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Via U.S. and Electronic Mail

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Re: Comments on the Initial Study/Mitigated Negative Declaration for the 6701 Shellmound Street Project in Emeryville

Dear Mr. Bryant and Ms. Desai:

We write on behalf of **Emeryville Residents for Responsible Development** (“**Emeryville Residents**”) to provide comments on the Initial Study/Mitigated Negative Declaration (“IS/MND”) prepared by the City of Emeryville (“City”) for the 6701 Shellmound Street Project (“Project”) proposed by Anton Development Company, LLC (“Applicant”). The Applicant is proposing the construction of approximately 211 market rate rental units sited on a triangular-shaped parcel comprised of approximately 2.3 acres located at 6701 Shellmound Street (Assessor’s Parcel Number 49-1490-2) in Emeryville (“Project site”).¹ The Project site is bounded by Interstate-80 (I-80) to the west, the Ashby Avenue exit on- and off-ramps to the north, Shellmound Street and the Union Pacific Railroad (“UPRR”) tracks to

¹ Initial Study and Mitigated Negative Declaration for 6701 Shellmound Street, Produced by Urban Planning Partners, Inc. for City of Emeryville, p. 1 (June 2014) [*hereinafter* IS/MND].
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the east, and Ex'pression College for Digital Arts immediately to the south.² The Project site is currently designated as "Mixed Use with Residential."³

Based upon our review of the IS/MND and supporting documentation, we conclude that the IS/MND fails to comply with the California Environmental Quality Act ("CEQA").⁴ The IS/MND fails to provide a complete and accurate project description and to set forth an accurate description of the environmental setting against which to measure the Project's potentially significant impacts. The City has also failed to set forth specific, enforceable and definite mitigation measures, and has improperly deferred formulation of mitigation measures to post approval studies. These deficiencies in the IS/MND are fatal errors. As a result, the IS/MND fails to identify the Project's potentially significant environmental impacts and propose measures that can reduce those impacts to a less than significant level.

As described in these comments, there is more than a fair argument that the Project will result in potentially significant direct and indirect air quality, public health, hazardous materials, noise and water quality impacts. The City may not approve a Conditional Use Permit ("CUP"), and Design Review for the Project until it prepares an Environmental Impact Report ("EIR") that adequately analyzes the full scope of discretionary approvals required for the Project, addresses the Project's potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to minimize these impacts.

We prepared these comments with the assistance of hazards expert Matt Hagemann and air quality expert, Jessie Jaeger. Their technical comments⁵ on the IS/MND and qualifications are attached and submitted to the City, in addition to the comments in this letter (**Attachment A**).

I. STATEMENT OF INTEREST

Emeryville Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of

² *Id.*

³ IS/MND, p. 5.

⁴ Pub. Res. Code §§ 21000 et seq.

⁵ **Attachment A.**

the Project. The coalition is comprised of individuals, including Emeryville residents Alex Bale-Glickman and Roy Blackshire, and Oakland resident, Matthew Spoonhour, the International Brotherhood of Electrical Workers Local 595 and Sheet Metal Workers Local 104, and their members and their families who live and/or work in the City of Emeryville and Alameda County.

The individual members of Emeryville Residents live, work, and raise their families in the City of Emeryville and in Alameda County. They would be directly affected by the Project's impacts. Individual members may also work on the Project itself. They will therefore be first in line to be exposed to any health and safety hazards that exist on the Project site.

The organizational members of Emeryville Residents also have an interest in enforcing environmental laws and land use planning policies that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities.

Finally, Emeryville Residents members are concerned about projects that risk serious harm to the environment and public health without providing countervailing economic benefits. The CEQA process allows for a balanced consideration of a project's socioeconomic and environmental impacts, and it is in this spirit that we offer these comments.⁶

II. THE MND FAILS TO ADEQUATELY DESCRIBE THE PROJECT

The MND does not meet CEQA's requirements because it fails to include a complete and accurate project description, rendering the entire impact analysis inherently unreliable. An accurate and complete project description is necessary to perform an evaluation of the potential environmental effects of a proposed project.⁷ Without a complete project description, the environmental analysis will be impermissibly narrow, thus minimizing the project's impacts and undermining

⁶ Pub. Res. Code § 21001(g); Cal. Codes & Regs. tit. 14, § 15021(d) [*hereinafter* CEQA Guidelines].

⁷ See, e.g., *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.

meaningful public review.⁸ The courts have repeatedly held that “an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document].”⁹ Only through an accurate view of a project may affected outsiders and public decision makers balance the proposal’s benefit against its environmental costs.¹⁰

A. The IS/MND Completely Fails to Discuss Dewatering Activities Related to Project Development

The Project Description completely fails to describe any dewatering activities that may be associated with excavation and trenching at the Project site. According to the IS/MND, and its supporting studies, groundwater at the site was encountered at approximately 8 – 11 feet below ground surface (“bgs”), and in some places, as shallow as approximately five feet bgs.¹¹ Although the IS/MND claims that the only necessary excavation at the site would be five feet bgs,¹² this conclusion is not supported by the geotechnical memorandum prepared for the Project.¹³

Because the Applicant has not yet selected whether deep or shallow foundations will be used for construction of the Project,¹⁴ it is impossible to determine the depth of excavation. Should the Applicant select a deep foundation option, trenching may extend to a depth of 60 feet,¹⁵ which would require dewatering activities, given the shallow depth of groundwater at the Project site. Without additional information and analysis, Project impacts on hydrology, drainage, and hydrological resources cannot be determined. The City must describe potential dewatering activities so the public and decision makers can fully assess the Project’s impacts on the environment.

⁸ *See id.*

⁹ *County of Inyo v. County of Los Angeles* (1977) 71 Cal.App.3d 185, 193.

¹⁰ *Id.* at 192-193.

¹¹ IS/MND, p. 78; Geotechnical Memo, p. 2.

¹² IS/MND, p. 78

¹³ *See Generally*, Geotechnical Memo.

¹⁴ *See* Geotechnical Memo, p. 3.

¹⁵ *Id.*

B. The IS/MND Completely Fails to Discuss the Demolition of Onsite Buildings

The IS/MND fails to describe the pre-construction demolition activities at the Project site. According to the IS/MND, “[t]here are two existing structures on the property: a two-story office building and a warehouse connected by a passageway, which total 65,738 square feet...”¹⁶ The IS/MND acknowledges that there may be lead, asbestos, and Polychlorinated biphenyls (“PCBs”) in these buildings given the date of their construction.¹⁷

Because, “[l]ead and asbestos are State-recognized carcinogens,”¹⁸ it is especially important that the IS/MND identify the demolition activities associated with Project development. Without a description of the scope of demolition and a characterization of the waste stream, it is impossible to determine the Project’s impacts on worker and public health, hydrology, air quality, traffic and circulation and utilities. The City must identify the scope of demolition necessary for Project development so that the Project and decision makers may assess the full scope of Project impacts on the environment.

C. The IS/MND Completely Fails to Discuss the Hazardous Waste Stream that will be Generated by the Project and Necessary Waste Disposal

The IS/MND fails to quantify the hazardous waste generated by Project construction, and the corresponding landfill space required for the hazardous materials generated by demolition activities and construction of the Project. The IS/MND’s failure to fully describe hazardous waste associated with the Project renders the project description insufficient for two reasons.

First, according to the IS/MND, the buildings now on the Project site were constructed before lead paint and the use of asbestos in building material were banned.¹⁹ Accordingly, the IS/MND recognizes that the buildings may contain these materials in hazardous amounts, along with PCBs.²⁰ The asbestos may be released into the atmosphere, impacting sensitive receptors, while, construction

¹⁶ IS/MND, p. 3.

