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Date: July 30, 2024

To: Responsible Agencies and Trustee Agencies/ Interested Organizations and Individuals

Subject: Notice of Preparation of a Revised Environmental Impact Report for MoVal 2040: The Moreno Valley Comprehensive General Plan Update, Municipal Code and Zoning (including Zoning Atlas) Amendments, and Climate Action Plan

Lead Agency:

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The City of Moreno Valley ("City") as the Lead Agency under the California Environmental Quality Act ("CEQA") will prepare a Revised Environmental Impact Report ("EIR") for MoVal 2040 ("Project"). In accordance with Section 15082 of the CEQA Guidelines, the City has issued this Notice of Preparation ("NOP") to provide responsible and trustee agencies and interested parties with information describing the proposed Project and its potential environmental effects.

Due to the time limits mandated by State law, your response to this NOP must be sent at the earliest possible date, but no later than 30 days from the date of confirmed receipt of this NOP (the close of this NOP review period) or August 28, 2024, whichever is later.

Please send your response to City contact and address listed above. Please include the name, phone number, and address of a contact person in your response. If your agency or organization will be a responsible or trustee agency for this Project, please so indicate.

Project Title: MoVal 2040: The Moreno Valley Comprehensive General Plan Update, Municipal Code and Zoning (including Zoning Atlas) Amendments, and Climate Action Plan (PEN19-0240 GPA and PEN21-0020 CZ)

Location: MoVal 2040 and associated documents and approvals, will help guide the physical development and growth of the City within its current boundaries and its sphere of influence. The revised CAP will allow Moreno Valley to identify and mitigate greenhouse gas emissions within the same areas. A map showing the boundaries of both is attached as Exhibit 2.

PROJECT DESCRIPTION

In June 2021, the City Council of the City of Moreno Valley ("City Council") approved and adopted the City's 2040 General Plan Update ("2040 General Plan"), a Change of Zone and Municipal Code Update, and its Climate Action Plan ("CAP") and certified an EIR, State Clearinghouse No. 2020039022, as having been prepared in compliance with CEQA in connection with the approvals. A lawsuit entitled *Sierra Club v. The City of Moreno Valley*, Riverside Superior Court Case No. CVRI2103300, challenged the validity of the CAP and the EIR. In May 2024, the City Council set aside the 2021 approvals and certification, based on a March 2024 ruling and judgment of the court (the "Ruling"). A copy of the judgment, with the Ruling attached, is attached as Exhibit 1 to this Notice.

The Project, known as MoVal 2040, consists of the readoption of the 2040 General Plan and the Change of Zone (including an update to the Zoning Atlas) and Municipal Code Update, and the revision and adoption of the CAP.

PROBABLE ENVIRONMENTAL EFFECTS

In order to respond to the inadequacies identified in the Ruling, the Revised EIR will use a new baseline year, 2024, and analyze the potential effects of the 2040 General Plan, Municipal Code updates, the associated rezoning, and the revised CAP. The areas of analysis in the Revised EIR, identified in the Ruling, are the effects of the Project on air quality, energy and greenhouse gas emissions. Further, if necessary, the effects of the Project on noise and transportation will also be analyzed. Mitigation measures for any identified significant impacts will also be included.

The Revised EIR will contain only those portions of the EIR that were found to be inadequate in the Ruling along with any necessary revisions.

NOP COMMENT PERIOD

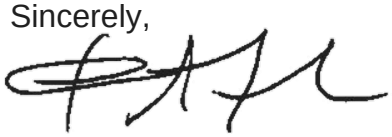
This NOP is subject to a minimum 30-day public review period per Public Resources Code Section 21080.4 and CEQA Guidelines Section 15082. During the public review period, public agencies, interested organizations, and individuals have the opportunity to comment on the proposed Project and identify those environmental issues that have the potential to be impacted by the Project and should be addressed further by the City of Moreno Valley in the Revised EIR.

SCOPING MEETING

In accordance with Section 21083.9(a)(2) of the Public Resources Code and CEQA Guidelines Section 15082(c), the City will hold a public scoping meeting, where agencies, organizations, and members of the public will receive a brief presentation on the Project. Although the primary purpose of the scoping meeting is to meet with representatives of involved agencies to assist the lead agency in determining the scope and content of the environmental information that responsible or trustee agencies may require, members of the public may be provided with an opportunity to submit brief oral comments at this scoping meeting not exceeding three minutes. However, members of the public and relevant agencies are requested to provide their comments in writing, via email or mail, to the contact address shown above. **The scoping meeting will be held on Wednesday, August 14, 2024, at 6:00 PM at the City Council Chambers within Moreno Valley City Hall, located at 14177 Frederick Street, Moreno Valley, California 92552**.

Please contact the Community Development Department, Planning Division at (951) 413-3206 or planningnotices@moval.org with any questions regarding this notice or the scoping meeting.

Sincerely,



Robert Flores
Planning Division Manager/Official

Enclosures:
Exhibit 1 – Ruling
Exhibit 2 – Planning Area

Exhibit 1: Ruling

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

SIERRA CLUB Petitioner, v. CITY OF MORENO VALLEY, *et al*, Respondents, PEOPLE OF THE STATE OF CALIFORNIA Plaintiff in Intervention.	FILED SUPERIOR COURT OF CALIFORNIA COUNTY OF RIVERSIDE MAR 05 2024 K. Rahlwes AA 1 MAR 06 2024 R

COUNSEL	DEPT. 3 DATE 03/05/24	CASE NUMBER: CVRI2103300
Edward Terry Schexnayder Abigail Adams Smith For Petitioner Sierra Club Michael Ryan Cobden Arthur Coon For Respondents City of Moreno Valley Omonigho Oiyemhonlan Scott Lichtig Attorney General of California For Plaintiff in Intervention		

STATEMENT OF DECISION RE HEARING ON PEREMPTORY WRIT OF MANDATE (CEQA)

Brief Statement of Ruling

The Court grants the Petition on the issues of inadequate baseline, air quality/climate changes (GHG emissions)/energy use analyses.

The Court denies the Petition on the issue of land use analysis.

Factual/Procedural Context:

Petitioner Sierra Club (Petitioner or Sierra Club) challenges Respondent City of Moreno Valley's and its City Council's (collectively City) 6/15/21 decision to approve the MoVal 2040 Project, which consists of the 2021 General Plan update (GPU) including a Housing Element Update, a Climate Action Plan (CAP), and associated zoning amendments, and to certify an Environmental Impact Report (EIR) for the Project, which provides for large increases in industrial and commercial development within the City.

The Project is intended to replace the existing 2006 General Plan (2006 GP) and its elements, and to establish "a planning and policy framework" through 2040. (see Administrative Record [AR] 866.) Petitioner asserts that "the land use element incorporates all of the projects that were under City review or have been adopted since 2006 (AR 393), and includes plans for three mixed-use 'centers' and additional mixed-use development along major transportation corridors." (AR 4102-4105.) The GPU "also changes the land use designations for some residential areas to high-density residential, commercial, and "business flex," which allows for commercial and light-industrial warehouse uses." (AR 103-105, 116, 875, 4106.)

Petitioner asserts that the City violated the California Environmental Quality Act (CEQA), and its Guidelines by failing to use a valid baseline, which effectively prejudiced the City's consideration of the Project's air quality, transportation, energy, and other impacts; and, by failing to adequately disclose or mitigate the significant environmental impacts on air quality, and greenhouse gas (GHG) emissions.

Factual Background

The City of Moreno Valley, where over 200,000 residents live, suffers from severe air pollution. The City is in the South Coast Air Basin (designated as in nonattainment of federal and state air quality standards), which has a severe pollution burden and other disadvantages. The last comprehensive General Plan update was adopted by the City in 2006. Since that time, the City has approved many new warehouse projects, including the 40+ million square foot (SF) World Logistics Center (one of the largest in the United States), which allow substantial GHG and diesel emissions in the City.

The GPU, CAP and zoning amendment released on 4/2/21 demonstrate significant new growth, including in locations adjacent to existing residential communities. (First Amended Petition [FAP] ¶ 25 ["business flex" zone].) Petitioner, Sierra Club, alleged the proposed GPU includes new land use designations that

dramatically increase "residential density in the largely-rural northeast Moreno Valley", and would exacerbate impacts there "by redesignating nearby areas for "highway/commercial" uses" increasing traffic and other impacts. Petitioner asserts that the EIR indicates that the Project would increase emissions, but then claims air quality and GHG emission impacts were less than significant and required no mitigation.

Procedural Background

The City began the Project in October of 2019. Between 2/9/20 and 4/9/20, the City circulated a Notice of Preparation of a Draft EIR for the Project. On 4/2/21, the City released the proposed GPU, CAP, and zoning amendment to the public along with the Draft EIR for a 45-day comment period. On 5/17/21, Sierra Club submitted extensive comments on the Draft EIR. (FAP ¶ 33.) In addition, other commenters noted that the City's proposed CAP was insufficient by failing to identify GHG reduction measures. (FAP ¶ 34.) On 5/24/21, the City released the Final EIR (EIR), which allegedly failed to address these comments, or to revise the analysis leaving the Project's key components unchanged. (FAP ¶ 35.) Thereafter, the Planning Commission was to consider the Final EIR on 5/27/21, but that meeting was delayed. (FAP ¶ 36.) The Project was considered and recommended for approval by the Planning Commission on 6/8/21. (AR 189, 224, 228.) On 6/15/21, and on 8/3/21, the City Council considered the Project, and despite a vacant seat (representing over 25% of City residents), and the errors identified by commenters, the City Council voted to approve the Project and certify the EIR. (AR 7, 139, 178.) On 6/17/21, the City filed a Notice of Determination for the Project. (AR 1-6.)

Petition

On 10/28/21, Petitioner, Sierra Club, filed its verified First Amended Petition for Writ of Mandate and Complaint for Declaratory Relief (FAP), alleging three causes of action: 1) violations of CEQA – Pub. Res. Code § 21000, *et. seq.*; State CEQA Guidelines; CCP §§ 1085, 1094.5); 2) violations of CEQA and the Moreno Valley Municipal Code (MVMC §§ 2.60.010-2.60.100); and 3) declaratory relief.

