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November 24, 2014

VIA E-MAIL AND OVERNIGHT MAIL

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**Re: Comments on the Initial Study/Mitigated Negative Declaration
for the Bay Walk Mixed-Use Project (File No. PLN-14-021)**

Dear Ms. Whales:

We write on behalf of Richmond Residents for Responsible Development to submit comments on the Initial Study and Mitigated Negative Declaration (“IS/MND”) prepared by the City of Richmond (“City”) for the proposed Bay Walk Mixed-Use Project (“Project”) proposed by Development Solutions Seascapes, LLC (“Applicant”). The proposed Project requires a Rezoning, Conditional Use Permit, Tentative Subdivision Map, Design Review, and approval of a Street Vacation for the demolition of an industrial warehouse and the construction of 40 buildings, with a total of 255 townhomes, and one small building with a fitness center and business center, located at 830 Marina Way South, in the Ford Peninsula area of the City.

The Project site is currently designated for “R&D/Business (Commercial/Special Industry)” land use, under the City’s Knox Freeway/Cutting Boulevard Corridor Specific Plan, and it would keep that land use designation under the City’s currently proposed South Shoreline Specific Plan.

As explained more fully below, the IS/MND prepared for the proposed Project is significantly flawed and does not comply with the requirements of the California

Environmental Quality Act (“CEQA”), Public Resources Code section 21000 *et seq.* Furthermore, the City may not approve the required Project rezoning, or issue permits for the Project, until the City prepares an Environmental Impact Report (“EIR”) that adequately analyzes the Project’s potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to minimize these impacts.

I. INTRODUCTION

A. Interest of Commenters

Richmond Residents for Responsible Development (“Richmond Residents”) is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of the Project. The coalition includes Timothy Doyle, Donald Drown, Fynrare Fletcher, Andrew Harris, the International Brotherhood of Electrical Workers Local 302, Plumbers and Steamfitters Local 159, Sheet Metal Workers Local 104, and their members and their families who live and/or work in the City of Richmond and Contra Costa County.

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

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

Finally, Richmond Residents’ members are concerned about projects that risk serious harm to the environment and public health without providing countervailing economic benefits. The CEQA process allows for a balanced

consideration of a project's socioeconomic and environmental impacts, and it is in this spirit that we offer these comments.¹

B. Lack of Timely Information and Potential Need to Submit Further Comments

A Notice of Availability ("NOA") of the IS/MND was made publicly available on October 9, 2014.² At the time of the IS/MND's release, none of the documents listed as references in the IS/MND were posted to the City's website, and no links, web addresses or other information was provided for where these materials could be obtained. On October 31, 2014, we submitted a Public Records Act ("PRA") request for all materials related to the Project.³ By letter on November 17, 2014, the City informed us that it would be unable to provide responsive documents until November 20, 2014, four days before the close of the public comment period.⁴

On November 18th, we requested immediate access to the documents referenced in the IS/MND, and explained that CEQA requires that these documents be made available *for the entire public comment period*.⁵ We also requested an extension of the comment period. On November 18th, the City made 48 documents available.⁶ After reviewing these documents, Richmond Residents submitted an additional request on November 21st, noting that the City had not yet provided one of the requested reference documents, a September 2013 report prepared by David J. Powers & Associates that is referenced in Table AQ-10 of IS/MND Appendix B-2.⁷ Later that day, City staff provided three documents, one labeled "Appendix A," but did not provide the entirety of the September 2013 report.

¹ CEQA, Pub. Resources Code § 21001(g); CEQA "Guidelines," 14 Cal. Code Regs. 15021(d).

² See Notice of Availability and Intent to Adopt a Mitigated Negative Declaration (Oct. 9, 2014), available at <http://www.ci.richmond.ca.us/DocumentCenter/View/29773>.

³ The chain of correspondence between Adams Broadwell Joseph & Cardozo and City staff is attached hereto as **Attachment A**.

⁴ *Ibid.*

⁵ *Ibid.*; Pub. Resources Code § 21092(b)(1); CEQA Guidelines § 15072(g)(4).

⁶ The City's response to our Public Records Act request contains almost no e-mail correspondence. It is unclear whether the City intends to further supplement its response under the Public Records Act, but it seems likely that the City is in possession of additional documents related to the Project. If the City is withholding any documents on the basis of privilege, the Public Records Act requires that the City disclose this to us in writing. Gov. Code § 6255; *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1074-1075.

⁷ **Attachment A**.

Richmond Residents submitted an additional request on November 22nd, noting that the City had not yet provided another reference document, an August 2013 report prepared by Far Western Anthropological Research Group that is referenced on page 40 of the IS/MND. The City provided the document on November 22nd, just two days before the close of the public comment period.⁸

Given the fact that Richmond Residents received copies of the IS/MND's reference materials less than one week prior to the close of the comment deadline, Richmond Residents has not had sufficient time to review the reference documents and supporting materials prior to the close of the comment period. This compromises our ability to fully understand the Project and to develop meaningful comments. For these reasons, we reserve the right to supplement these comments before the Project reaches the City for approval.

C. Summary of Comments

Based on our review of the IS/MND and its supporting documents, we have concluded that the IS/MND does not comply with the basic requirements of CEQA. The IS/MND fails to meet the informational and public participation requirements of CEQA, because it does not adequately describe the existing environmental setting or the evidence to support the City's environmental conclusions. Moreover, we have concluded that substantial evidence exists that the proposed Project may result in significant impacts, even with the mitigation imposed. These impacts include but are not limited to air quality impacts, wetland impacts, historical resource impacts, stormwater impacts, impacts from removing undocumented fill from the site, hazardous materials impacts, impacts from future inundation of the Project site due to sea level rise or tsunamis, and wastewater impacts. Because there is substantial evidence supporting a fair argument that the proposed Project may have one or more significant effects on the environment, the City cannot approve an IS/MND and must instead prepare an EIR.

