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Via Electronic Mail

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Re: Idaho-Maryland Mine Project Final Environmental Impact Report

Dear Mr. Kelley:

On behalf of Community Environmental Advocates Foundation (CEA Foundation), we respectfully submit these comments in connection with the Final Environmental Impact Report (FEIR) for the Idaho-Maryland Mine Project (Project). As demonstrated in our comments on the Draft Environmental Impact Report (DEIR), the DEIR failed to comply with the California Environmental Quality Act (CEQA), Public Resources Code section 21000 *et seq.* Numerous inadequacies in its scope, project description, and analysis and mitigation of environmental impacts precluded any meaningful review of the Project, and required that the DEIR be revised and recirculated. Our comments had also explained that it would be improper and infeasible to attempt to correct these deficiencies within an FEIR.

Unfortunately, the FEIR has not fixed the myriad issues in the DEIR. In particular, it continues to erroneously exclude the remediation of the Centennial Site from the Project description and environmental baseline. Its alternatives analysis also remains deficient. And it has not adequately addressed the numerous faults in the DEIR's analysis and mitigation of impacts related to waste rock and tailings, hydrology, water quality, air quality, greenhouse gas (GHG) emissions, or energy use. Because the EIR remains deeply flawed, CEA Foundation urges the County to deny the Project and not certify the EIR.

This letter, along with the February 2, 2023 report prepared by Baseline Environmental Consulting regarding air quality, GHG emissions, and energy use (attached as Exhibit A), constitute our comments on the FEIR. Please refer to that report for further detail and discussion of the FEIR’s continued inadequacies.

I. The EIR still fails to describe the Project accurately or to use an accurate baseline by refusing to admit that the Centennial Site remediation is part of this Project.

We previously commented that the DEIR’s project description is flawed because it improperly excludes the proposed remediation of the Centennial Industrial Site (the “Centennial cleanup”) pursuant to a Voluntary Cleanup Agreement with the California Department of Toxic Substances Control (“DTSC”). The DEIR also lacks a legally adequate baseline because it assumes the Centennial cleanup will have been completed as the baseline to analyze certain impacts, while using existing conditions—*i.e.*, without the cleanup—on the site as the baseline to analyze other impacts. The FEIR failed to correct either of these problems.

A. The FEIR does not correct the improper project description, but instead continues to omit the Centennial cleanup.

The DEIR’s project description is legally inadequate because it excludes the required cleanup of existing contamination on the Centennial Site, which is plainly part of the Project. FEIR p. 2-798, 2-803-05. CEQA defines a “project” broadly to include the “whole of an action” with the potential to result in a physical change in the environment, rather than “each separate governmental approval.” CEQA Guidelines § 15378(a), (c); *Nelson v. County of Kern*, 190 Cal.App.4th 252, 271 (2010) (the term “project” is “broadly construed and applied in order to maximize protection of the environment.”) Where two actions are integrally related or where one is conditioned on another, they must be considered together as one project; segmenting their analysis is a way to evade a complete impact analysis, and is therefore forbidden. *Nelson*, 190 Cal.App.4th at 271.

Courts have described several ways that actions can be related such that they are deemed a single project under CEQA. See *POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 74 (“[T]here are different ways actions can be related.”). For example, one action is considered part of the remainder of the project when that action is “among the ‘various steps which taken together obtain an objective,’ or when it is “part of a coordinated endeavor.” *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1226, 1228 (internal citation omitted).

Additionally, activities are related and constitute a single project when they are “related in 1) time, 2) physical location, and 3) the entity undertaking the action.” *Id.* at 1227.

Based on these factors and considerations, the Centennial cleanup is plainly part of the IMM Project. First, it is an integral step to achieving the IMM Project’s objectives. The DEIR lists as a project objective the aim to “[i]ncrease the usable land at the Centennial Industrial Site to allow its future use as industrial land.” DEIR at 3-12. Accordingly, the applicant proposes to dump the approximately 500 tons of waste rock and tailings it will generate daily on the Centennial and Brunswick sites as “engineered fill.” DEIR at 3-19; *id.* at 3-29; *see also* FEIR at 2-48 (defining “engineered fill” as “barren rock and sand tailings”). The engineered fill would be graded into pads intended to support future industrial development on both sites. DEIR at 3-29. However, the Centennial site cannot be used as a dumping ground for “engineered fill” from the IMM Project until it has been remediated pursuant to a DTSC-approved Remedial Action Plan (RAP). DEIR at 3-10. The RAP similarly reveals that the objective of the Centennial cleanup is to prepare the property for use to place “additional mine waste (mine rock and crushed sand tailings) resulting from future mining operations.” *See* Exhibit C to Shute Mihaly & Weinberger March 30, 2022 Comments on DEIR (Draft Final RAP) at xv. Accordingly, the Centennial cleanup is one of the steps to obtaining this Project objective. *See Tuolumne County*, 155 Cal.App.4th at 1226.

Furthermore, the review process and proposed timeline for the Centennial cleanup are closely related in time to the review process and proposed start of the IMM Project. The applicant submitted the Centennial RAP January 25, 2021. *See* Exhibit C to Shute Mihaly & Weinberger March 30, 2022 Comments on DEIR (Draft Final RAP). Around that same time, the applicant was beginning the environmental review process for the IMM Project: the County issued the Notice of Preparation on July 17, 2020, and it issued the DEIR in December 2021. And, as evidenced by the fact that the DEIR assumes the Centennial cleanup will have already occurred, the applicant aims to complete the cleanup before the IMM Project commences. Accordingly, this factor shows that the Centennial cleanup is closely related to the IMM Project. *See Tuolumne County*, 155 Cal.App.4th at 1227.

The physical location of the Centennial cleanup is also closely related to the IMM Project: the Centennial site comprises the physical site of the IMM Project. DEIR at 3-1, 3-12. Finally, the same entity is undertaking both the Centennial cleanup and the IMM Project: Rise Grass Valley, the project applicant. *Compare* Exhibit F to Shute Mihaly & Weinberger March 30, 2022 Comments on DEIR (Department of Toxic Substances Control, Voluntary Cleanup Agreement) at 1 (naming Proponent as Rise Grass Valley,

Inc.) *with* DEIR at 1-1. Accordingly, under any test used to determine whether an action is part of a project for purposes of CEQA, the Centennial cleanup is plainly part of the IMM Project. *See Tuolumne County*, 155 Cal.App.4th at 1227.

Nevertheless, the FEIR merely restates the same faulty justifications from the DEIR for its decision to piecemeal the review of the Centennial cleanup from the IMM Project. FEIR at 2-7 to 2-10. These justifications remain unsatisfactory.

First, the FEIR contends that the IMM Project is “designed to proceed whether the DTSC clean-up project is completed or is not completed.” FEIR at 2-8. Relatedly, the FEIR contends that the Centennial cleanup has independent utility, serves a different purpose, and can be implemented independently of the IMM Project. *Id.* at 2-9. These assertions ignore the fact that one of the IMM Project’s objectives is to reclaim the Centennial Site for future industrial use. DEIR at 3-42, 3-46. The assertions are also belied by the fact that all of the alternatives considered in the DEIR assume the Centennial cleanup has occurred and the DEIR assumed the Centennial cleanup had occurred as the baseline to analyze several environmental impacts, as discussed further below.

Accordingly, the FEIR’s citation of *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1223, only serves to reinforce that the Centennial cleanup is part of the IMM Project. *See* FEIR at 2-8. According to the FEIR, this case provides that one of the only circumstances in which two activities will be considered a single project under CEQA is when development of the project under review requires or presumes completion of another activity. *Id.* However, that is *exactly* the circumstance here: the DEIR presumes in much of its analysis that the Centennial cleanup will have occurred. *See* DEIR at 1-6 to 1-7; *id.* at 6-16 to 6-42.

Second, the fact that the EPA identified the Centennial site for possible remediation before the applicant owned the IMM Project site, and that discussions about the Centennial cleanup “began between the U.S. EPA, the DTSC and the site owner prior to any application for the IMM Project having been submitted” (FEIR at 2-8) is immaterial to whether the Centennial cleanup is part of the IMM Project. Whether there were amorphous “discussions” and “coordination” among the parties does not change the fundamental fact that the DEIR includes as a project objective the use of the Centennial site, and that it presumes the Centennial cleanup will have occurred and relies on that presumption in its impacts and alternatives analyses.

Third, the FEIR says, the Centennial cleanup is under DTSC's control, whereas the IMM Project is under the County's control. FEIR at 2-8. However, this fact is irrelevant for purposes of defining the "project." Indeed, the CEQA Guidelines expressly state that a project comprises the "activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." CEQA Guidelines § 15378(c). Courts have elaborated that this requirement is meant to prevent the exact circumstances present here: a project proponent filing "separate environmental reports for the same project to different agencies thereby preventing 'consideration of the cumulative impact on the environment...'" *Nelson*, 190 Cal.App.4th at 271 (internal citation omitted). Here, the applicant filed its EIR with the County for the IMM Project, and it entered into the Voluntary Agreement and submitted the Draft Final RAP to the DTSC for the Centennial cleanup. Doing so does not change the fact that these are part of the same project for CEQA purposes, and that they must be analyzed together.

The FEIR's reliance on *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, is unavailing. *See* FEIR 2-9. There, the Court of Appeal upheld an EIR for the City's proposed development project on Treasure Island that would occur after the Navy had cleaned up hazardous materials on the project site. 227 Cal.App.4th at 1056. The cleanup was "the sole responsibility of the Navy," and the EIR assumed that it would be completed before the property was conveyed to the City. *Id.* at 1056-57. However, the EIR also contemplated the possibility that the City might assume responsibility for remediating certain sites on the property. *Id.* at 1057. Accordingly, although the possibility of any cleanup effort by the City was "abstract and speculative," the EIR nevertheless included a contingent mitigation measure in case the City were to assume control of the cleanup. *Id.* at 1058. The court upheld the City's deferral of CEQA analysis for any such potential cleanup, noting that the City could not "possibly know whether it will be called upon to undertake a more active role" in the cleanup. *Id.* at 1058-59.

Treasure Island does not help the County, because that case did not address whether the Navy's cleanup should have been part of the project being analyzed in the EIR. Instead, the court was addressing the question whether the City had properly disclosed how it would manage and dispose of hazardous materials in the event it took responsibility for part of the cleanup. *Id.* at 1058-59.

Additionally, to the extent the court in *Treasure Island* sanctioned reviewing the cleanup separately from the later development project, the facts of that case are distinct. There, the Navy, rather than the project proponent, was responsible for cleaning up the

site. *Id.* at 1056-57. Here, the project applicant is responsible for both the Centennial cleanup and the IMM Project. Furthermore, the Navy cleanup was already under way in *Treasure Island*, and nearly half of the project site had been cleaned up or was uncontaminated. *Id.* at 1056. And, the cleanup activities would occur “with or without the Proposed Project.” *Id.* Here, in contrast, it is unclear whether the Centennial cleanup will be approved let alone whether it will be completed during the lifetime of the IMM Project. Accordingly, while it might have been reasonable to assume the Navy cleanup would occur in *Treasure Island*, there is no similar reason to assume that the Centennial cleanup will occur, nor to rely on that assumption to analyze impacts or alternatives.

