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9 *ex rel. Rob Bonta, Attorney General*

**Exempt from Filing Fees pursuant to
Government Code section 6103**

10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF SAN BERNARDINO

13
14 **PEOPLE OF THE STATE OF**
15 **CALIFORNIA,**

Petitioner,

16
17 v.

18 **CITY OF FONTANA,**

Respondent.

Case No.

**PEOPLE'S PETITION FOR WRIT OF
MANDATE**

[CEQA CLAIM]

**[Code Civ. Proc., §§ 1085, 1094.5; Pub.
Res. Code, § 21167]**

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21 **DUKE REALTY CORPORATION,**

Real Party in Interest.

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PARTIES

5. The Attorney General, as the chief law enforcement officer of the State of California, has broad independent powers under the California Constitution and the California Government Code to enforce laws within the State, and has special and explicit statutory authority to participate in cases involving the protection of California’s environment. (Cal. Const., art. V, § 13; Gov. Code, §§ 12511, 12600-12612.) The Attorney General also has a unique and important role in the enforcement of CEQA, as recognized by statute. (Pub. Resources Code, §§ 21167.7, 21177, subd. (d).)

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6. Respondent City of Fontana is and was, at all relevant times, a general-law city and a political subdivision of the State of California organized and existing under Government Code sections 34000 et seq. The City is a local governmental agency charged with regulating and controlling local land use and development within its territory in compliance with provisions of state law, including CEQA. The City is the lead agency for the Project under Public Resources Code section 21067.

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7. The People are informed, believe, and therefore allege that Real Party in Interest Duke Realty Corporation (“Duke Realty”), is and was, at all relevant times, the applicant for the Project.

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JURISDICTION AND VENUE

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8. Pursuant to Public Resources Code sections 21168 and 21168.5, and California Code of Civil Procedure sections 1085 and 1094.5, this Court has jurisdiction over this matter.

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9. Venue is appropriate in this judicial district pursuant to Code of Civil Procedure section 394. Respondent and the Project are both located in San Bernardino County.

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10. The People have satisfied all statutory prerequisites to filing this action.

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BACKGROUND

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Project Review Under CEQA

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11. CEQA serves the important purpose of alerting governmental decisionmakers and the public to a project’s potential significant environmental effects before the project is approved and its effects become irreversible. (Cal. Code Regs., tit. 14, § 15002, subd. (d).)

1 12. CEQA requires that a lead agency authorizing a project conduct an initial study to
2 determine if the project may have a significant effect on the environment, including direct
3 impacts and reasonably foreseeable indirect impacts. (Cal. Code Regs., tit. 14, §§ 15063, subd.
4 (a), 15378.) This initial study must describe the existing environmental setting in which the
5 project will be built, including the existing built environment and its effect on sensitive receptors.
6 (Cal. Code Regs., tit. 14, § 15125.) In addition, the initial study must evaluate the “whole of the
7 action” that may result in physical changes, including all phases of the project’s planning,
8 implementation, and operation. (Cal. Code Regs., tit. 14, §§ 15063, subd. (a), 15378.)

9 13. After conducting the initial study, if the lead agency determines that substantial
10 evidence in the record shows that the project may have a significant direct, indirect, or cumulative
11 effect on the environment, the lead agency must prepare an environmental impact report (“EIR”).
12 (Cal. Code Regs., tit. 14, § 15064, subd. (f)(1).) The threshold for preparation of an EIR is a low
13 one. An EIR is required whenever substantial evidence supports a “fair argument” that the
14 proposed project may have a significant effect on the environment, even if other substantial
15 evidence before the lead agency indicates that the project will not have a significant effect.
16 (*Ibid.*)

17 14. If substantial evidence shows that the project may have a significant effect on the
18 environment, but the lead agency determines (1) that project revisions would avoid the effects or
19 mitigate the effects to a point where clearly no significant effect on the environment would occur;
20 and (2) there is no substantial evidence in light of the whole record before the agency that the
21 project, as revised, may have a significant effect on the environment, the lead agency may prepare
22 an MND. (Cal. Code Regs., tit. 14, § 15070, subd. (b).)

