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August 26, 2016

**VIA EMAIL AND OVERNIGHT MAIL**

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Planning and Zoning Division  
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City of Oakland  
250 Frank H. Ogawa Plaza, Suite 2114  
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City of Oakland  
One Frank H. Ogawa Plaza  
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**Re: W12 Mixed-Use Project (PLN16-133) Appeal to Oakland City Council**

Dear Ms. Ferracane and City Clerk:

We write on behalf of **Oakland Residents for Responsible Development** to appeal the Oakland Planning Commission's August 17, 2016 decision to approve the following entitlements for the W12 Mixed-Use Project ("Project"):

1. Affirm staff's environmental determination and adopt the CEQA findings and Standard Conditions of Approval/Mitigation Monitoring and Reporting Program (SCAMMRP).
2. Approve the Major Conditional Use, Design Review and Vesting Tentative Parcel Map subject to findings and conditions (including the SCAMMRP).

August 26, 2016

Page 2

The Project includes the demolition of existing structures, including the Downtown Oakland Charter School, and the construction of two seven-story buildings with up to 416 residential units, approximately 25,050 square feet of commercial space, and up to 317 on-site parking spaces. The Project is located on two parcels at 301 12th Street and 285 12th 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 LMSAP 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 2, 2016 and supplemental comments on August 3, 2016 with the assistance of experts Matt Hagemann and Jessie Jaeger from SWAPE, which we incorporate herein by reference.<sup>1</sup> Furthermore, we reviewed, with the assistance of SWAPE, the August 12, 2016 memorandum from the City's consultant, ESA Community Development ("Memorandum"),<sup>2</sup> as well as the July 5, 2016 letter from the Developer's consultant Sierra Research.<sup>3</sup> SWAPE's attached technical comments are submitted as support

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<sup>1</sup> See Letter and Attachments from Laura Horton to the Oakland Planning Commission and Christina Ferracane re: Comments on the CEQA Analysis for the W12 Mixed-Use Project (PLN16-133), August 2, 2016, **Attachment A**; see also Letter and Attachments from Laura Horton to the Oakland Planning Commission and Christina Ferracane re: Supplemental Comments on the CEQA Analysis for the W12 Mixed-Use Project (PLN16-133), August 3, 2016, **Attachment B**.

<sup>2</sup> See Letter from ESA Community Development to Christina Ferracane re: W12 Response to Comment Letters from Adams Broadwell Joseph & Cardozo, August 12, 2016, (hereinafter, "Memorandum"), **Attachment C**.

<sup>3</sup> See Letter from Sierra Research to Justin Osler, The Martin Group re: Evaluation of Construction Phase Emissions for the Webster & 12th (W12) Project, Oakland, California, July 5, 2016 (hereinafter "Sierra Research Letter"), **Attachment D**.

August 26, 2016

Page 3

for this appeal letter, and SWAPE's previous letters are incorporated herein by reference.<sup>4</sup>

## 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 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.

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<sup>4</sup> See Letter from Matt Hagemann and Jessie Jaeger, SWAPE, to Laura Horton re: Comments on the W12 Mixed-Use Project (hereinafter, "SWAPE Comments I"), August 3, 2016 [found in Attachment A]; *see also* Letter from Matt Hagemann and Jessie Jaeger, SWAPE, to Laura Horton re: Supplemental Comments on the W12 Mixed-Use Project (hereinafter, "SWAPE Comments II"), August 3, 2016, [found in Attachment B]; *see also* Letter from Matt Hagemann and Jessie Jaeger, SWAPE, to Laura Horton re: Response to Comments on the W12 Mixed-Use Project, August 25, 2016 (hereinafter, "SWAPE Comments III"), **Attachment E**.

August 26, 2016

Page 4

## 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>5</sup> The EIR is the “heart” of this requirement.<sup>6</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>7</sup>

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>8</sup> An adequate EIR must contain facts and analysis, not just an agency’s conclusions.<sup>9</sup> CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.<sup>10</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>11</sup> If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.<sup>12</sup> CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.<sup>13</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.

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<sup>5</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>6</sup> *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

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

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

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

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

<sup>11</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>12</sup> Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

<sup>13</sup> *Id.*, §§ 21002-21002.1.

August 26, 2016

Page 5

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>14</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>15</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>16</sup>

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

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<sup>14</sup> CEQA Guidelines § 15126.4(a)(2).

<sup>15</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>16</sup> *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

<sup>17</sup> CEQA Guidelines §§ 15060, 15063(c).

<sup>18</sup> *See, e.g.*, Pub. Resources Code § 21100.

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

August 26, 2016  
Page 6

- (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>20</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 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

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<sup>20</sup> Pub. Resources Code § 21166.

August 26, 2016  
Page 7

- (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>21</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 documentation.<sup>22</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>23</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 claims the Project is consistent with CEQA Guidelines Sections 15162 (Subsequent EIR and Negative Declaration), 15164 (Addendums), and 15168 (Program EIRs).<sup>24</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 substantive analysis for a large development project which was not specifically analyzed in the LMSAP EIR.<sup>25</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

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<sup>21</sup> CEQA Guidelines § 15162(a)(1)-(3).

<sup>22</sup> CEQA Guidelines § 15162(b).

