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March 8, 2016

VIA OVERNIGHT MAIL AND EMAIL

City of Emeryville
Planning and Building Department
Attn: Miroo Desai
1333 Park Avenue
Emeryville, CA 94608
E-mail: mdesai@ci.emeryville.ca.us

Re: Comments on the Draft Environmental Impact Report for the Sherwin-Williams Development Project (SCH # 2004122083)

Dear Ms. Desai:

We are writing on behalf of **Emeryville Residents for Responsible Development** to submit comments on the Draft Environmental Impact Report (“DEIR”) prepared by the City of Emeryville (“City”) for the Sherwin-Williams Development Project (“Project”). The Project requires a General Plan Amendment, Planned Unit Development approval, Development Plan, Encroachment Permits, Tentative and Final Maps, a potential Land Swap Agreement (Project Option A), and related approvals for the development of a new mixed-use community on 10 acres of urban land. The Project includes 540 residential units, 94,600 square feet of commercial space, 3.5 acres of parks and open space, and 1 acre of new roads.

As explained more fully below, the City’s DEIR prepared for the 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.* The City may not approve the Project until an adequate DEIR is prepared and recirculated for public review and comment.

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We have reviewed the DEIR and its technical appendices with assistance from technical consultants Matthew Hagemann and Jessie Jaeger, and Daniel Smith, whose comments and qualifications are attached as **Attachment A** and **Attachment B**. The City should respond to these expert comments separately and individually.

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I. INTRODUCTION

A. Interest of Commenters

Emeryville Residents for Responsible Development (“Emeryville Residents”) is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of the Project. The association includes Rudolph Brooks, Rances Rodriguez, the International Brotherhood of Electrical Workers Local 595, Plumbers & Steamfitters Local 342, and Sheet Metal Workers Local 104, and their members and their families who live and/or work in the City of Emeryville and the surrounding area.

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Individual members of Emeryville Residents and its affiliated organizations live, work, recreate and raise their families in Alameda County, including the City of Emeryville. 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 the health and safety hazards that exist on the Project site. Emeryville Residents 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 it less desirable for businesses to locate and people to live there.

B. Summary of Comments

As explained below, the Project will generate a multitude of impacts in a number of impact areas, including air quality, greenhouse gas emissions, hazardous materials, traffic, and water supplies. The DEIR fails to adequately characterize and analyze these impacts. Furthermore, many of the mitigation measures described in the DEIR will not in fact mitigate impacts to the extent claimed. The DEIR must be revised to resolve its inadequacies and must be recirculated for public review and comment.

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CEQA requires recirculation of a DEIR for public review and comment when significant new information must be added to the DEIR following public review, but before certification.¹ The state CEQA Guidelines clarify that new information is significant if “the DEIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the Project or a feasible way to mitigate or avoid such an effect.”² The purpose of recirculation is to give the public and other agencies an opportunity to evaluate the new data and the validity of conclusions drawn from it.³

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As discussed below, the DEIR does not adequately describe the environmental setting from which to analyze the Project’s impacts, and does not adequately describe the Project or the City’s proposed mitigation measures. The Project will result in significant environmental impacts that are not analyzed in the DEIR, and there are feasible mitigation measures available to reduce significant impacts, which are not required in the DEIR. These City must address these deficiencies in a revised DEIR that is circulated for public review and comment.

II. THE CITY LACKS SUBSTANTIAL EVIDENCE TO SUPPORT ITS CONCLUSIONS, AND THE DEIR FAILS TO INCORPORATE ALL FEASIBLE MITIGATION TO REDUCE SUCH IMPACTS TO A LEVEL OF INSIGNIFICANCE.

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CEQA has two basic purposes, neither of which the DEIR satisfies. First, CEQA is designed to inform decision makers and the public about the potentially significant environmental impacts of a Project before harm is done to the environment.⁴ The DEIR is the “heart” of this requirement.⁵ The DEIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”⁶

¹ CEQA, Pub. Resources Code § 21092.1.

² CEQA “Guidelines,” 14 Cal. Code Regs. § 15088.5.

³ *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (1981) 122 Cal.App.3d 813, 822.

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

⁵ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

⁶ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

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To fulfill this function, the discussion of impacts in a DEIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”⁷ An adequate DEIR must contain facts and analysis, not just an agency’s conclusions.⁸ CEQA requires a DEIR to disclose all potential direct and indirect, potentially significant environmental impacts of a project.⁹

Second, if a DEIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.¹⁰ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.¹¹ Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the DEIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding instruments.¹² A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.¹³ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”¹⁴

In this case, the DEIR fails to satisfy the basic purposes of CEQA. The DEIR’s conclusions regarding air quality, greenhouse gas emissions, hazardous materials, and traffic are not supported by substantial evidence. In preparing the DEIR, the City: (1) failed to provide sufficient information to inform the public and decision-makers about potential environmental impacts; (2) failed to accurately identify and adequately analyze all potentially significant environmental impacts;

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⁷ CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

⁸ See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

⁹ Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

¹⁰ Pub. Resources Code §§ 21002.1(a), 21100(b)(3); CEQA Guidelines § 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass’n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

¹¹ Pub. Resources Code §§ 21002-21002.1.

¹² CEQA Guidelines § 15126.4(a)(2).

¹³ *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28.

¹⁴ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Ass’n.* (1986) 42 Cal.3d 929, 935.

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and (3) failed to incorporate adequate measures to mitigate environmental impacts to a less than significant level. The City must correct these shortcomings and recirculate a revised DEIR for public review and comment.

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

1. The Air Pollution Model Was Manipulated to Avoid Mitigation.

The DEIR estimated the Project's air pollution emissions using the "CalEEMod" modeling program, which allows users to input project-specific information supported by substantial evidence.¹⁵ The modeling program's calculations for the Project are generated as "output files" that reveal what inputs and parameters were used.¹⁶ Any deviations from the "default values" in the model must include a written description to justify why a different value was selected.¹⁷

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When reviewing the Project's CalEEMod output files, experts Matthew Hagemann and Jessie Jaeger found that a number of the values that were inputted into the model were not consistent with information disclosed in the DEIR. As a result, emissions associated with the construction and operation of the Project were underestimated. It is the opinion of Mr. Hagemann and Ms. Jaeger that a revised DEIR should be prepared to adequately assess the potential impacts that the Project will have on regional and local air quality, using appropriate input parameters.¹⁸

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a. Parks and Roads Were Excluded from the Model.