The Project

Prior to this Project, the City had been operating under the 2006 GP. Since 2006, the population in the City has increased by 25%. (AR 3131.) The City asserts that since the 2006 GP was adopted, there have been legislative updates, changes in economic conditions and technology, environmental conditions, and demographic shifts that warrant an update. (AR 3131, 3133.) New state law significantly changed the requirements for a Housing Element Update (HEU)[1] and the City's share of the

[1] The Legislature enacted the Housing Element Law, which requires local governments to adopt a "housing element" as a component of its GP. (Govt. Code § 65580, *et. seq.*; *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1183.) The Housing Element Law ensures that cities take part in the state housing goal, including providing "housing affordable to low- and moderate- income households." (Govt. Code §§ 65581(a), 65580(c).) The HEU of a GP must be reviewed and revised every five to eight years. (Govt. Code §§ 65583, 65588(b), (e).) It must also contain specific components, analyses, goals

Regional Housing Needs Allocation (RHNA.) (AR 848-849, 867, 875, 3133, 4091.)

The process for the developing the General Plan Update (GPU) began in 2016 with adoption of a strategic plan called "Momentum MoVal". (AR 849-850.) In 2019, the Project was called "MoVal 2040", and included four phases of development through three documents: the 2021 GPU, the CAP, and the HEU. (AR 851-852.) The City asserts that these three documents "represent the implementation of the vision for the City of Moreno Valley through 2040 that was articulated by residents, local businesses, property owners and other interested parties, the GP Advisory Committee, the Planning Commission, and the City Council during the outreach phase of the GPU." (AR 3159, 4091.)

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Sierra Club's Opening Brief

Sierra Club asserted that the City rushed to approve the 2021 GPU, without adequately addressing the public's environmental concerns; and that the City set public meetings at inconvenient times, which impaired the public's ability participate. Sierra Club argued that the EIR is deficient in the following respects: 1) the air pollution and energy use analyses fail to compare the Project's environmental impacts against *existing* conditions; instead, the impacts are compared to *assumed* impacts under the former GP, which understates the impacts from the present Project; 2) the air quality impacts are contrary to law and not supported by substantial evidence; 3) although GHG emissions will be substantially increased under the Project, the EIR has no *enforceable* mitigation measures (MMs) to reduce them; instead it relies on "reduction strategies" in the CAP that are voluntary and/or unfunded; 4) the energy use impacts analysis is legally inadequate; 5) the EIR does not consider the Project's land use changes that would allow new warehouses directly adjacent to homes in the Edgemont community, and other planned new development in the City; and 6) the City violated CEQA by not retaining all materials and public correspondence for the administrative record (AR) in this case.

Attorney General's Opening Brief

Intervenor, People of the State of California (People), represented by the Attorney General (AG) argued that by certifying the program EIR and approving the Project without proper environmental review, the City abused its discretion in violation of CEQA, and requests the Court declare that the Moreno Valley CAP does not comply with CEQA's tiering and streamlining requirements and cannot be used to streamline analysis of future projects' GHG emissions. The People argued that the City failed to fully disclose, analyze, and mitigate the Project's air quality impacts: 1) the EIR analysis that Project emissions are consistent with the 2016 Air Quality Management Plan (AQMP) is flawed and unsupported by substantial evidence; 2) the EIR failed to adequately analyze the Project's air quality impacts to sensitive receptors; 3) the EIR failed to analyze the Project's diesel particulate matter (DPM)

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and policies. (Govt. Code § 65583(a), (c).)

emissions and related impacts; 4) the EIR failed to identify and correlate the emissions to human health effects; and, 5) the EIR failed to mitigate the significant, adverse effects caused by the Project's emissions.

In addition, The People argued that the City's Climate Action Plan (CAP) is ineligible for tiering and streamlining environmental review of the GHG emission analysis for the development proposed in the project because it does not satisfy CEQA's tiering and streamlining requirements.

Combined Brief in Opposition

The City argued that the EIR used an existing conditions baseline of 2018, and compared those conditions to both the 2006 GP and buildout of the proposed 2021 GPU, which comparison was intended to explain to the public the choice between keeping the 2006 GP or adopting a new 2021 GPU. City also argues that Sierra Club failed to exhaust administrative remedies; that the City has discretion to choose methodologies; and that this Project involved a program level EIR (or Programmatic EIR), which is not held to the same standard as for project level EIRs.

The City also argued that comparing the buildout of the GPU with the existing 2006 GP was an appropriate method for applying the chosen thresholds of significance; that the EIR accurately described the existing baseline physical conditions; that the EIR properly compared buildouts of competing GPs against the 2018 baseline to establish significant impacts; and, that even if it was error to compare the buildouts of the existing GP and the GPU, that error was not prejudicial because the EIR provided data on existing air quality.

The City further argued that the air quality analysis is sufficient because: 1) the EIR properly analyzed Criteria Pollutant Thresholds (CPT) at a programmatic level and declined to speculate as to specific impacts of future site-specific projects; and, 2) the EIR correctly concluded that the Project is consistent with the AQMP. The City argues that the EIR properly addressed potential impacts on sensitive receptors; correctly disclosed climate impacts and adopted appropriate mitigation measures (MM) for a program-level EIR; correctly analyzed the Project's energy use impacts, and land use impacts for this type of program level EIR; that the CAP satisfies CEQA's tiering requirements; and, that there is no authority for invalidating an EIR where some emails could not be included in the AR because they were unintentionally deleted.

Oral Argument

The day before oral argument on 02/23/24, the Court posted a tentative ruling largely granting Petitioner's Writ with the exception of the Land Use Issues. After hearing oral argument from all parties, the Court took the matter under submission.

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Analysis

Administrative Record

The Administrative Record (AR) consists of just over 34,000 pages of documents, which was submitted on a USB drive on 5/10/22. Thereafter, on 7/29/22, Sierra Club filed a Notice of Lodgment of Supplemental Administrative Record, which supersedes the prior AR lodged in May of 2022. (see 7/29/22 Notice of Lodging of Supplemental Administrative Record.) The supplemental AR contains approximately 500 additional pages.

Request for Judicial Notice

Western States Petroleum Assn. v. Sup. Ct. (1995) 9 Cal.4th 559 is the primary authority on extra-record evidence and provides that such evidence is generally inadmissible. However, if the extra-record evidence does not directly contradict the agency's evidence, extra-record evidence is admissible " 'for background information ... or for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision.' " (*Id.* at 579.)

In support of the Combined Brief in Opposition (RB), the City requests judicial notice of certain documents: 1) Resolution No. 2022-81 (Moreno Valley Business Park) (Ex. "A"); 2) Resolution No. XXX (Brodiaea Commerce Center PEN17-0145) (Ex. "B"); 3) 2006 General Plan Final EIR (Ex. "C"); 4) California Air Pollution Control Officers Association (CAPCOA) Quantifying Greenhouse Gas Mitigation Measures (2010) (Ex. "D"). (see City's 11/6/23 Request for Judicial Notice [RJN].) Exhibits "C" and "D" were downloaded from online websites. (see RJN, Dec.Cobden ¶¶ 3-4.)

The City seeks judicial notice of these documents pursuant to Evid. Code § 452(b) ["[r]egulations and legislative enactments issued by or under the authority of ... any public entity in the United States,"], (c) ["[o]fficial acts of the legislative, executive, and judicial departments of ... any state of the United States"], and (h) ["[f]acts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute"].) The City argued that these documents are matters of public record, that are relevant to the issues raised in the Opposition and/or referenced in the subject EIR. The documents fit squarely within the cited portions of the Evidence Code, and there is no opposition to the RJN. Although the RJN itself does not state a specific purpose for the document, the City's brief references them as background information. To that extent, they are admissible. Thus, the Court shall take judicial notice of these documents.

In support of the Reply, Sierra Club requested judicial notice of: 1) excerpts from Mitigated Negative Declaration (MND) for the Moreno Valley Business Center Project (June 2022) (Ex. "1"); 2) excerpts from MND for the Cottonwood & Edgemont Project (Feb. 2023) (Ex. "2"); and, 3) Notice of Preparation of an EIR for Bay & Day Commerce Center Project (9/5/22) (Ex. "3".) (see Sierra Club's 12/18/23 RJN.) Sierra Club seeks judicial notice pursuant to Evid. Code § 452(c) and (h).

Sierra Club asserts that Ex. "1" is to show that the Moreno Valley Business Center consists of more than 150,000 square feet (SF) of warehousing space in proximity to residences in the Edgemont neighborhood and located in the GPU's new Business Flex zone. (see RJN, Ex. "1" at pp. 8, 18-21.) Ex. "2" is to show that the Cottonwood & Edgemont Project consists of nearly 100,000 SF of warehousing space close to residences in the Edgemont neighborhood. (*Id.* Ex. "2" at 2, 7, 13-16.) And, Ex. "3" shows that the Bay & Day Project consists of nearly 200,000 SF of warehousing space close to the Edgemont neighborhood. (*Id.* Ex. "3" at pp. 1-2, 4-7.)

Sierra Club argues that these documents demonstrate "that warehouse development was a plainly foreseeable consequence" of the GPU's Business Flex land use change in Edgemont, which is significant to correct the City's misleading statement that it is not possible to predict whether warehouses would be located in the new Business Flex zone in Edgemont.

Here, the documents are being used to directly contradict the City's position regarding potential land use in the Edgemont neighborhood. While the Project contemplates new warehouse development, which may be placed near residential areas in Edgemont, information about previously approved warehouses does not establish the City's statement was misleading. Thus, the Court denies judicial notice of these documents.

The EIR at issue

An agency may choose to begin CEQA review at the planning stage using one of the streamlining processes, which may then be followed by later actions or approvals. (Kostka & Zischke, Practice Under the CEQA (CEB 2023) § 10.3.) Among the types of CEQA streamlining processes are: 1) "tiering" EIRs, which cover general matters in broad EIRs for planning of policy level actions, and covering more project-specific matters in focused or site-specific EIRs or negative declarations (Pub. Res. Code ("PRC") §§ 21068, 21093; 14 Cal. Code of Regulations [CCR] ("CEQA Guidelines" or "Guidelines") § 15152); 2) program EIRs for a series of related actions that can be characterized as one large project (Guidelines §15168(a)); and, 3) combining the EIR for a city general plan, and the general plan itself into a single document (Guidelines §15166.) (Kostka & Zischke, *supra.* at § 10.2.) In some situations, more than one CEQA streamlining provision may apply. (*Ibid.*) In such cases, the lead agency has discretion to determine which provisions to use. (*Id.* citing Guidelines § 15152(h).)

