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RE: Mariposa Industrial Park Project Approval and Certification of Final Environmental Impact Report (State Clearinghouse Number: 2020120283)

Dear Ms. Moore:

Thank you for this opportunity to provide comments on the City of Stockton's Final Environmental Impact Report (FEIR) prepared under the California Environmental Quality Act (CEQA) for the Mariposa Industrial Park Project (Project). The Project is a proposed seven-building, 3,616,870 square-foot warehouse complex to be constructed in southeast Stockton. Most of the Project buildings will operate as "high-cube" warehouses, 24 hours a day, 7 days a week. The City has determined that the Project will create several significant and unavoidable environmental impacts, including: (1) significant and unavoidable air quality impacts; (2) significant and unavoidable impacts from exposing nearby sensitive receptors to criteria pollutants harmful to human health and safety; (3) significant and unavoidable impacts to greenhouse gas (GHG) emissions; (4) significant and unavoidable impacts to noise levels on nearby residences; (5) significant and unavoidable impacts to vehicle miles travelled, or VMT; and (6) significant and unavoidable impacts to agricultural lands.

On October 7, 2021, the Attorney General's Office submitted comments on the Project's Draft EIR that identified areas where the DEIR's analysis needed improvement and outlined the City's legal requirements under CEQA to certify the EIR and approve the Project.¹ We have subsequently reviewed the FEIR released to the public on March 1, 2022, including the City's response to the Attorney General's Office's comments, and submit these follow up comments.²

¹ A copy of this comment letter can be found at:
<https://oag.ca.gov/system/files/media/Mariposa%20Industrial%20Park%20AGO%20CEQA%20Comment%20Letter.pdf>.

² The Attorney General's Office submits these comments pursuant to his independent power and duty to protect the environment and natural resources of the State. (See Cal. Const.,

I. THE CITY IS REQUIRED TO ADOPT FEASIBLE MITIGATION MEASURES TO LESSEN THE PROJECT'S SIGNIFICANT ENVIRONMENTAL IMPACTS.

An EIR must describe and adopt all feasible mitigation measures to minimize the significant environmental impacts of a project.³ As the California Supreme Court has determined, “Even when a project's benefits outweigh its unmitigated effects, agencies are still required to implement all mitigation measures unless those measures are truly infeasible.”⁴ Further, CEQA Guidelines provide that in order for the City to approve the Project despite its significant effect on the environment, it must make a “fully informed and publicly disclosed decision that: (a) There is no feasible way to lessen or avoid the significant effects...”⁵

The City response to the Attorney General’s Office’s comments question whether the City is legally obligated to adopt all feasible mitigation.⁶ To the extent that the City contests these well-established CEQA obligations, it is incorrect. CEQA, the CEQA Guidelines, and the California Supreme Court’s jurisprudence on the subject make clear that lead agencies are “required to implement all mitigation measures unless those measures are truly infeasible.”⁷ It appears possible that the City’s misunderstanding regarding CEQA’s legal obligations has led the City to outright reject multiple feasible mitigation measures that would substantially decrease the Project’s significant and unavoidable environmental impacts. By rejecting these feasible mitigation measures without explanation, Stockton is unable to substantiate the necessary findings to approve the Project in compliance with California law.

II. THE CITY MUST CLEARLY IDENTIFY THE MITIGATION MEASURES APPLICABLE TO THE PROJECT.

The City has not adequately explained what mitigation measures will apply to the Project. An EIR serves as an “informational document” that appraises the public and decisionmakers of the significant environmental effects of a project and ways in which those effects can be

art. V, § 13; Gov. Code, §§ 12511, 12600-12612; *D’Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 14–15.).

³ Pub. Resources Code, § 21002; CEQA Guidelines, § 15126.4, subd. (a)(1).

⁴ *Sierra Club v. Cty. of Fresno* (2018) 6 Cal.5th 502, 524–25 (citing *City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945, 967) [emphasis added].

⁵ CEQA Guideline, § 15043.

⁶ FEIR, 3-69 (Response 3O).

