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August 26, 2016

VIA EMAIL AND OVERNIGHT MAIL

Oakland Community and Economic Development Agency
Planning and Zoning Division
Attn: Peterson Z. Vollmann, Planner IV
City of Oakland, Bureau of Planning
250 Frank H. Ogawa, Suite 2114
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City Clerk
City of Oakland
One Frank H. Ogawa Plaza
Oakland, CA 94612
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**Re: 277 27th Street (24th and Harrison Streets Project, PLN 16-080)
- Appeal to Oakland City Council**

Dear Mr. Vollmann and City Clerk:

We write on behalf of **Oakland Residents for Responsible Development** ("Residents") to appeal the Oakland Planning Commission's August 17, 2016 decision to approve the following entitlements for the 277 27th Street Project, also known as 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"):¹

1. Affirming staff's environmental determination and adoption / approval the CEQA findings and Standard Conditions of Approval/Mitigation Monitoring and Reporting Program (SCAMMRP).

¹ Pub. Resources Code §§ 21000 et seq.

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2. Approval of the Regular Design Review for a new mixed use development containing 437 dwelling units and approximately 65,000 square feet of retail; the Conditional Use Permit to allow the D-BV zone bonuses for Residential and Height, Minor Variance for off-street loading; and Vesting Tentative Map, subject to findings and conditions of approval, including the SCAMMRP.

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 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.

This appeal letter demonstrates that the Commission's decision was not supported by substantial evidence in the record. Specifically, we identified several flaws in the City's analysis, as well as information regarding new or more severe impacts than previously analyzed in the Broadway Valdez District Specific Plan ("BVDSP") environmental impact report ("EIR"), which were not adequately considered by the Commission. The City's CEQA Analysis fails to analyze and mitigate the Project's site contamination impacts and the construction health risks to workers, residents, and 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.

This appeal letter and attachments raises each and every issue that is contested, and includes all arguments and evidence in the record previously presented to the Planning Commission as required by Section 17.134.070 of the Oakland Planning Code. We previously filed comments on the Project on August 3, 2016 with the assistance of experts Matt Hagemann and Jessie Jaeger from Soil / Water / Air Protection Enterprise ("SWAPE"), which we incorporate herein by reference.² Furthermore, with the assistance of SWAPE, we reviewed the Staff

² See Letter and Attachments from C. Caro to the Oakland Planning Commission and Peterson Z. Vollmann re: 24th and Harrison Streets Project (PLN 16-080), August 3, 2016 ("PC Comments") including Letter from Matt Hagemann and Jessie Jaeger, SWAPE, to Christina Caro re: Comments on the 24th and Harrison Streets Project (hereinafter, "SWAPE I"), August 3, 2016, attached hereto as Exhibit 2.

Report for the August 17, 2016 continued Planning Commission hearing, along with new technical reports prepared for the City and Applicant Holland Partner Group ("Applicant") in response to our August 3, 2016 comments (collectively "Responses"). We submitted supplemental comments to the Commission on August 17, 2016 which addressed the Responses, along with expert comments from Jessie Jaeger of SWAPE, which we incorporate herein by reference.³ Finally, Matt Hagemann of SWAPE has prepared supplemental comments regarding the Responses. His technical comments are submitted in support of this appeal letter, and is incorporated herein by reference.⁴

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 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

³ See Letter and Attachments from C. Caro to the Oakland Planning Commission and Peterson Z. Vollmann re: 24th and Harrison Streets Project (PLN 16-080), August 17, 2016, including August 17, 2016 letter from SWAPE to C. Caro re Supplemental Comments on the 24th and Harrison Streets Project ("SWAPE II"), attached hereto as **Exhibit 3**.

⁴ See Letter from Matt Hagemann SWAPE, to C. Caro re: Comments on the 24th and Harrison Streets Project (hereinafter, "SWAPE III"), August 25, 2016, attached hereto as **Exhibit 1**.

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.⁵ The EIR is the "heart" of this requirement.⁶ 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."⁷

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."⁸ An adequate EIR must contain facts and analysis, not just an agency's conclusions.⁹ CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.¹⁰

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.¹¹ If an EIR identifies potentially significant impacts, it must then propose and evaluate

⁵ 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.

⁶ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

⁷ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁸ CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

⁹ See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

¹⁰ Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

¹¹ 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.

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mitigation measures to minimize these impacts.¹² CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.¹³ 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.¹⁴ 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.¹⁵ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”¹⁶

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.¹⁷ CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.¹⁸ 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.”¹⁹

¹² Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

¹³ *Id.*, §§ 21002-21002.1.

¹⁴ CEQA Guidelines § 15126.4(a)(2).

¹⁵ *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).

¹⁶ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

¹⁷ CEQA Guidelines §§ 15060, 15063(c).

¹⁸ *See, e.g.*, Pub. Resources Code § 21100.

