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**Re: Mitigated Negative Declaration for Waterman Industrial Center
(Development Permit Type D – 15-11) – SCH No. 2016021002**

Dear Mr. Martin:

This letter is submitted on behalf of **Laborers International Union of North America, Local Union 783**, and its hundreds of members living in San Bernardino County (collectively, "LIUNA" or "Commenters") concerning the City of San Bernardino's (the "City") Initial Study and Mitigated Negative Declaration ("IS/MND") prepared for the Waterman Industrial Center, Development Permit Type D – 15-11) (SCH No. 2016021002) (the "Project").

The Project is a 564,652 square foot industrial building that includes office space, parking, a pump house, and landscaping. The Project is located at the intersection of East Dumas Street and South Waterman Avenue in the City of San Bernardino.

These comments have been prepared with the assistance of Matt Hagemann, P.G., C.Hg., QSD, QSP, an expert hydrogeologist; and Jessie Jaeger, air quality specialist from SWAPE. Their comments and curriculum vitae are attached as Exhibit A hereto ("Hagemann") and are incorporated by reference in their entirety. The City should respond to Mr. Hagemann's comments separately. See OR4

Commenters request that the City withdraw the IS/MND and instead prepare an environmental impact report ("EIR") for the Project, as there is substantial evidence that the Project will have significant unmitigated impacts on the environment as discussed OR3-1

OR3-1 below. There is a fair argument that the Project may have significant unmitigated
Cont. impacts, including:

- OR3-2 1. Significant and unmitigated air quality impacts associated with the
operation of the Project.
- OR3-3 2. Significant and unmitigated human health risks from diesel particulate
matter emissions associated with Project construction.

OR3-4 An EIR is required to analyze these and other impacts and to adopt feasible
mitigation measures to reduce the impacts to the extent feasible.

PROJECT DESCRIPTION

OR3-5 The Project is a proposed 564,652-square-foot (SF) industrial center building on
the southwest corner of the intersection of East Dumas Street and South Waterman
Avenue in the City of San Bernardino. It also includes office space, parking, a pump
house, and landscaping on an approximately 26-acre property. The future tenant of the
building is not currently known, so associated operational details are not known.
Additionally, there are 8 Southern California Edison (SCE) power poles that contain 6
wires of high voltage 66kv Edison transmission lines, a 3 wire 12kv system and a 3 wire
4kv system. The City concluded that the Project, with proposed mitigation measures
identified in the IS/MND, will not have a significant effect on the environment and that an
EIR is therefore not required.

STANDING

OR3-6 Members of LIUNA, Local Union No. 783 live, work, and recreate in the
immediate vicinity of the Project site. These members will suffer the impacts of a poorly
executed or inadequately mitigated Project, just as would the members of any nearby
homeowners association, community group or environmental group. Hundreds of
LIUNA Local Union No. 783 members live and work in areas that will be affected by air
pollution generated by the project. Therefore, LIUNA Local Union No. 883 and its
members have a direct interest in ensuring that the Project is adequately analyzed and
that its environmental and public health impacts are mitigated to the fullest extent
feasible.

OR3-7 Pursuant to CEQA, LIUNA Local Union No. 783 submits these comments in
response to the City's proposed IS/MND. Under the circumstances presented here,
CEQA clearly requires the preparation of an EIR and accordingly, the City should
decline to adopt the proposed IS/MND.

LEGAL STANDARD

OR3-8 As the California Supreme Court recently held, "[i]f no EIR has been prepared for

a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.” (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320 [“CBE v. SCAQMD”], citing, *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505.) “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” (*Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal.App.4th 98, 109 [“CBE v. CRA”].)

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The EIR is the very heart of CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927.) The EIR is an “environmental ‘alarm bell’ whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return.” (*Bakersfield Citizens, supra*, 124 Cal.App.4th at 1220.) The EIR also functions as a “document of accountability,” intended to “demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.” (*Laurel Heights Improvements Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.) The EIR process “protects not only the environment but also informed self-government.” (*Pocket Protectors, supra*, 124 Cal.App.4th at 927.)

