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June 29, 2012

VIA E-MAIL AND OVERNIGHT MAIL

San Diego Unified Port District
Attn: Anna Buzaitis
Environmental and Land Use Mgmt. Dept.
3165 Pacific Highway
San Diego, CA 92101-1128
abuzaiti@portofsandiego.org



Re: **Comments on Draft Environmental Impact Report for the San Diego Convention Center Phase III Expansion & Expansion Hotel Project & Port Master Plan Amendment**

Dear Ms. Buzaitis:

We write on behalf of the **San Diego Coalition for A Better Convention Center** to comment on the San Diego Unified Port District's Draft Environmental Impact Report ("DEIR") for the San Diego Convention Center Phase III Expansion & Expansion Hotel Project & Port Master Plan Amendment ("Project"). The Project covers 21 waterfront acres and includes: (1) construction of an expansion to the San Diego Convention Center ("SDCC" or "Convention Center") of at least 442,620 square feet of exhibit hall, meeting, ballroom, and retail space; (2) construction of a new tower at the Hilton San Diego Bayfront hotel with approximately 500 new rooms and at least 67,500 square feet of fitness, spa, retail, and meeting space; (3) a 5-acre rooftop space atop the SDCC expansion; (4) relocation of the Water Transportation Center; (5) utility and infrastructure upgrades; and (6) a Port Master Plan amendment.

The Project presents significant land use and environmental issues that must be addressed prior to Project approval. The DEIR does not comply with the requirements of the California Environmental Quality Act ("CEQA"). The DEIR also fails to include adequate a mitigation measures for the Project's potentially significant impacts. The Port may not approve the Project or grant any permits for

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the Project until the DEIR is revised and recirculated for public review and comment.

I. STATEMENT OF INTEREST

The San Diego Coalition for A Better Convention Center is an unincorporated association of individuals and labor unions that may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of the Project. The coalition includes San Diego County resident Billie Johnson, the San Diego County Building and Construction Trades Council, and UNITE HERE Local 30, and their local union affiliates and union members and their families who live, recreate and/or work in the City of San Diego and San Diego County.

The San Diego County Building and Construction Trades Council (“Council”) has a strong interest in enforcing environmental laws such as CEQA. The members of the unions affiliated with the Council reside, recreate and work in the City and County of San Diego. In fact, these members may work on the Project itself. Individual members who work on the Project would be first in line to be exposed to toxic air, soil, and groundwater contaminants, and inadequate parking and traffic congestion. Individual members who live, work and raise their families in the City of San Diego would be exposed to public health and safety hazards identified in these comments, would be directly affected by increased traffic impacts in an area already congested, and their public access and enjoyment of coastal resources would be adversely affected by the proposed Project. Members also live in and use areas that would suffer from the cumulative impacts of the proposed Project and other projects in the City of San Diego. For these reasons, Council members would be directly and disproportionately affected by the environmental impacts of the Project.

The Council supports environmentally sound land use and development in the City of San Diego. Environmentally detrimental projects, on the other hand, 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 here. Indeed, continued degradation can, and has, caused construction moratoria and other restrictions on growth that, in turn, reduce future employment opportunities. Finally, members are concerned about projects that carry serious environmental risks and public service infrastructure

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demands without providing countervailing employment and economic benefits to local workers and communities. The Council, therefore, has a strong interest in enforcing environmental laws to protect their affiliates' members.

UNITE HERE was formed when the Union of Needletrades, Textiles and Industrial Employees joined one of the nation's oldest unions, the Hotel Employees & Restaurant Employees International. Today, UNITE HERE represents over 440,000 active members and 400,000 retirees throughout North America. UNITE HERE Local 30 ("Local 30") represents more than 4,000 workers in the San Diego region. Local 30 has represented its members on employment, civil rights, and public health issues before municipal, county, and state bodies for over 50 years. Local 30 members provide professional service in hotels, casinos, foodservice, airport concessions, and restaurants in the vicinity of the City and County of San Diego. As a result, it will likely be Local 30 members who will suffer from Project-related traffic and parking congestion, the release of soil and air contaminants, and whose public access and enjoyment of coastal resources would be adversely affected by the proposed Project. Local 30's comments are made in its representative capacity on behalf of Local 30 members and their families who currently reside in and are directly affected by coastal development in the City and County of San Diego.

Furthermore, Local 30 members are concerned about sustainable land use and development throughout San Diego County. Like the public at large, Local 30 members and their families have a direct and substantial interest in assuring that new coastal development is designed, constructed and operated in a manner that will not result in significant impacts and that will be consistent with all applicable local, state and federal laws and policies. Local 30 members live, work, and recreate in the communities that suffer the impacts of environmentally detrimental and poorly planned projects.

Billie Johnson lives and works in the City of San Diego and will be directly affected by the potential impacts of the Project.

These comments were prepared with the assistance of technical experts Matt Hagemann, P.G. and Daniel Smith, P.E. Their comments and curriculum vitae are attached hereto as Exhibits 1 and 2. Please note that these experts' comments supplement the issues addressed below.

II. THE CITY OF SAN DIEGO IMPROPERLY DELEGATED ITS ROLE AS LEAD AGENCY FOR THE CONVENTION CENTER EXPANSION PROJECT TO THE PORT

The City of San Diego (“City”) is the proper “lead agency” under CEQA for the SDCC expansion (“Expansion Project”), not the Port. The Port has assumed the role of lead agency responsible for preparing an EIR for the Expansion Project, but the appropriate lead agency is the agency with “principle responsibility” for implementing the Expansion Project, which is the City.¹ “If a Project will be carried out by a public agency, that agency shall be the lead agency *even if* the Project would be located within the jurisdiction of another public agency.”² The City is solely responsible for planning, funding, and constructing the Expansion Project, and also has financial and legal responsibility for the EIR process.³ The DEIR, however, only notes that the City will be a “responsible agency” because it has approved the Project financing.⁴ This is misleading and incorrect. CEQA requires the City to be the lead agency in charge of preparing the DEIR for the Expansion Project.

The fact that the City took over responsibility for the Expansion Project from the San Diego Convention Center Corporation (“Corporation”) does not change the outcome. The Corporation fully assigned its interest as the Expansion Project applicant to the City on August 2, 2011, more than nine months before the DEIR was published.⁵ The City immediately took steps to obtain funding for the Expansion Project⁶ and assumed the obligation to pay for preparing the DEIR.⁷ The City’s control over the EIR process was memorialized in the February 2012 Joint Community Facilities Agreement between the City and the Port, which reiterates that the City has full and sole responsibility for planning and constructing the Expansion Project:

The City agrees to fully administer, and to take full and sole governmental responsibility for, the construction or acquisition of the

¹ CEQA, Pub. Resources Code § 21067.

² 14 Cal. Code Regs. (“CEQA Guidelines”) § 15051(a) (emphasis added).

³ See footnotes 5 and 8, *infra*.

⁴ DEIR p. 1-3.

⁵ Exhibit 3, Agenda documents for August 2, 2011 City Council meeting, Agenda Item 334.

⁶ *Ibid.*, Excerpted Minutes from August 2, 2011 City Council meeting, Agenda Item 109.

⁷ *Ibid.*, Agenda documents for August 2, 2011 City Council meeting, Agenda Item 334.

Facilities including but not limited to funding the preparation of documents for environmental review, preparing plans and specifications for approval, bid requirements, performance and payment bond requirements, insurance requirements, contract and construction administration, staking, inspection, acquisition of necessary property interests in real or personal property, the holding back and administration of retention payments, punch list administration, and the Port District shall have no responsibility whatsoever in that regard.⁸

The City also agreed to defend, indemnify and hold the Port harmless from any claims or lawsuits arising from the “environmental review, design engineering, construction and installation of the Facilities.”⁹ Because the City has controlled the planning of the Expansion Project for over nine months, and is paying for the EIR, it must assume responsibility as lead agency.

The fact that the Port must approve a PMP amendment in order for the Expansion Project to go forward simply makes the Port a “responsible agency” under CEQA.¹⁰ The City has impermissibly delegated its responsibility as lead agency to the Port.

III. THE DEIR USES OVERLY NARROW PROJECT OBJECTIVES

The project objectives in an EIR should describe “the underlying purpose of the project.”¹¹ The project objectives drive the lead agency’s selection of alternatives for analysis and approval, and give the lead agency potential grounds for rejecting project alternatives.¹² “The process of selecting the alternatives to be included in the EIR begins with the establishment of project objectives by the lead agency.”¹³ An EIR need not “identify and analyze alternatives that would not meet a project’s

⁸ Exhibit 4, Joint Community Facilities Agreement, pp. 4-5.

⁹ *Ibid.* p. 5.

¹⁰ CEQA, Pub. Resources Code § 21069.

¹¹ CEQA Guidelines § 15124(b).

¹² *Id.* §§ 15124(b), 15126.6(c).

¹³ *Jones v. Regents of Univ. of California* (2010) 183 Cal.App.4th 818, 825.

objectives.”¹⁴ Accordingly, when a project and its objectives are defined too narrowly, the EIR’s treatment of alternatives may also be inadequate.¹⁵

Chapter 3 of the DEIR describes the Project as a “Phase III expansion of the existing SDCC as well as an associated expansion of the existing Hilton Hotel to serve the anticipated increase in demand for hotel room nights related to the new Phase III expansion.” Chapter 3 describes the Mayor’s Citizens Task Force 2009 Final Report and the AECOM 2010 Final Report as “feasibility studies.” The DEIR relies on these studies to formulate the Project objectives. Specifically, it relies on the 2009 Task Force report to conclude that:

A non-contiguous [SDCC] building, if further than directly across the street, is not an expansion by definition to the customers interviewed because it would result in two completely different venues. Based on these interviews, no major conventions and tradeshow (or consumer shows) would book both venues at the same time.¹⁶

The DEIR then sets forth Project objectives that specifically require a “contiguous” SDCC Expansion Project, of a particular size, located on Port tidelands:

1. Expand the size of the existing SDCC to accommodate larger, full-facility users and two large simultaneous events by adding 225,000 square feet of **contiguous** exhibition space, 100,000 square feet of meeting rooms, and an 80,000-square-foot ballroom, to meet market demand; preserve the SDCC’s competitiveness in the meeting and convention industry; expand employment opportunities; and enhance the SDCC’s role as an economic engine for the City of San Diego and surrounding region.
2. Provide for the development and operation of a full-service hotel of a size, quality, and location appropriate for first-class convention

¹⁴ *Id.* at 828.

¹⁵ *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1455; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.2d 692, 735-737; *Rural Land Owners Assoc. v. Lodi City Council* (1983) 143 Cal.App.3d 1013, 1024-25; *County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1, 9.

¹⁶ DEIR p. 3-4.
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- center operations so as to enhance the SDCC's competitiveness in the meeting and convention center industry and better serve the anticipated increase in demand for hotel rooms associated with the proposed expansion of the SDCC.
3. Enhance public access and views to San Diego Bay by creating public walkways and enhancing promenades along Park Boulevard and the waterfront in the immediate vicinity of the Project site, improving the function and utility of public spaces within the Project site, and relocating the proposed Expansion Hotel from the former Spinnaker site to a non-waterfront location.
 4. Conserve energy and reduce greenhouse gas emissions by expanding the existing SDCC (**in a contiguous manner**) and hotel facilities to avoid duplication of support, parking, and logistic infrastructure and services; maximizing the use of existing public transit and transportation services; and promoting energy efficiency and water conservation with a design for LEED certification by the U.S. Green Building Council.
 5. Provide infill development on Port District tidelands that is compatible with surrounding uses; maximizes the economic benefit to the City of San Diego and surrounding region by maximizing hotel room revenue, restaurant and retail sales, and hotel and retail sales taxes; promotes the economic viability of nearby SDCC and visitor-serving businesses; and generates sufficient leasehold revenue to support the Port District's participation in financing the proposed expansion of the SDCC.¹⁷

These Project objectives are drafted so narrowly that the *only* project that can meet them is the specifically proposed contiguous Expansion Project on the proposed Expansion Project site. The objectives are worded so that other potential project sites are disadvantaged, if not entirely precluded. But the CEQA process "is not designed to freeze the ultimate proposal in the precise mold of the initial project."¹⁸

¹⁷ DEIR pp. 3-6 to 3-7.

¹⁸ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736-37. 2572-010j

The Port accepted the City's reasons for choosing the contiguous Project site because, as the EIR explains, only that project "would allow larger events" at the Convention Center. This conclusion is unsupported. Although the 2009 Task Force report and AECOM's 2010 report do indicate that large tradeshows prefer contiguous convention facilities, they do not support the conclusion that large groups would choose not to book a non-contiguous Expansion Project. To the contrary, there is evidence that contiguity is not a big concern.

A. The City Purposefully Chose Overly Narrow Project Objectives

In 2007, the City hired PricewaterhouseCoopers LLP to analyze the potential for a Phase III expansion of the Convention Center. The resulting report showed that nearly 40% of "lost business" was due to the Convention Center being booked up on desired dates.¹⁹ It concluded that because of the Convention Center's location "it may be difficult for the center to expand contiguously."²⁰

In 2009, City Mayor Jerry Sanders formed the Mayor's Citizen Task Force on the Convention Center Project to evaluate the feasibility of expanding the Convention Center.²¹ The Mayor's Task Force met approximately a dozen times, and its first meeting was in February 2009.²² The Mayor's Task Force asked for a description of "what the ideal convention space is" and also asked for "a breakdown on how much business would be lost if the new building was not contiguous."²³

The next Mayor's Task Force meeting on March 12, 2009 involved a presentation by a consultant hired by the City, Michael Hughes from Tradeshaw Week Research.²⁴ Mr. Hughes opined that the "ideal convention center . . . has the primary exhibition hall in one building, on one level."²⁵ Although Mr. Hughes confirmed that "it's not just space, it's dates," he offered his opinion that a "non-

¹⁹ Exhibit 5, PricewaterhouseCoopers' Report, p. 7 (Dec. 21, 2007) (the remaining lost business was not due to space or date constraints).

²⁰ *Ibid.* p. 13.

²¹ Exhibit 6, *Mayor Sanders' Fact Sheet*, p. 2 (May 12, 2011).

²² *Ibid.*; Exhibit 7, *Final Report of the Mayors Citizens Task Force on the San Diego Convention Center Project*, pp. 3, 7, 15, 57 (Sept. 2009).

²³ Exhibit 8.

²⁴ Hughes presentation to Task Force at March 12, 2009 meeting, *available at*:

<http://www.conventioncentertaskforce.org/resources/presentations/TF%20Present%20March%202009-TSW%20Research%20Hughes.pdf>

²⁵ *Ibid.* p. 13.

contiguous building if it is further than across the street, is not an expansion – it would result in two completely different venues; basically no major conventions and tradeshows would book both venues at the same time.”²⁶ Mr. Hughes could not predict how much business would be lost if the new building was not contiguous. Instead, he estimated the revenues that could be gained from booking very large conventions and trade shows, which in his opinion would prefer a contiguous Expansion Project.²⁷

Later in May 2009, the Mayor’s Task Force heard a presentation from Steven Spickard of Economics Research Associates (“ERA”)/AECOM, a consultant hired by the City to review the PricewaterhouseCoopers report.²⁸ The ERA/AECOM study verified that the top reason for lost business at the Convention Center is the “lack of available dates.”²⁹ It concluded that 89% of this lost business “would be able to fit within a 225,000 sq. ft. expansion space as a *self-contained event*.”³⁰ This represents 339 events per year that could “be accommodated on a self contained basis in an expansion building with a range of sizes.”³¹ The report also concluded, based on interviews with dozens of convention planners, that a contiguous Expansion Project was not essential, even for large groups that require more than 225,000 square feet:

In an era of competitive oversupply, as is presently the case, facilities with contiguous exhibit halls on a single level enjoy a competitive advantage, assuming other key factors are essentially equal. However, consensus among interviewees is that San Diego holds such strong market appeal, that many large groups would be willing to work with non-contiguous exhibit space.³²

²⁶ *Ibid.* pp. 10, 13.