23 15. An MND is appropriate only if project revisions would mitigate the potentially
24 significant effects identified in the initial study to a point where clearly no significant effects on
25 the environment would occur, and there is no substantial evidence in the record before the agency
26 “that the project, as revised, may have a significant effect on the environment.” (Pub. Resources
27 Code, § 21064.5.)
28

1 16. Critically, as part of this process, CEQA requires lead agencies to analyze,
2 disclose, and mitigate to the extent feasible projects’ cumulative impacts. A cumulative impact is
3 “two or more individual effects which, when considered together, are considerable or which
4 compound or increase other environmental impacts.” (Cal. Code Regs., tit. 14, § 15355.) A
5 project’s cumulative impact is significant when its incremental addition to environmental impacts
6 from past, current, and reasonably probable future projects is cumulatively considerable. (Cal.
7 Code Regs., tit. 14, §§ 15065, 15130.) A project’s incremental addition to existing environmental
8 impacts may be cumulatively considerable even if its environmental impact is “individually
9 limited.” (Cal. Code Regs., tit. 14, § 15065, subd. (a)(3).)

10 **The Project & Environmental Setting**

11 17. The Project consists of a 205,949 square-foot, high-cube warehouse with 22 truck
12 docks, 40 truck parking stalls, and 95 standard parking stalls. The MND estimates that the
13 warehouse would generate 114 daily truck trips and 272 daily passenger car trips during the
14 Project’s 24-hour, seven-days-a-week operations. One quarter of the warehouse space—over
15 50,000 square feet—could be used for cold storage, a use that generates truck trips with highly-
16 polluting auxiliary diesel engines needed for refrigeration.

17 18. The Project will be constructed on the southwest corner of Slover Avenue and
18 Oleander Avenue, in a south Fontana neighborhood that already suffers from some of the highest
19 pollution levels in all of California. The Project shares its southern property line with Jurupa
20 Hills High School, a large high school with nearly 2,000 students. Outdoor tennis and basketball
21 courts for students’ use border the Project. The Project will sit across the street from homes to the
22 east and north, with more residences located a block from the Project in the other two directions.
23 Two more schools—Citrus High School and Fontana Adult School—are adjacent to Jurupa Hills
24 High School to the east and within two blocks of the Project. Truck traffic visiting the Project is
25 projected to travel past several residences on Slover Avenue, including the Capri Mobile Estates
26 mobile home park.

27 19. The southern portion of Fontana is the statewide epicenter of warehouse
28 development that conflicts with sensitive land uses.

- 1 20. Over 20 warehouses have already been built within a mile of the Project site and
2 Jurupa Hills High School, most of which have been built within the last 10 years:
- 3 a. Starting from the east and moving clockwise, three warehouses on the
4 northeast corner of Sierra Avenue and Santa Ana Avenue;
 - 5 b. At least two warehouses south of Santa Ana Avenue, between Oleander
6 Avenue and Cypress Avenue;
 - 7 c. Four warehouses south of Santa Ana Avenue, between Citrus Avenue and
8 Oleander Avenue;
 - 9 d. At least five warehouses south of Santa Ana Avenue, between Catawba
10 Avenue and Citrus Avenue;
 - 11 e. A warehouse north of Jurupa Avenue, between Poplar Avenue and Catawba
12 Avenue;
 - 13 f. A warehouse south of Santa Ana Avenue, between Poplar Avenue and
14 Catawba Avenue;
 - 15 g. A warehouse north of Santa Ana Avenue, between Catawba Avenue and Citrus
16 Avenue;
 - 17 h. At least two warehouses north of Santa Ana Avenue, between Poplar Avenue
18 and Catawba Avenue;
 - 19 i. At least one warehouses south of Slover Avenue, between Elm Avenue and
20 Poplar Avenue;
 - 21 j. A warehouse on the southwest corner of Slover Avenue and Catawba Avenue;
22 and
 - 23 k. The Slover Gateway Commerce Center, on the southwest corner of Cypress
24 Avenue and Slover Avenue.
- 25 21. On April 27, 2021, the City approved another warehouse (the Citrus Avenue and
26 Slover Avenue Warehouse Project, Master Case No. 20-050) for the site directly west of the
27 Project, which also borders Jurupa Hills High School.
- 28 22. In addition to the Project, the Citrus Avenue and Slover Avenue Warehouse

1 Project, and the existing warehouses listed above, at least three more warehouses are in
2 construction, have been approved, or are being planned for the area:

- 3 a. Sierra Business Center, to be located on the northeast corner of Slover Avenue
4 and Cypress Avenue;
- 5 b. Slover-Juniper Industrial Building Project, to be located on the northeast
6 corner of Slover Avenue and Juniper Avenue; and
- 7 c. Another Duke Realty warehouse on the northwest corner of Slover Avenue and
8 Cypress Avenue.

