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BY E-MAIL AND U.S. MAIL

April 17, 2017

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Re: Comments of Southwest Regional Council of Carpenters and Laborers
International Union of North America Local Union 300 on the Draft
Environmental Impact Report for the 6901 Santa Monica Boulevard
Mixed-Use Project (EIR No. ENV-2015-4612-EIR; SCH No. 2016021044)

Dear Ms. King;

I am writing on behalf of the Southwest Regional Council of Carpenters ("SWRCC"), Laborers International Union of North America Local Union 300 ("LIUNA"), and City of Los Angeles residents Dan Macdonald and Alexis Olbrei concerning the Draft Environmental Impact Report ("DEIR") for the 6901 Santa Monica Boulevard Mixed-Use Project (EIR No. ENV-2015-4612-EIR; SCH No. 2016021044) ("Project"). We hereby request that the City of Los Angeles ("City") fully comply with all requirements of the California Environmental Quality Act ("CEQA") in its review of the Project.

After reviewing the proposed project and the DEIR together with our expert consultants at SWAPE, including Matthew Hagemann, P.G., C.Hg., QSD, QSP, former Senior Science Policy Advisor, U.S. EPA Region 9 and Hydrogeologist, Superfund, RCRA and Clean Water programs, it is evident that the document contains numerous errors and omissions that preclude accurate analysis of the Project. Technical comments prepared by SWAPE are attached hereto as Exhibit A. As a result of these inadequacies, the DEIR fails as an informational document, fails to identify environmentally superior Project alternatives, and fails to impose feasible mitigation

measures to reduce the Project's impacts.¹ A supplemental DEIR should be prepared and circulated for full public comment to address these issues.

I. BACKGROUND.

The Project includes the demolition and removal of the existing office and automobile storage buildings located on the Project Site, and development of the Project Site with a mixed-use building, including seven stories of residential multi-family units (231 total units) and 15,000 square feet of ground-floor neighborhood-serving commercial uses (including up to a 5,000-square-foot high-turnover restaurant and up to 10,000 square feet of general retail), and 390 vehicle parking spaces within two levels of subterranean parking.

The Project requests a Vesting Zone and Height District Change to C2-2D, which would permit a base density of one unit per 400 square feet of lot area (R4 density). The Project Site lot area is 72,772 square feet prior to street dedications, which would permit 181 units (72,772 SF / 400 SF). The Project includes a 27.5% density bonus that permits the 231 units in lieu of 181 units and a density bonus on-menu incentive to calculate density based on the lot area prior to street dedications. Approximately 8% of the permitted base density, equal to 15 units, would be restricted for Very Low-Income households. The Project would have a total of 218,316 square feet of floor area, with a corresponding floor area ratio (FAR) of 3.2:1 (FAR calculated based on lot area after street dedications which is 68,272 square feet).

The Project includes a request for a General Plan Amendment to change the land use designation from Highway Oriented Commercial and Medium Density Residential to Neighborhood Commercial, to permit the development of a mixed-use building. An additional General Plan Amendment is requested for an Add Area so that additional parcels would be changed from the Highway Oriented Commercial land use designation to the Neighborhood Commercial land use designation and would not result in the creation of "spot" zoning. The Project Site is located within a transition zone between industrial and medium density residential land use designations.

II. STANDING.

Members of SWRCC and LIUNA live, work and recreate in the immediate vicinity of the Project site. These members will suffer the impacts of an inadequately mitigated Project, just as would the members of any nearby homeowners association, community group or environmental group. Hundreds of members of SWRCC and LIUNA live and work in areas that will be affected by traffic, air pollution, and other impacts generated by the Project. Dan Macdonald and Alexis Olbrei are residents of the City of Los

¹ We reserve the right to supplement these comments at later hearings and proceedings for this Project. See, *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109.

Angeles and will be directly affected by the air pollution, traffic and other impacts of the proposed Project.

In addition, construction workers such as the members of SWRCC and LIUNA will suffer many of the most significant impacts from the Project as currently proposed, including from air pollution emissions from poorly maintained or controlled construction equipment, possible risks related to hazardous materials in the soil and groundwater on the Project site, and other impacts. Therefore, SWRCC and LIUNA and their members have a direct interest in ensuring that the Project is adequately analyzed and that its environmental and public health impacts are mitigated to the fullest extent feasible.

III. LEGAL STANDARDS.

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances). (See, e.g., Pub. Res. Code § 21100.) The EIR is the very heart of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.) "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal.App.4th 98, 109.)

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. (14 Cal. Code Regs. ("CEQA Guidelines") § 15002(a)(1).) "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.) 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." (*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.)

Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures. (CEQA Guidelines § 15002(a)(2) and (3); See also, *Berkeley Jets*, 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.) The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced." (CEQA Guidelines §15002(a)(2).) If the project will have a significant effect on the environment, the agency may approve the project only if it finds 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." (Pub. Res. Code § 21081; CEQA Guidelines § 15092(b)(2)(A) & (B).)

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. “A clearly inadequate or unsupported study is entitled to no judicial deference.” (*Berkeley Jets*, 91 Cal.App.4th at 1355, quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, 409, fn. 12.) As the court stated in *Berkeley Jets*:

A prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722]; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946).

(91 Cal.App.4th at 1355.)

IV. LEGAL ANALYSIS.

A. THE DEIR FAILS TO PROVIDE SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING OF OVERRIDING CONSIDERATIONS.

As is discussed below, the Project will have significant, unmitigated environmental impacts, contrary to the conclusions of the DEIR. As a result, a statement of overriding considerations will be required. Under CEQA, when an agency approves a project with significant environmental impacts that will not be fully mitigated, it must adopt a “statement of overriding considerations” finding that, because of the project’s overriding benefits, it is approving the project despite its environmental harm. (CEQA Guidelines §15043; Pub. Res. Code §21081(B); *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222.) A statement of overriding considerations expresses the “larger, more general reasons for approving the project, such as the need to create new jobs, provide housing, generate taxes and the like.” (*Concerned Citizens of South Central LA v. Los Angeles Unif. Sch. Dist.* (1994) 24 Cal.App.4th 826, 847.)