Finally, in the alternative, even if it were appropriate to sever the Centennial Cleanup from the IMM Project, the DEIR and FEIR would have erred by failing to analyze the cumulative impacts of these projects together. CEQA requires the “cumulative effects of two separate projects which are ‘individually limited but cumulatively considerable’ to be addressed in the EIR.” *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 733 (citing Pub. Resources Code § 21083(b)). Because the Centennial Cleanup was severed from the project description, and the combined effects of the Cleanup and the IMM Project were not considered in the DEIR or the FEIR, these documents provide an “inaccurate assessment” of the IMM Project’s impacts. *See id.* at 733.

B. The FEIR does not correct the inaccurate and shifting baseline, which assumes for some impact analyses that the Centennial Cleanup is complete, and for others that it is not.

As we explained in our comments on the DEIR, CEQA requires that an EIR include an accurate description of a project’s environmental setting, which provides “the baseline physical conditions by which a lead agency determines whether an impact is significant.” CEQA Guidelines § 15125(a). This baseline “should describe physical environmental conditions *as they exist at the time the notice of preparation is published.*” *Id.* (emphasis added). “Without a determination and description of the existing physical conditions on the property at the start of the environmental review process, the EIR cannot provide a meaningful assessment of the environmental impacts of the proposed project.” *Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 119. CEQA also prohibits the use of “hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans, as the baseline.” CEQA Guidelines § 15125(a)(3).

Here, the DEIR pretended that the Centennial Site cleanup was already completed in its analysis of aesthetic impacts, agriculture and forestry resources, biological resources, hazards and hazardous materials, and wildfire risk. DEIR at 1-6 to 1-7. However, in the analysis of other impact areas and elsewhere, the DEIR and FEIR acknowledged that the Centennial Site cleanup might not be approved by DTSC. *See, e.g.*, DEIR at 1-3, 3-26; FEIR at 2-8 (acknowledging the cleanup might not be completed within the life of the IMM Project).

In our comments on the DEIR, we explained that it was improper to define existing conditions with reference to conditions “expected when the project becomes operational” because there is no guarantee that the Centennial site cleanup will have even begun—let alone been completed—before the Project begins operations. FEIR at 2-801. The DEIR *itself* acknowledges that the cleanup may not be approved by DTSC, and may never be completed. DEIR at 1-3, 3-26. Accordingly, the DEIR’s use of a hypothetical baseline for various impact areas in which the Centennial cleanup has already occurred renders its analysis legally inadequate and unsupported by substantial evidence. FEIR at 2-801.

The FEIR contends that it was not using a future conditions baseline, but instead the “conditions expected when the project becomes operational.” FEIR at 2-295. However, there is no evidence that that the Centennial cleanup will have occurred such that it can be “expected” by the time the Project is operational.

The FEIR does nothing to correct this fundamental deficiency in the Project’s baseline. Instead, the FEIR doubles down on its use of an inconsistent baseline for the DEIR’s impact analyses. According to the FEIR, “the baseline for the Centennial Site was adjusted because the proposed project could not possibly impact that site unless and until the DTSC cleanup project has already been completed.” FEIR 2-924. Therefore, the FEIR says, “presenting the Project’s impacts to the Centennial Site based on the pre-DTSC Project conditions would be misleading . . . and would not represent actual project impacts.” *Id.*

To the contrary, it is the EIR’s strategy of separating the Centennial cleanup from the IMM Project that it is misleading. The EIR truncates its environmental analysis and only considers a portion of the impacts attributed to the IMM Project, without considering the considerable impacts of the Centennial cleanup. By assuming the Centennial cleanup has already been completed for purposes of defining the baseline to analyze impacts—while at the same time claiming that it may never happen and is not part of the Project—the EIR ignores the impacts caused by the Centennial cleanup. *See*

Woodward Park Homeowners Assn., Inc. v. City of Fresno (2007) 150 Cal.App.4th 683, 707 (“If an EIR for a construction project on vacant land uses something other than vacant land as its baseline, the EIR will report only a portion of the impacts the project will have.”).

Additionally, the EIR’s inconsistent baseline precludes a consistent description of the IMM Project’s impacts. CEQA allows the use of multiple baselines only if the EIR compares the project to *each* of the baselines. See *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 707. For example, in *Woodward Park* the EIR acknowledged that the existing condition of the project site was a vacant lot, but then in many instances it compared the project’s impacts to those of the maximum buildable development under zoning and plan designations. 150 Cal.App.4th at 707. Had the EIR actually evaluated the project’s impacts “in relation to *both* a vacant lot *and* a large development permissible under existing zoning and plan designations,” the court found that the treatment of the baseline would have been legally correct. *Id.* Instead, the EIR largely compared the proposed project to buildout possible under the zoning, “combined with a scattered, partial discussion of some of the project’s impacts relative to vacant land.” *Id.* at 707-08. Accordingly, the EIR did not present a “clear or consistent description” of the project’s impacts compared with the effects of leaving the land in its existing state.” *Id.* at 708.

The FEIR also contends it “explicitly addresses” the situation in which the cleanup might not occur by analyzing the impacts of placing engineered fill on the Brunswick Site but not the Centennial Site, and hauling the remaining fill to local and regional markets. FEIR at 2-925 (citing DEIR 1-3). In response to comments noting that the DEIR failed to analyze the impacts if the Centennial Site were not available to receive 1.6 million tons of mine waste, the FEIR merely added a condition of approval that would require the use of electric trucks to transport waste rock and engineered fill offsite before 2033. FEIR at 2-925-26. However, this condition assumes the use of electric vehicles is a panacea for all potential impacts caused by hauling this waste rock offsite. To the contrary, there may be impacts to water quality caused by the debris left by electric vehicles traveling greater distances to transport the waste rock; air quality impacts caused by dust and debris from the vehicles; GHG impacts associated with producing the electricity for the vehicles, and more. The County should revise the DEIR to analyze these potential impacts if the Centennial site is unavailable.

The FEIR asserts that our comment letter “mistakenly reference[d] CEQA Guidelines Section 15125(a)(2), for ‘future conditions’ baselines, but the DEIR relied on CEQA Guidelines Section 15125(a)(1), which allows use of a baseline consisting of

‘conditions expected when the project becomes operational.’” FEIR at 2-925. According to the FEIR, the reliance on expected conditions was appropriate because “it is reasonably expected that the DTSC cleanup project will be complete with the project becomes operational.” *Id.* This response is not only belied by the FEIR’s acknowledgements elsewhere that the DTSC cleanup might not be completed at all within the 80-year term of the IMM Project, but it also misapprehends our comments on the DEIR.

As we explained, despite asserting that it was *not* using a future baseline, the DEIR in fact *does* use a future baseline when it assumes that the Centennial Site Cleanup has occurred. Comments at 7-8. As the CEQA Guidelines make clear, projected future conditions are simply “those beyond the date of project operations.” Guidelines § 15125(a)(2). Because the FEIR and DEIR have acknowledged that the post-remediation baseline for the Centennial Site may not occur until after Project operations have begun, (DEIR at 1-3, 3-26), they are using a projected future conditions as its baseline.

Accordingly, the FEIR *must* satisfy the requirements for a future baseline, which include demonstrating “with substantial evidence that use of existing conditions would be either misleading or without informative value to decision-makers and the public.” Guidelines § 15125(a)(2). The EIR may not avoid these requirements simply by asserting that it does not purport to use a future baseline. *See* DEIR at 1-4, FEIR at 2-925. Similarly, the FEIR may not avoid the requirements to justify its use of a future conditions baseline by contending that it expects the Cleanup project to be complete by the time the IMM project becomes operational, especially when it has also acknowledged the opposite is also possible. *See* FEIR at 2-925; *id.* at 2-10.

II. The FEIR does not correct the DEIR’s deficient alternatives analysis.

CEQA requires that an EIR consider a “reasonable range” of alternatives “that will foster informed decision-making and public participation.” CEQA Guidelines § 15126.6(a). These alternatives must “feasibly attain most of the basic objectives of the project” but “avoid or substantially lessen any of the significant effects of the project.” *Id.* The DEIR’s alternatives analysis was flawed both because it failed to find certain impacts significant, and therefore it did not study alternatives that would avoid those impacts, and also because it failed to study alternatives that would reduce any of the Project’s significant impacts on aesthetics, noise, and transportation to less than significant levels. DEIR at 6-44; FEIR at 2-853 to 2-854.

The FEIR simply doubled down on the DEIR's alternatives analysis, reciting the number of alternatives it considered and rejected and those that it analyzed in detail. FEIR 2-924 (noting that the DEIR "considered nine different alternatives," five of which were rejected, and four of which were analyzed in detail). The County "believes" the DEIR's approach, and specifically the *number* of alternatives it considered, "provides a reasoned choice of alternatives for consideration by the public and decisionmakers." *Id.* However, the number of alternatives has no bearing on whether the EIR actually considered alternatives that could reduce the Project's significant impacts. As commenters pointed out, the DEIR's alternatives would not reduce *any* of the Project's significant impacts. FEIR at 2-853 to 2-854. For that reason, the EIR's analysis of alternatives did not permit a reasoned choice about the IMM Project.

In response to comments that the DEIR failed to find certain impacts significant, the FEIR contends these comments did not explain why the DEIR reached the wrong conclusion about these impacts. FEIR at 2-946. However, this response ignores the comments' copious discussion about the deficiency of these impact analyses. *See, e.g.*, FEIR at 2-809 to 2-817 (explaining the deficiency in the DEIR's analysis of hydrology and water quality impacts); FEIR at 2-825 to 2-837 (explaining the deficiency in the DEIR's analysis of hazards); FEIR at 2-827 to 2-833 (explaining the deficiency in the DEIR's analysis of air quality impacts); *see also* FEIR at 2-853 (explaining that the DEIR's incorrect significance conclusions tainted its alternatives analysis).

Additionally, all the alternatives, including the no-project alternative, assumed that remediation of the Centennial site would occur. DEIR at 6-16 to 6-42; FEIR at 2-855. The FEIR contended there was no reason its alternatives should *not* assume that the Centennial site is remediated. FEIR at 2-947 ("The commenter does not explain why the DEIR must assume the DTSC project is not completed for the purpose of analyzing alternatives to the project."). This assertion is belied by the FEIR *also* acknowledging the very real possibility that "Project activities would not be allowed on the Centennial Site" if the cleanup is not completed. FEIR at 2-10. As described above, the EIR also has strenuously denied that the IMM Project relies on the Centennial cleanup being completed. If that is the case, and given the potential that the cleanup may never be approved, let alone completed, the EIR should study alternatives that do not assume that the Centennial cleanup will be completed.

