the lead agency adopted. The Checklist declares that conforming with the steps is sufficient to demonstrate that a project's contribution to cumulative GHG emissions may be determined not to be cumulatively considerable under CEQA Guidelines sections 15064(h)(3), 15130(d), and 15183(b).

The Checklist largely disregards the GHGRS goals by suggesting that adherence to the Checklist alone is sufficient to demonstrate consistency with the GHGRS. When adhered to, this procedure allows consistency with the GHGRS to be analyzed without considering any of the guidance within the GHGRS. As a result, the MND circumvented analysis of San Jose's adopted emission intensity target for 2030, as identified in the GHGRS, which is 2.94 MTCO_{2e} per service population. Because the Project's net operational GHG emissions minus existing emissions are estimated to be 3,282.32 MTCO_{2e}/year, and the Project will have 160 employees, the Project's per-capita GHG emissions would be approximately 20.51 MTCO_{2e}/service population, greatly exceeding San Jose's emissions intensity from 2017, as well as the future target³⁰⁰. Therefore, the Project is not compliant with the GHGRS emissions target overall, and compliance with the Checklist cannot, in itself, cure this defect.

Response G-4: Refer to Response G-3.

Comment G-5: Moreover, although the MND purports to comply with the Checklist, the Project has not sufficiently demonstrated compliance with the Checklist. Therefore, even if the Checklist is deemed a sufficient substitute for the GHGRS itself, the Project is not consistent with the GHGRS because it does not comply with all of the mandatory measures on the Checklist. According to the descriptions and explanations below each Checklist measure, the Project would not be compliant with seven of the required measures identified in the Checklist.

³⁰⁰ Emissions metrics obtained from CalEEMod summary printouts and service population obtained from the MND.
Project's mitigated operational emissions = 3,282.32 MTCO_{2e}
5,206.342 MTCO_{2e} ÷ 160 employees = 20.51, rounded to the nearest hundredths-place.
San José 2017 Emissions Inventory intensity = 3.96 MTCO_{2e}/service population (GHGRS p. 35)
2030 Emissions Intensity Target = 2.94 MTCO_{2e}/service population (GHGRS p. 51).

First, MS-2.2 requires that the Project “encourage maximized use of on-site generation of renewable energy for all new and existing buildings.” The Project anticipates being “solar-ready by including building roof space and conduit infrastructure...per California Code,” which is the bare minimum for the statutory requirements but is far from representative of the “maximized use” of solar panels. Neither the Checklist explanation nor the MND expressed that the amount of solar ready roof space was the maximum or otherwise “maximized” the use of on-site electricity generation.

Response G-5: Refer to Response G-3.

Comment G-6: Second, MS-2.7 involves “encourag[ing] installation of solar panels or other clean energy power generation sources over parking areas.” The lead agency responded by saying that “[f]uture tenants within the project would be able to take advantage of incentives that are in place at the time of construction,” without actually including any infrastructure that would encourage the installation of solar panels. For example, simply constructing an overhead canopy to provide space for solar panel installation would encourage the installation of solar panels in parking lots. The lead agency made no effort to demonstrate voluntary actions which would comply with this measure other than encouraging factors that are already in existence and have no relation to the Project, or more specifically, parking areas on the Project site.

Response G-6: City’s GHGRS includes several criteria for meeting compliance such as land use and zoning consistency, enrollment in SJCE TotalGreen. Although the policies in the GHGRS are not mandated, the project applicant would enroll in SJCE’s GreenSource program that provides 95 percent carbon free energy and thereby, complies with the City’s GHGRS and would be a project condition of approval. Also see Response F-16.

Comment G-7: Third, MS-16.2 requires promoting “neighborhood-based” distributed renewable energy. However, the lead agency’s response reflects an individual Project-based renewable energy effort, which is not the same as the community-based strategy outlined in this measure. As this measure requires a community effort to provide an alternate means of investing in renewable energy to groups and individuals who may otherwise not be able to install systems on their own property, to be compliant with this measure the lead agency must demonstrate that they would promote a community effort in some other way beyond simply using renewable energy sources for the Project. It is implied that the energy distributed in a neighborhood-based network should be promoted for all electricity use beyond which is produced on-site. Simply being solar ready does not promote neighborhood-based distribution of renewable energy generation, even if it works toward the goal of reducing energy wasted.