¹⁷IS/ MND, pp. 30, 64.

¹⁸ *Id.*, p. 30.

¹⁹ *Id.*

²⁰ IS/MND, p. 64.

debris containing lead may be considered hazardous material, depending on the concentration of lead.²¹ Furthermore, disposal of PCBs is subject to strict regulatory requirements.²² The IS/MND must discuss the hazardous waste stream associated with demolition so the full Project impacts may be assessed.

Second, the IS/MND fails to describe the landfill space required, and where the hazardous waste generated by construction activities will be diverted. Because the fill material at the site is heavily contaminated²³ with total petroleum hydrocarbons such as diesel and motor oil, semi-volatile organic compounds, PCBs, and metals at rates which exceed residential standards,²⁴ remediation is required to prepare the Project site for residential use.²⁵ Because the fill and demolition waste is contaminated, it will need to be disposed of in a hazardous waste landfill. However, the IS/MND provides no discussion of where this stream of hazardous fill and demolition debris will be directed. In fact, the only discussion of generated waste is with regards to the Altamont Landfill in Livermore.²⁶ The Altamont Landfill is a non-hazardous waste landfill, and therefore, will not be able to accept the hazardous fill materials generated by excavation activities required for Project development.²⁷

The City must fully quantify and disclose the hazardous waste stream that will be generated by construction of the Project so its effect on the environment may be fully and completely known by the public and decision makers. Because there is no evidence or even description of a landfill with sufficient capacity to accept the hazardous waste generated by the Project, or any guarantee that the full amount of hazardous waste will be accepted by a nearby facility, impacts to public health, air quality, traffic and hydrological resources cannot be fully analyzed. The City is required to fully characterize the Project's waste stream and identify landfill space at a facility that accepts hazardous materials in the surrounding region and otherwise analyze impacts from disposal of the Project's waste.

²¹ Environmental Protection Agency, Asbestos (last visited Feb. 13, 2015) *available at* <http://www.epa.gov/airtoxics/hlthef/asbestos.html>.

²² 40 C.F.R §§ 761 *et seq.*

²³ *Id.*, p. 68 70.

²⁴ *Id.*, p. 69.

²⁵ IS/MND, p. 70.

²⁶ IS/MND, p.142.

²⁷ Waste Management, Altamont Landfill and Resource Recovery Facility. **Attachment B.**
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III. THE MND FAILS TO ADEQUATELY DESCRIBE THE EXISTING ENVIRONMENTAL SETTING

An MND must include a description of a project's environmental setting.²⁸ The description of the environmental setting constitutes the baseline physical conditions by which a lead agency may assess the significance of a project's impacts.²⁹ As a general matter, the MND must also "disclose the data or evidence upon which person(s) conducting the study relied. Mere conclusions simply provide no vehicle for judicial review."³⁰ According to the deed restrictions that have been placed on the Project property due to the hazardous material concentrations, "[a]n environmental risk assessment may be required by the [Alameda County Health Care Services Agency] ACHCSA if any significant change in land use is proposed."³¹ To date, the Project site has been remediated for commercial uses, and accordingly, the Project requires further remediation for residential uses proposed. However, the preparation of an environmental risk assessment ("ERA"),³² which the Environmental Protection Agency ("EPA") uses to determine impacts on human health, has been omitted from the IS/MND. The purpose of the ERA is to determine:

- How much of a chemical is present in an environmental medium (e.g., soil, water, air);
- How much contact (exposure) a person or ecological receptor has with the contaminated environmental medium; and
- The inherent toxicity of the chemical.³³

There are two types of ERAs used: Ecological Risk Assessments, which address impacts to biological receptors, and Human Health Risk Assessments.³⁴ According to EPA, a Human Health Risk Assessment, which Matt Hagemann concludes is

²⁸ CEQA Guidelines, §15063(d)(2).

²⁹ *Id.*, §15125(a).

³⁰ *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171.

³¹ IS/MND, p. 68.

³² IS/MND, p. 68.

³³ Environmental Protection Agency, Risk Assessment: Basic Information (last visited Feb. 17, 2015) available at http://www.epa.gov/risk_assessment/basicinformation.htm.

³⁴ Environmental Protection Agency, Risk Assessment: Basic Information (last visited Feb. 17, 2015) available at http://www.epa.gov/risk_assessment/basicinformation.htm. See also Environmental Protection Agency, Human Health Risk Assessment (last visited Feb. 17, 2015) available at http://www.epa.gov/risk_assessment/health-risk.htm.

required to fully characterize the existing environment for hazards³⁵ seeks to address questions such as:

- What types of health problems may be caused by environmental stressors such as chemicals and radiation?
- What is the chance that people will experience health problems when exposed to different levels of environmental stressors?
- Is there a level below which some chemicals don't pose a human health risk?
- What environmental stressors are people exposed to and at what levels and for how long?
- Are some people more likely to be susceptible to environmental stressors because of factors such as age, genetics, pre-existing health conditions, ethnic practices, gender, etc.?
- Are some people more likely to be exposed to environmental stressors because of factors such as where they work, where they play, what they like to eat, etc.?³⁶

The IS/MND fails to disclose or analyze the types and severity of health problems caused by human exposure to the chemical contamination at the site. According to Mr. Hagemann, “[o]nly limited cleanup of contaminated soils and soil vapor has been conducted and the Project site, including the underlying groundwater, remains highly contaminated.”³⁷ Accordingly, a Human Health Risk Assessment is required to determine whether the Project will pose an unacceptable risk to human health and the environment.

According to the Phase I and Phase II Environmental Site Assessment (“ESA”) for the Project, the site is contaminated with PCBs and methyl isobutyl ketone (“MIBK”) as a result of Leaking Underground Storage Tanks (“LUST”) at the Project site.³⁸ Despite repeated attempts to remediate the site, the site has still not been cleaned up to residential standards.³⁹ Indeed, Mr. Hagemann points out that the ESAs for the site produced sampling results demonstrating that:

³⁵ SWAPE, p. 1.

³⁶ Environmental Protection Agency, Human Health Risk Assessment (last visited Feb. 17, 2015) available at http://www.epa.gov/risk_assessment/health-risk.htm.

³⁷ SWAPE, p. 1.

³⁸ *Id.*

³⁹ SWAPE, p. 2

The following contaminants of concern in fill materials [are] above the [San Francisco Regional Water Quality Control Board] SFRWQCB Environmental Screening Levels (ESLs)⁴⁰ for residential land uses:

- Total petroleum hydrocarbons as diesel (TPHd) and motor oil (TPHmo), semivolatile organic compounds, PCBs, and metals in soil;
- TPHd, TPHmo, volatile organic compounds, and metals in groundwater; and
- Benzene in soil vapor.⁴¹

Based on the concentrations of hazardous materials on the site, Mr. Hagemann concludes that the Project site is “highly contaminated.”⁴² These materials have known adverse impacts on human health.⁴³ Accordingly, the IS/MND must issue an ERA that fully describes the extent of on-site contamination, how much contact construction workers and the broader public will have with these materials and the inherent toxicity of the chemicals. In the absence of this information it is impossible to determine the full extent of impacts associated with the hazardous materials to which the Project will expose construction workers, nearby residents and future residents.⁴⁴

IV. AN ENVIRONMENTAL IMPACT REPORT IS REQUIRED

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.⁴⁵ “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR protects not only the environment, but also informed self-government.”⁴⁶ The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”⁴⁷

CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the “fair argument” standard.

⁴⁰ http://www.swrcb.ca.gov/rwqcb2/water_issues/programs/esl.shtml.

⁴¹ SWAPE, p. 3.

⁴² SWAPE, p. 4.

⁴³ *See supra*, p. 16.