The CalEEMod output files for the Project disclose that the land uses input into the model's Project description did not include parks and open space (the Project's publicly accessible park, children's playground, sports courts, adult fitness area, bike and pedestrian trail, and dog park).¹⁹ The model also failed to include the new Project roads and on-street parking spaces.²⁰ The construction and existence of

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¹⁵ Hagemann and Jaeger Comments, **Attachment A**, p. 6.

¹⁶ Hagemann and Jaeger Comments, p. 6; DEIR Appendix C.

¹⁷ Hagemann and Jaeger Comments, p. 6.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, pp. 6-7; DEIR Figures III-4 through III-7, and Appendix C, p. 4.

²⁰ *Ibid.*

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these features on a significant portion of the Project site will create additional air pollutant emissions that must be included in the CalEEMod emissions model.²¹

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b. *The Model Underestimated Building Square Footage.*

CalEEMod requires users to input the number of acres of a proposed land use and the total square footage of proposed buildings. The acreage “is used to determine the amount of ground to be prepared, graded, paved, etc.,” while the square footage is used to determine emissions of volatile organic compounds (“VOCs”) from architectural coatings and the energy impacts of a Project.²²

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The CalEEMod output files for the Project show that only 540,000 square feet was input for the residential land uses.²³ However, the DEIR is explicit that the Project’s 540 dwelling units will occupy 621,000 square feet of building space.²⁴ Land use square footage is important for determining the impacts from emissions generated by architectural coatings and energy consumption. Therefore, by underestimating the square footage, the Project’s operational emissions were also underestimated.²⁵

c. *Haul Trucks Were Excluded from the Model.*

The DEIR’s Transportation Impacts Analysis estimates that approximately 7,000 cubic yards of fill will be imported to the Project site during the grading phase of construction.²⁶ This equates to 180 one-way haul truck trips per day for a work week, or 900 total truck trips.²⁷ There is also a thick layer of “unsuitable” artificial fill, debris, and clay soils beneath existing building pads and throughout the Project site that will need to be removed and replaced with compacted fill to support the Project’s building foundations.²⁸ This will increase the export and import of fill material during construction.

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²¹ Hagemann and Jaeger Comments, pp. 7-8; *see also* CalEEMod “User’s Guide,” p. 15 (July 2013), **Attachment C** (“all information” about a project’s land uses “needs to be entered by the user otherwise no emissions will be calculated”), available at: <http://www.caleemod.com/>

²² CalEEMod “User’s Tips,” p. 2 (April 2014), **Attachment D**, available at: <http://www.caleemod.com/>

²³ Hagemann and Jaeger Comments, p. 8.

²⁴ DEIR pp. 45, 46 (Table III-2), 358, 447, 499, and Figures III-6 and III-7.

²⁵ Hagemann and Jaeger Comments, p. 9.

²⁶ DEIR, Appendix B, p. 68.

²⁷ *Ibid.*, p. 69; Hagemann and Jaeger Comments, p. 10.

²⁸ Hagemann and Jaeger Comments, p. 9; DEIR, pp. 270, 278-279; CDM Smith, *2012 Update – Geotechnical Results and Conceptual Geotechnical Engineering Recommendations*, pp. 4, 6 (Nov. 7

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However, the CalEEMod model did not include any haul truck trips throughout the course of Project construction.²⁹ This is a result of failing to input a value for materials that will be imported to and exported from the Project site.³⁰ As stated in the CalEEMod User's Guide: "The user needs to enter the amount of material imported and exported to the site in order for CalEEMod to estimate hauling trips correctly from material transport."³¹

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In addition to projections of required haul trips in the traffic and geological sections of the DEIR, it is very likely that additional Project-related haul trips will be required to address the persistent contamination of soil and groundwater at the Project site, including haul trips to export and dispose of contaminated soils, and to import clean replacement fill.³² The DEIR's failure to include *any* haul trips in its calculations results in "substantially underestimated" construction-related air pollutant emissions.³³

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d. The Model Improperly Calculated "Pass-By" Trips for Project-Related Traffic.

The Transportation Impact Analysis for the Project concluded that it was inappropriate to count a percentage of Project-related traffic trips as "pass-by" trips, which occur when vehicles makes an interim stop at the Project site on an already-planned trip, but do not deviate from their course.³⁴ Pass-by trips are not expected in large numbers because of the traffic-isolated location of the Project site, and therefore most drivers will deviate from nearby courses along 40th Street or San Pablo Avenue.³⁵ 40th Street is located approximately one quarter of a mile from the Project site entrance, while San Pablo Avenue is located approximately one half of a mile away.³⁶

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As explained by Mr. Hagemann and Ms. Jaeger, in contrast to the Transportation Impact Analysis, the CalEEMod output files for the air quality

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2012); CDM, *Summary of Geotechnical Results and Conceptual Geotechnical Engineering Recommendations*, pp. 6, 8 (June 10, 2005).

²⁹ Hagemann and Jaeger Comments, p. 10; DEIR, Appendix C, p. 9.

³⁰ Hagemann and Jaeger Comments, pp. 9-10.

³¹ CalEEMod User's Guide, p. 26, **Attachment C**.

³² DEIR pp. 317-319; Hagemann and Jaeger Comments, pp. 9, 10.

³³ Hagemann and Jaeger Comments, p. 10.

³⁴ *Ibid.*; DEIR, Appendix B, p. 38.

³⁵ *Ibid.*

³⁶ Hagemann and Jaeger Comments, p. 11.