City asserts that the subject EIR – the 2021 GPU – is a program-level EIR.[2] Program EIRs can be used: 1) to avoid multiple EIRs – this allows an agency "to characterize an overall program as the project that is proposed for approval", which "[i]f sufficiently comprehensive and specific", may allow the agency "to dispense with

[2] "[T]he title placed on an EIR is not necessarily significant in determining whether it is legally adequate. It is the substance of the EIR's analysis, not the label applied to it, that matters." (Kostka & Zischke, *supra.* at § 10.3 citing *Citizens for a Sustainable Treasure Island v. City & County of San Francisco* (2014) 227 Cal.App.4th 1036, 1051 [rejecting the argument that the EIR should have been described as a program EIR rather than as a project EIR.])

further environmental review of activities within the program that are adequately covered by the program EIR"; 2) to simplify later environmental review – this may be used "to address environmental impacts, mitigation measures, and alternatives that apply to the program as a whole to simplify later review for activities within the program"; and, 3) to consider broad programmatic issues – "to consider broad programmatic issues for related actions at an early state of the planning process." (*Id.* at § 10.14 citing *Center for Biological Diversity v. Department of Fish & Wildlife (CBD)* (2015) 234 Cal.App.4th 214, 233.)

Notably, "[t]he Guidelines do not specify the level of analysis required in a program EIR. All EIRs must cover the same elements, but the level of specificity is determined by the nature of the underlying activity covered by the EIR." (*Id.* citing Guidelines § 15146; *San Franciscans for Livable Neighborhoods v. City & County of San Francisco* (2018) 26 Cal.App.5th 596, 608.) "A program EIR that is prepared to support approval of an overall program, and to simplify later environmental review as activities within the program are considered, may focus on program-wide issues and leave to later EIRs detailed analysis of issues specific to particular program components." (*Id.* citing Guidelines § 15168(b); *City of Hayward v. Board of Trustees of Cal. State Univ.* (2015) 242 Cal.App.4th 833, 849; *Town of Atherton v. California High-Speed Rail Auth.* (2014) 228 Cal.App.4th 314, 345.) "By contrast, a program EIR that is designed to allow approval activities within the program without the need for further CEQA review should provide description of the activities that would implement the program and a specific and comprehensive evaluation of the program's foreseeable environmental impacts, so that later activities can be approved on the basis of the program EIR." (*Id.* citing Guidelines § 15168(c)(1), (2), (5); *CBD, supra.* 234 Cal.App.4th 214, 237.) These two approaches may be combined. (*Id.* citing, e.g., *Mission Bay Alliance v. Office of Community Inv. & Infrastructure* (2016) 6 Cal.App.5th 160, 172.)

Similar to any EIR, "a program EIR must provide decision-makers with "sufficient analysis to intelligently consider the environmental consequences of the project," and "designating the EIR as a program EIR in itself does not decrease the level of analysis otherwise required." (*Id.* citing *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts (SANDAG).* (2017) 17 Cal.App.5th 413, 426.) "A lead agency preparing a program EIR must disclose what it reasonably can, and any determinations that it is not feasible to provide specific information must be supported by substantial evidence." (*Id.* citing *SANDAG, supra.* at 440.)

If the agency determines "that the activity's environmental effects were examined in the program EIR and that a subsequent EIR would not be required", the City "may approve the activity as being within the scope of the project covered by the program EIR." (*Id.* at § 10.16.) However, the proposed activity cannot be approved based on a program EIR "if its impacts were not evaluated in the EIR." (*Id.* citing *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1164; see also, *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1321 [activity cannot be approved based on a program EIR if is it not "within the scope of the project, program,

or plan described in the program EIR."])

Standards of Review

Generally, a CEQA matter is subject to judicial review pursuant to Public Resources Code § 21168.5, which provides that judicial review is limited "only to whether there is a prejudicial abuse of discretion." This is established either "if the agency did not proceed in a manner required by law" or "if the agency's decision is not supported by substantial evidence." (Pub. Res. Code, § 21168.5; *Vineyard Area Citizens v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.)

In order to decide the proper standard of review for the legal adequacy of an EIR, the court must first find the nature of the alleged defect and then determine whether the claim is one for improper procedure or a dispute over the facts. (*Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 949.) Courts independently review an EIR's compliance with procedural requirements, but a review of factual findings is accomplished under the substantial evidence test. (*Id.* at 954.) Where petitioner challenges an EIR on the ground it omitted essential information, this is a procedural question that is also reviewed de novo. (*Banning Ranch Conservancy v. City of Newport Beach (Banning Ranch)* (2017) 2 Cal.5th 918, 935.)

Sierra Club and the AG assert that that courts apply a "dual standard of review" to CEQA claims. Thus, the applicable standard of review depends on the particular issue presented. For instance, the AG argues that the analysis that Project emissions are consistent with the regional air quality plan is reviewed under the highly deferential substantial evidence test. (People's Opening Brief [AG's OB], pp. 11:28-12:2.) The substantial evidence standard applies to challenges to "conclusions, findings and determinations" and "to the scope of an EIR's analysis of a topic, the methodology used for studying an impact, and the reliability or accuracy of the data" that the EIR relied on, since "those challenges involve factual questions." (*City of Hayward v. Board of Trustees of Cal. State Univ.* (2015) 242 Cal.App.4th 833, 839.) The reviewing court does not undertake a "scientific critique" of the EIR's analysis and does not pass on the validity of an EIR's environmental conclusions. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376.) Instead, the reviewing court considers the evidence as a whole to determine whether substantial evidence exists to support the analysis in the EIR. (*Id.* at 408.)

However, where the EIR is challenged because it failed to adequately analyze an issue (e.g., air quality impacts on sensitive receptors), they are reviewed de novo. (*Banning Ranch, supra.*) The City acknowledges the same standards of review. The City states: "[a]lleged legal error, in the form of failure to comply with CEQA's procedural or substantive requirements, is reviewed de novo, but all factual determinations are reviewed according to the substantial evidence standard." (City's Responding Brief [RB] p. 13:28-14:2.) These standards of review are addressed, in context, below.

Exhaustion of Administrative Remedies

Courts cannot consider an issue that was not first presented to the public agency during the administrative process. (PRC § 21177.) "'The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review.'" (*North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd.* (2013) 216 Cal.App.4th 614, 623 [Citations omitted].) Petitioner is required to prove exhaustion by citation to the record. (*Id.* at 624.) This rule is jurisdictional, and is binding on all courts. (*Clews Land & Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161, 184.) The City argues that many of the issues raised by Sierra Club were not first raised administratively. This issue is discussed below in the context of each section, as applicable.[3]

I. BASELINE (ENVIRONMENTAL SETTING)

The EIR's Baseline is Legally Inadequate

Sierra Club argues that one of the most glaring deficiencies in the EIR is that the air pollution and energy use analyses fail to compare the respective impacts with *existing* conditions (baseline), which understates the potential environmental impacts created by the Project.

"An EIR must include a description of the physical environmental conditions in the vicinity of the project ... as they exist at the time the notice of preparation is published or, if no notice of preparation is published, at the time the environmental analysis is commenced." (Guidelines §15125(a), (a)(1); *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist. (CBE)* (2010) 48 Cal.4th 310, 320.) The EIR "must delineate environmental conditions prevailing absent the project, defining a 'baseline' against which predicted effects can be described and quantified." (*Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth. (Neighbors)* (2013) 57 Cal.4th 439, 447.) Lead agencies have significant discretion in determining the appropriate "existing conditions" baseline. (*Id.* at 453.) The EIR's description of the existing environmental setting or baseline should be comprehensive enough so that the project's significant impacts can "be considered in the full environmental context." (Guidelines §15125(a).) The assessment of project impacts should normally be limited to changes in those existing physical conditions. (Guidelines § 15126.2(a); see *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 849.) While the description is important to set the starting point for the impact analysis, it is not required to be as comprehensive and detailed as the impact analysis itself. (Guidelines §15125(a),(c).)

The EIR's analysis should use a realistic baseline. (*CBE, supra.* at 328.) "An

[3] As to the AG, the rule of exhaustion is inapplicable. (PRC § 21177(d).) The City acknowledges this, but argues that it applies in full to Sierra Club, which has the burden to demonstrate compliance for each argument and cited *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536. However, the cited portion of this case does not support the argument. And, even though not relevant here, the City also fails to consider that any other member of the public could have raised the issue.

agency that elects not to provide an analysis based on conditions existing at the time the environmental analysis began must, however, provide an adequate justification for doing so." (*Id.* citing, *Poet, LLC v. State Air Resource Bd.* (2017) 12 Cal.App.5th 52, 80.)

A lead agency may use two baselines to analyze an impact, one defined by existing conditions and another defined by expected future conditions, as long as the description of future conditions is supported by reliable predictions based on substantial evidence in the record." (*Id.* at § 12.19 citing Guidelines § 15125(a)(1).) "A justification for use of a future conditions baseline is required only if the lead agency substitutes a "future conditions" analysis for an "existing conditions" analysis; no justification is required if the EIR analyzes impacts against both an existing conditions baseline and a future conditions baseline." (*Id.* at § 12.25 citing, *Neighbors, supra.* 57 Cal.4th 439, 454.)

Where an EIR compares "a proposed project with an existing plan, the EIR must examine existing conditions at the time of the notice of preparation as well as future conditions envisioned in the plan." (Guidelines § 15125(e).) An EIR must focus on impacts on the environment from the project as opposed to hypothetical situations. (Guidelines § 15126.2(a)(3); see *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.) "An EIR that fails to consider the project's impacts of the existing environment, and limits its analysis to a comparison with future development that would be allowed by existing zoning and other land use plans, is legally inadequate." (Kostka & Zischke, *supra.* at § 12.19 citing *Woodward Park HOA v. City of Fresno* (2007) 150 Cal.App.4th 683, 707 ["EIR for planning and zoning changes for new commercial development rejected because EIR compared proposed development only to hypothetical office park that could be developed under preexisting plan but did not compare proposed development with existing physical conditions on site"]; *Environmental Planning & Info. Council v. County of El Dorado (EPIC)* (1982) 131 Cal.App.3d 350 ["EIR on proposed new general plan must address existing level of physical development as a baseline for impact analysis, not existing plan, even though new plan would allow less growth than existing plan."])

