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May 22, 2017

*By E-mail and U.S. Mail*

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Re: Comments on Draft Environmental Impact Report for the ICON at Panorama Project (Case No. ENV-2016-1061-EIR, SCH No. 2016081031)

Dear Ms. Zasadzien:

I am writing on behalf of the Southwest Regional Council of Carpenters ("SWRCC") and Laborers International Union of North America Local Union 300 ("LIUNA") (collectively, "Commenters") concerning the Draft Environmental Impact Report ("DEIR") for the ICON at Panorama Project (Case No. ENV-2016-1061-EIR, SCH No. 2016081031) (the "Project").

After reviewing the Project and the DEIR together with our expert consultants, it is evident that the DEIR contains numerous errors and omissions that preclude accurate analysis of the Project. As a result of these inadequacies, the DEIR fails as an informational document and fails to impose all feasible mitigation measures to reduce the Project's impacts. Commenters request that the Los Angeles Department of City Planning address these shortcomings in a revised draft environmental impact report ("RDEIR") and recirculate the RDEIR prior to considering approvals for the Project.

Commenters submit herewith comments of the environmental consulting firm Soil/Water/Air Protection Enterprise ("SWAPE"), including Matthew Hagemann, P.G., C.Hg., QSD, QSP, former Senior Science Policy Advisor, U.S. EPA Region 9 and Hydrogeologist, Superfund, RCRA and Clean Water programs and environmental scientist Jessie Jaeger who conclude that the DEIR fails to adequately evaluate and mitigate the Project's air quality and greenhouse gas impacts. First, the Project's emissions were improperly analyzed in the DEIR because the DEIR used incorrect and unsubstantiated input parameters. When SWAPE ran an air quality model that corrected these errors, it demonstrates that the Project will have significant and unmitigated construction-related NOx emissions. Second, the DEIR failed to conduct a Health Risk Assessment ("HRA") for the Project, based on reasoning that is inconsistent with the South Coast Air Quality Management District's ("SCAQMD") and the Office of Environmental Health Hazards ("OEHHA") guidance on when HRAs are needed. SWAPE's screening-level

analysis demonstrates that a more detailed HRA is needed to fully understand the potentially significant health risks associated with the Project. Third, SWAPE found that the DEIR improperly calculated the Project's GHG emissions, and when calculated properly, the emissions will be significant and must be mitigated. Finally, there are additional mitigation measures that are feasible that must be considered to reduce the Project's significant air quality and greenhouse gas emissions.

SWAPE also concludes that the DEIR's Hazards and Hazardous Waste section is wholly inadequate. The Project site used to house a gas station and automotive repair shop, but the DEIR because it fails to identify the underground storage tanks and hydraulic lifts from those operations as Recognized Environmental Conditions ("RECs"), despite the Environmental Site Assessment determining that they are.

Commenters also submit comments from civil and traffic engineer Daniel Smith, Jr., who determined that, because the traffic impacts are significant and unavoidable, the City should approve alternative 2, the reduced project alternative, which is also the environmentally preferred alternative.

Mr. Hagemann and Ms. Jaeger's comments and curriculum vitae are attached hereto as Exhibit A and are incorporated herein by reference. Mr. Smith's comments and curriculum vitae are attached hereto as Exhibit B and are incorporated herein by reference. Each of SWAPE's and Mr. Smith's comments requires separate responses from the City. These experts and our own independent review demonstrate that the DEIR is woefully inadequate and that a revised DEIR should be prepared prior to Project approval to analyze all impacts and require implementation of all feasible mitigation measures.

## **I. PROJECT DESCRIPTION**

The Project proposes to demolish three existing but vacant commercial buildings and the removal of associated surface parking areas currently at the Project site in order to construct a 540,000 gross square foot mixed-use development on an 8.9 acre site in Los Angeles, California. The Project includes construction of seven buildings, with approximately 200,000 square feet of commercial floor area, and 422 multi-family residential units. The Project also includes parking for approximately 1,690 vehicles and 858 bicycles. The commercial uses would be located in five separate one and two-story buildings on the south and east parts of the site, and would be served by a six-level parking structure in the center of the Project site. The residences would be located in two separate seven-story buildings, with five stories of residential over two levels of above-ground parking, on the western and northern parts of the Project site.

## **II. LEGAL STANDARDS**

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances). *See, e.g.*, Pub. Res. Code § 21100. The EIR is the very heart of CEQA. *Dunn-*

*Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Comms. for a Better Env’t v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. 14 Cal. Code Regs. (“CEQA Guidelines”) § 15002(a)(1). “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.” *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.

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures. CEQA Guidelines § 15002(a)(2) and (3); *see also Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.” CEQA Guidelines § 15002(a)(2). If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.” Pub.Res.Code (“PRC”) § 21081; CEQA Guidelines § 15092(b)(2)(A) & (B).

The EIR is the very heart of CEQA. *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. CEQA requires that a lead agency analyze all potentially significant environmental impacts of its proposed actions in an EIR. PRC § 21100(b)(1); CEQA Guidelines § 15126(a); *Berkeley Jets*, 91 Cal.App.4th 1344, 1354. The EIR must not only identify the impacts, but must also provide “information about how adverse the impacts will be.” *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831. The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692. “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Communities for a Better Env’t v. Calif. Resources Agency* (2002) 103 Cal.App.4th 98, 109.

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A ‘clearly inadequate or unsupported study is entitled to no judicial

deference.” *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 391 409, fn. 12. A prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 722]; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946. As discussed below, and in the attached expert comment letters of expert hydrogeologist Matthew Hagemann, P.G., C. Hg., and expert urban planner Terry Watt, Ph.D, the EIR for this Project fails to adequately analyze and mitigate the Project’s impacts.

### **III. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE ENVIRONMENTAL SETTING OF THE PROJECT.**

To facilitate its informational goals, an EIR must contain an accurate description of the project’s environmental setting. An EIR “must include a description of the physical environmental conditions in the vicinity of the project... from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.” (CEQA Guidelines, §15125(a).) The “environmental setting” is defined as “the physical conditions which exist within the area which will be affected by a proposed project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.” (CEQA Guidelines, §15360; see §21060.5; *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1192.) As the court stated in *Friends of Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859:

There is good reason for this requirement: “Knowledge of the regional setting is critical to the assessment of environmental impacts. . . . The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context.” ([CEQA] Guidelines, § 15125, subd. (c).) We interpret this Guideline broadly in order to “afford the fullest possible protection to the environment.” (*Kings County Farm Bureau, supra*, 221 Cal.App.3d 692, 720.) In so doing, we ensure that the EIR’s analysis of significant effects, which is generated from this description of the environmental context, is as accurate as possible.

