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### **VIA EMAIL and HAND DELIVERY**

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### **Re: Comments on 24th and Harrison Streets Project (PLN 16-080)**

Dear Chair Moore, Honorable Members of the Oakland Planning Commission and Mr. Vollmann:

These comments are submitted on behalf of Oakland Residents for Responsible Development regarding Agenda Item No. 6, the 24th and Harrison Streets Project (PLN 16-080) ("Project), and the CEQA Analysis prepared by the City of Oakland ("City") for the Project pursuant to the California Environmental Quality Act ("CEQA Analysis").<sup>1</sup> The Project includes the demolition of existing structures, including an Acura car dealership and warehouse, surface parking lots, auto repair shops, and a fitness facility; and the construction of an 18-story mixed-use residential and retail building and parking garage, with an area of

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<sup>1</sup> Pub. Resources Code §§ 21000 et seq.

approximately 730,655 gross square feet. The proposed building would have a maximum height of 200 feet and would be built above one level of subterranean parking. The Project is located at 277 27th Street and 300, 302, and 304 24th Street in Oakland.

The CEQA Analysis evaluates the Project's potential environmental impacts and consistency with the Broadway Valdez District Specific Plan ("BVDSPP"). The Project is located within the Central Business District area of the BVDSPP. We reviewed the CEQA Analysis in conjunction with our technical consultants, and have identified a number of significant deficiencies in the City's analysis, as well as new and more severe impacts than previously analyzed in the BVDSPP. Furthermore, we identified several mitigation measures not previously analyzed that would reduce significant impacts. Specifically, the CEQA Analysis fails to analyze the Project's high levels of site contamination as well as the construction health risks to the surrounding community, which are new or more severe than previously analyzed. Therefore, the City lacks substantial evidence to support the conclusions in its CEQA Analysis and an EIR is required.

We reviewed the CEQA Analysis, Staff Report, BVDSPP, and other plans and EIRs with the help of experts Matt Hagemann and Jessie Jaeger of Soil / Water / Air Protection Enterprise ("SWAPE"). Their attached technical comments are submitted in addition to the comments in this letter.<sup>2</sup> Accordingly, they must be addressed and responded to separately. The curricula vitae of these experts are also attached as exhibits to this letter.

## I. STATEMENT OF INTEREST

**Oakland Residents for Responsible Development** ("Oakland Residents") is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. The association includes Alan Guan, Risi Agbabiaka, Peter Lew, Bridgette Hall, Tanya Pitts, the **International Brotherhood of Electrical Workers Local 595, Plumbers and Steamfitters Local 342, Sheet Metal Workers Local 104, Sprinkler**

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<sup>2</sup> See Letter from Matt Hagemann and Jessie Jaeger, SWAPE, to Christina Caro re: Comments on the 24th and Harrison Streets Project (hereinafter, "SWAPE Comments"), August 3, 2016, **Exhibit A**.

**Fitters Local 483**, and their members and their families who live and/or work in the City of Oakland and Alameda County.

The individual members of Oakland Residents live, work, and raise their families in the City of Oakland. 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 may exist on the Project site.

The organizational members of Oakland Residents also have an interest in enforcing the City's planning and zoning laws and the State's 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. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, Oakland Residents' members are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

## **II. THE CITY MAY NOT RELY ON PREVIOUS ENVIRONMENTAL ANALYSIS FOR PROJECT APPROVAL**

CEQA has two basic purposes, neither of which is satisfied by the CEQA Analysis. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.<sup>3</sup> The EIR is the "heart" of this requirement.<sup>4</sup> 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."<sup>5</sup>

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<sup>3</sup> 14 Cal. Code Regs. § 15002(a)(1) ("CEQA Guidelines"); *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.

<sup>4</sup> *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

<sup>5</sup> *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”<sup>6</sup> An adequate EIR must contain facts and analysis, not just an agency’s conclusions.<sup>7</sup> CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.<sup>8</sup>

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.<sup>9</sup> If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.<sup>10</sup> CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.<sup>11</sup> Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR 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.<sup>12</sup> 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.<sup>13</sup> This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”<sup>14</sup>

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<sup>6</sup> CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

<sup>7</sup> See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

<sup>8</sup> Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

<sup>9</sup> 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.

<sup>10</sup> Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

<sup>11</sup> *Id.*, §§ 21002-21002.1.

<sup>12</sup> CEQA Guidelines § 15126.4(a)(2).

