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February 2, 2021

By Hand-Delivery

ORIGINAL
408 615-2450

Mayor Gillmor and City Council Members
Santa Clara City Council
c/o Planning Division
City Hall
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050

Re: Appeal of Planning Commission Denial of Appeal of Development Review Adoption of the Mitigated Negative Declaration and Mitigation Monitoring and Reporting Program for the 1111 Comstock Data Center (PLN2019-13941; CEQ2020-01079)

Dear Mayor Gillmor and Councilmembers:

We are writing on behalf of Santa Clara Citizens for Sensible Industry ("Santa Clara Citizens") to appeal the January 27, 2021 decision of the Santa Clara Planning Commission ("Commission") denying Santa Clara Citizens' appeal of the Santa Clara Development Review Officer's November 4, 2020 adoption of the Mitigated Negative Declaration and Mitigated Monitoring and Reporting Program (collectively, with the Initial Study, "IS/MND") and approval of the Architectural Review and Minor Modifications to increase the building height to 87 feet and reduce the parking space requirements (collectively, "Permits") for the 1111 Comstock Data Center ("Project") (collectively, "Appeal").

Appellants Santa Clara Citizens is an unincorporated association of individuals and labor organizations directly affected by the Project. The association includes Santa Clara resident Mr. Long Vu, and other individuals and organization whose affiliates' members and their families live, work, recreate and raise their families in the City of Santa Clara and Santa Clara County. Santa Clara Citizens includes residents of the City of Santa Clara. Accordingly, pursuant to the City's

Planning Application Fee Schedule, effective July 1, 2020, the applicable Appeal fee to file this Appeal should be "Non-Applicant, Resident $469."[1]

Enclosed is the following:

- Required Appeal form
- Appeal application fee for $469 and any applicable associated charges for Santa Clara residents;
- Supporting evidence, including:
    - Exhibit A: Comments filed with the Planning Commission ahead of its January 27, 2021 hearing regarding our appeal, along with accompanying exhibits and expert comments in rebuttal to the City's Responses to Comments;
    - Exhibit B: Santa Clara Citizens' comments on the IS/MND, including expert comments;
    - Exhibit C: Santa Clara Citizens' November 11, 2020 appeal of the Development Review Officer's November 4, 2020 decision[2];
    - Appellants' oral testimony from the January 27, 2021 Planning Commission hearing.

As all architectural review approvals are heard de novo, we reserve the right to supplement this appeal with additional written comments and supporting evidence prior to consideration by the City Council.

Sincerely,

Kendra Hartmann

KH:acp
Attachments

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[1] See https://www.santaclaraca.gov/home/showdocument?id=56997.

[2] This appeal was originally addressed to the City Council. Per Santa Clara City Code Section 18.76.020(j), "For a project other than a single-family residential project, in the event the applicant or any interested party are not satisfied with the decision of the Director, they may, within seven days after such decision, appeal in writing to the City Council, in accordance with the procedures set forth in SCCC 18.108.060(b)."

Planning and Inspection Department
Planning Division
1500 Warburton Avenue
Santa Clara, CA 95050
Ph: (408) 615-2450

Appeal Form

Instructions

Use this form to appeal a decision of the Architectural Review Committee or Planning Commission. **All appeals must be filed in the Planning Division within seven calendar days of the action being appealed.**

Appeals from the Architectural Review Committee are made to the Planning Commission and will be set for hearing on the next available Planning Commission agenda. Appeals from the Planning Commission are made to the City Council and will be placed on the subsequent City Council Agenda to set a hearing date. Please contact the Planning Division at the number listed above with any inquiries about the process.

Please print, complete, and sign this form before mailing or delivering to the City, along with the fee payment, and supporting documentation, letters, etc. (if any).

Appeal Fees

Appeal Fees are set by the Municipal Code of the City of Santa Clara and are subject to annual review. Please call the Planning Division for the current Appeal Fee. **Fee payment must be received by the City of Santa Clara before this form submittal can be certified as complete.**

Appeal fees may be paid by cash, check, or with VISA, MasterCard, or American Express, at the Permit Center at City Hall. Alternatively, checks or money orders made payable to City of Santa Clara can be mailed or delivered to Planning Division, City Hall, 1500 Warburton Avenue, Santa Clara, California 95050.

Appellant Declaration

Name:	Santa Clara Citizens for Sensible Industry c/o legal counsel
Street Address:	Adams Broadwell Joseph & Cardozo, 601 Gateway Blvd., Ste. 1000
City, State, Zip Code:	South San Francisco, CA 94080
Phone number:	(650) 589-1660
E-mail address:	khartmann@adamsbroadwell.com

In accordance with the provisions of the Municipal Code of the City of Santa Clara, I hereby appeal the following action of the:

☐ Architectural Review Committee ☑ Planning Commission

at it's meeting of January 27, 2021 .
(date)

Agenda Item No.: 2

File No.(s): (PLN2019-13941; CEQ2020-01079)

Address:/APN(s): 1111 Comstock Street, Santa Clara CA; APN 224-08-092

Appellant Statement
(If more space is required, attach a separate sheet of paper.)

Action being appealed:

Please see attached letter and exhibits.

Reason for Appeal:

Please see attached letter and exhibits.

Certification of Authenticity

Beware, you are subject to prosecution if you unlawfully submit this form. Under penalty of law, transmission of this form to the City of Santa Clara is your certification that you are authorized to submit it and that the information presented is authentic.

Signature of Appellant

February 2, 2021
Date

EXHIBIT A

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MARC D. JOSEPH
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Not admitted in California. Licensed in Colorado.

January 27, 2021

Via Email Only

Chair Lance Saleme and Planning Commission Members
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050
Email: PlanningPublicComment@SantaClaraCA.gov;
PlanningCommission@santaclaraca.gov

Re: Agenda Item No 2: Appeal of the Development Review Hearing Adoption of a Mitigated Negative Declaration and Architectural Approval of 1111 Comstock Data Center Project (PLN2019-13941; CEQ2020-01079)

Dear Chair Saleme and Planning Commission Members:

We are writing on behalf of Santa Clara Citizens for Sensible Industry ("Santa Clara Citizens") to request that the Planning Commission grant Santa Clara Citizens' appeal and reverse the November 4, 2020 decision of City of Santa Clara Development Review Officer to adopt a Mitigated Negative Declaration ("MND") and Mitigated Monitoring and Reporting Program (collectively, with the Initial Study, "IS/MND") and to approve the Architectural Review and Minor Modification to increase the building height to 87 feet and reduce the parking space requirements for the Project (collectively, "Permits") for the 1111 Comstock Street Data Center ("Project").

The Project, proposed by Prime Data Centers ("Applicant"), proposes to demolish an existing 23,765-square-foot industrial building and construct a four-story, 121,170-square-foot data center building on the 1.38-acre Project site (APN 224-08-092). The data center building would house computer servers designed to provide 10 megawatts ("MW") of information technology power; underground electrical conduit with concrete encasement would be installed onsite and would connect to an existing underground Silicon Valley Power ("SVP") electric line. Standby backup emergency electrical generators would be installed to provide for

an uninterrupted power supply. Six 3,000-KW diesel-fueled engine generators and one 500-kW diesel-fueled engine generator would be located within a generator room on the first floor of the building. Fuel for the generators would be stored in two 30,000-gallon underground storage tanks which would feed individual 160-gallon day tanks located adjacent to each generator. The site, zoned as Light Industrial with a General Plan designation of Low Intensity Office/R&D, is located north of Comstock Street, east of Kenneth Street, south of Bayshore Freeway, and west of Lafayette Street within the City of Santa Clara.

On October 13, 2020, we submitted comments on the IS/MND prepared for the Project ("Comment Letter"). Our comments were prepared with the assistance of technical expert James J.J. Clark, Ph.D. of Clark & Associates Environmental Consulting, Inc. As detailed therein, we identified potentially significant and unmitigated impacts from the Project due to emissions of toxic air contaminants ("TACs") from the Project's backup diesel generators, as well as other potentially significant impacts to air quality, public health, and from greenhouse gas ("GHG") emissions, which the IS/MND fails to adequately mitigate. Based on these potentially significant and unmitigated impacts, as well as other deficiencies in the Initial Study, Santa Clara Citizens' comments concluded that the IS/MND in its current form violates CEQA and that substantial evidence supports a fair argument that an environmental impact report ("EIR") is required for the Project.

At the November 4, 2020 public hearing, the Development Review Officer adopted the IS/MND and approved the Permits. Santa Clara Citizens timely appealed this decision on November 11, 2020 ("Appeal"). Citizens' representative was improperly charged $10,203.26 to file the Appeal, an excessive and unconscionable fee which violated Citizens' due process rights and the City's own Fee Schedule for Santa Clara residents ("Appeal Fee"). Citizens paid the Appeal Fee in protest, and herein request that the Planning Commission order the City to reimburse Citizens for the excess fees it was charged.

The City prepared Responses to Comments ("Responses") which responded to some, but not all, of the issues raised in the Comment Letter. Review of the Responses, and further review of the IS/MND, demonstrates that the City failed to resolve many of the IS/MND's deficiencies identified by Citizens, and that the IS/MND still fails to address many of the Project's potentially significant impacts, including energy impacts, GHG emissions, and emissions from backup generators, in violation of CEQA. This letter addresses the Responses and additional deficiencies in the IS/MND which the City must correct before the Project can be approved.

We respectfully request that the Planning Commission uphold this appeal and reverse the decision of the Director to adopt the IS/MND and approve the Permits. We reserve the right to supplement these comments at later hearings on this Project.[1]

I. STATEMENT OF INTEREST

Santa Clara Citizens is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential health, safety, public service, and environmental impacts of the Project. The association includes City of Santa Clara resident Mr. Long Vu, and other individuals and organizations, including California Unions for Reliable Energy ("CURE") and its local affiliates, and the affiliates' members and their families, who live, work, recreate and raise their families in the City of Santa Clara and Santa Clara County.

Since its founding in 1997, CURE has been committed to building a strong economy and a healthier environment. Its members help solve the State's energy problems by building, maintaining, and operating conventional and renewable energy power plants and transmission facilities. CURE members have an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Individual members live, work, recreate, and raise their families in Santa Clara. They would be directly affected by the Project's environmental and health and safety impacts. Its members may also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants or other health and safety hazards that exist onsite.

Santa Clara Citizens supports the development of data centers where properly analyzed and carefully planned to minimize impacts on the environment. Any proposed project should avoid impacts to public health, energy resources, sensitive species and habitats, and should take all feasible steps to ensure significant impacts are mitigated to the maximum extent feasible. Only by maintaining the highest standards can development truly be sustainable.

Santa Clara Citizens and its members are concerned with projects that can result in serious environmental harm without providing countervailing economic

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[1] Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield ("Bakersfield")* (2004) 124 Cal. App. 4th 1184, 1199-1203; *see Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

benefits such as decent wages and benefits. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for industry to expand in the City and the surrounding region, and by making it less desirable for businesses to locate and people to live and recreate in the City, including in the vicinity of the Project. Continued degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduces future employment opportunities. Santa Clara Citizens' members therefore have a direct interest in enforcing environmental laws that minimize the adverse impacts of projects that would otherwise degrade the environment. CEQA provides a balancing process whereby economic benefits are weighted against significant impacts to the environment. It is for these purposes that we offer these comments

II. CEQA REQUIRES THE CITY TO PREPARE AN ENVIRONMENTAL IMPACT REPORT

CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. The "fair argument" standard reflects this presumption. The fair argument standard is an exceptionally low threshold favoring environmental review in an EIR rather than a negative declaration.[2] This standard requires preparation of an EIR if any substantial evidence in the record indicates that a project may have an adverse environmental effect.[3] As a matter of law, substantial evidence includes both expert and lay opinion based on fact.[4] Even if other substantial evidence supports a different conclusion, the agency nevertheless must prepare an EIR.[5] As we have shown in our two Comment Letters and Appeal Letter, there is substantial evidence that the Project **may** cause significant adverse environmental and public health effects.

The City has failed to comply with its duty under CEQA to evaluate *any* potential significant environmental impacts through an EIR. As explained in our Comment Letter and herein, as well as in the attached rebuttal of our technical expert, James Clark,[6] the City must prepare an EIR for this Project.

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[2] *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.
[3] 14 C.C.R. § 15064(f)(1); *Pocket Protectors,* 124 Cal.App.4th at 931.
[4] PRC § 21080(e)(1) (For purposes of CEQA, "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."); 14 C.C.R. § 15064(f)(5).
[5] *Arviv Enterprises v. South Valley Area Planning Comm.* (2002) 101 Cal.App.4th 1333, 1346; *Stanislaus Audubon v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597.
[6] **Exhibit** A: James Clark Comments, January 26, 2021 ("Clark Comments").

A. The IS/MND's Emissions Calculations and Determinations of Significance Are Unsupported by Substantial Evidence

1. The IS/MND's Analysis of Greenhouse Gas Emissions Relies on an Unsupported Threshold

CEQA requires agencies to consider both direct and indirect GHG emissions and air quality impacts associated with a project.[7] An agency's evaluation of the significance of the environmental impacts of a project requires "consideration of reasonably foreseeable indirect physical changes caused by the project."[8] Substantial evidence must support an agency's conclusions regarding significance of impacts, even when a project appears consistent with state and regional emission reduction goals.[9]

The City argues that the Project would not generate significant GHG emissions, either directly or indirectly, because it 1) would receive electricity from a utility (Silicon Valley Power) which is on track to meet the SB 32 2030 GHG emission reduction target; 2) would result in lower emissions (43.5 percent) than the statewide average for an equivalent facility due to SVP's power mix; 3) would include energy efficiency measures to reduce emissions to the extent feasible; and 4) would be consistent with applicable plans and policies adopted to reduce GHG emissions.[10] The qualitative threshold against which the City evaluates the Project's GHG emissions is unsupported, and its analysis flawed, for several reasons.

First, the City cannot rely on SVP's power mix to ensure that the Project will not contribute to GHG emissions. According to the IS/MND, 25% of SVP's power mix is generated by GHG-emitting natural gas (16%) and coal-fired (9%) sources.[11] Though the City asserts that SVP recently eliminated coal-fired power, and will increase its use of renewable sources of energy in the future, the Project will continue to draw energy from the grid throughout its life, which by the IS/MND's own admission includes GHG-emitting sources. Even with measures to increase reliance on renewables, fossil-fuel powered energy facilities will continue to provide

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[7] 14 C.C.R. § 15064(d).
[8] *Id.*
[9] *Ctr. for Biological Diversity v. Dept. of Fish & Wildlife* ("*CBD*") (2015) 62 Cal.4th 204, 225–229, 240–241.
[10] Response A.8, p. 12.
[11] SVP's 2017 Power Mix included 9% from coal and 16% from natural gas, IS/MND, p. 68.

power to California's energy grid until they are phased out, likely until at least 2045 according to the state's Renewables Portfolio Standards.[12]

The IS/MND discloses that at least 16% of the Project's energy at the time of approval will consist of GHG-emitting fossil-fuel energy from natural gas.[13] The Project has a 10 MW capacity, meaning that a full 1.6 MW of energy used by the Project will have indirect GHG emissions. The IS/MND's reliance on SVP's power mix does nothing to reduce or eliminate this significant GHG impact. Indeed, the IS/MND states that Santa Clara offers SVP energy consumers a "carbon-free energy option," yet fails to require it for the Project.[14] Thus, the IS/MND both fails to disclose a significant GHG impact, and fails to require reasonably feasible mitigation to reduce the impact to less than significant levels, by relying on an unsupported significance threshold related to SVP's illusory "power mix."[15]

Any GHG emissions resulting from the generation of energy to operate the Project's data center would be necessarily caused by the data center. In other words, the data center would contribute to GHG emissions. The City must prepare an EIR to disclose and mitigate these impacts.

Secondly, the IS/MND's claim that the incorporation of a "variety of energy efficiency measures" will contribute to reductions of GHG emissions is an overstatement and not legally supported. The Project in fact only lists 2 such measures, consisting of:

(1) Power Usage Effectiveness ("PUE"): The Project's PUE (the ratio of total power used by the facility to the power used exclusively for its information technology equipment) would be 1.2.[16] This brings the Project into compliance with the City's Climate Action Plan Measure 2.3.[17]

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[12] See IS/MND, p. 50 ("SB 100, passed in 2018, increased the 2030 renewable source requirement to 60%, and requires 100 percent of electricity in California to be provided by 100 percent renewable and carbon-free sources by 2045.").
[13] IS/MND, p. 68.
[14] IS/ MND, p. 52, FN 22.
[15] Responses, p. 12.
[16] IS/MND, p. 54.
[17] We argued in our initial comments, and reiterate here, that because the CAP was adopted to achieve 2020 emissions reduction targets, consistency with the CAP does not support a determination that impacts will be less than significant beyond that year.

(2) Energy and Water Use Efficiency in Building Design: the project proposes to implement efficiency measures, including evaporative cooling instead of mechanical cooling for IT and electrical rooms; daylight penetration of common areas; reflective roof surface; meet or exceed Title 24 requirements; clean air vehicle parking; low-flow plumbing fixtures; low-water use landscaping.

This approach fails to comply with CEQA, which requires the lead agency to not only describe a project's impacts resulting from energy in an EIR, it must quantify them, and may not merely rely on energy efficiency measures to reduce energy-related impacts.[18]

Finally, the Project's consistency with state and local climate goals and regulations cannot substitute as evidence that the Project will have no significant impacts on GHG emissions, absent more than mere conclusory statements regarding the Project's consistency with regulations. The City must also provide a reasoned explanation supported by substantial evidence that the Project's consistency with state climate goals render its GHG impacts less than significant.[19] The following illustrate the inadequacy of the IS/MND's discussion of the Project's qualitative threshold:

- The IS/MND states that the Project "would be required to comply with General Plan Policy 5.8.5-P1, which requires new development to implement [transportation demand management ("TDM")] programs that can include site-design measures, including preferred carpool and vanpool parking, enhanced pedestrian access, bicycle storage and recreational facilities."[20] It does not indicate, however, whether or how the Project intends to comply with this policy. It appears no TDM program has been prepared, and the IS/MND does not list

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[18] *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 264-65 (energy impact analysis requires clarification and technical information regarding project-related energy usage and conservation features); *Spring Valley Lake Association v. City of Victorville* (2016) 248 Cal.App.4th 91, 103 (EIR must show factual basis of its assumptions that both energy use and greenhouse gas emissions will be reduced); *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 210 ("CEQA EIR requirements are not satisfied by saying an environmental impact is something less than some previously unknown amount").

[19] *Ctr. for Biological Diversity v. Dept. of Fish & Wildlife* ("*CBD*") (2015) 62 Cal.4th 204, 225–229, 240–241.

[20] IS/MND, p. 72.

specific measures that it intends to implement to bring it into compliance with GP Policy 5.8.5-P1.

- The IS/MND asserts that implementation of General Plan policies that increase energy efficiency or reduce energy use would reduce the Project's indirect GHG emissions associated with the energy generation.[21] Consistency with these policies will be achieved by the Project's proposal to use emergency generators with "advanced air pollution controls," as well as the implication that generator testing would be performed intermittently to reduce impacts from concurrent generator emissions. The IS/MND also states, however, that the Project's generators would use diesel-fueled engines that meet U.S. EPA Tier 2 emissions standards.[22] A cleaner alternative, which would meet the GP's policy of minimizing public health hazards and reducing emissions, would be the use of Tier 4 engines, which have been recommended in similar data center projects by CARB.[23]

- The IS/MND states that the Project is in compliance with the Bay Area 2017 Clean Air Plan's Energy Sector Control Measures. Analysis of its compliance, however, is limited to the statement that "energy efficiency measures have been included in the design and operation of the electrical and mechanical systems on the site."[24] What those measures are or how they ensure consistency with the Clean Air Plan is absent.

- Analysis of the Project's consistency with California's Climate Change Scoping Plan offers even less discussion. The IS/MND offers only the statement that the Project "would be generally consistent" with the Scoping Plan.[25]

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[21] GP Policy 5.10.2-P3 encourages implementation of technological advances that minimize public health hazards and reduce the generation of air pollutants." IS/MND, pp. 72–73.
[22] IS/MND Appendix A, p. 2.
[23] Comments by CARB on the California Energy Commission's Proposed Decision for the Proposed Sequoia Data Center Project (19-SPPE-03) (October 15, 2020).
[24] IS/MND, p. 72.
[25] IS/MND, p. 74.

Though the City may, at its discretion, choose to evaluate the Project's GHG emissions according to a qualitative threshold, the IS/MND's unsupported, conclusory statements do not qualify as adequate analyses of consistency with local, state, and regional plans because they lack any discussion of the plans' goals and policies as they apply to the Project.

An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.[26] While courts have found it could be reasonable to use consistency with AB 32 and other California climate goals as a measure of significance under CEQA, agencies must support their conclusions about a project's consistency with statewide emissions reduction goals with substantial evidence for CEQA to be satisfied. Absent clear evidence that the Project would, in fact, aid in the achievement of statewide emissions reductions goals, the City cannot properly conclude that GHG emissions impacts would be insignificant.

2. The IS/MND Fails to Consider Reasonably Foreseeable Impacts from Backup Generator Emergency Operations

In our Comments on the IS/MND, we asserted that the assumption in the IS/MND that the backup generators will only ever run for 50 hours per year ignores the reality of power failures, utility shutdowns, and the very purpose of a data center—to provide an uninterrupted power supply—in its emissions calculations.[27] The City's Response pointed out that CEQA does not require evaluation of emergency conditions.[28]

CEQA requires that a Project's reasonably foreseeable impacts be assessed. As pointed out by CARB in its comments to the CEC, data centers market themselves on the premise that they will provide reliable, uninterrupted power at all times, even during power loss events.[29] "These obligations and operational realities mean forecasting a reasonable range of uses during power outages is appropriate. Such use is reasonably foreseeable. Although we recognize continuing work to limit reliability events and power shutoffs, data centers are constructed on the reasonable premise that such outages do occur, and that we must manage the

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[26] *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516, 520; *Kings County Farm Bureau*, 221 Cal.App.3d at 732.
[27] Comments, p. 10,
[28] Response A.4, p. 8.
[29] Comments by CARB on the California Energy Commission's Proposed Decision for the Proposed Sequoia Data Center Project (19-SPPE-03) (October 15, 2020).

continuing risks of a warming climate."[30] CARB's comments provide substantial evidence demonstrating that emergency operations are a common place operation of data centers, and a reasonably foreseeable use which requires analysis under CEQA.

The City argues that because of SVP's record with respect to power outages and shutoffs (which it maintains is better than PG&E or San Jose Clean Energy) renders the possibility of emergency operations of backup generators remote, CARB's assertion that weather events that lead to power shutoffs are likely to become more frequent, not less, means operation of backup generators is reasonably foreseeable.

"In CARB's view, data center emergency operations are not speculative, and an evaluation of their operations during loss of power—for which the centers are being specifically designed, and for which they are marketed to customers—is also not speculative. CEQA requires an appropriate evaluation even of foreseeable impacts otherwise imprecise in scope or contingent in occurrence."[31]

B. The Project Has Potentially Significant Operational Energy Impacts Which the IS/MND Fails to Disclose and Mitigate

The IS/MND concludes that though the Project will result in an increase in energy consumption at the site, its incorporation of energy efficiency measures and compliance with standards such as those in the Title 24 and the Green Building Standards Code will reduce its energy impacts to less than significant.[32] This conclusion is clearly erroneous and unsupported when considering that the increase in energy use will be massive: 89,352 MWh per year compared to the 196 MWh that the current industrial site consumes yearly.[33] The IS/MND further claims that the Project's energy impacts require no mitigation due to its consistency with various regulatory standards, such as the Renewables Portfolio Standards, building codes, Energy Star, and the Advanced Clean Cars Program.[34] The extent of its analysis of the Project's consistency with any of these programs, however, consists of a reiteration of SVP's role as supplier of Project energy; vague indications of lighting control, air economization, and low-flow plumbing fixtures; and conclusory

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[30] Id.
[31] Id.
[32] IS/MND, p. 54.
[33] IS/MND, p. 54.
[3434] IS/MND, pp. 50–51.

statements regarding compliance with policies.[35] The IS/MND declares that compliance with these measures will account for the colossal 455-fold increase in energy use.[36]

Courts have routinely rejected this approach to energy impact analysis. In *Ukiah Citizens*, the Court of Appeal held that the EIR inadequately described the energy impacts of a Costco project where the EIR relied on the project's compliance with energy conservation standards to conclude that energy consumption would be less than significant.[37] The Court determined that the EIR certified by the City of Ukiah failed to comply with CEQA's energy impacts analysis requirements because it failed to evaluate energy impacts from transportation, construction, or operation, relying instead on compliance with building codes and separate GHG emissions mitigation measures to conclude that impacts would be less than significant.[38] The Court concluded that the EIR failed to adequately describe or discuss the energy impacts of the project. Consequently, the Court ordered the City of Ukiah to recirculate the EIR for public comment with a legally adequate energy impacts analysis.[39]

The City's reliance on compliance with standards such as Title 24 to replace a meaningful analysis of the Project's actual energy impacts violates CEQA. Just as the courts in *CCEC* and *Ukiah Citizens* held that the lead agencies could not rely on state-mandated Title 24 and CALGreen building codes as evidence to conclude that the projects' energy consumption impacts would be rendered less than significant, the City cannot merely point to Title 24 and California Green Building Standards to support the IS/MND's conclusion that the Project's energy impacts will not be significant.