Response G-7: The policies in the GHGRS are not mandated and therefore, the applicant is not required to implement or enroll in a community-based strategy. Also see Response G-6.

Comment G-8: Fourth, CD-2.1 promotes “the Circulation Goals and Policies in the Envision San José 2040 General Plan” by “[c]reat[ing] streets that promote pedestrian and bicycle transportation by following applicable goals and policies in the Circulation section of the Envision San José 2040 General Plan.” The City responded to this requirement by saying “not applicable,” even though there was no specification that this requirement need not apply to industrial areas. We request that the City provide further clarification for why this requirement is not applicable to this Project.

Response G-8: See revisions to the revised Appendix E from the IS/MND, in Section 3 of this document, which now identifies that the proposed project would include bicycle racks as well as

bicycle and pedestrian access on the driveways and that the project would install on-street Class IV bikeways on Hellyer Avenue. In addition, this response now identifies that Silicon Valley Boulevard would have additional Class IV bikeway improvements installed to improve access to Coyote Creek Trail. These aspects of the project are already captured in the analysis of the IS/MND. As a result, no changes to the text of the IS/MND or new analysis are required.

Comment G-9: Fifth, TR-7.1 requires that “large employers...develop TDM programs to reduce the vehicle trips and vehicle miles generated by their employees through the use of shuttles, provision for car-sharing, bicycle sharing, carpool, parking strategies, transit incentives and other measures.” Here, the future tenant is likely deemed a “large employer,” at an estimated 160 employees. The explanation in the Checklist did not anticipate the preparation of a TDM program but rather vaguely mentioned “VMT reduction measures,” with the only examples being “marketing/education” and “bicycle parking.” The City should further specify all of the reduction measures the Project would use as part of a comprehensive TDM program to be in compliance with this Checklist measure.

Response G-9: The GHGRS checklist has been updated to state that on-street Class IV bikeway would be installed on Hellyer Avenue per City standards. Silicon Valley Boulevard would have additional Class IV bikeway improvements installed to improve access to Coyote Creek Trail (IS./ND page 16). This does not change any conclusions or does not raise any new impact that requires additional analysis.

Comment G-10: Sixth, TR-8.5 intends for projects to “[p]romote participation in car share programs to minimize the need for parking spaces in new and existing development.” However, rather than discussing the implementation of car share programs, the explanation of the Project’s compliance with this measure made no mention of car share programs in the response, and rather focused on the availability of bike parking spaces and the fact that the Project would include “trip reduction marketing/education.” The purpose of this measure is aimed at minimizing the need for parking spaces, given a set number of employees. Thus, educating the employees about trip reduction would not help due to the employee’s mandatory work schedule, and this requirement is focused specifically on car share programs, which the lead agency completely ignores in response. To be compliant with this measure, the Project should take some active role in car share programs specifically, for its future tenants and their employees to be encouraged to share cars when commuting to work.

Response G-10: As noted in the comment above, the project would include trip reduction education for employees of the proposed project, including car share programs. This complies with the intent of Policy TR-8.5 to promote participation in car share programs. The language of Appendix E of the IS/MND (see Section 3 of this document) has been updated to specifically refer to car sharing programs in response to this comment. This comment does not require any changes or additions to the text of the IS/MND.

Comment G-11: Seventh, MS-19.4 requires that the Project use recycled water “wherever feasible and cost-effective to serve existing and new development.” In response, the lead agency claimed that the Project would “utilize recycled water for the landscaping.” Yet, in an industrial project such as this one, it may be feasible and cost effective to use recycled water for other uses beyond just landscaping, such as for cooling mechanisms for manufacturing, or other uses. Recycled water does not necessarily need to be restricted to landscaping only, and the City’s response should reflect the feasibility of using recycled water for as many uses as would be cost effective, in accordance with this Checklist requirement.

Response G-11: The policies in the GHGRS are not mandated and therefore, the applicant is not required to utilize recycled water. The end uses of the proposed project have not been determined at this time, and as a result the feasibility of utilizing recycled water for industrial use cannot be determined at this time. This comment does not require any text edits to the IS/MND.

