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Via E-Mail

Council President Arias and Councilmembers
City of Fresno
2600 Fresno Street
Room 2097
Fresno, CA 93721

Re: *City of Fresno General Plan Final Program Environmental Impact Report and Greenhouse Gas Reduction Plan (SCH # 2019050005)*

Dear Council President Arias and Councilmembers:

This firm represents Leadership Counsel for Justice and Accountability (“Leadership Counsel”) in matters relating to the Program Environmental Impact Report (“PEIR”) for the City of Fresno’s 2014 General Plan (“General Plan”). Leadership Counsel submitted comments on the Draft PEIR on May 5, 2020. *See* Response to Comments at Comment Letter C-3; C-69 to C-123. Unfortunately, the PEIR’s Response to Comments does little to address the concerns raised in that letter. Chief among these are deficiencies in the PEIR’s project description, and its inadequate analysis and mitigation of the Project’s significant air quality and transportation impacts, including impacts to public health. The PEIR is also seriously deficient in its analysis of impacts from greenhouse gas (GHG) emissions and mitigation of those impacts. In light of these flaws and others previously raised by Leadership Counsel, the PEIR continues to fall far short of the requirements of the California Environmental Quality Act (“CEQA”) (Public Resources Code section 21000 et seq.) and CEQA Guidelines (California Code of Regulations, title 14 section 15000 et seq.). Moreover, the City’s updated GHG Reduction Plan (“GHG Plan”), which would serve as its climate action plan, fails to meet the requirements of CEQA Guidelines section 15183.5, and cannot be used to support streamlined project-level GHG analysis.

This is not the first time the City Council has been asked to certify an EIR for this General Plan. The City adopted its current General Plan in 2014, with a 2035 planning horizon and a 2056 buildout date. The General Plan set a blueprint for development in

Fresno for decades to come, one that would prevent the City from significantly improving air quality or aggressively reducing GHG emissions, and which would set in motion acute deterioration of many Fresno residents' quality of life. In particular, it planned for the transformation of South Fresno residential communities into sites for massive industrial warehouses and distribution centers, with high volumes of commercial truck traffic crisscrossing neighborhood streets and interfering with residents' enjoyment and access to their homes, places of worship, and community-serving businesses and amenities. These neighborhoods are already some of the most pollution burdened not just in the city, but in the entire state, and are disproportionately home to people of color, immigrants, and people whose first language is not English.

In 2014, the City prepared a Master Environmental Impact Report (MEIR) for its update to the City's General Plan and the Development Code, which was "prepared to evaluate the potential environmental impacts associated with the implementation" of these documents. Draft MEIR at 1-1 and 1-2. This law office prepared comments on the Draft MEIR, emphasizing the gravity of the General Plan's proposed changes and the MEIR's lack of adequate analysis of associated environmental impacts. That letter detailed how, in numerous instances, the MEIR failed to thoroughly assess impacts deemed to be significant and unavoidable and to identify all feasible mitigation measures to reduce the severity of the impacts. *See* Shute, Mihaly & Weinberger LLP Oct. 8, 2014 comment letter re Draft MEIR, Attachment 1 to this letter. It highlighted these flaws with regard to transportation impacts, air quality and associated public health impacts, greenhouse gas emissions, and noise. The City nevertheless certified the MEIR and adopted the General Plan in 2014 without seriously addressing those concerns. And since then, as described below, South Fresno neighborhoods have already begun to suffer the impacts of the City-approved of the industrialization of their communities.

Now, just six years after certifying the MEIR for the General Plan, the City has drafted a Program EIR for the already-approved General Plan.¹ The PEIR is an entirely new, largely rewritten environmental impact report. In some instances it imports text

¹ The PEIR omits any environmental review of the impacts of implementing the City's Development Code. It justifies this by noting that "[t]he project is not amending the Development Code, and the environmental analysis that was conducted when the Development Code was adopted was adequate." Response to Comments at 3-74. This is an unsatisfactory explanation, and is generally inconsistent to the PEIR's approach to environmental review of the General Plan – the Project only proposes to amend the Mobility and Transportation Element of the General Plan, yet the PEIR addresses more than just transportation impacts.

from the MEIR but also has original text, and reaches similar – but not entirely the same – conclusions about environmental impacts from and needed mitigation for the General Plan’s implementation.² Yet the PEIR never explains exactly how it stands in relationship to the MEIR. The PEIR describes itself as a “conversion” of the General Plan’s “previously-certified MEIR to a PEIR.” PEIR at 1.2. This would suggest simply a shift in format from one type of environmental impact report – a master EIR – to another one – a program EIR. Yet, as described below, the PEIR simultaneously insists that it is *not* in fact an EIR for the entire period of General Plan implementation, but rather an EIR for the “*continued* implementation of the approved General Plan.” PEIR at 1-2 (emphasis added). The PEIR never explains what this means. However, given that the PEIR employs a 2019 baseline, it presumably refers to the fact that the PEIR only analyzes impacts from the General Plan’s implementation from 2019 onward, and not the impacts of the entire lifetime of the General Plan starting in 2014.

This uncertainty and confusion about the status of the PEIR and MEIR, and the scope of the project that the PEIR must review, infects the entire document. The PEIR appears to take advantage of this uncertainty, seeming to claim at times that it need not fully review certain impacts of General Plan implementation because the General Plan has already been adopted. *See, e.g.* Response to Comments at 3-78 (declining to review the impacts of General Plan land use policies because those policies were adopted in 2014). The PEIR also declines to consider recommending revisions to the General Plan in order to address and reduce environmental impacts. To justify this, it references the artificially-imposed constraint that the City only contemplates limited edits to the General Plan regarding vehicles miles travelled (“VMT”), even though additional revisions might in fact be necessary to fully mitigate for environmental impacts of General Plan implementation. *See e.g.*, Response to Comments at 3-50. This, along with the PEIR’s significant flaws in analysis, as described in the Leadership Counsel May 5, 2020 letter and below, render the PEIR inadequate and noncompliant with CEQA. As a result, the City must recirculate and revise the PEIR to address these deficiencies before it can consider certification, and must not close off consideration in the PEIR that revisions to the General Plan might be needed to mitigate for significant environmental impacts from the General Plan’s implementation.

Additionally, as noted in Leadership Counsel’s correspondence of May 5, 2020, the various deficiencies in the PEIR have a negative and disproportionate impact on

² Because the PEIR carries forward many of the same defects as the MEIR, we renew the October 8, 2019 comments our firm made on the MEIR, and apply them to the PEIR. That comment letter and its exhibits appear as Attachment 1 to this letter.

communities of color. Accordingly, the proposed action to approve the Project and certify the associated PEIR violates state and federal civil rights laws, in addition to the California Environmental Quality Act.

I. The PEIR's Flawed Project Description and Improper Baseline Conflict with CEQA's Mandate to Review the Impacts of the "Whole of an Action" and Undermine the Entire PEIR.

An EIR must accurately and consistently describe the project it analyzes. CEQA Guidelines § 15124; Guidelines § 15378 (defining "project"); *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-3 ("An accurate, stable, and finite project description is the sine qua non of an informative and legally sufficient EIR."). An inaccurate or incomplete project description undermines CEQA's purposes because it thwarts a full analysis of project impacts, thus minimizing the project's effects. *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 656. Thus, when an EIR gives "conflicting signals to decision-makers and the public about the nature and scope of the activity being proposed," the courts have found it "fundamentally inadequate and misleading." *San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at 655-56.

As Leadership Counsel emphasized in its May 5, 2020 letter, the PEIR's description of the project is conflicted, confusing, and raises doubts about the nature of the action. Response to Comments 3-74 to 77. The PEIR explains that the project consists of two discretionary approvals: an update to the City's GHG Plan and limited updates to the text of the approved General Plan to reflect changes in statutes and regulations related to Vehicle Miles Traveled (VMT). Draft PEIR at 1-2. But the PEIR also notes that the project includes "converting the previously-certified MEIR to a PEIR" and updating "technical analyses to reflect the current baseline conditions of 2019" "for the continued implementation of the approved General Plan." *Id.* at 1-2. The Staff PowerPoint posted on the City's website for the August 20, 2020 City Council meeting continues to frame the project in this disjointed manner. For clarity, this letter's references to the "Project" includes this entire suite of actions, even though, as discussed further below, some of these actions are not technically a project subject to CEQA review.

The City's description of the Project poses several problems. First, the PEIR is an environmental document. Its purpose is to *evaluate* the environmental impacts of a project and set mitigation measures for them; by definition it therefore cannot be a *part* of a project. To assert otherwise confuses environmental review itself with the subject of that review.