The DEIR also defined the Project so narrowly that very few alternatives could reasonably meet its objectives. FEIR at 2-854. "The purpose of an EIR is *not* to identify alleged alternatives that meet few if any of the project's objectives so that these alleged alternatives may be readily eliminated." *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089. Attempting to defend the Project's narrowly-defined

objectives, the FEIR contended that setting a particular ore production level as an objective was necessary in order to feasibly finance and construct a mine “that will take in excess of 100 million dollars to construct.” FEIR at 2-946. However, this circular logic simply assumes Project as described in the DEIR will be built and will cost 100 million dollars, thereby failing to consider alternatives that would be cheaper to construct and therefore could be feasible at lower production levels. Furthermore, this response ignores the CEQA Guidelines requirement to focus on alternatives that would avoid significant effects, even if those alternatives “would be more costly.” Guidelines § 15126.6(b).

Additionally, in contending that it was necessary to achieve a certain ore production level, the FEIR ignored evidence showing that a mining project with lower production would still be economically viable. An independent economic analysis of the proposed Idaho-Maryland Mine conducted for the County showed that the project would be profitable even assuming very low reserves. *See* Exhibit B (RDN, Robert N. Niehaus, Inc., “Economic Impact of the Proposed Idaho-Maryland Mine Project,” Nov. 15, 2022, at 52-53). This analysis assessed a “high-end scenario,” based on assumed yearly production of 108,400 ounces of gold. *Id.* at 52. Under this scenario, the mine would earn \$179.8 million annually, with \$68.3 million in annual expenses, resulting in a net annual income of \$111.5 million. However, even under the “low-end scenario,” in which the mine would produce only 26,500 ounces of gold annually, and earning only \$44 million annually and incurring annual expenses of \$16.7 million, the mine would still be profitable, netting an annual \$27.3 million. *Id.* at 53. Furthermore, even assuming production were cut in half from the low-end scenario to \$22 million, and conservatively assuming expenses remained the same, at \$16.7 million, the mine operations would *still* yield \$5.3 million in net annual income, reflecting a roughly 25% profit. *See id.* Accordingly, the FEIR should have included a more flexible objective with respect to the project’s output.

The FEIR also defended the objective to locate the project on property owned by the applicant with existing access to underground workings, because economical quantities of gold “exist in very limited locations.” FEIR at 2-947. However, this response ignores the information in the DEIR itself that sets out numerous mineral resource zones containing in Western Nevada County alone. DEIR at 6-9 to 6-10. The response also fails to justify why the IMM Project must take place on property with existing access to underground workings—an objective that unnecessarily narrows the field of possible project sites.

The FEIR’s attempt to justify only the Project’s first two objectives also ignores the eight other project objectives that impermissibly narrow its scope and thus the range of potential alternatives. For example, the objective to “[u]tilize existing underground

access points” limits the project to properties with such infrastructure, while the objective to “[p]rovide property owners along East Bennett Road a reliable and clean potable water source” narrows the possible locations to one near this road. DEIR at 3-12.

The FEIR also contends that it has satisfied the Guidelines section 15126.6(b) requirement to focus on alternatives that would avoid or substantially lessen any significant effects “even if these alternatives would impede to some degree the attainment of the project objectives” because the DEIR “does include discussion of alternatives that do not satisfy all project objectives.” FEIR at 2-946 to 2-947. However, this interpretation of the Guidelines ignores the *most salient* requirement of that Guideline: that the alternatives considered would avoid or substantially lessen significant effects. Guidelines § 15126.6(b). Here, the EIR examined alternatives that did not avoid or substantially lessen the Project’s significant effects on aesthetics, noise, and transportation. Instead, the County should revise the DEIR to include an analysis of alternatives that would actually reduce these significant effects

The FEIR also attempted to refute commenters’ argument that it should have selected Alternative 2 as the environmental superior argument. This Alternative would reduce the Project’s significant impacts in nine of the ten categories found to be significant. DEIR at 6-42. However, according to the FEIR, while this Alternative would “lessen some traffic impacts,” it would not “substantially lessen” environmental impacts, and therefore it does not preclude approval of the Project. FEIR at 2-948 to 2-949 (citing DEIR 6-21 to 6-29). This response, which focuses inexplicably on traffic impacts, ignores the fact that the Alternative would reduce nine out of ten significant impacts.

Further, the Guidelines do not define “substantial,” nor do they require an alternative to reduce an impact from significant to less than significant in order to substantially lessen an impact. *See* CEQA Guidelines § 15021(a)(2). Here, the County’s own description of Alternative 2 explains that it would have “fewer” impacts in nine of ten impact areas, without specifying the degree of these decreases, i.e., whether they would be “substantially less.” *See* DEIR at 6-44. Accordingly, it is disingenuous to claim that these reductions are not “substantial” enough for CEQA’s purposes. Finally, the County’s interpretation ignores its fundamental duty under CEQA to “avoid or minimize environmental damage where feasible.” CEQA Guidelines § 15021(a).

III. The FEIR continues to defer the testing required to ensure that waste rock and tailings will not result in harmful discharges, and it still does not have a plan for safely storing this fill material on site pending its sale and use offsite.

The DEIR includes a plan to utilize waste rock and mine tailings generated by the Project as “engineered fill” on the Centennial and Brunswick sites, and then, once these sites are at capacity, to sell these materials for use as construction aggregate in the region. FEIR 2-59, 2-826. This waste rock has the potential to be contaminated. As a result, whether these materials are used as engineered fill on the Centennial and Brunswick sites, are sold offsite, or are stockpiled onsite pending some further action, they risk discharging contaminants and causing water quality issues.

The DEIR found that the impact to water quality from mine waste was potentially significant, and that mitigation is required for this impact. FEIR at 2-45. Proposed mitigation includes submitting a Report of Waste Discharge to the Regional Water Quality Control Board, and obtaining approval of a Waste Discharge Requirements permit before placing mine waste as engineered fill. FEIR 2-60 to 61. According to the FEIR, significant testing will be required to obtain Waste Discharge Requirements permit from the Water Board. FEIR at 2-45. As part of this process, the Water Board will determine the appropriate mining waste classification for the proposed engineered fill. FEIR at 2-61. Mine waste is classified pursuant to regulations as either Group A, Group B, or Group C, based on an assessment of the risk of water quality degradation. 27 C.C.R. § 22480(b). According to the FEIR, testing done for the DEIR shows that the waste rock from the IMM Project will likely be considered Group C mining waste, FEIR at 2-47, which is waste from which any discharge would be in compliance with the applicable water quality control plan. 27 C.C.R. § 22480(b)(3).

However, commenters pointed out that the waste characterization conducted on the Project site—which relied on two samples, from a total of 11 feet of drill core, to characterize waste rock generated during the entire 80-year life of the project (FEIR 2-502)—was inadequate, and that further testing was required to ensure that the use of fill would not impact water quality. FEIR 2-433. The FEIR denies the need for additional testing, relying on the inadequate testing done to date to assert that “mine materials will *likely* be classified as Group C mine waste.” FEIR 2-59 (emphasis added). This response ignores commenters’ concerns that the testing done to date has been insufficient. The FEIR also deferred any further testing to the waste characterization process done as part of the process of submitting a Report of Waste Discharge to the Water Board. *Id.* at 2-47.

The FEIR also refused to plan for the potential scenario that the waste rock is not fit for sale and must instead be stored onsite. *See* FEIR at 2-507. The Central Valley

Regional Water Quality Control Board commented that it was “concerned with the general assumption” that “a significant volume of the mining waste produced during the life of the Project will be suitable for off-site sale and use . . . with limited regulatory restrictions (i.e., Group C mining waste).” FEIR at 2-233. As a result, the Water Board noted that the County “should examine[]” the “alternative scenario that the mining waste is not suitable for off-site use.” *Id.* The FEIR brushed off this concern, asserting that its testing showed that this situation “is not reasonably expected to occur.” FEIR at 2-238 to 239. Elsewhere, the FEIR affirmed that “[n]o stockpiles of fill material are proposed on-site,” failing to explain its plan to store these materials pending sale or in the event they are not fit for sale. FEIR at 2-564.

The FEIR modified Mitigation Measure 4.8-1(e) to state that only mining products previously classified as Group C mining waste will be utilized for local and regional construction projects. FEIR 2-60. However, this modification to the Mitigation Measure does not assuage concerns that waste that does not qualify as Group C waste could nevertheless be stored onsite or used as “engineered fill” at the Brunswick and Centennial Sites. *See* FEIR 2-61 (the Mitigation Measure was modified to add the sentence, “The applicant shall not sell or utilize waste rock and tailings from the Project for construction aggregate or fill purposes *offsite* (i.e., sites other than the applicant[']s Brunswick and Centennial sites) unless such material has been tested and confirmed to qualify as Group C mining waste.”) (emphasis added).

The Mitigation Measure should be modified to also prohibit the applicant from using waste rock and tailings for fill purposes *on the Brunswick and Centennial Sites* unless it is tested and confirmed to qualify as Group C waste. The Water Board’s comments on the DEIR affirmed this point, noting that the waste rock “being proposed for engineered fill will need to be characterized as Group C mining waste . . . prior to its use as engineered fill.” FEIR at 2-233. And yet, in response to the Water Board’s comment, the FEIR merely deleted a statement that the “engineered fill would be considered a Group C mining waste,” (FEIR at 2-237), and the FEIR’s change to Mitigation Measure 4.8-1(e) gives no indication that it will require the waste rock used as fill on the Brunswick and Centennial sites to qualify as Group C waste.

The FEIR avoids a full evaluation of water quality impacts related to the use of waste rock and mine tailings as engineered fill by stating that the project proponent would be required to submit a Report of Waste Discharge (RoWD) and that Waste Discharge Requirements (WDR) before the mine waste is placed. FEIR 2-516. However, compliance with existing policies and regulations does not excuse the agency from describing project activities or from analyzing resulting impacts. *See Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1108-09

(environmental effect may be significant despite compliance with such requirements). To simply assert that water quality standards will be met is not sufficient for the public or decisionmakers to assess either the adequacy of water treatment methods proposed or the adequacy of the standards proposed for the discharge permit.

Finally, to avoid mining waste rock that is contaminated, the FEIR also asserts that the applicant will collect samples before mining, and that “[r]ock types that are not suitable for offsite sale *would likely* not be mined, and if mined, the waste rock would be placed underground.” FEIR 2-60 (emphasis added). This flimsy prediction of what *might* happen is no assurance that the Project will not result in contaminated waste rock with the potential to cause water quality issues as it sits onsite before being shipped offsite, or is used as fill on the Brunswick and Centennial sites. Furthermore, the EIR’s statement that the applicant will simply place contaminated waste rock that is unsuitable for sale “underground” provides no binding guarantee about how this waste will be treated to ensure it does not result in water quality issues. The EIR must provide a clear plan for how it will safely store waste rock that does not qualify as Group C waste fit for sale that does not risk contaminating water onsite.