⁴⁴ SWAPE, p. 5.

⁴⁵ *See* Pub. Res. Code § 21000; CEQA Guidelines § 15002.

⁴⁶ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.

⁴⁷ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

Under that standard, a lead agency “shall” prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.⁴⁸

In contrast, an IS/MND may be prepared instead of an EIR only when, after preparing an initial study, a lead agency determines that a project may have a significant effect on the environment, but:

- (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review *would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur,*
- and (2) there is *no substantial evidence* in light of the whole record before the public agency that the project, as revised, *may* have a significant effect on the environment.⁴⁹

Courts have held that “[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.”⁵⁰ The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through the issuance of a negative declaration.⁵¹ An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.⁵²

“Substantial evidence” required to support a fair argument is defined as “enough relevant information and reasonable inferences from this information that

⁴⁸ Pub. Res. Code §§ 21080(d), 21082.2(d); CEQA Guidelines §§ 15002(k)(3), 15064(f)(1) and (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

⁴⁹ Pub. Res. Code § 21064.5 (*emphasis added*).

⁵⁰ *Communities For a Better Env’t. v. S. Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319-320.

⁵¹ *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

⁵² *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”⁵³ Substantial evidence can be provided by technical experts or members of the public.⁵⁴

According to the CEQA Guidelines, when determining whether an EIR is required, the lead agency is required to apply the principles set forth in Section 15064(f):

[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.

With respect to this Project, the IS/MND fails to satisfy the basic purposes of CEQA. The IS/MND fails to adequately describe the existing environmental conditions, fails to adequately investigate and analyze the Project’s potentially significant impacts, and fails to provide substantial evidence to support a finding that impacts will be mitigated to a less-than-significant level. Because the IS/MND lacks basic information regarding the Project’s potentially significant impacts, the IS/MND’s implicit conclusion that the Project will have a less-than-significant impact on the environment is unsupportable.⁵⁵ Because the City failed to gather the relevant data to support its finding of no significant impacts, and substantial evidence (summarized below) shows that the Project may result in potentially significant impacts, a fair argument can be made that the Project may cause significant impacts requiring the preparation of an EIR.

⁵³ CEQA Guidelines § 15384(a).

⁵⁴ *E.g. Citizens for Responsible and Open Gov’t. v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340 (substantial evidence regarding noise impacts included public comments at hearings); *Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1117 (substantial evidence regarding impacts to historic resource included fact-based testimony of qualified speakers at public hearing); *Gabric v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183, 199.

⁵⁵ Pub. Res. Code § 21064.5.

A. The IS/MND Fails to Disclose Pertinent Information About Existing Site Conditions and the Risks Associated With Constructing the Project in an Area Prone to Liquefaction

The IS/MND's analysis omits important information relevant to assessing the potential impacts of constructing a seven-story structure over a two-floor parking podium in a liquefaction zone. According to the IS/MND, "[t]he proposed development would necessitate excavation to a depth of approximately 5 feet bgs."⁵⁶ This statement is contradicted, however, by the geotechnical analysis supporting the Project, which provides multiple options for construction that require trenching to different depths.⁵⁷ The deep trenching foundation option for the Project may pose significant impacts for two reasons.

First, substantial evidence shows that the Project's location may expose future residents to violent shaking and liquefaction. According to CEQA, projects that may expose people to substantial adverse affects related to ruptures of earthquake faults, strong seismic ground shaking and liquefaction may pose a significant impact.⁵⁸ The whole of the Project site is subject to violent shaking as the ground consists of artificial fill over marine and marsh deposits;⁵⁹ and the Project site has a very high susceptibility to liquefaction.⁶⁰ Emeryville is located in an "area that contains many active and potentially active faults and is considered to be an area of high seismic activity."⁶¹

Given the site's vulnerability to shaking and liquefaction, the depth of excavation is relevant to determining the structural integrity of the building foundation in the event of an earthquake. Substantial evidence supports a fair argument that the Project will expose future residents to violent shaking, liquefaction and substantial losses in the event of an earthquake. Accordingly, the City must provide further information as to the structural integrity of the building and the depth of trenching in order to determine whether the foundations would adequately support the building.

⁵⁶ IS/MND, 78.

⁵⁷ See Geotechnical Memo.

⁵⁸ CEQA Guidelines, Appendix G.

⁵⁹ See Emeryville General Plan, Figure 6-2 Geology and Earthquake Shaking Potential.

⁶⁰ See Emeryville General Plan, Figure 6-4 Liquefaction Susceptibility.

⁶¹ IS/MND, p. 48.

Second, the Geotechnical Memo provides information that demonstrates Project construction may violate the deed restrictions placed on the site to ensure that impacts associated with hazards are contained. According to the deed restrictions, “[p]otential vertical conduits between the shallow and deep aquifers shall not be created.”⁶² However, the Project’s foundations may require piles that are driven up to 60 feet underground.⁶³ Accordingly, Project construction may disturb the contaminated groundwater at the site, which is relatively shallow, only approximately five feet bgs in some places.⁶⁴

The IS/MND fails to disclose information regarding whether pile driving could create a conduit between the shallow and deep groundwater at the Project site. This information is necessary to determine the scope of potential impacts, given that public and worker exposure to the contaminants found at the Project site could result in significant health impacts, including headaches and dizziness, nerve disorders called “peripheral neuropathy”, effects on the blood, immune system, lungs, skin, and eyes, can cause cancer, as well as premature births and learning disabilities.⁶⁵ Because the Applicant has deferred the selection of a construction method, and the deep foundation option may necessitate approximately 60 feet of trenching bgs,⁶⁶ the City must analyze impacts related to both the installation of the shallow and deep foundations. It is especially important that the trenching be properly described and analyzed because groundwater at the Project site is contaminated, and the deed restrictions prohibit the creation of conduits between groundwater.⁶⁷ If Project trenching disturbs the groundwater table at the site, the contaminated plume could spread beyond the site, further contaminating area ground and surface water.

The IS/MND fails to adequately describe the location and extent of the Project’s proposed trenching, the relationship between the location of the excavation and the contaminated groundwater plume beneath the site, and whether the depth of trenching, and installation of materials at a depth sufficient to support a building in an area prone to liquefaction in the event of an earthquake, will disturb and cause the migration of contaminants at the Project site. The IS/MND’s failure to describe the proposed excavation and trenching renders the IS/MND’s conclusory

⁶² IS/MND, p. 69.

⁶³ Geotechnical Memo, p. 3.

⁶⁴ Geotechnical Memo, p. 2.

⁶⁵ SWAPE, p. 3.

⁶⁶ *Id.*

⁶⁷ IS/MND, pp. 66 – 70.

statements of little worth in analyzing the potential impacts the Project may have on the environment given the pervasive contamination and liquefaction potential in the area. Accordingly, substantial evidence supports a fair argument that the Project's construction may result in potentially unmitigated impacts related to liquefaction and public health hazards. Therefore, an EIR is required.

B. The IS/MND Fails to Fully Disclose, Analyze and Mitigate Impacts Associated With Hazardous Materials Present at the Project Site

Mr. Hagemann reviewed the IS/MND and determined that the document fails to provide an adequate analysis or propose sufficient mitigation of the significant adverse impacts of the Project related to hazardous materials.⁶⁸ Accordingly, it is Mr. Hagemann's professional opinion that "[a]n EIR should be prepared to disclose Project site contaminants that are identified in site assessments and the risks these contaminants would pose to construction workers and future residents."⁶⁹ Mr. Hagemann concludes, based on his independent analysis of the facts and the evidence available, that "the Project may pose unacceptable risks to construction workers and future residents."⁷⁰

The contamination of the Project site is pervasive, and therefore, could result in significant public health impacts. According to the IS/MND, "[s]oil, groundwater, and soil vapor at the project site appear to be impacted by various contaminants, including MIBK, TPH, PCBs, volatile organic compounds, semi-volatile organic compounds, and metals from past land uses."⁷¹ The likely presence of asbestos, lead and PCB-containing materials in the structures to be demolished may pose significant impacts on human health.⁷² Another section of the IS/MND also notes that there is substantial groundwater contamination due to LUST that have been removed from the site, and that groundwater monitoring wells have been improperly abandoned.⁷³ The impacts associated with Project site contamination and the IS/MND's proposed mitigation measure are discussed below.