Second, it sows doubt about the scope of environmental impacts from General Plan implementation that the PEIR does and should review. When the PEIR describes itself as a conversion of the General Plan MEIR (*see, e.g.* Draft PEIR at 3-5), it necessarily claims to be an EIR for the whole of the implementation of General Plan. But then, in direct contradiction, it describes itself as the environmental document for “the *continued* implementation of the approved General Plan,” (Draft PEIR at 3-5, *emphasis added*) i.e., presumably the EIR for only one segment the General Plan’s implementation, from 2019 onward. The PEIR’s Response to Comments fails to meaningfully address Leadership Counsel’s concerns about the PEIR’s contradictory stances on its purpose and scope; it essentially restates the text from the Draft PEIR that the Leadership Counsel letter critiqued. Response to Comments 3-74 to 3-78.

Equally concerning, the PEIR’s *Master Response: Project Description and Baseline Conditions* suggests that the PEIR need not give full review to impacts from implementation of the General Plan’s land use policies, because no amendments are currently being proposed to those policies. It states:

“The General Plan, as a whole, is not being considered to be re-adopted. The City is not modifying the City’s current land use plan, and the proposed project does not result in any direct physical changes or new land uses. . . . Any previous changes to the land use plan, including General Plan amendments, adoption of Specific Plans, and approval of various projects throughout Fresno, have already been evaluated under CEQA, as applicable, and those changes, by definition do not result in any new potential environmental impacts to be considered or evaluated as part of the proposed project.” Response to Comments at 3-3.

The Response to Comments makes similar assertions in its responses to portions of Leadership Counsel’s letter on the PEIR’s failure to adequately analyze or mitigate the General Plan’s impacts, such as land use-related impacts. *See, e.g.*, Response to Comments at 3-70, 71, 72, 74, 78, 80. This selective approach to reviewing the General Plan’s impacts is inexplicable, even under the approach of only analyzing “continuing impacts” of General Plan implementation. The General Plan’s land use policies will be implemented, and their effects felt, over the next several decades. Under the PEIR’s logic, the PEIR would not need to review potential impacts associated with any General Plan elements for which no amendments are proposed. To the extent that the PEIR takes this approach regarding other potential impacts, its analysis of those impacts is incomplete and in violation of CEQA.

In characterizing the Project as “continued implementation of the approved General Plan” rather than the implementation of the full General Plan over its lifetime,

and picking and choosing which impacts of General Plan implementation to review, the PEIR fails to describe the whole of the action. A fundamental premise of CEQA is that a lead agency must consider the environmental impacts of the whole of the action being approved, not segmented pieces. CEQA Guidelines § 15378(a) (defining “project”). CEQA prohibits segmentation of a project. *See Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1229 (“when one activity is an integral part of another activity, the combined activities are within the scope of the same CEQA project” and must be analyzed together); Guidelines § 15378(a) (“‘Project’ means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”); *see also* CEQA Guidelines § 15378(c) (term “project” means the whole of the “activity which is being approved”). Because the statute requires study of “the whole of an action,” CEQA prohibits public agencies from “subdivid[ing] a single project into smaller individual subprojects in order to avoid the responsibility of considering the environmental impact of the project as a whole.” *Orinda Assn. v. Bd. of Supervisors* (1986) 182 Cal.App.3d 1145, 1171. Breaking the project into smaller subprojects will lead to inadequate environmental review. *See, e.g., City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452 (citation omitted) (CEQA “mandates ‘that environmental considerations do not become submerged by chopping a large project into many little ones’” which, individually, may have lesser environmental effects but which together may be “disastrous.”).

Here, the “whole of the action” is the full period of the General Plan’s implementation, starting at its adoption in 2014. Yet the PEIR, by resetting the baseline at 2019, and claiming to only review the General Plan’s “continued implementation,” incorrectly truncates that review. This approach improperly segments the environmental review for one general plan between two different EIRs. Doing so has the effect of ignoring the impacts of the substantial industrial development that has already occurred under the General Plan to date. Further, it risks minimizing the significance of impacts from proposed projects that might tier off of the PEIR’s environmental analysis. When using a 2019 baseline, and not the baseline from the time of General Plan adoption, impacts from projects that have come online since General Plan adoption are absorbed into the new baseline.

This is evident, for example, in the PEIR’s baseline for air quality emissions analysis, as measured by levels of criteria pollutants in different areas of the City. The 2015 to 2018 air quality baseline, which undergirds the PEIR’s air quality analysis, is markedly worse than the 2009 to 2012 baseline applied in the MEIR. PEIR at 4.3-6 to 4.6-7; MEIR at 5.3-4 to 5.3-6. This decrease in air quality is not a surprise. Since the

2014 General Plan was adopted, large-scale industrial facilities have begun to proliferate in South Fresno, just as the General Plan allows. The California Attorney General's Office highlighted the impacts of this development in an August 2, 2019 comment letter on the City's preparation of the South Industrial Area Specific Plan. That letter noted that "[i]n the past few years, Fresno has approved over 5 million square feet of industrial warehouse space along E. Central Avenue" and that this industrial development has resulted in "thousands of associated truck trips visiting these warehouses daily." *See* California Attorney General August 2, 2019 letter to City of Fresno re City of Fresno's South Industrial Priority Area Specific Plan at 10, Attachment 2 to this letter. That letter details the significant increase in air pollutants brought about by several of these projects, projects the City approved under Mitigated Negative Declarations on the basis that they would not have significant environmental impacts. Attorney General's Letter at 11-12.

One of the implications of this skewed baseline is that project-level analysis of cumulative impacts will also be skewed. Specifically, as a result of this decrease in air quality, when new projects come up for review, their contributions to cumulative air emissions will be evaluated against a baseline for air quality that is already substantially deteriorated, making the project's emissions contributions appear artificially low compared to existing conditions.

The PEIR's failure to describe and analyze the entire project, including implementation of both the General Plan and the Development Code over their entire life cycles, violates CEQA and results in an inaccurate impacts analysis that significantly underestimates the project's impacts. The PEIR does not look at the impacts for the project as a whole, because it zeros out six years of development under the General Plan, and six years of negative impacts for the community. The PEIR must use the predevelopment baseline to fully account for all environmental impacts occurring as a result of the General Plan as drafted. To do otherwise minimizes the General Plan's impacts. At the same time the PEIR cannot assert that environmental review of certain impacts is unnecessary because the underlying General Plan has already been adopted. On that premise, the PEIR could skip over or shortchange review of almost any environmental impact, which would entirely defeat the purpose of conducting environmental review. The PEIR must be revised to correct these deficiencies.

II. General Comments.

The following are our general comments on the legal inadequacies of the PEIR. More specific comments on individual sections of the document follow.

A. The PEIR Improperly Attempts to Avoid Analysis and Mitigation of the General Plan’s Impacts by Concluding That They Are Significant and Unavoidable.

Where all available and feasible mitigation measures have been proposed, but are inadequate to reduce an environmental impact to a less-than-significant level, an EIR may conclude that the impact is significant and unavoidable. *See* CEQA Guidelines § 15126.2. If supported by substantial evidence, the lead agency may make findings of overriding considerations and approve the project in spite of its significant and unavoidable impacts. *Id.* at §§ 15091, 15093. However, the lead agency cannot simply conclude that an impact is significant and unavoidable and move on. A conclusion of residual significance does not excuse the agency from (1) performing a thorough evaluation and description of the impact and its severity before and after mitigation, and (2) proposing *all* feasible mitigation to “substantially lessen the significant environmental effect.” CEQA Guidelines § 15091(a)(1); *see also id.* § 15126.2(b) (requiring an EIR to discuss “any significant impacts, *including those which can be mitigated but not reduced to a level of insignificance*” (emphasis added). “A mitigation measure may reduce or minimize a significant impact without avoiding the impact entirely.” 1 Stephen Kostka & Michael Zischke, *Practice Under the California Environmental Quality Act* § 14.6 (2d ed. 2008).

The PEIR finds that the City’s plans for future growth and development as set out in the General Plan will result in significant and unavoidable impacts in multiple topic areas. Draft PEIR at 1-9 to 1-46. As detailed below, in numerous instances, the PEIR fails to thoroughly assess impacts deemed to be significant and unavoidable and/or fails to identify all feasible mitigation measures to reduce the severity of the impacts.

B. The PEIR Fails to Analyze the Impacts of All Development That Could Occur as a Result of Buildout under the General Plan.

The General Plan acknowledges the harmful effects of unrestricted growth in the City, including increased reliance on personal automobile use and the inability to provide efficient public transit service to new development, which leads to increased air pollution and greenhouse gas emissions. General Plan at 3-6, 3-7, and 7-7. Yet, the General Plan proposes land use policies that fail to limit development in future growth areas. Specifically, the General Plan includes objectives and policies that address growth by “promoting” development in certain parts of the City. (*See, e.g.,* Objective UF-12 directing the City to locate *roughly* one half of future residential development in infill areas; and PEIR at 4.3-28 emphasis added.) However, the General Plan is unclear regarding the definitions for terms such as “roughly” and “approximately” as applied in

the Plan. Specifically, the General Plan states that use of these terms is intended to be flexible so that depending on context, a reference to “approximately one-half” could vary at least 10 to 15 percent and use of the term “roughly” could include twice that amount or more. General Plan at 1-30. These vague definitions have important implications when applied to planning policy.

