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*Via Email*

November 29, 2023

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**Supplement Comment on the Initial Study (IS) and Mitigated Negative Declaration (MND) the Covelop Project – December 5 City Council Meeting – *Approval of Development Plan (PD22-20), Oak Tree Removal (OTR23-11), Vesting Tentative Parcel Map PR 22-0054, and Conditional Use Permit 23-14 at 2930 Union Road/APN: 025-362-043***

Dear Mayor Hamon and Honorable Councilmembers:

I am writing on behalf of Supporters Alliance for Environmental Responsibility ("SAFER") regarding the Covelop Project, proposed to be located at 2930 Union Road, Paso Robles, CA ("Project"). After careful review of the IS/MND and its accompanying documents, SAFER concludes that the IS/MND fails as an informational document, and that there is a fair argument that the Project may have adverse environmental impacts. Therefore, we request that the City of Paso Robles ("City") prepare an environmental impact report ("EIR") for the Project pursuant to the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000, et seq. SAFER previously submitted comments on November 7, 2023, which was prepared with the assistance of Wildlife Biologist Dr. Shawn Smallwood, PhD, and Daniel Jones of the consulting firm, the RCH Group ("RCH"). SAFER incorporates those comments herein.

## LEGAL STANDARD

As the California Supreme Court has held "[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." (*Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319-320 [citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505].) "Significant environmental effect" is defined very broadly as "a substantial or potentially substantial adverse change in the environment." (Pub. Res. Code § 21068; 14 CCR § 15382.)

The EIR is the very heart of CEQA. *Bakersfield Citizens for Local Control v. City of Bakersfield (*2004) 124 Cal.App.4th 1184, 1214 (*Bakersfield Citizens*); *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927. The EIR is an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return." *Bakersfield Citizens*, 124 Cal.App.4th at 1220. The EIR also functions as a "document of accountability," intended to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." *Laurel Heights Improvements Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392. The EIR process "protects not only the environment but also informed self-government." *Pocket Protectors*, 124 Cal.App.4th at 927.

Where an initial study shows that the project may have a significant effect on the environment, a mitigated negative declaration may be appropriate. However, a mitigated negative declaration is proper *only* if the project revisions would avoid or mitigate the potentially significant effects identified in the initial study "to a point where clearly no significant effect on the environment would occur, and…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." (PRC §§ 21064.5 and 21080(c)(2); *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 331.) In that context, "may" means a reasonable possibility of a significant effect on the environment. (PRC §§ 21082.2(a), 21100, 21151(a); *Pocket Protectors*, 124 Cal.App.4th at 927; *League for Protection of Oakland's etc. Historic Res. v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–05.)

Under the "fair argument" standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency's decision. (14 CCR § 15064(f)(1); *Pocket Protectors,* 124 Cal.App.4th at 931; *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-51; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.) The "fair argument" standard creates a "low threshold" favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. (*Pocket Protectors*, 124 Cal.App.4th at 928.) The "fair argument" standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

> This 'fair argument' standard is very different from the standard normally followed by public agencies in making administrative determinations. Ordinarily, public agencies weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact. The lead agency's decision is thus largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

Kostka & Zischke, *Practice Under CEQA*, §6.29, pp. 273–74.

The Courts have explained that "it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, with *a preference for resolving doubts in favor of environmental review*." *Pocket Protectors*, 124 Cal.App.4th at 928 (emphasis in original).

## DISCUSSION

### I. The IS/MND Fails to Provide an Adequate Project Description, Including its Environmental Setting and Sensitive Land Uses.

Every CEQA document must start from a "baseline" assumption. The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. (*Communities for a Better Envt. v. So. Coast Air Qual. Mgmt. Dist.* (2010) 48 Cal. 4th 310, 321.) Section 15125(a) of the CEQA Guidelines (14 C.C.R., § 15125(a)) states in pertinent part that a lead agency's environmental review under CEQA:

> "…must include a description of the **physical environmental conditions** in the vicinity of the project, as they exist at the time [environmental analysis] is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline **physical conditions** by which a Lead Agency determines whether an impact is significant." (emph. added.)