Comment G-12: Ultimately, non-compliance with any one of these requirements would be enough to demonstrate that the City cannot use the Checklist as a way of avoiding analyzing the GHG significance thresholds described in the MND and adopted from CEQA Guidelines Appendix G. Additionally, as previously stated, this MND consistency analysis cannot stand because complying with the Checklist alone is not adequate to show consistency with the GHGRS, which the Project is not consistent with. While the chosen significance threshold adopted from CEQA Guidelines Appendix G encourages comparison between the proposed project and relevant GHG emissions plans, it does not permit an applicable plan to circumvent CEQA Guidelines by prescribing its own separate procedure to demonstrate CEQA compliance. Therefore, in any circumstance, the City must show consistency with all applicable plans, including the GHGRS generally, and notwithstanding the Checklist procedure.

Response G-12: As described on page 95 of the IS/MND, the City's GHG Reduction Strategy is intended to meet the mandates as outlined in the CEQA Guidelines and standards for "qualified plans" as set forth by the BAAQMD. Projects that conform to the General Plan Land Use/Transportation Diagram and supporting policies are considered consistent with the City's GHG Reduction Strategy. The project is consistent with the General Plan land use designation and, with implementation of GHG reduction strategies, the proposed project would have a less than significant impact related to GHG emissions.

Comment G-13: The MND did not analyze whether the Project would conflict with an applicable plan, policy, or regulation adopted for the purpose of reducing GHG emissions, based on the purported consistency with the GHGRS. Because it is not consistent with this reduction strategy, the analysis should fall back to the significance thresholds identified in CEQA Appendix G and on page 98 of the MND. Thus, without any changes, this significance analysis violates CEQA by being deficient in several areas, as discussed below.

For example, the analysis should have accounted for consistency with the 2017 Scoping Plan from the California Air Resources Board (**2017 CARB Scoping Plan**), which was developed to facilitate California's compliance with SB 32, which requires statewide GHG emissions to be reduced to 40% below 1990 levels by 2030 (Health & Safety Code § 38566). The Project is inconsistent with the 2017 CARB Scoping Plan's goals, including the 2050 goal of 80% below 1990 levels. The 2017 CARB Scoping Plan sets out statewide goals for total GHG emissions targets of 6 MTCO_{2e}/capita by 2030, and 2 MTCO_{2e}/capita by 2050 (CARB Scoping Plan, p. 99). With the Project's net operational GHG emissions at approximately 3,282 MTCO_{2e} annually, the Project's per-service population GHG emissions would be 20.51 MTCO_{2e}/capita, greatly exceeding both the 2030 and 2050 CARB 2017 Scoping Plan targets by more than 10 times³⁰¹.

An agency must consider a project's land use patterns over time to reasonably evaluate the GHG emissions impacts (*Cleveland Nat'l Forest Foundation v. San Diego Ass'n of Governments* (2017) 3 Cal.5th 497, 513). The MND accounted for a building lifespan of 30 years when amortizing the construction emissions, indicating the expected lifespan of the Project. As the Project will likely be

³⁰¹ All metrics obtained from the MND. $3,282 / 160 = 20.51$, rounded to the nearest tenths-place.

operating well into 2050, that the Project must show consistency with long-term goals to comply with CEQA. Accordingly, to be consistent with the 2017 CARB Scoping Plan, the MND must demonstrate that it is on track to meet its share of the statewide goal of 2 MTCO₂ per capita by 2050.

Under the CEQA Appendix G Guidelines, the Project would have significant GHG emissions if it were to “Conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases” This language requires that the MND analyze the Project’s consistency with *all* applicable plans, not just the ones that the lead agency prefers. And there is no demonstration that the Project would be net zero by any point in the operations. The MND itself references this threshold in its analysis. (MND, p. 98.)

In addition to consistency with the 2017 Scoping Plan, the Project must demonstrate consistency with CARB’s 2022 Climate Change Scoping Plan (**2022 Scoping Plan**) in order to meet Threshold GHG-2. The 2022 Scoping Plan mandates that all commercial appliances be electric by 2029 (2022 Scoping Plan, p. 75.) This is a requirement that the MND did not address and the City should demonstrate that the Project will meet this requirement with further analysis and specification.