(108 Cal.App.4th at 874.)

#### **A. THE DEIR FAILS TO DISCLOSE KNOWN, SIGNIFICANT HAZARDS IMPACTS RELATED TO DOCUMENTED RECOGNIZED ENVIRONMENTAL CONDITIONS AT THE PROJECT SITE.**

From 1961 to 2003, a portion of the Project site was used as an automotive repair shop and gasoline service station. DEIR, p. IV.E-5. As part of its operations, the auto repair shop

used five to seven underground storage tanks (“USTs”), and 13 hydraulic vehicle lifts. DEIR, p. IV.E-9. These features were documents in a 2015 Phase I Environmental Site Assessment (“ESA”) that was conducted for the site to determine the environmental conditions of the Project site. The Phase I concludes that USTs are RECs. It states:

Based on the lack of information regarding the disposition of the UST(s) at this facility and the absence of UST closure documentation, the former auto repair facility features are considered a recognized environmental condition.

DEIR, App. F.1, p. 36.

Rather than disclose this, and further investigate the potential impacts stemming from these USTs, the EIR makes the exact opposite conclusion, stating:

Based on review of the previous subsurface investigations and geophysical surveys conducted in 2001 and 2014, the former presence of USTs and a gasoline dispensing operation are not considered to be a Recognized Environmental Concern (REC) for the Project Site at this time.

DEIR, p. IV.E-9.

Similarly, the DEIR improperly concluded that the hydraulic lifts are not a REC despite the opposite finding in the Phase I ESA. The Phase I ESA states (DEIR, App. F.1, p. 36):

Based on the presumed age of the hydraulic lifts, the potential for hydraulic oil to contain polychlorinated biphenyls (PCBs), observed evidence of leakage, and the amount of time the lifts have been present in the ground, the presence of in-ground hydraulic vehicle lifts is considered a recognized environmental condition.

Again, the DEIR comes to the opposite conclusion:

Based on review of the previous subsurface investigations, the interior lifts, clarifier, and floor drains are not considered to be a REC for the Project Site at this time.

DEIR, p. IV.E-12.

The DEIR’s description of the site not containing any RECs is inaccurate. Because the DEIR found that there were no RECs at the site, it goes on to state:

Based on review of the previous subsurface investigations and geophysical surveys conducted in 2001 and 2014, the former presence of USTs and a gasoline dispensing operation are not considered to be a REC for the Project Site at this time. As such, no recommendations for further investigation of the former USTs and gasoline dispensing operation were made at this time. Additionally, based on review of the previous

subsurface investigations, the interior lifts, clarifier, and floor drains are not considered to be a REC for the Project Site at this time. As such, no further investigation of the former automotive repair building are recommended at this time.

DEIR, p. IV.E-12.

Because of the incorrect finding that there are no RECs on site, the City has not investigated the former USTs, lifts, floor drains, or the clarifier. Without such an investigation, the City lacks any evidence of the environmental setting of the Project. Without a full understanding of the existing environment, there is no understanding of the potential risks to construction workers, future residents, neighboring residents, and potential groundwater impacts. SWAPE, p. 2.

The Project may have significant impacts due to the presence of toxic and cancer-causing chemicals in the soil at the Project site, but the DEIR failed to conduct the analysis to make such a determination. Construction workers such as the members of SWRCC and LIUNA will be at the highest risk from such chemicals, as will be future residents of the Project and neighboring residents, who may be exposed via soil vapor intrusion. Construction workers will be directly disturbing and excavating contaminated soil during Project construction. SWAPE points out some of the risks associated with these USTs:

Construction workers would be at risk of any contamination which is present, which may include the human carcinogen benzene, a component of fuel. Construction workers would be potentially exposed through breathing contaminated vapors or by touching contaminated soil. Future residents could be exposed via a vapor intrusion pathway whereby contaminated vapors seep into indoor air spaces. Neighboring residents could be exposed to dust to which contaminants have been sorbed. Groundwater contamination may also have resulted from any leakage of USTs, degrading water resources and perhaps serving as a source for off-site vapor intrusion.

SWAPE, pp. 2-3. The hydraulic lifts, clarifier, and floor drains may include PCBs, a probable human carcinogen, which would also expose construction workers, future residents, and neighboring residents to potential risks. SWAPE, pp. 3-4.

To avoid these risks, SWAPE recommends that “[t]he DEIR process should be halted until an investigation of the USTs and the vehicle lifts can be completed under regulatory supervision and any necessary cleanup is conducted that would support the proposed residential land use, protect neighboring residents from potential exposure and protect the environment.” SWAPE, p. 2.

Because the DEIR does not recognize the USTs or the hydraulic lifts as RECs, it does not analyze potential exposure scenarios, and it does not include mitigation measures to prevent potential health impacts. SWAPE, p. 4. A full investigation of these RECs, and an analysis of the Project’s potential impacts resulting from those RECs is required. Without this information,

the DEIR has not substantial evidence to support its conclusion that the Project will not have a significant environmental impact from hazards and hazardous substances. The DEIR is legally insufficient for failing to disclose these known RECs at the Project site. As in the recent *Banning Ranch* case, the City has failed to disclose in the DEIR known environmental hazards on the project site. In so doing the City has failed to proceed in a manner required by law. *Banning Ranch Conservancy v. City of Newport Beach*, 2017 Cal. LEXIS 2327 (Cal. S.Ct. Mar. 30, 2017).

**IV. THE DEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE ALL POTENTIALLY SIGNIFICANT AIR QUALITY IMPACTS.**

**A. THE PROJECT'S EMISSIONS WERE IMPROPERLY ANALYZED BECAUSE THE DEIR USES INCORRECT AND UNSUBSTANTIATED INPUT PARAMETERS.**

The DEIR's Air Quality Assessment (Appendix B) estimates emission using the California Emissions Estimator Model Version CalEEMod.2013.2.2 ("CalEEMod"). CalEEMod provides recommended default values based on site specific information entered by the user, such as land use type, meteorological data, total lot acreage, etc. SWAPE, p. 4. The user can change these default values, but must provide a justification for doing so. *Id.* The DEIR generally provides the Project parameters to be input into CalEEMod, such as site location and characteristics, duration of construction, number of worker trips, etc. As pointed out in SWAPE's expert comments, however, several of the values inputted into the model are inconsistent with information disclosed in the DEIR, and inconsistent with guidance set forth by the South Coast Air Quality Management District ("SCAQMD"). SWAPE, p. 5. By relying on incorrect modeling parameters, "emissions associated with construction and operation of the Project are greatly underestimated." *Id.* Accordingly, the Air Quality Assessment estimates are unreliable and should not be used to determine whether construction activities would result in significant air quality impacts. *Id.*

