

COMMENT SET 10: ADAMS BROADWELL JOSEPH & CARDOZO ON BEHALF OF SAFER CALIFORNIA

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November 13, 2014

By: Email and Overnight Mail

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Re: Comments on the Draft Environmental Impact Report for the
Tesoro Avon Marine Oil Terminal Lease Consideration (SCH
No. 2014042013)

Dear Ms. Mongano:

We are writing on behalf of Safe Fuel and Energy Resources California ("SAFER California") to provide comments on the Draft Environmental Impact Report ("DEIR") prepared by the California State Lands Commission ("CSLC"), pursuant to the California Environmental Quality Act ("CEQA"),¹ for the Tesoro Avon Marine Oil Terminal Lease Consideration Project ("Project") in Contra Costa County. Tesoro Refining and Marketing Company, LLC ("Applicant") attempts to enter into a new 30-year lease of State sovereign land with the CSLC to continue the Avon Marine Oil Terminal ("Avon Terminal").² According to the DEIR, the Project objective is to continue operations at, and maintain the level of refined petroleum product exported through, the existing Avon Terminal. In addition to a renewed 30-year lease, the Applicant is also proposing to upgrade the Avon

¹ Pub. Resources Code, §§ 21000 et seq.

² The proposed Project involves Tesoro Refining and Marketing Company, LLC, a wholly owned subsidiary of Tesoro Petroleum Corporation.
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Terminal to meet Marine Oil Terminal Engineering and Maintenance Standards ("MOTEMS").³

10-1 Based upon our review of the DEIR, CSLC records, as well as pertinent
10-2 public records in the possession of other agencies, we conclude that the DEIR is so
10-3 inadequate under CEQA that it must be withdrawn. As a preliminary matter, the
10-4 DEIR fails to adequately describe the Project under review, precluding an accurate
10-5 assessment of its impacts. CSLC's failure to use an appropriate baseline for the
10-6 analysis in the DEIR also precludes the agency and public from accurately
assessing the environmental impacts. The DEIR further fails to identify and
address all of the Project's potentially significant impacts to water and air quality.
Finally, the DEIR is inadequate because it fails to propose feasible mitigation
measures to reduce and avoid the potentially significant impacts caused by the
Project, and illegally defers formulating some mitigation measures to a future time.
These numerous defects in the DEIR, set forth in greater detail in the following
paragraphs, are fatal errors. The CSLC must withdraw the DEIR and prepare a
revised DEIR which fully complies with CEQA.

10-7 We prepared these comments with the assistance of technical experts Phyllis
Fox, Ph.D., QEP, PE, DEE (**Attachment A**) and marine ecologist Michael
McGowan, Ph.D (**Attachment B**). Dr. Fox's and Dr. McGowan's technical
comments and curriculum vitae are attached and submitted in addition to the
comments in this letter. We request that the CSLC respond to the comments of Dr.
Fox and Dr. McGowan separately.

I. STATEMENT OF INTEREST

SAFER California advocates for safe processes at California refineries to protect the health, safety, the standard of life and the economic interests of its members. For this reason, SAFER California has a strong interest in enforcing environmental laws, such as CEQA, which require the disclosure of potential environmental impacts of, and ensure safe operations and processes for, California oil refineries and their associated transportation, loading, and unloading facilities. Failure to adequately address the environmental impacts of crude oil transport and refining processes poses a substantial threat to the environment, worker health,

³ MOTEMS are codified in California Code of Regulations, Title 24, California Building Code, Chapter 31F- Marine Oil Terminals (Cal. Code Regs., tit. 24, § 3101F et seq.), 3187-006cv.

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surrounding communities, and the local economy.

Refineries and their associated facilities are uniquely dangerous and capable of generating significant fires and the emission of hazardous and toxic substances that adversely impact air quality, water quality, biological resources and public health and safety. These risks were recognized by the Legislature and Governor when enacting SB 54 (Hancock). Absent adequate disclosure and mitigation of hazardous materials and processes, refinery workers and surrounding communities may be subject to chronic health problems and the risk of bodily injury and death.

Poorly planned oil industry projects also adversely impact the economic well-being of people who perform construction and maintenance work in those facilities and the surrounding communities. Plant shutdowns in the event of accidental release and infrastructure breakdown have caused prolonged work stoppages. Such nuisance conditions and catastrophic events impact local communities and can jeopardize future jobs by making it more difficult and more expensive for businesses to locate and people to live in the area. The participants in SAFER California are also concerned about projects that carry serious environmental risks and public service infrastructure demands without providing countervailing employment and economic benefits to local workers and communities.

The members represented by the participants in SAFER California live, work, recreate and raise their families in Contra Costa County, including the city of Martinez. Accordingly, these people would be directly affected by the Project's adverse environmental impacts. The members of SAFER California's participating unions may also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants, and other health and safety hazards, that exist onsite.

II. THE DEIR'S DESCRIPTION OF THE ENVIRONMENTAL SETTING RENDERS IMPACT ANALYSES FUNDAMENTALLY FLAWED AND MISLEADS DECISION MAKERS AND THE PUBLIC

CEQA requires the lead agency to include a description of the physical environmental conditions in the vicinity of a project as they exist at the time environmental review commences.⁴ The description of the environmental setting

⁴ CEQA Guidelines, § 15125(a); see also *Communities for A Better Environment v. South Coast Air Quality Management Dist.*, 48 Cal. 4th 310, 321 (2010).
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constitutes the baseline physical conditions by which a lead agency may assess the significance of a project's impacts. The EIR must also describe the existing environmental setting in sufficient detail to enable a proper analysis of project impacts.⁵

Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the project is critical to an accurate, meaningful evaluation of environmental impacts. The courts are clear that, "[b]efore the impacts of a Project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment."⁶ It is:

a central concept of CEQA, widely accepted by the courts, that the significance of a Project's impacts cannot be measured unless the DEIR first establishes the actual physical conditions on the property. In other words, baseline determination is the first rather than the last step in the environmental review process.⁷

Additionally, it is axiomatic that the baseline information on which an EIR relies must be supported by substantial evidence.⁸ The CEQA Guidelines define "substantial evidence" as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion."⁹ "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." "[U]nsupported opinion or narrative [and] evidence which is clearly inaccurate or erroneous . . . is not substantial evidence."¹⁰

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↓ In this DEIR, the CSLC violated these standards by comparing the Project's lease-period operating emissions to a baseline significantly overinflated and thus not representative of existing environmental conditions. Specifically, the CSLC employed a ten-year average of ocean-going vessel ("OGV") calls to the Tesoro Avon

⁵ *Galante Vineyards v. Monterey Peninsula Water Management District*, 60 Cal. App.4th 1109, 1121-22 (1997).

⁶ *County of Amador v. El Dorado County Water Agency*, 76 Cal. App. 4th 931, 952 (1999).

⁷ *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors*, 87 Cal. App. 4th 99, 125 (2001).

⁸ See CEQA Guidelines, §15063(a)(3) ("An initial study may rely upon expert opinion supported by facts, technical studies or other substantial evidence to document its findings.").

⁹ CEQA Guidelines, §15384.

¹⁰ Pub. Resources Code, § 21082.2(c).
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Marine Terminal.¹¹ Under this approach, the CSLC estimated that the average number of ships calling on the Avon Terminal pre-project was 124.¹² CSLC stated that its 10-year average approach "recognizes that the number of vessels using the Avon Terminal can fluctuate substantially from year to year."¹³ Even still, the agency's ten-year baseline grossly inflates the number of vessel calls to the Avon Terminal because it averages into the ten year baseline six operating years when two berthing stations operated; Berth 1 and Berth 5.

As Dr. Fox points out in her comments, since Berth 5 was shut down in 2009, the use of a "10-year period that includes Berth 5 operations does not accurately capture 'actual' conditions at the time CEQA review was started."¹⁴ As the DEIR itself acknowledges, Berth 1A will operate without any changes to Avon's current ship traffic.¹⁵ Since the decommissioning of Berth 5 in 2009, the Avon Terminal has never reached 100 ship calls.¹⁶ Thus, all operational years prior to 2010 are unrepresentative of pre-Project conditions because they included vessel calls for the Avon Terminal when two berthing stations operated.¹⁷ Since the proposed Project will continue to operate a single berth at current ship traffic levels, the pre-project baseline was considerably overinflated. Dr. Fox opines that a "more accurate representation of 'actual' conditions is the two years immediately prior to CEQA review, or 2012 and 2013."¹⁸ The average number of ship calls during these years was 85.¹⁹ Operational year 2011 was unrepresentative also because the Avon Terminal had unusually low vessel calls due to maintenance at the terminal and the refinery.