9 23. Interspersed with the warehouses listed above are numerous smaller warehouses
10 and other logistics-related industrial sites, such as truck parking and rental facilities.

11 24. On information and belief, Respondent is considering or planning additional
12 industrial development in the area.

13 25. As warehouse development in the area has intensified, sensitive receptors have
14 become increasingly surrounded by these industrial facilities. Throughout southern Fontana,
15 warehouses sit adjacent to schools and homes. Collectively, these warehouses generate thousands
16 of daily heavy-duty diesel truck trips. These trucks traverse neighborhoods where families live,
17 walk, bike, and recreate, emitting toxic pollution and posing a threat to pedestrians, cyclists,
18 drivers, and sensitive populations, including children in school. The warehouses also operate 24
19 hours per day and seven days per week, are loud from loading activity, and have bright lights at
20 night, among other environmental impacts.

21 26. The environmental impacts of the rapid warehouse development in southern
22 Fontana are compounded by the substantial pre-existing pollution in the area. According to
23 CalEnviroScreen 4.0, the California Environmental Protection Agency's screening tool that ranks
24 each census tract in the state for pollution and socioeconomic vulnerability, the Project's census
25 tract is more polluted than 98 percent of the state's census tracts, making it among the most
26 polluted areas in the state. Residents of the area suffer from some of the highest exposures
27 statewide to fine particulate matter (94th percentile), which are inhalable microscopic particles
28 that travel deep into human lungs and are linked to increased risk of premature death,

1 cardiovascular disease, lung cancer, and asthma attacks. Local residents are also heavily exposed
2 to ozone (96th percentile), which is similarly linked to serious respiratory illness, and toxic
3 releases that can cause a wide array of other diseases and impairments (97th percentile). The
4 Project’s census tract also ranks in the top quarter for exposure to diesel particulate matter, traffic,
5 drinking water contamination, hazardous waste, solid waste, and contaminated sites. Because the
6 majority of warehouse development in southern Fontana has occurred very recently and
7 CalEnviroScreen 4.0’s data for most indicators are about three to ten years old, southern Fontana
8 residents’ true pollution exposure is almost certainly far higher.

9 27. Southern Fontana’s demographics underscore the community’s vulnerability.
10 Polluting industries historically have been disproportionately concentrated in low-income
11 communities and communities of color. According to CalEnviroScreen 4.0, 65 percent of the
12 residents of the census tract where the Project is located are Hispanic and 85 percent are people of
13 color. The community is also relatively lower-income—based on data from the California
14 Department of Education, 83 percent of students at Jurupa Hills High School and 87 percent of
15 students at Citrus High School qualify for free or reduced-price meals. The Project would add to
16 the environmental and health problems already faced by the families that live in the area.

17 **Feasible Mitigation Measures for Warehouse Projects**

18 28. In the most recent update to its General Plan, the City identified numerous feasible
19 measures to mitigate warehouse projects’ air quality impacts. Specifically, the City’s August 10,
20 2018, Final Environmental Impact Report for its General Plan Update listed 24 air quality
21 mitigation measures as “best management practices to be applied to future projects.” These
22 measures include common sense, feasible measures such as using non-diesel forklifts on-site,
23 using low-emissions construction equipment, and exceeding state green building standards.

24 29. In addition, in March 2021, the California Office of the Attorney General
25 published a document entitled “Warehouse Projects: Best Practices and Mitigation Measures to
26 Comply with the California Environmental Quality Act” (Warehouse Best Practices Document).
27 The Warehouse Best Practices Document lists dozens of measures to mitigate warehouses’
28 various environmental impacts. Nearly all of the measures in the Warehouse Best Practices

1 Document have been included in other warehouse projects in California, including some in
2 projects in the City, demonstrating their feasibility.