**1. Air Quality Model Uses Incorrect Building Square Footage.**

By reviewing the output files for the CalEEMod model, SWAPE determined that the Air Quality Model incorrectly decreased the size of the proposed movie theater's square footage by 23,000 square feet (27,000 v. 50,000 square feet) compared to the size provided for in the DEIR. SWAPE, p. 6. Similarly, the residential building was incorrectly and unjustifiably reduced by 10,000 square feet. *Id.* The "User Entered Comments" state that this was done "to reflect proposed site plan," but this is inconsistent with the DEIR itself, which states that the movie theater is to be 50,000 sf (DEIR, p. II-9), and residential buildings are to be 384,000 sq. ft., not 374,000 sq. ft. (DEIR, p. II-9.) SWAPE explains the importance of this error:

This discrepancy between what is proposed in the DEIR and what is modeled in CalEEMod presents a significant issue. The land usage parameters, including land use types and sizes, are used throughout CalEEMod to determine default variables and

emission factors that go into the model's calculations.<sup>1</sup> For example, land use areas are used for certain calculations such as determining the wall space to be painted (i.e., VOC emissions from architectural coatings) and volume that is heated or cooled (i.e., energy impacts). Therefore, by assigning incorrect square footages to the Project's proposed residential and movie theater land uses, the operational emissions from the land use's energy consumption is not properly accounted for.

SWAPE, pp. 6-7.

## **2. Air Quality Model Failed to Account for Off-Road Construction Equipment.**

The CalEEMod output files also demonstrate that the air quality analysis changed the default off-road construction equipment list, but did not provide an appropriate justification for the change. SWAPE, p. 7. The user entered comments with the reasons for manually changing the Project's construction list states:

Off-road Equipment - Default list and number of demolition equipment changed to reflect proposed construction equipment.
Off-road Equipment - Default list and number of grading equipment changed to reflect proposed construction equipment.
Off-road Equipment - Default list and number of building construction equipment changed to reflect proposed construction equipment.
Off-road Equipment - Three air compressors added to the default amount of one for architectural coatings.
Off-road Equipment - Default amount of paving equipment reduced by half due to minimal paving at the project site.

The problem with this explanation is that the DEIR provides no alternative construction list. Without such a list, there is no way to know whether these statements are accurate. Because of this unsubstantiated change, the Project's construction emissions have been underestimated. SWAPE, p. 7.

## **3. Air Quality Model Incorrectly Modeled Material Export During Demolition and Grading Phases.**

As part of Project construction, 172,500 square feet of existing structures and surface parking lot will be demolished. DEIR, p. IV.A-15. The DEIR states that demolition of these existing structures would generate "approximately 14,921 tons of demolition debris" (p. I-38, p. II-28). In addition to this demolition debris, the DEIR also states that the Project would require a net export of approximately 18,600 cubic yards (CY), or 22,320 tons, from grading activities. DEIR, pp. I-38, II-28. As a result, the CalEEMod output files should reflect 14,921 tons of demolition debris, and 22,320 tons of grading debris. SWAPE, p. 7. Instead, the CalEEMod output files show the emissions model assumed 22,320 tons during the demolition phase (rather than grading), and fails to account at all of the 14,921 tons of debris anticipated to be generated during the demolition phase. SWAPE, p. 8. "This underestimation presents a significant issue, as the inclusion of the entire amount of material export within the model is necessary to calculate

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<sup>1</sup> CalEEMod User's Guide, p. 14, available at: <http://www.caleemod.com/>

emissions produced from material movement, including truck loading and unloading, and additional truck hauling trips. As a result, emissions generated during Project construction are underestimated.” SWAPE, p. 8. An updated air quality analysis is needed to adequately evaluate the Project’s emissions using the proper inputs.

**B. UPDATED AIR QUALITY MODEL DEMONSTRATES THAT THE PROJECT WILL HAVE SIGNIFICANT CONSTRUCTION-RELATED AIR QUALITY IMPACTS FROM NO<sub>x</sub> EMISSIONS.**

SWAPE corrected the above errors, and re-ran CalEEMod. SWAPE, p. 8. When corrected, the updated model demonstrates that the Project’s construction emissions of PM10, PM 2.5, and NO<sub>x</sub> all increase. *Id.* In particular, the Project’s related NO<sub>x</sub> emissions increase by 40% to a level that is deemed significant under CEQA. *Id.* Based on the corrected inputs, during construction, the Project will emit 102.1 lbs/day of NO<sub>x</sub>, which is above the 100 lbs/day threshold of significance set by the South Coast Air Quality Management District (“SCAQMD”). SWAPE, p. 8.

<b>Maximum Daily Construction Emissions (lbs/day)</b>			
<b>Model</b>	<b>NO<sub>x</sub></b>	<b>PM10</b>	<b>PM2.5</b>
DEIR	73.0	11.6	4.6
SWAPE	102.1	12.9	6.5
<b>Percent Increase</b>	<b>40%</b>	<b>11%</b>	<b>41%</b>
<b>SCAQMD Regional Threshold (lbs/day)</b>	<b>100</b>	<b>150</b>	<b>55</b>
<b>Threshold Exceeded?</b>	<b>Yes</b>	<b>No</b>	<b>No</b>

NO<sub>x</sub> reacts with other chemicals in the air to form both PM and ground level ozone. The Los Angeles air basin suffers from the worst ozone pollution in the nation. The Project’s NO<sub>x</sub> emissions will therefore be exacerbating an already unacceptable level of air pollution. According to the U.S. Environmental Protection Agency (US EPA), even short-term exposure to ozone can have significant irreparable health impacts. US EPA states:

Ozone can cause the muscles in the airways to constrict, trapping air in the alveoli. This leads to wheezing and shortness of breath.

Ozone can:

- Make it more difficult to breathe deeply and vigorously.
- Cause shortness of breath, and pain when taking a deep breath.
- Cause coughing and sore or scratchy throat.
- Inflammate and damage the airways.
- Aggravate lung diseases such as asthma, emphysema, and chronic bronchitis.
- Increase the frequency of asthma attacks.
- Make the lungs more susceptible to infection.

- Continue to damage the lungs even when the symptoms have disappeared.
- Cause chronic obstructive pulmonary disease (COPD).

These effects have been found even in healthy people, but can be more serious in people with lung diseases such as asthma. They may lead to increased school absences, medication use, visits to doctors and emergency rooms, and hospital admissions.