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An EIR is required if “there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.” (Pub. Resources Code, § 21080(d); see also *Pocket Protectors, supra*, 124 Cal.App.4th at 927.) In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (14 Cal. Code Regs., § 15371 [“CEQA Guidelines”]), only if there is not even a “fair argument” that the project will have a significant environmental effect. (Pub. Resources Code, §§ 21100, 21064.) Since “[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process,” by allowing the agency “to dispense with the duty [to prepare an EIR],” negative declarations are allowed only in cases where “the proposed project will not affect the environment at all.” (*Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440.)

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Where an initial study shows that the project may have a significant effect on the environment, a mitigated negative declaration may be appropriate. However, a mitigated negative declaration is proper *only* if the project revisions would avoid or mitigate the potentially significant effects identified in the initial study “to a point where clearly no significant effect on the environment would occur, and...there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.” (Public

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Resources Code §§ 21064.5 and 21080(c)(2); *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 331.) In that context, “may” means a *reasonable possibility* of a significant effect on the environment. (Pub. Resources Code, §§ 21082.2(a), 21100, 21151(a); *Pocket Protectors, supra*, 124 Cal.App.4th at 927; *League for Protection of Oakland’s etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–905.)

Under the “fair argument” standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency’s decision. (CEQA Guidelines, § 15064(f)(1); *Pocket Protectors, supra*, 124 Cal.App.4th at 931; *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-15; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.) The “fair argument” standard creates a “low threshold” favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. (*Pocket Protectors, supra*, 124 Cal.App.4th at 928.)

The “fair argument” standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

This ‘fair argument’ standard is very different from the standard normally followed by public agencies in making administrative determinations. Ordinarily, public agencies weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact. The lead agency’s decision is thus largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

(Kostka & Zishcke, *Practice Under CEQA*, §6.29, pp. 273-274.) The Courts have explained that “it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency’s determination. Review is de novo, with a **preference for resolving doubts in favor of environmental review.**” (*Pocket Protectors, supra*, 124 Cal.App.4th at 928 [emphasis in original].)

As a matter of law, “substantial evidence includes . . . expert opinion.” (Pub. Resources Code, § 21080(e)(1); CEQA Guidelines, § 15064(f)(5).) CEQA Guidelines demand that where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the environmental effects to be significant and prepare an EIR. (CEQA Guidelines § 15064(f)(5); Pub. Res. Code § 21080(e)(1); *Pocket Protectors, supra*, 124 Cal.App.4th at 935.) “Significant environmental effect” is defined very broadly as “a substantial or potentially substantial

adverse change in the environment.” (Pub. Resources Code, § 21068; see also CEQA Guidelines, § 15382.) An effect on the environment need not be “momentous” to meet the CEQA test for significance; it is enough that the impacts are “not trivial.” (*No Oil, Inc.*, *supra*, 13 Cal.3d at 83.) In *Pocket Protectors*, the court explained how expert opinion is considered. The Court limited agencies and courts to weighing the admissibility of the evidence. (*Pocket Protectors*, *supra*, 124 Cal.App.4th at 935.) In the context of reviewing a negative declaration, “neither the lead agency nor a court may ‘weigh’ conflicting substantial evidence to determine whether an EIR must be prepared in the first instance.” (*Id.*) Where a disagreement arises regarding the validity of a negative declaration, the courts require an EIR. As the Court explained, “[i]t is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project.” (*Id.*)

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DISCUSSION

A. AN EIR IS REQUIRED BECAUSE THE PROJECT WILL MAY HAVE SIGNIFICANT UNMITIGATED ENVIRONMENTAL IMPACTS.

An EIR is required whenever substantial evidence in the entire record before the agency supports a fair argument that a project may have a significant effect on the environment. (*CBE v. SCAQMD*, *supra*, 48 Cal.4th at 319-20; Public Resources Code § 21080(d); see also, *Pocket Protectors*, *supra*, 124 Cal.App.4th at 927.) As set forth below, there is a fair argument supported by substantial evidence that the Project may result in significant environmental impacts from the operation of the Project. Therefore, the City is required to prepare an EIR to evaluate the Project’s impacts and analyze mitigation measures needed to reduce such impacts to a less than significant level.