Air Quality Baseline

Sierra Club argues that the City used the same unlawful approach invalidated in *Woodward* and *EPIC.* It is acknowledged that compared to existing conditions, the Project will substantially increase emissions of certain air pollutants: PM_{10}, $PM_{2.5}$, and Reactive Organic Gas (ROG). (AR 934.) These emissions will increase by 20%, 10%, and 55%, respectively. (*Ibid.*) But this comparison was not used to determine if the Project's air quality impacts were significant. Instead, the EIR compared projected emissions by buildout in the 2021 GPU to emissions by buildout of the existing 2006 GP. (AR 937.) The EIR then concluded air quality impacts were less than significant. (AR 934, 938.) This hypothetical comparison avoids full disclosure of the air quality impacts. (*CBE,* 48 Cal.4th at 322 quoting *EPIC,* 131 Cal.App.3d at 359.)

Energy Use Baseline

As to energy use impacts, Sierra Club argues that the analysis suffers from the same flaw. The EIR sets forth existing transportation- and building-related energy use in the Planning Area. (AR 1039-1040.) It shows daily vehicle miles traveled (VMT) would increase by almost 44% compared to existing conditions. (AR 1039, 1890 [from 3.1 million miles to 4.5 million miles.]) It also shows building electricity consumption would more than double. (AR 1040 [from 803,725,709 kWh to 1,695,632,252 kWh.]) The EIR then concludes less than significant impacts because it solely compared the projected increases to *theoretical* buildout under the 2006 GP. (AR 1039, 1040.)

While the City responded to public comments, and indeed repeated said arguments during the hearing, indicating there was a comparison to both existing conditions and the 2006 GP, the Court finds an insufficient comparison occurred. (see AR 934, 938; 1039-1040.) The EIR does not use existing conditions to determine whether air quality and energy use impacts are significant. Instead, existing conditions were merely stated, not analyzed. (*Ibid;* see *EPIC, supra.* at 358-359; *Woodward Park, supra.* at 710.)

Exhaustion

Returning briefly to the issue of exhaustion, the City's position on the baseline issue begins with its claim that Sierra Club failed to raise this issue during the review and comment period so, it never had a chance to address it. The City then concludes that Sierra Club is jurisdictionally barred for failure to exhaust administrative remedies. (*Stop Syar Expansion v. County of Napa* (2021) 63 Cal.App.5th 444, 453.) The City adds that Sierra Club also seems to be arguing that the EIR did not use a correct threshold of significance, which was also not raised below. (RB, p. 21:6-8.)

The Court does not find the City's argument persuasive. As noted above, PRC § 21177 does not apply to the AG, who joined and fully incorporated Sierra Club's argument that the EIR relies on a legally inadequate baseline. (SC's OB p. 10, fn. 2.) More to the point, however, exhaustion can be achieved where any member of the public "fairly apprises" the City of the issue. (see *Save the Hill Group v. City of Livermore* (2022) 76 Cal.App.5th 1092, 1104-1105.) Moreover, Sierra Club persuasively points out that the Court should be skeptical of this defense in light of the fact that "the City has ***admitted*** to destroying documents, including communications from the public, that could form the basis for exhaustion." (SC's Reply p. 7:19-20; see also, section VI below.) Finally, Sierra Club raised the baseline issue thereby satisfying the exhaustion requirements. (see AR 5991, 9785.)

Baseline

The City argued that it complied with CEQA by describing existing environmental conditions "using 2018 as an existing-conditions baseline year" and compared the baseline year conditions to conditions under both the 2006 GP buildout and the 2021 GPU buildout. (RB, p. 7:19, 22-24; see also, AR 930, 934, 1070, 1556.) The City claims that to determine which impacts were significant, the EIR chose to

compare changed conditions from the Project to changes that would have occurred without the Project (impacts from buildout of the existing 2006 GP) and then analyzes consistency of the Project's impacts to the applicable air quality plan. The City argued that this approach is authorized by CEQA (Guidelines § 15125(e)), and that it states the actual impact of the Project. Indeed, the City asserted that its choice was between the 2006 GP and the 2021 GPU (collectively GPs). It was not between the 2018 baseline and adoption of a GPU. As a result, the City concluded it was necessary to "compare apples to apples" (the existing 2006 GP to the 2021 GPU.)

To this point, the City has made several arguments both in its written oppositions as well as at oral argument. The City argued that the EIR examined and described the existing baseline physical conditions. The City asserted that there is a detailed analysis of existing air quality conditions, which "describes multiple monitoring station measurements for air quality indicators from 2015 through 2019." (RB, p. 20:11-12; see AR 921-923, Table 4.3-1.) The City moreover claimed that existing conditions were intended to be compared to both GPs. (AR 930-931.) For instance, the EIR asserts that vehicle traffic is the main source of emissions in the Planning Area. (AR 931.) As to VMT (vehicle miles traveled) the existing conditions (2018) are stated in the EIR alongside the two GPs. (AR 931, 934, Table 4.3-4.) However, while the City's citations to the record indicate that the 2018 existing conditions were stated in the EIR, the comparison was made between the two GPs, not between the 2018 baseline and each GP. (AR 931.) Based on this comparison, the EIR then concluded that the 2021 GPU would have less than significant emissions impacts because the buildout of the 2021 GPU is estimated to produce less emissions than the existing 2006 GP. (AR 930, 934.)

The City asserted the same approach was used for climate change impacts (GHG emissions) using the CAP. (AR 1070.) The City added that the CAP also provides the baseline information. (AR 4283; see also 4284-4285.) Then, the City asserted that the CAP's Business As Usual (BAU) discussion shows the comparison between the 2018 conditions as compared to both GPs. (AR 4294-4298; 4298-4300.) The CAP states that "[t]he BAU forecast assumes the 2006 General Plan land use and circulation system, as amended through 2018, and estimates emissions through the year 2040 ...." (AR 4283, 4294 [same].) It also states: "The emissions inventory is calculated for the year 2018, which is the baseline year for existing land use buildout and vehicle miles traveled." (AR 4283; see also, AR 4295 [e.g., "This is estimated at 1.5 percent per year through 2040, based on 2040 buildout of the 2006 General Plan land use map, as amended through 2018."]) Significantly, there is no direct comparison between the 2018 baseline and each GP, which establishes that the City used the same approach - comparing the two GPs against each other. Thus, the same approach used for air quality is also used for GHG emissions.

The City argued that comparing the buildouts of the two GPs against the 2018 baseline was proper for purposes of determining significant impacts. The City asserts impacts were evaluated by establishing four thresholds of significance including consistency with the A QMP. (AR 931.) Under the AQMP, the City asserted the

EIR evaluated two criteria: 1) whether the project would exceed the assumptions in the AQMP; and, 2) whether the project results in an increase in the frequency or severity of existing air quality violations, causes or contributes to new violations, or delays timeline attainment of air quality standards. (AR 933.) The City asserted that the AQMP assumes land use designations and buildout projections for the 2006 GP buildout and "pipeline" projects through 2016. (AR 933, 391-395.) The City then argued that because the AQMP makes these assumptions, consistency can only be measured by comparing the two GPs, which "is simply a function of how the AQMP is prepared and used." (AR 8794.137.) The conclusion reached is that there will not be any significant impact because under the 2021 GPU the increase is less than projected under the 2006 GP. But, this is not a comparison to 2018 baseline conditions; it is a comparison between GP buildouts.

Notably, there is no dispute that the City has discretion to select the methodology to be used, which is reviewed under the substantial evidence test. (Guidelines § 15064.4(b), (c); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198; *Tiburon Open Space Committee v. County of Marin* (2022) 78 Cal.App.5th 700, 728; *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068; *Lotus v. Dept. of Transp.* (2014) 223 Cal.App.4th 645, 655, fn. 7 ["The standard of significance applicable in any instance is a matter of discretion exercised by the public agency depending on the nature of the area affected."]; *Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 192.) The City also has authority to use future conditions as the sole baseline if using existing conditions would be misleading or lack informative value so long as that baseline is supported by substantial evidence. (CEQA Guidelines § 15125.) As an example, the City cites to *Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, 240, where the project required a Conditional Use Permit (CUP) to expand mining operations. The County chose to evaluate the potential increase in traffic, caused by the project, by comparison to the maximum potential traffic under existing conditions, which comparison was upheld on appeal. (*Id.* at 242-243.) There, the Court determined that to assume relatively low traffic would continue into the future was unrealistic. (*Id.* at 243.) Then, the City argues that the same is true in this case. However, this is a different argument from claiming that existing (2018) conditions *were* evaluated. Here, the City claims it is unreasonable to assume growth is static and would not continue to increase under the 2006 GP if the 2021 GPU were not adopted. The City argues that the two GP comparison more realistically presents the actual choice that needs to be made – which GP is in effect for the future.

The problem with the City's arguments is that the EIR must compare the Project's impacts against the existing conditions, and ***use*** that comparison to evaluate whether the Project's impacts are significant. (*EPIC, supra.* 131 Cal.App.3d 350, 357-358.) Much of what the City argued is that they described the existing conditions; but it is not enough to just describe the existing conditions without evaluating whether a project's changes are significant. (see *CBE* 48 Cal.4th 310, 320-321.) Sierra Club asserts that, contrary to the City's position, this rule applies to specific projects

as well as planning-level projects like a GP. (see *EPIC, supra.* at 357-358; see also, *Cleveland Nat'l Forest Found. v. San Diego Assn. of Governments (SANDAG)* (2017) 17 Cal.App.5th 413, 426.)

The Court notes that Sierra Club is not arguing that the Project (e.g., 2021 GPU) should be evaluated *only* against existing conditions; it can also be evaluated with the future conditions in the existing plan (e.g., 2006 GP.) (*Woodward Park, supra.* 150 Cal.App.4th at 707.) The problem here is that the EIR did not evaluate the air quality and energy impacts of either GP *as against the existing conditions.* (*EPIC, supra.*) Importantly, an agency has discretion not to use an existing-conditions baseline *only* where a project has "unusual aspects" that would make a comparison to existing conditions misleading or uninformative. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 451-454.) In this case, no such determination was made (that *using* an existing-conditions baseline would be misleading or uninformative.) Moreover, Sierra Club points out that the City's position was rejected by the Supreme Court. (*Id.* at 461-462 [holding that a project's long-term impacts are "a characteristic of the ***project in operation,*** not a characteristic of the ***environmental baseline***" and cannot justify not performing an existing-conditions analysis.]) Here, as pointed out by Sierra Club, that using an existing-conditions analysis will be informative in this context, and not misleading.

