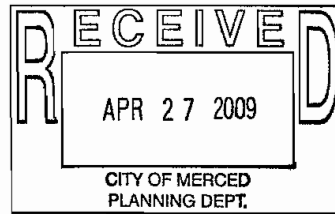


April 27, 2009

Kim Espinosa, Planning Manager  
City of Merced Planning Division  
678 West 18th Street  
Merced, CA 95340



**RE: Comments on the Draft Environmental Impact Report for the Proposed Wal-Mart Distribution Center in Southeast Merced (State Clearinghouse Number 2006071029)**

Ms. Espinosa:

We are the Stop Wal-Mart Action Team: a three year-old grassroots community group opposed to the impacts of the proposed Wal-Mart distribution center. Many of our members and supporters live in South and Southeast Merced, meaning that our health and quality of life will be among those most affected by the proposed distribution center and other development in southeast Merced. Since 2006, over 4,000 Merced County residents have signed petitions opposing the project as proposed and expressing their concern over its impacts.

Over the past several years, members of the Stop Wal-Mart Action Team have commented on a number of matters related to the proposed distribution center and issues related to its impacts. We are deeply concerned that without adequate political representation, southeast Merced will continue to develop as an underserved neighborhood facing the concentrated build-out of the highest-polluting land uses in Merced. We find it unacceptable for this project to happen on the backs of southeast Merced residents.

Our reading of the Draft Environmental Impact Report (DEIR) is based on the Southeast Merced Community Survey conducted from November 2008 to April 10, 2009 by Stop Wal-Mart Action Team members, volunteers, friends and family members. This letter is divided into two sections: first, a discussion of the survey and its results, and second, comments on the DEIR itself which are informed by the survey. However, we wish for the entire letter to be considered by the City of Merced in the course of preparing written responses to comments, as required for production of the Final EIR.[C1]

16-1

**I. The Southeast Merced Community Survey**

*Why we conducted the survey*

We believe that people who are most affected by development in their community should be heard the loudest in the decision-making process. San Joaquin Valley communities that are already overburdened with higher-than-average crime, poverty, pollution and foreclosure rates often find themselves coping with the local impacts of industrial and otherwise “unwanted” land uses. These communities – our communities – are also more likely to feel excluded from the local political system.

Many of the proposed distribution center’s most severe impacts are local; however, the voices of people most affected by the project have largely been missing from public dialogue about the project. We see this survey as an effort to support southeast Merced residents in having their interests heard in what is likely the most controversial project in the history of southeast Merced.

*Methodology*

We define “southeast Merced,” as the area within Merced city limits east of Highway 99, south of Highway 140 and bounded by Mission Ave. to the south and Tower Rd. to the East. The Survey was conducted over a six month period using an intensive door-to-door interviewing process with a mail or drop off option for

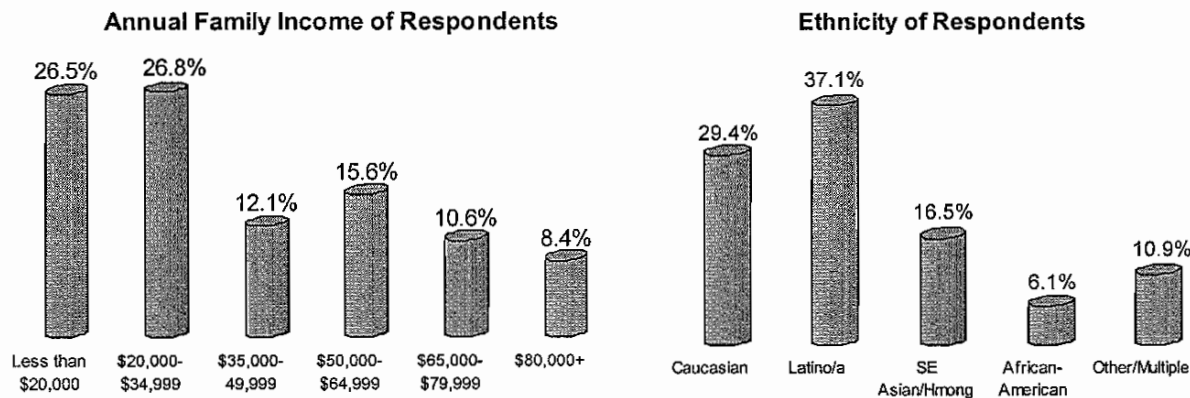
those residents who were not home. Door-to-door surveys improve the quality and level of response, allow more personal interaction and ensure that certain groups, for example young people, people who speak English as a second language, or people living in a particular neighborhood are able to participate meaningfully.

We estimate that roughly 90% of southeast Merced residents were given the opportunity to take the survey either via a personal visit at their door or a survey left at their doorstep. The other 10% includes homes and apartment buildings that restrict access to outsiders and allows for some human error by volunteers[2].

*Respondents*

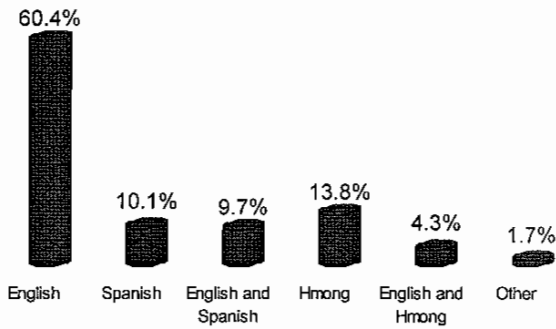
Of the 416 surveys received, 25 were administered via a Spanish language version questionnaire, and a smaller number were verbally translated into Hmong. Survey respondents were demographically diverse in terms of income, ethnicity, language, and family size. About a quarter of respondents earn a total annual family income of less than \$20,000 a year, while another quarter earn between \$20,000 and \$35,000, and 8% have a family income of \$80,000 or more. Respondents self-reported their ethnicity as roughly 37% Latino/a, 29% Caucasian, 17% Southeast Asian (including Hmong), and 6% African American. Almost two-thirds of respondents speak primarily English at home, but a fifth spoke either primarily Spanish or a mix of English and Spanish, and another fifth Hmong or English and Hmong. About 70% of respondents have children living at home with them; of these, the majority have either one or two children, but 10% had five or more.<sup>1</sup>

Altogether, although detailed census data are badly out of date as an objective standard of comparison, our familiarity with our city leads us to believe that the demographic mix of respondents to the survey is representative of the neighborhood as a whole. We can characterize Southeast Merced as a multiethnic, residential/family-oriented neighborhood rapidly transitioning to an urban center from its rural/agricultural roots.

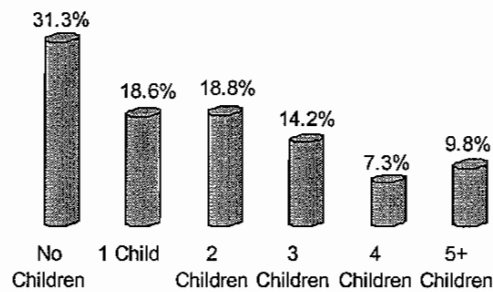


<sup>1</sup> Calculations of percentages of survey respondents reported herein exclude any respondents who did not provide an answer to a particular question.

**Primary Language Spoken at Home by Respondents**



**Number of Children Living at Home with Respondents**



*Findings*

- ❖ **A plurality of respondents opposed the distribution center, but overall feelings about the project were very mixed.**



Many claims of popular support have been made in the contentious debate over the proposed Wal-Mart distribution center. Our results show that, in reality, southeast Merced is deeply divided on the issue. Perhaps the most notable aspect of these results is that a full quarter of respondents fell somewhere between support and opposition—they filled in “2” on a scale of support for the distribution center ranging from 1 (oppose) to 3 (support). This finding suggests that meaningful mitigation of project impacts or guarantees of benefits could create a solid base of support for the project—but without real mitigation or guarantees, even the support it currently enjoys is likely to erode.

- ❖ **Neither income, nor ethnicity, nor number of children had any significant effect on levels of support for the distribution center.**

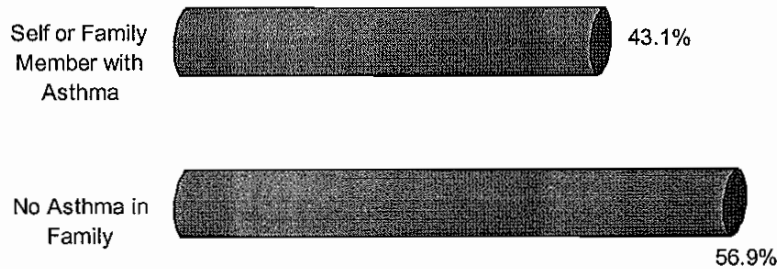
One might expect that a respondent’s annual family income would be closely related to level of support for the distribution center. Lower-income residents might be expected to be more interested in new jobs, and thus be more supportive of the distribution center. However, we found that there were no significant differences in levels of support for the center among respondents of different income levels.<sup>2</sup> Similarly, one might have expected that residents with more children would be more supportive, due to interest in new jobs both for themselves (to better support their children in the present) and for their children (for the future). However, again, we found no significant differences among respondents with different numbers of children living at home in terms of levels of support for the center.<sup>3</sup> Finally, although it is unclear precisely what effect one might have expected ethnicity to have on support for the distribution center, it is still worth noting

<sup>2</sup> An ANOVA revealed that there were no significant differences (P=0.179) among respondents within different annual family income classes in terms of their level of support for the distribution center.

<sup>3</sup> An ANOVA revealed that there were no significant differences (P=0.444) among respondents with different numbers of children in terms of their level of support for the distribution center.

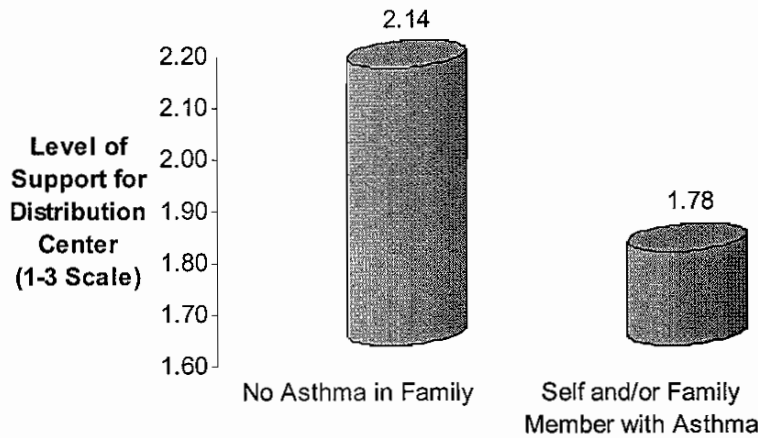
that we found no significant differences among respondents of different ethnicities in this regard.<sup>4</sup> These findings suggest that other factors are making the difference between support and opposition for the distribution center.

❖ **Almost half of respondents had asthma themselves, had a family member with asthma or respiratory problems, or both.**



Existing, widely reported data indicate that twenty percent of children in the San Joaquin Valley have been diagnosed with asthma.<sup>5</sup> Our survey results indicate what this means for Merced families—more than 43% of respondents had asthma themselves, had a family member with asthma, or both.

❖ **Experience with asthma or respiratory problems significantly decreased support for the distribution center.**



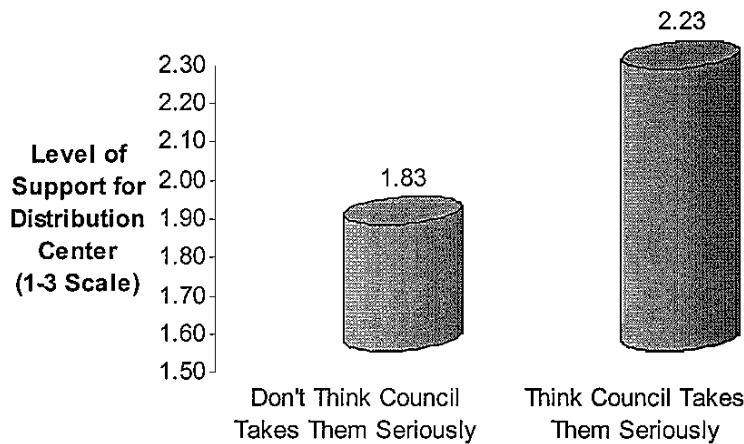
Respondents who have asthma, have a family member with asthma, or both showed a significantly lower level of support for the distribution center than those with no experience of asthma in their families.<sup>6</sup> Furthermore, the average score for those with no asthma in their families was above the neutral “2” (meaning they tended slightly toward support for the center), while the average score for those with asthma in their families was below neutral (meaning they tended toward opposition). This finding, combined with the extremely high levels of asthma in the community, helps to explain the serious concerns about the distribution center’s air quality impacts that have been frequently expressed over the past several years.

<sup>4</sup> An ANOVA revealed that there were no significant differences ( $P=0.694$ ) among respondents of different ethnicities in terms of their level of support for the distribution center.

<sup>5</sup> See for example the Merced/Mariposa County Asthma Coalition’s 2008 “Report to the Community on Asthma.”

<sup>6</sup> A two-sample *t*-test assuming unequal variances found that respondents who had asthma and/or family members with asthma scored significantly lower than others in terms of support for the distribution center. In fact, the difference was highly significant (for one-tailed test,  $P=0.00006$ ).

❖ **Opponents of the distribution center felt more politically disenfranchised than supporters.**



Nearly half (47%) of respondents felt that the Merced City Council as a whole would not take them seriously if they stated their opinions to City Council. Furthermore, these disenfranchised residents on average were significantly more opposed to the distribution center than those who felt that the City Council did take them seriously.<sup>7</sup> In short, southeast Merced residents will be uniquely impacted by this project, and yet feel uniquely excluded from the process by which this project will be considered by City Council.