<sup>23</sup> CEQA Guidelines § 15164; CEQA Analysis, p. 9.

<sup>24</sup> CEQA Analysis, p. 9 – 10.

<sup>25</sup> *Id.*, at p. 2.

August 26, 2016

Page 8

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.<sup>26</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>27</sup> and 15183.3 (Qualified Infill)<sup>28</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 risk to construction workers and residents, which was not fully analyzed under the LMSAP. Furthermore, the Project's health risks from diesel particulate matter ("DPM") emissions during construction would be highly significant. In particular, because the LMSAP 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 LMSAP EIR did not fully address these peculiar and more significant impacts, and there are mitigation measures not previously identified that would reduce these significant impacts.

The Memorandum responds by claiming there are no new or more severe impacts than those analyzed in the LMSAP EIR. The Memorandum also claims that the SCAs mitigate the impacts and therefore those impacts are no longer peculiar. However, as explained further below, the SCAs do not properly address the site contamination and construction health risks and therefore those impacts remain significant and were not analyzed in previous CEQA documents.

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<sup>26</sup> *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).

<sup>27</sup> CEQA Guidelines Section 15183.

<sup>28</sup> CEQA Guidelines Section 15183.3.



August 26, 2016

Page 9

Thus, the Project will have new or more severe significant impacts than previously analyzed in the LMSAP EIR and other CEQA documents. 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 an EIR.

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

*1. Project Site Contamination Has Not Been Adequately Addressed*

As we previously commented, the CEQA Analysis states that a Phase I Environmental Site Assessment ("ESA"), which the City failed to provide Oakland Residents after several requests, identified multiple recognized environmental conditions ("RECs") at the Project site and the 301 12th Street parcel is now listed on the Cortese List<sup>29</sup> as a cleanup site by the California Department of Toxic Substances Control ("DTSC").<sup>30</sup> The CEQA Analysis further states that there are "ongoing environmental investigations" on the site.<sup>31</sup> As discussed in the LMSAP, federal, State, and regional regulations would apply to contaminated sites. However, CEQA still requires analysis and mitigation of significant impacts, despite the applicability of oversight by other agencies. The LMSAP did not conduct project-specific assessment of on-site hazards, and thus deferred investigation and cleanup of hazards to the Project planning stage.

SWAPE explains in its initial comments that although the Project site is highly contaminated, the CEQA Analysis fails to acknowledge that contaminants underlying the Project site have recently been found in excess of screening levels in the indoor air of existing buildings and that cleanup has yet to commence.<sup>32</sup> The 301 12<sup>th</sup> Street Parcel is a former automobile dealership and repair center. According to Envirostor,<sup>33</sup> a cleanup agreement is pending between the Developer and DTSC, but as discussed further below, no cleanup agreement is currently in place.<sup>34</sup>

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<sup>29</sup> Cal. Govt. Code section 65962.5.

<sup>30</sup> CEQA Analysis, p. 57.

<sup>31</sup> *Id.*

<sup>32</sup> SWAPE Comments I, p. 4 – 5.

<sup>33</sup> [http://www.envirostor.dtsc.ca.gov/public/profile\\_report.asp?global\\_id=60002362](http://www.envirostor.dtsc.ca.gov/public/profile_report.asp?global_id=60002362).

<sup>34</sup> *Ibid.*

August 26, 2016

Page 10

According to SWAPE, soil, soil gas and groundwater samples collected from beneath the site showed elevated concentrations of trichloroethylene (“TCE”), along with other chlorinated solvents and petroleum hydrocarbons.<sup>35</sup> The indoor air of the Downtown Oakland Charter School that is currently located on the property was analyzed in May 2016. SWAPE explains that the concentrations of TCE in indoor air at the school ranged from 10 to 200 µg/m<sup>3</sup>, greatly exceeding US EPA Region 9’s Accelerated Response Action Level (“ARAL”) for residential direct exposure (2 µg/m<sup>3</sup>).<sup>36</sup> A ventilation system installed at the school reduced concentrations of TCE in indoor air to less than the ARAL. On May 26, 2016, DTSC notified the school that indoor air levels of TCE had been reduced to below the ARAL for residential direct exposure.<sup>37</sup> SWAPE notes that although the ventilation system has been effective in reducing the indoor air concentrations of TCE, “no cleanup has been conducted and no comprehensive evaluation of the source of the TCE and the other chlorinated solvents in the subsurface has been initiated.”<sup>38</sup>

SWAPE further explains that a “completed vapor intrusion pathway – whereby TCE and other chlorinated compounds move from contaminated groundwater, soil, and soil vapor into the air within overlying buildings – has been demonstrated at the Project site and remains viable.”<sup>39</sup> According to SWAPE, TCE is a cancer-causing agent<sup>40</sup> that would pose risks to construction workers and future residents unless the pathway is cut off.<sup>41</sup> According to SWAPE, the vapor intrusion pathway will remain at the Project site until a comprehensive investigation and a remedial effort, where the source of the TCE is removed, has been completed.

The CEQA Analysis fails to provide for any mitigation that would target and remove the source of TCE and other chlorinated compounds. The CEQA Analysis merely includes general provisions to address the contamination and only after earth-moving activities are initiated. SCA HAZ-1 and SCA-2 call for implementation of best management practices and measures for dealing with “unexpected” soil contamination that is visually discolored or that is emanating an odor. SWAPE finds that “[t]his is entirely inappropriate for a site where

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<sup>35</sup> SWAPE Comments I, p. 4 – 5.