IV. The FEIR does not address the basic deficiencies in the DEIR’s groundwater and water quality analyses.

The EIR’s existing groundwater analysis remains deeply—and admittedly—flawed. The FEIR proposes to correct these errors by eventually doing the necessary analysis, but only after the project has been approved. This is inadequate. The EIR itself needed to have included a current and accurate environmental baseline. Without one, the EIR’s impacts analysis and mitigation measures also are necessarily defective. Moreover, the FEIR has not adequately responded to concerns commenters raised with the soundness of its groundwater level modeling methodology.

A. The EIR’s outdated groundwater baseline deprives its impacts and mitigation analyses of any value.

The most recent groundwater well level measurements in the EIR are from 2007. These data were collected by the Idaho-Maryland Mining Corporation (IMMC) from 79 private domestic wells during two monitoring periods, from 1995 through 2001 and again from 2003 through 2007. *See* DEIR 4.8-11; DEIR App. K.2 at 26–28. The DEIR relied upon these data to construct its groundwater level baseline and to calibrate its modeling of groundwater impacts. (*See* FEIR 2-74.) Several commenters contested this approach, explaining that fifteen-year-old data cannot possibly furnish an accurate environmental baseline. *See id.* at 2-73, 2-76.

The FEIR does not meaningfully refute these criticisms. In fact, it acknowledges that there are major gaps in the existing data. *See* FEIR 2-74 “[N]o groundwater level measurements have been completed since 2007, which creates some uncertainty to [*sic*] the predicted impact to percentage of water column in domestic well.”). But it claims that all these deficiencies will be cured through the implementation of a groundwater monitoring plan—*after* the EIR has been certified and the Project approved. *See id.* Under this plan, “water-level monitoring data” will be “collected before commencement of dewatering,” and any “[i]mpacts to domestic water wells will be measured against those current baseline measurements and not historic water levels.” *Id.*; *see also id.* at 2-76 (“This water level monitoring [under the post-approval plan] will provide the baseline levels prior to dewatering. The collection of 12 months of baseline data allows for the seasonal change in water levels at each location to be captured.”).

This is not so much an explanation as it is an admission that the EIR is legally deficient. The FEIR cannot postpone to some opaque post-CEQA process the articulation of the environmental baseline that should have been the foundation of the EIR’s impacts analysis. *See County of Amador v. El Dorado Cnty. Water Agency* (1999) 76 Cal.App.4th 931, 952 (“Before the impacts of a project can be assessed and mitigation measures considered, an EIR must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”); CEQA Guidelines §§ 15125, 15126. This is not, as the FEIR presents it, simply a matter of deferred mitigation. *See* FEIR 2-931 through -932, 2-951 through -952. It is the deferral of the EIR’s entire groundwater impacts analysis.

That postponement would be improper under any circumstances. *See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 441 (“CEQA’s informational purpose is not satisfied by simply stating information will be provided in the future.” (citation and internal quotation marks omitted)). But it is especially unjustifiable here, given that the FEIR offers no reasons for why new well level data cannot be collected and analyzed until after the Project is approved. *See* FEIR 2-74, 2-76 (acknowledging comments that said new groundwater data needed to be incorporated within the EIR, but not explaining why this could not or need not be done).

Because the EIR lacked “an adequate baseline description” of existing groundwater levels, it was “impossible” for the EIR to have provided a reasoned “analysis of impacts, mitigation measures[, or] project alternatives.” *County of Amador*, 76 Cal.App.4th at 953. For example, the EIR could not reasonably conclude that the Project’s potentially significant impacts to domestic groundwater wells would be limited to the East Bennett area, when that impacts modeling was based on admittedly deficient inputs. *Contra* FEIR 2-79. Nor could it accurately predict the extent of the Project’s one-

foot “drawdown isopeth,” and thus the extent of the properties that should be eligible for the newly proposed Domestic Well Monitoring Program. *Contra* FEIR 2-79 through -80. As the FEIR itself correctly observes, “speculation” and “unsubstantiated opinion . . . does not constitute substantial evidence.” (*Id.* (quoting CEQA Guidelines § 15384).); *see also Kings Cnty. Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 721–23 (mandating an EIR must consider environmental impacts over the entire area where one might reasonably expect them to occur). But “speculation” is all the EIR rests upon until there is an adequate inventory of existing environmental conditions.

Elsewhere, the FEIR also implies that the newly collected data will not reveal anything different, in any event, since the existing domestic well data do not display any “long-term increasing or decreasing trends.” FEIR 2-74; *see also id.* at 2-93, 2-519, 2-952,¹ 2-5824. This secondary response is no more compelling. First, the FEIR’s idle speculation about what current measurements might show is no reason to delay their collection. Second, datapoints collected sporadically over a twelve-year period ending over fifteen years ago is hardly a basis from which to gauge “long-term” trends. This is especially true when climatic conditions between 1995 and 2007 were significantly and consistently wetter than over the next fifteen years.² The region’s mean annual precipitation from 1995 to 2007 was approximately 57.63 inches—over 8 inches more than the 49.33-inch annual average from 2008 through 2022.³ And the 2008 through 2022 period saw *five* years that were drier (2008, 2013, 2015, 2020, 2022) than the driest single year between 1995 and 2007 (2007).⁴ These included the driest single year on record (2013), and four of the five driest years for which near-complete data are available (2008,

¹ This passage, in particular, alleges that new data would not change the DEIR’s groundwater impact analysis because that analysis “was based on a computer model of groundwater wells under existing (pre-dewatering) conditions.” FEIR 2-952. This is incorrect. The existing model—as the FEIR and DEIR elsewhere admit—was calibrated using well level data that are at least fifteen years old. Without valid current data, it is entirely speculative to claim that “[a]dditional measurements would not substantially inform or change that [impacts] analysis.” *Id.*

² All calculations here were derived from the same dataset that the DEIR used. *See* Western Regional Climate Center (WRCC), Grass Valley No. 2, CA – Total of Precipitation (Inches) (last updated Feb. 16, 2023), <https://wrcc.dri.edu/cgi-bin/cliMAIN.pl?ca3573>. A printout of this dataset is included as Exhibit C to this letter.

³ This is also about 4.5 inches more than the 52.18-inch annual mean for the entire available reporting period (1966 through 2022). *See* Exhibit C (WRCC dataset).

⁴ *See* Exhibit C (WRCC dataset).

2013, 2015, and 2020).⁵ It strains credulity to assume that whatever “trends” in groundwater levels may or may not have emerged between 1995 and 2007 necessarily held up under these intervening circumstances.⁶

The FEIR also suggests that groundwater level data from individual “domestic wells” suffer from “uncertainties” that render the data unusable—or at least much less useful—for modeling purposes. FEIR 2-77, 2-953; *see also id.* at 2-955 through -956. This seems to be the basis for the FEIR’s insistence that new groundwater monitoring wells must first be drilled before any accurate baseline information can be collected. *See id.* But this stance is in obvious tension with the fact that the DEIR’s analysis *did* incorporate the existing domestic well level data from the 1995 through 2007 monitoring period. *See* FEIR 2-74, 2-76, 2-92 through -93; DEIR 4.8-11 through -12, 4.8-55 & n.34; DEIR App. K.2 at 26–28; DEIR App. K.3 at 7–8. If these datapoints from domestic wells are as nebulous as the FEIR claims, the DEIR and its appendices had no basis for relying upon them—even putting aside their outdatedness. But if domestic well level data *are* sufficiently reliable to serve as inputs, the EIR needed to have used measurements that are less than fifteen years old. The EIR’s waffling about when and what domestic well data are useable suggests that its methodology was informed more by convenience than good science.

In sum, CEQA demands an accurate and up-to-date baseline from which to assess a project’s impacts, alternatives, and mitigation measures. The EIR’s groundwater level baseline does not fit that description. It admittedly uses no actual recent data from either domestic or monitoring wells. As a result, the EIR’s entire groundwater supply analysis is unsupported. Promising to collect the baseline data later and to then re-run the analysis is not a “fix”; it is a concession that the EIR violates CEQA.

⁵ *See id.*

⁶ The FEIR acknowledges that there is, at minimum, a possibility that changes in climate and precipitation levels will impact groundwater recharge rates. *See* FEIR 2-93 through -94. But it dismisses any downward trend in recharge as “speculative” and unworthy of further analysis. *See* FEIR 2-94. The FEIR has it backwards. What is “speculative” is declining to collect new and readily available groundwater level data that could then be compared against the pre-drought 1995–2007 measurements, and instead insisting that any “trends” in the old dataset must have remained consistent over the past fifteen years.

B. The FEIR does not adequately respond to commenters' concerns regarding its faulty groundwater modeling.

Several commenters explained that the DEIR's groundwater analysis was flawed not only due to its bad inputs, but also because the modeling methodology itself was inappropriate and unjustified. *See, e.g.*, FEIR 2-812, 2-866, 2-5779 through 2-5782. Specifically, they emphasized that it was improper for the DEIR to have relied upon a flow model designed for porous media, at least without first conducting the extensive analysis necessary to determine if the fractured rock underlying the Project site actually displays those tendencies. *See id.* They noted that fractured rock aquifers can behave drastically differently than porous media aquifers, and thus the DEIR's models—and all of the impacts analyses and mitigation measures that relied upon them—could be entirely off base. *See id.*

The FEIR does not meaningfully respond to these criticisms. It simply reiterates that the DEIR was justified in assuming porous media conditions, and asserts that the new monitoring data to be collected post-Project approval will help to confirm whether these assumptions were correct. *See* FEIR 2-5783 through -5785; *id.* at 2-5785 (“A porous media representation is an appropriate way to model a fractured bedrock system at the scale of this project. However, the DEIR acknowledges that without the implementation of a groundwater monitoring program and well mitigation plan, the project could result in a significant impact to groundwater supplies.”).

Once again, this response gets things completely backwards. The time to *confirm*—not to merely *assume*—what groundwater models would be appropriate for this Project site was during the DEIR preparation process. If a detailed geological evaluation had revealed that accurate modeling of the groundwater environment would instead require a more nuanced approach than the simplistic porous media model that the EIR currently uses, that is what CEQA demands.⁷ Because the EIR instead relies on

⁷ As multiple commenters pointed out, there are strong indications that the porous media model is inapt for the Project site. Among other evidence, existing well level data reflect a level of hydrologic discontinuity in the region that appears incompatible with a porous media environment. *See* FEIR 2-5780 through -5781. The FEIR's main response—apart from again asserting that post-approval data collection will help to fill in the analytical gaps—is that these discontinuities might not be quite as severe as commenters alleged. *See* FEIR 2-5784. But this does not address the broader questions of whether the aquifer is, in fact, a porous media environment or what Project-specific evidence the EIR drew upon in reaching that conclusion. Instead, the FEIR's responses suggest that it opted for the porous media model because the Project site's fractured rock environment appeared

uncorroborated assumptions and a smattering of outdated well level datapoints, *see* FEIR 2-5783, its groundwater modeling methodology is not supported by substantial evidence. As a result, each component of the EIR’s groundwater analysis that relies upon that model—including its drawdown isopleth projections, the groundwater monitoring program, and the newly proposed domestic well monitoring plan—are themselves unsupported and inadequate. *See County of Amador*, 76 Cal.App.4th at 952; *Vineyard Area Citizens for Responsible Growth*, 40 Cal.4th at 441; CEQA Guidelines § 15384.