3 **Respondent’s Project Approval**

4 30. On or about March 2021, the City released the results of its initial study evaluating
5 the Project (“Initial Study”). The Initial Study concluded that, “with the incorporation of
6 mitigation measures, there is no substantial evidence ... that the Project would have a significant
7 effect on the environment.” Based on that determination, Respondent prepared the MND, which
8 incorporates the Initial Study.

9 31. The MND does not disclose the existence of dozens of other industrial warehouses
10 comingled with residential and other sensitive uses in the Project’s immediate vicinity. The
11 MND also does not disclose the fact that Respondent has approved and is planning additional
12 warehouse developments within blocks of the Project. Indeed, while the MND was being
13 prepared, Respondent was planning another warehouse project (the Citrus Avenue and Slover
14 Avenue Warehouse Project) for the site directly west of the Project, a fact entirely omitted from
15 the MND. By approving the Project and the Citrus Avenue and Slover Avenue Warehouse
16 Project, Respondent will ensure that the entire northern property line of Jurupa Hills High School
17 is occupied by industrial warehouses.

18 32. Moreover, the MND’s cumulative air quality impact analysis does not account
19 for—or even acknowledge—the multitude of other warehouses near the Project. Rather than
20 consider the environmental setting within which the Project will be situated, the MND simply
21 states that the Project will not result in a cumulatively considerable increase in emissions because
22 the Project’s individual air quality impacts will be less than significant. The MND even applies
23 this reasoning to its analysis of health impacts from localized emissions, despite making no
24 attempt to determine or disclose the severity of the existing health impacts from localized
25 emissions in the community.

26 33. The MND does not include any measures to mitigate the Project’s air quality
27 impacts, and it omits all 24 air quality mitigation measures listed as best management practices in
28 the City’s August 10, 2018, Final Environmental Impact Report for its General Plan Update.

1 Failure to Identify Existing Environmental Setting

2 (Cal. Code Regs., tit. 14, § 15125)

3 41. In order to accurately assess the significance of changes to the environment a
4 project might cause, CEQA requires that a lead agency treat the existing conditions on the ground
5 as the environmental baseline against which the significance of a project's impacts to the
6 environment are measured. (See Cal. Code Regs., tit. 14, § 15125.)

7 42. It is well established that the significance of a project's effects depends on the
8 environmental setting in which it occurs. The existing built environment and presence of human
9 beings are both integral parts of this environmental setting and must be considered in any analysis
10 of the Project's impacts. An agency is required to find that a "project may have a 'significant
11 effect on the environment'" if, among other things, "[t]he environmental effects of a project will
12 cause substantial adverse effects on human beings, either directly or indirectly." (Pub. Resources
13 Code, § 21083, subd. (b)(3); see also Cal. Code Regs., tit. 14, § 15126.2.) In making a
14 determination regarding the significance of a project's impacts, lead agencies must therefore take
15 special care to describe the presence of impacted communities and sources of pollution besides
16 the project.

17 43. The MND does not adequately describe the existing environmental setting
18 surrounding the Project and consequently fails to properly consider the significance of the
19 Project's impacts on that existing setting. The MND omits disclosure of the numerous
20 warehouses in the Project's immediate vicinity, including other developments that are being
21 planned or have been approved but are not yet operating. Only Respondent possesses the most
22 current information on future developments planned for the community, yet this information was
23 not disclosed in the MND. Consequently, the MND fails to disclose the existing built
24 environment's effects on human beings in the community, including the families living in nearby
25 residences and the students attending Jurupa Hills High School and Citrus High School. This
26 information is critical to the MND's ability to adequately evaluate the Project's impacts on the
27 existing environmental setting, and is necessary to inform governmental decisionmakers about the
28 Project's potential environmental impacts. Therefore, the MND's subsequent conclusions that the

1 Project will not create significant environmental impacts are unsupportable pursuant to CEQA.

2 Failure to Analyze the Project's Environmental Impacts in a Manner Required by Law

3 (Cal. Code Regs., tit. 14, §§ 15063, 15064, 15064.7, 15065, 15130, 15355)

4 44. The MND's analysis of the Project's environmental impacts, including but not
5 limited to the Project's air quality impacts, did not proceed in a manner required by law.