C. Cumulative Impacts from Emissions Were Not Evaluated

CEQA Guidelines section 15064 specifies how to demonstrate consistency with a greenhouse gas reduction plan. That section states: "When relying on a plan, regulation or program [for the reduction of GHG emissions], the lead agency should explain how implementing the plan, regulation or program ensures that the

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[35] *Id.*, p. 55.
[36] IS/MND, p. 54.
[37] *Ukiah Citizens for Safety First v. City of Ukiah* ("*Ukiah Citizens*") (2016) 248 Cal.App.4th 256, 263-266.
[38] *Id.*
[39] *Id.* at 266-267.

project's incremental contribution to the cumulative effect is not cumulatively considerable." Additionally, the consistency analysis "must identify those requirements specified in the plan that apply to the project, and if those requirements are not otherwise binding and enforceable, incorporate those requirements as mitigation measures applicable to the project."[40]

Rather than identifying explaining how implementation measures would result in less-than-significant cumulative impacts, the IS/MND merely makes the conclusory statement that due to such measures, "the proposed project would not result in substantial adverse effects on human beings, individually or cumulatively."[41] The IS/MND wholly fails to explain how these measures will protect against cumulatively considerable impacts.

Furthermore, the region where the Project will be located has seen a proliferation of similar data center projects, all proposing to use backup diesel generators and most—including the Project at issue—proposing to use the dirtier Tier 2 engines, rather than the cleaner Tier 4.[42] The increase has been such that CARB's recent comments to the California Energy Commission included the recommendation that data centers include in their emissions modeling estimates the simultaneous operation of backup generators during power outages. "The only purpose for the installation of the backup diesel generators for this proposed project is to operate and provide power to the data center due to a disruption in utility power. Modeling at least some impact from simultaneous operation of the backup generators is no more speculative than assuming no hours of simultaneous operation or even in modeling the permitted 50 hours annually of operation for maintenance, which requires a similar degree of CEC making reasonable assumptions."[43]

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[40] 14 C.C.R. § 15183.5(b)(2); BAAQMD CEQA Guidelines (May 2017), p. 4-4 ("A project must demonstrate its consistency by identifying and implementing all applicable feasible measures and policies from the GHG Reduction Strategy into the project.").
[41] IS/MND, p. 145.
[42] Comments by CARB on the California Energy Commission's Proposed Decision for the Proposed Sequoia Data Center Project (19-SPPE-03) (October 15, 2020).
[43] Id.

III. THE CITY'S UNREASONABLE FEE FOR FILING AN APPEAL VIOLATES SANTA CLARA CITIZENS' DUE PROCESS RIGHTS

The Courts have upheld the authority of agencies to charge reasonable fees for filing administrative appeals of decisions.[44] Agencies cannot, however, impose fees so excessive that they discourage the exercise of a party's due process rights to a hearing.[45] The fees an agency imposes may not preclude a party from filing an appeal, and they likewise cannot create "an incentive not to make such a demand and not to mount a rigorous defense."[46]

CEQA's standing requirements do not require that a party reside in the region where a project is taking place in order to challenge an agency's findings of significant environmental impacts. A project's environmental impacts can be felt regardless of legislative boundaries: "Effects of environmental abuse are not contained by political lines; strict rules of standing that might be appropriate in other contexts have no application where broad and long-term effects are involved."[47]

Though anyone can legally challenge the City's conclusions regarding the Project's environmental impacts contained in the IS/MND, the City's new fee schedule, adopted by the City Council on April 28, 2020 as Resolution 20-8839 and made effective July 1, 2020, imposes such an exorbitant fee upon nonresidents of Santa Clara who wish to file an appeal as to violate due process. Though residents of the City are required to pay $469 to file an appeal, "all others" are now charged $9,381.[48] "All others" includes anyone who does not reside within City limits—including nonresident neighbors who may live in much closer proximity to a project site than residents across the city. The fee is so high—20 times higher than what residents pay—as to be prohibitive.

Santa Clara Citizens' appeal, filed on November 12, 2020, was improperly assessed a $10,203.26 fee,[49] despite the fact that Appellants members include Santa Clara residents. This was an illegal and unconscionable fee.

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[44] *See Friends of Glendora v. City of Glendora* (2010) 182 Cal.App.4th 573, 579–80; *see also Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 419.
[45] *California Teachers Association v. State of California* (1999) 20 Cal. 4th 327, 331.
[46] *Id.* at 352.
[47] *Bozung v. Local Agency Formation Com.* (1975)13 Cal. 3d 263, 272.
[48] **Exhibit B:** Santa Clara Planning Application Fee Schedule.
[49] **Exhibit C:** Itemized Receipt of Appeal Fees.

In addition to the City's due process violations in the form of unconscionable fees, Santa Clara Citizens' membership rolls consist of many residents of the City, including Long Vu. This appeal of the Design Review Officer's decision clearly should not have been subject to the $9,381 fee. A timely refund for the difference between the resident fee and the nonresident fee of $8,912 is requested.[50]

IV. RELIEF REQUESTED

Santa Clara Citizens requests that the Planning Commission grant its Appeal and reverse the November 4, 2020 decisions of the Development Review Officer to 1) adopt the Mitigated Negative Declaration and approve the Architectural Review for the Project. We further request that the City prepare an EIR which fully analyzes and mitigates the Project's potentially significant environmental impacts as described in our Comment Letters and this Appeal. By doing so, the City and public can ensure that all adverse environmental and public health impacts of the Project are adequately analyzed, disclosed, and mitigated, as required by law.

Finally, we request relief in the form of reimbursement of the excessive Appeal Fee paid.

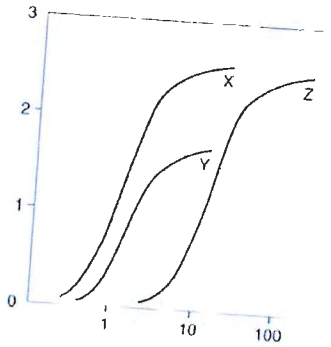
Sincerely,

Kendra Hartmann

KH:acp
Attachment

[50] Santa Clara Citizens was also charged $822.26 for a "Technology Surcharge"; the City's Fee Schedule states that the Technology Surcharge "will be assessed at 3.37% of the application fee for all applications except those that are collected 'at cost.'"

EXHIBIT A



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January 26, 2021

Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 100
South San Francisco, CA 94080

Attn: Ms. Kendra D. Hartmann

Subject: Comment Letter on Initial Study With Proposed Mitigated Negative Declaration (IS/MND) for 1111 Comstock Street Data Center, Santa Clara, California, PLN2019-13941 and CEQ2020-01079

Dear Ms. Hartmann:

At the request of Adams Broadwell Joseph & Cardozo (ABJC), Clark and Associates (Clark) has reviewed materials related to the IS/MND for the above referenced project. The IS/MND was prepared by David J. Powers and Associates, Inc. for the City of Santa Clara Community Development Department.

Clark's review of the materials in no way constitutes a validation of the conclusions or materials contained within the project record. If we do not comment on a specific item this does not constitute acceptance of the item.

General Comments:

The City's response to comments from ABJC and Clark analysis of the air quality impacts of emissions from the project are unsupported and flawed. The analysis used as the basis for determining that emissions from the Project are less than significant fails to address the true potential to emit (PTE) and is not in compliance with regulations about the use of backup power generators, nor is it in compliance with regulations regarding the use of Best Available Control Technology (BACT) for diesel back-up generators. These flaws are detailed below.

The City must update its analysis as an Environmental Impact Report (EIR) to correct the unsupported conclusions presented in the IS/MND.

Specific Comments:

1. **The City's Response to Comments Ignores The Issues Identified Regarding The Impacts Of The Operational Phase of The Project**

According to the City's response to comments from ABJC and Clark, the air quality analysis and risk analysis performed were appropriate since the City is assuming that testing can be performed once per month for up to one hour, or 12 hours per generator per year. The City claims that since this is less than the 50 hours per year modeled the IS overestimates the project's emissions.

This answer flies in the face of existing regulations from the Bay Area Air Quality Management District (BAAQMD) which require that the lead agency determine the potential to emit (PTE) for emergency backup power generators. This policy states that 100 hours of operation per year represents a reasonable worst-case scenario for the use of back-up generators at any site and will be used to determine the applicability of District permitting regulations (Attachment 1 to this letter). According to the policy, Facilities with one or more such generators are subject to the policy. Such facilities should presume that each of their generators will experience 100 hours per year of emergency operation when calculating their PTE for purposes of determining the applicability of the permitting regulations in Reg. 2 - including the District's New Source Review regulations (Reg. 2, Rule 2) and Title V Major Facility Review regulations (Reg. 2, Rule 6).

The policy's rationale includes the following statement: "This presumption of 100 hours per year of emergency operation is consistent with EPA's approach to calculating the PTE of such generators. EPA has recognized that emergency operations are unpredictable, and that they will be variable in duration but will probably not last more than one day (24 hours) per emergency event. Notwithstanding this likelihood that emergency conditions would not exceed 24 hours, EPA has suggested using a highly conservative assumption of 500 hours per year of emergency operation. EPA reasoned that even with this highly conservative number, most facilities with only a single

generator will remain below the agency's 'major source' regulatory applicability thresholds. But EPA also made clear that different presumptions may be appropriate based on other considerations."

The policy also prohibits the Air District from allowing a limit on owner/operator to accept a permit condition to limit emergency operations to less than 100 hours per year to reduce a source's PTE. An owner/operator may reduce a generator's PTE by accepting lower limits on testing and reliability-related operation or by installing an emissions control device, but not through accepting a limit on ***emergency operation*** (emphasis added). The City's response that the longest recorded outage in the last 10 years lasted roughly 7.5 hours fails to address the potential impacts based on the reasonable worst-case scenario as required by the BAAQMD permitting regulations.

Clearly this policy requires the Proponent and by extension the City to evaluate the emissions impacts from the generators for testing (assumed to be 12 hours per generator) and operation (100 hours per year per unit by BAAQMD policy) throughout the year. The assumption that the generators will only operate for 12 hours per year and will not be operated as designed (for emergency use) throughout the course of any given year clearly does not meet the requirements in CEQA to evaluate the operational impacts of the project. While the Proponent modeled 50 hours of testing, they have not modeled the additional 100 hours per year of operation. This underestimates the potential emissions by two-thirds (2/3), representing a very significant ***underestimation*** of the emissions from the Project. This failure clearly requires the City to prepare an Environmental Impact Report (EIR) to accurately assess the impacts of the project on the surrounding community.

2. The Method For Assessing The Project's Air Quality Impacts Fails To Compare The Emissions Against The BAAQMD's Applicable New Source Review Rule Regulations.

Per the December 21, 2020 letter from the BAAQMD to the California Energy Commission (CEC)[1], the BAAQMD has established a best available control technology (BACT) guideline for large

[1] BAAQMD. 2020. Letter To CEC, Re: BACT Determination For Diesel Back-Up Engines Greater Than or Equal To 1,000 Brake Horsepower. From Richard Corey, Executive Officer to Drew Bohan, Executive Director. Dated December 21, 2020

(greater or equal to 1,000 brake horsepower) diesel engines used for emergency standby power that requires them to meet the U. S. EPA's Tier 4 emissions standards (Attachment 2 to this letter). This determination will apply to any new and open permit application with a diesel backup engine ≥ 1000 bhp that is deemed complete after 1/1/2020. The project as designed has 6 diesel-fueled 3,000-kW generators (equal to 4,023 bhp) as an essential component of the project design.

As part of the BAAQMD's permitting processes, the Air District's New Source Review Rule (Regulation 2, Rule 2) requires that new or modified sources of air pollutants undergo permit review for Best Available Control Technology (BACT). BACT2 "Achieved-In-Practice" applies to the most effective emission controls already in use or the most stringent emission limit achieved in the field for the type and capacity of equipment comprising the source under review and operating under similar conditions.

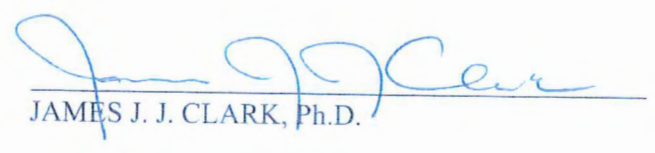
BAAQMD Regulation 2, Rule 2, states that ***any new or modified source*** (emphasis added) which results in an increase in emissions of precursor organic compounds (POC), non-precursor organic compounds (NPOC), nitrogen oxides (NOx), sulfur dioxide (SO2), particulate matter (PMl0), or carbon monoxide (CO) in excess of 10 pounds per highest day must be reviewed for possible application of BACT. California Health and Safety Code Section 42300 authorizes delegation of stationary source permitting authority from the state to the local air pollution control districts, including the setting of rules and definitions

The CALEEMOD runs submitted in support of the IS/MND (mitigated operation) show that for the stationary sources of pollution at the site, the annual emissions of oxides of nitrogen (NOx) and carbon monoxide (CO) are 4.8689 tons per year and 2.7661 tons per year, respectively. Multiplying the tons per year by 2000 lbs per ton and dividing the total by 365 days, the number of pounds per day of operational emissions may be calculated. This results in the calculation of 26.68 lbs per day of NOx and 15.21 lbs per day of CO. Clearly, these emissions exceed the values detailed in BAAQMD Regulation 2, Rule 2. The Project will need a review therefore for BACT, a significant change in the air quality analysis performed for the Project. This deficiency in IS/MND analysis clearly requires the City to prepare an Environmental Impact Report (EIR) to accurately assess the impacts of the project on the surrounding community.

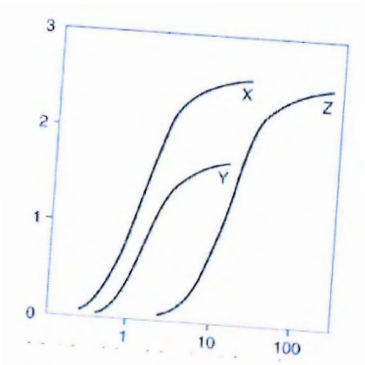
Conclusion

Clearly, the facts above present substantial evidence supporting a fair argument that the project would result in significant and unmitigated environmental impacts. The request for a EIR to quantify those impacts is warranted.

Sincerely,



JAMES J. J. CLARK, Ph.D.



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James J. J. Clark, Ph.D.

Principal Toxicologist

Toxicology/Exposure Assessment Modeling

Risk Assessment/Analysis/Dispersion Modeling

Education:

Ph.D., Environmental Health Science, University of California, 1995

M.S., Environmental Health Science, University of California, 1993

B.S., Biophysical and Biochemical Sciences, University of Houston, 1987

Professional Experience:

Dr. Clark is a well recognized toxicologist, air modeler, and health scientist. He has 20 years of experience in researching the effects of environmental contaminants on human health including environmental fate and transport modeling (SCREEN3, AEROMOD, ISCST3, Johnson-Ettinger Vapor Intrusion Modeling); exposure assessment modeling (partitioning of contaminants in the environment as well as PBPK modeling); conducting and managing human health risk assessments for regulatory compliance and risk-based clean-up levels; and toxicological and medical literature research.

Significant projects performed by Dr. Clark include the following:

LITIGATION SUPPORT

Case: James Harold Caygle, et al, v. Drummond Company, Inc. Circuit Court for the Tenth Judicial Circuit, Jefferson County, Alabama. Civil Action. CV-2009

Client: Environmental Litgation Group, Birmingham, Alabama

Dr. Clark performed an air quality assessment of emissions from a coke factory located in Tarrant, Alabama. The assessment reviewed include a comprehensive review of air quality standards, measured concentrations of pollutants from factory, an inspection of the facility and detailed assessment of the impacts on the community. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: Rose Roper V. Nissan North America, et al. Superior Court of the State Of California for the County Of Los Angeles – Central Civil West. Civil Action. NC041739

Client: Rose, Klein, Marias, LLP, Long Beach, California

Dr. Clark performed a toxicological assessment of an individual occupationally exposed to multiple chemicals, including benzene, who later developed a respiratory distress. A review of the individual's medical and occupational history was performed to prepare an exposure assessment. The exposure assessment was evaluated against the known outcomes in published literature to exposure to respiratory irritants. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: O'Neil V. Sherwin Williams, et al. United States District Court Central District of California

Client: Rose, Klein, Marias, LLP, Long Beach, California

Dr. Clark performed a toxicological assessment of an individual occupationally exposed to petroleum distillates who later developed a bladder cancer. A review of the individual's medical and occupational history was performed to prepare a quantitative exposure assessment. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Summary judgment for defendants.

Case: Moore V., Shell Oil Company, et al. Superior Court of the State Of California for the County Of Los Angeles

Client: Rose, Klein, Marias, LLP, Long Beach, California

Dr. Clark performed a toxicological assessment of an individual occupationally exposed to chemicals while benzene who later developed a leukogenic disease. A review of the individual's medical and occupational history was performed to prepare a quantitative exposure assessment. The exposure assessment was evaluated against the known outcomes in published literature to exposure to refined petroleum hydrocarbons. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: Raymond Saltonstall V. Fuller O'Brien, KILZ, and Zinsser, et al. United States District Court Central District of California

Client: Rose, Klein, Marias, LLP, Long Beach, California

Dr. Clark performed a toxicological assessment of an individual occupationally exposed to benzene who later developed a leukogenic disease. A review of the individual's medical and occupational history was performed to prepare a quantitative exposure assessment. The exposure assessment was evaluated against the known outcomes in published literature to exposure to refined petroleum hydrocarbons. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: Richard Boyer and Elizabeth Boyer, husband and wife, V. DESCO Corporation, et al. Circuit Court of Brooke County, West Virginia. Civil Action Number 04-C-7G.

Client: Frankovitch, Anetakis, Colantonio & Simon, Morgantown, West Virginia.

Dr. Clark performed a toxicological assessment of a family exposed to chlorinated solvents released from the defendant's facility into local drinking water supplies. A review of the individual's medical and occupational history was performed to prepare a qualitative exposure assessment. The exposure assessment was evaluated against the known outcomes in published literature to exposure to chlorinated solvents. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: JoAnne R. Cook, V. DESCO Corporation, et al. Circuit Court of Brooke County, West Virginia. Civil Action Number 04-C-9R

Client: Frankovitch, Anetakis, Colantonio & Simon, Morgantown, West Virginia.

Dr. Clark performed a toxicological assessment of an individual exposed to chlorinated solvents released from the defendant's facility into local drinking water supplies. A review of the individual's medical and occupational history was performed to prepare a qualitative exposure assessment. The exposure assessment was evaluated against the known outcomes in published literature to exposure to chlorinated solvents. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: Patrick Allen And Susan Allen, husband and wife, and Andrew Allen, a minor, V. DESCO Corporation, et al. Circuit Court of Brooke County, West Virginia. Civil Action Number 04-C-W

Client: Frankovitch, Anetakis, Colantonio & Simon, Morgantown, West Virginia.

Dr. Clark performed a toxicological assessment of a family exposed to chlorinated solvents released from the defendant's facility into local drinking water supplies. A review of the individual's medical and occupational history was performed to prepare a qualitative exposure assessment. The exposure assessment was evaluated against the known outcomes in published literature to exposure to chlorinated solvents. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: Michael Fahey, Susan Fahey V. Atlantic Richfield Company, et al. United States District Court Central District of California Civil Action Number CV-06 7109 JCL.

Client: Rose, Klein, Marias, LLP, Long Beach, California

Dr. Clark performed a toxicological assessment of an individual occupationally exposed to refined petroleum hydrocarbons who later developed a leukogenic disease. A review of the individual's medical and occupational history was performed to prepare a qualitative exposure assessment. The exposure assessment was evaluated against the known outcomes in published literature to exposure to refined petroleum hydrocarbons. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: Constance Acevedo, et al., V. California Spray-Chemical Company, et al., Superior Court of the State Of California, County Of Santa Cruz. Case No. CV 146344

Dr. Clark performed a comprehensive exposure assessment of community members exposed to toxic metals from a former lead arsenate manufacturing facility. The former manufacturing site had undergone a DTSC mandated removal action/remediation for the presence of the toxic metals at the site. Opinions were presented regarding the elevated levels of arsenic and lead (in attic dust and soils) found throughout the community and the potential for harm to the plaintiffs in question.

Case Result: Settlement in favor of defendant.

Case: Michael Nawrocki V. The Coastal Corporation, Kurk Fuel Company, Pautler Oil Service, State of New York Supreme Court, County of Erie, Index Number I2001-11247

Client: Richard G. Berger Attorney At Law, Buffalo, New York

Dr. Clark performed a toxicological assessment of an individual occupationally exposed to refined petroleum hydrocarbons who later developed a leukogenic disease. A review of the individual's medical and occupational history was performed to prepare a qualitative exposure assessment. The exposure assessment was evaluated against the

known outcomes in published literature to exposure to refined petroleum hydrocarbons. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Judgement in favor of defendant.

SELECTED AIR MODELING RESEARCH/PROJECTS

Client – Confidential

Dr. Clark performed a comprehensive evaluation of criteria pollutants, air toxins, and particulate matter emissions from a carbon black production facility to determine the impacts on the surrounding communities. The results of the dispersion model will be used to estimate acute and chronic exposure concentrations to multiple contaminants and will be incorporated into a comprehensive risk evaluation.

Client – Confidential

Dr. Clark performed a comprehensive evaluation of air toxins and particulate matter emissions from a railroad tie manufacturing facility to determine the impacts on the surrounding communities. The results of the dispersion model have been used to estimate acute and chronic exposure concentrations to multiple contaminants and have been incorporated into a comprehensive risk evaluation.

Client – Los Angeles Alliance for a New Economy (LAANE), Los Angeles, California

Dr. Clark is advising the LAANE on air quality issues related to current flight operations at the Los Angeles International Airport (LAX) operated by the Los Angeles World Airport (LAWA) Authority. He is working with the LAANE and LAX staff to develop a comprehensive strategy for meeting local community concerns over emissions from flight operations and to engage federal agencies on the issue of local impacts of community airports.

Client – City of Santa Monica, Santa Monica, California

Dr. Clark is advising the City of Santa Monica on air quality issues related to current flight operations at the facility. He is working with the City staff to develop a comprehensive strategy for meeting local community concerns over emissions from flight operations and to engage federal agencies on the issue of local impacts of community airports.

Client: Omnitrans, San Bernardino, California

Dr. Clark managed a public health survey of three communities near transit fueling facilities in San Bernardino and Montclair California in compliance with California Senate Bill 1927. The survey included an epidemiological survey of the effected communities, emission surveys of local businesses, dispersion modeling to determine potential emission concentrations within the communities, and a comprehensive risk assessment of each community. The results of the study were presented to the Governor as mandated by Senate Bill 1927.

Client: Confidential, San Francisco, California

Summarized cancer types associated with exposure to metals and smoking. Researched the specific types of cancers associated with exposure to metals and smoking. Provided causation analysis of the association between cancer types and exposure for use by non-public health professionals.

Client: Confidential, Minneapolis, Minnesota

Prepared human health risk assessment of workers exposed to VOCs from neighboring petroleum storage/transport facility. Reviewed the systems in place for distribution of petroleum hydrocarbons to identify chemicals of concern (COCs), prepared comprehensive toxicological summaries of COCs, and quantified potential risks from carcinogens and non-carcinogens to receptors at or adjacent to site. This evaluation was used in the support of litigation.

Client – United Kingdom Environmental Agency

Dr. Clark is part of team that performed comprehensive evaluation of soil vapor intrusion of VOCs from former landfill adjacent residences for the United Kingdom's Environment

Agency. The evaluation included collection of liquid and soil vapor samples at site, modeling of vapor migration using the Johnson Ettinger Vapor Intrusion model, and calculation of site-specific health based vapor thresholds for chlorinated solvents, aromatic hydrocarbons, and semi-volatile organic compounds. The evaluation also included a detailed evaluation of the use, chemical characteristics, fate and transport, and toxicology of chemicals of concern (COC). The results of the evaluation have been used as a briefing tool for public health professionals.

EMERGING/PERSISTENT CONTAMINANT RESEARCH/PROJECTS

Client: Ameren Services, St. Louis, Missouri

Managed the preparation of a comprehensive human health risk assessment of workers and residents at or near an NPL site in Missouri. The former operations at the Property included the servicing and repair of electrical transformers, which resulted in soils and groundwater beneath the Property and adjacent land becoming impacted with PCB and chlorinated solvent compounds. The results were submitted to U.S. EPA for evaluation and will be used in the final ROD.