(See, *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124-125.) As the court of appeal has explained, "the impacts of the project must be measured against the 'real conditions on the ground,'" and not against hypothetical permitted levels. (*Save Our Peninsula*, supra, 87 Cal.App.4th 99, 121-123.)

As applied here, SAFER maintains that the City inadequately described the Project area's existing sensitive land uses and is inconsistent with the Project as described in the City's October 2023 Planning Commission Report. CEQA requires the agency to describe the "environmental setting" of the Project. (CEQA Guidelines §15063(d)(2); *Mejia v. City of Los Angeles*, 130 Cal. App. 4th 322 (2005).) The "environmental setting" is defined as "the physical conditions which exist within the area which will be affected by a proposed project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." (CEQA Guidelines, § 15360; see § 21060.5; *Lighthouse Field Beach Rescue v. City of Santa Cruz*, 131 Cal. App. 4th 1170, 1192 (2005).)

RCH reviewed the Air Quality and Greenhouse Gas Analysis ("AQ/GHG Analysis") by LSA and concluded that the Project failed to provide an adequate legal description of the Project site, omitting critical information of existing sensitive uses and thereby failing to perform the requisite analysis for these sensitive uses. Because of how unreliable the IS/MND is and given the fair argument that the Project will result in a significant adverse impact due to its air quality/GHG emissions, the City must prepare an EIR for the Project. Specifically, the Initial

Study fails to disclose the fact that there are 10 residences within 1,000 feet of the proposed Project site, including four residences within 100 feet of the Project site. As such, the Initial Study fails to include an adequate environmental setting description.

The IS/MND's failure to identify these residences as sensitive uses is alarming because any subsequent health risk analysis, such as the one provided in the AQ/GHG Analysis, is then based on the assumption that no sensitive uses exist. Therefore, "[t]here is no discussion of potential health risk impacts on the approximately 10 single-family residences or planned residential developments within 1,000 feet of the Project site from Project sources that emit toxic air contaminants such as Project construction activities and associated diesel-powered off-road equipment and on-road heavy trucks, diesel-fueled heavy truck internal circulation and idling, wine processing and storage, and on-site mobile equipment supporting the proposed industrial uses." (November 7, 2023 SAFER Letter.)

As such, the City must prepare and circulate additional environmental analysis that adequately captures the correct baseline environmental setting and analyzes the environmental impacts of the Project to the extent that the sensitive land uses are implicated.

## II. There is a Fair Argument that the Project Will Have Significant Air Quality Impacts Because the Project Conflicts with CARB and County APCD Policy.

Where a local or regional policy of general applicability, such as an ordinance, is adopted to avoid or mitigate environmental effects, a conflict with that policy indicates a potentially significant impact on the environment. (*Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903.) Indeed, any inconsistencies between a proposed project and applicable plans must be discussed in an EIR. (14 CCR § 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).)

A Project's inconsistencies with local plans and policies constitute significant impacts under CEQA. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4, 32 Cal.Rptr.3d 177; see also, *County of El Dorado v. Dept. of Transp.* (2005) 133 Cal.App.4th 1376 (fact that a project may be consistent with a plan, such as an air plan, does not necessarily mean that it does not have significant impacts).) *Californians for Alternatives to Toxics v. Department of Food and Agriculture* (2005) 136 Ca1.App.4th 1, 17 ("[c]ompliance with the law is not enough to support a finding of no significant impact under the CEQA."). The recent *Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358 echoes *Pocket Protectors*. These both apply the fair argument standard to a potential inconsistency with a plan adopted for environmental protection. *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099 says an EIR needs to analyze any topic for which a fair argument of significant impact is raised. As applied here, an EIR is

warranted because of the Project's conflict with the California Air Resources Board's ("CARB") policy as well as documented evidence from SLO County APCD that put the City on record notice about the Project's conflict with APCD policies.

First, according to their 2005 Air Quality Land Use Handbook, CARB recommends a 1,000-foot buffer between sensitive land uses and distribution centers that accommodate more than 100 trucks per day. There are approximately 10 single-family residences and planned residential development within 1,000 feet of the Project site. Unfortunately, neither the AQ/GHG Analysis or IS/MND disclose the estimated number of heavy truck trips and resulting emissions from this Project, leading to an inaccurate analysis of estimated emissions and potential health risk impacts posed by the Project on these residences.