For example, General Objective UF-12 directs the City to locate “roughly one half” of future residential development in infill areas. But given the General Plan’s flexible definition of the word “roughly,” anywhere from 20 percent to over 80 percent of future development could occur in infill areas. General Plan at 1-28 and 1-29. Such “infill” developments in the city have included several sprawl developments, including city islands, east of Highway 180 bordering Clovis and west of Highway 99. However, the PEIR presents only one set of estimates for the amount of anticipated development at build-out. *See* Draft PEIR Table 3-3. Thus, the PEIR fails to disclose its assumptions for the amount of infill used (*i.e.*, 20 percent, 50 percent, or 80 percent of development in infill areas at build-out) for the analyses of the Project’s environmental impacts. Given that the Plan allows a broad range of development to occur outside of infill areas, the PEIR must evaluate potential impacts that would occur if only 20 percent of anticipated future development were to take place in identified infill areas, or better yet, revise General Objective UF-12 to ensure the majority of future development occurs in infill areas and define infill areas with sufficient precision to promote reduced automobile travel. If the majority of Project-related growth takes place outside the identified infill areas, Project impacts related to transportation, air quality and greenhouse gases would be much worse than the PEIR indicates. These impacts would be even more severe in disadvantaged communities that are already over-burdened with pollution and inadequate access to transit.

C. The PEIR Ignores Feasible Mitigation, Such as Changes to the Land Use Designations and Densities and Intensities Proposed in the General Plan.

For several of the General Plan’s significant and unavoidable impacts, notably the Project’s significant impacts related to greenhouse gas emissions, the PEIR fails to consider all feasible mitigation. The PEIR never considers changes to land use designations or densities and intensities as potential mitigation even though such changes could significantly reduce greenhouse gas emissions and other significant impacts disclosed in the PEIR. CEQA requires the EIR to consider such mitigation.

The City cannot approve projects with significant environmental impacts if any feasible mitigation measure or alternative is available that will substantially lessen the

severity of any impact. Pub. Res. Code § 21002; CEQA Guidelines § 15126(a). The City is legally required to mitigate or avoid the significant impacts of the projects it approves whenever it is feasible to do so. Pub. Res. Code § 21002.1(b). “In the case of the adoption of a plan, policy, regulation, or other public project [such as the General Plan], mitigation measures can be incorporated into the plan, policy, regulation, or project design.” CEQA Guidelines § 15126.4(a)(2). Mitigation is defined by CEQA to include “[m]inimizing impacts by limiting the degree or magnitude of the action and its implementation.” CEQA Guidelines § 15370(b). In addition to proposing new “policies” as mitigation, mitigation should include changes in where development is planned, what kind is planned, and how dense or intense that development is planned to be, *i.e.*, changes to the land use diagram and land use designations.

There is no indication that the PEIR considered modifications to land use designations or densities and intensities to mitigate the impacts of the General Plan. This omission is surprising given that those changes are the easiest, most effective, and most obvious ways to lessen or avoid many of the General Plan’s impacts. For example, the Plan has resulted, and will continue to result in, locating a substantial amount of new industrial uses in close proximity to existing and proposed residential areas. Draft PEIR at Figure 3-5 Growth Areas; General Plan Implementation Element Figure IM-2. This will in turn result in increased exposure of sensitive receptors, especially disadvantaged communities, to substantial pollutant concentrations. Draft PEIR at 4.3-57 and 58. As explained in previous comments, exploring alternative land use scenarios would go a long way toward reducing numerous significant General Plan impacts identified in the PEIR, and with the MEIR before it, such as air quality, public health, climate change, traffic, and noise.

D. The PEIR Cannot Rely on Unenforceable and Noncommittal General Plan Policies to Mitigate the Project’s Significant Impacts.

Mitigation measures proposed in an EIR must be “fully enforceable” through permit conditions, agreements, or other legally binding instruments. Pub. Res. Code § 21081.6(b); CEQA Guidelines § 15126.4(a)(2). The PEIR relies on a number of General Plan policies to mitigate significant environmental impacts. *See*, for example, Draft PEIR at 4.3-47, 4.3-55, 4.3-59. Many of these General Plan policies and programs are vague, optional, directory, or otherwise unenforceable.

For example, the Plan fails to provide enforceable policies that direct orderly growth. Instead, the Plan includes policies that call for “promoting” development in certain parts of the City. *See*, e.g., Policy LU-1-a (directing the City to *promote* development within the existing City Limits and in infill areas); Policy LU-1-c (directing

the City to *promote* order land use development in pace with public facilities and services needed to serve development) (emphasis added). These vague and unenforceable policies fail to describe how the City will promote and enforce an orderly growth process and fail to ensure that infill development will occur prior to development in the Growth Areas. General Plan Implementation Element at 12-30.

A other examples of ineffective mitigation—out of numerous instances—include the following (emphases added):

- Policy RC-8-c: Energy Conservation in New Development. *Consider* providing an incentive program for new buildings that exceeds California Energy Code requirements by fifteen percent. Draft PEIR at 4.3-33.
- Policy RC-8-j: Alternative Fuel Network. *Support* the development of a network of integrated charging and alternate fuel stations for both public and private vehicles, and *if feasible*, open up municipal stations to the public as part of network development. *Id.* at 4.3-34.
- Policy LU-2-b: Infill Development for Affordable Housing. *Consider* a priority infill incentive program for residential infill development of existing vacant lots and underutilized sites within the City limits as a strategy to help to meet the affordable housing needs of the community. *Id.* at 4.6-15.
- Policy LU-6-b: *Consider* adopting commercial development guidelines to assure high quality design and site planning for large commercial developments, consistent with the Urban Form policies of this Plan. *Id.* at 4.6-16.
- Policy LU-1-e: Annexation Requirements. *Consider* implementing policies and requirements that achieve annexations to the City that conform to the General Plan Land Use Designations and open space and park system, and are revenue neutral and cover all costs for public infrastructure, public facilities, and public services on an ongoing basis. *Id.* at 4.10-10.
- Policy LU-2-a: Infill Development and Redevelopment. *Promote* development of vacant, underdeveloped, and redevelopable land within the City Limits where urban services are available by *considering* the establishment and implementation of supportive regulations and programs. *Id.* at 4.11-11.

- Policy D-4-b: Incentives for Pedestrian-Oriented Anchor Retail. *Consider* adopting and implementing incentives for new pedestrian-friendly anchor retail at intersections within Activity Centers and along corridors to attract retail clientele and maximize foot traffic. *Id.* at 4.6-17.
- Policy D-4-f: Design Compatibility with Residential Uses. *Strive to ensure* that all new nonresidential land uses are developed and maintained in a manner complementary to and compatible with adjacent residential land uses, to minimize interface problems with the surrounding environment and to be compatible with public facilities and services. *Id.* at 4.1-10 and 11.

A general plan's goals and policies are necessarily general and aspirational. The City may rely on such policies to mitigate environmental impacts under CEQA, however, only if they will be implemented through specific implementation programs that represent a firm, enforceable commitment to mitigate. *See Napa Citizens for Honest Gov't v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 358 (citing *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 377). CEQA requires that mitigation measures actually be implemented—not merely adopted and then disregarded. *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1186-87; *Fed'n of Hillside & Canyon Ass'ns v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261.

Here, the General Plan's vague, unenforceable, and noncommittal policies and programs (and policies for which no implementation programs are identified) allow the City to take no action and thus fail to mitigate impacts. As a result, the PEIR cannot ensure that the policies relied on as mitigation measures will ever in fact be implemented. Therefore, they cannot serve as CEQA mitigation. *See Anderson First*, 130 Cal.App.4th at 1186-87.

III. The PEIR's Analysis of and Mitigation for the General Plan's Transportation Impacts is Factually and Legally Deficient.

The Leadership Counsel's May 5, 2020 letter alerted the City to deficiencies in the PEIR's analysis of the General Plan's transportation impacts, relating both to VMT and impacts on pedestrians, cyclists, and transit riders. The PEIR's Response to Comments fails to respond to those concerns, and the PEIR's transportation analysis continues to contain numerous defects that must be remedied if the public and decisionmakers are to fully understand the General Plan's potential effects.

A. The PEIR Fails to Adequately Analyze Impacts Relating to VMT and Lacks Support for Its Conclusion That Impacts Relating to VMT Would Be Less than Significant.

The PEIR's analysis of the General Plan's effect on VMT is deficient because it fails to document its assumptions relating to existing and General Plan-related VMT, and because it lacks support for its conclusion that the General Plan's VMT-related impacts would be less than significant.

The Draft PEIR identifies existing (2019) VMT and VMT under the General Plan in 2035. *See* Table 4.16-2: County and City of Fresno VMT, Draft PEIR at 4.16-40. However, it is not sufficient to simply identify these numbers without providing information about how the City arrived at these estimates. Meaningful analysis of impacts effectuates one of CEQA's fundamental purposes: to "inform the public and responsible officials of the environmental consequences of their decisions before they are made." *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1123. To accomplish this purpose, an EIR must contain facts and analysis, not just an agency's bare conclusions. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568. An EIR's conclusions must be supported by substantial evidence. *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 409.