Long-term exposure to ozone is linked to aggravation of asthma, and is likely to be one of many causes of asthma development. Long-term exposures to higher concentrations of ozone may also be linked to permanent lung damage, such as abnormal lung development in children.

Recent studies consistently report associations between short-term ozone exposures and total non-accidental mortality, which includes deaths from respiratory causes. Studies suggest that long-term exposure to ozone also may increase the risk of death from respiratory causes, but the evidence is not as strong as the evidence for short-term exposure.<sup>2</sup>

People with asthma, children, older adults, and people who are active outdoors, especially *outdoor workers* are most susceptible to health effects caused by ground level ozone.<sup>3</sup> EPA has found “strong and convincing evidence that exposure to ozone is associated with exacerbation of asthma-related symptoms.” 66 Fed. Reg. 5002, 5012 (Jan. 18, 2001).)

In light of the above, the DEIR must be updated to reflect this significant environmental impacts, and to consider all feasible mitigation measures and alternatives to reduce NOx emissions.

**C. THE PROJECT WILL HAVE A SIGNIFICANT CONSTRUCTION-RELATED HEALTH RISK IMPACT THAT HAS NOT BEEN ADEQUATELY ANALYZED OR MITIGATED.**

The DEIR concludes that “the health risk from air pollutants generated during project construction would be less than significant,” but it makes this finding without actually conducting a health risk assessment (“HRA”). DEIR, App. B, p. 26. An HRA is required to determine whether or not the Project will expose sensitive receptors to substantial air pollutants. SWAPE, p. 13.

The DEIR attempts to justify the omission of an HRA by stating that “Construction activities associated with the project would be short-term in nature. Estimation of the cancer risk

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<sup>2</sup> U.S. EPA, “Health Effects of Ozone Pollution,” <https://www.epa.gov/ozone-pollution/health-effects-ozone-pollution>; 66 Fed. Reg. 5002, 5012 (Jan. 18, 2001).

<sup>3</sup> *Id.*

from diesel particulate matter assumes long-term exposure to the pollutant of 70 years.” DEIR, App. B, p. 26. This justification is incorrect. SWAPE, p. 13. The fact that a project’s construction phase is “short-term in nature,” does not render an HRA unnecessary. *Id.* According to the SCAQMD, HRAs are recommended even for short-term projects. *Id.* The SCAQMD guidance document explains:

Since these short-term calculations are only meant for projects with limits on the operating duration, these short-term cancer risk assessments can be thought of as being the equivalent to a 30-year cancer risk estimate and the appropriate thresholds would still apply (i.e. for a 5-year project, the maximum emissions during the 5-year period would be assessed on the more sensitive population, from the third trimester to age 5, after which the project’s emissions would drop to 0 for the remaining 25 years to get the 30-year equivalent cancer risk estimate).<sup>4</sup>

The DEIR should have prepared a quantitative analysis of the Project’s construction and operational emission to the SCAQMD threshold of 10 in one million for determining a project’s health risk impact. SWAPE, p. 13.

In addition, the DEIR justifies the omission of an HRA by stating that:

Currently, CARB sites the need for conducting a site-specific health risk analysis when sensitive receptors are placed within 50 feet of a gas station with an annual throughput of less than 3.6 million gallons, 300 feet of a gas station with more than 3.6 million gallons annually, 500 feet of dry cleaners, and 1,000 feet of distribution centers with more than 100 trucks per day, more than 40 trucks with transport refrigeration units, or where transport refrigeration units are operated more than 300 hours per week... The Project would involve the operation of a new residential and commercial retail building at the Project Site. The proposed commercial uses are also not sensitive receptors for TACs. Additionally, the proposed use would not be a significant TAC source. A small number of diesel vehicles are expected to deliver items to the site on a daily basis; much less than 40 vehicles per day.

DEIR, p. IV.A-24.

As SWAPE notes, however, merely stating that the Project’s “proposed commercial uses are also not sensitive receptors for TACs” does not mean an HRA is not needed. SWAPE, p. 14. And while the SCAQMD recommends HRAs for warehouses and truck stops, it does not restrict the preparation of HRAs to industrial projects. *Id.* According to the SCAQMD’s Mobile Source Toxics Analysis page on AQMD’s website (emphasis added),

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<sup>4</sup> <http://www.aqmd.gov/docs/default-source/planning/risk-assessment/riskassprocjune15.pdf?sfvrsn=2>, p. IX-2

In August 2002, the SCAQMD's Mobile Source Committee approved the 'Health Risk Assessment Guidance for Analyzing Cancer Risks from Mobile Source Diesel Emissions.' This document provided guidance for analyzing cancer risks from diesel particulate matter from mobile sources at facilities such as truck stops and warehouse distribution centers. Subsequently, SCAQMD staff revised the aforementioned document to expand the analysis to provide technical guidance for analyzing cancer risks from potential diesel particulate emissions impacts from truck idling and movement (such as, but not limited to, truck stops, warehouse and distribution centers, or transit centers), ship hotelling at ports, and train idling. This revised guidance document titled, 'Health Risk Assessment Guidance for Analyzing Cancer Risks from Mobile Source Diesel Idling Emissions for CEQA Air Quality Analysis' was presented to and approved by the SCAQMD's Mobile Source Committee at its March 28, 2003 committee meeting. It is suggested that projects with diesel powered mobile sources use the following guidance document to quantify potential cancer risks from the diesel particulate emission.<sup>5</sup>

In other words, a mobile source HRA should be prepared whenever a project generates or attracts vehicular trips. SWAPE, p. 14. "The SCAQMD does not state that the preparation of an HRA should be restricted to industrial projects or land uses, nor does it state that residential and commercial projects are exempt from this recommendation." *Id.*

As SWAPE explains

Seeing as Project construction is expected to occur over a 25-month period (p.II-28), it is reasonable to assume that a significant amount of diesel particulate matter (DPM), a known human carcinogen, will be emitted from the exhaust stacks of construction equipment the Project proposes to use (Appendix B, pp. 46). Additionally, according to the Project's Traffic Impact Study, the Project will generate approximately 7,996 vehicle trips a day during operation, all of which would emit substantial amounts of DPM during operation, potentially exposing nearby sensitive receptors to substantial air pollutants (Table 2, Appendix I-1, pp. 29). As such, the DEIR should have conducted a construction and operational HRA, as long term exposure to DPM and other toxic air contaminants (TACs) may result in a significant health risk impact.

SWAPE, pp. 14-15.