The CSLC violated CEQA by utilizing a ten-year average baseline unsupported by substantial evidence. As a result, the pre-project baseline used to compare the Project's potential impacts was 45% higher than a more representative

¹¹ DEIR, p. 1-10 ("The vessel traffic numbers used as the baseline for the analysis in this EIR is the average number of vessel calls per year from 2004 to 2013.")

¹² DEIR, Table 2-4, p. 2-31.

¹³ *Id.* at 2-31.

¹⁴ Comments of Dr. Phyllis Fox, November 10, 2014 at p. 3, (hereinafter "Dr. Fox Comments"), attached as **Attachment A**.

¹⁵ DEIR, p. 1-4.

¹⁶ DEIR, Table 2-4, p. 2-31.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Dr. Fox Comments, p. 3.
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↑ two year average.²⁰ The DEIR's exaggerated baseline corrupts the DEIR's entire emissions analysis. Since the Avon Terminal will continue to operate with a single Berth under the renewed 30-year lease, Dr. Fox's 2-year average baseline of 85 vessel calls is far more representative of actual conditions and supported by substantial evidence. Accordingly, the CSLC must prepare a revised DEIR that complies with CEQA Guidelines section 15125 (a). The revised DEIR must also reanalyze the Project's emissions impacts using a baseline that represents *actual* conditions.

A. The DEIR's Biological Analysis is Fundamentally Flawed Because it Relies on Out of Date and Incomplete Information

10-9

According to Dr. McGowan's expert opinion, the DEIR relies upon obsolete and incomplete information for its analysis of biological impacts.²¹ As a result, Dr. McGowan concludes that the resulting baseline in the DEIR is so deficient that the severity of the Project's impacts to biological resources cannot be estimated.²²

10-10

Moreover, the CSLC failed to disclose and analyze all of the Project's potentially significant impacts to biological resources and failed to identify feasible mitigation measures necessary to reduce those impacts. Consequently, the CSLC must prepare a revised DEIR that accounts for all sensitive biological resources and mitigates any potentially significant impacts to them.

10-11

Dr. McGowan begins by explaining that Table 4.2-1 in the DEIR relies on two out-of-date and incomplete sources- the 1959 Arthur Smith study (over half a century old) and the 2007 National Oceanic and Atmospheric Administration ("NOAA") Report on Subtidal Habitats and Associated Biological Taxa in San Francisco Bay.²³ Dr. McGowan finds both references fail to account for numerous native and nonindigenous species that have been found in the Project area.

Dr. McGowan provides substantial evidence that the 2007 NOAA Report is outdated with regards to the presence of blue mud shrimp (*Upogebia pugettensis*) in the San Francisco Bay. The blue mud shrimp is an important element of the benthic community because it carries a parasite driving native species extinct in

²⁰ 45% figure is derived by comparing the DEIR's 10-year baseline of 124 OGV to Dr. Fox's 2-year baseline of 85 OGV.

²¹ Comments of Dr. Michael McGowan, November 10, 2014 at p. 4, (hereinafter "Dr. McGowan Comments"), attached as **Attachment B**.

²² Dr. McGowan Comments, pp. 4-5.

²³ DEIR, Table 4.2-1, pp. 4.2-4; 4.2-5.
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several West Coast estuaries.²⁴ Contrary to the 2007 NOAA Report stating the presence of blue mud shrimp in the San Francisco Bay as "questionable," Dr. McGowan presents substantial evidence indicating that blue mud shrimp is present and was the second most abundant organism collected in the San Pablo Bay in 2010.²⁵ The DEIR's omission of the blue mud shrimp stems from the agency's decision to rely on obsolete sources of information. Thus, the CSLC's biological analysis was not based on substantial evidence. The CSLC must prepare a revised DEIR that identifies the blue mud shrimp and evaluates the Project's potential impacts to this species.

B. The DEIR Improperly Defers the Identification and Incorporation of Mitigation Measures

CEQA requires that "[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so."²⁶ This requirement is the "core of an EIR."²⁷ The environmental review must identify feasible and fully enforceable mitigation measures for each significant impact.²⁸ This approach helps "insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."²⁹

10-12

Deferring formulation of mitigation measures to post-approval studies is generally impermissible.³⁰ An agency may only defer the formulation of mitigation measures when it "recognizes the significance of the potential environmental effect, commits itself to mitigating the impact, and articulates specific performance criteria for the future mitigation."³¹ "A study conducted after approval of a project will inevitably have a diminished influence on decision making. Even if the study is

²⁴ Dr. McGowan's Comments, p. 4.

²⁵ Dr. McGowan Comments, p. 4 (Dr. McGowan also stated blue mud shrimp were abundant in the San Francisco bay in a similar 2011 study).

²⁶ Pub. Resources Code, § 21002.1, subd. (b).

²⁷ *Citizens of Goleta Valley v. Bd. of Supervisors of Santa Barbara Cnty.*, 52 Cal. 3d 553, 564-65 (1990).

²⁸ CEQA Guidelines, § 15126.4, subd. (a)(1)(A); (a)(2).

²⁹ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.*, 42 Cal. 3d 929, 935 (1986) (citations omitted).

³⁰ *Sundstrom v. County of Mendocino*, 202 Cal. App. 3d 296, 308-309 (1988); *see also* CEQA Guidelines, § 15126.4, subd. (a)(1)(B).

³¹ *Gentry v. City of Murrieta*, 36 Cal. App. 4th 1359, 1411 (1995) (citing *Sacramento Old County Assn. v. County Council*, 229 Cal. App. 3d 1011, 1028-1029 (1991)).
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subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA."³²

CEQA's requirement to assess feasible mitigation measures applies not only to an agency's analysis of a project, but to an agency's consideration of alternatives:

[I]t is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects.³³

The CEQA Guidelines reiterate the state's policy that a public agency "should not approve a project as proposed if there are feasible alternatives or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment."³⁴ Pursuant to this policy, no public agency shall approve a project unless its findings on the feasibility of alternatives and mitigation measures are supported by substantial evidence.³⁵

10-13

In the DEIR, the CSLC improperly deferred to a future environmental review any discussion of twenty mitigation measures for the only two alternatives considered for the Project.³⁶ The CSLC considered three alternatives to the Project: the No Project alternative, the Restricted Lease alternative and the Environmentally Superior alternative (the proposed Project).³⁷ Under the No Project alternative, the Avon Terminal lease would not be renewed and the existing Avon Terminal would be decommissioned.³⁸ Under the Restricted Lease alternative, the Avon Terminal lease would be renewed but restricted from

³² *Sundstrom*, 202 Cal. App. 3d at 307.

³³ Pub. Resources Code, §21002.

³⁴ CEQA Guidelines, §15021(a)(2).

³⁵ Pub. Resources Code, §21081.5.

³⁶ DEIR, p. 4.2-73.

³⁷ *Id.* at 3-7; 9-10.

³⁸ *Id.* at ES-5.

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transporting oil. The Avon Terminal would be placed into caretaker status and left in place to be used for alternative purposes.³⁹ The CSLC concluded that the Environmentally Superior alternative was the proposed Project because the No Project alternative and the Restricted Lease alternative had greater potential for adverse environmental impacts.⁴⁰ However, the CSLC failed to set forth any evidence to support this conclusion.

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The DEIR precluded both the decisionmakers and public from intelligently evaluating, analyzing, and comparing the Project alternatives to the proposed Project. The DEIR contains no discussion of mitigation measures for potentially significant or significant and unavoidable impacts related to the No Project alternative and the Restricted Lease alternative; instead, the DEIR merely lists the impacts: OS-10, OS-11, BIO-23, BIO-24, BIO-25, BIO-26, WQ-16, WQ-18, AQ-6, AQ-7, GHG-4, GHG-5, GSS-10, CR-2, LT-3, LT-4, LUR-6, LUR-8, CS-10, and CS-11. The DEIR's failure to assess and improperly deferral of mitigation measures for alternatives renders the entire alternatives analysis legally inadequate under CEQA.⁴¹ It is impossible for the public, let alone the decisionmakers, to intelligently compare the alternatives to the proposed Project without *some* discussion of these twenty deferred mitigation measures.

10-15

Accordingly, the CSLC's determination that the proposed Project is the Environmentally Superior alternative is not supported by substantial evidence. The CSLC arbitrarily selected the proposed Project as the Environmentally Superior alternative without fully considering the No Project and Restrict Lease alternatives, because the DEIR failed to analyze any mitigation measures associated with the only two alternatives considered in the DEIR. As the California Supreme Court held in *Citizens of Goleta Valley v. Board of Supervisors*, the discussion of mitigation measures and alternatives is the "core of an EIR."⁴² The CSLC must prepare a revised DEIR that analyzes the twenty deferred mitigation measures and recirculate it for public review.