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analysis assign a not-insignificant number of Project traffic trips to the pass-by category.³⁷ CalEEMod only assigns a trip length of 0.1 miles to pass-by trips, because they are supposed to result in no diversion from the primary trip route.³⁸ This is highly unlikely for the Project, and thus the “operational emissions associated with the proposed Project are greatly underestimated.”³⁹

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Mr. Hagemann and Ms. Jaeger recalculated the Project’s air pollutant emissions using CalEEMod and the corrected inputs described above, and determined that significant air quality impacts would occur.⁴⁰ The DEIR must be recirculated to disclose these impacts and propose sufficient mitigation measures.

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e. Traffic-Related Operational Emissions Are Underestimated.

As described in the traffic discussion below, the City improperly reduced the number of Project-generated traffic trips. In turn, this resulted in an underestimation of Project-related air pollutant emissions, and this error must be accounted for in a revised DEIR analysis.

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B. The DEIR Fails to Adequately Disclose, Analyze and Mitigate Significant Greenhouse Gas Impacts.

1. The PG&E Energy Intensity Factor Was Improperly Reduced.

Emissions of greenhouse gases (“GHG”) associated with the operation of a project include those generated by electric energy consumption. For this Project, energy consumption is the second largest source of operational GHG emissions.⁴¹ The utility provider for the Project is Pacific Gas and Electric (PG&E).⁴²

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Similar to other air pollutants, the CalEEMod program was used to estimate the Project’s emissions of GHG. Because each utility provider relies on a different mix of energy sources, CalEEMod applies a utility-specific “GHG intensity factor” to calculate a project’s emissions. For PG&E, the CalEEMod program applies a default

³⁷ *Ibid.*, pp. 10-11.

³⁸ *Ibid.*, p. 11.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, pp. 11-12.

⁴¹ DEIR p. 241, Table IV.E-3.

⁴² DEIR p. 365.

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GHG intensity factor of 641 pounds of GHG (CO2 equivalent) per megawatt hour, based on the officially reported GHG intensity factor at the time the latest CalEEMod model was released.⁴³

The GHG intensity factor for a particular utility provider can be changed from the CalEEMod default value, “if a new value is identified before the defaults are updated,” and if the lead agency provides *substantial evidence* to justify the change, in the remarks section of the CalEEMod output files.⁴⁴

For this Project, the City changed the default GHG intensity factor for PG&E from 641 pounds to only 290 pounds, a 65% reduction.⁴⁵ This resulted in a much lower estimate of GHG emissions associated the Project’s operation. The only justification provided for this substantial reduction was in the CalEEMod remarks section, which states: “Per PG&E GHG Emissions April 2013.”⁴⁶ Although that referenced source is not provided, experts Hagemann and Jaeger believe that the replacement intensity factor of 290 pounds was taken from a PG&E customer document entitled “Greenhouse Gas Emissions Factors: Guidance for PG&E Customers.”⁴⁷ That document estimates that PG&E’s *future* GHG intensity factor may be reduced to only 290 pounds by 2020.⁴⁸

The City’s decision to use an estimated future GHG intensity factor is not supported by substantial evidence. First, PG&E makes clear in its customer document that future estimates are “not to be used” for GHG regulatory compliance purposes, or similar purposes.⁴⁹ This is because PG&E follows a “rigorous process” each year to “have its emissions independently verified by a third party.”⁵⁰ Future estimates are not verified. Under a common-sense interpretation of the CalEEMod User’s Guide, unverified future estimates do not qualify as a “new value,” which is “identified” and justifies such a significant departure from the CalEEMod default value.

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⁴³ CalEEMod User’s Guide, Appendix D, Table 1.2, **Attachment E**.

⁴⁴ CalEEMod User’s Guide, **Attachment C**, pp. 9, 13.

⁴⁵ Hagemann and Jaeger Comments, p. 8; DEIR, Appendix C, p. 4.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*; PG&E, *Greenhouse Gas Emission Factors: Guidance for PG&E Customers* (Nov. 2015), **Attachment F**, available at:

https://www.pge.com/includes/docs/pdfs/shared/environment/calculator/pge_ghg_emission_factor_info_sheet.pdf

⁴⁸ *Ibid.* (The Project will be fully operational long before 2020, see DEIR p. 209.)

⁴⁹ PG&E, *Greenhouse Gas Emission Factors: Guidance for PG&E Customers*, p. 1 (emphasis added).

⁵⁰ *Ibid.*, p. 2; CalEEMod User’s Guide, **Attachment C**, p. 13.

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Second, the PG&E customer document uses estimates of future GHG intensity factors that were made in 2010, prior to the drought, and “so the forecasts do not take into consideration the impact of the drought on hydroelectric power.”⁵¹ PG&E’s intensity factor varies from year to year, based in large part on the availability of clean hydroelectric power, which produces fewer GHGs than other electric energy sources.⁵² For example, 2011 was an extremely wet year and PG&E achieved its lowest GHG intensity factor of 393 pounds.⁵³ During the dry years of 2007 and 2008, however, PG&E’s intensity factor rose to over 600 pounds.⁵⁴

This weather-dependent variation is reflected in PG&E’s most recent verified GHG intensity factor of 435 pounds for the year 2014.⁵⁵ This was higher than PG&E’s verified intensity factor for the year 2013, and higher than its previously projected intensity factor for 2014.⁵⁶ California’s drought and changing climate trends have made hydro-power resources less reliable. Accordingly, PG&E’s unverified future projections of GHG intensity factors, which explicitly do not take these variables into account, cannot be relied upon as a substitute CalEEMod input value. Even PG&E acknowledges that its data should not be relied upon until “a thorough, third-party verification” is conducted each year.⁵⁷ The DEIR’s significant modification of the CalEEMod default assumption for PG&E is unsupported because it relies on speculative future estimates.

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Third, PG&E’s customer document provides a more reliable method for estimating the GHG intensity factor for a year that is not yet verified: “[T]o estimate GHG emissions in a recent or future year for which an emission factor is not yet available, we recommend using an average of the five most recent coefficients available.”⁵⁸ The document shows that the most recent five-year average

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⁵¹ PG&E, *Greenhouse Gas Emission Factors: Guidance for PG&E Customers*, pp. 2, 3.