As transportation engineer Neal Liddicoat with Griffin Cove Transportation Consulting ("GCTC") explains, the brevity of the VMT discussion in the Draft PEIR is a function of the "black box" analysis procedure involved. *See* GCTC Report, August 7, 2020, Attachment 3 at 1. The VMT analysis was completed entirely within the Fresno Council of Governments Regional Travel Demand Model (also referred to as the "Activity-Based Model"). As such, the background assumptions and detailed analysis steps are unknown and it is impossible for the public and decisionmakers to determine whether the VMT estimates are accurate. *Id.*

This error is particularly serious because Liddicoat informed the City of this precise problem with the 2014 Master EIR's transportation analysis. (*See* September 10, 2014 Letter from N. Liddicoat, MRO Engineers to C. Borg, Shute, Mihaly & Weinberger, LLP at 5, Exhibit A to Attachment 1 to this letter: "No information is provided in the DMEIR with regard to the specific input parameters that were used in developing the theoretical thresholds applied in the LOS analysis, whether for freeways or any of the other roadway types presented. Consequently, it is impossible to judge whether the analysis is credible and, moreover, whether the LOS results are valid.").

The PEIR's Response to Comments attempts to address this deficiency when it asserts that the VMT projections were calculated using the Fresno COG Model and directing the reader to a link to the Fresno Council of Governments and to the Technical Appendix. Response to Comments at 3-82. This approach does not cure the deficiencies in the PEIR. The City may not scatter relevant information through an EIR (or send the public to a generalized link to an agency) and then demand that the public locate, collate, and then analyze it to obtain vital information. Much to the contrary, CEQA obligates the agency to present the information in an accessible manner. As the California Supreme Court put it in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 443, "The question is [] not whether the project's significant environmental effects *can* be clearly explained [in a brief], but whether they *were* explained in the EIR." (emphasis in original).

The Draft PEIR errs further by concluding, absent the required evidentiary support, that the General Plan's VMT-related impacts would be less than significant. Draft PEIR at 4.16-42. Indeed, the PEIR's conclusion is directly contrary to the analysis within the Draft PEIR which states that the increase in VMT from the General Plan *would* constitute a significant impact. (See Draft PEIR at 4.16-41, "Because the measures of VMT in per capita and per employee increase with the City's General Plan (2035) compared to existing (2019) conditions, it is determined that continued implementation of the approved General Plan may be considered to result in a significant impact related to State CEQA Guidelines Section 15064.3 subdivision (b), analyzing transportation impacts consistent with SB 743."). Indeed, we concur that a plan that would more than double VMT from 9,395,800 to 19,883,400 would undoubtedly result in a significant impact. See Response to Comments at 3-36 Comment A2-19.

The Draft PEIR arrives at its "less than significant" conclusion merely because the City had not yet adopted thresholds of significance. See Draft PEIR at 4.16-42. Yet a lack of a threshold of significance is not a sufficient basis for determining that a project's impact is less than significant.

There are additional defects in the City's approach. First, the City erred by publishing an EIR without thresholds of significance. Significance thresholds are of critical importance as CEQA's most basic purpose is to inform governmental decisionmakers and the public about the potential significant environmental effects of a proposed project. CEQA Guidelines § 15002(a)(1). Determining whether a project may result in a significant adverse environmental effect is one of the key aspects of CEQA. Guidelines § 15064(a) (determination of significant effects "plays a critical role in the CEQA process"). CEQA specifically anticipates that agencies will use thresholds of significance as an analytical tool for judging the significance of a project's impacts. *Id.* §

15064.7. The determination of significance “is critical, because once ‘significant effects’ have been identified in the EIR, an agency must explore feasible mitigation measures or alternatives to avoid or reduce the effect.” See *Berkeley Keep Jets Over the Bay Committee v. City of Oakland* (2001) 91 Cal.App.4th 1344, 1373. Thus, one of the first steps in any analysis of an environmental impact is to select a threshold of significance. The Draft PEIR’s failure to contain a threshold of significance for the General Plan’s substantial increase in VMT leads to a cascade of other failures: without a threshold, the PEIR cannot do its job. Specifically, although the PEIR demonstrates the General Plan would result in a significant increase in VMT, it failed to identify mitigation for this impact.

Second, the Draft PEIR may not rely on its failure to adopt a threshold of significance to claim impacts would be less than significant in light of clear evidence to the contrary. Agencies may not rely exclusively on a lack of significance threshold for a finding of insignificant impacts if other substantial evidence in the record demonstrates that the project may actually cause significant impacts. *Communities for a Better Env’t v. California Resources Agency* (2002) 103 Cal.App.4th 98, 112-13 (thresholds of significance cannot be used as binding standards that foreclose the use of other evidence to demonstrate that a project may have significant effects); *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 (“in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met”). Clearly, the Draft PEIR should have disclosed that the General Plan would result in a significant impact related to its increase in VMT. The Draft PEIR should have then been recirculated.

Apparently recognizing the flawed approach in the Draft PEIR, the Response to Comments makes a futile attempt to correct this error. The Response to Comments notes that the City adopted VMT guidelines and thresholds in June 2020 to be effective on July 1, 2020. Response to Comments at 3-81. These guidelines, entitled “CEQA Guidelines for Vehicle Miles Traveled Thresholds for the City of Fresno,” June 18, 2020 (“VMT Guidelines”) include thresholds of significance for land use plans. *Id.* Specifically, the VMT Guidelines identify the following methodology and significance threshold for land use plans: “compare the existing VMT per capita and/or VMT per employee for the region with the expected horizon year VMT per capita and/or VMT per employee for the land use plan. *If there is a net increase in the VMT metric under horizon year conditions, then the project will have a significant impact.*” VMT Guidelines at 38 (emphasis added).

Yet, rather than evaluate the increase in VMT from the General Plan against the significance thresholds established in the VMT Guidelines, the Final EIR promises to

apply the newly adopted VMT thresholds of significance the *next time* the City updates its General Plan. Response to Comments at 3-82, 3-83. The Final EIR then changes its reason as to why the Plan would not result in a significant impact relating to VMT increases, but even here the document is inconsistent. First it asserts that “with the adoption of Policy MT-2-m, the City will use VMT as the criteria for transportation impacts as the City continues to implement the approved General Plan. Therefore, impacts related to VMT are considered [less than significant] at this time.” Response to Comments at 3-84. Yet Policy MT-2-m will do nothing to reduce VMT impacts from the Plan as it simply sets forth the City’s policy to use VMT (as opposed to level of service) as the criteria for evaluating transportation impacts for CEQA review. Draft PEIR at 3-8. A policy that requires the City to study VMT does nothing to ensure that impacts will be less than significant.

Second, the Response to Comments asserts that with implementation of the VMT Guidelines, impacts related to VMT would be reduced to a less than significant level through mitigation measures identified in the VMT Guidelines that include measures such as improving or increasing access to transit, implementing employer-based trip reduction programs, and increasing development density. Response to Comments at 3-84. While the VMT Guidelines do include a list of mitigation strategies (*see* Table C), the PEIR includes no indication that these strategies would actually be adopted, let alone implemented. In short, the mitigation measures listed in the VMT Guidelines simply do not and cannot reduce to insignificance the increase in VMT caused by the General Plan. When a lead agency relies on mitigation measures to find that a project’s impacts will be reduced to a level of insignificance, there must be substantial evidence in the record demonstrating that the measures are feasible and will be effective. *Sacramento Old City Assn. v. City Council of Sacramento*, 229 Cal.App.3d 1011, 1027 (1991); *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d 692, 726-29 (1990). There is no such evidence in the record for this Plan. In fact, to the contrary, the VMT Guidelines make clear that it may not even be feasible to mitigate a project’s VMT impacts. (*See* VMT Guidelines at 40, stating the “practical implementation of these [VMT] strategies as formal CEQA mitigation measures in perpetuity is yet to be tested,” and “[t]hese issues of regional scale, partial participation, and geographic ambiguity confound the certainty of the City’s identification of VMT mitigation measures”; *see also* VMT Guidelines at 27).

The VMT Guidelines refer to the potential for regional VMT mitigation strategies such as mitigation banks, fees, and exchanges (VMT Guidelines at 41), yet the PEIR does not identify such banks, fees or exchanges or analyze how such strategies could effectively reduce the General Plan’s VMT impacts.

In sum, the PEIR should be revised to disclose that the General Plan will result in significant impacts due to its increase in VMT. The revised document should then identify mitigation for these impacts. The PEIR notes that that given the increase in VMT under the General Plan, “it is recommended that when the City plans to update its General Plan Mobility and Transportation Element, it should strive to lower the General Plan (2035) VMT per capita compared to existing conditions.” Draft PEIR at 4.16-41. However, the City may not update this Element again for decades. Given the gravity of the GHG and air quality impacts associated with high VMT, the PEIR must identify mitigation measures or General Plan alternatives that promote sustainable growth as a mechanism for reducing VMT.