Sierra Club further demonstrates that the City's argument concerning thresholds of significance conflates a baseline with a threshold of significance, both of which are required, but have different purposes. Baseline of existing conditions is what the project's effects are compared to. (Guidelines § 15125(a).) The threshold of significance is the "level of a particular environmental effect" showing what changes are significant, and those that are not. (Guidelines § 15064.7(a).) Notably, Sierra Club did not challenge the City's choice of air quality thresholds. The challenge is to the fact that the City identified the thresholds, but then did not use them to establish whether the Project's impacts to existing conditions were significant. (*EPIC, supra.* at 357-359.) Sierra Club also asserts that the EIR does not evaluate the Project's energy use impacts against existing conditions, which assertion is undisputed.

Lastly, the City argued that even if its approach was in error, it was not prejudicial because the EIR provided data on existing air quality. The City cites to *Cleveland Nat'l Forest Found. v. San Diego Assn. of Governments (SANDAG)* (2017) 3 Cal.5th 497, 516, for the proposition that where an EIR presents the required information so that the public can easily make their own comparison, the EIR is not required to do so "just for the sake of form." The City argues that even if it was required to use 2018 data for the baseline to measure impacts against, any error is not prejudicial because the 2018 data was presented alongside the projected buildout data for the two GPs. (see AR 930-931; 934; 1070; 4283-4285; 4294-4300; 4299.) However, there is no easy comparison to be made in this case. While the data is stated in the EIR, it is ignored in the analysis itself.

In other words, critical analysis has been omitted – a procedural error, which is presumptively prejudicial. (*Martis Camp Community Assn. v. County of Placer*

(2020) 53 Cal.App.5th 569, 606-607.) Sierra Club also points out that *SANDAG* is not to the contrary because there, the project impacts were compared against existing conditions. (*SANDAG, supra.* at 510, 515-516.) The EIR's failure to use the existing conditions as the baseline prevented all readers from understanding the Project's impacts and the significance so they could be mitigated, reduced or avoided (e.g., by alternatives.)

In sum, "[a]n agency that elects not to provide an analysis based on conditions existing at the time the environmental analysis began must, however, provide an adequate justification for doing so." (*Id.* citing, *Poet, LLC v. State Air Resource Bd.* (2017) 12 Cal.App.5th 52, 80.) The City has not sufficiently justified its failure to actually consider existing conditions as to air quality and energy use. Therefore, the Petition is granted on the issue of the City's use of an improper baseline.

II. AIR QUALITY

The EIR's Conclusions Regarding Air Quality Impacts are Contrary to Law and Unsupported by Substantial Evidence

The Applied Thresholds of Significance Obscures Substantial Evidence of Potentially Significant Air Quality Impacts

Sierra Club asserted that the EIR applies two thresholds of significance to conclude that the Project's air quality impacts are less than significant, which thresholds require an assessment of whether the Project will (1) "[r]esult in a cumulatively considerable net increase of any criteria pollutant for which the project region is [in] nonattainment" (the Criteria Pollutant Threshold or CPT) or (2) "[c]onflict with or obstruct implementation of the applicable air quality plan (Plan-Consistency Threshold or PCT). (AR 931.) As to the first assessment, Sierra Club argues that there is substantial evidence on the face of the record that the Project will cause a net increase in nonattainment criteria pollutants that will significantly impact air quality. (AR 921-922 [nonattainment]; 8794.34; Table 4.3-4 [AR 934].) Specifically, there will be substantial emissions of PM_{10}, $PM_{2.5}$, and ROGs, which are precursors for ground-level ozone. (AR 934; see *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3rd 692, 718 [even relatively small amounts of ozone precursor emissions could be significant "in light of the serious nature of the ozone problems in this air basin"].)

However, the EIR concludes there would be no cumulatively considerable net increase in any criteria pollutant so, air quality impacts would be less than significant. (AR 938.) This conclusion is based on evaluating Project emissions only against buildout of the 2006 GP. But, this comparison fails to consider substantial evidence in the record showing the emissions are significant. (see *East Sacramento, supra.* 5 Cal.App.5th at 303; see also, *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109.) Sierra Club also argued that the City claims GPs are evaluated for consistency with the local air quality plan, but consistency is evaluated under the separate PCT, but since the CPT was also adopted, the EIR was required to evaluate both thresholds.

In response, the City argued both were discussed. As to the CPT (Criteria Pollutant Threshold), the EIR provides a hypothetical construction project to model how future projects could be developed in the future. (AR 822; 934-938.) But the EIR found that CPT analysis was too speculative at the program-level, and is best left for specific projects. (AR 936.) The City claims this is an authorized approach. (Guidelines § 15145; see *Atherton v. Board of Supervisors* (1983) 146 Cal.App.3d 346, 351; see also *Residents Ad Hoc Stadium Com. v. Board of Trustees* (1979) 89 Cal.App.3d 274, 286; *Marin Mun. Water Dist. V. Kg Land Cal. Corp.* (1991) 235 Cal.App.3d 1652, 1662.) The City argues that the EIR was in compliance with CEQA by analyzing impacts in general terms, and deferring project-level analysis to subsequent project-level EIRs. (*In re Bay-Delta* (2008) 43 Cal.4th 1143, 1172; see also, *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 342.)

Sierra Club replied that as to the CPT, the EIR shows the Project buildout will cause substantial, daily increases in emissions of PM_{10} by 21%, $PM_{2.5}$ by 10% and ROGs by 54%. (AR 930-931, 934.) But the EIR does not determine whether the Project's cumulative increases are significant under the CPT even though CEQA requires it. (see *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 840-842.)

As to the City's argument that the impacts under the CPT are too speculative in a program-level EIR, the subject EIR states otherwise. (AR 934.) Sierra Club correctly asserts that the anticipated increases were calculated, but not whether they were significant. The City failed to apply the CPT at all even though it chose this metric to evaluate significance, which is unlawful. (*East Sacramento, supra.* at 5 Cal.App.5th 281, 303 [an EIR cannot apply a threshold of significance in a manner that "foreclose[s] the consideration of substantial evidence tending to show the environmental effect to which the threshold related might be significant."]; see also, *Amador Waterways, supra.* at 116 Cal.App.4th at 1109 [same].)

The Court finds that while the City tries to distinguish these cases, they relate to an EIR improperly using stated significance thresholds to ignore evidence that impacts could be significant. (*East Sacramento, supra.* at 287; *Amador Waterways, supra.* at 1103.) Sierra Club asserts that the City's cited cases do not compel a different result. (see *In re Bay-Delta Programmatic EIR Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1156, 1170-1171; *Town of Atherton, supra.* 228 Cal.App.4th 314, 346.) While some analysis may be deferred when project details are uncertain, there is no uncertainty here. Since the Project's cumulative, program-level emissions, were disclosed, the EIR should evaluate them under the CPT.

The Explanation of Consistency with the Air Quality Plan is Legally Inadequate and Unsupported by Substantial Evidence [SC]

Sierra Club argues that the EIR's PCT (Plan Consistency Threshold) analysis violates CEQA by omitting details that would allow non-preparers of the EIR to understand the issues created by the Project. (see *Sierra Club v. County of Fresno*

(2018) 6 Cal.5th 502, 510.) Sierra Club asserts that the EIR cannot show how the 2021 GPU (which expands warehouse spaces approved since 2006), remains consistent with the 2016 AQMP.

Since the 2006 GP was adopted, the City has considered over 50 million SF of industrial warehousing and commercial space, which is incorporated into the 2021 GPU along with further commercial and industrial development. (AR 5994, 393, and 4095.) However, Sierra Club argues that the City claims the 2016 RTP/SCS relies on land use amendments approved since adoption of the 2006 GP so, all growth under the 2021 GPU was incorporated into the AQMP's assumptions. (AR 391.) Sierra Club argues the City's assertion on this point is false because while some warehouse projects were incorporated into the 2021 GPU, some were planned after the SCAG published the RTP/SCS in 2016. (see AR 5994 [two projects approved in 2017 and 2021].) Thus, Sierra Club concludes there is no evidence in the record that the RTP/SCS or the AQMP considered the City's later growth after July of 2015; that there is no evidence of what projects were included in the 2016 RTP/SCS; that there is no evidence that the AQMP accounts for all planned growth since 2006. Sierra Club adds that failing to include sufficient detail of specific projects in the AQMP's growth assumptions shows the EIR's conclusion of consistency with the AQMP is not supported by substantial evidence. (see *East Sacramento, supra.* at 300.)

The City attempted to justify its approach by asserting that the two missing projects are relatively small (less than 1% of warehouse projects), and include conditions of approval for compliance with regional air quality regulations. And, the City asserted that the AQMP accounts for the WLC (World Logistics Center), which accounts for 80% of the warehouse projects approved since the 2006 GP was adopted. (AR 393-394.) The City concluded that at the time of preparation, the list of projects in the AQMP included all but, the two minor warehouses described above. However, this argument does not sufficiently counter Sierra Club's position. To the extent that the 2016 AQMP does not contain data after July of 2015, the consistency analysis is incomplete. Sierra Club points out that the record does not contain a list of the projects that the 2016 AQMP *actually* includes.

Thus, the Court finds that EIR's statement that the 2016 AQMP accounts for the growth expected under the 2021 GPU omits critical data that should be included in the PCT analysis. Moreover, the finding that impacts would be less than significant due to the purported consistency with the 2016 AQMP is not supported by substantial evidence. (AR 933-934; see also, AR 391, 393, 395, 888, 932-935.)

City Failed to Fully Disclose, Analyze, and Mitigate the AQ Impacts (AG)

Similar to Sierra Club, the AG argued that the EIR obscures the Project's damaging effects on the City's air quality by claiming there will not be a detrimental effect due to consistency with the regional air quality plan. (AR 933-934, 944.) The AG adds that the EIR indicates that Project emissions do not conflict with the AQMP because there will be fewer emissions than estimated in the 2006 GP. (AR 933-934.) But, the AG argued that neither the record nor the law supports these conclusions.

Project Emissions are Significant Because They Conflict with the AQMP [AG]

The AG acknowledges that one of the four thresholds evaluating the Project's impacts is whether Project emissions will conflict with the 2016 AQMP. (AR 931.) The EIR compared Project emissions against theoretical buildout of the 2006 GP, and concluded there was no conflict with the AQMP because the Project will generate less emissions that the 2006 GP. (AR 933-934.) However, similar to Sierra Club's position, this plan-to-plan comparison is not permitted under CEQA. (CEQA Guidelines §15125(e); see *League to Save Lake Tahoe Mountain etc. v. County of Placer* (2022) 75 Cal.App.5th 63, 152; see also, *EPIC, supra.* at 358; *Christward Ministry v. Sup. Ct.* (1986) 184 Cal.App.3d 180, 190-191; *City of Carmel-By-The-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246-247; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1416 [rejecting arguments "that a project's effects *cannot* be significant as long as they are *not* greater than those deemed acceptable in a general plan"] (emphasis in the original).)