The MND must also analyze consistency with Executive Order B-55-18, which requires the State of California to achieve carbon neutrality—net zero GHG emissions—by 2050. The Project is inconsistent with EO B-55-18 because it will use gasoline, diesel, and natural gas, and burning such non-renewable fuels results in considerable GHG emissions. Because the Project is inconsistent with the 2017 CARB Scoping Plan, 2022 CARB Scoping Plan, and EO B-55-18, its emissions will be significant. Inconsistency under any one of these plans alone would be enough to conclude a significant impact. Under CEQA, therefore, the City must therefore require fair-share mitigation, i.e. the Applicant must fully mitigate all of the Project’s GHG emissions. Such mitigations may be on-site (e.g., solar panels), or off-site (e.g., offsets).

We recommend that the City adopt a net-zero threshold for this project, and that the Project be constructed as a net-zero project, where its GHG emissions are fully mitigated, resulting in no net increase. Two of California’s largest housing projects, Tejon’s Centennial, and Five Points’ Newhall Ranch, were built as net-zero projects, after the courts found their EIRs inadequate on GHG emissions. This would require, among other things, eliminating natural-gas use in the Project.

Response G-13: Refer to Response G-12.

Comment G-14: CalEEMod was used as a model to estimate existing project emissions to serve as the baseline for the Project. The CalEEMod analysis was included in Appendix A to the MND and was inconsistent with the MND itself in two ways. CalEEMod should be rerun to get a more accurate estimation of Project GHG emissions.

At the end of the CalEEMod analysis, a heading for Section 11.0, Vegetation is listed, but there are no parameters for vegetation included. This omission disregards the MND’s role as an informative document by attempting to hide the parameters that went into CalEEMod’s Vegetation analysis for the Project. Even if the Project site does little modifications to vegetation, the extent to which it makes a difference in the quantification of GHG emissions should still be known to the public and the decision makers by including it in the CalEEMod report. The CalEEMod Vegetation analysis also accounts for variation in soil type for carbon sequestration.

Additionally, there were no operational stationary equipment added to page 82 through 83 of the CalEEMod outputs in Appendix A to the MND. There was no explanation for why this Project would not have any operational equipment to be described in this section, which would be likely given the industrial nature of the Project.

The lead agency should make these changes or justify the missing sections within CalEEMod. When a lead agency quantifies a Project's emissions, it should be accurate and not misleading about the GHG impact of the Project.

Response G-14: Refer to Responses G-12 and G-13.

Comment G-15: No mitigation measures were considered for GHGs due to the erroneous determination of less-than-significant impact. However, because the City should have found significant impact for GHG emissions, it should update its findings accordingly and would therefore be required to create a full Environmental Impact Report (**EIR**) and mitigate to the fair share level.

There are many mitigation measures that can feasibly be adopted. For example, while CalGreen Code and Title 24 Requirements would be met, the Project would not adopt any other feasible green building strategies, such as LEED certification standard. In addition to adhering to green building standards, the Applicant could further mitigate the Project's emissions by incorporating energy-generating features such as rooftop solar panels, or offset emissions through the sponsorship local renewable energy programs. Lastly, the Project could require future tenants to use electric equipment and vehicles to the extent possible, and strictly prohibit idling on the premises.

Response G-15: Refer to Responses G-12 and G-13.

Comment G-16: In conclusion, City should not have prepared an MND for this project, but rather should have concluded that there was a likelihood of significant impact on GHG emissions, which would then require that an EIR with full analysis in accordance with CEQA guidelines to be prepared. The MND incorrectly analyzed the Project's consistency with the CARB 2017 Scoping Plan, erroneously concluding that it would not conflict with the goals laid out in that plan. As to other plans, the lead agency assumed, without sufficiently analyzing, that the Project would comply with the measures outlined in applicable plans and policies, but clearly conflicts with those plans. And it entirely ignored several key applicable plans for GHG reductions. An MND was not appropriate for this case because there is a fair argument that the Project may have significant GHG impacts.

Response G-16: Refer to Responses G-12 and G-13, and Topic Response 2.1.1.

Comment G-17: Please put Advocates for the Environment on the list of interested parties to receive updates about the progress of this potential project approval.

Response G-17: The City will add Advocates for Environmental Justice to the public interest list for this project and continue to provide notification of any subsequent environmental documents, public notices, public hearings, and notices of determination per the commenter's request.