¹⁹ *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

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.²⁰

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 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;

²⁰ Pub. Resources Code § 21166.

- (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.²¹

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 documentation.²² 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.²³

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").²⁴ Those provisions include the

²¹ CEQA Guidelines § 15162(a)(1)-(3).

²² CEQA Guidelines § 15162(b).

²³ CEQA Guidelines § 15164; CEQA Analysis, p. 9.

²⁴ CEQA Analysis, pp. 2-3, Attachments B and C.

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Community Plan Exemption,²⁵ Qualified Infill Exemption,²⁶ and Addendum to the Broadway Valdez District Specific Plan ("BVDSP").²⁷ 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 BVDSP.²⁸ 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 case, the City's decision must be supported by substantial evidence.²⁹ 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)³⁰ and 15183.3 (Qualified Infill)³¹ 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.

²⁵ CEQA Guidelines Section 15183.

²⁶ CEQA Guidelines Section 15183.3.

²⁷ CEQA Guidelines Section 15164.

²⁸ 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 13th Street Project (PLN15320) <http://www2.oaklandnet.com/oakcal/groups/ceda/documents/report/oak058739.pdf>; *See also* 2400 Valdez Street Project (PLN15-336), <http://www2.oaklandnet.com/oakcal/groups/ceda/documents/report/oak057878.pdf>).

²⁹ *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).

³⁰ CEQA Guidelines Section 15183.

³¹ CEQA Guidelines Section 15183.3.

Furthermore, the City's own air quality analysis concluded that the Project's health risks from diesel particulate matter ("DPM") emissions during construction will be significant unless the Applicant uses exclusively Tier 4 diesel emissions control equipment for Project construction. The City has failed to provide evidence demonstrating that the Applicant will feasibly be able to obtain Tier 4 equipment prior to commencing construction. This lack of evidence of feasibility undermines the City's determination that Standard Conditions of Approval ("SCAs") required under the BVDSP would effectively mitigate these significant health impacts. 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.

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

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

Our PC Comments explained that the CEQA Analysis inaccurately concluded 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 Responses fail to meaningfully respond to these comments, and misconstrue the plain language of the City's own ESAs.

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.³² Nevertheless, the CEQA Analysis concluded that the results of the 277 27th Street Phase II showed that “no significant contamination was detected.”³³

As SWAPE explained in its original comments, 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.³⁴ 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 areas of historic and present vehicle servicing.”³⁵ 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.”³⁶ SWAPE concluded 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.”³⁷

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,³⁸ 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.³⁹ The

³² See 277 27th Street Phase II ESA at p. 55.

³³ CEQA Analysis, p. 5-7.

³⁴ SWAPE I, p. 9.

³⁵ See 277 27th Street Phase II at pp. 6-10.

³⁶ *Id.*

³⁷ SWAPE I, p. 9.

³⁸ See 304 to 322 24th Street Phase II ESA, p. 4.

³⁹ SWAPE I, p. 9.

CEQA Analysis failed 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."⁴⁰

Because the CEQA Analysis failed to disclose the Project's significant levels of contamination, it also failed to analyze the potentially significant health effects of the Project. In particular, the CEQA Analysis failed 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 failed 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 eyes⁴¹ when touching contaminated soil or breathing contaminated dust.⁴² This is a potentially significant impact that the City must disclose and analyze in an EIR.

The CEQA Analysis also failed 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). In its original comments, SWAPE found 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."⁴³

The CEQA Analysis next assumed, 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

⁴⁰ CEQA Analysis, p. 56.

⁴¹ <http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=423&tid=75>.

⁴² SWAPE I, p.9.

⁴³ *Id.*

with applicable laws and local agency requirements as required.”⁴⁴ 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.”⁴⁵ 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 generalized plan rather than on the project’s actual environmental impacts.”⁴⁶ 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.”⁴⁷ 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.”⁴⁸ The ruling suggests that an agency that merely provides a bare assertion that the project will be in compliance with

⁴⁴ CEQA Analysis, p. 56.

⁴⁵ *Keep our Mountains Quiet v. County of Santa Clara* (2015) Case No. H039707, p. 21.

⁴⁶ *Communities for a Better Env’t v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453.

⁴⁷ *Id.*

⁴⁸ *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1355.

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 BVDSF EIR is improper because the BVDSF 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.⁴⁹ 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 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. *The City's Responses Fail to Adequately Respond to Comments Regarding Potentially Significant Soil Contamination*

Matt Hagemann of SWAPE reviewed the City's Responses and explains that the Responses fail to remedy the CEQA Analysis' inaccurate conclusions that existing soil and groundwater contamination at the Project site are insignificant when, in fact, the City's own ESAs disclose widespread soil and groundwater contamination present at the Project site at levels which exceed health-protective ESLs.⁵⁰ SWAPE explains that the Responses mischaracterize the results of the Phase II ESAs and fail to remedy the inadequacies in the CEQA Analysis' reliance on SCA-HAZ-1 and SCA-HAZ-2 to address potentially significant soil contamination that may be unearthed during Project construction.

