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Submitted by email to: espinosak@cityofmerced.org

Ms. Kim Espinosa, Planning Manager
City of Merced Planning Department
678 West 18th Street
Merced, CA 95340

Re: Proposed Wal-Mart Regional Distribution Center, Final Environmental Impact Report, State Clearinghouse Number 2006071029

Dear Ms. Espinosa:

This office represents the Merced Alliance for Responsible Growth ("Alliance") with respect to the City of Merced's consideration of the proposed Wal-Mart Regional Distribution Center and the Final Environmental Impact Report ("FEIR") prepared for the project. As described in more detail below, Alliance objects to approval of the Distribution Center on grounds the FEIR does not comply with the requirements of the California Environmental Quality Act ("CEQA").

1. AIR QUALITY IMPACTS

a. Ozone Precursors: Reactive Organic Gases ("ROG") and Nitrogen Oxides ("NOX")

Alliance previously commented that the EIR's reliance on the San Joaquin Valley Air Pollution Control District's ("Air District") thresholds of significance for determining the significance of both project-level and cumulative ozone pollution impacts was illegal. The FEIR's response to comments summarily dismisses Alliance's comment. (FEIR Master Response 13, pp 3-18 to 3-19.) Therefore, Alliance hereby expands upon its previous comments on this point, and for this purpose incorporates by reference the letter dated September 14, 2009 from Greg Gilbert attached hereto as Exhibit 1 (hereinafter, "Gilbert letter").

The San Joaquin Valley Air Basin (SJVAB) is classified as an "extreme non-attainment" area for ozone, for which ROG and NOX pollutants are precursors. The EIR finds that as long as mitigation measures identified in the EIR keep increases in emissions of these pollutants below 10 tons per year (TPY), the "project-level" (i.e. "individual" or "incremental") impacts are not "significant." (DEIR p. 4.2-34.)

With respect to cumulative impacts, the DEIR offers up the following confused statement

that such impacts are not significant:

> Project implementation would result in significant air quality impacts from short-term, construction-related, and long-term operation-related (regional) emissions of reactive organic gases (ROG), oxides of nitrogen (NOX), respirable particulate matter (PM10), and fine particulate matter (PM2.5). However, implementation of Mitigation Measures 4.2-1a, 4.2-1b, 4.2-1c, 4.2-1d, 4.2-1e, 4.2-2a, 4.2-2b, 4.2-2c, and 4.2-2d would reduce these project level impacts to less than significant. Ozone impacts are the result of the cumulative emissions from numerous sources in the region and transport from outside the region. Ozone is formed in chemical reactions involving ROG, NOX, and sunlight. All but the largest individual sources emit ROG and NOx in amounts too small to have a measurable effect on ambient ozone concentrations by themselves. However, when all sources throughout the region are combined, they result in severe ozone problems. For the evaluation of cumulative ozone impacts SJVAPCD recommends that lead agencies use the project-level significance standards to determine whether a project's construction or operational emissions of ROG and NOX would not have a cumulatively considerable contribution to a significant cumulative impact (SJVAPCD 2002). The project-level impact of ROG and NOX emissions associated with construction and operation of the project would not be cumulatively considerable with mitigation.

(DEIR, p. 6-4.)

b. Project-level ROG and NOX Impacts: the DEIR's Conclusion of Less-Than-Significant Impacts Is Erroneous as a Matter of Law.

With respect to project-level ROG and NOX impacts, the DEIR uses as its threshold of significance ("TOS") a standard established by the Air District of 10 TPY in emissions for each pollutant. The Air District established this standard at pages 25-26 of its publication entitled "Guide for Assessing and Mitigating Air Quality Impacts" adopted in 1998 and revised in 2002 (hereinafter, "SJVAPCD Guide"). A true and correct copy of the SJVAPCD Guide is attached hereto as Exhibit 2.

The DEIR's use of this TOS is erroneous as a matter of law for several reasons.[1] First, the DEIR uses the Air District's TOS uncritically, without any factual analysis of its own, in violation

[1] *Endangered Habitats League v County of Orange* (2005) 131 Cal.App.4th 777, 793 ("The use of an erroneous legal standard [for the threshold of significance in an EIR] is a failure to proceed in the manner required by law that requires reversal.").

of CEQA.[2] Second, this uncritical application of the Air District's TOS represents a failure of the City of Merced to exercise its independent judgement in preparing the EIR.[3] Just as disagreement from another agency does not deprive a lead agency of discretion under CEQA to judge whether substantial evidence supports its conclusions,[4] agreement from another agency does not relieve a lead agency of separately discharging its obligations under CEQA.

Third, the SJVAPCD Guide does not provide any factual explanation as to why the 10 TPY standard represents an appropriate TOS for judging the significance of project-level ozone pollution impacts. As a result, the DEIR also fails to include any such explanation.[5] The only explanation offered by the Air District that actually explains its reasoning is that:

> "Although it may be argued that any increase in pollutant emissions in an area with a severe [now extreme] pollution problem may be significant, a reasonable threshold is still needed to avoid unnecessarily burdening every project with a requirement to prepare an EIR, which is clearly not intended by CEQA nor desired by the SJVAPCD."

(SJVAPCD Guide, Exhibit 2, pp. 22-23.) But this reasoning is deeply flawed. CEQA requires an EIR for every project that may have a significant impact; it does not authorize setting a TOS to ensure that some projects do not have an EIR or determination of significance.

Fourth, it is well-settled that compliance with other regulatory standards cannot be used under CEQA as a basis for finding that a project's effects are insignificant, nor can it substitute for a fact-

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[2] *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 ("Thus, in preparing the EIR, the agency must determine whether any of the possible significant environmental impacts of the project will, in fact, be significant. In this determination, thresholds of significance can once again play a role. As noted above, however, the fact that a particular environmental effect meets a particular threshold cannot be used as an automatic determinant that the effect is or is not significant. To paraphrase our decision in *Communities for a Better Environment*, a threshold of significance cannot be applied in a way that would foreclose the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant.").

[3] *Friends of La Vina v. County of L.A.*, (1991) 232 Cal.App.3d 1446.

[4] *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.

[5] *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831 ("The EIR must contain facts and analysis, not just the bare conclusions of a public agency. An agency's opinion concerning matters within its expertise is of obvious value, but the public and decision-makers, for whom the EIR is prepared, should also have before them the basis for that opinion so as to enable them to make an independent, reasoned judgment.").

based analysis of those effects.[6]

Fifth, the DEIR's reliance on Appendix G of the CEQA Guidelines for permission to use the Air District's TOS (see DEIR p. 4.2-27) is misplaced because the CEQA Guidelines cannot authorize a violation of CEQA itself.[7]

Sixth, the Air District's use of a 10 TPY standard reflects the regulatory framework of the Clean Air Act, which is different in fundamental respects than CEQA's regulatory framework. (See section 1.c below).

Seventh, the 10 TPY standard is wholly arbitrary because different regulatory standards apply to similar projects in other Clean Air Act regulatory programs. For example, stationary sources regulated under the Air District's New Source Rule must apply Best Available Control Technology if emissions will exceed 10 pounds per day (about 2 TPY); then if emissions still exceed 10 TPY, the new source must purchase offsets at a ratio of 1.5 to 1, thereby effectively reducing emissions increases to less than zero! (See Gilbert letter, Exhibit 1, pp. 10-11.)

c. The Methods and Consequences of Regulation Under the Clean Air Act and CEQA Are Different.

Borrowing the Air District's 10 TPY criterion is inappropriate because this criterion was

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[6] See, e.g., *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16 (lead agencies must review the site-specific impacts of pesticide applications under their jurisdiction, because "DPR's [Department of Pesticide Regulation] registration does not and cannot account for specific uses of pesticides..., such as the specific chemicals used, their amounts and frequency of use, specific sensitive areas targeted for application, and the like"); *Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture (*1986) 187 Cal.App.3d 1575, 1587-1588 (state agency applying pesticides cannot rely on pesticide registration status to avoid further environmental review under CEQA); *Oro Fino Gold Mining Corporation v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881-882 (rejects contention that project noise level would be insignificant simply by being consistent with general plan standards for the zone in question). *See also City of Antioch v. City Council of the City of Pittsburg* (1986) 187 Cal.App.3d 1325, 1331-1332 (EIR required for construction of road and sewer lines even though these were shown on city general plan); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712-718 (agency erred by "wrongly assum[ing] that, simply because the smokestack emissions would comply with applicable regulations from other agencies regulating air quality, the overall project would not cause significant effects to air quality.").

[7] *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 ("Courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA.").

established by the Air District to implement entirely different statutes – the federal and state Clean Air Acts – which have different goals and different regulatory schemes than CEQA. A brief history of the regulation of ozone pollution in this district gives a flavor of the radical differences between the clean air acts and CEQA.

(1) One-Hour Ozone NAAQS

Ozone pollution significantly harms public health and the environment. (See section 1.e below.) As a result, in 1971 EPA set a one-hour National Ambient Air Quality Standard ("NAAQS") for ozone at 0.08 parts per million ("ppm") by volume, a level EPA deemed sufficient to protect human health. (36 Fed.Reg. 8186 (Apr. 30, 1971), Exhibit 3.) In 1979, EPA revised the one-hour ozone NAAQS from 0.08 ppm to 0.12 ppm. (44 Fed.Reg. 8202 (Feb. 8, 1979), Exhibit 4.)

An area complies with the 1-hour ozone standard when measured ozone levels do not exceed 0.12 parts per million by volume at any monitoring station in the area on more than one day per year over any three year period. (40 C.F.R. § 50.9(a).) The 1990 Amendments to the Clean Air Act designated each area of the country that exceeded the health-based NAAQS as "marginal," "moderate," "serious," "severe," or "extreme" non-attainment, depending on the severity of the area's air pollution. (42 U.S.C. § 7511a(a)-(e).)

Based on its air quality from 1987 to 1989, EPA classified the San Joaquin Valley Air Basin ("SJVAB") as a "serious" non-attainment area for ozone. (56 Fed.Reg. 56694 (Nov. 6, 1991), codified at 40 CFR 81.300 et seq., Exhibit 5.) Under that classification, the Air District was required to bring the air basin into compliance with the 1-hour ozone standard by November 15, 1999. (42 U.S.C. § 7511(a).)

The Air District failed to meet the November 15, 1999 deadline, and on June 19, 2000, EPA proposed a rule (i) formally finding the Air District had failed to meet the deadline, (ii) reclassifying SJVAB as a "severe" non-attainment area, and (iii) finding the Air District had failed to fully implement the approved State Implementation Plan ("SIP") for ozone. (65 Fed.Reg. 37926 (Jun. 19, 2000), Exhibit 6.) The proposed rule noted that thirteen monitoring sites in the SJVAB had registered ozone levels above the 0.12 standard for more than 1 day during the 1997-1999 period, including Merced.[8] The proposed rule also noted that the impact of the proposed reclassification to "severe" would include (i) extending the attainment deadline by six years to November 15, 2005, and (ii) requiring the State to submit a new attainment plan that met the Clean Air Act's requirements for severe ozone non-attainment areas. (*Id.* at 37927; 42 U.S.C. §§ 7511(b)(2), 7511a(i).) EPA proposed giving the State eighteen months from the effective date to submit the new attainment plan. (65 Fed.Reg. 37928, Exhibit 6.) Lastly, the proposed rule noted six deficiencies in the Air District's implementation of its original SIP. (*Id.* at 37930; see 42 U.S.C. § 7509(a)-(b).)