6 45. Section 15355 of title 14 of the California Code of Regulations defines cumulative
7 impacts as two or more impacts that, when considered together, compound environmental
8 impacts. Sections 15130 and 15065 elaborate that a project has a significant cumulative impact
9 when a project's incremental addition to environmental impacts from past, current, and
10 reasonably probable future projects is cumulatively considerable. Significant cumulative impacts
11 can result from the incremental effects of many projects that do not individually have a significant
12 environmental impact.

13 46. The MND did not disclose the existence of the numerous past, current, and future
14 warehouses and other polluting sources in the Project's immediate vicinity. As a result, the MND
15 could not consider whether, in the context of the many other pollution sources near the Project,
16 the Project would add a cumulatively considerable contribution to the existing significant
17 cumulative air pollution faced by the community, as required by CEQA.

18 47. Furthermore, the MND failed to analyze the Project's air quality impacts in the
19 context of the existing significant cumulative air quality impact in the Fontana community where
20 the Project is located. The MND made no attempt to consider the overwhelming evidence, both
21 in Respondent's possession and presented by public commenters, demonstrating that the Project
22 will have a significant cumulative air quality impact. For example, the MND did not consider the
23 Citrus Avenue and Slover Avenue Warehouse Project, which Respondent planned and approved
24 for the site directly west of the Project. The MND also did not consider the dozens of other
25 warehouses sited, or planned to be sited, in the Project's immediate vicinity. The MND further
26 ignored the many public comments received illustrating the environmental and health impacts of
27 those facilities and the expected cumulatively considerable impacts of the Project in the context
28 of those past, current, and reasonably probable future conditions. The MND therefore failed to

1 proceed in a manner required by CEQA.

2 48. The MND asserts that the Project will have a less than significant cumulative air
3 quality impact because it will have a less than significant individual air quality impact. This
4 reasoning contravenes CEQA because projects that do not have significant individual impacts
5 may nonetheless create significant cumulative impacts. (*See, e.g., Kings Cty. Farm Bureau v.*
6 *City of Hanford* (1990) 221 Cal.App.3d 692, 720.) In addition, a proper cumulative impact
7 analysis considers whether a project has a cumulatively considerable impact in the context of a
8 particular existing cumulative impact. (Cal. Code Regs., tit. 14, § 15065, subd. (a)(3).) In
9 contrast to the MND’s project-level air quality impact analysis, which used significance
10 thresholds that are identical across the entire South Coast Air Basin, whether the Project has a
11 significant cumulative air quality impact depends on the extent of the existing cumulative impact
12 in the Project’s vicinity.

13 49. The MND cites Appendix D of an August 2003 white paper published by the
14 South Coast Air Quality Management District (“SCAQMD”) entitled “*White Paper on Potential*
15 *Control Strategies to Address Cumulative Impacts from Air Pollution*” (“2003 SCAQMD White
16 Paper”). To the extent that the 2003 SCAQMD White Paper asserts that any project with less
17 than significant individual air quality impacts also necessarily has less than significant cumulative
18 air quality impacts, it is inconsistent with CEQA for at least the reasons stated above. Moreover,
19 the 2003 SCAQMD White Paper lacks substantial evidence to support such a contention, and thus
20 the MND’s reliance on it violates CEQA. (Cal. Code Regs., tit. 14, § 15064.7, subd. (c).) The
21 MND further violated CEQA by failing to provide substantial evidence to support its reliance on
22 the 2003 SCAQMD White Paper, Appendix D as “guidance.” (*Ibid.*) Finally, even if the MND’s
23 reliance on the 2003 SCAQMD White Paper were proper and supported by substantial evidence,
24 the MND did not consider other evidence—such as public comments and the existence of many
25 other sources of pollution near the Project site—showing that the Project could have a significant
26 cumulative air quality impact. (*See* Cal. Code Regs., tit. 14, § 15064, subd. (b).)