A statement of overriding considerations must be supported by substantial evidence in the record. (CEQA Guidelines §15093(b); *Sierra Club v. Contra Costa Co.* (1992) 10 Cal.App.4th 1212, 1223.) The agency must make “a fully informed and publicly disclosed” decision that “specifically identified expected benefits from the project outweigh the policy of reducing or avoiding significant environmental impacts of the project.” (CEQA Guidelines §15043(b).) As with all findings, the agency must present an explanation to supply the logical steps between the ultimate finding and the facts in the record. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.)

Key among the findings that the lead agency *must* make is that:

“Specific economic, legal, social, technological, or other considerations, including **the provision of employment opportunities for highly trained workers**, make infeasible the mitigation measures or alternatives identified in the environmental impact report... [and that those] benefits of the project outweigh the significant effects on the environment.”

(Pub. Res. Code §21081(a)(3), (b).)

Thus, the City must make specific findings, supported by substantial evidence, concerning both the environmental impacts of the Project, and the economic benefits including “the provision of employment opportunities for highly trained workers.” The DEIR fails to provide substantial evidence to support a statement of overriding considerations.

The DEIR makes no effort whatsoever to analyze the fiscal impacts related to jobs to be created by the proposed project, or the quality of the new jobs. While the DEIR states that a Project goal is to “promote fiscal benefits, economic development and job creation,” (DEIR p. 2-6), the DEIR is devoid of any analysis of whether the new jobs to be created will be higher or lower wage than the jobs to be displaced in the existing buildings, or how the quality of the jobs to be created will compare to citywide averages. CEQA expressly requires an analysis of: “Specific economic, legal, social, technological, or other considerations, including **the provision of employment opportunities for highly trained workers**.” (Pub. Res. Code §21081(a)(3), (b).) The Fiscal Analysis makes no attempt to determine whether new jobs created by the Project, in either the construction phase or the operational phase, will be for “highly trained workers,” and what the likely salary and wage ranges of these jobs will be. Without this information, the City lacks substantial evidence to make any statement of overriding considerations.

In short, the City cannot find that the economic benefits of the Project outweigh the environmental costs if it does not know what the economic benefits will be. A revised DEIR is required to provide this information.

B. THE DEIR FAILS TO DESCRIBE ADEQUATELY THE ENVIRONMENTAL SETTING OF THE PROJECT.

To facilitate its informational goals, an EIR must contain an accurate description of the project’s environmental setting. An EIR “must include a description of the physical environmental conditions in the vicinity of the project... from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.” (CEQA Guidelines, §15125(a).) The “environmental setting” is defined as “the physical conditions which exist within the area which will be affected by a proposed project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.” (CEQA Guidelines, §15360; see §21060.5; *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1192.) As the court

stated in *Friends of Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859:

There is good reason for this requirement: "Knowledge of the regional setting is critical to the assessment of environmental impacts. . . . 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 in the full environmental context." ([CEQA] Guidelines, § 15125, subd. (c).) We interpret this Guideline broadly in order to "afford the fullest possible protection to the environment." (*Kings County Farm Bureau, supra*, 221 Cal.App.3d 692, 720.) 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.

(108 Cal.App.4th at 874.)

1. The DEIR Fails to Disclose Known, Highly Significant Toxic Chemical Contamination at the Project Site.

The Project will have very significant impacts due to the presence of high levels of toxic and cancer-causing chemicals in the soil and groundwater at the Project site. Construction workers such as the members of SWRCC and LIUNA will be at the highest risk from such chemicals, as will be future residents of the Project, who may be exposed via soil vapor intrusion. Construction workers will be directly disturbing and excavating contaminated soil during Project construction.

Despite the fact that these hazards were documented in a 2007 Phase II ESA and a 2012 Environmental Conditions Summary (2012 ECS), the DEIR fails to mention these risks at all. Despite repeated requests by SWRCC and LIUNA under CEQA and the Public Records Act, the City did not make available copies of the 2007 and 2012 reports until April 5, 2017, toward the tail end of the public comment period. The City exacerbated this omission by then refusing to grant SWRCC's and LIUNA's reasonable request for an extension of the comment period in order to have a full 30-days to comment on the project in light of the prior site investigations. Not only does this violate CEQA's procedural requirement that all documents relied upon in the DEIR be made available to the public for the full comment period, but it shows that the DEIR fundamentally violates CEQA's requirement of full disclosure of all potentially significant impacts.

The 2007 and 2012 reports reveal very significant contamination that is not disclosed in the DEIR. From at least 1928 until at least 1950, a bulk oil storage facility operated by Union Oil Company was located on the south-central portion of the project site, containing oil storage above ground storage tanks (ASTs) and oil/water separator tanks. (2012 ECS, p. 5). The report also describes numerous more recent industrial uses of the property involving underground storage tanks (USTs) with unknown contents.

The 2012 ECS identified very high levels of benzene and perchloroethylene (PCE) in the soil and groundwater at the Project site. According to the United State Environmental Protection Agency (US EPA) benzene causes cancer in humans and has serious short and long-term health effects:

Acute (short-term) inhalation exposure of humans to benzene may cause drowsiness, dizziness, headaches, as well as eye, skin, and respiratory tract irritation, and, at high levels, unconsciousness. Chronic (long-term) inhalation exposure has caused various disorders in the blood, including reduced numbers of red blood cells and aplastic anemia, in occupational settings. Reproductive effects have been reported for women exposed by inhalation to high levels, and adverse effects on the developing fetus have been observed in animal tests. Increased incidence of leukemia (cancer of the tissues that form white blood cells) have been observed in humans occupationally exposed to benzene. EPA has classified benzene as known human carcinogen for all routes of exposure.

<https://www.epa.gov/sites/production/files/2016-09/documents/benzene.pdf>).

