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April 30, 2018

Via Email and Overnight Delivery

Johnny Le
City of Los Angeles, Department of City Planning
200 North Spring Street, Room 750
Los Angeles, CA; 90012
Email: Johnny.Le@lacity.org

**Re: Comments on the Draft Environmental Impact Report for the
College Station Project (SCH No. 2014061066)
(Environmental Case No. ENV-2012-2055-EIR)**

Dear Mr. Le:

On behalf of **Coalition for Responsible Equitable Economic Development ("CREED LA")**, we submit these comments on the Draft Environmental Impact Report ("DEIR") for the College Station Project (SCH No. 2014061066) (Environmental Case No. ENV-2012-2055-EIR) ("Project"), proposed by Chinatown Station Owner, LLC ("Applicant"). The Project proposes to construct a mixed-use transit-oriented residential and commercial project located on an approximately 4.92-acre parcel at 129-135 W. College Street and 924 N. Spring Street ("Project Site") in the City of Los Angeles ("City").

The Project includes 770 dwelling units, including 355 studios, 360 one-bedroom units (including 10 townhomes), 55 two-bedroom units, and up to approximately 51,390 square feet of retail, restaurant, and other commercial space. The Project would develop approximately 642,239 square feet ("sf") of total floor area (approximately 3:1 floor area ration ("FAR")) within six residential buildings above a two-level podium structure and spatially arranged around a series of garden courtyards.

Project implementation would require a number of discretionary entitlements and related approvals, including a General Plan Amendment for a deviation from Footnote 12 of the Central City North Community Plan; a General Plan Amendment from Hybrid Industrial land use designation to Regional Center

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Commercial; a Specific Plan Amendment to reflect the Project Site's exemption from the Cornfield Arroyo Seco Specific Plan ("CASP") and to effect a corresponding correction to the Central City North Community Plan General Plan Land Use Map; a Zone Change from UC(CA) to C2 to reflect the Project Site's exemption from the CASP provisions and to effect the corresponding correction to the Zoning Map; a Height District Change from Height District 1 to Height District 2, to allow an increase in the maximum FAR from 1.5:1 to 3:1; Conditional Use Permit ("CUP") pursuant to the Los Angeles Municipal Code ("LAMC") Section 12.24-W.1 to permit the sale and dispensing of a full line of alcoholic beverages for off-site consumption at the Project's proposed restaurant/dining and commercial uses; a Vesting Tentative Tract Map ("VTTM"); Site Plan Review; certification of the Environmental Impact Report; a Development Agreement; and grading, excavation, foundation, and associated building permits (collectively, the "Project Approvals").¹

Based upon our review of the DEIR, we conclude that the DEIR fails to comply with the California Environmental Quality Act² ("CEQA") in numerous aspects. As explained more fully below, the DEIR fails to provide an accurate and complete Project description; fails to accurately disclose the extent of the Project's potentially significant impacts on air quality, public health, and from hazardous materials; fails to support its findings with substantial evidence; and fails to properly mitigate the Project's potentially significant impacts. The City cannot approve the Project until the errors in the DEIR are remedied and a revised DEIR is circulated for public review and comment.

We have reviewed the DEIR and its technical appendices with the assistance of our technical consultant, air quality and hazardous resources expert James J.J. Clark, PhD.³ The attached expert comments require separate responses under CEQA. We reserve the right to supplement these comments at a later date, and at any later proceedings related to this Project.⁴

¹ DEIR, p. ES-2; June 12, 2017 Development Agreement Application for ENV-2012-2055-EIR; 2017 Draft Development Agreement between the City of Los Angeles and Chinatown Station Owner, LLC, CPC 2017-2372 ("Draft Development Agreement").

² Pub. Resources Code ("PRC") §§ 21000 et seq.; 14 Cal. Code Regs. ("CCR") §§ 15000 et seq.

³ Dr. Clark's technical comments and curriculum vitae are attached hereto as Exhibit A.

⁴ Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield ("Bakersfield")* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

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I. STATEMENT OF INTEREST

CREED LA is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. The coalition includes the Sheet Metal Workers Local 105, International Brotherhood of Electrical Workers Local 11, Southern California Pipe Trades District Council 16, and District Council of Iron Workers of the State of California, along with their members, their families, and other individuals who live and work in the City of Los Angeles.

Individual members of CREED LA and its member organizations include John Ferruccio, Jorge L. Aceves, John P. Bustos, Gerry Kennon, and Chris S. Macias. These individuals live, work, recreate, and raise their families in the City of Los Angeles and surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist onsite.

In addition, CREED LA has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. LEGAL BACKGROUND

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).⁵ The EIR is the very heart of CEQA.⁶ "The foremost principle in interpreting CEQA is that the Legislature intended the act to be read so

⁵ See, e.g., PRC § 21100.

⁶ *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.

as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”⁷

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.⁸ “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.’”⁹ 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.”¹⁰

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures.¹¹ 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.”¹² 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.”¹³

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.’”¹⁴ As the courts have explained, “a

⁷ *Comtys. for a Better Env’ v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 (“*CBE v. CRA*”).

⁸ 14 CCR § 15002(a)(1).

⁹ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

¹⁰ *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.

¹¹ 14 CCR§ 15002(a)(2) and (3); see also *Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.

¹² 14 CCR §15002(a)(2).

¹³ PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

¹⁴ *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.

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.”¹⁵

III. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE PROJECT

The DEIR does not meet CEQA’s requirements because it fails to include an accurate, complete and stable Project description, rendering the entire analysis inadequate. California courts have repeatedly held that “an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document].”¹⁶ CEQA requires that a project be described with enough particularity that its impacts can be assessed.¹⁷ Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate project description.¹⁸

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....”¹⁹ 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.”²⁰ Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project’s impacts and undermining meaningful public review.²¹

¹⁵ *Berkeley Jets*, 91 Cal.App.4th at 1355; *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.

¹⁶ *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.

¹⁷ *Id.* at 192.

¹⁸ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311 (“*Sundstrom*”).

¹⁹ *Id.* at 192-193.

²⁰ *Id.* at 197-198.

²¹ *See, e.g., Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.

A. The DEIR Fails to Describe the Development Agreement.

The DEIR explains that the Project requires a number of discretionary entitlements and related approvals, but fails to explain that one of the Project's required approvals is a development agreement ("Development Agreement"). The DEIR also fails to include the proposed Development Agreement as an attachment to the DEIR, and fails to describe its terms. As a result, the DEIR fails to describe this critical component of the Project.

A development agreement is a discretionary contract between an agency and a developer designed to establish development rights for a person or entity having a legal or equitable interest in a particular property development. The purpose of a development agreement is generally to extend the life of the property's land use entitlements by "freezing" the rules, regulation, and land policies that are in place at the time of execution of the agreement, in exchange for the provision of various public benefits to the approving agency that the developer would not otherwise be required to provide.²² Development agreements reduce the economic risk of development to the developer, while providing additional benefits to the community in which the project is located. While a development agreement must advance an agency's local planning policies, it may also contain provisions that vary from otherwise applicable zoning standards and land use requirements, as long as the project is consistent with the general plan and any applicable specific plan.²³

Approval of a development agreement is a legislative act which must be approved by ordinance by the agency's governing body, in this case, the City Council.²⁴ As such, it qualifies as a Project "approval" within the meaning of CEQA.²⁵ For these reasons, it is both necessary and critical that the terms of a proposed development agreement be disclosed to the public and analyzed during the Project's CEQA review process in order to determine whether the development agreement may have potentially significant impacts that are not otherwise inherent in the project.