Other results:

- In order of favorable response, southeast Merced residents want the following types of development in their neighborhood: Places to shop (71%); parks (70%); health care (63%); schools (59%); offices (56%); industrial (36%); residential (34%).
- 56% of respondents feel that truck traffic near schools in southeast Merced is a “major problem.” However, 37% of respondents feel that truck traffic is not *currently* an issue in the neighborhood. We feel these answers indicate a consciousness of the health and safety threat posed by the build-out of nearby industrial land.
- By a two to one ratio, respondents felt that they have “no confidence” that City Council makes decisions that benefit the health and quality of life of residents in south and southeast Merced.
- Despite years of publicity surrounding the project, 30% of respondents in southeast Merced were unaware of the project.

Full results of the Southeast Merced Community Survey are attached to this document.

**II. Comments on the Wal-Mart Distribution Center Draft Environmental Impact Report**

The DEIR as written is inadequate as an informational document. It should be recirculated via an inclusive process that allows residents most affected by the project’s impacts to participate meaningfully.

16-2

*Participation and process*

Throughout the DEIR comment period, the City has heard from residents struggling to understand what the DEIR says. At the first available City Council meeting on March 2, several residents approached Council to ask for a 1-2 month extension of the comment period; meaningful translation of part of the DEIR;

16-3

<sup>7</sup> A two-sample *t*-test assuming unequal variances found that respondents who thought City Council did not take them seriously scored significantly lower in terms of support for the distribution center than those who thought Council took them seriously. In fact, the difference was highly significant (for one-tailed test, P=0.0006).

notification to residents near the project site; and a public hearing in southeast Merced, with translators, to explain the DEIR's findings and receive comments. All of these requests were rejected by a 5-1 vote when the requests were agendaized at the March 16 City Council meeting.

16-3  
Cont'd

As demonstrated by the Southeast Merced Community Survey, residents directly affected by this project want to participate meaningfully in the CEQA process, but have been frustrated by the barriers erected by the City and contempt expressed by some City Councilmembers. [C4]

According to CEQA, "EIRs shall be written in plain language and may use appropriate graphics so that decision-makers and the public can rapidly understand the documents" (CEQA Guidelines § 15140). There are a number of established ways to measure how easy it is for a reader to understand a given piece of writing. For example, the text from 4.2-42 to 4.2-44 describes how the project's long-term on-site operational emissions supposedly result in a "less than significant" exposure of carcinogenic soot to sensitive receptors. This passage scores an 18.59 in the Standard Measure of Gobbledygook (SMOG) test, and a 17.9 in the Flesch-Kincaid grade level test, meaning that a Master's-level education is required to comprehend the section. As a whole, the Air Quality chapter scores a 15.9, meaning that it requires a four-year degree to understand the chapter. According to the 2006 Census, 11.6% of Merced County residents have a Bachelor's Degree or higher.

16-4

Unfortunately, the DEIR comment period will be closed by the time you read this letter, excluding many of our members and affected residents from meaningful participation.

*Southeast Merced is already an underserved, overburdened neighborhood*

The project site is 4.2 miles from the nearest fire engine company station and 7.1 miles from the nearest truck company station. According to Fire Chief Mitten, the project site falls outside of the City of Merced Fire Department's accepted response standards (Lyons Annexation #97-22 memo dated 4/29/1998). Quantities of flammable and hazardous materials would be stored on-site, jeopardizing the health and safety of southeast Merced residents. Adequate fire and police protection must be in place before the facility is operational.

16-5

There is a long-acknowledged, regular level of diesel truck travel through Childs Ave. and Gerard Ave. in southeast Merced. Residents in the neighborhood have long complained about truck parking in residential neighborhoods, excessive truck idling, and illegal off-route truck driving. Communities near distribution centers commonly experience these issues. The EIR should identify measures to actively enforce and, where necessary, strengthen existing laws regarding truck traffic.

16-6

The Weaver School District was predicted to exceed its K-8<sup>th</sup> grade facility capacity of 2,470 students at the beginning of the 2008-2009 school year. Given the elevated health impacts, absenteeism, safety risks, infrastructure degradation and population increase generated by the project, Wal-Mart should pay a 2:1 School Facilities Impact Fee.

16-7

If Toxic Air Contaminants generated by diesel trucks using this facility require the Weaver School District to relocate its planned school site between Gerard Ave. and Childs Ave. adjacent to the western edge of the Campus Parkway, Wal-Mart should be required to reimburse the School District fully for the costs of relocating its long-planned school site.

16-8

*Agriculture*

The DEIR should explain how the tax assessment of the project site will increase pressure adjacent agricultural land to convert their land for development. [C5]

16-9

The project site does not incorporate an adequate buffer from adjacent agriculturally-zoned land. | 16-10

The DEIR does not assess the crop damage due to elevated ozone exposure from this project. | 16-11

We feel that 4:1 mitigation is appropriate for the conversion of prime agricultural land on the project site. | 16-12

*Air quality*

We follow southeast Merced residents’ clear concern over the effects of localized diesel truck emissions as expressed in the Southeast Merced Community Survey. Forty-seven percent of southeast Merced residents either have asthma or other respiratory problems, or have a family member that does. This is an urgent public health crisis. We have identified several deficiencies in assessment of these impacts in the DEIR.

A Health Risk Assessment (HRA) that incorporates cancer risk from off-site operational traffic emissions generated by vehicles using the facility must be conducted for southeast Merced residents to fully understand how this project will impact their health. The HRA ignores construction phase impacts and Toxic Air Contaminant exposure to truck drivers and other workers employed at the facility. | 16-13

Any mitigation agreement should prioritize the elimination of emissions generated by the project’s mobile and stationary sources. We oppose any voluntary agreement that permits concentrated local emissions over the life of this project because of uncertain and questionable off-site in-lieu fees.

The DEIR prematurely identifies the project’s regional operational air quality impacts as less than significant by relying on undefined mitigation measures, such as those supposed to exist in not-yet-negotiated voluntary agreements between Wal-Mart and the San Joaquin Valley Air Pollution Control District (SJVAPCD)<sup>[C6]</sup>. The DEIR denies the 47% of families with a member with respiratory problems the opportunity to appropriately assess and participate in this aspect of the process. The DEIR should be recirculated with identified emission reduction measures to allow for public review and comment before discretionary approval. | 16-14

The DEIR fails to assess how criteria air pollutants generated by this project will impact Air Basins outside of the San Joaquin Valley, including Yosemite National Park and Kings Canyon National Park. | 16-15

Cumulative on- and off-site emissions generated by the project represent a significant cancer risk level. Wal-Mart should provide proper warning to the surrounding neighborhood that its development will cause an elevated cancer risk.

A Safe Use Determination pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986 must be obtained regarding the diesel engine exhaust produced and concentrated locally as a result of the project before discretionary approval can be granted. The DEIR, at the very least, must contain a full discussion of the Act and its applicability to the project. | 16-16

The Air Impact Assessment mitigation process described in the Air Quality chapter improperly defers mitigation. Construction and operational particulate emissions generated by the project after Indirect Source Review mitigation are still significant and should be treated as such. The approach taken in the DEIR—namely, refusing to quantify the effects of mitigation measures and instead merely asserting that standard control measures will ensure less-than-significant impacts—ignores the unusually high levels of particulate emissions produced by the project.<sup>[C7]</sup> | 16-17

The discussion of carbon monoxide (CO) inappropriately uses SJVAPCD screening criteria to rule out in-depth study of CO hot spots. First, SJVAPCD’s screening criteria are pre-empted by a more stringent | 16-18

standard contained in a mitigation measure for the current General Plan (and also incorporated as a 1998 Lyons annexation mitigation measure): "Appropriate CO (CALINE or equivalent) hot-spot air quality studies shall be prepared to identify appropriate project level mitigation measures for all development proposals which can be expected to reduce road segment or intersection levels of service below "D"." Every segment or intersection with a projected "E" or "F" level of service in 2010 or 2030 must be subjected to a CO hot-spot study. Furthermore, the rationales provided in the DEIR for not performing these required studies are unsupported and are not found in either the SJVAPCD screening criteria or the General Plan/Lyons annexation mitigation measure.

16-18  
Cont'd

*Mitigation*<sup>[C8]</sup>

The mitigation measures related to air quality and energy use are inappropriately vague and improperly defer mitigation, denying the public an opportunity to assess and comment upon proposed mitigation.

16-19

The EIR improperly assumes that a number of air quality and traffic impacts will be less than significant after mitigation. There are too many uncertainties in the implementation of the Air Impact Assessment, proposed voluntary agreements between Wal-Mart and the SJVAPCD, and proposed roadway improvements to support those conclusions.

16-20

The City of Merced has a history of not fulfilling its mitigation monitoring enforcement responsibilities, including on this very site. This project violates adopted mitigation measures for the Weaver Annexation and Lyons Annexation. <sup>[C9]</sup>

16-21

*Traffic*

There is little evidence that the City has coordinated with the County or CalTrans about this project's impacts, including changes to the Campus Parkway. The DEIR should be circulated with the Campus Parkway EIR/EIS and UC-Merced Long Range Development Plan EIR.

The DEIR requires modifications to Campus Parkway to accommodate project traffic. Currently, plans for Campus Parkway have been finalized and approved by all applicable agencies, but construction has not yet begun. Making modifications to the project will require either recirculation of Parkway plans or waiting until the first phase of the Parkway is completed as currently planned (and then making modification to accommodate the distribution center).

16-22

The City of Merced and Lyons Investments, LLC have piecemealed the expansion of Childs Ave. and Gerard Ave. adjacent to the distribution center site in order to facilitate the approval of this project<sup>[C10]</sup>. The DEIR must assess the full impacts of these expansions, which to date have been considered separately.

The traffic study is unnecessarily vague and inadequate. It makes unsupported assumptions about the route that trucks would use to reach the facility, the number of trucks using the facility at peak hours and the types of vehicles using the facility.

*Noise*

The noise impacts identified are not significant and unavoidable. Commonly used mitigation measures such as soundproofing windows are not discussed.

16-23

*Cumulative impacts*

Expanded Initial Study #97-22 assumes that full build-out of the entire 484-acre Lyons Annexation land will occur over a 40-year period (by 2037). Various studies included in the EIR ignore the build-out of this

16-24



industrial area, even while incorporating the build-out of other adjacent uses into their analyses. These probable future projects include a 500 megawatt natural gas peaking power plant and industrial park near Childs Ave. and Kibby Rd.

16-24  
Cont.

The DEIR improperly concludes that cumulative air emissions are less than significant. This conclusion is particularly unwarranted in the case of exposure to Toxic Air Contaminants, as the Health Risk Assessment fails to address the substantial current and future “background” exposure levels of sensitive receptors near the project site from existing and planned emission sources.

*Economics*

When the City of Merced considers discretionary approvals for this project, any economic benefits from the project need to be weighed against the project’s costs in damage to human health, productivity, infrastructure and agricultural crop yields (many of which are localized to southeast Merced and eastern Merced County), among other impacts. Because some impacts have been determined to be “significant and unavoidable,” the City will have to adopt a Statement of Overriding Considerations if it chooses to approve the project. The DEIR must provide adequate information for decision-makers to consider in weighing this choice.

16-25

Because the project’s impacts are primarily local, the project’s benefits should be local as well. The DEIR should 1) describe how many employees at the facility would be new hires, and 2) include a binding mitigation measure that 100% of new employees hired at the facility reside in Merced County.

The DEIR should assess local hiring as a mitigation measure to reduce employee trips and reduce the project’s air quality emissions.

16-26

Wal-Mart has faced a long history of lawsuits charging structural discrimination against women and people of color. Because of the demographics of Merced County, a local hiring requirement would not be adequate without addressing these issues. Thus, the local hiring mitigation measure described above should incorporate binding conditions from its recent settlement with African-American truck drivers. The settlement directs Wal-Mart to “establish benchmark hiring goals so future hires are proportionate by race to the composition of applicants, select a diversity recruiter, and improve its recruitment efforts and advertising aimed at African-Americans” (*Wall Street Journal*, 02/20/2009).

*Alternatives*

The Project Objectives are unnecessarily limited; just because Wal-Mart rejected an otherwise viable site doesn’t mean that the site should be rejected without further question. Legitimate alternatives were discarded inappropriately.

16-27

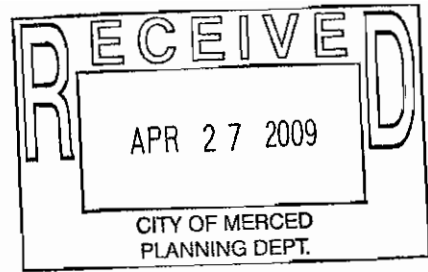
The rationale behind discarding the Reduced Site Plan as the Environmentally Superior Alternative is confusing and unnecessarily vague.

The DEIR and the CEQA process for this project to date have failed to meet legal standards and excluded residents most affected by the project, resulting in an unacceptable burden on an underserved, impacted neighborhood. We reserve the right to submit additional information at the time of the public hearing on the Final Environmental Impact Report.