<sup>36</sup> [http://www.envirostor.dtsc.ca.gov/public/profile\\_report.asp?global\\_id=60002362](http://www.envirostor.dtsc.ca.gov/public/profile_report.asp?global_id=60002362).

<sup>37</sup> SWAPE Comments, p. 5.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> <http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=172&tid=30>.

<sup>41</sup> SWAPE Comments I, p. 5.

August 26, 2016

Page 11

groundwater, soil and soil vapor have been contaminated with TCE which can be extremely difficult to assess and remediate to health protective levels.”<sup>42</sup>

The CEQA Analysis fails to include requirements for a site cleanup that is health-protective of construction workers and future Project workers and occupants.<sup>43</sup> Instead, SWAPE notes that the CEQA Analysis assumes that whatever contamination is seen or smelled during grading or trenching will be addressed through “undefined” Best Management Practices.<sup>44</sup> SWAPE further states that TCE contamination is often found in the form of a dense non-aqueous phase liquid (“DNAPL”) where pools or layers of leaked TCE accumulates on low-permeability clays in the subsurface.<sup>45</sup> These DNAPLs “may be below the area to be excavated and may represent a residual, ongoing source of contamination via the vapor intrusion pathway that would be unaddressed during construction because it would be below the level of Project excavation.”<sup>46</sup>

SWAPE finds that prior to proceeding with soil excavation and Project construction, a “thorough investigation of the contamination at the site is necessary to determine if development as a residential community is appropriate.”<sup>47</sup> This is necessary to address during CEQA review, even if another agency such as DTSC has additional oversight. The CEQA Analysis merely assumes, without further justification, that regulations outside of the CEQA process would mitigate impacts to less than significant levels, without adequately disclosing those impacts and mitigation measures during the CEQA process. However, as case law has shown, compliance with applicable regulations does not automatically obviate the need for further analysis of impacts.<sup>48</sup>

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 TCE contamination on the site. The City may not rely solely on compliance with regulations or laws as reducing impacts without a

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

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

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Keep our Mountains Quiet v. County of Santa Clara* (2015) Case No. H039707, p. 21; *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453; *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1355.

August 26, 2016

Page 12

full analysis of impacts or enforceable mitigation. Furthermore, reliance on the LMSAP is improper because the LMSAP 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 document that a thorough assessment and cleanup of the contamination has been completed under regulatory oversight and that a residential land use is appropriate.”<sup>49</sup>

## 2. *Other Hazards on the Project Site*

Regarding the Project’s hazards, SWAPE submitted supplemental comments on August 3 reiterating the dangers of the highly contaminated site, including risks from TCE and other contaminants, and identifying additional hazards associated with the site, including:<sup>50</sup>

- A suspected waste oil underground storage tank (UST), exact location and regulatory status unknown;
- The presence of seven hydraulic lifts and two possible tanks associated with the hydraulic lifts at the southeastern part of the 301 and 345 12th Street portion of the site – no removal records were found in regulatory agency files;
- The presence of five historical aboveground storage tanks;
- The presence of an 800-gallon oil-containing UST;
- Use of the property for vehicle service and mechanical repair and the presence of a floor drain, in association with these activities;
- The presence of a floor drain in an area of paint and body repair;
- Numerous historical dry-cleaning and auto service facilities in proximity to the Project site.

SWAPE notes that “[n]o requirements for assessment and cleanup to concentrations that are health-protective of construction workers and future Project occupants are included in the Analysis.”<sup>51</sup> Therefore, SWAPE concludes that an

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<sup>49</sup> SWAPE Comments I, p. 4.

<sup>50</sup> SWAPE Comments II, p. 8.

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

August 26, 2016

Page 13

EIR is necessary to ensure that a thorough investigation is conducted prior to proceeding with soil excavation and Project construction, to determine if development as a residential community is appropriate on the proposed site.<sup>52</sup>

3. *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>53</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>54</sup>

The CEQA Analysis states that “[s]ome dewatering may be required for construction of the proposed project, but the dewatering is not anticipated to substantially lower the groundwater level.”<sup>55</sup> The CEQA Analysis also states that the Project “would involve grading and excavation activities up to depths of approximately 16 feet below grade to construct the building. . .”<sup>56</sup> Thus dewatering will most likely be required at those depths. SWAPE states that the known TCE contamination in groundwater and any residual source of TCE contamination below the water table “poses a water quality issue during dewatering.”<sup>57</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>58</sup> Contaminated groundwater that is generated from the dewatering process would need to be handled and disposed in accordance with the San Francisco Bay Regional Water Quality Control Board’s NPDES General Permit requirements,<sup>59</sup> but the City is still required under CEQA to fully describe, analyze, and mitigate potential impacts from dewatering in its CEQA document.

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<sup>52</sup> *Id.*

<sup>53</sup> CEQA Guidelines, Appendix G.

<sup>54</sup> *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645.

<sup>55</sup> CEQA Analysis, p. 60.

<sup>56</sup> *Id.*, at 47.

<sup>57</sup> SWAPE Comments I, p. 5.