⁶⁸ SWAPE comments.

⁶⁹ SWAPE, p. 5.

⁷⁰ SWAPE, p. 1.

⁷¹ IS/MND, p. 69.

⁷² IS/MND, p. 29.

⁷³ IS/MND p. 59.

i. *The IS/MND Fails to Disclose and Mitigate Impacts Associated With Project Construction*

The IS/MND fails to fully disclose and mitigate public health impacts associated with exposing construction workers, nearby residents and future residents of the Project to hazardous materials on the Project site. According to the IS/MND:

The disturbance of hazardous materials in soil and/or groundwater during earthwork activities could pose a hazard to construction workers, nearby receptors, and the environment. Future residents, patrons, and trench workers who come into contact with contaminated soils could also experience adverse health effects.⁷⁴

However, the IS/MND does not adequately analyze and mitigate impacts associated with Project construction for two reasons.

First, the IS/MND incorrectly concludes that “[i]mplementation of Mitigation Measure HAZ-1 would . . . reduce impacts associated with potential hazardous materials in soil, groundwater, and soil vapor at the project site to a less-than-significant level.”⁷⁵ However, the proposed mitigation measure is unrelated to Project construction. Mitigation Measure Haz-1 states:

Under the oversight of the ACDEH and/or SF Bay RWQCB or an agency of applicable jurisdiction designated under Health and Safety Code Chapter 6.65 section 25260, as applicable (Applicable Agency), the project shall receive case closure and record a new deed restriction to the satisfaction of the Applicable Agency.⁷⁶

Case closure is unrelated to Project construction, which will expose construction workers to contaminated fill material at the Project site.⁷⁷ As previously discussed in this letter, the installation of building foundations will require grading, trenching and excavation activities. According to the IS/MND, the soil that the workers will be excavating contains total petroleum hydrocarbons such as diesel and motor oil,

⁷⁴ IS/MND, pp. 69 – 70.

⁷⁵ IS/MND, pp. 69 – 70.

⁷⁶ *Id.*, p. 70.

⁷⁷ *Id.*, p. 66.

semi-volatile organic compounds, PCBs, and metals at rates which exceed residential standards.⁷⁸ To prepare the Project site for residential uses, the IS/MND requires the removal of this material, and remediation of the Project site.⁷⁹ The removal of these materials and construction activities by workers, will expose them to the soil, which according to Mr. Hagemann, may result in severe health impacts.⁸⁰ Mr. Hagemann concludes that exportation of fill material may also impact nearby receptors, as removing the fill material from the Project site, will expose the general public to contaminated soil vapor. Mr. Hagemann explains:

Total petroleum hydrocarbons (TPH) can cause headaches and dizziness, nerve disorders called "peripheral neuropathy and effects on the blood, immune system, lungs, skin, and eyes." The polycyclic aromatic hydrocarbons (PAHs, e.g. benzo(a)anthracene) are reasonably expected to be carcinogens. Lead is harmful to the neurological system, especially in children. Harmful effects include premature births, smaller babies, decreased mental ability in infants, learning difficulties, and reduced growth. Arsenic exposure may cause nausea and vomiting, decreased production of red and white blood cells, abnormal heart rhythm, damage to blood vessels, and a sensation of "pins and needles" in hands and feet. PCB exposure may cause skin conditions such as acne and rashes. Studies in exposed workers have shown changes in blood and urine that may indicate liver damage.

In addition, "[l]ong-term exposure to high levels of benzene in the air can cause leukemia, particularly acute myelogenous leukemia and benzene is a known carcinogen." The potential impacts from worker exposure to this contamination as a result of construction is not discussed anywhere in the IS/MND. CEQA requires that an environmental review document evaluate project impacts against the existing environmental setting,⁸¹ which is a site that is heavily contaminated with hazardous materials, in amounts that exceed residential standards.⁸² In order to prepare the Project site for residential uses, these materials will be removed from the site,⁸³ exposing workers and nearby receptors to hazardous materials. Given the substantial evidence of severe health impacts associated with the hazardous

⁷⁸ *Id.*, p. 69.

⁷⁹ IS/MND, p. 70.

⁸⁰ SWAPE, p. 3.

⁸¹ CEQA Guidelines, § 15125(a); *see also* *Communities for A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 321.

⁸² SAWPE, p. 3.

⁸³ IS/MND, p. 70.

waste materials present at the site, a fair argument exists that the Project will result in significant impacts on human health and the environment.

Second, construction workers may suffer health impacts associated with exposure to lead, asbestos and PCBs present in the on-site buildings that will be demolished. According to the IS/MND, the buildings now on the Project site were constructed before lead paint and the use of asbestos in building material were banned.⁸⁴ Accordingly, the IS/MND recognizes that the buildings may contain lead, asbestos and PCBs in hazardous amounts.⁸⁵ Therefore, construction workers demolishing these buildings will be exposed to air containing lead and asbestos, which, if inhaled, may result in significant health impacts. Each of these materials poses significant impacts on human health, as previously discussed, and is subject to regulatory requirements:

- During demolition, asbestos may be released into the atmosphere, impacting sensitive receptors. The Emeryville General Plan Draft EIR, Clean Air Act and Cal-OSHA identify asbestos containing materials as a hazardous air pollutant.⁸⁶ Exposure to asbestos could lead to mesothelioma, gastrointestinal and lung cancer and a disease called asbestosis.⁸⁷
- Construction debris containing lead may be considered hazardous material, depending on the concentration of lead. Generally, soil containing lead concentrations is classified as hazardous if the lead exceeds a total concentration of 1,000 parts per million.⁸⁸ Lead based paint chips and dust-generating activities associated with demolition pose public health impacts on construction workers and nearby residents.⁸⁹ Where workers are exposed to lead in this manner, the Occupational Health and Safety Administration (“OSHA”) requires respiratory protection, protective clothing, hygiene facilities medical surveillance and training.⁹⁰
- Disposal of PCBs is subject to strict regulatory requirements.⁹¹ According to the Emeryville General Plan, “an initial survey to determine the presence of PCBs

⁸⁴ *Id.*

⁸⁵ IS/MND, p. 64.

⁸⁶ Emeryville General Plan EIR, p. 3.3-11.

⁸⁷ Environmental Protection Agency, Asbestos (last visited Feb. 13, 2015) *available at* <http://www.epa.gov/airtoxics/hlthef/asbestos.html>.

⁸⁸ Cal. Code Regs. tit. 22, § 66261.24.

⁸⁹ *Id.*

⁹⁰ 29 C.F.R. § 1926.62.

⁹¹ 40 C.F.R §§ 761 *et seq.*

would need to be conducted for a specific site followed by implementation of appropriate measures to handle any materials with PCBs.”⁹²

The IS/MND fails to address at all the potential impacts to worker and public safety associated with the demolition activities. Lead and asbestos are likely to be present on the Project site, while PCB-contamination has been confirmed. The public and construction workers will be exposed to these harmful substances during Project construction. Accordingly, substantial evidence supports a fair argument that Project construction activities will pose potentially significant impacts on the public and construction workers. Therefore, an EIR that fully discloses and mitigates impacts associated with the Project’s hazardous waste stream is required.