Client: City of Santa Clarita, Santa Clarita, California

Dr. Clark is managing the oversight of the characterization, remediation and development activities of a former 1,000 acre munitions manufacturing facility for the City of Santa Clarita. The site is impacted with a number of contaminants including perchlorate, unexploded ordinance, and volatile organic compounds (VOCs). The site is currently under a number of regulatory consent orders, including an Immanent and Substantial Endangerment Order. Dr. Clark is assisting the impacted municipality with the development of remediation strategies, interaction with the responsible parties and stakeholders, as well as interfacing with the regulatory agency responsible for oversight of the site cleanup.

Client: Confidential, Los Angeles, California

Prepared comprehensive evaluation of perchlorate in environment. Dr. Clark evaluated the production, use, chemical characteristics, fate and transport, toxicology, and remediation of perchlorate. Perchlorates form the basis of solid rocket fuels and have recently been detected in water supplies in the United States. The results of this research

were presented to the USEPA, National GroundWater, and ultimately published in a recent book entitled *Perchlorate in the Environment*.

Client – Confidential, Los Angeles, California

Dr. Clark is performing a comprehensive review of the potential for pharmaceuticals and their by-products to impact groundwater and surface water supplies. This evaluation will include a review if available data on the history of pharmaceutical production in the United States; the chemical characteristics of various pharmaceuticals; environmental fate and transport; uptake by xenobiotics; the potential effects of pharmaceuticals on water treatment systems; and the potential threat to public health. The results of the evaluation may be used as a briefing tool for non-public health professionals.

PUBLIC HEALTH/TOXICOLOGY

Client: Brayton Purcell, Novato, California

Dr. Clark performed a toxicological assessment of residents exposed to methyl-tertiary butyl ether (MTBE) from leaking underground storage tanks (LUSTs) adjacent to the subject property. The symptomology of residents and guests of the subject property were evaluated against the known outcomes in published literature to exposure to MTBE. The study found that residents had been exposed to MTBE in their drinking water; that concentrations of MTBE detected at the site were above regulatory guidelines; and, that the symptoms and outcomes expressed by residents and guests were consistent with symptoms and outcomes documented in published literature.

Client: Confidential, San Francisco, California

Identified and analyzed fifty years of epidemiological literature on workplace exposures to heavy metals. This research resulted in a summary of the types of cancer and non-cancer diseases associated with occupational exposure to chromium as well as the mortality and morbidity rates.

Client: Confidential, San Francisco, California

Summarized major public health research in United States. Identified major public health research efforts within United States over last twenty years. Results were used as a briefing tool for non-public health professionals.

Client: Confidential, San Francisco, California

Quantified the potential multi-pathway dose received by humans from a pesticide applied indoors. Part of team that developed exposure model and evaluated exposure concentrations in a comprehensive report on the plausible range of doses received by a specific person. This evaluation was used in the support of litigation.

Client: Covanta Energy, Westwood, California

Evaluated health risk from metals in biosolids applied as soil amendment on agricultural lands. The biosolids were created at a forest waste cogeneration facility using 96% whole tree wood chips and 4 percent green waste. Mass loading calculations were used to estimate Cr(VI) concentrations in agricultural soils based on a maximum loading rate of 40 tons of biomass per acre of agricultural soil. The results of the study were used by the Regulatory agency to determine that the application of biosolids did not constitute a health risk to workers applying the biosolids or to residences near the agricultural lands.

Client – United Kingdom Environmental Agency

Oversaw a comprehensive toxicological evaluation of methyl-*tertiary* butyl ether (M*t*BE) for the United Kingdom's Environment Agency. The evaluation included available data on the production, use, chemical characteristics, fate and transport, toxicology, and remediation of M*t*BE. The results of the evaluation have been used as a briefing tool for public health professionals.

Client – Confidential, Los Angeles, California

Prepared comprehensive evaluation of *tertiary* butyl alcohol (TBA) in municipal drinking water system. TBA is the primary breakdown product of M*t*BE, and is suspected to be the primary cause of M*t*BE toxicity. This evaluation will include available information on the production, use, chemical characteristics, fate and transport in the environment, absorption, distribution, routes of detoxification, metabolites, carcinogenic potential, and remediation of TBA. The results of the evaluation were used as a briefing tool for non-public health professionals.

Client – Confidential, Los Angeles, California

Prepared comprehensive evaluation of methyl *tertiary* butyl ether (MTBE) in municipal drinking water system. MTBE is a chemical added to gasoline to increase the octane

rating and to meet Federally mandated emission criteria. The evaluation included available data on the production, use, chemical characteristics, fate and transport, toxicology, and remediation of MTBE. The results of the evaluation have been were used as a briefing tool for non-public health professionals.

Client – Ministry of Environment, Lands & Parks, British Columbia

Dr. Clark assisted in the development of water quality guidelines for methyl tertiary-butyl ether (MTBE) to protect water uses in British Columbia (BC). The water uses to be considered includes freshwater and marine life, wildlife, industrial, and agricultural (e.g., irrigation and livestock watering) water uses. Guidelines from other jurisdictions for the protection of drinking water, recreation and aesthetics were to be identified.

Client: Confidential, Los Angeles, California

Prepared physiologically based pharmacokinetic (PBPK) assessment of lead risk of receptors at middle school built over former industrial facility. This evaluation is being used to determine cleanup goals and will be basis for regulatory closure of site.

Client: Kaiser Venture Incorporated, Fontana, California

Prepared PBPK assessment of lead risk of receptors at a 1,100-acre former steel mill. This evaluation was used as the basis for granting closure of the site by lead regulatory agency.

RISK ASSESSMENTS/REMEDIAL INVESTIGATIONS

Client: Confidential, Atlanta, Georgia

Researched potential exposure and health risks to community members potentially exposed to creosote, polycyclic aromatic hydrocarbons, pentachlorophenol, and dioxin compounds used at a former wood treatment facility. Prepared a comprehensive toxicological summary of the chemicals of concern, including the chemical characteristics, absorption, distribution, and carcinogenic potential. Prepared risk characterization of the carcinogenic and non-carcinogenic chemicals based on the exposure assessment to quantify the potential risk to members of the surrounding community. This evaluation was used to help settle class-action tort.

Client: Confidential, Escondido, California

Prepared comprehensive Preliminary Endangerment Assessment (PEA) of dense non-aqueous liquid phase hydrocarbon (chlorinated solvents) contamination at a former printed circuit board manufacturing facility. This evaluation was used for litigation support and may be used as the basis for reaching closure of the site with the lead regulatory agency.

Client: Confidential, San Francisco, California

Summarized epidemiological evidence for connective tissue and autoimmune diseases for product liability litigation. Identified epidemiological research efforts on the health effects of medical prostheses. This research was used in a meta-analysis of the health effects and as a briefing tool for non-public health professionals.

Client: Confidential, Bogotá, Columbia

Prepared comprehensive evaluation of the potential health risks associated with the redevelopment of a 13.7 hectares plastic manufacturing facility in Bogotá, Colombia The risk assessment was used as the basis for the remedial goals and closure of the site.

Client: Confidential, Los Angeles, California

Prepared comprehensive human health risk assessment of students, staff, and residents potentially exposed to heavy metals (principally cadmium) and VOCs from soil and soil vapor at 12-acre former crude oilfield and municipal landfill. The site is currently used as a middle school housing approximately 3,000 children. The evaluation determined that the site was safe for the current and future uses and was used as the basis for regulatory closure of site.

Client: Confidential, Los Angeles, California

Managed remedial investigation (RI) of heavy metals and volatile organic chemicals (VOCs) for a 15-acre former manufacturing facility. The RI investigation of the site included over 800 different sampling locations and the collection of soil, soil gas, and groundwater samples. The site is currently used as a year round school housing approximately 3,000 children. The Remedial Investigation was performed in a manner

that did not interrupt school activities and met the time restrictions placed on the project by the overseeing regulatory agency. The RI Report identified the off-site source of metals that impacted groundwater beneath the site and the sources of VOCs in soil gas and groundwater. The RI included a numerical model of vapor intrusion into the buildings at the site from the vadose zone to determine exposure concentrations and an air dispersion model of VOCs from the proposed soil vapor treatment system. The Feasibility Study for the Site is currently being drafted and may be used as the basis for granting closure of the site by DTSC.

Client: Confidential, Los Angeles, California

Prepared comprehensive human health risk assessment of students, staff, and residents potentially exposed to heavy metals (principally lead), VOCs, SVOCs, and PCBs from soil, soil vapor, and groundwater at 15-acre former manufacturing facility. The site is currently used as a year round school housing approximately 3,000 children. The evaluation determined that the site was safe for the current and future uses and will be basis for regulatory closure of site.

Client: Confidential, Los Angeles, California

Prepared comprehensive evaluation of VOC vapor intrusion into classrooms of middle school that was former 15-acre industrial facility. Using the Johnson-Ettinger Vapor Intrusion model, the evaluation determined acceptable soil gas concentrations at the site that did not pose health threat to students, staff, and residents. This evaluation is being used to determine cleanup goals and will be basis for regulatory closure of site.

Client Dominguez Energy, Carson, California

Prepared comprehensive evaluation of the potential health risks associated with the redevelopment of 6-acre portion of a 500-acre oil and natural gas production facility in Carson, California. The risk assessment was used as the basis for closure of the site.

Kaiser Ventures Incorporated, Fontana, California

Prepared health risk assessment of semi-volatile organic chemicals and metals for a fifty-year old wastewater treatment facility used at a 1,100-acre former steel mill. This evaluation was used as the basis for granting closure of the site by lead regulatory agency.

ANR Freight - Los Angeles, California

Prepared a comprehensive Preliminary Endangerment Assessment (PEA) of petroleum hydrocarbon and metal contamination of a former freight depot. This evaluation was as the basis for reaching closure of the site with lead regulatory agency.

Kaiser Ventures Incorporated, Fontana, California

Prepared comprehensive health risk assessment of semi-volatile organic chemicals and metals for 23-acre parcel of a 1,100-acre former steel mill. The health risk assessment was used to determine clean up goals and as the basis for granting closure of the site by lead regulatory agency. Air dispersion modeling using ISCST3 was performed to determine downwind exposure point concentrations at sensitive receptors within a 1 kilometer radius of the site. The results of the health risk assessment were presented at a public meeting sponsored by the Department of Toxic Substances Control (DTSC) in the community potentially affected by the site.

Unocal Corporation - Los Angeles, California

Prepared comprehensive assessment of petroleum hydrocarbons and metals for a former petroleum service station located next to sensitive population center (elementary school). The assessment used a probabilistic approach to estimate risks to the community and was used as the basis for granting closure of the site by lead regulatory agency.

Client: Confidential, Los Angeles, California

Managed oversight of remedial investigation most contaminated heavy metal site in California. Lead concentrations in soil excess of 68,000,000 parts per billion (ppb) have been measured at the site. This State Superfund Site was a former hard chrome plating operation that operated for approximately 40-years.

Client: Confidential, San Francisco, California

Coordinator of regional monitoring program to determine background concentrations of metals in air. Acted as liaison with SCAQMD and CARB to perform co-location sampling and comparison of accepted regulatory method with ASTM methodology.

Client: Confidential, San Francisco, California

Analyzed historical air monitoring data for South Coast Air Basin in Southern California and potential health risks related to ambient concentrations of carcinogenic metals and volatile organic compounds. Identified and reviewed the available literature and calculated risks from toxins in South Coast Air Basin.

IT Corporation, North Carolina

Prepared comprehensive evaluation of potential exposure of workers to air-borne VOCs at hazardous waste storage facility under SUPERFUND cleanup decree. Assessment used in developing health based clean-up levels.

Professional Associations

American Public Health Association (APHA)
Association for Environmental Health and Sciences (AEHS)
American Chemical Society (ACS)
California Redevelopment Association (CRA)
International Society of Environmental Forensics (ISEF)
Society of Environmental Toxicology and Chemistry (SETAC)

Publications and Presentations:

Books and Book Chapters

Sullivan, P., **J.J. J. Clark,** F.J. Agardy, and P.E. Rosenfeld. (2007). *Synthetic Toxins In The Food, Water and Air of American Cities*. Elsevier, Inc. Burlington, MA.

Sullivan, P. and **J.J. J. Clark**. 2006. *Choosing Safer Foods, A Guide To Minimizing Synthetic Chemicals In Your Diet*. Elsevier, Inc. Burlington, MA.

Sullivan, P., Agardy, F.J., and **J.J.J. Clark**. 2005. *The Environmental Science of Drinking Water*. Elsevier, Inc. Burlington, MA.

Sullivan, P.J., Agardy, F.J., **Clark, J.J.J.** 2002. *America's Threatened Drinking Water: Hazards and Solutions*. Trafford Publishing, Victoria B.C.

Clark, J.J.J. 2001. "TBA: Chemical Properties, Production & Use, Fate and Transport, Toxicology, Detection in Groundwater, and Regulatory Standards" in *Oxygenates in the Environment.* Art Diaz, Ed.. Oxford University Press: New York.

Clark, J.J.J. 2000. "Toxicology of Perchlorate" in *Perchlorate in the Environment.* Edward Urbansky, Ed. Kluwer/Plenum: New York.

Clark, J.J.J. 1995. Probabilistic Forecasting of Volatile Organic Compound Concentrations At The Soil Surface From Contaminated Groundwater. UMI.

Baker, J.; **Clark, J.J.J.**; Stanford, J.T. 1994. Ex Situ Remediation of Diesel Contaminated Railroad Sand by Soil Washing. Principles and Practices for Diesel Contaminated Soils, Volume III. P.T. Kostecki, E.J. Calabrese, and C.P.L. Barkan, eds. Amherst Scientific Publishers, Amherst, MA. pp 89-96.

Journal and Proceeding Articles

Tam L. K.., Wu C. D., Clark J. J. and **Rosenfeld, P.E.** (2008) A Statistical Analysis Of Attic Dust And Blood Lipid Concentrations Of Tetrachloro-p-Dibenzodioxin (TCDD) Toxicity Equialency Quotients (TEQ) In Two Populations Near Wood Treatment Facilities. Organohalogen Compounds, Volume 70 (2008) page 002254.

Tam L. K.., Wu C. D., Clark J. J. and **Rosenfeld, P.E.** (2008) Methods For Collect Samples For Assessing Dioxins And Other Environmental Contaminants In Attic Dust: A Review. Organohalogen Compounds, Volume 70 (2008) page 000527

Hensley A.R., Scott, A., Rosenfeld P.E., **Clark, J.J.J.** (2007). "Attic Dust And Human Blood Samples Collected Near A Former Wood Treatment Facility." *Environmental Research.* 105:194-199.

Rosenfeld, P.E., **Clark, J. J.,** Hensley, A.R., and Suffet, I.H. 2007. "The Use Of An Odor Wheel Classification For The Evaluation of Human Health Risk Criteria For Compost Facilities" Water Science & Technology. 55(5): 345-357.

Hensley A.R., Scott, A., Rosenfeld P.E., **Clark, J.J.J.** 2006. "Dioxin Containing Attic Dust And Human Blood Samples Collected Near A Former Wood Treatment Facility." The 26th International Symposium on Halogenated Persistent Organic Pollutants – DIOXIN2006, August 21 – 25, 2006. Radisson SAS Scandinavia Hotel in Oslo Norway.

Rosenfeld, P.E., **Clark, J. J.** and Suffet, I.H. 2005. "The Value Of An Odor Quality Classification Scheme For Compost Facility Evaluations" The U.S. Composting Council's 13th Annual Conference January 23 - 26, 2005, Crowne Plaza Riverwalk, San Antonio, TX.

Rosenfeld, P.E., **Clark, J. J.** and Suffet, I.H. 2004. "The Value Of An Odor Quality Classification Scheme For Urban Odor" WEFTEC 2004. 77th Annual Technical Exhibition & Conference October 2 - 6, 2004, Ernest N. Morial Convention Center, New Orleans, Louisiana.

Clark, J.J.J. 2003. "Manufacturing, Use, Regulation, and Occurrence of a Known Endocrine Disrupting Chemical (EDC), 2,4-Dichlorophnoxyacetic Acid (2,4-D) in California Drinking Water Supplies." National Groundwater Association Southwest Focus Conference: Water Supply and Emerging Contaminants. Minneapolis, MN. March 20, 2003.

Rosenfeld, P. and **J.J.J. Clark**. 2003. "Understanding Historical Use, Chemical Properties, Toxicity, and Regulatory Guidance" National Groundwater Association Southwest Focus Conference: Water Supply and Emerging Contaminants. Phoenix, AZ. February 21, 2003.

Clark, J.J.J., Brown A. 1999. Perchlorate Contamination: Fate in the Environment and Treatment Options. In Situ and On-Site Bioremediation, Fifth International Symposium. San Diego, CA, April, 1999.

Clark, J.J.J. 1998. Health Effects of Perchlorate and the New Reference Dose (RfD). Proceedings From the Groundwater Resource Association Seventh Annual Meeting, Walnut Creek, CA, October 23, 1998.

Browne, T., **Clark, J.J.J.** 1998. Treatment Options For Perchlorate In Drinking Water. Proceedings From the Groundwater Resource Association Seventh Annual Meeting, Walnut Creek, CA, October 23, 1998.

Clark, J.J.J., Brown, A., Rodriguez, R. 1998. The Public Health Implications of MtBE and Perchlorate in Water: Risk Management Decisions for Water Purveyors. Proceedings of the National Ground Water Association, Anaheim, CA, June 3-4, 1998.

Clark J.J.J., Brown, A., Ulrey, A. 1997. Impacts of Perchlorate On Drinking Water In The Western United States. U.S. EPA Symposium on Biological and Chemical Reduction of Chlorate and Perchlorate, Cincinnati, OH, December 5, 1997.

Clark, J.J.J.; Corbett, G.E.; Kerger, B.D.; Finley, B.L.; Paustenbach, D.J. 1996. Dermal Uptake of Hexavalent Chromium In Human Volunteers: Measures of Systemic Uptake From Immersion in Water At 22 PPM. Toxicologist. 30(1):14.

Dodge, D.G.; **Clark, J.J.J.**; Kerger, B.D.; Richter, R.O.; Finley, B.L.; Paustenbach, D.J. 1996. Assessment of Airborne Hexavalent Chromium In The Home Following Use of Contaminated Tapwater. Toxicologist. 30(1):117-118.

Paulo, M.T.; Gong, H., Jr.; **Clark, J.J.J.** (1992). Effects of Pretreatment with Ipratroprium Bromide in COPD Patients Exposed to Ozone. American Review of Respiratory Disease. 145(4):A96.

Harber, P.H.; Gong, H., Jr.; Lachenbruch, A.; **Clark, J.**; Hsu, P. (1992). Respiratory Pattern Effect of Acute Sulfur Dioxide Exposure in Asthmatics. American Review of Respiratory Disease. 145(4):A88.

McManus, M.S.; Gong, H., Jr.; Clements, P.; **Clark, J.J.J.** (1991). Respiratory Response of Patients With Interstitial Lung Disease To Inhaled Ozone. American Review of Respiratory Disease. 143(4):A91.

Gong, H., Jr.; Simmons, M.S.; McManus, M.S.; Tashkin, D.P.; Clark, V.A.; Detels, R.; **Clark, J.J.** (1990). Relationship Between Responses to Chronic Oxidant and Acute

Ozone Exposures in Residents of Los Angeles County. American Review of Respiratory Disease. 141(4):A70.

Tierney, D.F. and **J.J.J. Clark.** (1990). Lung Polyamine Content Can Be Increased By Spermidine Infusions Into Hyperoxic Rats. American Review of Respiratory Disease. 139(4):A41.

EXHIBIT 1

Policy: Calculating Potential to Emit for Emergency Backup Power Generators

Policy

When determining the Potential to Emit (PTE) for an emergency backup power generator, **the District shall include emissions resulting from emergency operation of 100 hours per year**, in addition to the permitted limit for reliability-related and testing operation.

Applicability

This assumption of 100 hours per year of emergency operation will be **used to determine the applicability of District permitting regulations**, such as New Source Review and Title V Major Facility Review. It will **not be used to determine the amount of emissions offsets required** for a project that triggers New Source Review. Emissions offsets represent ongoing emission reductions that continue every year, year after year, in perpetuity. As such, offsets are intended to counterbalance emissions that will occur every year, year after year, on a regular and predictable basis, to ensure Reasonable Further Progress towards attainment of the applicable ambient air quality standards. Accordingly, the PTE that a facility needs to offset is only its potential for such regular and predictable emissions – not any emissions that will only occur infrequently when emergency conditions arise.

In addition, **this policy does not apply to emergency fire pump engines.** The assumptions about potential emergency usage are different for emergency engines used to fight fires as compared to emergency engines use to provide backup power. The length of time that a facility may have to operate without grid power during any given year could be significantly longer than the amount of time it would take to put out a fire.

Finally, **this policy does not apply for purposes of the Toxics New Source Review requirements of District Reg. 2-5**. Pursuant to Reg. 2-5-111, Reg. 2-5 does not apply to emissions from emergency use of emergency standby engines.

Effective date

This policy is effective when signed by the director and will not be applied retroactively to previous permitting actions. For existing permitted emergency generators, the policy will be implemented for the next permit application.

Policy: Calculating Potential to Emit for Emergency Backup Power Generators

Who is affected

This policy applies for calculating the PTE of emergency backup power generators for purposes of determining the applicability of District permitting regulations. Facilities with one or more such generators are subject to the policy. Such facilities should presume that each of their generators will experience 100 hours per year of emergency operation when calculating their PTE for purposes of determining the applicability of the permitting regulations in Reg. 2 – including the District's New Source Review regulations (Reg. 2, Rule 2) and Title V Major Facility Review regulations (Reg. 2, Rule 6).

The permitting regulations covered by this policy include the "small facility" offsets provisions in Reg. 2-2-302.1. Reg. 2-2-302.1 provides that for facilities with a PTE of less than 35 TPY, (i) offsets are required only at a 1:1 ratio (as opposed to a 1.15:1 ratio for larger facilities); and (ii) the APCO will provide the offsets from the District's Small Facility Banking Account (SFBA), subject to certain restrictions. Some facilities with emergency backup power generators may have been permitted in the past without taking any emergency operation into account, which may have kept their PTE below 35 TPY and rendered them eligible to take advantage of the SFBA. With 100 hours of emergency operation included, some of these facilities may have a PTE above 35 TPY, rendering them ineligible for SFBA credit. In such cases, the next time the facility applies for a permit, it will not be eligible for the "small facility" offsets provisions in Reg. 2-2-302.1, but will instead by subject to Reg. 2-2-302.2. Per Reg. 2-2-302.2, if such a facility has previously received credits from the SFBA, the owner/operator will be required to reimburse the SFBA for all credits received from the SFBA for each pollutant where the PTE exceeds 35 TPY, and it will have to provide any additional offsets for that pollutant at a 1.15:1 ratio.

This policy also applies for calculating a facility's PTE for purposes of determining whether it is required to obtain a Title V permit or a Synthetic Minor Operating Permit (SMOP) under Reg. 2-6. Some facilities have been permitted in the past assuming 500 hours per year of emergency operation. For these facilities, their PTE will be lower using the presumption of 100 hours per year under this policy. If their PTE is reduced below the Title V applicability thresholds, they may no longer need a Title V permit or SMOP.

Note that certain District regulations include specific provisions that exempt emergency operation, including Reg. 2, Rule 5. This policy does not apply in situations covered by a specific regulatory exemption. This policy also does not apply for determining the amount of a facility's cumulative increase that must be offset.

Policy: Calculating Potential to Emit for Emergency Backup Power Generators

Rationale

100 hours represents a reasonable worst-case assumption regarding the amount of time during any given year that a facility could have to operate without outside power, which would necessitate emergency operation of the facility's backup generator(s).

Emergency backup power generators are used to provide power in emergency situations where a facility loses its external power supply from the power grid. By its very nature, such emergency operation is unplanned and infrequent, and when it does occur it is impossible to predict how long it will last. Although it foreseeable that an emergency backup power generator may have to operate to respond to emergency conditions at some point during its useful life, it is not possible to predict with any specificity exactly how frequently such operations will occur, or for what duration. 100 hours is a reasonable worst-case assumption of the longest a facility may need to operate on backup power in any given year in the event of a major power outage.

This presumption of 100 hours per year of emergency operation is consistent with EPA's approach to calculating the PTE of such generators. EPA has recognized that emergency operations are unpredictable, and that they will be variable in duration but will probably not last more than one day (24 hours) per emergency event. Notwithstanding this likelihood that emergency conditions would not exceed 24 hours, EPA has suggested using a highly conservative assumption of 500 hours per year of emergency operation. EPA reasoned that even with this highly conservative number, most facilities with only a single generator will remain below the agency's "major source" regulatory applicability thresholds. But EPA also made clear that different presumptions may be appropriate based on other considerations.