EPA has also determined that PCE has serious health effects:

Exposure to very high concentrations of PCE (particularly in closed, poorly ventilated areas) can cause dizziness, headache, sleepiness, confusion, nausea, difficulty in speaking and walking, unconsciousness and even death. Skin irritation may result from repeated or extended contact with it as well.

The Eleventh Report on Carcinogens (RoC) has determined that PCE may reasonably be anticipated to be a carcinogen.

[https://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dc283e6c5d6056f88257426007417a2/f17f784b5a1b6c3b8825794c006325b3/\\$FILE/Vapor%20Intrusion%20PCE%20Fact%20Sheet%20EPA%2013%20174kb.pdf](https://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dc283e6c5d6056f88257426007417a2/f17f784b5a1b6c3b8825794c006325b3/$FILE/Vapor%20Intrusion%20PCE%20Fact%20Sheet%20EPA%2013%20174kb.pdf)).

The 2012 ECS determined that the contamination is migrating off-site and the extent of contamination is unknown. The document advises that further sampling and clean-up is required and that there is a risk of soil vapor intrusion – a situation where toxic gases can migrate out of the soil and into a building placed on the contaminated site.

Despite these critical disclosures in the 2012 ECS, the DEIR fails to mention this document and the full extent of groundwater and soil vapor contamination. Instead, the DEIR relies on a 2014 Environmental Site Assessment (2014 ESA) and misleads the reader regarding the import of the prior Phase II investigations. Thus, the DEIR says in footnote that “[t]he conclusions of the 2014 Phase II ESA incorporated the findings of the 2007 Phase II ESA.” (DEIR, p. 4.F-22, n. 8.) As SWAPE’s review explains:

This statement is inaccurate. In fact, conclusions made in the 2014 Phase I and Phase II ESAs summarily ignored key 2007 Phase II ESA findings and recommendations as well as findings and recommendations made in the 2012 report. Most notably and egregiously, the 2014 Phase II failed to heed 2007 Phase II and 2012 report's recommendations to: (1) evaluate, under regulatory oversight, offsite groundwater impacts from a source at the Project site; and (2) assess the potential for soil vapor intrusion of PCE, a human carcinogen. Additionally, the 2014 Phase I failed to incorporate recognized environmental conditions identified in the 2007 Phase II and in the 2012 report, despite the claim made in the DEIR on p. 4.F-22.

(SWAPE, p. 2.) Likewise, rather than incorporating the 2007 Phase II report's findings, the 2014 ESA misrepresents the earlier investigations. The 2014 Phase I ESA, states:

Historical releases of petroleum hydrocarbons to the subsurface that have occurred at the Site are considered to be historical recognized environmental conditions in connection with the Site that were previously assessed to the satisfaction of local and State regulatory agencies. Such conditions do not represent a significant environmental concern given the current land use of the Site.

(2014 Phase 1, p. 27). As SWAPE's review makes clear, this assertion is false:

The petroleum releases have never been investigated by regulators and no records exist that would indicate that the releases have been assessed to the satisfaction of regulators, as claimed. The petroleum contamination, identified in 2007 and 2012 as a condition that required regulatory notification and further investigation, is likely to be ongoing and presents both potential harm to the environment and human health. The 2014 Phase II did not sample groundwater, stating that the water table had been lowered by the drought (p. 5). The 2014 Phase II did not provide an explanation for not drilling deeper in an attempt to intercept the water table so that groundwater samples could be obtained.

(SWAPE, p. 3.) The DEIR further contributes to the misleading statements about the site's groundwater pollution. With respect to offsite migration of contaminated groundwater from the Project site, the DEIR states:

Regarding groundwater sampling, Blackstone [the 2007 Phase II consultant] found that five of the eighteen samples contained elevated VOC concentrations above the applicable MCLs and appeared to be down gradient of the former on-site USTs. The lateral extent of the plume was referenced as being defined with potential migration off-site to the southwest.

(DEIR, p. 4.F-14). Again, SWAPE's comments point out the inaccuracies of the DEIR's statement, noting that "[t]he DEIR's conclusion that the 'lateral extent of the plume was referenced as being defined' is misleading." What the 2007 Phase II in fact concludes is:

that the groundwater contamination beneath the southern portion of the site likely originated from historical releases at or near the on-site source areas, and that it is reasonable to believe the groundwater plume has migrated off-site. The off-site extent of the groundwater plume is unknown and at this time, and is considered the less-defined risk.

(2007 Phase II, p. 23).

Despite the confirmed presence of benzene and PCE contamination in ground water at the site, the 2014 ESA did not even bother to sample for benzene and PCE in ground water. Likewise, the 2014 ESA did not conduct any sampling of soil vapor for the presence of PCE. Of course, the report will not find contamination if it does not look for it. Thus, over and over again, instead of fairly disclosing the extensive groundwater and soil contamination by benzene and PCE, the DEIR and the project's consultants engage in an active effort to downplay the significance of dangerous levels of contamination at the site.

Similarly, the 2014 reports and the DEIR do not bother to mention the numerous "recognized environmental conditions"² (RECs) identified at the Project site in the 2007 and 2012 reports. The earlier assessments found the following RECs: REC 1: A bulk oil storage facility (aboveground storage tanks [ASTs] storing crude oil); REC 2: An oil storage building; REC 3: A service station with underground storage tanks (Service Station USTs); Recs 4 through 7 (USTs, hydraulic lifts, maintenance bays and a paint booth associated with an automotive repair and maintenance building once on the site; REC 8: A low spot in paving where water collects during hand washing of vehicles; and, on an adjoining property to the north, REC 9 consisting of five USTs. (See SWAPE, p. 5.) Instead of disclosing those RECs, the 2014 ESA report instead states:

This assessment has revealed no evidence of current recognized environmental conditions in connection with the Site. Historical releases of petroleum hydrocarbons to the subsurface that have occurred at the Site are considered to be historical recognized environmental conditions in connection with the Site that were previously assessed to the satisfaction of local and State regulatory agencies.

(2014 Phase 1, p. 27.) As SWAPE's review concludes:

² Defined as the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, groundwater, or surface water of the property.