<sup>13</sup> *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

<sup>14</sup> *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to determine whether to prepare an EIR or negative declaration, identify whether a program EIR, tiering, or other appropriate process can be used for analysis of the project's environmental effects, or determine whether a previously prepared EIR could be used with the project, among other purposes.<sup>15</sup> CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.<sup>16</sup> A negative declaration may be prepared instead of an EIR when, after preparing an initial study, a lead agency determines that a project "would not have a significant effect on the environment."<sup>17</sup>

When an EIR has previously been prepared that could apply to the Project, CEQA requires the lead agency to conduct subsequent or supplemental environmental review when one or more of the following events occur:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.<sup>18</sup>

The CEQA Guidelines explain that the lead agency must determine, on the basis of substantial evidence in light of the whole record, if one or more of the following events occur:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new

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<sup>15</sup> CEQA Guidelines §§ 15060, 15063(c).

<sup>16</sup> See, e.g., Pub. Resources Code § 21100.

<sup>17</sup> *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

<sup>18</sup> Pub. Resources Code § 21166.

significant effects or a substantial increase in the severity of previously identified effects;

- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
  - (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
  - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
  - (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
  - (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.<sup>19</sup>

Only where **none** of the conditions described above calling for preparation of a subsequent or supplemental EIR have occurred may the lead agency consider preparing a subsequent negative declaration, an Addendum or no further

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<sup>19</sup> CEQA Guidelines § 15162(a)(1)-(3).

documentation.<sup>20</sup> For Addendums specifically, which is one of several CEQA exemption/streamlining avenues that the City claims is applicable to the Project, CEQA allows Addendums to a previously certified EIR if minor changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.<sup>21</sup>

Here, the City has failed to demonstrate that the Project can be lawfully approved based on the CEQA Analysis provided. Indeed, as explained in this letter, the City must disclose, analyze, and mitigate the Project's significant impacts in an EIR. Otherwise, the City's approval of the Project would violate CEQA.

**A. The Project is Not Consistent with CEQA Addendum and Exemption Requirements**

The City relies on three CEQA provisions in proposing to approve the Project without an Environmental Impact Report ("EIR").<sup>22</sup> Those provisions include the Community Plan Exemption,<sup>23</sup> Qualified Infill Exemption,<sup>24</sup> and Addendum to the Broadway Valdez District Specific Plan ("BVDS").<sup>25</sup> However, the City's reliance on these provisions is misplaced.

The CEQA Analysis does not simply provide "minor changes or additions are necessary" to the EIR as is allowed under the Addendum provision. Rather, it includes a new substantive analysis for a large development project which was not specifically analyzed in the BVDS.<sup>26</sup> The City must discontinue this practice, which clearly violates CEQA. Second, as explained further below, the Project will result in new or more severe significant impacts than analyzed in previous EIRs, and there are new mitigation measures that were not considered in the previous EIRs, but that could reduce those impacts to a less than significant level. In any

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<sup>20</sup> CEQA Guidelines § 15162(b).

<sup>21</sup> CEQA Guidelines § 15164; CEQA Analysis, p. 9.

<sup>22</sup> CEQA Analysis, pp. 2-3, Attachments B and C.

<sup>23</sup> CEQA Guidelines Section 15183.

<sup>24</sup> CEQA Guidelines Section 15183.3.

<sup>25</sup> CEQA Guidelines Section 15164.

<sup>26</sup> See CEQA Analysis, p. 2. The City has also improperly used the Addendum provisions of CEQA on other recent projects as demonstrated in comments and evidence submitted by Oakland residents (See 226 13<sup>th</sup> Street Project (PLN15320) <http://www2.oaklandnet.com/oakca1/groups/ceda/documents/report/oak058739.pdf>; See also 2400 Valdez Street Project (PLN15-336), <http://www2.oaklandnet.com/oakca1/groups/ceda/documents/report/oak057878.pdf>).

case, the City's decision must be supported by substantial evidence.<sup>27</sup> Here, the City's decision not to prepare a subsequent or supplemental EIR for the Project is not supported by substantial evidence.

The City also relies on additional CEQA provisions that allow approval of projects without an EIR in narrow circumstances. Specifically, the City relies on CEQA Guidelines Sections 15183 (Community Plan)<sup>28</sup> and 15183.3 (Qualified Infill)<sup>29</sup> for Project approval. However, the City's determination that exemptions also apply is not supported by substantial evidence.

The exemptions apply only when a Project does not have impacts peculiar to the proposed project that are new or more significant than previously analyzed or can be substantially mitigated by uniformly applicable development policies or standards. The Project fails to meet these requirements because the site is highly contaminated and could pose a significant risk to construction workers, residents and off-site receptors which was not fully disclosed or analyzed under the BVDSP. Furthermore, the Project's health risks from diesel particulate matter ("DPM") emissions during construction may be highly significant. In particular, because the BVDSP did not actually quantify project-level health risks, the absence of any previous project-specific analysis undermines the City's determination that Standard Conditions of Approval ("SCAs") would mitigate the impact. Unfortunately, the BVDSP did not fully address these peculiar and more significant impacts, and there are mitigation measures not previously identified that would reduce these significant impacts.