⁵² PG&E article dated (Feb. 20, 2013), **Attachment G**, available at: <http://www.pgecurrents.com/2013/02/20/pge%E2%80%99s-clean-energy-reduces-greenhouse-gas-emissions/>

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ PG&E website update (Feb. 5, 2016), **Attachment H**, available at: <http://www.pgecurrents.com/2016/02/05/pge%E2%80%99s-carbon-emissions-remain-among-nation%E2%80%99s-lowest/>

⁵⁶ Compare *ibid.* with PG&E, *Greenhouse Gas Emission Factors: Guidance for PG&E Customers*, p. 3.

⁵⁷ PG&E, *Greenhouse Gas Emission Factors: Guidance for PG&E Customers*.

⁵⁸ *Ibid.*

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GHG intensity factor is 457 pounds.⁵⁹ In Mr. Hagemann’s and Ms. Jaeger’s expert opinion, “at the very least, an intensity factor of 457 lbs/MWh should have been applied to the Project, which is still much greater than the 290 lb/MWh intensity factor used within the CalEEMod model.”⁶⁰ As a result, the Project’s GHG emissions are greatly underestimated.”⁶¹

CEQA requires that when analyzing a project’s impacts, the lead agency “should normally limit its examination to changes in the existing physical conditions in the affected area *as they exist at the time the notice of preparation is published.*”⁶² This has been interpreted to mean that the lead agency does not have “carte blanche to select the conditions on some future, post-approval date.”⁶³ The City’s use of a future estimated GHG emissions rate for the Project’s energy consumption violates this requirement. Based on currently available energy intensity factors, the Project’s GHG emissions will be higher than estimated in the DEIR, and the DEIR should be revised to reflect this information.

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2. Traffic-Related Emissions Were Underestimated.

As described in the traffic discussion below, the City improperly reduced the number of Project-generated traffic trips. In turn, this resulted in an underestimation of Project-related GHG emissions, and this error must be accounted for in a revised DEIR analysis.

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C. Impacts From Hazardous Materials on the Project Site Are Not Adequately Disclosed, Analyzed and Mitigated.

The Project site has a long history of industrial practices that caused extensive contamination of soil and groundwater. The Sherwin Williams parcel has not achieved established cleanup goals, and the Successor Agency parcel is still considered an open site under regulatory investigation. In Mr. Hagemann and Ms. Jaeger’s expert opinion, the DEIR’s analysis and proposed mitigation measures are inadequate, and the DEIR should not be certified until a thorough investigation is made regarding the suitability of the Project site for the proposed land uses.⁶⁴

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⁵⁹ *Ibid.*, p. 3.

⁶⁰ Hagemann and Jaeger comments, p. 9.

⁶¹ *Ibid.*

⁶² CEQA Guidelines § 15126.2 (emphasis added); *see also id.* § 15125(a).

⁶³ *Sunnyvale W. Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1379.

⁶⁴ Hagemann and Jaeger Comments, p. 2.

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1. Disturbance of the Sherwin Williams Parcel Poses a Significant and Unmitigated Risk to the Health of Construction Workers, Future Residents, and Recreational Users of the Project Site.

The Sherwin Williams parcel was used for manufacturing of lead- and arsenic-based pesticides, lacquer, and paint for almost 100 years, and was first designated as a contaminated site more than 25 years ago. In 2012, the California Department of Toxic Substances Control (“DTSC”) approved the excavation and removal of contaminated soil “hot spots” on the site, coupled with a strategy of “natural attenuation” for the contamination that remained on the site, a monitoring plan for soil vapor and groundwater, and a land use covenant that prohibits further disturbance of the site without further investigation and DTSC approval.⁶⁵

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Regarding the Sherwin Williams parcel, there is substantial evidence that the parcel continues to pose a significant risk of exposure to contamination, at levels that are unhealthy for construction workers, residents, and recreational users. This is reflected in the limited soil vapor and groundwater monitoring results from the northern part of the parcel where remediation activities occurred, and evidence of unremediated soil and groundwater contamination on the southern part of the parcel, including the area containing the “Building 35” concrete building pad, which was constructed in the mid-1960’s and has not yet been uncovered.⁶⁶

Following soil excavation and installation of slurry walls to control groundwater flow on the northern part of the parcel, Sherwin Williams monitored soil gas three times, at nine monitoring locations, between June 2012 and June 2013.⁶⁷ After this first year of soil gas monitoring, which produced highly variable results, Sherwin Williams abandoned seven of the soil monitoring locations, and maintained two in case future monitoring was needed (locations “06” and “08”). Soil gas sampling ceased after June 2013. The soil gas samples showed benzene and other contaminants of concern were above regulatory health screening levels.⁶⁸

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⁶⁵ DEIR, pp. 298-299.

⁶⁶ Hagemann and Jaeger Comments, p. 3.

⁶⁷ CDM Smith, *Updated Soil Gas Data Summary and Evaluation Report*, p. 1-1 and Table 1 (Aug. 15, 2013), found in DEIR, Hazardous Materials Reference Documents, .pdf pp. 1200 and 1217 (soil gas vapor monitoring points were constructed in June 2012 and monitored three times through June 2013).

⁶⁸ DEIR, p. 300.