The documented presence of petroleum compounds and PCE in groundwater and soil vapor at the Project site, as detailed in the 2007 and 2012 Phase IIs, constitutes a REC under any reasonable professional estimation, including the estimation of the prior Phase II consultants (Blackstone and Waterstone). The explanation provided above by the 2014 Phase II is simply false: There are known and ongoing releases of hazardous substances and petroleum products and no regulatory oversight, much less any regulatory resolution, of most of the soil contamination and none of the ground water and vapor contamination has been undertaken at the Project site.

(SWAPE, p. 6.)

Likewise, the DEIR makes no effort to disclose the soil vapor risks existing at the Project site. The 2007 Phase II investigation found tetrachloroethene ("PCE") in soil vapor samples collected at the Project site, including one sample along the Project's southern boundary detecting PCE from 10 feet in depth at a concentration of 351 µg/L. As SWAPE points out, the sample is "well in excess of the commercial exposure scenario California Human Health Screening Levels ("CHHSL") which is 0.6 µg/L." (SWAPE, p. 4.) Incredibly, the 2014 ESA did not sample soil vapor or groundwater and failed to heed any of the 2012 recommendations (they only sampled soil for VOCs, the least reliable of any media to indicate impacts).

The 2014 ESA, and the DEIR which relies upon it, is false and misleading in that the public is lead to believe that the site is not heavily contaminated, when in fact the report simply did not test for the very chemicals that had already been found at the Project site.

SWAPE concludes that the benzene and PCE levels identified in the 2012 ECS are highly significant and exceed health-based significance thresholds. Since the DEIR fails entirely to disclose these impacts, a new draft EIR is required to analyze this contamination, and to devise a mitigation plan to delineate, and clean-up the contamination in a manner that will safeguard construction workers and future residents of the Project.

The DEIR is legally insufficient for failing to disclose the presence of cancer-causing and toxic chemicals on the Project site. As in the recent *Banning Ranch* case, the City has failed to disclose in the DEIR known environmental hazards on the project site. In so doing the City has failed to proceed in a manner required by law. (*Banning Ranch Conservancy v. City of Newport Beach*, 2017 Cal. LEXIS 2327 (Cal. S.Ct. Mar. 30, 2017).)

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C. THE DEIR FAILS TO ANALYZE AND MITIGATE ALL POTENTIALLY SIGNIFICANT IMPACTS.

An EIR must disclose all potentially significant adverse environmental impacts of a project. (Pub. Res. Code § 21100(b)(1); CEQA Guidelines § 15126(a); *Berkeley Jets*, 91 Cal.App.4th at 1354.) CEQA requires that an EIR must not only identify the impacts, but must also provide “information about how adverse the impacts will be.” (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.) The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692.) The DEIR for this Project fails to do so.

1. The DEIR Fails to Adequately Analyze and Mitigate the Project’s Impacts Related to Toxic Chemicals.

Since the DEIR fails to disclose toxic groundwater and soil vapor contamination, it also fails to develop an adequate mitigation plan. The mitigation proposed by the DEIR is inadequate to reduce the Project’s disturbance and release of ground water contamination and its routing of toxic vapors into the proposed building to a level of insignificance. A supplemental DEIR should be prepared to propose more stringent remediation.

Furthermore, the DEIR proposes to finalize a clean-up plan only after the DEIR is approved, thereby improperly deferring mitigation until after the completion of the CEQA process. The DEIR states,

F-2. Prior to excavation, a technician shall perform boring tests of (1) soil near any USTs, clarifiers, drains or other potentially contaminated equipment discovered by pre-excavation survey; and (2) soil in portions of the Project Site where historical conditions indicate potential contamination, including the locations identified by the Phase II ESA. If soils impacted with hazardous chemicals and/or petroleum products are encountered or discovered by pre-excavation survey, a licensed Professional Geologist or Professional Engineer shall oversee proper characterization and remediation of identified impacted materials.

F-3. A Construction Soil Management Plan shall be required to guide the excavation of the below-grade portions of the Project Site. The Plan shall address the Site’s known historic conditions related to subsurface petroleum at the Project Site in addition to any potential sources of contamination discovered during the pre-excavation survey, and present the appropriate

methods and protocol for management of encountered conditions.

F-5. A system to prevent the entry of vapors into the building, (i.e. vapor barrier and venting system) shall be incorporated into the design and construction of Project building slabs to ensure adequate mitigation of the vapor intrusion exposure pathway and continuous protection of human health after the Project is constructed.

(DEIR, pp. 1-25, 1-26.)

These vague, future mitigation measures do not address the impacts that will occur as a result of the Project disturbing the extensive groundwater contamination at the site. (See SWAPE, p. 6.) Thus, no mitigation measures are included to address the project's effect on contaminated groundwater, including any changes to the size or rate of migration of the contaminated groundwater plume traveling offsite and no measures are included to address contaminated groundwater that would be encountered during dewatering activities. (*Id.*) Project construction will restrict the ability to investigate the extent of contamination at the Project site and the ability to remediate the contamination because access to the subsurface (to drill groundwater monitoring and extraction wells) will be restricted by construction of buildings and other Project hardscape. (*Id.*) Nor do these vague measures identify what mitigations might be expected to address vapor intrusion into the Project or any soil contamination mitigation. No measures are included to address how Project construction will exacerbate soil vapor intrusion potential, both for onsite and offsite receptors. (*Id.*)

CEQA does not permit deferral of the development of mitigation measures until after project approval. The overall effectiveness of the proposed mitigation must be evaluated in the Draft EIR and subjected to public comment. (CEQA Guidelines § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309.) An agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727.) This approach helps to "insure the integrity of the process of decision-making by precluding stubborn problems or serious criticism from being swept under the rug." (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.) By deferring either a reasonable description of the mitigation measures that would be expected to address soil and vapor contamination as well as approval of the clean-up plan until after certification of the CEQA document, the EIR "sweeps under the rug" questions concerning the effectiveness, and potential adverse impacts of any proposed measures in violation of CEQA. Mitigation to address the Project's disturbance of groundwater contamination is swept completely out of the house.