The District has found that 100 hours per year is a more appropriate presumption, for several reasons. For one, 500 hours – nearly 21 straight days – is an overestimate of the amount of time that any facility would reasonably be expected to have to operate without grid power, even in an extended emergency. For another, EPA's analysis focused on small facilities with a single generator and whether a 500-hour presumption was sufficiently low to keep such facilities from exceeding the "major source" thresholds. 500 hours may be sufficiently low for this purpose for facilities with only a single generator, but it leads to unintended consequences for larger facilities that may have multiple generators, or generators in conjunction with

other emitting sources. It is therefore more appropriate to use an alternative presumption – as specifically contemplated by EPA – to provide a more realistic estimate of reasonable worst-case emergency operations. 100 hours per year is a more appropriate presumption for this purpose.

This presumption is appropriate for calculating emergency backup power generators' PTE when determining whether a facility is subject to District permitting regulations. This is because the District generally looks to a facility's highest potential emissions in any given year to determine whether the facility should be subject to a particular regulation, even if the emissions will not reach that level in every year of operation. But the presumption is not appropriate for calculating the amount of emissions that need to be offset under Regs. 2-2-302 and 2-2-303. Offsets are required to counterbalance emissions that occur consistently and continuously every year, and thus hinder the region's ability to attain and maintain applicable ambient air quality standards on an ongoing basis. It is therefore appropriate to offset emissions from testing and reliability-related operation, which will occur year in and year out – but not emissions from emergency operation, which by their very nature will not occur at all during most years of a generator's life. Thus, in applying Reg. 2-2-606 and Reg. 2-2-607 to determine the cumulative increase that a facility must offset, emissions from an emergency backup power generator will be calculated based on its testing and reliability-related operation only, and not any emergency operation.

Prohibition of limit on emergency operation

In implementing this policy, the Air District will not allow an owner/operator to accept a permit condition to limit emergency operation to less than 100 hours per year to reduce a source's PTE. The District does not impose limits on emergency operations because of the need to maintain flexibility to respond to emergency situations; and because such limits would not be practically enforceable in any event because if an emergency arises, most facilities would continue to operate to mitigate the emergency notwithstanding of the threat of District enforcement action for exceeding a permit limit. An owner/operator may reduce a generator's PTE by accepting lower limits on testing and reliability-related operation or by installing an emissions control device, but not through accepting a limit on emergency operation.

Policy: Calculating Potential to Emit for Emergency Backup Power Generators

Contact Greg Stone, Extension 4745

Approval

Name & Title	Signature	Date
Pamela Leong, Director of Engineering	Pamela J Leong	6/3/2019

EXHIBIT 2

DOCKETED	
Docket Number:	19-SPPE-03
Project Title:	Sequoia Data Center
TN #:	236088
Document Title:	BAAQMD letter Re BACT Determination for Diesel Back-up Engines Greater Than or Equal to 1,000 Brake Horsepower
Description:	From Jack P. Broadbent, Executive Officer,APCO, Bay Area Quality Management District
Filer:	Lisa Worrall
Organization:	Bay Area Quality Management District
Submitter Role:	Public Agency
Submission Date:	12/22/2020 1:14:33 PM
Docketed Date:	12/22/2020

12/21/2020

Mr. Richard Corey
Executive Officer
California Air Resources Board
1001 I Street,
Sacramento, CA 95814

Mr. Drew Bohan
Executive Director
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

RE: **BACT Determination for Diesel Back-Up Engines Greater than or equal to 1,000 Brake Horsepower**

Dear Mr. Corey and Mr. Bohan,

The purpose of this letter is to inform your agencies that the Bay Area Air Quality Management District (Air District) has established a best available control technology (BACT) guideline for large (greater or equal to 1,000 brake horsepower) diesel engines used for emergency standby power that requires them to meet the U. S. EPA's Tier 4 emissions standards. This determination will apply to any new and open permit application with a diesel backup engine $\geq$1000 bhp that is deemed complete after 1/1/2020.

The Air District is the entity charged with permitting for stationary sources of air pollution in the nine-county region surrounding the San Francisco bay. Air District permits are required by law for:

- Any stationary equipment that may cause air pollution;
- Modifications to existing permitted equipment or their permit conditions;
- Permitted equipment that is moved to a new location;
- Transfer of permitted equipment to new owners; and
- Installation of equipment used to control emissions.

As part of our permitting processes, The Air District's New Source Review Rule - Regulation 2, Rule 2 (Regulation 2, Rule 2) - requires that new or modified sources of air pollutants undergo permit review for Best Available Control Technology (BACT). BACT2 "Achieved-In-Practice", applies to the most effective emission controls already in use or the most stringent emission limit achieved in the field for the type and capacity of equipment comprising the source under review and operating under similar conditions.

Regulation 2, Rule 2, states that any new or modified source which results in an increase in emissions of precursor organic compounds (POC), non-precursor organic compounds (NPOC), nitrogen oxides (NOx), sulfur dioxide (SO2), particulate matter (PM10), or carbon monoxide (CO) in excess of 10 pounds per highest day must be reviewed for possible application of BACT. California Health and Safety Code Section 42300 authorizes delegation of stationary source permitting authority from the state to the local air pollution control districts, including the setting of rules and definitions.

For the BACT Guideline, the Air District relied on its evaluations of the following projects, which are both emergency standby engines that are installed and operating in compliance with the U.S. EPA Tier 4 emissions standards:

- Air District Permit Application 27020 (San Jose – Santa Clara Regional Wastewater Facility, Four Emergency Diesel Standby Engines, each 4,376 BHP)
- Air District Permit Application 25115 (Sutro Tower, Inc., Emergency Diesel Standby Engine, 1,881 BHP).

The Air District also relied on an evaluation of the permit and source test results of the Microsoft – MWH Data Center, in Quincy, Washington. The permit limits that Microsoft complies with are in units of g/bhp-hr: 0.5 NOx, 0.14 NMHC, 0.02 PM filterable, 2.6 CO. These emergency diesel standby engines ranged from 0.75 MWe to 3.0 MWe.

Thank you for your attention and If you have any questions regarding this letter, please contact Damian Breen, Senior Deputy Executive Officer at (415) 749-5041.

Sincerely,

Jack P. Broadbent
Executive Officer/APCO

EXHIBIT B

PLANNING APPLICATION FEE SCHEDULE

1500 Warburton Avenue, Santa Clara, California 95050
Ph: (408) 615-2450; Fax: (408) 247-9857; Email: planning@santaclaraca.gov

Fees Effective July 1, 2020

Resolution 20-8839 adopted by the City Council on April 28, 2020 established the following Fee Schedule for Planning Applications. The fee shall be paid at the time of filing of these applications and no application will be considered until the fee is paid. No fee shall be refunded because of the denial of any application. No fee shall be charged for school districts, municipal corporations or agencies of the State of California and United States Government for public projects. Please contact Planning Staff for any questions related to these fees.

ABC REVIEW VERIFICATION [1]	$533
ANNEXATION OF TERRITORY TO THE CITY OF SANTA CLARA	
(Not under the Annexation Act of 1913) [1]	$37,308
APPEALS	
Non-Applicant, Resident [1]	$469
All Others [1]	$9,381
ARCHITECTURAL REVIEW	
Staff Architectural Review over the counter	No Charge
Minor Amendment to Approved Projects [1]	$799
Single family residential going to DRH [1]	$878
New Development/Non-Single Family [1,2]	$31,978
Design Consultant Review	Contract Cost + Administration
CERTIFICATE OF COMPLIANCE	
Pursuant to SCCC 17.10.280 [1]	$2,132
CONTRACT ADMINISTRATION	At Cost
DEVELOPMENT AGREEMENT	
Pursuant to Chapter 17.10 SCCC [1]	$31,978
Amendment or Cancellation [1]	$10,660
ENVIRONMENTAL REVIEW (CEQA)	
Environmental Impact Report (EIR) [1,2,4]	$31,978
Supplemental EIR [1,2,4]	$15,989
Initial Study and/or Negative Declaration [1,2]	$21,319
Exemption [1]	$799
Exemption (Paperless)	No Charge
Recordation of Exemption [1]	$508
Re-Use of Prior Environmental Determination [1]	$1,599
Addendum to Prior Environmental Determination [1]	$4,263
FLOOD ZONE VERIFICATION [1]	$266
GENERAL PLAN AMENDMENT	
Single Family [1,2]	$2,664
Up to one acre [1,2]	$21319
One to five acres [1,2]	$31,978
Over five acres [1,2]	$37,308
HERITAGE TREE REMOVAL [1]	$745
HISTORICAL REVIEW	
Significant Property Alteration – Major	
Single Family [1]	$878
All Others [1]	$10,660
Significant Property Alteration – Minor	
Single Family [1]	$586
All Others [1]	$1,861
HLC Review	
Single Family [1]	$878
All Others [1]	$10,660
Non-Historical Referral to the HLC	
Standard [1]	$469
Comprehensive [1]	$878
MILLS ACT APPLICATION [1]	$7,564
MINOR MODIFICATIONS	
Single Family [1]	$533
All Others [1]	$1,332
OFF-SITE PARKING PERMITS	
Citywide [1]	$1,332
Events North of 101 [1]	$1,332
Off-Site Parking Facilities per Space/Event	$5.91
PRE-APPLICATION	
Single Family [1,5]	$468
Planning Review [1,5]	$3,125
Project Clearance Committee Review [1,2,5]	$5,330
REPOSTING PUBLIC NOTIFICATION	
Single family [1]	$117
Non-Single Family [1]	$1,066
Re-Noticing in Newspaper	At Cost
(Note: This fee is charged for active projects when revised project descriptions require an additional public notice)	
REZONING	
Single lot to R1 [1]	$8,197
Non-Planned Development (PD) [1,2]	$18,610
Planned Development (PD) [1,2]	$53,297
Planned Development Master Community (PD-MC) [1,2]	$63,957
Development Area Plan for PD-MC rezoning [1,2]	$34,643
SIGNS	
Individual Sign (attached or ground) for 1st Sign [1]	$312
Each Additional Sign [1]	$77
Temporary Sign/Street Banner [1]	$77
Temporary Sign Removal [1]	$133
Master Sign Program [1]	$3,997
SPECIAL PERMITS	
Special Permit – Council Approval [1]	$2,664
Special Permit – Non-Profit [1]	$250
Special Permit – Admin Approval [1]	$1,332
STORMWATER MANAGEMENT PLAN REVIEW [1]	$799
TENTATIVE MAPS	
4 or Fewer Lots [1,2]	$15,989
5 or More Lots [1,2]	$21,319
Lot Line Adjustment [1,2]	$5,330
TECHNOLOGY SURCHARGE	
Applied to all fees except "at cost" fees	3.37% of Application Fee
TIME EXTENSIONS	
Entitlement Extension [1]	50% Application Fee
Reactivation of Inactive File [1]	25% Application Fee
(Note: Expired permits must file a new application with 100% of applicable fees)	
USE PERMITS	
Minor Use Permit [1,3]	$5,628
Standard Use Permit [1,3]	$13,027
VARIANCE	
Single family [1]	$3,133
All others [1,2]	$9,313
ZONING CODE TEXT AMENDMENT [1,2]	$23,984
ZONING VERIFICATION [1]	$455

1. A Technology Surcharge will be assessed at 3.37% of the application fee for all applications except those that are collected "at cost."
2. DPW, Fire, and/or Water fees apply (these fees are collected only once if multiple applications are concurrently submitted for a single project).
3. DPW, Fire, and/or Water fees apply except for alcohol sales only without outdoor seating or tenant improvements.
4. Fire Department CEQA Review Fee applies.
5. 50% of the fees associated with a Pre-Application review will be applied towards a formal application if said application is submitted within three months of receiving the responses on the Pre-Application.

Other Departmental Review Fees

These fees are charged by Departments outside of the Community Development Department for certain Planning Applications

Department of Public Works

Architectural Review	$846.86
EIR	$4,385.45
IS/MND/ND	$2,628.75
Lot Line Adjustment	$677.91
Pre-Application	$846.86
Rezone	$846.86
Tentative Map (Less than 4)	$1,496.44
Tentative Map (4 or more)	$2,382.13
Use Permit	$411.36
Variance	$411.36
Traffic Study Report Review	$2,636.09

Fire Department

CEQA Review (up to 6 hours)	$1,397.89
CEQA Review (each additional hour)	$212.83
Planning Application Review	$617.20

Water & Sewer Utilities Department

Project Clearance Committee Review	$591

Outside Agency Fees

These fees are subject to change by the jurisdiction assessing the fee and are provided here for convenience only.

CEQA Document Declarations & Dept. of Fish and Wildlife Fees

(Make Checks Payable To: Santa Clara County Clerk-Recorder; Deliver Checks to City of Santa Clara Planning)

Notice of Determination (EIR)	$3,343.25
Notice of Determination (ND) and (MND)	$2,406.75
Environmental Document Pursuant to a Certified Regulatory Program (CRP)	$1,136.50
County Administrative Fee (for all CEQA filings)	$50.00

Airport Land Use Commission (projects within ALUC boundaries)

(Make Checks Payable To: Santa Clara County-ALUC; Deliver checks to Santa Clara County Planning Department)

ALUC filing fee (Major projects)	$1,829
ALUC filing fee (Minor projects)	$1,067
ALUC filing fee (De Minimis projects)	$747

Frequently Asked Questions

What is the difference between a Minor Use Permit and a Standard Use Permit?

- Examples of a Minor Use Permit include: alcohol related uses, incidental entertainment uses, outdoor walk-up service facilities, etc.
- Examples of a Standard Use Permit include: auto sales car lots, auto-related uses, nightclubs, animal care uses, etc.

What kind of Architectural Review can be completed over the counter at no charge?

- Single-family detached reviews that do not go to a Development Review Hearing, installation of solar panels, interior remodels excluding 4 or more bedrooms, and roof replacements.

What types of projects qualify as a Minor Amendment to an Approved Project?

- Tree removals/landscape changes on commercial, industrial, or multi-family residential properties; restriping or reconfiguration of parking lots; minor architectural changes; off sale beer and wine licenses; DMV license for wholesale auto sales, etc.

What is a Reactivation of an Inactive File and what would cause me to be charged that fee?

- If an applicant fails to make progress on a Planning Application for more than six (6) months, a Processing Time Extension fee will be assessed at a rate of 25% of the initial application fee.

When does an hourly rate apply instead of one of the listed fees?

- Additional hourly fees may apply above and beyond those identified on the front of this application, e.g., if multiple community meetings are needed for a single application.
- For requests that do not fall under an identified application category, an hourly fee may be applicable.
- Please reference the most recent User Fee Study for current hourly rates and additional information.

EXHIBIT C

Fees Associated With
Case #: PLN2019-13941

3/2/2021
1:44:02PM

Fee Type	Start Date	End Date	Dept	Description	Trans Code	Revenue Account Number	Created By	Created Date	Amount	Due
PL54	7/8/2018	7/31/2019		Arch Review (all others)		001-5522-56700	JSCH	6/17/2019	2,768.00	0.00
P107	7/8/2018	7/31/2019		Minor Mod - All Others		001-5522-56700	JSCH	6/17/2019	1,419.00	0.00
PL78	7/8/2018	7/31/2019		Stormwater Mangement Rev		001-5522-56700	JSCH	6/17/2019	1,135.00	0.00
P117	7/1/2017	7/31/2019		Recalc--Advanced Planning		001-5522-56700-(I)3165	JSCH	6/17/2019	2,298.30	0.00
P118	7/8/2018	7/31/2019		Recalc--Fire Referral Fee		001-7832-56900-(I)7438	JSCH	6/17/2019	449.00	0.00
P126	7/1/2018	7/31/2019		Recalc--Technology Surchar		001-3611-56610	JSCH	6/17/2019	315.42	0.00
P117	7/1/2017	7/31/2019		Advanced Planning Surcha		001-5522-56700-(I)3165	JSCH	6/17/2019	2,298.30	0.00
PL35	7/8/2018	7/31/2019		Env. IS / Neg Dec		001-5522-56700	JSCH	6/17/2019	9,862.00	0.00
PL93	7/8/2018	6/30/2019		Env.FireDept.CEQA Rev(<		001-7833-56950	JSCH	6/17/2019	896.00	0.00
P117	7/1/2017	7/31/2019		Recalc--Advanced Planning		001-5522-56700-(I)3165	JSCH	6/17/2019	681.00	0.00
P126	7/1/2018	7/31/2019		Recalc--Technology Surchar		001-3611-56610	JSCH	6/17/2019	415.16	0.00
PL27	7/8/2018	7/31/2021		Appeal - All Others		001-5522-56700	REBU	11/12/2020	9,381.00	9,381.00
P126	1/1/2017	7/31/2021		Recalc--Technology Surchar		001-3611-56610	REBU	11/12/2020	822.26	822.26
								Total Due:		**$10,203.26**

Planning and Inspection Department
Planning Division
1500 Warburton Avenue
Santa Clara, CA 95050
Ph: (408) 615-2450

Appeal Form

Instructions

Use this form to appeal a decision of the Architectural Review Committee or Planning Commission. **All appeals must be filed in the Planning Division within seven calendar days of the action being appealed.**

Appeals from the Architectural Review Committee are made to the Planning Commission and will be set for hearing on the next available Planning Commission agenda. Appeals from the Planning Commission are made to the City Council and will be placed on the subsequent City Council Agenda to set a hearing date. Please contact the Planning Division at the number listed above with any inquiries about the process.

Please print, complete, and sign this form before mailing or delivering to the City, along with the fee payment, and supporting documentation, letters, etc. (if any).

Appeal Fees

Appeal Fees are set by the Municipal Code of the City of Santa Clara and are subject to annual review. Please call the Planning Division for the current Appeal Fee. **Fee payment must be received by the City of Santa Clara before this form submittal can be certified as complete.**

Appeal fees may be paid by cash, check, or with VISA, MasterCard, or American Express, at the Permit Center at City Hall. Alternatively, checks or money orders made payable to City of Santa Clara can be mailed or delivered to Planning Division, City Hall, 1500 Warburton Avenue, Santa Clara, California 95050.

Appellant Declaration

Name: Adams, Broadwell, Joseph & Cardozo
Street Address: 601 Gateway Blvd. Ste. 1000
City, State, Zip Code: South San Francisco, CA 94080
Phone number: (650) 589-1660
E-mail address: khartmann@adamsbroadwell.com

In accordance with the provisions of the Municipal Code of the City of Santa Clara, I hereby appeal the following action of the:

☑ Architectural Review Committee ☐ Planning Commission

at it's meeting of November 4, 2020 .
(date)

Agenda Item No.: 20-1088
File No.(s): PLN2019-13941 / CEQ2020-01079
Address:/APN(s): 224-08-092

Appellant Statement
(If more space is required, attach a separate sheet of paper.)

Action being appealed:

Please see attached letter.

Reason for Appeal:

Please see attached.

Certification of Authenticity

Beware, you are subject to prosecution if you unlawfully submit this form. Under penalty of law, transmission of this form to the City of Santa Clara is your certification that you are authorized to submit it and that the information presented is authentic.

Signature of Appellant

11/11/2020
Date

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MARC D. JOSEPH
Of Counsel

*Not admitted in California
Licensed in Colorado

November 12, 2020

By Hand-Delivery

Mayor Gillmor and City Council Members
Santa Clara City Council
City Hall
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050

Re: Appeal of the Mitigated Negative Declaration for 1111 Comstock Data Center Project (PLN2019-13941; CEQ2020-01079)

Dear City Council:

We are writing on behalf of Santa Clara Citizens for Sensible Industry ("Santa Clara Citizens") to appeal the November 4, 2020 decision of the City of Santa Clara Development Review Officer ("City") at a Development Review Hearing to adopt the Mitigated Negative Declaration and Mitigation Monitoring and Reporting Program (collectively with the Initial Study, "IS/MND") for the 1111 Comstock Data Center Project ("Project") and approve the Architectural Review for the Project and Minor Modification to increase the building height to 87 feet and reduce the parking space requirements for the Project (collectively, "Permits").

The Project, proposed by Prime Data Centers ("Applicant"), proposes to demolish an existing 23,765-square-foot industrial building and construct a four-story, 121,170-square-foot data center building on the 1.38-acre Project site (APN 224-08-092). The data center building would house computer servers designed to provide 10 megawatts ("MW") of information technology power; backup generators; underground fuel storage containers; and mechanical cooling equipment on the building's roof. The site, zoned as Light Industrial with a General Plan designation of Low Intensity Office/R&D, is located north of Comstock Street, east of Kenneth

Street, south of Bayshore Freeway, and west of Lafayette Street within the City of Santa Clara.

On October 13, 2020, we submitted comments on the IS/MND prepared for the Project ("Comment Letter"). Our comments were prepared with the assistance of technical expert James J.J. Clark, Ph.D. of Clark & Associates Environmental Consulting, Inc. As detailed therein, we identified potentially significant and unmitigated impacts due to emissions from the Project's backup diesel generators, as well as significant impacts to air quality, public health, and greenhouse gas ("GHG") emissions from the Project. Our Comment Letter also showed that the IS/MND fails as a matter of law to address energy impacts as required under CEQA. Based on these potentially significant and unmitigated impacts, as well as other deficiencies in the Initial Study, our comments concluded that the MND in its current form and substance violates CEQA and that substantial evidence supports a fair argument that an environmental impact report ("EIR") is required for the Project.

At the November 4, 2020 public hearing, the MND was adopted and the Permits were approved. We request that the City Council uphold this appeal and reverse the decision of the Director to adopt the IS/MND and approve the Permits.

I. STATEMENT OF INTEREST

Santa Clara Citizens is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential health, safety, public service, and environmental impacts of the Project. The association includes individuals and organizations, including California Unions for Reliable Energy ("CURE") and its local affiliates, and the affiliates' members and their families, who live, work, recreate and raise their families in the City of Santa Clara and Santa Clara County.

Since its founding in 1997, CURE has been committed to building a strong economy and a healthier environment. Its members help solve the State's energy problems by building, maintaining, and operating conventional and renewable energy power plants and transmission facilities. CURE members have an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Individual members live, work, recreate, and raise their families in Santa Clara. They would be directly affected by the Project's environmental and health and safety impacts. Its members

may also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants or other health and safety hazards that exist onsite.

Santa Clara Citizens supports the development of data centers where properly analyzed and carefully planned to minimize impacts on the environment. Any proposed project should avoid impacts to public health, energy resources, sensitive species and habitats, and should take all feasible steps to ensure significant impacts are mitigated to the maximum extent feasible. Only by maintaining the highest standards can development truly be sustainable.

Santa Clara Citizens and its members are concerned with projects that can result in serious environmental harm without providing countervailing economic benefits such as decent wages and benefits. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for industry to expand in the City and the surrounding region, and by making it less desirable for businesses to locate and people to live and recreate in the City, including in the vicinity of the Project. Continued degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduces future employment opportunities. Santa Clara Citizens' members therefore have a direct interest in enforcing environmental laws that minimize the adverse impacts of projects that would otherwise degrade the environment. CEQA provides a balancing process whereby economic benefits are weighted against significant impacts to the environment. It is for these purposes that we submit this appeal.

II. BASIS FOR THE APPEAL

CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. The "fair argument" standard reflects this presumption. The fair argument standard is an exceptionally low threshold favoring environmental review in an EIR rather than a negative declaration.[1] This standard requires preparation of an EIR if any substantial evidence in the record indicates that a project may have an adverse environmental effect.[2] As a matter of law, substantial evidence includes both expert and lay opinion based on fact.[3]

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[1] *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.
[2] 14 C.C.R. § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931.
[3] PRC § 21080(e)(1) (For purposes of CEQA, "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."); 14 C.C.R. § 15064(f)(5).