⁴⁹ SWAPE I, p. 9.

⁵⁰ SWAPE III, pp. 1-3.

First, the Responses state that findings in the Phase II ESA completed for the 277 27th Street parcel with respect to the TPH-d (diesel) interpret the chemical to actually be biogenic interference from naturally occurring organic materials.⁵¹ As explained by Mr. Hagemann, this statement is wholly inaccurate. The Phase II clearly states that the petroleum detections exceeding established ESLs at the Project site are considered to be related to petroleum hydrocarbon releases associated with historic site operations.⁵²

Second, the Responses fail to meaningfully respond to SWAPE's observations that SCA-HAZ-1 and SCA-HAZ-2 do not impose adequately health-protective or regulatory-compliant procedures to ensure adequate detection and removal of the type of contaminants located at the Project site. As SWAPE previously commented, SCA-HAZ-1 and SCA-HAZ-2 include only general provisions to address "unexpected" contamination that is encountered after earth-moving activities have commenced, by relying on measures for visual and olfactory detection (i.e. sight and smell). SWAPE found 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."⁵³ The Responses merely reiterate the erroneous conclusions from the CEQA Analysis, which SWAPE again concludes fail to address this gap in proposed hazardous materials mitigation, and fail 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.⁵⁴ Therefore, the City's response is inadequate.

Finally, the Responses state that the City will rely on the deferred creation of a Site Management Plan to require implementation of specific sampling and handling and transport procedures for reuse or disposal of contaminated soil and groundwater.⁵⁵ However, the Responses admit that "the exact method employed or plan to be implemented" has not yet been determined. The City cannot defer further analysis of the site's soil contamination to a future, post-approval stage. That analysis must be performed prior to Project approval and included in a proposed Site Management Plan that is disclosed to the public.

⁵¹ Responses, p. 4.

⁵² See SWAPE III, pp. 1-2; Phase II ESA, p. 5-7.

⁵³ See SWAPE I.

⁵⁴ SWAPE III, p. 3.

⁵⁵ See Responses, p. 4.

The Site Management Plan must also include adequate mitigation measures to address the nature of contamination at the site. SWAPE recommends that the City require the following measures in the Site Management Plan:

- Be prepared by a qualified Environmental Professional and signed and stamped by a Professional Geologist ("P.G.") or Professional Engineer ("P.E."), who shall oversee its execution.
- Include sampling and detection monitoring procedures to identify contaminated soil and groundwater during construction, and provisions for managing, removing, transporting and disposing of any such materials if encountered, in accordance with applicable State, Federal, and local regulatory requirements.
- Describe procedures for soil and groundwater testing (e.g., sampling frequencies, test methods, and action levels, etc.) for petroleum hydrocarbons, and shall include mandatory procedures to be followed for the temporary stockpiling of soil and collection of groundwater for testing, off-site disposal and/or discharge of collected soil and groundwater under applicable stormwater discharge permit(s), health and safety considerations, documentation and reporting. These procedures shall comply with all applicable regulatory requirements, including, but not limited to, the Hazardous Materials Regulations. These procedures shall include, at a minimum, the following:
 - The P.G. or P.E. shall document the occurrence of any water table encountered during excavation activities.
 - If a water table is encountered during excavation activities, groundwater present at those locations shall be sampled for petroleum hydrocarbons.

A site-specific Health and Safety Plan ("HASP") shall be prepared and implemented during construction. The HASP shall identify potential health and safety risks associated with petroleum-contaminated soil and groundwater, along with appropriate protective responses if encountered. The HASP shall include provisions for air monitoring, identify action levels based on health risk-based standards, and describe mandatory responses, including upgrades in personal protective equipment, evacuation of the work area, and/or enhanced ventilation. The Construction Contractor shall ensure that adequate protective equipment is

available for worker use at all times. Protective equipment shall include the equipment described in 29 Code of Federal Regulations Section 1910.120 Appendix B, Level C or Level D, depending on the results of field monitoring and testing conducted pursuant to this section. Workers shall be made aware of site-specific health and safety risks and hazards through an initial orientation and routine meetings during field work.⁵⁶

3. *Dewatering Impacts Have 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.⁵⁷ 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.⁵⁸

The CEQA Analysis states that dewatering would be required during construction.⁵⁹ 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.⁶⁰ Thus, dewatering will most likely be required at those depths. In its initial comments, SWAPE explained 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.⁶¹ SWAPE further noted that the CEQA Analysis fails to consider that groundwater that would be dewatered is known to be contaminated with TCE and other compounds.⁶² Nevertheless, the City is still required under CEQA to fully describe, analyze, and mitigate potential impacts from dewatering in its CEQA document.