B. The PEIR Fails to Disclose, Analyze, or Identify Feasible Mitigation Measures for the General Plan Implementation’s Significant Impacts on Pedestrians, Cyclists, or Transit Riders.

As noted in Leadership Counsel’s May 5, 2020 Draft PEIR comment letter, the PEIR does not contain information on or analysis of how implementation of the General Plan would affect pedestrians, cyclists, or public transit riders. The PEIR in fact states explicitly that it “does not consider potential impacts on walking, biking, and transit. Pedestrians, bicyclists, transit riders are all users of the roadway system but may not be fully recognized in the traffic operations analysis and the calculation of LOS.” Draft PEIR at 4.16-4. The PEIR’s Response to Comments points to General Plan goals and policies pertaining to pedestrians, cyclists, and transit rides (Response to Comments at 3-85), but as noted in Leadership Counsel’s May 5, 2020 letter (*id.*), this approach does not substitute for an analysis of General Plan implementation’s direct impact on pedestrians, transit riders, and cyclists, nor can it suffice as mitigation for those not-yet analyzed impacts. During public meetings held by the General Plan Implementation Committee, staff presentations have disclosed that, six years in to General Plan implementation, many of the General Plan policies have not yet been implemented. Reliance on the existence of policies is insufficient.

The Response to Comments asserts that the proposed project ultimately does not include any environmental changes resulting in impacts to cyclists, pedestrians, or transit users. *Id.* It therefore appears to contend that the environmental impacts of an already-adopted General Plan policy need not be analyzed. But this would improperly limit the scope of environmental review, which includes impacts of implementing the General Plan, including impacts that implementation of the General Plan’s environmental and policy changes will have on multimodal transportation users.

The PEIR's Response to Comments also points to the adopted Active Transportation Plan (ATP). *Id.* However, as the Leadership Counsel noted in its May 5, 2020 letter, the ATP is not incorporated into the General Plan, does not address the General Plan's unspecified and unanalyzed impacts, and operates as a guidance document that aids the City in choosing from an extensive list of projects when applying for regional, state, and federal dollars to invest in active transportation projects throughout the City. *Id.* There is no mandatory duty to implement the ATP and there is no required methodology for choosing projects, much less projects that will mitigate the impacts of this project. Of particular importance, the ATP has no projects proposed to be developed in the ATP's priority network for the city's south central areas where industrial land uses are planned, sited, and under development and includes very few projects proposed in the "build-out" (presumably secondary) phase for this area. The price tag on the priority network is approximately \$90 million which makes the possibility of investment in the build out phase (and thus south central Fresno) elusive. Accordingly, the PEIR's identification of the ATP as justification of lack of pedestrian or cyclist impacts is insufficient.

Land use changes in the project area, specifically siting and development of industrial land uses in the south central region of the city and in areas within the sphere of influence, have and will significantly impact and worsen walking and biking conditions for residents. Since the siting and development of several facilities in this area, including facilities developed since General Plan adoption, residents in the neighborhood have noticed an astronomical increase in low and heavy duty vehicles as the cumulative traffic each of these facilities attracts thousands of more trips than before. *See Warehouses Are Headed for the Central Valley Too*, The New York Times, July 22, 2020, Attachment 4 to this letter; *Will Fresno put the brakes on an industrial park project? Some residents hope so*, The Fresno Bee, January 11, 2019, Attachment 5 to this letter; *Judge grants state attorney general intervention in Fresno environmental justice lawsuit*, The Fresno Bee, July 12, 2018, Attachment 6 to this letter.

Recent industrial installations have made it much more unsafe for students walking to Orange Center Elementary and residents trying to stay active in their neighborhoods in south central Fresno, as increased traffic volume and speeds increasingly impact streets already deficient in pedestrian facilities. The community of Calwa and the surrounding areas of southeast Fresno have also been impacted by recent developments including a parking facility for Amazon delivery vans. The facility increases traffic congestion and pollution levels, exacerbating already unsafe conditions for students walking to school and bus stops, and for parent volunteers who help usher younger children to school.

IV. The Draft PEIR Fails to Adequately Analyze and Mitigate the Project’s Air Quality Impacts.

A. The Draft PEIR Fails to Support its Conclusion that the Project Will Not Violate Applicable Air Quality Plans.

One of the PEIR’s thresholds of significance for Air Quality, AQ-1, looks at whether the “proposed project would [] conflict with or obstruct implementation of the applicable air quality plan.” In reviewing the project’s potential impacts in this regard, the PEIR lists several Air Quality Plans (“AQPs”), including the Assembly Bill 617: Community Emission Reduction Plan (“AB 617”, “CERP”). However, it does not go beyond a simple description of the CERP, and fails to address the role of the City and General Plan in ensuring consistency with the goals and policies of the recently adopted CERP. Both the Leadership Counsel’s letter, and a letter from the San Joaquin Valley Air Pollution Control District, noted the Draft PEIR’s failure to provide an analysis of the General Plan’s consistency with the CERP. Response to Comments at 3-55, 56.

The PEIR’s Response to Comments states that the City “will continue the planning efforts related to the CERP,” but goes no further. *Id.* at 3-87; *see also id.* at 3-55, 56. And the Response to Comments also declines, for example, to consider suggestions from the San Joaquin Valley Air Pollution Control District that revisions be made to the General Plan to discuss a heavy-duty truck rerouting study from the adopted CERP, noting that “approved General Plan at this time are limited to specific changes related to VMT and compliance with recent legislative updates.” *Id.* at 3-59.

The CERP covers an area that includes large swaths of southwest, southeast, south central, and central Fresno. This area was chosen as a result of the atrocious air pollution and the unfair burden low-income communities of color in these areas of the city bear, and the urgent need to respond to historical inequities in these communities. Antithetical to these efforts, however, is the City continuing to zone parts of these same areas—south central, southeast, and the downtown regions—for nearly all of the city’s heavy industrial development. Attachment 7 to this letter includes a map identifying these overlapping efforts.

The CERP itself is unequivocal that its purpose is to reduce pollution in the designated south Fresno area. While the San Joaquin Valley Air Pollution Control District (“Air District”) leads CERP implementation, the City has a critical role in supporting CERP implementation and emission reduction. Several policies and commitments in the CERP implicate the City of Fresno’s participation, yet none of these policies and commitments have made their way into either the General Plan or the PEIR,

and the PEIR does not analyze whether implementation of the General Plan would be consistent with these policies. Some of the most relevant policies and commitments in the CERP that require municipal coordination include:

- HD.11: Heavy Duty Truck Rerouting
- C.5: Incentive Program for Educational Training for Electric Vehicle Mechanics
- LU.2: Provide Assistance During the California Environmental Quality Act Process
- LU.3: Provide Education and Outreach on Available Tools for Public Information Regrading Land Use Projects
- LU.4: Collaborating to Enhance Community Participation in Land Use Processes
- FD.2: Street Sweeping
- Strengthened working relationship between the Air District and agencies that have land use and transportation authority in South Central Fresno, including development of a Memorandum of Understanding or other appropriate mechanisms for coordination.

The PEIR has not demonstrated, nor can it support, a basis for its conclusion that the General Plan is consistent with the AQPs listed or furthers the goals and commitments in the CERP.

B. The PEIR's Analysis of the Health Impacts Associated with the Project's Air Quality Impacts is Deficient.

The PEIR's analysis (or lack thereof) of the connection between the project's likely air emissions and health impacts falls far short of the standards set by CEQA. The PEIR's failures include: 1) failing entirely to acknowledge potential health impacts on certain vulnerable populations, and 2) dismissing the possibility of assessing the health impacts of criteria air pollutants emitted as a result of General Plan implementation, without providing adequate justification. These failures and the PEIR's resulting lack of mitigation to address the health impacts associated with the project's criteria air pollutant emissions will disproportionately harm people of color, low-income Fresnoans, the elderly and children who are most susceptible to air pollution, as well as disadvantaged

communities in and near the Planning Area which are designated for new industrial development.

The PEIR does not assess the strong correlation between air pollution, disparate impacts on Black and Latino populations, and coronavirus disease (“COVID-19”). An unprecedented infectious disease, the 2019 novel coronavirus is a newly identified disease that has caused illness in millions of people worldwide. At the time of the PEIR’s release in March 2020, widespread transmission of the novel coronavirus was a recent development in Fresno and most other California counties, and the extent of its impact was still unknown. As time has passed and the coronavirus continues to ravage communities worldwide, including communities in Fresno, local and state agencies better understand the impacts and vulnerabilities associated with the virus, including the extent to which polluted air increases susceptibility to the virus and the severity of its impacts.