²⁷ *Ibid.* pp. 14-15.

²⁸ Spickard presentation to Task Force at May 26, 2009 meeting, *available at*:

<http://www.conventioncentertaskforce.org/resources/presentations/TF%20Present%20May%2026%202009-ERA%20Presentation.pdf>

²⁹ *Ibid.* p. 5.

³⁰ *Ibid.* (emphasis added).

³¹ ERA/EACOM, *Market, Feasibility & Impact Analysis for the Proposed San Diego Convention Center Expansion*, pp. 64-65 (May 26, 2009), *available at*:

<http://www.conventioncentertaskforce.org/resources/meetingdocs/5-26-09%20ERA%20Report.pdf>

³² *Ibid.* p. 63.

It was clear from ERA/AECOM's May 2009 report, however, that the City had already ruled out non-contiguous sites:

[T]he specifics regarding the physical plan for a proposed expansion have evolved. The proposed expansion would be adjacent to the existing site, between the current center and the San Diego Bay. The expansion would contain approximately 225,000 square feet of prime exhibit space . . . A different non-adjacent site with greater size potential *has been taken off the table*, so the expansion [w]ould be capped at 225,000 square feet.³³

In fact, the City's commitment to a contiguous site was confirmed as early as 2008, when the Corporation executed a Memorandum of Understanding and a Purchase and Sale Agreement that reserved its right to purchase a long-term lease on the currently proposed contiguous Project site.³⁴

In June 2009, the Mayor's Task Force heard a presentation from Tucker Saddler Architects ("TSA")/HNTB, who was hired by the City to conduct a detailed site selection process, and had already eliminated nine potential Expansion Project sites, some of which were contiguous and others non-contiguous to the Convention Center.³⁵ The architects used "a range of criteria" to evaluate the feasibility of each location, including environmental criteria ("water, air, habitat, acoustic, remediation"), urban design ("views to and from site, view corridors, visual connection"), constructability, cost, and existing land uses.³⁶

The City's architects also eliminated a tenth potential site, the "Tailgate Park" site, which is not located on public tidelands but is inland, across the street near Petco Stadium.³⁷ The reason for eliminating this site was that "feedback from convention center clients indicated the facility would not meet their primary needs

³³ *Ibid.* pp. 5, 23 (emphasis added); the 2010 AECOM report states that AECOM presented the exact same project description in its later interviews.

³⁴ Exhibit 9, Port description of Expansion Project background, excerpts from Port minutes authorizing 2008 memorandum of understanding and 2010 lease agreement, and other related materials.

³⁵ Mueller presentation to the Task Force at June 2, 2009 meeting, *available at*: <http://www.conventioncentertaskforce.org/resources/presentations/TF%20Present%20June%202%202009-TSA%20Presentation.pdf>

³⁶ Exhibit 7, pp. 38-39.

³⁷ *Ibid.* pp. 39-40.
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of a contiguous space and was located too far from the current facility to be considered for use by large clients needing more space than currently exists in the current convention center.”³⁸ The architects determined that this site would need 400,000 square feet of exhibit space to be “marketable,” and therefore the resulting facility would be too bulky.³⁹ The architects did not indicate what market research data they relied upon to reach their conclusions, nor did they address the recent ERA/AECOM study, which showed that 89% of lost business opportunities only require 250,000 square feet of exhibition space, and that interviews revealed that “many large groups would be willing to work with non-contiguous exhibit space.”

Based on this site selection process the architects concluded that the proposed Project site was the preferred site for the Expansion Project.⁴⁰ The architects then chose a conceptual design for the Expansion Project on that site, rejecting another design that would encompass a larger area, “[a]fter reviewing the required mitigations necessary to build on the larger site.”⁴¹ In July 2009, the architects presented to the Mayor’s Task Force detailed floor plans, design drawings, and construction cost estimates for an Expansion Project on the proposed Project site.⁴²

The Mayor’s Task Force concluded that a contiguous Expansion Project would be preferred by convention center clients, directly quoting Mr. Hughes’ opinion that “basically” no major conventions would be interested in a non-contiguous Expansion Project.⁴³ The Mayor’s Task Force also agreed with the architects’ recommended design concept for the proposed Project site.⁴⁴ In April 2010, the Corporation purchased a long-term lease on the proposed Project site, for \$13.5 million, and began the process of obtaining entitlements for the Expansion Project from the Port.⁴⁵

³⁸ *Ibid.*, p. 40.

³⁹ *Ibid.*

⁴⁰ *Ibid.* p. 41.

⁴¹ *Ibid.*

⁴² *Ibid.* p. 42-45; Castro presentation to the Task Force at July 6, 2012 meeting, *available at*: <http://www.conventioncentertaskforce.org/resources/presentations/TF%20Present%20July%206%202009-TSA.pdf>

⁴³ Exhibit 7, pp. 13, 38.

⁴⁴ *Ibid.*, pp. 39-41.

⁴⁵ Exhibit 9.

B. The DEIR Reflects the City's Purposeful Narrowing of Project Objectives

When the Port authorized the Corporation's purchase of the leasehold at the proposed Project site, it noted that the Expansion Project would still be subject to CEQA review and the Port "would retain complete discretion to consider all the issues surrounding environmental analysis . . . and staff would consider the full range of alternatives and mitigation measures mandated by law."⁴⁶ The DEIR, however, improperly accepted the City's overly narrow Project objectives.

First, the DEIR mischaracterizes the 2009 Task Force report. That report did not base its recommendation for a contiguous Expansion Project on data from customer interviews, but on one presentation from Michael Hughes of Tradeshow Week Research. (*See* discussion above.) Mr. Hughes gave his unverified opinion that "basically" no large tradeshow would book a non-contiguous facility, and without analyzing how much business would be lost if the new building was not contiguous, or comparing revenues for non-contiguous and contiguous space, he presented data claiming that the "ideal" venue for most large tradeshow is a contiguous exhibit space.

Second, the DEIR fails to note that the interviews AECOM conducted for its 2009 and 2010 reports were based on directives from the City that a non-contiguous Expansion Project had already been "taken off the table," and so the interviews focused exclusively on a contiguous Expansion Project proposal. (*See* discussion above.)

Third, the DEIR fails to acknowledge the conclusion in AECOM's 2009 report:

In an era of competitive oversupply, as is presently the case, facilities with contiguous exhibit halls on a single level enjoy a competitive advantage, assuming other key factors are essentially equal. However, **consensus among interviewees is that San Diego holds such**

⁴⁶ *Ibid.*
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strong market appeal, that many large groups would be willing to work with non-contiguous exhibit space.⁴⁷

The 2010 AECOM report does state that “[c]ontiguous space is generally an issue in the industry,” but it then concludes that the City’s proposal to build additional exhibit hall space on a different level than the existing exhibit hall space “does not appear to be a major issue.”⁴⁸ The report also reflects the preference of some customers to be “under one roof,”⁴⁹ but it does not change AECOM’s initial conclusion that most large groups will be willing to work with a non-contiguous space.

The Project objectives listed in the DEIR are unreasonably narrow, without a good explanation why. The objectives are based on the City’s pre-EIR elimination of alternatives that now precludes meaningful public review. As discussed further below, based on these overly narrow Project objectives, the Port improperly and artificially limited the range of alternatives considered in the DEIR.⁵⁰ (*See* comments regarding alternatives analysis, below.) The Project objectives must be revised so that they allow for consideration of more than just the specifically proposed Expansion Project at the specifically proposed Project site.

IV. THE PROJECT DESCRIPTION IS INCOMPLETE AND UNSTABLE

The DEIR does not meet CEQA’s requirements because it fails to include a complete Project description, rendering the entire analysis inadequate. CEQA places the burden of environmental investigation on the government rather than the public. Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate Project description.⁵¹ An accurate and complete project description is necessary to perform an adequate evaluation of the potential environmental effects of a proposed project. In contrast, an inaccurate or incomplete project description renders the analysis of environmental impacts inherently unreliable. Without a complete project description, the environmental

⁴⁷ *See* footnote 32, *supra*.

⁴⁸ 2010 AECOM report, p. 24.

⁴⁹ *Ibid.* p. 29.

⁵⁰ *See Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736.

⁵¹ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

analysis under CEQA will be impermissibly narrow, thus minimizing the project's impacts and undercutting public review.⁵²

California courts have also repeatedly held that “an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document].”⁵³ CEQA requires that a project be described with enough particularity that its impacts can be assessed.⁵⁴ It is impossible for the public to make informed comments on a project of unknown or ever-changing description. “A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental costs....”⁵⁵ As articulated by the court in *County of Inyo v. City of Los Angeles*, “a curtailed, enigmatic or unstable project description draws a red herring across the path of public input.”⁵⁶ Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project's impacts and undermining meaningful public review.⁵⁷

CEQA broadly defines a “project” as “the whole of an action” with the potential to result in a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment.⁵⁸ A lead agency must therefore review a project's impacts as a whole, including all phases of the project.⁵⁹

A. The Project Proposes to Include a New Wastewater Treatment Plant and a New Stormwater Outfall to San Diego Bay That Are Not in the DEIR Project Description

The Project apparently involves a proposed on-site wastewater treatment plant to remediate the 0.4 million gallons per day of seawater (“groundwater”)

⁵² See, e.g., *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.

⁵³ *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.

⁵⁴ *Id.* at 192.

⁵⁵ *Id.* at 192-193.

⁵⁶ *Id.* at 197-198.

⁵⁷ See, e.g., *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.

⁵⁸ CEQA Guidelines § 15378(a).

⁵⁹ *Burbank-Glendale-Pasadena Airport Auth. v. Hensler* (1991) 233 Cal.App.3d 577, 592; *Laurel Heights Improvement Assn. v. Regents of the Univ. of Calif.* (1988) 47 Cal.3d 376, 396-397.

currently pumped out of the Convention Center through a dewatering system. Buried in appendix I-1 is this description:

“The proposed development intends to biologically and mechanically treat the siphoned ground water in order to improve its water quality to a level where the convention center will be permitted to discharge it to the San Diego Bay instead of the sanitary sewer system. Since the convention center pays sewer fees on all of the ground water it discharges to the Harbor Drive trunk sewer, there is an obvious incentive for the proposed development to strive for this goal.”⁶⁰

The DEIR, however, only casually refers to the wastewater treatment plant, first mentioning that the San Diego Regional Water Quality Control Board (“SDRWQCB”) will act as a CEQA responsible agency in connection with approving the treatment plant, and later proposing an “on site water treatment system” as a potential mitigation measure to offset greenhouse gas emissions.⁶¹ The DEIR does not describe the treatment plant as a component of the proposed Project, or analyze the potential environmental effects of constructing a new treatment plant to discharge treated water into the bay.

The DEIR also incorrectly suggests that the Regional Water Quality Control Board will be able to rely on the Port’s DEIR, as a “responsible agency” under CEQA, and approve the water treatment plant.⁶² Since the Project description does not include the wastewater treatment plant, and does not analyze or mitigate for the environmental impacts that the plant will create, the SDRWQCB will not have the information it needs to consult with the Port and comment on the DEIR as a responsible agency, and will not be able to rely on the DEIR.⁶³

The DEIR also contemplates the construction of a new stormwater outfall into San Diego Bay,⁶⁴ but the Project description only states that new and relocated stormwater lines will “tie into an existing 30-inch stormwater drain that outlets to the Bay.”⁶⁵ Since the Project description does not include the new stormwater

⁶⁰ DEIR Appendix I-1, pp. 9-10; *see also ibid.* p. 5.

⁶¹ DEIR pp. 1-3; 4.6-43.

⁶² DEIR p. 1-3.

⁶³ CEQA Guidelines § 15096.

⁶⁴ DEIR p. 4.8-20, Figure 4.13-1.

⁶⁵ DEIR p. 3-16.

outfall, and the DEIR fails to list the approvals and permits that must be issued by the SDRWQCB,⁶⁶ the DEIR does not properly notice the SDRWQCB or the public that the DEIR is intended to cover the SDRWQCB's approvals. The SDRWQCB will not necessarily be aware of its need to consult with the Port and comment on the DEIR as a responsible agency, and will not be able to rely on the DEIR.⁶⁷

B. The DEIR's Proposal to Fund the Entire Cost of a New Fire Station as a "Mitigation Measure" Violates the Law; the Fire Station Should be Included in the DEIR Project Description

Also buried in the DEIR is mitigation measure MM-PSR-1, which requires the City to fund the entire cost of constructing a new "Bayside" fire station at Cedar Street and Pacific Highway.⁶⁸ The DEIR does not explain why the City would be required by CEQA to contribute all of the funds needed to construct the new fire station. There is no indication that the mitigation measure is proportionate to the environmental impacts caused by the Project (i.e. the Project's demand for public fire service). For example, the cumulative impacts section of the DEIR states that the new fire station is needed in order to "meet the increased demand that has resulted from past and present projects . . . and to provide adequate fire protection services for reasonably foreseeable future projects."⁶⁹ The DEIR states that these projects would be "required to pay their fair share mitigation in proportion to their impact contribution."⁷⁰ A public agency like the City is legally prohibited from paying more than its fair share to fund new infrastructure under a CEQA mitigation measure.⁷¹ Because the Project will not itself demand the services of an entire fire station, the fire station is more properly considered as part of the Project, not as a mitigation measure.

The City purchased the site for the Bayside fire-station redevelopment project in 2006. A Program DEIR covering several redevelopment projects was completed in 2006, and in 2010 the City approved the fire station design and

⁶⁶ See DEIR p. 1-3.

⁶⁷ CEQA Guidelines § 15096.

⁶⁸ DEIR p. 4.11-10.

⁶⁹ DEIR p. 5-32.

⁷⁰ *Ibid.*

⁷¹ See *City of Marina v. Board of Trustees of Cal. State Univ.* (2006) 39 Cal.4th 341, 372 (payment is not considered an unconstitutional gift of public funds so long as it is used to "mitigate or avoid the significant effects on the environment of projects that it carries out or approves").

concluded that the Program DEIR still adequately addresses the project's environmental impacts. In February 2011, the City redevelopment agency approved \$17.18 million dollars to construct the Project.⁷² A new state law enacted in June 2011, however, dissolved the City's redevelopment agency, and that legislation was upheld by the California Supreme Court.⁷³ The law requires that sites purchased with redevelopment funds, but not yet developed, must be sold off by the City to generate funds for schools, the City budget, and special districts.⁷⁴ Legislation that would help local agencies retain those undeveloped properties has not yet been enacted.⁷⁵ Recently, the City tried to discourage the private purchase of the fire-station site by placing restrictive zoning on the site.⁷⁶

The DEIR indicates that the "design and environmental review for the new fire station has been completed and approved by the City."⁷⁷ This is not sufficient. The City is the successor agency to the former redevelopment agency, and it appears that the City is not legally authorized to build the fire station solely based on its prior approvals. The City's proposal to fund and construct the fire station as part of this Project may serve as a way for the City to get around the redevelopment ban that took effect last year, but building the fire station as part of this Project is a new, discretionary decision that re-triggers CEQA. Conditioning Project approval on the construction of a new fire station also creates a link between the two projects, requiring that they be treated as one "project" under CEQA, and not two distinct projects.⁷⁸ The funding for the fire station project is now gone, and a new discretionary decision has been made—as part of this Project—to fund the entire cost of constructing the fire station. The DEIR cannot rely on the City's prior environmental review of the fire station project, without incorporating the 2006 Program DEIR by reference and providing a detailed explanation of its adequacy.⁷⁹ The fire station project is now part of this Project and must be analyzed in a recirculated DEIR.