16-28

**The Merced Stop Wal-Mart Action Team**  
Kyle Stockard      Marilynne Pereira  
Co-Chairs[C12]

MEMORANDUM



TO: Mark Hamilton, Planner  
City of Merced Planning & Permitting Division  
678 West 18th Street  
Merced, CA 95340

CC: Mayor, City Council members and  
Other interested parties

FROM: The Merced Stop Wal-Mart Action Team  
1735 Canal St. Suite 13  
Merced, CA 95340  
[swat@mercedstopwalmart.org](mailto:swat@mercedstopwalmart.org)

DATE: July 7, 2008

**RE: Comments on Lyons Investments for Irrigation and Drainage Pipeline  
Encroachment Permit #288 / Mitigated Negative Declaration  
Item K-2 on July 7 City Council agenda**

Mr. Hamilton,

We are the Merced Stop Wal-Mart Action Team: a broad, grassroots coalition of community groups and thousands of Merced residents opposed to the construction of the proposed Wal-Mart distribution center in Southeast Merced. Many of our members and supporters live in South and Southeast Merced, meaning that our health and quality of life will be among those most affected by the proposed distribution center.

Site Plan Application #288 proposes a "14-inch irrigation pipeline" which would travel under the Campus Parkway and close to or onto the proposed Wal-Mart distribution center site, thus interacting intimately with two of the largest, most complex projects in the history of our city. The pipeline must, therefore, be considered in light of its relationship to these two projects. Furthermore, the relationship between the "irrigation pipeline" and the proposed Wal-Mart distribution center is far closer than mere adjacency. Rather, the pipeline is an integral part of the Wal-Mart project and/or nearby anticipated industrial development whose separate consideration is misleading to the public and to decisionmakers and contravenes the California Environmental Quality Act (CEQA).

The purpose of this letter is to comment on Site Plan Application #288 and the accompanying Mitigated Negative Declaration. We conclude that the pipeline is not approvable as proposed and its impacts must be further examined as part of the environmental review process for the larger industrial development of which it is a part.

## **I. The Pipeline Is Part of the Wal-Mart Distribution Center Project and/or nearby Industrial Development**

The Mitigation Measure proposed by the City's Mitigated Negative Declaration which purports to limit the use of the pipeline to irrigation purposes states in part:

The applicants shall only use the irrigation pipes for watering the existing agricultural use (orchard). They may not use the pipes for storm drainage or any other purpose for any future development, **until that use (an industrial one per the current zoning) goes through an environmental review and is approved by the City.** (emphasis added)

In other words, the Mitigated Negative Declaration recognizes the pipeline's future use as a stormwater pipe for "an industrial use" such as the proposed distribution center and expressly allows such stormwater use following approval of the industrial project by the City. Indeed, since the distribution center and nearby industrial development are intended to replace all of the current agricultural use on the site either concurrently with or soon after the Campus Parkway is constructed, the project's ostensible purpose—allowing the pipeline to continue to function after the Parkway is built—only makes sense if the applicant's primary intention is to use the pipeline for industrial stormwater rather than for agricultural irrigation.

The proposed Wal-Mart Distribution Center is separated from the nearest major canals and laterals by City rights-of-way and substantial distances, posing problems for Wal-Mart's stormwater drainage plans. The nearest waterway into which Wal-Mart could potentially deliver its stormwater is the Doane Lateral, but the Lateral is separated from the distribution center site by the right-of-way of the proposed Campus Parkway. A memorandum from Wal-Mart's engineer to the City dated July 5, 2007, lays out the two potential options for stormwater drainage then being negotiated by Wal-Mart and the Merced Irrigation District (Attachment A). Both routes would require thousands of linear feet of pipeline (Attachments A1, A2).

A stormwater pipe which, instead of being forced to follow the Campus Parkway right-of-way until it crossed the Doane Lateral, crossed under the Campus Parkway, could potentially reduce the linear footage of a distribution center stormwater pipe by over half over the two current options, if the discharge point was approved by MID. The "irrigation pipeline" provides just such a route.

It therefore seems very likely that the pipeline will become an integral part of the Wal-Mart project. If so, any approvals required for the pipeline must be included in the Wal-Mart project description and analyzed together with the rest of the impacts of the proposed Wal-Mart distribution center in the forthcoming Environmental Impact Report for that project (CEQA Guidelines 15124 et seq.). If the pipeline connects to another project adjacent to the distribution center (the only other option), the same principle applies. The courts have consistently held that splitting one project into two or more smaller projects for the purposes of avoiding full environmental review is unacceptable under CEQA, yet this is the only possible explanation for the current attempt to have the pipeline considered separately from any industrial development it would serve.

The Mitigated Negative Declaration for Site Plan Application #288 is inadequate in that it does not consider all of the impacts of the full Wal-Mart distribution center project and/or nearby industrial development. The proposed pipeline cannot be approved prior to certification of the EIR for the industrial development of which it is a part, which EIR must analyze it as part of said industrial project(s). Should the applicant wish to pursue the pipeline as an independent project, the City must remove the qualifying statement from the proposed Mitigation Measure cited above and instead must expressly prohibit any future stormwater use of the pipeline regardless of the outcomes of the City's environmental review and permitting processes for any other pending and future projects.

## **II. An "Irrigation Pipeline" Contravenes Title 20 of the Merced Municipal Code**

Even assuming that the proposed pipeline would or could in fact be used for agricultural irrigation, Site Plan Application #288 cannot be approved. In fact, even temporary usage for agricultural irrigation prior to conversion to industrial stormwater use is prohibited by Title 20 of the Merced Municipal Code.

Rather disingenuously, the "Land Use" section of Initial Study #08-21 states in part:

Given the zoning and the surrounding industrial and agricultural uses in the area, the project is very compatible with the purpose and the intent of the City's General Plan designation of Industrial.

In fact, agricultural uses are **not** allowed under the site's current zoning designation of I-H, as they are not listed as Permitted (MMC Section 20.36.020), Accessory (MMC Section 20.36.030), or Conditional Uses (MMC Section 20.36.040) in the City's Code. The current agricultural use of the site is a legal nonconformity, resulting from the continuation of such use from a time prior to the establishment of the site's current zoning (MMC Section 20.60). However, the City may not approve new plans or uses for the site which do not conform with the current zoning restrictions (MMC Section 20.60.050), and no new or existing agricultural structures—such as the proposed irrigation pipeline—may be built, modified, or moved on the site (MMC Section 20.60.060).

The proposed "irrigation pipeline" is in fact intended to be a stormwater drainage pipeline, as discussed above. Even as an irrigation pipeline, however, it is not an allowable use under the site's current zoning designation.

## **III. The Pipeline Environmental Review is Inadequate**

The Mitigated Negative Declaration is an invalid document under CEQA, as it is the product of a piecemeal environmental review of only one part of a larger project or projects—the proposed Wal-Mart distribution center and/or nearby industrial development. Even if the Declaration were to stand on its own, however, the document would be inadequate on several grounds.

First, the project description is incomplete. When the pipeline was first proposed (along with a second nearby pipeline) several months ago, the applicant requested encroachment permits from the City to allow the pipelines to cross City rights-of-way (Attachment B). The current project is framed as a site plan application, which is appropriate, but an encroachment permit also remains necessary. The project description should include both approvals.

The failure to address the encroachment permit requirement appears to have contributed to some of the inadequacies of the environmental review for the pipeline. For example, the conclusion that the pipeline will have negligible impacts on public services results from a failure to consider the potential restrictions on the construction of the Campus Parkway and attendant drainage facilities which could be caused by the placement of the pipe under the roadway.

Further inadequacies resulted from failure to consider the impacts of the acknowledged future use of the pipeline for stormwater drainage. Thus, the Mitigated Negative Declaration rejects without sufficient analysis the possibility of significant impacts on surface water quality, on the capacity of receiving waters to continue to receive stormwater from other sources, etc. Furthermore, the document fails to acknowledge that the project will, in fact, “result in a significant alteration of the present or planned land use” of the area by facilitating the conversion of existing agricultural land to the proposed and anticipated industrial uses.

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In sum, the proposed pipeline cannot be approved at the current time in any form. The pipeline “project” is in fact part of a much larger industrial development—most likely the Wal-Mart distribution center project currently undergoing environmental review—and must be analyzed and reviewed accordingly; even if the pipeline were in fact an independent project accurately described by the applicant, no new irrigation pipeline can be approved on the site pursuant to its current zoning designation; and the current Mitigated Negative Declaration is in any case inadequate.

Attachments

- Attachment A: Memorandum from Wal-Mart’s Engineer, Dated July 5, 2007
- Attachment A1: “Preferred Stormwater Drainage Route”
- Attachment A2: “Alternate Stormwater Drainage Route”
- Attachment B: Request for Encroachment Permits
- Attachment C: Merced Municipal Code

Sincerely,

The Merced Stop Wal-Mart Action Team (SWAT)

## MEMORANDUM

**TO:** Kim Espinosa, Planning Manager  
City of Merced  
678 West 18th Street  
Merced, California 95340

**CC:** Mayor and City Council Members  
Jack Lesch, Development Services Department  
Frank Quintero, Development Manager

**FROM:** The Merced Stop Wal-Mart Action Team  
1735 Canal St., Suite 13  
Merced, CA 95340

**DATE:** April 25, 2008

**RE:** Proposed Kibby Road Abandonment for Wal-Mart Distribution Center Violates Adopted Mitigation Measures, Other Regulations

In the past two years, the Merced Stop Wal-Mart Action Team has conducted several California Public Records Act requests. As a result of reading these thousands of pages of documents, it has come to our attention that the site plan for the proposed Wal-Mart Distribution Center in Merced, if approved, would be in violation of a number of binding restrictions and regulations on the use of the site.

We write this letter to protect the public's right to participate in development review and the broader planning process, and ensure those concerns are enforced by City staff as is their legal obligation. Merced residents depend on City staff to enforce binding mitigation measures in development agreements. To ignore or alter these measures behind closed doors represents a betrayal of the public trust.

One problem with the Site Plan which has come to our attention centers on the proposed abandonment of the Kibby Road right-of-way between Childs and Gerard Avenues. This abandonment is key to the configuration of the Distribution Center as currently proposed.

**I. The proposed abandonment of Kibby Road would violate adopted mitigation Measures.**

In 1998, the City annexed an area which contained the majority of the site on which the Distribution Center is now proposed to be located (the "Lyons Annexation"). At the time, the City's Planning Division produced an "Expanded Initial Study #97-22 for Lyons Annexation to the City of Merced." This Expanded Initial Study formed the basis for a Mitigated Negative Declaration, and both documents were adopted by the City. The City then proceeded with the Lyons Annexation and accompanying project approvals.

The Mitigation Measures adopted by the City with the Expanded Initial Study and Mitigated Negative Declaration include the following:

The developer shall construct all collector, local, or cul-de-sac streets within the Project boundaries to their ultimate right-of-way with full frontage improvements . . . This includes Kibby Road, Gerard Avenue, Tower Road, and any new interior streets within the Project boundaries. . . .

Kibby Road’s right-of-way is fully or partially “within the Project boundaries” of the Lyons Annexation between Childs Avenue and Mission Avenue, and it is classified as a “collector” in the City’s General Plan throughout this segment. The City may believe that the proposed General Plan amendment eliminating this segment of Kibby Road from the General Plan relieves the developer from constructing Kibby in conformance with this adopted Mitigation Measure. This is not the case. Removing Kibby’s General Plan designation as a “collector” cannot obscure the fact that it is named specifically in the adopted Mitigation Measures as a street which the developer must construct “to its ultimate right-of-way.” Thus, even with an appropriately approved General Plan amendment, approving the Site Plan as proposed would produce a clear violation of this adopted Mitigation Measure.

It should be noted that the requirement for the developer to construct Kibby Road between Childs and Mission Avenues was based in part on the need for acceptable traffic routes between this industrial area and Highway 99. The Expanded Initial Study makes this clear:

[T]here will be three possible major routes in and out of the Project area. Route 1 would be Kibby Road to Highway 140, Route 2 would be Childs Avenue to Highway 99, and Route 3 would be Kibby Road to Mission Avenue to Highway 99. . . . Some vehicle trips would also be routed to Gerard Avenue and the Eastern Beltway/Campus Parkway but these trips are not projected to be as significant in number.

Specifically, the Study projected that only 10% of trips would use the Gerard Avenue/Campus Parkway route. In contrast, the plan proposed by Wal-Mart for its Distribution Center involves eliminating Kibby Road and placing no entrance on Childs Avenue, thus putting all trips onto Gerard Avenue. In fact, Wal-Mart proposes routing all truck traffic to Highway 99 via the Gerard Avenue/Campus Parkway route—virtually the only route available given the proposed site configuration. This would fly in the face of the projections relied upon in the Expanded Initial Study.

## **II. The proposed abandonment of Kibby Road violates the City’s Storm Drain Master Plan.**

The City’s adopted Storm Drain Master Plan includes a storm drain running along part of the Kibby Road right-of-way between Childs and Gerard Avenues. In fact, it is our understanding that this storm drain is already constructed. General Plan Implementing Action P-1.1.d directs the City as follows:

Construct a stormwater drainage system, water system, and sewer system in accordance with master plans.

The vacation of the segment of Kibby Road at issue and the construction of the Wal-Mart Distribution Center as proposed would necessitate removal or re-routing of the storm drain in the

Kibby Road right-of-way, in contravention of the adopted Storm Drain Master Plan and the City's General Plan.

**III. The proposed abandonment of Kibby Road violates the conditions of approval of the 2005 subdivision of the site.**

In December 2005, the Merced City Minor Subdivision Committee approved a Minor Subdivision of the proposed Wal-Mart Distribution Center site (Lot Split Application #05-15). Resolution #871, passed by the Committee, approved the Minor Subdivision with the following condition of approval:

Prior to the issuance of an occupancy permit on any parcel, the street frontages (except Campus Parkway which is addressed under Condition #7) shall be improved to full City standards. Improvements shall include, but not be limited to, curb, gutter, fire hydrants, paving, street trees, street lights, under grounding of utilities and canals, and traffic control devices. . . .