We have reviewed the IS/MND and its technical reference documents with assistance from technical consultants Anders Sutherland and Matthew Hagemann, whose comments and qualifications are attached as **Attachment B**.

⁸ **Attachment A.**

II. AN EIR IS REQUIRED

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.⁹ “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.”¹⁰ 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.”¹¹

CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the “fair argument” standard. Under that standard, a lead agency “shall” prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.¹²

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

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

⁹ See CEQA § 21000; CEQA Guidelines § 15002.

¹⁰ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.

¹¹ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹² CEQA §§ 21080(d), 21082.2(d); CEQA Guidelines §§ 15002(k)(3), 15064(f)(1) and (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

record before the public agency that the project, as revised, *may* have a significant effect on the environment.¹³

Courts have held that “[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.”¹⁴ The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through the issuance of a negative declaration.¹⁵ An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.¹⁶

“Substantial evidence” required to support a fair argument is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”¹⁷ Substantial evidence can be provided by technical experts or members of the public.¹⁸

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

[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported

¹³ CEQA § 21064.5 (emphasis added).

¹⁴ *Communities For a Better Env’t. v. S. Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319-320.

¹⁵ *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

¹⁶ *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

¹⁷ CEQA Guidelines § 15384(a).

¹⁸ *E.g. Citizens for Responsible and Open Gov’t. v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340 (substantial evidence regarding noise impacts included public comments at hearings); *Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1117 (substantial evidence regarding impacts to historic resource included fact-based testimony of qualified speakers at public hearing); *Gabric v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183, 199.

by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.

With respect to this Project, the IS/MND fails to satisfy the basic purposes of CEQA. The IS/MND fails to adequately describe the existing environmental conditions, adequately investigate and analyze the Project's potentially significant impacts, and provide substantial evidence to conclude that impacts will be mitigated to a less-than-significant level. Because the IS/MND lacks basic information regarding the Project's potentially significant impacts, the IS/MND's implicit conclusion that the Project will "clearly" have a less-than-significant impact on the environment is unsupported.¹⁹ Because the City failed to gather the relevant data to support its finding of no significant impacts, and substantial evidence (summarized below) shows that the Project may result in potentially significant impacts, a fair argument can be made that the Project may cause significant impacts requiring the preparation of an EIR.

A. The IS/MND fails to disclose pertinent information about existing air quality and the risks and uncertainties associated with siting new residences on the Project site

The IS/MND analyzes the impacts that nearby air pollution sources would have on Project residents, and the cumulative impact that Project construction activities would have on nearby non-Project residents. The IS/MND and attached Air Quality Appendices, however, fail to disclose relevant information about existing air quality risks faced by City residents, recommended "buffer" zones for locating new residences near substantial sources of pollution, and the inherent complexity of trying to quantify air pollution impacts from the nearby Port of Richmond and the Richmond Pacific Railroad Corporation Rail Yard.

1. Richmond is an "Impacted Community" with existing air quality conditions that threaten public health

The Bay Area Air Quality Management District ("BAAQMD") initiated the Community Air Risk Evaluation ("CARE") program in 2004 to evaluate and reduce health risks associated with exposures to outdoor toxic air contaminants ("TACs") in the Bay Area. The program examines Toxic Air Contaminant ("TAC") emissions

¹⁹ CEQA § 21064.5.

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

BAAQMD used the information gathered during the CARE process to designate six “Impacted Communities” in the nine-county San Francisco air basin that have higher relative TAC exposure levels. The City of Richmond is one of these six Impacted Communities, due to its higher relative TAC exposure. In March 2014, BAAQMD released a report estimating that residents living in the portion of the City that includes the Project site have a 200 in 1 million to 300 in 1 million risk of developing cancer from existing TAC exposure levels.²⁰ As explained by Mr. Hagemann and Mr. Sutherland, the City is within the top 15% of the pollution-vulnerability index, where combined community health impacts from air quality detriments are predicted to be the highest.²¹ This baseline information is critical to analyzing and understanding the potential cumulative effects of the Project.

2. Air quality officials recommend against locating new residences near a major freeway, a rail yard, or a port, let alone all three

The California Air Pollution Control Officers Association, California Air Resources Board, and the BAAQMD advise that cities and developers avoid siting new residences within 500 feet of a freeway, 1,000 feet of a rail yard, or immediately downwind of ports in heavily impacted air quality zones.²² The Project site is located only 200 feet from the Interstate 580 freeway, 200 feet from the Richmond

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

²¹ **Attachment B**, Hagemann and Sutherland comments, p. 2.