In addition, an October 9, 2023 Letter from the SLO County APCD to the City explained that an independent review of the Project "indicate that the construction phase impacts will likely exceed the APCD's significance threshold values identified in Table 2-1 of the CEQA Air Quality Handbook…Therefore, APCD recommends that the City of Paso Robles add a mitigation measure that the project's construction phase will either use low VOC paints (50 g of VOC per liter or lower) or source prefabricated/painted project materials to ensure the project is beneath the APCD's ozone precursor quarterly threshold." (APCD Letter, p. 3.) In response, LSA explained that given their own analysis that concluded the project would fall below the APCD's significance thresholds and would result in less than significant regional air quality impacts, "identification and analysis of mitigation measures suggested in [SLO County APCD's] comment letter is not required."

Even despite rebutting the APCD's comment, the City includes such mitigation measure as a condition of approval, such that "[t]he project's construction phase shell either use low VOC paints (50 g of VOC per liter or lower) or source prefabricated/painted project materials to ensure the project is beneath the APCD's ozone precursor quarterly threshold." (City's Response to Comments, p. 2.) However, upon reviewing the conditions of approval, such mitigation measure is not included, meaning that there is no guarantee that the Project will use low-VOC paints and that the Project's environmental impacts during construction would fall below significance thresholds.

Regardless of LSA's independent findings rebutting the air quality agency's findings, APCD's letter on the record constitutes a fair argument, supported by substantial evidence, that the Project will result in adverse environmental effects. Since the Project is inconsistent with CARB and APCD policy, both of which are intended to protect human health and the environment, this is substantial evidence of a fair argument that that the project may have

significant adverse environmental impacts. As such, approval of the Project under the IS/MND is improper, and the City must instead prepare and analyze Project impacts under an EIR.

### III. The MND's Proposed Mitigation Measures are Neither Enforceable nor are they Feasible and Must be Amended to Better Reflect the Project Needs.

CEQA requires that policies and mitigation measures be enforceable and feasible. (CEQA Guidelines, § 15126.4(a)(1) & (2).) Policies that have no standards cannot be enforced against development projects. Where feasibility of a mitigation measure is called into question, the agency must demonstrate feasibility. In *Sundstrom v County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309, mitigation calling for a future use permit for sludge disposal was improperly deferred because there was no evidence of feasibility in the face of uncertainty: "the record discloses that the applicant presented no plans for sludge disposal and that no solution was readily available." (*Id.* at 308.)

In their response to comments, the City explains that the Initial Study adequately addresses removal and preservation policies for the Oak trees. However, the City's response is irrelevant. SAFER's analysis was not limited to the impacts on the present Oak trees, but rather regarding the trees' habitat value for animal species, including the presence of nesting sites for avian species. The Initial Study, while it acknowledges the process of removing the trees and their condition, does not explain the subsequent impacts that removal would have on wildlife. Therefore, contrary to the City's response, it has not adequately addressed the Project's impacts to biological resources. Furthermore, because the City's response to SAFER's comments regarding mitigation measures were only limited to its biological impacts, the City has failed to address SAFER's comments regarding its mitigation measures for AQ/GHG impacts.

Dr. Smallwood and RCH propose numerous mitigation measures that could vastly reduce the above impacts. These mitigation measures, including but not limited to detection surveys for bats, construction monitoring, habitat loss, pest control, wildlife connectivity, should be analyzed in an EIR and imposed if feasible. Thus, since there is substantial evidence of a fair argument that the Project will have adverse biological and air quality/GHG impacts, an EIR is required to analyze and mitigate those impacts.

## CONCLUSION

For the above reasons, SAFER believes that the IS/MND for the Project is wholly inadequate. SAFER requests that the City prepare an Environmental Impact Report ("EIR") to analyze and mitigate the Project's significant adverse environmental impacts. Thank you.

Sincerely,

Marjan R. Abubo
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