Thus, the Project will have new or more severe significant impacts than previously analyzed in the BVDSP EIR. In addition, as described below, the site-specific analysis conducted for the Project is legally deficient in several ways and the CEQA Analysis fails to incorporate all feasible mitigation. Therefore, the City may not rely on the CEQA Analysis for Project approval, and must provide detailed analysis of the Project's impacts in a subsequent or supplemental EIR.

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<sup>27</sup> *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).

<sup>28</sup> CEQA Guidelines Section 15183.

<sup>29</sup> CEQA Guidelines Section 15183.3.

**B. The CEQA Analysis Fails To Adequately Analyze and Mitigate On-Site Hazards**

*1. Project Site Contamination Has Not Been Adequately Disclosed and Mitigated*

The CEQA Analysis inaccurately concludes that existing soil and groundwater contamination at the Project site is insignificant, when in fact, the City's own Environmental Site Assessments ("ESAs") disclose that there is widespread soil and groundwater contamination present at the Project site at levels which exceed applicable health-protective Environmental Screening Levels ("ESLs").

The Project site has a long history of industrial use as a gas station, an automotive dealer and service facility, and a furniture company. Two Phase II ESAs were completed for contaminated sites within the Project boundaries – at 277 27th Street and 304 to 322 24th Street. Both ESAs disclosed substantial levels of contamination at levels exceeding applicable health standards.

The Phase II ESA completed for the 277 27th Street parcel collected 30 soil and groundwater samples. Of these samples, TPH-diesel ("TPH-d") and TPH-motor oil ("TPH-mo") were detected in 8 shallow soil samples at concentrations exceeding the San Francisco Bay Regional Water Quality Control Board ("SFRWQCB") ESLs. In groundwater, TPH-d was detected in 9 of the samples and exceeded the ESL in 3 samples. TPH-mo exceeded the ESL in 1 sample.<sup>30</sup> Nevertheless, the CEQA Analysis concluded that the results of the 277 27th Street Phase II showed that "no significant contamination was detected."<sup>31</sup>

As SWAPE explains, the findings of the 277 27th Street Phase II ESA *squarely contradict* the conclusions articulated in the CEQA Analysis, and demonstrate that there are significant levels of existing contamination at the site which pose a potentially significant health risk to the public.<sup>32</sup> With regard to soil contamination, the Phase II ESA concluded that, "[b]ased on the prior and current soil data, it appears that shallow soil contamination is present in the fill soils in the

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<sup>30</sup> See 277 27th Street Phase II ESA at p. 55.

<sup>31</sup> CEQA Analysis, p. 5-7.

<sup>32</sup> SWAPE Comments, p. 9.

areas of historic and present vehicle servicing.”<sup>33</sup> With regard to groundwater contamination, the Phase II concluded that “consideration will have to be given to the presence of petroleum hydrocarbons in groundwater if dewatering of foundation elements (e.g. elevator pit and pile borings) is required.”<sup>34</sup> SWAPE concludes that the CEQA Analysis contains “a mischaracterization of the sample results and of the Phase II conclusions” which “incorrectly portrays contamination at the Project site as insignificant.”<sup>35</sup>

The Phase II ESA conducted for the 304 to 322 24th Street portion of the Project site similarly discloses significant levels of soil and groundwater contamination. The 304 to 322 24th Street Phase II ESA detected concentrations of TPH-d and TPH-mo in both soil samples and a groundwater sample. TPH-mo was detected in one of the two groundwater samples at 270 ug/L,<sup>36</sup> a concentration which is more than twice the ESL of 100 ug/L. SWAPE explains that this detection discloses that the Project site contains significant levels of contamination.<sup>37</sup> The CEQA Analysis fails to disclose this as a significant impact, and instead erroneously states that the 304 to 322 24th Street Phase II results as “all below ESLs.”<sup>38</sup>

Because the CEQA Analysis fails to disclose the Project’s significant levels of contamination, it also fails to analyze the potentially significant health effects of the Project. In particular, the CEQA Analysis fails to include any quantified study or discussion of the health risks that may result when Project construction workers encounter contaminated soil when conducting earthmoving activities, or from tracking that contamination off-site. The CEQA Analysis also fails to evaluate the potential that future residents, Project site workers and visitors will contact contaminated soil. SWAPE explains that any such persons who come into contact with Project-site contaminants may be subject to central nervous system impairments and effects to the blood, immune system, lungs, skin, and eyes<sup>39</sup> when touching contaminated soil or breathing contaminated dust.<sup>40</sup> This is a potentially significant impact that the City must disclose and analyze in an EIR.

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<sup>33</sup> See 277 27th Street Phase II at pp. 6-10.

<sup>34</sup> *Id.*

<sup>35</sup> SWAPE Comments, p. 9.