As to Project consistency with the AQMP, the AG argues that the analysis is similarly flawed by making the same type of illusory comparison. (AR 921-923.) In addition, the AG points to other evidence in the record indicating that Project emissions will conflict with the AQMP (e.g., if several projects are constructed simultaneously or overlap in time.) (AR 933, 935-936.)

The EIR states that operational emissions "would far exceed" daily emission thresholds, but then concludes that measure is not for program-level analysis. (AR 936.) But, the EIR finds that the Project would not conflict with the AQMP; since operational emissions would be less under the 2021 GPU than under the 2006 GP, the Project would not result in significant impacts. (AR 938.) Nor would the operational emissions have a cumulatively considerable net increase so, impacts would be less than significant. (AR 946.) The program-level analysis is defective due to the comparison to the 2006 GP. The AG points out that adding Project emissions in the City's nonattainment area will create serious air quality violations that will delay attainment of air quality standards, which will conflict with the AQMP. (AR 933; see *Banning Ranch, supra.* at 2 Cal.5th 918, 938-939.) The AG adds that while the City adopted the 2016 AQMP, it did not evaluate Project emissions using it; the City did not engage with the content in the 2016 AQMP or use the conformance criteria to assess the significance of the emissions on air quality. (see *Lotus, supra.* 223 Cal.App.4th at 653-658.)

The AG argued that the City treats the 2006 GP as a "proxy" for the AQMP significance threshold, which violates CEQA because: 1) the City did not adopt the 2006 GP as an air quality significance threshold for the Project, and *Fairview Neighbors, supra.* at 70 Cal.App.4th 242-243, does not support adopting the AQMP as a significance threshold, and then using a different metric (buildout under the 2006 GP) to analyze air quality impacts; 2) there is no reasonable basis for the City to treat the 2006 GP as a substitute for the 2016 AQMP as each has a different purpose; the record lacks substantial evidence to support that these documents are

interchangeable; 3) using buildout of the 2006 GP to measure the significance of the Project's emissions does not provide an accurate depiction of the nature and magnitude of the Project's effect on the City's air quality (*EPIC, supra.* at 131 Cal.App.3d 350, 355-358); and, 4) the inclusion of the 2018 baseline figures does not cure the error in the baseline analysis.

The EIR's finding that the Project's emissions are less than significant is illusory when considering the evidence in the record that demonstrates significantly increased emissions.

EIR Lacks Analysis and Mitigation of Impacts to Sensitive Receptors

The AG argued that another threshold is to evaluate whether the Project emissions would expose "sensitive receptors to substantial pollutant concentrations. (AR 931.) If so, mitigation measures are required. (Guidelines § 15126.4(a)(2).) Sensitive receptors are "children, pregnant women, the elderly, and communities already experiencing high levels of air pollution and related diseases." (*SANDAG, supra.* at 438.) The EIR should define sensitive receptors and describe "substantial concentrations of pollution." (*Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1390.) The analysis in the EIR also lacks "a reasoned estimate of the number and location of sensitive receptors." (*SANDAG, supra.* at 439-440.)

The AG asserted that the EIR failed to perform the sensitive receptor analysis, and then concluded no significant adverse impact on air quality. (AR 939-940, 942.) The proposed land uses include industrial and commercial development in western Moreno Valley. (AR 875; 940; 1127; 1129; 1139-1141.) The Project will place more warehouses and distribution centers in that area, which will affect sensitive receptors, but they were not considered nor mitigated. (AR 402-403, 31122, 5993-5994.) The City deferred analysis and mitigation for future proposed individual projects in violation of CEQA. (AR 937, 940, 942, 948, 937-938, 944-945; Guidelines § 15144; *SANDAG, supra.* at 438-440.)

In response, the City asserted that potential impacts on sensitive receptors were discussed in the EIR, in section 4.3.5.3(b). (AR 823, 832, 938-942.) It asserted sensitive receptors and sensitive receptor areas were defined in the 2006 GP, which was incorporated by reference. (City's RJN, Ex. "C" at p. 5.3-10) and that EIR Figures 4.15-1 and 4.11-1 show the locations. (AR 1213, 1128.) Moreover, the EIR showed future locations (AR 4176, 4106.) The City asserted that while operational impacts would be less than significant (AR 937-942), the EIR provides MMs to reduce them even further. (AR 935-936 [construction], 936-937 [operations], 940.) The City adds that impacts will vary widely considering what specific project is proposed, which "could only be meaningfully assessed and mitigated on a project-level" EIR analysis. (AR 605, 626, 822-823, 940-942, 947-948.) However, the citations to the record only briefly mention sensitive receptors, without any details. The City argues that under this program-level EIR, detailed information and mitigation can be deferred to a specific project-level EIR in the future. (CEQA Guidelines §§ 15152(c), 15126.4.)

The Court finds that the City relies on incorporation of the sensitive receptor analysis from the prior 2006 GP, but no such incorporation is addressed in the 2021 GPU. (AR 938-942.) The City failed to comply with CEQA's requirements regarding incorporation. (CEQA Guidelines § 15150(b), (c).) In addition, while the City seeks judicial notice of the 2006 GP, it contains only a few sentences rather than long, descriptive, or technical materials. (*Id.* § 15150(f).) Thus, the EIR fails to disclose the number and location of sensitive receptors in the proximity of the Project as well as whether they will be exposed to "substantial pollutant concentrations." (AR 931; see *SANDAG, supra.* 17 Cal.App.5th at 438-440.) In addition, all of the analysis and potential mitigation relating to sensitive receptors was deferred to future specific individual projects. (AR 937, 940; see also, AR 942, 948, 937-938, 944-945.) While this approach may be appropriate in some situations, the City is required to provide whatever information is available to it at this point. (*SANDAG, supra.* at 440.) The analysis on this issue is minimal.

EIR Lacks Analysis and Mitigation of Toxic Air Contaminants

The AG argued that there has been no effort by the City to analyze and mitigate the Project's toxic air contaminants emissions. (AR 939-942.) Diesel exhaust particulate matter (DPM) is such a contaminant. (AR 924; see Health & Safety Code § 39655(a).) In the EIR, it is stated that DPM is generated by construction equipment (e.g., grading), and during various industrial and commercial processes. (AR 939, 940.) But, it contains no estimates for how much DPM will be generated (even though it did so for other pollutants.) The AG asserted that the EIR was also vague as to the *number* of diesel truck trips generated under the Project. The City's response was that the information was provided in the VMT (vehicle miles traveled) analysis. (AR 390, 392-393, 1890.) The AG asserts that while the City referenced a technical report, it only discussed *assumptions* in the VMT analysis. (AR 402, 1877-1890.) The AG argues that the public should not have to search to find this data, and then make its own determination about DPM emissions. (*Banning Ranch, supra.* at 941.) The City's conclusions about the DPM emissions (e.g., "short-lived", "highly dispersive", and "occur[ing] intermittently) are useless without knowing how much DPM will be emitted by the Project. (AR 939.)

The City failed to oppose this argument.

EIR Failed to Identify/Correlate Project Emissions to Adverse Health Impacts

The AG argues that an EIR must disclose health and safety problems caused by the Project's changes on the environment. (CEQA Guidelines § 15126.2(a).) But the subject EIR fails to "describe the nature and magnitude of the adverse effect" and provide a nexus to adverse impacts on human health. (*Sierra Club v. City of Fresno* (2018) 6 Cal.5th 502, 518; see also, *SANDAG, supra.* at 514-515; *Bakersfield Citizens, supra.* 124 Cal.App.4th at 1219-1220; *Berkeley Keep Jets, supra.* 941 Cal.App.4th at 1371.) For instance, while the EIR discloses pollutants (ozone and particulate matter) and toxic air contaminants (DPM), which will result in significant air quality impacts

(AR 934, 936, 939), the adverse human health effects related to such exposure were not disclosed or analyzed. The AG asserts that this omission occurred even though health effects from each pollutant are "well-known and accessible." (AG's OB, p. 22:4.)

According to the AG, what is missing is "evidence of the anticipated parts per million (ppm) of [DPM] as a result of the Project." (AG's OB p. 22:18-19.) The AG asserts that EIRs must: 1) disclose the type and tons of pollutants a project will emit each year; 2) provide "a general description of each pollutant and how it affects human health"; 3) indicate the concentration levels for each pollutant that would trigger adverse public health impacts; and 4) correlate project emissions to adverse human health impacts. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 518-519.)

The City failed to oppose this argument. Accordingly, the City violated CEQA by failing to disclose what it reasonably could about the Project's emissions impact on residents. (*CNFF, supra.* at 441.) Thus, the Petition is granted on this issue.

III. CLIMATE CHANGES

The EIR's Analysis of Climate Change Impacts Is Unsupported by Substantial Evidence

Sierra Club asserts that the EIR states GHG emissions will far exceed California's 2040 GHG reduction targets. (AR 1073-1074.) GHG emissions will increase by over 50% under the Project from 866,410 metric tons of carbon dioxide equivalent per year (MT CO_2E) to 1,325,101. (AR 1074.) Per capita emissions will increase by 25% from 4.17 to 5.25 MT CO_2E. (*Ibid.*) Despite this increase, the EIR concludes the Project will have less than significant climate change impacts and requires no mitigation. (AR 1080.) This is because the EIR has incorporated the CAP's GHG reduction strategies into the Project, which purportedly will reduce emissions by 425,594 MT CO_2E. (AR 1074-1081.)

The EIR Fails to Acknowledge the Project's Significant Climate Impacts or Identify Mitigation Measures to Reduce those Impacts

Sierra Club asserted that EIRs are required to discuss a project's significant environmental effect and *separately* discuss mitigation measures (MMs). (PRC § 21100(b)(1), (3); see also, Guidelines § 15126.4(c).) Sierra Club asserts the EIR improperly combines impacts and mitigation into a single discussion. Although the Project will not meet the GHG reduction targets by 2040, the EIR does not consider MMs to reduce the Project's significant effects. Instead, it incorporates the CAP's GHG reduction strategies to conclude less than significant effects. Sierra Club argues that this approach is prohibited under CEQA. (*Lotus v. Dept. of Transp.* (2014) 223 Cal.App.4th 645, 656 [when the impact and mitigation analyses are combined, it creates a "structural deficiency in the EIR", which prevents proper MMs and findings.])