[8] Ozone levels at the Merced monitoring station exceeded the standard on five days during the 1997-1999 monitoring period. (65 Fed.Reg. 37927, Exhibit 6.)

EPA noted that the State would be subject to sanctions unless it (i) adopted measures to correct the deficiencies within eighteen months and implemented those measures by November 15, 2002. (*Id.* at 37931; see 42 U.S.C. § 7509(b) [regarding sanctions for non-implementation of SIP's].)

During the comment period on the proposed rule, the Air District sought a further two-year extension of the compliance deadline by requesting a reclassification under the special designation of "severe 17," a unique non-attainment classification that would have given the Air District until November 15, 2007 to meet the one-hour ozone standard.[9] (See 66 Fed.Reg. 27616, 27617 (May 18, 2001), Exhibit 8; 42 U.S.C. § 7511(a)(2).) As grounds for this additional extension, the Air District argued that "attainment by 2005 may not be possible given the air quality problem in the area" and that ozone levels in the SJVAB were the worst in the country for areas facing a 2005 attainment deadline. (66 Fed.Reg. 27617, Exhibit 8.) EPA proposed the "severe 17" reclassification in a proposed rule issued on May 18, 2001. (*Id.*)

EPA issued its final rule on November 8, 2001. (66 Fed.Reg. 56476, Exhibit 7.) In the final rule, EPA ultimately concluded that it lacked the authority under the Clean Air Act to extend the Basin's attainment date beyond 2005 through a reclassification to "severe 17" status. (*Id.* at 56478.) As a result, EPA reclassified SJVAB as a "severe" non-attainment area. (*Id.* at 56477.) EPA also set a deadline of May 31, 2002 for the State to submit a SIP addressing the severe non-attainment area requirements. (*Id.* at 56481.) Lastly, EPA's final rule noted that "under section 181(b)(3) of the Clean Air Act [42 U.S.C. § 7511(b)(3)], the State may request reclassification [to "extreme" non-attainment] and receive a 2010 attainment deadline in order to have the additional time the State believes is necessary to attain ozone NAAQS." (*Id.*; see 42 U.S.C. § 7511(a)(1).)

In November 2001 – just days after the EPA denied the Air District's request for an extension under the "severe 17" classification and reclassified the SJVAB to "severe" non-attainment – Air District staff identified the option (mentioned in EPA's final rule) of voluntarily requesting reclassification to "extreme" in order to avoid sanctions for failing to meet the new November 15, 2005 deadline. (Exhibit 47, pp. 2-3 [June 20, 2002 San Joaquin Valley Air Pollution Control District Staff Report].). The Air District Governing Board then directed staff to pursue reclassification to "extreme." (*Id.* at p. 3.)

On September 18, 2002, EPA found that the Air District and California had failed to meet the May 31, 2002 deadline it had set to submit a revised SIP for a severe non-attainment area. (See 67 Fed.Reg. 61784 (Oct. 2, 2002), Exhibit 10.) On October 2, 2002, EPA took final action formalizing its September 18th finding. (*Id.*) As a result of this action, EPA also started the

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[9] The Air District also requested that EPA change the boundary for the SJVAB by separating out the eastern portion of Kern County into its own non-attainment area. In its final rule, EPA designated the new East Kern County area as a serious non-attainment area, and extended the attainment deadline for the area by two years to November 15, 2001. (66 Fed.Reg. 56476 (Nov. 8, 2001), Exhibit 7.)

eighteen-month clock for mandatory application of sanctions under 42 U.S.C. § 7509(a)-(b), and the two-year clock for a Federal Implementation Plan ("FIP") under 42 U.S.C. § 7410(c)(1). (*Id.* at 61785.)[10] The Air District and State failed to correct the deficiencies in the SIP within the eighteen months, and EPA imposed an "offset" sanction on March 18, 2004. (69 Fed.Reg. 20550, 20552 (Apr. 16, 2004), Exhibit 12.)

At a December 18, 2003 hearing, the Air District's Governing Board adopted Resolution No. 03-12-10, approving the decision to submit a request to EPA to reclassify the SJVAB to "extreme" non-attainment, and directing the Air District's Executive Director/Air Pollution Control Officer to transmit the request to the EPA through the California Air Resources Board ("CARB"). (Exhibit 13.) On January 9, 2004, CARB forwarded Resolution No. 03-12-10 to the EPA. (Exhibit 14.)

On April 16, 2004, EPA took final action to grant the request by the Air District and the State to voluntarily reclassify the SJVAB from a severe to an extreme one-hour non-attainment area. (69 Fed.Reg. 20550, Exhibit 12.) In the proposed rule to reclassify, EPA opined: "when the SJVAB is reclassified to extreme, the failure of the State to submit a severe area ozone attainment demonstration will no longer have any significance. Therefore, upon the effective date of the reclassification, the sanction and FIP clocks that were started as a result of the Agency's October 2, 2002 finding ... will stop." (69 Fed.Reg. 8126, 8127 (Feb. 23, 2004), Exhibit 15.) The final rule maintained this line, terminating the federal offset sanction EPA had imposed on March 18, 2004, as well as the clocks for highway sanctions and an FIP. (69 Fed.Reg. 20552, Exhibit 12.)

Thus, reclassification from "severe" to "extreme" non-attainment allowed the Air District to avoid four federal sanctions. First, the "offset" sanction, which increases the ratio of pollution reduction "offsets" required for new and modified major stationary sources of air pollution from 1.2:1 to 2:1.(42 U.S.C. §§ 7509(b)(2); 7511a(d)(2).) By using offsets, the statute allows new development, but only on the condition that new pollution from the proposed development be "offset" by a greater reduction of pollution from other existing sources in the Air Basin. (See 67 Fed.Reg. 61784, Exhibit 10; 59 Fed.Reg. 39832, 39833, Exhibit 11.) Under this sanction, new sources of pollution would have to reduce twice as much pollution as the new source will create by purchasing or acquiring 2:1 pollution credits-to-emissions from other pollution sources in the Air District, rather than 1.2:1 under then-current Air District rules and the Clean Air Act.

The second and third sanctions are the highway fund sanction and a federal takeover of Clean

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[10] If a state fails to correct the deficiency that started the sanctions clock within eighteen months, then EPA must first impose the "offset" sanction, which increases the ratio of pollution reduction "offsets" required for new and modified major stationary sources of air pollution from 1.2:1 to 2:1. (42 U.S.C. §§ 7509(b)(2); 7511a(d)(2); 59 Fed.Reg. 39832, 39833 (Aug. 4, 1994), codified at 40 CFR § 52.31 et seq., Exhibit 11.) If the state has not corrected the deficiency after a further six months, EPA must impose the second, "highway" sanction. (42 U.S.C. §§ 7509(a), (b)(1); see also 67 C.F.R. 61784.)

Air Act implementation in the Basin.[11] Under the highway fund sanction, EPA would freeze federal highway funding for the Air Basin, except for safety projects and projects with environmental benefits. (42 U.S.C. §§ 7509(b)(1)(A)(i)-(vii); 67 Fed.Reg. 61784, Exhibit 10; see also Exhibit 9 [Dec. 18, 2003 San Joaquin Valley Air Pollution Control District staff report, p. 2].) Under the federal takeover sanction, EPA would take over from the Air District the responsibility for developing the rules and regulations necessary to attain the ozone NAAQS by issuing a Federal Implementation Plan ("FIP") that would include measures to attain the one-hour ozone standard. (42 U.S.C. § 7410(c); 67 Fed.Reg. 61784; Exhibit 9, SJVAPCD staff report, p. 2].)[12]

Fourth, all major stationary sources of air pollution would pay an annual $5,000 per ton fee for 20% of each source's NOX and VOC emissions. (42 U.S.C. §§ 7511a(f), 7511d(a), 7511d(b)(1); District Rule 3170; Exhibit 9, SJVAPCD staff report, p.5].)

On October 8, 2004, the Air District adopted the "2004 Extreme Ozone Attainment Demonstration Plan" which CARB approved and forwarded to EPA by the November 15, 2004 deadline. (See 73 Fed.Reg. 61381, 61382 (Oct. 16, 2008), Exhibit 16.) EPA's review of that plan was delayed by litigation related to its proposed rule to replace the one-hour NAAQS with an eight-hour NAAQS (see *post*). During this delay, the Air District adopted "Clarifications Regarding the 2004 Extreme Ozone Attainment Plan" which the State submitted to EPA on September 5, 2008. (*Id.* at p. 61382.) EPA completed its review of the Air District's one-hour "2004 Extreme Ozone Attainment Demonstration Plan" and the "clarifications" (together, the "2004 Plan") in October 2008. EPA issued a proposed rule to approve the 2004 Plan as meeting all applicable Clean Air Act requirements, except for the requirement that extreme non-attainment areas use reasonably available control technology ("RACT") for sources emitting 10 TPY and above. (*Id.* at 61392-61393.)[13]

The State had withdrawn the RACT provisions from the 2004 Plan in September 2008, indicating that the Air District would satisfy the RACT requirement for the one-hour ozone NAAQS through its submission of a revised eight-hour ozone SIP pursuant to EPA's new ozone NAAQS (see *post*). (See 74 Fed.Reg. 3442, 3443, Exhibit 17.) As a result of this withdrawal, EPA found that the 2004 Plan no longer complied with the one-hour NAAQS, and again started the eighteen-month

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[11]Since the Air District had already found that it could not meet the Clean Air Act requirement that it demonstrate attainment by the November 15, 2005 deadline, these sanctions were virtually certain absent reclassification to "extreme" non-attainment. Pet. 1st RJN, Exh. 6 (June 20, 2002 District Staff report, Exhibit 47, p. 2 ("Since the District cannot realistically obtain the reductions needed to meet the 2005 deadline, mandatory sanctions are required by the . . . Act.")).

[12]A FIP can include extraordinary measures such as "no drive" days on which automobile use is restricted or refused outright. (42 U.S.C. § 7410(c).)

[13] EPA has yet to issue a final rule approving the balance of the 2004 Plan. (See 74 Fed.Reg. 3442, fn. 3 (Jan. 21, 2009), Exhibit 17.)

mandatory sanctions clock against California. (*Id.*) The action took effect on January 21, 2009. (*Id.*)

(2) Eight-Hour Ozone NAAQS

In July 1997, EPA announced a final rule to replace the 0.12 ppm one-hour ozone NAAQS with a 0.08 ppm eight-hour NAAQS to "provide increased protection to the public, especially children and other at-risk populations ...." (62 Fed.Reg. 38856 (Jul. 18, 1997), Exhibit 18.) Several parties challenged EPA's authority under the Clean Air Act to revise the ozone NAAQS. (See *Whitman v. Am. Trucking Assns.* (2001) 531 U.S. 457, 462-463 (*Whitman*).) The litigation stalled EPA's implementation of the new rule, and in July 2000, EPA took final action to rescind withdrawal of the one-hour NAAQS on the ground that it was "important to have a fully enforceable ozone standard" in light of the uncertainty over whether and when the new eight-hour standard would come into effect. (65 Fed.Reg. 45182 (Jul. 20, 2000), Exhibit 19.)