As we have shown in our Comment Letter, there is substantial evidence that the project may cause significant environmental effects requiring the City to prepare an EIR. The City's Response to Comments ("Response") failed to rebut this presumption, and instead attempted to dismiss our comments by stating that the City provides substantial evidence to support its conclusions. However, even if other substantial evidence supports a different conclusion, the City nevertheless must prepare an EIR under CEQA.[4]

A negative declaration is improper, and an EIR must be prepared, whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.[5] "[S]ignificant effect on the environment" is defined as "a substantial, or potentially substantial, adverse change in the environment."[6] An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial."[7] Substantial evidence, for purposes of the fair argument standard, includes "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."[8]

Whether a fair argument exists is a question of law that the court reviews de novo, with a preference for resolving doubts in favor of environmental review.[9] In reviewing a decision to prepare a negative declaration rather than an EIR, courts "do not defer to the agency's determination."[10]

The fair argument standard creates a "low threshold" for requiring preparation of an EIR and affords no deference to the agency's determination.[11] Where substantial evidence supporting a fair argument of significant impacts is presented, the lead agency must prepare an EIR "even though it may also be

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[4] *Arviv Enterprises v. South Valley Area Planning Comm.* (2002) 101 Cal.App.4th 1333, 1346; *Stanislaus Audubon v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597.
[5] Pub. Resources Code § 21151; 14 CCR § 15064(f); *Citizens for Responsible Equitable Envt'l Dev. v. City of Chula Vista* ("*CREED*") (2011) 197 Cal.App.4th 327, 330–331; *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319 ("*CBE v. SCAQMD*").
[6] Pub. Resources Code § 21068; 14 CCR § 15382; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1581.
[7] *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83 fn. 16.
[8] Pub. Resources Code § 21080(e)(1) (emphasis added); *CREED*, 197 Cal.App.4th at 331.
[9] *CREED*, 197 Cal.App.4th at 331; *Pocket Protectors*, 124 Cal.App.4th at 927.
[10] *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 332; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318.
[11] *Pocket Protectors*, 124 Cal.App.4th at 928.

presented with other substantial evidence that the project will not have a significant effect."[12] A reviewing court must require an EIR if the record contains any "substantial evidence" suggesting that a project "may have an adverse environmental effect"—even if contrary evidence exists to support the agency's decision.[13]

Where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the effects to be significant and prepare an EIR.[14] In short, when "expert opinions clash, an EIR should be done."[15] "It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project."[16] In the context of reviewing a mitigated negative declaration, "neither the lead agency nor a court may 'weigh' conflicting substantial evidence to determine whether an EIR must be prepared in the first instance."[17] Where such substantial evidence is presented, "evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact."[18]

The fair argument test requires the preparation of an EIR whenever "there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial."[19] Such substantial evidence is present here. The City Council should uphold this appeal and reverse the decision to approve Permits and adopt the IS/MND, and require the City to take a closer look at the Project's potentially significant environmental impacts in an EIR.

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[12] Pub. Resources Code § 21151(a); 14 CCR § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 927; *County Sanitation Dist. No. 2*, 127 Cal.App.4th at 1579 ("where the question is the sufficiency of the evidence to support a fair argument, deference to the agency's determination is not appropriate.") (quoting *Sierra Club*).
[13] *Mejia*, 130 Cal.App.4th at 332–333.
[14] *Pocket Protectors*, 124 Cal.App.4th at 935; *Sierra Club*, 6 Cal.App.4th at 1317–1318; CEQA Guidelines § 15064(f)(5).
[15] *Pocket Protectors*, 124 Cal.App.4th at 928; *Sierra Club*, 6 Cal.App.4th at 1317–1318.
[16] *Pocket Protectors*, 124 Cal.App.4th at 935.
[17] *Id.* at 935.
[18] *Sundstrom*, 202 Cal.App.3d at 310 (citation omitted).
[19] 14 C.C.R. § 15063(b)(1) (emphasis added).
4938-007acp

a. The City Failed to Provide the Documents Referenced in the MND to the Public for the Entire Comment Period, as Required by CEQA

The City violated CEQA and improperly truncated the public comment period when it failed to make all documents referenced or relied on in the IS/MND available for public review during the entire public comment period.[20] As a result, Santa Clara Citizens and other members of the public were unable to complete a meaningful review and analysis of the IS/MND and its supporting evidence.

In its response to our Comment Letter, the City asserted that the CEQA Guidelines no longer require an agency to provide documents referenced in a negative declaration or mitigated negative declaration, but that the CEQA Guidelines only require that documents "incorporated by reference" be made available.[21] This is an incomplete and inaccurate reading of the law. Though Section 15072 of the CEQA Guidelines was indeed amended to include documents "incorporated by reference" in its description of the required contents of a notice of intent to adopt a negative declaration, Section 21092 of the Act continues to require that notice of preparation of a CEQA document include "the address where copies of the draft environmental impact report or negative declaration, and *all documents referenced* in the draft environmental impact report or negative declaration, are available for review."[22]

The courts have held that the failure to provide even a few pages of a CEQA document for a portion of the review and comment period invalidates the entire CEQA process, and that such a failure must be remedied by permitting additional public comment.[23] It is also well settled that a CEQA document may not rely on hidden studies or documents that are not provided to the public.[24]

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[20] *See* Pub. Resources Code § 21092(b)(1); 14 C.C.R. § 15072(g)(4).
[21] Response A.2, pg. 6; 14 C.C.R. § 15072(g)(4).
[22] Pub. Resources Code § 21092(b)(1).
[23] *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.
[24] *Santiago Cty. Water Dist. v. Cty. of Orange* (1981) 118 Cal.App.3d 818, 831 ("Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.").

b. The IS/MND Fails to Adequately Disclose, Analyze, and Mitigate the Project's Potentially Significant Public Health Impacts

The IS/MND concludes that the Project would not expose sensitive receptors to substantial pollutant concentrations.[25] As indicated in our Comment Letter, the IS/MND's Air Quality Assessment erroneously states that the "closest sensitive receptors to the proposed project site are existing residences about 3,315 feet north of the project site,"[26] while the Granada Islamic School is much closer—1,700 feet—to the Project site. The City responded that "[t]he IS states on pages 30 and 36 that the Granada Islamic School is the closest sensitive receptor to the project site, and so this comment is incorrect."[27] The comment's factual basis is clearly not incorrect (as evidenced by the statements on Page 10 of the Air Quality Assessment), but more importantly, the City appears to have missed the purpose of the comment: to point out that the Assessment does not include calculations of health impacts at the closest sensitive receptor.

Potential health impacts from operation of the Project's generators were evaluated using air quality dispersion modeling and applying BAAQMD recommended health impact calculation methods.[28] Though the IS/MND states that "[t]he maximum increased cancer risk at the closest sensitive receptor, Granada Islamic School, would be 0.02 in one million, and the maximum increased cancer risk at the closest residence would be 0.1 in one million," it is unclear where those numbers came from. Nothing in the Assessment indicates whether the evaluations of health impacts were actually performed at the Granada Islamic School or at the residences further away. The Assessment's initial erroneous assumption that the closest sensitive receptors were the residences more than 3,000 feet from the Project site does not appear to have been corrected during calculations of health risks, as Figure 2 in the Assessment does not include the Granada Islamic School in its display of sensitive receptors. As explained by Dr. Clark, such an oversight would significantly alter the assumptions and conclusions of the IS/MND. The City must re-analyze the Project's potentially significant impacts in an EIR.

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[25] IS/MND, p. 36.
[26] IS/MND Appendix A, p. 5.
[27] Response A.5, p. 10.
[28] IS/MND Appendix A, p. 15.

As required by CEQA, the City must prepare a site-specific baseline health risk assessment ("HRA") that calculates the excess incremental lifetime risk for all of the nearby receptors. Though the City responded that the IS/MND included an HRA, the assessment,[29] as pointed out in our Comment Letter, does not include calculations for all of the nearby receptors. As Dr. Clark points out in his comments, "[t]he City's emissions estimates for criteria pollutants do not substitute for a health risk analysis of the cancer risk posed by exposure to toxic air contaminants (TACs), in particular diesel particulate matter (DPM), released during Project construction and operation."[30]

c. Compliance with Plans and Policies Does Not Establish that the Project's GHG Emissions Would Be Less Than Significant

As stated in our Comment Letter, the IS/MND relies on obtaining the status of less-than-significant for the Project's emissions from a plan that is set to expire before the Project is implemented. The City's Climate Action Plan, adopted in 2013, contains projected emissions and measures designed to help the City meet statewide 2020 goals established by AB 32.[31] As acknowledged in the IS/MND, "consistency with the CAP cannot be used to determine significance under CEQA."[32] The City responded that because the Project would receive electricity from a utility on track to meet the SB 32 2030 GHG emission reduction target and would be consistent with applicable plans and policies adopted to reduce GHG emissions, "the project would not generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment."[33]

This argument, however, ignores the clear mandate of CEQA and case law that an agency may only rely on a qualified GHG reduction plan that follows specific rules and guidelines set forth in Section 15183.5 of the CEQA Guidelines.[34] A CAP that is no longer valid to be used as a qualified GHG reduction plan clearly does not satisfy this requirement.

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[29] Response A.7, p. 11.
[30] Dr. Clark Comments, pp. 9–10.
[31] *Id.* at 67.
[32] *Id.*
[33] Response A.10, p. 14.
[34] 14 C.C.R. § 15183.5; *see Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204.

The IS/MND argues that because electricity—by far the biggest source of the Project's emissions—is provided by Silicon Valley Power, "a utility on track to meet the 2030 GHG emissions reductions target established by SB 32," the Project would generate lower emissions than the statewide average for an equivalent facility.[35] The IS/MND fails, however, to establish that the Project's consistency with these plans and programs will ensure that the Project's contribution to global climate change is not significant. Case law demonstrates that limiting discussion to a project's consistency with statewide goals is not sufficient by itself, and that substantial discussion of the applicability of the statewide goals to the specific project is required.[36]

Furthermore, substantial evidence supports a fair argument that the Project's GHG emissions are significant notwithstanding their consistency with local, regional, and state plans. As stated above, the Project's total operational emissions amount of 10,323 $MTCO_2e$ annually is significantly higher than the 1,100 $MTCO_2e$/year threshold established by BAAQMD. Though the City's Response points out that BAAQMD's CEQA guidelines no longer require the use of this threshold,[37] the huge disparity between the Project's operational emissions and a threshold that until very recently was required to avoid significant impacts cannot be ignored. The IS/MND fails to describe how these operational emissions might be abated through the Project's compliance with GHG reduction strategies.

III. THE DIRECTOR LACKS SUBSTANTIAL EVIDENCE TO MAKE THE FINDINGS REQUIRED TO GRANT ARCHITECTURAL APPROVAL UNDER THE SANTA CLARA CITY CODE

Santa Clara City Code Section 18.76.010 provides that one of the purposes of the architectural review process is to "[m]aintain the public health, safety and welfare." Furthermore, Section 18.76.020, subsection (d)(4) provides that to approve a project, the Director must find that the Project cannot "[m]aterially affect adversely the health, comfort or general welfare of persons residing or working in the neighborhood of said development."[38]

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[35] *Id.*
[36] *See, e.g., Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204.
[37] Response A.8, p. 12.
[38] S.C.C.C. § 18.76.020(d).

a. The Project's Failure to Demonstrate Less-Than-Significant Public Health Risks and GHG Emissions May Result in Adverse Impacts to Persons Residing or Working in the Area

The IS/MND's inconsistent calculations and statements with regard to health risks to nearby sensitive receptors make it impossible for the Director to unequivocally maintain the public health, safety, and welfare or guarantee that the Project will be consistent with Santa Clara City Code Section 18.76.020, subsection (d)(4).

Meanwhile, the Project's operational GHG emissions, which exceed BAAQMD's latest numeric threshold of significance for land use projects, will adversely affect those in the immediate vicinity of the Project, as well as all Californians in the form of increased drought, wildfires, and rising sea levels.

The Project is in close proximity to residences and schools and is surrounded by office buildings and other industry. The City's analysis in the IS/MND and Response to our Comment Letter do not support a finding that the Project approval will not materially affect adversely the welfare of persons residing or working in the neighborhood of the Project.

IV. RELIEF REQUESTED

Santa Clara Citizens requests that the City Council grant this appeal and rescind the November 4, 2020 decisions to 1) adopt the IS/MND and 2) approve the Permits. We further request that the City conduct further analysis on the Project's potentially significant environmental impacts in an EIR and correct the City's deficiencies in the CEQA process that prejudiced Santa Clara Citizens, as described above. By doing so, the City and public can ensure that all adverse environmental and public health impacts of the Project are adequately analyzed, disclosed, and mitigated as is required by law.

a. Procedural Requirements for Appeals

Santa Clara Citizens has satisfied the procedural requirements for an appeal of a decision of the Development Review Officer as set forth in the Santa Clara City Code. City Code sections 18.76.020(i) and (j) state:

(i) In the event the applicant or any interested party are not satisfied with the decision of the Director or designee for a single-family residential project, they may, within seven days after such decision, appeal in writing to the Planning Commission.

(j) For a project other than a single-family residential project, in the event the applicant or any interested party are not satisfied with the decision of the Director, they may, within seven days after such decision, appeal in writing to the City Council, in accordance with the procedures set forth in SCCC 18.108.060(b). In the event the applicant or any interested party are not satisfied with the decision of the Planning Commission for a single-family residential project, they may, within seven days after such decision, appeal in writing to the City Council, in accordance with the procedures set forth in SCCC 18.108.060(b). Said appeal shall be taken by the filing of a notice in writing to that effect with the City Clerk. All appeals of architectural review approvals will be heard de novo. The Director of Community Development may refer any application for architectural consideration to the City Council for its decision with the same effect as if an appeal had been taken.

Here, the Director made the decision on the adoption of the IS/MND and approval of the Permits on November 4, 2020. This letter and the attached appeal form constitute notice in writing of the appeal.

We have also enclosed a check for the appeal fee for non-applicants.

Thank you for your consideration of this appeal to the City Council.

Sincerely,

Kendra Hartmann
Tanya Gulesserian

KDH:acp

1938-007acp

EXHIBIT B

ADAMS BROADWELL JOSEPH & CARDOZO
A PROFESSIONAL CORPORATION
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601 GATEWAY BOULEVARD, SUITE 1000
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October 13, 2020

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Rebecca Bustos, RBustos@santaclaraca.gov

Re: Initial Study/Mitigated Negative Declaration: 1111 Comstock Data Center Project ((PLN2019-13941; CEQ2020-01079)

Dear Mr. Haggag, Ms, Dhadli, Mr. Crabtree, Mr. Abbe and Ms. Bustos:

On behalf of Santa Clara Citizens for Sensible Industry ("Santa Clara Citizens"), we submit these comments on the Initial Study/Mitigated Negative Declaration ("IS/MND"), prepared pursuant to the California Environmental Quality Act ("CEQA") by the City of Santa Clara ("City") for the 1111 Comstock Data Center Project ("Project"), proposed by Prime Data Centers ("Applicant"). The Project proposes to demolish an existing 23,765-square-foot industrial building and

construct a four-story, 121,170-square-foot data center building on the 1.38-acre project site (APN 224-08-092). The data center building would house computer servers designed to provide 10 megawatts ("MW") of information technology power; backup generators; underground fuel storage containers; and mechanical cooling equipment on the building's roof. The site, zoned as Light Industrial with a General Plan designation of Low Intensity Office/R&D, is located north of Comstock Street, east of Kenneth Street, south of Bayshore Freeway, and west of Lafayette Street within the City of Santa Clara.

The Project seeks from the City the following discretionary approvals: Architectural Review and Demolition Permit. The Architectural Review Process, found at Zoning Ordinance Chapter 18.76 of the Santa Clara City Code, requires that the Director of Community Development or a designee review plans and drawings prior to issuance of a building permit.[1] The review, which takes place at a publicly noticed Development Review Hearing, assesses design, aesthetics, and consistency with zoning standards.[2] Demolition permits require the following: PCB screening assessment, sewer cap permit, air quality permit from the Bay Area Air Quality Management District ("BAAQMD"), and planning clearance. All demolition of structures larger than 1,000 square feet must create and submit a recycling plan.[3]

Based on our review of the IS/MND, we have concluded that it fails to comply with CEQA. The IS/MND fails to accurately describe the existing environmental setting and underestimates and fails to adequately mitigate air quality, public health, and greenhouse gas ("GHG") impacts from the Project.

These comments were prepared with the assistance of James J.J. Clark, Ph.D. of Clark & Associates Environmental Consulting, Inc. Dr. Clark's comments and curricula vitae are attached to this letter as Attachment A.[4] For the reasons discussed herein, and in the attached expert comments, Santa Clara Citizens urges

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[1] Santa Clara City Code, Title 18: Zoning, Chap. 18.76.
[2] *Id.*
[3] *City of Santa Clara Requirements for Obtaining a Demolition* Permit, July 1, 2019, https://www.santaclaraca.gov/home/showdocument?id=66421.
[4] James J.J. Clark, PhD., Comment Letter on Initial Study with Proposed Mitigated Negative Declaration (IS/MND) for 1111 Comstock Data Center, Santa Clara, California (PLN2019-13941 and CEQ2020-01075), Clark and Associates, (Aug. 21, 2020) (hereafter "Dr. Clark Comments"). **ATTACHMENT A.**

the City to remedy the deficiencies in the IS/MND by preparing a legally adequate environmental impact report ("EIR") pursuant to CEQA.

I. STATEMENT OF INTEREST

Santa Clara Citizens is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential health, safety, public service, and environmental impacts of the Project. The association includes individuals and organizations, including California Unions for Reliable Energy ("CURE") and its local affiliates, and the affiliates' members and their families, who live, work, recreate and raise their families in the City of Santa Clara and Santa Clara County.

Since its founding in 1997, CURE has been committed to building a strong economy and a healthier environment. Its members help solve the State's energy problems by building, maintaining, and operating conventional and renewable energy power plants and transmission facilities. CURE members have an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Individual members live, work, recreate, and raise their families in Santa Clara. They would be directly affected by the Project's environmental and health and safety impacts. Its members may also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants or other health and safety hazards that exist onsite.

Santa Clara Citizens supports the development of data centers where properly analyzed and carefully planned to minimize impacts on the environment. Any proposed project should avoid impacts to public health, energy resources, sensitive species and habitats, and should take all feasible steps to ensure significant impacts are mitigated to the maximum extent feasible. Only by maintaining the highest standards can development truly be sustainable.

Santa Clara Citizens and its members are concerned with projects that can result in serious environmental harm without providing countervailing economic benefits such as decent wages and benefits. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for industry to expand in the City and the surrounding region, and by making it less desirable for businesses to locate and people to live and recreate in the City, including in the vicinity of the Project. Continued degradation can, and has, caused

construction moratoriums and other restrictions on growth that, in turn, reduces future employment opportunities. Santa Clara Citizens' members therefore have a direct interest in enforcing environmental laws that minimize the adverse impacts of projects that would otherwise degrade the environment. CEQA provides a balancing process whereby economic benefits are weighted against significant impacts to the environment. It is for these purposes that we offer these comments.

II. LEGAL BACKGROUND

A. CEQA

CEQA is intended to provide the fullest possible protection to the environment. CEQA requires that a lead agency prepare and certify an EIR for any discretionary project that may have a significant adverse effect on the environment.[5] In order to set an accurate foundation for the analysis, an EIR must include a description of the "existing physical conditions in the affected area."[6] CEQA requires analysis of the "whole of an action," including the "direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."[7] "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR protects not only the environment but also informed self-government."[8]

In addition, public agencies must adopt feasible mitigation measures that will substantially lessen or avoid a project's potentially significant environmental impacts and describe those mitigation measures in the EIR.[9] A public agency may not rely on mitigation measures of uncertain efficacy or feasibility.[10] "Feasible" means capable of successful accomplishment within a reasonable period of time, taking into account economic, environmental, legal, social, and technological

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[5] Pub. Resources Code §§ 21002.1(a), 21100(a), 21151(a); 14 C.C.R. §§ 15064(a)(1), (f)(1), 15367.
[6] *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319–322; 14 C.C.R. § 15125.
[7] Pub. Resources Code § 21065; 14 C.C.R. § 15378(a).
[8] *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 (internal quotations omitted).
[9] Pub. Resources Code §§ 21002, 21081(a), 21100(b)(3); 14 C.C.R. § 15126.4.
[10] *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727–728.

factors.[11] Mitigation measures must be enforceable through permit conditions, agreements, or other legally binding instruments.[12]

CEQA prohibits deferring identification of mitigation measures when there is uncertainty about the efficacy of those measures or when the deferral transfers authority for approving the measures to another entity.[13] An agency may only defer identifying mitigation measures when practical considerations prevent formulation of mitigation measures at the usual time in the planning process, the agency commits to formulating mitigation measures in the future, and that commitment can be measured against specific performance criteria the ultimate mitigation measures must satisfy.[14]

B. An EIR is Required

The EIR is the very heart of CEQA.[15] A negative declaration is improper, and an EIR must be prepared, whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.[16] "[S]ignificant effect on the environment" is defined as "a substantial, or potentially substantial, adverse change in the environment."[17] An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is

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[11] 14 C.C.R. § 15364.
[12] *Id.* § 15126.4(a)(2).
[13] *Id.* § 15126.4(a)(1)(B); *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 366; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308–309.
[14] *POET, LLC v. California Air Res. Bd.* (2013) 218 Cal.App.4th 681, 736, 739–740, *as modified on denial of reh'g* (Aug. 8, 2013), *review denied* (Nov. 20, 2013); see also *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281 (EIR deficient for failure to specify performance standards in plan for active habitat management of open space preserve); *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 (EIR's deferral of acoustical report demonstrating structures designed to meet noise standards without setting the actual standards is inadequate for purposes of CEQA); *Gentry v. Murrieta* (1995) 36 Cal.App.4th 1359, 1396 (negative declaration's deferral of mitigation measure improper where the measure required applicant to comply with recommendations of a report that did not exist yet with no further guidance on what mitigation was necessary).
[15] See *Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App.4th 903, 926–927; *Sundstrom v. County of Mendocino* (1974) 202 Cal.App.3d 296, 304.
[16] Pub. Resources Code § 21151; 14 CCR § 15064(f); *Citizens for Responsible Equitable Envt'l Dev. v. City of Chula Vista* ("*CREED*") (2011) 197 Cal.App.4th 327, 330–331; *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319 ("*CBE v. SCAQMD*").
[17] Pub. Resources Code § 21068; 14 CCR § 15382; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1581.

enough that the impacts are "not trivial."[18] Substantial evidence, for purposes of the fair argument standard, includes "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."[19]

Whether a fair argument exists is a question of law that the court reviews de novo, with a preference for resolving doubts in favor of environmental review.[20] In reviewing a decision to prepare a negative declaration rather than an EIR, courts "do not defer to the agency's determination."[21]

The fair argument standard creates a "low threshold" for requiring preparation of an EIR and affords no deference to the agency's determination.[22] Where substantial evidence supporting a fair argument of significant impacts is presented, the lead agency must prepare an EIR "even though it may also be presented with other substantial evidence that the project will not have a significant effect."[23] A reviewing court must require an EIR if the record contains any "substantial evidence" suggesting that a project "may have an adverse environmental effect"—even if contrary evidence exists to support the agency's decision.[24]

Where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the effects to be significant and prepare an EIR.[25] In short, when "expert opinions clash, an EIR should be done."[26] "It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project."[27] In the context of reviewing a mitigated negative declaration,

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[18] *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83 fn. 16.
[19] Pub. Resources Code § 21080(e)(1) (emphasis added); *CREED*, 197 Cal.App.4th at 331.
[20] *CREED*, 197 Cal.App.4th at 331; *Pocket Protectors*, 124 Cal.App.4th at 927.
[21] *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 332; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318.
[22] *Pocket Protectors*, 124 Cal.App.4th at 928.
[23] Pub. Resources Code § 21151(a); 14 CCR § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 927; *County Sanitation Dist. No. 2*, 127 Cal.App.4th at 1579 ("where the question is the sufficiency of the evidence to support a fair argument, deference to the agency's determination is not appropriate.") (quoting *Sierra Club*).
[24] *Mejia*, 130 Cal.App.4th at 332–333.
[25] *Pocket Protectors*, 124 Cal.App.4th at 935; *Sierra Club*, 6 Cal.App.4th at 1317–1318; CEQA Guidelines § 15064(f)(5).
[26] *Pocket Protectors*, 124 Cal.App.4th at 928; *Sierra Club*, 6 Cal.App.4th at 1317–1318.
[27] *Pocket Protectors*, 124 Cal.App.4th at 935.

"neither the lead agency nor a court may 'weigh' conflicting substantial evidence to determine whether an EIR must be prepared in the first instance."[28] Where such substantial evidence is presented, "evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact."[29]

The fair argument test requires the preparation of an EIR whenever "there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial."[30] Such substantial evidence is present here and requires the preparers of this IS/MND to take a closer look at the environmental impacts of the Project in an EIR.

III. THE CITY FAILED TO PROVIDE THE DOCUMENTS REFERENCED IN THE IS/MND FOR THE ENTIRE COMMENT PERIOD

The City violated CEQA and improperly truncated the public comment period when it failed to make all documents referenced or relied on in the IS/MND available for public review during the entire public comment period.[31] As a result, Santa Clara Citizens and other members of the public were unable to complete a meaningful review and analysis of the IS/MND and its supporting evidence. The City delayed providing the coalition access to responsive records, while denying the coalition's request to extend the comment period. We therefore provide these initial comments on the IS/MND and reserve our right to submit supplemental comments at a future date.