²² **Appendix D**, CAPCOA, *Health Risk Assessments for Proposed Land Use Projects*, p. 9 (Table 2), available at: http://www.capcoa.org/wp-content/uploads/downloads/2010/05/CAPCOA_HRA_LU_Guidelines_8-6-09.pdf;

Attachment E, BAAQMD, *California Environmental Quality Act Air Quality Guidelines* (May 2011), p. 9-4, available at: <http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines%20May%202011.ashx?la=en>

Pacific Railroad Corporation's ("RPRC") 23rd Street Rail Yard, and approximately 2,000 feet downwind from the Port of Richmond.²³

In addition, the City's General Plan policy number EC5.3 aims to reduce the impacts of "stationary and non-stationary sources of pollution such as industry, the Port, railroads, diesel trucks and busy roadways," and ensure that sensitive uses such as housing "are protected from adverse impacts of emissions."²⁴ The proposed Project does not meet the recommended buffer distances between new residences and significant pollution sources, and is not situated in an advisable location for new residential development.²⁵

3. Air pollution impacts from rail yards and ports are notoriously difficult to quantify

The Project site is located near several "complex" sources of air pollution. The IS/MND explains that TAC concentrations were modeled using the basic screening tools in BAAQMD's *Recommended Methods for Screening and Modeling Local Risks and Hazards*.²⁶ However, major air pollution sources located near the Project site include the Port of Richmond and the RPRC 23rd Street Rail Yard. The BAAQMD classifies ports and rail yards as "complex sources that generate significant pollution."²⁷ A complex source is one "whose emissions may pose significant risks but that are complex, or otherwise unique in nature, such that they do not lend themselves to simplified screening tools or even modeling analysis that can be easily generalized."²⁸ As explained in BAAQMD's *Recommended Methods for Screening and Modeling Local Risks and Hazards*:

Complex sources are important to consider if the proposed project is sited nearby; but they will require specific and specialized analysis. ... Quantification of emissions from these types of sources is complex and requires comprehensive knowledge on the sources of emissions

²³ **Attachment B**, Hagemann and Sutherland comments, p. 2.

²⁴ **Attachment F**, City's *General Plan 2030*, Chapter 8.

²⁵ **Attachment B**, Hagemann and Sutherland comments, p. 2.

²⁶ IS/MND p. 28; Appendix B-2, p. 1.

²⁷ **Attachment G**, BAAQMD, *Recommended Methods for Screening and Modeling Local Risks and Hazards*, p. 11 (May 2011), available at:

<http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20Modeling%20Approach.ashx>

²⁸ *Ibid.*, p. 10.

(i.e., trucks, locomotives, construction equipment, airplanes, etc.), number of sources, and the types of pollutants emitted.²⁹

For all of the reasons discussed above, it is imperative that the Project's air quality impacts "be assessed with the highest degree of scrutiny."³⁰ The IS/MND does not accomplish this.

B. The Air Quality Analysis in the IS/MND is lacking in transparency, is inaccurate, and does not disclose the full extent of potential air quality impacts

According to experts Matthew Hagemann and Anders Sutherland, the air quality assessment prepared for the Project "is lacking in transparency and likely underestimates the magnitude of air quality impacts."³¹ The air quality assessment has "severely limited information on the calculations used in evaluating air quality impacts."³² In their expert opinion, the calculations should be "prepared and presented succinctly" in an EIR, and should verify that the calculations were done in compliance with the appropriate regulatory guidance documents. The need for a transparent disclosure of the calculations used in the air quality assessment is underscored by several apparent flaws contained in the IS/MND analysis, as described below.

1. The air quality assessment underestimates train traffic

The IS/MND does not accurately characterize the air quality impacts from Diesel Particulate Matter ("DPM") emission sources surrounding the Project site, because it does not provide accurate estimates of the train traffic that utilizes the two railroad tracks and the rail yard south of the site. The air quality assessment attached to the IS/MND describes the operational assumptions for locomotives that were used in the air dispersion modeling.³³ The assessment states that a total of 22 daily trains were included in the modeling, three from the Port of Richmond and 19

²⁹ *Ibid.*, pp. 10-11.

³⁰ **Attachment B**, Hagemann and Sutherland comments, p. 2.

³¹ *Ibid.*

³² *Ibid.*

³³ IS/MND, Appendix B-1, p. 8 (Table AQ-10) (we requested the AERMOD modeling data used in the Project Health Risk Assessment, but the City has not provided this data).

from the BNSF facility south of the site. It does not appear, however, that the “Port of Richmond” facility referenced in the air quality assessment is actually the Richmond Pacific Railroad Corporation’s 23rd Street Rail Yard near the Project site, which is a significant oversight.

Current data from the Federal Railroad Administration’s Office of Safety Analysis shows that the BNSF rail line directly south of the Project site accommodates approximately 20 daily trains crossing Marina Way South.³⁴ The RPRC rail line located 200 feet from the Project site accommodates approximately 9 daily trains, according to the same data.³⁵ It therefore appears that the air quality assessment underestimated the number of passing trains by 30%, and this portion of the assessment should be revised.³⁶ In addition to the number of trains that pass by the Project site each day, daily switching activities occur at the RPRC rail yard, where switch locomotives move trains around the yard. These activities have been documented to pose increased risks to the human health of residents who live nearby, and they should also be included as part of a revised air quality assessment for the Project.³⁷

2. The air quality assessment uses marine vessel assumptions from the Port of Long Beach and Port of Los Angeles, which are not necessarily applicable to the Port of Richmond

Instead of using specific information about the marine vessel traffic at the Port of Richmond, the air quality assessment in the IS/MND relies on specifications from a 2006 study of DPM exposure at the Ports of Los Angeles and Long Beach.³⁸ For example, it assumes that the exhaust stacks on marine vessels that use the Port of Richmond are 50 meters (150 feet) high.³⁹ In Mr. Hagemann and Mr.

³⁴ **Attachment H**, *U.S. DOT Crossing Inventory Information as of 11/20/14*, BNSF Railroad at Marina Way and RPRC Railroad at Marina Way, available at: <http://safetydata.fra.dot.gov/OfficeofSafety/PublicSite/Crossing/XingLocResults.aspx?state=06&countycity=3010&railroad=&reportinglevel=ALL&radionm=City&street=Marina%20Way&xingtype=3&xingstatus=1&xingpos=1>

³⁵ *Ibid.*

³⁶ **Attachment B**, Hagemann and Sutherland comments, p. 3.