After the Supreme Court upheld EPA's authority to change the ozone NAAQS in *Whitman*, *supra*, EPA continued its efforts to implement a more stringent eight-hour NAAQS. On June 2, 2003, EPA re-proposed the rule to transition from the one-hour ozone NAAQS to an eight-hour ozone NAAQS. (68 Fed.Reg. 32802 (Jun. 2, 2003), Exhibit 20.) EPA issued a final rule on April 30, 2004 ("Phase I Rule") which provided for (i) the area classifications for the new eight-hour NAAQS; (ii) the revocation of the one-hour NAAQS effective June 15, 2005; and (iii) the implementation of anti-backsliding principles to retain certain one-hour NAAQS requirements to ensure continued progress toward attainment of the eight-hour NAAQS. (69 Fed.Reg. 23951 (Apr. 30, 2004), Exhibit 21.)[14] EPA designated SJVAB as a "serious" non-attainment area for the eight-hour NAAQS. (69 Fed.Reg. 23858, 23881 (Apr. 30, 2004), Exhibit 22.) Under the "serious" designation, the Air District had nine years from the designation date to reach attainment, i.e., until April 30, 2013. (40 C.F.R. 51.903(b).)

The Air District adopted an eight-hour ozone RACT demonstration addressing sources down to 25 TPY on August 17, 2006, and the State submitted a related SIP revision on January 31, 2007. (74 Fed.Reg. 3443, Exhibit 17.) On November 16, 2007, the State submitted the Air District's 2007

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[14] Clean Air Act challenges arose again to EPA's approval of the transition. On December 22, 2006, the U.S. Court of Appeals for the District of Columbia vacated EPA's entire Phase I Rule. (*South Coast Air Quality Management Dist. v. EPA* (D.C. Cir. 2006) 472 F.3d 882.) The Court subsequently revised its ruling to clarify that it had vacated only those parts of the Phase I Rule that had been successfully challenged. (*South Coast Air Quality Management Dist. v. EPA* (D.C. Cir. 2007) 489 F.3d 1295.) Included in those aspects which were vacated were changes to the Clean Air Act's anti-backsliding provisions that would have allowed states to remove from the SIP, or to not adopt, several one-hour NAAQS obligations once the one-hour NAAQS were revoked. (*Id.* at p. 1248; see also 73 Fed.Reg. 61382-61383, Exhibit 16.) As a result, the Air District continues to have obligations related to the one-hour NAAQS (see 40 C.F.R. § 51.905) as well obligations under the new eight-hour NAAQS.

eight-hour ozone plan to the EPA based on the "serious" non-attainment designation. (*Id.*) The State also communicated to the EPA, and supported, the Air District's request for a voluntary reclassification to "extreme" non-attainment of the eight-hour ozone NAAQS. (*Id.*) EPA has not issued a proposed or final rule granting the request, but has indicated that it believes its approval is mandated under 42 U.S.C. § 7511(b)(3). (*Id.*, fn. 5.) Assuming EPA reclassifies SJVAB as an extreme non-attainment area, EPA has the discretion to set the date by which the Air District must submit a complete extreme area plan; to be valid the plan must show attainment by November 15, 2024. (42 U.S.C. §§ 7511(a), 7511a(i); 40 C.F.R. 51.903(b).) If the Air District and the State fail to submit a valid plan by that deadline, the same four types of sanctions described *ante* in the context of the one-hour extreme ozone plan will apply to the eight-hour plan.

In summary, the Air District is currently classified as an "extreme" non-attainment area for the one-hour ozone NAAQS. As of January 21, 2009, the Air District's "2004 Extreme Ozone Attainment Demonstration Plan" for one-hour ozone is not in compliance with the Clean Air Act. Mandatory sanctions will result if the Air District does not submit a satisfactory one-hour plan by July 21, 2010. The Air District is currently classified as a "serious" non-attainment for the eight-hour ozone NAAQS, but EPA is currently preparing a mandatory rule to reclassify the Air District as "extreme" non-attainment for the eight-hour NAAQS as well, extending the compliance deadline until 2024. (See 74 Fed.Reg. 3443, fn. 5, Exhibit 17.)

As shown by the above history, regulation under the Clean Air Act includes potential draconian remedies (i.e. sanctions) that can be applied to large sectors of the Air District's economy based on the degree of air quality "non-attainment" over a large geographic area and over long periods of time. Moreover, at the "project-specific" level, permit requirements are triggered based on numerical calculations of emissions levels, without regard to the social and economic benefits of the projects. Ultimately, the focus of regulation under the Clean Air Act is to bring the entire district to "attainment" by a date certain, but a date that has, can, and may continue to change depending on a host of political and economic calculations.

Thus, while criteria of significance developed by the Air District for purposes of moving the district as a whole to attainment at some distant time in the future may be appropriate to a regulatory scheme that has such potential to severely restrict economic activity, such criteria of significance cannot simply be uncritically imported into CEQA, because regulation under CEQA is fundamentally different. Under CEQA, a finding of significance does not automatically trigger specific numerical emission limits or control technologies as it does under the Clean Air Act. Instead, a finding of significance under CEQA requires implementing all feasible mitigation measures that would substantially reduce significant impacts. Also, since CEQA allows approval of projects with remaining significant effects where social and economic benefits outweigh the environmental harm, CEQA imposes no absolute restriction on economic activity as may occur under the Clean Air Act.

Here, uncritically borrowing the Air District's TOS results in a failure to disclose the existence of an actual significant effect of subjecting people to increased ozone pollution now and

for the foreseeable future. In addition, failing to identify that impact as significant means that additional feasible mitigation measures that would substantially reduce may never be identified or implemented. This short-circuits a crucial part of the CEQA process and defeats the purpose of the statute.

d. Impacts of Ozone on Human Health.

(1) Ozone-Related Health Hazards Generally

Ozone pollution has serious adverse health consequences. (Exhibit 23, p. 37 [Am. Lung Assn., *State of the Air: 2008*, hereinafter "State of the Air"].) Children, persons over 65, people who work and exercise outdoors, and those with existing lung disease such as asthma are all especially vulnerable to adverse health effects from breathing ozone. (*Id.* at p. 38.)

Ozone is the principal component of ground-level smog, and is a "powerful oxidizing agent that damages lung tissue." (Exhibit 24, p. 1 [Am. Lung Assn., Annotated Bibliography of Recent Studies of the Health Effects of Ozone Air Pollution 1997-2001, hereinafter "2001 ALA Bibliography"].) The noxious health effects from exposure to ozone include "increased respiratory symptoms, damage to cells of the respiratory tract, pulmonary inflammation, declines in lung function, increased susceptibility to respiratory infections, and increased risk of hospitalization and early death. (*Id.*)

The scientific literature linking ozone exposure to chronic disease is substantial. Two important studies from 2004-2005[15] provide "strong evidence ... that short-term exposure to ozone can shorten lives." (State of the Air, p. 38.) Both studies showed "a small, but robust association between daily ozone levels and increased deaths." (*Id.* at pp. 38-39.) In addition to premature death, exposure to ozone can cause shortness of breath, chest pain when inhaling, wheezing, coughing, asthma attacks, increased susceptibility to respiratory infection, pulmonary inflammation, and heart-related problems such as arrhythmia and stroke. (*Id.* at p. 39.)

Exposure to ozone can be particularly damaging to children. Ozone has been linked to birth defects,[16] deficient lung function growth,[17] and decreased pulmonary function among children with

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[15] M.L. Bell, et al., *Ozone and Short-Term Mortality in 95 U.S. Urban Communities, 1987-2000* in Journal of the American Medical Association (Am. Med. Assn. edit., 2004) Vol. 292, No. 19, pp. 2372-2378. (Attached hereto as Exhibit 25.) M.L. Bell, et al., *A Meta-Analysis of Time-Series Studies of Ozone and Mortality with Comparison to the National Morbidity, Mortality, and Air Pollution Study* in Epidemiology (Lippincott Williams & Wilkins edits., 2005) Vol. 16, No. 4, pp. 436-445). (Attached hereto as Exhibit 26.)

[16] See B. Ritz, et al., *Ambient Air Pollution and Risk of Birth Defects in Southern California* in American Journal of Epidemiology (Johns Hopkins Bloomberg School of Public Health edit., 2002)

asthma.[18] Similarly, in adults ozone has been linked to increased stroke mortality,[19] increased mortality in patients with severe asthma,[20] decreased pulmonary function,[21] and increased hospital admissions.[22] (See generally 2001 ALA Bibliography, *supra*.)

(2) Ozone Levels and At-Risk Populations in Merced

The American Lung Association's report "State of the Air: 2008" identifies Merced (#17) and five other surrounding cities in the SJVAB – Bakersfield (#2), Visalia-Porterville (#3), Fresno-Madera (#5), Modesto (#21), Hanford-Corcoran (#24) – as among the twenty-five most ozone-polluted cities in the United States. (Exhibit 23, p. 21.) The report also notes that Merced is one of seven metropolitan areas nationwide which ranked among the worst polluted in two of three categories tracked by the ALA – ozone and fine particle pollution. (*Id.* at p.9.) Lastly the report shows that approximately 53% of the population of Merced are at a higher risk from ozone pollution

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Vol. 155, No. 1, pp. 17-25. (Attached hereto as Exhibit 27.)

[17] W.J. Gauderman, et al., *Association between Air Pollution and Lung Function Growth in Southern California Children* in American Journal of Respiratory Critical Care Medicine (2002) Vol. 166, pp. 76-84. (Attached hereto as Exhibit 28.)

[18] K.M. Mortimer, et al., *The Effect of Air Pollution on Inner-City Children with Asthma* in European Respiratory Journal (ERS Journals Ltd. edit., 2002) Vol. 19, pp. 699-705. (Attached hereto as Exhibit 29.) J.F. Gent, et al., Association of Low-Level Ozone and Fine Particles with Respiratory Symptoms in Children with Asthma in Journal of the American Medical Association (Am. Med. Assn. edit., 2003) Vol. 290, No. 14, pp. 1859-1867. (Attached hereto as Exhibit 30.)

[19] Am. Lung Assn., Annotated Bibliography of Recent Studies on the Health Effects of Air Pollution, October 11, 2002, p. 6. (Attached hereto as Exhibit 31.)

[20] J. Sunyer, et al., *Effect of Nitrogen Dioxide and Ozone on the Risk of Dying in Patients with Severe Asthma* in Thorax (2002) Vol. 57 pp. 687-693. (Attached hereto as Exhibit 32.)

[21] S.A. Korrick, et al., *Effects of Ozone and Other Pollutants on the Pulmonary Function of Adult Hikers* in Environmental Health Perspectives (1998) Vol. 106, No. 2, pp. 93-99. (Attached hereto as Exhibit 33.) N. Kunzli, et al., *Association between Lifetime Ambient Ozone Exposure and Pulmonary Function in College Freshmen in Environmental Research* (1997) Vol. 72, pp. 8-23. (Attached hereto as Exhibit 34.)