²² Gove Code Sections 65864-65869.5.

²³ *Id.*; *Santa Margarita Area Residents Together v. County of San Luis Obispo* (2000) 84 Cal. App. 4th 221, 227 ("*SMART*" v. *County of SLO*").

²⁴ Gov't Code § 65867.5.

²⁵ *See Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal. App. 4th 899, 926-927.

Public records obtained from the City demonstrate that the Applicant submitted a Development Agreement application (“DA Application”) to the City on June 14, 2017.²⁶ The DA Application explains that the Applicant seeks a Development Agreement “to provide certain mutually agreed upon Project assurances, as well as public benefits, including off-site affordable housing.”²⁷ The City subsequently prepared the Draft Development Agreement, which names the City and Applicant Chinatown Station Owner, LLC as parties.²⁸

The Draft Development Agreement proposes to freeze existing local regulations so that any subsequent changes in the applicable general plan, specific plan, zoning or building regulations adopted after the effective date of the Agreement would not apply to the Project.²⁹ The Draft Agreement explains that “this Agreement is necessary to assure the Property Owner that the Project will not be reduced in density, intensity or use or be subjected to new rules, regulations, ordinances or policies” unless expressly agreed to.³⁰

The Draft Agreement describes the public benefits that “will be achieved and developed” as part of the Agreement as “new jobs, housing in immediate adjacency to employment, and commercial space all within close proximity to mass transit.”³¹ The Draft Agreement also states that the Applicant will be obligated to provide an unspecified amount of money “for the improvement/creation of off-site affordable housing units.”³²

The Draft Agreement does not specify its proposed duration.³³ Given that Project construction is anticipated to take at least 3.5 years,³⁴ it is reasonable to infer that the Development Agreement would maintain a regulatory freeze for a minimum of 4 years. Moreover, any duration that is subsequently included in the Agreement would be automatically extended to account for any delays associated

²⁶ See Exhibit B, DA Application.

²⁷ See Exhibit B, DA Application, p. 2; § 2.3.2.

²⁸ See Exhibit B, Draft Development Agreement.

²⁹ See Exhibit B, Draft Development Agreement, § 3.2.3.1.

³⁰ See Exhibit B, Draft Development Agreement, p. 1.

³¹ See Exhibit B, Draft Development Agreement, § 2.3.1.

³² See Exhibit B, Draft Development Agreement, § 3.1.3.

³³ See Exhibit B, Draft Development Agreement, § 6.2 (“Term. The Term of this Agreement shall commence on the Effective Date and shall extend for a period of ____ years after the Effective Date.”).

³⁴ DEIR, p. 2-26.

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with Project permitting, any legal action that enjoins performance of the terms of the Agreement by one party or another, and any subsequent litigation related to the Project Approvals.³⁵

When a development agreement is planned or required to implement a project, it is considered part of the project under CEQA.³⁶ Development agreements must be enacted in accordance with the Government Code and applicable local planning codes, and require environmental review at the time of adoption. Therefore, the Project's proposed Development Agreement must be described in the EIR and considered by the City's decision-makers at the same time as the rest of the Project approvals.

The DEIR's failure to describe the Development Agreement is unexplained and impermissible. The Draft Development Agreement was prepared in 2017, several months before the DEIR was released for public review. It is a City document that is contained in the City's planning file for the Project.³⁷ There is therefore no question that the City is aware of its existence and proposed terms. The DEIR contains a lengthy list of the Project's proposed entitlements, including various General Plan and Specific Plan amendments, zoning changes, a CUP, a VTTM, site plan review, and various ministerial permits such as grading and building permits.³⁸ However, the DEIR fails to mention the Development Agreement anywhere in the document, including in the DEIR's Land Use and Planning section, which should have analyzed the impacts of the Draft Development Agreement's proposed freeze on local land use regulations. The DEIR is fundamentally deficient as a result of this omission.

The City may not escape its duty to comply with CEQA by contending that the Development Agreement would be subject to future environmental review. This would result in improper piecemealing. CEQA requires that an EIR analyze "the

³⁵ See Exhibit B, Draft Development Agreement, §§ 6.2; 6.4.

³⁶ See Gov. Code § 65864; 14 CCR §§15352(a), (b), 15378; *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116.

³⁷ CREED LA obtained the Draft Development Agreement and DA Application in response to its March 2018 Public Records Act request for "all documents related to the Project."

³⁸ See DEIR, p. ES-2.

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whole of the project.”³⁹ Failure, as here, to include a component of a project in an EIR’s project description renders the description inaccurate and inadequate under CEQA.⁴⁰ CEQA requires that “[a]ll phases of a project must be considered when evaluating its impact on the environment.”⁴¹ Since the Draft Development Agreement is already in existence, CEQA requires that it be analyzed in the DEIR and considered along with the other Project approvals.⁴²

The DEIR must be revised and recirculated to fully and accurately describe the terms of the Draft Development Agreement, and to analyze its potential impacts, including in particular, its impacts on local land use and planning policies. For example, the Draft Agreement proposes to allow the Applicant to provide offset payments for affordable housing and/or off-site affordable housing units, as opposed to the on-site affordable units currently required under the City’s Central City North Community Plan.⁴³ The Central City North Community Plan currently requires residential uses like the Project, with FARs 1.5:1 to 3:1, to set aside 20% of their units for affordable housing.⁴⁴ Because the Draft Development Agreement is not discussed in the DEIR, it is unclear whether or to what extent the Development Agreement would require the Applicant to relocate or compensate the City for removal of those units from the Project site. CEQA requires an analysis of whether a project would displace existing housing.⁴⁵ Because on-site affordable housing is required under the existing Community Plan, any proposal to relocate that affordable housing off-site is a potentially significant impact which must be analyzed in the DEIR.

³⁹ 14 CCR § 15062(a); *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 396.

⁴⁰ 14 CCR § 15062(a).

⁴¹ 14 CCR § 15126.

⁴² Nor is it reasonable to believe that any supplemental review would be required under the Draft Agreement. Although the Draft Agreement provides for annual review during the life of the Agreement, such review is limited in scope to assessing the Applicant’s “good faith compliance with the provisions and conditions of th[e] Agreement.” See Exhibit B, Draft Development Agreement, § 4.1.

⁴³ See Exhibit B, Draft Development Agreement, p. 2; § 3.1.3; see DEIR, p. 2.7 (Central City North Community Plan currently requires that “residential uses with FARs 1.5:1 to 3:1 shall set aside 20% of their units for affordable housing).

⁴⁴ *Id.*

⁴⁵ See CEQA Appendix G., Section XIII(b).