<sup>36</sup> See 304 to 322 24th Street Phase II ESA, p. 4.

<sup>37</sup> SWAPE Comments, p. 9.

<sup>38</sup> CEQA Analysis, p. 56.

<sup>39</sup> <http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=423&tid=75>.

<sup>40</sup> SWAPE Comments, p.9..

The CEQA Analysis also fails to provide for any effective mitigation that would target and remove the sources of TPH and mitigate potential health risks from exposure to the chemicals. The CEQA Analysis relies on Specific Plan Standard Conditions of Approval (“SCAs”) SCA HAZ-1 and SCA-2 to mitigate potentially significant hazardous materials impacts. However, SCA HAZ-1 and SCA-2 merely includes general provisions to address “unexpected” contamination that is encountered after earth-moving activities have commenced. SCA HAZ-1 and SCA-2 rely on measures for visual and olfactory detection (i.e. sight and smell). SWAPE finds that these measures are inadequate because “[t]he TPH-d and TPH-mo contamination that is documented at the site may be hazardous to health at concentrations which cannot be seen or smelled in the soil, rendering provisions in SCA-HAZ-1 and SCA-HAZ-2 ineffective.”<sup>41</sup>

The CEQA Analysis next assumes, without analysis, that “if new or more significant contamination is encountered during site redevelopment earthwork, the project sponsor shall confirm that any cleanup actions are performed consistent with applicable laws and local agency requirements as required.”<sup>42</sup> However, as case law has shown, compliance with applicable regulations does not automatically obviate the need for further analysis of impacts at this pre-approval stage of the Project.

In *Keep our Mountains Quiet v. County of Santa Clara*, neighbors of a wedding venue sued over the County’s failure to prepare an EIR due to significant noise impacts. The court concluded that “a fair argument [exists] that the Project may have a significant environmental noise impact” and reasoned that although the noise levels would likely comply with local noise standards, “compliance with the ordinance does not foreclose the possibility of significant noise impacts.”<sup>43</sup> The court ordered the County to prepare an EIR. The ruling demonstrates the possibility that a project may be in compliance with an applicable regulation and still have a significant impact.

In *Communities for a Better Env’t v. California Res. Agency*, the court struck down a CEQA Guideline because it “impermissibly allow[ed] an agency to find a cumulative effect insignificant based on a project's compliance with some

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<sup>41</sup> *Id.*

<sup>42</sup> CEQA Analysis, p. 56.

<sup>43</sup> *Keep our Mountains Quiet v. County of Santa Clara* (2015) Case No. H039707, p. 21.

generalized plan rather than on the project's actual environmental impacts.”<sup>44</sup> The court concluded that “[i]f there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding that the project complies with the specified plan or mitigation program addressing the cumulative problem, an EIR must be prepared for the project.”<sup>45</sup> Thus, the ruling supports the notion that despite assured compliance with applicable standard outside of the CEQA process, a lead agency still has an obligation to consider substantial evidence and analyze and mitigate potentially significant impacts.

In *Leonoff v. Monterey County Bd. of Supervisors*, the court held that conditions requiring compliance with regulations are proper “where the public agency had meaningful information reasonably justifying an expectation of mitigation of environmental effects.”<sup>46</sup> The ruling suggests that an agency that merely provides a bare assertion that the project will be in compliance with applicable regulations, without further explanation or enforceability, may not fulfill the requirements of CEQA.

Here, the City failed to provide any information explaining how compliance with the outside laws and regulations would reduce the risks posed to workers and residents from the high levels of TPH contamination on the site. The City may not rely solely on compliance with regulations or laws as reducing impacts without a full analysis of impacts or enforceable mitigation. Furthermore, reliance on the BVDSPE EIR is improper because the BVDSPE EIR did not conduct a site-specific investigation of the highly contaminated site.

CEQA requires that the City describe all components of the Project that may have a significant impact, and adequately analyze and require mitigation for all potentially significant impacts related to on-site hazards. Here, the City failed to do so in its CEQA Analysis. SWAPE concludes that Project construction should not be allowed until a full EIR has been prepared to include a thorough assessment and cleanup of the contamination.”<sup>47</sup> An EIR must be prepared to remedy the defects in the City’s CEQA Analysis of hazardous materials impacts. In particular, this analysis must include proper disclosure and assessment of site contaminants, the

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<sup>44</sup> *Communities for a Better Env’t v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453.

<sup>45</sup> *Id.*

<sup>46</sup> *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1355.

<sup>47</sup> SWAPE Comments, p. 9.

risk they pose to the health of construction workers, site visitors and future occupants, and a regulatory agency-approved cleanup plan to address any health risks that the contaminants pose.

