www.MyValleySprings.com
email: myvalleysprings@myvalleysprings.com
P.O. Box 1501
Valley Springs, CA 95252

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VIA HAND DELIVERY

Mr. Peter N. Maurer
Planning Director
Calaveras County Planning Department
891 Mountain Ranch Road
San Andreas, California 95249

Mr. Brian S. Moss
Agency Administrator, Air Pollution Control Officer
Calaveras County Air Pollution Control District
Environmental Management
891 Mountain Ranch Road
San Andreas, California 95249

Re: Opposition to Ford/CB Asphalt Appeal, Project No. 2015-029A/B

Dear Mr. Maurer and Mr. Moss:

We write in support of Calaveras County's (the "County") Air Pollution Control District's (the "District") determination that the California Environmental Quality Act ("CEQA") applies to the District's issuance of the Authority to Construct ("ATC") an asphalt plant to CB Asphalt, Inc. and Ford Construction ("Appellants"). Because the asphalt plant will have substantial effects on the environment and requires a public agency to issue one or more discretionary permits for the plant to operate, it is a "project" to which CEQA applies, and an environmental impact report is required.

CEQA applies to a public agency's approval of a discretionary project. *See* Cal. Pub. Res. Code § 21080(a). Accordingly, the first issue is whether the asphalt plant is a "project" subject to CEQA. *See Rominger v. Cnty. of Colusa*, 229 Cal.App.4th 690, 701 (2014) (finding the first step of CEQA analysis is to determine whether an activity is a project subject to CEQA).

CEQA defines "project" "extremely broadly" to maximize protection of the environment. *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal.App.4th 1165, 1188–89 (1997); *McQueen v. Bd. of Dirs.*, 202 Cal.App.3d 1136, 1143 (1988); *see also* CEQA Guideline 15002(d) (providing that historical constructions of the term "project" under CEQA go far beyond the term's dictionary definition). A "project" is any activity that may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment, and which is an activity that involves a public agency's issuance of a lease, permit, license, certificate, or other entitlement for use to a person. Cal. Pub. Res. Code § 21065(c).

A. <u>The asphalt plant is a "project" subject to CEQA</u>.

"Whether an activity constitutes a project subject to CEQA is a categorical question respecting whether the activity is of a general kind with which CEQA is concerned, without regard to whether the activity actually will have environmental impact." *Rominger*, 229 Cal.App.4th at 701 (quoting *Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Comm'n*, 41 Cal.4th 372, 381 (2007)). Appellants plan to construct and operate an asphalt plant. The definition of asphalt is a "bitumen, a constituent of a mixture used in paving streets and highways, found in a natural state or obtained by the processing of *crude oil*." Ballantine's Law Dictionary (3d ed. 2010) (emphasis added); *see, e.g., Hallawell v. Union Oil Co.*, 36 Cal.App. 672, 676 (1918) (noting commercial asphalt plant heated crude petroleum to nearly seven hundred degrees Fahrenheit until it became viscous).

In enacting CEQA, "the Legislature has determined that certain activities . . . *always* have at least the *potential* to cause a direct physical change or a reasonably foreseeable indirect physical change in the environment." *Rominger*, 229 Cal. App. 4th at 702. Without determining whether the plant will actually have environmental impacts, heating petrochemicals to extreme heats to produce asphalt is the sort of activity with which CEQA is concerned. *See Muzzy Ranch Co.*, 41 Cal. 4th at 382 ("The question is whether [the activity] is the sort of activity that may cause a direct physical change or a reasonably foreseeable indirect physical change in the environment so as to constitute a project."); *cf. Rominger*, 229 Cal. App. 4th at 702 (finding the subdivision of land was "categorically a CEQA project"). In short, regardless of whether the plant will actually affect the environment, the County and the District should conclude the asphalt plant is a "project" *categorically* under controlling case law.

1. *The asphalt plant will cause a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment.*

The plant will result in physical changes to the environment, including but not limited to the following:

a. Increased Truck Traffic

The manufacture of asphalt requires liquid asphalt and the Appellant plans to use RAP, reclaimed asphalt pavement, per Attachment A to the Appellant's application for the ATC ("General Purpose of Each Process"). Because these materials are not available onsite at the Hogan Quarry, trucks will deliver these materials to the plant. After production, trucks will transport asphalt from the plant. Moreover, there is evidence in the Application for the ATC that the contract requires nighttime operation of the plant and trucks, increasing the number of truck trips per day.