CEQA and the CEQA Guidelines require that "all documents referenced" and "all documents incorporated by reference" in a negative declaration shall be "readily accessible to the public during the lead agency's normal working hours" during the entire public comment period.[32] The courts have held that the failure to provide even a few pages of a CEQA document for a portion of the review and comment period invalidates the entire CEQA process, and that such a failure must be

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[28] *Id.* at 935.
[29] *Sundstrom*, 202 Cal.App.3d at 310 (citation omitted).
[30] 14 C.C.R. § 15063(b)(1) (emphasis added).
[31] *See* PRC § 21092(b)(1); 14 CCR § 15087(c)(5).
[32] Pub. Resources Code § 21092(b)(1); 14 C.C.R. § 15072(g)(4); see *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

remedied by permitting additional public comment.[33] It is also well settled that a CEQA document may not rely on hidden studies or documents that are not provided to the public.[34]

On September 23, 2020, we submitted a request to the City for "immediate access to any and all documents referenced or incorporated by reference in the Initial Study/Mitigated Negative Declaration related to the 1111 Comstock Street Project" (Request No. 20-554).[35] On September 29, 2020, the City asked for clarification as to what records were sought, even though there was no ambiguity in such a basic request. In a follow-up letter to the City on October 1, 2020, we explained that our request included "all documents referenced and referred to throughout the MND and used to support conclusions reached in the MND, including any documents not made available in the Appendices."[36]

On October 5, the City stated that responsive documents would be provided by October 19, 2020—six days after the close of the comment period. The City then provided us with documents referenced in the IS/MND on October 9, four days before the public review and comment period ended. CURE and other members of the public have therefore been denied access to the relevant documents referenced and incorporated by reference in the MND during the entire public comment period in violation of CEQA.[37]

IV. THE IS/MND FAILS TO PROVIDE A COMPLETE AND ACCURATE PROJECT DESCRIPTION

CEQA requires that an EIR "set forth a project description that is sufficient to allow an adequate evaluation and review of the environmental impact."[38]

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[33] *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.
[34] *Santiago Cty. Water Dist. v. Cty. of Orange* (1981) 118 Cal.App.3d 818, 831 ("Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.").
[35] Letter from Adams, Broadwell, Joseph & Cardozo ("ABJC") to City of Santa Clara re Request for Immediate Access to Documents Referenced in the Mitigated Negative Declaration – 1111 Comstock Street Project by Prime Data Centers (PLN2019-13941; CEQ2020-01079) (September 23, 2020).
[36] Letter from ABJC to City of Santa Clara re FOLLOW-UP to Request for Immediate Access to Documents Referenced in Mitigated Negative Declaration – 1111 Comstock Street Project by Prime Data Centers (PLN2019-13941; CEQ2020-01079) (October 1, 2020).
[37] See *Ultramar*, 17 Cal.App.4th 689, 699.
[38] *San Joaquin Raptor Rescue Center v. County of Merced* 149 Cal.App.4th 645, 654 (citing 14 C.C.R. § 15124).
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Similarly, an IS/MND must present a complete and accurate description of the project under consideration.[39] "The scope of the environmental review conducted for the initial study must include the entire project. . . . [A] correct determination of the nature and scope of the project is a critical step in complying with the mandates of CEQA."[40] A negative declaration is "inappropriate where the agency has failed either to provide an accurate project description or to gather information and undertake an adequate environmental analysis. An accurate and complete project description is necessary for an intelligent evaluation of the potential environmental impacts of the agency's action. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal . . . and weigh other alternatives in the balance."[41]

The IS/MND fails to provide a complete description of several of the Project's components, including details of the demolition of the existing improvements on the site; specifications of the generators and other technology to be employed; and construction processes, schedules and details. Moreover, no description of critical processes that will take place throughout the Project's lifetime—such as de-energizing of generators for maintenance and testing—is offered. In the absence of this crucial information, the public is precluded from meaningful review of the Project's potential impacts.

V. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT MAY RESULT IN SIGNIFICANT IMPACTS

As noted above, under CEQA, a lead agency must prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.[42] The fair argument standard creates a "low threshold" favoring environmental review

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[39] 14 C.C.R. § 15063(d)(1) (requiring an initial study to include a description of the project).
[40] *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 267 (internal quotations and citations omitted).
[41] *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 406 (internal quotations and citations omitted).
[42] Pub. Resources Code § 21082.2; CEQA Guidelines § 15064(f), (h); *Laurel Heights II, supra,* 6 Cal. 4th at p. 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical, supra,* 29 Cal.App.4th at pp. 1601-1602.

through an EIR, rather than through issuance of a negative declaration.[43] An agency's decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.[44] Substantial evidence can be provided by technical experts or members of the public.[45] "If a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect."[46]

A. The IS/MND Fails to Adequately Disclose, Analyze and Mitigate the Project's Potentially Significant Air Quality Impacts

The IS/MND concludes that emissions from the Project will not have a significant impact on air quality.[47] Dr. Clark reviewed the IS/MND and provided substantial evidence that the City underestimated the Project's criteria pollutant emissions. Thus, substantial evidence demonstrates that the Project will have significant impacts beyond what is disclosed, analyzed and mitigated in the IS/MND.

1. The City Lacks Substantial Evidence that the Project's Backup Generators Will Run Only 50 Hours Each Year

The Project includes six 3,000-kW and one 500-kW backup diesel generators that the City assumed would run 50 hours per year, which is the Bay Area Air Quality Management District's ("BAAQMD") stationary source rule's maximum allowable run time.[48] The IS/MND notes that emergency situations, including

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[43] *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.
[44] *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; *see also Friends of B Street, supra,* 106 Cal.App.3d at p. 1002 ("If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an [environmental impact report] and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact").
[45] See, e.g., *Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340 (substantial evidence regarding noise impacts included public comments at hearings that selected air conditioners are very noisy); *see also Architectural Heritage Assn. v. County of Monterey*, 122 Cal.App.4th 1095, 1117-1118 (substantial evidence regarding impacts to historic resource included fact-based testimony of qualified speakers at the public hearing); *Gabric v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183, 199.
[46] CEQA Guidelines § 15062(f).
[47] IS/MND, p. 32.
[48] IS/MND, p. 34.

power failures, as well as private utility work to restore services and protect property from damage, are exempt from the limits in BAAQMD's rules and that the City did not calculate or analyze emissions beyond the 50 hours.[49]

The IS/MND also notes that data centers consume more energy than other land uses and require an uninterrupted power supply, thereby admitting that there will be significant emissions of criteria pollutants beyond what is modeled.[50] For example, public safety power shut offs are conducted by Pacific Gas & Electric, which are expected to cause power outages of 24 to 48 hours each.[51] Nearby San Jose Clean Energy estimates that these outages may last several days a year, far beyond the 50 hours modeled in the IS/MND.[52] The IS/MND must be withdrawn, and an EIR must be prepared that considers the emissions associated with running the backup diesel generators beyond 50 hours.

B. The IS/MND Fails to Adequately Disclose, Analyze, and Mitigate the Project's Potentially Significant Public Health Impacts

The IS/MND concludes that the Project would not expose sensitive receptors to substantial pollutant concentrations.[53] This conclusion suffers from two errors: 1) the failure of the Air Quality and Greenhouse Gas Emissions Assessment (Appendix A) to include the most sensitive receptors in emissions modeling, and 2) the failure to model emissions beyond 50 hours of operation of the backup generators, noted above.[54]

The IS/MND's Air Quality Assessment erroneously states that the "closest sensitive receptors to the proposed project site are existing residences about 3,315

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[49] IS/MND, pp. 34; 105.
[50] *See* IS/MND, p. 6.
[51] *See Pacific Gas & Electric, Public Safety Power Shutoffs, available at* https://www.pge.com/en_US/safety/emergency-preparedness/natural-disaster/wildfires/public-safety-power-shutoff-faq.page; Silicon Valley Power, PG&E's Public Safety Power Shutoffs, *available at* https://www.siliconvalleypower.com/svp-and-community/safety/pg-e-s-public-safety-power-shutoff-program.
[52] *See San Jose Clean Energy, PG&E Power Shutoffs, available at* https://sanjosecleanenergy.org/psps/.
[53] IS/MND, p. 36.
[54] Dr. Clark Comments, p. 9.
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feet north of the project site ..."[55] The Granada Islamic School is much closer—1,700 feet—to the Project site.

Potential health impacts from operation of the Project's generators were evaluated using air quality dispersion modeling and applying BAAQMD recommended health impact calculation methods.[56] Though the IS/MND states that "[t]he maximum increased cancer risk at the closest sensitive receptor, Granada Islamic School, would be 0.02 in one million, and the maximum increased cancer risk at the closest residence would be 0.1 in one million," it is unclear where those numbers came from. Nothing in the Assessment indicates whether the evaluations of health impacts were actually performed at the Granada Islamic School or at the residences further away. The Assessment's initial erroneous assumption that the closest sensitive receptors were the residences more than 3,000 feet from the Project site does not appear to have been corrected during calculations of health risks, as Figure 2 in the Assessment does not include the Granada Islamic School in its display of sensitive receptors. As asserted by Dr. Clark, such an oversight would significantly alter the assumptions and conclusions of the IS/MND. The City must re-analyze the Project's impacts in an EIR.

As required by CEQA, the City must prepare a site-specific baseline health risk assessment ("HRA") that calculates the excess incremental lifetime risk for all of the nearby receptors. As Dr. Clark points out, "[t]he City's emissions estimates for criteria pollutants do not substitute for a health risk analysis of the cancer risk posed by exposure to toxic air contaminants (TACs), in particular diesel particulate matter (DPM), released during Project construction and operation."[57]

Diesel exhaust contains nearly 40 toxic substances, including TACs and may pose a serious public health risk for residents in the vicinity of the facility. It has been linked to a range of serious health problems, including an increase in respiratory disease, lung damage, cancer, and premature death.[58,59] Dr. Clark

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[55] IS/MND Appendix A, p. 5.
[56] IS/MND Appendix A, p. 15.
[57] Dr. Clark Comments, pp. 9–10.
[58] Dr. Clark Comments, p. 9.
[59] California Air Resources Board, Initial Statement of Reasons for Rulemaking, Proposed Identification of Diesel Exhaust as a Toxic Air Contaminant, Staff Report, June 1998; see also California Air Resources Board, Overview: Diesel Exhaust & Health, https://ww2.arb.ca.gov/resources/overview-diesel-exhaust-and-health#:~:text=Diesel%20Particulate%20Matter%20and%20Health&text=In%201998%2C%20CARB

asserts that, given the Project's proximity to sensitive receptors and the nature of the TACs emitted, an HRA, prepared in accordance with the Office of Environmental Health and Hazard Assessment and analyzing the Project's potentially significant public health impacts from TACs emitted from the diesel particulate matter, is essential.[60]

C. The IS/MND Fails to Adequately Disclose, Analyze and Mitigate the Project's Potentially Significant Greenhouse Gas Impacts

The CEQA Guidelines require a lead agency to compare a project's GHG emissions against a threshold of significance that the agency determines applies to the Project, or to otherwise determine the extent to which the project complies with local regulations and requirements adopted to reduce GHG emissions, provided there is no evidence that GHG emissions would be cumulatively considerable.[61] Here, the City chose to use a qualitative approach when considering GHG emissions. Rather than measure the Project's emissions against a numerical threshold, the IS/MND instead evaluated them based on whether they conflict with a plan, policy, or regulation adopted for the purpose of reducing GHG.[62] Substantial evidence, however, supports a fair argument that the Project's emissions are significant.

1. Substantial Evidence Does Not Support the Conclusion that GHG Emissions Will Not Be Significant

Though BAAQMD provides clear thresholds to which emissions from both stationary and nonstationary sources can be compared,[63] the IS/MND fails to measure any of the Project's emissions against a numerical threshold, and fails, therefore, to demonstrate that Project impacts are less than significant.

%20identified%20DPM,and%20other%20adverse%20health%20effects; U.S. EPA, Health Assessment Document for Diesel Engine Exhaust, Report EPA/600/8-90/057F, May 2002; Environmental Defense Fund, Cleaner Diesel Handbook, Bring Cleaner Fuel and Diesel Retrofits into Your Neighborhood, April 2005; http://www.edf.org/documents/4941_cleanerdieselhandbook.pdf, accessed July 5, 2020.

[60] Dr. Clark Comments, pp. 9–10.

[61] CEQA Guidelines § 15064.4 subd. (b).

[62] IS/MND, p. 66.

[63] BAAQMD identifies thresholds of significance for emissions from nonstationary operational sources as 1,100 $MTCO_2e$/yr or 4.6 $MTCO_2e$/service population/yr (in the absence of compliance with a qualified GHG reduction strategy). The Guidelines set the threshold for stationary operational sources at 10,000 $MTCO_2e$/yr. BAAQMD CEQA Guidelines (May 2017), p. 2-10.

The IS/MND indicates that total Project emissions are calculated as 10,323 $MTCO_2e$/year. The BAAQMD CEQA Guidelines, meanwhile, provide the following thresholds of significance for operational-related GHG emissions for land use development projects: "Compliance with a qualified GHG Reduction Strategy; or annual emissions less than 1,100 $MTCO_2e$/yr; or 4.6 $MTCO_2e$/SP/yr (residents + employees)."[64]

Even subtracting from the total emissions the 522 $MTCO_2e$/year attributed to generators (since stationary sources are subject to different thresholds than nonstationary sources), Project emissions are significant. As stated in BAAQMD's CEQA Guidelines, "[i]f annual emissions of operational-related GHGs exceed [threshold] levels, the proposed project would result in a cumulatively considerable contribution of GHG emissions and a cumulatively significant impact to global climate change."[65]

2. Compliance with Plans and Policies Does Not Establish that the Project's GHG Emissions Would Be Less Than Significant

The IS/MND concludes that the Project's GHG emissions would not have a significant impact on the environment because the Project is consistent with the City of Santa Clara Climate Action Plan ("CAP"), as well as other plans, policies, and regulations adopted for the purpose of reducing GHG emissions.[66] Substantial evidence, however, supports a fair argument that the Project's GHG emissions are significant notwithstanding their consistency with local, regional, and state plans.

As stated above, the Project's total operational emissions amount to 10,323 $MTCO_2e$ annually—significantly higher than the 1,100 $MTCO_2e$/year threshold established by BAAQMD. The IS/MND fails to describe how this might be abated through the Project's compliance with GHG reduction strategies.

Furthermore, the IS/MND relies on obtaining the status of less-than-significant for the Project's emissions from a plan that is set to expire before the Project is implemented. The City's Climate Action Plan, adopted in 2013, contains projected emissions and measures designed to help the City meet statewide 2020

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[64] BAAQMD CEQA Guidelines (May 2017), p. 2-4.
[65] *Id.*
[66] IS/MND, p. 70–71.

goals established by AB 32.[67] As acknowledged in the IS/MND, "consistency with the CAP cannot be used to determine significance under CEQA."[68]

The IS/MND argues that because electricity—by far the biggest source of the Project's emissions—is provided by Silicon Valley Power, "a utility on track to meet the 2030 GHG emissions reductions target established by SB 32," the Project would generate lower emissions than the statewide average for an equivalent facility.[69] Additionally, because the Project would allegedly comply with several applicable City and state plans, including green building and energy efficiency measures, and policies adopted to reduce GHG emissions, the IS/MND concludes that "the project would not generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment."[70]

The IS/MND fails, however, to establish that the Project's consistency with these plans and programs will ensure that the Project's contribution to global climate change is not significant. Despite compliance with these plans, Dr. Clark reiterates that calculations of the Project's total emissions provided in the IS/MND nevertheless surpass BAAQMD's thresholds, demonstrating that emissions would be significant. The City must prepare an EIR that analyzes and mitigates these significant GHG emissions.

V. CONCLUSION

CEQA requires that an EIR be prepared if there is substantial evidence that a project, either individually or cumulatively, may have a significant impact on the environment.[71] As discussed above, there is substantial evidence supporting a fair argument that the Project would result in significant adverse impacts that were not identified or adequately analyzed in the IS/MND.

We urge the City to fulfill its responsibilities under CEQA by withdrawing the IS/MND and preparing a legally adequate EIR to address the potentially significant impacts described in this comment letter. Only by complying with all

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[67] *Id.* at 67.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Pub. Resources Code § 21151; 14 CCR §15063(b)(1).

applicable laws will the City and the public be able to ensure that the Project's environmental impacts are mitigated to less than significant levels.

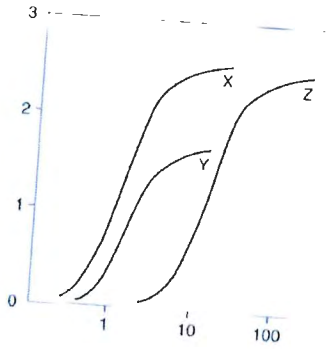
Sincerely,

Kendra Hartmann
Tanya Gulesserian

Attachments

KDH:acp

ATTACHMENT A



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October 12, 2020

Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 100
South San Francisco, CA 94080

Attn: Ms. Kendra D. Hartmann

Subject: Comment Letter on Initial Study With Proposed Mitigated Negative Declaration (IS/MND) for 1111 Comstock Street Data Center, Santa Clara, California, PLN2019-13941 and CEQ2020-01079

Dear Ms. Hartmann:

At the request of Adams Broadwell Joseph & Cardozo (ABJC), Clark and Associates (Clark) has reviewed materials related to the IS/MND for the above referenced project. The IS/MND was prepared by David J. Powers and Associates, Inc. for the City of Santa Clara Community Development Department.

Clark's review of the materials in no way constitutes a validation of the conclusions or materials contained within the project record. If we do not comment on a specific item this does not constitute acceptance of the item.

General Comments:

The City's analysis of the air quality impacts of emissions from the construction and operational phases of the project are unsupported and flawed. The analysis in the IS/MND fails to quantify the total emissions in a meaningful manner in which yearly and daily emissions may be compared to relevant and appropriate standards, fails to address necessary mitigation measures to reduce significant impacts, and makes assertions about the impacts to the surrounding communities without a clear and reproducible methodology. Several mitigation measures outlined in the DEIR are merely aspirational and may not effectively reduce emissions from the project. These flaws are detailed below,

making the conclusions in the IS/MND unsupported. The City must update their analysis as an Environmental Impact Report (EIR) to correct the unsupported conclusions presented in the IS/MND.

Project Description

According to the IS/MND, the approximately 1.38-acre project site, located at 1111 Comstock Street (APN 224-08-092) in Santa Clara, is currently developed with a one-story, 23,765 square foot (sf) industrial building and a paved parking lot. The site is zoned as Light Industrial, and has a General Plan designation of Low Intensity Office/R&D. The project proposes to demolish the existing improvements on the site to construct a four-story, 121,170 sf data center building. The data center building would house computer servers for private clients in a secure and environmentally controlled structure and would be designed to provide 10 megawatts (MW) of information technology (IT) power. Mechanical equipment for building cooling would be located on the roof. Standby backup emergency electrical generators would be installed to provide for an uninterrupted power supply. Six 3,000-KW diesel-fueled engine generators and one 500-kW diesel-fueled engine generator would be located within a generator room on the first floor of the building. Fuel for the generators would be stored in two 30,000-gallon underground storage tanks which would feed individual 160-gallon daytanks located adjacent to each generator.

The data center building would be approximately 80 feet in height, with parapets extending to a height of 87.5 feet. A metal roof screen would extend to a height of 98 feet to shield mechanical equipment. The building would be located in the southern, central portion of the site and set back approximately 15 feet from the southern property line on Comstock Street, 45 feet from the northern property line, 50 feet from the western property line, and 25 feet from the eastern property line.

Access to the site would be provided by a primary driveway on Comstock Street. The primary driveway would be approximately 26 feet wide and would be located in the southwestern portion of the site in the same location as the existing driveway entrance. A secondary driveway entrance for emergency access would be constructed on Comstock Street in the southeastern portion of the site and would be approximately 22 feet wide. The emergency driveway would wrap around the perimeter of the building and would include a curb and handicap ramp. The project would provide approximately 24 parking spaces, including one accessible space and two clean air/vanpool/EV spaces, located along the western side of the building.

Generator Testing Schedule

The seven emergency backup generators would each be tested once per month for up to one hour. Tests would be conducted with no load for 11 months out of the year, and at with full load one month out of the year.

Existing Project Site

The existing improvements on the site would be demolished to allow for construction of the project. Demolition and construction activities would last approximately 12 months. Excavation for utilities would extend to depths of up to eight feet. Roughly 860 cubic yards of soil would be removed from the site as a result of excavation activities. Augered foundation piles would extend to a depth of 80 1111 Comstock Data Center 7 Initial Study City of Santa Clara September 2020 feet. The site would be graded to direct stormwater flows towards the biotreatment area located along the western boundary of the site.

The project proposes to remove approximately 24 existing trees on-site and plant five replacement trees. New landscaping consisting of trees, shrubs, sedge, perennials, bulbs, annuals and groundcover would be installed in the northeastern, northwestern, and southwestern corners of the site, as well as the southern perimeter of the site, and the western side of the proposed building.

The project proposes to construct a stormwater treatment area between the west side of the building and the parking lot. The existing storm drain line on the site would be removed and a new 12-inch storm drain line would connect the treatment area to the existing storm drain line in Comstock Street. Pedestrian walkways would be composed of permeable pavers. The site would have a total of approximately 28,337 sf of pervious surface, which would be an increase compared to existing condition.

Specific Comments:

1. **The IS/MND Fails To Model The Diesel Particulate Matter (DPM) Concentration At the Closest Sensitive Receptor To The Site**

According to the IS/MND the project will be a source of air pollutant emissions during construction and operation, with the main source being backup generator testing and maintenance. The diesel-fueled generators emit diesel particulate matter (DPM), which is a known toxic air contaminant

(TAC). The generators are also a source of $PM_{2.5}$, which is also known to induce adverse health effects.

Based on the assumption that each of the six 3000-kW generators and one 500-kW generator would operate up to 50 hours a year during testing and maintenance, the City calculated that approximately 49 lbs of DPM per year would be emitted. Dispersion modeling in the IS/MND attempts to define the concentration of DPM to which sensitive receptors would be exposed over time.

The IS/MND defines Sensitive Receptors as persons who are most likely to be affected by air pollution: infants, children under 18, the elderly over 65, athletes, and people with cardiovascular and chronic respiratory diseases. Locations that may contain a high concentration of these sensitive population groups include residential areas, hospitals, daycare facilities, elder care facilities, elementary schools, churches and places of assembly, and parks. According to the IS/MND the closest sensitive receptors to the proposed project site are the Granada Islamic School, located about 1,700 feet (approximately 536 meters) northwest of the project site; existing residences about 3,315 feet north of the project site; and additional residences about 4,330 and 4,590 feet south of the project site.[1] The maximum average annual off-site DPM concentrations were used to calculate potential increased cancer risks from the project. Average annual DPM concentrations were used as being representative of long-term (30-year) exposures for calculation of cancer risks. [2]

According to the Proponent, the maximum modeled annual DPM and PM2.5 concentration from operation of the generators at the data center was 0.0001 $\mu g/m^3$ at several residential receptors north of the project site on Lafayette Street. Concentrations at all other existing residential locations would be lower than the maximum concentration. [3]

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[1] Powers. 2020. *Initial Study 1111 Comstock Data Center.* Prepared by David J. Powers and Associates, Inc. for the City of Santa Clara Community Development Department. Page 36

[2] Powers. 2020. *Initial Study 1111 Comstock Data Center.* Prepared by David J. Powers and Associates, Inc. for the City of Santa Clara Community Development Department. Page 36

[3] Powers. 2020. *Initial Study 1111 Comstock Data Center.* Prepared by David J. Powers and Associates, Inc. for the City of Santa Clara Community Development Department. Page 37

Based on the maximum modeled DPM concentrations that assume operation for 50 hours per year per generator, maximum increased cancer risks and non-cancer health impacts were calculated using BAAQMD recommended methods. The maximum increased cancer risk at the closest sensitive receptor, Granada Islamic School, would be 0.02 in one million, and the maximum increased cancer risk at the closest residence would be 0.1 in one million.[4] These conclusions are not supported by the data presented within the report.

A review of Appendix A to the IS/MND, the Air Quality and GHG Emissions Assessment prepared by the Illingworth and Rodkin, Inc., shows that the closest sensitive receptor (Granada Islamic School) and all of the closest worker receptors are not included in the AERMOD model of the emissions from the site. The report within Appendix A is originally dated November 11, 2019 and was updated May 19, 2020. On pages 6 and 15 of the Illingworth and Rodkin report, it states that the closest sensitive receptors to the proposed project site and additional residences are about 4,330 and 4,590 feet south of the project site. DPM and $PM_{2.5}$ concentrations were calculated at the locations of existing residences in the project area. The report does not indicate if any other receptors are included in the analysis. Figure 2 of Appendix A clearly indicates the nearest sensitive receptors identified by the proponent. What the figure does not identify is the location of the Granada Islamic School.