³⁹ *Id.* at ES-5; ES-6.

⁴⁰ DEIR, pp. ES-16; ES-17.

⁴¹ DEIR, Table ES-2, pp. ES-18-ES-25.

⁴² *Citizens of Goleta Valley*, 52 Cal. 3d at 564, 3187-006cv.

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III. THE DEIR FAILS TO SATISFY CEQA'S PURPOSE AND GOALS

CEQA has two basic purposes, neither of which the DEIR satisfies. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.⁴³ CEQA requires that an agency analyze potentially significant environmental impacts in an EIR.⁴⁴ The EIR must not rely on scientifically outdated information to assess the significance of impacts, and must instead result from "extensive research and information gathering" including consultation with state and federal agencies, local officials, and the interested public.⁴⁵ To be adequate, the EIR must evidence the lead agency's good faith effort at full disclosure.⁴⁶ 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.⁴⁷ Thus, the EIR protects not only the environment but also informed self-government.⁴⁸ The EIR's purpose is to inform responsible officials of the environmental consequences of their decisions *before* those decisions are made.

The second purpose of CEQA is to require public agencies to avoid, reduce or prevent environmental damage when possible by requiring appropriate mitigation measures and through the consideration of environmentally superior alternatives.⁴⁹ The EIR serves to provide public agencies, and the public in general, with information about the effect that a proposed project is likely to have on the environment and to "identify ways that environmental damage can be avoided or significantly reduced."⁵⁰ If a project has a significant effect on the environment, the agency may approve the project only upon a finding that it has "eliminated or substantially lessened all significant effects on the environment where feasible," and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns" specified in CEQA section 21081.⁵¹ The DEIR fails to satisfy these two basic purposes of CEQA.

⁴³ CEQA Guidelines, § 15002, subd. (a)(1).

⁴⁴ Pub. Resources Code, § 21000; CEQA Guidelines, § 15002.

⁴⁵ *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm.*, 91 Cal. App. 4th 1344, 1367 (2001); see also *Schaeffer Land Trust v. San Jose City Council*, 215 Cal. App. 3d 612, 620 (1989).

⁴⁶ CEQA Guidelines, § 15151; see also *Laurel Heights I*, 47 Cal. 3d 376, 406 (1998).

⁴⁷ *County of Inyo v. Yorty*, 32 Cal. App. 3d 795, 810 (1973) (internal quotations omitted).

⁴⁸ *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 564 (1990) (quotations omitted).

⁴⁹ CEQA Guidelines, § 15002(a)(2)-(3); *Berkeley Keep Jets Over the Bay Comm.*, 91 Cal. App. 4th at 1354.

⁵⁰ CEQA Guidelines, § 15002, subd. (a)(2).

⁵¹ CEQA Guidelines, § 15092, subd. (b)(2)(A)-(B).

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A. The DEIR Fails to Include All the Relevant Data in a Single Report

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As a preliminary matter, we hereby reserve our right to file supplemental comments at a later date because the CSLC failed to make all documents referenced in the DEIR available for review during the full comment period. The DEIR's failure to incorporate and summarize all of the relevant information in the text of the document in a manner that is understandable to the public violates CEQA's disclosure requirements. CEQA expressly requires a lead agency to make all referenced documents available to the public for the full comment period.⁵² The EIR must be "a compilation of all relevant data into a single formal report . . . which would facilitate both public input and the decisionmaking process."⁵³

The DEIR failed to meet this most basic requirement of CEQA. In section 4.1 of the DEIR, it states that the probability estimates for tanker and barge spills from vessel traffic accidents was based on data developed during the preparation of the Unocal San Francisco Refinery Marine Terminal EIR (the 1994 Chambers Group Inc. report).⁵⁴ The report was not made available to the public during the entire comment period, nor provided to us in response to our October 13, 2014 request for immediate access to all documents referenced or relied upon in the DEIR.⁵⁵ By failing to provide the 1994 Chambers Group Inc. report, the CSLC impeded the public from thoroughly assessing whether the potential impacts of oil spills was accurately assessed. This error is amplified because the report is over 20 years old. As Dr. McGowan states in his comment letter, the data the agency relied upon is not substantial evidence because it is more than 20 years old.⁵⁶

Similarly, Table 4.2-1 of the DEIR summarizes the biotic communities found in the Project area based upon the 1959 Arthur Smith report titled, *The Natural History of San Francisco Bay Region*.⁵⁷ This report was unavailable during the entire comment period and not provided to us in response to our October 13, 2014 request for immediate access to all documents referenced or relied upon in the

⁵² Pub. Resources Code, § 21092(b)(1); see also CEQA Guidelines, § 15087(c)(5).

⁵³ *Russian Hill Improvement Association v. Board of Permit Appeals*, 44 Cal. App. 3d 158, 168 (1975).

⁵⁴ DEIR, p. 4.1-33.

⁵⁵ See Adams, Broadwell, Joseph & Cardozo Request for Immediate Access, (hereinafter "Request for Immediate Access"), sent October 13, 2014, attached as **Attachment C**.

⁵⁶ Dr. McGowan Comments, p. 2.

⁵⁷ DEIR, Table 4.2-1, pp. 4.2-4; 4.2-5; see also DEIR, p. 9-18.

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DEIR.⁵⁸ By failing to provide this report, the CSLC obstructed the public's ability to fully analyze whether the DEIR adequately addressed impacts to biological resources. As Dr. McGowan again states in his comment letter, the data from this fifty year old report is obsolete and thus does not constitute substantial evidence.⁵⁹

Public access to all supporting data for each section of the DEIR is critical for an informed review of the DEIR. The CSLC failed to provide substantial evidence to support its environmental conclusions presented in the Operational Safety and Risk of Accidents and in the Biological Resources section of the DEIR. The agency also failed to provide *all* data relied upon during the full comment period. Consequently, a revised DEIR that includes all of the relevant underlying data must be prepared for public review and comment in order to be compliant under CEQA.

B. The Project Description in the DEIR is Inadequate

10-17

CEQA Guidelines section 15378 defines "project" to mean "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."⁶⁰ "The term "project" refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term project does not mean each separate governmental approval."⁶¹ Courts have explained that "[a] complete project description of a project has to address not only the immediate environmental consequences of going forward with the project, but also all "reasonably foreseeable consequence[s] of the initial project."⁶² "If a[n] . . . EIR . . . does not adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project, informed decisionmaking cannot occur under CEQA and the final EIR is inadequate as a matter of law."⁶³

⁵⁸ Request for Immediate Access; *see also* Adams, Broadwell, Joseph & Cardozo Public Records Act Request (hereinafter "PRA Request"), sent October 13, 2014, attached as **Attachment D**.

⁵⁹ Dr. McGowan comments, p. 3.

⁶⁰ CEQA Guidelines, §15378.

⁶¹ CEQA Guidelines, 15378 subd. (c).

⁶² *Laurel Heights Improvement Association v. Regents of University of California*, 47 Cal. 3d 376, 398 (1988) (emphasis added); *see also* *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 449-50 (2007).

⁶³ *Riverwatch v. Olivenhain Municipal Water Dist.*, 170 Cal. App. 4th 1186, 1201 (2009).
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The DEIR fails to meet CEQA's requirements for an adequate project description, by omitting from the analysis the reasonably foreseeable consequences of the Avon Marine Oil Terminal Lease Consideration Project. In particular, the DEIR fails to identify and analyze reasonably foreseeable changes in crude imports to the Avon Terminal.

10-18

In *Communities for a Better Environment v. City of Richmond*, the First District Court of Appeal held that an EIR for a refinery project must disclose whether the proposed project would allow the refinery to process heavier crude where a change in feedstock is a reasonably foreseeable consequence of the proposed project.⁶⁴ There, petitioners argued that the EIR was inadequate because the project description failed to clearly and consistently state whether the project would facilitate the future processing of heavier crudes at the refinery, and to analyze the consequences of such a change.⁶⁵ In that case, the EIR acknowledged that the proposed project would allow the refinery to process a wider range of crude oils, including crude that contains a higher amount of sulfur and associated contaminants.⁶⁶ However, the lead agency denied claims that the refinery would also be able to process heavier crudes than before.⁶⁷ Petitioners pointed to conflicting statements in the EIR and the project proponent's SEC filings, as well as the project proponent's rejection of a permit limitation precluding the alteration of the baseline crude slate mix, all of which suggested that the project would (contrary to the lead agency's claim) enable the refinery to process heavier crudes.⁶⁸ The court agreed with petitioner that a crude switch was reasonably foreseeable and invalidated the EIR "because the EIR's project description ... [was] inconsistent and obscure as to whether the Project enables the Refinery to process heavier crudes."⁶⁹

Here, the DEIR suffers from a similar error. The DEIR presents conflicting statements in the EIR about the type of oil imports occurring at the Avon Terminal. First noting that the majority of imports and all crude oil imports occur at Tesoro's Amorco Marine Terminal,⁷⁰ the DEIR then suggests crude oil is being imported at the Avon Terminal.⁷¹ This ambiguity is exacerbated by the DEIR's failure to place

⁶⁴ *Communities for a Better Environment v. City of Richmond*, 184 Cal. App. 4th 70, 89 (2010).