The omission of an HRA is also inconsistent with the most recent guidance published by the Office of Environmental Health Hazard Assessment (OEHHA), the organization responsible for providing recommendations and guidance on how to conduct health risk assessments in

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<sup>5</sup> "Mobile Source Toxics Analysis." SCAQMD, *available at*: <http://www.aqmd.gov/home/regulations/ceqa/air-quality-analysis-handbook/mobile-source-toxics-analysis>

California. SWAPE, p. 15. OEHHA recommends that all short-term projects lasting at least two months be evaluated for cancer risks to nearby sensitive receptors.<sup>6</sup> Since Project construction is expected to take place over a 25-month period, an HRA is required. DEIR, p. II-28. Moreover, once construction is complete, Project operation will generate truck trips, which will generate additional exhaust emissions, thus continuing to expose nearby sensitive receptors to DPM emissions. As a result, an HRA should have been conducted. SWAPE, p. 15.

SWAPE conducted a screening-level HRA to demonstrate the potential risk to nearby sensitive receptors from Project construction and operation. SWAPE, p. 15. SWAPE's analysis concludes that the Project may result in a significant health risk impact from the Project's construction and operational DPM emissions that was not previously identified in the DEIR. SWAPE, p. 15. "The excess cancer risk to adults, children, and infants at a sensitive receptor located approximately 25 meter away, over the course of Project construction and operation are 24, 160, and 130 in one million, respectively." SWAPE, p. 18. In addition, the "excess cancer risk over the course of a residential lifetime (30 years) is approximately 308 in one million." *Id.* These all exceed the SCAQMD threshold of 10 in one million, demonstrating a significant environmental impact not addressed or mitigated in the DEIR. *Id.*

An updated DEIR must be prepared, including a Health Risk Assessment, to determine the Project's health risk impact, and fully mitigate that impact to the extent feasible.

**D. FEASIBLE MITIGATION MEASURES ARE AVAILABLE TO MITIGATE THE PROJECT'S SIGNIFICANT CONSTRUCTION-RELATED NO<sub>x</sub> AND DPM EMISSIONS.**

Based on SWAPE's updated air quality analysis and risk assessment, the Project's construction related NO<sub>x</sub> and DPM emissions would result in significant air quality impacts having significant health risks. SWAPE, p. 19. As a result, the City must identify and incorporate feasible mitigation measures into a revised DEIR to reduce the impacts to a less than significant level.

As SWAPE explains, DPM and NO<sub>x</sub> are a "a byproduct of diesel fuel combustion, and are emitted by on-road vehicles and by off-road construction equipment." SWAPE, p. 19. Accordingly, SWAPE recommends the following feasible mitigation measures, which are described in greater detail in SWAPE's comment letter:

- Limit construction equipment idling beyond regulation requirements;
- Require implementation of diesel control measures;
- Repower or replace older construction equipment engines with newer, cleaner engines;
- Install retrofit devices on existing construction equipment that reduce emissions;
- Use electric and hybrid construction equipment to mitigate DPM emissions;

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<sup>6</sup> "Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments." OEHHA, February 2015, available at: [http://oehha.ca.gov/air/hot\\_spots/2015/2015GuidanceManual.pdf](http://oehha.ca.gov/air/hot_spots/2015/2015GuidanceManual.pdf), p. 8-18

- Implement a construction vehicle inventory tracking system; and
- Implement Enhanced Exhaust Control Practices as recommended by the Sacramento Metropolitan Air Quality Management District, which includes a plan to demonstrate that construction vehicles will achieve a project wide fleet-average of 20% NO<sub>x</sub> reduction and 45% particulate matter reduction compared to the most recent CARB fleet average.

SWAPE, pp. 19-24.

All feasible mitigation, including the above measures, should be considered in a revised DEIR to reduce the Project's construction-related air quality impacts to a less-than-significant level.

**E. THE PROJECT WILL HAVE A SIGNIFICANT GREENHOUSE GAS IMPACT THAT THE DEIR FAILS TO DISCLOSE THAT MUST BE MITIGATED.**

The DEIR relies on a flawed methodology to evaluate the Project's GHG emissions. SWAPE, p. 24-25. In doing so, the DEIR's GHG analysis comes to an artificially low number. *Id.* The flaw comes from the DEIR's use of an incorrect "service population" estimate. SWAPE demonstrates that when the correct service population is used, the Project will have a significant GHG impact. *Id.*

The DEIR relies on the SCAQMD's draft tiered thresholds to determine the significance of the Project's GHG emissions. SWAPE, p. 24. These thresholds were established to meet the AB 32 goal of reducing statewide GHG emissions to 1990 levels by 2020. *Id.* To meet this goal, SCAQMD set an "efficiency target of 4.8 metric tons of carbon dioxide equivalents per service population per year (MT CO<sub>2</sub>e/sp/year) for project level analyses. *Id.* To calculate this, an analysis takes a project's total GHG emissions, and divides it by the expected service population.

According to SAQMD, the "service population" is calculated as the total residents and employees associated with a project." DEIR, App. E, p. 25. Similarly, the California Air Pollution Control Officers Association ("CAPCOA") defines service population as "the sum of the number of residents and the number of jobs supported by the project." SWAPE, p. 26. Rather than rely on this established definition, the DEIR instead relies on a service population that "consists of residents, employees, customers, vendors, students, etc." DEIR, App. E, p. 25. The DEIR's justification for this deviation is:

"The SCAQMD's draft thresholds defines the service population as the total residents and employees associated with a project. This may be appropriate for regional or community-wide analyses in which most people are either residents or employees and the two cross over (residents of the community are also employees in the community). In the case of general development projects, the service population consists of residents, employees, customers, vendors, students, etc. In the case of a commercial project,

employees may be only about two percent of the number of people that visit a site. The vast majority of people visiting a commercial project are customers with a smaller number of vendors (delivery and sales). It does not make sense to consider only the employees as the service population for a project such as this. The employees are at a site to serve the needs of their customers. Therefore, this analysis assumes that the service population is everyone that would be served by the proposed office use, including residents, employees, customers, and vendors.

DEIR, App. E, p. 25.

Using its own method, based on this line of reasoning, the DEIR goes on to estimate the “service population” by dividing the number of potential daily vehicle trips generated by the Project by two. DEIR, p. IV-39. The DEIR explains:

The proposed commercial uses are expected to generate approximately 10,633 average daily vehicle trips per weekday based upon the trip generation numbers identified in the Technical Impact Analysis prepared for the proposed project. This number is the total trips that would be generated by the proposed land use prior to any credit for internal capture, transit credit, and pass-by trips. This is appropriate since it identifies a trip generation estimate for the entire commercial service population. Dividing this number by two identifies a conservative commercial service population of approximately 5,317 employees, customers, and vendors. Adding the 1,063 residents to this number presents a total project site service population of 6,380 persons.