The American Lung Association has ranked the Fresno area as the most polluted metro area in the nation from PM 2.5 by calculating the average year-round concentration. *See* American Lung Association press release re ‘State of the Air’ report, April 21, 2020, Attachment 9 to this letter. A Harvard study found that an increase of only 1 $\mu\text{g}/\text{m}^3$ in PM 2.5 is associated with an increase of eight percent death rate from COVID-19. *See* Exposure to air pollution and COVID-19 mortality in the United States: A nationwide cross-sectional study, Xiao Wu & Rachel C. Nethery, et al., Department of Biostatistics, Harvard T.H. Chan School of Public Health, posted April 27, 2020, Attachment 8 to this letter. Moreover, COVID-19 has disproportionately infected and killed more Latino and disproportionately killed more Black people in the United States, and has disproportionately killed and infected Latinos in Fresno County. Fresno County COVID-19 Data and Surveillance Dashboard, Covid-19 Deaths Race-Ethnicity, and Cases by Race and Ethnicity, accessed August 18, 2020, Attachments 10 and 11 to this letter. These disproportionate impacts of COVID-19 on people of color, and the disproportionate share of Latino and Black residents that live in South Fresno neighborhoods raise particular concerns as to the PEIR’s failure to assess and mitigate air quality and health impacts, and failure to assess the disproportionate impacts of this failure on people of color, especially in the context of COVID-19.

V. The PEIR Fails to Adequately Analyze and Mitigate for the General Plan’s Greenhouse Gas Emissions, and the GHG Plan Cannot Qualify as a CEQA Streamlining Document.

Reducing GHG emissions to minimize the harms from climate change is one of the most urgent challenges of our time. Scientific evidence continues to mount that we are not only facing a true climate crisis, but also rapidly running out of time to confront

it. The City of Fresno and the surrounding region face mounting risks from climate change, including wildfire, precipitation extremes (GHG Plan at 2.7 to 2.8), drought, decreased water supply, and worsening air quality (*see Climate Change, Public Health, and Policy: A California Case Study*, American Journal of Public Health, C. Ganesh & J. Smith, April 1, 2018, Attachment 12 to this letter). The residents of Fresno therefore have a direct and immediate interest in swift and decisive climate action at all levels of government. Further, the law is clear that lead agencies must thoroughly evaluate a project's impacts on climate change under CEQA, and identify and adopt feasible mitigation measures to address project-specific or cumulative impacts. *See Communities for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70, 89-91; CEQA Guidelines § 15064.4.

The City's preparation of the PEIR and update to its GHG Plan, included as Appendix G to the Draft PEIR and incorporated into the General Plan, offer an important opportunity to aggressively reduce emissions, including from VMT, which contributes significantly to climate disruption in Fresno. GHG Plan at ii. Unfortunately, the City is effectively passing up this opportunity with its proposed GHG Plan and associated PEIR.

The GHG Plan relies largely on vague, nonbinding policies from the General Plan to reduce GHG emissions, and fails to provide data to support its conclusion that compliance with these policies would be sufficient meet the state's GHG emission reduction mandates. These policies are essentially the same as those relied on in the 2014 GHG Plan. Further, the GHG Plan applies such a vague approval process for a project to tier off of the GHG Plan that it provides no assurance that tiered projects will reliably reduce GHG emissions through project design. With these deficiencies, the GHG Plan cannot serve as a "qualified" climate action plan under CEQA Guidelines section 15183.5, i.e. one that can be used as a "threshold of significance" for evaluating the climate impacts of future discretionary projects.

The PEIR likewise relies on implementation of these same vague, optional General Plan policies to mitigate the impacts of greenhouse gas emissions from General Plan implementation. Finding that GHG emissions from implementation might nevertheless have potentially significant climate change impacts, the PEIR asserts that these emissions can be mitigated to less than significant levels with a single mitigation measure: for new development projects subject to discretionary review are to show consistency with the GHG Plan and its CEQA Project Consistency Checklist. *See* Mitigation Measure GHG-1.1, Draft PEIR at 4.8-45. Efficacy of this measure is unsupported by substantial evidence, and cannot be relied upon given the vague framework for project-level GHG reductions laid out in the GHG Plan. The PEIR also lacks evidence to support its conclusion that the General Plan is consistent with

applicable plans, policies, and regulations adopted to reduce GHG emissions. Draft PEIR at 4.8-46, 47.

A. The City’s GHG Plan Fails to Ensure Reduction of GHG Emissions and Cannot be Relied on for Tiering under CEQA Guidelines § 15183.5.

Where a public agency’s climate action plan meets the requirements in CEQA Guidelines section 15183.5, compliance with that plan may be used to mitigate cumulative levels of GHG emissions within a jurisdiction to a less-than-significant level, and allows development project tiering from the plan. CEQA Guidelines § 15185.3. Such plans must do all of the following: (1) make an inventory of greenhouse gas emissions, both existing and projected over a specified time period, resulting from activities within a defined geographic area; (2) set a reduction target, based on substantial evidence, below which the contribution to greenhouse gas emissions from activities covered by the plan would not be cumulatively considerable; (3) forecast projected emissions for activities covered by the plan; (4) specify reduction 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 reduction target; and (5) establish a mechanism to monitor the plan's progress toward achieving reduction targets.

The City’s GHG Plan fails to meet all of these requirements. In particular, it omits 2050 as a target reduction year, which leaves the City without information on whether adequate reductions, under General Plan and other local policies, will be possible in later years. The Plan also lacks substantial evidence that its reduction measures, taken largely from the General Plan, are capable of achieving reduction targets. Further, it provides only vague direction for how a project tiering off of the GHG Plan would comply with the plan, undermining the GHG Plan’s ability to ensure project-level emissions reduction.

1. *The Baseline Inventory of GHG Emissions Is Incomplete and Inaccurate.*

The baseline inventory of City GHG emissions is the foundation of the GHG Plan. Without a complete and accurate inventory, the City cannot accurately project future business-as-usual (“BAU”) emissions or measure the effectiveness of reduction measures in meeting identified targets and goals. Effective policies cannot be built on a flawed inventory. Unfortunately, the City’s GHG Plan inventory is incomplete and therefore inaccurate. The GHG Plan omits certain types of emissions without justification. For example, the GHG Plan states that it did not include emissions sources that comprise less

than 3 percent of the emissions inventory. GHG Plan at 3-1. The GHG Plan gives no further details and no explanation or basis for this arbitrary omission.

Similarly, the inventory specifically omits emissions from large industrial sources that are subject to California Air Resources Board's (CARB) reporting regulations and to Cap-and-Trade regulations. *Id.* In other words, only emissions from smaller sources are counted in the baseline inventory, while emissions from larger permitted sources are ignored. However, by subtracting permitted industrial emissions from the baseline inventory, the GHG Plan presents an inaccurate description of existing conditions. CEQA Guidelines § 15125(a).

The City's GHG Plan and PEIR fail to disclose these emissions, analyze their impacts, or identify feasible measures to ensure emission reductions over the life of the Plan. The result is a GHG Plan that presents flawed baseline data of GHG emissions that undermines the entire planning process. Without an accurate baseline inventory, the PEIR presents an inaccurate description of the existing setting and its projected future emissions have no evidentiary basis. Inasmuch as the City permits the activities resulting in emissions, the City has an obligation to disclose these emissions. The failure to do so renders the GHG Plan fatally flawed. A revised Plan must correct this flaw and include a comprehensive inventory of all emissions.

2. *The GHG Plan's Emission Forecasts Should Extend to 2050.*

The GHG Plan states that the "approved General Plan and GHG Plan Update ensure that the City of Fresno will do its part of reducing GHG emissions for the short-term (2020) and the long term (2050)." GHG Plan at 1-8; PEIR at 4.8-48. Yet the GHG Plan, as well as the PEIR, forecast emissions only for the years 2020, 2030, and 2035. The forecast does not go to 2050. GHG Plan at i; Draft PEIR at 4.8-48.

The PEIR asserts that a forecast farther into the future is unnecessary. It states that "[a]lthough the General Plan growth rate would result in buildout by the year 2056, given current methods and the State's goals and targets, 2035 is a reasonable forecast for GHG and is in-line with the State emission reduction targets." Draft PEIR at 4.8-45. This approach is inadequate. First, the GHG Plan notes that one of the goals of converting the MEIR to a PEIR is to "extend[] the life of the Fresno General Plan and the accompanying environmental document by up to 10 years." GHG Plan at 1-2. To the extent that this means extending the lives of these documents 10 years past 2035, until 2045, a forecast farther into the future is essential to establish that the General Plan's policies are capable of reducing emissions in line with state mandates over the entire life of the General Plan.

Further, because buildout under General Plan extends to 2056 (GHG Plan at 2-2; PEIR at 4-2, 4.8-32) the GHG Plan should have forecast emissions to implement the plan until at least 2050. As drafted, the document considers at most only 20 years' worth of emissions—a small fraction of the time over which General Plan impacts will be felt, a Plan that sets in place land use patterns leading to emissions for decades to come, long after 2035. This time horizon fails to provide the public with a meaningful assessment of the Project's long-term impacts. The GHG Plan should have accounted for, and the PEIR should have analyzed, GHG emissions at least through the year 2050. Only then could the PEIR analysis determine if implementation of the General Plan and other local GHG reducing policies is consistent with the long-term emissions reductions targets for climate stabilization articulated in AB 32 and California's 2017 Climate Change Scoping Plan. The statewide reduction goals set forth in in the Scoping Plan call for reducing emissions levels to 80 percent below 1990 levels by the year 2050. Accordingly, 2050 is the minimum appropriate planning horizon for analyzing annual emissions of a long-term project such as the City's General Plan.