OR3-16

1. Substantial Evidence Supports a Fair Argument that the Project Will Result in Significant Unmitigated Impacts to Air Quality By Failing to Input Correct Parameters into the IS/MND’s Emissions Calculations.

The IS/MND used the California Emissions Estimator Model Version CalEEMod.2013.2.2 (“CalEEMod”) to calculate emissions from the Project. However, Mr. Hagemann observes that several of the assumptions used and values input into CalEEMod were inconsistent with both information disclosed in the IS/MND as well as recommended procedures and values set forth by the South Coast Air Quality Management District (“SCAQMD”) for a high-cube warehouse (the type of Project at issue). Had the Project’s emissions been calculated using the correct parameters, the Project would have a potentially significant impact on air quality. As such, the Project’s air quality impacts have not been properly analyzed and mitigated. Accordingly, the following points constitute substantial evidence that support a fair argument that the IS/MND failed to properly calculate the Project’s emissions and that the Project will thus have significant unmitigated impacts.

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a. The IS/MND Improperly Assumes That the Project Will Not Involve Refrigeration.

OR3-18

The IS/MND significantly underestimated the Project's operational emissions by assuming that all warehouses at the Project will be unrefrigerated. The CalEEMod calculations were premised entirely on the notion that the proposed industrial building was modeled as an unrefrigerated warehouse. (IS/MND, Appendix A, pp. 52, 182.) However, the IS/MND is clear that the future tenant of the industrial building is not currently known. SCAQMD requires the use of a conservative air quality impact analysis to afford the fullest possible protection of the environment. In this case, a conservative analysis would dictate modeling the proposed warehouse as either entirely or partially refrigerated. Mr. Hagemann's letter explains that refrigerated warehouses release more air pollutants and greenhouse gas ("GHG") emissions when compared to unrefrigerated warehouses. Thus, by failing to include refrigerated warehouses a potential land use in the CalEEMod calculations, the Project's operational emissions may be substantially underestimated, and would thus likely result in a significant impact on regional air quality. This constitutes substantial evidence that an EIR should be prepared to evaluate the impacts of the Project's operational emissions and to mitigate those impacts.

b. The IS/MND Incorrectly Relies on the Fontana Truck Trip Study to for the Truck Trip Rate and for the Fleet Mix.

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The IS/MND also significantly underestimated the Project's operational mobile-source emissions by relying on an improper truck trip rate and fleet mix percentage. Specifically, the IS/MND's Traffic Impact Assessment (Appendix F, p. 3) and its Air Quality/GHG Assessment (Appendix A, p. 60) improperly rely on the August 2003 City of Fontana *Truck Trip Generation Study* ("Fontana Study") to determine the number of vehicle and truck trips the Project will generate during operation. As Mr. Hagemann's letter details, SCAQMD has found numerous problems with the Fontana Study and has thus recommended specific figures to use for the truck trip rate for a high-cube warehouse distribution center.

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Mr. Hagemann used SCAQMD's recommended rate to calculate the Project's number of truck trips and found the number of truck trips associated with the Project increased by approximately 87% from the number contained in the IS/MND's model, which is based on the Fontana Study's truck trip rate. Thus, the IS/MND's improper reliance on the Fontana Study likely misrepresented the actual air quality impacts of the Project.

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Similarly, the IS/MND relied on the Fontana Study's total truck fleet mix of 20%, which sets forth the operational mix of cars, 2-axle trucks, 3-axle trucks, and 4-axle

trucks to input into CalEEMod. As Mr. Hagemann notes, this approach “is not consistent with recommendations set forth by SCAQMD, and does not accurately represent the percentage of trucks that access a high-cube warehouse on a daily basis.” (Hagemann, p. 6.) To avoid underestimating the number of trucks visiting warehouse facilities, SCAQMD recommends a truck fleet mix of 40%. This number is double that used by the IS/MND, and is a conservative value especially given that the future tenant of the warehouse is unknown. Based on this recommendation, Mr. Hagemann’s letter sets forth a fleet mix percentage that the City should have input into CalEEMod that more accurately represents the number of trips that would likely occur during Project operation. As such, the IS/MND uses an inaccurate rate for the fleet mix percentage that does not adequately assess and mitigates the Project’s air quality and GHG impacts. As EIR should be prepared that adequately assesses and mitigates these impacts.