Mitigation Measure Haz-1 only addresses site closure. However, construction impacts must also be addressed in a legally sufficient EIR. Indeed, CEQA requires that an environmental review document evaluate project impacts against the existing environmental setting,⁹³ which is a site that is heavily contaminated with hazardous materials, in amounts that exceed residential standards.⁹⁴ However, the IS/MND completely fails to identify and mitigate impacts associated with the construction of the Project, but rather, focuses on impacts to future residents. The IS/MND fails to identify public health impacts associated with demolition and construction activities on a heavily contaminated site, and therefore, fails to satisfy CEQA’s requirements. A legally adequate EIR that identifies, analyzes and mitigates Project impacts on current nearby residents and construction workers is required. .

ii. *The IS/MND Defers the Formulation of Specific Mitigation Measures and Fails to Assess Impacts Associated with Mitigation*

Despite the prevalence of contamination on the Project site, the IS/MND proposes only one mitigation measure. The proposed mitigation in the IS/MND requires:

Under the oversight of the ACDEH and/or SF Bay RWQCB or an agency of applicable jurisdiction designated under Health and Safety Code Chapter

⁹² Emeryville General Plan EIR, p. 3.3-12.

⁹³ CEQA Guidelines, § 15125(a); *see also* *Communities for A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 321.

⁹⁴ SAWPE, p. 3.
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6.65 section 25260, as applicable (Applicable Agency), the project shall receive case closure and record a new deed restriction to the satisfaction of the Applicable Agency.

Mr. Hagemann concludes that this measure will not reduce impacts below a level of significance for three reasons.⁹⁵

First, the mitigation measure fails to set forth the appropriate oversight body. As noted by Mr. Hagemann, the “lack of agency specificity demonstrates a lack of diligence on the part of the applicant in seeking oversight of the cleanup of the highly contaminated soil, soil vapor and groundwater at the site to levels which are protective of residential land use.”⁹⁶ The reason the designation of a regulatory body is imperative is that only Department of Toxic Substances Control (“DTSC”) has toxicologists that can ensure the Project site is remediated to residential standards. If the site is improperly remediated, the onsite contamination will pose significant impacts on nearby receptors and future residents. Accordingly, mitigation that ensures DTSC oversight is required. Without this assurance, the Project may pose significant impacts to future residents and workers.

Second, the mitigation measure prematurely assumes that the site will receive case closure.⁹⁷ Mr. Hagemann explains that, “[c]ase closure may be granted by an appropriate agency only after the investigation and cleanup of the site has been conducted under the condition of the intended land use.”⁹⁸ The Applicant seeks to construct a residential project on a site that has lacked any regulatory oversight in the approximately 20 years since limited cleanup was conducted.⁹⁹ This may be problematic because, “[c]leanup requirements to support a residential land use are more rigorous than for commercial or industrial sites.”¹⁰⁰ The IS/MND’s assumption that site remediation is feasible is premature and does not provide substantial evidence that impacts will be less than significant. Indeed, the IS/MND fails to include any analysis of the feasibility of the mitigation measures to achieve the case closure.

⁹⁵ SWAPE, pp. 4 - 5.

⁹⁶ SWAPE, p. 4.

⁹⁷ *Id.*

⁹⁸ *Id.* (emphasis in original).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Third, the IS/MND defers mitigation and fails to identify significant impacts associated with Project site remediation. CEQA prohibits a lead agency from setting forth a generalized goal, without performance standards.¹⁰¹ However, the IS/MND does exactly this in Mitigation Measure HAZ-1, which merely requires that the Applicant receive site closure.¹⁰² The measure fails to stipulate that the site must be remediated to residential standards, for the various reasons discussed throughout this letter, and fails to identify the process for identification of the methods that will be used for cleanup of the site.

Indeed, the remediation of the Project site may pose additional impacts on residents. For example, the exportation of soil may impose air quality impacts.¹⁰³ If Project trenching reaches groundwater, dewatering activities will be required.¹⁰⁴ Because the groundwater at the Project site is contaminated, the water will need to be treated prior to disposal.¹⁰⁵ Accordingly, it is Mr. Hagemann's opinion that an EIR, which "identif[ies] cleanup actions necessary to achieve concentrations in soil and soil vapor protective of residential land use,"¹⁰⁶ be prepared so the public and decision makers can determine the full scope of impacts associated with the Project and mitigation measures associated with clean up.

Substantial evidence supports a fair argument that the mitigation measure proposed for hazards at the Project site is insufficient, and may pose additional unmitigated impacts. Accordingly, the City must prepare an EIR that identifies impacts associated with remediation, and implements all feasible remediation made enforceable through permit terms and conditions, as required by CEQA.

C. The Project Conflicts With Several Emeryville Zoning Requirements and General Plan Policies and Will Cause Significant Land Use Impacts

The Project fails to comply with a number of Emeryville's Zoning and Land Use Standards. The Project's noncompliance with these standards may lead to potentially significant impacts on future residents of the Project, and on the environment. These issues are discussed in detail below.

¹⁰¹ *Citizens for a Better Env't v. City of Richmond* (2010) 184 CalApp.4th 70, 93.

¹⁰² IS/MND, p. 78.

¹⁰³ SWAPE, p. 4.

¹⁰⁴ IS/MND, pp. 75-77.

¹⁰⁵ IS/MND, pp. 76-77.

¹⁰⁶ SWAPE, p. 5.

i. *The IS/MND Fails to Disclose and Mitigate Potentially Significant Impacts on Air Quality, Public Health and Greenhouse Gas Emissions Associated with the Conditional Use Permit Required for the Project*

The IS/MND fails to address the Project's indirect impacts on public health and air quality resulting from the increased auto emissions that will result from the Project's noncompliance with the parking standards of Emeryville's Zoning Ordinance. CEQA requires that both direct and indirect impacts on the environment be assessed, analyzed and mitigated.¹⁰⁷ The IS/MND falls short of this requirement.

The Emeryville Zoning Ordinance requires a specified number of parking spaces depending on the type and size of a new development.¹⁰⁸ Emeryville's Zoning Ordinance, section 9.4-404 requires that a multi-family residential Project provide one parking space for each studio and one-bedroom unit, 1.5 parking spaces for two-bedroom, and larger units, and 0.25 parking spaces for guest parking at developments with five or more dwelling units.¹⁰⁹ The only reductions permissible for the number of parking spaces are for those areas within the Transit Hub Overlay Zone, Neighborhood Retail Overlay Zone, and discretionary exemptions granted by the Director for affordable units.¹¹⁰ None of these exceptions from the required parking standards apply to the Project.¹¹¹ Accordingly, 313 parking spaces are required¹¹² yet the Project only provides 264 spaces.¹¹³ Therefore, the Project seeks a CUP to avoid compliance with this requirement.¹¹⁴

According to the IS/MND, "[a]s proposed, the project's parking demand is expected to exceed supply, which could result in inadequate parking capacity."¹¹⁵ However, the IS/MND determines that the Project's impact is insignificant.¹¹⁶ The

¹⁰⁷ CEQA Guidelines, § 15064(d).

¹⁰⁸ See Emeryville Municipal Code, Tit. 9, Ch. 4, Parking and Loading.

¹⁰⁹ Emeryville Municipal Code, § 9-4.404.

¹¹⁰ Emeryville Municipal Code, §§ 9-4.402(d), 9-4.403(e).

¹¹¹ City of Emeryville Zoning Map. **Attachment C.**

¹¹² IS/MND, p.84.

¹¹³ IS/MND, p.84.

¹¹⁴ Emeryville Municipal Code, § 9-4.404(g).