⁶⁵ See *id.* at 83.

⁶⁶ See *id.* at 76-77.

⁶⁷ *Id.*

⁶⁸ See *id.* at 83-85.

⁶⁹ See *id.* at 89.

⁷⁰ DEIR, p. 2-1, note 3.

⁷¹ DEIR, p. 4.4-11.

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any limits on what the applicant can import. As a result, the DEIR leaves open the possibility of future increases of imports to the Avon Terminal.⁷² Dr. Fox contends that "[t]his is a serious omission as there is nothing to prevent Tesoro from using the Avon Terminal to import crude oil. This would significantly increase indirect volatile organic compounds ("VOC") and toxic air contaminants ("TAC") emissions (e.g., benzene) from on-shore tanks."⁷³ Elevated VOC and TAC emissions, relative to current feedstocks, would also result in increased VOC and TAC emissions when transporting, storing and moving crude oils into and out of tanks and associated equipment, such as pumps, connectors, and valves.⁷⁴

10-19

Dr. Fox goes on to explain that Bakken crudes have unique chemical and physical characteristics that distinguish them from currently refined crudes.⁷⁵ These unique characteristics include high volatility, flammability, and elevated concentrations of TACs and VOCs.⁷⁶ Should the applicant choose to increase Bakken crude imports, as it very well could under the current DEIR, the significant environmental impacts to air quality and public health would not be analyzed in the DEIR.⁷⁷ Moreover, Dr. Fox notes that the Material Safety Data Sheets submitted with Tesoro's Vancouver Terminal Application additionally disclosed very high concentrations of benzene in its crude oil. According to Dr. Fox, increased concentrations of benzene means the crude is more volatile.⁷⁸

The Chief Executive Officer of Tesoro, Greg Goff, stated that Tesoro shipped 5,000 to 7,000 bbl/day of Bakken into California in the first quarter of 2014 and the Bakken supply is limited to 10,000 bbl/day due to logistic constraints.⁷⁹ According to Dr. Fox, these numbers are consistent with known rail imports of Bakken to Tesoro's Martinez refinery,⁸⁰ which is supplied by the Avon Terminal.⁸¹ It is also

⁷² DEIR, p. 2-9 ("a small percentage of imports occurs on an as-needed basis as discussed in Section 2.1.1").

⁷³ Dr. Fox Comments, p. 9.

⁷⁴ *Id.* at 11.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 10.

⁷⁸ *Id.* at 9-10.

⁷⁹ Q1 2014 Tesoro Corporation Earnings Conference Call (hereinafter referred to as "Q1 Conference Call"), May 1, 2014, Goff response to Barclay questions at 28:10 – 28:47 min, webcast available at: <http://edge.media-server.com/mfp/1b8e4nzb/asp/en> and transcript attached as **Attachment E**; see generally Dr. Fox Comments, p. 12.

⁸⁰ Q3 2013 Tesoro Corporation Earnings Conference Call, November 7, 2013 Transcript, George Goff statements at p. 4 ("We also started taking up to 3 unit trains a month of Bakken crude oil into our 3187-006cv

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reasonably foreseeable that the Bakken crude could be supplied by a recently permitted Global Partners rail-to-marine terminal in Oregon⁸² and the proposed 360,000 bbl/day rail-to-marine terminal facility at the Port of Vancouver in Washington (Vancouver Terminal) that Tesoro is currently building with Savage Companies.⁸³ The Vancouver Terminal will import North American "cost-advantaged" crudes by rail and export them by ship to California and Alaska. Dr. Fox states that this terminal is "key" to Tesoro's plans to import Bakken and other cost advantaged crudes to its west coast refineries.⁸⁴ And as explained already, nothing in the DEIR limits the amount of "cost-advantaged" crudes the Avon Terminal accepts.

Accordingly, substantial evidence shows that it is reasonably foreseeable that the Project will involve a change in amount and quality of crude imported at the Avon Terminal. The failure of the DEIR to analyze, let alone mitigate, any of the potentially significant environmental impacts associated with Bakken crude renders the DEIR inadequate. The CSLC must either expand its analysis to encompass the reasonably foreseeable possibility that Bakken crude will be imported to the Avon Terminal or condition the approval of the Project to prohibit the import of Bakken and other similar light crudes.

Martinez refinery... we have the capacity to deliver nearly 350,000 barrels per month of Bakken crude oil into our Martinez, California refinery.") and 11 ("...what we said was we can deliver three unit trains per month into the Martinez or Golden Eagle refinery as well as some additional manifest cars that we do, which allows us to maximize the use of the facilities. As a result of that, it's 350,000 barrels per month at the present time.), available at: <http://phx.corporate-ir.net/phoenix.zhtml?c=79122&p=irol-transcriptsarchive>, transcript attached as **Attachment F**; see generally Dr. Fox Comments, p. 12.

⁸² Dr. Fox Comments, p. 12.

⁸³ See, e.g., Global Wins, Tesoro Waits on Bringing Bakken Oil West, Bloomberg, August 20, 2014, Available at: <http://www.bloomberg.com/news/2014-08-20/global-partners-rail-terminal-approved-as-tesoro-waits.html> and Rory Carroll, Exclusive: California Getting More Bakken Crude by Barge than Rail, Reuters, October 23, 2014, Available at: <http://www.reuters.com/article/2014/10/23/us-california-bakken-barge-idUSKCN0IC17L20141023>, both attached as **Attachment G** and **Attachment H**, respectively; see generally Dr. Fox Comments, p. 10.

⁸⁴ Dr. Fox Comments, p. 10.

⁸⁵ Q1 Conference Call, *supra*, Goff response to Barclay questions at 28:54 – 30:19 min. 3187-006cv

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IV. THE CSLC IMPROPERLY PIECEMEALED ENVIRONMENTAL REVIEW OF THE PROJECT

CEQA defines "project" broadly to encompass the "whole of the action."⁸⁵ The CEQA Guidelines state "the term 'project' has been interpreted to mean far more than the ordinary dictionary definition of the term."⁸⁶ Any activity "which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" constitutes a "project" or the "whole of the action."⁸⁷ This includes, but is not limited to, "later phases of the project, and any secondary, support, or off-site features necessary for its implementation."⁸⁸ If later phases or future activities are reasonably foreseeable consequences of a proposed project, an agency must include a description of the actions in the environmental review document and analyze their impacts.⁸⁹

In performing its analysis, a lead agency must not "piecemeal" or "segment" a project by splitting it into two or more segments. This approach ensures "that environmental considerations do not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences."⁹⁰

10-20

Here, the DEIR improperly excluded emissions associated with on-shore tanks that receive imported products.⁹¹ The DEIR's failure to consider these potentially significant environmental impacts directly violates 21100(b)(1) of the Public Resources Code, because VOC emissions from on-shore tanks are a reasonably foreseeable indirect or secondary effect⁹² caused by the Project. Even the DEIR states in the Project Description that the objective of the Avon Terminal is to transfer products between the Refinery and/or on-shore tankage to ships berthed at the Avon Terminal, or import Refinery feedstocks to upland storage tanks that will later be transferred to Refinery process units.⁹³ Admittedly then,

⁸⁵ Pub. Resources Code, §§ 21065, 21080(a); CEQA Guidelines, §§ 15002(b), 15003(h), 15165, 15378, Appendix G.

⁸⁶ CEQA Guidelines, § 15002(b).

⁸⁷ Pub. Resources Code, § 21065.

⁸⁸ CEQA Guidelines, Appendix G.

⁸⁹ *Citizens Assn. for Sensible Development v. County of Inyo*, 172 Cal. App. 3d 151, 168 (1985).

⁹⁰ *Burbank-Glendale-Pasadena Airport Authority v. Hensler*, 233 Cal. App. 3d 577, 592 (1991);

Bozung v. Local Agency Formation Commission, 15 Cal. 3d 263, 283-284 (1975).