<sup>58</sup> *Id.*

<sup>59</sup> [http://www.waterboards.ca.gov/sanfranciscobay/board\\_decisions/adopted\\_orders/2012/R2-2012-0060.pdf](http://www.waterboards.ca.gov/sanfranciscobay/board_decisions/adopted_orders/2012/R2-2012-0060.pdf).

August 26, 2016

Page 14

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>60</sup>

4. *ESA Community Development's August 12 Memorandum Fails to Resolve These Issues*

SWAPE notes in its August 25 comments that the CEQA Analysis only referenced the July 15, 2016 Phase 1 ESA that was prepared for the Project site.<sup>61</sup> The CEQA Analysis failed to cite to a July 14, 2016 Subsurface Investigation Report prepared for the 301 and 285 12<sup>th</sup> Street properties as available on Envirostor.<sup>62</sup> SWAPE further states that the analytical results for soil, soil vapor and groundwater in this report are only tangentially referenced in the Memorandum without direct reference to the July 14, 2016 Subsurface Investigation Report.

According to SWAPE, the July 14, 2016 Subsurface Investigation Report documents concentrations of contaminants in groundwater, soil, and soil gas well in excess of the 2016 San Francisco Bay Environmental Screening Levels.<sup>63</sup> The following maximum concentrations for TCE obtained from the July 14, 2016 Subsurface Investigation Report (as compared to the ESLs included in that report) were not disclosed in the CEQA Analysis:

- Deep Soil: 780 ug/kg (Residential ESL: 460 ug/kg)
- Soil Vapor: 1,620,000 ug/m<sup>3</sup> (Residential ESL: 240 ug/m<sup>3</sup>)
- Groundwater: 1,800 ug/L (Residential groundwater ESL for vapor intrusion: 3.7 ug/L)

The soil and groundwater data, which was not disclosed in the CEQA Analysis and only indirectly referenced in the Memorandum, documents a highly contaminated Project site, according to SWAPE.<sup>64</sup> The maximum TCE detection in soil vapor, 1,620,000 ug/m<sup>3</sup>, has not been disclosed to the public in the CEQA Analysis or in the Memorandum, as required under CEQA.

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<sup>60</sup> SWAPE Comments I, p. 5.

<sup>61</sup> SWAPE Comments III, p. 1 – 2.

<sup>62</sup> [http://www.envirostor.dtsc.ca.gov/public/community\\_involvement/3655578434/20160715%20--%20W12%20PES%20Soil%20Investigation%20%28Phase%20II%29.pdf](http://www.envirostor.dtsc.ca.gov/public/community_involvement/3655578434/20160715%20--%20W12%20PES%20Soil%20Investigation%20%28Phase%20II%29.pdf), pages 1 – 23 as

**Attachment F.**

<sup>63</sup> SWAPE Comments III, p. 2.

<sup>64</sup> *Id.*

August 26, 2016

Page 15

According to a personal communication from the Project Manager at the California Department of Toxic Substances Control to SWAPE, no agreement to clean up contaminants at the site currently exists.<sup>65</sup> However, the Project Manager communicated that a draft plan is being prepared, although not available to the public, and future CEQA review would be conducted in connection with cleanup plans. Future CEQA evaluation related to the site is also referenced on Envirostor.<sup>66</sup> SWAPE notes that long-term options to address the contaminants at the site, according to DTSC, include soil removal, long term groundwater monitoring and groundwater extraction. However, under CEQA, site contamination and clean up measures must be analyzed in a full Draft Environmental Impact Report (“DEIR”) *prior* to Project approval, not at a later date after a Project has been approved.

Neither the CEQA Analysis nor the Memorandum report any plan that would assess and clean up the site for the intended uses for the Project, including residential. Given contaminant concentrations documented at the site, and given the lengthy history of assessment and cleanup at DTSC sites where TCE and other chlorinated solvents have been found as noted by SWAPE,<sup>67</sup> the public has no way of knowing how and when the site will be cleaned up to support the intended land use.

Disclosure of the contaminants at the Project site is necessary so the public can understand the potential impacts of the contamination on the proposed land uses. Assessment and cleanup plans also need to be disclosed so impacts, including construction emissions associated with soil removal and disposal can be analyzed and mitigated under CEQA. SWAPE concludes that as a responsible agency to the Project, DTSC itself should publicly disclose the details of site cleanup prior to Project approval, including a site cleanup agreement. Furthermore, analysis of those cleanup plans and mitigation, along with analysis of impacts associated with clean up of the site, must be disclosed in a full DEIR prior to the City’s approval of the Project. The DEIR should identify any additional mitigation that may be required by DTSC in addition to those measures included in SCA HAZ-1 and SCA HAZ-2.

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<sup>65</sup> *Id.*

<sup>66</sup> Envirostor, 301 12<sup>th</sup> Street Future Development (60002362), Activities, **Attachment G**.

<sup>67</sup> For example, SWAPE notes that the Technichem site in Emeryville where assessment of tetrachloroethylene began in 1993 and where assessment and cleanup is ongoing.