⁷ *Sierra Club* 6 Cal.5th at 524–25.

minimized.⁸ The lead agency is expected to develop mitigation measures in an open process and consider measures proposed by other interested agencies and the public.⁹

The mitigation measures that will apply to the Project are unclear. With regard to the Project's significant air quality impacts, different measures to reduce the impact are discussed in: (1) the FEIR's Mitigation Chart, which simply states "none feasible" for air quality mitigation measures; (2) Appendix B to the DEIR titled "Additional Air Quality Improvement Measures" and; (3) Appendix C to the FEIR titled "Proposed Best Available Air Quality Mitigation Measures." The City states that the measures in Appendix C are to be considered "in combination with the mitigation measures" in the DEIR.¹⁰ Elsewhere in the FEIR, the City indicates that Appendix B and Appendix C are the same, referencing the "Air Quality Improvement Measures included in Appendix B of the DEIR (FEIR Appendix C)."¹¹ Yet elsewhere, Stockton claims that, "The more confusing elements of DEIR Appendix B have been modified or *eliminated* for clarity."¹² But there is no adequate explanation for how Stockton determined which measures it decided were worth repetition in Appendix C and whether and how this inclusion alters – or eliminates – the obligations included in Appendix B.

Such an approach to identifying the applicable mitigation measures makes it extremely difficult for the public and Stockton's decisionmakers – as well as the future developer, tenant, and entity responsible for enforcement – to ascertain the measures the Project must include to reduce its significant impacts. While our prior comments requested that the City clarify the application of the identified "Air Quality Improvement Measures" included in Appendix B, the FEIR makes the application of specific mitigation measures even more difficult to discern. The City's approach to the applicable mitigation measures injects unnecessary confusion, defeating the purpose of the EIR as an informational document.

An EIR's discussion of mitigation measures must also distinguish between the measures proposed by the project applicant and other measures the lead agency determines could reduce significant adverse impacts if imposed as conditions of project approval.¹³ The Project FEIR and its inclusion of both Appendix B's "Improvement Measures" to which the City asserts the Project applicant already agreed and Appendix C's "Mitigation Measures" does not adequately address this requirement. The Project FEIR should clearly identify the Project as proposed and

⁸ CEQA Guideline, § 15121, subd. (a).

⁹ *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 93.

¹⁰ FEIR, Appendix C, p.1.

¹¹ FEIR, 3-69.

¹² FEIR, 3-72 [emphasis added].

¹³ CEQA Guideline, § 15126.4(a)(1)(A).

the mitigation measures the City is requiring to mitigate the Project's significant environmental impacts. Doing so in one place and with clarity, rather than in multiple appendices, would better serve the EIR's purpose of providing clear information.

III. THE MITIGATION MEASURES MUST BE ENFORCEABLE AND NOT IMPROPERLY DEFERRED.

Deferring critical decisions regarding the applicable mitigation measures is generally prohibited under CEQA.¹⁴ This rule is not absolute however, and when it is impractical or infeasible to specify the details of mitigation during the EIR review process, specific performance standards for mitigating a significant impact may be identified instead. This is permissible only if the lead agency commits to implementing the mitigation, adopts the performance standard, and identifies the types of actions that may achieve compliance with the performance standard.¹⁵

Here, the City has deferred several critical mitigation measures to reduce the Project's significant air quality impacts – arguing that such deferral is necessary because the future use is unknown – but has not committed to actually implementing the mitigation. Nor has the City adopted any performance standards to ensure that these impacts are in fact mitigated. The City has also not demonstrated that deferral of this mitigation is impractical or infeasible. Lead agencies throughout California regularly include the necessary mitigation measures for large industrial warehouse facilities such as this Project without deferral, despite the same uncertainties regarding the ultimate tenant. The City's unnecessary deferral of mitigation violates CEQA.

The City must include mitigation measures that are enforceable and not deferred to later determinations without proper guardrails. Yet as outlined in the FEIR, significant questions remain as to how Stockton intends to require and enforce the variety of "air quality improvement measures" and "mitigation measures" included. In fact, it appears that many of these measures will not ultimately be required. Appendix B of the DEIR specifies that at some point in the future, after the Project is approved, a plan for implementation of the identified air quality "improvement" or "mitigation" measures will be developed.¹⁶ That mitigation plan will apparently perform a separate, secondary analysis of whether the air quality measures in Appendices B and C will be applied. Such deferral of mitigation measures to a later time without public oversight and without any barriers for implementation violates CEQA's requirement that mitigation measures be developed in an open, public process and not be unnecessarily deferred.

¹⁴ CEQA Guideline 15126.4(a)(1)(B).

¹⁵ *Ibid*; see also *POET, LLC v. State Air Resources Bd.* (2013.) 218 CA4th 681, 735.

¹⁶ DEIR, Appendix B, Measure No. 10.