Greater truck traffic will have significant environmental impacts. The trucks will be carrying hazardous materials, such as liquid asphalt and reclaimed asphalt pavement. Trucks traveling to and from the asphalt plant must travel along Silver Rapids Road, which is narrow with no shoulder, winding, and immediately bordering the Calaveras River. Moreover, there are no lights in this area, increasing the risk of truck accidents at night. If there is an accident involving a truck carrying hazardous materials to or from the plant, there are no barriers or obstructions to prevent spillage into the Calaveras River. Greater truck traffic will also add congestion at the highway 12/26 intersection and on highway 26, which is a narrow winding old wagon path already congested by trucks and commuter traffic. State Route 26 is already at a low Level of Service (LOS D) from Silver Rapids Road to the San Joaquin County Line during peak volumes, as per 2012 Calaveras County Regional Transportation Plan. Increased truck traffic will also have significant detrimental effects on neighboring residential communities on or near Silver Rapids Road because of the attendant accidents, noise, and pollution of truck traffic traveling to and from Hogan Quarry.

Although Appellants have not submitted information for the District to evaluate the environmental impact of the asphalt plant, such as annual production and the number of truck trips per day, any evidence Appellants may offer is largely irrelevant. In *Rominger*, the county argued substantial evidence supported its assumptions regarding trip generation. 229 Cal.App.4th at 720. The Court of Appeal dismissed the county's evidence, finding the question was "whether there was substantial evidence to support a fair argument that the county was wrong and that the project may have a significant impact on traffic in the area." *Id.* ("[W]e can uphold the county's decision not to require an EIR only if there is *no credible evidence* that the project may have a significant impact."). This standard of review compels the dismissal of Appellants' appeals.

b. Degraded Air Quality

The primary sources of emissions associated with asphalt plants are the dryers, hot bins, and mixers, which emit particulate matter and various gaseous pollutants. EPA, *Hot Mix Asphalt Plants Emission Assessment Report* 1, December 2000, *available at* www.epa.gov/ttn/chief/ap42/ch11/related/ea-report.pdf. Pollutants include particulate

matter less than 10 micrometers, volatile organic compounds, carbon monoxide, sulfur dioxide, nitrogen oxides, polycyclic aromatic hydrocarbons, and phenol. *Id.* A typical batch mix plant using a No. 2 fuel oil-fired dryer emits over 74,000 pounds per year of these pollutants, and a typical batch mix plant using a natural gas-fired dryer emits over 56,000 pounds per year of these pollutants. *Id.* at 2–3.

Here, in the ATC application, there is evidence the proposed plant is not a batch plant but a continuous drum mix plant (asphalt plant specifications and photos, page 14: "Portable Counter Flow Drum Mixer"). In a continuous plant, the dryer not only dries the aggregate but mixes hot and dry aggregate with liquid asphalt. As a result, emissions of gaseous and liquid aerosols are greater in a continuous plant than in a batch mix plant. A typical drum mix plant using a No. 2 fuel oil-fired dryer emits approximately 83,000 pounds per year of pollutants, and a typical drum mix plant using a natural gas-fired dryer emits approximately 75,000 pounds per year of pollutants. *Id.* at 3. In short, regardless of the type of asphalt plant, batch or drum mix, the plant will cause a direct physical change in air quality, and at a minimum, it is reasonably foreseeable plant emissions will indirectly change the quality of the air.

In their appeals, Appellants assert the asphalt plant will process a quantity of materials "as allowed and processed historically." The baseline for analysis, however, is the physical conditions actually existing at the time of analysis. *See Cmtys. for a Better Env't v. South Coast Air Quality Mgmt. Dist.*, 48 Cal.4th 310, 316 (2010) (rejecting as an analytical baseline for a new petroleum refinery the maximum capacity the prior equipment permits allowed). As such, the baseline measurement for air pollution are the existing physical conditions without the plant, not the historical physical conditions of the former plant, and it would be an error for the District to determine the project has no significant environmental effects compared to historical use. *See, e.g., id.* ("The District abused its discretion in determining the project at issue would have no significant environmental effects compared to a baseline of maximum permitted capacity").

c. Taking of Steelhead Trout

A lead agency must find that a project has a significant effect on the environment and thereby require an Environmental Impact Report ("EIR") where there is substantial evidence that the project will substantially reduce the habitat of a fish, cause a fish to drop below self-sustaining levels, or substantially reduce the number or restrict the range of a threatened species. *See* CEQA Guideline 15065(a). Here, the proposed plant will require water as a cooling mechanism, to control dust, or both, and water from the plant will drain into the Calaveras River. *See* Cal. Reg'l Water Quality Control Reg'l Bd. Cent. Valley Region Order No. R5-2002-0226, December 2002, at 4. The Calaveras River serves as warm and cold freshwater habitat for a number of species, including steelhead trout. Steelhead trout in the Central Valley region of California are a federally listed threatened species. *See* Dep't of Fish & Wildlife, Natural Res. Agency, Cal., *State & Federally Listed Endangered & Threatened Animals of California* 5, March 2015, *available at* www.dfg.ca.gov/biogeodata/ cnddb/pdfs/TEAnimals.pdf. The proposed plant, therefore, will adversely affect steelhead trout, a federally listed threatened species. At a minimum, under California law, the District must determine whether diversion from or pollution of the Calaveras River will substantially harm

steelhead trout. *See* CEQA Guideline 15065(a); *Friends of the Eel River v. Sonoma Cnty. Water Agency*, 108 Cal.App.4th 859, 873–74 (concluding the EIR was deficient because it did not disclose the impact of diverting water from the Eel River on salmonid species).