"A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is 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." (*Sundstrom*, 202 Cal.App.3d at 307.) "[R]eliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking; and[,] consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92.)

"Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. [Citation.] On the other hand, an agency goes too far when it simply requires a project applicant to obtain a biological [or other] report and then comply with any recommendations that may be made in the report." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.)

The DEIR is inadequate because it simply states that if toxic chemicals are found in soil at the Project site, then a clean-up plan will be developed at that time. Likewise, a generic vapor mitigation measure does not provide any ability of a reader of the EIR to review the as yet unidentified mitigation. The absence of any mitigations of groundwater contamination speaks for itself. This is precisely the type of deferred mitigation that is prohibited by CEQA.

2. The DEIR Fails to Adequately Analyze and Mitigate the Project's Impacts Related to Air Pollution.

The DEIR erroneously concludes that the Project will have less than significant emissions of nitrogen oxides (NOx) from construction. The DEIR concludes that construction-phase NOx will be 98 pounds per day (ppd), just slightly below the CEQA significance threshold of 100 ppd. (DEIR, p. 4.C-18.) SWAPE's review and inclusion of missing parameters in the air modeling demonstrates that the Project's construction NOx emissions will exceed CEQA significance thresholds.

The DEIR relies upon the CalEEMod to model the Project's construction and operational emissions. After reviewing the Project's CalEEMod output files, SWAPE found the following issues:

- The Modeling Failed to Include Parking Land Use: According to the DEIR, the Project proposes to include a total of "390 vehicle parking spaces within two levels of subterranean parking" (DEIR, p. 2-1.) Review of the Project's CalEEMod output files, located in Appendix D, however, demonstrates that the model completely omitted the proposed parking land use (Appendix D, pp. 17, 41.) By failing to include all of the Project's proposed land uses, the Project's construction emissions are underestimated. (SWAPE, pp. 7-8.)

- **The Modeling Incorrectly Assumed the Use of Tier 4 Final Equipment:** The DEIR estimates Project emissions assuming that all off-road construction equipment would be equipped with Tier 4 Final engines, yet fails to require the Project to use such equipment during Project construction (Appendix D, pp. 18, 42.) Not only does the DEIR fail to commit to using Tier 4 Final construction equipment, it also fails to include this as mitigation within the DEIR (Table 1-1, pp. 1-7 - 1-49), and, more importantly, fails to evaluate the feasibility of obtaining an entire construction fleet equipped with Tier 4 Final engines. By failing to discuss the reason for implementing Tier 4 Final equipment into the Project's design and by failing to include the use of Tier 4 engines in the Project's list of proposed mitigation, not only is the use of Tier 4 Final equipment entirely unenforceable, but it appears that the Project has no intention of using Tier 4 Final equipment during Project construction. Assuming the use and availability of Tier 4 Final equipment for Project use, without requiring that it actually will be used, failing to include it as mitigation, or verifying its availability, not only underestimates the Project's construction-related emissions, but it also significantly underestimates the health risk posed to nearby sensitive receptors. (SWAPE, pp. 8-10.)
- **The Modeling Uses an Incorrect Number of Daily Vehicle Trips:** A comparison of the Project's CalEEMod output files and the DEIR's Traffic Report study (Appendix I-1) demonstrates that the model underestimated the number of vehicle trips expected to occur during operation of the proposed Project. Specifically, the CalEEMod model underestimates the number of trips by approximately 62 trips per day, or by approximately **22,630 vehicle trips per year** (Appendix D, pp. 35, pp. 67, Appendix I-1, pp. 24). By underestimating the total number of vehicle trips expected to occur during Project operation, the DEIR greatly underestimates the Project's operational emissions. As a result, the DEIR's air pollution model is unreliable and should not be used to determine the significance of the Project's air quality impacts. (SWAPE, pp. 10-12.)
- **The Modeling Uses an Incorrect Trip Purpose Percentage:** The Project's CalEEMod model double counts the number of pass-by trips expected to occur throughout Project operation. CalEEMod separates the operational trip purposes into three categories: primary, diverted, and pass-by trips. According to Appendix A of the CalEEMod User's Guide, the primary trips utilize the complete trip lengths associated with each trip type category. Diverted trips are assumed to take a slightly different pass than a primary trip and are assumed to be 25% of the primary trip lengths. Pass-by trips are assumed to be 0.1 miles in length and are a result of no diversion from the primary route (<http://www.aqmd.gov/docs/default-source/caleemod/caleemod-appendixa.pdf?sfvrsn=2>, p. 20). Review of the Project's CalEEMod output files demonstrates that the trip purpose percentage was divided amongst primary, diverted, and pass-by trip types

for the Project's proposed retail and restaurant land uses (Appendix D, pp. 35, pp. 67). However, as demonstrated in the DEIR's Traffic Report, pass-by trips for both land uses were already accounted for in the Traffic Report's Project Traffic Generation calculations (Table 2, Appendix I-1, pp. 24). Therefore, the CalEEMod model should have divided the trip purpose between primary and diverted trips. Because the proposed Project's CalEEMod model incorrectly allocates the Project's operational trips to the various categories of trip purposes, the emissions associated with these trips are underestimated. (SWAPE, pp. 12-13.)

SWAPE corrected the above errors, re-ran CalEEMod, and determined that the Project will have significant air quality impacts, contrary to the conclusions of the DEIR. SWAPE concludes that the Project will have significant emissions of nitrogen oxides (NOx). (SWAPE, pp. 14-15.) Based on the corrected inputs to CalEEMod, during construction the Project will emit 116.6 lbs/day of NOx, almost 17 percent greater than the significance threshold established by the SCAQMD. (*Id.*, p. 14.) Although the NOx emissions from the Project's operation do not exceed SCAQMD's threshold, the DEIR also must be corrected to accurately reflect the fact that, based on the proper inputs to CalEEMod, the Project's operational NOx emissions increase by 64 percent to 24.6 lbs/day. (*Id.*, pp. 14-15.) Given the existing cumulative impacts to air quality in the Los Angeles air basin, the EIR should disclose this and consider additional operational mitigation measures.