⁹¹ DEIR, p. 4.4-18.

⁹² CEQA Guidelines, § 15358(a)(2).

⁹³ DEIR, p. 2-1.

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↑ the on-shore tanks *are* part of the Project. The CSLC illegally piecemealed the Project by excluding from CEQA review reasonably foreseeable emissions associated with on-shore tanks.

10-21

The agency further erred by concluding incorrectly and without substantial evidence that emissions from these on-shore tanks are primarily driven by diurnal temperature changes and atmospheric pressure conditions.⁹⁴ As Dr. Fox makes clear, emissions from on-shore tanks is primarily driven by the vapor pressure of the material being stored in the tanks and handled by the fugitive components.⁹⁵ Dr. Fox explains that the import of Bakken crude oils to the Avon Terminal would lead to reasonably foreseeable significant environmental impacts from emissions from on-shore tanks.⁹⁶ Thus, the DEIR must analyze the type and amount of crude oil to be imported to the Avon Terminal.

10-22

The DEIR failed to analyze reasonably foreseeable direct and indirect emissions associated with on-shore tanks because the CSLC illegally piecemealed the Project. The agency also erred by concluding, without substantial evidence, that emissions are driven by weather and atmospheric pressure, not the vapor pressure of the materials stored within them. For these reasons, the DEIR is fatally deficient under CEQA. Accordingly, the DEIR must be revised to address these potentially significant impacts or, alternatively, place restrictions on the type and amount of crude oil imports that the Avon Terminal can receive.

V. THE DEIR FAILS TO DISCLOSE OR ANALYZE ALL POTENTIALLY SIGNIFICANT IMPACTS AND SIGNIFICANT ENVIRONMENTAL IMPACTS OF THE PROJECT

An EIR must disclose all potentially significant adverse environmental impacts of a project.⁹⁷ As explained in an appellate court CEQA decision:⁹⁸

The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered

⁹⁴ DEIR, p. 4.4-18.

⁹⁵ Dr. Fox Comments, p. 10.

⁹⁶ *Id.*

⁹⁷ Pub. Res. Code, § 21100(b)(1).

⁹⁸ *Friends of the Eel River v. Sonoma County Water Agency*, 108 Cal. App. 4th 859, 874 (2003). 3187-006cv.

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in the full environmental context.⁹⁹ We interpret this Guideline broadly in order to "afford the fullest possible protection to the environment."¹⁰⁰ In so doing, we ensure that the EIR's analysis of significant effects, which is generated from this description of the environmental context, is as accurate as possible.¹⁰¹

10-23

The DEIR for this Project fails to provide the legally required disclosure. Among other things, the DEIR provides an inadequate baseline condition from which to evaluate environmental significant and potentially significant impacts to air quality, water quality, and biological resources.

The DEIR must be revised to address these impacts and re-circulated for public review. CEQA requires re-circulation of an EIR when significant new information is added to the EIR following public review but before certification.¹⁰² The Guidelines clarify that new information is significant if "the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project" including, for example, "a disclosure showing that . . . [a] new significant environmental impact would result from the project."¹⁰³ The following new, significant environmental impacts would result from the Project and must be addressed in a revised DEIR that is re-circulated for public review.

A. The DEIR Must Be Revised To Disclose All Potentially Significant and Significant Air Quality Impacts from Operation of the Project

1. The DEIR's Operational Emission Estimates Are Underestimated, Significant and Not Supported By Substantial Evidence

10-24

According to Dr. Fox, the DEIR underestimated the maximum potential increase in ship calls during the lease period (140 vs. over 191) and overestimated the number of ship calls during the "actual" baseline years (124 vs. 85).¹⁰⁴ In doing so, the DEIR erroneously claimed the Project would reduce emissions when in fact

⁹⁹ Guidelines, § 15125, subd. (c).

¹⁰⁰ *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692, 720 (1990).

¹⁰¹ See also Remy et al., Guide to the Cal. Environmental Quality Act (10th ed. 1999), pp. 374-376.

¹⁰² Pub. Res. Code, § 21092.1.

¹⁰³ CEQA Guidelines, § 15088.5.

¹⁰⁴ Dr. Fox Comments, p. 2 (emphases added).

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they would be significantly increased.¹⁰⁶ When the more representative two-year vessel call average is used to estimate pre-project baseline emissions, and the DEIR's emission calculations are otherwise used, the Project actually *increases* emissions, as summarized by Dr. Fox in Table 2,

Table 2.
Revised Emissions Based on
Revised Pre-Project (2012-2013 Baseline) Emissions (ton/yr)

	CO	NO _x	PM ₁₀	PM _{2.5}	VOC	SO _x
Pre-Project	7.9	66.1	2.3	2.3	3.4	21.4
Post-Project	11.2	93.3	3.3	3.2	4.8	30.3
Increase	3.3	27.2	1.0	0.9	1.4	8.9

The DEIR established significance thresholds of 15 ton/yr and 88 lb/day for three pollutants: VOCs, mono-nitrogen oxides ("NO_x"), and particulate matter with an aerodynamic diameter of 10 micrometers or less ("PM₁₀").¹⁰⁶ The DEIR then concluded that "annual emissions from the baseline year would decrease and, therefore, no significance thresholds are expected to be exceeded."¹⁰⁷ However, as Dr. Fox explains, the DEIR only points to emissions in ton/yr and is entirely silent on daily emissions. Dr. Fox analyzed the DEIR's emission increase calculations from a single ship call, calculated in Appendix D of the DEIR and summarized here in Table 4 below.

10-25

Table 4.
Revised Emissions Based on
Revised Ship Calls and Revised Per Ship Emissions

	CO	NO _x	PM ₁₀	PM _{2.5}	VOC	SO _x
Tesoro Neg.Dec. (lb/day)	814	9,350	163	129	339	324
DEIR, Appx. D (lb/day)	186	1,555	55	53	80	504
Revised Emissions (ton/yr)	43	496	9	7	18	17

According to the DEIR, a ship call lasts about 24 hours, so Dr. Fox concluded that the ship emissions estimated in the DEIR on page 4.4-11 are daily emissions.

¹⁰⁶ DEIR, Table 4.4-3, p. 4.4-13.

¹⁰⁷ DEIR, Table 4.4-3, p. 4.4-13.

¹⁰⁸ *Id.*

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She contends the significance of these daily emissions should have been assessed in the DEIR relative to the pre-Project daily emissions amount of zero.¹⁰⁸ This she explains, is the appropriate analysis because while the emissions from a single ship call are the same in the pre- and post-Project periods, there will be *many more days* where ships are called in the post-Project period than during the pre-Project baseline period. Because the DEIR utilized the exceptionally high baseline year, it erroneously concluded that the post-Project period would have *less* ship calls than during the baseline period. When using the more representative baseline of 85 ship calls annually, Dr. Fox finds that there were no ships called on 280 days ($365 - 85 = 280$) or 77% of the time. Therefore, she concludes that the DEIR's daily emission increase analysis should have utilized a zero ship emissions baseline and compared that with emissions from one ship in the post-Project period. When the more representative baseline of 85 ship calls is used, as opposed to the inflated 124 ship calls, the ship emissions summarized above from Appendix E (Table 4) are actually daily *increases* in emissions, **not** decreases as the DEIR concludes.

Dr. Fox goes on to explain that because Table 4 actually represents daily increases in emissions, the daily emissions from these criteria pollutants greatly exceeds the daily significance thresholds. For instance, the daily NOx emissions of 1,555 to 9,350 lb/day greatly exceed the daily significance threshold of 88 lb/day adopted by the DEIR. Likewise, the revised daily VOC emissions of 339 lb/day exceed the DEIR's VOC significance threshold (339 vs. 85 lb/day). Dr. Fox also found that although the DEIR's VOC emissions of 80 lb/day are just under the DEIR's VOC significance threshold (80 vs. 85 lb/day), she opines that VOC emissions would actually exceed the DEIR's significance thresholds if indirect emissions from on-shore tanks were included in its analyses (see section VI of this comment letter). This further exemplifies why CEQA prohibits the piecemealing of projects - piecemealing hides significant environmental impacts that would otherwise be apparent.

10-26

Dr. Fox then showed in Table 2 that annual emissions of all criteria pollutants increases as well when the more reasonable 85 vessel call baseline is used. She presented substantial evidence that the increase in NOx emissions, 27.2 ton/yr, exceeds the DEIR's CEQA significance threshold of 15 ton/yr by about a factor of two.¹⁰⁹ Accordingly, Dr. Fox opines that the increase in NOx emissions due

¹⁰⁸ Dr. Fox Comments, p. 5.