C. The EIR should have addressed how chemicals released from truck tires would impact water quality and aquatic species.

The Project would cause a substantial increase in truck traffic on regional roadways, including on roads that adjoin waterbodies like Wolf Creek and South Fork Wolf Creek. *See* DEIR 3-26 through 3-29, 3-30 (Fig. 3-13), 4.8-3 (Fig. 4.8-1). As they wear down, these trucks’ tires inevitably would release the pollutant 6PPD-quinone (6PPD-q), a chemical that is ubiquitous in modern rubber tires.⁸ There is a growing body of scientific literature demonstrating that 6PPD-q released from truck tires and leached into neighboring waterways is highly lethal to multiple species of fish and other aquatic organisms.⁹ The EIR should have addressed the foreseeable impacts to water quality and biological resources that would result from increased 6PPD-q pollution associated with

roughly analogous, and implementing a more nuanced model would be too inconvenient. *See* FEIR 2-5783, 2-5785 (referencing three times the “large scale” of the Project when attempting to justify the use of the porous media model).

⁸ *See* Erik Stokstad, *Common Tire Chemical Implicated in Mysterious Deaths of At-risk Salmon*, *Science* (Dec. 3, 2020), available at <https://www.science.org/content/article/common-tire-chemical-implicated-mysterious-deaths-risk-salmon> (attached as Exhibit D); Kate Raphael, *A Nasty Salmon-Killing Chemical Is in Bay Waterways. Can It Be Cleaned Up?*, *Bay Nature* (Mar. 2, 2023), available at <https://baynature.org/2023/03/02/a-nasty-salmon-killing-tire-chemical-is-in-bay-waterways-can-it-be-cleaned-up/> (attached as Exhibit E).

⁹ *See, e.g.*, B.F. French et al., *Urban Roadway Runoff is Lethal to Juvenile Coho, Steelhead, and Chinook Salmonids, but Not Congeneric Sockeye*, 9 *Envtl. Sci. & Tech. Letters* 733 (2022) (attached as Exhibit F); Zhenyu Tian et al., *6PPD-Quinone: Revised Toxicity Assessment and Quantification with a Commercial Standard*, 9 *Envtl. Sci. & Tech. Letters* 140 (2022) (attached as Exhibit G); Stokstad, *supra* note 8 (Exhibit D); Raphael, *supra* note 8 (Exhibit E).

Project vehicle trips. And, if necessary, the EIR should have incorporated feasible measures to mitigate these impacts.¹⁰

V. The FEIR’s analysis and mitigation of impacts relating to air quality, GHG emissions, and energy use are flawed.

Commenters had pointed to several issues in the DEIR’s evaluation of impacts and mitigation measures relating to air quality, GHG emissions, and energy use. The FEIR generally does not attempt to correct those errors, and instead offers up various rationales for sticking by the DEIR’s analysis. For the reasons set forth below, each of the FEIR’s responses is unavailing. The EIR remains deeply flawed, and in some areas the FEIR has made matters worse by offering up contradictory responses and unexplained proposals.

A. The FEIR provides only one justification for refusing to mitigate the Project’s potentially significant operational air quality impacts, and that justification is wrong.

The DEIR recognized that the Project’s operational impacts from ROG, NO_x, and PM₁₀ emissions would be “potentially significant,” based on the North Sierra Air Quality Management District’s (NSAQMD) significance thresholds. But the DEIR also predicted that there would be no difference whatsoever between the project’s “unmitigated” and “mitigated” operational emissions for these pollutants. *See* DEIR 4.3-67 through -70, 4.3-74 through -76. In other words, the DEIR identified a significant impact, and then did nothing to mitigate it. This violates CEQA’s clear mandate that an EIR must either adopt all feasible mitigation measures to reduce impacts to less-than-significant levels, or it must explain why further mitigation is infeasible. *See King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 852; Cal. Pub. Res. Code § 21081(a); CEQA Guidelines § 15126.4(a).

Inexplicably, the FEIR and DEIR nonetheless assert that the Project’s operational air quality impacts *have* been mitigated to less-than-significant levels. *See* FEIR 2-103; DEIR 4.3-73; DEIR App. E.1 at v, 51. The FEIR does not—and cannot—claim that the EIR’s *construction*-related air quality mitigation measures will have any actual impact on the Projects *operational* air quality emissions; the DEIR itself shows that they will not.

¹⁰ *See, e.g.,* J.K. McIntyre et al., *Soil Bioretention Protects Juvenile Salmon and Their Prey from the Toxic Impacts of Urban Stormwater Runoff*, 132 *Chemosphere* 213 (2015) (finding “relatively inexpensive” green stormwater infrastructure technologies can be “highly effective at reversing” severe adverse effects of contaminated runoff on fish and aquatic macroinvertebrate species) (attached as Exhibit H).

See DEIR 4.3-67 through -70, 4.3-74 through -76. Rather, the FEIR says only that as a legal matter, a project’s potentially significant operational air quality impacts are automatically reduced to less-than-significant levels as long as the EIR adopts certain construction-phase measures listed in the NSAQMD’s CEQA guidelines. See FEIR 2-104, 2-183; see also DEIR 4.3-67 n.38.

The FEIR is incorrect. Unsurprisingly, the NSAQMD guidelines do not say that a project can automatically reduce its potentially significant *operational* air quality impacts simply by incorporating pro forma *construction*-related mitigation measures. The guidelines instead provide a “suggested list” of mitigation measures that is explicitly “not all-inclusive.” NSAQMD Guidelines 10. The only measures that the DEIR incorporated, and which the FEIR insists are sufficient to mitigate all of the Project’s air quality impacts, are listed in the NSAQMD guidelines under the heading, “Mitigations for Use *During Design and Construction Phases.*” *Id.* (emphasis added). The guidelines expressly contemplate that “additional, project-specific mitigation measures” may be necessary to “ensure that impacts are sufficiently mitigated.” *Id.* In other words, the NSAQMD guidelines are not some rubber stamp that allows every project to mitigate all potentially significant impacts via construction-related measures.

This flexible, project-specific methodology is also exactly what CEQA requires. See Cal. Pub. Res. Code § 21081(a); CEQA Guidelines § 15370. That is because if mitigation measures are not “at least partially effective” in reducing an otherwise significant impact, they do not qualify as mitigation measures at all. *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 523; *King & Gardiner Farms*, 45 Cal.App.5th at 865. The NSAQMD guidelines cannot absolve the EIR of its obligation to incorporate “effective” mitigation. Construction-phase measures that have literally zero impact on operational air quality emissions do not satisfy this requirement.

The FEIR points to CEQA materials from other past projects in the region that it claims have interpreted the NSAQMD guidelines in the same way. See FEIR 2-104 & n.14, 2-183 & n.13. This past practice cannot supplant the clear directives in the NSAQMD guidelines and in CEQA itself. But even if those previous studies were relevant, not a single one supports the FEIR’s position. Three of the four projects had no estimated operational emissions at all. Thus, there was no need to even analyze operational air quality impacts, much less mitigate them.¹¹ And the one project that *did*

¹¹ See *Lake Wildwood Tennis Facility Lighting Expansion – Notice of Availability for Public Review and Notice of Intent to Adopt a Proposed Mitigated Negative Declaration and Excerpt of Initial Study* (July 2022) at 15 (“The proposed project would result in a temporary but incrementally small net increase in pollutants due to minor land

involve operational air quality emissions incorporated mitigation measures that substantially and quantifiably reduced those emissions¹²—exactly what the EIR needed to do here.

In short, the EIR relies on a single faulty legal justification to excuse itself from CEQA’s basic mitigation requirements. The FEIR does *not* claim that it would be infeasible to adopt measures that would lessen the Project’s operational air quality impacts.¹³ It simply asserts that it did not need to consider such measures in the first place. That is wrong, and the EIR is legally deficient as a result.

disturbance and construction vehicle and equipment emissions related to the installation of the 24 light poles and trenching for underground electrical.”) (attached as Exhibit I); *Auburn Ski Club Lighting Expansion – Notice of Availability for Public Review and Notice of Intent to Adopt a Proposed Mitigated Negative Declaration and Excerpt of Initial Study* (July 2022) at 16–17 (“The proposed project would result in a temporary but incrementally small net increase in pollutants due to minor land disturbance and construction vehicle and equipment emissions related to the installation of the 40 light poles and trenching for underground electrical.”) (attached as Exhibit J); *Empire Mine State Historic Park Site Characterization and Remediation Draft Program Environmental Impact Report Section 4.2, Air Quality* (Aug. 2009) at 4.2-21 (“This air quality impact analysis does not evaluate the impacts following completion of the Project (such as exposure to visitors walking on trail systems), but the impacts as a result of the Project Actions that would occur during the Project implementation.”) (attached as Exhibit K).

¹² See *Rincon del Rio Draft Environmental Impact Report Section 3.3, Air Quality* (Jan. 2012) at 3.3-21 through 3.3-22 (analyzing two mitigation measures that would result in a significant reduction in operational ROG, NO_x, and PM₁₀ emissions relative to unmitigated levels) (attached as Exhibit L).

¹³ Nor could it: One such measure—the use of electric trucks to haul mine waste off-site during the operational phases of the Project—is a potentially feasible method of reducing operational emissions. See FEIR 2-10. The fact that the FEIR botched its analysis of this new mitigation proposal, see Section V.D., *infra*, does not necessarily mean that it is infeasible. *But cf.* Section V.D., *infra*; Exhibit A (Baseline Report (Feb. 2023)) at 3 (questioning whether heavy-duty electric trucks will be available in sufficient numbers during the early years of Project operations).

B. The FEIR’s discussion of the Project’s applicant-proposed measures (APMs) for air quality is incoherent.

The DEIR identified several air quality APMs that would be implemented during the construction and/or operational phases of the Project, including (1) exhaust emission controls (APM-AQ-1), (2) fugitive dust control measures (APM-AQ-2), and (3) an asbestos minimization plan (APM-AQ-3). *See* DEIR 4.3-65. The DEIR was clear that it had factored the first two APMs in to its “unmitigated” emissions assessment. *See id.* at 4.3-73 (“The emission data presented in Table 4.3-17 (i.e., unmitigated emissions) reflect the reductions that would occur with implementation of APM-AQ-1 and APM-AQ-2. Table 4.3-19 shows the estimated maximum daily mitigated emissions associated with construction, operation, and reclamation of the project, accounting for additional emissions associated with Mitigation Measure 4.3-1(b) . . .”). Commenters were equally clear that this approach was improper. They explained that the EIR needed to treat these APMs as the mitigation measures that they actually are, rather than as design features of the Project. That would require omitting them from the “unmitigated” emissions scenario and separately quantifying their impacts on Project emissions.