¹¹⁵ IS/MND, p. 129.

¹¹⁶ See *Id.*

IS/MND is incorrect. Substantial evidence shows that the Project's proposed reduction in parking may result in a significant air quality impacts, greenhouse gas ("GHG") emissions and significant public health impacts.

"CEQA considers a project's impact on parking of vehicles to be a physical impact that could constitute a significant effect on the environment."¹¹⁷ Accordingly, "a project's impact on parking generally should be studied for any potential impact on the environment."¹¹⁸ "[T]o the extent th[at] lack of parking affects humans, that factor may be considered in determining whether the project's effect on parking is significant under CEQA."¹¹⁹

The IS/MND incorrectly asserts that the Project is on an infill site, which is located in a transit priority area, thus exempting the Project from disclosing significant impacts associated with aesthetics and parking. "Transit priority area" is defined as "an area within one-half mile of a major transit stop that is existing or planned, if the planned stop is scheduled to be completed within the [four year] planning horizon included in a Transportation Improvement Program adopted pursuant to Section 450.216 or 450.322 of Title 23 of the Code of Federal Regulations."¹²⁰ The IS/MND states that the Project is within a half mile of the Emeryville Amtrak station; however, this claim is incorrect. The Project will be constructed outside the half-mile radius where the exemption would apply. Therefore, the City must determine the impact that cars circling and looking for parking spaces or idling outside buildings, will have on the environment.

Cars contribute significantly to global warming, as they emit GHGs. Indeed, mobile emissions contribute approximately 30% of all U.S. global warming emissions.¹²¹ "A 2004 inventory of greenhouse gas emissions showed that the transportation sector in Emeryville was the greatest contributor, with 49% of the total."¹²² Furthermore, auto emission may have a significant impact on public health. Mobile emissions are associated with asthma rates, respiratory disease, and

¹¹⁷ *Taxpayers for Accountable School Bond Spending v. San Diego Unified School District* (2013) 215 Cal.App.4th 1013, 1051 [*hereinafter Taxypayers*].

¹¹⁸ *Id.* at 1052.

¹¹⁹ *Id.* at 1053.

¹²⁰ Association of Environmental Professionals, *CEQA Statute and Guidelines*, p. liv (2014).

¹²¹ Union of Concerned Scientists, Clean Vehicles, (last visited July 2, 2014) http://www.ucsusa.org/clean_vehicles/why-clean-cars/global-warming/.

¹²² Emeryville General Plan, p. 6-2.
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heart disease.¹²³ Accordingly, there is more than a fair argument backed by substantial evidence that the traffic generated by the Project's inadequate parking may pose significant public health impacts as well as impacts associated with GHG emissions and climate change. The City is required to analyze and mitigate the significant impacts associated with reduced parking in an EIR.

ii. *The Project Fails to Provide Adequate Parkland, as Required By the General Plan*

The IS/MND incorrectly concludes that the Project's impacts on public services, such as parks, are less than significant. However, substantial evidence supports a fair argument that the Project will have significant unmitigated impacts on the amount of parkland available to residents, as demonstrated by the standards established by the Emeryville General Plan.

According to the Emeryville General Plan, the City's standard is to provide 3 acres of parkland per 1,000 residents.¹²⁴ Currently, Emeryville is below that rate, providing only 2.21 acres of park per 1,000 residents.¹²⁵ The construction of the Project will increase the City's population without providing any additional parkland or fees to mitigate the Project's impacts on park use. When the Project is completed, the ratio of parkland acreage to residents will decrease to 2.13 acres per 1,000 Emeryville residents.

Although the Project will reduce the ratio of parks to residents, the IS/MND concludes that the Project will not have a significant impact, and proposes no mitigation. By adding residents and not supplying additional parkland, the Project presents a potential for significant impact on park use and public services and would violate a General Plan policy that was adopted to mitigate impacts on the environment. This potential impact must be identified and addressed in a legally sufficient EIR.

¹²³ American Lung Association, *The Road to Clean Air: Public Health and Global Warming Benefits of Advanced Clean Car Standards*, p. 1 (last visited July 2, 2014) *available at* <http://www.calcleancars.org/docs/the-road-to-clean-air.pdf>.

¹²⁴ IS/MND, p. 112.

¹²⁵ *Id.*

iii. *The IS/MND Fails to Adequately Address and Mitigate Impacts on Future Residents Associated with Noise Pollution, as Required By the General Plan*

The Project seeks to construct the Project in an area with noise levels that are “clearly unacceptable”¹²⁶ for residential uses, according to the Emeryville General Plan. According to CEQA, a project that results in the exposure of individuals to “noise levels in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies,” may have a significant impact.¹²⁷ The Project fails to comply with the General Plan, and to incorporate all feasible mitigation. The Project’s non-compliance with applicable General Plan policies is substantial evidence of a significant impact.

The Emeryville General Plan includes a policy that seeks to prevent exposure of individuals to high levels of noise: “[o]ccupants of existing and new buildings should be protected from exposure to excessive noise, particularly adjacent to Interstate-80 and the railroad.”¹²⁸ The Project will expose future residents to “[v]ehicular traffic on the I-80 and the I-80 off ramps, and trains on the UPRR tracks, [which] currently generate noise levels ranging from 69 to 86 [decibels] throughout most of the project site (Table XII-3).”¹²⁹ Accordingly, the residents should be protected from noise pollution.

In another section, the General Plan requires:

If new residential buildings are proposed adjacent to freeways and railroad tracks impacts of these corridors, including noise, vibration, and air pollution, should be considered during site planning. Noise, vibration, and air pollution shall be mitigated to the extent possible.¹³⁰

The Project site lies between I-80 and the UPRR Tracks. Given the nearby freeway traffic, Amtrak passenger trains and freight trains the majority of the site is exposed to noise that exceeds 65 decibels (“dB”).¹³¹ Therefore, the Project clearly

¹²⁶ Emeryville General Plan, p. 6-26.

¹²⁷ CEQA Guidelines, Appendix G.

¹²⁸ Emeryville General Plan, Policy CSN-P-52.

¹²⁹ IS/MND, p. 98.

¹³⁰ Emeryville General Plan, Policy LU-P-25.

¹³¹ CSDA Design Group, 6701 Shellmound Street Mixed-use Environmental Noise and Vibration Study, Figures 3 and 4 (June 2013).

comes within the scope of projects to which this policy applies. However, the IS/MND fails to include all feasible mitigation, as required by CEQA, and the General Plan.

The IS/MND confines its mitigation measures for Project operation to Mitigation Measure NS-2, which requires, “noise buffering, dampening, and/or active cancellation shall be used to reduce noise generated by HVAC systems.”¹³² This mitigation measure fails to address the noise pollution from nearby sources. Because the Project will expose individuals to noise levels in excess of standards established in the local general plan, substantial evidence supports a fair argument that the Project will result in significant impacts on future residents. An EIR that identifies and mitigates this potentially significant impact is required.

D. The IS/MND Fails to Disclose Pertinent Information About Existing Air Quality and the Project’s Impacts on Air Quality and Sensitive Receptors

The IS/MND analyzes the impacts that nearby air pollution sources would have on Project residents, and the cumulative impact that Project construction activities would have on nearby non-Project residents. However, the IS/MND and attached Air Quality Appendices, fail to disclose relevant information about existing air quality risks faced by City residents, fail to provide data regarding daily construction emission calculations and fail to adequately assess cancer risk rates associated with TACs that will be emitted during construction. Because the IS/MND’s conclusions are not supported by substantial evidence, additional mitigation is required to ensure that project impacts are reduced below a level of significance.

i. Emeryville is an “Impacted Community” with Existing Air Quality Conditions that Threaten Public Health

The IS/MND must account for the environmental setting at the Project site in determining whether the Project impacts on air quality are cumulatively considerable. The Bay Area Air Quality Management District (“BAAQMD”) initiated the Community Air Risk Evaluation (“CARE”) program in 2004 to evaluate and reduce health risks associated with exposures to outdoor toxic air contaminants (“TACs”) in the Bay Area. The program examines TAC emissions from large and

¹³² IS/MND, p. 97.
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small point sources such as refineries and auto shops, and from mobile sources such as cars, trucks, ships and locomotives. The CARE program focuses on these types of emissions near sensitive populations to help prioritize air quality mitigation strategies.