As there is no exception made for Kibby Road, this condition of approval requires Kibby to be constructed between Childs and Gerard Avenues.

Another condition of approval contained within Resolution #871 requires compliance with the City's Storm Drain Master Plan:

Before issuance of a building permit, subdivider shall demonstrate, to the satisfaction of the City Engineer, that storm drainage is designed to function as an integral part of a larger system. . . . This shall include compatibility with the City's Storm Drain Master Plan.

As described above, the proposed abandonment of Kibby Road would inevitably result in non-compliance with this Master Plan. Thus, the proposed abandonment would result in the violation of two of the conditions of approval of this Minor Subdivision.

**IV. The proposed abandonment of Kibby Road would result in violations of the General Plan's policies on industrial traffic.**

The General Plan's Implementing Action T-1.1.b directs the City as follows:

Whenever feasible implement a system of arterials and higher order streets in new growth areas based on the adopted concept of arterials/expressways.

The description of the Implementing Action specifies further:

Arterials and higher order streets will carry the higher-speed traffic to adjacent commercial, industrial, and other major destinations. Collectors and local streets will be designed for local, neighborhood traffic . . .

The plan outlined in the Lyons Annexation Expanded Initial Study and Mitigation Measures would have largely conformed to these policies: For example, Kibby Road was to be used to access the industrial area to and from Mission Avenue (an arterial), which would provide access to Highway 99. This plan is consistent with the current General Plan and remains feasible. However, the abandonment of Kibby Road, along with other aspects of the proposed Site Plan for the Wal-Mart Distribution Center, would instead result in a street system and traffic pattern



that violates the General Plan by funneling all of Wal-Mart's industrial traffic onto Gerard Avenue (a collector). As the General Plan recognizes, collector streets like Gerard Avenue are simply not designed to handle this kind of high-volume, high-speed industrial traffic. Maybe these issues are being addressed in the current General Plan update process; maybe not. The City must rely on the existing General Plan until the update process is completed and a new document is approved.

**V. The City and Wal-Mart have recognized the necessity of constructing this segment of Kibby Road since the beginning of planning for this project.**

In 2003, before making a final decision to pursue a Distribution Center in Merced, Wal-Mart submitted a number of questions regarding the currently proposed Distribution Center site to Frank Quintero, the City's Economic Development Manager. In his response, Mr. Quintero clearly indicated that Kibby Road had to be constructed between Childs and Gerard Avenues. He stated in part:

Right of Way for Kibby Road extended may be moved; however, Kibby Road must go through from Childs Avenue to Mission Avenue for public safety access.

He further stated:

Kibby Road, Tower Road, Mission Avenue, Gerard Avenue and Childs Avenue would have to be improved to City Standards.

It is unclear to us why Wal-Mart and the City have proceeded so far with the review of Wal-Mart's proposed Site Plan and Kibby Road abandonment, despite apparently recognizing at the beginning that this segment of Kibby Road could not be abandoned. Regardless, the information outlined herein (which only recently came to our attention) must serve to remind the City and Wal-Mart of the impossibility of the proposed Kibby Road abandonment.

\*\*\*\*\*

**The Mitigation Monitoring Program adopted by the City along with the Lyons Annexation Mitigation Measures states in part:**

Any person or agency may file a complaint asserting noncompliance with the mitigation measures associated with the project. The complaint shall be directed to the City Planner in written form providing specific information on the asserted violation. The City Planner shall cause an investigation and determine the validity of the complaint. If noncompliance with a mitigation measure has occurred, the City Planner shall cause appropriate actions to remedy any violation.

It has been clearly demonstrated herein that the proposed abandonment of Kibby Road would result in violation of the adopted Lyons Annexation Mitigation Measures as well as several other applicable rules and restrictions. The City's planning staff must investigate and take appropriate steps to ensure that this does not occur. In other words, if Wal-Mart wishes to build a Distribution Center on the currently proposed site in Merced, it must discard the idea of abandoning Kibby Road and re-design its Site Plan around the Kibby Road right-of-way. It is the City's duty to ensure that this occurs by enforcing its own regulations governing development of the site.

MEMORANDUM

TO: Jack Lesch, Director of Development Services  
Planning Division  
City of Merced  
678 West 18th Street  
Merced, California 95340

CC: Mayor, City Council and Planning Commission members  
Other interested parties

FROM: The Merced Stop Wal-Mart Action Team  
1735 Canal St. Suite 13  
Merced, CA 95340  
[swat@mercedstopwalmart.org](mailto:swat@mercedstopwalmart.org)

DATE: June 2, 2008

RE: Comments on University Industrial Park Vesting Tentative Subdivision Map #1299  
Item 4.1 on June 4 City of Merced Planning Commission agenda

Mr. Lesch,

We are the Merced Stop Wal-Mart Action Team, a broad, grassroots coalition of community groups and thousands of Merced residents opposed to the construction of the proposed Wal-Mart distribution center in Southeast Merced. Many of our members and supporters live in South and Southeast Merced, meaning that our health and quality of life will be among those most affected by the proposed distribution center and nearby projects.

We appreciate the opportunity to comment on this project. The University Industrial Park Subdivision is located near the Campus Parkway and proposed Wal-Mart distribution center, two of the largest, most complex projects in the history of our city. It is essential that projects abutting the Parkway and distribution center site take into account the cumulative impacts of rapidly-shifting conditions on the ground in Southeast Merced, a fast-growing area that will "transform a sleepy corner of southeast Merced into a residential and commercial hub" (Merced Sun-Star, Aug. 22, 2007).

**The studies for the Tentative Subdivision Map are outdated**

Due to numerous changed circumstances in the past decade, some of the studies found in the University Industrial Park Subdivision Initial Study #98-06 – released to the public on May 21, 1998 and approved by the Planning Commission on July 8, 1998 – are out-dated and contradict other City statements and findings. Consequently, TSM #1299 should not be permitted to tier off of the Negative Declaration.

A “Negative Declaration” is a “written statement by the Lead Agency briefly describing the reasons that a proposed project...will not have a significant effect on the environment and therefore does not require the preparation of an EIR” (CEQA Guidelines, §15371). A negative declaration must be prepared when after completing an initial study, a lead agency determines that a project “would not have a significant effect on the environment” [Public Resources Code §21080 (c)]. This determination can only be made if there is “no substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment” [Public Resources Code, §21080 (c)(1)].

The “fair argument” standard under CEQA applies when a lead agency decides whether to issue a negative declaration. This standard places a greater burden of proof on the project proponent to demonstrate that it cannot be “fairly argued” that a project could result in a significant impact. Additionally, “the existence of serious public controversy in itself indicates that preparation of an EIR is desirable” [*No Oil, Inc. v. City of Los Angeles (1974) 13 Cal. 3d 68*]. The intent is to err towards a broad application of CEQA that protects the right of the public to participate in decisions that may worsen the environment and their own health and quality of life.

The Negative Declaration should be withdrawn. A full Environmental Impact Report needs to be prepared to correct factual errors in previous studies, evaluate cumulative impacts and determine alternatives to the project. The City can no longer certify that this proposed project “could not have a significant effect on this environment” or that no “serious public controversy” exists.

We also want to remind the Planning Commission and City Council of the various duties and obligations of the Developer as detailed in the 32 conditions found in the Staff Report for this item, some of which are required before issuance of the final map when prepared. Additionally, we urge City staff to re-examine the appropriateness of these conditions after over ten years’ time.

### **Comments on Initial Study #98-06 Environmental Evaluation**

#### **B.) Air**

Since 1998, the scientific and medical communities’ understanding of the health impacts of non-attainment of ozone and particulate standards has improved dramatically. We live in a terrible air quality public health crisis where, according to a report released by the California Air Resources Board on May 22, over 2,900 Valley residents die prematurely every year from exposure to fine particulate. New projects must take the health and quality of life of most affected Merced residents into account in every step of the permitting process.

The Applicant should communicate with the San Joaquin Valley Air Pollution Control District to determine whether new standard requirements have taken effect since 1998. For the tentative map phase, the Air District suggests a variety of mitigations, including:

- Contribute to Local Air Quality Mitigation Fee Fund
- Energy conservation measures above and beyond requirements
- Pay for fleet vehicle conversions to alternative fuels

There is an inadequate discussion of how the Applicant plans to mitigate localized toxic air emissions that will likely come from industrial use.

The City of Merced is currently updating its General Plan. The Applicant should communicate with City staff to create an updated list of roadway and intersection improvements in the vicinity of the site.

#### C.) Water

The years of study used to determine the City's peak water capacity – 1990-1994 – are outdated and inadequate to understand how this project will impact City water supply. Subdivision of the project may result in greater-than-anticipated water usage when compared to other types of industrial usage. The intervening years have been some of the driest on record; the City needs the latest analysis possible to make wise decisions about our limited groundwater supply.

#### I.) Traffic

The traffic study upon which the mitigated negative declaration was based is flawed and must be conducted again.

The study estimates 9 Average Daily Trips (ADT) per 1,000 square feet and estimates that this project will generate 3,880 ADT at full build-out. The study does not, however, describe how many of those trips will be cars or trucks, or how that traffic will interact with current traffic levels and circulation.

The study assumes:

- 50% of the traffic uses Kibby Road north to Highway 140 (75% will go west, 20% will go east and 5% will continue north)
- 35% use Childs Avenue West to Highway 99
- 10% use Kibby Road south to Highway 99
- 5% use Childs Avenue eastbound (or other miscellaneous local needs)

Since 1998, Wal-Mart purchased the parcel to the south of this project, subdivided it, and proposed to amend the City's General Plan to abandon build-out of Kibby Road south to Highway 99. It is our contention in a letter dated April 25, 2008 and attached for your convenience, that the abandonment of Kibby Road violates numerous adopted City plans and mitigation measures and contradicts the advice of City staff. In addition to the points raised in this April 2008 letter, we now add that Vesting Tentative Subdivision Map #1299 would also preclude the abandonment of Kibby Road as proposed by Wal-Mart. In any case, the City must clearly state its intentions with regard to the proposed abandonment of Kibby Road before this project can move forward as proposed.

A document entitled "Weaver Conditions," last updated June 15, 1995, includes binding mitigation measures for the Plum-Sutter-Vierra annexation. Condition 03.01 (c) states:

Whenever practical construction-related truck traffic should be prohibited from using adjacent arterial and collector streets, and all truck traffic should be directed to State Highway 140 via Childs Avenue or Gerard Avenue to Kibby Road.

This binding mitigation measure is currently violated on a daily basis as any Southeast Merced resident can attest. The City is obligated to post relevant signage in and around the project site and work with users of the industrial park to educate drivers about where they can park and drive their trucks. Perhaps the added truck traffic through Kibby to SR 140 with the enforcement of City code would impact improvements necessary to Kibby Road and circulation in the area. Without a new traffic study, we will not know.

MEMORANDUM

TO: Kim Espinosa, Planning Manager  
City of Merced Planning & Permitting Division  
678 West 18th Street  
Merced, CA 95340

CC: Mayor, City Council members and other interested parties

FROM: The Merced Stop Wal-Mart Action Team  
1735 Canal St. Suite 13  
Merced, CA 95340  
[swat@mercedstopwalmart.org](mailto:swat@mercedstopwalmart.org)

DATE: January 20, 2008

RE: Proposed Abandonment of a Portion of a Certain Right-of-Way and Storm Drain Detention Basin for the Campus Parkway Project

**Environmental Review #08-52 (CEQA Section 15162 Finding)**

Ms. Espinosa:

We are the Merced Stop Wal-Mart Action Team: a broad, grassroots coalition of community groups and thousands of Merced residents opposed to the construction of the proposed Wal-Mart distribution center in Southeast Merced. Many of our members and supporters live in South and Southeast Merced, meaning that our health and quality of life will be among those most affected by the proposed distribution center and other development in southeast Merced.

We are writing to continue our previous comments found in the City Council Administrative Report as Attachment #5.

***Summary***

The City proposes to vacate to Lyons Investments a 59,729 sq. ft. piece of land (a map is found in Staff Report Attachment #1). This is land for which the City paid Lyons Investments about \$90,000 in 2006, but the City does not propose to request any refund from Lyons for returning it by means of the vacation. The area was intended to be a storm drain basin for the Campus Parkway, but, according to the City, it was determined to be no longer needed. The City describes the impact of this abandonment as “negligible.”

The City also proposes to acquire a 3,718 sq. ft. piece of land located at the southeast corner of the Campus Parkway and Childs Ave. intersection to be used as an additional and/or modified right turn lane from Northbound Campus Parkway onto Eastbound Childs Ave. A 10 ft. temporary construction easement would surround both of these pieces of land. The draft City Council Resolution included in the Staff Report describes

the vacation as conditional upon the acquisition of the 3,718 sq. ft. piece of land near Childs Ave. on or before Feb. 13, 2009.

However, the City also proposes to independently acquire 10,150 sq. ft. of land along Gerard Ave. The staff report identifies the use of the Gerard Ave. land only as “additional right of way” and claims without explanation that both pieces of land to be acquired “[add] to the functionality of the Campus Parkway project.” The accompanying plat maps, legal description and the rationale for bundling the Gerard Ave. land to be acquired with this action are confusing, contradictory, and obscure. Therefore, we must use these comments to shed light on the subject.