⁷²http://docs.sandiego.gov/councildockets_attach/2011/February/Item_Summary_Bayside_Fire_Station_Feb_28.pdf

⁷³ <http://articles.latimes.com/2011/dec/29/local/la-me-redevelopment-20111230>

⁷⁴ <http://www.utsandiego.com/news/2012/mar/28/downtown-parks-fire-stations-get-additional-protec/>

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ DEIR p. 4.11-10.

⁷⁸ *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214.

⁷⁹ CEQA Guidelines §§ 15150, 15153(b); *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442-443.
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C. It Appears that the Harbor Drive Pedestrian Bridge Is a Hollow Proposal

The Project description includes a Harbor Drive pedestrian bridge, but notes that “the economic feasibility of such a feature is unknown at this time.”⁸⁰ This is probably not the case because the City has already approved financing for the entire Project. Instead, based on an e-mail from the City’s representative, it appears that the City has already chosen not to devote funding to the pedestrian bridge, and does not actually intend to construct the bridge unless it is required as a mitigation measure to offset the Project’s impacts on public access.⁸¹ Because the Project will have significant and unavoidable impacts on public access, the pedestrian bridge is a feasible mitigation measure and the City should make a commitment to construct it. The City’s hesitance to do so renders the DEIR’s Project description unstable.

D. The DEIR Does Not Clearly Establish that the Water Transportation Center Will Be Relocated

The Project description states that the Project will involve relocating the existing water transportation center (“WTC”) to the former Spinnaker Hotel site.⁸² The DEIR does not depict the proposed new location for the WTC, and does not actually analyze the construction-related or operational impacts of relocating the WTC.

It is important for the DEIR to confirm that the WTC actually will be relocated. If the Project will demolish the WTC without providing a replacement, this would create unmitigated impacts to public access and recreation, and would conflict with the Coastal Act and the Port Master Plan (“PMP”).

⁸⁰ DEIR p. 3-13.

⁸¹ Exhibit 16, E-mail from Charles Black to Don Wood (9/23/2011) (“First, we believe the bridge is unnecessary to ensure the space is highly accessible. Second, the Expansion project does not adversely impact the public’s access to the waterfront and, therefore, the bridge is unnecessary to mitigate adverse impacts. Finally, the City would prefer to expend its limited resources delivering world-class public realm space as part of a sustainable, green project.”)

⁸² DEIR p. 3-12.
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V. THE DEIR FAILS TO ADEQUATELY ESTABLISH THE BASELINE FOR ANALYZING POTENTIALLY SIGNIFICANT IMPACTS

The DEIR uses an inaccurate and incomplete baseline, thereby skewing the impact analysis. The “baseline” refers to the existing environmental setting and is the starting point from which the lead agency must measure whether a proposed Project may cause a significant environmental impact.⁸³ CEQA defines “baseline” as the physical environment as it exists at the time CEQA review is commenced.⁸⁴

Describing the environmental setting is critical to an accurate, meaningful evaluation of environmental impacts. The importance of having a stable, finite, fixed environmental setting for purposes of an environmental analysis was recognized decades ago.⁸⁵ Today, the courts are clear that, “[b]efore the impacts of a Project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”⁸⁶ In fact, it is:

a central concept of CEQA, widely accepted by the courts, that the significance of a Project’s impacts cannot be measured unless the DEIR first establishes the actual physical conditions on the property. In other words, baseline determination is the first rather than the last step in the environmental review process.⁸⁷

The DEIR must also describe the existing environmental setting in sufficient detail to enable a proper analysis of Project impacts.⁸⁸ Section 15125 of the CEQA Guidelines provides, in relevant part, that “[k]nowledge of the regional setting is critical to the assessment of environmental impacts.”⁸⁹ This level of detail is

⁸³ See, e.g., *Communities for a Better Env’t v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278 (“*Fat*”), citing Remy, et al., *Guide to the Calif. Environmental Quality Act* (1999) p. 165.

⁸⁴ CEQA Guidelines §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 (“*Riverwatch*”).

⁸⁵ *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.

⁸⁶ *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

⁸⁷ *Save our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.

⁸⁸ *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1121-22.

⁸⁹ CEQA Guidelines § 15125(d).

necessary to “permit the significant effects of the Project to be considered in the full environmental context.”⁹⁰

The description of the environmental setting in the DEIR is inadequate because it omits highly relevant information regarding hazardous waste contamination and ongoing sea-water intrusion problems at the Project site. The SDCC is literally sited on a toxic waste dump that is routinely flooded by sea-water intrusion from San Diego Bay. Yet the DEIR incorrectly assumes that the proposed Project site is the only feasible location for the SDCC expansion, because customers prefer it. (*See* section II, above.) The DEIR also miscalculates existing Convention Center attendance, thereby skewing the DEIR’s analysis of traffic, parking, and other impacts. The Port is required to gather the relevant data, and provide an adequate description of the existing environmental setting in a revised DEIR.

A. The DEIR Fails to Adequately Establish the Existing Setting for Analyzing Potentially Significant Impacts to Biological Resources

Eelgrass is an important native biological resource. San Diego Bay hosts 20 percent of the eelgrass beds in California and 50 percent of the beds in southern California.⁹¹ The DEIR states that there are 21 eelgrass beds within 500 feet of the Project site, with the largest bed within 100 feet of the Project site. The DEIR gives very specific square footage for these beds and provides a map of the large eelgrass bed near the Project site.⁹² But neither the DEIR nor its appendices or references explains where this information came from. The DEIR cites “Merkel 2009” for this data, but that 10-page report does not contain detailed site-specific maps, nor does it provide square footage. Furthermore, the Merkel report states that it “cannot be extrapolated for impact assessment purposes or site specific uses,” and that the maps contained therein “are not to be used for project specific analyses.”⁹³ There is no indication that an underwater survey was conducted to delineate the location and extent of eelgrass in the vicinity of the Project, even though such surveys are routinely conducted for similar projects on San Diego Bay.⁹⁴ The Port fails to

⁹⁰ *Id.*

⁹¹ Merkel 2009 p. 1.

⁹² DEIR pp. 4.3-5, 4.3-19, Figure 4.3-2.

⁹³ Merkel 2009 p. 8.

⁹⁴ *See e.g.* DEIR for Sunroad Harbor Island Hotel Project and East Harbor Island Subarea PMP Amendment, p. 4.2-1 to 4.2-2, App. C (marine resources assessment was undertaken for hotel Project 2572-010j)

provide evidence of how it delineated the eelgrass beds near the Project site, and an underwater survey should be conducted to verify the location and extent of eelgrass beds in the Project vicinity.

B. The DEIR Fails to Adequately Establish the Existing Setting for Analyzing Potentially Significant Impacts Associated with Fill on the Project Site and Soil and Groundwater Contamination

The failure of the DEIR to disclose the historic and ongoing contamination problems at the Project site cannot be overstated. These omissions in the DEIR are described throughout these comments. The DEIR's avoidance of the true state of affairs at the Project site results in a failure to "permit the significant effects of the Project to be considered in the full environmental context."⁹⁵

Matt Hagemann, a technical expert on hazardous materials, explains that the DEIR fails to describe the existing setting for purposes of conducting an analysis of the potential impacts that may be caused by the release of hazardous materials, formulating appropriate mitigation measures, and analyzing the potential impacts of implementing those mitigation measures.⁹⁶ According to Mr. Hagemann:

The Project site has a century-long history as a garbage dump, an incinerator, an automobile repair shop, a metals warehouse, a tank farm, and a shipyard. The Project site is currently listed as an open cleanup site . . . Hazardous materials exist in the soil and groundwater at the Project site including . . . lead, polyaromatic hydrocarbons, dioxins, PCBs, and nickel . . . tributyltin, copper, cyanide, hydrogen sulfide. . . zinc, mercury, and total petroleum hydrocarbons.⁹⁷

Mr. Hagemann describes the decades of garbage dumping that occurred on the site, the widespread pollution from the City's incinerator (more widespread than

near the water, including underwater dive surveys), *available at*:
<http://www.portofsandiego.org/sunroad-harbor-island-hotel/1848-draft-environmental-impact-report-for-sunroad-harbor-island-hotel-now-available.html>

⁹⁵ CEQA Guidelines § 15125(d).

⁹⁶ Exhibit 1, Hagemann comments on DEIR (June 27, 2012).

⁹⁷ *Ibid.* pp. 1-2.

admitted in the EIR), and the past industrial uses that caused contamination throughout the Project site that has never been fully remediated.⁹⁸ He concludes that the DEIR must be revised to disclose that the soils and groundwater beneath the *entire* Project site are likely contaminated, and that the types of contaminants are much more dangerous than those disclosed in the DEIR.⁹⁹ He also concludes that a Phase II subsurface environmental site assessment (“ESA”) should be conducted now, as part of the EIR process, in order to accurately characterize the site and prepare adequate mitigation measures.¹⁰⁰ As Mr. Hagemann points out, the Port has conducted Phase II ESA’s when preparing EIR’s for other waterfront projects.¹⁰¹ It appears that here the Port has chosen to defer preparation of a Phase II ESA because it does not want to disclose the sheer scope of the contamination on the Project site, and the extent of remediation that will be required.

The DEIR and the Phase I ESA improperly conclude that the Project site is not on a list of hazardous materials sites compiled pursuant to Government Code § 65962.5, that there were “no reports of any past or present violations” for the Project site on environmental databases, and that the reports of hazardous materials on the Project site that are listed on environmental databases “are typical of convention center and hotel operations.”¹⁰² This is incorrect. Even the Phase I ESA notes that the Project site is listed as a “land disposal site” in the LDS database, meaning that it is designated as a landfill or garbage dump.¹⁰³ The site is also listed on the HIST CORTESE database, which is the type of lists referred to in Government Code § 65962.5.¹⁰⁴ Mr. Hagemann notes that the Project site is also listed—twice—on the RWQCB Envirostar website of hazardous waste sites.¹⁰⁵ These listings are *not* typical of Convention Center and hotel operations.

The DEIR also fails to disclose that the large eelgrass bed in the water adjacent to the Project site is actually an artificially created “habitat cap” to contain

⁹⁸ *Ibid.* pp. 3-7.

⁹⁹ *Ibid.* pp. 7-8.

¹⁰⁰ *Ibid.* p. 9.

¹⁰¹ *Ibid.* (citing Port’s DEIR for Sunroad Harbor Island Hotel (2010), Appendix D, *available at*: <http://www.portofsandiego.org/sunroad-harbor-island-hotel/1848-draft-environmental-impact-report-for-sunroad-harbor-island-hotel-now-available.html>)

¹⁰² *See e.g.* DEIR Appendix F, p. 4-1.

¹⁰³ *Ibid.*

¹⁰⁴ DEIR Appendix F, p. 4-2.

¹⁰⁵ Hagemann comments p. 3.

contaminated sediment that was historically released from the Project site.¹⁰⁶ Even though the Port is responsible for monitoring the cap and ensuring its integrity over the course of the upcoming decades, the DEIR makes no mention of this environmentally sensitive area, let alone analyze how the Project might affect it.¹⁰⁷

C. The DEIR Fails to Adequately Establish the Existing Setting for Analyzing Potentially Significant Impacts Associated with Traffic and Parking

Daniel Smith, a technical expert on traffic and parking impacts, explains that the DEIR fails to describe the existing setting for purposes of conducting an analysis of potential traffic and parking impacts.¹⁰⁸ The DEIR purports to use an “85th percentile event” at the Convention Center as the representative traffic and parking baseline.¹⁰⁹ According to the limited information in Appendix H-1 of the DEIR, however, it appears that the DEIR actually uses a weighted average of combined event types, which is not a true estimate of the 85th percentile attendance event, for two reasons.¹¹⁰

First, the DEIR uses a hodge-podge of data that results in a skewed estimate of Convention Center attendance. It calculates the 85th percentile event by multiplying the 85th percentile of the number of attendees in 2010 times the average number of events from 2003 through 2010.¹¹¹ The problem with this calculation is that the number of attendees in 2010 was significantly less than prior years—14 percent less than the average of all prior years and 21 percent less than the highest-attended prior year (2008).¹¹² On the other hand, on average there were significantly more events from 2003 through 2010—29 percent more—than in 2010 alone.¹¹³ Comparing 2010 attendance data with the 2003-2010 average number of events is illogical, and it results in an unrealistic estimate of the 85th percentile attendance event.

¹⁰⁶ *Ibid.*, pp. 9-10.

¹⁰⁷ *Ibid.*

¹⁰⁸ See Exhibit 2, Smith comments on DEIR, June 12, 2012.

¹⁰⁹ DEIR p. 2-6.

¹¹⁰ Smith comments p. 2 (and request for further clarification and explanation in the DEIR).

¹¹¹ *Ibid.* pp. 2-3; DEIR Appendix H-1, pp. 16-17.

¹¹² *Ibid.*; DEIR p. 2-10; AECOM Report (2010) pp. 12-13.

¹¹³ *Ibid.*

Second, using a weighted average most likely underestimates the number of attendees at the true 85th percentile attendance event, and does not reflect a real baseline. The 85th percentile attendance event used in the DEIR is 9,734 attendees, which is almost 16 percent less than the 85th percentile attendance at a National/State Convention or Tradeshow, or 31 percent less than the actual attendance at one of these shows.¹¹⁴ National/State Conventions and Tradeshows, however, represent 60 percent of all Convention Center attendance, and they take place on at least 220 event-days per year, usually more.¹¹⁵ The Convention Center usually has multiple events taking place each day.¹¹⁶ It is clear from these numbers and from Mr. Smith's conclusions that the actual 85th percentile event is likely much higher than 9,734 attendees.

Finally, neither the DEIR nor the technical appendices provide the basic attendance data upon which the baseline was calculated. As Mr. Smith concluded: "In short, the Port's methodology is far from transparent."¹¹⁷ For example, the actual 2010 attendance data used to calculate the baseline is not described or disclosed, and the numbers reported in the DEIR do not match anything in the AECOM report on Convention Center attendance, so they must be based on an independent analysis of data that is not included in an appendix or reference document. Appendix H-1 purports to include an "Appendix B" but that document is not provided with the DEIR.¹¹⁸ There is also no explanation for how the DEIR arrived at the number of increased events or attendees that can be expected from the Expansion Project. Not even our expert could decipher how the Port calculated the existing setting and the analysis that follows. Simply put, the Port failed to disclose the basis for its assumptions and analysis as required by CEQA.

VI. THE DEIR'S CONCLUSIONS REGARDING POTENTIALLY SIGNIFICANT PROJECT IMPACTS LACK SUBSTANTIAL EVIDENCE AS REQUIRED BY CEQA; THE DEIR FAILS TO INCORPORATE ALL FEASIBLE MITIGATION MEASURES

¹¹⁴ Smith comments p. 4; DEIR Appendix H-1, p. 17, Table 3.1.

¹¹⁵ Smith comments p. 3 (in 2010 these large shows occurred on 248 event days); DEIR Appendix H-1, p. 17, Table 3-1 (historic average is 220 event days); AECOM report p. 12 (2010) (on average, large shows draw 60 percent of attendees).

¹¹⁶ *Ibid.*

¹¹⁷ Smith comments p. 4.

¹¹⁸ Smith comments p. 4.