[22] M. Medina-Ramon, et al., *The Effect of Ozone and PM_{10} on Hospital Admissions for Pneumonia and Chronic Obstructive Pulmonary Disease: A National Multicity Study* in American Journal of Epidemiology (Johns Hopkins Bloomberg School of Public Health edit., 2006) Vol. 163, No. 6, pp. 579-588. (Attached hereto as Exhibit 35.)

due to respiratory illness or other infirmity.[23] (*Id.* at p. 21.)

In 2008, the SJVAB exceeded the state one-hour ozone standard on 95 days, the state eight-hour standard on 150 days, and national eight-hour standard on 127 days. (Exhibit 36 [CARB's Annual Ozone Summaries].) CARB's annual ozone summaries for the period 2006-2008, indicate that ozone levels are increasing in the Merced region (i.e., the SJVAB) as a whole. (*Id.*) In 2008, the number of days per year in which at least one SJVAB ozone monitoring site registered levels above the state and federal standards was between 5.6% and 6.4% higher than in 2006, depending on the standard. (*Id.*) In addition, maximum annual ozone concentrations in the SJVAB greatly exceeded the state and federal standards: SJVAB registered a maximum one-hour ozone concentration of 0.157 ppm versus a state standard of 0.09 ppm; and a maximum eight-hour ozone concentration of 0.1323 ppm versus a 0.07 ppm state standard and 0.075 ppm national standard. (*Id.*)

Thus, under any reasonable application of the definition of cumulative impacts, adding up to 10 tons per year of these ozone precursors to such extremely degraded existing conditions constitutes a significant cumulative impact.

e. Cumulative ROG and NOX Impacts: the DEIR's Conclusion of Less-Than-Significant Impacts Is Erroneous as a Matter of Law.

As noted above, the DEIR's analysis of cumulative ozone impacts (all of one paragraph long) is confused. It is also erroneous as matter of law. The first two sentences restate the DEIR's conclusion that before mitigation, "project-level" ozone impacts (synonymous with individual or incremental impacts) are significant, but after mitigation they are less than significant:

> "Project implementation would result in significant air quality impacts from short-term, construction-related, and long-term operation-related (regional) emissions of reactive organic gases (ROG), oxides of nitrogen (NOX), respirable particulate matter (PM10), and fine particulate matter (PM2.5). However, implementation of Mitigation Measures 4.2-1a, 4.2-1b, 4.2-1c, 4.2-1d, 4.2-1e, 4.2-2a, 4.2-2b, 4.2-2c, and 4.2-2d would reduce these *project level impacts* to less than significant." (DEIR, p. 6-4 [italics added].)

The next four sentences accurately state the crux of the cumulative impact problem, which recognizes that individual impacts that are not significant when viewed in isolation may be cumulatively significant, stating:

> "Ozone impacts are the result of the cumulative emissions from numerous sources in the region and transport from outside the region. Ozone is formed in chemical

[23] The "at-risk" groups include: (i) children under 18; (ii) persons 65 and over; (iii) persons with asthma; (iv) persons with chronic bronchitis; and (v) persons with emphysema. (Exhibit 23, p. 21.)

> reactions involving ROG, NOX, and sunlight. *All but the largest individual sources emit ROG and NOx in amounts too small to have a measurable effect on ambient ozone concentrations by themselves. However, when all sources throughout the region are combined, they result in severe ozone problems*." (DEIR, p. 6-4 [emphasis added].)

The next sentence of the DEIR's paragraph describing cumulative ozone impacts states a falsehood that underlies its conclusion that cumulative impacts are less than significant, stating:

> "For the evaluation of cumulative ozone impacts SJVAPCD recommends that lead agencies use the project-level significance standards to determine whether a project's construction or operational emissions of ROG and NOX would not have a cumulatively considerable contribution to a significant cumulative impact (SJVAPCD 2002)."

(DEIR, p. 6-4.) In fact, the Air District's Guide states no such thing. The SJVAPCD Guide addresses the application of TOS's for ozone precursor impacts in three places, as follows.

With respect to project-level impacts, the SJVAPCD Guide states:

> "Ozone precursor emissions from project operations should be compared to the thresholds provided in Table 4-1. Projects that emit ozone precursor air pollutants in excess of the levels in Table 4-1 will be considered to have a significant air quality impact. ...

Table 4-1
Ozone Precursor Emissions Thresholds
For Project Operations

Pollutant	**Tons/yr.**
ROG	10
NOx	10

For cumulative impacts, the SJVAPCD Guide states:

> "Cumulative Impacts. Any proposed project that would individually have a significant air quality impact (see Section 4.3.2 – Thresholds of Significance for Impacts from Project Operations) would also be considered to have a significant cumulative air quality impact. Impacts of local pollutants (CO, HAPs) are cumulatively significant when modeling shows that the combined emissions from the

> project and other existing and planned projects will exceed air quality standards. See also Section 5.9. [at p. 29]
>
> "Evaluating Cumulative Ozone Impacts. Ozone impacts are the result of the cumulative emissions from numerous sources in the region and transport from outside the region. Ozone is formed in chemical reactions involving ROG, NOX, and sunlight. All but the largest individual sources emit ROG and NOX in amounts too small to have a measurable effect on ambient ozone concentrations by themselves. However, when all sources throughout the region are combined, they result in severe ozone problems. Lead Agencies should use the quantification methods described in Section 4 to determine if ROG or NOX emissions exceed SJVAPCD thresholds." [at p. 53]

Thus, while the SJVAPCD Guide considers project-level significance to automatically determine cumulative significance, it does not, contrary to the EIR's language, state the converse, i.e., that project-level insignificance automatically determines cumulative insignificance. Nor could it, because the SJVAPCD Guide explicitly recognizes, as does the EIR, that individual impacts that are too small to even measure may be cumulatively significant.

Thus, contrary to the statement in the EIR that the Air District recommends using project-level significance standards to determine the significance of cumulative impacts, the SJVAPCD Guide actually recommends using "the quantification methods described in Section 4." But this sentence from the SJVAPCD Guide is incoherent. Section 4 does not contain quantification methods, it contains TOS's. Section 5 contains quantification methods. So should the reader of the SJVAPCD Guide assume it is in error in referring to "quantification methods" when it means "TOS," or is the SJVAPCD Guide in error in referring to "section 4" when it means "section 5." The former interpretation would directly conflict with the language recognizing that individually insignificant increases may be cumulatively significant – language that reflects the definition of cumulative impacts under CEQA. (CEQA Guidelines, § 15355.) Therefore, the reader should assume the reference to quantification methods is correct and the reference to section 4 should be to section 5.

Finally, the last sentence of the DEIR's paragraph describing cumulative ozone impacts states: "The project-level impact of ROG and NOX emissions associated with construction and operation of the project would not be cumulatively considerable with mitigation." (DEIR, p. 6-4.) Thus, the DEIR concludes that cumulative impacts are not significant because project-level impacts are below the SJVAPCD Guide's TOS for individual impacts.

Thus, in the end, the DEIR's assessment of cumulative ozone impacts is flatly inconsistent with CEQA's definition of cumulative impacts. And to the extent the DEIR is correct that the SJVAPCD Guide states a TOS for cumulative impacts that is the same as its TOS for individual impacts, then the SJVAPCD Guide is also inconsistent with CEQA's definition of cumulative impacts. Stated another way, either the DEIR misapplies the SJVAPCD Guide, or the SJVAPCD

Guide misapplies CEQA.

Indeed, it is well-settled that where a project will exacerbate existing significant impacts, the project's cumulative impacts must be recognized as significant. Thus, in a case involving air pollution in the Central Valley, the Court of Appeal ruled the EIR prepared for a co-generation plant was inadequate because it failed to judge the significance of project impacts as a function of the project's small incremental impact in combination with existing significant impacts, stating: "'One of the most important environmental lessons evident from past experience is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant, assuming threatening dimensions only when considered in light of the other sources with which they interact.'" (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720-721.)

Similarly, in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, the Court of Appeal invalidated a new CEQA Guideline providing that, "An EIR may determine that a project's contribution to a significant cumulative impact is *de minimis* and thus is not significant." (103 Cal.App.4th at p. 117.) The Court explained that the Guideline "would turn cumulative impact analysis on its head by diminishing the need to do a cumulative impact analysis as the cumulative impact problem worsens" because "the *de minimis* approach ... compares the incremental effect of the proposed project against the collective cumulative impact of all relevant projects." (*Id*. at 118.) According to the Court of Appeal: "the basic approach set forth in Guidelines section 15064, subdivision (i)(1) seems sound – that is, in assessing whether a cumulative effect requires an EIR, the lead agency shall consider whether the cumulative impact is significant and whether the proposed project's incremental effects are cumulatively considerable. ... In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." (*Id*. at 120.)

Here, the DEIR's conclusion that adding up to 10 TPY of ozone precursors to such extremely degraded existing conditions does not constitute a significant cumulative impact simply fails to apply CEQA's definition of cumulative effects. Indeed, ozone pollution in the San Joaquin Valley air basin surrounding Merced is classified by the EPA as "extreme non-attainment."

The City's method for determining the significance of this Project's cumulative ozone impacts is a Ponzi scheme. If the City (and other agencies in the air basin) continues to find that projects that make air quality worse – when it is already terrible – do not have a significant adverse cumulative impact on air quality, then the City will have no legal obligation to adopt feasible mitigation measures to reduce the significant cumulative impact. Under that scenario, there is no limit to how bad the air can, and will, get while the City continues to find that each new project making air quality worse has no significant cumulative impact. This is exactly the result that CEQA's requirement to assess and mitigate cumulatively significant impacts is designed to avoid.

Let's take a common sense example and keep the math simple. Using the EIR's logic, if the City finds that one project will add 11 TPY of ozone precursors, it would be considered a significant

project level impact. But, at the same time, the City could approve 10 new projects in this area as long as each new project added less than 10 TPY of ozone precursors. The City could make a finding of no significant cumulative impact for each such project even though the total amount of ozone precursors added to the air from the 10 projects would be 100 TPY. In sum, an increase of 11 tons per year would be considered significant, while an increase of 100 tons per year would be considered not significant. So the EIR's logic is pure nonsense.

f. Toxic Air Contaminants - Diesel PM Impacts: the DEIR's Conclusion of Less-Than- Significant Impacts from Diesel PM Is Also Erroneous as a Matter of Law.

The DEIR states that the baseline condition from existing (at least in the year 2000) Diesel PM impacts is 390 excess cancer cases per million people in the air basin. (DEIR, p. 4.2-10 ["Diesel PM poses the greatest health risk among these ten TACs mentioned. Based on receptor modeling techniques, ARB estimated the Diesel PM health risk in 2000 to be 390 excess cancer cases per million people in the SJVAB."].)

The DEIR estimates this project will add Diesel PM health risks of 7.3 excess cancer cases per million people in the basin among people living within one mile of the Project; 2.4 excess cancer cases per million people in the basin among workers working within one mile of the Project; 0.18 excess cancer cases per million people in the basin among children attending schools within one mile of the Project; and 1.31excess cancer cases per million people in the basin among workers working in schools within one mile of the Project.