[http://www.envirostor.dtsc.ca.gov/public/hwmp\\_profile\\_report.asp?global\\_id=CAD981375983](http://www.envirostor.dtsc.ca.gov/public/hwmp_profile_report.asp?global_id=CAD981375983)

August 26, 2016

Page 16

CEQA does not allow for Project approval to take place prior to disclosure, analysis, and mitigation of all Project impacts including site contamination. CEQA also does not allow piecemealing of CEQA analysis for a project to occur.<sup>68</sup> In this case, SWAPE's analysis demonstrates that "the Project site is highly contaminated and therefore the Project may pose a significant risk to workers, residents, and other members of the public, which was not disclosed in the CEQA Analysis."<sup>69</sup> The City and DTSC may not exempt the Project from environmental review when there are unmitigated significant impacts while at the same time piecemealing environmental review of the site contamination and cleanup plans to a future date.

Therefore, a DEIR must be prepared to adequately evaluate the Project's impacts related to site contamination, including disclosing and analyzing cleanup plans and any impacts resulting from those plans.

**C. The CEQA Analysis Fails To Adequately Analyze and Mitigate Project-Specific Health Risk From Diesel Particulate Matter**

*1. The City is Required to Quantify the Project's Health Risk from DPM Emissions During Construction*

The California Air Resources Board ("CARB") identifies diesel particulate matter ("DPM") as a toxic air contaminant ("TAC") based on published evidence of a relationship between diesel exhaust exposure and lung cancer and other adverse health effects.<sup>70</sup> In 2012, the International Agency for Research on Cancer listed diesel engine exhaust as "carcinogenic to humans."<sup>71</sup> As with other air pollutants, SWAPE explains that DPM emissions during development construction can impact both on-site construction workers and the surrounding community such as schools and residential sensitive receptors.<sup>72</sup>

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<sup>68</sup> CEQA Guidelines, § 15378(a); *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592; *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 283-84; *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396-397.

<sup>69</sup> SWAPE Comments III, p. 3.

<sup>70</sup> <http://www.arb.ca.gov/research/diesel/diesel-health.htm>.

<sup>71</sup> *Id.*

<sup>72</sup> SWAPE Comments I, p. 3 - 4.



August 26, 2016

Page 17

The LMSAP EIR concludes that “[d]evelopment facilitated by the proposed Plan would potentially expose sensitive receptors to substantial health risks from [TACs] from sources including both DPM and gaseous emissions.”<sup>73</sup> Furthermore, the LMSAP EIR found that while compliance with the City’s SCAs “would entail the preparation of site-specific health risk assessments which would reduce DPM exposure to a less than significant level”, the SCAs would not necessarily reduce gaseous TACs to a less-than-significant level.<sup>74</sup> Therefore, the LMSAP EIR found the impacts related to DPM exposure would be less than significant, while the remaining TAC impacts (related to gaseous sources) would be significant and unavoidable.<sup>75</sup>

As we stated in our previous comments, the LMSAP EIR did not address project-level construction related exposures because “[t]he specificity of detail necessary to conduct a health risk assessment is not available at the Plan stage...”<sup>76</sup> The LMSAP 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 to ensure that DPM exposure would not exceed applicable thresholds.

However, the CEQA Analysis completely failed to evaluate the health risk posed to nearby sensitive receptors from exposure to DPM emissions released during Project construction, despite the indication in the LMSAP EIR that a health risk assessment (“HRA”) would be required.<sup>77</sup> The City’s omission of a construction HRA is particularly egregious because of the Project’s proximity to the American Indian Public Charter School, which is a charter middle school with predominantly low-income, minority students within a few blocks of the Project. As stated in the CEQA Analysis, construction-related emissions (as well as the release of potentially hazardous materials during construction as explained above) would occur for up to 2 years.<sup>78</sup>

The CEQA Analysis stated that although “[t]he LMSAP EIR determined that sensitive receptors in proximity to construction-related DPM emissions (generally within 200 meters) could be subject to increased cancer risk, chronic health

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<sup>73</sup> LMSAP DEIR, p. ES-34.

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

<sup>75</sup> *Id.*, at 3.3-25.

<sup>76</sup> *Id.*, at 3.3-39.

<sup>77</sup> SWAPE Comments I, p. 2 – 3.

<sup>78</sup> CEQA Analysis, p. 2.

August 26, 2016

Page 18

problems and acute health risk,” all future development projects pursuant to the LMSAP would be subject to basic construction control measures and best management practices through implementation the SCAs and thus the impact would be less than significant.<sup>79</sup> The Memorandum states the same.<sup>80</sup> SWAPE’s analysis demonstrates that these justifications are misplaced.

Although the CEQA Analysis incorporates SCAs from the LMSAP, the City is not absolved of CEQA’s requirement that agencies disclose significant environmental impacts to the public and mitigate those impacts.<sup>81</sup> The CEQA Analysis openly states that the LMSAP EIR determined that sensitive receptors may be subject to an increased cancer risk due to construction activities. Therefore, CEQA mandates that the City quantify that risk in order to determine *if* the basic construction control measures and best management practices in the SCAs will reduce DPM emissions to less than significant levels.