Comment Letter H: Mitchell M. Tsai, Attorney at Law (on behalf of Carpenter’s Local Union 405)

Summary Response to Letter H: This letter was received 63 days after the close of the public review period. This letter largely reflects the comments and concerns presented in Letter F. Refer to the responses to Letter F as well as the following:

- Adequacy of IS/MND: Topic Response 2.1.1
- Transportation/VMT Evaluation: Responses C-7, C-10, C-11, C-12. See also below.
- GHGs: Topic Response 2.1.3, Responses G-2, G-3, G-6, G-9, G-12
- Hazardous Materials: C-4, C-6, E-5, E-37.
- Noise: Topic Response 2.1.3, Responses E-10, E-34 to E-36
- Biological Resources: Topic Response 2.1.3, Responses E-11, E-13 to E-23

This letter does not raise any new issues compared to the comment letters received during the public comment period.

Additional Clarification of VMT

The commenter mentions how truck traffic VMT should be measured rather than just the home-based work VMT trips. The Technical Advisory issued by OPR provides only guidelines and that while “tour-based assessment is ideal because it captures travel behavior more comprehensively. But where tour-based tools or data are not available for all components of an analysis, a trip-based assessment of VMT serves as a reasonable proxy.” The City Council Policy 5-1 and the Transportation Handbook is set to look at VMT from a trip-based assessment. There is not reliable or accurate data for specific tour-based assessment and specifically of warehouses, as different warehouse operators have their own delivery schedules and/or total daily truck trip lengths can vary.

The commenter requests that the mitigation measures should be clear. The described traffic calming measures and pedestrian network improvements would need to be constructed to mitigate the VMT impact, not just the submittal and review of plans. The mitigation measures are approved discretionally by elected decisionmakers (i.e., Director of Planning Building and Code Enforcement) with the approval of the Planning Permit. The mitigation measures are intended not just to reduce this project’s employee VMT, but with these specific multimodal infrastructure improvements implemented, it can be assumed that the other surrounding uses may also benefit from the better pedestrian and bicycle improvements and reduce their employee VMT.

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Section 3. Text Changes to the IS/MND

The following section outlines changes to the text of the IS/MND based on the comments received during the circulation period. New additions to the text are shown in underline. Deleted text is shown in ~~strikethrough~~.

Page Number	Description of Change
IS/MND Page ii	<p><i>The list of appendices under Table of Contents has been amended to reflect the correct order and to add the Historical/Archaeological Literature Review and Assessment as Appendix C. However, no new information in the appendices has been added and no new environmental impacts have been identified.</i></p> <p>Appendices</p> <ul style="list-style-type: none"> A. Air Quality Assessment B. Biological Resources Memorandum C. <u>Historical/Archaeological Literature Review and Assessment</u> D. <u>Geotechnical Report</u> Greenhouse Gas Emissions Checklist E. <u>Greenhouse Gas Emissions Checklist</u> Phase I and Phase II Environmental Site Assessments F. Noise and Vibration Assessment <u>F-1F Phase I and Phase II Environmental Site Assessments</u> <u>F-2 Phase II Environmental Site Assessments</u> G. <u>Noise and Vibration Assessment</u> Transportation Study H. <u>Transportation Study</u>
IS/MND Page 64	<p><i>Impact a) text has been updated as follows:</i></p> <p>With implementation of the identified mitigation measures, the project’s impact to nesting birds and raptors, as well as western burrowing owls, would be less than significant. <u>When considered cumulatively with the impacts from the adjacent development at 644-675 Piercy, these impacts would remain cumulatively less than significant with implementation of project specific mitigation for other projects to avoid impacts to nesting birds and raptors and western burrowing owls.</u></p>
IS/MND Page 65	<p><i>Impact d) text has been updated as follows:</i></p> <p>The project is proposed in a semi-urbanized setting and has not been found to contain any <u>provide low-quality habitat for</u> native resident or wildlife species. The southwestern adjacent parcel contains Coyote Creek riparian woodlands, <u>located</u> approximately 380 feet southwest of the Hellyer Avenue border of the project site. The northwestern adjacent parcel contains serpentine bunchgrass grasslands, located approximately 510 feet northwest of the Piercy Road border of the project site. <u>The project would not impact the adjacent riparian corridor or serpentine bunchgrass grasslands.</u> There are no streams, creeks or wetlands located on the project site, which is largely dominated by nonnative annual forbs and dirt roads.</p> <p><u>Native wildlife species may move through the project site between the grassland and riparian habitat; however, use of the site as a wildlife corridor is likely limited due to the disturbed nature of the site, the surrounding development, and the presence of roadways separating the site on either side from the natural habitat areas, especially Hellyer Avenue, which is a four-lane divided street. Further, the project site is not identified as a “natural landscape block” or “essential connectivity area” in the California Essential Habitat Connectivity Project: A Strategy for Conserving a Connected California (Caltrans and CDFW, 2010), and no special considerations for roadways are</u></p>