¹⁰⁹ DEIR, p. 4.4-13, 3187-006cv.

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to the Project are "highly significant if estimated relative to 'actual' conditions at the time that CEQA review commenced."¹¹⁰

Table 2.
Revised Emissions Based on
Revised Pre-Project (2012-2013 Baseline) Emissions (ton/yr)

	CO	NOx	PM10	PM2.5	VOC	SOx
Pre-Project	7.9	66.1	2.3	2.3	3.4	21.4
Post-Project	11.2	93.3	3.3	3.2	4.8	30.3
Increase	3.3	27.2	1.0	0.9	1.4	8.9

In light of these significant errors underestimating the Project's operational emissions, a revised DEIR analyzing the Project's significant impacts on air quality must be prepared. The revised DEIR must utilize a baseline that conforms to CEQA Guidelines section 15125(a) and proposes all necessary mitigation measures to reduce the Project's significant air impacts to less than significant.

2. The DEIR Must Be Revised To Disclose the Project's Significant PM2.5 Emissions

10-27

The DEIR identifies particulate matter with an aerodynamic diameter of 2.5 micrometers or less ("PM_{2.5}") and particulate matter with an aerodynamic diameter of 10 micrometers or less ("PM₁₀") as criteria pollutants that poses a serious health hazard.¹¹¹ The DEIR's summary of PM_{2.5} ambient air quality data in the vicinity of the Avon Terminal showed that the federal PM_{2.5} standard was exceeded eight times in 2011, once in 2012, and seven times in 2013 near the Terminal.¹¹² Absent from the DEIR, however, is the disclosure that the San Francisco Bay Area Air Basin ("SFBAAB") is classified as "non-attainment" for California and national ambient air quality standards for both PM_{2.5} and PM₁₀ standards.¹¹³ Dr. Fox explains that the significance of the SFBAAB being non-attainment is that any increases in PM_{2.5} emissions as a result of this Project could contribute to existing

¹¹⁰ Dr. Fox Comments, p. 4.

¹¹¹ DEIR, pp. 4.4-2

¹¹² DEIR, Table 4.4-1, p. 4.4-7.

¹¹³ 2013 Area Designations for State Ambient Air Quality Standards PM_{2.5}, Available at: http://www.arb.ca.gov/design/adm/2013/state_pm25.pdf, attached as **Attachment I**. 3187-006cv

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↑ exceedances of ambient PM_{2.5} air quality standards in the vicinity of the Project, which is a per se significant impact.¹¹⁴

In summarizing the PM₁₀ and PM_{2.5} ambient air quality data in the vicinity of the Avon Terminal,¹¹⁵ the DEIR acknowledges that "PM_{2.5} is considered even more dangerous to human health than PM₁₀ due to its ability to lodge more deeply into lung tissue."¹¹⁶ Yet, despite recognizing the serious human health risks associated with this criteria pollutant, and notwithstanding the fact the SFBAAB is in non-attainment of national and state ambient air quality standards, the DEIR fails to evaluate the significance of increases in both PM₁₀ and PM_{2.5} as a result of the Project's increase in ship calls over the lease period.

10-28

↓ The DEIR did not establish a significance threshold for PM_{2.5}, stating that the Bay Area Air Quality Management District ("BAAQMD") recommended that CEQA lead agencies continue to rely upon thresholds set forth in its 1999 BAAQMD CEQA Guidelines.¹¹⁷ BAAQMD in fact only withdrew its recommendation of the updated 2010 CEQA Guidelines pending an appeal before the California Supreme Court. However, this appeal has nothing to do with the merits of the thresholds and is narrowly focused on whether the adoption of these thresholds was a "project" under CEQA.¹¹⁸ Nevertheless, for purposes of this DEIR, the CSLC adopted the 1999 BAAQMD CEQA significance thresholds for NOx, VOCs, and PM₁₀ without considering substantial evidence demonstrating that they are outdated and incomplete.¹¹⁹

Since the BAAQMD adopted the 1999 CEQA guidance, Dr. Fox explains that significant changes have occurred in the SFBAAB that affect air quality, warranting use of a more reasonable threshold of significance for NOx, VOCs and PM₁₀.¹²⁰ Ambient air quality standards have become more stringent and new pollutants, PM_{2.5} and lead, have been added to federal and state ambient air quality standards. The BAAQMD updated its CEQA significance thresholds precisely to address these significant developments in air quality, recognizing that the 1999 thresholds were outdated by omitting important criteria pollutants and too high to

¹¹⁴ Dr. Fox Comments, p. 8.

¹¹⁵ DEIR, pp. 4.4-2; 4.4-7.

¹¹⁶ DEIR, p. 4.4-4.

¹¹⁷ *Id.* at 4.4-15.

¹¹⁸ *Id.* at 4.4-8, note 1.

¹¹⁹ *Id.* at 4.4-8.

¹²⁰ Dr. Fox Comments, p. 6.
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adequately protect ambient air quality. Dr. Fox presented Table 5 in her comment letter to highlight the significant differences between the 1999 and 2010 BAAQMD CEQA significance thresholds. That table is recreated below.

Table 5.
Comparison of
BAAQMD CEQA Significance Thresholds
Adopted in 1999 and 2010

	ANNUAL (ton/yr)		DAILY (lb/day)	
	1999	2010	1999	2010
VOC	15	10	85	54
N0x	15	10	85	54
PM10	15	15	85	82
PM2.5	-	10	-	54

The DEIR's attempt to find refuge in the lack of significance thresholds in BAAQMD's 1999 CEQA Guidelines for PM_{2.5} does not save the agency from conducting an impact analysis for this criteria pollutant under CEQA. Indeed, the CSLC was fully authorized to develop its own threshold. CEQA Guidelines Section 15064.7 states that "[e]ach agency is encouraged to develop and publish thresholds of significance that the agency uses in the determination of the significance of environmental effects."¹²¹ The CSLC could have established significance thresholds of PM_{2.5} using the established thresholds of numerous other air districts throughout the state.¹²² For example, the South Coast Air Quality Management District ("SCAQMD") has established two PM_{2.5} significance thresholds - a regional threshold of 55 lb/day and localized thresholds, reported in lookup tables as a function of location, receptor distance, and project size.¹²³ These localized thresholds range from 1 lb/day to 46 lb/day, based on the size of the source and its

¹²¹ CEQA Guidelines, § 15064.7; see also Pub. Res. Code, § 21082 (directing agencies to adopt procedures and criteria for evaluating projects).

¹²² Dr. Fox Comments, p. 8.

¹²³ DEIR, pp. 4.4-2; 4.4-7.

¹²⁴ SCAQMD, Final - Methodology to Calculate Particulate Matter (PM) 2.5 and PM 2.5 Significance Threshold, October 2006, available at: [http://www.aqmd.gov/docs/default-source/ceqa/handbook/localized-significance-thresholds/particulate-matter-\(pm\)-2.5-significance-thresholds-and-calculation-methodology/final_pm2_5methodology.pdf?sfvrsn=2](http://www.aqmd.gov/docs/default-source/ceqa/handbook/localized-significance-thresholds/particulate-matter-(pm)-2.5-significance-thresholds-and-calculation-methodology/final_pm2_5methodology.pdf?sfvrsn=2), attached as

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↑ distance to the nearest receptor. The Mendocino County Air Quality Management District ("MCAQMD") also has established a PM_{2.5} CEQA significance threshold of 54 lb/day.¹²⁴

10-29

According to Dr. Fox, the Project's daily increase in PM_{2.5} emissions, as estimated in the DEIR, is slightly less than the MCAQMD, BAAQMD, and SCAQMD regional thresholds (53 lb/day v. 54 and 55 lb/day), but exceeds the upper end of the range of the SCAQMD's localized thresholds (53 lb/day > 46 lb/day).¹²⁵ But when the Project's daily increase in PM_{2.5} emissions is revised according to Dr. Fox's much more reasonable vessel call average (85 OGV), the Project significantly exceeds the daily regional PM_{2.5} thresholds established by all three air districts (129 lb/day > 54-55 lb/day).¹²⁶ Substantial evidence therefore indicates that PM_{2.5} emissions are significant when properly evaluated under CEQA using significance thresholds established by numerous other air districts and under the updated BAAQMD threshold guidelines. Dr. Fox contends that these elevated levels should at the very least trigger a re-evaluation of the emission calculations to assure that reasonably foreseeable impacts have been calculated.