In addition, the City needed to make express findings regarding MMs to mitigate or avoid significant environmental impacts and adopt a Mitigation

Monitoring and Reporting Program (MMRP). (Pub. Res. Code §§ 21081(a)(1), 21081.6(a)(1).) But, the City did not meet these requirements. The EIR states the Project will have no impact or less than significant direct or cumulative impacts and requires no mitigation. (AR 151-152.) And, the City's MMRP does not mention any MMs to mitigate the climate change impacts. (AR 174-177.) The AG joins in this argument.

The City argues that Sierra Club's challenge to incorporation of the CAP's GHG reduction strategies is misplaced because the CAP is a part of the Project, and is self-mitigating. (AR 4096; see Guidelines § 15126.4(a)(2).) The City argues that it is not improper for an EIR to evaluate self-mitigating measures as part of the project to conclude that impacts will be less than significant.

However, there is not dispute that the Project will substantially increase GHG emissions by more than 50%; this is stated in the EIR. (AR 1074.) But Sierra Club argues that the CAP is mitigation under CEQA. (Guidelines § 15183.5(b).) While specific design features that further project objectives and that are useful beyond reducing impacts may be considered part of the project, measures that are intended to avoid or minimize impacts are MMs. (*Lotus, supra.* at 223 Cal.App.4th 645, 655-656, fn. 8.) The City concedes that the reduction strategies are "designed to mitigate the adverse impacts of growth", but then also claims they are part of the Project. (RB, p. 37:17-18.) The problem is that the City has not elaborated as to how the reduction strategies further project objectives or are useful beyond reducing impacts. (see *Save the Plastic Bag Coalition v. City and County of San Francisco* (2013) 222 Cal.App.4th 863 [the 10-cent bag fee furthered the purpose of limiting single-use bags].) To the extent that the CAP's reduction strategies were intended as mitigation (AR 1074, 4263-4264, 4312, 4333, 4334-4350.), they must be analyzed as MMs, not part of the Project. This is true for program-level and project-level EIRs. *Lotus, supra.* at 656; see also, *SANDAG,* 17 Cal.App.5th at 426.)

In addition, Sierra Club asserts that MMs are only incorporated into a plan at the end of the CEQA process. (see PRC § 21108.6(b).) The EIR is required to: 1) adopt findings of significance (*Id.* § 21100(b)(1)); 2) determine whether feasible mitigation will minimize or avoid those impacts (*Id.* § 21100(b)(3); 3) before project approval, make express findings adopting specific feasible MMs (*Id.* § 21081(a)(1)); and, 4) adopt a Mitigation Monitoring and Reporting Program (MMRP) to ensure compliance with the MMs (*Id.* § 21081.6(a)(1).)

The Court finds that this failure is prejudicial because the EIR fails to properly define the Project to include mitigation.

EIR's Conclusion that Climate Change Impacts are Less Than Significant is Not Supported by Substantial Evidence

Sierra Club argues that the EIR fails to adequately support the threshold of significance that the City chose, and there is a lack of evidence that the City can reduce the projected GHG emissions below that threshold. The City chose the State's 2017 Scoping Plan to select per capita emissions threshold of 4 MT CO_2E per year.

(AR 1073.) However, Sierra Club argues that there is no explanation that this threshold is appropriate. Even if it was a proper threshold, substantial evidence does not support the conclusion that the Project's climate change impacts are less than significant. (*CBE, supra.* at 62 Cal.4th at 225.) Sierra Club asserts that the City's claim that the CAP's reduction strategies will reduce GHG emissions is unsupported because: 1) the EIR assumes that the voluntary, aspirational, and discretionary CAP strategies will actually reduce GHG emissions; 2) the EIR incorrectly assumes that strategies affecting a small subset of GHG sources applies to entire industry sectors, which grossly overestimates the reductions; 3) the EIR's claimed emissions reductions are inconsistent with CAP itself; and, 4) the record does not support the CAP's emission reduction calculations because the supporting studies are not in the record.

In response, rather than demonstrate compliance, the City repeated its argument that this program-level EIR does not require the detailed MMs that Sierra Club wants. (Guidelines § 15146.) The City asserts that a GP may identify specific MMs that may be implemented in subsequent specific project level EIRs provided, based on substantial evidence, that the City commits to the mitigation; adopts specific performance standards to be achieved; and, identifies the types of potential actions that can achieve each performance standard. (*Id.* § 15126.4(a)(1)(B).) The City claims the EIR and the CAP does this. (see AR 4315, 4333-4350 [CAP Appendix B].)

Moreover, the EIR's conclusion that the CAP strategies will reduce impacts below the significance threshold is not supported by substantial evidence, which is the City's burden. (*CBD, supra.* at 62 Cal.4th at 225.) In the context of this program EIR, the City does not demonstrate how any particular reduction strategy will be applied to any particular project.

The CAP is Ineligible for Tiering and Streamlining Environmental Review of the Development Proposed in the Project

The AG asserts that CAPs are a mechanism for lead agencies "to analyze and mitigate significant effects of greenhouse gas emissions at a programmatic level, such as in a general plan." (CEQA Guidelines § 15183.5(a).) CAPs can be used to fast track the GHG emissions analyses in future projects by tiering or streamlining to a properly compliant CAP. (*Id.* at subd. (b).) However, the AG disputes that the CAP in this matter can be used for environmental review of future projects because the CAP does not comply with tiering and streamlining requirements.

CAP Does Not Satisfy CEQA's Tiering and Streamlining Requirements

CAPs used for tiering and streamlining are required to "[s]pecify measures or a group of measures, including performance standards, that substantial evidence demonstrates, if implemented on a project-by-project basis, would collectively achieve the specified emissions level." (CEQA Guidelines § 15183.5(b)(1)(D).) GHG reduction measures included in the CAP must be feasible, fully enforceable, and additional. (CEQA Guidelines § 15041, § 15126.4(a).) But, the AG argues the strategies in the

subject CAP are insufficiently defined, and lack clearly defined performance standards to be enforceable. (AR 1073-1074, 5998.) The AG also argues that a CAP is also required to establish a mechanism to monitor the plan's progress, but this CAP does not do so. (AR 4317-4324; CEQA Guidelines § 15183.5(b)(1)(E).) The AG asserts that while the City claims the CAP is compliant and can be used for tiering and streamlining (AR 399-400, 828, 1073-1074), there is a genuine controversy about this. (see *Zeitlin v. Arnebergh* (1963) 59 Cal.2d 901, 908.)

The City acknowledges that some of the proposed GHG reduction strategies are voluntary, but claims the AG ignores those that are mandatory. (AR 4340 [smart meters in new construction]; AR 4347 [limits idling of heavy construction equipment].) The City argues that a measure's effectiveness is based on industry standard methodologies (e.g., CAPCOA Quantifying GHG MMs), which methodologies were not challenged administratively. The City adds that just because the measures are voluntary does not mean they should be discounted.

The City then argues that since the Project is a GP, it is appropriate to incorporate MMs into the plan. (Guidelines § 15126.4(c)(5) ["...mitigation may include identification of specific measures that may be implemented on a project-by-project basis."]) The City concludes that the CAP provides standards to support tiering depending on what requirements are appropriate for specific project-level analysis. (AR 4281.)

However, while the City offers an explanation for its approach, it does not dispute that it failed to comply with the statutory requirements. Similar to Sierra Club, the AG argues that there is no substantial evidence that the CAP strategies can achieve the GHG reductions needed, and there is no schedule to monitor and update the CAP. (Guidelines § 15183.5(b)(1)(D), (E).) At a minimum, the Court finds that the City should be required to comply with the applicable statutes.

IV. ENERGY USE

Energy Use Impacts Analysis is Legally Inadequate

Sierra Club argues that the EIR is required to state "measures to reduce the wasteful, inefficient, and unnecessary consumption of energy." (§ 21100(b)(3); Guidelines, Appx. "F".) While not all impacts and MMs apply in all cases, the EIR here should consider a project's "energy requirements and ... energy use efficiencies by amount and fuel type for each stage of the project," its "effects ... on ...demands for electricity," and its "projected transportation energy use requirements." (Guidelines, Appx. "F" § II.C.) MMs may include "siting, orientation, and design to minimize energy consumption," "reducing peak energy demand," and use of renewable fuels and energy systems. (*Id.* at § II.D, and § 15126.2(b).)

However, the EIR omits analysis of energy impacts from construction claiming it is too speculative at the program-level. (AR 1038.) Similarly, it fails to analyze transportation-related energy use. (AR 1049.) But, more is required. The EIR is to provide whatever information it reasonably can now. (Guidelines § 15144.) Sierra Club notes that in the air quality section, the City analyzed a typical construction

project. (AR 930, 935-936.) But, as to energy use/transportation-related energy use, no similar analysis was performed. More importantly, without the initial analysis, mitigation of any impacts cannot be rendered less than significant. (see AR 1038.)

While the analysis of *building-related* energy use is addressed in the EIR by stating it would more than double, it never discusses the applicable MMs stated in the Guidelines. Instead, the EIR merely concludes that compliance with the state Green Building Code and promoting voluntary energy-efficiency programs will reduce impacts to less than significant levels. (AR 1040.) More is required. (*Calif. Clean Energy Comm. v. City of Woodland (Clean Energy)* (2014) 225 Cal.App.4th 173, 211 [re CEQA Guidelines, Appx. F]; *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 265; Guidelines § 15126.2(b).)

The City argues that the energy use impacts analysis is sufficient for a program-level EIR, and includes Appendix F topics. (AR 1032-1033, 1036-1038, 1040.) Based on this, the City asserts that the projected energy use is not wasteful or in conflict with applicable regulations. (AR 1041-1042.) The City mischaracterizes Sierra Club's argument by stating that Sierra Club wrongfully expects energy use projections in detail "for every future project possible under a general plan." (RB, p. 43:21.) The City argues that what the EIR presents is the City's determination that the analysis is entirely speculative so, CEQA requires the conclusion be noted, and terminate the analysis. (Guidelines § 15145; see also *Atherton, supra.* at 146 Cal.App.3d at 351.) The City also notes that *Ukiah Citizens* involves a project-level EIR, with no discussion of energy impacts. (*Id.* at 260, 263.)