	<p><u>recommended in the report for areas outside of natural landscape blocks or essential connectivity areas. Riparian corridors, such as the adjacent Coyote Creek riparian corridor, are known to provide important wildlife corridors and therefore, animals within the vicinity are more likely to move along the adjacent riparian corridor than through the project site. In addition, the project would not isolate the riparian from the serpentine bunchgrass grassland from one another because they meet up with one another less than one mile southeast of the project site and approximately three miles northwest of the project site.</u> Therefore, the proposed project would have a less than significant impact with respect to interfering substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors or impede the use of native wildlife nursery sites.</p>
IS/MND Page 81	<p><i>Impact a) text has been updated to remove the reference to energy consumption in the form of natural gas.</i></p> <p>Operation of the proposed project would consume energy, in the form of electricity and natural gas, primarily for building heating and cooling, lighting, cooking, and water heating.</p>
IS/MND Page 191	<p><i>Impact b) text has been updated to refer to cumulative biological impacts.</i></p> <p>Less Than Significant with Mitigation Incorporated. Based on the analysis provided in this Initial Study, the proposed project will not significantly contribute to cumulative impacts. This analysis takes into account the proposed development at the 644-675 Piercy Road, which adjoins the site to the east and consists of one single-story industrial building with a maximum of 250,000 square feet. No other development proposals are located within 1,000 feet of the proposed project. As discussed in <i>Section C. Air Quality</i> and <i>Section H. Greenhouse Gas Emissions</i>, the project would have a less than significant impact related to criteria air pollutants and GHG emissions. <u>As discussed in <i>Section D. Biological Resources</i>, the project would have a less than significant impact related to cumulative biological resources impacts.</u> As discussed in <i>Section Q. Transportation</i>, the project would have a less than significant impact related to cumulative VMT. For these reasons, the project would have a less than significant cumulative impact on air quality overall. In addition, as discussed in <i>Section M. Noise & Vibration</i>, the project would have a less than significant impact related to cumulative construction and operational noise.</p>
Appendix B Biological Resources Report Page 1	<p><i>The first sentence of Section 1.2 has been updated to correct the acreage of habitats within the project site:</i></p> <p>The project site is composed of annual grassland (27.8 <u>25.7</u> acres) and ruderal/developed (3.01 acres) habitat.</p>
Appendix B Biological Resources Report Page 13	<p><i>The first paragraph in Section 3.1.1 has been updated to correct the acreage of annual grassland habitat within the project site:</i></p> <p>Approximately 25.87 <u>25.87</u> acres of annual grassland habitat is present within the project site (Figure 3).</p>
Appendix B Biological Resources Report Page 13	<p><i>Section 3.1.2 has been updated to correct the acreage of ruderal habitat within the project site:</i></p> <p>Approximately 3.01 <u>3.01</u> acres of developed/ruderal habitat is present at the site (Figure 3).</p>
Appendix B Biological Resources Report (Appendix D)	<p><i>The "Potential Occurrence within the Project Site" column for the California Tiger Salamander has been revised as follows:</i></p> <p>Low Closest species <u>CNDDDB</u> occurrence is approximately 1.1 miles (<u>1.7 km</u>) southeast of the project site in the Coyote Creek riparian woodland. Suitable upland habitat is present north of the project site. No suitable <u>breeding</u> habitat is <u>present</u> within the project site. <u>Suitable upland and dispersal habitat is present within the project site and small mammal burrows were observed; however, this species is unlikely to utilize the project site because</u></p>