³⁷ **Attachment I**, Trade, Health and Environment Impact Project, *Tracking Harm: Health and Environmental Impacts of Rail Yards* (Jan. 2012), available at: <http://hydra.usc.edu/scehsc/pdfs/Rail%20issue%20brief.%20January%202012.pdf>

³⁸ IS/MND, Appendix B-2, pp. 8-9 (Tables AQ-11 and AQ-12).

³⁹ IS/MND, Appendix B-2, p. 8.

Sutherland's opinion, this assumption is not appropriate for the fleet of marine vessels that use the Port of Richmond.⁴⁰ For example, the stack height of a tanker has been reported at less than 33 meters high.⁴¹ Adjusting the height of marine vessel exhaust stacks "would likely increase ground-level DPM concentrations and consequent cancer risks to future and existing residents."⁴²

C. Dust control mitigation is neither binding nor enforceable

The IS/MND notes that the BAAQMD CEQA Guidelines list dust control measures that will help reduce fugitive dust emissions during construction to less than significant levels. The IS/MND errs, however, in describing these measures as "required by law," and by not including them as binding and enforceable mitigation measures.⁴³ The BAAQMD CEQA Guidelines state that "for all proposed projects, BAAQMD recommends the implementation of all Basic Construction Mitigation Measures (Table 8.1) whether or not construction-related emissions exceed applicable thresholds."⁴⁴ It is up to the City, as lead agency under CEQA, to require implementation of these dust control measures as fully enforceable mitigation measures, subject to verification and oversight by the City. All of the measures listed on pages 24 and 25 of the IS/MND must be incorporated as CEQA mitigation measures, subject to compliance reporting by the Applicant and verification by the City.

D. Regulated wetlands may be filled during Project construction

The southeast corner of the Project site includes a one-acre vegetated area that serves as a drainage.⁴⁵ This drainage area has apparently been in existence for more than 75 years, and it currently accepts stormwater from the Project site and from storm drains that run along 17th Street and nearby streets.⁴⁶ The drainage

⁴⁰ **Attachment B**, Hagemann and Sutherland comments, p. 4.

⁴¹ **Attachment J**, *Air Quality Impacts from NOx Emissions of Two Potential Marine Vessel Control Strategies in the South Coast Air Basin*, p. 18 (Nov. 2000), available at: http://www.arb.ca.gov/eos/projects/M13/M13_final_report-nov2000.pdf

⁴² **Attachment B**, Hagemann and Sutherland comments, p. 4.

⁴³ IS/MND, pp. 24-25, 30.

⁴⁴ **Attachment E**, BAAQMD's *CEQA Guidelines*, pp. 8-2 and 8-3.

⁴⁵ IS/MND, pp. 37-38.

⁴⁶ *Ibid.*, p. 65; Far Western Anthropological Research Group, Inc., *Results of Subsurface Geoarchaeological Explorations for the 830 Marina Way South Project*, p. 7 (Figure 1) (Nov. 15, 2013).

area discharges into the nearby San Francisco Bay.⁴⁷ It appears from topographical maps and historical data that the drainage was part of a historical waterway, Meeker Ditch, which connected to Meeker Slough in the San Francisco Bay.⁴⁸

As part of the proposed Project, the drainage area would be filled in and water would instead be carried across the Project site in underground pipes.⁴⁹ The IS/MND concludes that the drainage “does not contain regulated wetlands or other waters of the state.”⁵⁰ This conclusion is not supported by substantial evidence. Wetlands regulated under the federal Clean Water Act are defined as areas that are “inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”⁵¹ The drainage area on the Project site that extends to Meeker Avenue is vegetated, yet no wetland delineation has been performed to determine if the drainage area supports wetland vegetation and therefore qualifies as a wetland.

Furthermore, it is clear that the drainage area is part of a historic waterway constructed in what was once marshland.⁵² The drainage has existed for many decades, and it has a direct connection to the San Francisco Bay. Under the federal Clean Water Act, no “waters of the United States” may be filled in without a permit if they have a significant nexus to a regulated navigable waterway such as San Francisco Bay.⁵³ There is a fair argument that Project construction will result in the discharge of fill material into regulated waters, without the required environmental clearance, thus resulting in a potentially significant environmental impact.

⁴⁷ See IS/MND, p. 65.

⁴⁸ **Attachment K**, topographic map with star showing project site; Far Western Anthropological Research Group, *Cultural Resources Inventory and Buried Site Assessment for the 830 Marina Way South Project*, pp. 22, 24 and 25 of 109 (Aug. 13, 2013).

⁴⁹ IS/MND, p. 38.

⁵⁰ *Ibid.*

⁵¹ 40 Code Fed. Regs. 240.3(t).

⁵² Far Western Anthropological Research Group, *Results of Subsurface Geoarchaeological Explorations for the 830 Marina Way South Project*, pp. (Aug. 13, 2013).

⁵³ *Rapanos v. U.S.*, 547 U.S. 715, 782 (2006).

E. There is no showing that it is infeasible to incorporate more effective “low impact development” stormwater techniques

The City’s Municipal Regional Stormwater Permit (“MRP”) requires the Project to use “low impact development” (“LID”) features to control and reduce stormwater runoff.⁵⁴ The City’s MRP covers more than 70 cities and towns in the San Francisco Bay Area. The MRP was issued by the San Francisco Bay Regional Water Quality Control Board in 2009 and revised in 2011.⁵⁵ Provision C.3 of the MSP requires the City to place conditions on development projects to incorporate site design measures, source controls, and stormwater treatment measures. These measures are intended to address stormwater runoff pollutant discharges and prevent increases in runoff flows from new development projects. The C.3 goal is to be accomplished primarily through the implementation of LID techniques.