Moreover, the Applicant is proposing a General Plan amendment to allow deviation from this Community Plan requirement.⁴⁶ The DEIR fails to discuss whether the affordable housing terms proposed by the Development Agreement would adequately mitigate the significant impacts from the loss of affordable housing that would be caused by the Project's General Plan amendment, or whether off-site affordable housing is even feasible. These gaps in the DEIR's analysis must be addressed in a revised DEIR before the Project can be considered for approval.

B. The DEIR Fails to Describe the Project's Methane Mitigation System.

The DEIR explains that the Project site is located in the City's Methane Buffer Zone,⁴⁷ but fails to describe the type of methane mitigation that is proposed for the Project, or whether any methane mitigation has been incorporated into the Project design.

LAMC Section 91.7104.2 (Methane Mitigation Systems) requires that all buildings located in the City's Methane Buffer Zone provide a "methane mitigation system" based on the buildings' appropriate Site Design Level.⁴⁸ Section 91.7104.3.6 and LAMC Table 71 provide an exception to the requirement to install a methane mitigation system for buildings which provide a "Design Methane Pressure" which is less than or equal to two inches of water pressure and is located in an area that is either a Site Design Level I or II, or which qualifies as Site Design Level III and the utilities are installed with Trench Dams and Cable or Conduit Seal Fitting.⁴⁹

There is no dispute that the City's Methane Ordinance applies to the Project, since it is located in the Methane Buffer Zone. However, the DEIR fails to state whether a methane mitigation system has been incorporated into the Project design, what type of system has been incorporated, or whether the Project fits into any of the exemptions outlined in the LAMC. This is a critical omission. By failing to describe the Project's proposed methane mitigation system, the DEIR fails to

⁴⁶ DEIR, p. 4.6-17.

⁴⁷ DEIR, p. 4.5-6.

⁴⁸ LAMC Section 91.7104.2.

⁴⁹ Section 91.7104.3.6 and LAMC Table 71.

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ensure that the Project complies with applicable laws and land use policies set forth in the LAMC.

The DEIR also fails to explain whether the Project will adequately protect residents and the surrounding community from the explosive hazards that may be posed by unmitigated, or inadequately mitigated, subsurface methane deposits. These omissions must be corrected in a revised DEIR.

IV. THE DEIR FAILS TO ADEQUATELY ESTABLISH THE EXISTING BASELINE FOR HAZARDOUS MATERIALS AND PUBLIC HEALTH IMPACTS

The DEIR contains serious flaws in its disclosure of baseline environmental conditions related to the presence of hazardous materials at and adjacent to the Project site, and of the proximity of sensitive human receptors who are the most likely to be exposed to hazardous air pollution during Project construction. As a result, the DEIR lacks the necessary baseline information against which to measure the Project's environmental impacts with regard to hazardous materials and human exposure to toxic contaminants during Project construction.

The existing environmental setting is the starting point from which the lead agency must measure whether a proposed project may cause a significant environmental impact.⁵⁰ CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.⁵¹ Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The courts have clearly stated that, “[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing

⁵⁰ 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.

⁵¹ CEQA Guidelines §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 (“*Riverwatch*”).

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environment. It is only against this baseline that any significant environmental effects can be determined.”⁵²

The DEIR must be revised to provide accurate baseline information about these critical Project conditions in order to facilitate an accurate impact analysis and mitigation plan for the Project.

A. The DEIR Fails to Disclose the Extent of Existing Soil and Groundwater Contamination at the Project Site.

The DEIR discloses that the Project site has had a history of leaking underground storage tanks (“USTs”) and other significant soil contamination related to the site’s historic uses as a rail freight yard, which also included storage of wood, coal, and petroleum products.⁵³ The Project Site was subject to a number of hazardous materials investigations between 1989 and 2003.⁵⁴ The DEIR explains that four USTs and approximately 30 cubic yards of impacted soil were removed from the Project Site in 1989.⁵⁵ Subsequent cleanups resulted in removal of the majority of the Project site’s subsurface contaminants, including TPH, DDE, DDT, PCBs, benzene, antimony, mercury, and other contaminants.⁵⁶ However, some residual contamination remained.

A remedial action plan (“RAP”) was submitted to and approved by the Los Angeles Regional Water Quality Control Board (“LARWQCB”) in 2001 to remove hydrocarbons and arsenic.⁵⁷ A health risk assessment (“HRA”) was prepared in conjunction with the RAP.⁵⁸ The Phase I ESA explains that the HRA “was prepared for a mixed-use project where residential uses would not occupy the ground floor,”⁵⁹ and that cleanup levels were calculated based on that restriction.⁶⁰ The RAP was implemented and contaminated soil was removed in 2002. The LARWQCB issued a

⁵² *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

⁵³ DEIR, p. 4.5-1 to 4.5-2; Appendix E, 2013 Phase I Environmental Site Assessment (“ESA”).

⁵⁴ *Id.*

⁵⁵ DEIR, p. 4.5-2.

⁵⁶ *Id.*; Phase I ESA, pp. 7-11.

⁵⁷ *Id.*; Phase I ESA, pp. 7-11.

⁵⁸ Phase I ESA, p. 9.

⁵⁹ Phase I ESA, p. 9.

⁶⁰ *Id.*

“No Further Action” letter for the Project Site in 2003.⁶¹ However, the letter included a deed restriction prohibiting the development of ground-level residential uses on the Project Site.⁶² Additionally, groundwater sampling conducted at the Project Site has documented the ongoing presence of “heavier end” hydrocarbons in the southwest corner of the Site from an off-site source.⁶³

A post-remediation HRA was conducted in 2003, which assumed the same residential restrictions imposed by the Water Board.⁶⁴ The 2003 HRA was reviewed by OEHHA, which concluded that “**residential use of the second floors and above** does not pose a significant threat to human health.”⁶⁵ OEHHA’s conclusion emphasized that “**as long as...the use of the land does not depart from the proposed use**, the health risks associated with residual contamination left in soils at the site will not exceed – and most likely will be less than – those estimated for the protection of human health.”⁶⁶ However, the 2003 HRA continued to identify “two potentially exposed populations: current outdoor workers and future construction workers.”⁶⁷ Although the HRA was subsequently approved by OEHHA, no further cleanup activities were conducted at the Project site.⁶⁸

The DEIR explains that “the Project would include a two-story podium structure containing ground-level residential and retail uses,”⁶⁹ but fails to disclose the current levels of soil contamination remaining beneath these areas of the Project site, and fails to disclose that the ground-level residences potentially violate the LARWQCB’s closure restrictions. The DEIR further acknowledges that “sampled groundwater beneath the extreme southwestern portion of the Project Site contained hydrocarbons determined to derive from natural sources (oil seeps) and off-site sources” and recognizes that “Project-related excavation for subterranean parking structure or other building components, as well as for utilities, could

⁶¹ DEIR, p. 4.5-2.

⁶² DEIR, p. 4.5-2.

⁶³ Phase I ESA, p. 11.

⁶⁴ Phase I ESA, p. 10; see February 20, 2003, LARWQCB Letter re No Further Action – Parcel PA-018, 924 North Spring Street, Los Angeles (“No Further Action Letter”), p. 1.

⁶⁵ See No Further Action Letter, p. 1 (emphasis added).

⁶⁶ See No Further Action Letter, p. 3 (emphasis added).