Rather than correcting these substantive issues in the DEIR, the FEIR offers up conflicting excuses. Its first and clearest response is that the DEIR merely had a typo—that the sentence on page 4.3-73 was meant to read, “[t]he emission data presented in Table 4.3-17 (i.e., unmitigated emissions) reflect the reductions that would occur without implementation of APM-AQ-1 and APM-AQ-2.” FEIR 2-182; *see also id.* at 2-184. In other words, the APMs “were not actually included in the unmitigated emissions inventory.” *Id.* at 2-182. With that “minor change . . . to clarify the DEIR text,” the FEIR reassures us, “no change to the analysis in the DEIR” is necessary. *Id.*

Elsewhere, however, the FEIR says exactly the opposite—that the DEIR *did* include APM-AQ-1 and APM-AQ-2 within the “unmitigated” emissions scenario, and thus did not treat them as mitigation measures. *See* FEIR 2-104 (“These APMs, which go above and beyond the measures suggested in the NSAQMD [guidelines] . . . *were already incorporated into the assessment* and, therefore, do not result in additional reductions under the mitigated scenario, nonetheless the APMs do reduce emissions of criteria air pollutants compared to the Project if it did not incorporate these emission reduction features.” (emphasis added)); *id.* at 2-940 (“As the applicant proposed these [APMs] as part of the project, prior to analysis of air quality impacts of the project, they are properly considered as part of the Project Description.”); *id.* at 2-941 (“[T]he project’s criteria air pollutant emissions incorporating the APMs as part of the proposed

project can be directly measured against numerical emissions thresholds established by [NSAQMD].”).¹⁴

These two contradictory responses cannot both be true. The result—that it is impossible for the reviewing public to discern how or whether the EIR evaluated the air quality APMs—is a violation of CEQA in and of itself. *See Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 439 (holding “[f]actual inconsistencies and lack of clarity in the FEIR leave the reader—and the decision makers—without substantial evidence” to support the EIR’s conclusions); *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 404 (“[T]here must be a disclosure of the analytic route the agency traveled from evidence to action.” (cleaned up)).

But even if the EIR were clear that it considered the APMs *either* (1) as part of the “unmitigated” Project emissions baseline, *or* (2) as mitigation measures, the EIR’s air quality discussion would still violate CEQA. If scenario (1) is true—and thus the “typo” excuse is wrong—the EIR is deficient for all the reasons already pointed out in the comments on the DEIR. Specifically, an EIR may not “compress[] the analysis of impacts and mitigation measures into a single issue” by folding mitigation into the project description; the EIR must first evaluate the Project’s unmitigated impacts and then gauge the extent to which the mitigation measures lessen them. *Lotus v. Dep’t of Transp.* (2014) 223 Cal.App.4th 645, 656, 658.

If scenario (2) is right, the EIR is flawed because it does not separately assess the impact of these measures or explain why a more detailed analysis is infeasible.¹⁵ A one-sentence assertion that the APMs “do[] achieve a reduction in emissions as compared to the unmitigated emissions,” FEIR 2-182, is not enough. *See King & Gardiner Farms*, 45

¹⁴ This response seems to be the correct one. Notably, the DEIR’s “unmitigated” emissions table also includes footnotes explaining how APM-AQ-1 and APM-AQ-2 were factored in to the “unmitigated” calculations. *See* DEIR 4.3-70. Additionally, the DEIR’s separate air quality report includes the same sentence as on page 4.3-73 of the DEIR, *see* DEIR App. E.1 at 47–48, and its “unmitigated” emissions table includes the same footnotes regarding the APMs as the DEIR’s table, *see id.* at 44. The FEIR does not purport to correct or explain any of these issues, each of which conflicts with the “typo” explanation. *See also* Exhibit A (Baseline Report (Feb. 2023)) at 3.

¹⁵ And, in any event, the APMs would not be valid mitigation measures as to *operational* air quality impacts, since the Project’s “unmitigated” and “mitigated” operational emissions are the same. *See* Section V.A., *supra*; *Sierra Club*, 6 Cal.5th at 523 (requiring that mitigation measures be “at least partially effective” in lessening impacts).

Cal.App.5th at 869 (“To fulfill the EIR’s informational role, the discussion of the mitigation measures must contain facts and analysis, not bare conclusions and opinions.”); *Sierra Club*, 6 Cal.5th at 522 (agreeing that the “use of the term ‘substantial’ to describe the impact the proposed mitigation measures would have on reducing the Project’s significant health effects, without further explanation or factual support, amounted to a ‘bare conclusion’ that did not satisfy CEQA’s disclosure requirements”). In either scenario, the basic problem is the same: The EIR provides virtually no explanation of the effect the APMs will have on Project emissions. *See also* Exhibit A (Baseline Report (Feb. 2023)) at 3–4 (describing in further detail the issues with the EIR’s analysis of the impacts of the APMs).

These exact same issues recur in the EIR’s discussion of GHG emissions. That is because the DEIR’s GHG emissions analysis—apparently like its air quality analysis—incorporated the effects of APM-AQ-1 within its “unmitigated” operational emissions inventory. *See* DEIR 4.3-94 (explaining, in footnote “a” of Table 4.3-23, that the “unmitigated” emissions calculations “[a]ccount[] for APM-AQ-1 (Exhaust Emission Controls), including Tier 4 Final equipment”). Again, this was improper: The EIR first should have calculated the Project’s GHG emissions without the APMs in place, and then separately quantified the APMs’ effects on emissions. *See Lotus*, 223 Cal.App.4th at 656, 658. The error is all the more glaring in this GHG context, since the EIR found that the Project’s “unmitigated” operational GHG emissions—even after improperly factoring in APM-AQ-1—were barely below the significance threshold. *See* DEIR 4.3-94. Consequently, had the EIR handled the APMs correctly, this impact might well have been “significant” without mitigation.

C. The EIR’s plan to test for and manage the asbestos content of mined rock is internally inconsistent and likely to fail, and it improperly defers mitigation.

The applicant prepared an Asbestos, Serpentine, and Ultramafic Rock Management Plan (“ASUR Plan”) that purportedly incorporates measures to minimize asbestos in the engineered fill generated by the Project. DEIR at 3-20. According to the EIR, the ASUR Plan “requires testing of *all* mined materials” to “ensure that average mined material and engineered fill contains less than 0.01% asbestos by mass.” DEIR at 4.3-61 (emphasis added); *id.* at 3-20. Thus, the EIR gives the impression that all rock generated by the Project will be tested, and that it will achieve an average level of less than 0.01% asbestos by mass. However, to the contrary, the EIR and ASUR Plan elsewhere obliquely reveal that very little of the mined rock will actually be tested, that it will be held to a much lower standard of 0.25% asbestos, and that there is no concrete plan for what to do if the engineered fill is found to be contaminated with asbestos.

Furthermore, the EIR improperly deferred mitigation measures to address the Project's asbestos risks.

1. The EIR improperly relies on the ASUR Plan's inadequate asbestos testing

The ASUR Plan contains measures related to the asbestos content of barren rock and sand tailings generated by the Project. DEIR Appendix E.2 (ASUR Management Plan) at 13 ("ASUR Plan"). The ASUR Plan asserts that it is designed so that "all aboveground materials are sampled and analyzed for asbestos before they are loaded for transportation and used as Engineered Fill." *Id.* (emphasis in original). However, the sampling plan for the barren rock and sand tailings fails to account for the sheer volume of these materials and does not allow enough time for accurate testing to determine their asbestos content.

Although the Project will result in 1,500 tons per day of mined material (*see* ASUR Plan at 5-6), the ASUR Plan describes an above-ground silo to store barren rock and sand tailings that can hold slightly less than a single day's production. *Id.* at 13 (silo has capacity of 1,400 tons). Before the material is transferred to the silo, the applicant will conduct three random grab samples from the barren rock or the mineralized material for every 1,000 tons of material. *Id.* To determine if the samples are "Asbestos Containing Material," which is any material with an asbestos content of 0.25% or greater, the samples will be analyzed using Polarized Light Microscopy (PLM), which has the ability to detect 0.25% asbestos. *Id.* at 2, 13. In addition, for purposes of maintaining an "Asbestos Inventory," which will measure the "rolling three-month weighted average" of the mined materials, the samples will also be tested using the Transmission Electron Microscope (TEM) method, which can detect 0.01% asbestos. *Id.* at 13-14; *id.* at 15. However, the more accurate TEM test requires two weeks for results. *See* FEIR at 2-542.

The ASUR Plan also contains several requirements for what must happen if the engineered fill contains asbestos. ASUR Plan at 16-17. If a sample shows that the material is Asbestos-Containing Material *and* the three-month rolling average asbestos content is at least 0.01%, then all barren rock "represented by the composite sample" will be disposed underground as cemented paste backfill rather than loaded onto trucks for use as Engineered Fill. *Id.* at 16. Similarly, all sand tailings derived from processing Asbestos-Containing Material will be used for underground cemented paste backfill and not for Engineered Fill. *Id.* at 16-17. Additionally, if the three-month rolling Asbestos Inventory exceeds 0.01% asbestos, then the "geology department will immediately . . . halt mining in the area of concern until a revised mine plan is prepared." *Id.* at 20.

However, these planned actions fail to account for the two weeks for a TEM test result to come back, during which time the barren rock and rock tailings will have moved far beyond the surface silo. Because the testing would occur before the materials are transferred to the silo, which only has the capacity to store materials produced from a single day, the mined materials would be moved on to the next phase of processing before the TEM test results are developed. *See* ASUR Plan at 14 (noting that rock is “stored in bins with capacity of ~1 day”). Given this limited storage, during the 2-week testing period, any material containing asbestos will likely have been transported offsite or used as engineered fill at the Brunswick or Centennial Sites, where it would pose a risk of airborne asbestos exposure. *See* DEIR at 2-546 (noting that the “project site is not designed to hold 3-months of mined material in inventory and will not do so”). The EIR also fails to explain how the geology department will determine the source of contaminated material, given the volume of material mined, the very small sample rate, and the lapse in time from the sample to the result.

The FEIR gives no assurances about this process, noting instead that “[m]ining will continue as normal during the two week turn-around time for TEM samples,” and vaguely contending that the “asbestos content [of] mined material” will be “managed through the measures of the ASUR plan which included exploration sampling, mine planning, and testing of materials on surface to monitor and ensure the effectiveness of these measures.” FEIR at 2-542. Again, this response fails to account for the fact that—given limited storage capacity—contaminated material may already be far from the project site by the time the problem comes to light. Conceding that the more accurate TEM testing will be largely ineffective, the FEIR asserts that the purpose of TEM testing “is not to control the fate of the rock and tailings after it reaches surface [sic],” because “that is the purpose of the PLM testing.” FEIR at 2-514.