27 50. Accordingly, because the MND’s environmental impacts analysis did not proceed
28 in a manner required by law, the MND’s findings under Section 15063 of title 14 of the

1 California Code of Regulations are erroneous, and the Project approval must be set aside.

2 Failure to Prepare an EIR

3 (Cal. Code Regs., tit. 14, § 15064, subd. (f))

4 51. Upon completion of the Initial Study and the receipt of public comments,
5 Respondent violated CEQA by not preparing an EIR despite substantial evidence in the record
6 supporting a fair argument that the Project may have significant environmental impacts. (Cal.
7 Code Regs., tit. 14, § 15064, subd. (f)(1).) Substantial evidence supports a fair argument that the
8 Project may have significant environmental impacts on, at minimum, air quality. Respondent's
9 failure to prepare an EIR despite this evidence violated CEQA.

10 52. Respondent violated CEQA by approving the Project without preparation of an
11 EIR for reasons that include, but are not limited to, the fact that substantial evidence supports a
12 fair argument that the Project will have a significant adverse impact on air quality. Respondent is
13 in possession of, and received from the public during periods for public comment, substantial
14 evidence that the Project will result in a cumulatively considerable contribution to a cumulative
15 air quality impact. The Project will be located in a community suffering from some of the worst
16 air quality in California, where dozens of warehouses and other industrial developments already
17 exist in conflict with sensitive land uses. Substantial evidence supports a fair argument that the
18 Project will significantly add to the air quality impacts the community already bears from these
19 other warehouse and industrial developments. Respondent's findings in the MND that the Project
20 will not have a cumulative air quality impact are insufficiently substantiated. The MND omits
21 any mention of the past, current, and reasonably probable future polluting uses in the Project's
22 immediate vicinity or the public health impacts from which the community already suffers.
23 Moreover, the methodology for considering cumulative air quality impacts on which the MND
24 relies is itself unsupported by substantial evidence. Therefore, because substantial evidence
25 supports a fair argument that the Project will have a significant adverse impact on air quality,
26 CEQA requires preparation of an EIR.

1 Failure to Mitigate Significant Environmental Impacts

2 (Cal. Code Regs., tit. 14, §§ 15021, 15070, 15074, and 15097, subd. (a))

3 53. CEQA prohibits public agencies from approving projects if feasible mitigation
4 measures are available that would substantially lessen the project's significant environment
5 effects. (Pub. Resources Code, § 21002.) Approval of a project without including such feasible
6 mitigation measures to avoid or minimize environmental damage violates CEQA. (Cal. Code
7 Regs., tit. 14, § 15021.)

8 54. Pursuant to CEQA, a mitigated negative declaration can be employed only if
9 enforceable mitigation measures would lessen all potentially significant effects to a point where
10 clearly no significant effects would occur, and no substantial evidence exists to support a fair
11 argument that the project, including mitigation measures, may have a significant effect on the
12 environment. (See Pub. Resources Code, § 21080, subd. (c).)

13 55. The MND does not identify mitigation measures that will adequately mitigate the
14 Project's potentially significant environmental impacts to a less than significant level, including
15 but not limited to the Project's potentially significant environmental impacts on air quality.
16 Despite the Project's foreseeable adverse environmental impacts, the MND does not identify any
17 measures to mitigate these impacts.

18 56. For example, the Project does not include any of the feasible mitigation measures
19 identified in the California Office of the Attorney General's Warehouse Best Practices Document,
20 which had previously been provided to the City.

21 57. In addition, the City's August 10, 2018, Final Environmental Impact Report for its
22 General Plan Update identified numerous mitigation measures as "best management practices to
23 be applied to future projects."

24 58. Of the mitigation measures identified in the City's August 10, 2018, Final
25 Environmental Impact Report for its General Plan Update, at least MM-AQ-1, MM-AQ-2, MM-
26 AQ-3, MM-AQ-4, MM-AQ-5, MM-AQ-6, MM-AQ-7, MM-AQ-9, MM-AQ-10, MM-AQ-11,
27 MM-AQ-13, MM-AQ-14, MM-AQ-15, MM-AQ-16, MM-AQ-17, MM-AQ-18, MM-AQ-19,
28 MM-AQ-22, and MM-AQ-23 are applicable to industrial warehouses like the Project.

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Dated: July 23, 2021

Respectfully Submitted,
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CHRISTIE VOSBURG
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/s/ Robert D. Swanson

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