Furthermore, the CEQA Analysis assumed that because construction would occur over a short period of time, the health risk posed from construction activities would be negligible. SWAPE explains that this determination conflicts with most recent guidance published by the Office of Environmental Health Hazard Assessment (“OEHHA”), the organization responsible for providing recommendations for health risk assessments in California. OEHHA’s *Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments*, which was formally adopted by OEHHA in March of 2015, describes the types of projects that warrant the preparation of a health risk assessment.<sup>82</sup> OEHHA guidance recommends that all short-term projects lasting at least two months be evaluated for cancer risks to nearby sensitive receptors.<sup>83</sup>

Here, Project construction is expected to last up to 24 months and Project construction will produce emissions of DPM, as described in the CEQA Analysis. SWAPE explains that OEHHA’s recommendation that such short-term projects be evaluated for cancer risks to nearby sensitive receptors “reflects the most recent

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<sup>79</sup> *Id.*

<sup>80</sup> Memorandum, p. 7 – 8.

<sup>81</sup> CEQA Guidelines §§ 15126.2, 15126.4.

<sup>82</sup> “Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments.” OEHHA, February 2015, available at: [http://oehha.ca.gov/air/hot\\_spots/hotspots2015.html](http://oehha.ca.gov/air/hot_spots/hotspots2015.html).

<sup>83</sup> *Id.*, at 8-18.

August 26, 2016

Page 19

health risk assessment policy, and as such, an assessment of health risks to nearby sensitive receptors from construction should be included in a revised CEQA evaluation for the Project.”<sup>84</sup>

2. *The Project Will Result in Significant Health Risks from DPM Emissions During Construction*

At the time of our August 2 comments, the City had not yet provided us with the CalEEMod output files. As a result, SWAPE was only able to provide a comparative analysis of a similar project’s health risks from DPM emissions during construction, concluding that it was likely that this Project would result in health risks above significance thresholds. Shortly after we submitted those comments the City provided us with the CalEEMod files and SWAPE was able to conduct a screening level health risk assessment based on those CalEEMod files, which showed highly significant health risks. However, Sierra Research provided updated modeling in its July 5 letter, and SWAPE conducted a revised health risk assessment based on the updated modeling.<sup>85</sup>

SWAPE explains that as of 2011, the EPA recommends AERSCREEN as the leading air dispersion model, due to improvements in simulating local meteorological conditions based on simple input parameters.<sup>86</sup> The Memorandum minimizes the results of SWAPE’s previous health risk assessment stating, “SWAPE’s analysis used a highly conservative screening model (aerscreen) which overestimates health risk. AERMOD is the analysis tool that is the industry standard for conducting HRA’s because it allows a much more refined analysis.”<sup>87</sup> However, as SWAPE previously demonstrated, AERSCREEN is included in OEHHA<sup>88</sup> and CAPCOA<sup>89</sup> guidance as the appropriate air dispersion model for Level 2 health risk

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<sup>84</sup> SWAPE Comments I, p. 3.

<sup>85</sup> SWAPE Comments III, p. 6 – 8.

<sup>86</sup> “AERSCREEN Released as the EPA Recommended Screening Model,” USEPA, April 11, 2011, available at:

[http://www.epa.gov/ttn/scram/guidance/clarification/20110411\\_AERSCREEN\\_Release\\_Memo.pdf](http://www.epa.gov/ttn/scram/guidance/clarification/20110411_AERSCREEN_Release_Memo.pdf)

<sup>87</sup> Memorandum, p. 8.

<sup>88</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>89</sup> “Health Risk Assessments for Proposed Land Use Projects,” CAPCOA, July 2009, available at: [http://www.capcoa.org/wp-content/uploads/2012/03/CAPCOA\\_HRA\\_LU\\_Guidelines\\_8-6-09.pdf](http://www.capcoa.org/wp-content/uploads/2012/03/CAPCOA_HRA_LU_Guidelines_8-6-09.pdf)

August 26, 2016

Page 20

screening assessments (“HRSAs”). SWAPE explains that the use of AERSCREEN is appropriate to prepare a screening level analysis, and if the results of the screening level analysis indicate that there is an unacceptable health risk, the City must prepare a refined health risk assessment in a DEIR, using a program such as AERMOD, as was suggested in the Memorandum.<sup>90</sup> However, as SWAPE notes, the City has failed to prepare any level of health risk assessment.

SWAPE’s revised health risk assessment demonstrates that the excess cancer risk to adults, children, and infants during Project construction for the sensitive receptors located 25 meters away are 24.1, 139, and 371 in one million, respectively.<sup>91</sup> Consistent with OEHHA guidance, exposure was assumed to begin in the infantile stage of life to provide the most conservative estimates of air quality hazards. The adult, child, and infantile exposure for the sensitive receptors all far exceed the BAAQMD threshold of 10 in one million.<sup>92</sup>

SWAPE’s analysis demonstrates that the Project poses a “significant health risk as a result of exposure to DPM emissions.”<sup>93</sup> Therefore, a revised DEIR must be prepared to adequately evaluate the Project’s health risk impact.

3. *ESA Community Development’s August 12 Memorandum Fails to Resolve These Issues*

SWAPE’s analysis demonstrates that the Project would have a significant health risk during construction. In its previous comments, SWAPE provided a list of potential mitigation measures that could reduce DPM emissions, and the corresponding health risk. The Memorandum dismisses those mitigation measures and states in response:

“Construction associated with the Project (and other projects in the LMSAP area) would not result in a more severe impact than what was previously disclosed in the LMSAP EIR. Further, as discussed below, there is no evidence that the Project would have peculiar or unusual impacts or impacts that are new or more significant than previously analyzed in the LMSAP EIR. Consequently, the construction health risk has been adequately

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<sup>90</sup> SWAPE Comments III, p. 6 – 7.