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Benzene is a known human carcinogen and may pose a risk to construction workers and future occupants who may be exposed to soil vapors.⁶⁹

Monitoring locations 06 and 08 are outside the area where soil was excavated in 2012.⁷⁰ At monitoring location 06, the level of benzene in soil gas was 18 to 75 times above the safe level for residential use, and ethylbenzene was 145 times above the safe level.⁷¹ The highest level of naphthalene on the site was measured at monitoring location 08, at 2.4 times above the safe level.⁷² The last soil gas monitoring report, published in August 2013, speculated that these high levels may be attributable to contaminated soil, in addition to contaminated groundwater, because the soil at those two monitoring locations was not excavated as part of the previous remediation activities.⁷³

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Groundwater monitoring still occurs on the northern part of the Sherwin Williams parcel. A recent report based on 2014 samples from four groundwater monitoring wells shows elevated levels of VOC's, including the contaminants dichloroethane and benzene.⁷⁴ Samples from a larger number of wells that were tested for arsenic exceeded the arsenic cleanup goal for groundwater, with the highest levels found outside of the area where soil was excavated and removed.⁷⁵ These samples showed groundwater arsenic concentrations on portions of the Sherwin Williams site that were not excavated that were 7 to 50 times higher than the cleanup goal.⁷⁶

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In addition to evidence of elevated soil vapor and groundwater contamination on the northern part of the Sherwin Williams parcel, particularly in those areas that were not excavated, a significant portion of the southern part of parcel includes the original concrete building pad for the Sherwin Williams "Building 35," which was constructed in the mid-1960's and demolished in 2007. The existing footprint of the building pad is approximately 1.8 acres and covers more than 20% of the entire

⁶⁹ Hagemann and Jaeger Comments, p. 2 (citing Benzene "ToxFAQs," **Attachment I**, available at: <http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=38&tid=14>).

⁷⁰ CDM Smith, *Updated Soil Gas Data Summary and Evaluation Report*, Drawing 1, .pdf p. 1223.

⁷¹ *Ibid.*, Table 3, .pdf p. 1219.

⁷² *Ibid.*, Table 3, .pdf p. 1220.

⁷³ *Ibid.*, report pp. 4-2 to 4-3, .pdf pp. 1213-1214.

⁷⁴ Arcadis, *Data Summary Report for Groundwater Monitoring Activities for the Period from July 1, 2014 through December 31, 2014*, Table C-1 (Jan. 8, 2015).

⁷⁵ *Ibid.*, .pdf p. 444 and Figure 4, .pdf p. 455.

⁷⁶ *Ibid.*

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Sherwin Williams parcel.⁷⁷ The DEIR does not describe the extent of any previous investigations to determine potential levels of contamination in soil, groundwater, and soil vapor beneath this building pad.

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Prior to Sherwin William's acquisition of this area and construction of Building 35, the property beneath Building 35 was owned by the Southern Pacific Transportation Company and was occupied by seven sets of railroad tracks, from at least the late 1920's through the early 1960's.⁷⁸ The railroad tracks were removed and Building 35 was constructed and used by Sherwin Williams for storing products and chemicals, and later used for product manufacturing.⁷⁹

There is a risk of previously unidentified contamination beneath Building 35. Similar to the conclusions in the 2006 "Phase I Environmental Site Assessment" for the adjacent Successor Agency parcel, Mr. Hagemann and Ms. Jaeger conclude that the potential environmental concerns are related to the former use of this area as a railroad spur, including the "possible presence of petroleum hydrocarbons, petroleum-based solvents and thinners, chlorinated solvents, volatile and semi-volatile organic compounds, polynuclear aromatic hydrocarbons, polychlorinated biphenyls, and heavy metals, based on potential historic applications of arsenic-based herbicides to railroad tracks and the industrial land uses in the vicinity of the subject property that may have been serviced by the railroad tracks, including the Sherwin Williams plant."⁸⁰

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There is further evidence of contamination on the Sherwin Williams parcel outside of the area where soil was excavated and removed. First, a 2012 geologic report tested soils on the parcel at four locations outside of the excavated area, and noted that the soil in all four locations included a layer of "black, gray and brown clay" that was "described as having a petroleum-like odor."⁸¹ Second, the underground slurry wall on the parcel was purposefully breached in 2012 to provide a point of groundwater outflow for the "southern portion of the arsenic plume" on the parcel, which was described as flowing "along or under" Building 35 and could not be contained "due to the presence of Building 35."⁸²

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⁷⁷ Hagemann and Jaeger Comments, p. 3.

⁷⁸ Erler & Kalinowski, *Phase I Environmental Site Assessment, UPRR Parcel D*, p. 7 and Figures 3, 4, and 5 (2006); CDM, *Remedial Action Plan ("RAP")*, pp. 2-2 and 2-3 (June 11, 2010).

⁷⁹ Erler & Kalinowski, *Phase I, ibid.*, p. 7.

⁸⁰ Hagemann and Jaeger Comments, p. 3 (citing *ibid.*, p. 15).

⁸¹ CDM Smith, *2012 Update – Geotechnical Results and Conceptual Geotechnical Engineering Recommendations*, pp. 4, 6, and Figure 1 (Nov. 7, 2012).

⁸² *RAP*, pp. 2-13, 2-28, 2-29, 4-9.

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DTSC has not yet provided public comments about the suitability of the Sherwin Williams parcel for residential use. According to Mr. Hagemann and Ms. Jaeger, it is therefore “speculative at this time to assume the Sherwin Williams parcel is suitable for residential housing in light of data which shows contamination above cleanup goals, and potential additional contamination sources on the subject property.”⁸³ This does not, however, alleviate the City of its obligation to fully investigate and disclose the foreseeable environmental impacts of the Project. In Mr. Hagemann and Ms. Jaeger’s opinion, the DEIR should be revised to include a “definitive determination, backed by a Project-specific human health risk assessment, that the Sherwin Williams parcel is safe for human occupancy.”⁸⁴

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The City has improperly deferred investigating and disclosing the levels of contamination that persist throughout the Project site, and failed to adequately analyze the remediation strategies and mitigation measures that will be needed to ensure protection of human health, along with air quality and greenhouse gas emissions limits. A lead agency may not put off an analysis of what mitigation measures are required, or call for an unspecified mitigation plan to be devised based on future studies.⁸⁵ Moreover, an agency may not rely on mitigation measures of uncertain efficacy or feasibility.⁸⁶

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The DEIR acknowledges that contamination remains on the parcel above safe levels, and that pursuant to the Land Use Covenant on the parcel, DTSC will require further investigation, excavated soil management and disposal procedures, and further engineering controls to address the contamination.⁸⁷ There are foreseeable environmental impacts associated with the need to further remediate contaminated soil and groundwater on the Project site. These impacts include an increase in construction-related air pollution and GHG emissions from excavators, haul trucks, and related equipment.⁸⁸ The City cannot hide its head in the sand and attempt to avoid analyzing these impacts as part of the DEIR.