NOx reacts with other chemicals in the air to form both PM and ground level ozone. The Los Angeles air basin suffers from the worst ozone pollution in the nation. The Project's NOx emissions will therefore be exacerbating an already unacceptable level of air pollution. As in the case of *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d at 718, the court concluded that an EIR inadequately considered an air pollution (ozone) cumulative impact. The court said: "The [] EIR concludes the project's contributions to ozone levels in the area would be immeasurable and, therefore, insignificant because the [cogeneration] plant would emit relatively minor amounts of [ozone] precursors compared to the total volume of [ozone] precursors emitted in Kings County. The EIR's analysis uses the magnitude of the current ozone problem in the air basin in order to trivialize the project's impact." The court concluded: "The relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin." As in Kings County, the Project will be exacerbating an already unacceptable ozone air pollution problem in the region. The DEIR is inadequate for failing to disclose this impact and therefore for failing to consider feasible mitigation measures and alternatives.

According to the U.S. Environmental Protection Agency (US EPA), even short-term exposure to ozone can have significant irreparable health impacts. US EPA states:

Ozone can cause the muscles in the airways to constrict, trapping air in the alveoli. This leads to wheezing and shortness of breath.

Ozone can:

- Make it more difficult to breathe deeply and vigorously.
- Cause shortness of breath, and pain when taking a deep breath.
- Cause coughing and sore or scratchy throat.
- Inflammate and damage the airways.
- Aggravate lung diseases such as asthma, emphysema, and chronic bronchitis.
- Increase the frequency of asthma attacks.
- Make the lungs more susceptible to infection.
- Continue to damage the lungs even when the symptoms have disappeared.
- Cause chronic obstructive pulmonary disease (COPD).

These effects have been found even in healthy people, but can be more serious in people with lung diseases such as asthma. They may lead to increased school absences, medication use, visits to doctors and emergency rooms, and hospital admissions.

Long-term exposure to ozone is linked to aggravation of asthma, and is likely to be one of many causes of asthma development. Long-term exposures to higher concentrations of ozone may also be linked to permanent lung damage, such as abnormal lung development in children.

Recent studies consistently report associations between short-term ozone exposures and total non-accidental mortality, which includes deaths from respiratory causes. Studies suggest that long-term exposure to ozone also may increase the risk of death from respiratory causes,³ but the evidence is not as strong as the evidence for short-term exposure.³

People with asthma, children, older adults, and people who are active outdoors, especially **outdoor workers** are most susceptible to health effects caused by ground level ozone.⁴ EPA has found “strong and convincing evidence that exposure to ozone is associated with exacerbation of asthma-related symptoms.” (66 Fed. Reg. 5002, 5012 (Jan. 18, 2001).)

As EPA observes, the impacts of ozone on “asthmatics are of special concern particularly in light of the growing asthma problem in the United States and the increased rates of asthma-related mortality and hospitalizations, especially among children in general and black children in particular.” (62 Fed. Reg. 38856, 38864 (July 18, 1997).) In fact:

³ U.S. EPA, “Health Effects of Ozone Pollution,” <https://www.epa.gov/ozone-pollution/health-effects-ozone-pollution>; 66 Fed. Reg. 5002, 5012 (Jan. 18, 2001).

⁴ *Id.*

Asthma is one of the most common and costly diseases in the United States. . . . Today, more than 5 percent of the US population has asthma. On average, **15 people died every day** from asthma in 1995. . . . In 1998, the cost of asthma to the U.S. economy was estimated to be \$11.3 billion, with hospitalizations accounting for the largest single portion of the cost. 66 Fed. Reg. at 5012 (emphasis added) (footnotes omitted).

The health and societal costs of asthma are wreaking havoc here in California. A 2000 study by the California Department of Health Services found that there were 2.2 million Californians suffering from asthma.⁵ In one year alone, nearly 56,413 residents, including 16,705 children, required hospitalization because their asthma attacks were so severe. Shockingly, asthma is one of the leading causes of hospital admissions of young children in California. (*Id.* at 1.) With asthma health complications a leading cause of school absenteeism,⁶ the same children struggling with a life-long health affliction are also being denied the educational opportunities enjoyed by healthy children.

In light of the above, it is necessary for a revised Draft EIR to be prepared and circulated to analyze the Project's significant NOx and ozone impacts and to consider all feasible mitigation measures and alternatives to reduce NOx emissions.

Feasible mitigation measures exist to reduce NOx impacts during the construction phase, which have not been required for this project. (See SWAPE, pp. 23-28.) CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and mitigation measures. (CEQA Guidelines § 15002(a)(2) and (3); See also, *Berkeley Jets*, 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.)

Feasible measures include switching to cleaner fuels such as alternative fuels (compressed natural gas, liquefied natural gas, propane, ethanol, and methanol) or alternative diesel fuels (emulsified diesel), and fuel borne-catalysts; replacing, repowering, or rebuilding old equipment; and retrofitting equipment with diesel particulate filters, diesel oxidation catalysts, selective catalytic reduction, lean NOx catalyst technology, and exhaust gas recirculation; all of which have been demonstrated on off-road equipment. (See SWAPE, pp. 23-28.) In addition, the following best management measures can help reduce exposure to diesel pollution and generation of ozone precursors:

⁵ Calif. Dep't of Health Servs., *California County Asthma Hospitalization Chart Book 1* (2000) ("*County Asthma Book*") (Ex. E-1).

⁶ President's Task Force on Env'tl. Health Risks & Safety Risks to Children, *Asthma and the Environment: A Strategy to Protect Children* 5 (Jan. 28, 1999) (revised May 2000), available at <http://www.epa.gov/children/whatwe/fin.pdf> (Ex. E-2) (some 10 million school days are missed annually due to asthma).