NECESSARY TO REDUCE SUCH IMPACTS TO A LEVEL OF INSIGNIFICANCE

CEQA has two basic purposes, neither of which the DEIR satisfies. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a Project before harm is done to the environment.¹¹⁹ The DEIR is the “heart” of this requirement.¹²⁰ The DEIR 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.”¹²¹

To fulfill this function, the discussion of impacts in an DEIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”¹²² An adequate DEIR must contain facts and analysis, not just an agency’s conclusions.¹²³ CEQA requires an DEIR to disclose all potential direct and indirect, significant environmental impacts of a Project.¹²⁴

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.¹²⁵ If an DEIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.¹²⁶ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible Project alternatives or mitigation measures.¹²⁷ Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the DEIR to meet this obligation.

¹¹⁹ CEQA Guidelines § 15002(a)(1); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹²⁰ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

¹²¹ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹²² CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

¹²³ *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

¹²⁴ Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

¹²⁵ CEQA Guidelines, § 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass’n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

¹²⁶ Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

¹²⁷ *Id.*, §§ 21002-21002.1.

In this case, the DEIR fails to satisfy the basic purposes of CEQA. The DEIR's conclusions regarding impacts to aesthetics, air quality, biological resources, geology and soils, greenhouse gas emissions, sea level rise, hazardous materials, hydrology and water quality, land use, noise and vibration, public services and recreation, traffic and parking, utilities, and cumulative impacts are not supported by substantial evidence. In preparing the DEIR, the Port has: (1) failed to provide sufficient information to inform the public and decision-makers about potential environmental impacts; (2) failed to accurately identify and adequately analyze all potentially significant environmental impacts; and (3) failed to incorporate adequate measures to mitigate environmental impacts to a less than significant level. The Port must correct these shortcomings and recirculate a revised DEIR for public review and comment.

A. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Aesthetic Impacts

It is the intent of the PMP to “preserve and enhance” designated vista points.¹²⁸ Appendix G of the CEQA Guidelines requires a finding of significant impact if a project will “have a substantial adverse effect on a scenic vista” or “substantially degrade the existing visual character or quality of the site and its surroundings.”¹²⁹ The DEIR uses key observation points (“KOPs”) to analyze the aesthetic impacts of the Project. KOP 1, located on Coronado, is a designated vista point under the PMP. The DEIR characterizes KOP 1 as having moderate to high visual quality. The view from KOP 1 includes the San Diego Metropolitan Transit Center clock tower and the Harbor Drive Pedestrian Bridge, which the DEIR later characterizes as “key visual resources.”¹³⁰ But these visual resources are not even mentioned in the DEIR's discussion of KOP 1. As a result of the Project, views from KOP 1, including views of these key visual resources and the rising landform of residential San Diego behind them, will be completely walled off by the Project. The stark contrast between the before-and-after views from KOP 1 are shown in DEIR Figures 4.1-5 and 4.1-14. This impact should be considered potentially significant; yet the Port does not provide any convincing explanation for its finding of no significant impact. The DEIR's statement that “the downtown San Diego skyline would remain largely intact” is not accurate.¹³¹

¹²⁸ DEIR p. 4.1-3.

¹²⁹ DEIR p. 4.1-18.

¹³⁰ DEIR pp. 4.1-11, 4.1-13.

¹³¹ DEIR pp. 4.1-10 through 4.1-11, 4.1-13, 4.1-19 through 4.1-20.
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KOP 2 will also have severely diminished views. The visual focal points of this view include the bay, a grassy park, clock tower, pedestrian bridge, and rising landform in the background. Like KOP 1, all but the view of the bay will be obscured by the Project, and this impact should also be considered significant.¹³²

The DEIR concludes that construction-related visual impacts would be “contained on site” (behind screened fences) and would be “temporary” (approximately 2.5 years). But entirely blocking views through the Project site, with construction-related fencing and barriers, for a period of 2.5 years, may well cause significant visual impacts. The DEIR inadequately addresses these impacts by writing them off as “temporary.”

Park Boulevard is a designated view corridor in the San Diego Downtown Community Plan. The DEIR states that as one approaches the Project site on Park Boulevard, “views of the Bayfront and Coronado begin to emerge.”¹³³ By focusing on individual KOPs (KOP 5 and 9), the DEIR does not directly address the impacts that the Project will have on the emerging views of the Bayfront and Coronado that one experiences from Park Boulevard. This impact on a designated view corridor should be addressed up front. For instance, the DEIR does not reconcile the fact that Park Boulevard is a designated view corridor with the DEIR’s conclusion that views from Park Boulevard toward the bayfront are “low.”¹³⁴ The Project will likely have a “walling off” effect on the view corridor similar to the KOPs discussed above.

The DEIR is also unclear whether the Project site is or is not within the SR-75 scenic highway corridor. No simulated views from the bridge to the project site were prepared, so it is impossible to verify the DEIR’s conclusion that “existing views of downtown San Diego would remain intact.”¹³⁵ In other words, there can be no dispute that the DEIR is not supported by substantial evidence.

The DEIR concludes that contributions to nighttime lighting will not be significant because the area “is already characterized by high ambient light levels,” and nighttime views “are already compromised by high levels of nighttime

¹³² DEIR pp. 4.1-11, 4.1-23 to 4.1-24; *compare* Figures 4.1-6 with 4.1-15.

¹³³ DEIR p. 4.1-5.

¹³⁴ DEIR pp. 4.1-14, 4.1-18.

¹³⁵ DEIR p. 4.1-21.

lighting.”¹³⁶ The DEIR similarly concludes that “because existing daytime views in the surrounding area are already compromised by moderate levels of daytime glare” due to the existing Convention Center, surrounding hotels, and light reflecting off vehicles, the Project’s addition of a Convention Center expansion, new hotel, and increased vehicle traffic “would not result in a significant new source of glare.”¹³⁷ This is not adequate under CEQA. Courts have held that “the greater the existing environmental problems are, the lower the threshold should be” for treating the project’s contribution to the problem as significant.¹³⁸ The DEIR must be revised to discuss whether the Project’s contribution to “already compromised” light and glare levels is significant.

B. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Air Quality Impacts

The New Children’s Museum and adjacent children’s park are not mentioned in the DEIR’s description of nearby sensitive receptor land uses. These uses are roughly 1,400 feet from the new pedestrian bridge and 2,200 feet from the Expansion Project.¹³⁹ Potential impacts on sensitive receptors (children) who use the children’s museum and children’s park should be evaluated.

The DEIR also concludes that Project-related air pollutant emissions will not be covered by the State Implementation Plan/Regional Air Quality Strategies, because the Project is not a contemplated future development under those plans. The DEIR therefore writes off the Project’s air quality impacts as “significant and unavoidable,” without explaining whether the City could purchase emissions offsets, emissions reduction credits (“ERC’s”), or undertake similar mitigation in order to

¹³⁶ DEIR pp. 4.1-38 to 4.1-39.

¹³⁷ DEIR pp. 4.1-39 to 4.1-41.

¹³⁸ *Communities for a Better Env’t v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 119-120; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718, 721 (rejecting the theory used in the DEIR, that “the greater the overall problem, the less significance a project has”); *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1025 (“the relevant issue to be addressed in the EIR on the plan is not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any additional amount of traffic noise should be considered significant in light of the serious nature of the traffic noise problem already existing”).

¹³⁹ DEIR p. 4.2-5.

fall within the projected growth assumptions in those plans.¹⁴⁰ These are feasible measures which could be employed to reduce the Project's air quality impacts to less than significant.

The DEIR's estimate of construction-related air pollutant emissions does not take into account the high likelihood that extensive soil excavation and remediation will be required due to the presence of toxic soil contaminants. (See comments regarding soils and geology, and hazards and hazardous materials, below). Similarly, there is no indication that the DEIR's estimates of construction-related emissions accounts for the construction of a new wastewater treatment plant, a fire station, or a new water transportation center. (See comments regarding Project description and water transportation center, above.) Extra emissions associated with these activities would almost certainly push the emissions of, for example, carbon monoxide, above threshold levels of significance.¹⁴¹

Mitigation measure AQ-2b is too lenient.¹⁴² The exceptions to this mitigation measure are completely unnecessary and illogical, and they should be eliminated. The mitigation measure *requires* that all on-road heavy duty diesel trucks that are used during construction be model 2010 or newer (100 percent compliant for PM₁₀ and NOx reductions), but it then allows trucks to be model 2007 or newer (only 50 percent compliant) if: (1) "specialized equipment" is not available for purchase or lease in model 2010 or newer; (2) a contractor has applied for funds to "put controls on" an older truck; or (3) a contractor has ordered a model 2010 or newer truck but that order is not completed. These exceptions make no sense. First, a heavy-duty diesel truck is either a model 2010 or newer truck, or it isn't. Second, the mitigation measure only pertains to on-road vehicles such as hauling trucks and material delivery trucks, not off-road equipment used during construction. Heavy duty hauling and delivery trucks are not considered "special equipment." Third, a contractor cannot "put controls on" an older truck and transform it into a 2010 or newer model. Fourth, a contractor should not be able to avoid this mitigation measure simply because it placed an "order" for a 2010 or newer truck.

¹⁴⁰ See <http://www.arb.ca.gov/drdb/sd/curhtml/r26.htm> (San Diego Air Quality Management District's regulations on ERC banking); <http://www.sdapcd.org/permits/ERCs.pdf> (San Diego's ERC banking summary). These websites show that San Diego also banks transportation-related ERC's ("TERCs").

¹⁴¹ DEIR pp. 4.2-12 to 4.2-14 (Project CO emissions during construction expected to be 545, and significance threshold is 550).

¹⁴² DEIR p. 4.2-17.

Eliminating the exceptions to this mitigation measure and enforcing the 2010-or-newer truck requirement is a feasible form of mitigation that would move the Project closer to meeting, or perhaps even below, the NO_x threshold of significance. With the 2007 model standards in place (50 percent NO_x compliant), the proposed mitigation measures would reduce NO_x by 157.5 lbs per day. The project's maximum projected NO_x emissions would thus be 76.4 lbs per day over the NO_x threshold. If 2010 model standards were used instead (100 percent NO_x compliant), it is likely that most if not all of those 76.4 lbs could be eliminated.¹⁴³ Compliance with the NO_x threshold might also change the cumulative impacts determination.¹⁴⁴ The DEIR does not explain why these exceptions are necessary or how they even apply to this mitigation measure. The exceptions should be removed.

The DEIR concludes that sensitive receptors would not be exposed to substantial pollutant concentrations—and therefore an elevated health risk—because: (1) diesel exposure during the 30-month construction period is short-term compared to the 70-year period used to estimate lifetime cancer risks; (2) off-road equipment would comply with EPA's "most stringent emission standards" (no mitigation measure requires this so apparently the Port infers, but does not explain, that off-road equipment is legally required to meet those standards); and (3) on-road diesel exhaust will be reduced by proposed mitigation measures. The DEIR states that the prevailing wind direction from the Project site is west-northwest, which means that emissions could be directed toward the existing children's museum and park. A health risk assessment should be conducted, particularly due to the high numbers and concentration of diesel equipment that the Project will require, and because the site contains contamination that may be released into the air upon disturbance. (*See* comments regarding soils and geology, and hazards and hazardous materials, below.)

C. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Impacts to Biological Resources

The DEIR states that potential effects on eelgrass may occur from two sources: shading from new buildings, or shading from the construction barge that

¹⁴³ DEIR pp. 4.2-17 to 4.2-18, 4.2-21 (maximum NO_x emissions with mitigation is based on 2007 model trucks, and would be 76.4 lbs per day over the threshold); DEIR Appendix C., attachment "A," pp. 10-12, "Onroad Emission Calculations" (mitigation for on-road vehicles—using 2007 standards—would reduce NO_x emissions by 157.5 lbs/day).

¹⁴⁴ DEIR p. 4.2-23.
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will dock on the waterfront southwest of the Project site several times per week for approximately 30 months.¹⁴⁵ As noted in our comments about the environmental setting, above, the location of the eelgrass beds must be verified in order to accurately assess Project impacts. It is also unclear whether the large eelgrass bed shown on the map is the same large bed referred to in the DEIR.¹⁴⁶ This portion of the DEIR is confusing and lacks any reference to the data that was used to reach the conclusions made.

As described by Mr. Hagemann, the Project includes a proposed new stormwater outfall that will discharge into the bay at the location of the large eelgrass bed near the Project site.¹⁴⁷ Stormwater discharge from this outfall into the eelgrass bed will likely have significant negative impacts on the eelgrass habitat, and may cause the release of hazardous materials now contained within the underwater sediment cap.¹⁴⁸ The DEIR does not identify the potential impacts that this will have on the eelgrass bed and the species that utilize it. Those impacts must be investigated, analyzed, and mitigated.

Eelgrass is an essential fish habitat (EFH) under the Magnuson-Stevens Act, and any Project that may have significant adverse effects on EFH requires consultation with the National Marine Fisheries Service (NMFS).¹⁴⁹ The DEIR states that construction-related activities “would be potentially significant prior to mitigation.”¹⁵⁰ Therefore, consultation with NMFS is required. This is particularly true because proposed mitigation measure MM-BIO-3 is wholly insufficient (see below). NMFS should be consulted for purposes of formulating appropriate mitigation and ensuring proper compliance during construction. Mr. Hagemann suggests that the City implement recommended eelgrass habitat mitigation measures from NMFS’s “California Eelgrass Mitigation Policy.”¹⁵¹

¹⁴⁵ DEIR pp. 3-20, 4.3-19 to 4.3-20.

¹⁴⁶ DEIR pp. 4.3-19 (referring to a 52,562 square-foot bed within 500 feet of project site, and a 9,299 square foot bed within 100 feet of project site, although on Figure 4.3-2 these appear to be the same bed).

¹⁴⁷ Exhibit 1, Hagemann comments, pp. 10-11 (citing DEIR pp. 4.3-5, 4.8-20, and Figure 4.13-1).

¹⁴⁸ *Ibid.*

¹⁴⁹ DEIR pp. 4.3-5, 4.3-8.

¹⁵⁰ DEIR p. 4.3-19.

¹⁵¹ Exhibit 1, Hagemann comments, p. 11.

MM-BIO-3 requires a general contractor to “verify” that the construction barge is not placed over mapped eelgrass patches, and then submit a verification to the Port that “eelgrass habitat has been avoided.”¹⁵² The first shortcoming of this mitigation measure is that a general contractor is not qualified to verify whether eelgrass habitat has been avoided. Compliance with MM-BIO-3 (or a similar measure approved by NMFS) should instead be verified by a qualified biologist. Second, it is not clear that the eelgrass beds in the Project vicinity have been adequately mapped (see comment above).

Finally, the Project will utilize a construction barge that will be moored four times per week near the Project site during the first 18 months of construction.¹⁵³ The DEIR does not address the likelihood that the barge will create significant turbulence and sedimentation that will affect the nearby eelgrass bed, and will shade the eelgrass bed even if it is placed nearby, but not over it. MM-BIO-3 is insufficient to reduce Project impacts to the eelgrass bed to a less-than-significant level. In fact, these mitigation measures may result in additional significant impacts that must be analyzed.

D. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Geological Impacts

The geology and soils section of the DEIR describes existing soils at the Project site as fill material that was “likely obtained during dredging,” but yet contains “coal tar” and “construction debris.”¹⁵⁴ As determined in previous projects and discussed in the cultural-impacts section of the DEIR, the site is actually “a large historic era trash dump located in the former tidelands that existed all along this section of the Bay.”¹⁵⁵ Trash was “encountered everywhere during construction of Phases I and II” of the Convention Center.¹⁵⁶ The “base for the filled land was in large measure created from the garbage that had been dumped in the Bay since the 1800’s, with some added Bay dredgings.”¹⁵⁷ The geology and soils section of the DEIR does not disclose or analyze how this will affect the construction of the Project.