Critically, meeting the statewide 2050 goals requires continuing and steady annual reductions in both total and per capita GHG emissions. *See* California's 2017 Climate Change Scoping Plan (excerpt), California Air Resources Board, April 1, 2018 at 18, Attachment 13 to this letter. Because state policy aims to steeply reduce GHG emissions over that same time period, it is imperative that the PEIR inform the public and decision-makers whether the General Plan implementation directly conflicts with the state's reduction goals. Of course, as mentioned above, that analysis should include the Project's anticipated emissions out to 2050. As the California Supreme Court has held, an agency "abuses its discretion if it exercises it in a manner that causes an EIR's analysis to be misleading or without informational value." *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 457. Here, neither the GHG Plan nor the EIR provide evidence that emissions reductions targets will be met.

3. *The GHG Plan Presents Vague Measures That Cannot Produce the Necessary Emission Reductions and Lacks Evidence of the Development of Implementation Programs.*

The GHG Plan's most fundamental weakness may be its failure to identify a set of GHG reduction measures that comes anywhere close to achieving the City's desired targets and goals. The GHG Plan offers only a vague assurance that the "GHG Plan Update ensures conformity with the mandates of California Supreme Court in the Newhall Ranch case and the State of California's latest GHG regulations" (GHG Plan Update at i) but fails to comprehensively address how it will "ensure conformity" and

does not demonstrate how these policies in the GHG Plan will reduce emissions by the amounts necessary.

Indeed, many of the GHG reduction measures collected in the GHG Plan from various elements of the General Plan represent vague, unenforceable, unquantifiable commitments to “encourage” or “promote” various actions (*see* Section V.B.1 below for specific examples). Although measures of this sort may be appropriate to supplement more concrete requirements, identification of specific, enforceable measures and quantification of resulting emissions reductions are required to demonstrate consistency with quantitative targets and goals. Enforceable, concrete commitments to mitigation also are required under CEQA. Neither the GHG Plan nor the PEIR contain adequate measures of this kind. Such measures are vital here given that the City needs tremendous reductions in emissions by 2035 and even greater reductions in 2050, particularly through reductions in VMT, to achieve state-mandated targets. The City will be unable to achieve these reductions through unenforceable policies.

In addition, although the GHG Plan states conclusions regarding projected levels of GHG emission reductions under the GHG Plan, it fails to provide evidentiary support for those conclusions. For example, that plan indicates that required emissions reductions are met for 2020, but provides no evidence that the GHG Plan policies will be enforceable and effective at meeting emission reduction targets. GHG Plan at 4-4. In addition, the GHG Plan concludes that the reductions will be met for 2030 and 2035, but again provides no evidence to support this conclusion. *Id.* at 5-31.

Meanwhile, the approval process and checklist the GHG Plan sets for individual development projects to qualify for CEQA streamlining is too undefined to ensure that projects will achieve necessary GHG reductions. This severely undermines the GHG Plan’s ability to reduce emissions. This is especially serious given that the Plan relies largely on reducing emissions from new development because “[r]esidents of new development projects will achieve lower per capita rates than residents of existing development.” GHG Plan at 1-8.

The Plan specifies a review process for proposed new developments subject to discretionary approval that are consistent with the underlying land use and zoning designations. Such projects would review the GHG Plan Update Consistency Checklist, and incorporate and implement design features or mitigation measures “as needed to demonstrate consistency.” GHG Plan at 6-1, 2. The GHG Plan does not specify what these proposed projects must demonstrate consistency with. For example, if it is consistency with the Checklist itself, what would consistency with the Checklist entail? Adoption of one or more measures included on the Checklist? Adoption of all measures

included in the Checklist? This requirement is vague and unclear. Furthermore, the Checklist itself contains only a handful of measures, some of which are optional, or appear to already be required by state law or local policy. Checklist at 4, Appendix B to GHG Plan. Notably, the GHG Plan does not clarify how it will be determined if design features or mitigation measures will be “needed,” and does not specify that all possible features or measures will be required. It further does not make clear whether a project may still take advantage of CEQA streamlining if it does not comply with all the measures on the checklist. *Id.* It is also unclear how the City will determine how a project is consistent with the Checklist given that not all the measures are mandatory. *Id.*

Meanwhile, the approval process for new discretionary industrial projects requiring a general plan amendment inexplicably excepts emissions from stationary sources from consideration in the significance determination. GHG Plan at 6-2. Neither the GHG Plan nor the PEIR provide any justification for omitting stationary sources from CEQA review for these projects. To ensure that future projects are adequately reviewed, all emissions, including stationary sources must be considered in the CEQA analysis.

4. *The GHG Plan Lacks a Reliable Mechanism for Monitoring Compliance.*

Under CEQA Guidelines section 15183.5, a qualifying plan must establish a mechanism to monitor the plan's progress toward achieving reduction targets. The City's GHG Plan does not meet this requirement. The Plan concedes that its implementation and monitoring steps are “suggested—not required” (GHG Plan at 7-1) even though the Plan states that “successful implementation of the GHG Plan Update will require implementation and monitoring.” *Id.* The GHG Plan then states: “presently it would appear that without future State action the City would need to implement the local reduction strategies to reach its reduction targets for 2035.” GHG Plan at 7-2. This casts doubt on the City's plans for implementing reduction strategies, yet according to other sections of the GHG Plan, the City must implement local reduction strategies regardless in order to meet reduction targets. GHG Plan at 3-31. This further underscores the need for a reliable monitoring mechanism.

5. *The GHG Plan Does Not Satisfy the Requirements for CEQA Streamlining and Must Be Revised to Indicate That.*

The GHG Plan allows for streamlined review for new projects subject to discretionary review and that trigger review under CEQA. GHG Plan at iv. As drafted, however, the GHG Plan falls far short of the requirements of CEQA Guidelines section 15183.5. In order to support a determination that climate action plan consistency

eliminates significant climate effects, a climate action plan must, among other things, clearly demonstrate that its prescribed measures will actually achieve the reductions necessary to attain the climate action plan's stated goals. CEQA Guidelines § 15183.5(b)(1)(D). As discussed above, the GHG Plan provides no basis for such a conclusion. The GHG Plan and the PEIR should therefore be revised to make explicit that the GHG Plan does not contain sufficient specific, enforceable GHG reduction measures to support streamlined CEQA review of future projects. Development projects in Fresno are already subject to great discretion regarding the level of applicable environmental review. *See, e.g.* Attorney General Letter at 11-12. The City cannot, in addition, allow most projects subject to discretionary review bypass GHG analysis under the GHG Plan.

B. The PEIR Fails to Adequately Analyze and Mitigate for the General Plan's Greenhouse Gas Emissions.

The PEIR, like the GHG Plan, concludes that implementation of the General Plan, along with implementation of other local policies, will enable the City to meet state-mandated GHG reduction targets. Draft PEIR at 4.8-44, 38. The City therefore relies on implementation of these policies to mitigate GHG emissions resulting from implementation of the General Plan.

Courts have clarified that an EIR is inadequate where proposed mitigation measures are so undefined that it is impossible to evaluate their effectiveness. *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79. Moreover, “[m]itigation measures must be fully enforceable through permit conditions, agreements, or legally binding instruments.” CEQA Guidelines § 15126.4(a). The record must also contain substantial evidence of the measures’ feasibility and effectiveness. *Sacramento Old City Assn. v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1027.

Unfortunately, the GHG mitigation identified in the PEIR fails to meet these standards. Many of the General Plan’s policies and programs relied on to mitigate impacts related to GHG emissions are vague, optional, directory, or otherwise unenforceable, or lack evidence to support their assumptions. Emissions reductions cannot be assumed from such policies. A few examples—out of numerous instances—include the following:

- General Plan Objective UF-12. Directing the City to locate *roughly* one half of future residential development in infill areas (emphasis added). Draft PEIR at 4.8-18. However, the General Plan provides liberal definitions for terms such as “roughly” and “approximately” as applied in the Plan. It

states that use of these terms is intended to be flexible so that depending on context, a reference to “approximately one-half” could vary at least 10 to 15 percent and use of the term “roughly” could include twice that amount or more. General Plan at 1-30. Anywhere from 20 percent to over 80 percent of future development could occur in infill areas.