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⁸³ Hagemann and Jaeger Comments, p. 4.

⁸⁴ *Ibid.*

⁸⁵ CEQA Guidelines § 15126.4(a)(1)(B); *City of Long Beach v. Los Angeles School Dist.* (2009) 179 Cal.App.4th 889, 915; *Communities for a Better Env’t v. City of Richmond* (2010) 184 Cal.App.4th 70, 95; *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 669.

⁸⁶ *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28.

⁸⁷ DEIR, pp. 315-319.

⁸⁸ Hagemann and Jaeger Comments, p. 4.

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The City's proposed mitigation measures suggest that a future Soil Management Plan ("SMP") will be adequate to protect construction worker health, and that a future investigation of soil vapor effects on indoor air quality will be adequate to protect residents and recreational users of the Project site.⁸⁹ Mr. Hagemann and Ms. Jaeger conclude that these measures are not nearly stringent enough to reduce the potential impacts of the Project to a less-than-significant level. They recommend that to protect public health the City must first require, as part of its investigation of potential environmental impacts pursuant to CEQA, a thorough investigation and disclosure of the extent and character of residual contamination on the entire parcel, particularly those areas that are outside of the previous excavation zone, and under Building 35. The City should then ensure safe and proper remediation of any unsafe levels of contaminants, including the preparation of a Human Health Risk Assessment ("HHRA") to be included in a revised DEIR. A HHRA is a standard assessment to determine if a site will be safe for human occupancy following remediation. The City should also require an enforceable worker Health and Safety Plan, which is also a standard practice when redeveloping a contaminated site.⁹⁰

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Finally, the potential impacts of any residual contamination left in place on the Project site will not be limited to vapor intrusion effects on indoor air quality. The Project will include numerous parks and open space features that could expose children and others to unsafe levels of contaminated soil and soil vapor. The DEIR must be revised to include a HHRA that adequately addresses these risks.

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2. Disturbance of the Successor Agency Parcel Poses a Significant and Unmitigated Risk to the Health of Construction Workers, Future Residents, and Recreational Users of the Project Site.

A regulatory determination that the Successor Agency parcel is suitable for housing or public park uses has not been made. In fact, the DEIR fails to identify the status of the cleanup on the Successor Agency parcel, stating only:

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DTSC stated that they could not concur with the NFA [no further action] if concentrations remain above residential levels without a deed restriction.⁹¹

⁸⁹ DEIR pp. 27-28.

⁹⁰ Hagemann and Jaeger Comments, p. 4.

⁹¹ DEIR, p. 304.

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There is no evidence of a proper deed restriction on the Successor Agency parcel, and DTSC's Envirostor Website indicates that the regulatory status of the Successor Agency parcel is open.⁹² A 2009 post-cleanup report obtained from the City indicates that contaminants remain in the soil on the Successor Agency parcel in excess of residential-scenario cleanup goals, including petroleum hydrocarbons (diesel and motor oil), arsenic, cadmium, and lead.⁹³ The cleanup activities conducted by the City in 2008 were not completed because soil excavation could not proceed under adjacent buildings, railroad tracks, and sidewalks.⁹⁴

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cont.

Other contaminants including VOCs may also be present beneath the Successor Agency parcel in soil vapor.⁹⁵ These contaminants, which may have originated from the Sherwin Williams parcel, could include benzene, a known human carcinogen. Workers may be exposed to vapors during earthwork activities and put at risk to health effects which include, in addition to cancer, dizziness, rapid heart rate, headaches, tremors, confusion, and unconsciousness.⁹⁶ Future residents and recreational users may be subject to similar health effects if the source of the contaminants in soil, groundwater, and soil vapor is not addressed.⁹⁷

The DEIR states that vapor intrusion at the Successor Agency parcel may pose a potentially significant hazard for future occupants if residential development proceeds on the Successor Agency parcel under Option A.⁹⁸ To address this potential, the DEIR includes Mitigation Measure HAZ-2b, which requires an evaluation of soil gas conditions and indoor air quality, with approval from DTSC before residential housing can be built on the Successor Agency parcel. This mitigation is inadequate. Reliance on a future evaluation of vapor intrusion risks constitutes deferred mitigation.

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Before the City approves the Project it must investigate and disclose the extent of contamination that remains on the Successor Agency parcel, and must ensure that proper mitigation measures are in place to protect not only future

⁹² Hagemann and Jaeger Comments, p. 4 (citing Envirostor Website, **Attachment J**, available at: http://www.envirostor.dtsc.ca.gov/public/profile_report.asp?global_id=60000833).

⁹³ Hagemann and Jaeger Comments, p. 4 (citing Erler & Kalinowski, *Remedial Action Completion Report, UPRR Parcel D*, p. 16 (Jan. 30, 2009)).

⁹⁴ DEIR, p. 301.

⁹⁵ DEIR, p. 316; Hagemann and Jaeger Comments, p. 5.

⁹⁶ Benzene ToxFAQs, **Attachment I**.

⁹⁷ Hagemann and Jaeger Comments, p. 5.

⁹⁸ DEIR, p. 316.

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residents, but also construction workers, and residents who live across the street from the Project site and may be affected by construction releases.

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As with the Sherwin Williams parcel, “studies of vapor intrusion and soil contamination at the Successor Agency parcel should be conducted for inclusion in a revised DEIR.”⁹⁹ A clear delineation of areas where soil contamination remains above residential cleanup goals should also be included in a revised DEIR. Only with proper disclosure of contamination conditions can the potential impacts on human health of residents and construction workers be understood.

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Finally, it is not enough to require a soil vapor investigation only if residential housing is constructed on the parcel under Project Option A, but not if a public park is constructed under Project Option B.¹⁰⁰ Recreational users of the public park, including children and Project residents, must be protected from unhealthy levels of exposure to contaminated soil and soil vapor.