¹⁵² DEIR p. 4.3-20.

¹⁵³ DEIR p. 4.6-19.

¹⁵⁴ DEIR pp. 4.5-1 to 4.5-2.

¹⁵⁵ DEIR p. 4.4-4.

¹⁵⁶ *Ibid.*

¹⁵⁷ DEIR p. 4.4-3.

The Project site is unbuildable, yet the DEIR does not explain how this problem will be addressed, or what the collateral environmental impacts will be. The DEIR states that the soil beneath the Project site is not “engineered structural fill and is too compressible,” and is therefore “considered unsuitable in its present condition for improvements or support of building structures.”¹⁵⁸ Mitigation measure MM-GEO-1a requires a geotechnical investigation to determine what measures will be taken to fix this problem, but not until a City grading permit is issued for the Project.¹⁵⁹ It is unclear why this investigation needs to be deferred. The DEIR says that the geotechnical study will occur “once development plans are available,” but detailed design plans for the Project are already available.¹⁶⁰ For other projects, the Port has commissioned detailed geotechnical studies during the EIR process, and incorporated mitigation measures into those EIR’s to address the problems of building on artificial fill.¹⁶¹

There will likely be significant impacts associated with the measures required to make the site buildable, and the DEIR does not disclose or mitigate these impacts. The DEIR contemplates earthwork procedures including soil removal and replacement, and it states that the geotechnical report will make recommendations for the “removal of unsuitable material prior to placing fill.”¹⁶² The City indicated that it expects to import 37,400 cubic yards of soil for the Expansion Project (enough to cover roughly 100,000 square feet with 10 feet of soil), and 10,000 cubic yards for the hotel project (enough to cover 27,000 square feet with 10 feet of soil).¹⁶³ This is in addition to the demolished concrete and asphalt that the Project will utilize onsite as fill material.¹⁶⁴ The cumulative impacts section of the DEIR states that past, present, and future projects in the Project area “have and will remove soils unsuitable for structure construction and replace them with soils that are suitable.”¹⁶⁵ Clearly a significant amount of fill will be removed and

¹⁵⁸ DEIR pp. 4.5-2, 4.5-15.

¹⁵⁹ DEIR pp. 4.5-10 to 4.5-11.

¹⁶⁰ See John Portman and Associates design documents.

¹⁶¹ See Port’s DEIR for the Sunroad Harbor Island Hotel, Appendix H (2010), available at: <http://www.portofsandiego.org/sunroad-harbor-island-hotel/1848-draft-environmental-impact-report-for-sunroad-harbor-island-hotel-now-available.html>

¹⁶² DEIR pp. 4.5-11, 4.5-17.

¹⁶³ DEIR, pp. 4.6-20, 4.6-21.

¹⁶⁴ *Ibid.*

¹⁶⁵ DEIR pp. 5-19 to 5-20.

replaced during project construction, yet the EIR barely mentions this. The existing onsite fill contains toxic materials due to its long history as a garbage dump, incinerator, and heavy industrial site (*see* comments above and below.) The EIR is the only place where potential impacts to air quality, human health, and local or regional waste disposal facilities that will be caused by removing and replacing these materials can be addressed and mitigated. In order for these impacts to be assessed and mitigated for, the geotechnical report should be completed now, as part of the EIR process. The Port cannot defer this mitigation until a later date; it must be analyzed in a revised DEIR.

E. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Impacts Relating to Greenhouse Gas Emissions and Sea Level Rise

1. GHG emissions are underestimated, and mitigation is inadequate

As noted by Mr. Hagemann, the DEIR's construction-related greenhouse gas ("GHG") emissions modeling is based on emissions from a 2013-model vehicle fleet.¹⁶⁶ It is unreasonable to assume that the construction fleet will be entirely comprised of brand-new trucks and equipment.¹⁶⁷ In the air-quality section of the DEIR it was assumed that model 2007 or newer trucks would be used.¹⁶⁸ Even proposed mitigation measure AQ-2b only requires haul and delivery trucks to be model 2010 or newer, with exceptions. (*See* air quality comments, above.) The DEIR's use of model 2013 emissions rates is inaccurate, and results in an underestimation of construction-related GHG emissions. Furthermore, the DEIR does not include an estimate of the GHG emissions (or other air pollutants for that matter) from building an onsite water treatment plant, an offsite fire station, or a new sewer pump station.¹⁶⁹ (*See* project description comments, above, and utility comments, below.) Mr. Hagemann concluded that the proposed mitigation measures for GHG emissions are inadequate, and recommended a specific list of further feasible mitigation that should be incorporated into the Project.¹⁷⁰

¹⁶⁶ Exhibit 1, Hagemann comments, p. 13, citing DEIR p. 4.6-20.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*, citing DEIR p. 4.2-18.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.* p. 14.

Mr. Hagemann further concluded that the DEIR likely underestimates the Project's operational GHG emissions. The DEIR only considers emissions created by local attendees and not non-local attendees.¹⁷¹ It also unreasonably assumes that 90% of non-local attendees will use mass transit, walk, or bike to the Convention Center. It is more likely that many of these attendees will utilize hotel shuttles, taxis, or rental cars.¹⁷² The DEIR therefore underestimates the GHG emissions that will result from Project operation. Mr. Hagemann suggests that further GHG mitigation measures be adopted to offset these emissions.¹⁷³

Finally, the overall efficiency of the Project is not analyzed in the DEIR.¹⁷⁴ The DEIR uses the threshold of significance adopted by the Bay Area Air Quality Management District, which states that if a Project will exceed the 1,100 MTCO_{2e} per year threshold for GHGs, the impact can still be considered less than significant if the project would result in an overall efficiency of less than 4.6 MTCO_{2e} per year per service population (the sum number of jobs and residents provided by a Project). The DEIR concludes that the Project's impacts will be significant because it will exceed 1,100 MTCO_{2e} per year, but it does not go on to analyze what the overall efficiency of the Project is.¹⁷⁵ This is important public information. The DEIR should disclose not just the sum total of Project emissions, but also how efficient the Project will be compared to the number of jobs it creates.¹⁷⁶ The Port must fully apply its chosen CEQA significance threshold.

2. Foreseeable impacts related to sea level rise are not adequately analyzed and mitigated

Regarding the impacts of sea level rise, the DEIR agrees with the court decision in the *Ballona Wetlands* case, that an EIR need not evaluate "impacts of the environment on a Project."¹⁷⁷ It is particularly troubling that the Port, as trustee of the tidelands that encompass the entire shoreline of San Diego, chooses to adopt such an irresponsible and cavalier position. The foreseeable impacts of sea level rise call for trustee agencies like the Port to pursue rigorous analysis and take

¹⁷¹ *Ibid.*, citing DEIR Table 4.6-5, p. 4.6-30.

¹⁷² *Ibid.*, p. 15.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ DEIR pp. 4.6-30, 4.6-34.

¹⁷⁶ Hagemann comments, p. 15.

¹⁷⁷ *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455. 2572-010j

concrete actions, not authorize poorly planned and unmitigated waterfront developments under the theory that analysis and mitigation are not technically required.

Ballona Wetlands is not a correct interpretation of CEQA. CEQA defines the “environment” as “the physical conditions which exist within the area which will be affected by the project, including land.”¹⁷⁸ Under CEQA, a project has a “significant effect on the environment” if its environmental effects “will cause substantial adverse effects on human beings.”¹⁷⁹ Building a project on a site that is prone to flooding and seawater intrusion leads to denser human populations there and increases environmental risks. The obvious purpose of CEQA is not to consider the “environment” in a vacuum, separate from the project and from human beings, but to analyze the interactions between environmental conditions, the project, and people in and around the project site.

In accordance with these principles, the CEQA Guidelines instruct agencies to consider whether a project will expose people or structures to a risk of flooding or inundation from the sea.¹⁸⁰ Section 15126.2(a) of the CEQA Guidelines also instructs agencies to consider the “effects the project might cause by bringing development and people into the area affected,” including floodplains or similar hazard areas.¹⁸¹ A lead agency’s duty to comply with these statutes after the *Ballona Wetlands* case remains murky. For example, in recent documents addressing CEQA that were issued after *Ballona Wetlands*, the California attorney general’s office has invoked section 15126.2(a) and has opined that compliance with that regulation generally, and the need to evaluate existing environmental conditions in the vicinity of a project, is required by CEQA.¹⁸²

Moreover, the court in *Ballona Wetlands* did not consider certain amendments that were made to CEQA in 2002 and 2008, which expressly indicate that the state legislature also endorses this scope of environmental review. The

¹⁷⁸ Pub. Resources Code § 21060.5.

¹⁷⁹ *Id.* § 21083(b).

¹⁸⁰ CEQA Guidelines, Appendix G, Checklist Part IX.

¹⁸¹ *Id.* § 15126.2(a).

¹⁸² Exhibit 10, Office of the California Attorney General, “Environmental Justice at the Local and Regional Level - Legal Background,” (May 8, 2012); Exhibit 11, *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (S.D. Sup. Ct., January 20, 2012), People’s Petition for Writ of Mandate in Intervention. (NO. 37-2001-00101593-CU-TT-CTL).

amendments created new CEQA exemptions, which are not available for projects that are subject to flood risks.¹⁸³ These “exceptions” to the CEQA exemptions show that the legislature is aware of the CEQA Guidelines and intends for unmitigated environmental hazards to be addressed and mitigated through the CEQA process, even if a project would otherwise be exempt. If the legislature did not intend for CEQA to address these hazards, there would be no point in listing them as exceptions to a CEQA exemption.

Ballona Wetlands involved a claim that sea level rise could potentially inundate a project site located two miles from the ocean, which required an analysis of off-site conditions that were much more remote than the seawater intrusion that exists on this Project site.¹⁸⁴ Finally, the court in *Ballona Wetlands* noted that its conclusion did not extend to projects that exacerbate, or themselves have an effect on, an existing environmental hazard.¹⁸⁵ As explained below, this Project’s proposal to directly address the problem of seawater intrusion takes it out of the *Ballona Wetlands* framework.

The DEIR nonetheless addresses the potential impacts of locating the Project in an area that will be subject to sea level rise, “for informational purposes,” and concludes that impacts will be significant if the Project exposes property or persons to flooding or other impacts resulting from climate change.¹⁸⁶ The Port should clarify whether it actually intends to adhere to the significance thresholds it adopts in its DEIR, or whether it intends to abandon those thresholds if they come under criticism or challenge.

Even as an informational discussion, the DEIR masks the truth. Current predictions of future sea level rise caused by global climate change, in combination with the existing seawater intrusion problems on the Project site, can only lead to one reasonable conclusion: constructing the Project in its proposed location would be a very poor public planning choice. The risk of inundation and storm damage, increasing dewatering requirements, and even eventual abandonment of the SDCC due to sea level rise is foreseeable. The DEIR states that the Project site is 10 feet

¹⁸³ Pub. Resources Code §§ 21155.1(a)(6) (transit priority projects) (2008); 21159.21(h) (exemption criteria), 21159.22(b)(3) (agricultural employee housing), 21159.23(a)(2)(A) (low-income housing), 21159.24(a)(3) (urban infill) (2002).

¹⁸⁴ See *Ballona Wetlands*, 201 Cal.App.4th at 472-473.

¹⁸⁵ See e.g. *id.*, fn. 9.

¹⁸⁶ DEIR p. 4.6-27.

above mean sea level, but this only represents the midway point between low and high tides. During June 2012, when these comments were prepared, daily high tides in San Diego reached 7.4 feet above mean sea level.¹⁸⁷ This leaves 2.6 feet (30 inches) of “freeboard” between San Diego Bay and the Project site.¹⁸⁸

The DEIR states that the predicted sea level rise in San Diego Bay by 2050 is 16 inches. This means that during a high tide conditions like the one mentioned above, the Project site would only be 14 inches above San Diego Bay. During storm events or large high tides, it is more than likely that inundation will occur. As Mr. Hagemann points out, during El Niño years these impacts would be greater.¹⁸⁹ The DEIR also ignores the likelihood of increasing inundation after 2050, when sea levels will continue to rise.¹⁹⁰ Recent projections from the National Research Council show that sea levels in Southern California are expected to rise 4–30 cm (1.6 to 12 inches) by 2030, 12–61 cm (4.7 to 24 inches) by 2050, and 42–167 cm (16.5 to 66 inches) by 2100.¹⁹¹ This indicates that the existing below-ground seawater intrusion at the SDCC and surrounding vicinity will only get worse over time.

The DEIR states that the Project “would be located at higher elevations and would be set back from the water,” but it does not provide any evidence that this is the case, or explain how a minor setback from the water would avoid inundation. The conceptual renderings of the Expansion Project in the Aesthetics and Visual Quality section of the DEIR, Figures 4.1-6 and 4.1-7 (“before”) and Figures 4.1-15 and 4.1-16 (“after”), reveal that the Expansion Project will be located very close to, and at the same elevation as, the walkway that is now the lowest elevation on the Project site. The DEIR’s treatment of this important issue is cursory at best.

The DEIR discloses that the existing Convention Center already requires “ongoing dewatering” in the subterranean parking garage, and that an average of 400,000 gallons of seawater are pumped from the parking garage and disposed of in

¹⁸⁷ <http://www.saltwatertides.com/dynamic.dir/californiasites.html> (input San Diego [Broadway], June 1 through 14, 2012).

¹⁸⁸ See also DEIR Appendix F, p. 2-1 (USGS topographic maps indicate that the “ground-surface elevation” of the Project site “is at sea level”).

¹⁸⁹ Exhibit 1, Hagemann comments, p. 16.

¹⁹⁰ DEIR p. 4.6-40.

¹⁹¹ Exhibit 12, excerpt from *Sea-Level Rise for the Coasts of California, Oregon, and Washington: Past, Present, and Future*, p. 5 (2012) (full report available at http://www.nap.edu/catalog.php?record_id=13389).

the city sewer system per day.¹⁹² The Project proposal includes a water treatment plant that will remove contamination from this water and seek a permit to dispose of it back into the bay. (See comments on Project description, above.) The alternative is that this water will be disposed of in the City's sewer system, which is not desirable because of high sewer costs. The preliminary sewer capacity study attached to the DEIR indicates that certain sewer upgrades will be required for this Project if the dewatering discharges to the City sewer will continue.

The DEIR fails to disclose the likelihood that sea level rise will cause an increase in seawater intrusion at the SDCC, requiring increased dewatering and thus increased disposal through either the proposed water treatment plant or the Project's sewer lines. The DEIR notes that the groundwater level beneath the Project site roughly corresponds to the water level in San Diego Bay.¹⁹³ This indicates that as sea levels rise, there will be a corresponding increase in the dewatering required to prevent inundation of the SDCC. Because the Project includes new facilities to address the problem of seawater intrusion, the impacts associated with sea level rise are directly correlated with the impacts that the Project itself will create. The DEIR must not only discuss the impacts associated with treating and disposing of seawater that is contaminated by below-ground hazardous materials, it must also address the foreseeable need to dispose of more and more of this water as sea level rise occurs.

F. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Impacts from Hazards and Hazardous Materials

As discussed in our comments about the environmental baseline, above, the DEIR severely understates the nature and extent of on-site contamination. The DEIR's description of on-site contamination is based on an inadequate Phase I

¹⁹² DEIR pp. 4.5-2, 4.8-4, 4.8-17, Appendix F pp. 2-2, 5-1. It takes 660,000 gallons to fill an Olympic-size swimming pool, so the Convention Center now pumps about two thirds the volume of an Olympic-size swimming pool *per day*. (http://en.wikipedia.org/wiki/Olympic-size_swimming_pool). This volume comprises the vast majority of wastewater that the Convention Center contributes to the sewer system, and it will undoubtedly increase as sea levels continue to rise in upcoming decades. (DEIR Appendix E-1, pp. 3-4 [preliminary Sewer Capacity Study measured wastewater discharges from the existing Convention Center as between 157,00 and 583,000, which presumably included dewatering discharges].)