Another mitigation measure is so vague as to be entirely unenforceable. Per the Attorney General's Office's suggestion to limit the impacts of construction on the surrounding area, the City appears to seek to limit the amount of grading area that is disturbed on a daily basis. Yet to do so, the City simply states that the applicable mitigation measure is "Limiting the amount of daily grading disturbance area." This fails to identify any known limits, and leaves open the question of whether they are being deferred to a later time. In order for this mitigation measure to be enforceable and mitigate the significant air quality impacts from project construction, the City must actually establish the appropriate limits for this Project, not simply restate the Attorney General's Office's broad suggestion. Such vague statements provide no assurance that these measures will reduce any significant environmental impact.

Finally, the City strongly suggests to the Project applicant, construction contractor, and future tenant that they may be able to evade having to comply with mitigation measures it has imposed. For example, while recognizing that mitigation measures have been widely adopted at warehouses outside of Stockton, the City asserts that "there is little to no experience with these measures in the general project vicinity."¹⁷ The City further posits that this lack of "experience" with mitigation measures and unidentified "other factors" allegedly "introduce uncertainty into the feasibility of future implementation of the measures."¹⁸ But the fact that Stockton has not previously applied the mitigation measures required by law under CEQA is not a justifiable explanation for why these requirements are infeasible. Because these statements indicate that the City may not enforce these measures and that the Project applicant may avoid implementing them, they should be removed.

IV. THE CITY HAS NOT INCLUDED FEASIBLE MEASURES TO MITIGATE THE PROJECT'S SIGNIFICANT IMPACTS.

The City has decided not to impose several feasible mitigation members suggested by commenters that would reduce the Project's significant environmental impacts. While the EIR's response to a suggested mitigation measure need not be comprehensive, "it should evince good faith and a reasoned analysis."¹⁹ "Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified."²⁰ Ultimately, while the EIR need not adopt every mitigation measure suggested, "it must

¹⁷ FEIR, Appendix C, p.1.

¹⁸ *Ibid.*

¹⁹ *Covington v. Great Basin Unif. Air Pollution Cont. Dist.* (2019) 43 Cal.App.5th 867, 879.

²⁰ CEQA Guideline, § 15126.4(a)(1)(B).

incorporate ‘feasible mitigation measures’ when such measures would ‘substantially lessen’ a significant environmental effect.”²¹

The Attorney General’s Office and other agencies, including the California Air Resources Board (CARB) and the San Joaquin Valley Air Quality Control Board (SJVAPCD), submitted comments including multiple feasible mitigation measures to reduce the Project’s significant impacts in several areas, including air quality and GHG emissions. As discussed above, the City appears to suggest some of these measures are infeasible, but it does not provide a reasoned explanation for its statements. The measures identified in the Attorney General’s Office’s prior letter are feasible and should be applied to the Project. In fact, just today the City of Fontana agreed to implement several of these feasible mitigation measures for a warehouse project to settle a lawsuit filed by the Attorney General’s Office.²² The Fontana project will now require additional mitigation measures including, but not limited to, the installation of solar systems, project construction to a minimum LEED “Silver” standard, the tenant’s exclusive use of zero emission forklifts and yard trucks (a.k.a. yard goats and yard hostlers), an onsite truck idling restriction of 3 minutes, and enhanced landscape buffers to reduce impacts on nearby sensitive receptors.²³ The City of Fontana also adopted an Ordinance to ensure that these feasible mitigation measures are applied to all similar future industrial warehouse projects.²⁴

Here, multiple feasible mitigation measures that would reduce this Project’s significant environmental impacts as required by CEQA are not included as Project conditions. The following is a non-exclusive list of such feasible mitigation measures that are currently not required as part of the Project:

- The City is not requiring a mitigation measure that the Project be constructed with solar panels, only that the structures be “solar-ready” to accommodate potential future solar panels. Specifically, the City is requiring that, “Industrial structure [*sic*] shall be ‘solar ready,’ designed to accommodate solar panel installation an [*sic*] conduit from electrical panel to panel locations per the California Energy Code.” The City must clarify what this mitigation measure actually requires with

²¹ *Covington* 43 Cal.App.5th at 879 [citing *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502, 1519].

²² “Attorney General Bonta Announces Innovative Settlement with City of Fontana to Address Environmental Injustices in Warehouse Development” (April 18, 2022) available at: <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-innovative-settlement-city-fontana-address>.

²³ A copy of the settlement in the People of California’s lawsuit against the City of Fontana can be found in the above link and is incorporated herein.

²⁴ A copy of the City of Fontana’s Ordinance No. 1891 can be found in the above link and is incorporated herein.

regard to the requisite conduits and the structures being “solar ready,” including which section of the California Energy Code identifies and mandates these standards. Regardless, actual solar panels should be required mitigation to reduce the Project’s significant air quality and GHG impacts.