2. The EIR improperly defers development of asbestos mitigation measures

The EIR relies on the ASUR Plan as an “applicant proposed measure” (APM) for air quality impacts (DEIR 4.3-65) without clarifying that this Plan actually purports to mitigate potentially significant asbestos impacts. DEIR at 4.3-65. Comments on the DEIR explained that the APMs, including the ASUR Plan, were “in reality mitigation measures, which the DEIR improperly fails to recognize as such,” despite being incorporated into the Project. FEIR at 2-830, 2-874-75. In response, the FEIR simply stated that these measures were part of the project, rather than mitigation measures. *Id.* at 2-922. However, simply calling a measure that is meant to mitigate impacts a part of the project

does not cure the fundamental defect in this approach: namely, that it obscures the true extent of the impacts. *Lotus*, 223 Cal.App.4th at 656 (EIR may not compress the analysis of impacts and mitigation measures by incorporating the mitigation measure into the project's features). Here, for example, the EIR fails to evaluate the Project's asbestos impacts resulting both from the mining process and from the storage and shipment of engineered material offsite, opting instead to hide behind the assertion that these impacts will be mitigated through the ASUR Plan and ill-defined plans therein. Instead, the EIR must classify the ASUR Plan as a mitigation measure and evaluate the significance of the Project's asbestos impacts with and without the Plan.

Furthermore, the ASUR Plan itself defers development of important mitigation measures, instead relying on ill-defined and unenforceable plans. *See* ASUR Plan at 8. In particular, the ASUR Plan and the EIR both contend that TEM testing will be used to determine the asbestos content “during the exploration and pre-mining phase before mining is commenced,” (FEIR at 2-547), and this “was made an explicit requirement of the ASUR Plan.” *Id.* at 2-514. To the contrary, the ASUR Plan lacks any concrete and measurable commitments to test for asbestos, and instead defers creating measures to detect and mitigate the presence of asbestos in mined material. In so doing, the EIR falls short of its primary purpose to “describe feasible measures which could minimize significant adverse impacts.” CEQA Guidelines § 15126.4(a)(1).

For example, the ASUR Plan asserts that “[e]xploration core drilling and core logging shall be supervised by a California Licensed Geologist,” and that “[l]ithological units and gold mineralization will be adequately sampled and tested for naturally occurring asbestos.” ASUR Plan at 8. However, the ASUR Plan does not specify when core drilling and logging and the related sampling and testing will occur, including how frequently and how far in advance of mining operations. Similarly, the ASUR Plan does not specify what “adequate” sampling and testing entails, and what standards will be applied to the materials before determining whether or not to proceed with mining. These vague assertions do not constitute mitigation measures for the potentially serious asbestos contamination associated with the Project. *See at California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 198 (vague or speculative mitigation measures do not comply with CEQA); *Lincoln Place Tenants Assn. v. City of Las Angeles* (2007) 155 Cal.App.4th 425, 445 (mitigation measures must be feasible and enforceable).

Similarly, after in situ testing, the ASUR Plan contends that “[a]n Engineered Fill Placement Plan will be maintained to ensure that adequate non-Asbestos Containing Material, as determined by PLM testing, is available for Surfacing applications.” ASUR Plan at 8. This Engineered Fill Placement Plan will “be designed to ensure that Asbestos

Containing Material is not used for Surfacing,” and will “designate areas which are suitable for the placement of Asbestos Containing Material.” *Id.* at 17. However, the EIR fails to provide any details about what this plan will contain or require, or to include specific performance standards, including the criteria for an area to be “suitable” for the placement of Asbestos-Containing Material. In so doing, the ASUR Plan and the EIR have improperly deferred mitigation. *See Preserve Wild Santee v. City of Santee*, 210 Cal.App.4th 260, 281 (2012) (EIR improperly deferred formulation of mitigation measures in part because it did not state why specifying performance standards for habitat management was impractical or infeasible); *see also San Joaquin Raptor*, 149 Cal.App.4th at 670 (deferring the formulation of mitigation measures until after a project is approved “leave[s] the reader in the dark about what . . . management steps will be taken, or what specific criteria or performance standard will be met”).

Relatedly, the ASUR Plan’s plan to provide auxiliary ventilation and dust collection in the event that tunneling is projected to exceed a 3-month rolling average of 0.01% asbestos is similarly flawed due to the failure to provide any specific performance standards. *See* ASUR Plan at 10. Instead, it merely asserts that under such circumstances, “an experienced professional” would select “dust collection equipment . . . to suit the conditions and air flow.” *Id.* Similarly, the “dust collection equipment will be designed to allow removal of collected dust and filter cartridges without exposing workers or releasing dust into the air.” *Id.* As a result of these vague assertions, the EIR is only able to contemplate that the “workers *should* not be exposed to rock with unexpected high values of asbestos.” FEIR at 2-514 (emphasis added). This vague assertion does not constitute the binding commitment to achieve a specific performance standard that is required, and the EIR did not attempt to justify its failure to specify the details. *See* CEQA Guidelines § 15126.4(a)(2) (an EIR may postpone development of the “specific details” of a mitigation measure only if it first demonstrates why “it is impractical or infeasible to include those details during the project’s environmental review”).

Finally, the EIR contains inconsistent conclusions regarding the risk associated with asbestos exposure. On the one hand, the EIR states that implementing the ASUR Plan “would ensure that underground mining activities and use of project-generated fill would not result in the emission of asbestos containing dust.” DEIR at 4.3-82. However, the EIR also states that without implementing an Asbestos Dust Mitigation Plan (ADMP), “the project could result in a significant impact with respect to exposing receptors to substantial concentrations.” *Id.*; *see also* DEIR at 6-32. If the Project will not result in the emissions of dust containing asbestos, why is an ADMP required to avoid significant impacts related to the exposure to *substantial concentrations of asbestos*? In reaching this conclusion, the EIR is tacitly conceding that the ASUR Plan alone is not

reasonably likely to reduce asbestos exposure to a less-than-significant level, contrary to the EIR's statements elsewhere that it would. Accordingly, the EIR must be revised to provide specific mitigation measures that include concrete and measurable performance standards to mitigate the risk of exposing mine workers and the public to asbestos.

D. The FEIR fails to support its use of an unjustifiably high threshold of significance for operational GHG emissions.

Several commenters explained at length that it was inappropriate for the DEIR to use a significance threshold of 10,000 metric tons of carbon dioxide equivalent (MT CO₂e) per year for operational GHG emissions. They pointed out that this ad hoc threshold is outdated, unsupported by Project-specific evidence, and unreasonably high. The FEIR once again ignores these concerns and doubles down on the single rationale provided in the DEIR: The threshold is acceptable because other agencies elsewhere in the State have used it before. *See* FEIR 2-115 through -116.

This response misses the mark for several reasons. First, the mere fact that other jurisdictions have adopted a certain significance threshold in the past is not adequate to justify its use for this particular Project. As various commenters noted, all of the thresholds that the DEIR references were developed before the enactment of S.B. 32 in 2016. That law set significantly more aggressive targets for reducing statewide GHG emissions compared to the earlier A.B. 32 regime. Thus, one cannot assume that what was a less-than-significant contribution to GHG emissions in 2015 remains so today. These thresholds were also all designed for "industrial" and/or "stationary source" projects. That makes for an awkward fit with this Project, where mobile sources are projected to be the second largest contributor to operational GHG emissions. *See* DEIR 4.3-93 through -94. In light of all these changes and nuance, "if it's good enough for them, it's good enough for us" is not substantial evidence. *See Golden Door Props., LLC v. County of San Diego* (2018) 27 Cal.App.5th 892, 904-05.

Second, the FEIR's rationale is wrong even on its own terms. Some of the very agencies whose lead the FEIR purports to be following have now abandoned the 10,000 MT CO₂e threshold. For example, the July 2022 Draft Environmental Impact Report prepared by the County of Santa Clara for the analogous Sargent Ranch Quarry project, which is located within the jurisdiction of the Bay Area Air Quality Management District (BAAQMD), uses a *net-zero* significance threshold for operational GHG emissions. *See* Sargent Ranch Quarry Draft Environmental Impact Report Section 3.8, Greenhouse Gas

Emissions at 3.8-10 (July 2022) (attached as Exhibit M).¹⁶ The Sargent Ranch Quarry DEIR adopted this threshold after expressly—and correctly—recognizing that BAAQMD’s old standards “were designed . . . to meet the AB 32 goal of reducing GHG emissions to 1990 levels by 2020,” and thus were no longer “consistent with the more recently adopted SB 32 target of reducing statewide GHG emissions to 40 percent below 1990 levels by 2030.” *See id.*¹⁷ The FEIR does not acknowledge this shift. It instead incorrectly asserts that the 10,000 MT CO_{2e} “is [still] used by” BAAQMD “for industrial and/or stationary source emissions of GHGs.” FEIR 2-116 (quoting DEIR 4.3-43).

Had the EIR conducted its own meaningful review of the current GHG landscape, the only reasonable conclusion it could have reached was that the same net-zero threshold is appropriate for this Project. And had the threshold been reduced by even a tiny fraction of that—to 9,000 MT CO_{2e} per year—the Project’s operational emissions would have been significant and required mitigation. *See* DEIR 4.3-94 (estimating annual operational GHG emissions of 9,041.23 MT CO_{2e} in years 2033 to 2102). At minimum, the EIR needed to try to explain why it relies on outdated thresholds used in other jurisdictions—thresholds that purportedly deserve complete deference when set at 10,000 MT CO_{2e}, *see* FEIR 2-116—when those same jurisdictions now use thresholds that have been updated and lowered to reflect the serious threat of climate change. *See also* Exhibit A (Baseline Report (Feb. 2023)) at 7–8. Because the EIR did none of this, its significance threshold lacks substantial evidence and violates CEQA. *See Golden Door Props.*, 27 Cal.App.5th at 904–05.

E. The FEIR’s new proposal to use electric trucks to haul mine waste off-site is unexplained and underdeveloped.

For the first time, the FEIR proposes a new condition of approval for the Project: “In the event that sand tailings or waste rock material is transported from the Brunswick Site prior to 2033 to locations other than the Centennial Site, all transport of such materials shall be accomplished using electric vehicles.” FEIR 2-10. The FEIR includes no analysis of this new plan—just a few of cursory sentences implying that this condition

¹⁶ Available at https://stgenpln.blob.core.windows.net/document/10747_Sargent_Ranch_Quarry_DEIR_July_2022.pdf.

¹⁷ This transition away from a bright-line GHG significance threshold is also more consistent with the California Supreme Court’s intervening decision in *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 220–23, which requires that a project’s GHG emissions be evaluated in the context of the State’s long-term climate goals.

would not result in “greater air quality and GHG emissions impacts or energy use impacts than analyzed under the DEIR.” *See id.* at 2-926; *see also id.* at 2-10, 2-940.