DEIR, App. E, p. 26.

The DEIR’s made-up method for determining the service population is improper, and should not be relied on. The SCAQMD’s GHG thresholds clearly define service population as the total residents and employees associated with a project. “Because the DEIR relies upon the SCAQMD’s draft thresholds to determine Project significance, the Project’s estimated service population should reflect the service population defined by the SCAQMD.” SWAPE, p. 26. Significantly, “[n]owhere in the SCAQMD’s draft thresholds guidance document does it state that this definition of a service population is only applicable to “regional or community-wide analyses,” nor does it provide an alternative service population definition for general development projects.” SWAPE, p. 26. “[O]nly the Project’s total number of employees and residents should have been used as the Project’s service population value, as this is consistent with applicable SCAQMD and CAPCOA guidance.” *Id.*

The DEIR estimates that the Project would generate 15,467 MT CO<sub>2</sub>e/year. DEIR, App. E, p. 25. Using the incorrectly defined service population of 6,380 people, the DEIR concludes that the Project’s per capita GHG emissions would be 2.42 MT CO<sub>2</sub>e/sp/year, which is less than the project-level threshold of 4.8 MT CO<sub>2</sub>e/sp/year. *Id.* at 26. As a result, the DEIR’s analysis finds that the Project’s GHG impact is not significant. *Id.*

SWAPE conducted an analysis of the Project’s GHG emissions based on the definition of

“service population” required by SCAQMD and CAPCOA. Under this analysis, SWAPE concludes that the Project would emit approximately 14.6 CO<sub>2</sub>e/sp/yr, which greatly exceeds the 4.8 MT CO<sub>2</sub>e/sp/yr significance threshold for 2020 and the 3.0 CO<sub>2</sub>e/sp/yr significance threshold for 2035, as set forth by SCAQMD. SWAPE, p. 27.

<b>The Maximum Exposed Individual at an Existing Residential Receptor (MEIR)</b>					
<b>Activity</b>	<b>Duration (years)</b>	<b>Concentration (µg/m<sup>3</sup>)</b>	<b>Breathing Rate (L/kg-day)</b>	<b>ASF</b>	<b>Cancer Risk</b>
Construction	2.00	0.39	1090	10	1.3E-04
<b><i>Infant Exposure Duration</i></b>	<b><i>2.00</i></b>			<b><i>Infant Exposure</i></b>	<b><i>1.3E-04</i></b>
Construction	0.08	0.39	572	3	8.4E-07
Operation	13.92	0.43	572	3	1.6E-04
<b><i>Child Exposure Duration</i></b>	<b><i>14.00</i></b>			<b><i>Child Exposure</i></b>	<b><i>1.6E-04</i></b>
Operation	14.00	0.43	261	1	2.4E-05
<b><i>Adult Exposure Duration</i></b>	<b><i>14.00</i></b>			<b><i>Adult Exposure</i></b>	<b><i>2.4E-05</i></b>
<b>Lifetime Exposure Duration</b>	<b>30.00</b>			<b>Lifetime Exposure</b>	<b>3.08E-04</b>

A revised DEIR must be prepared with an updated GHG analysis that conforms to the requirements of SCAQMD and CAPCOA, and provides mitigation measures to reduce the Project’s significant GHG emissions.

**F. FEASIBLE MITIGATION MEASURES ARE AVAILABLE TO MITIGATE THE PROJECT’S SIGNIFICANT OPERATIONAL NO<sub>x</sub>, VOC, AND GHG EMISSIONS.**

One of the most startling aspects of the DEIR is that it acknowledges significant air quality impacts from the Project’s operational NO<sub>x</sub> and VOC emissions, but then concludes that there is not a single feasible mitigation measure to reduce those impacts. DEIR, p. IV.A-19. This conclusion is incorrect and not supported by substantial evidence.

CEQA prohibits a lead agency from approving a project with significant environmental effects if there are feasible mitigation measures or alternatives that can substantially lessen or avoid those effects. Pub. Res. Code §21002; *Mountain Lion Found. v. Fish & Game Comm’n* (1997) 16 Cal.4th 105, 134; *Laurel Heights*, 47 Cal.3d at 403.

SWAPE’s expert comment letter lists numerous feasible mitigation measures that the DEIR failed to incorporate, which would reduce the Project’s operational NO<sub>x</sub>, VOC, and GHG emissions. SWAPE, pp. 28-33. SWAPE recommends the following feasible mitigation measures that would avoid, minimize, and mitigate the Project’s significant emissions of NO<sub>x</sub>, VOCs, and GHGs, and were not considered in the DEIR.

- Use Zero-VOC emission paints;

- Use material that does not require paint;
- Use spray equipment with greater transfer efficiencies;
- Use passive solar design <sup>7,8</sup>
- Maximize the use of solar energy including solar panels. The DEIR states that “roof structures, electrical systems and conduits would be installed to accommodate future photovoltaic panels in selected areas” (p. II-27). We propose that that Project implement the maximum possible number of solar energy arrays on all building roofs on the Project site to generate solar energy for the facilities.
- Reduce unnecessary outdoor lighting by utilizing design features such as limiting the hours of operation of outdoor lighting.
- Develop and follow a “green streets guide” that requires:
  - Use of minimal amounts of concrete and asphalt;
  - Installation of permeable pavement to allow for storm water infiltration; and
  - Use of groundcovers rather than pavement to reduce heat reflection.<sup>9</sup>
- Implement Project design features such as:
  - Shade HVAC equipment from direct sunlight;
  - Install high-albedo white thermoplastic polyolefin roof membrane;
  - Install high-efficiency HVAC with hot-gas reheat;
  - Install formaldehyde-free insulation; and
  - Use recycled-content gypsum board.
- Provide education on energy efficiency to residents, customers, and/or tenants. Provide information on energy management services for large energy users.
- Meet “reach” goals for building energy efficiency and renewable energy use.
- Limit the use of outdoor lighting to only that needed for safety and security purposes.
- Require use of electric or alternatively fueled sweepers with HEPA filters.
- Include energy storage where appropriate to optimize renewable energy generation systems and avoid peak energy use.
- Plant low-VOC emitting shade trees, e.g., in parking lots to reduce evaporative emissions from parked vehicles.
- Use CARB-certified or electric landscaping equipment in project and tenant operations; and introduce electric lawn, and garden equipment exchange program.