(1) Project-Level Impacts

The DEIR concludes these project level Diesel PM impacts are not "significant" because, as it did with ROG and NOX, they are below a TOS (10 additional cancer cases per 1 million population) borrowed from the Air District. This is erroneous as a matter of law for the same reasons discussed above regarding ozone precursors.[24]

(2) Cumulative Impacts

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[24](1) The DEIR uses the Air District's TOS uncritically, without any factual analysis of its own; (2) this uncritical application of the Air District's TOS represents a failure to exercise independent judgement in preparing the EIR; (3) neither the Air District's Guide nor the DEIR provides any factual explanation as to why the 10 additional cases represents an appropriate TOS for judging significance; (4) compliance with other regulatory standards cannot substitute for a fact-based analysis of those effects; (5) the DEIR's reliance on Appendix G to use the Air District's TOS is misplaced because the CEQA Guidelines cannot authorize a violation of CEQA itself; and (6) the Air District's standard reflects the regulatory framework of the Clean Air Act, which is different than CEQA's regulatory framework.

Indeed, the EIR does not even provide a "project plus baseline" health risk assessment, in violation of CEQA Guideline 15125(a). But adding the project-induced health risk increase (7.3) to the baseline health risk (390) yields a total cumulative Diesel PM health risk of 397.3 excess cancer cases per million people in the basin among people living within one mile of the project.

Why isn't this a significant cumulative impact? Instead of providing a true assessment of cumulative impacts, the DEIR, as it did with ROG and NOX, relies on the fact that the individual Diesel PM impacts of the Project are below a TOS borrowed from the Air District. (See DEIR, p. 6-5.) This is erroneous as a matter of law for the same reason discussed above in relation to ROG and NOX, i.e., where a project will exacerbate existing significant impacts, the project's cumulative impacts must be recognized as significant. The City's method for determining the significance of this Project's cumulative diesel toxics impacts is also a Ponzi scheme for same reasons discussed above regarding ozone pollution: if the City continues to find that projects that make air quality worse do not have significant adverse cumulative impacts on air quality, then the City will have no legal obligation to adopt feasible mitigation measures to reduce the significant cumulative impacts; and there is no limit to how bad the air can get while the City continues to find that each new project that makes air quality worse has no significant cumulative impact.

g. PM10 Impacts

At p 4.2-28, the DEIR identified a significant impact from project-generated, construction-related emissions of PM10, stating:

> ... with respect to construction-related emissions of PM10, SJVAPCD recommended control measures beyond compliance with Regulation VIII-Fugitive Dust Prohibition are not incorporated into the project design. Thus, project-generated, construction-related emissions of criteria air pollutants and precursors could violate or contribute substantially to an existing or projected air quality violation, and/or expose sensitive receptors to substantial pollutant concentrations, especially considering the nonattainment status of Merced County. As a result, this would be a significant impact.

The text of the DEIR following ths heading states:

> Emissions of Fugitive PM Dust. Emissions of fugitive PM dust (e.g., PM10 and PM2.5), are associated primarily with ground disturbance activities during initial site preparation (e.g., grading) and vary as a function of such parameters as soil silt content, soil moisture, wind speed, acreage of disturbance area, and vehicle miles traveled (VMT) on- and off-site. Exhaust emissions from diesel equipment and worker commute trips also contribute to short-term increases in PM emissions, but to a much lesser extent (see Table 4.2-6).

> SJVAPCD's approach to CEQA analyses of construction-related fugitive PM10 dust emissions is to require implementation of effective and comprehensive control measures rather than a detailed quantification. SJVAPCD recommended control measures beyond compliance with Regulation VIII-Fugitive Dust Prohibition, which is required by law, are not incorporated into the project design. Thus, project-generated, construction- related emissions of fugitive dust could violate or contribute substantially to an existing or projected air quality violation, and/or expose sensitive receptors to substantial pollutant concentrations, especially considering the nonattainment status of Merced County. As a result, this would be a significant impact.

The DEIR clearly stated that the Air District does not have a TOS for this pollutant, stating: "SJVAPCD has not identified mass emissions thresholds for construction-related emissions of PM10 or PM2.5." (DEIR Table 4.2-6, footnote 3.)

The FEIR corrects the DEIR by providing, for the first time, accurate information that the Air District does, in fact, have a numeric threshold of significance for PM10 pollution, by deleting the reference to PM10 from footnote 3 of Table 4.2-6, and stating that "Project-generated, construction-related emissions of ... PM10 would exceed SJVAPCD's significance thresholds for PM-10." (FEIR, p. 4-55.) Thus, contrary to the DEIR's representations, the Air District does require quantification of the impact, and this Project exceeds its TOS of 15 ton per year. (FEIR, p 4-55.)

This is significant new information requiring recirculation in a revised Draft EIR. As discussed above, the selection of the TOS is a crucial step in assessing the significance of impacts under CEQA. The identification of the new TOS for PM10 opens an entirely new line of inquiry and comment that is unavailable to the public due to its late disclosure in the FEIR instead of the Draft EIR.

Also, the FEIR's reliance on mitigation measures that will reduce PM10 emissions below the Air District's TOS as a basis for finding that project-level PM10 impacts are not significant is erroneous for the same reasons discussed above with respect to ozone precursors and diesel toxics.[25]

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[25] Again, (1) the FEIR uses the Air District's TOS uncritically, without any factual analysis of its own; (2) this uncritical application of the Air District's TOS represents a failure to exercise independent judgement in preparing the EIR; (3) neither the Air District's Guide nor the FEIR provides any factual explanation as to why the 10 additional cases represents an appropriate TOS for judging significance; (4) compliance with other regulatory standards cannot substitute for a fact-based analysis of those effects; (5) the FEIR's reliance on Appendix G to use the Air District's TOS is misplaced because the CEQA Guidelines cannot authorize a violation of CEQA itself; and (6) the Air District's standard reflects the regulatory framework of the Clean Air Act, which is different than CEQA's regulatory framework.

In addition, the FEIR's reliance on mitigation measures that will reduce PM10 emissions below the Air District's TOS as a basis for finding that cumulative PM10 impacts are not significant is erroneous for the same reasons discussed above with respect to ozone precursors and diesel toxics.[26]

Very truly yours,

Thomas N. Lippe

[26] Again, where a project will exacerbate existing significant impacts, the project's cumulative impacts must be recognized as significant. The City's method for determining the significance of this Project's cumulative PM10 impacts is also a Ponzi scheme for same reasons discussed above regarding ozone pollution: if the City continues to find that projects that make air quality worse do not have significant adverse cumulative impacts on air quality, then the City will have no legal obligation to adopt feasible mitigation measures to reduce those significant cumulative impacts; and there is no limit to how bad the air can get while the City continues to find that each new project that makes air quality worse has no significant cumulative impact.

List of Exhibits

1. Letter from Mr. Greg Gilbert, dated September 14, 2009, and curriculum vitae for Mr. Gilbert.

2. Guide for Assessing and Mitigating Air Quality Impacts, San Joaquin Valley Air Pollution Control District.

3. Federal Register Notice, 36 Fed.Reg. 8186 (Apr. 30, 1971).

4. Federal Register Notice, 44 Fed.Reg. 8202 (Feb. 8, 1979).

5. Code of Federal Regulations, 40 CFR § 81.300 et seq. (codifying Federal Register Notice, 56 Fed.Reg. 56694 (Nov. 6, 1991)).

6. Federal Register Notice, 65 Fed.Reg. 37926 (Jun. 19,2000).

7. Federal Register Notice, 66 Fed.Reg. 56476 (Nov. 8, 2001).

8. Federal Register Notice, 66 Fed.Reg. 27616 (May 18, 2001).

9. San Joaquin Valley Air Pollution Control District Staff Report, dated December 18, 2003.

10. Federal Register Notice, 67 Fed.Reg. 61784 (Oct. 2, 2002).

11. Code of Federal Regulations, 40 CFR § 52.31 et seq. (codifying Federal Register Notice, 59 Fed.Reg. 39832 (Aug. 4, 2004).

12. Federal Register Notice, 69 Fed.Reg. 20550 (Apr. 16, 2004).

13. San Joaquin Valley Air Pollution Control District letter to CARB, dated December 18, 2003.

14. California Air Resources Control Board letter to EPA, dated January 9, 2004.

15. Federal Register Notice, 69 Fed.Reg. 8126 (Feb. 23, 2004).

16. Federal Register Notice, 73 Fed.Reg. 61831 (Oct. 16, 2008).

17. Federal Register Notice, 74 Fed.Reg. 3442 (Jan. 21, 2009).

18. Federal Register Notice, 62 Fed.Reg. 38856 (Jul. 18, 1997).

19. Federal Register Notice, 65 Fed.Reg. 45182 (Jul. 20, 2000).

20. Federal Register Notice, 68 Fed.Reg. 32802 (Jun. 2, 2003).

21. Federal Register Notice, 69 Fed.Reg. 23951 (Apr. 30, 2004).

22. Federal Register Notice, 69 Fed.Reg. 23858 (Apr. 30, 2004).

23. American Lung Association report titled, *State of the Air: 2008*.

24. American Lung Association report titled, *Annotated Bibliography of Recent Studies of the Health Effects of Ozone Air Pollution 1997-2001*.

25. Article by M.L. Bell, et al., *Ozone and Short-Term Mortality in 95 U.S. Urban Communities, 1987-2000* in Journal of the American Medical Association (Am. Med. Assn. edit., 2004) Vol. 292, No. 19, pp. 2372-2378.

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Function of Adult Hikers in Environmental Health Perspectives (1998) Vol. 106, No. 2, pp. 93-99.

34. Article by N. Kunzli, et al., *Association between Lifetime Ambient Ozone Exposure and Pulmonary Function in College Freshmen in Environmental Research* (1997) Vol. 72, pp. 8-23.

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36. California Air Resources Board, *Annual Ozone Summaries for Selected Regions*.

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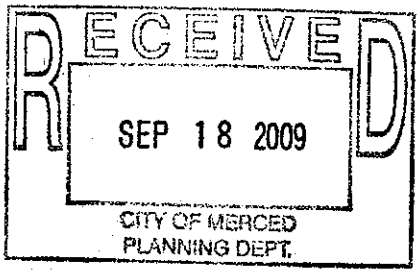

Ms. Kim Espinosa
Planning Manager
City of Merced Planning Department
678 West 18th Street
Merced, CA 95340

Re: Delivery of Exhibits to Merced Alliance for Responsible Growth's Comment Letter on Final Environmental Impact Report for Proposed Wal-Mart Regional Distribution Center (State Clearinghouse No. 2006071029)

Dear Ms. Espinosa:

This office represents the Merced Alliance for Responsible Growth ("Alliance") with respect to the City of Merced's consideration of the proposed Wal-Mart Regional Distribution Center and the Final Environmental Impact Report ("FEIR") prepared for the project.

We will be submitting a comment letter on the FEIR to you by email tomorrow, in advance of Monday's City Council public hearing. The purpose of this letter and the enclosed CD is to transmit to you the exhibits that will be referenced and incorporated in the Alliance's comment letter.

The enclosed CD contains Exhibits 1-47 to the comment letter, including:

1. Letter from Mr. Greg Gilbert, dated September 14, 2009, regarding air quality impacts, and curriculum vitae for Mr. Gilbert.
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6. Federal Register Notice, 65 Fed.Reg. 37926 (Jun. 19,2000).
7. Federal Register Notice, 66 Fed.Reg. 56476 (Nov. 8, 2001).
8. Federal Register Notice, 66 Fed.Reg. 27616 (May 18, 2001).
9. San Joaquin Valley Air Pollution Control District Staff Report, dated December 18, 2003.
10. Federal Register Notice, 67 Fed.Reg. 61784 (Oct. 2, 2002).
11. Code of Federal Regulations, 40 CFR § 52.31 et seq. (codifying Federal Register Notice, 59 Fed.Reg. 39832 (Aug. 4, 2004)).