D. Traffic Impacts Are Underestimated and Unmitigated

The DEIR uses a completely new approach to analyzing the Project’s impacts on the City’s transportation network. Expert Daniel Smith, PE, reviewed the DEIR’s transportation analysis and found fundamental flaws that render the DEIR critically deficient. As a result, traffic impacts are underestimated and unmitigated.

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1. The City’s Traffic Consultant Used a New Self-Developed Transportation Model that Underestimates Project Traffic.

The DEIR estimates motor vehicle trip generation using a new method of analysis, the “MXD+” model for mixed-use developments, which was only recently self-developed by the City’s transportation analysis firm. According to Mr. Smith, the City’s reliance on the MXD+ model significantly understates vehicle trip totals associated with Project operation, because the new method is not reflective of Emeryville-specific considerations.

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The MXD+ model assumes that a full 35% of all associated with the Project on a daily and weekend basis, and 40% of all trips taken during peak hours, will not involve the use of a motor vehicle, but will instead be made by walking, bicycling, taking public transit, or by residents utilizing the commercial space on the Project

⁹⁹ Hagemann and Jaeger Comments, p. 5.

¹⁰⁰ *Ibid.*, p. 6.

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site to avoid driving elsewhere.¹⁰¹ The MXD+ model therefore deducts 40% from the baseline trip level established through the conventional Institute of Transportation Engineers' "*Trip Generation*" rates.¹⁰²

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As explained by Mr. Smith, the results of the MXD+ model lack a relationship to the overall transportation conditions in Emeryville.¹⁰³ There are a number of mixed-use developments in Emeryville that the traffic consultant could have looked to in order to calibrate and verify the accuracy of the MXD+ model, but did not.¹⁰⁴ The MXD+ model includes many disclaimers that the model's predictions have not been validated, are only accurate with respect to the "underlying research" of mixed-use project data, and that alternative methods are suggested to validate the MXD+ method "with respect to local data."¹⁰⁵ Mr. Smith concludes that the City's failure to calibrate or validate the model for use in Emeryville resulted in an unreliable trip generation estimate.¹⁰⁶

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Similarly, although the DEIR states that the MXD+ model is "approved for use by the US EPA," the cited EPA public relations release merely states that the model has been validated against the data used to create it.¹⁰⁷ The DEIR also states that the MXD+ model is "peer reviewed," but one of the cited references was authored by the person who developed the data to create the MXD+ model, while the other cited reference is a comparative evaluation of several models is inconclusive about their accuracy and states that the evaluation "is not adequate to fully assess the performance of available methods."¹⁰⁸

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Mr. Smith also criticizes the decision to deduct its unreliable and unverified estimate of a 35% to 40% reduction in traffic trips from the traditional "ITE" trip generation rate, noting that the ITE rate is focused on traffic trips only, and does not reflect the fact that its data sources, particularly those sites studied in recent versions of the trip generation manual, necessarily include some level of walking, bicycling and transit trips.¹⁰⁹ In Mr. Smith's professional opinion "it is simply wrong to presume that the ITE *Trip Generation* data on motor vehicle trips at residential

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¹⁰¹ Smith Comments, **Attachment B**, p. 2.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, p. 3.

¹⁰⁴ *Ibid.*, p. 4.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, p. 6.

¹⁰⁷ *Ibid.*; DEIR p. 119, fn. 8.

¹⁰⁸ Smith Comments, p. 5.

¹⁰⁹ *Ibid.*, p. 6.

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developments reflects a ‘zero’ baseline of transit, walking, and bicycle trips and zero internalization of trips.”¹¹⁰

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cont.

2. The Project Area Is Not a Highly Walkable, Bicycle-friendly Setting.

Contrary to the statement in the DEIR that the Project area is a walkable, bicycle-friendly area, this is not the case.¹¹¹ The Emeryville General Plan describes how the pedestrian and bicycle travel is impeded by areas “with no sidewalks, where pedestrians must share the street with motor vehicles and bicyclists,” and the industrial and commercial areas where “large blocks [and] railroad and freeway corridors act as barriers to pedestrian travel.”¹¹² The General Plan also describes the “barriers to safe and convenient bicycling,” including auto-oriented retail uses and streets with high vehicle traffic volumes.¹¹³

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Mr. Smith provides a good overview of the significant physical barriers to walking and bicycling that exist in the vicinity of the Project site, including the Union Pacific railroad tracks to the west, three non-pedestrian and non-bicycle-friendly railroad overcrossings, and nearby intersections where pedestrian and bicycle crossings are restricted, dangerous, and intimidating.¹¹⁴ Mr. Smith also notes that Emeryville has an automobile-dependent development structure that includes thousands upon thousands of public parking spaces at nearby big-box stores.¹¹⁵

Finally, Mr. Smith points out that the Project developer has proposed only one fewer than the *maximum* number of Project parking spaces allowed under the City Code, which strongly indicates that the developer believes the Project will only be marketable to vehicle drivers.¹¹⁶ Given these circumstances, the City abused its discretion in reducing the Project’s estimated vehicle trips by 35% to 40%.

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¹¹⁰ *Ibid.*, p. 7.

¹¹¹ DEIR, p. 118.

¹¹² Emeryville General Plan, p. 3-14, **Attachment L**.

¹¹³ *Ibid.*

¹¹⁴ Smith Comments, pp. 7-12.

¹¹⁵ *Ibid.*, p. 13.

¹¹⁶ *Ibid.*

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3. The DEIR Relies on New “VMT” and “QOS” Significance Criteria That Are Not Yet Adequately Developed, and Ignores Significant Traffic Impacts Under the Traditional “LOS” Criteria.

As explained by Mr. Smith, the DEIR “abandons conventional Level of Service (“LOS”) standards of significance for traffic impacts” and instead bases the transportation and analysis on:

a) a new vehicle miles traveled (“VMT”) significance criterion that, at the time the DEIR transportation analysis was completed, had yet to be adopted, was still subject to change, and for which no explicit computational procedures and significance thresholds had yet been defined, and

b) amorphous Quality of Service (“QOS”) criteria for which thresholds of significance are only nominatively defined by the DEIR’s transportation analysts themselves.