⁶⁷ Phase I ESA, p. 10.

⁶⁸ *Id.*

⁶⁹ DEIR, p. 2-1.

intercept historic high groundwater in this location.”⁷⁰ However, the DEIR fails to include any study documenting current levels of groundwater contamination at the Project site.

The most recent soil and groundwater sampling tests that are discussed in the DEIR were conducted in the mid-1990’s, and were superseded by the LARWQCB’s 2002 remediation. Although the DEIR generally discusses the LARWQCB’s subsequent 2002 remediation and No Further Action letter, neither the DEIR nor the Phase I ESA document the levels of residual contamination that remained at the Project site following the 2002 remediation – or which currently exist.

The LARWQCB’s No Further Action determination was predicated on restricted future use of the site which prohibits ground-level residential uses. The post-remediation HRA also identifies “outdoor workers” and “future construction workers” as categories of persons that could potentially be exposed to hazardous contamination as the result of Project construction at the site.⁷¹ Thus, there appear to be additional hazards associated with project development at the site that may extend beyond solely the ground-level residential hazards identified by the LARWQCB. It is therefore reasonable to infer that the site has existing levels of soil contamination that may exceed applicable health screening levels for residential uses and close contact by workers and sensitive receptors. The DEIR fails to describe these current conditions with specificity, and fails to quantify the existing levels of contamination. As a result, the DEIR fails to establish an accurate baseline from which to evaluate the significance of the Project’s impacts from disturbance of contaminated soil and groundwater during Project construction.

The DEIR must be revised to include a current Phase II ESA which quantifies the current level of soil and groundwater contamination in all areas of the Project site which will be disturbed during Project construction. Once identified, the contamination levels should be compared to the California Human Health Screening Levels (“CHHSLs”) published by the Office of Environmental Health and Hazard Assessment (“OEHHA”).⁷² Soil and groundwater that contains one or more contaminants at levels above those identified in the CHHSLs should be

⁷⁰ DEIR, pp. 4.5-12 to 4.5-13.

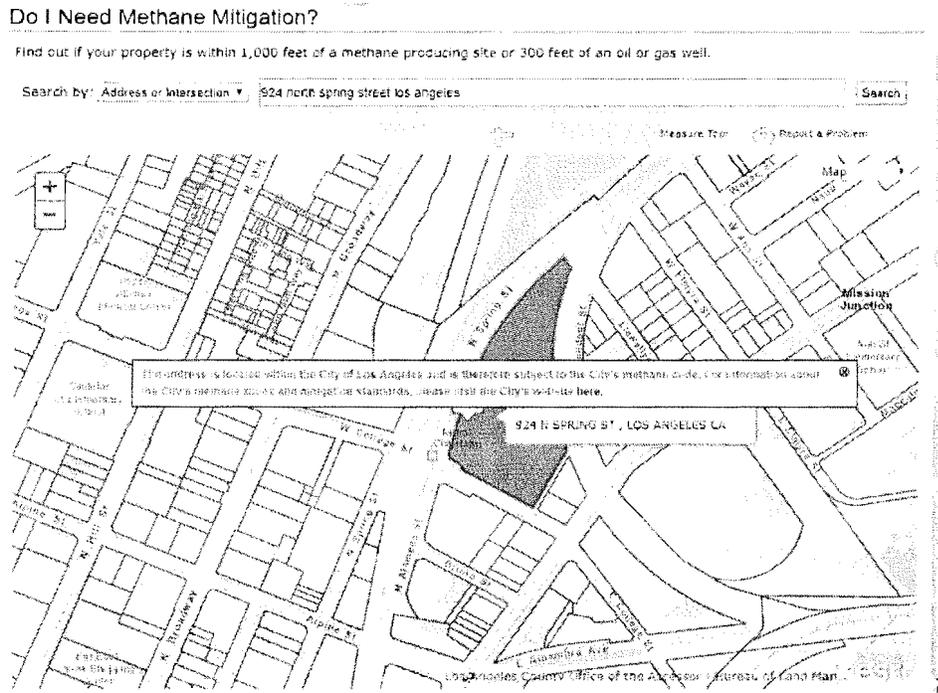
⁷¹ Phase I ESA, p. 10.

⁷² Available at <http://oehha.ca.gov/chhsltable>.

considered “impacted,” and appropriate mitigation measures identified to reduce contamination to less than significant levels.

B. The DEIR Fails to Disclose Potentially Significant Methane Contamination That May Be Disturbed by the Project.

The DEIR explains that the Project site is located in the City’s Methane Buffer Zone,⁷³ but fails to state whether any methane is present beneath the Project site, and at what levels. This is a critical omission, because the potential presence of methane beneath the Project site is a required disclosure under the LAMC, and may pose a significant health and safety risk if it is disturbed during Project construction or subsequently released during Project operation.



⁷³ DEIR, p. 4.5-6.

⁷⁴ See Exhibit A, p. 14, Figure 2. Methane Mitigation Map.

Methane is a combustible and potentially explosive gas at concentrations above 50,000 parts per million (ppm) in the presence of oxygen.⁷⁵ Underground methane is a major problem in areas of Los Angeles that are located near former oil wells, gas wells, or landfills.⁷⁶

The LAMC includes a Methane Ordinance, Ordinance No, 175790, which regulates the disclosure and abatement of methane hazards in the City's Methane Zone and Methane Buffer Zones.⁷⁷ LAMC Section 91.7104.2 mandates that all buildings located in the Methane Buffer Zone, like the Project site, must provide a methane mitigation system, or be exempted from one based on the appropriate Site Design Level for the building. Finally, LAMC Section 91.106.4.1 provides that the Planning Department "shall have the authority to withhold permits on projects located within a Methane Zone or Methane Buffer Zone" if the project proponent fails to provide evidence of the legally required methane mitigation system.⁷⁸ Permits may only be issued upon submittal of "detailed plans that show adequate protection against flammable gas incursion by providing the installation of suitable methane mitigation systems."⁷⁹

The DEIR fails to contain any discussion of the baseline levels of methane present at the Project site, and, as discussed above, fails to describe whether a methane mitigation system is planned for the Project. These omissions are critical, as they prevent the City and the public from ascertaining whether, and to what extent, potentially explosive methane gas exists at the Project site. The lack of information also prevents the City and the public from having any assurance that any methane that may be released during Project construction would be adequately abated, as required by the Methane Ordinance.

Based on a review of adjacent properties, it is reasonable to conclude that the Project site may contain high levels of methane that the DEIR fails to disclose. Dr.

⁷⁵ DEIR, p. 4.5-6.

⁷⁶ See Landfill Gas Assessment And Management, Los Angeles County Department Of Public Works, Landfill Gas Protection Policy, available at <https://dpw.lacounty.gov/epd/swins/docs/pdf/methane/Methane%20Packet.pdf>.

⁷⁷ See LAMC Methane Ordinance, Ordinance No, 175790, available at <https://www.ladbs.org/docs/default-source/publications/ordinances/methane-code--ordinance-no-175790.pdf?sfvrsn=10>.

⁷⁸ LAMC Section 91.106.4.1.