- Require on-site electrical service for hand tools;
- Require preparation of a traffic control plan;
- Demonstrate proper inspection and maintenance of construction equipment;
- Limit idling to 5 minutes;
- Configure construction parking to minimize traffic interference;
- Consolidate truck deliveries when possible;
- Provide dedicated turn lanes for movement of construction trucks and equipment on and off site;
- Suspend use of all construction equipment operations during second stage smog alerts;
- Establish a staging zone for trucks that are waiting to load or unload material at the work zone in a location where diesel emissions from the trucks will have minimum impact on abutters and the general public;
- Locate construction equipment away from sensitive receptors such as fresh air intakes to buildings, air conditioners and operable windows;
- Provide on-site lunch, e.g., a lunch wagon;
- Implement a carpool program for construction workers.
- Require all deliveries to the construction site to be made with trucks that meet clean engine standards or are otherwise equipped with post-combustion controls that reduce emissions compared to uncontrolled equivalents by 50% for NOx, 90% for ROG and CO, and 80% for PM10/PM2.5.
- Prohibit the use of conventional cut-back asphalt for paving and restrict the maximum VOC content of asphalt emulsion;
- Use low-ROG paints and other low-ROG construction materials;
- Employ a construction site manager to verify that engines are properly maintained and keep a maintenance log;
- Require all diesel trucks used by construction contractor(s) at the site, or for on-road hauling of construction material, to be post-1996 models; and
- Prohibit diesel portable generators less than 50 hp at the construction site.

A supplemental DEIR should be prepared to analyze these impacts and consider these mitigation measures.

3. The DEIR Fails to Properly Analyze Significant Cumulative Air Quality Impacts.

The DEIR states that, "individual projects that generate emissions not in excess of SCAQMD's significance thresholds would not contribute considerably to any potential cumulative impact." (DEIR, p. 4.C-20.) Therefore, the DEIR concludes that Project construction and long-term operational emissions would not result in a cumulatively considerable impact. (DEIR, p. 4.C-22.)

This reasoning, however, is incorrect. First, as discussed above, the Project's individual air quality impacts are, in fact, significant. Second, even if the Project's individual air impacts were slightly below significance thresholds (which they are not),

the DEIR's legal analysis is incorrect. According to CEQA Guidelines Section 15355, "Cumulative impacts" refers to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts" (http://www.dot.ca.gov/ser/cumulative_guidance/ceqa_guidelines.htm). Furthermore, the Section 15064(h)(1) of the CEQA Guidelines state,

"The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time"
(http://www.dot.ca.gov/ser/cumulative_guidance/ceqa_guidelines.htm).

Recognizing that several projects may together have a considerable impact, CEQA requires an agency to consider the "cumulative impacts" of a project along with other projects in the area. (Pub. Res. Code §21083(b); CEQA Guidelines §15355(b).) If a project may have cumulative impacts, the agency must prepare an EIR, since "a project may have a significant effect on the environment if "[t]he possible effects of a project are individually limited but cumulatively considerable." (*Communities for a Better Environment v. Calif. Resources Agency*, 103 Cal.App.4th at 114; *Kings County Farm Bur. v. City of Hanford* (1990) 221 Cal.App.3d 692, 721 ("Kings Co.")). It is vital that an agency assess "the environmental damage [that] often occurs incrementally from a variety of small sources . . ." (*Bakersfield Citizens For Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214.)

The DEIR identifies 118 projects relevant to the Project's cumulative impacts. (DEIR, Table 3-1, pp. 96-101.) SWAPE calculates that, of the 118 projects identified in the DEIR, 47 of them are located within a mile of the Project site and 22 are located within a half-mile. (SWAPE, pp. 16-17.) Despite the large number of projects identified in the EIR and their close proximity to the Project, the DEIR makes no effort to consider the actual amount of pollutants being emitted by all of those new projects and then compare the cumulative effect of those total emissions on the air quality standards. (*Id.*, pp. 15-17.) Taken together, even if one assumes all 118 projects do not emit air pollutants in excess of any SCAQMD threshold, they may, as a group, have significant impacts on air quality in the City. (*Id.*) The DEIR, however, does not confirm whether each of the 118 projects will emit air pollutants below SCAQMD thresholds. Given the City's authority to approve a project notwithstanding its air quality impacts, one cannot determine from the DEIR whether many of the listed projects are expected to emit air pollutants at levels that will have significant impacts.

Therefore, simply because the DEIR found the Project's individual emissions to not exceed SCAQMD thresholds does not mean that the Project, in combination with surrounding projects, is not cumulatively significant. As a result, the DEIR's cumulative air quality analysis is insufficient and should not be relied upon to determine Project significance.

4. The DEIR Incorrectly Analyzes Health Risks Posed by the Project.

Sensitive receptors are estimated by the EIR to be within 1 meter of the Project site. Rather than evaluate any cancer risk to nearby residents and workers, the DEIR concludes that because the Project's criteria air pollutant emissions would not exceed SCAQMD significance thresholds, "the Project would not expose sensitive receptors to substantial pollutant emissions" and "therefore, Project impacts related to sensitive receptors during construction would be less than significant" (DEIR, p. 4.C-17). Additionally, in reference to the Project's operational emissions, the DEIR states:

TAC emissions are not expected to be significant, as the Project does not include typical sources of acutely and chronically hazardous TACs such as industrial manufacturing processes and automotive repair facilities. In addition, SCAQMD recommends that health risk assessments be conducted for substantial sources of diesel particulate emissions (e.g., truck stops and warehouse distribution facilities) and has provided guidance for analyzing mobile source diesel emissions. The Project would not generate a substantial number of truck trips. Based on the limited activity of TAC sources, the Project would not warrant the need for a health risk assessment associated with on-site activities, and any minimal TAC impacts would be less than significant" (DEIR, p. 4.C-20).