- The City is not including a mitigation measure requiring that the Project tenant use electric vehicle (EV) heavy duty trucks in any capacity. The only mitigation measure to reduce the significant air quality impacts from the heavy duty trucks servicing the Project simply requires that “all tenant-owned and operated fleet equipment with a gross vehicle weight rating greater than 14,000 pounds accessing the site must meet or exceed 2010 model-year emissions equivalent engine standards.” Rather than requiring that some of the trucks meet a 12-year-old engine standard, the City should require the use of EV trucks for a certain percentage of tenant-owned vehicles.
- The City is not requiring that the Project include EV truck charging stations. The mitigation requires that the Project include electrical conduits to the dock doors “to provide for future EV truck charging,” but only “in proportion to the predicted percentage of EV trucks using the site.” Rather than leaving it up to the future tenant to determine whether to use EV trucks and construct the appropriate charging stations, the City should require these mitigation measures.
- The City will allow the Project to use paints, architectural coatings, and industrial maintenance coatings that have volatile organic compound levels well over 10 g/L. As required by several other jurisdictions, the City should restrict the Project to using such materials with volatile organic compound levels below 10 g/L.
- Despite recognizing that the Project may foreseeably use Transport Refrigeration Units (TRUs), the City has imposed no mitigation measures for TRUs. Instead, Stockton simply asserts that should a future tenant propose cold storage uses, the City “may” require additional mitigation. Rather than unnecessarily deferring the mitigation of these potential significant air quality impacts in violation of CEQA, the City must commit now to requiring mitigation of the additional air quality impacts from TRUs should cold storage be a Project use. Such mitigation could require a covenant that the Project not use TRUs, or, if no such covenant is filed, the City could require that electric conduits for EV trucks be installed during construction to serve at least 50% of the loading dock doors at which TRUs will be deployed.
- The City is not requiring that the Project applicant provide sensitive receptors – including the residences along Marfargoa Road and the multiple religious institutions in the surrounding area – with air filtration devices to reduce the Project’s acute impacts on these neighbors or air monitors to measure these impacts.
- Appendix B requires that truck loading bays and truck/trailer parking “shall be designed” to be located farthest from any sensitive receptors “where feasible.” Yet according to the FEIR Project site plans, hundreds of trucks and vehicles will

be parked along the western side of the Property, *mere feet* from residential properties on Marfargoa Road. (See image below.) To the extent the Project site plans suggest that the City has concluded that this mitigation measure in Appendix B is infeasible and will not be applied to the Project, no findings have been provided or substantial evidence cited to support the determination that designing the site to locate truck trailers away from sensitive receptors is infeasible.



Depiction of proposed building and truck parking adjacent to Marfargoa Road residences

Source: Google Earth Overlay of FEIR Figure 2-2 with Marfargoa Road

- Also troubling, despite the Project’s significant impacts on air quality and noise, in addition to the City’s recommended approval of Project buildings up to 100 feet tall, the mitigation to protect the adjacent residential properties appears to be inapplicable to the Project. In Appendix B, the City has imposed a requirement of “a screen wall to the north of the Hoggan property” and stated that “the Hoggan property shall install a masonry or other solid wall on the northern side.” As our Office pointed out in its previous letter, the Sanchez-Hoggan property is an entirely separate project previously approved by Stockton. Thus, this requirement has no relation to the Project at issue here. Instead, it appears that the inclusion of this this mitigation measure is in error and the City is simply cutting-and-pasting from EIRs for entirely different projects. As also asserted by San Joaquin County

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in its March 10, 2022, comment letter, the City has still not adequately analyzed the specific impacts from this Project on the Marfargoa Road residences.

The City should require these feasible mitigation measures to lessen the Project's significant environmental impacts, or provide a good faith, reasoned analysis for why they are not included. We also encourage the City to further explore additional feasible mitigation measures suggested by other stakeholders.

V. CONCLUSION

Our Office previously submitted comments on this Project, including a list of feasible mitigation measures, so that the City would include these measures or provide a reasoned explanation for why it has not included the requested mitigation measures, as required by CEQA. As mentioned above, several other public agencies submitted similar comments regarding the need for Stockton to include the necessary, feasible mitigation measures. Stockton has chosen not to include these feasible mitigation measures to mitigate the Project's significant environmental impacts as required by California law. Our Office therefore urges the City Council to reject this Project as currently designed so that the FEIR can be amended as needed to comply with the applicable legal requirements. Please contact our Office if it has any questions or would like to discuss these comments further.

Sincerely,



SCOTT LICHTIG
Deputy Attorney General

For ROB BONTA
Attorney General