⁷⁹ *Id.*

Clark explains that the Blossom Plaza project site, which is located directly adjacent to the Project site, was recently developed between 2007-2014.⁸⁰ Blossom Plaza was classified as a Level V methane contaminated site.⁸¹ Level V sites contain more than 12,500 ppmv, and are considered highly contaminated.⁸² The City prepared an MND for the Blossom Plaza Project in 2007. The City required the Blossom Plaza project proponent to implement a robust methane ventilation system to mitigate Blossom Plaza's significant methane impacts.⁸³

In this case, the DEIR fails to even disclose whether methane is present beneath the Project site, let alone disclose the levels of any existing contamination, as required by the LAMC. As a result of this omission, the DEIR fails to include any mitigation measures to address potentially significant methane impacts. The DEIR must be revised to include a factually and legally adequate discussion of the baseline methane conditions at the Project site, and to incorporate mitigation measures which require the Applicant to install a methane mitigation system, as required by the LAMC and CEQA.

C. The DEIR Fails to Disclose the Presence of Critical Sensitive Receptors Adjacent to the Project Site.

The DEIR fails to disclose the presence of numerous sensitive receptors that are located within 0.25 miles of the Project site, including two schools, hundreds of apartments adjacent to the Project site, and recreational users of the adjacent Los Angeles State Historic Park.

Dr. Clark reviewed land use mapping and Google Earth images for the areas surrounding the Project site, and determined that the following sensitive receptors were omitted from discussion in the DEIR:

- Chinese Consolidated School located at 816 Yale Street (approximately 1,300 feet west of the site);

⁸⁰ See e.g. <http://cityplanning.lacity.org/staffrpt/initialRpts/CPC-2004-4139.pdf/>.

⁸¹ See Exhibit A, p. 13.

⁸² See LAMC 12

TABLE 71. Minimum Methane Mitigation Requirements (Level V is the highest level of methane contamination recognized under the Code).

⁸³ See <http://cityplanning.lacity.org/staffrpt/initialRpts/CPC-2004-4139.pdf/>.

- Cathedral High School located at 1253 Bishops Road (approximately 1,000 feet north west of the site);
- Los Angeles State Historic Park (approximately 130 feet northwest of the Project Site, across Spring Street);
- The newly constructed Blossom Plaza mixed-use development is located at the corner of N. Broadway and W. College Street (approximately 200 feet west of the Project Site);
- Mixed-use residential developments are located at the corner of Alameda Street and Alpine Street (approximately 400 feet south of the Project Site).
- The William Mead Homes, a public housing project, completed in 1942 and operated by the Housing Authority of the City of Los Angeles (approximately 620 feet east of the Project Site).

Both the DEIR's hazardous materials impact analysis and air quality health risk analysis rely on the conclusion that there are no sensitive receptors within 0.25 miles of the Project site that would be adversely impacted from hazardous substances and toxic air emissions to conclude that the Project would not adversely impact sensitive human receptors.⁸⁴ By failing to identify hundreds of sensitive receptors within the immediate vicinity of the Project site, the DEIR fails to provide the basic information necessary to make an accurate significance determination with regard to the Project's hazardous materials and public health impacts.

⁸⁴ See DEIR, p. 4.5-13 ("Threshold HAZ-2: Would the Project emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school?"); p. 4.2-34 ("The Project would expose sensitive receptors to substantial concentrations of TACs if it emits carcinogenic materials or TACs that exceed the maximum incremental cancer risk of 10 in 1 million or a cancer burden greater than 0.5 excess cancer cases (in areas greater than or equal to 1 in 1 million) or an acute or chronic hazard index of 1.0."); see p. 4.2-19 ("CARB's siting recommendations include the following: (1) avoid siting sensitive receptors within 500 feet of a freeway, urban road with 100,000 vehicles per day, or rural roads with 50,000 vehicles per day; (2) avoid siting sensitive receptors within 1,000 feet of a distribution center (that accommodates more than 100 trucks per day, more than 40 trucks with operating transport refrigeration units per day, or where transport refrigeration unit operations exceed 300 hours per week); (3) avoid siting sensitive receptors within 300 feet of any dry cleaning operation using perchloroethylene and within 500 feet of operations with two or more machines; and (4) avoid siting sensitive receptors within 300 feet of a large gasoline dispensing facility (3.6 million gallons per year or more) or 50 feet of a typical gasoline dispensing facility (less than 3.6 million gallons per year).").

The DEIR must be revised to include accurate baseline information regarding the sensitive local populations that will be directly impacted by the Project's emissions.

V. THE DEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE POTENTIALLY SIGNIFICANT HAZARDOUS MATERIALS IMPACTS

An EIR must fully disclose all potentially significant impacts of a Project, and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.⁸⁵ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁸⁶

As discussed above, the Project site has had a history of significant soil contamination related to the site's historic uses as a rail freight yard.⁸⁷ The Project Site was subject to a number of hazardous materials investigations between 1989 and 2003.⁸⁸ The LARWQCB's 2002 regulatory closure left some contamination in place, and restricted future land use at the site to prohibit residential uses on the ground floor in order to reduce "human health risk."⁸⁹ The post-remediation HRA continued to identify "two potentially exposed populations: current outdoor workers and future construction workers."⁹⁰

The DEIR includes a Phase I ESA which documents the site's contamination history. However, the DEIR fails to include any quantified analysis of existing levels of soil and groundwater contamination, and fails to disclose the levels of contaminants that will be disturbed by Project construction. Instead, the DEIR relies on the LARWQCB's 2002 site closure letter to summarily conclude that the Project will not result in any significant impacts to off-site sensitive receptors,

⁸⁵ 14 CCR § 15064(b).

⁸⁶ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

⁸⁷ DEIR, p. 4.5-1 to 4.5-2; Appendix E, 2013 Phase I Environmental Site Assessment ("ESA"), pp. 8-11.

⁸⁸ *Id.*

⁸⁹ *Id.*; see LARWQCB No Further Action Letter.

⁹⁰ Phase I ESA, p. 10.

construction workers, or future Project residents from Project construction activities, including excavation of on-site soils and site preparation.⁹¹

This approach is inadequate because the LARWQCB's No Further Action Letter was not prepared for the Project. In particular, it did not address the Project's proposed inclusion of ground-level residential uses and subterranean parking. Underground parking structures may require deeper soil excavation than the mixed-use development contemplated by the LARWQCB in 2002. The placement of residential uses on the ground level of the Project site also appears to violate the LARWQCB deed restriction placed on the property. The Project proposes activities that are beyond the scope of the LARWQCB site closure, and therefore require further analysis under CEQA.

CEQA mandates that an "EIR shall [] analyze any significant environmental effects the project might cause by bringing development and people into the area affected," including "attracting people to the location and exposing them to the hazards found there."⁹² In this case, there is no dispute that the Project site contains existing "hazards" in the form of residual soil contamination, and that the Project will disturb contaminated soil during Project construction. The Project proposes to place residences, subterranean parking, and retail uses directly atop this contamination, thereby exposing people to existing contamination. The City may not simply rely on a 16-year old regulatory closure report that does not describe the Project to conclude that the Project will not result in any significant environmental effects from this exposure. The City has an ongoing duty to analyze and mitigate the potential effects from hazardous exposure in the EIR.