This justification for failing to conduct a quantified construction and operational HRA, however, is incorrect and is inconsistent with the most recent guidance published by the Office of Environmental Health Hazard Assessment ("OEHHA"). First, as discussed above, the Project will, in fact, have significant criteria air pollutant emissions. Second, SCAQMD's guidance does not limit HRAs for industrial or automotive repair projects. Instead, SCAQMD suggests that "projects with diesel powered mobile sources use the following guidance document ('Health Risk Assessment Guidance for Analyzing Cancer Risks from Mobile Source Diesel Idling Emissions for CEQA Air Quality Analysis') to quantify potential cancer risks from the diesel particulate emission." ("Mobile Source Toxics Analysis," SCAQMD, *available at*: <http://www.aqmd.gov/home/regulations/ceqa/air-quality-analysis-handbook/mobile-source-toxics-analysis>; SWAPE, pp. 18-19.)

In addition, OEHHA recommends that all short-term projects lasting at least two months be evaluated for cancer risks to nearby sensitive receptors. (SWAPE, p. 14, citing "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, p. 8-18.) The OEHHA document recommends that exposure from projects lasting more than 6 months should be evaluated for the duration of the project, and recommends that an exposure duration of 30 years be used to estimate individual cancer risk for the maximally exposed individual resident (MEIR). (SWAPE, pp. 19-20.)

SWAPE has prepared a screening level health risk assessment of the Project's emissions of diesel particulate matter. (SWAPE, pp. 20-23.) Because of the excessive

cancer risks identified by that screening level assessment, a full HRA should be conducted for the Project and disclosed and evaluating in the EIR. SWAPE's review identifies cancer risks resulting from the Project's construction and operation of 23, 150, and 290 in one million for adults, children and infants, respectively. (*Id.*, p. 22.) SWAPE further calculates the excess cancer risk over the course of a residential lifetime (30 years) as approximately 470 in one million. (*Id.*) All of these cancer risks exceed the SCAQMD threshold of 10 in one million. (*Id.*) Based on this evidence, a refined health risk assessment should be prepared for the Project and the potentially significant impacts of exposures to toxic air contaminants fully addressed in the EIR. Until this potential impact and appropriate mitigations are addressed in the EIR, the EIR will be deficient pursuant to CEQA. (See SWAPE, pp. 23-28, 33-40 (identifying numerous additional mitigation measures that can be employed by the Project).)

5. The DEIR Improperly Analyzes Greenhouse Gas Impacts.

To address greenhouse gas ("GHGs") impacts, the DEIR compares the Project's construction and operational greenhouse gas (GHG) emissions to the emissions that would be generated by the Project in the absence of any GHG reduction measures, also known as a Business As Usual (BAU) scenario or as a No Action Taken (NAT) scenario (DEIR, p. 4.E-31.) Using this method, the DEIR concludes that because the Project would achieve a 31 percent reduction in GHGs between the BAU and As Proposed scenarios (DEIR, Table 4.E-7, p. 4.E-31) – which is greater than the AB 32 2014 Revised Scoping Plan's statewide reduction goal of 15.3 percent for 2020 (Table 4.E-4, p. 4.E-12) – the Project would have a less than significant GHG impact. (DEIR, p. 4.E-38).

The DEIR's comparison of project-specific reductions to statewide reduction goals, however, is not appropriate. In the recent case of *Center for Biological Diversity et al. v. California Department of Fish and Wildlife and the Newhall Land and Farming Company* (2015) 62 Cal.4th 204 ("*Newhall*"), the Supreme Court held that the approach utilized in the DEIR to achieve compliance with AB 32, in which a straight-line comparison is made between the Project's emission reductions and the statewide target, is improper. The *Newhall* case concludes that lead agencies cannot use the statewide GHG emission reduction percentage as the CEQA threshold to determine whether a specific project-level proposed Project has significant GHG emissions. The *Newhall* case explicitly states that the BAU methodology can only be used if the lead agency provides an adjusted, project-specific GHG percent reduction that the Project must achieve in order to comply with statewide goals. Because the DEIR fails to provide this adjusted project-specific value, the use of a BAU comparison method to determine Project significance is incorrect. For this reason alone, the EIR's GHG discussion and analysis must be redrafted.

In the absence of a legitimate GHG analysis, SWAPE has identified a significance threshold proposed by the SCAQMD and conducted a project-specific analysis of the Project's GHG emissions and their potential environmental significance. (SWAPE, p. 31.) SWAPE identifies a proposed significance threshold identified by

SCAQMD staff of 3,000 MT CO₂e/yr for all non-industrial projects. (*Id.*) SWAPE then calculates that, based either on the flawed air quality modelling used in the DEIR or SWAPE's corrected air modelling result discussed above, the Project's GHG emissions will exceed 3,000 MT CO₂e/yr. (*Id.*, pp. 32-33.) Because the Project exceeds that screening level, SWAPE then compares the Project's emissions to a 2020 efficiency target of 4.8 MT CO₂e/sp/yr and a 2035 efficiency target of 3.0 MT CO₂e/sp/yr, also proposed by SCAQMD's staff. (*Id.*, p. 33-35.) Applying guidance provided by the California Air Pollution Control Officers Association's (CAPCOA), SWAPE calculates that, employing the flawed DEIR air model, the Project's efficiency will be 4.6 MT CO₂e/sp/yr, exceeding the 2035 efficiency target. (*Id.*) Employing SWAPE's corrected air modeling, the Project's efficiency degrades to 6.4 MT CO₂e/sp/yr – will above the efficiency SCAQMD's proposed efficiency requirements for both 2020 and 2035. (*Id.*) SWAPE's analysis is substantial evidence of a fair argument that the Project will have adverse GHG impacts throughout its operative life. Because the DEIR's current GHG analysis is obviously improper, a new GHG analysis must be prepared and mitigations identified.

D. THE CITY SHOULD PREPARE AND RECIRCULATE A SUPPLEMENTAL DEIR

A supplemental draft EIR ("SDEIR") should be prepared and circulated for full public review to address the impacts identified above and to propose feasible mitigation measures. CEQA requires re-circulation of an EIR when significant new information is added to the EIR following public review but before certification. (Pub. Res. Code § 21092.1.) 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." (CEQA Guidelines § 15088.5.) The above significant environmental impacts have not been analyzed in the EIR and must be addressed in a supplemental DEIR that is re-circulated for public review.

Sincerely,



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