10-30

↓ Besides, the DEIR states that "[f]or purposes of this analysis, an impact was considered to be significant and to require mitigation if it would result in ... a considerable net increase of any criteria pollutant for which the Project region is non-attainment under an applicable federal or State ambient air quality standard ...".¹²⁷ As discussed above, violations of the federal PM_{2.5} standards have been recorded in the Project vicinity and the area is non-attainment for both federal and state PM_{2.5} standards. Thus, this criterion applies to the Project. According to Dr. Fox's analyses, she presented substantial evidence in Table 3 and Table 4 (recreated here below) that the Project would increase PM_{2.5} emissions by 53 to 129 lb/day¹²⁸ and 2.8 ton/yr¹²⁹ to 7 ton/yr.¹³⁰ Dr. Fox concludes these are "considerable net increases" under the DEIR's own criteria that should have been found significant and therefore requiring mitigation under CEQA.

¹²⁴ MCAQMD, Adopted Air Quality CEQA thresholds of Significance, June 2, 2010, available at: http://www.co.mendocino.ca.us/aqmd/pdf_files/MCAQMDCEQAREcommendations.pdf, attached as **Attachment K**.

¹²⁵ Dr. Fox Comments, p. 8.

¹²⁶ *Id.* at 5.

¹²⁷ DEIR, p. 4.4-15 (emphasis added).

¹²⁸ See Dr. Fox Comments, Table 4, p. 5.

¹²⁹ See Dr. Fox Comments, Table 3, p. 4.

¹³⁰ See Dr. Fox Comments, Table 4, p. 5.

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Table 3.
Revised Emissions Based on
Revised Pre- and Post-Project Ship Calls (ton/yr)

	CO	N0x	PM10	PM2.5	VOC	S0x
Pre-Project	7.9	66.1	2.3	2.3	3.4	21.4
Post-Project	17.8	148.6	5.3	5.1	7.6	48.2
Increase	9.9	82.5	3.0	2.8	4.2	26.8

Table 4.
Revised Emissions Based on
Revised Ship Calls and Revised Per Ship Emissions

	CO	N0x	PM10	PM2.5	VOC	S0x
Tesoro Neg.Dec. (lb/day)	814	9,350	163	129	339	324
DEIR, Appx. D (lb/day)	186	1,555	55	53	80	504
Revised Emissions (ton/yr)	43	496	9	7	18	17

10-31

In light of the existing levels of excess PM_{2.5} in the SFBAAB, and as shown by Dr. Fox, substantial evidence indicates that the Project will result in significant, unmitigated emissions of PM_{2.5} in the region. This pollutant, if left unmitigated, has the potential to negatively impact labor involved with construction of the Project and communities living nearby the Avon Terminal. The CSLC must prepare a revised DEIR which analyzes the Project's significant adverse public health impacts associated with PM_{2.5} emissions and include in its analysis all necessary mitigation measures that reduce the Project's potentially significant impacts to less than significant.

B. The DEIR Must Be Revised To Disclose All Significant and Potentially Significant Water Quality Impacts from the Operation of the Project

1. The DEIR Underestimates the Risk of an Oil Spill in the San Francisco Bay Estuary

10-32

According to Dr. McGowan, the DEIR's analysis of the risks of an oil spill into the San Francisco Bay as a result of this Project is flawed. Dr. McGowan

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explains that the DEIR understates the possible impacts of oil spills by using a mean average to summarize the frequency of spills, relies upon outdated reports, arbitrarily choosing to measure oil spills of 10,000 gallons or larger, and by estimating the risk of Avon-related shipping accidents by erroneously comparing Avon Terminal shipping traffic with *all* shipping traffic in the San Francisco Bay.¹³¹ For the reasons explained below, Dr. McGowan concludes that the CSLC must prepare a revised DEIR that addresses these fatal errors.

10-33

The DEIR uses the expected mean time between spills inside and outside the San Francisco Bay in order to summarize the frequency of spills occurring.¹³² Table 4.1-9 presents the expected mean time between spills for three sizes: 238 barrels, 1,000 barrels, and 10,000 barrels.¹³³ According to Dr. McGowan, the CSLC's use of the statistic "mean" understates the frequency of the Project's oil spills because the use of the mean time skews the "middle" value toward the long time between spills.¹³⁴ An average is therefore highly susceptible to being skewed by a single outlier. Instead, Dr. McGowan explains that a better measure of frequency of oil spills would be the median time.¹³⁵ The median would give a more representative expected time estimate between spills, better predict the frequency of future oil spills, and avoid being skewed by any outliers. Dr. McGowan therefore concludes that in order to better represent the risk of spills, the DEIR must be revised by replacing the "mean" frequency time with the "median."

10-34

Next, Dr. McGowan explains that the DEIR's oil spill risk assessment is inadequate under CEQA because it relies on an outdated 1994 Chambers Group Inc. report. This report is more than twenty years old and fails to constitute substantial evidence under CEQA. As a result, Dr. McGowan contends that the DEIR's conclusions regarding potential impacts from an oil spill are entirely unsupported. Because all oil spills in U.S. water must be reported to the U.S. Coast Guard,¹³⁶ this data was available online to the CSLC for the years 1990 through 2014.¹³⁷ The CSLC must prepare a revised DEIR which uses more recent data available regarding oil spills.

¹³¹ Dr. McGowan Comments, pp. 2-3.

¹³² DEIR, Table 4.1-9, p. 4.1-47.

¹³³ *Id.*

¹³⁴ Dr. McGowan Comments, p. 2.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ United States Coast Guard's National Response Center, available at: <http://www.nrc.uscg.mil>. 3187-006cv

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10-35 The DEIR in Table 4.1-9 also underreported the frequency of oil spills by erroneously choosing to measure only spills of 238 barrels (10,000 gallons) or larger. No substantial evidence supports this selection. Dr. McGowan contends that many of the spills reported to the U.S. Coast Guard are smaller than 238 barrels¹³⁸ and that smaller oil spills can still have significant adverse environmental impacts.¹³⁹ Dr. McGowan contends that the DEIR's arbitrary selection of 238 barrels underreports the frequency of spills by disregarding all spills below 238 barrels.¹⁴⁰ As a result, the DEIR's conclusion that there is a 36 year interval between oil spills is inaccurate and unsupported by substantial evidence.¹⁴¹ The CSLC must revise the DEIR to discuss the chronic impact of more frequent smaller oil spills that can have substantial environmental impacts to the San Francisco Bay.

10-36 Lastly, Dr. McGowan finds that the DEIR is inadequate because it calculated the risk of Avon-related accidents by comparing the distance traveled of all shipping traffic relative to the distance traveled by Avon-related shipping traffic.¹⁴² There is no substantial evidence provided in the DEIR that supports the agency's analysis that the relative distance traveled is an accurate assessment of Avon-related spills. Dr. McGowan explains that the actual frequency of Avon-related shipping accidents must be compared to the total frequency of accidents and then scaled by distance. He contends that his approach better accounts for the fact that the vessels calling on the Avon Terminal may need more (or less) stringent risk reduction and mitigation measures than other vessels not calling on the Avon Terminal due to the variety of ships using the San Francisco Bay.¹⁴³ To adequately assess the risk of oil spills into the San Francisco Bay as a result of the Project, the DEIR must be revised to include the actual frequencies and sizes of all Avon-related oil spills into the San Francisco Bay over the last 30-year lease.

¹³⁸ Dr. McGowan Comments, p. 3.

¹³⁹ *Id.* at 2.

¹⁴⁰ See, e.g., USCG National Response Center 2013 Report, Seq. No. 1035055, reporting one gallon of oil spilled from Tesoro pipeline into Martinez waterway, available at: <http://www.nrc.uscg.mil/FOIAFiles/CY13.xlsx>.

¹⁴¹ DEIR, Table 4.1-9, p. 4.1-47.

¹⁴² DEIR, p. 4.1-47.

¹⁴³ Dr. McGowan Comments, p. 3
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2. *The DEIR Acknowledges But Fails to Analyze All Potentially Significant Impacts Relating to Sea Level Rise*

10-37

The DEIR acknowledges that the impacts of climate change are expected to alter the San Francisco Bay Estuary ecosystem by "inundating and eroding shoreline areas."¹⁴⁴ Sea level could be up to eighteen inches higher by 2050 than levels measured in 2000.¹⁴⁵ Although the DEIR states it considered the effects of sea level rise on operations, Dr. Gowan states that the DEIR is barren on any analysis concerning the severity and possible impacts of sea level rise to the structural and operational elements of the Avon Terminal.¹⁴⁶ Since the 30-year lease will almost run through the projected 2050 estimates, the DEIR must be revised to include a much more thorough analysis regarding climate change and sea-level rise.