BAAQMD used the information gathered during the CARE process to designate six “Impacted Communities” in the nine-county San Francisco air basin that have higher relative TAC exposure levels. The City of Emeryville is one of these six Impacted Communities due to its higher relative TAC exposure.¹³³ In March 2014, BAAQMD released a report estimating that residents living in the portion of the City that includes the Project site have a 200 in 1 million to 300 in 1 million risk of developing cancer from existing TAC exposure levels.¹³⁴ This baseline information is critical to analyzing and understanding the potential cumulative effects of the Project.

ii. *IS/MND Omits the Required Health Risk Assessment to Determine the Extent of Construction Emission Impacts on Sensitive Receptors*

The IS/MND omits a health risk assessment (“HRA”), as required by the BAAQMD. BAAQMD requires the submission of an HRA that demonstrates a Project’s potentially significant impacts on sensitive receptors when a change in land uses host non-permitted sources of Toxic Air Contaminants (“TACs”), such as construction equipment.¹³⁵ However, the IS/MND entirely fails to “examine concentrations of hazardous air pollutants or [TACs] that will be generated by construction of the proposed Project.”¹³⁶ Air quality expert, Jessie Jaeger, reviewed the Project’s emissions data and determined that “significant air quality impacts may be generated through the use of diesel-fueled construction equipment on-

¹³³ *Improving Air Quality & Health in Bay Area Communities*, Figure 2.4 (April 2014) available at http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CARE%20Program/Documents/CARE_Retrospective_April2014.ashx?la=en.

¹³⁴ BAAQMD, *Identifying Areas with Cumulative Impacts from Air Pollution in the San Francisco Bay Area*, p. 17 (Figure 3.a) (March 2014), available at: http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CARE%20Program/Documents/ImpactCommunities_2_Methodology.ashx?la=en.

¹³⁵ BAAQMD CEQA Guidelines, p. 5-7 (last visited Feb. 13, 2014) available at http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines_Final_May%202012.ashx?la=en.

¹³⁶ SWAPE, p. 5.
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site.”¹³⁷

The IS/MND incorrectly concludes that, “construction-phase TACs would have a less-than-significant impact on nearby sensitive receptors because construction activities ‘would be temporary.’”¹³⁸ The IS/MND’s conclusion relies upon the statement, “cancer risk modeling methodologies are associated with longer-term exposure periods of 9, 30 and 70 years, which do not correlate well with the temporary and highly variable nature of construction activities.”¹³⁹

The IS/MND’s rationale for not considering short term impacts is incorrect. As Ms. Jaeger explains, the, “[Office of Environmental Health Hazard Assessment] OEHHA document[s] recommend[] that all short-term projects lasting at least two months be evaluated for cancer risks to nearby sensitive receptors.”¹⁴⁰ The OEHHA guidance should be followed because OEHHA is the “organization responsible for providing recommendations for health risk assessments in California.”¹⁴¹ Project construction will persist for well over one year, triggering the requirement for an HRA. An HRA is required so the public and decisionmakers are fully informed of the Project’s potentially significant impacts on air quality and public health.

iii. *Project Construction Will Lead to Unidentified and Unmitigated Significant Impacts on Air Quality and Public Health*

Substantial evidence shows that the Project’s construction emissions will have potentially significant impacts on sensitive receptors. Ms. Jaeger simulated an HRA based on the data provided in the CalEEMod output files contained in the IS/MND’s appendices. Her modeling was performed using AERSCREEN, which the EPA recommends as the “leading air dispersion model.”¹⁴² Based on this model, Ms. Jaeger calculated the excess cancer risks for adult, childhood and infant receptors. The results indicate that “[t]he infantile and child exposure for the sensitive receptors exceed the BAAQMD threshold of 10 in one million.”¹⁴³ The Project’s construction emissions exceed the threshold-of-significance for impacts on sensitive receptors, triggering the need for mitigation.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ IS/MND, p. 35.

¹⁴⁰ SWAPE, p. 6.

¹⁴¹ SWAPE, p. 5.

¹⁴² SWAPE, p. 6.

¹⁴³ SWAPE, p. 9.

The IS/MND relies on Mitigation Measure AQ-1 to reduce cancer risks to below a level of significance, but provides no calculations or other information to demonstrate that this mitigation measure would actually have this effect. Indeed, the IS/MND fails to provide data or substantial evidence supporting its conclusion that “temporary construction activities would have a less-than-significant impact on nearby receptors.”¹⁴⁴ The IS/MND’s conclusion is a bare statement not backed by facts or analysis.

CEQA requires that the IS/MND demonstrate through empirical evidence and analysis that mitigation measures have been required that will result in reducing emissions below the threshold-of-significance for excess cancer risk.¹⁴⁵ Once the mitigation measures have been incorporated into emissions calculations, the environmental review document can determine whether the risk to sensitive receptors has been mitigated, or whether the impact on air quality would be significant and unavoidable.¹⁴⁶ The IS/MND’s conclusory statement is of little worth in determining the scope and severity of Project impacts.

iv. The IS/MND’s Conclusions Regarding Project Impacts on Air Quality are based on Inaccurate Data

The IS/MND concludes that construction emissions are below the BAAQMD’s thresholds of significance.¹⁴⁷ The IS/MND’s information and determination are flawed for at least two reasons. First, there is no explanation or information as to how the emissions data was derived. Ms. Jaeger explains that, “[t]he values calculated...for average daily construction emissions are not explained or demonstrated.”¹⁴⁸ To determine the accuracy of the IS/MND’s conclusions, Ms. Jaeger analyzed the calculations, and determined “that the average daily emissions summarized in the IS were incorrectly calculated, resulting in an underestimation of the true daily values.”¹⁴⁹

¹⁴⁴ IS/MND, p. 35.

¹⁴⁵ BAAQMD CEQA Guidelines, p. 4- 3 (last visited Feb. 13, 2014) *available at* http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines_Final_May%202012.ashx?la=en.

¹⁴⁶ *Id.*

¹⁴⁷ IS/MND, p. 31.

¹⁴⁸ SWAPE, p. 9

¹⁴⁹ *Id.*

Second, the IS/MND incorrectly averaged construction emissions over 365 days, which resulted in an underestimation of emissions, and, in turn, the significance of Project impacts. Ms. Jaeger used the true number of work days, rather than a yearly average, to calculate construction impacts.¹⁵⁰ When the emissions were properly calculated, it became clear that Reactive Organic Gas (“ROG”) emissions would exceed the threshold-of-significance established by the BAAQMD.¹⁵¹ According to the BAAQMD, “if daily average emissions of construction-related criteria air pollutants or precursors exceed any applicable threshold...the project would result in a significant cumulative impact.”¹⁵² Because this significant impact is not identified, analyzed or mitigated in the IS/MND, the City must produce an updated CEQA document that sets forth the actual emissions associated with construction and proposes mitigation measures that reduce emissions below a level of significance.

v. *The IS/MND Fails to Implement Adequate Mitigation Measures to Reduce the Project’s Impacts on Air Quality*

The Project will result in public health impacts on sensitive receptors, and will have a significant impact on air quality, as evidenced by its exceedance of BAAQMD CEQA thresholds. Accordingly, Ms. Jaeger concludes that an EIR, which includes additional mitigation measures, be issued to reduce Project construction impacts to a level of insignificance.¹⁵³ Ms. Jaeger explains that “even with the implementation of the [] [mitigation] measures, the Project still has a significant impact.”¹⁵⁴ Indeed, “[w]hen Project emissions are found to exceed thresholds, after basic construction mitigation measures are applied, BAAQMD recommends the implementation of the following *Additional Construction Mitigation Measures*.”¹⁵⁵ Ms. Jaeger recommends that the following mitigation measures be included in an EIR to reduce construction impacts on air quality and public health:

- All exposed surfaces shall be watered at a frequency adequate to maintain minimum soil moisture of 12 percent. Moisture content can be verified by lab samples or moisture probe;

¹⁵⁰ SWAPE, p. 10.