## 2. *Dewatering Impacts Has Not Been Adequately Addressed*

Under CEQA, a project may have a significant impact if it would violate any water quality standards or waste discharge requirement, create or contribute runoff water that would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff, or otherwise substantially degrade water quality.<sup>48</sup> CEQA and applicable case law require the City to describe all aspects of the Project, and, as explained above, disclose the significance of all impacts and provide separate and enforceable mitigation.<sup>49</sup>

The CEQA Analysis states that dewatering would be required during construction.<sup>50</sup> The CEQA Analysis also states that the Project would involve grading and excavation activities up to depths of approximately 13 feet below grade to construct the building<sup>51</sup> Thus, dewatering will most likely be required at those depths. SWAPE explains that the contaminated groundwater generated from the dewatering process may pose a potentially significant water quality issue, and that any contaminated groundwater encountered during Project construction must be handled and disposed in accordance with the San Francisco Bay Regional Water Quality Control Board's NPDES General Permit requirements<sup>52</sup> SWAPE further notes that the CEQA Analysis fails to consider that groundwater that would be dewatered is known to be contaminated with TCE and other compounds.<sup>53</sup> Nevertheless, the City is still required under CEQA to fully describe, analyze, and mitigate potential impacts from dewatering in its CEQA document.

SWAPE concludes that an EIR must be prepared to analyze the impact and identify the Regional Board's dewatering requirements and how they will be met during Project construction.<sup>54</sup>

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<sup>48</sup> CEQA Guidelines, Appendix G.

<sup>49</sup> *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645.

<sup>50</sup> CEQA Analysis, p. 18.

<sup>51</sup> *Id.*

<sup>52</sup> SWAPE Comments, p. 10.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

**C. The CEQA Analysis Fails To Adequately Analyze The Project-Specific Health Risk And Fails To Incorporate Conditions And Measures Identified in the Broadway Valdez District Specific Plan**

The BVDSP EIR determined that development under the plan could generate substantial levels of Toxic Air Contaminants (“TACs”), resulting in significant health risks to sensitive receptors during construction activities and project operations. The BVDSP EIR further determined that new operational sources, such as backup diesel generators, could result in significant impacts on new and existing receptors.<sup>55</sup> SCAs and mitigation measures were identified to reduce the impacts.<sup>56</sup>

Despite the SCAs and mitigation measures, the BVDSP EIR determined that the TAC exposure resulting generally from the Project would remain significant and unavoidable. This conclusion, however, was based primarily on operational exposures, and the BVDSP EIR did not evaluate in detail the potential health risk to sensitive receptors during *construction*. The BVDSP EIR did not address construction related exposures because “the specificity of detail necessary to conduct a health risk assessment is not available at the Specific Plan stage.”<sup>57</sup> The BVDSP EIR thus deferred the assessment of health risks from construction activities to the project level stage where project-specific impacts and mitigation measures could be determined.

As explained by SWAPE, however, the CEQA Analysis completely fails to evaluate the health risk posed to nearby sensitive receptors from exposure to diesel particulate matter (“DPM”) emissions released during Project construction.<sup>58</sup> The CEQA Analysis concludes that, “[b]ased on an examination of the analysis, findings, and conclusions of the BVDSP EIR, implementation of the proposed project would not substantially increase the severity of significant impacts identified in the BVDSP EIR, nor would it result in new significant impacts related to air quality that were not identified in the BVDSP EIR.”<sup>59</sup> This conclusion is incorrect.

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<sup>55</sup> BVDSP EIR, p. 4.2-28.

<sup>56</sup> *Id.*, at 4.2-28 – 29.

<sup>57</sup> *Id.*, at 4.2-27.

<sup>58</sup> SWAPE Comments, p. 5.

<sup>59</sup> CEQA Analysis, p. 37.

While an operational health risk assessment (“HRA”) was prepared, the risks from exposure to DPM emissions during construction were not quantified, nor were they compared to applicable numerical thresholds.<sup>60</sup> Although the CEQA Analysis states that the Project would require implementation of SCAs and Transportation Demand Management (“TDM”) to control construction emissions,<sup>61</sup> SWAPE notes that the risk must still be quantified in order to determine whether all necessary SCAs and mitigation measures have been applied if the measures will adequately reduce DPM emissions.<sup>62</sup>

Furthermore, SWAPE explains that by failing to quantify the risk associated with Project construction, the CEQA Analysis “is inconsistent with guidance set forth by the Office of Environmental Health Hazard Assessment (“OEHHA”),” the organization responsible for providing recommendations for HRAs in California.<sup>63</sup> The February 2015 OEHHA guidance document describes the types of projects that warrant the preparation of an HRA.<sup>64</sup> According to SWAPE, construction of the Project will produce emissions of DPM, a human carcinogen, through the exhaust stacks of construction equipment over a construction period of 30 months, as stated in the CEQA Analysis.<sup>65</sup> OEHHA recommends that all short-term projects lasting longer than two months be evaluated for cancer risks to nearby sensitive receptors.<sup>66</sup> SWAPE explains that “[t]his recommendation reflects the most recent HRA policy, and as such, the health risk for Project construction should be quantified and evaluated against the numerical significance threshold established by the Bay Area Air Quality Management District (“BAAQMD”).”<sup>67</sup>

SWAPE prepared a simple screening-level HRA, which demonstrates that construction-related DPM emissions would exceed BAAQMD health risk thresholds.<sup>68</sup> SWAPE’s model indicates that construction activities will generate

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> SWAPE Comments, pp. 5-6.