However, the City did not address Sierra Club's arguments as to transportation-related and/or building-related energy use impacts, and therefore, cannot conclude that they are less than significant. As to transportation-related energy impacts, the EIR provides VMT under the Project (AR 1039) but, it does not describe the energy impacts of those trips. (see *Ukiah Citizens, supra.* at 264-265.) Without the analysis, the conclusion that the impacts are less than significant is unreasonable. (*Clean Energy, supra.* at 210.)

Sierra Club adds that it did not argue that the EIR is required to show energy impacts "for every future project." (RB, p. 43:21.) But, it must provide the information that it reasonably can now. Moreover, as to building-related energy use, the EIR does not explain how the Project could more than double the electricity use (AR 1040), but also does not use unnecessary energy resources. This issue was not properly or adequately analyzed nor were MMs considered.

The Petition is granted on this issue.

V. LAND USE

Land Use Changes

Sierra Club argues that the Project's land use changes will allow substantial new development, including new warehouses right next to homes in the Edgemont

community, and land use changes in northeast Moreno Valley, but none of the foreseeable environmental impacts have been analyzed in the EIR.

Sierra Club asserted both in its written papers and at oral argument that the Project changes land use designations from purely residential uses to "Business Flex", which will allow light manufacturing, warehouses, distribution centers, among others. (AR 116, 14, 940.) The EIR then defers analysis to later project-level review. (AR 776-778.) Sierra Club takes issue with this deferral arguing that the designations will place large warehouses next to homes causing health risks due to increased DPM from trucks; that the character of the neighborhoods will be disrupted due to "massive walls" next to homes; and that setbacks should be larger next to non-residential uses. (AR 9263-9464). In this instance, the argument is limited to the Edgemont neighborhood. However, without a clear concept of any proposed development, the Court finds that deferral is appropriate.

Indeed, the City argued that to meet its Housing Element update obligation, it had to find suitable locations for higher density housing. (AR 875, 883.) The City asserts that this was fully analyzed in the EIR including access to services and infrastructure, energy conservation, affordability, state mandates, interest of current residents, and other factors. (AR 884-885.) Also, population growth and housing changes were analyzed. (AR 1203-1210.) The City essentially argues that these were analyzed from a program-level point of view. (AR 890.)

While there are consequences of placing warehouses and industrial development close to residential areas, this is acknowledged by the EIR. (AR 940.) The Court finds this program-level analysis was adequate.

Sierra Club also argues that the EIR fails to analyze the "reasonably foreseeable growth-inducing impacts of the land use changes in northeast Moreno Valley." (SC's OB, p. 31:13-15.) The Project's land use designations are to change from lower-density residential and hillside residential to highway office/commercial and higher density residential. (AR 103-105, 872, 877.) Sierra Club argues that the EIR fails to analyze the impacts (e.g., infrastructure extensions.) (AR 1284; Guidelines § 15126.2(e), Appx. G, § XIV(a).)

However, similar to the argument above as to the Edgemont neighbor, the impacts are too speculative to evaluate without a specific project. The Petition is denied on this issue.

VI. PRESERVING DOCUMENTS

City Violated CEQA By Failing to Preserve Records

Sierra Club argues that the City violated CEQA by failing to retain all documents, including public correspondence, that is required for the AR. The City admitted that it could not produce internal emails because its servers only retained them for 90 days, after which they are automatically deleted and unrecoverable. (Dec.McKerley ¶¶ 19-21.) This failure by the City violates CEQA. (§ 21167.6(e);

Golden Door Properties, LLC v. Sup. Ct. of San Diego County (2020) 53 Cal.App.5th 733, 764.)

The question thus begs what the remedy should be for the destruction of these materials? In *Golden Door,* the Court concluded that the appropriate remedy for the destruction of hundreds or thousands of emails from the record was somewhat nuanced. In that case, the Court ordered the parties to meet and confer, and if they could not agree, then the "superior court shall afford Plaintiffs a reasonable opportunity to bring motions to compel" in light of the other findings by the appellate court. (*Golden Door, supra,* at p. 794.)

The Court gleans from *Golden Door* that courts should have flexibility to fashion an appropriate remedy when needed. In this case, the Court has already made some findings that Sierra Club did not fail to exhaust all administrative remedies, and indeed, has found that the AG is not subject to that requirement. However, the Court also acknowledges, as pointed out by Sierra Club, the City is attempting to benefit from the loss of these materials by arguing that many issues were not exhausted administratively.

The Court recognizes that the destruction of these materials was inadvertent, but there still should be a remedy. Thus, recognizing that the Court has already determined that the City's exhaustion defenses were not valid in other respects, the Court finds that the City should not benefit from any fact or argument not specifically addressed, especially given that it was the City that destroyed these administrative records. Thus, the City's objections to Sierra Club on exhaustion remedies is overruled.

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VII. CONCLUSION

Based on the foregoing, the Petition is granted on the issues of baseline (existing conditions analysis), air quality, climate changes (GHG emissions), and energy use. It is denied as to land use.

This shall constitute the court's Statement of Decision pursuant to Code of Civil Procedure section 632 and Rule 3.1590 of the California Rules of Court. Within 15 days after the proposed Statement of Decision has been served, any party affected by the Statement of Decision may make, serve and file objections to the proposed Statement of Decision. After expiration of the time for filing objections to the proposed Statement of Decision, the Statement of Decision will be considered final.

At the end of the expiration period that time, Counsel for Petitioner Sierra Club is ordered to prepare and submit the judgment in accordance with the above Statement of Decision within 10 days.

The Court shall set an OSC re submission of Judgment on May 10, 2024 at 8:30am. If the Court has signed the Judgment, the Court shall take the OSC off calendar.

GOOD CAUSE APPEARING, IT IS SO ORDERED:

Dated: March 5, 2024

CHAD W. FIRETAG
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

Historic Court House
4050 Main Street, Riverside, CA 92501

Case Number: CVRI2103300

Case Name: SIERRA CLUB vs THE CITY OF MORENO VALLEY

CERTIFICATE OF MAILING

I certify that I am currently employed by the Superior Court of California, County of Riverside, and that I am not a party to this action or proceeding. In my capacity, I am familiar with the practices and procedures used in connection with the mailing of correspondence. Such correspondence is deposited in the outgoing mail of the Superior Court. Outgoing mail is delivered to and mailed by the United States Postal Service, postage prepaid, the same day in the ordinary course of business. I certify that I served a copy of the foregoing Case Number CVRI2103300 Minute Order dated: 03/05/2024 on this date by depositing said copy as stated above.

Dated: 03/05/2024

JASON B. GALKIN,
Court Executive Officer/Clerk of Court

by: K. Rahlwes

K. Rahlwes, Deputy Clerk

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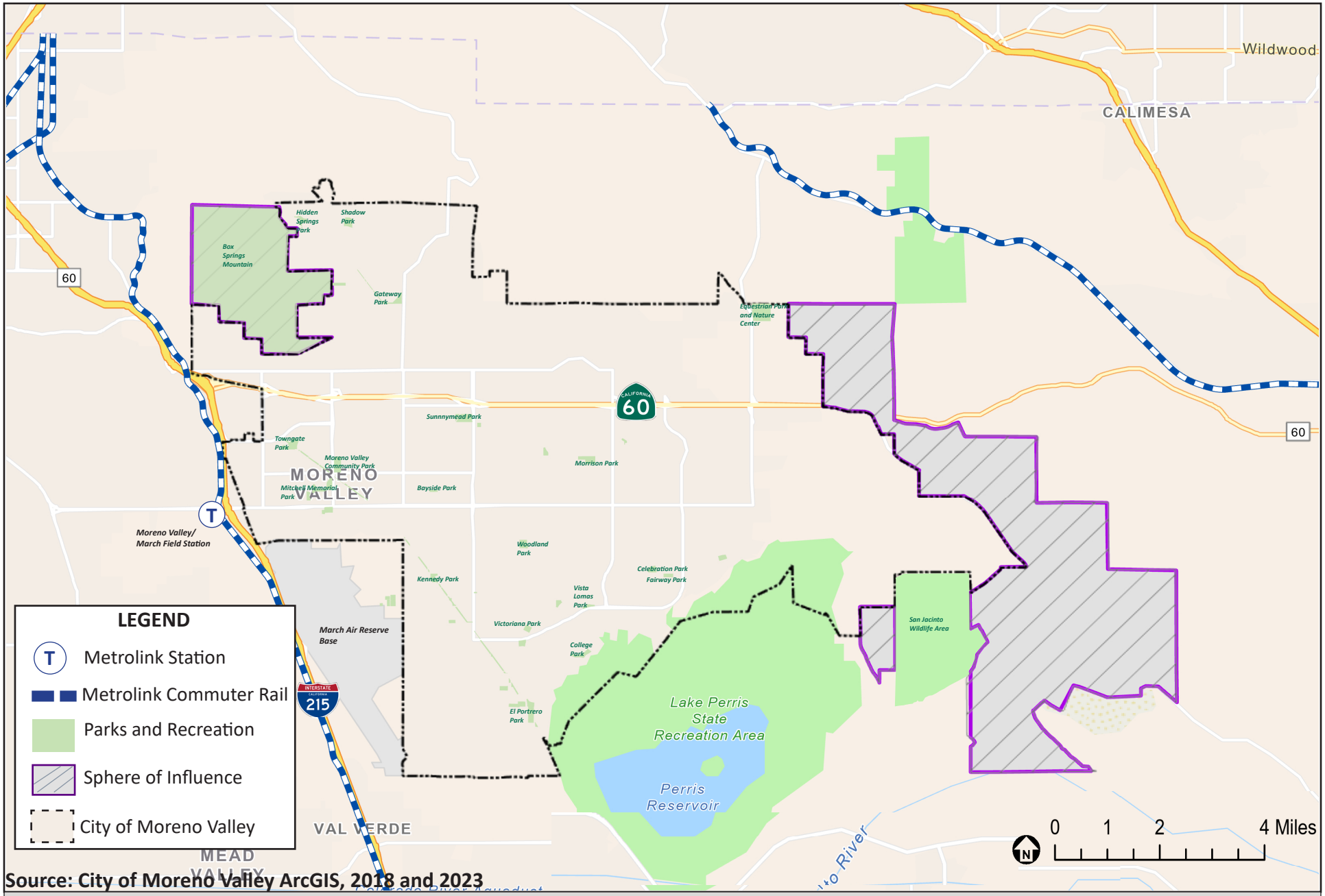

Source: City of Moreno Valley ArcGIS, 2018 and 2023

EXHIBIT 2: PLANNING AREA

MoVal 2040

Kimley»Horn