There are four types of LID treatment measures set forth in the MRP: stormwater harvesting and re-use, infiltration, evapotranspiration, and biotreatment.⁵⁶ Biotreatment may only be considered “if it is infeasible to implement harvesting and re-use, infiltration, or evapotranspiration at a project site.”⁵⁷ As explained in the MRP:

A properly engineered and maintained biotreatment system may be considered only if it is infeasible to implement harvesting and re-use, infiltration, or evapotranspiration at a project site. . . . This Provision recognizes the benefits of harvesting and reuse, infiltration and evapotranspiration and establishes these methods at the top of the LID treatment hierarchy.⁵⁸

The IS/MND indicates that stormwater will be treated through biotreatment systems, including flow-through planters and bioretention spaces.⁵⁹ There is no

⁵⁴ IS/MND, p. 64.

⁵⁵ **Attachment L**, relevant excerpt from the City’s MRP. A full copy of the MRP is *available at*: http://cleanwaterprogram.org/uploads/R2-2009-0074_Revised.pdf

⁵⁶ *Ibid.*, p. 28.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, Appendix I (“Fact Sheet”), p. 30.

⁵⁹ IS/MND, pp. 65-66 (including Figure 11).

stormwater management plan for the Project, nor is there any evidence to support the conclusion that the three top-priority LID techniques are not feasible to implement on the Project site. For example, the IS/MND shows that some of the paving proposed for use on the Project site, but not the majority of paving, will be “permeable.”⁶⁰ Therefore it seems clear that there is no barrier to infiltration on the Project site, and a higher percentage of stormwater could be treated using higher-priority LID techniques, including but not limited to infiltration.

The IS/MND does not adequately show that it would be infeasible for the proposed Project to incorporate the three top-priority LID techniques. There is a fair argument that the Project has not complied with the requirements of the MSP, has not been designed to minimize stormwater runoff, and will create potentially significant and unmitigated stormwater impacts.

F. Approximately four feet of undocumented soil (fill) needs to be excavated and replaced, beneath and around all 41 proposed buildings, which will have potentially significant impacts on air quality and traffic, and may expose construction workers to hazardous materials

The Project description in the IS/MND states that grading will involve only “shallow excavations” for utilities, plus the excavation and removal of “about 3,500 cubic yards of potentially contaminated soils.”⁶¹ The technical analyses that support the conclusions in the IS/MND are based on this assumption. For example, the Project air quality analysis estimates that 875 heavy-duty haul truck trips would be made during the grading phase of the Project. This is the exact number of haul trucks required to remove and replace 3,500 cubic yards of soil, assuming that the trucks hauling soil away and the trucks delivering clean replacement soil are different.⁶²

⁶⁰ *Ibid.*, p. 5 (Figure 3, Project Note 10).

⁶¹ IS/MND, p. 9; *see also* pp. 46, 60,

⁶² IS/MND, Appendix A-2, *Construction and Operational Emissions: CALEEMOD Output Files*, pp. 4 and 10 of 36 (875 haul trips during Project grading); **Attachment M**, *CalEEMod User’s Guide*, p. 27 (July 2013), available at: <http://www.caleemod.com> (“Hauling trips are based on the assumption that a truck can handle 20 tons (or 16 cubic yards) of material per load. Assuming one load of material, CalEEMod considers a haul truck importing material will have a return trip with an empty truck (2 trips). Similarly, the haul truck to take material away will have an arrival trip in an empty truck (2 trips). Thus, each trip to import and export material is considered as two separate round trips (4

The geotechnical report prepared for the Project, however, makes clear that the entire Project site is underlain by 2 to 6 feet of “undocumented” fill that is not suitable for building foundations. As recommended by the engineers who conducted the geotechnical investigation, this fill will need to be excavated from below all of the Project building pads and 5 feet around them:

Undocumented fill was encountered in our explorations to depths ranging from approximately 2 to 6 feet, with an average depth of about 3 to 4 feet. ... [T]he fill may be highly variable and may not support all of the proposed residential and garage structures without long-term distress.

...

Existing undocumented fill should be over-excavated down to native soils within the proposed building footprints and 5 feet laterally beyond. On a preliminary basis and for conceptual planning and cost estimating, undocumented fill over-excavation on the order of 4 feet should be considered.⁶³

The geotechnical report goes on to provide recommended specifications for “imported fill materials” to replace the soils removed from the “stripped layer.”⁶⁴

Project buildings are expected to cover 41.5% of the Project site, or 180,689 square feet.⁶⁵ Removing a 4-foot layer of undocumented fill from this area, plus 5 feet around project buildings, will exceed 725,000 cubic feet, or 27,000 cubic yards of fill. This is eight times the amount of excavation estimated in the IS/MND. The IS/MND’s air quality, traffic, greenhouse gas, and worker safety requirements for hazardous materials are based on a significant underestimation of the amount of soil that will need to be excavated, loaded, and hauled from the Project site, and replaced with new soil to support the Project buildings. The significance of these potential impacts must be analyzed and properly mitigated. The IS/MND is the only place where potential impacts to air quality, human health, and local or regional waste disposal facilities that will be caused by removing and replacing

trips.)” 3,500 cubic yards divided by 16 cubic yards per truck load equals 218.75 truck loads, multiplied by 4 hauls trips each (2 to remove and 2 to replace) equals 875 haul trips.