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<sup>7</sup> Santa Barbara Air Pollution Control District, Scope and Content of Air Quality Sections in Environmental Documents, September 1997.

<sup>8</sup> Butte County Air Quality Management District, Indirect Source Review Guidelines, March 1997.

<sup>9</sup> See Irvine Sustainable Travelways “Green Street” Guidelines; [www.ci.irvine.ca.us/civica/filebank/blobload.asp?BlobID=8934](http://www.ci.irvine.ca.us/civica/filebank/blobload.asp?BlobID=8934); and Cool Houston Plan; [www.harc.edu/Projects/CoolHouston](http://www.harc.edu/Projects/CoolHouston).

- Install an infiltration basin to provide an opportunity for 100% of the storm water to infiltrate on-site.

The following additional feasible mitigation measures would reduce on-site area emissions caused by the Project's commercial and retail land uses:

- Increase in insulation such that heat transfer and thermal bridging is minimized.
- Limit air leakage through the structure and/or within the heating and cooling distribution system.
- Use of energy-efficient space heating and cooling equipment.
- Installation of electrical hook-ups at loading dock areas.
- Installation of dual-paned or other energy efficient windows.
- Installation of automatic devices to turn off lights where they are not needed.
- Application of a paint and surface color palette that emphasizes light and off-white colors that reflect heat away from buildings.

In addition, the following feasible mitigation measures found in CAPCOA's *Quantifying Greenhouse Gas Mitigation Measures*, would reduce GHG levels. GHG emissions are produced during fuel combustion, and are emitted by on-road vehicles and by off-road equipment. Therefore, to reduce the Project's mobile-source GHG emissions, consideration of the following measures should be made.

- Neighborhood/Site Enhancements - Providing a pedestrian access network to link areas of the Project site encourages people to walk instead of drive.
- Incorporate Bike Lane Street Design (On-Site)- Incorporating bicycle lanes, routes, and shared-use paths into street systems, new subdivisions, and large developments can reduce VMTs.
- Limit Parking Supply- This mitigation measure will change parking requirements and types of supply within the Project site to encourage "smart growth" development and alternative transportation choices by project residents and employees. This can be accomplished in a multi-faceted strategy:
  - Elimination (or reduction) of minimum parking requirements
  - Creation of maximum parking requirements
  - Provision of shared parking
- Unbundle Parking Costs from Property Cost - Unbundling separates parking from property costs, requiring those who wish to purchase parking spaces to do so at an additional cost from the property cost.
- Implement Commute Trip Reduction Program with employers to discourage single-occupancy vehicle trips and encourage alternative modes of transportation.

- Provide Ride-Sharing Programs - The project can promote ride-sharing programs through a multi-faceted approach such as:
  - Designating a certain percentage of parking spaces for ride sharing vehicles
  - Designating adequate passenger loading and unloading and waiting areas for ride-sharing vehicles
  - Providing a web site or message board for coordinating rides
- Implement Subsidized or Discounted Transit Program - This project can provide subsidized/discounted daily or monthly public transit passes to incentivize the use of public transport.
- Provide End of Trip Facilities for bicycle riders including showers, secure bicycle lockers, and changing spaces.
- Encourage Telecommuting and Alternative Work Schedules
- Implement Commute Trip Reduction Marketing Strategies
- Implement Preferential Parking Permit Program offering free or reduced parking fees, priority parking, or reserved parking for commuters who carpool, vanpool, ride-share or use alternatively fueled vehicles.
- Implement Car-Sharing Program – provide some parking spaces for car-sharing program cars to allow residents to have on-demand access to a shared fleet of vehicles on an as-needed basis to reduce the need for car ownership.
- Provide Employer-Sponsored Vanpool/Shuttle
- Implement Bike-Sharing Program
- Price Workplace Parking
- Implement Employee Parking "Cash-Out" - The project can require employers to offer employee parking “cash-out.” The term “cash-out” is used to describe the employer providing employees with a choice of forgoing their current subsidized/free parking for a cash payment equivalent to the cost of the parking space to the employer.

Each of the above mitigation measures must be considered, and unless there is substantial evidence that one of the measures is not feasible, they must be required.

#### **V. THE DEIR FAILS TO PROVIDE SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING OF OVERRIDING CONSIDERATIONS.**

The DEIR admits that the Project will have significant, unmitigated environmental impacts. As a result, a statement of overriding considerations will be required. Under CEQA, when an agency approves a project with significant environmental impacts that will not be fully mitigated, it must adopt a “statement of overriding considerations” finding that, because of the project’s overriding benefits, it is approving the project despite its environmental harm. 14 CCR § 15043; PRC § 21081(B); *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212,

1222.) A statement of overriding considerations expresses the “larger, more general reasons for approving the project, such as the need to create new jobs, provide housing, generate taxes and the like.” *Concerned Citizens of South Central LA v. Los Angeles Unif. Sch. Dist.* (1994) 24 Cal.App.4th 826, 847.

A statement of overriding considerations must be supported by substantial evidence in the record. 14 CCR § 15093(b); *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1223. The agency must make “a fully informed and publicly disclosed” decision that “specifically identified expected benefits from the project outweigh the policy of reducing or avoiding significant environmental impacts of the project.” 14 CCR § 15043(b). As with all findings, the agency must present an explanation to supply the logical steps between the ultimate finding and the facts in the record. *Topenga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.

Key among the findings that the lead agency *must* make is that:

Specific economic, legal, social, technological, or other considerations, including *the provision of employment opportunities to highly trained workers*, make infeasible the mitigation measures or alternatives identified in the environmental impact report ... [and that those] benefits of the project outweigh the significant effects on the environment.

PRC § 21081(a)(3), (b).

Thus, the City must make specific findings, supported by substantial evidence concerning both the environmental impacts of the Project and the economic benefits including, “the provision of employment opportunities for highly trained workers.” The DEIR fails to provide substantial evidence to support a statement of overriding considerations.

The DEIR makes not effort whatsoever to analyze the fiscal impacts related to jobs to be created by the proposed project or the quality of the new jobs. While the DEIR states that a Project goal is to “[f]oster local economic development and job creation,” (DEIR, p. II-29), the DEIR is devoid of any analysis of how the quality of jobs created compares to citywide averages, for example. The DEIR makes no attempt to determine whether new jobs created by the Project, in either the construction phase or the operational phase, will be for “highly trained workers,” and what the likely salary and wage ranges of these jobs will be. Without this information, the City lacks substantial evidence to make any statement of overriding considerations.