We are obliged to point out that, before City Council can adopt the draft resolution approving the vacation, the City must:

- Show fiscal responsibility and demand that Lyons Investments refund the portion of fee reimbursement it received in 2006 from the City of Merced for the land now proposed for vacation—according to the assessment value used when right-of-way was originally acquired, Lyons Investments should refund the City \$89,126.70;
- Appropriately amend the “Public Facilities Impact Fee Credit or Reimbursement Agreement” entered into by the City and Lyons Investments in 2006;
- Amend Lot Split Resolution #871, including Condition #7, which requires dedication of the area proposed to be abandoned and the construction of storm drainage improvements on this land;
- Add an addendum to the Campus Parkway EIR/EIS that explains the new information that prompted the City to believe land originally intended as a storm drain basin is in fact unneeded and can be abandoned without loss of critical storm drainage capacity, as well as why changes to the right turn lane configuration from the Campus Parkway onto Childs Ave. is necessary, including any traffic study conducted;
- Describe why the City now believes that the expansion of the Childs Ave./Campus Parkway intersection requires no environmental review after several years of arguing the opposite in various environmental documents;
- Describe the intended use of the 10,150 sq. ft. of land to be acquired along Gerard Ave. and how this acquisition and subsequent improvement interacts with surrounding development, including the Lyons Investments properties and the proposed Wal-Mart distribution center;

### ***Fiscal Responsibility***

On Feb. 6, 2006, the City of Merced and Lyons Investments entered into a “Public Facilities Impact Fee Credit or Reimbursement Agreement” for storm basin right-of-way and oversize right-of-way dedication “in excess of 74 feet (collector standard) or 37 feet measured from both the east and west ultimate right-of-way line.” Per this agreement, the City of Merced paid \$758,615 to Lyons Investments in April 2006 to acquire 21 acres of land. This included \$464,490 for storm basin right-of-way, including the land now proposed for vacation, which was purchased at \$65,000 per acre. At 59,729 sq. ft., or

1.37118 acres, the land proposed for vacation cost the City \$89,126.70 when Lyons Investments dedicated it in 2006.

Furthermore, it is important to note that Lyons Investments is not eligible for reimbursement for the land now proposed for acquisition by the City. In September 1998, the Merced City Council approved Expanded Initial Study #97-22 for the Lyons Annexation, adding approximately 484 acres of agricultural land pre-zoned as Heavy-Industrial (I-H) in the southeast corner of the City of Merced. The Expanded Initial Study also includes a number of mitigation measures that are binding on future development within the annexation area, including Transportation/Circulation item M-3:

**M-3 The developer shall dedicate the full right-of-way for all arterial and higher order streets within the Project boundaries as defined in the *Merced Vision 2015 General Plan*. For those arterial or higher order streets that are adjacent to but do not lie completely within the Project boundaries, the developer shall dedicate half of the required right-of-way. This includes Childs Avenue, Mission Avenue, and the Campus Parkway.** Consistent with Mitigation Measure 7.b of the *Merced Vision 2015 General Plan EIR*, where the extent of right-of-way dedication exceeds the City's development standards for a collector street (currently 74 feet for a collector street located entirely within the Project and 37 feet for a collector abutting the Project), then the developer is eligible for reimbursements in accordance with the City's Public Facilities Impact Fee Ordinance and guidelines, unless a traffic study determines that the Project's traffic impacts require additional dedication. (emphasis supplied)

The 10,150 sq. ft. piece of land along Gerard Ave. is part of a planned minor arterial in the City General Plan and falls completely within the project boundaries and is therefore not eligible for reimbursements. The 3,718 sq. ft. piece of land along Childs Ave. is an arterial adjacent to the annexation area and therefore Lyons is contractually obligated to dedicate this required right-of-way without reimbursement as well.

Our members include taxpayers who reside within the City of Merced. As former City Manager Jim Marshall wrote in his final memo for the fiscal year 2008-2009 City of Merced Municipal Budget:

We are public servants. We need to keep a narrow focus during tight budgets and not attempt to publicly finance every project or program that presents itself. Basic public services must not be diluted at the expense of providing deep pocket funding to those who are unwilling or unable to develop their own source of capital. Be vigilant.

In the spirit of fiscal responsibility and vigilance, we demand that the City obtain a refund for the portion of storm drain basin right-of-way it purchased from Lyons Investments but has determined is no longer needed. The land at issue has both market value, and, as indicated in the Administrative Report, potential future "bike path and open space benefits." To return this land to Lyons Investments without fair compensation would be to waste valuable City assets. We demand, then, that the City obtain a refund from Lyons Investments for the costs of acquiring and later abandoning this piece of land, including at least \$89,126.70 for the land itself, as well as compensation for staff time and attorney's fees. We also remind the City of California Code Section 526a:

An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a



citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.

### ***Amendments to Existing Agreements and Resolutions***

On December 15, 2005, during the final review of the Campus Parkway EIR/EIS, the City of Merced Minor Subdivision Committee approved the resubdivision of 313 acres of the Lyons Annexation, including the portion of land the City proposes to vacate in this action. Resolution #871 of the City's Minor Subdivision Committee contains 14 conditions that apply to the land described in this action. Most importantly, Condition #7 of the Resolution required Lyons Investments to dedicate right-of-way along the route of the future Campus Parkway, including the right-of-way now proposed for vacation. Therefore, the vacation will result in non-compliance with Resolution #871 unless the Resolution is amended prior to the vacation.

Furthermore, the Reimbursement Agreement described above includes a finding, contained within Recital C, that the improvements intended for the right-of-way now proposed for vacation are critical for the city's infrastructure. The City must amend this finding prior to abandoning the right-of-way—and thus any potential future infrastructure on it.

### ***Additional Environmental Review***

In October 1998, the City signed a development agreement with Lyons Investments, LLC that contains 35 "sections" that define how the City will govern future development within the annexation area. Since the portion of land that the City proposes to vacate is within the Lyons Annexation area, both the Expanded Initial Study #97-22 and the Lyons Annexation development agreement contain conditions that apply to the land described in this action. In the following years, the City and County of Merced, CalTrans and the U.S. Department of Transportation conducted the planning and environmental review for the Campus Parkway. The Campus Parkway EIR/EIS document was released for public review mid-2005.

Page 2-27 of the "Project Alternatives" chapter of the Campus Parkway Final EIR/EIS clearly describes the potential significant impacts of widening the intersection of Childs and the Campus Parkway:

A constraint to widening the Childs Avenue intersection at Campus Parkway was identified as a result of environmental review. The Sunshine Dairy is southwest of and adjacent to the Hartley Lateral, which parallels the existing Childs Avenue in the area of the proposed Campus Parkway. Adding turning lanes on Childs Avenue may require minor relocation of the canal, which would require acquisition of a small sliver of land in the existing fields at the Sunshine Dairy. The Sunshine Dairy was determined eligible for listing in the National Register of Historic Places and the California Register of Historic Resources. To avoid this property entirely, the traffic signal and the intersection of Childs Avenue and Campus Parkway would be designed to minimize widening of Childs Avenue.

These same constraints were reiterated by the City in Staff Report #07-01 dated January 2007 for General Plan Amendment #06-12.

On July 5, 2005, Lyons Investments submitted a traffic study performed by Fehr & Peers as comments on the Campus Parkway EIR/EIS. Senior Transportation Engineer Richard Lee writes of the Childs and Campus Parkway intersection:

It is important that this intersection provide an adequate level of service for traffic, including truck traffic, traveling to and from the existing and future industrial facilities along Childs Avenue. Please confirm that there will be sufficient right of way on the western leg of the Childs Avenue/Campus Parkway intersection to develop Childs Avenue as an arterial as it is designed in the City of Merced's 1997 General Plan.

The reply:

The constraints noted in the Draft EIS/EIR would remain as long as the dairy is present. When and if a development plan is submitted for this parcel, intersection improvements (or at least right-of-way acquisition or dedication) would be made a requirement. If no development plan is advanced for this parcel, the intersection is still functional.

The Jan. 20, 2009 action apparently proposes to only widen the southeastern portion of the Childs/Campus Parkway intersection. Even so, portions of the Hartley Lateral would still need to be rebuilt. How would this impact the existing canal system in the area? Who will conduct those improvements? Has the City notified MID that it has plans to rebuild its canal? The staff report and Environmental Review #08-52 do not provide answers. In fact, the acquisition of 3,718 sq. ft. of land for an additional right turn lane onto Childs contradicts evidence provided in the Campus Parkway EIR/EIS; it is totally unacceptable to tier off of this document per CEQA Guidelines 15162. Additional review is needed.

Furthermore, Condition #6 of Resolution #871 states clearly that any additional right-of-way needed for the Childs Ave./Campus Parkway intersection must be "addressed at the Site Plan Approval stage." In other words, the Resolution anticipates that extra right-of-way may be needed to accommodate future industrial projects within the Lyons subdivision area—exactly the reason we believe the City is currently attempting to acquire additional right-of-way in these locations—and requires this issue to be addressed during site plan review. As we have noted in our previous comments, the present action is in this and many other ways a part of the Wal-Mart distribution center project and/or other future Lyons industrial projects, and must be reviewed as part of those projects, not independently.

### ***Conditions of Approval***

The City has noted the value of this land as open space, and the Administrative Report implies that even after abandonment the land will remain open space. If this is accurate, it would alleviate some of our concerns regarding the action. Therefore, when abandoning this piece of land, we also request that the City add certain conditions, particularly that Lyons Investments place the land into an easement that guarantees its use as open space in perpetuity, and that it will not be used to piecemeal the development of other industrial development or induce other types of high-polluting development in the area.

Attachments:

Lyons Annexation Development Agreement, signed Oct. 19, 1998, and Lyons Annexation Expanded Initial Study #97-22 mitigation measures

[http://www.mercedstopwalmart.org/images/SWAT\\_PDFS/lyonsdevelopmentagreement.pdf](http://www.mercedstopwalmart.org/images/SWAT_PDFS/lyonsdevelopmentagreement.pdf)

Public Facilities Impact Fee Credit or Reimbursement Agreement dated February 6, 2006, and Lot Split Resolution #871, adopted Dec. 19, 2005

[http://mercedstopwalmart.org/images/SWAT\\_PDFS/lyonsreimbursement.pdf](http://mercedstopwalmart.org/images/SWAT_PDFS/lyonsreimbursement.pdf)

City of Merced Staff Report #07-01 to Planning Commission, Jan. 17, 2007.

<http://www.cityofmerced.org/civica/filebank/blobdload.asp?BlobID=5047>

Campus Parkway Final EIR/EIS

<http://www.dot.ca.gov/dist10/media/docs/CampusParkwayFinalEIS.pdf>

City of Merced 2015 General Plan, Chapter 4: Transportation and Circulation

<http://www.cityofmerced.org/civica/filebank/blobdload.asp?BlobID=3997>

Marshall, James G. "Fiscal Year 2008-2009 City of Merced Municipal Budget,"

<http://www.cityofmerced.org/civica/filebank/blobdload.asp?BlobID=6494>

An Overview

of the

# **WILSON ENERGY CENTER**

Presented to the

**City of Merced and its Councilmembers**

by

**APEX** Power Group, LLC

May 19, 2008

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INVESTORS  
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# APEX and its Affiliations

- Energy Investors Funds
- General Electric Company
- Kiewit Constructors and Engineers
- URS Corporation



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# Why Choose Merced?

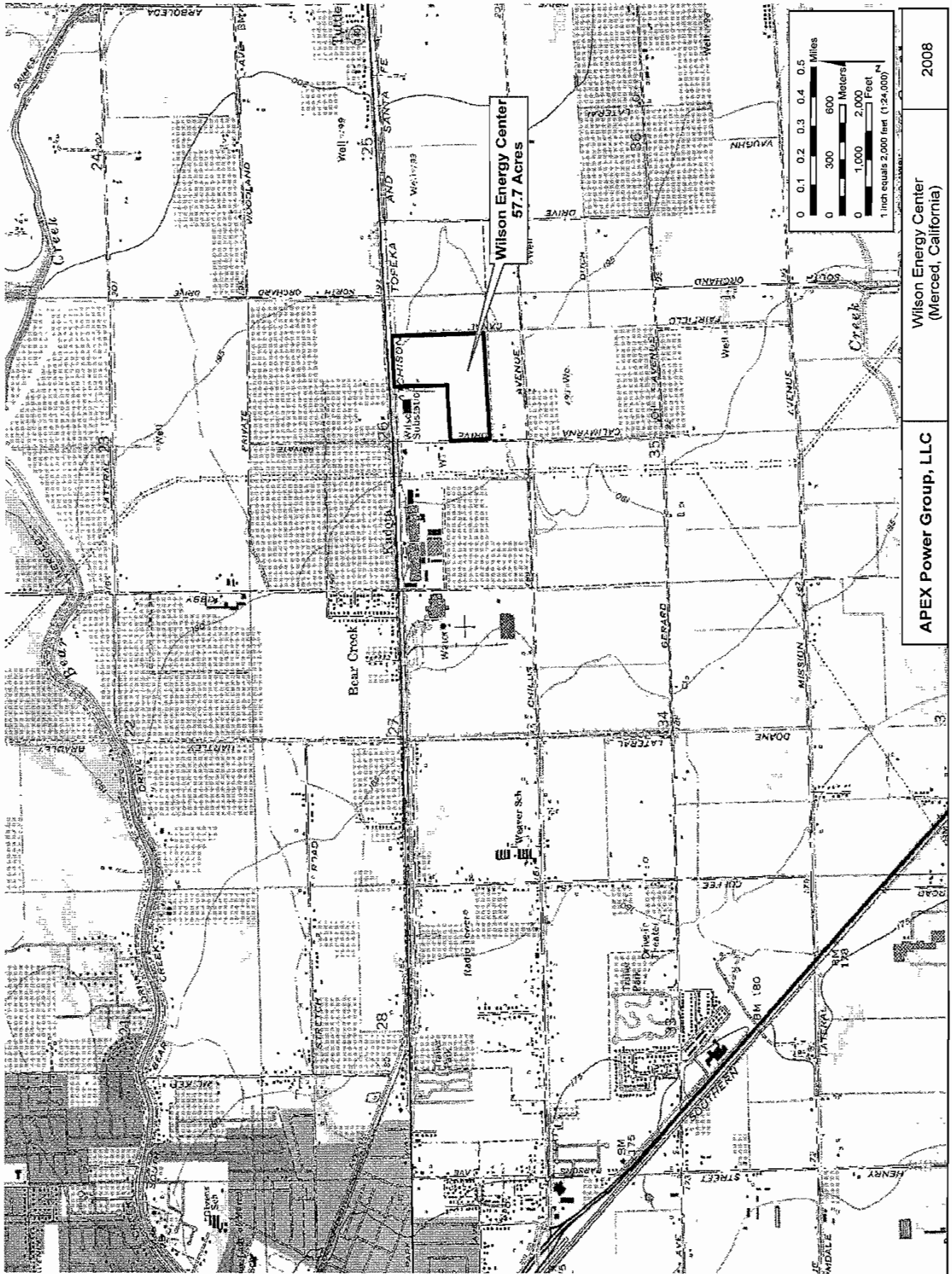
- Central Valley generating capacity shortage
- Electrical grid congestion and overloading
- Available infrastructure and resources
- Societal Changes and Load Growth Forecast
- Heavy Industrial zoning designation