[4] Powers. 2020. *Initial Study 1111 Comstock Data Center.* Prepared by David J. Powers and Associates, Inc. for the City of Santa Clara Community Development Department. Page 37

Figure 2– Project Site, Influence Area (red circle) and Nearest Sensitive Receptors (yellow +) and Location of Maximum TAC Impact and PM2.5 Concentration

Figure 2– Project Site, Influence Area (red circle) and Nearest Sensitive Receptors (yellow +) and Location of Maximum TAC Impact and PM2.5 Concentration

The figure above clearly indicates the location of the Granada Islamic School, which is much closer than the residences indicated by the yellow crosses on the figures above. This oversight significantly alters the assumptions and conclusions contained within the IS/MND. The City must re-analyze the project impacts and present them in an EIR for the site.

2. The IS/MND's Analysis of Risk Fails to Meet Its Obligation to Calculate the Risk from Emissions to the Maximum Exposed Individual (MEI).

According to the BAAQMD CEQA Guidelines,[5] emissions from a new source or emissions affecting a new receptor would be considered significant where ground-level concentrations of carcinogenic TACs from any source result in an increased cancer risk greater than 10.0 in one million, assuming a 70-year lifetime exposure. The Maximum Exposed Individual (MEI) is normally defined as an individual who is present at the point of maximum impact (PMI) as outlined in the Office of Environmental Health and Hazard Assessment's (OEHHA's) Air Toxic Hot Spots Program Risk Assessment Guidelines[6] (Toxic Hot Spots). Under Section 4.7.1 of the OEHHA Guidance, the modeling analysis should contain a network of receptor points with sufficient detail (in number and density) to permit the estimation of the maximum concentrations. Locations that must be identified include:

- The maximum estimated off-site impact or point of maximum impact (PMI),
- The maximum exposed individual at an existing residential receptor (MEIR),
- The maximum exposed individual at an existing occupational worker receptor (MEIW).

The modeling performed for the IS/MND fails to identify the PMI and the MEIW. This oversight significantly alters the assumptions and conclusions contained within the IS/MND. The City must re-analyze the project impacts and present them in an EIR for the site.

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[5] BAAQMD. 2017. California Environmental Quality Act Air Quality Guidelines. Bay Area Air Quality Management District (BAAQMD). May 2017. Page D-40

[6] OEHHA. 2015. Air Toxic Hot Sports Program Risk Assessment Guidelines. Guidance Manual For Preparation of Health Risk Assessments at pdf page 99.

3. The Proposed Emission Controls Assumes that Testing and Maintenance Operations Can Be Performed in Approximately One-Fourth of the Normally Required Time

Emissions from combustion engines for stationary uses, including diesel generators, are generally regulated by the U.S. Environmental Protection Agency (U.S. EPA) and the California Air Resources Board (CARB). Engine emission standards are promulgated in a tiered system that designates maximum pollutant emissions. Unlike Off-Road Diesel-Powered Engines for Mobile Sources (currently utilizing Tier 4 Interim and Final technology which reduce PM2.5 emissions by 90% and more) all new generators have U.S. EPA Tier II rating and need to be outfitted with diesel particulate filters. Diesel-powered generator engines should be fueled using ultra-low sulfur diesel fuel with a maximum sulfur content of 15 parts per million (ppm). According to the City, all generator engines would be equipped with California Air Resources Board (CARB) Level 3 verified diesel particulate filters (DPFs) with a minimum control efficiency of 85 percent removal of particulate matter.

In the absence of stricter emission control devices, the City is proposing to reduce the number of hours of potential operation for testing and maintenance on an annual basis. Rather than assuming testing would occur for up to 50 hours per year for each generator, the City is assuming that the same types of maintenance and testing that needs to be performed to ensure the operations of the generators can be accomplished in 24% of the time generally assumed to be required (12 hours instead of 50 hours). Given the complexity of the equipment, reducing the maintenance and testing period by 76% seems like an illogical and unsustainable mitigation measure. The proponents must evaluate the emissions again considering the required maintenance period and include all of the maintenance for the whole campus in this evaluation.

4. The City Must Prepare A Site-Specific Baseline Health Risk Assessment Using Methods from the Office of Environmental Health and Hazard Assessment to Analyze Diesel Particulate Matter Emissions

The City has failed in its obligation to perform a site-specific health risk assessment (HRA) for the project that calculates the excess incremental lifetime risk for all of the nearby receptors , as required by CEQA. The City's emissions estimates for criteria pollutants do not substitute for a health risk

analysis of the cancer risk posed by exposure to toxic air contaminants (TACs), in particular diesel particulate matter (DPM), released during Project construction and operation. Diesel exhaust contains nearly 40 toxic substances, including TACs and may pose a serious public health risk for residents in the vicinity of the facility. TACs are airborne substances that are capable of causing short-term (acute) and/or long-term (chronic or carcinogenic, i.e., cancer causing) adverse human health effects (i.e., injury or illness). TACs include both organic and inorganic chemical substances. The current California list of TACs includes approximately 200 compounds, including particulate emissions from diesel-fueled engines.

Diesel exhaust has been linked to a range of serious health problems including an increase in respiratory disease, lung damage, cancer, and premature death.[7,8,9] Fine DPM is deposited deep in the lungs in the smallest airways and can result in increased respiratory symptoms and disease; decreased lung function, particularly in children and individuals with asthma; alterations in lung tissue and respiratory tract defense mechanisms; and premature death.[10] Exposure to DPM increases the risk of lung cancer. It also causes non-cancer effects including chronic bronchitis, inflammation of lung tissue, thickening of the alveolar walls, immunological allergic reactions, and airway constriction.[11] DPM is a TAC that is recognized by state and federal agencies as causing severe health risk because it contains toxic materials, unlike $PM_{2.5}$ and PM_{10}.[12]

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[7] California Air Resources Board, Initial Statement of Reasons for Rulemaking, Proposed Identification of Diesel Exhaust as a Toxic Air Contaminant, Staff Report, June 1998; *see also California Air Resources Board, Overview:* Diesel Exhaust & Health, https://ww2.arb.ca.gov/resources/overview-diesel-exhaust-and-health#:~:text=Diesel%20Particulate%20Matter%20and%20Health&text=In%201998%2C%20CARB%20identified%20DPM,and%20other%20adverse%20health%20effects.

[8] U.S. EPA, Health Assessment Document for Diesel Engine Exhaust, Report EPA/600/8-90/057F, May 2002.

[9] Environmental Defense *Fund, Cleaner Diesel Handbook, Bring Cleaner Fuel and Diesel Retrofits into Your* Neighborhood, April 2005; http://www.edf.org/documents/4941_cleanerdieselhandbook.pdf, accessed July 5, 2020.

[10] California Air Resources Board, Initial Statement of Reasons for Rulemaking, Proposed Identification of Diesel Exhaust as a Toxic Air Contaminant, Staff Report, June 1998.

[11] Findings of the Scientific Review Panel on The Report on Diesel Exhaust as adopted at the Panel's April 22, 1998 Meeting.

[12] Health & Safety Code § 39655(a) (defining "toxic air contaminant" as air pollutants "which may cause or contribute to an increase in mortality or in serious illness, or which may pose a present or potential hazard to human health. A substance that is listed as a hazardous air pollutant pursuant to subsection (b) of Section 112 of the federal act (42 U.S.C. Sec. 7412 (b)) is a toxic air contaminant.")

The IS/MND fails to include a site-specific analysis of the Project's construction or operational health risk posed by DPM emissions. Given the proximity of sensitive receptors to the site and the nature of the TACs emitted, a health risk assessment, prepared in accordance with OEHHA guidance for the baseline, construction, and future years of the project, is essential.

5. The IS/MND's Greenhouse Gas Emissions Analysis Is Unsupportable and Flawed

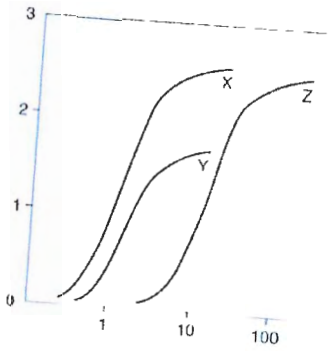
In its analysis of the Project's greenhouse gas (GHG) emissions the City ignores the 1,100 MT CO_2e-per-year threshold contained in BAAQMD's CEQA Air Quality Analysis; the IS/MND indicates, however, that operational emissions from area sources, water, solid waste and energy demand total 10,323 MT CO_2e per year— higher than the 10,000 MT CO_2e per year threshold for new stationary sources. The cumulative estimate of 10,323 MT CO_2e per year makes the project a significant emitter of GHGs based on BAAQMD's guideance. Since the City's Climate Action Plan (CAP) does not have quantitative thresholds for GHG emissions, the BAAQMD's threshold will remain the in effect.The City must revise its analysis and present a correct assessment of total GHG emissions from the project as significant. The results should be presented in an EIR along with mitigation measures to correct the impacts.

Conclusion

The facts identified and referenced in this comment letter lead me to conclude that the Project could result in significant unmitigated impacts if the air quality analysis is not corrected and the conditions of approval are not binding.

Sincerely,

JAMES J. J. CLARK, Ph.D.



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James J. J. Clark, Ph.D.

Principal Toxicologist

Toxicology/Exposure Assessment Modeling

Risk Assessment/Analysis/Dispersion Modeling

Education:

Ph.D., Environmental Health Science, University of California, 1995

M.S., Environmental Health Science, University of California, 1993

B.S., Biophysical and Biochemical Sciences, University of Houston, 1987

Professional Experience:

Dr. Clark is a well-recognized toxicologist, air modeler, and health scientist. He has 30 years of experience in researching the effects of environmental contaminants on human health including environmental fate and transport modeling (SCREEN3, AEROMOD, ISCST3, Johnson-Ettinger Vapor Intrusion Modeling, RESRAD, GENII); exposure assessment modeling (partitioning of contaminants in the environment as well as PBPK modeling); conducting and managing human health risk assessments for regulatory compliance and risk-based clean-up levels; and toxicological and medical literature research.

Significant projects performed by Dr. Clark include the following:

LITIGATION SUPPORT

Case: Pamela Butler Vs. Mallinckrodt, Inc. & Cotter Corporation. Case No.: 4:2018cv01701 United States District Court Eastern District of Missouri Eastern Division

Case: Kenneth Edward Koterba Vs. Mallinckrodt, Inc. & Cotter Corporation. Case No.: 4:2018cv01702 United States District Court Eastern District of Missouri Eastern Division

Case: Anthony Hines Vs. Mallinckrodt, Inc. & Cotter Corporation. Case No.: 4:2018cv01703 United States District Court Eastern District of Missouri Eastern Division

Case: Emery David Walick, III Vs. Mallinckrodt, Inc. & Cotter Corporation. Case No.: 4:2018cv01704 United States District Court Eastern District of Missouri Eastern Division

Client: Humphrey, Farrington & McClain, P.C., Independence, Missouri

Dr. Clark performed a historical dose reconstruction for community members exposed to radioactive waste released into the environment from the St. Louis Air Port Site (SLAPS) and the Hazelwood Interim Storage Site (HISS). The releases resulted in impacts to soils, sediments, surface waters, and groundwater in the vicinity of the SLAPS and HISS sites. The analysis was performed in general accordance with the methods outlined by the Agency for Toxic Substances Control (ATSDR) for assessing radiation doses from historical source areas in North St. Louis County, Missouri.

Case Result: Trial Pending

Case: Don Strong, et al. vs. Republic Services, Inc., Bridgeton Landfill, LLC, vs. Cotter Corporation, N.S.L., Case No.: 17SL-CC01632-01 Circuit Court of St. Louis County, State of Missouri, Division 17

Client: Humphrey, Farrington & McClain, P.C., Independence, Missouri

Dr. Clark performed a historical dose reconstruction for community members from radiologically impacted material (RIM) releases from the adjacent West Lake Landfill. The analysis was performed in general accordance with the methods outlined by the Agency for Toxic Substances Control (ATSDR) for assessing radiation doses from historical source areas in North St. Louis County, Missouri.

Case Result: Settlement in favor of plaintiff.

Case: Arnold Goldstein, Hohn Covas, Gisela Janette La Bella, et al.. vs. Exxon Mobil Corporation, PBF Energy Inc., Torrance Refining Company LLC, et al., Case No.: 2:17-cv-02477DSF United States District Court for the Central District of California

Client: Sher Edlging, LLP, San Francisco, California and Matern Law Group , PC., El Segundo, California

Dr. Clark performed a historical dose reconstruction for community members from an active 700 acre petroleum refinery in Los Angeles. The analysis included a multi-year dispersion model was performed in general accordance with the methods outlined by the U.S. EPA and the SCAQMD for assessing the health impacts in Torrance, California. The results of the analysis are being used as the basis for injunctive relief for the communities surrounding the refinery.

Case Result: Trial Pending

Case: Scott D. McClurg, et al. v. Mallinckrodt Inc. and Cotter Corporation. Lead Case No.: 4:12CV00361 AGF United States District Court Eastern District of Missouri Eastern Division

Client: Environmental Law Group, Birmingham, AL.

Dr. Clark performed a historical dose reconstruction for community members and workers exposed to radioactive waste released into the environment from the St. Louis Air Port Site (SLAPS) and the Hazelwood Interim Storage Site (HISS). The releases resulted in impacts to soils, sediments, surface waters, and groundwater in the vicinity of the SLAPS and HISS sites. The analysis included the incorporation of air dispersion modeling across the community to determine ground-level air concentrations and deposition of thorium and uranium isotopes and their respective daughter products. The dose reconstruction considered all relevant pathways to determine total doses of radiation received across the community from 1946 through 2017.

Case Result: Settlement in favor of plaintiff.

Case: Mary Ann Piccolo V. Headwaters Incorporated, et al. Seventh Judicial Court In and For Carbon County, State of Utah. Case No. 130700053

Client: Law Offices of Roy L. Mason. Annapolis, MD

Dr. Clark performed a dose assessment of an individual occupationally exposed to metals and silica from fly ash who later developed cancer. A review of the individual's medical and occupational history was performed to prepare opinions regarding his exposure and later development of cancer.

Case Result: Settlement in favor of plaintiff.

Case: Tracey Coleman V. Headwaters Incorporated, et al. Seventh Judicial Court In and For Carbon County, State of Utah. Case No. 140902847

Client: Law Offices of Roy L. Mason. Annapolis, MD

Dr. Clark performed a dose assessment of an individual occupationally exposed to metals and silica from fly ash who later developed cancer. A review of the individual's medical and occupational history was performed to prepare opinions regarding his exposure and later development of cancer.

Case Result: Settlement in favor of plaintiff.

Case: David Dominguez and Amanda Dominguez V. Cytec Industries, Inc et al. Superior Court of the State Of California for the County Of Los Angeles – Central Civil West. Civil Action. BC533123

Client: Rose, Klein, Marias, LLP, Long Beach, California

Dr. Clark performed a toxicological assessment of an individual occupationally exposed to hexavalent chromium who later developed cancer. A review of the individual's medical and occupational history was performed to prepare opinions regarding her exposure and later development of cancer.

Case Result: Settlement in favor of plaintiff.

SELECTED AIR MODELING RESEARCH/PROJECTS

Client(s) – Multiple

Indoor Air Evaluations, California: Performed multiple indoor air screening evaluations and risk characterizations consistent with California Environmental Protection Agency's (Cal/EPA) Department of Toxic Substances Control (DTSC) and Regional Water Quality Control Board (RWQCB) methodologies. Characterizations included the use of DTSC's modified Johnson & Ettinger Model and USEPA models, as well as the attenuation factor model currently advocated by Cal/EPA's Office of Environmental Health and Hazard Assessment (OEHHA).

Client – Confidential

Dr. Clark performed a comprehensive evaluation of criteria pollutants, air toxins, and particulate matter emissions from a carbon black production facility to determine the impacts on the surrounding communities. The results of the dispersion model were used to estimate acute and chronic exposure concentrations to multiple contaminants and were be incorporated into a comprehensive risk evaluation.

Client – Confidential

Dr. Clark performed a comprehensive evaluation of air toxins and particulate matter emissions from a railroad tie manufacturing facility to determine the impacts on the surrounding communities. The results of the dispersion model have been used to estimate acute and chronic exposure concentrations to multiple contaminants and have been incorporated into a comprehensive risk evaluation.

EMERGING/PERSISTENT CONTAMINANT RESEARCH/PROJECTS

Client: City of Santa Clarita, Santa Clarita, California

Dr. Clark managed the oversight of the characterization, remediation and development activities of a former 1,000 acre munitions manufacturing facility for the City of Santa Clarita. The site is impacted with a number of contaminants including perchlorate, unexploded ordinance, and volatile organic compounds (VOCs). The site is currently under a number of regulatory consent orders, including an Immanent and Substantial Endangerment Order. Dr. Clark assisted the impacted municipality with the development of remediation strategies, interaction with the responsible parties and stakeholders, as well as interfacing with the regulatory agency responsible for oversight of the site cleanup.

Client – Confidential, Los Angeles, California

Dr. Clark is performing a comprehensive review of the potential for pharmaceuticals and their by-products to impact groundwater and surface water supplies. This evaluation will include a review if available data on the history of pharmaceutical production in the United States; the chemical characteristics of various pharmaceuticals; environmental fate and transport; uptake by xenobiotics; the potential effects of pharmaceuticals on water treatment systems; and the potential threat to public health. The results of the evaluation may be used as a briefing tool for non-public health professionals.

PUBLIC HEALTH/TOXICOLOGY

Client: Brayton Purcell, Novato, California

Dr. Clark performed a toxicological assessment of residents exposed to methyl-tertiary butyl ether (MTBE) from leaking underground storage tanks (LUSTs) adjacent to the subject property. The symptomology of residents and guests of the subject property were evaluated against the known outcomes in published literature to exposure to MTBE. The study found that residents had been exposed to MTBE in their drinking water; that concentrations of MTBE detected at the site were above regulatory guidelines; and, that the symptoms and outcomes expressed by residents and guests were consistent with symptoms and outcomes documented in published literature.

Client: Covanta Energy, Westwood, California

Evaluated health risk from metals in biosolids applied as soil amendment on agricultural lands. The biosolids were created at a forest waste cogeneration facility using 96% whole tree wood chips and 4 percent green waste. Mass loading calculations were used to estimate Cr(VI) concentrations in agricultural soils based on a maximum loading rate of 40 tons of biomass per acre of agricultural soil. The results of the study were used by the Regulatory agency to determine that the application of biosolids did not constitute a health risk to workers applying the biosolids or to residences near the agricultural lands.

Client: Kaiser Venture Incorporated, Fontana, California

Prepared PBPK assessment of lead risk of receptors at a 1,100-acre former steel mill. This evaluation was used as the basis for granting closure of the site by lead regulatory agency.

RISK ASSESSMENTS/REMEDIAL INVESTIGATIONS

Kaiser Ventures Incorporated, Fontana, California

Prepared health risk assessment of semi-volatile organic chemicals and metals for a fifty-year old wastewater treatment facility used at a 1,100-acre former steel mill. This evaluation was used as the basis for granting closure of the site by lead regulatory agency.

ANR Freight - Los Angeles, California

Prepared a comprehensive Preliminary Endangerment Assessment (PEA) of petroleum hydrocarbon and metal contamination of a former freight depot. This evaluation was as the basis for reaching closure of the site with lead regulatory agency.

Kaiser Ventures Incorporated, Fontana, California

Prepared comprehensive health risk assessment of semi-volatile organic chemicals and metals for 23-acre parcel of a 1,100-acre former steel mill. The health risk assessment was used to determine clean up goals and as the basis for granting closure of the site by lead regulatory agency. Air dispersion modeling using ISCST3 was performed to determine downwind exposure point concentrations at sensitive receptors within a 1 kilometer radius of the site. The results of the health risk assessment were presented at a public meeting sponsored by the Department of Toxic Substances Control (DTSC) in the community potentially affected by the site.

Unocal Corporation - Los Angeles, California

Prepared comprehensive assessment of petroleum hydrocarbons and metals for a former petroleum service station located next to sensitive population center (elementary school). The assessment used a probabilistic approach to estimate risks to the community and was used as the basis for granting closure of the site by lead regulatory agency.

Client: Confidential, Los Angeles, California

Managed oversight of remedial investigation most contaminated heavy metal site in California. Lead concentrations in soil excess of 68,000,000 parts per billion (ppb) have been measured at the site. This State Superfund Site was a former hard chrome plating operation that operated for approximately 40-years.

Client: Confidential, San Francisco, California

Coordinator of regional monitoring program to determine background concentrations of metals in air. Acted as liaison with SCAQMD and CARB to perform co-location sampling and comparison of accepted regulatory method with ASTM methodology.

Client: Confidential, San Francisco, California

Analyzed historical air monitoring data for South Coast Air Basin in Southern California and potential health risks related to ambient concentrations of carcinogenic metals and volatile organic compounds. Identified and reviewed the available literature and calculated risks from toxins in South Coast Air Basin.

IT Corporation, North Carolina

Prepared comprehensive evaluation of potential exposure of workers to air-borne VOCs at hazardous waste storage facility under SUPERFUND cleanup decree. Assessment used in developing health based clean-up levels.

Professional Associations

American Public Health Association (APHA)
Association for Environmental Health and Sciences (AEHS)
American Chemical Society (ACS)
International Society of Environmental Forensics (ISEF)
Society of Environmental Toxicology and Chemistry (SETAC)

Publications and Presentations:

Books and Book Chapters

Sullivan, P., **J.J. J. Clark,** F.J. Agardy, and P.E. Rosenfeld. (2007). *Synthetic Toxins In The Food, Water and Air of American Cities.* Elsevier, Inc. Burlington, MA.

Sullivan, P. and **J.J. J. Clark**. 2006. *Choosing Safer Foods, A Guide To Minimizing Synthetic Chemicals In Your Diet.* Elsevier, Inc. Burlington, MA.

Sullivan, P., Agardy, F.J., and **J.J.J. Clark**. 2005. *The Environmental Science of Drinking Water.* Elsevier, Inc. Burlington, MA.

Sullivan, P.J., Agardy, F.J., **Clark, J.J.J.** 2002. *America's Threatened Drinking Water: Hazards and Solutions.* Trafford Publishing, Victoria B.C.

Clark, J.J.J. 2001. "TBA: Chemical Properties, Production & Use, Fate and Transport, Toxicology, Detection in Groundwater, and Regulatory Standards" in *Oxygenates in the Environment.* Art Diaz, Ed.. Oxford University Press: New York.

Clark, J.J.J. 2000. "Toxicology of Perchlorate" in *Perchlorate in the Environment.* Edward Urbansky, Ed. Kluwer/Plenum: New York.

Clark, J.J.J. 1995. Probabilistic Forecasting of Volatile Organic Compound Concentrations At The Soil Surface From Contaminated Groundwater. UMI.

Baker, J.; **Clark, J.J.J.**; Stanford, J.T. 1994. Ex Situ Remediation of Diesel Contaminated Railroad Sand by Soil Washing. Principles and Practices for Diesel Contaminated Soils, Volume III. P.T. Kostecki, E.J. Calabrese, and C.P.L. Barkan, eds. Amherst Scientific Publishers, Amherst, MA. pp 89-96.

Journal and Proceeding Articles

Tam L. K.., Wu C. D., Clark J. J. and **Rosenfeld, P.E.** (2008) A Statistical Analysis Of Attic Dust And Blood Lipid Concentrations Of Tetrachloro-p-Dibenzodioxin (TCDD) Toxicity Equialency Quotients (TEQ) In Two Populations Near Wood Treatment Facilities. Organohalogen Compounds, Volume 70 (2008) page 002254.

Tam L. K.., Wu C. D., Clark J. J. and **Rosenfeld, P.E.** (2008) Methods For Collect Samples For Assessing Dioxins And Other Environmental Contaminants In Attic Dust: A Review. Organohalogen Compounds, Volume 70 (2008) page 000527

Hensley A.R., Scott, A., Rosenfeld P.E., **Clark, J.J.J.** (2007). "Attic Dust And Human Blood Samples Collected Near A Former Wood Treatment Facility." *Environmental Research.* 105:194-199.

Rosenfeld, P.E., **Clark, J. J.,** Hensley, A.R., and Suffet, I.H. 2007. "The Use Of An Odor Wheel Classification For The Evaluation of Human Health Risk Criteria For Compost Facilities" Water Science & Technology. 55(5): 345-357.

Hensley A.R., Scott, A., Rosenfeld P.E., **Clark, J.J.J.** 2006. "Dioxin Containing Attic Dust And Human Blood Samples Collected Near A Former Wood Treatment Facility." The 26th International Symposium on Halogenated Persistent Organic Pollutants – DIOXIN2006, August 21 – 25, 2006. Radisson SAS Scandinavia Hotel in Oslo Norway.

Rosenfeld, P.E., **Clark, J. J.** and Suffet, I.H. 2005. "The Value Of An Odor Quality Classification Scheme For Compost Facility Evaluations" The U.S. Composting Council's 13th Annual Conference January 23 - 26, 2005, Crowne Plaza Riverwalk, San Antonio, TX.