<sup>63</sup> *Id.*, at 10.

<sup>64</sup> “Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments.” OEHHA, February 2015, *available at*: [http://oehha.ca.gov/air/hot\\_spots/2015/2015GuidanceManual.pdf](http://oehha.ca.gov/air/hot_spots/2015/2015GuidanceManual.pdf).

<sup>65</sup> SWAPE Comments, p. 10.

<sup>66</sup> OEHHA, Risk Assessment Guidelines, at 8-18.

<sup>67</sup> SWAPE Comments, p. 6.

<sup>68</sup> *Id.* at pp. 7-8.

approximately 429.2 pounds of DPM over a 372-day construction period.<sup>69</sup> SWAPE then calculated the excess cancer risk for each sensitive receptor location, for adults, children, and/or infant receptors using applicable HRA methodologies prescribed by OEHHA. As SWAPE explains, OEHHA recommends the use of Age Sensitivity Factors (“ASFs”) to account for the heightened susceptibility of young children to the carcinogenic toxicity of air pollution.<sup>70</sup> SWAPE’s findings are included below.

| Parameter          | Description            | Units             | Adult           | Child           | Infant          |
|--------------------|------------------------|-------------------|-----------------|-----------------|-----------------|
| $C_{air}$          | Concentration          | ug/m <sup>3</sup> | 1.52            | 1.52            | 1.52            |
| DBR                | Daily breathing rate   | L/kg-day          | 302             | 581             | 581             |
| EF                 | Exposure Frequency     | days/year         | 350             | 350             | 350             |
| ED                 | Exposure Duration      | years             | 1.02            | 1.02            | 1.02            |
| AT                 | Averaging Time         | days              | 25550           | 25550           | 25550           |
|                    | Inhaled Dose           | (mg/kg-day)       | 6.4E-06         | 1.2E-05         | 1.2E-05         |
| CPF                | Cancer Potency Factor  | 1/(mg/kg-day)     | 1.1             | 1.1             | 1.1             |
| ASF                | Age Sensitivity Factor | -                 | 1               | 3               | 10              |
| <b>Cancer Risk</b> |                        |                   | <b>7.06E-06</b> | <b>4.07E-05</b> | <b>1.36E-04</b> |

As demonstrated in the table, SWAPE found that excess cancer risk to adults, children, and infants during Project construction for the sensitive receptors located 25 meters away are 7.06, 40.7, and 136 in one million, respectively. The child and infantile exposures vastly exceed the BAAQMD threshold of 10 in one million. Thus, SWAPE’s findings constitute substantial evidence of a potentially significant health risk that the CEQA Analysis failed to disclose or adequately mitigate. SWAPE concludes that “a refined health risk assessment must be prepared and included in [an EIR] to examine air quality impacts generated by Project construction using site-specific meteorology and specific equipment usage schedules.”<sup>71</sup>

Furthermore, the CEQA Analysis fails to identify or incorporate all SCAs and mitigation required under the BVDSP. The CEQA Analysis not only fails to

<sup>69</sup> *Id.* at p. 7.

<sup>70</sup> *Id.*; OEHHA, Risk Assessment Guidelines.

<sup>71</sup> SWAPE Comments, p. 8.

quantify the construction health risk to determine whether all necessary SCAs and mitigation have been incorporated (which were not even clearly identified in the BVDSPP), but also fails to incorporate Mitigation Measure AIR-4: Risk Reduction Plan to address the Project's use of an emergency generator, which can introduce new TACs as stated in the CEQA Analysis.<sup>72</sup>

AIR-4 states that “[a]pplicants for projects that would include backup generators shall prepare and submit to the City, a Risk Reduction Plan for City review and approval. . . The applicant shall implement the approved plan.”<sup>73</sup> The BVDSPP appears to require this measure for all projects with backup generators, such as this Project, to address cumulatively considerable health risks from multiple new sources.<sup>74</sup> However, even though the BVDSPP clearly anticipated cumulatively considerable health risks from new sources of TACs, such as emergency generators, the CEQA Analysis ignores this analysis and concludes that AIR-4 is not required.<sup>75</sup> This is contrary to the requirements of the BVDSPP.