12. Federal Register Notice, 69 Fed.Reg. 20550 (Apr. 16, 2004).
13. San Joaquin Valley Air Pollution Control District letter to CARB, dated December 18, 2003.
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19. Federal Register Notice, 65 Fed.Reg. 45182 (Jul. 20, 2000).
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21. Federal Register Notice, 69 Fed.Reg. 23951 (Apr. 30, 2004).
22. Federal Register Notice, 69 Fed.Reg. 23858 (Apr. 30, 2004).
23. American Lung Association report titled, *State of the Air: 2008*.
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26. Article by M.L. Bell, et al., *A Meta-Analysis of Time-Series Studies of Ozone and Mortality with Comparison to the National Morbidity, Mortality, and Air Pollution Study* in Epidemiology (Lippincott Williams & Wilkins edits., 2005) Vol. 16, No. 4, pp. 436-445).
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38. Carter-Burgess, 2007, Preliminary Site Drainage Analysis.
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41. ENGEO, 2004, Geotechnical Feasibility Report, Merced Distribution Center, APN 061-025-018, 061-025-035, 061-029- 001, and 061-029-027.
42. ENGEO, 2006, Final Geotechnical Exploration Report (FGR2), Proposed Industrial Warehouse Distribution Center, Merced, CA.
43. ENGEO, 2007, Groundwater Recharge Discussion, Wal-Mart Distribution Center, Merced, California.
44. Letter from Mr. Dan Smith, dated September 15, 2009, regarding traffic impacts.
45. Letter from Dr. Phillip King, dated September 16, 2009, regarding land use impacts.
46. Letter from Mr. Harry Benke dated August 14, 2009, regarding visual impacts.
47. San Joaquin Valley Air Pollution Control District Staff Report, dated June 20, 2002.
48. City of Merced, Planning Commission, Public Hearing re Wal-Mart Regional Distribution Center, Transcript of Proceedings, Vol. I (excerpts), August 19, 2009.

We are submitting these exhibits separately by CD due to their size (which could potentially reduce the functionality of your email system), and based on our partner Keith Wagner's conversation with Ken Rozell, Deputy City Attorney, yesterday. If, for whatever reason, the City Council or Planning Department requires exhibits to be submitted only by email or in hard copy, please let me know as soon as possible, and we will deliver hard copies of the exhibits on Monday.

Thank you for your attention to this matter.

Very truly yours,

John H. Curran

Enclosure (1)

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September 21, 2009

Submitted by email to: espinosak@cityofmerced.org

Ms. Kim Espinosa, Planning Manager
City of Merced Planning Department
678 West 18th Street, Merced, CA 95340

Re: Proposed Wal-Mart Regional Distribution Center, Final Environmental Impact Report, State Clearinghouse Number 2006071029

Dear Ms. Espinosa:

This office represents the Merced Alliance for Responsible Growth ("Alliance") with respect to the City of Merced's consideration of the proposed Wal-Mart Regional Distribution Center (the "Project") and the Final Environmental Impact Report ("FEIR") prepared for the Project. As described in more detail below, Alliance objects to approval of the Distribution Center on grounds the FEIR does not comply with the requirements of the California Environmental Quality Act ("CEQA").

This letter also refers to and incorporates by reference a number of exhibits that my office delivered to the City under separate cover on September 18, 2009, which are described in detail at the end of the letter.

1. HYDROLOGY IMPACTS

This letter incorporates by reference the September 15, 2009 letter from Dennis Jackson at Exhibit 37 as well as Mr. Jackson's previous letter dated April 24, 2009. (Mr. Jackson's April 24, 2009 letter referenced the documents identified as Exhibits 38 through 43 at the end of this letter.)

a. Drinking Water Quality Impacts.

The City of Merced has a municipal drinking water well on the southern border of the Project, and the Project includes both underground and above-ground storage tanks that will hold over 40,000 gallons of diesel fuel and over 6,000 gallons of motor oil. But the DEIR fails to assess, or provide enough information to allow the public to assess, the risk of the Project contaminating this water source if these tanks fail. The DEIR fails to adequately describe the environmental setting because its does not describe the drinking water well, much less its spatial relationship to the Project or the proposed underground tanks, or the characteristics of the land that might increase the risk of tank failure or well contamination (e.g., soil characteristics).

The site's geologic and geomorphic characteristics include several risk factors that the DEIR does not include in its evaluation of potential impacts, including (1) two old stream channels that are now filled with soil that is less dense and more permeable to water than the surrounding land; (2) the fact that the soil on the site has a high "shrink-swell potential," meaning that it expands and contracts when exposed to wet and dry conditions; and (3) corrosive soil conditions. These characteristics of the site increase the risk of tank failure, but the DEIR does not discuss them. The FEIR's response to this comment is that the City will wait for the preparation of a final geotechnical report before assessing the risk posed by these soil characteristics. As a matter of policy, it is difficult to understand why the City would risk contaminating a source of drinking water by granting entitlements to Wal-Mart before assessing this risk. As a matter of law, the EIR fails to describe this aspect of the environmental setting.

The DEIR relies on the regulation of underground storage tanks under state law to determine that impacts from them are not potentially significant. But uncritical reliance on a project's compliance with other regulatory standards cannot substitute for the City's obligation to assess impacts based on the facts of this Project and its particular environmental setting.

b. Downstream Water Quality Impacts.

Mr. Jackson commented on the DEIR that the standards to protect downstream water quality were not specific enough to evaluate. Mitigation measure 4.6-2 provides for developing "design standards for water quality treatment " at some point in the future. This represents an unlawful deferral of the development of mitigation measures.

He also comments that the design of the detention basins does not allow water quality contaminants enough residence time in the basins to settle out, which will cause significant downstream water quality impacts. (Exhibit 37.)

c. Flooding Impacts - Detention Pond Berm Failure.

The Project description is uncertain in that the capacity of the detention basins is stated one place to be the 50-year, 24-hour storm event (DEIR, p. 2-33) and in another place to be the 100-year, 24-hour storm event (DEIR, p. 2-34). Also, at page 2-33, the DEIR states there are two detention ponds, but Exhibit 4.6-2 at page 4.6-13 shows six ponds. In addition, the DEIR does not provide the elevations of the stormwater inlets to the detention basins in relation to the elevation of the bottom of the basins to allow a calculation of their actual capacity.

Also, the DEIR does not assess, or provide enough information to allow the public to assess, the risk that the berms that surround the detention ponds may fail, releasing large volumes of water into the surrounding neighborhood. The Project description is incomplete because the design specifications for the detention pond system are not sufficiently detailed to allow an evaluation of this risk.

Similarly, the description of the environmental setting is incomplete because the intensity of design storms and the details of the runoff calculations are not given in the DEIR, preventing a complete examination of these issues; and neither the presence of the old stream channels nor the expansive soils were considered in the design of the detention ponds. (The filled-in stream channels may contain sand deposits which may experience liquefaction during earthquakes which could cause collapse of the overlying berm.)

The FEIR does not respond to these comments.

d. Flooding Impacts - Detention Pond Berm Effects on Floodwaters.

The Project's surrounding detention pond berms will form an "island" in times of surface water flooding that will apparently form an complete barrier to 100-year flood water. The effect of a 110 acre "island" on the movement of 100-year flood water has not been discussed. The DEIR fails to ask or answer the question whether the presence of this "island" will cause 100-year flood water to accelerate near the Project and whether this will result in erosion of the surrounding land or roads.

The FEIR does not respond to these comments.

e. Downstream Geomorphology Impacts.

The Project will alter the natural drainage pattern on the site by collecting, concentrating, and discharging all runoff into one of two possible outlets: Fairfield Canal to the northeast, or the Farmdale Lateral to the southwest. The Project description is uncertain because it is not clear which location will be used for drainage. It is also uncertain in that the criteria that will govern that decision are not specified.

The EIR also does not describe the environmental setting downstream of the Project, nor does it provide any assessment of the potential impact of the increased peak flows on either channel or surrounding land downstream. The Merced Irrigation District ("MID") limits stormwater discharges from the Project to less than 25% of pre-project 2-year discharge, suggesting that there are existing off-site cumulative impacts from routing stormwater into MID's Fairfield Canal that the EIR has not disclosed.

The FEIR does not respond to these comments.

2. TRAFFIC IMPACTS

This letter incorporates by reference the September 15, 2009 letter from Dan Smith at Exhibit 44 as well as Mr. Smith's previous letter, dated April 24, 2009. Mr Smith, in his comments, carefully documents two conclusions. First, the FEIR fails to assess traffic impacts in a manner that would reliably disclose significant traffic impacts at a number of locations as a result of several errors, including failing to describe the environmental setting and the true impacts of the Project.

Second, even for locations where the FEIR concludes that traffic impacts will be significant, the above errors have caused the magnitude of those impacts to be understated. Therefore, any statement of overriding considerations will be unsupported because the City Council cannot balance benefits of the Project against its environmental harm without knowing the magnitude of that harm.

The DEIR uses an inappropriate baseline for measuring this Project's incremental impact on traffic. Instead of using existing conditions, as required by CEQA, the DEIR examines the Project's traffic impacts against hypothetical future traffic conditions that include anticipated traffic from housing that may never be built or occupied. (See CEQA Guidelines, §§ 15125(a), 15126.2(a).) This error masks the true impacts of the Project.

The DEIR fails to describe the Project in enough detail to disclose its true impacts. As described by Mr. Smith in detail, the Project underestimates both the number of truck trips and the number of employee trips the Project will generate. Mr. Smith further explains that the FEIR's responses to these comments are based on falsehoods. Responses to comments must be good-faith, reasoned, and based on empirical or expert evidence. The City's responses do not meet these requirements.

Wal-Mart's lawyers apparently convinced the City to drop the mandatory requirements of mitigation measure 4.2-2(b), requiring an enforceable employee trip reduction program. The FEIR's revisions to the DEIR indicate this decision is based on California Health and Safety Code section 40717.9, which the City interprets as not allowing it to require an employee trip reduction program. But this statute only prevents cities from adopting rules of this nature that would apply to existing businesses. It does not prevent the City from making a trip reduction program a condition of approval of a permit that the applicant has no right to obtain.

3. LAND USE AND URBAN DECAY IMPACTS.

This letter incorporates by reference the September 16, 2009 letter from Dr. Phillip King at Exhibit 45 as well as Dr. King's previous letter dated April 27, 2009. The DEIR is informationally deficient with respect to land use and urban decay impacts. The following discussion summarizes several, but not all, of Dr. King's observations.

a. Urban Decay Impacts.

Dr. King describes the immediate, local, and direct effects of this Project on the surrounding residential neighborhoods, including increased rates of foreclosure, abandoned homes, increases in crime, etc.

The DEIR also fails to assess the Project's potential to cause regional urban decay impacts by enabling the development of new Wal-Mart stores in the region (both regular stores and Supercenters), and the conversion of existing regular stores to Supercenters, that this distribution center will service. As a result, the DEIR fails to assess impacts on the "affected environment." The

DEIR commits this failure by studiously not providing any information about Wal-Mart's plans to expand retail operations in the region.