In addition to increasing traffic, degrading air quality, and threatening already threatened species, the proposed plant will cause noise, emit odors, and deplete groundwater. In short, the plant will cause a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment, and therefore, it meets the first prong of CEQA's definition of "project."

2. The asphalt plant involves the District issuing the Appellants a permit.

The proposed plant requires a public agency to issue the Appellants a lease, permit, license, certificate, or other entitlement for use. *See* Cal. Pub. Res. Code § 21065(c). As Calaveras County (the "County") determined, after consultation with the County's Planning Department and the County Counsel, issuing the ATC to the Appellants satisfies the second prong of the definition of "project" under CEQA.

"'Discretionary project' means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity." CEQA Guideline 15357. Here, the application for the ATC required the Appellants to provide pertinent information for the Air Pollution Control Officer to review and approve. According to the application, after construction of the asphalt plant is complete, the District may verify the plant comports with the plans the Appellants submitted, and the District may observe the equipment in operation, all prior to issuing a Permit to Operate ("PTO"). Moreover, the District issues PTOs annually and therefore annually inspects facilities to confirm compliance with requirements regarding air contaminants. In determining whether to issue an ATC or a PTO, therefore, the District exercises considerable discretion and judgment.

The County also correctly reasoned that the determination under Calaveras County Municipal Code (the "Code") section 17.42.035 brings the plant within CEQA's definition of "project." Prior to a change of use, a project proponent must submit to the county health officer a list or plan of all substances to be used or produced by the proposed business. Code § 17.42.035. The health officer must review the plan or list to determine if the type, method of use, or quantity of substances are such that there may be a significant effect on the environment associated with the substances. If there is a significant effect, the health officer must notify the planning director. Such uses require approval and validation of a conditional use permit, regardless of whether the use is prescribed as a permitted or conditional use. *See id.*

The Code does not provide any guidelines or checklists to aid the health officer in making this determination; rather the ordinance requires the health officer to exercise significant independent judgment about whether the applicant's use "may be a significant effect on the environment." *See id.* As such, this determination independently brings the plant within CEQA's definition of discretionary projects.

Thus far, it seems Appellants are unwilling to submit the list of all substances the plant will use or produce. Rather, it appears the Appellants intend to argue the plant is not a change in use based on prior historical uses. Legally, that argument is unavailing. *See Cmtys. for a Better Env't v. S. Coast Air Quality Mgmt. Dist.*, 48 Cal.4th 310, 316 (2010) (finding the baseline for analysis are the physical conditions actually existing at the time of analysis); *see, e.g., San Remo Hotel v. City & Cnty. of S.F.*, 27 Cal.4th 643, 660 (2002) (finding a change from partial tourist use to complete tourist use would be a significant alteration or enlargement of the existing use, requiring a new conditional use permit).

Factually, prior planning directors have found the existing Use Permit is insufficient to allow an asphalt plant. Director Sellman in a letter dated 2004 wrote about the limitations on exporting materials under the Use Permit and determined "[t]he solution . . . is to *amend the current Use Permit* to include sufficient volume of export. . . ." (emphasis added). In a 2006 press release, the Planning Director determined the Hogan Quarry was a vested mine but that an increase in production would make "updates to the reclamation plan necessary. . . ." Indeed, the Reclamation Plan provides that "[a]ny change in the nature of the proposed operation, shall require a distinct and separate Mining Use Permit and Mining Reclamation Plan application and approval."

Finally, whereas prior versions of the Code listed asphalt batch plants as a permitted use, the current version of the Code does not ("asphalt plant" disappeared as a permitted use in 1978). This confirms the intent of the drafters of the Code to exclude an asphalt batch plant from the list of permitted uses. *See Felder v. State*, 116 So.3d 605, 607 (Fla. Ct. App. 2013) (finding the removal of language in an amended statute evidenced legislative intent to exclude the language); *State v. Cleppe*, 635 P.2d 435, 438 (Wash. 1981) (finding the omission of words from a precursor statute in a current statute showed legislative intent to exclude the words). Indeed, prior Planning Director Larson stated "A.C. hot plants are not included" within the definition or scope of permitted uses in Title 17 of the Code. *See* Supervisor Minutes from October 12, 1993, Agenda Item 13. Moreover, other parts of the Code provide an express distinction between asphalt and concrete, proving the drafters did not intend Code section 17.40.020.A.8 to include asphalt. *See, e.g.*, Code §§ 8.10.340.B.2 ("Any driveway . . . shall be provided with an asphalt or concrete surface."); 17.70.050.A ("Concrete may be substituted for a.c. [asphalt concrete] to the specifications of the department of public works.").