¹⁹³ DEIR p. 5-26.

ESA.¹⁹⁴ Perhaps the most troubling part of the hazards and hazardous materials section of the DEIR is its suggestion that cleanup activities undertaken to comply with the SDRWQCB's enforcement action against the Campbell Shipyard means that on-site contamination has been eliminated. This is not true. The site's history as a garbage dump, City incinerator, shipbuilding and maintenance yard, and even a diesel tank farm has resulted in widespread soil and groundwater contamination, and the limited cleanup actions that have occurred on the site did nothing to remediate the majority of the site.¹⁹⁵ The SDRWQCB issued a cleanup and abatement order in 1995 because soils, groundwater, and bay sediments at the Project site were extremely contaminated.¹⁹⁶ Although some soils onshore (particularly in the area of a former underground tank and pipeline) were excavated, others were remediated by "capping" contamination in place.¹⁹⁷ Most of the Project site is now paved, and information in the DEIR suggests that even the non-paved park area is nonetheless covered by an impermeable membrane to prevent the release of toxic materials.¹⁹⁸ Construction of the Project will expose this capped contamination throughout the Project site.

Mitigation measures MM-HAZ-1a through 1c are inadequate to address the very real construction-related public health impacts that are likely to occur. First, potential contamination on the Project site is not limited to the triangular area identified in the DEIR, but extends across the entire Project site.¹⁹⁹ The mitigation measure (a contamination study, remediation, and worker protections) must be revised to extend to the entire Project site. Second, as discussed in our comments on the environmental baseline, above, a Phase II ESA must be conducted now, during the EIR process, and not later during the grading-permit phase.

Finally, the DEIR incorrectly concludes that there will be no significant impacts from the transport, use, or disposal of hazardous materials during Project

¹⁹⁴ DEIR Appendix F (although the Phase I ESA is voluminous, the written analysis is only 17 short pages, at pp. ES-1 to 8.1).

¹⁹⁵ See DEIR Appendix E-1, p. 4; Exhibit 1, Hagemann comments.

¹⁹⁶ See http://www.waterboards.ca.gov/sandiego/board_decisions/adopted_orders/2001/2001_0045.pdf

¹⁹⁷ http://www.waterboards.ca.gov/sandiego/water_issues/programs/shipyards_sediment/docs/sediment_cleanup/adt/updates061411/sdgc_supp_ar_part6.pdf (p. 140 of 221 discusses capping); see also DEIR p. 5.4-1 ("upper several layers of fill [on Project site] were likely capped with terrestrial fill imported to the site").

¹⁹⁸ DEIR p. 6-7, Appendix F, p. 5-2.

¹⁹⁹ Hagemann comments, pp. 1-9; DEIR Figure 4.7-1; p. 4.4-13 (it is "expected that there will be toxic hazardous materials such as ash . . . , heavy metals, an petroleum products" in Project site soils).

construction.²⁰⁰ The DEIR fails to note that large areas of contaminated fill will almost certainly need to be trucked away from the Project site for disposal. The Project site is obviously contaminated, and the DEIR requires remediation in the form of soil removal and disposal.²⁰¹ Also, because the fill at the Project site is not suitable for structures, it is foreseeable that large amounts of contaminated fill will need to be removed and replaced in order to construction to occur. (*See* comments on geology and soils, above.) Hazards associated with transporting these materials through the City and disposing of them must be addressed and mitigated in the DEIR and cannot be deferred until later.

Finally, the DEIR does not address the potential for pile driving and other ground-shaking construction activity to cause cracks in, or other degradation of, the habitat-contamination cap in the bay adjacent to the Project site.²⁰² Nor does it address the likelihood that the four-times-weekly barge moorings will disrupt and degrade the cap.²⁰³ The DEIR does not even mention the habitat cap, or the Port's ongoing mandatory monitoring to ensure that no damage occurs to the cap, damage that could result in the release of toxic materials into the bay. These significant errors and omissions must be addressed in a revised and recirculated DEIR.

G. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Hydrology/Water Quality Impacts

The DEIR states that water pumped from the dewatering facilities at the existing Convention Center (400,000 gallons per day) “is transported back into the Bay.”²⁰⁴ This is incorrect. The Preliminary Sewer Capacity Study attached to the DEIR states that:

“ground water siphoned by the dewatering system is discharged to the existing 15-inch Harbor Drive trunk sewer. The volume of ground water discharged to the public sewer varies depending on daily (tidal) and seasonal cycles. The flow rate is metered because the Convention Center must pay sewer fees based on the volume of ground water discharged to the sewer. The daily average volume discharged to the

²⁰⁰ DEIR pp. 4.7-11 to 4.7-12.

²⁰¹ DEIR p. 4.7-1.

²⁰² Hagemann comments, pp. 9-10.

²⁰³ *Ibid.*

²⁰⁴ DEIR p. 4.8-4.

existing 15-inch Harbor Drive trunk sewer is approximately 0.400+ MGD.”²⁰⁵

As noted by Mr. Hagemann, it is unlikely that groundwater pumped from the existing Convention Center can be utilized for landscape irrigation, because it does not meet water quality standards and is likely polluted by historical subsurface hazardous wastes in the soils beneath the Convention Center.²⁰⁶ During site reconnaissance, the Building Superintendent of the Convention Center informed the Port’s consultants that “in 2008 water from their dewatering system had to be redirected from ocean discharge into the City sewer due to threshold exceedances associated with the National Pollutant Elimination Discharge System (NPDES) permit.”²⁰⁷ That water cannot be presumed suitable for landscape irrigation, nor can it be discharged to the bay. The DEIR’s assumptions in this regard are unfounded.²⁰⁸ The DEIR contemplates that the water could be used directly on salt-tolerant plant species, or indirectly after “desalination.”²⁰⁹ Salt is not the only constituent of concern in that water.

Dewatering discharges at the Convention Center are already regulated by the SDRWQCB and have been the subject of prior enforcement actions and civil penalties.²¹⁰ The anticipated construction-related dewatering for this Project must therefore comply with the SDRWQCB’s specific terms and conditions for dewatering discharges at the SDCC, and cannot rely on a general construction permit or a general dewatering permit, as stated in the DEIR.²¹¹

The hydrology and water quality section of the DEIR understates the likelihood that: (1) dewatering will be required during construction, (2) the amount of water pumped will likely be significant; and (3) the pumped groundwater will almost certainly be contaminated. The geology and soils section of the DEIR states:

²⁰⁵ DEIR Appendix I-1, p. 5.

²⁰⁶ Hagemann comments, p. 12.

²⁰⁷ DEIR Appendix F, p. 5-1; *see also* Hagemann comments p. 12 (water is contaminated with nickel, tributyltin, copper, cyanide, hydrogen sulfide, zinc, mercury, and total petroleum hydrocarbons).

²⁰⁸ DEIR p. 4.8-17; *see also ibid.*, Appendix E-1, p. 5 (some of the water would be pumped to the green roof and “dissipated by evapo-transpiration mechanisms” [i.e. plants]).

²⁰⁹ *Ibid.*

²¹⁰ DEIR pp. 5-1 and Appendix A, “Map Findings,” pp. 8-9; Hagemann comments, pp. 6, 12.

²¹¹ DEIR pp. 4.8-7, 4.8-15.

“temporary dewatering to a depth below construction activities is anticipated for building foundations or installation of underground utilities for the Proposed Project. . . . Due to historical contamination on site, it is anticipated that any groundwater pumped during construction would require treatment in accordance with Federal, State, and local laws prior to discharge (see DEIR Section 4.8, ‘Hydrology and Water Quality’). Mitigation is included to ensure such measures are taken to reduce this potential impact to less than significant.”²¹²

However, the hydrology and water quality section of the DEIR nowhere concludes that impacts from construction dewatering will be significant, nor does it require mitigation in the form of water treatment. It states that dewatering will only be needed for “trenching associated with utility lines,” and that “the [general construction] NPDES permit covers small amounts of dewatering if excavation or construction activities prove that dewatering is needed.”²¹³ The true scope of foreseeable dewatering must be addressed, and mitigation must be put in place to address the impacts of construction-related dewatering on wastewater systems and public health.

It is likely that groundwater pumped from the Project site during construction dewatering will need to be discharged into the City’s sewer system, similar to the requirements for ongoing dewatering at the Convention Center. The potential impacts of this activity must be addressed and mitigated. For example, the Preliminary Sewer Capacity Study shows that the existing sewer trunkline on Harbor Drive, which serves the Project site, already exceeds City standards for acceptable sewer capacities.²¹⁴ Apparently sewer upgrades will be required before Project construction can begin, and the DEIR must address this.

The Expansion Project will be placed over an existing storm drain, and the DEIR anticipates relocating this drain and constructing a new outfall into the bay.²¹⁵ Figure 4.13-1 shows the proposed utility realignment for the Project (outfall

²¹² DEIR pp. 4.5-9 to 4.5-10.

²¹³ DEIR p. 4.8-15; Hagemann comments p. 13.

²¹⁴ DEIR Appendix E-1, pp. 4-5 (City’s maximum flow depth ratio for sewer lines is 0.5; the maximum existing Convention Center discharges were measured at 0.8, and average flows measured at 0.68); Hagemann comments p. 13.

²¹⁵ DEIR p. 4.8-20.

located at point labeled “hydrodynamic separator”). The proposed location of the new outfall, however, is immediately adjacent to the eelgrass-habitat cap offshore of the Project site.²¹⁶ A new stormwater outfall will have negative impacts on the eelgrass bed and the habitat cap.²¹⁷ Existing outfalls are already subject to monitoring and water quality testing in connection with the health of the eelgrass bed and associated species.²¹⁸ It is unlikely that the SDRWQCB will approve a new outfall so close to this habitat area, and therefore this proposal appears infeasible.

The proposed stormwater measures for the Project do not consider the likelihood that stormwater leaving the Project site will contain hazardous materials. Mr. Hagemann concludes that the proposed SWPPP and BMPs will not be effective in mitigating contaminant discharge in stormwater, because the DEIR does not indicate that the SWPPP and BMP’s will be developed to address this hazard.²¹⁹

The DEIR acknowledges that the Project site is within a County-designated high-risk area for tsunamis, but concludes that there is a low probability of damage or injury from storm surges, seiches, or tsunamis, because San Diego Bay is buffered from the Pacific Ocean by Coronado, and is located 10 feet above mean sea level.²²⁰ Later, the DEIR states that a tsunami or seiche would “likely only result in sheet flow around the Project,” and that “damage would likely be limited to ground floor water damage.” This is an inadequate analysis, particularly given the foreseeable effects of sea level rise (*See* comments on GHG emissions, above). The DEIR gives only cursory consideration to this environmental hazard.

²¹⁶ Compare DEIR Figure 4.3-2 (showing eelgrass bed) with Figure 4.8-3 (showing “Option 2, Alternative New Outfall”).

²¹⁷ Hagemann comments pp. 10-11.

²¹⁸ *Ibid.*; <http://books.google.com/books?id=jVPW5tyFFBUC&pg=PA131&lpg=PA131&dq=SDRWQCB+CAO+95-21&source=bl&ots=h7qS4UkU51&sig=s7ZTXA18DKTRm56TomLJ-U0Rib8&hl=en&sa=X&ei=bVPRT7jIEIfg2AXStJ2ZDw&ved=0CDsQ6AEwAA#v=onepage&q=SDRWQCB%20CAO%2095-21&f=false>

²¹⁹ Hagemann comments p. 11, citing DEIR pp. 4.3-14, 4.5-13.

²²⁰ DEIR p. 4.8-5.

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H. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Land Use Impacts

The DEIR makes broad conclusions that the Project will be consistent with the planning goals of the PMP, but in many ways this is incorrect. For example, the DEIR concludes that the Project would be consistent with PMP Goal VII, which states that views “should be enhanced” and artworks should be promoted. The DEIR concludes that “no views would be disrupted” and that the Project “would not exclude the future placement of public art.”²²¹ In fact, the Project will remove existing public artworks and will certainly disrupt views. (See comments on aesthetic impacts, above.) The DEIR also concludes that the Project would be consistent with PMP Goal IX, which strives to insure physical access to the Bay by providing “windows to the water.” The DEIR states that the Expansion Project “would create physical access to the Bay and windows to the water,” primarily by providing a rooftop park.²²² This ignores the fact that the Project will remove existing parks and promenades that are now on ground-level and are more accessible to the public.

Contrary to the DEIR’s conclusions, the Project as proposed would also conflict with the Coastal Act. For example, “maximum access” to the Bay is being reduced, not provided, due to the elimination of onshore parks, the replacement of ground-level parks with less accessible rooftop parks, and the reduction in public parking. Also, there is no evidence that the hotel project intends to provide “lower cost visitor recreational facilities.”²²³

The Project as proposed would not conform to a number of local and regional plans. It would be inconsistent with the City’s Downtown Community Plan because it would not “improve physical and visual access to the water across Harbor Drive and the Convention Center.”²²⁴ The Project would further block views, constrict access, and reduce parking. Moreover, funding for the pedestrian bridge is unknown, therefore this Project feature is not assured.

The Project would be inconsistent with the South Embarcadero Urban Design and Signage Guidelines, and the South Embarcadero Public Access Program,

²²¹ DEIR pp. 4.9-16 to 4.9-17.

²²² DEIR p. 4.9-17.

²²³ See DEIR pp. 4.9-21, 4.9-22.

²²⁴ DEIR p. 4.9-31.

because it would diminish the visual and physical corridor that links the Ballpark district to the waterfront, remove public park space and relocate it to a less accessible area farther removed from the water, remove public art without providing for any definite replacement, reduce parking, and relocate public bathrooms from the waterfront to the Convention Center rooftop/hotel lobby.²²⁵ DEIR Appendix B-3 does not show the existing map of public-access routes designated in the South Embarcadero Public Access Program, so it is impossible for the reader to understand the context for the proposed changes to that map. These changes should be clearly disclosed and depicted.

The SDCC Public Access Program will also be amended. The SDCC Public Access Program was put in place in 1995 to *designate shoreline access* required as a result of the Phase II Convention Center expansion.²²⁶ The Land Use and Planning section of the DEIR, however, does not even mention the SDCC Public Access Program, or explain why amendments to that program—which will undoubtedly reduce previously mandated shoreline access—are appropriate. DEIR Appendix B-2 does not indicate what changes are proposed to the existing SDCC Public Access Program, but instead provides completely new proposed language. The Project’s inconsistencies with the existing SDCC Public Access Program must be addressed, and the proposed changes must be clearly disclosed and depicted.

Finally, it is difficult to imagine how pedestrian, bicycle, and vehicular access to the promenade and waterfront areas would be maintained during Project construction.²²⁷ The aesthetics, noise, and traffic sections of the DEIR all anticipate screens, fences, and shielding of the Project site.²²⁸ If access were provided via Park Boulevard within the Project site, there would be increased air quality and human health impacts associated with the disturbance of contaminated soil and construction-related diesel and other TAC emissions. The DEIR’s impact conclusion is not supported by any concrete explanation of how the 30-month period of Project construction would provide for continued access to the Bay.

²²⁵ DEIR pp. 4.9-32 to 4.9-33.

²²⁶ DEIR p. 3-19.