Rosenfeld, P.E., **Clark, J. J.** and Suffet, I.H. 2004. "The Value Of An Odor Quality Classification Scheme For Urban Odor" WEFTEC 2004. 77th Annual Technical Exhibition & Conference October 2 - 6, 2004, Ernest N. Morial Convention Center, New Orleans, Louisiana.

Clark, J.J.J. 2003. "Manufacturing, Use, Regulation, and Occurrence of a Known Endocrine Disrupting Chemical (EDC), 2,4-Dichlorophnoxyacetic Acid (2,4-D) in California Drinking Water Supplies." National Groundwater Association Southwest Focus Conference: Water Supply and Emerging Contaminants. Minneapolis, MN. March 20, 2003.

Rosenfeld, P. and **J.J.J. Clark**. 2003. "Understanding Historical Use, Chemical Properties, Toxicity, and Regulatory Guidance" National Groundwater Association Southwest Focus Conference: Water Supply and Emerging Contaminants. Phoenix, AZ. February 21, 2003.

Clark, J.J.J., Brown A. 1999. Perchlorate Contamination: Fate in the Environment and Treatment Options. In Situ and On-Site Bioremediation, Fifth International Symposium. San Diego, CA, April, 1999.

Clark, J.J.J. 1998. Health Effects of Perchlorate and the New Reference Dose (RfD). Proceedings From the Groundwater Resource Association Seventh Annual Meeting, Walnut Creek, CA, October 23, 1998.

Browne, T., **Clark, J.J.J.** 1998. Treatment Options For Perchlorate In Drinking Water. Proceedings From the Groundwater Resource Association Seventh Annual Meeting, Walnut Creek, CA, October 23, 1998.

Clark, J.J.J., Brown, A., Rodriguez, R. 1998. The Public Health Implications of MtBE and Perchlorate in Water: Risk Management Decisions for Water Purveyors. Proceedings of the National Ground Water Association, Anaheim, CA, June 3-4, 1998.

Clark J.J.J., Brown, A., Ulrey, A. 1997. Impacts of Perchlorate On Drinking Water In The Western United States. U.S. EPA Symposium on Biological and Chemical Reduction of Chlorate and Perchlorate, Cincinnati, OH, December 5, 1997.

Clark, J.J.J.; Corbett, G.E.; Kerger, B.D.; Finley, B.L.; Paustenbach, D.J. 1996. Dermal Uptake of Hexavalent Chromium In Human Volunteers: Measures of Systemic Uptake From Immersion in Water At 22 PPM. Toxicologist. 30(I):14.

Dodge, D.G.; **Clark, J.J.J.**; Kerger, B.D.; Richter, R.O.; Finley, B.L.; Paustenbach, D.J. 1996. Assessment of Airborne Hexavalent Chromium In The Home Following Use of Contaminated Tapwater. Toxicologist. 30(1):117-118.

Paulo, M.T.; Gong, H., Jr.; **Clark, J.J.J.** (1992). Effects of Pretreatment with Ipratroprium Bromide in COPD Patients Exposed to Ozone. American Review of Respiratory Disease. 145(4):A96.

Harber, P.H.; Gong, H., Jr.; Lachenbruch, A.; **Clark, J.**; Hsu, P. (1992). Respiratory Pattern Effect of Acute Sulfur Dioxide Exposure in Asthmatics. American Review of Respiratory Disease. 145(4):A88.

McManus, M.S.; Gong, H., Jr.; Clements, P.; **Clark, J.J.J.** (1991). Respiratory Response of Patients With Interstitial Lung Disease To Inhaled Ozone. American Review of Respiratory Disease. 143(4):A91.

Gong, H., Jr.; Simmons, M.S.; McManus, M.S.; Tashkin, D.P.; Clark, V.A.; Detels, R.; **Clark, J.J.** (1990). Relationship Between Responses to Chronic Oxidant and Acute

Ozone Exposures in Residents of Los Angeles County. American Review of Respiratory Disease. 141(4):A70.

Tierney, D.F. and **J.J.J. Clark.** (1990). Lung Polyamine Content Can Be Increased By Spermidine Infusions Into Hyperoxic Rats. American Review of Respiratory Disease. 139(4):A41.

EXHIBIT C

Planning and Inspection Department
Planning Division
1500 Warburton Avenue
Santa Clara, CA 95050
Ph· (408) 615-2450

Appeal Form

Instructions

Use this form to appeal a decision of the Architectural Review Committee or Planning Commission. **All appeals must be filed in the Planning Division within seven calendar days of the action being appealed.**

Appeals from the Architectural Review Committee are made to the Planning Commission and will be set for hearing on the next available Planning Commission agenda. Appeals from the Planning Commission are made to the City Council and will be placed on the subsequent City Council Agenda to set a hearing date. Please contact the Planning Division at the number listed above with any inquiries about the process.

Please print, complete, and sign this form before mailing or delivering to the City, along with the fee payment, and supporting documentation, letters, etc. (if any).

Appeal Fees

Appeal Fees are set by the Municipal Code of the City of Santa Clara and are subject to annual review. Please call the Planning Division for the current Appeal Fee. **Fee payment must be received by the City of Santa Clara before this form submittal can be certified as complete.**

Appeal fees may be paid by cash, check, or with VISA, MasterCard, or American Express, at the Permit Center at City Hall. Alternatively, checks or money orders made payable to City of Santa Clara can be mailed or delivered to Planning Division, City Hall, 1500 Warburton Avenue, Santa Clara, California 95050.

Appellant Declaration

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Phone number:	(650) 589-1660
E-mail address:	khartmann@adamsbroadwell.com

In accordance with the provisions of the Municipal Code of the City of Santa Clara, I hereby appeal the following action of the:

☑ Architectural Review Committee ☐ Planning Commission

at it's meeting of November 4, 2020
(date)

Agenda Item No.: 20-1088

File No.(s): PLN2019-13941 / CE2020-01079

Address:/APN(s): 224-08-092

Appellant Statement
(If more space is required, attach a separate sheet of paper.)

Action being appealed:

Please see attached letter.

Reason for Appeal:

Please see attached.

Certification of Authenticity

Beware, you are subject to prosecution if you unlawfully submit this form. Under penalty of law, transmission of this form to the City of Santa Clara is your certification that you are authorized to submit it and that the information presented is authentic.

Signature of Appellant

11/11/2020
Date

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November 12, 2020

By Hand-Delivery

Mayor Gillmor and City Council Members
Santa Clara City Council
City Hall
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050

Re: Appeal of the Mitigated Negative Declaration for 1111 Comstock Data Center Project (PLN2019-13941; CEQ2020-01079)

Dear City Council:

We are writing on behalf of Santa Clara Citizens for Sensible Industry ("Santa Clara Citizens") to appeal the November 4, 2020 decision of the City of Santa Clara Development Review Officer ("City") at a Development Review Hearing to adopt the Mitigated Negative Declaration and Mitigation Monitoring and Reporting Program (collectively with the Initial Study, "IS/MND") for the 1111 Comstock Data Center Project ("Project") and approve the Architectural Review for the Project and Minor Modification to increase the building height to 87 feet and reduce the parking space requirements for the Project (collectively, "Permits").

The Project, proposed by Prime Data Centers ("Applicant"), proposes to demolish an existing 23,765-square-foot industrial building and construct a four-story, 121,170-square-foot data center building on the 1.38-acre Project site (APN 224-08-092). The data center building would house computer servers designed to provide 10 megawatts ("MW") of information technology power; backup generators; underground fuel storage containers; and mechanical cooling equipment on the building's roof. The site, zoned as Light Industrial with a General Plan designation of Low Intensity Office/R&D, is located north of Comstock Street, east of Kenneth

Street, south of Bayshore Freeway, and west of Lafayette Street within the City of Santa Clara.

On October 13, 2020, we submitted comments on the IS/MND prepared for the Project ("Comment Letter"). Our comments were prepared with the assistance of technical expert James J.J. Clark, Ph.D. of Clark & Associates Environmental Consulting, Inc. As detailed therein, we identified potentially significant and unmitigated impacts due to emissions from the Project's backup diesel generators, as well as significant impacts to air quality, public health, and greenhouse gas ("GHG") emissions from the Project. Our Comment Letter also showed that the IS/MND fails as a matter of law to address energy impacts as required under CEQA. Based on these potentially significant and unmitigated impacts, as well as other deficiencies in the Initial Study, our comments concluded that the MND in its current form and substance violates CEQA and that substantial evidence supports a fair argument that an environmental impact report ("EIR") is required for the Project.

At the November 4, 2020 public hearing, the MND was adopted and the Permits were approved. We request that the City Council uphold this appeal and reverse the decision of the Director to adopt the IS/MND and approve the Permits.

I. STATEMENT OF INTEREST

Santa Clara Citizens is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential health, safety, public service, and environmental impacts of the Project. The association includes individuals and organizations, including California Unions for Reliable Energy ("CURE") and its local affiliates, and the affiliates' members and their families, who live, work, recreate and raise their families in the City of Santa Clara and Santa Clara County.

Since its founding in 1997, CURE has been committed to building a strong economy and a healthier environment. Its members help solve the State's energy problems by building, maintaining, and operating conventional and renewable energy power plants and transmission facilities. CURE members have an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Individual members live, work, recreate, and raise their families in Santa Clara. They would be directly affected by the Project's environmental and health and safety impacts. Its members

may also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants or other health and safety hazards that exist onsite.

Santa Clara Citizens supports the development of data centers where properly analyzed and carefully planned to minimize impacts on the environment. Any proposed project should avoid impacts to public health, energy resources, sensitive species and habitats, and should take all feasible steps to ensure significant impacts are mitigated to the maximum extent feasible. Only by maintaining the highest standards can development truly be sustainable.

Santa Clara Citizens and its members are concerned with projects that can result in serious environmental harm without providing countervailing economic benefits such as decent wages and benefits. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for industry to expand in the City and the surrounding region, and by making it less desirable for businesses to locate and people to live and recreate in the City, including in the vicinity of the Project. Continued degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduces future employment opportunities. Santa Clara Citizens' members therefore have a direct interest in enforcing environmental laws that minimize the adverse impacts of projects that would otherwise degrade the environment. CEQA provides a balancing process whereby economic benefits are weighted against significant impacts to the environment. It is for these purposes that we submit this appeal.

II. BASIS FOR THE APPEAL

CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. The "fair argument" standard reflects this presumption. The fair argument standard is an exceptionally low threshold favoring environmental review in an EIR rather than a negative declaration.[1] This standard requires preparation of an EIR if any substantial evidence in the record indicates that a project may have an adverse environmental effect.[2] As a matter of law, substantial evidence includes both expert and lay opinion based on fact.[3]

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[1] *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.
[2] 14 C.C.R. § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931.
[3] PRC § 21080(e)(1) (For purposes of CEQA, "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."); 14 C.C.R. § 15064(f)(5).

As we have shown in our Comment Letter, there is substantial evidence that the project may cause significant environmental effects requiring the City to prepare an EIR. The City's Response to Comments ("Response") failed to rebut this presumption, and instead attempted to dismiss our comments by stating that the City provides substantial evidence to support its conclusions. However, even if other substantial evidence supports a different conclusion, the City nevertheless must prepare an EIR under CEQA.[4]

A negative declaration is improper, and an EIR must be prepared, whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.[5] "[S]ignificant effect on the environment" is defined as "a substantial, or potentially substantial, adverse change in the environment."[6] An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial."[7] Substantial evidence, for purposes of the fair argument standard, includes "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."[8]

Whether a fair argument exists is a question of law that the court reviews de novo, with a preference for resolving doubts in favor of environmental review.[9] In reviewing a decision to prepare a negative declaration rather than an EIR, courts "do not defer to the agency's determination."[10]

The fair argument standard creates a "low threshold" for requiring preparation of an EIR and affords no deference to the agency's determination.[11] Where substantial evidence supporting a fair argument of significant impacts is presented, the lead agency must prepare an EIR "even though it may also be

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[4] *Arviv Enterprises v. South Valley Area Planning Comm.* (2002) 101 Cal.App.4th 1333, 1346; *Stanislaus Audubon v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597.
[5] Pub. Resources Code § 21151; 14 CCR § 15064(f); *Citizens for Responsible Equitable Envt'l Dev. v. City of Chula Vista* ("*CREED*") (2011) 197 Cal.App.4th 327, 330–331; *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319 ("*CBE v. SCAQMD*").
[6] Pub. Resources Code § 21068; 14 CCR § 15382; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1581.
[7] *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83 fn. 16.
[8] Pub. Resources Code § 21080(e)(1) (emphasis added); *CREED*, 197 Cal.App.4th at 331.
[9] *CREED*, 197 Cal.App.4th at 331; *Pocket Protectors*, 124 Cal.App.4th at 927.
[10] *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 332; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318.
[11] *Pocket Protectors*, 124 Cal.App.4th at 928.
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presented with other substantial evidence that the project will not have a significant effect."[12] A reviewing court must require an EIR if the record contains any "substantial evidence" suggesting that a project "may have an adverse environmental effect"—even if contrary evidence exists to support the agency's decision.[13]

Where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the effects to be significant and prepare an EIR.[14] In short, when "expert opinions clash, an EIR should be done."[15] "It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project."[16] In the context of reviewing a mitigated negative declaration, "neither the lead agency nor a court may 'weigh' conflicting substantial evidence to determine whether an EIR must be prepared in the first instance."[17] Where such substantial evidence is presented, "evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact."[18]

The fair argument test requires the preparation of an EIR whenever "there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial."[19] Such substantial evidence is present here. The City Council should uphold this appeal and reverse the decision to approve Permits and adopt the IS/MND, and require the City to take a closer look at the Project's potentially significant environmental impacts in an EIR.

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[12] Pub. Resources Code § 21151(a); 14 CCR § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 927; *County Sanitation Dist. No. 2*, 127 Cal.App.4th at 1579 ("where the question is the sufficiency of the evidence to support a fair argument, deference to the agency's determination is not appropriate.") (quoting *Sierra Club*).

[13] *Mejia*, 130 Cal.App.4th at 332–333.

[14] *Pocket Protectors*, 124 Cal.App.4th at 935; *Sierra Club*, 6 Cal.App.4th at 1317–1318; CEQA Guidelines § 15064(f)(5).

[15] *Pocket Protectors*, 124 Cal.App.4th at 928; *Sierra Club*, 6 Cal.App.4th at 1317–1318.

[16] *Pocket Protectors*, 124 Cal.App.4th at 935.

[17] *Id.* at 935.

[18] *Sundstrom*, 202 Cal.App.3d at 310 (citation omitted).

[19] 14 C.C.R. § 15063(b)(1) (emphasis added).

a. The City Failed to Provide the Documents Referenced in the MND to the Public for the Entire Comment Period, as Required by CEQA

The City violated CEQA and improperly truncated the public comment period when it failed to make all documents referenced or relied on in the IS/MND available for public review during the entire public comment period.[20] As a result, Santa Clara Citizens and other members of the public were unable to complete a meaningful review and analysis of the IS/MND and its supporting evidence.

In its response to our Comment Letter, the City asserted that the CEQA Guidelines no longer require an agency to provide documents referenced in a negative declaration or mitigated negative declaration, but that the CEQA Guidelines only require that documents "incorporated by reference" be made available.[21] This is an incomplete and inaccurate reading of the law. Though Section 15072 of the CEQA Guidelines was indeed amended to include documents "incorporated by reference" in its description of the required contents of a notice of intent to adopt a negative declaration, Section 21092 of the Act continues to require that notice of preparation of a CEQA document include "the address where copies of the draft environmental impact report or negative declaration, and *all documents referenced* in the draft environmental impact report or negative declaration, are available for review."[22]

The courts have held that the failure to provide even a few pages of a CEQA document for a portion of the review and comment period invalidates the entire CEQA process, and that such a failure must be remedied by permitting additional public comment.[23] It is also well settled that a CEQA document may not rely on hidden studies or documents that are not provided to the public.[24]

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[20] *See* Pub. Resources Code § 21092(b)(1); 14 C.C.R. § 15072(g)(4).
[21] Response A.2, pg. 6; 14 C.C.R. § 15072(g)(4).
[22] Pub. Resources Code § 21092(b)(1).
[23] *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.
[24] *Santiago Cty. Water Dist. v. Cty. of Orange* (1981) 118 Cal.App.3d 818, 831 ("Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.").

b. The IS/MND Fails to Adequately Disclose, Analyze, and Mitigate the Project's Potentially Significant Public Health Impacts

The IS/MND concludes that the Project would not expose sensitive receptors to substantial pollutant concentrations.[25] As indicated in our Comment Letter, the IS/MND's Air Quality Assessment erroneously states that the "closest sensitive receptors to the proposed project site are existing residences about 3,315 feet north of the project site,"[26] while the Granada Islamic School is much closer—1,700 feet—to the Project site. The City responded that "[t]he IS states on pages 30 and 36 that the Granada Islamic School is the closest sensitive receptor to the project site, and so this comment is incorrect."[27] The comment's factual basis is clearly not incorrect (as evidenced by the statements on Page 10 of the Air Quality Assessment), but more importantly, the City appears to have missed the purpose of the comment: to point out that the Assessment does not include calculations of health impacts at the closest sensitive receptor.

Potential health impacts from operation of the Project's generators were evaluated using air quality dispersion modeling and applying BAAQMD recommended health impact calculation methods.[28] Though the IS/MND states that "[t]he maximum increased cancer risk at the closest sensitive receptor, Granada Islamic School, would be 0.02 in one million, and the maximum increased cancer risk at the closest residence would be 0.1 in one million," it is unclear where those numbers came from. Nothing in the Assessment indicates whether the evaluations of health impacts were actually performed at the Granada Islamic School or at the residences further away. The Assessment's initial erroneous assumption that the closest sensitive receptors were the residences more than 3,000 feet from the Project site does not appear to have been corrected during calculations of health risks, as Figure 2 in the Assessment does not include the Granada Islamic School in its display of sensitive receptors. As explained by Dr. Clark, such an oversight would significantly alter the assumptions and conclusions of the IS/MND. The City must re-analyze the Project's potentially significant impacts in an EIR.

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[25] IS/MND, p. 36.
[26] IS/MND Appendix A, p. 5.
[27] Response A.5, p. 10.
[28] IS/MND Appendix A, p. 15.

As required by CEQA, the City must prepare a site-specific baseline health risk assessment ("HRA") that calculates the excess incremental lifetime risk for all of the nearby receptors. Though the City responded that the IS/MND included an HRA, the assessment,[29] as pointed out in our Comment Letter, does not include calculations for all of the nearby receptors. As Dr. Clark points out in his comments, "[t]he City's emissions estimates for criteria pollutants do not substitute for a health risk analysis of the cancer risk posed by exposure to toxic air contaminants (TACs), in particular diesel particulate matter (DPM), released during Project construction and operation."[30]

c. Compliance with Plans and Policies Does Not Establish that the Project's GHG Emissions Would Be Less Than Significant

As stated in our Comment Letter, the IS/MND relies on obtaining the status of less-than-significant for the Project's emissions from a plan that is set to expire before the Project is implemented. The City's Climate Action Plan, adopted in 2013, contains projected emissions and measures designed to help the City meet statewide 2020 goals established by AB 32.[31] As acknowledged in the IS/MND, "consistency with the CAP cannot be used to determine significance under CEQA."[32] The City responded that because the Project would receive electricity from a utility on track to meet the SB 32 2030 GHG emission reduction target and would be consistent with applicable plans and policies adopted to reduce GHG emissions, "the project would not generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment."[33]

This argument, however, ignores the clear mandate of CEQA and case law that an agency may only rely on a qualified GHG reduction plan that follows specific rules and guidelines set forth in Section 15183.5 of the CEQA Guidelines.[34] A CAP that is no longer valid to be used as a qualified GHG reduction plan clearly does not satisfy this requirement.

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[29] Response A.7, p. 11.
[30] Dr. Clark Comments, pp. 9–10.
[31] *Id.* at 67.
[32] *Id.*
[33] Response A.10, p. 14.
[34] 14 C.C.R. § 15183.5; *see Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204.

The IS/MND argues that because electricity—by far the biggest source of the Project's emissions—is provided by Silicon Valley Power, "a utility on track to meet the 2030 GHG emissions reductions target established by SB 32," the Project would generate lower emissions than the statewide average for an equivalent facility.[35] The IS/MND fails, however, to establish that the Project's consistency with these plans and programs will ensure that the Project's contribution to global climate change is not significant. Case law demonstrates that limiting discussion to a project's consistency with statewide goals is not sufficient by itself, and that substantial discussion of the applicability of the statewide goals to the specific project is required.[36]

Furthermore, substantial evidence supports a fair argument that the Project's GHG emissions are significant notwithstanding their consistency with local, regional, and state plans. As stated above, the Project's total operational emissions amount of 10,323 $MTCO_2e$ annually is significantly higher than the 1,100 $MTCO_2e$/year threshold established by BAAQMD. Though the City's Response points out that BAAQMD's CEQA guidelines no longer require the use of this threshold,[37] the huge disparity between the Project's operational emissions and a threshold that until very recently was required to avoid significant impacts cannot be ignored. The IS/MND fails to describe how these operational emissions might be abated through the Project's compliance with GHG reduction strategies.

III. THE DIRECTOR LACKS SUBSTANTIAL EVIDENCE TO MAKE THE FINDINGS REQUIRED TO GRANT ARCHITECTURAL APPROVAL UNDER THE SANTA CLARA CITY CODE

Santa Clara City Code Section 18.76.010 provides that one of the purposes of the architectural review process is to "[m]aintain the public health, safety and welfare." Furthermore, Section 18.76.020, subsection (d)(4) provides that to approve a project, the Director must find that the Project cannot "[m]aterially affect adversely the health, comfort or general welfare of persons residing or working in the neighborhood of said development."[38]

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[35] *Id.*
[36] *See, e.g., Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204.
[37] Response A.8, p. 12.
[38] S.C.C.C. § 18.76.020(d).

a. The Project's Failure to Demonstrate Less-Than-Significant Public Health Risks and GHG Emissions May Result in Adverse Impacts to Persons Residing or Working in the Area

The IS/MND's inconsistent calculations and statements with regard to health risks to nearby sensitive receptors make it impossible for the Director to unequivocally maintain the public health, safety, and welfare or guarantee that the Project will be consistent with Santa Clara City Code Section 18.76.020, subsection (d)(4).

Meanwhile, the Project's operational GHG emissions, which exceed BAAQMD's latest numeric threshold of significance for land use projects, will adversely affect those in the immediate vicinity of the Project, as well as all Californians in the form of increased drought, wildfires, and rising sea levels.

The Project is in close proximity to residences and schools and is surrounded by office buildings and other industry. The City's analysis in the IS/MND and Response to our Comment Letter do not support a finding that the Project approval will not materially affect adversely the welfare of persons residing or working in the neighborhood of the Project.

IV. RELIEF REQUESTED

Santa Clara Citizens requests that the City Council grant this appeal and rescind the November 4, 2020 decisions to 1) adopt the IS/MND and 2) approve the Permits. We further request that the City conduct further analysis on the Project's potentially significant environmental impacts in an EIR and correct the City's deficiencies in the CEQA process that prejudiced Santa Clara Citizens, as described above. By doing so, the City and public can ensure that all adverse environmental and public health impacts of the Project are adequately analyzed, disclosed, and mitigated as is required by law.

a. Procedural Requirements for Appeals

Santa Clara Citizens has satisfied the procedural requirements for an appeal of a decision of the Development Review Officer as set forth in the Santa Clara City Code. City Code sections 18.76.020(i) and (j) state:

(i) In the event the applicant or any interested party are not satisfied with the decision of the Director or designee for a single-family residential project, they may, within seven days after such decision, appeal in writing to the Planning Commission.

(j) For a project other than a single-family residential project, in the event the applicant or any interested party are not satisfied with the decision of the Director, they may, within seven days after such decision, appeal in writing to the City Council, in accordance with the procedures set forth in SCCC 18.108.060(b). In the event the applicant or any interested party are not satisfied with the decision of the Planning Commission for a single-family residential project, they may, within seven days after such decision, appeal in writing to the City Council, in accordance with the procedures set forth in SCCC 18.108.060(b). Said appeal shall be taken by the filing of a notice in writing to that effect with the City Clerk. All appeals of architectural review approvals will be heard de novo. The Director of Community Development may refer any application for architectural consideration to the City Council for its decision with the same effect as if an appeal had been taken.

Here, the Director made the decision on the adoption of the IS/MND and approval of the Permits on November 4, 2020. This letter and the attached appeal form constitute notice in writing of the appeal.

We have also enclosed a check for the appeal fee for non-applicants.

Thank you for your consideration of this appeal to the City Council.

Sincerely,

Kendra Hartmann
Tanya Gulesserian

KDH:acp

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