- General Plan Policy RC-5-c: GHG Reduction through Design and Operations. “*Promote* the expansion of incentive-based programs that involve certification of projects for energy and water efficiency and resiliency. . . . *Promote* appropriate energy and water conservation standards and facilitate mixed-use projects, new incentives for infill development, and the incorporation of mass transit, bicycle and pedestrian amenities into public and private projects.” Draft PEIR at 4.8-27 (emphasis added).
- Building Energy Efficiency. “The City *encourages* developers to achieve the *voluntary* tier levels from the CPUC Energy Efficiency Strategic Plan, which ultimately lead to net zero energy consumption for residential development by 2020 and non-residential development by 2030.” Draft PEIR at 4.8-42.
- General Plan Policy RC-8-b: Energy Reduction Targets. “Strive to reduce per capita residential electricity use to 1,800 kWh per year and non-residential electricity use to 2,700 kWh per year per capita by developing and implementing incentives, design and operation standards, promoting alternative energy sources, and cost-effective savings.” Draft PEIR at 4.8-30.
- General Policy RC-8-c: Energy Conservation in New Development. “*Consider* providing an *incentive* program for new buildings that exceed California Energy Code requirements by fifteen percent.” Draft PEIR at 4.8-30.
- Electric Vehicles. The PEIR states that based upon the historic trends in Electric Vehicle (EV) ownership and the CARB Zero-Emission Vehicles (ZEV) Action Plan, it is assumed that by 2030 EV ownership in the city would reach 8.7%, and by 2035, 13% of the vehicle trips would be made by EVs. Draft PEIR at 4.8-40, 41. The PEIR offers no evidence to support this assertion.

Moreover, although the PEIR purports to analyze impacts of the General Plan's continued implementation (Draft PEIR at 1-1), it fails to present evidence that the City has acted on these policies. The City has had six years since General Plan adoption to develop incentive programs and reduction measures, yet it present no evidence that any programs have been implemented. Therefore, the PEIR cannot conclude that the City will see the substantial emissions reductions from these policies necessary to meet state mandates.

Further, in concluding that General Plan implementation may directly or indirectly generate GHG emissions having significant environmental impacts and would result in significant cumulative GHG impacts, the PEIR relies entirely on Mitigation Measure GHG-1 to reduce these emissions to less than significant. Draft PEIR at 4.8-45, 47-48. Mitigation Measure GHG-1 requires new development projects subject to discretionary review to show consistency with the GHG Plan and its CEQA Project Consistency Checklist. Draft PEIR at 4.8-45. However, Mitigation Measure GHG-1 relies on consistency with the very policies, described above, from the General Plan and other local programs, that require little apart from consistency with existing regulations, or with vague and unenforceable measures. This approach fails for the same reasons as noted above. Permissible mitigation under CEQA must be binding or fully enforceable. The PEIR fails to present evidence applying Mitigation Measure GHG-1 will actually allow the City to meet GHG emissions reduction mandates.

There are numerous feasible mitigation measures the City could adopt to reduce the General Plan's GHG impacts. Some examples include:

- Create funding incentives for projects that conform to the General Plan and development approvals to smart growth and infill development standards such as LEED Neighborhood Development standards. Alternatively, the City could adopt a policy that it will not provide future funding for widening roadways to serve sprawl developments, but will instead prioritize funding for projects that serve development adjacent to or within already developed areas.
- Institute city-wide parking pricing policies.
- Adopt any number of policies that apply to new development within the City's jurisdiction. For example, it could:
 - Adopt an ordinance requiring payment of indirect source impact fees from development projects, similar to what the San Joaquin Valley

Air Pollution Control District requires in order to offset air pollution. The fee could be tailored to address traditional air pollution, toxic air contaminants, as well as GHG emissions.

- Adopt a policy conditioning funding of certain transportation projects on a demonstration that the project will reduce vehicle-miles traveled.
- Adopt a policy requiring publicly accessible electric vehicle charging stations to be installed at all new buildings (residential and commercial) with a parking lot larger than 10 parking spots.
- Offer fee reductions, waivers, loans or grants to developers and contractors who commit to verifiable green building practices that exceed state minimum standards. *See* Attachment 1, Exhibit K [Institute for Local Govt Best Practices] at 9.
- Provide incentives for new development projects to install home or business electric vehicle charging stations, alternative energy systems or energy efficiency upgrades. *See* Attachment 1, Exhibit K [Institute for Local Govt Best Practices] at 11.
- Review and adopt other policies such as those outlined in the Institute for Local Government's Best Practices guide. *See* Attachment 1, Exhibit K.

Even if the City cannot feasibly adopt some of these measures as part of its environmental review of the General Plan, it certainly can commit to developing and adopting specific measures in the future, provided it includes proper performance standards that will guide it in developing the measures. *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099.

C. The PEIR's Conclusion that the Project Will Not Conflict with an Applicable Plan to Reduce GHG Emissions is Not Supported by Substantial Evidence.

The PEIR recognizes that the Project will have significant GHG-related impacts if it will conflict with an applicable plan, policy, or regulation that was adopted for the purpose of reducing the emissions of GHGs. Draft PEIR at 4.8-46. However, the PEIR

concludes that the Project will not conflict with any such plan, and therefore will not have a significant impact. *Id.* at 4.8-46 to 47. The PEIR's analysis on this point is flawed.

First, the PEIR concludes that the Project is consistent with state GHG reduction goals and with the CARB Scoping Plan, and asserts that implementation of the GHG Plan will allow the City to meet the state's reduction targets. *Id.* Yet it appears to omit data supporting this conclusion. An EIR's conclusions must be supported by substantial evidence. *Laurel Heights Improvement Ass'n*, 47 Cal.3d at 409. And without presenting such evidence, the PEIR cannot ensure that the Project is consistent with state climate mandates.

Second, the PEIR fails to analyze the Project's consistency with the San Joaquin Valley Air Pollution Control District Climate Change Action Plan. Goal 3 of that plan, referenced in the PEIR, states: "Ensure that climate protection measures do not cause increases in toxic or criteria pollutants that adversely impact public health or environmental justice communities." PEIR at 4.8-15. The Project is inconsistent with this goal, and therefore with the District's plan, because it results in increases of both toxic and criteria pollutants in close proximity to, and in some cases directly within, low income communities and communities of color in Fresno already overburdened by pollution – environmental justice communities.

Finally, the PEIR fails to examine the Project's consistency with the San Joaquin Valley Air Pollution Control District's Guidance for Valley Land-use Agencies in Addressing GHG Emission Impacts for New Projects under CEQA. The Project, however, is inconsistent with this Guidance as well, where the Guidance finds that project-specific emissions are cumulative, and "that this cumulative impact is best addressed by requiring all projects to reduce their GHG emissions" Draft PEIR at 4.8-16. The PEIR does not generally "require" such project-specific reductions, and therefore could not be found consistent with the Guidance.

VI. Conclusion.

For the foregoing reasons, we request that the City revise the PEIR to correct the errors identified in this letter, and recirculate the revised PEIR for public review and comment. The revised PEIR must conduct a thorough review of impacts from the entire lifetime of the General Plan, and cannot fail to consider proposed mitigation measures simply because the General Plan has already been adopted. In addition, we request the City to revise its GHG Plan to indicate that it does not meet the requirements for CEQA streamlining.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Marlene Dehlinger



Carmen J. Borg, AICP, Urban Planner

ATTACHMENTS

- Attachment 1:** Shute, Mihaly & Weinberger LLP comment letter re Draft Master Environmental Impact Report for the Draft General Plan and Development Code Update for the City of Fresno, including Exhibits A-Q, October 8, 2014
- Attachment 2:** California Attorney General letter to City of Fresno re City of Fresno's South Industrial Priority Area Specific Plan, August 2, 2019
- Attachment 3:** Griffin Cove Transportation Consulting report, August 7, 2020
- Attachment 4:** *Warehouses Are Headed for the Central Valley Too.* The New York Times, July 22, 2020
- Attachment 5:** *Will Fresno put the brakes on an industrial park project? Some residents hope so.* The Fresno Bee, January 11, 2019
- Attachment 6:** *Judge grants state attorney general intervention in Fresno environmental justice lawsuit.* The Fresno Bee, July 12, 2018

- Attachment 7:** Map showing AB 617 and South Central Specific Plan boundary lines
- Attachment 8:** Exposure to air pollution and COVID-19 mortality in the United States: A nationwide cross-sectional study, Xiao Wu & Rachel C. Nethery, et al., Department of Biostatistics, Harvard T.H. Chan School of Public Health, posted April 27, 2020
- Attachment 9:** American Lung Association press release re ‘State of the Air’ report, April 21, 2020
- Attachment 10:** Fresno County COVID-19 Data and Surveillance Dashboard, Covid-19 Deaths Race-Ethnicity, accessed August 18, 2020
- Attachment 11:** Fresno County COVID-19 Data and Surveillance Dashboard, Cases by Ethnicity, accessed August 18, 2020
- Attachment 12:** *Climate Change, Public Health, and Policy: A California Case Study*, American Journal of Public Health, C. Ganesh & J. Smith, April 1, 2018
- Attachment 13:** California’s 2017 Climate Change Scoping Plan (excerpt), California Air Resources Board, April 1, 2018

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