²²⁷ DEIR p. 4.9-8.

²²⁸ DEIR pp. 4.10-20, 4.12-39 (“all active construction areas would be closed to the public”).
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I. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Impacts from Project-Related Noise and Vibration

It does not appear that the noise/vibration analysis for construction-related impacts took into account the use of a tugboat that will regularly tow a construction barge to and from the site.²²⁹ This noise source should be incorporated into a revised noise analysis.

The DEIR states that groundborne vibration from pile driving is expected to range from 0.08 to 0.19 PPV inches per second at a distance of 100 feet.²³⁰ This level of vibration would be enough to cause damage to non-standard and historic buildings.²³¹ The DEIR also notes that groundborne vibration attenuates rapidly over distance, but that some soil types transmit vibration more efficiently than others.²³² Pile driving for this Project will occur very close to the water, likely within 100 feet of the offshore eelgrass-habitat cap put in place to contain toxic sediments.²³³ Due to the high groundwater table at the Project site, it is likely that vibrations will be more efficiently transmitted and will not attenuate at the rates predicted in the DEIR. Potentially significant impacts could occur if pile driving activities fracture or otherwise disturb the remediation cap, causing contamination to leak directly into the eelgrass habitat and the bay.²³⁴ The DEIR does not even disclose the existence of the remediation cap, let alone analyze the impacts that Project construction may have on the cap. These impacts must be addressed and mitigated in the DEIR.

J. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Impacts to Public Services and Recreation

The Project's likelihood of causing deterioration of nearby park facilities is not adequately addressed. The Project will remove 4.5 acres of shorefront park

²²⁹ DEIR p. 4.10-12 (noise analysis considered equipment such as loaders, dozers, trucks, etc.)

²³⁰ DEIR p. 4.10-21.

²³¹ DEIR p. 4.10-16.

²³² DEIR p. 4.10-5.

²³³ See DEIR Figures 4.1-15 and 4.1-16 (showing location of new building in relation to buoys that mark the boundaries of the remediation cap).

²³⁴ Hagemann comments, p. 10.

situated near the Embarcadero Marina Park South, and replace it with a 5-acre rooftop park that can only be accessed by elevators inside the Convention Center or a quarter-mile long ascending walkway.²³⁵ The DEIR does not describe how shoreline users will even know that the rooftop park is open to the public. Moreover, the City intends to allow the rooftop park to be used for special private events and concerts that will exclude the general public.²³⁶ It is not enough to replace existing open park-space with rooftop benches and vegetation. (*See also* comments on hydrology and water quality, above, which question the proposed water source for park irrigation.) Impacts on recreation caused by reducing existing park space must be addressed and mitigated, perhaps by requiring public access signage to the rooftop park,²³⁷ providing exterior elevators, strictly limiting or prohibiting private events, and retaining public restrooms on the waterfront rather than relocating them to the roof.

Particularly because of the reduction in shoreline park space, it is foreseeable that the increase in Convention Center attendees, new hotel guests, and Convention Center and hotel workers, as well as those visiting the Project's new retail shops along the shoreline, will choose to visit the adjacent Embarcadero Marina Park South. The DEIR simply states that the "relatively small addition of visitors" and "expected light use" of that park would not lead to substantial deterioration of park facilities.²³⁸ This is an unfounded statement. During the construction phase alone, there will be over 1,000 construction workers on site for over two years, and there are very few places nearby for them to take breaks and enjoy their lunch, other than the Embarcadero Marina Park South.²³⁹ The DEIR does not adequately address the potential degradation that will occur during both the construction and operation phases of the Project. These impacts must be adequately analyzed and mitigated.

²³⁵ DEIR p. 4.11-16.

²³⁶ DEIR pp. 4.10-19 to 4.10-20 (park could be used for "large concerts associated with corporate incentive type groups," receptions, outdoor catered banquets, chef's tasting tables, and photo shoots).

²³⁷ *See e.g.* DEIR p. 4.12-42 (Project mitigation will involved increased signage related to public transit).

²³⁸ DEIR p. 4.11-15.

²³⁹ DEIR p. 6-2.

K. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Traffic and Parking Impacts

As noted in our comments on the environmental baseline, above, the DEIR underestimates traffic and parking impacts by inaccurately describing the existing setting. Even using the existing setting described in the DEIR, there will be 48 days per year (4 days per month) when traffic conditions will be significantly degraded and will trigger mitigation in the form of an Event Transportation Management Plan (ETMP).²⁴⁰ The fact that the Project will cause downtown San Diego to experience extreme traffic delays an average of one day per week is not disclosed in the DEIR. This is critical information that the decisionmakers and the public should be made aware of during the environmental review process. As Mr. Smith notes, the DEIR's methodology and analysis of traffic impacts "is far from transparent."²⁴¹ The DEIR tries to downplay the significant traffic problems that the Project will cause by stating that bad traffic days will not occur "85 percent of the year."²⁴² Focusing on statistics detracts from the fact that bad traffic days will occur 4 times per month. It also misleads the public and decision makers, because traffic impacts caused by the next-largest events may not be much different than the largest events identified as causing bad traffic days 4 times per month.²⁴³

Although parking impacts have been removed from the CEQA Guidelines as a stand-alone environmental issue, the Project's effects on parking availability will have a direct effect on public access to the waterfront, and therefore will affect the Project's compliance with the Coastal Act and the land use policies in the PMP. Therefore parking impacts are linked to environmental impacts that must be addressed and mitigated under CEQA.²⁴⁴ Even though the Project is expected to increase Convention Center-attendee traffic trips by over 50 percent, no new parking is proposed for the Project. Furthermore, the Project will remove an existing parking lot that currently provides 278 employee parking spaces.²⁴⁵ The DEIR's threshold of significance for purposes of parking impacts is that a significant

²⁴⁰ Exhibit 2, Smith comments, pp. 4-5.

²⁴¹ *Ibid.* p. 4.

²⁴² *Ibid.* p. 7.

²⁴³ *Ibid.*

²⁴⁴ DEIR pp. 4.12-20, 4.12-26 to 4.12-27 (acknowledging that parking impacts are addressed for public access purposes).

²⁴⁵ DEIR pp. 4.12-22, 4.12-44.

impact will occur any time the Project exceeds available parking spaces.²⁴⁶ This threshold does not give any consideration to the availability of non-Project public parking. Under the DEIR's analysis, there would be no significant impact even if only *one* parking spot is allocated to public-access parking. The DEIR's significance threshold is unreasonable and inappropriate for purposes of considering the Project's impacts on public access.

Mr. Smith reviewed the DEIR and the technical traffic and parking appendices, and concluded that the DEIR's analysis understates parking impacts, because it considers only the "absolute space total" of the parking supply rather than its practical capacity.²⁴⁷ A conventional parking analysis methodology assumes that only 90 percent of theoretically available parking spaces can be occupied, due to the temporary use of some parking spaces for dumpsters and building-supply storage, large or mis-parked vehicles that take up two spaces, special parking spaces such as handicapped spaces that are not available for general public parking, and truck unloading, etc.²⁴⁸ Had this reasonable assumption been used in the DEIR's parking analysis, Mr. Smith concludes, "the DEIR would have found the Project's parking impacts to be significantly greater than disclosed."²⁴⁹ Parking deficits for Project-related vehicles, which again does not even consider general public parking, would increase from the 224-space deficit predicted in the DEIR, to a 523-space deficit, between the hours of 8 am and 4 pm.²⁵⁰ Using the 90-percent assumption suggested by Mr. Smith provides a better reflection of reality, and a better estimate of parking impacts. The parking deficit calculations in the DEIR must be revised to reflect this.

Mr. Smith concludes that the proposed parking mitigation measure to implement a Parking Management Plan whenever Convention Center events exceed 13,800 attendees is inadequate. First, significant parking impacts will occur whenever events exceed 12,100 attendees, not 13,800 attendees.²⁵¹ Second, the proposal that Parking Management Plans will include leasing other parking areas that are close to the Project site will simply displace other parkers in an area where

²⁴⁶ DEIR p. 4.12-45.

²⁴⁷ Exhibit 2, Smith comments, p. 5.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ Smith comments, p. 6 (events with 13,800 attendees will create a 666-space deficit).
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coastal access is a concern.²⁵² Third, the proposal to use valet parking only in the daytime hours during large events is impractical, because valet parkers who work day shifts normally do so as a full-time job, not a part-time job.²⁵³ Mr. Smith concludes that the most reasonable mitigation measure to offset public parking impacts “is to construct an additional 600+ space parking structure in the area.”²⁵⁴ The DEIR should adopt revised parking mitigation measures that actually mitigate parking impacts, rather than relying on the use of Parking Management Plans that use impractical approaches that are not expected to substantially reduce impacts.

Similarly, Mr. Smith concludes that the DEIR’s reliance on “Event Transportation Management Plans” gives the impression that the Port is trying its best to minimize traffic impacts, when in fact the elements of these plans are “vague and insubstantive,” and include items “that work at evident cross purposes” with other mitigation measures.²⁵⁵ For example, prohibiting curb parking and temporarily closing certain streets during large events will likely only intensify parking and traffic problems, respectively.²⁵⁶ Where mitigation measures would, themselves, cause significant environmental impacts, CEQA requires an evaluation of those secondary (indirect) impacts.²⁵⁷

Finally, the DEIR fails to disclose feasible mitigation measures for significant impacts to the State Highway System. Even though the DEIR proposes to contribute fair-share mitigation payments to Caltrans for improvements that will help mitigate the Project’s impacts on state-highway traffic, there is no evidence that Caltrans has any actual planned improvement projects for the highway segments that will be affected by the Project.²⁵⁸ The DEIR must be revised to disclose what specific actions Caltrans could take to mitigate these Project impacts.

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ CEQA Guidelines § 15064(d).

²⁵⁸ Smith comments, p. 7.

L. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Impacts to Utilities

Construction dewatering will need to utilize the existing sewer system, which already exceeds maximum capacity due to ongoing dewatering discharges from the existing Convention Center. (See hydrology and water quality comments, above). The DEIR must be revised to discuss how this problem will be remedied (i.e. by constructing sewer upgrades and water treatment facilities prior to undertaking other construction, using water trucks to dispose of dewatering water, etc.)

The Utilities section of the DEIR does not disclose that the proposed Project includes a new water treatment plant to remediate the 0.4 million gallons per day of groundwater that is now pumped through dewatering facilities at the Convention Center. (See hydrology and water quality comments, above.) The potential environmental impacts of constructing and operating this new utility system must be addressed and mitigated, including impacts related to the disposal of treated waste.

There is a large discrepancy between the estimated amount of wastewater that will be generated by the Project and the Project's total estimated water demand. The sewer study predicts that the Project will generate 0.429 million gallons per day ("mgd") of wastewater, which is 429,000 gallons per day ("gpd").²⁵⁹ Within this figure, the Expansion Project alone will generate 0.221 mgd (221,000 gpd). These estimates were generated by the Project architects in conjunction with mechanical engineers, and they do not include wastewater generated by the existing Convention Center—including wastewater from dewatering—or the existing Hilton hotel.²⁶⁰ The Water Supply Assessment ("WSA") for the Project, however, estimates that the Project will only demand 97,322 gpd.²⁶¹ This estimate was based on rough comparisons to the existing Convention Center and hotel.²⁶² The numbers do not add up: how can the Project's ratio of water received to wastewater produced be 1:4.4? At least one of these calculations is terribly incorrect. Correcting the error may lead to new conclusions regarding other Project

²⁵⁹ DEIR p. 4.13-13.

²⁶⁰ DEIR Appendix I-1, pp. 6-7.

²⁶¹ DEIR p. 4.13-14.

²⁶² DEIR Appendix I-2, pp. 6-7.

impacts, for instance the type of sewer line upgrades needed to serve the Project,²⁶³ or the availability of water supplies to serve the Project.²⁶⁴

Even assuming that the DEIR's water demand calculation is accurate and is not underestimated, the Project will demand 7.6% of the entire amount of water set aside for unexpected developments throughout San Diego County.²⁶⁵ This is a significant amount of water, and yet the WSA prepared for the Project does not even discuss the fact that the Project will rely on water that has been set aside for unanticipated growth.²⁶⁶ The information presented in the DEIR regarding the availability of water for unplanned projects, such as this Project, is simply not verified by the WSA, and should be further explained and supported by documentation and written assurances from the San Diego Water Authority that water is available.

The DEIR's discussion of the solid waste that will be generated by Project construction must address the availability and capacity of suitable disposal facilities for contaminated soil and groundwater that will be removed from the site.²⁶⁷ (*See* comments on soils and geology, hazards and hazardous materials, and hydrology and water quality, above).

The DEIR notes that the existing on-site sewer line will be relocated, but it does not address the problems identified in the sewer capacity study, including the likelihood that a new sewer pump station will be needed in connection with the relocated sewer line.²⁶⁸ Because the utilities section of the DEIR indicates that the sewer line will be relocated, the DEIR must address impacts associated with the construction of a new sewer pump station.²⁶⁹

The potential impacts of rerouting stormwater to a new outfall that is immediately adjacent to an existing eelgrass bed must also be addressed and

²⁶³ DEIR pp. 3-16, 6-5, 6-6, Appendix I-1, p. 13.

²⁶⁴ DEIR p. 4.13-15.

²⁶⁵ DEIR pp. 4.13-14 to 4.13-15 (Project will require 109 acre-feet annually ("afa") and there are 1,433 afa available for "accelerated growth" through 2035).

²⁶⁶ DEIR Appendix I-2.

²⁶⁷ DEIR pp. 4.13-15 to 4.13-16.

²⁶⁸ DEIR Appendix I-1, p. 8.

²⁶⁹ DEIR p. 4.13-18, Figure 4.13-1.

properly mitigated.²⁷⁰ (*See* hydrology and water quality comments, above.) If the new stormwater outfall is infeasible due to impacts on the existing eelgrass habitat and contamination cap, the DEIR should earnestly discuss whether other feasible options exist for relocating the existing stormwater system on the Project site.

M. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Potentially Significant Cumulative Impacts

The DEIR does not address potentially significant cumulative impacts from emissions of diesel particulate matter and other toxic air contaminants (“TACs”), such as carbon monoxide (“CO”).²⁷¹ The DEIR notes that air emissions from other projects “could combine with emissions associated with the Proposed Project to expose nearby sensitive receptors to substantial CO or TAC concentrations,” but it does not go on to analyze whether impacts will be significant or whether mitigation is available to reduce their severity.²⁷² The New Children’s Museum and outdoor children’s park is located near the Project site, just north of Harbor Drive near 1st Avenue and Front Street. In addition to the Project there are other projects located near the children’s park and museum that will likely be constructed on an overlapping timeline with the Project.²⁷³ The Project alone is very close to the threshold for significant CO emissions, and as discussed above, the air emissions analysis did not include truck trips and other construction-related emissions that will be required for removing contaminated fill and constructing a new wastewater treatment plant, fire station, sewer pump station, and water transportation center. The Port has not conducted any investigation of the cumulative potential for CO hotspots or other dangerous TAC concentrations to affect nearby sensitive receptors and the general public. A health risk assessment that includes emissions dispersion modeling should be conducted as part of the EIR process, and mitigation measures incorporated as needed.

As discussed in our comments about the Project description, above, the Project will include the construction of a new fire station, which is listed in the cumulative impacts section of the DEIR as project number 31, a City redevelopment

²⁷⁰ DEIR p. 4.13-19.

²⁷¹ DEIR pp. 5-14 to 5-15.