<sup>91</sup> *Id.*, at 8.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

August 26, 2016

Page 21

addressed by the planning-level review and the Project's conditions of approval. Furthermore, there is nothing in the LMSAP EIR indicating that a stand-alone HRA for construction-related impacts is required on a project-by-project basis. In fact, preparation of a construction-related HRA would result in unnecessary and duplicative studies that would ultimately reach the same conclusions and control measures already established in the LMSAP EIR.

For example, as noted on page 3.3-39 of the LMSAP EIR, construction health risks would be minimized to less than significant through application of SCA A (W12 SCA AIR-1), which indicates that diesel emissions would be minimized through the application of various measures. Specifically, subsections (g) and (h) of SCA AIR A (W12 SCA AIR-1) minimize idling; subsection (i) ensures that construction equipment is running in proper condition; subsection (j) specifies that portable equipment would be powered by electricity if available; subsection (u) requires that equipment meet emissions and performance requirements; subsection (v) requires the use of low volatile organic compound coatings; subsection (w) requires that equipment and diesel trucks be equipped with Best Available Control Technology; and subsection (x) requires that off-road heavy diesel engines meet the California Air Resources Board's most recent certification standard.

The Project sponsor would be obligated to use construction equipment that meets Tier 4 emissions standards and utilize high performance renewable diesel (diesel HPR) in order to comply with subsections (w) and (x). Tier 4 engines and diesel HPR are considered the best available technology and are readily available in the marketplace.<sup>94</sup>

However, SWAPE finds this justification to be "inadequate."<sup>95</sup> Although the Project would implement W12 SCA AIR-1 to minimize the Project's health risks, the CEQA Analysis still fails to disclose the actual health risk. SWAPE finds that without quantification of this risk, it is unclear how much the risk will be minimized, and it is unclear if this risk will be reduced to a less-than-significant level once these mitigation measures are implemented.

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<sup>94</sup> Memorandum, p. 7 – 8.

<sup>95</sup> SWAPE Comments III, p. 4.

August 26, 2016  
Page 22

Furthermore, SWAPE notes that both the CEQA Analysis and the Memorandum fail to actually evaluate the adequacy of the mitigation measures listed under W12 SCA AIR-1. As a result, SWAPE concludes that the Project's health risk assessment is incomplete, and should not be relied upon to determine Project significance.

The measures proposed under W12 SCA AIR-1 of the CEQA Analysis are presented in an exhaustive list and use ambiguous language stating that "the project applicant shall implement all of the following applicable air pollution control measures during construction..."<sup>96</sup> SWAPE notes that "[t]here is no guarantee that all of the measures listed under W12 SCA AIR-1 will be 'applicable' to the proposed Project, as the CEQA Analysis fails to actually assess the feasibility of the measures proposed."<sup>97</sup> As a result, the feasibility of each measure also needs to be assessed, and the health risk needs to still be quantified in order to determine what applicable measures can be implemented to reduce the construction health risk to a less than significant level and whether additional measures will be needed.

In fact, SWAPE finds the Memorandum's statement that "[t]he Project sponsor would be obligated to use construction equipment that meets Tier 4 emissions standards and utilize high performance renewable diesel (diesel HPR) in order to comply with subsections (w) and (x)"<sup>98</sup> to be "questionable" as the feasibility of using all Tier 4 equipment is unclear.<sup>99</sup> SWAPE further finds that the City and the Developer makes no effort to actually demonstrate the feasibility of implementing this measure once the Project is approved.

The California Air Resources Board does not require that off-road construction fleets be comprised solely of Tier 4 Final engines. Furthermore, even just based on availability, SWAPE finds that the City has failed to demonstrate that all of the construction equipment utilized for the Project will have Tier 4 engines and the mitigation measure does not specifically require all Tier 4 equipment during construction. Unlike SCA AIR-1, SCA AIR-2 specifically calls for Tier 4 to reduce operational impacts, but even then the measure merely requires Tier 4 "if feasible" (p. A-6 of the CEQA Analysis). The United States Environmental Protection Agency's (USEPA) 1998 nonroad engine emission standards were

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<sup>96</sup> CEQA Analysis, p. 99.

<sup>97</sup> SWAPE Comments III, p. 4.

<sup>98</sup> Memorandum, p. 8.

<sup>99</sup> SWAPE Comments III, p. 4.