Mr. Smith’s review of this analysis reveals that the DEIR understated the Project’s traffic impacts using unreliable methodologies.¹¹⁷ Acknowledging that the VMT and QOS criteria are still under development are still subject to change, had the City used the conventional LOS method of analysis it would have found *four* intersections where the Project will have significant traffic impacts.¹¹⁸ Accordingly, the DEIR fails to address potential mitigation to alleviate these impacts, including stringent transportation demand management measures.¹¹⁹ The DEIR should be revised to accurately portray the Project’s trip generation rate and significant traffic impacts, and further mitigation measures should be imposed.

E. Project Description and Mitigation Measures Are Vague and Uncertain.

The DEIR does not meet CEQA’s requirements because it fails to include an accurate and complete Project description, and several of its mitigation measures are vague and unenforceable. California courts have also repeatedly held that “an accurate, stable and finite project description is the *sine qua non* of an informative

¹¹⁷ *Ibid.*, pp. 14-15.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, p. 15.

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and legally sufficient [CEQA document].”¹²⁰ CEQA requires that a project be described with enough particularity that its impacts can be assessed.¹²¹ “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.”¹²² 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.”¹²³ Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project’s impacts and undermining meaningful public review.¹²⁴

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cont.

The DEIR does not adequately describe how contaminated groundwater will be treated and conveyed offsite during construction dewatering operations. The DEIR also fails to adequately describe how stormwater will be treated and conveyed offsite once the Project is constructed.¹²⁵ For example, the Project plans show that stormwater lines will be upgraded along Sherwin Avenue, but do not explain the extent of the required upgrades, nor disclose the potentially significant contamination that will be released when those lines are replaced.

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Furthermore, a lead agency may not put off an analysis of what mitigation measures are required, or call for an unspecified mitigation plan to be devised based on future studies.¹²⁶ A lead agency may not rely on mitigation measures of uncertain efficacy or feasibility.¹²⁷ Mitigation Measure AIR-1 requires construction equipment to meet the most recent “certification standards” for clean engines, but does not indicate what those standards are. There are numerous available air pollutant control measures that can be imposed by a lead agency to mitigate for construction-related air pollution, including a requirement that “Tier 3” or the most recent “Tier 4” clean-burning engines be used. The DEIR must include specific mitigation requirements for what type of pollution controls will be required, and the City must thereafter monitor and enforce those requirements to ensure compliance.

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¹²⁰ *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.

¹²¹ *Id.* at 192.

¹²² *Id.* at 192-193.

¹²³ *Id.* at 197-198.

¹²⁴ See, e.g., *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.

¹²⁵ See DEIR pp. 58,

¹²⁶ CEQA Guidelines § 15126.4(a)(1)(B); *City of Long Beach v. Los Angeles School Dist.* (2009) 179 Cal.App.4th 889, 915; *Communities for a Better Env’t v. City of Richmond* (2010) 184 Cal.App.4th 70, 95; *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 669.

¹²⁷ *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28.

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Furthermore, the “LID” treatment requirements in Mitigation Measure HYD-1b are entirely vague.¹²⁸ Infiltration of stormwater has been limited on the Project site by DTSC.¹²⁹ Accordingly, the City must identify what types of stormwater treatment options are available on the site, and determine whether the Project will comply with the requirements of the City’s Municipal Stormwater Permit.

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F. The Water Supply Assessment Is Eleven Years Old and Inadequate.

California law requires that “at the time” a lead agency determines to prepare an EIR for a proposed project it must identify the public water service provider for the project and request the preparation of a Water Supply Assessment (“WSA”).¹³⁰ The CEQA Guidelines state that the water supplier should determine whether the water demand for the project was included in its “most recently adopted” urban water management plan.¹³¹ The main purpose of a WSA is to discuss whether the public water supplier will be able to meet the project’s water demand for 20 years into the future in addition to existing and planned future uses.¹³² Thus, a WSA is expected to be a *current* document at the time the lead agency considers whether to approve a proposed project.

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The City asked the East Bay Municipal Utilities District (“EBMUD”) to prepare a WSA for a prior version of a development Project on the Sherwin Williams site in January 2005, only several years after the state-law WSA requirements were enacted. The resulting WSA prepared by EBMUD was less than five pages long with only one attached chart showing EBMUD’s projected customer demand for water and its projected water supply through 2020.¹³³ The five-page WSA relied on EBMUD’s 2000 Urban Water Management Plan (“UWMP”). It did not include development of the Successor Parcel.¹³⁴

A lead agency may only rely on a WSA that was prepared for a larger project or a previous version of the same project if that prior WSA was in compliance with

¹²⁸ DEIR p. 290.

¹²⁹ *Ibid.* p. 291.

¹³⁰ Water Code § 10910(b).

¹³¹ CEQA Guidelines § 15155(b)(1).

¹³² CEQA Guidelines § 10910(c)(3).

¹³³ Letter from William Kirkpatrick, EBMUD to Miroo Desai, City of Emeryville dated March 10, 2005.

¹³⁴ *Ibid.*, p. 1.

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all of the requirements of the Water Code and included all required elements of a WSA.¹³⁵ The previous WSA cannot be relied upon if changes in circumstances or conditions have substantially affected the ability of the public water system to provide sufficient water supplies or significant new information becomes available regarding the public water system's water supplies.¹³⁶

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In conclusion, The Project presents significant environmental issues that must be addressed prior to Project approval. The DEIR fails to include an adequate analysis of and mitigation measures for the Project's potentially significant impacts, and its conclusions lack substantial evidence as required by CEQA. The DEIR must be revised and recirculated.

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Sincerely,



Ellen L. Wehr

ELW:ljl

Attachments

(websites provided and attachments submitted on compact disc)

¹³⁵ Water Code § 10910(h); CEQA Guidelines §§ 15155(a)(4), (d).

¹³⁶ *Id.*