²⁷² *Ibid.*

²⁷³ DEIR Figure 5-1, pp. 5-2, 5-5 (Marriott projects); *see also* pp. 5-3, 5-7 through 5-11 (projects labeled on Figure 5-1 as numbers 1, 18, 30, 37, and 48).

agency project.²⁷⁴ The City's redevelopment agency has been dissolved, and the City now proposes to construct the fire station as part of this Project. The fire station is therefore not a cumulative project. Not even the cumulative impacts section of the DEIR addresses the impacts of constructing the fire station as part of the Project.

VII. THE DEIR'S ALTERNATIVES ANALYSIS IS INADEQUATE

Chapter 7 of the DEIR contains the Port's alternatives analysis. It states that eight alternatives were initially considered, but only the "No Project" alternative and three others were carried forward for analysis.²⁷⁵ It describes how four alternatives that involved different locations for the Expansion Project were initially considered "to respond to concerns about expanding development along the San Diego Bay and the existing promenade," but that all of these non-contiguous alternatives were rejected and not further analyzed. Accordingly, under all of the Project alternatives analyzed in the EIR (other than the No Project alternative), the Expansion Project will be located on the same site as the proposed site analyzed in the DEIR.

The public's concerns about building the Expansion Project on the proposed site go back several years. When the Expansion Project was first proposed, it received general praise from business owners and convention attendees, but it also received critical feedback from San Diego residents. Their concerns ranged from the cost of removing toxic materials on the proposed site, to the "walling off" of the waterfront (reduced access to public tidelands, poorer views, and less shoreline open space).²⁷⁶ The commenters urged the City not to pursue the Expansion Project, or to pursue a non-contiguous site not located on public tidelands.²⁷⁷ One commenter wrote several letters urging the City to pursue the Expansion Project "on a site off the public tidelands," and expressed concern that the Mayor's Task Force was "actively trying to skew the public discussion in order to promote the project, instead of carefully examining the pros and cons of the proposed concept and project alternatives."²⁷⁸ The commenter complained that non-contiguous sites were given

²⁷⁴ DEIR Figure 5-1.

²⁷⁵ DEIR p. 7-4.

²⁷⁶ Exhibit 13, Public Comments and Letters received by the Task Force, *available at* <http://www.conventioncentertaskforce.org/MCTFdocs-letters.shtml>.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.* (comments of Don Wood).

only “a summary consideration and a cursory rejection by the design team,” and argued that non-contiguous sites should be “fully analyze[d]” during the EIR process.²⁷⁹

In 2011, the San Diego Chargers developed a proposal for a football stadium project across the street from the Convention Center, a project that could potentially be combined with the Expansion Project.²⁸⁰ The Chargers proposed that the Expansion Project could be constructed on a site that is close to, but not contiguous to, the Convention Center.²⁸¹ The Mayor and other City spokespersons immediately rejected this option, noting that a non-contiguous Expansion Project had already been ruled out.²⁸² The City indicated that hoteliers and convention center visitors preferred a contiguous site.²⁸³ The Mayor stated that “[t]he Convention Center has to be contiguous space. It can’t be two places, separated by six blocks or 100 yards or 1,000 yards. It has to be the same building.”²⁸⁴ Based on the City’s response, public commenters noted that the City was “dead set” against a non-contiguous Expansion Project.²⁸⁵

On January 22, 2012, the San Diego U-T newspaper published two editorials calling for the Expansion Project to be built on a site that is nearby but not contiguous to the Convention Center.²⁸⁶ The U-T claimed that its proposal would increase public access to the waterfront and would be less likely to receive objections from the California Coastal Commission, whereas the City’s proposed site would limit public access and interfere with views.²⁸⁷ The Mayor, a City Councilman, and the City’s special assistant for the Expansion Project rejected the proposal, noting that hoteliers and convention center experts preferred a contiguous Expansion Project.²⁸⁸

Simply because the City prefers a particular site and refuses to entertain the idea that a different site might be environmentally superior does not mean that the

²⁷⁹ *Ibid.*

²⁸⁰ Exhibit 14, News articles describing Chargers’ proposal and City’s response.

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *Ibid.* (statement by Mayor Sanders).

²⁸⁵ *Ibid.*

²⁸⁶ Exhibit 15, News articles describing San Diego U-T’s proposal and City’s response.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

DEIR can avoid analyzing a reasonable range of alternatives, including off-site alternatives. The DEIR provides three reasons why all of the off-site, non-contiguous Project alternatives were rejected, but these reasons are inadequate under CEQA.

A. Incompatibility with Project Objectives

The Port's first reason for rejecting the non-contiguous site alternatives is that they would not meet the Project objectives:

“Objective #1 would not be met because this alternative would not result in an expanded SDCC contiguous to the existing SDCC, which would allow larger events. Objective #2 would not be fully met because the SDCC expansion would no longer be adjacent to a hotel expansion. Objective #4 would not be fully met because the SDCC expansion would not maximize the use of existing infrastructure and services that exist at the Proposed Project site. Lastly, Objective #5 would not be fully met because this alternative would not be as compatible with the surrounding uses when compared to the Proposed Project.”²⁸⁹

The Port's explanation is slightly different for each of the four non-contiguous alternatives. For the “Port Site” and “Harbor Peninsula” alternatives, the DEIR explains that Objective #5 would not be met because it would require removing existing infrastructure, although no such explanation is given for the Tailgate Park alternative. The “Adjacent Underground” site does not conflict with Objectives #2 and #4. Otherwise, the Port's quoted explanation above is identical for each of the four rejected alternatives.

As discussed in our comments about the DEIR's Project objectives, above, the Project objectives are overly narrow, allowing for consideration of only one specific Project design and location.²⁹⁰ This is made clear in the alternatives analysis, which finds that non-contiguous Project alternatives would not meet the Project objectives mainly *because of* their location. As we explained earlier, the Port lacks substantial evidence to show that a contiguous expansion is the only Project alternative that would allow for larger events at the Convention Center. The

²⁸⁹ DEIR pp. 7-5 to 7-7.

²⁹⁰ DEIR p. ES-3.

alternatives analysis is therefore artificially and intentionally limited. The DEIR also provides no explanation for why the Expansion Project must be adjacent to the hotel expansion. It does not explain why off-site alternatives would be less preferable from an “infrastructure and services” standpoint, particularly given the challenges at the proposed site with respect to inadequate parking, inadequate sewer lines, stormwater disposal challenges, seawater intrusion, etc. Finally, the Port does not explain why a non-contiguous Expansion Project would “not be as compatible with the surrounding uses when compared to the Proposed Project,” unless this is a fancy way of saying that the land use most “compatible” with a Convention Center expansion is the existing Convention Center. The Project objectives are self-serving and redundant, and they nullify the entire purpose of an alternatives analysis. This is not a proper reason to reject off-site alternatives.

B. Infeasibility

The Port’s second reason for rejecting non-contiguous alternatives is that none of the four non-contiguous sites that the Port considered are “feasible”:

Economic feasibility research conducted by the Mayor’s Task Force and AECOM in the 2010 economic study indicates that for a convention center expansion to be feasible, the expansion must be contiguous with existing facilities. If the expansion is not, the AECOM study indicates that convention planners will seek alternative locations to support large conventions. Many of these large conventions would be primary events, which have significant economic impact on the region.²⁹¹

The EIR also provides a secondary reason why each of the four alternatives is infeasible: (1) the Tailgate Park site overlays a fault line that “could put structures and people at risk”; (2) excavating large quantities of earth at the Adjacent Underground site may be cost prohibitive and/or technically infeasible, and the site is already leased to the Hilton; (3) costs associated with removing portions of the Tenth Avenue Marine Terminal site could be prohibitive, and the Port has committed to maintaining existing maritime activities there; and (4) “removing all of the Embarcadero Marina Park South may be politically infeasible.”

²⁹¹ DEIR pp. 7-5 to 7-7.
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A lead agency must determine whether a project alternative is “feasible” by determining whether it is “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.”²⁹² Relevant factors include site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries, whether the project proponent already owns the site, and whether the project proponent can acquire, control, or have access to the site if it does not own it.²⁹³ The lead agency must have sufficient information to support its finding that an alternative is infeasible.²⁹⁴

As discussed above, the Port does not have sufficient information to support its primary conclusion that the Project must be contiguous in order to be feasible. The Port also does not have sufficient information to support its secondary conclusions. The conclusion that building the Expansion Project on an active seismic area “could put structures and people at risk” is ironic, given that the Port adopts the conclusion from *Ballona Wetlands* that risks to project structures and project users is beyond the scope of CEQA. It also rings hollow because the currently proposed site is located on unbuildable, extremely liquefiable soils that are severely contaminated, subject to seawater intrusion, and will likely be inundated by sea level rise within decades. Moreover, the City’s initial architectural consultants that undertook their own alternatives analysis concluded that the seismic risks at the Tailgate Park site could be overcome.²⁹⁵

The Port’s secondary reasons for rejecting the Adjacent Underground site seem like a “belt and suspenders” approach that lacks any actual analysis. Its conclusion about the cost of removing materials from the Tenth Avenue Marine Terminal fails to consider the costs of removing contamination, relocating and expanding utility systems, and providing a water treatment plant at the currently proposed site. Moreover, the Port’s prior resolution to maintain maritime uses at the Marine Terminal is not the type of regulatory hurdle that the Port itself cannot

²⁹² CEQA Guidelines § 15364; Pub. Resources Code § 21061.1.

²⁹³ CEQA Guidelines § 15126.6(f)(1); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576.

²⁹⁴ *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1355; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 737 (no evidence in record supported claim that alternative was economically infeasible); Pub. Resources Code § 21081.

²⁹⁵ Exhibit 7, *Final Report of the Mayors Citizens Task Force on the San Diego Convention Center Project* (Sept. 2009).

overcome, and the Port did not explore whether maritime uses could still be maintained on part of the site. Finally, there is no explanation for why the South Embarcadero site would be politically infeasible as compared to the currently proposed site. Both options would involve the removal of shorefront park land.

“[T]he circumstances that led the applicant in the planning stage to select the project for which approval is sought and to reject alternatives cannot be determinative of their feasibility.”²⁹⁶ A lead agency cannot avoid considering an alternative “simply because, prior to commencing CEQA review, an applicant made substantial investments in the hope of gaining approval for a particular alternative.”²⁹⁷ That is what occurred here. The City undertook its own alternatives analysis, outside the purview of CEQA, and rejected a number of potential non-contiguous alternative sites. The Port cannot rely on the City’s conclusions without conducting its own reasoned analysis, supported by substantial evidence. The public’s concern that off-site alternatives were given “summary consideration and a cursory rejection” by the City is reason enough to provide a thorough explanation for why those sites were rejected. The City initially considered nine alternatives for the Expansion Project, and the DEIR does not explain why only four of those were considered when preparing the DEIR. Without a better explanation of the Port’s reasoning, its conclusion that there is no feasible off-site alternative is unsubstantiated.

C. Not Environmentally Superior

The Port’s third explanation is that none of the non-contiguous alternatives would “reduce any significant and unavoidable impacts when compared with the Proposed Project”:

- (1) Tailgate Park site may have increased traffic impacts in the downtown area, particularly when concurrent PETCO Park events are in session, and an earthquake fault runs through the site;
- (2) Adjacent Underground site could increase impacts to air quality, greenhouse

²⁹⁶ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736.

²⁹⁷ *Id.*
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gases, cultural resources, geology/soils, noise, and utilities; (3) Port Site may have greater impacts depending on where the hotel was relocated, and would not be consistent with Port's land use commitment to maintain maritime activities there; and (4) Harbor Peninsula site would have similar impacts to the proposed Project and may have greater impacts depending on where the hotel would be located.²⁹⁸

An EIR does not need to consider project alternatives that would not reduce or eliminate the environmental impacts of a proposed project.²⁹⁹ The problem with the DEIR is that it does not focus on reducing the impacts from the proposed Project, it only provides a very preliminary opinion about the potential impacts associated with alternative sites. Building the Expansion Project at an off-site location would: (1) reduce the Project's impacts on views and therefore be more compatible with the PMP and Coastal Act; (2) reduce the need to excavate soil and to make the site buildable, and thus reduce public health impacts from air pollution and exposure to contamination; (3) avoid threatening the viability of the large eelgrass bed or its underlying contamination cap; (4) prevent the removal of a shoreline park and thus be more compatible with local and regional plans; (5) provide better opportunities to address parking limitations and associated impacts on public access; (6) potentially utilize existing sewer and stormwater infrastructure and reduce the need to relocate and upgrade utilities; (7) avoid the substantial foreseeable risk of inundation due to sea level rise; (8) not require groundwater dewatering and thus avoid impacts related to groundwater contamination and sewer system capacity.³⁰⁰

Rather than acknowledging these significant environmental considerations, the DEIR provides a vague description of potential impacts from other alternative sites, some of which have more to do with the chosen hotel location, and none of which are thoroughly explained. Of course, an alternative project site is never perfect, but the DEIR does not adequately support its conclusion that such sites will not reduce or eliminate one or more of the environmental impacts of the proposed Project. The alternatives analysis must be revised in order to give thorough consideration to off-site alternatives.

²⁹⁸ DEIR pp. 7-5 to 7-7.

²⁹⁹ *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089.

³⁰⁰ *Ibid.* pp. ES-39 to ES-40,
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VIII. THE DEIR MUST BE REVISED AND RECIRCULATED FOR PUBLIC REVIEW AND COMMENT

CEQA requires recirculation of an DEIR for public review and comment when significant new information is added to the DEIR following public review, but before certification.³⁰¹ The CEQA Guidelines clarify that new information is significant if “the DEIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the Project or a feasible way to mitigate or avoid such an effect.”³⁰²

The purpose of recirculation is to give the public and other agencies an opportunity to evaluate the new data and the validity of conclusions drawn from it.³⁰³ As discussed above: (1) not all Project components are disclosed and analyzed in the DEIR; (2) the Project will result in significant environmental impacts that are not analyzed in the DEIR; (3) further study—for example a Phase II ESA subsurface investigation—is required in order to adequately identify the existing conditions on the ground, determine appropriate mitigation, and analyze and mitigate the environmental impacts that implementing that mitigation will create—such as impacts from hauling contaminated soil offsite; and (4) mitigation measures must be revised. These changes must be addressed in a revised DEIR that is circulated for public review and comment.

IX. CONCLUSION

The Project presents significant environmental issues that must be addressed prior to Project approval. The Port has improperly accepted the role of CEQA lead agency for the Expansion Project. The Project objectives are overly narrow. The DEIR’s Project description is improperly truncated. The DEIR fails to adequately establish the existing setting upon which to measure impacts related to biological resources, soils and contamination, and traffic and parking. The DEIR also fails to include an adequate analysis of and mitigation measures for the Project’s potentially significant impacts. Finally, the DEIR’s alternatives analysis is

³⁰¹ *Id.* § 21092.1.

³⁰² CEQA Guidelines § 15088.5.

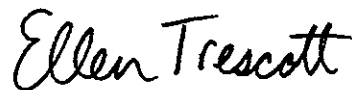
³⁰³ *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (1981) 122 CalApp3d 813, 822. 2572-010j

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inadequate. The DEIR's conclusions lack substantial evidence as required by CEQA. The DEIR must be revised and recirculated.

Due to informational gaps in the DEIR, the complex issues associated with the proposed Project site, and the short public comment period, we were unable to obtain all of the information we needed to fully understand the existing environmental setting and the potential for significant Project impacts. We reserve the right to raise further issues during the EIR process, and to adopt the concerns raised by other commenters in response to the DEIR.

Sincerely,

A handwritten signature in black ink that reads "Ellen Trescott". The signature is written in a cursive, flowing style.

Tanya A. Gulesserian
Ellen L. Trescott

ELT:ljl

Attachments