The DEIR should be revised and recirculated to include a quantified analysis of existing soil and groundwater contamination levels at the Project site, and to implement all necessary mitigation measures to ensure that Project construction will not expose people to unhealthful levels of contamination.

⁹¹ See DEIR, p. 4.5-12.

⁹² 14 CCR § 15126.2(a).

VI. THE DEIR FAILS TO ADEQUATELY ANALYZE, QUANTIFY, AND MITIGATE SIGNIFICANT AIR QUALITY IMPACTS

An EIR must fully disclose all potentially significant impacts of a Project, and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.⁹³ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁹⁴

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.⁹⁵ Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.⁹⁶ In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will 'determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements.'⁹⁷

Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not '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.'⁹⁸

A. The DEIR Fails to Adequately Disclose and Mitigate the Project's Significant Construction Air Quality Impacts.

⁹³ 14 CCR § 15064(b).

⁹⁴ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

⁹⁵ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

⁹⁶ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁹⁷ *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

⁹⁸ *Berkeley Jets*, 91 Cal.App.4th at 1355.

Under CEQA a project has significant impacts if it “[v]iolate[s] any air quality standard or contribute[s] substantially to an existing or projected air quality violation.”⁹⁹ The South Coast Air Quality Management District (“SCAQMD” or “Air District”) maintains thresholds of significance for criteria air pollutants that are to be used in determining the significance of a project’s air quality impacts under CEQA.¹⁰⁰ The DEIR failed to fully analyze the Project’s construction emissions by improperly applying mitigation measures to unmitigated emissions prior to making its significance determination. As a result, the DEIR fails to disclose that Project construction will result in significant emissions that exceed applicable Air District thresholds, resulting in significant, unmitigated air quality impacts.

1. The DEIR’s Air Quality Impact Analysis Improperly Relies on Mitigated Emissions to Conclude that Construction and Operational Emissions Are Less Than Significant.

The DEIR underestimates the significance of the Project’s air quality impacts by using mitigated emissions for its initial significance determination. By applying emissions controls that will be applied as mitigation to the Project’s unmitigated emissions, the DEIR “compress[es] the analysis of impacts and mitigation measures into a single issue,”¹⁰¹ in violation of CEQA. This approach is prohibited by CEQA because it fails to inform the public of the true severity of an impact.

The DEIR relies on Project Design Features (“PDFs”) that are intended to reduce construction and operational emissions to conclude that the emissions are less than significant. This approach incorrectly dismisses the significance of the Project’s actual, unmitigated emissions. With regard to construction emissions, the DEIR improperly relies on PDF AQ-1,¹⁰² which states that the Project will be required to use off-road diesel-powered construction equipment that meets or

⁹⁹ CEQA Appendix G.

¹⁰⁰ See SCAQMD Thresholds, available at <http://www.aqmd.gov/docs/default-source/ceqa/handbook/scaqmd-air-quality-significance-thresholds.pdf?sfvrsn=2>.

¹⁰¹ *Ibid.*

¹⁰² The DEIR’s improper reliance on PDFs applies equally to PDF GHG-1, PDF GHG-2, PDF GHG-3, and PDF GHG-4, which similarly apply GHG mitigation measures to unmitigated emissions in order to conclude that the Project’s GHG emissions are less than significant, requiring no mitigation. See e.g., DEIR, pp. ES-21 to ES-22.

exceeds the CARB and USEPA Tier 4 off-road emissions standards during Project construction.¹⁰³ The DEIR initially describes the Project's unmitigated construction emissions, stating that "a discussion of the Project's construction emissions without the implementation of Project Design Features is included for informational purposes to disclose the emissions levels without the use of these features."¹⁰⁴ However, before reaching a conclusion regarding the significance of the Project's construction emissions, the DEIR applies a reduction factor based on the intended use of Tier 4 construction equipment and fugitive dust controls, and then concludes that the Project's construction emissions will be less than significant.¹⁰⁵ This "downward adjustment" of the Project's construction emissions artificially reduces their significance.

The DEIR makes a similar mistake with its significance determination for operational emissions by applying anticipated trip reductions from Project characteristics, including internal capture from co-locating commercial and residential uses on the Project Site, and access to nearby mass transit, to calculate the Project's mobile-source emissions.¹⁰⁶ As a result, rather than disclose the Project's unmitigated mobile source emissions, the DEIR compares "[t]he maximum daily *net* emissions from operation of the Project," which "assume compliance with PDF AQ-2, and PDF NOISE-2" to the SCAQMD daily regional numeric indicators.¹⁰⁷ The DEIR then concludes that the Project's mobile-source emissions are less than significant.¹⁰⁸

In both cases, the DEIR concludes that the Project's construction and operational emissions will be less than significant based on application of various PDFs. The DEIR then fails to incorporate any binding mitigation measures to reduce either construction or operational emissions, incorrectly concluding that "no mitigation measures are required" for any of the Project's air quality impacts.¹⁰⁹

¹⁰³ DEIR, p. 4.2-36.

¹⁰⁴ DEIR, p. 4.2-29.

¹⁰⁵ DEIR, p. 4.2-48 to 4.2-49 ("These calculations assume compliance with applicable dust control measures required to be implemented during each phase of construction by SCAQMD Rule 403 (Control of Fugitive Dust), and emissions reductions from the implementation of PDF AQ-1 (Construction Techniques).").

¹⁰⁶ DEIR, p. 1.2-30.

¹⁰⁷ DEIR, p. 4.2-31; 4.2-50.

¹⁰⁸ *Id.*

¹⁰⁹ See DEIR, pp. ES-18 to ES-20 ("Section 4.2 Air Quality – No Mitigation Measures are Required.").

This approach violates CEQA. CEQA requires that an EIR disclose the significance of an impact prior to mitigation.¹¹⁰ The purpose of this analysis is both to require public disclosure of a project's impacts, and to require the lead agency to "identify and focus on the significant environmental effects of the proposed project."¹¹¹ In evaluating the significance of an impact, an EIR must discuss the physical changes in the environment that the project will cause, including:

relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution, population concentration, the human use of the land (including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resource base such as water, historical resources, scenic quality, and public services.¹¹²

Only after this discussion occurs may the agency identify and apply mitigation measures to reduce potentially significant impacts to less than significant levels.¹¹³ The discussion is rendered meaningless (or, as here, omitted entirely) if the EIR falsely concludes that a project's impact is less than significant based on premature application of mitigation measures. In this case, the DEIR failed to undertake the requisite analysis required by CEQA Guidelines Section 15126.2 for the Project's construction and operational emissions because the DEIR did not disclose that the Project's air quality impacts were significant prior to incorporating PDF AQ-1, PDF-AQ-2, and NOISE-1.

Moreover, none of these PDFs are incorporated into the DEIR as a binding mitigation measure, in further violation of CEQA. CEQA defines mitigation as including any measures designed to avoid, minimize, rectify, reduce, or compensate for a significant impact.¹¹⁴ The PDFs described in the DEIR are actually mitigation measures because they perform these functions. For example, PDF AQ-1's requirement to use Tier 4 construction equipment is clearly designed as mitigation to reduce the Project's construction emissions. PDF AQ-2's "green building" measures are designed to reduce operational emissions. These PDFs are not

¹¹⁰ 14 CCR § 15126.2.