This does not mean the drafters of the Code decided to prohibit asphalt plants anywhere in the County, only that asphalts plants are not permitted uses by right and require a conditional use permit. Accordingly, the plant requires the County's approval and validation of a conditional use permit. Code § 17.40.030; *see Sports Arenas Props., Inc. v. City of San Diego*, 40 Cal.3d 808, 814-15 (1985) (finding a conditional but permitted use may be incompatible with applicable zoning, and therefore, a conditional use permit is required). The construction and operation of the proposed asphalt plant, therefore, will involve one or more County agencies issuing a permit, license, certificate, or other entitlement for use to the Appellants.

B. The asphalt plant is not exempt from CEQA's requirements.

The next step in CEQA analysis is to determine whether the plant is exempt from CEQA. *See Rominger v. Cnty. of Colusa*, 229 Cal.App.4th 690, 703 (2014).

1. No statutory exemption applies to the asphalt plant.

CEQA does not apply, for example, to ministerial projects approved by public agencies. Cal. Pub. Res. Code § 21080(b)(1). This exemption appears to be the only one plausible among the statutory list of exemptions. *See id.* § 21080(b)(1)–(15); *see, e.g., id.* § 21080(b)(2) (emergency repairs), (3) (properties damaged by disasters), (4) (emergency mitigation), (6) (thermal powerplant sites). As stated above, however, the proposed plant requires an ATC, an amendment to the existing Use Permit, a separate Mining Use Permit and Mining Reclamation Plan, and a conditional use permit, any or all of which require the County or the District to deliberate and exercise judgment in determining whether to issue the permits. *See* CEQA Guideline 15357.

Moreover, the District should interpret CEQA to "afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *People v. Dep't of Hous. & Cmty. Dev.*, 45 Cal.App.3d 185, 194 (1975). Any "doubts whether the project is ministerial or discretionary should be resolved in favor of the latter characterization." *Natural Res. Def. Council v. Arcata Nat'l Corp.*, 59 Cal.App.3d 959, 970 (1976).

2. No categorical exemption applies to the asphalt plant.

CEQA Guidelines 15301 through 15333 provide categorical exemptions, none of which apply to the proposed asphalt plant. The exemption for existing facilities, for example, provides that the "key consideration is whether the project involves negligible or no expansion of an existing use." CEQA Guideline 15301. There is not currently an asphalt plant at the Hogan Quarry, and therefore, the construction and operation of a new asphalt plant cannot be an existing facility within the exemption. The same analysis rules out the exemption for replacement or reconstruction, which assumes existing structures. *Id.* § 15302. In contrast to the term "project," which CEQA defines broadly, "[e]xemption categories should not be unreasonably expanded beyond their terms." *McQueen v. Bd. of Dirs.*, 202 Cal.App.3d 1136, 1148 (1988).

3. The commonsense exemption does not apply to the asphalt plant.

Finally, the commonsense exemption does not apply to the plant. "A project that qualifies for neither a statutory nor a categorical exemption may nonetheless be found exempt under . . . the 'commonsense' exemption, which applies where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." *Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Comm'n*, 41 Cal.4th 372, 380 (2007). Whether a project qualifies for the commonsense exemption is an issue of fact, and the agency invoking the exemption has the burden of demonstrating the exemption applies. *Rominger v. Cnty. of Colusa*, 229 Cal.App.4th 690, 704 (2014). For the exemption to apply, the District or the County would have to show that there is "no possibility that the approval . . . may result in a

significant effect on the environment." *Id.* Here, the manufacturing of asphalt is categorically the type of activity to which CEQA applies, and the plant will have a wide variety of significant effects on the environment, including traffic, air pollution, taking of species, noise, odors, and groundwater depletion. As such, the County and the District cannot prove that there is no possibility the plant will have a significant effect on the environment.

In conclusion, the plant is a "project" under CEQA, and the County must comply with CEQA's environmental review procedures, and in particular, prepare an environmental impact report, for the project. The County and District, therefore, should dismiss the Appellants' CEQA appeals.

Very truly yours,

Joyce Techel

Joyce Techel, President
MyValleySprings.com

Following is first page only; stamped & recived date from Environmental Health

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email: myvalleysprings@myvalleysprings.com

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