August 26, 2016

Page 23

structured as a three-tiered progression. Tier 1 standards were phased-in from 1996 to 2000 and Tier 2 emission standards were phased in from 2001 to 2006. Tier 3 standards, which applied to engines from 37-560 kilowatts (kW) only, were phased in from 2006 to 2008. The Tier 4 emission standards were introduced in 2004, and were phased in from 2008 – 2015.<sup>100</sup> These tiered emission standards, however, are only applicable to newly manufactured nonroad equipment. According to the USEPA “if products were built before EPA emission standards started to apply, they are generally not affected by the standards or other regulatory requirements.”<sup>101</sup> Therefore, pieces of equipment manufactured prior to 2000 are not required to adhere to Tier 2 emission standards, and pieces of equipment manufactured prior to 2008 are not required to adhere to Tier 4 emission standards. Construction equipment often lasts more than 30 years; as a result, Tier 1 equipment and non-certified equipment are currently still in use.<sup>102</sup> It is estimated that of the two million diesel engines currently used in construction, 31% were manufactured before the introduction of emissions regulations.<sup>103</sup>

Furthermore, according to SWAPE, in a 2010 white paper, the California Industry Air Quality Coalition estimated that approximately 7% and less than 1% of all off-road heavy duty diesel equipment in California was equipped with Tier 2 and Tier 3 engines, respectively.<sup>104</sup> It goes on to explain that “cleaner burning Tier 4 engines...are not expected to come online in significant numbers until 2014.” Given that significant production activities have only just begun within the last couple of years, it can be presumed that there is limited availability of Tier 4 equipment. Furthermore, due to the complexity of Tier 4 engines, it is very difficult

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<sup>100</sup> Emission Standards, Nonroad Diesel Engines, *available at:* <https://www.dieselnet.com/standards/us/nonroad.php#tier3>

<sup>101</sup> “Frequently Asked Questions from Owners and Operators of Nonroad Engines, Vehicles, and Equipment Certified to EPA Standards.” United States Environmental Protection Agency, August 2012. *Available at:* <http://www.epa.gov/oms/highway-diesel/regs/420f12053.pdf>

<sup>102</sup> “Best Practices for Clean Diesel Construction.” Northeast Diesel Collaborative, August 2012. *Available at:* <http://northeastdiesel.org/pdf/BestPractices4CleanDieselConstructionAug2012.pdf>

<sup>103</sup> Northeast Diesel Collaborative Clean Construction Workgroup, *available at:* <http://northeastdiesel.org/construction.html>

<sup>104</sup> “White Paper: An Industry Perspective on the California Air Resources Board Proposed Off-Road Diesel Regulations.” Construction Industry Air Quality Coalition, *available at:* [http://www.agc-ca.org/uploadedFiles/Member\\_Services/Regulatory-Advocacy-Page-PDFs/White\\_Paper\\_CARB\\_OffRoad.pdf](http://www.agc-ca.org/uploadedFiles/Member_Services/Regulatory-Advocacy-Page-PDFs/White_Paper_CARB_OffRoad.pdf)

August 26, 2016  
Page 24

if not nearly impossible, to retrofit older model machinery with this technology.<sup>105</sup> Therefore, SWAPE concludes that available off-road machinery equipped with Tier 4 engines are most likely new.

SWAPE notes that the California Air Resources Board (“CARB”) currently enforces regulations with regards to construction fleets. According to CARB, large and medium fleets (fleets with over 2,500 horse power) will not be allowed to add a vehicle with a Tier 1 engine to its fleet starting on January 1, 2014. The engine tier must be Tier 2 or higher.<sup>106</sup> Therefore, construction equipment fleets typically include a mix of Tier 2, 3, and 4 engines, rather than Tier 4 Final equipment exclusively. Without a condition specifically requiring all Tier 4 engines and a detailed analysis regarding the feasibility of such a measure, SWAPE concludes that “the City has failed to adequately demonstrate that all of the Project’s construction equipment would meet Tier 4 standards. As a result, this measure should not be relied upon to reduce the Project’s construction health risk to below levels of significance.”<sup>107</sup>

Therefore, the City has still failed to disclose the Project’s health risks during construction and failed to demonstrate feasible mitigation measures. Because SWAPE’s analysis has shown the Project will have significant project-specific health risks, which were not disclosed in the LMSAP EIR or any other CEQA document, the Project will have new or more severe significant impacts that were not previously analyzed. The City must prepare an EIR for the Project.

### III. CONCLUSION

The City’s environmental analysis for the Project fails to satisfy the requirements of CEQA. As explained in this appeal and in our previous comments, the City has failed to adequately analyze and mitigate the Project’s significant site contamination and health risks during construction, which are new or more severe

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<sup>105</sup> “Tier 4- How it will affect your equipment, your business and your environment.” Milton CAT, available at: <http://www.miltoncat.com/News/Documents/Articles/For%20the%20Trenches%20-%20Tier%204.pdf>

<sup>106</sup> “Enforcement of the In-Use Off-Road Vehicle Regulations.” California Air Resources Board, February 2014, available at: <http://www.arb.ca.gov/msprog/mailouts/msc1401/msc1401.pdf>

<sup>107</sup> SWAPE Comments III, p. 6.

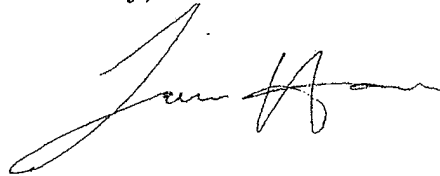


August 26, 2016

Page 25

than previously analyzed, therefore disqualifying the Project from any CEQA exemptions or streamlining. For these reasons, we urge the City Council to reverse the Commission's Project approval and CEQA findings and order the preparation of an EIR for the Project.

Sincerely,

A handwritten signature in black ink, appearing to read "Laura Horton", written in a cursive style.

Laura E. Horton

LEH:lj  
Attachments