⁶³ Cornerstone Earth Group, *Preliminary Geotechnical Investigation*, pp. 9-10 (Nov. 15, 2012).

⁶⁴ *Ibid.*, p. 10.

⁶⁵ IS/MND, p. 5 (Figure 3).

these materials can be addressed and mitigated. The City cannot defer this mitigation until a later date; it must be analyzed in an EIR.

G. The IS/MND and underlying analyses of both historical resources and hazardous materials fail to disclose that the Project site was an active part of the Kaiser Richmond Shipyards during World War II

The IS/MND does not adequately describe the history of land use at the Project site, other than to state that the warehouse on the site “was constructed in the early 1940s during the rapid expansion of wartime industry in the City of Richmond.”⁶⁶ The underlying Project documents indicate that the property was developed with a warehouse and another unidentified structure sometime before 1946.⁶⁷ Maps and photographs of the historic Kaiser Richmond Shipyards, however, clearly indicate that the warehouse was the large “Warehouse A,” part of Kaiser’s No. 2 Yard, which was used to fabricate numerous wartime ships.⁶⁸

During World War II, this area was heavily industrialized by wartime shipbuilding activity. At its peak, the No. 2 Yard contained 12 slipways for ship construction, and workers there were able to build and launch a Victory or Liberty ship in less than 30 days.⁶⁹ Today, almost no trace of the Richmond No. 2 Yard remains, and the warehouse on the Project site may be one of the last remaining remnants of this historical shipyard.⁷⁰

⁶⁶ IS/MND, p. 40.

⁶⁷ Cornerstone Earth Group, *Phase I Environmental Site Assessment and Preliminary Soil, Soil Vapor and Ground Water Quality Evaluation*, p. 11 (Nov. 7, 2012).

⁶⁸ **Attachment N**, Map entitled *General Layout, Richmond Shipyards* (Sept. 1, 1944), available at: http://www.sanpedro.com/Kaiser_Richmond/kaiser-richmond_15a.htm; *Cultural Resources Inventory and Buried Site Assessment for the 830 Marina Way South Project*, p. 9 (Figure 2) (Aug. 13, 2013).

⁶⁹ See **Attachment O**, website and attached map showing the Project site warehouse in the distance, entitled *Site of Permanente Metals Corp., Kaiser Richmond No. 2 Yard*, available at: <http://wikimapia.org/5405078/Site-of-Permanente-Metals-Corp-Kaiser-Richmond-No-2-Yard#channel=f671e830edf74b&origin=http%3A%2F%2Fwikimapia.org>;

Attachment P, photograph from the Henry J. Kaiser Pictorial Collection, 1941-1946, entitled *Warehouse A Group, January 10, 1946*, available at: <http://sunsite.berkeley.edu/FindingAids/dynaweb/calher/kaiser/figures/I0010659A.jpg>;

Attachment Q, photograph of Richmond Shipyards with Project site warehouse in background of “Yard 2,” available at: <http://imgzoom.cdlib.org/Fullscreen.ics?ark=ark:/13030/kt667nd21p/z1&&brand=calisphere>

⁷⁰ **Attachment O**.

The IS/MND notes that the Project site has not been identified as a historic resource.⁷¹ A building does not need to be officially listed as a historical resource in order to qualify as one for purposes of CEQA.⁷² Characteristics of a historical resource include buildings and structures that are historically significant in the military annals of California, and that are associated with events that made a significant contribution to California's history and cultural heritage.⁷³ As the largest warehouse and one of the largest remaining buildings from the historic wartime shipbuilding era in Richmond Harbor, the building surely has historical value that is not analyzed or mitigated in the IS/MND. There is a fair argument that destruction of the warehouse building will have a potentially significant impact on historic resources. The City should prepare an EIR that includes a full analysis of the historic value of the building.

Moreover, the building's construction several years into the wartime shipbuilding effort, on 2-10 feet of "undocumented" fill, and its use as part of the Kaiser Ship Yard increases the chance that the existing contamination of Project site soils is more widespread than previously believed. This is pertinent information that must be included in a publicly disclosed hazardous materials investigation overseen by the DTSC, as discussed further below. There is a fair argument that the failure to include this relevant Project site history in any of the IS/MND analyses creates the potential for unmitigated significant impacts.

H. Hazardous materials impacts are not properly disclosed or mitigated

After the site was used in the Richmond Yard No. 2, it was operated for decades by International Harvester Truck and Engine Company. Soil samples taken from all over the Project site reveal diesel hydrocarbons, gasoline hydrocarbons, oil hydrocarbons, PCB's, benzene, dichloroethane, lead, and arsenic, many of which greatly exceed levels that are safe for a residential site.⁷⁴ The

⁷¹ IS/MND, p. 40.

⁷² CEQA Guidelines § 15064.5(a)(4).

⁷³ CEQA Guidelines § 15064.5(a)(3).

⁷⁴ IS/MND, p. 60; Cornerstone Earth Group, *Phase I Environmental Site Assessment* ("Project Phase I"), pp. 36-37 (Nov. 7, 2012), Cornerstone Earth Group, *Limited Phase II Environmental Site Assessment Report* ("Project Phase II"), pp. 4-5 (April 16, 2014).

IS/MND obscures the full extent and implication of these results, and downplays the potential that most of the site is subject to unhealthy levels of contamination.