¹⁵¹ *Id.*

¹⁵² BAAQMD CEQA Guidelines, p. 2-6.

¹⁵³ SWAPE, p.10.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

- All excavation, grading, and/or demolition activities shall be suspended when average wind speeds exceed 20 mph;
- Wind breaks (e.g., trees, fences) shall be installed on the windward side(s) of actively disturbed areas of construction. Wind breaks should have at maximum 50 percent air porosity;
- Vegetative ground cover (e.g., fast-germinating native grass seed) shall be planted in disturbed areas as soon as possible and watered appropriately until vegetation is established;
- The simultaneous occurrence of excavation, grading, and ground-disturbing construction activities on the same area at any one time shall be limited. Activities shall be phased to reduce the amount of disturbed surfaces at any one time;
- All trucks and equipment, including their tires, shall be washed off prior to leaving the site;
- Site accesses to a distance of 100 feet from the paved road shall be treated with a 6 to 12 inch compacted layer of wood chips, mulch, or gravel.
- Sandbags or other erosion control measures shall be installed to prevent silt runoff to public roadways from sites with a slope greater than one percent;
- Minimizing the idling time of diesel powered construction equipment to two minutes;
- The project shall develop a plan demonstrating that the off-road equipment (more than 50 horsepower) to be used in the construction project (i.e., owned, leased, and subcontractor vehicles) would achieve a project wide fleet-average 20 percent NOX reduction and 45 percent PM reduction compared to the most recent ARB fleet average. Acceptable options for reducing emissions include the use of late model engines, low-emission diesel products, alternative fuels, engine retrofit technology, after-treatment products, add-on devices such as particulate filters, and/or other options as such become available;
- Use low VOC (i.e., ROG) coatings beyond the local requirements (i.e., Regulation 8, Rule 3: Architectural Coatings);
- Requiring that all construction equipment, diesel trucks, and generators be equipped with Best Available Control Technology for emission reductions of NOx and PM; and
- Requiring all contractors use equipment that meets CARB's most recent certification standard for off-road heavy duty diesel engines.

Ms. Jaeger concludes that, "[t]hese measures are more stringent and prescriptive than those measures identified in the IS, and provide many simple

design features, that when combined together, optimize pollutant emissions reductions and thus reduce ROG and PM10 emissions.”¹⁵⁶ Accordingly, the enhanced mitigation measures “will reduce the total criteria pollutant emissions, potentially to a level that does not exceed the BAAQMD thresholds.”¹⁵⁷ These recommended measures are feasible to implement. Accordingly the City must circulate an EIR that adequately assesses Project impacts and imposes adequate mitigation, such as that described by Ms. Jaeger to ensure that all Project impacts on air quality and public health are reduced below the BAAQMD CEQA thresholds.

E. The IS/MND Fails to Provide Enforceable Mitigation Measures Related to Stormwater Impacts

The IS/MND concludes that the Project will have a net beneficial impact on stormwater flows, given the incorporation of several components, such as pervious roadways and other drainage features.¹⁵⁸ The IS/MND violates CEQA by incorporating these measures into the analysis and project description, rather than requiring their implementation as part of an enforceable mitigation measure.

Courts interpreting CEQA have prohibited lead agencies from conflating the identification of significant impacts and development of mitigation measures into one step.¹⁵⁹ CEQA requires that an environmental review document identify an impact as significant, by analyzing the impact prior to the implementation of a mitigation measure.¹⁶⁰ Once a project’s impacts are identified as significant, only then is it appropriate for the lead agency to propose various mitigation measures, the effectiveness of which are analyzed and discussed.¹⁶¹ Indeed, reviewing courts “will not provide [a lead agency] a shortcut to CEQA compliance by allowing [it] to rely on mitigation measures that have not been adequately adopted.”¹⁶² However, the IS/MND does exactly this, by proposing vague and unenforceable Project design features, as a means to comply with the Nation Pollutant Discharge Elimination System (“NPDES”) stormwater permit applicable to the site, and to reduce impacts to a level of insignificance.¹⁶³

¹⁵⁶ SWAPE, p. 12.

¹⁵⁷ *Id.*

¹⁵⁸ IS/MND, p. 138.

¹⁵⁹ *See Lotus v. Dep’t of Transp.* (2014) 223 Cal.App.4th 645, 655-56.

¹⁶⁰ *Id.* at 656.

¹⁶¹ *Id.*

¹⁶² *Id.* at 653.

¹⁶³ IS/MND, p. 138.

The IS/MND makes its determination regarding the significance of Project impacts based upon vague and unenforceable measures. According to the IS/MND:

“The proposed project design incorporates stormwater infiltration and drainage features, including a permeable driveway entry to the garage, decomposed granite along the walking path, lined stormwater infiltration planting areas, vegetation on the third and seventh floor courtyards, and other landscaping.”¹⁶⁴

These measures are relied upon to support the conclusion that the Project’s impacts are not significant, even though they are not made enforceable through a properly adopted mitigation monitoring and reporting program. The courts have clearly held that mitigation measures are not to be incorporated into an agency’s significance determination, and cannot be relied upon for a determination that no significant effects will occur.¹⁶⁵ CEQA requires that the City produce a legally adequate EIR that identifies potential impacts on stormwater associated with the Project’s impervious surface area, and implements all feasible mitigation measures, with detailed performance objectives that are enforceable.¹⁶⁶

V. CONCLUSION

The CEQA Guidelines require that an EIR be prepared if there is substantial evidence that any aspect of a project, either individually or cumulatively, may cause a significant effect on the environment.¹⁶⁷ As discussed in detail above, there is substantial evidence that the Project would result in significant adverse impacts that were not identified in the IS/MND and that are not adequately mitigated.

We urge the City to fulfill its responsibilities under CEQA by withdrawing the IS/MND and preparing an EIR for the Project. In this way, the City and the public can ensure that all adverse impacts of the Project are mitigated to the full extent feasible and required by law.

¹⁶⁴ IS/MND, p. 84.

¹⁶⁵ See *Lotus v. Dep’t of Transp.* (2014) 223 Cal.App.4th 645, 655-56.

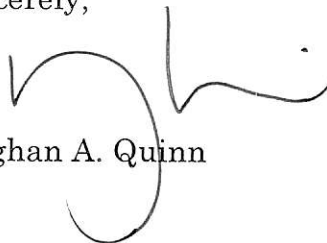
¹⁶⁶ See CEQA Guidelines, § 15204.

¹⁶⁷ CEQA Guidelines § 15063(b)(1).

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Thank you for your consideration of these comments. If you require further information or have any questions, please call us.

Sincerely,

A handwritten signature in black ink, appearing to be 'M.A. Quinn', written in a cursive style.

Meghan A. Quinn

MAQ:clv

Attachments