For example, the Project description is narrow, stating: "The underlying purpose of the project is storage and distribution of nongrocery goods to Wal-Mart retail stores located throughout the region." (DEIR, p. 3-1.) The growth-inducing impacts section is singularly evasive, stating: "Any growth-inducing effect the proposed regional distribution center may have relative to new Wal-Mart retail stores in the area or beyond is difficult to accurately determine. The proposed project can be viewed as a means to simply improve the service to existing retail outlets, given the fact that proximity to a distribution warehouse in and of itself and in the absence of consumer demand is not likely to warrant construction of a new retail facility." (DEIR, p. 6-35.)

"Difficult to accurately determine"; "can be viewed"! This is double-talk. The implication that Wal-Mart does not know its own plans to expand retail operations in this region is untenable, and the DEIR's failure to provide this information is unacceptable.

Dr. King presents overwhelming evidence that urban decay impacts, both in the City of Merced and in the surrounding region, are already significantly adverse. He also presents compelling evidence that this Project will exacerbate conditions. Yet the FEIR denies this significant cumulative impact without undertaking any investigation of the issue. The FEIR fails to investigate and disclose the urban decay conditions in the affected environmental setting (i.e., both the City of Merced and the surrounding region from Fresno in the South to Modesto or Stockton in the North.) The FEIR also fails to investigate and disclose Wal-Mart's plans to build new stores in the region that will be serviced by this distribution center, even though Mr. Rios, the Wal-Mart representative at the Planning Commission hearing on August 24, 2009, testified that the purpose of the distribution center is to support the future growth of the company. (See Exhibit 45, p. 36, line 19.)

b. Land Use Conflicts.

As explained by Dr. King, this Project will devastate the existing residential neighborhoods in the vicinity of the Project. It also threatens the viability of plans to build out the undeveloped portions of the residential zones in the immediate vicinity. Thus, the Project will frustrate the goals of the City's General Plan, yet the DEIR fails to recognize this as a significant impact.

The Final EIR responds that there is still going to be strong housing demand in Merced. That may be true, but it is unresponsive to Dr. King's point. Dr. King's point is that the neighborhood surrounding the Project will not provide housing supply to meet that demand; the supply will come from areas that are not near this distribution center. So, again, the response to the comment is evasive and unresponsive.

4. VISUAL IMPACTS

This letter incorporates by reference the September 16, 2009 letter from Harry Benke at

Exhibit 46 as well as Mr. Benke's previous letter dated April 27, 2009. The EIR is informationally deficient with respect to the Project's visual impacts.

Even though the FEIR admits that certain visual impacts will be significant and unavoidable, the defects described by Mr Benke are still prejudicial because the magnitude of these impacts is unknown and therefore, mitigation of these impacts is incomplete. (*Santiago County Water Dist. v. County of Orange, supra,* 118 Cal.App.3d at 831 ["The EIR must contain facts and analysis, not just the bare conclusions of a public agency. ... The conclusion that one of the unavoidable adverse impacts of the project will be the "[increased] demand upon water available from the Santiago County Water District" is only stating the obvious. *What is needed is some information about how adverse the adverse impact will be*." (emphasis added)].) Therefore, any statement of overriding considerations will be unsupported because City Council cannot balance benefits of the Project against its environmental harm without knowing the magnitude of that harm.

In addition, at the Planning Commission hearing on August 24, 2009, Planning Commissioner Zuercher: (1) identified himself as a landscape architect by training and profession; (2) stated that he had visited the site that day to consider its visibility from Highway 99 and the Campus Parkway; (3) stated his opinion that this building will have a significant adverse aesthetic impact, due to its location at the "entry" to the City and the UC Campus from Highway 99 on Campus Parkway; (4) stated his opinion that the current landscaping aesthetic mitigation (plant trees on 40 foot centers) will not do anything to mitigate this impact because the trees will be too far apart to hide this very large building; (5) proposed, instead that the EIR be modified to require a series of berms contoured around the site of up to 5 feet in height that would then have walls of vegetation planted on them to create a continuous screen; (6) explained that the costs associated with this type of visual screen would not be that much more than having to plant trees on 40-foot centers, but would be far more effective in reducing the building's aesthetic impacts; and (7) presented an artist's rendering showing what the berm with vegetation would look like. (Exhibit 50, pp. 41:21 - 46:21 and 58:6 - 60:24.)

The Planning Commission did not address the merits of Commissioner Zuercher's proposal, but rather considered only whether Wal-Mart had agreed to the new proposal. When Wal-Mart was invited to the podium and stated that it would not agree to this revised mitigation measure (Exhibit 50, 61:17), the Planning Commission decided to recommend certification of the EIR as written, without (1) accounting for Commissioner Zuercher's observation that the current aesthetic mitigation is inadequate to serve its stated purpose, or (2) considering the feasibility of changing the mitigation to meet Commissioner Zuercher's recommendations, regardless of the applicant's opposition. Therefore, the EIR is defective for failing to identify all feasible mitigation measures, and any approval will be defective for failing to adopt all feasible mitigation measures that will substantially reduce an identified significant impact.

It is telling that at least several commissioners labor under a seriously erroneous view of their role as planning commissioners. For example, in response to Commissioner Zuercher's proposal, Commissioner Williams stated: "But I'm just wondering if we are out of the scope of what we are

here for in terms of making a recommendation to the City to approve this project. I think there will be much more discussion once it gets to the City Council. And I just do not think we should be coming up with more conditions at this point for the project." (Exhibit 50, 62:2-12.)

This statement is really quite extraordinary for several reasons. First, Commissioner Williams apparently views the "scope" of the Commission's role as preordained, namely to "mak[e] a recommendation to the City to approve this project." In fact, however, the Planning Commission's role is to make a discretionary decision whether to recommend to the City Council that it approve or disapprove the Project, not to rubber stamp staff's recommendation.

Second, to the extent that members of the Planning Commission believe the Project can and should be improved before the Commission recommends approval, then it is their obligation to say so. Commissioner Zuercher was merely doing the job he was appointed to do, which is to give advice based on his knowledge and experience that the Commission can use to render a collective recommendation to the City Council. For any commissioner to view this advice as "outside the scope" indicates a fundamental misunderstanding of the Planning Commission's obligation under the Planning and Zoning Law to *independently review* and *make recommendations* regarding the Project and EIR.

Third, other members of the Commission apparently subscribe to Commissioner Williams' mistaken view. Commissioner Cervantes stated: "I do feel the same way. I think maybe it is a little unfair to ask Wal-Mart to come up and make a decision in the contingent period on something that is – well, as a policy like this, condition like this." (Exhibit 50, 62:17-21.) Commissioner Ward stated: "I would have to agree that I think it is burdensome." (Exhibit 50, 63:5-6.) Commissioner Acheson stated: "I appreciate Commissioner Zuercher's input, and I think there probably is some validity. What I have a concern about, though, is Wal-Mart didn't hear about it until all of us heard about it, which is a few minutes ago, and I think that was unfair. So I have some real major concerns about that. ... But I think the way that we tried to approach it tonight, even though maybe it was a valid suggestion, I think that was inappropriate." (Exhibit 50, 63:24-64:14.)

These concerns about burdening Wal-Mart or unfairly surprising it with Commissioner Zuercher's proposal only make sense if the commissioners are misinformed about the scope of their own legal duties and authority. The tension these commissioners are expressing arises from their own misconception that their role is solely to recommend approval and to do so now! That is not their role. The Planning Commission has the authority to continue its own hearing to allow Wal-Mart and staff to investigate the proposal and return with a formal response regarding the actual question presented to the Planning Commission: i.e., the feasibility of implementing Commissioner Zuercher's proposal (not Wal-Mart's willingness to agree to it), and the ability of that proposed change in the Project's mitigation measures to further reduce the Project's admitted and significant adverse aesthetic impacts.

Thus, the FEIR is informationally deficient regarding visual impacts.

Thank you for your attention to this matter.

Very truly yours,

Thomas N. Lippe

List of Exhibits

Exhibits 1 through 48 were included on a CD-ROM disk delivered to the City under separate cover by Federal Express on September 18, 2009. Exhibits 49 and 50 are being delivered to the City under separate cover by email on September 21, 2009.

1. Letter from Mr. Greg Gilbert, dated September 14, 2009, and curriculum vitae for Mr. Gilbert.

2. Guide for Assessing and Mitigating Air Quality Impacts, San Joaquin Valley Air Pollution Control District.

3. Federal Register Notice, 36 Fed.Reg. 8186 (Apr. 30, 1971).

4. Federal Register Notice, 44 Fed.Reg. 8202 (Feb. 8, 1979).

5. Code of Federal Regulations, 40 CFR § 81.300 et seq. (codifying Federal Register Notice, 56 Fed.Reg. 56694 (Nov. 6, 1991)).

6. Federal Register Notice, 65 Fed.Reg. 37926 (Jun. 19,2000).

7. Federal Register Notice, 66 Fed.Reg. 56476 (Nov. 8, 2001).

8. Federal Register Notice, 66 Fed.Reg. 27616 (May 18, 2001).

9. San Joaquin Valley Air Pollution Control District Staff Report, dated December 18, 2003.

10. Federal Register Notice, 67 Fed.Reg. 61784 (Oct. 2, 2002).

11. Code of Federal Regulations, 40 CFR § 52.31 et seq. (codifying Federal Register Notice, 59 Fed.Reg. 39832 (Aug. 4, 2004).

12. Federal Register Notice, 69 Fed.Reg. 20550 (Apr. 16, 2004).

13. San Joaquin Valley Air Pollution Control District letter to CARB, dated December 18, 2003.

14. California Air Resources Control Board letter to EPA, dated January 9, 2004.

15. Federal Register Notice, 69 Fed.Reg. 8126 (Feb. 23, 2004).

16. Federal Register Notice, 73 Fed.Reg. 61831 (Oct. 16, 2008).

17. Federal Register Notice, 74 Fed.Reg. 3442 (Jan. 21, 2009).

18. Federal Register Notice, 62 Fed.Reg. 38856 (Jul. 18, 1997).

19. Federal Register Notice, 65 Fed.Reg. 45182 (Jul. 20, 2000).

20. Federal Register Notice, 68 Fed.Reg. 32802 (Jun. 2, 2003).

21. Federal Register Notice, 69 Fed.Reg. 23951 (Apr. 30, 2004).

22. Federal Register Notice, 69 Fed.Reg. 23858 (Apr. 30, 2004).

23. American Lung Association report titled, *State of the Air: 2008*.

24. American Lung Association report titled, *Annotated Bibliography of Recent Studies of the Health Effects of Ozone Air Pollution 1997-2001*.

25. Article by M.L. Bell, et al., *Ozone and Short-Term Mortality in 95 U.S. Urban Communities, 1987-2000* in Journal of the American Medical Association (Am. Med. Assn. edit., 2004) Vol. 292, No. 19, pp. 2372-2378.

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Asthma in European Respiratory Journal (ERS Journals Ltd. edit., 2002) Vol. 19, pp. 699-705.