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**Wilson Energy Center  
(Merced, California)**

2008

# Technology and Plant Design

- 5 General Electric LMS 100 units
- Same technology as Panoche plant
- BACT compliant
- Highly flexible and efficient units
- 500 MW total
- Tie to Wilson substation

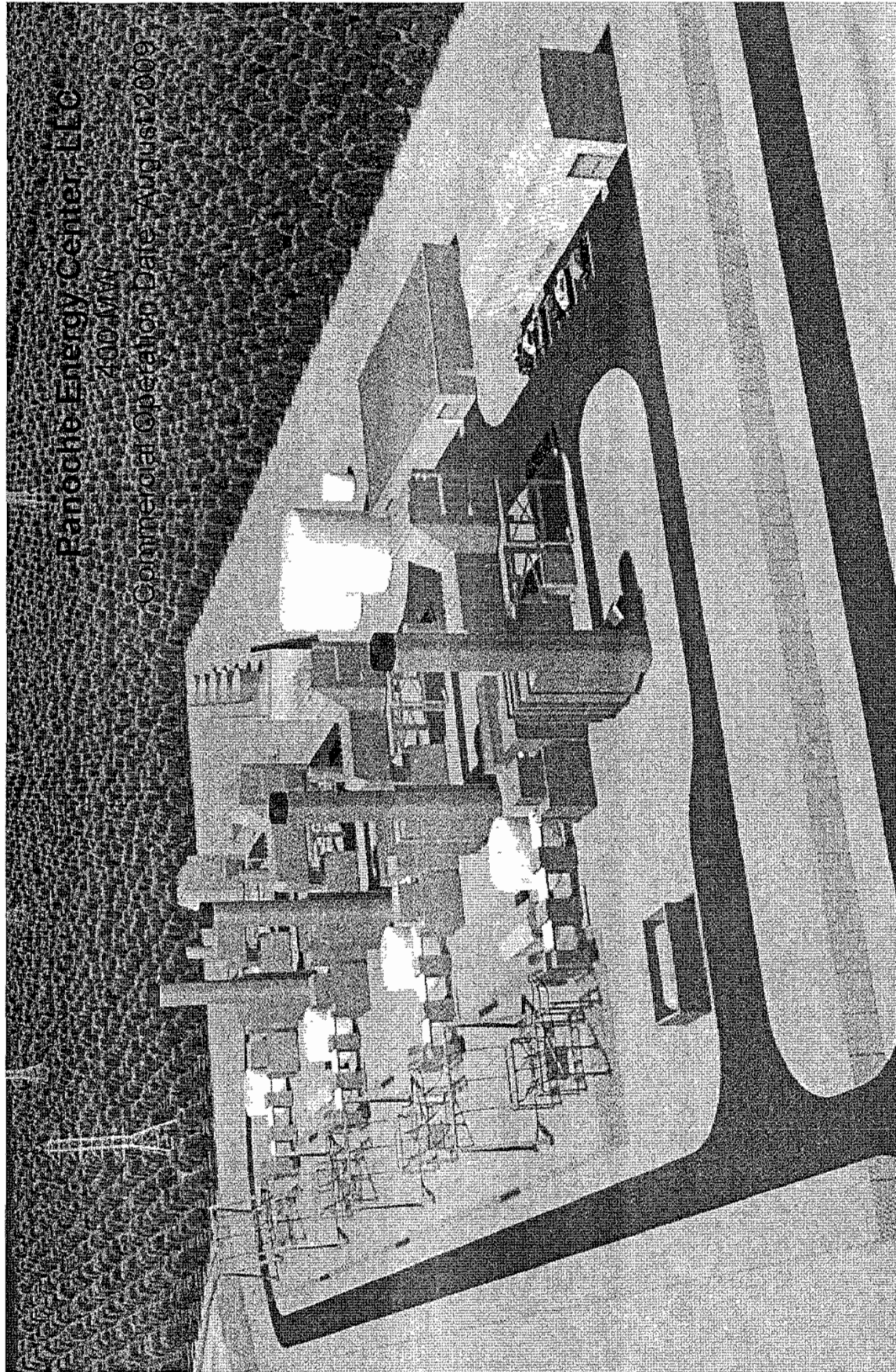


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Rancho Energy Center, LLC

400 MW

Commercial Operation Date: August 2009



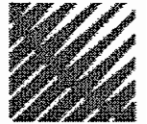
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# CONSTRUCTION and OPERATIONS

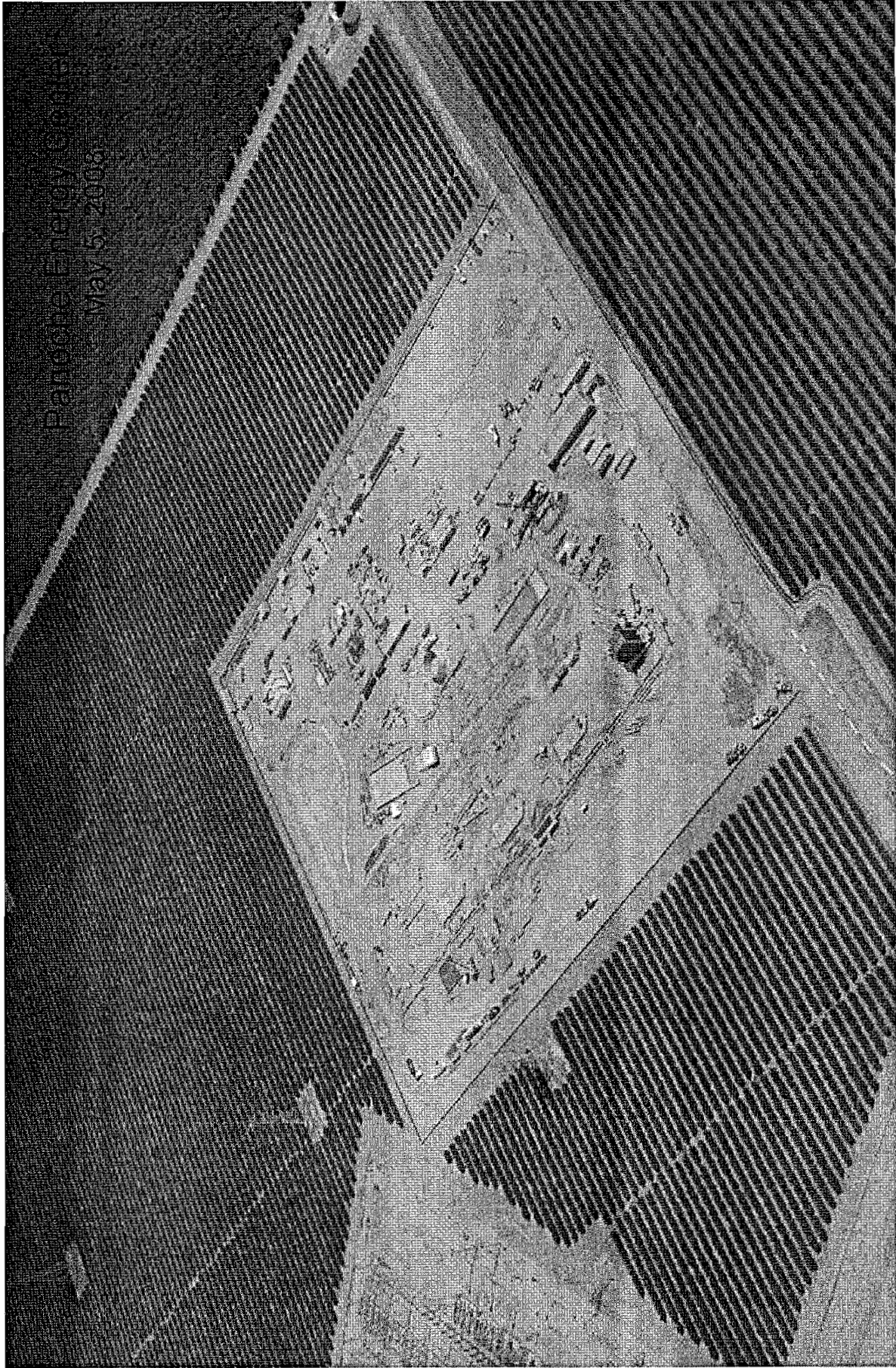
- Construction by Kiewit Power Corporation
- 18-month construction period
- Peak work force ~350
- All workers from California building trades
- Operations by highly experienced company – to be determined



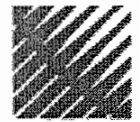
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Parsons Energy Center  
May 5, 2006



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# PG&E Request for Offers

- RFO and Bidding process
- PG&E Gas and Electric Studies
- Power Purchase Agreement



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# California Energy Commission

- *Warren-Alquist Act and CEC authority*
- *Application for Certification (AFC) process and the CA Environmental Quality Act*
- *City AFC review and approvals*
- *No City administered Environmental Impact Report (EIR)*



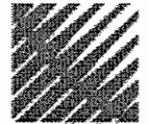
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# Environmental Considerations

- Air Emissions
- Water Resources
- Geologic Hazards
- Public Health & Safety
- Traffic & Transportation
- Noise
- Biological Resources
- Cultural Resources
- Visual Resources
- Paleontological Resources
- Land Use
- Socioeconomics
- Waste Management
- Hazardous Materials
- Worker Safety
- Cumulative Impacts
- Agriculture & Soils



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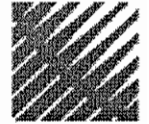
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# AIR EMISSIONS

- Apply BACT to lower NO<sub>x</sub>, CO and VOC emissions
- Project worst-case emissions for NO<sub>x</sub>, CO, VOC, PM, SO<sub>x</sub>, NH<sub>3</sub>, CO<sub>2</sub>
- Offset NO<sub>x</sub>, VOC, PM and SO<sub>x</sub> with Emission Reduction Credits (1 to 1.5 ratio)
- Perform ambient and cumulative analyses per SJVAPCD and EPA procedures



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# WATER RESOURCES

- Water is used to lower NOx emissions and to improve energy conversion efficiency
- Maximum use 1400 ac/ft per year
- ~50% returned to the City
- Proposed water plan with MID
- Proposed wastewater plan with City



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# Local Benefits

- Employment of skilled and professional positions
- Sales Taxes (\$12-\$15 million)
- Property Taxes (\$5 million per year)
- Power capacity and electric grid integrity



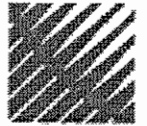
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# Employment

- Up to 350 workers during construction - from California building trades
- Up to 15 permanent skilled and professional positions during operations
- Periodic contracted skilled maintenance work force
- Local and regional service contractors



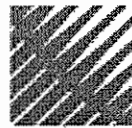
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# Community Growth and Changes in Electricity Use

- Wilson would increase local/regional capacity margins by 500MWs
- Improve power quality
- Improve power reliability
- Lower line losses (increase transmission efficiency)
- Could enhance regional groundwater balance through exchange and enhancement programs
- Would provide peaking generation that supports alternative energy development and use



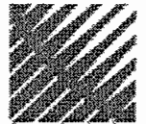
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# Milestone Schedule

- PG&E Bids July 21, 2008
- PG&E Short List October 20, 2008
- PG&E Contract Award December 2008
- File CEC Application March 2009
- CPUC Approval June 2009
- CEC Approval August 2010
- Start of Construction October 2010
- Commercial Operation April 2012