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c. The IS/MND Incorrectly Input Fleet Mix Percentage into CalEEMod.

Mr. Hagemann’s letter explains how the IS/MND input the aforementioned artificially low fleet mix percentage in the CalEEMod model incorrectly. Instead of inputting the fleet mix values into the model as fleet mix percentages, the values were used to adjust the trip type percentages for the Project. This approach is plainly inconsistent with Appendix A of the CalEEMod User’s Guide instructions on how to calculate the trip type. The IS/MND incorrectly assumed that commercial-work (“C-W”) trip are made exclusively by trucks and commercial-nonwork (“C-NW”) trips are made exclusively by passenger cars. In fact, both C-W and C-NW trips include trips made by a mix of vehicle types. Mr. Hagemann notes that “[a]s a result, the Project’s operational mobile-source emissions are both greatly underestimated and extremely inaccurate.” (Hagemann, p. 6.) An EIR should be prepared that inputs the proper data into the CalEEMod model and accurately analyzes the Project’s mobile-source emissions and provides mitigation measures for those impacts.

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2. Substantial Evidence Supports a Fair Argument that the Project Will Result in Significant Unmitigated Impacts to Human Health from Diesel Particulate Emissions Associated with Project Construction.

The IS/MND conclusion that the health risk posed to nearby sensitive receptors from exposure to diesel particulate matter (“DPM”) emissions released during Project construction would be less than significant fails to quantify this risk and compare it to applicable thresholds. The IS/MND fails to include a health risk assessment (“HRA”).

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The IS/MND concludes that health risk from construction activities would be less than significant because construction would occur over a period of time shorter than 70 years. However, this conclusion directly contrasts with guidance published by the Office of Environmental Health Hazard Assessment (“OEHHA”), which recommends that all

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OR3-24 short-term projects lasting at least two months be evaluated for cancer risks to nearby
Cont. sensitive receptors. The IS/MND is devoid of this analysis.

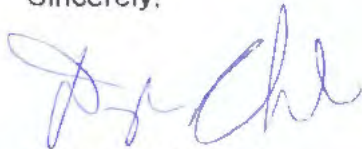
OR-25 Mr. Hagemann prepared a simple screening-level health risk assessment which demonstrates that construction related DPM emissions from the Project may result in a potentially significant health risk impact. (Hagemann, pp. 8-9.) Using annual estimates from the Project's CalEEMod model, Mr. Hagemann used the EPA's recommended AERSCREEN air dispersion model to generate the maximum reasonable estimates of single hour downwind DPM concentrations from the Project Site. Mr. Hagemann then calculated the excess cancer risk for each sensitive receptor location using applicable HRA methodologies prescribed by OEHHA. (*Id.*, pp. 9-10.) He found that "[t]he infantile exposure for the sensitive receptors exceeds the SCAQMD threshold of 10 in one million." (*Id.*, p. 10.) Further, it is likely that this impact would be even greater since the estimates from the Project's CalEEMod model were artificially low, as demonstrated above. Thus, Mr. Hagemann states that "a refined health risk assessment must be prepared to examine air quality impacts generated by Project construction using site-specific meteorology and specific equipment usage schedules." (*Id.*, p. 10.)

OR3-26 Mr. Hagemann's analysis clearly provides substantial evidence supporting a fair argument that construction emissions from the Project may have significant impacts on human health and the environment. Accordingly, the City must prepare an EIR to analyze these impacts and evaluate potential mitigation measures to address the impacts.

CONCLUSION

OR3-27 For the foregoing reasons, the IS/MND for the Project should be withdrawn, an EIR should be prepared and the draft EIR should be circulated for public review and comment in accordance with CEQA. Thank you for considering our comments.

Sincerely,



Douglas Chermak
Lozeau Drury LLP