Using electric trucks to haul mine waste off-site is a good idea, in theory. But there are major problems with the FEIR’s proposal. First, as explained in the Baseline report, there are significant questions about whether this measure would even be feasible as presented in the FEIR, given that heavy-duty electric trucks are not expected to be widely commercially available during the early years of the Project’s operations. *See* Baseline Letter (Feb. 2023) 3. The FEIR leaves these feasibility questions entirely unanswered, and instead seems to simply assume that this measure can be implemented. But CEQA demands more than unspoken assumptions; it requires *evidence* of feasibility. *See Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1119–20 (holding a “mitigation measure[is] inadequate under CEQA” where “there is not substantial evidence to conclude that this [mitigation] option is even feasible”).

Second, the FEIR is void of analysis regarding the environmental impacts that may arise from this new plan. The DEIR had identified several environmental impacts that were on the cusp of significance. For example, the Project’s operational GHG emissions were predicted to fall slightly below the EIR’s (unjustifiably high) significance threshold. *See* DEIR 4.3-93. And the Project’s electricity demand was projected to bring the circuit serving the Project site within just a couple of megawatts of its total capacity. *Id.* at 4.11-34 through -35. Would the increased GHG emissions¹⁸ and electricity demand associated with using grid energy to charge the electric trucks cause these or any other significance thresholds to be surpassed? The FEIR is defective as an informational document because it does not even begin to acknowledge these foreseeable impacts, much less “contain analysis sufficient to allow informed decision making.” *See Laurel Heights*, 47 Cal.3d at 403–05; *see also* Exhibit A (Baseline Report (Feb. 2023)) at 3.

Finally, even if the FEIR had correctly analyzed the feasibility and the environmental impacts of this new proposal, it would still be flawed because the measure does not go far enough. Specifically, there was no basis for limiting the proposal to off-site hauling that occurs “prior to 2033” and “to locations other than the Centennial Site.” As discussed above, this Project will have potentially significant—and so far entirely unmitigated—operational air quality impacts. *See* Section V.A., *supra*. To address those impacts, the EIR should have included off-site electric truck use as an enforceable

¹⁸ Notably, the use of grid-supplied electricity is projected to be *by far* the largest contributor to operational GHG emissions over the duration of the Project. *See* DEIR 4.3-92 through -94.

mitigation measure, without any of the current limitations.¹⁹ *See King & Gardiner Farms*, 45 Cal.App.4th at 865 (emphasizing CEQA requires the adoption of “all feasible mitigation measures”). And the EIR should have explained the degree to which this measure would reduce the Project’s operational air quality impacts. *See Sierra Club*, 6 Cal.5th at 522. Those steps would not have been sufficient to fix the many flaws in the EIR’s air quality analysis. But they were necessary steps, and without them the EIR cannot be certified.

F. The FEIR fails to address several other concerns raised about the DEIR’s handling of air quality, GHG emissions, and energy use.

Commenters expressed concerns that the DEIR’s Project description stated that construction would last for 18 months, whereas the air quality analysis assumed a 12-month construction timeline and provided no explanation for this discrepancy. *See* FEIR 2-111. The FEIR’s one response is effectively “no harm, no foul”: Because a 12-month timeline would result in shorter but more intensive impacts, it purportedly represents a “worst-case” scenario. *Id.* at 2-112. But this is not responsive to the concerns actually raised by commenters, which focused on the DEIR’s lack of analysis to support its assertion that a shorter timeline is, in fact, a “worst-case.” For example, commenters flagged that a longer construction timeline could result in a more extensive exposure to critical air pollutants, and thus possibly more severe—or at least different—impacts. The FEIR fails to either account for these comments or furnish any evidence showing that the DEIR’s approach really is more “conservative” than an 18-month construction timeline.

Commenters also explained at length the lack of evidence supporting the DEIR’s Health Risk Assessment (HRA). *See, e.g.*, FEIR 2-179, 2-942. To its credit, the FEIR includes some new analysis in response to these concerns. *See* Exhibit A (Baseline Report (Feb. 2023)) at 4–5. Unfortunately, this new information does not support the DEIR’s optimistic projections regarding the extent to which Mitigation Measure 4.3-1(b) will reduce the risks of cancer linked to Project emissions. In particular, and as discussed at greater length in the Baseline Environmental Consulting letter, the FEIR does not provide any explanation of how Measure 4.3-1(b)’s estimated 2% reduction in total diesel exhaust emissions could, standing alone, produce a 27% decrease in cancer risk. *See id.* at 4–6.

¹⁹ Even if it turned out that it would be infeasible to use electric haul trucks during the early years of the Project’s operations, the FEIR should have considered whether it would be feasible to begin implementing this measure in a later operational year, when heavy-duty electric trucks are projected to be more broadly available.

Finally, the FEIR makes several changes to Mitigation Measure 4.3-7(b) (GHG Offset Credits), apparently in recognition of the fact that the version of the measured proposed in the DEIR would be impermissible under *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467. What the FEIR does not explain, though, is why it is appropriate to use offset credits to accomplish 100% of the Project's GHG emissions reductions, instead of implementing feasible on-site measures. Commenters had pointed to several possible on-site measures, including the retention of additional on-site vegetation, the use of solar power during construction, and the use of electric construction equipment and haul trucks. The FEIR ignores each of these specific suggestions and points back to its pro forma response regarding GHG credits. *See* FEIR 2-945; *see also id.* at 2-753 (alleging "feasible construction GHG emissions mitigation is very limited," but not responding to the specific suggestions provided in comments). The notion that on-site GHG mitigation measures are currently infeasible also flatly conflicts with the FEIR's new proposal to use electric haul trucks. *See id.* at 2-10.

VI. The County should deny the Project and should not certify the EIR.

The many environmental impacts associated with the Project, as well as its inconsistency with Grass Valley's and the County's land use plans provide ample justification for denying the Project. If it denies the Project, the County is under no obligation to certify the EIR. *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 83 (upholding decision to stop preparation of an EIR and specific plan where city determined the project was not consistent with its land use policies); Pub. Res. Code § 21080(a) (CEQA applies only to projects that public agencies carry out or approve).

Denial of the Project would also consistent with a long line of case law recognizing that public agencies may limit the use of land to protect public values without resulting in a taking of property. *Penn Cent. Transp. Co. v. City of New York* (1978) 438 U.S. 104, 129 ("[T]his Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.") (citations omitted); *id.* ("[I]n instances in which a state tribunal reasonably concluded that 'the health, safety, morals or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized property interests."); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 324 ("Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford.").

The Supreme Court has identified two primary tests to determine whether regulation causes a taking of property. First, a taking may occur if the regulation eliminates *all* use or value of the property. See *Lucas v. S.C. Coastal Council* (1992) 505 U.S. 1003. Under that test, there must be no value whatsoever remaining in the property; even a diminution of value of 95% is insufficient. See *Tahoe-Sierra*, 535 U.S. at 330 (citing *Lucas*, 505 U.S. at 1019 n.8). The second test involves evaluation of multiple factors, including the severity of the impact of the regulation on the value of the property, the extent of its interference with reasonable investment-backed expectations of use of the property, and the character of the governmental action. See *Lingle v. Chevron* (2005) 544 U.S. 528, 538-39 (citing *Penn Central*, 438 U.S. at 124). Courts have consistently held that *Penn Central* test requires elimination of nearly all value in the property. The Ninth Circuit has recently recognized that even “diminution in property value because of governmental regulation ranging from 75% to 92.5% does not constitute a taking.” *Colony Cove Props. LLC v. City of Carson* (9th Cir. 2018) 888 F.3d 445, 451; see also *Hadacheck v. Sebastian* (1915) 239 U.S. 394, 405 (no taking despite diminution in value from \$800,000 to a maximum of \$60,000, and property could not be used for any purpose permitted under city's ordinance).

In fact, as long as permissible uses exist, a denial would not deprive the applicant of economically viable use of its property. *Shea Homes Ltd. P'ship v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1267 (finding no regulatory taking because agricultural designation allowed single family use if certain County standards were met).

Here, the entire Brunswick Industrial Site is currently zoned M1-SP (Light Industrial, Site Performance Combining District), per the County's Zoning Code. Its land use designation is IND (Industrial) under the County's General Plan. The applicant is proposing to re-zone it as M1-ME (Light Industrial with Mineral Extraction Combining District) as part of the project. The Centennial Industrial Site and potable water pipeline easement areas are both zoned as M1 (Light Industrial) and designated as IND. All of these land use designations provide a reasonable economic use of the property and, on their face, defeat any claim that the applicant is entitled to establish a gold mine at the site.


Conclusion

As set forth above, the FEIR failed to address or correct the many fundamental issues with the DEIR. As a result, the EIR violates CEQA and cannot be certified. The County should exercise its authority to deny the Project.

Matt Kelley
March 20, 2023
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Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Ellison Folk

cc: Ralph Silberstein, Community Environmental Advocates Foundation

Exhibits:

- Exhibit A: Baseline Environmental Consulting Report, February 2, 2023.
- Exhibit B: RDN, Robert N. Niehaus, Inc., “Economic Impact of the Proposed Idaho-Maryland Mine Project,” Nov. 15, 2022.
- Exhibit C: Western Regional Climate Center (WRCC), Grass Valley No. 2, CA – Total of Precipitation (Inches) (last updated Feb. 16, 2023).
- Exhibit D: Erik Stokstad, *Common Tire Chemical Implicated in Mysterious Deaths of At-risk Salmon*, Science (Dec. 3, 2020).
- Exhibit E: Kate Raphael, *A Nasty Salmon-Killing Chemical Is in Bay Waterways. Can It Be Cleaned Up?*, Bay Nature (Mar. 2, 2023).
- Exhibit F: B.F. French et al., *Urban Roadway Runoff is Lethal to Juvenile Coho, Steelhead, and Chinook Salmonids, but Not Congeneric Sockeye*, 9 *Envtl. Sci. & Tech. Letters* 733 (2022).

- Exhibit G: *Zhenyu Tian et al., 6PPD-Quinone: Revised Toxicity Assessment and Quantification with a Commercial Standard*, 9 *Envtl. Sci. & Tech. Letters* 140 (2022).
- Exhibit H: *J.K. McIntyre et al., Soil Bioretention Protects Juvenile Salmon and Their Prey from the Toxic Impacts of Urban Stormwater Runoff*, 132 *Chemosphere* 213 (2015).
- Exhibit I: *Lake Wildwood Tennis Facility Lighting Expansion – Notice of Availability for Public Review and Notice of Intent to Adopt a Proposed Mitigated Negative Declaration and Excerpt of Initial Study* (July 2022).
- Exhibit J: *Auburn Ski Club Lighting Expansion – Notice of Availability for Public Review and Notice of Intent to Adopt a Proposed Mitigated Negative Declaration and Excerpt of Initial Study* (July 2022).
- Exhibit K: *Empire Mine State Historic Park Site Characterization and Remediation Draft Program Environmental Impact Report Section 4.2, Air Quality* (Aug. 2009).
- Exhibit L: *Rincon del Rio Draft Environmental Impact Report Section 3.3, Air Quality* (Jan. 2012).
- Exhibit M: *Sargent Ranch Quarry Draft Environmental Impact Report Section 3.8, Greenhouse Gas Emissions* (July 2022).