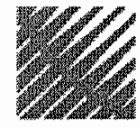
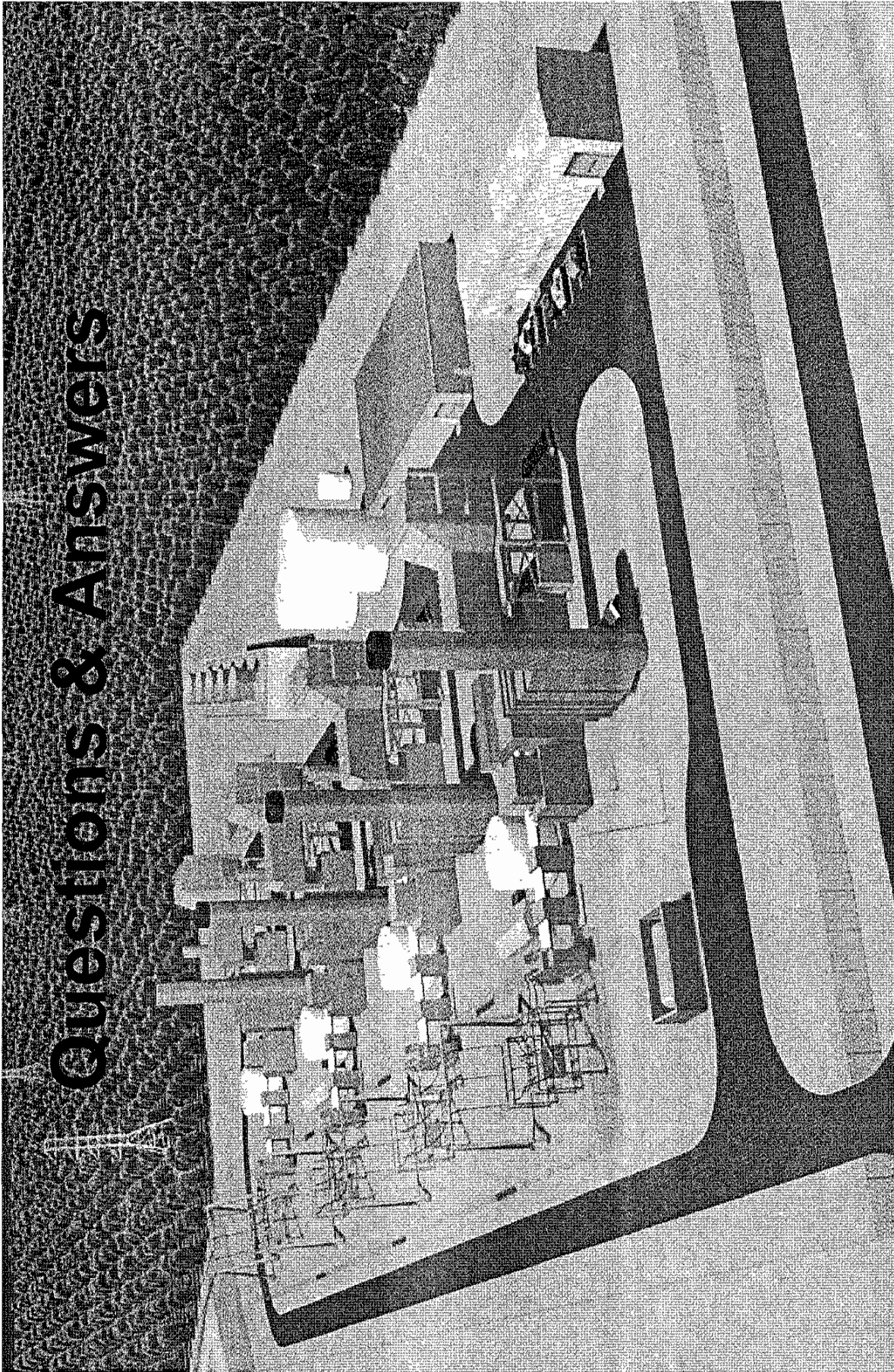


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# Questions & Answers



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**Espinosa, Kim**

---

**From:** Nick Robinson [ndrobinson@gmail.com]  
**Sent:** Monday, April 27, 2009 5:20 PM  
**To:** Espinosa, Kim  
**Subject:** Additional attachment

Kim,  
Please accept this attachment to the Stop Wal-Mart Action Team's comments that were submitted this afternoon.

Thank you,  
Nick Robinson

--  
Nick Robinson  
209.489.1740 | [ndrobinson@gmail.com](mailto:ndrobinson@gmail.com)



## RESULTS

Below are each of the questions which appeared in our survey of Southeast Merced residents, exactly as they appeared on the survey. The percentage of respondents who chose each option is presented below that option in **red**. These are the results of the survey in their most basic form. Please note that percentages for each question were calculated based on the total number of respondents who answered each question; thus, respondents who did not answer a given question (or who did not answer it within the parameters provided) were not included in the total for that question. However, countable response rates were generally above 98%, so the influence of this exclusion on calculations is insignificant. (Also: percentages are rounded to whole numbers, and unless otherwise noted, any failure of percentages for a given question to add to 100% is a result of rounding.)

1. **Did you know that Wal-Mart wants to build a distribution center between Childs and Gerard Avenues in southeast Merced?**

Yes       No  
70%      30%

**Many different things *could* be built in Southeast Merced. We want to know which are most important to people who live in southeast Merced. By “southeast Merced,” we mean the area within Merced city limits east of Highway 99, south of 140, and with Mission Ave. to the south.**

If you *don't* like it, then circle 1; if you like it a lot and want to see it built, circle 3.

2. More places to shop for groceries, clothing, or other things	1 <u>16%</u>	2 <u>13%</u>	3 <u>71%</u>
3. More homes and apartments	1 <u>44%</u>	2 <u>22%</u>	3 <u>34%</u>
4. More places for professionals to work, like offices or banks	1 <u>21%</u>	2 <u>23%</u>	3 <u>56%</u>
5. More doctor, dental and other healthcare	1 <u>16%</u>	2 <u>21%</u>	3 <u>63%</u>
6. More industrial, like storage, manufacturing or warehouses	1 <u>43%</u>	2 <u>21%</u>	3 <u>36%</u>
7. More schools	1 <u>20%</u>	2 <u>21%</u>	3 <u>59%</u>
8. More parks and playgrounds	1 <u>11%</u>	2 <u>19%</u>	3 <u>70%</u>

9. **How many children under the age of 18, if any, live with you?**

0	1	2	3	4	5+
<u>31%</u>	<u>19%</u>	<u>19%</u>	<u>14%</u>	<u>7%</u>	<u>10%</u>

10. **Do you or does anyone in your family have asthma, problems breathing, or use an inhaler to help them breathe?**

Yes – I do.       Yes – A family member.       No  
14%      33%      57%

*(Percentages do not add to 100% due to some respondents who both had asthma themselves and had a family member with asthma.)*

11. **Children who grow up within about 1,500 feet of a major road have a higher risk of developing asthma. There are plans to build another elementary school less than 500 feet from the Campus Parkway. How concerned are you about car and truck traffic near schools in southeast Merced?**

1 means truck traffic is not an issue →

<b>1</b>	<b>2</b>	<b>3</b>
<b><u>16%</u></b>	<b><u>27%</u></b>	<b><u>56%</u></b>

← 3 means it's a major problem

**12. How do you feel about the level of truck traffic in the neighborhood right now?**

1 means truck traffic is not an issue now →

<b>1</b>	<b>2</b>	<b>3</b>
<b><u>37%</u></b>	<b><u>34%</u></b>	<b><u>28%</u></b>

← 3 means truck traffic is a major problem

**13. Based on what you know, do you support or oppose the Wal-Mart distribution center?**

1 means you *oppose* the project as proposed →

<b>1</b>	<b>2</b>	<b>3</b>
<b><u>38%</u></b>	<b><u>25%</u></b>	<b><u>36%</u></b>

← 3 means you *support* it

**After they hear from residents, the Mayor and six elected Merced City Council members will vote on whether to approve site plans and environmental studies for the distribution center.**

**14. How much confidence do you have that City Council makes decisions that benefit the health and quality of life of residents in south and southeast Merced?**

1 means you have no confidence in City Council →

<b>1</b>	<b>2</b>	<b>3</b>
<b><u>34%</u></b>	<b><u>50%</u></b>	<b><u>16%</u></b>

← 3 means you are completely confident

**15. Do you think City Council as a whole takes you seriously if you give them your opinion?**

1 means you don't feel taken seriously →

<b>1</b>	<b>2</b>	<b>3</b>
<b><u>47%</u></b>	<b><u>36%</u></b>	<b><u>18%</u></b>

← 3 means you feel taken seriously

**16. Do you think in general, City Council understands issues important to Southeast Merced residents?**

1 means City Council doesn't understand your issues →

<b>1</b>	<b>2</b>	<b>3</b>
<b><u>36%</u></b>	<b><u>41%</u></b>	<b><u>23%</u></b>

← 3 means City Council understands

**17. What is your ethnicity?**

1.  Caucasian  
**30%**

2.  Hispanic, Latino  
**38%** (including "Mexican," etc.)

3.  Punjabi  
**0%**

4.  Southeast Asian  
**17%** (including "Hmong," etc.)

5.  African American  
**7%**

6.  Other \_\_\_\_\_  
**9%**

*(Percentages do not add to 100% due to some respondents who marked more than one ethnicity.)*

**18. What language is spoken the most at home?**

1.  English  
**76%**

2.  Spanish  
**20%**

3.  Hmong  
**18%**

4.  Mien  
**0%**

5.  Laotian  
**0%**

6.  Punjabi  
**0%**

7.  Other \_\_\_\_\_  
**1%**

*(Percentages do not add to 100% due to some respondents who marked more than one language.)*

**19. What is your family's combined yearly income?**

1.  \$0-\$19,999  
**27%**

2.  \$20,000-\$34,999  
**27%**

3.  \$35,000-\$49,999  
**12%**

4.  \$50,000-\$64,999  
**16%**

5.  \$65,000-\$79,999  
**11%**

6.  \$80,000+  
**8%**



- 16-1 The comment introduces the letter, indicating that it is divided in two sections: first, a discussion of a survey conducted by the Stop Wal-Mart Action Team, and second, comments on the DEIR informed by the survey. The commenter requests that the entire letter be considered by the City in the course of preparing responses. CEQA requires that written responses describe the disposition of significant environmental issues raised (*State CEQA Guidelines* Section 15088[c]). CEQA does not require written responses for non-environmental issues. The first part of the letter describing the survey has been reviewed and does not raise any significant environmental issues (it should however be noted that the comment letter, including the description of the survey, is included in this FEIR, which will be considered by the decision makers). Regarding the second section of the letter, which includes comments on the DEIR, this FEIR includes responses to all environmental issues raised in the letter.
- 16-2 The comment indicates that the DEIR is inadequate as an informational document and should be recirculated with a more inclusive public review process. This comment alone is a general statement and does not raise any specific issues, but the comment provides introduction to the more specific comments that follow. Responses to Comments 16-3 through 16-28 below address these specific comments.
- 16-3 This comment describes language barrier issues, and the public requests for translation. Please see Master Response 2: Language Barrier and Public Review Period.
- 16-4 This comment describes language barrier issues associated with education level and text complexity. This issue is addressed in Master Response 2: Language Barrier and Public Review Period.
- 16-5 The commenter states that the project site falls outside of the City of Merced Fire Department's accepted response standards and expresses concern about flammable and hazardous materials stored on-site which could jeopardize the health and safety of southeast Merced residents. Commenter also states that adequate fire and police protection must be in place prior to facility operation.
- It should be noted that the nearest fire station, Fire Station 54, is approximately 2.6 miles from the project site, as opposed to 4.2 miles, as indicated by the commenter.
- The DEIR fully analyzed increased demand for fire and police protection facilities, systems, equipment, and services under 'Utilities and Public Services', pages 4.12-20 and 4.12-21 of the DEIR. As stated in Impact 4.12-7, the City of Merced Fire Department has indicated it would be capable of responding to fires and emergencies within the desired response time (Franco, pers. comm.). The applicant will also pay its fair share of the costs associated with increased demand for fire and police protection facilities and services, as appropriate, through the City's Public Facilities Impact Fees Ordinance. Using the fee levels from 2009 for a 1.1 million-square-foot "Light Industrial Use" at \$3,812 per 1,000 square feet, the project would pay approximately \$4.2 million in City Public Facilities Impact Fees, of which approximately \$790,000 would be designated for police and fire facilities (based on \$720 total per 1,000 square feet with \$501 for fire and \$219 for police facilities). Furthermore, on-site security measures are incorporated into the project design plan. For these reasons, impacts to police and fire services would be less than significant.

Related to health and safety issues associated with hazardous materials (including flammable) that may be stored on-site during construction and operations, please refer to ‘Public Health and Hazards’, pages 4.10-12 through 4.10-14 of the DEIR (Impact 4.10-2 and 4.10-3). This comment on hazardous materials does not raise any issues about the adequacy of environmental analysis in the DEIR. Therefore, no further response is necessary.

16-6 The commenter indicates that the DEIR should identify measures to enforce and strengthen existing laws regarding truck traffic. Please see Response to Comment 22-15, which addresses this issue.

16-7 The commenter states that Weaver School District was predicted to exceed its K-8<sup>th</sup> grade facility capacity of 2,470 students at the beginning of the 2008-2009 school year. The commenter also asks that Wal-Mart pay a 2:1 school facilities impact fee because the project will generate elevated health impacts, absenteeism, safety risks, infrastructure degradation, and population increases.

As stated in Section 4.12, ‘Utilities and Public Services’, page 4.12-7 of the DEIR, the project is anticipated to hire primarily from the local community, resulting in little in-migration. Therefore, the project is not expected to increase long-term demand for schools necessitating the expansion of existing facilities or construction of new facilities.

The California Legislature has declared that the school impact fee is deemed to be full and adequate mitigation under CEQA (Government Code Section 65996) [See Section 4.10, ‘Utilities and Public Services’, page 4.10-14 of the DEIR]. The project would be subject to development impact fees that would provide the legally maximum required level of funding under State law. A 2:1 school facilities impact fee is not required by State law. This comment does not provide any information on the correlation between doubling the applicant’s school facilities impact fee and the projects impact on health, absenteeism, safety risks, infrastructure degradation, and population. Further, this comment does not raise any issues about the adequacy of environmental analysis in the DEIR. Therefore, no further response is necessary.