3. *The DEIR Failed to Disclose and Analyze Impacts to Water Quality Associated with Firefighting Water & Foam Systems*

10-38

The DEIR states that the Avon Terminal is equipped with firewater and foam systems that can be activated in the event of a fire at the Terminal.¹⁴⁷ The DEIR discloses the following equipment associated with the fire prevention, detection and suppression systems: two 4,000-gallon-per-minute (GPM) firewater pumps with diesel drivers, each with an approximately 1,000-gallon fuel tank and a backup emergency generator; two 1,500-GPM elevated tower monitors with foam skids; local and remote-actuated motor-operated emergency shutdown valves at the Berth 1A piping manifolds and at the existing valve station; an automated fire detection system; booster pump; offshore firewater pump that takes suction from Suisun Bay; firewater supplied by the Refinery; automatic and manual fire alarms; vendor-supplied controls for new firewater pumps and elevated monitors; multiple hose reels, monitors (portable and fixed), hydrants, and foam drums; multiple portable and wheeled dry chemical extinguishers at the Avon Terminal; and an uninterruptible power supply system.¹⁴⁸

Absent from the DEIR is any consideration of potentially significant environmental impacts associated with the firewater and foam systems. It is

¹⁴⁴ DEIR, p. 4.3-10.

¹⁴⁵ *Id.*

¹⁴⁶ Dr. McGowan Comments, p. 5.

¹⁴⁷ DEIR, p. 2-46.

¹⁴⁸ DEIR, pp. 2-15; 2-46.

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reasonable to assume that two diesel-driven firewater pumps that spray an estimated 4,000-GPM and take water from the Suisun Bay would have a potentially significant environmental impact in the region. Moreover, the CSLC was aware of these potentially significant environmental impacts from firewater discharge because, in 2007, the agency analyzed impacts associated with firewater discharge for the Chevron Long Wharf Marine Oil Terminal Lease Consideration project.¹⁴⁹ In that EIR, the CSLC identified firewater discharged that would occur during tests and/or maintenance on the fire protection system could have adverse impacts to marine water quality. Although it concluded that treatment of such water at the refinery would minimize impacts to less than significant, the Long Wharf EIR demonstrates that the CSLC erred in the Avon Terminal DEIR by neither disclosing or analyzing potentially significant environmental impacts from firewater discharge.¹⁵⁰ The CSLC also noted in the Long Wharf EIR that the "[t]esting of firewater systems is a necessary safety precaution . . ." for the Long Wharf Marine Oil Terminal.¹⁵¹

Likewise, the testing of firewater systems and foam spray at the Avon Terminal is a necessary safety precaution. It would be unreasonable to assume that these systems would be left untested during the 30-year lease period. Moreover, unlike the Long Wharf Marine Terminal, the Project includes foam spray that may have significant environmental impacts to the environment. Accordingly, the CSLC was obligated under CEQA to identify potentially significant environmental effects from firewater and foam discharge, and propose feasible mitigation measures or alternatives that may reduce or avoid them. The CSLC must prepare a revised DEIR which discloses, analyzes, and mitigates significant impacts to water quality from the Project's fire suppression system.

VI. THE MITIGATION MEASURES PROPOSED IN THE DEIR ARE INADEQUATE AND UNENFORCEABLE

CEQA prohibits agencies from approving projects with significant environmental impacts when feasible mitigation measures can substantially lessen or avoid such impacts.¹⁵² An agency may not approve a project unless it has "[e]liminated or substantially lessened all significant effects on the environment

¹⁴⁹ CSLC, Draft Environmental Impact Report for the Chevron Long Wharf Marine Oil Terminal Lease Consideration, Section 4.2, p. 4.2-39, attached as **Attachment L**.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Pub. Resources Code, § 21002.
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where feasible.”¹⁵³ The mitigation measures that are adopted by the agency must be enforceable through conditions of approval, contracts, or other means that are *legally* binding.¹⁵⁴ Incorporating mitigation measures into conditions of approval ensures that the measures will be implemented, not merely adopted and ignored.¹⁵⁵ Therefore, a project proponent’s agreement to a mitigation measure, by itself, is insufficient under CEQA. The mitigation measure must be adopted in a way that makes it an enforceable agreement that actually mitigates the significant environmental impact.¹⁵⁶ The DEIR contains numerous mitigation measures that are unenforceable, ineffective, and therefore inadequate under CEQA.

A. MM WQ-3 Is Unenforceable And Inadequate Under CEQA

The DEIR acknowledges that the San Francisco Bay Estuary is one of the most invaded estuaries in the world.¹⁵⁷ According to the DEIR, vessels may discharge properly managed, segregated ballast water from segregated ballast tanks into the San Francisco Bay Estuary as they take on product from the Avon Terminal.¹⁵⁸ The DEIR recognizes that this discharged segregated ballast water has the potential to contain a variety of harmful substances, most notably nonindigenous aquatic species (“NAS”).¹⁵⁹ To inhibit the introduction and spread of NAS in California, the Coastal Ecosystems Protection Act of 2006 established performance standards for the discharge of ballast water, which are administered by the CSLC. The DEIR then concludes that the introduction of new NAS from discharged segregated ballast water as a result of continued Avon Terminal operation will likely remain significant and unavoidable.¹⁶⁰

As described by Dr. McGowan in his comments and summarized in the following paragraph, mitigation measure WQ-3 only requires that the applicant “advise” agents and representatives of the shipping company about applicable regulations.¹⁶¹ According to Dr. McGowan, this mitigation measure is inadequate to ensure that vessels actually comply with ballast water discharge regulations.

¹⁵³ CEQA Guidelines, § 15092 subd. (b)(2).

¹⁵⁴ Pub. Resources Code, § 21081.6(b).

¹⁵⁵ *Federation of Hillside & Canyon Ass’n v. City of Los Angeles*, 83 CA 4th 1252, 1261 (2000).

¹⁵⁶ *Woodward Park Homeowners Ass’n v. City of Fresno*, 150 CA 4th 683, 730 (2007).

¹⁵⁷ DEIR, p. 4.3-33.

¹⁵⁸ *Id.* at 4.3-30.

¹⁵⁹ *Id.* at 4.3-31.

¹⁶⁰ *Id.* at 4.3-34.

¹⁶¹ Dr. McGowan Comments, p. 5.
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↑ Notifying ship operators does not ensure compliance. Dr. McGowan states that that the DEIR must be revised to include mitigation measures that "require vessels to comply with the required laws and regulations *before* they can berth at the Avon Terminal."¹⁶² Dr. McGowan notes that the DEIR's MM WQ-6 is an example of a mitigation measure that ensures vessels berthing at the Avon Terminal comply with applicable regulations. Per mitigation measure WQ-6, Tesoro must require all representatives of vessels berthing at the Avon Terminal provide documentation certifying that their vessel is in compliance with the 2001 International Maritime Organization Convention on the Control of Harmful Antifouling Systems on Ships and other applicable regulations. Accordingly, the CSLC is required to prepare a revised DEIR which includes an enforceable mitigation measure that ensures all vessels calling on the Avon Terminal certify compliance with the established performance standards for discharging segregated ballast water into the San Francisco Bay Estuary.

B. MM WQ-5 Is Unenforceable And Inadequate Under CEQA

10-40

While mitigation measure WQ-5 ensures that vessels comply with applicable regulations, the measure is unenforceable because it only requires the applicant to prepare and maintain current, a fact sheet of the Marine Invasive Species Act of 2003 (MISA), and to provide it to all vessels calling at the Avon Terminal.¹⁶³ Dr. McGowan again explains that informing vessel agents of applicable regulations and standards is inadequate under CEQA to mitigate the significant environmental impacts associated with biofueling.¹⁶⁴ Nothing in this mitigation measure ensures compliance with MISA. The DEIR must be revised to include a mitigation measure that requires vessels to comply with the required laws and regulations associated with biofueling before they can berth at the Avon Terminal.

VII. CONCLUSION

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↓ The DEIR is inadequate and must be withdrawn. We urge the CSLC to prepare and circulate a revised DEIR which includes a complete Project description and an accurate environmental baseline upon which to measure the whole Project's reasonably foreseeable impacts. The revised DEIR must also identify *all* of the

¹⁶² *Id.* (emphasis added).

¹⁶³ DEIR, p. 4.9-33.

¹⁶⁴ Dr. McGowan Comments, p. 5.
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↑ Project's potentially significant impacts, and incorporate all necessary and feasible mitigation measures into the Project to reduce and avoid the Project's significant impacts on the environment and on neighboring communities. Finally, the revised DEIR must analyze feasible mitigation to reduce impacts from the alternatives, in addition to the Project.

We thank you for the opportunity to provide these comments on the DEIR.

Sincerely,



Adam J. Regele

AJR:clv

Attachments

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