¹¹¹ 14 CCR § 15126.2(a).

¹¹² 14 CCR § 15126.2(a).

¹¹³ 14 CCR § 15126.4.

¹¹⁴ 14 CCR § 15370.

designed to simply modify a physical element of the Project, as is inherent in any project “design feature.” Both PDFs are designed to reduce impacts. This makes them mitigation measures within the meaning of CEQA.

CEQA requires that mitigation measures be fully enforceable through permit conditions, agreements or other legally binding instruments.¹¹⁵ Because the City has not characterized PDF AQ-1, PDF AQ-2, or any of the other PDFs on which the DEIR relies as mitigation, they are not binding on the Applicant, and are not included in the Project’s Mitigation Monitoring and Reporting Program (“MMRP”). Reliance on PDFs to reduce impacts therefore provides no assurance that the Applicant would later comply with the “design features.” The PDFs therefore fail to provide the binding mechanism required by CEQA to compel the Applicant’s compliance with mitigation following Project approval.

The Court of Appeal recently reiterated that mitigation must be incorporated directly into a project’s MMRP to be considered enforceable. In *Lotus v. Department of Transportation*,¹¹⁶ an EIR approved by Caltrans contained several measures “[t]o help minimize potential stress on the redwood trees” during construction of a highway. Although those measures were clearly separate mitigation, the project proponents considered them “part of the project.” The EIR concluded that due to the planned implementation of those measures, the project would not result in significant impacts. The Court disagreed, finding that the EIR had “disregard[ed] the requirements of CEQA” by “compressing the analysis of impacts and mitigation measures into a single issue.” The Court continued, stating “[a]bsent a determination regarding the significance of the impacts ... it is impossible to determine whether mitigation measures are required or to evaluate whether other more effective measures than those proposed should be considered.”¹¹⁷

Similar to the inadequate analysis contained in the *Lotus* EIR, the DEIR asserts that incorporation of PDFs AQ-1, AQ-2, and NOISE-1 would reduce the Project’s air quality emissions to less than significant levels prior to mitigation. This approach improperly “compress[es] the analysis of impacts and mitigation measures into a single issue.” Even if the DEIR’s conclusions were accurate, which

¹¹⁵ 14 CCR §15126.4(a)(2).

¹¹⁶ *Lotus v. Dep’t of Transp.* (2014) 223 Cal. App. 4th 645, 651-52.

¹¹⁷ *Id.*

is unclear, the PDFs must be incorporated into the Project's MMRP as formal mitigation measures in order to be factored into the City's ultimate significance findings. "Simply stating that there will be no significant impacts because the project incorporates 'special construction techniques' is not adequate or permissible."¹¹⁸

The City has a duty to disclose unmitigated emissions and compare them to the applicable significance thresholds before applying mitigation measures. As a result of its improper reliance on PDFs to achieve emissions reductions, the DEIR underestimates the amount of emissions that will be generated by the Project and their effects on nearby sensitive receptors. The DEIR must be revised and recirculated to include an accurate analysis of the Project's air quality impacts, and to require that any and all mitigation measures that are intended to reduce emissions are incorporated as binding mitigation in the Project's MMRP.

2. The Project Has Significant Construction Emissions that the DEIR Fails to Disclose and Mitigate.

Dr. Clark performed an independent CalEEMod analysis which modeled the Project's construction emissions without the reductions assumed in the DEIR from application of PDF AQ-1. As Dr. Clark explains, "[t]he construction emission estimates for the DEIR are based upon assumptions that would minimize emissions from each of the pieces of equipment utilized. The emissions grossly underestimate emissions of PM10 and PM2.5."¹¹⁹ Dr. Clark performed a CalEEMod analysis using the same construction equipment input parameters defined in the DEIR, and concludes that the Project will have significant PM10 and PM2.5 emissions that exceed SCAQMD Localized Significance Thresholds ("LSTs"), resulting in significant PM impacts that the DEIR fails to disclose and mitigate.

The DEIR assumes that 192,000 cubic yards of soil will be excavated and removed from the site during the Project's mass grading/excavation phase. In this scenario, 240 truck trips are assumed to occur daily, along with the emissions from all of the construction equipment (bore/drill rig, compactor, excavators, forklifts, rough terrain forklifts, loaders, sweepers/scrubbers, tractors/backhoes). The DEIR's

¹¹⁸ *Id.*

¹¹⁹ Exhibit A, p. 7.

air quality analysis then assumes the use of Tier 4 equipment for these functions, and concludes that, for this phase, the maximum unmitigated construction emissions of PM10 and PM2.5 are 9.0 pounds per day and 3.2 pounds per day, respectively.¹²⁰

Dr. Clark explains that, when the same information is input into the latest version of CALEEMOD (2016Version3.2) without assuming the use of Tier 4 equipment, the unmitigated PM10 and PM2.5 values increase to 19.8 lbs/day and 11.6 lbs/day, respectively.¹²¹ Dr. Clark's analysis demonstrates that, when Project construction is properly characterized prior to mitigation, the Project's PM10 emissions are more than doubled, and the Project's PM2.5 emissions increase by more than three-fold. These values exceed SCAQMD's LSTs for PM10 of 1.5 lbs/day and PM2.5 of 1.5 pounds/day, resulting in a significant air quality impact that the DEIR failed to disclose.

The City must prepare a revised air quality analysis and revised DEIR which discloses these impacts as significant, and which incorporates binding mitigation measures to reduce PM emissions to less than significant levels.

B. The DEIR Failed to Adequately Disclose and Mitigate the Project's Significant Cancer Risk from Construction Emissions.

The DEIR fails to include a health risk analysis ("HRA") to disclose the adverse health impacts that will be caused by exposure to toxic air contaminants ("TACs") from the Project's construction and operational emissions. As a result, the DEIR fails to disclose the potentially significant cancer risk posed to nearby residents and children from TACs, and fails to mitigate it. Because the DEIR fails to support its conclusion that the Project will not have significant health impacts from diesel particulate matter ("DPM") emissions with the necessary analysis, this finding is not supported by substantial evidence.

One of the primary emissions of concern regarding health effects for land development projects is DPM, which can be released during Project construction and operation. The DEIR acknowledges that the greatest potential for TAC

¹²⁰ See DEIR, p. 4.2-54.

¹²¹ Exhibit A, p. 7.

emissions during construction would be related to DPM emissions associated with heavy-duty equipment during excavation and grading activities.¹²² The DEIR also explains that, during long-term operations, TACs could be emitted as part of periodic maintenance operations, period testing and maintenance of the emergency generator, restaurant charbroiling, cleaning, painting, etc., and from periodic visits from delivery trucks and service vehicles.¹²³ However, the DEIR failed to perform a quantitative assessment of the Project's DPM emissions, instead concluding that the Project's cancer risk from exposure to DPM would be less than significant based on the DEIR's conclusion that the Project's criteria pollutant emissions are less than significant.