	<p><u>current scientific information indicates that greater than 95% of dispersing CTS are found within 630 meters of a breeding pond, the project site is mostly separated from the known occurrence by development, and there are no known or potential breeding resources in the direction of the project site that individuals would disperse to. Further, the modeled habitat distribution for this species contained in Appendix D of the Santa Clara Valley HCP does not identify habitat within the project site or immediately surrounding area. Species is unlikely to utilize the project site as a habitat corridor due to the adjacent interstate highway that separates the project site and Coyote Creek.</u></p>																				
<p>Appendix E Greenhouse Gas Reduction Checklist</p>	<p><i>The response with regard to consistency with policy CD-2.1 has been revised to acknowledge compliance with Policy CD-2.1 and text has been added as follows:</i></p> <p>The proposed project is in an industrial area. The proposed project would include bicycle racks as well as bicycle and pedestrian access on the driveways. <u>On-street Class IV bikeway would be installed on Hellyer Avenue per City standards. Silicon Valley Boulevard would have additional Class IV bikeway improvements installed to improve access to Coyote Creek Trail. The project proposes improvements along Piercy Road, Hellyer Avenue and Silicon Valley Boulevard. Improvements also include the replacement and widening of the existing sidewalk with new tree wells along the project frontage on Hellyer Avenue and Piercy Road.</u></p> <p><u>The proposed project would not explicitly include any Transportation Demand Management (TDM) measures. As such, MM TR-1 of the accompanying CEQA document would be required to ensure the project’s VMT would be lowered by providing traffic calming measures and pedestrian network improvements.</u></p>																				
<p>Appendix G Noise Report</p>	<p><i>The draft noise report was completed on May 4, 2023, by Illingworth & Rodkin, Inc. (I&R). On page 28 of the draft noise report, the truck maneuvering calculations summarized in Table 12 used an incorrect source level. As stated in the noise report, typical maximum noise levels for heavy trucks range from 70 to 75 dBA Lmax; however, the minimum value was used for the estimates in the table. Using the 75 dBA Lmax value, Table 12 should be updated as follows:</i></p> <p>TABLE 12¹ Estimated Truck Maneuvering Noise Levels at Receiving Land Uses</p> <table border="1" data-bbox="493 1203 1369 1415"> <thead> <tr> <th>Receptor</th> <th>Distance from Center of Nearest Truck Parking Area</th> <th>Hourly Leq</th> <th>DNL</th> <th>Noise Level Increase, DNL</th> </tr> </thead> <tbody> <tr> <td>West Industrial</td> <td>570 feet</td> <td>51 to 57 dBA</td> <td>58 dBA</td> <td>1 dBA</td> </tr> <tr> <td>Distant East Residential</td> <td>1,560 feet</td> <td>42 to 48 dBA</td> <td>49 dBA</td> <td>0 dBA</td> </tr> <tr> <td>Future East Industrial</td> <td>660 feet</td> <td>50 to 56 dBA</td> <td>57 dBA</td> <td>N/A^a</td> </tr> </tbody> </table> <p>^a Future receptors are not exposed to existing ambient conditions, and therefore, would not be subject to a permanent noise increase.</p> <p><i>The updated information in the table does not result in an exceedance of the City’s General Plan or Municipal Code noise standards and would not result in a permanent noise level increase of 3 dBA DNL or more at the nearest residential uses.</i></p>	Receptor	Distance from Center of Nearest Truck Parking Area	Hourly Leq	DNL	Noise Level Increase, DNL	West Industrial	570 feet	51 to 57 dBA	58 dBA	1 dBA	Distant East Residential	1,560 feet	42 to 48 dBA	49 dBA	0 dBA	Future East Industrial	660 feet	50 to 56 dBA	57 dBA	N/A ^a
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SECTION 4. CONCLUSION

The comments received during the public circulation period for the 550 Piercy Road Industrial Development project's IS/MND did not raise any new environmental issues or provide information signifying that the project would result in additional impacts or impacts of greater severity than described in the circulated IS/MND. In conclusion, the IS/MND provides a legally adequate level of environmental review for the project, pursuant to California Public Resources Code §21080(c) and 21081.1(a), and CEQA Guidelines §15070.

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Attachment A – Consolidated Public Comment Letters

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