For example, the IS/MND states that the site is not on the State's "Cortese List," a trigger for a potentially significant impact under CEQA.⁷⁵ The Phase I Environmental Site Assessment ("ESA") prepared in 2012, however, indicates that the Project site is on the Cortese List.⁷⁶ The IS/MND also concludes that contaminated soils are limited to specific areas associated with a former truck scale, underground storage tank, and railroad spur.⁷⁷ The Phase I ESA indicates, however, that the exact location of the former underground storage tank (and a nearby oil water separator) is unknown, that high levels of lead and arsenic are spread across the southern portion of the property, and that an extremely high level of lead was detected from a soil boring *beneath* the warehouse.⁷⁸ These results are either ignored or downplayed in the most recent "Phase II ESA" prepared for the Project.

To address this contamination, the IS/MND states that, as mitigation, a remedial action plan ("RAP") will be prepared and submitted to the California Department of Toxic Substances Control ("DTSC") for review and approval prior to issuance of a grading permit for the project.⁷⁹ Mr. Hagemann and Mr. Sutherland conclude that although this is an essential step to ensure that the site is safe for construction workers and future residents, it is not acceptable to submit the RAP and disclose its contents *after* the Project is approved.⁸⁰ The proposed RAP should also be disclosed to the public and to the City's decision-makers. To date, no regulatory agencies have reviewed the Phase I and Phase II ESA reports prepared for the Project. There may be a possibility that the site is simply not suitable for residential use.⁸¹

The City may not rely on vague and uncertain mitigation measures.⁸² Vague mitigation measures are prohibited under CEQA because "vagueness makes it

⁷⁵ IS/MND, p. 60; CEQA Guidelines, Appendix G, section VIII(d); Gov. Code § 65962.5.

⁷⁶ *Project Phase I*, p. 6.

⁷⁷ IS/MND, p. 60.

⁷⁸ *Project Phase I*, pp. 5, 31-39.

⁷⁹ IS/MND, p. 60.

⁸⁰ **Attachment B**, Hagemann and Sutherland Comments, p. 2.

⁸¹ *Ibid.*

⁸² *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-728.

difficult to identify the who-what-when essential to enforcement” of a mitigation measure.⁸³ CEQA also requires that mitigation measures be fully enforceable through permit conditions, agreements, or other legally binding instruments.⁸⁴ The City is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved. This approach helps “insure the integrity of the process.”⁸⁵

Deferral of the formulation of mitigation measures to post-approval studies is generally impermissible.⁸⁶ An agency may only defer the formulation of mitigation measures when it “recognizes the significance of the potential environmental effect, commits itself to mitigating the impact, and articulates specific performance criteria for the future mitigation.”⁸⁷ The City’s proposed mitigation measure has no specific performance criteria, and it allows the Applicant to formulate the proposed RAP, which will be submitted to and negotiated with DTSC. A mitigation scheme is improper if it proposes to allow the Applicant to conduct the analysis and formulate the mitigation measures.⁸⁸ Deferral of mitigation is impermissible, in other words, if it removes the lead agency from its role as the decision maker.

Finally, the failure to prepare a RAP as part of the CEQA review process makes it impossible to tell how much contaminated soil must be removed from the Project site. Removal of soil, even if done as part of an approved mitigation measure, may have collateral environmental impacts that need to be addressed in an EIR. The IS/MND contains a prediction on the potential volume of soil that will need to be removed, but this is speculative and does not take into account the limitations in the analysis, described above. If even a portion of the soil excavated for the Project site is contaminated and needs to be transported and disposed of in a Class I landfill, this will require a significant disposal effort involving hundreds of trucks carrying toxic materials to far-away disposal sites. Yet, the IS/MND’s emissions calculations only estimate that haul trucks will travel a round-trip

⁸³ *Sierra Club v. Cnty. of Fresno* (2014) 226 Cal.App.4th 704, 172 (currently pending review in the California Supreme Court, 334 P.3d 686 (Cal. 2014).)

⁸⁴ CEQA Guidelines § 15126.4(a)(2).

⁸⁵ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) Cal.3d 929, 935.

⁸⁶ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; *see also* CEQA Guidelines § 15126.4(a)(1)(B).

⁸⁷ *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1411 (citing *Sacramento Old County Assn. v. County Council* (1991) 229 Cal.App.3d 1011, 1028-1029).

⁸⁸ *Id.* at 302-308.

distance of 20 miles.⁸⁹ The IS/MND also makes no provision for protecting public health associated with toxic air contaminants in dust from haul trucks. A fair argument exists that potentially significant impacts may occur, requiring the preparation of an EIR.

I. The IS/MND does not properly analyze or mitigate for future inundation of the Project site by sea water

1. There is no evaluation of climate change impacts due to sea level rise, as required by the General Plan

The Project site is located only 10 feet above “mean sea level,” and is within the 500-year flood plain.⁹⁰ As part of the City’s “Climate Resilient Communities” goal, General Plan Policies EC6.2 and EC6.3 require the City to “manage low-lying areas that are likely to be affected by sea level rise and storm surges,” by requiring “new developments to include an evaluation of climate change impacts in the project review process.”⁹¹ Under the City’s General Plan Action CN3.D, the City shall “require new development to install flood control measures to address sea level rise as appropriate.”⁹²

The IS/MND, however, simply notes that the Project site is mapped in the City’s General Plan as having pockets of inundation from future sea level rise of 3 feet by the year 2100.⁹³ This is insufficient. The IS/MND’s suggested Mitigation Measure IX-1 is to require that the project be graded such that finished floor elevations are 3.5 feet above “Base Flood Elevation,” and streets and pads are 3 feet above Base Flood Elevation.⁹⁴ This mitigation measure is extremely vague regarding what constitutes the Base Flood Elevation, and it comes nowhere close to an “analysis” as called for in the General Plan.