The DEIR's health risk conclusion is unsupported for three reasons. First, DPM is not a criteria pollutant like PM10 and PM2.5. Therefore, the DEIR relies on an analysis of the wrong pollutants to analyze health risk. DPM is a toxic air contaminant ("TAC") that is recognized by state and federal agencies, and atmospheric scientists, as causing severe respiratory disease, lung damage, cancer, and premature death. Air districts have recently recognized that "TACs present an even greater health risk than previously thought."¹²⁴ By contrast, standard criteria pollutants, which include both PM10 and PM2.5, are defined under both federal and state laws as "criteria pollutants."¹²⁵ PM alone does not contain toxic chemicals. PM is simply defined as "very small solid or liquid particles that can be suspended in the atmosphere."¹²⁶ TACs, by contrast, are defined as "air pollutant[s] which may cause or contribute to an increase in mortality or in serious illness, or which may pose a present or potential hazard to human health. Unlike regular particulate matter, DPM contains toxic chemicals which are not evaluated in a criteria pollutant analysis. The DEIR's attempt to rely on its criteria pollutant analysis to conclude that DPM emissions are insignificant is therefore a major error, and one which fails to provide any support for the DEIR's conclusion that the health risk posed by exposure to DPM is insignificant.

¹²² DEIR, p. 4.2-31.

¹²³ DEIR, p. 4.2-31.

¹²⁴ *California Bldg. Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 379.

¹²⁵ The seven criteria air pollutants are: ozone (O₃); carbon monoxide (CO); nitrogen dioxide (NO₂); sulfur dioxide (SO₂); PM₁₀; PM_{2.5}; and lead (Pb).

¹²⁶ *CURE v. Mojave Desert Air Qual. Mgm't Dist.* (2009) 178 Cal. App. 4th 1225, 1231-32; see 40 C.F.R. § 50.6(c).

Second, the DEIR's failure to quantify the health risk from DPM exposure is unsupported. The DEIR contends that the City was not required to perform a numeric analysis of the Project's DPM emissions and their associated health risk because "SCAQMD has not formally adopted guidance that requires quantitative health risk assessments be performed for short-term exposures to TAC emissions."¹²⁷ This position ignores the City's general duty under CEQA to analyze the health risks posed by a project, as well as relevant SCAQMD and OEHHA guidance which recommends performing a detailed health risk analysis for projects with construction periods over two months or involving vehicular trips.

CEQA expressly requires that an EIR to discuss, inter alia, "health and safety problems caused by the physical changes" resulting from the project.¹²⁸ When a project results in exposure to toxic contaminants, this analysis requires a "human health risk assessment."¹²⁹ Since 2002, SCAQMD guidance has also recommended that mobile source health risk assessments should be prepared for all projects involving vehicular trips.¹³⁰ SCAQMD's *Health Risk Assessment Guidance for Analyzing Cancer Risks from Mobile Source Diesel Emissions* explain that "in the event that the proposed project generates or attracts vehicular trips, especially heavy-duty diesel-fueled vehicles, it is recommended that the lead agency perform a mobile source health risk assessment."¹³¹ The SCAQMD mobile source guidance does not create any exception for projects that comply with CARB regulations.¹³² Finally, OEHHA¹³³ guidance sets a recommended threshold for preparing an HRA

¹²⁷ DEIR, p. 4.2-31.

¹²⁸ 14 CCR § 15126.2(a).

¹²⁹ *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* ("Berkeley Jets") (2001) 91 Cal.App.4th 1344, 1369; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219-1220 (CEQA requires that there must be some analysis of the correlation between the project's emissions and human health impacts).

¹³⁰ See "Mobile Source Toxics Analysis." SCAQMD, available at: <http://www.aqmd.gov/home/regulations/ceqa/air-quality-analysis-handbook/mobile-source-toxics-analysis>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ OEHHA is the organization responsible for providing recommendations and guidance on how to conduct health risk assessments in California. See OEHHA organization description, available at <http://oehha.ca.gov/about/program.html>.

of a construction period of two months or more.¹³⁴ Construction of the instant Project will last at least 43 months – over 20 times the threshold triggering a quantified health risk analysis pursuant to the OEHHA Guidance. The fact that the OEHHA Guidance is not a binding SCAQMD Rule does not excuse the City from its duty to quantify the health risk posed by human exposure to DPM and other TACs during Project construction. The DEIR’s failure to perform quantified analysis of health risk is entirely unsupported.

Third, the DEIR’s conclusion that health risk is less than significant is factually inaccurate. Dr. Clark performed a quantified analysis of the Project’s construction TAC emissions from DPM, benzene, and formaldehyde using the construction parameters described in the DEIR. Dr. Clark concludes that the Project will have significant TAC emissions which pose a significant cancer risk to nearby sensitive receptors, as follows:¹³⁵

Compound	Residential	Commercial
Acetaldehyde	0.3 in 1,000,000	0.0368 in 1,000,000
Acrolein	0.574 in 1,000,000	
Benzene	0.0685 in 1,000,000	0.0685 in 1,000,000
1,3-Butadiene	0.213 in 1,000,000	0.0255 in 1,000,000
Ethyl Benzene	0.0244 in 1,000,000	0.00291 in 1,000,000
Formaldehyde	2.03 in 1,000,000	0.242 in 1,000,000
Particulate Emissions from Diesel-Fueled Engines	224 in 1,000,000	26.7 in 1,000,000

¹³⁴ See “Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments.” OEHHA, February 2015, available at: http://oehha.ca.gov/air/hot_spots/hotspots2015.html (“OEHHA Guidance”), p. 8-18.

¹³⁵ Exhibit A, p. 7.

Total	227 in 1,000,000	27.1 in 1,000,000
	FAIL	FAIL

Dr. Clark concludes that Project construction would result in elevated cancer risks for persons located in both residential and commercial locations in close vicinity to the Project site. For residential users, Dr. Clark concludes that the Project's cancer risk is 227×10^{-6} (227 in 1,000,000).¹³⁶ For commercial users, he concludes that the cancer risk is 27.1×10^{-6} (27.1 in 1,000,000).¹³⁷ These exposure levels greatly exceed the SCAQMD's significance thresholds of 10 in 1,000,000 for cancer risk, and therefore constitute significant impacts requiring mitigation under CEQA.¹³⁸

The DEIR must be revised and recirculated to disclose the Project's significant health risks, and to require feasible and effective mitigation to reduce those impacts to less than significant levels.

VII. CONCLUSION

The DEIR is inadequate as an environmental document because it fails to include a complete and accurate Project description, fails to adequately disclose the extent of the Project's environmental impacts without mitigation, and fails to fully disclose and mitigate the Project's potentially significant impacts on air quality and public health. Moreover, its findings regarding Project impacts are not supported by substantial evidence. The City cannot approve the Project until it prepares a revised DEIR that resolves these issues and complies with CEQA's requirements.

¹³⁶ Exhibit A, p. 12.

¹³⁷ *Id.*

¹³⁸ *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (EIR must disclose an impact as significant when it exceeds a duly adopted CEQA significance threshold).

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Thank you for your attention to these comments. Please include them in the record of proceedings for the Project.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Christina M. Caro', written in dark ink.

Christina M. Caro

CMC:acp
Attachments

4223-004acp

 printed on recycled paper