The CEQA Analysis is therefore inconsistent with the BVDSPP because it fails to incorporate all mitigation required under the BVDSPP to reduce health risks to the surrounding community. In addition, the health risk impact disclosed by SWAPE from DPM emissions during construction presents new information showing a significant impact, which the BVDSPP explained could not be known at the Project level, and which was not discussed in the BVDSPP EIR. Therefore, an EIR is required for the Project and the City may not rely on the CEQA Analysis for Project approval.

**D. The CEQA Analysis Fails To Adequately Analyze Project-Specific Greenhouse Gas Emissions And Fails To Incorporate Conditions And Measures Identified In The Broadway Valdez District Specific Plan**

The BVDSPP EIR analyzed GHG emission impacts resulting from build-out of the entire plan, which were determined to be significant and unavoidable. Several mitigating SCAs were identified and incorporated into the BVDSPP. Those SCAs,

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<sup>72</sup> CEQA Analysis, p. 21 (“[The Project] would have an emergency generator, thereby introducing new sources of TACs.”).

<sup>73</sup> BVDSPP EIR, p. 4.2-28.

<sup>74</sup> *Id.*

<sup>75</sup> CEQA Analysis, p. 37.

such as a GHG Reduction Plan, apply to Projects that meet certain thresholds for GHG emissions. According to the CEQA Analysis, a GHG screening analysis (“GHG Analysis”) was conducted to determine if the proposed Project would meet the thresholds requiring the development of a GHG Reduction Plan under SCA F in the BVDSF (or SCA 38 as the CEQA Analysis’s GHG Analysis refers to it).<sup>76</sup>

Under SCA F, if the Project emits more than 1,100 metric tons of CO<sub>2</sub>e per year (MTCO<sub>2</sub>e/yr) and generates more than 4.6 metric tons of CO<sub>2</sub>e per year per service population (MTCO<sub>2</sub>/yr/sp), the Project would have a significant GHG impact, and the Project Applicant would be required to develop a GHG Reduction Plan.<sup>77</sup> The CEQA Analysis concluded that the Project does not exceed the applicable thresholds, and thus would have a less than significant GHG impact.<sup>78</sup> No SCAs or mitigation measures were applied to the Project.

However, SWAPE finds that the City’s conclusion regarding GHG impacts is inaccurate and based on emissions generated by an incorrect model.<sup>79</sup> As explained by SWAPE, the GHG Analysis relies on emissions calculated from the California Emissions Estimator Model Version CalEEMod.2013.2.2 (“CalEEMod”).<sup>80</sup> CalEEMod provides recommended default values based on site specific information, such as land use type, meteorological data, total lot acreage, project type and typical equipment associated with project type. If more specific project information is known, the user can change the default values and input project-specific values, but CEQA requires that such changes be justified by substantial evidence.<sup>81</sup> Once all the values are inputted into the model, the Project’s construction and operational emissions are calculated and “output files” are generated. These output files disclose to the reader what parameters were utilized in calculating the Project’s air pollution emissions, and make known which default values were changed as well as provide a justification for the values selected.<sup>82</sup>

When reviewing the construction and operational CalEEMod output files for the GHG analysis, SWAPE found that several of the assumptions used and values

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<sup>76</sup> BVDSF EIR, Section 4.6; Addendum, Attachment F; see CEQA Analysis, p. 51.

<sup>77</sup> *Id.*

<sup>78</sup> CEQA Analysis, pp. 51-52.

<sup>79</sup> SWAPE Comments, p.2.

<sup>80</sup> *Id.*; CalEEMod website, available at: <http://www.caleemod.com/>.

<sup>81</sup> CalEEMod User Guide, pp. 2, 9.

<sup>82</sup> *Id.*, at 7, 13.

inputted into the model are “not consistent with information disclosed in the CEQA Analysis and the GHG Screening Analysis.”<sup>83</sup> SWAPE explains that the GHG Analysis relied on an incorrect distribution of operational trip type and trip purpose in calculating operational GHG emissions. These inaccuracies skewed the City’s calculations such that GHG emissions appear to have been substantially underestimated.<sup>84</sup> As a result, SWAPE concludes that the GHG emissions associated with the construction and operation of the Project are underestimated.<sup>85</sup>

First, the “trip type” percentages identified in the CEQA Analysis do not correspond with the “trip types” that were input into the GHG Analysis. According to Appendix A of the CalEEMod User’s Guide, “the trip type breakdown describes the purpose of the trip generated at each land use,” and “multiplying the total trips for a land use by trip type breakdown percentage yields trips for a given trip type.”<sup>86</sup> Pursuant to the User Guide, the trip type for residential land uses are defined as home-work (H-W), home-shop (H-S), and home-other (H-O), while the trip types for non-residential land uses are defined as commercial-customer (C-C), commercial-work (C-W), and commercial-nonwork (C-NW).<sup>87</sup> However, the GHG Analysis applied inconsistent and unsupported values for the Project’s residential land use. The City’s CalEEMod emissions model states that 26.10 percent of trips were assigned to H-W, 29.10 percent were assigned to H-S, and 44.80 percent were assigned to H-O. For the commercial land use, 16.30 percent were assigned to C-W, 64.70 percent were assigned to C-C, and 19.00 percent were assigned to C-NW.<sup>88</sup>