16-8 The commenter states that Wal-Mart should fund relocation of Weaver Elementary School if TACs generated by diesel trucks using the proposed project require such location to be necessary. A comprehensive HRA is included in Appendix C of the DEIR. Impact 4.2-4, Exposure of Receptors to Toxic Air Contaminants, includes discussion about the potential health risk from long-term operation-related emissions of TACs, including TACs generated by diesel trucks. This analysis concluded that no nearby receptors, including all schools in the area, would be subject to increased levels of health risk that exceed the applicable thresholds of significance. Therefore, no mitigation would be required, including relocation of Weaver Elementary School.

16-9 The commenter states the DEIR should explain how tax assessment of the project site would increase pressure on adjacent agricultural land to convert to urban development. Related to economic issues, please refer to Response to Comment 12-14. Related to the conversion of farmland to nonagricultural use, please refer to Master Response 5: Agricultural Resources which addresses the issue related to conversion of important farmland.

16-10 The commenter states the proposed project does not include adequate buffer from adjacent agricultural land. The commenter does not provide any evidence of how the project does not provide sufficient buffer and what amount of buffer would be considered sufficient. The DEIR fully analyzes impacts associated with potential conflicts between urban land uses and adjacent agricultural operations (refer to Impact 4.1-3 of the DEIR). Therefore, analysis of impacts to agricultural resources is considered adequate. No additional analysis is required.

16-11 The commenter states the DEIR should assess crop damage from elevated ozone exposure from implementation of the proposed project. The proposed project would not emit substantial amounts of ozone at the site. Although ozone precursors (ROG and NO<sub>x</sub>) would combine in the atmosphere in the presence of sunlight to create ozone, the distribution of ozone is highly dependent on local meteorology on any given day. In addition, the vast majority of ozone precursors generated during project operation are emitted from diesel trucks traveling long distances. Furthermore, although the proposed project would generate ozone precursors, Section 4.2 “Air Quality” includes mitigation measures that reduce the operational emission of ozone precursors to a less-than-significant level (Mitigation Measures 4.2-2a through 4.2-2e). For these reasons, the project would not result in local elevated ozone levels such that crop production would be substantially affected. Therefore, analysis of air quality impacts and impacts to agricultural resources is considered adequate. No additional analysis is required.

16-12 The commenter recommends a 4:1 mitigation ratio for conversion of prime agricultural land on the project site. Please refer to Master Response 5: Agricultural Resources, which addresses the issue related to conversion of important farmland.

16-13 The commenter expresses concern about the effects of localized diesel truck emissions on people in Merced County who have asthma or other respiratory conditions. Please refer to Master Comment 13.

The commenter states that the HRA needs to address the level of increased cancer risk from off-site operational traffic emissions generated by vehicles using the proposed facility. Please refer to the response to comment 92-3.

The commenter states that the HRA needs to address TAC exposure to truck drivers and workers employed by the proposed project. Occupational risks to truck drivers and other employees, including exposure to potentially harmful levels of TACs, are regulated by the Occupational Safety and Health Administration (OSHA). The DEIR assumes that all OSHA regulations would be enforced and therefore, the analysis of TAC emissions discussed under Impact 4.2-4 focuses on the potential exposure of off-site receptors (e.g., schools, residents, and off-site places of employment) to project-generated TAC emissions.

The commenter also states that the HRA does not address construction-phase TAC emissions and TAC exposure to truck drivers and workers employed at the facility. Short-term construction-generated TAC emissions are addressed qualitatively under Impact 4.2-4. As explained on page 4.2-43, “SJVAPCD has not adopted a methodology for analyzing such impacts and does not recommended the completion of HRAs for construction-related emissions of TACs...”

16-14 The commenter believes the mitigation measures proposed to mitigate impacts 4.2-1 and 4.2-2 improperly defers mitigation. Please see response to comment 16-19.

16-15 The commenter states that the DEIR fails to assess how CAP emissions associated with project operations would affect air basins outside the SJVAB. Please refer to response to comment 96B-27.

The commenter also expresses concern about the impact of project-generated emissions on Yosemite National Park and Kings Canyon National Park. National Parks are considered Class I areas by EPA. Major stationary sources of emissions (e.g., coal-fired powered plants) that have the potential to adversely affect air quality in areas considered Class I areas by EPA, including national parks, are required to submit Prevention of Significant Determination (PSD) permit applications. The proposed project does not constitute a major stationary source with respect to the PSD permit program. The air quality analysis for the proposed project was conducted in

accordance with SJVAPCD-recommendations for this type of project as such relates to CEQA analysis, not for NEPA or other permit requirements as this is an EIR.

- 16-16 The commenter states that Wal-Mart should provide warning to the surrounding neighborhood that the project will cause elevated cancer risk. Impact 4.2-4 discusses the incremental increase in cancer risk to off-site receptors. The analysis concludes that the incremental increase would not exceed the applicable threshold of significance and, therefore, no mitigation is required, such as notification of nearby receptors. The commenter also indicates that the project must obtain a “Safe Use Determination” pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986. The Safe Drinking Water and Toxic Enforcement Act of 1986 (e.g., Proposition 65) contains two basic provisions: (1) no discharge of a listed chemical shall be made in a significant amount to a potential source of drinking water or to soil, which may cause the chemical to enter groundwater; and (2) the posting of clear and reasonable warnings prior to exposure of Proposition 65 chemicals is required. The potential for the proposed project to emit such chemicals and other toxic substances, and subsequent effects to surface water and groundwater, is addressed in Master Responses 8 and 9 in the FEIR, and in Section 4.10 “Public Health and Hazards”.
- 16-17 The commenter believes the mitigation measures proposed to mitigate impacts 4.2-1 and 4.2-2 improperly defers mitigation. Please see response to comment 16-19.
- 16-18 The commenter believes that the CO screening-level analysis used in the DEIR was inappropriately applied, and that a full CO hot-spot study should have been performed. The traffic study prepared for the project (DKS 2008) supports the conclusion that the project would not contribute to the deterioration of signalized intersections to unacceptable level of service (LOS), which SJVAPCD uses as an indicator for CO hot spot potential. In addition, the project would not exceed the threshold level for the mitigation measure from the General Plan EIR. The screening-level analysis provided by SJVAPCD (GAMAQI 2002) was correctly applied. The screening level analysis is a conservative approach such that if the project would not result in an exceedance of the screening criteria, the project would not result in a violation of the ambient air quality standards.
- 16-19 The commenter believes that mitigation measures proposed with the intent of reducing impacts to air quality are inappropriately vague and improperly defer mitigation, but does not provide any specific examples of where this has occurred. As a general matter, a lead agency must not defer the formulation of mitigation until after project approval (State CEQA Guidelines Section 15126.4[a][1][B]). The state courts have developed legal principles regarding the extent to which an agency can rely on a mitigation measure that defers some amount of environmental problem-solving until after project approval. In particular, deferral is permissible where the adopted mitigation measure commits the agency to a realistic performance standard or criterion that will ensure the mitigation of the significant effect, or lists alternative means of mitigating an impact that must be considered, analyzed, and possibly adopted in the future. Here, the City has set forth numerous mitigation measures designed to mitigate the project’s environmental consequences. As noted, where the mitigation measures, policies, or programs require future action, performance standards are included to ensure effectiveness of the mitigation. Where mitigation measures are proposed for the purpose of reducing impacts to air quality, timing, responsibility, and performance standards have been assigned to make measures as specific and enforceable as possible. Please also refer to response to comment 17-14.
- 16-20 The commenter indicates that uncertainties related to “implementation of the Air Impact Assessment,” the voluntary agreements between Wal-Mart and SJVAPCD, and proposed roadway improvements should have prevented the Draft EIR from concluding “less-than-

significant” for a number of air quality and traffic impacts. The commenter does not explain the alluded “uncertainties” and does not identify the specific impacts considered to be problematic in this instance. It should be noted that although the “Emissions Reduction Agreement” with SJVAPCD is, in most instances, a voluntary program, because the Draft EIR requires the applicant to participate in this program as mitigation to air quality impacts, the program is not voluntary in this case. Regarding uncertainties related to “implementation of the Air Impact Assessment” and proposed roadway improvements, specific responses cannot be provided, except that the Draft EIR clearly mitigates for traffic and air quality impacts, and there are no uncertainties related to these issues that could alter the conclusion of the Draft EIR.

- 16-21 The commenter suggests that the City has a history of failing to enforce the implementation of mitigation measures and cites two annexation projects as examples, and indicates that the project violates mitigation requirements for those annexation projects. However, the allegation is very general, and the attachments provided to support the examples of lack of mitigation enforcement are multifaceted, dealing with many alleged issues between the Lyons Annexation project, the Campus Parkway EIR/EIS, and the proposed project. Most of the issues are fiscal in nature and do not raise environmental issues. Master Response 3: “Piecemealing” addresses the adequacy of the Draft EIR with respect to other CEQA documents prepared for other projects in the vicinity. It should be noted that the proposed project would not violate any of the mitigation measures set forth in the Lyon’s Annexation project. When mitigation measures are adopted, they are not necessarily intended to remain forever unchanged. Subsequent projects come along, a community develops, and new projects need to consider what has happened before and how circumstances have changed. Since the Lyons Annexation, the Campus Parkway project was planned and that EIR assumed development in the industrially zoned project area. Campus Parkway has changed the environmental setting dramatically, introducing a new road system (under construction), including the Parkway and Mission Interchange, none of which was in place when the Lyons Annexation project was evaluated; from a transportation planning perspective, Kibby Road no longer makes sense as a collector in this location. Campus Parkway superseded it as a major arterial; that EIR has superseded the previous mitigation measures. In addition, abandoning the Kibby Road easement would not violate the General Plan because the City will be amending the General Plan.
- 16-22 The commenter states that there is little evidence that the City has coordinated with County or Caltrans regarding the project’s traffic impacts. The Notice of Preparation for the EIR was sent to the County and Caltrans, and both agencies provided comment letters prior to preparation of the EIR that were considered in the DEIR. In addition, these agencies commented on the DEIR. The DEIR assumes roadway improvements that are already programmed (such as modifications to Campus Parkway), as well as approved development projects. For roadway projects that are already programmed, the DEIR traffic analysis did not analyze whether the modifications are required, as noted in the comment. The traffic study carefully considered the number and types of potential vehicles, and their potential routes. The assumptions were reviewed and confirmed by City staff and an independent peer review of the analysis. Regarding the issue of piecemealing, please refer to Master Response 3: Piecemealing, which addresses this issue.
- 16-23 The comment states that noise impacts are not significant and unavoidable and that mitigation such as retrofitting windows is not included in the EIR. Window retrofitting and other soundproofing measures are addressed on page 4.8-27 in Mitigation Measure 4.8-3.
- 16-24 The commenter notes that the expanded IS/MND prepared for the Lyon’s Annexation project indicates a 40-year buildout period for the 484-acre site. The commenter claims that “various studies” in the Draft EIR ignore this assumption and identifies two “probable future projects,” including a power plant (actually an electrical power peaking plant, the application for which has

been rejected by the Public Utilities Commission (PUC) and, the City has no subsequent peaking plant applications on file at this time) and a business park. It should be noted that this annexation area is identified in the Merced Vision 2015 General Plan update, and the IS/MND incorporates the General Plan EIR by reference and therefore is based on the General Plan's buildout assumptions (regardless of the stated buildout estimate). Furthermore, neither the General Plan nor the Lyon's Annexation project identify specific uses for the properties located within the vicinity of the project (such as a power plant or business park), but rather identify general land use types that allow various uses. It is speculative to assume that specific uses will develop on specific parcels unless formal applications have been accepted by the City. Analysis in the Draft EIR for the proposed Merced Wal-Mart Distribution Center Project is based primarily on buildout assumptions included in the *Merced Vision 2015 General Plan*, as well as on information provided by City staff regarding approved and planned projects in the vicinity. Consequently, the Draft EIR is based on the best information available and heeds CEQA's warnings against speculation (*State CEQA Guidelines* Section 15145). The commenter also states that "the DEIR improperly concludes that cumulative air emissions are less than significant. This conclusion is particularly unwarranted in the case of Toxic Air Contaminants, as the Health Risk Assessment fails to address the substantial current and future 'background' exposure levels of sensitive receptors near the project site from existing and planned emissions sources." Please refer to response to comment 230-4. In addition, it is speculative to assume that any particular sources of TACs would be developed as part of the Lyon's Annexation project.

- 16-25 The commenter indicates that the City needs to weigh the economic benefits versus the proposed project's costs in damage to human health, productivity, infrastructure, and agriculture crop yields and that the City must adopt a Statement of Overriding Considerations to approve the project. The commenter further states that the Draft EIR must adequately inform the decision. The commenter is correct. Although this specific comment does not raise any issues regarding the adequacy of the Draft EIR, and will therefore not be further addressed, more information related to the decision to approve a project in light of significant impacts to the environment is provided in Response to Comment 118-2.
- 16-26 The commenter indicates that the DEIR should describe how many new employees will be generated from the proposed project and should require that all employees reside in the County of Merced. Local hiring procedure is not an environmental issue and does not require analysis under CEQA. Please see Response to Comment 92-4, which discusses this issue in greater detail.
- 16-27 The commenter objects to the limited nature of the objectives and the alternatives. See Master Response 12: Alternatives, which addresses this issue.
- 16-28 This comment concludes the letter with a general statement that the legal standards for the DEIR and the CEQA process have not been met and that affected residents have been excluded. Regarding the document and process, this comment offers no specific criticism and is assumed to emphasize more specific statements made previously in the letter. The responses to comments above address these specific statements. Regarding the exclusion of residents, again, the comment is non-specific, but it is assumed that the commenter refers to the language barrier issue, which is addressed in Master Response 2: Language Barrier and Public Review Period.