⁵⁶ August 17, 2016 personal communication with M. Hagemann of SWAPE.

⁵⁷ CEQA Guidelines, Appendix G.

⁵⁸ *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645.

⁵⁹ CEQA Analysis, p. 18.

⁶⁰ *Id.*

⁶¹ SWAPE I, p. 10.

⁶² *Id.*

SWAPE concluded 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.⁶³

C. The City Lacks Substantial Evidence on Which to Conclude that the Construction Emissions Identified in the Applicant's Health Risk Assessment Will Be Reduced Below Levels of Significance

Our PC Comments included a screening level health risk assessment ("HRA") prepared by SWAPE which concluded that the Project's construction emissions would result in an excess cancer risk to adults, children, and infants of 7.06, 40.7, and 136 in one million, respectively.⁶⁴ The child and infantile exposures calculated by SWAPE vastly exceeded the Bay Area Air Quality Management District ("BAAQMD") threshold of 10 in one million.

In response to SWAPE's analysis, the Applicant's consultant, Firstcarbon Solutions, prepared its own project level construction HRA for the Project ("Firstcarbon HRA"). SWAPE's review of the Firstcarbon HRA demonstrates that the Project's unmitigated construction emissions would result in a significant health risk impact to infants located in the residential communities approximately 25 meters away from the Project site. In an effort to mitigate this risk, the Firstcarbon HRA incorporates an assumption that the Project will use exclusively Tier 4 off-road equipment during construction pursuant to SCA-AIR-1, resulting in an 85% reduction in toxic diesel particulate matter ("DPM"). The Firstcarbon HRA concludes, that, with the use of Tier 4 equipment, the Project's health risk impact to infants would be mitigated to less than significant levels.⁶⁵

While both the Firstcarbon HRA and the City's CEQA Analysis rely on compliance with SCA-AIR-1 to obligate the Applicant to use exclusively Tier 4 construction equipment, neither report assesses the feasibility of actually implementing this SCA-AIR-1 if the Project is approved. The Firstcarbon HRA states:

⁶³ *Id.*

⁶⁴ See SWAPE I.

⁶⁵ Firstcarbon HRA, p. 2.

As noted in the project's CEQA Analysis, implementation of subsections (w) and (x) of SCA-AIR-1, which require equipment and diesel trucks to be equipped with Best Available Control Technology and meet the California Air Resources Board's most recent certification standard, would reduce emissions of diesel particulate matter during construction. In order to comply with subsections (w) and (x) of SCA-AIR-1, the project sponsor would be required to ensure that construction equipment meet Tier 4 emissions standards, which can reduce emissions of diesel particulate matter by at least 85 percent relative to equipment without emission control technologies installed.⁶⁶

However, this conclusion is unsupported by any evidence of feasibility, and is therefore speculative, because neither the City nor the Applicant have performed any due diligence to demonstrate that Tier 4 equipment can be reasonably procured for this Project. SCA-AIR-1 is an SCA that was generally adopted as part of the BVDSP, but no feasibility analysis was performed in the BVDSP for the application of SCA-AIR-1 to this Project. That analysis has yet to be performed because neither the Firstcarbon HRA nor the CEQA Analysis discuss the feasibility of actually obtaining an entirely Tier 4 fleet.

As SWAPE explained, although off-road Tier 4 equipment is available for purchase, it is new technology that may not yet be readily available at all construction equipment vendors, may require special procurement by the Applicant, and is more costly than lower tier equipment.⁶⁷ It is therefore unreasonable to presume, without analysis, that all construction equipment that will be used for the Project will automatically have Tier 4 engines simply because SCA-AIR-1 calls for it.

Until the feasibility of implementing SCA-AIR-1 is demonstrated through a meaningful feasibility analysis, the City cannot rely on compliance with SCA-AIR-1 alone to reduce the Project's admittedly significant construction emissions below levels of significance. Rather, the City must confirm, through a detailed analysis supported by fact, whether and how the Applicant will procure exclusively Tier 4 equipment for the Project. The City must also identify alternative mitigation measures that are technologically feasible in the event that the Applicant is unable to procure all Tier 4 equipment necessary to construct the Project.

⁶⁶ Firstcarbon HRA, p. 3.

⁶⁷ See SWAPE II, p. 2-3.

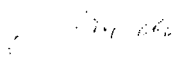
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III. CONCLUSION

For these reasons, we urge the City Council to vacate the Planning Commission's approval of the Project, and remand the Project to Staff to prepare a revised analysis in an EIR, as required by CEQA. The new analysis must 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 reconsiders approving the Project.

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

Sincerely,


Christina M. Caro

CMC:ljl

Attachments

3620-004j