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31. American Lung Association report titled, *Annotated Bibliography of Recent Studies on the Health Effects of Air Pollution*, October 11, 2002.

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47. San Joaquin Valley Air Pollution Control District Staff Report, dated June 20, 2002.

48. City of Merced, Planning Commission, Public Hearing re Wal-Mart Regional Distribution Center, Transcript of Proceedings, Vol. I (excerpts), August 19, 2009.

49. City of Merced, Planning Commission, Public Hearing re Wal-Mart Regional Distribution Center, Transcript of Proceedings, Vol. I, August 19, 2009. (Included herewith)

50. City of Merced, Planning Commission, Public Hearing re Wal-Mart Regional Distribution Center, Transcript of Proceedings, Vol. II, August 24, 2009. (Included herewith)

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September 23, 2009

Submitted by email to: espinosak@cityofmerced.org

Ms. Kim Espinosa, Planning Manager
City of Merced Planning Department
678 West 18th Street, Merced, CA 95340

Re: Proposed Wal-Mart Regional Distribution Center, Final Environmental Impact Report, State Clearinghouse Number 2006071029

Dear Ms. Espinosa:

This office represents the Merced Alliance for Responsible Growth ("Alliance") with respect to the City of Merced's consideration of the proposed Wal-Mart Regional Distribution Center (the "Project") and the Final Environmental Impact Report ("FEIR") prepared for the Project. As described in more detail below, Alliance objects to approval of the Distribution Center on grounds the FEIR does not comply with the requirements of the California Environmental Quality Act ("CEQA").

1. AIR QUALITY IMPACTS: Greenhouse Gases (GHG's) and Climate Change Impacts

As explained in the letter dated April 27, 2009 from Dr. Klaas Kramer (hereinafter "Kramer letter" [submitted with Alliance's comments on the DEIR]), the DEIR is informationally deficient with respect to the magnitude of this Project's cumulatively considerable contribution greenhouse gas emissions. As explained in the letter dated September 22, 2009 from Dr. Kramer and his colleagues (attached as Exhibit 51 and incorporated by reference herein), the FEIR does not remedy these deficiencies.

The DEIR, to its credit, admits that the cumulative climate change impacts of this Project are significant. Nevertheless, the EIR is informationally deficient regarding these impacts.

The DEIR fails to include all sources of GHG's in its calculation of the Project's GHG emissions, thereby underestimating the total climate change impact. (See Kramer letter.) The FEIR responds that including GHG's released by construction materials and goods sold is not possible. The Kramer letter and Exhibit 51 point out that this is not true.

The DEIR states: "Implementation of the Mitigation Measures 4.2-6a through 4.2-6d above would result in reductions of emissions of CO2 and offsets; however, at the time of writing this EIR these reductions cannot be fully quantified." (DEIR, p. 4.2-48.) This statement is misleading because

these reductions, or at least a large portion of them, can be approximately quantified using readily available analytic tools. (See Kramer letter.) Again, the FEIR disagrees with Alliance's assertion that the reductions can be approximately quantified, but the Kramer letter and Exhibit 51 explain how it can be done.

It is not enough to simply leave the magnitude of the GHG emissions after mitigation unquantified.(*Santiago County Water Dist. v. County of Orange* (1981), 118 Cal.App.3d 818, 831 ["The EIR must contain facts and analysis, not just the bare conclusions of a public agency. [¶] ... The conclusion that one of the unavoidable adverse impacts of the project will be the '[increased] demand upon water available from the Santiago County Water District' is only stating the obvious. *What is needed is some information about how adverse the adverse impact will be*." (emphasis added)].)

The failure to fully investigate and disclose the magnitude of this impact renders the EIR informationally deficient. It also makes it impossible for the City to balance the benefits of the Project against its environmental harm to determine whether its benefits outweigh that harm, because the magnitude of the harm is unknown.

Mitigation measures 4.2-6a through 4.2-6d rely on offsets. But the EIR does not specify any required measures, protocols or standards that would provide reasonable assurances that appropriate quantities of GHG emissions offsets will or can be obtained. (See Kramer letter.)

The DEIR states: "In addition, implementation of Mitigation Measure 4.2-1c and Mitigation Measure 4.2-2e, which require the Applicant to implement an emissions reduction agreement with SJVAPCD to reduce construction and operational emissions of ROG and NOX to less than the SJVAPCD-established threshold for ROG and NOX 10 TYP, will have the added benefit of reducing construction and operational GHG emissions. However, the size of the associated GHG reduction cannot be quantified at the time of writing this EIR and, more significantly, there is not [an] established methodology for verifying the associated GHG reductions from emission reduction agreements." (DEIR p. 4.2-48.)

This statement is misleading because ROG and NOX emission reduction mitigation measures may, and in some cases certainly will, increase – not decrease – GHG emissions. This represents yet another source of GHG emissions omitted from the DEIR's calculation of GHG emissions. (See Kramer letter.)

This statement is also misleading because to the extent that ROG and NOX emission reduction mitigation measures will either increase or decrease GHG emissions, those increases or decreases can be approximately quantified using readily available analytic tools. (See Kramer letter.)

2. "NEW" MITIGATION MEASURES FROM THE LYONS ANNEXATION EIR

The FEIR substantively changes the description of the CEQA project described and analyzed

in the publicly circulated DEIR. Specifically, a new paragraph has been added to the EIR's Project description that reveals for the first time that: (1) the approval of this Project actually constitutes the partial implementation of an earlier CEQA project (the "Lyon's Annexation"), and, therefore, the Wal-Mart Distribution Center Project is subject to the mitigation measures that were adopted for that project; and (2) in implementing the Wal-Mart Project, the City *will not* implement some of the mitigation measures that were adopted as mandatory mitigation measures for the Lyon's Annexation, but rather will implement different mitigation measures adopted as part of the Wal-Mart Project. However, neither the DEIR nor the FEIR identifies (1) which mitigation measures from the Lyon's Annexation project the City intends to delete or avoid; or (2) what mitigation measures from the Wal-Mart Project the City believes are sufficient to replace the (unspecified) Lyon's Annexation mitigation measures that will not be implemented. Instead, the amendment to the Project description in the FEIR only vaguely states that the determination of which Lyon's Annexation mitigation measures will be deleted will be made on a "case by case basis." (FEIR, p. 4-2.)

This new information renders the Project description incomplete and uncertain in violation of CEQA's mandatory procedures. "A curtailed or distorted project description may stultify the objectives of the reporting process. ... An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193.)

The DEIR that was circulated for public review and comment did not disclose the important fact that at least part of the Wal-Mart Project's impacts are intended to be mitigated through implementation of previously adopted mitigation measures for the Lyon's Annexation. In failing to disclose this important information, the City unlawfully deprived the public of the ability to consider or comment on the relationships between the two projects, or whether the mitigation measures that were adopted for the Lyon's Annexation will actually be sufficient to offset related impacts caused by the Wal-Mart Project. And, the FEIR's unlawfully delayed disclosure of the relationships between the two projects is so vague that the public has not been provided with enough information to meaningfully comprehend *which* of Lyon's Annexation mitigation measures (both those that will be implemented, and those that will not) are at issue. There is also no evidence the applicant has agreed to these measures.

Regarding future process, the DEIR and FEIR also violate CEQA's public disclosure and informed decisionmaking processes, because they provide no information regarding what public process (if any) will be employed by the City *after* the Wal-Mart Project has been approved, to decide which of the previously adopted Lyon's Annexation mitigation measures will be deleted or avoided by the City. In sum, the significant new information that has been added to the FEIR regarding the relationships between the Lyon's Annexation and Wal-Mart projects indicates that the DEIR that *was* circulated for public review and comment for the Wal-Mart Project did not contain an "accurate" or "stable" project description in violation of CEQA's mandatory procedures, and was "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (*County of Inyo*, *supra*, 17 Cal.App.3d at pp. 192-193; CEQA Guidelines, § 15088.5, subd. (a)(4).) Put simply, the City cannot certify the FEIR or approve the

Project, until a revised DEIR is prepared and recirculated for public review and comment with this significant, new information about the "whole" of the Project included.

As just one example of the information disclosure inadequacies that have resulted from the City's violation of CEQA's mandatory procedures, Lyons Annexation Mitigation Measure 1-(c) requires that the City assess an impact fee for purposes of mitigating air quality impacts of any new project located in the annexation area. (See Exhibit 52, Lyons Annexation, Expanded Initial Study [hereinafter "EIS"], Appendix A, p. A-16 [Adobe pdf p. 142].) The Lyon's Annexation EIS found this mitigation measure to be feasible. The Draft EIR for the Wal-Mart Project identified ozone, PM dust, toxic air contaminants, and PM10 as "significant impacts before mitigation," yet the Wal-Mart Project DEIR did not identify or discuss the Lyon's Annexation impact fee program as a mandatory mitigation measure that must be implemented to fully mitigate these impacts. The failure of the DEIR to disclose this mandatory impact fee mitigation requirement for public comment at the Draft EIR stage is highly prejudicial and requires recirculation so the public can comment on how much those fees should be and the purposes for the fees.

The City's sudden proposal to drop unspecified, mandatory mitigation measures that were previously found feasible and adopted under CEQA to reduce the significant effects of the Lyon's Annexation also constitutes a violation of the procedural requirements for deleting previously adopted CEQA mitigation measures described by the Court of Appeal in *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342 (*Napa Citizens*). In the *Napa Citizens* case, the court announced several rules that agencies must observe when deciding whether to delete a previously adopted mitigation measure.

First, as a general rule governing the courts' consideration of a challenge to an agency decision to delete a previously adopted mitigation measure, the court stated that "the deference provided to governing bodies with respect to land use planning decisions must be tempered by the presumption that the governing body adopted the mitigation measure in the first place only after due investigation and consideration." (*Id.* at p. 359.)

Second, the court identified two specific requirements that must be followed if an agency is to legally delete a previously adopted mitigation measure, stating that "a governing body must state a *legitimate reason* for deleting an earlier adopted mitigation measure, and must support that statement of reason with substantial evidence." (*Id.* [emphasis added].)

Third, in fleshing out what it meant by the term "legitimate reason," the court stated: "The modified EIR also must address the decision to delete a mitigation measure. In other words, the measure cannot be deleted without a showing that it is *infeasible*." (*Id.* [emphasis added].)

Fourth, the court concluded its decision on this issue by stating: "If no legitimate reason for the deletion has been stated, or if the evidence does not support the governing body's finding, the land use plan, as modified by the deletion or deletions, is invalid and cannot be enforced." (*Id.*)

In this case, CEQA's procedural requirements for deleting mitigation measures have not, and cannot, be met for the simple reasons that (1) the City has failed to identify *which* of the Lyon's Annexation mitigation measures it intends to delete in the future (thus making it impossible to determine whether there is, in fact, any "legitimate reason" for deleting such the measure); and (2) the City has not presented objective evidence demonstrating that it is, in fact, "infeasible" to implement the undisclosed Lyon's Annexation mitigation measures that the City intends to delete.

Thank you for your attention to this matter.

Very truly yours,

Thomas N. Lippe

List of Exhibits

Exhibit 51: Letter from Dr. Klaas Kramer, dated September 22, 2009.

Exhibit 52: Expanded Initial Study #97-22 for Lyons Annexation to the City of Merced, dated September 1998.

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