If the projected sea level rise of 3 feet does in fact occur, then the Project site will be only 7 feet above “mean” sea level (less during high tides), and will be

⁸⁹ IS/MND, Appendix A-2, CalEEMod model outputs for hauling during the grading phase.

⁹⁰ **Attachment R**, City General Plan, Map 7-1; IS/MND, p. 46.

⁹¹ **Attachment F**, City’s General Plan 2030, Chapter 8, pp. 8-36 and 8-37.

⁹² **Attachment S**, City’s General Plan 2030, Chapter 7, p. 7.29.

⁹³ **Attachment T**, City’s General Plan, Map 8-1.

⁹⁴ IS/MND, p. 67.

subject to inundation, as shown on the City's General Plan Map 8-1.⁹⁵ If Mitigation Measure IX-1 is intended to mean that the Project roads and pads shall be built 3 feet above the Base Flood Elevation *plus* 3 feet of sea level rise, this would require the entire site to be elevated, which would require importing a significant amount of fill. The IS/MND does not properly address future sea level rise, and an EIR should be prepared that contains the analysis called for in the City's General Plan.

2. The Project site is located within the City's tsunami inundation zone

The IS/MND relies on 2009 information from the Department of Conservation to conclude that the Project site is not located within a tsunami inundation area.⁹⁶ However, the City's General Plan, adopted in 2012, clearly shows the Project site within the City's tsunami inundation zone.⁹⁷ An EIR should be prepared that analyzes potential tsunami hazards and mitigation strategies.

J. Wastewater Impacts are Not Adequately Analyzed or Mitigated

The IS/MND acknowledges that the City's wastewater treatment capacity is inadequate by approximately 40% during periods of wet weather flows, when sanitary sewer overflows routinely occur.⁹⁸ Sewage overflows into the Richmond Inner Harbor are caused by water entering the City's sewer lines during rainfall events "through cracks and joints in the sewer pipes."⁹⁹ The proposed Project could worsen these existing deficiencies in the City's sewer system, which is a potentially significant environmental impact.¹⁰⁰

Proposed Mitigation Measure XVI-1 would require the Applicant to prepare and submit a study to analyze whether there is sufficient capacity in the local sewer lines to accommodate flows from the Project. The study would also be required to determine the Project's effects on the City's overall wastewater treatment capacity, "taking into account the planned Wet Weather Storage Project," and to identify

⁹⁵ **Attachment T.**

⁹⁶ IS/MND, p. 67.

⁹⁷ **Attachment V**, City General Plan, Map 12-5.

⁹⁸ IS/MND, p. 88.

⁹⁹ **Attachment W**, website for the City's Wet Weather Storage Basin Project, accessed November 5, 2014, available at: <http://www.richmond-wwstorage.org/about-the-project.html>.

¹⁰⁰ *Ibid.* p. 102.

measures to prevent the Project from contributing to the City's sewer overflow problem.¹⁰¹

Once again, the IS/MND has improperly deferred the formulation of mitigation measures to post-approval studies.¹⁰² The proposed mitigation measure has no specific performance criteria, and would allow the Applicant to conduct the analysis itself and formulate its own mitigation measures.¹⁰³ Where a mitigated negative declaration is proposed, CEQA requires that a lead agency set forth mitigation measures for all potentially significant impacts in the negative declaration itself. Project modifications necessary to avoid significant impacts must be made *before* the lead agency issues a proposed negative declaration for public review.¹⁰⁴ Mitigation measures adopted *after* project approval cannot validate the issuance of a negative declaration because this deferral denies the public the opportunity to comment on the project as modified to mitigate impacts.¹⁰⁵ "A study conducted after approval of a project will inevitably have a diminished influence on decision making. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA."¹⁰⁶

Moreover, if the local network of sewer lines is found to be inadequate to serve the Project, then the implementation of remedial measures may have associated environmental impacts, which must be analyzed and mitigated as part of the CEQA document for the proposed Project. For example, if the Project requires upgraded local sewer lines, the associated construction activities could encounter hazardous materials in the soil, or create other impacts. Because the City has refused to conduct this analysis at the outset, there is a fair argument that potentially significant impacts could occur, and that the City has improperly deferred the disclosure and mitigation of those impacts. The City must prepare an EIR that discloses potential sewer impacts and the environmental effects associated with any needed sewer upgrades to accommodate Project flows.

¹⁰¹ *Ibid.*

¹⁰² *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; *see also* CEQA Guidelines § 15126.4(a)(1)(B).

¹⁰³ *Sundstrom, id.* at 302-308; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1411.

¹⁰⁴ CEQA, Pub. Resources Code § 21064.5.

¹⁰⁵ *Gentry v. County of Murrieta* (1995) 36 Cal.App.4th 1359, 1393.

¹⁰⁶ *Sundstrom, supra*, 202 Cal.App.3d at 307.

III. CONCLUSION

The CEQA Guidelines require that an EIR be prepared if there is substantial evidence that any aspect of a project, either individually or cumulatively, may cause a significant effect on the environment.¹⁰⁷ As discussed in detail above, there is substantial evidence that the Project would result in significant adverse impacts that were not identified in the IS/MND and that are not adequately mitigated.

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

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

Sincerely,



Daniel L. Cardozo
Ellen L. Trescott

Attachments*

* Internet links to attached reference documents are provided herein, and a compact disc with attachments is provided herewith. Paper copies of these documents will be promptly provided to the City upon request.

ELT:ljl

¹⁰⁷ CEQA Guidelines § 15063(b)(1).