In short, the City cannot find that the economic benefits of the Project outweigh the environmental costs if it does not know what the economic benefits will be. A revised DEIR is required to provide this information.

## **VI. THE DEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE SIGNIFICANT CUMULATIVE AIR QUALITY IMPACTS.**

There are numerous problems with the DEIR's cumulative air quality analysis. First, the list of 19 projects "includes all approved, under construction, proposed, or reasonably foreseeable projects within the Study Area." DEIR, p. III-2. This list, however, does not include existing buildings and land uses. This violates CEQA, which requires an EIR to consider a project "in connection with the effects of **past projects**, the effects of other current projects, and the effects of probable future projects." PRC § 21083 (emph. added). Without included projects that already exist, the DEIR omits a major element of the cumulative analysis.

Second, the DEIR admits that the Project will have a significant cumulative operational VOC NOx impacts. For all other emissions, however, the DEIR finds the Project will not have a cumulative impact on air quality. This is based on the reasoning that "if an individual development project generates less-than-significant construction or operational emissions impacts, then the development project would not contribute to a cumulatively considerable increase in emissions for those pollutants for which the Basin is in nonattainment." DEIR, p. IV.A-21.

The DEIR's legal analysis is incorrect. According to CEQA Guidelines section 15355, "Cumulative impacts" refers to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." Section 15064 of the CEQA Guidelines state:

The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonable foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.

14 CCR § 15604.

Recognizing that several projects may together have a considerable impact, CEQA requires an agency to consider the "cumulative impacts" of a project along with other projects in the area. PRC § 21083(b); 14 CCR §15355(b). "[A] project may have a significant effect on the environment if '[t]he possible effects of a project are individually limited but cumulatively considerable.'" *Communities for a Better Environment v. Cal. Resources Agency*, 103 Cal.App.4th at 114; *King County Farm Bur. V. City of Hanford* (1990) 221 Cal.App.3d 692, 721. It is vital that an agency assess "the environmental damage [that] often occurs incrementally from a variety of small sources ..." *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214.

The DEIR relies on the exact argument CEQA's cumulative impact analysis is meant to protect against. The entire purpose of a cumulative impact analysis is to prevent the situation where mitigation occurs to address project-specific impacts, without looking at the bigger picture. This argument, applied over and over again, has resulted in major environmental damage, and is a major reason why CEQA was enacted. As the court stated in *CBE v. CRA*, 103

Cal. App. 4th at 114:

Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

(Citations omitted).

The same error is made as to the Project's construction emissions ("construction emissions associated with the Project would not exceed the SCAQMD's thresholds of significance. Therefore, the cumulative impact of the Project's construction emissions would be considered less than significant."). DEIR, p. IV.A-25.

Third, regarding construction-related TACs and odors, the DEIR dismisses the possibility of cumulative impacts because the Project and related projects would be required to comply with regional, state, and federal regulations, just like the Project is. But just because project will comply with air quality regulations does not mean that they do not have individually significant impacts, and says nothing about whether together, with the Project, the impact may be significant.

A revised DEIR must be prepared to properly analyze the Project's cumulative impacts.

## **VII. THE CITY SHOULD PREPARE AND RECIRCULATE A SUPPLEMENTAL DEIR**

A supplemental draft EIR ("SDEIR") should be prepared and circulated for full public review to address the impacts identified above and to propose feasible mitigation measures. CEQA requires re-circulation of an EIR when significant new information is added to the EIR following public review but before certification. PRC § 21092.1. The CEQA Guidelines clarify that new information is significant if "the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project" including, for example, "a disclosure showing that ... [a] new significant environmental impact would result from the project." 14 CCR § 15088.5. The above significant environmental impacts have not been analyzed in the EIR and must be addressed in a supplemental DEIR that is re-circulated for public review.

## **VIII. THE CITY MUST ADOPT THE ALTERNATIVE 2, THE REDUCED PROJECT ALTERNATIVE**

An EIR must describe a range of reasonable alternatives to the Project, or to the location of the Project, which would feasibly attain most of the basic objectives of the project but would

avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. Section 15126.6(b) of the CEQA Guidelines states:

Because an EIR must identify ways to mitigate or avoid the significant effects that a project may have on the environment, the discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of project objectives, or would be more costly.

One of CEQA's fundamental requirements is that the DEIR must identify the "environmentally superior alternative," and require implementation of that alternative unless it is infeasible. 14 Cal.Code Regs. §1526.6(e)(2); Kostka & Zischke, *Practice Under the California Environmental Quality Act* §15.37 (Cont. Educ. Of the Bar, 2008). As explained by the Court of Appeal, an environmentally superior alternative may not be rejected simply because it is more expensive or less profitable:

The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.

*Citizens of Goleta Valley v. Bd. of Supervisors* (1988) 197 Cal.App.3d 1167, 1180-81; *see also, Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322 (county's approval of 80 unit hotel over smaller 64 unit alternative was not supported by substantial evidence).

Here, the City must implement Alternative 2, which the DEIR identifies as the environmentally superior alternative (DEIR, p. VI-59) because it is feasible and would greatly reduce the Project's environmental impacts.

Alternative 2, the Reduced Project Alternative, is identified in the DEIR as the environmentally superior alternative. (DEIR, p. VI-59) It would reduce the Project by approximately 33%. DEIR, p. VI-13. As the DEIR explains:

The Reduce Project Alternative would have lower significant and unavoidable impacts than the Project with respect to traffic and operational air quality, and lower less than significant impacts than the Project with respect to noise, public services, utilities, and energy. Additionally, the Reduce Project Alternative would mostly satisfy the objectives of the Project, although to a lesser degree than the Project.

DEIR, p. VI-59.

Specifically, Alternative 2 would reduce operational air quality emissions by 33%, it would reduce construction-related air quality impacts and greenhouse gas impacts. DEIR, p. VI-13-14. In addition, it would generate 33% less traffic than the Project. DEIR, p. IV-19; *see* Smith Comment, p. 2. These reductions are significant given the DEIR's conclusion that traffic

and air quality impacts are “significant and unavoidable.”

Since there is no evidence that Alternative 2 is infeasible, it meets all of the Project objectives, and since it is the environmentally superior alternative, the City must select Alternative 2.

## **IX. CONCLUSION**

For the foregoing reasons, SWRCC and LIUNA believe that the ICON at Panorama DEIR is wholly inadequate. They urge the City to make the above changes, and recirculate a revised DEIR to the public for review. In addition, they urge the City to adopt the environmentally superior alternative. Thank you for your attention to these comments.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'R. L. Davis', with a long horizontal flourish extending to the right.

Rebecca L. Davis