However, as SWAPE explains, these trip type percentages represent a variety of vehicle types, including passenger vehicles with lower emissions than commercial trucks. The GHG Analysis’ emissions model did not model passenger vehicle trips, and instead modeled only truck trips, which have longer default trip lengths. Thus, SWAPE explains that, “[b]ecause trips utilized by passenger car vehicles to and from the Project site were not modeled and only truck trips were modeled, 100 percent of the trips should have been allocated to H-O and C-NW trip

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<sup>83</sup> SWAPE Comments, p. 2.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> “CalEEMod User’s Guide, Appendix A: Calculation Details for CalEEMod.” SCAQMD, *available at*: <http://www.aqmd.gov/docs/default-source/caleemod/caleemod-appendixa.pdf?sfvrsn=2>, p. 20.

<sup>87</sup> CalEEMod User Guide, p. 28, *available at*: <http://www.caleemod.com/>.

<sup>88</sup> See CEQA Analysis, p. 52.

types.”<sup>89</sup> SWAPE concludes that, by failing to allocate the correct percentage of operational trips to the appropriate trip type category, the actual vehicle miles travelled by the operational trips appear to have been underestimated, causing the Projects total operational emissions to be similarly underestimated.<sup>90</sup>

The second error in the GHG Analysis was in the City’s trip purpose analysis, which spread out the trip purpose percentage amongst primary, diverted, and pass-by trips for both the residential and commercial land uses. As SWAPE explains, the truck trips modeled do not represent diverted or pass-by trips and only represent primary trips.<sup>91</sup> By spreading the trip purpose percentages amongst the three categories, the GHG Analysis therefore used shorter trip lengths in its modeling, causing a further reduction in the total vehicle miles traveled. Based on the trip purposes identified in the CEQA Analysis, SWAPE concludes that 100 percent of the trip purpose should have been allocated to primary trips.<sup>92</sup>

The GHG Analysis concluded Project operational GHG emissions would be 1,061 MTCO<sub>2</sub>e/year, just slightly under the City’s applicable GHG threshold of 1,100 MTCO<sub>2</sub>e/year (or 4.6 MTCO<sub>2</sub>e/service population/year).<sup>93</sup> SWAPE concludes that, because the operational emissions identified in the GHG Analysis are very close to exceeding the threshold of significance, and the GHG Analysis contains erroneously minimizing input factors, “it is reasonable to assume that when the Project is modeled correctly, GHG emissions may exceed the threshold.”<sup>94</sup>

This determination is critical to the implementation of GHG mitigation measures for the Project. If the proposed Project was to exceed one of the City’s applicable thresholds (1,100 MTCO<sub>2</sub>e/year or 4.6 MTCO<sub>2</sub>e/service population/year), the Project would then meet the criteria of the BVDSP EIR’s Scenario B, which would require the preparation of a GHG Reduction Plan.<sup>95</sup> Given the inaccuracies in the City’s GHG modeling that are identified by SWAPE, an updated GHG analysis must be prepared that accurately models the Project’s operational trips in accordance with the Project information disclosed in the CEQA Analysis.

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<sup>89</sup> SWAPE Comments, p. 3.

<sup>90</sup> SWAPE Comments, p. 3.

<sup>91</sup> *Id.* at p. 4.

<sup>92</sup> *Id.* at p. 4.

<sup>93</sup> *Id.* at p. 5; CEQA Analysis, p. 52.

<sup>94</sup> SWAPE Comments, p. 5.

<sup>95</sup> See GHG Screening Analysis, p. 3.

### III. CONCLUSION

The City failed to comply with CEQA's procedural and evidentiary standards in its CEQA Analysis. As explained above, the CEQA Analysis fails to analyze and mitigate the Project's high levels of TPH contamination and the Project's significant health risks posed to the surrounding community from DPM emissions. Both of these significant impacts are new or more severe than previously analyzed, and mitigation measures, which are considerably different from those analyzed in the BVDSP EIR, would substantially reduce these significant effects, but have not been required in the CEQA Analysis. For these reasons, we urge the City to prepare a revised analysis in an EIR, as required by CEQA and to identify and implement all feasible mitigation measures available to reduce the Project's potentially significant site-specific impacts to less than significant levels before the City considers approving the Project.

Sincerely,



Christina M. Caro

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Attachments