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Via Email and Overnight Mail

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**Re: Gateway Crossings Project, SCH2017022066, PLN2016-12318,
PLN2016-12321, PLN2016-12481, and CEQ2016- 01025**

Honorable Members of the Planning Commission:

I am writing on behalf of the **Laborers International Union of North America, Local Union 270** and its members living in Santa Clara County and/or the City of Santa Clara ("LiUNA"), regarding the Gateway Crossings Project, aka SCH2017022066, PLN2016-12318, PLN2016-12321, PLN2016-12481, and CEQ2016-01025, including all actions related or referring to the proposed construction of a phased mixed-use development, to include up to 1,600 residential units, 182,000 square foot hotel, 15,000 square feet of ancillary retail, and parking at 1205 Coleman Avenue on APNs: 230-46-069 and 230-46-070 in the City of Santa Clara ("Project").

We have reviewed the Draft Environmental Impact Report ("DEIR") and Final Environmental Impact Report ("FEIR") for the Project and conclude that the

documents fail to comply with the California Environmental Quality Act ("CEQA"). We therefore request that the City prepare a Revised Environmental Impact Report ("REIR") to address the deficiencies on the EIR.

PROJECT DESCRIPTION

The project requires a General Plan Amendment (GPA) to change the land use designation on the site to Very High Density Residential to allow residential development at 51 to 100 du/ac in conjunction with a minimum commercial FAR of 0.20; an amendment to the General Plan Land Use Map for the Santa Clara Station Focus Area to reflect the General Plan change; and an amendment to Appendix 8.13 to the General Plan (the Climate Action Plan) to establish a 20 percent reduction in Vehicle Miles Traveled (VMT), half of which (a 10 percent reduction) would be achieved with a Transportation Demand Management (TDM) program. In addition, the project requires a Zoning Code text amendment to add a new zoning designation of Very High Density Mixed Use to facilitate the development of the land uses and building types contemplated for the project site; and a rezoning of the project site to the new zoning designation. The project also includes a Vesting Tentative Parcel Map and Development Agreement.

The project would develop one of two options:

- Option 1: Up to 1,400 dwelling units and up to 215,000 square feet of commercial uses, or
- Option 2: Up to 1,600 dwelling units and up to 215,000 square feet of commercial uses.

Option 2 is the preferred project alternative. The proposed maximum building height on the site under both options is 150 feet and subject to the Federal Aviation Administration (FAA) Regulations Part 77 height restrictions. Under both options, the development would have a minimum setback of 25 feet from Coleman Avenue and Brokaw Road.

LEGAL STANDARD

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." *Comms. for a Better Env't 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 v. Board of Supervisors* (1990) 52 Cal.3d 553, 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 ("PRC") § 21081; CEQA Guidelines § 15092(b)(2)(A) & (B).

The EIR is the very heart of CEQA. *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. CEQA requires that a lead agency analyze all potentially significant environmental impacts of its proposed actions in an EIR. PRC § 21100(b)(1); CEQA Guidelines § 15126(a); *Berkeley Jets*, 91 Cal.App.4th 1344, 1354. The 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 '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 Env't v. Calif. Resources Agency* (2002) 103 Cal.App.4th 98, 109.

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 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 391 409, fn. 12. 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.

The lead agency must evaluate comments on the draft EIR and prepare written responses in the final EIR (“FEIR”). (PRC §21091(d)) The FEIR must include a “detailed” written response to all “significant environmental issues” raised by commenters. As the court stated in *City of Long Beach v. LA USD* (2009) 176 Cal.App.4th 889, 904:

The requirement of a detailed written response to comments helps to ensure that the lead agency will fully consider the environmental consequences of a decision before it is made, that the decision is well informed and open to public scrutiny, and that public participation in the environmental review process is meaningful.

The FEIR’s responses to comments must be detailed and must provide a reasoned, good faith analysis. (14 CCR §15088(c)) Failure to provide a substantive response to comment render the EIR legally inadequate. (*Rural Land Owners Assoc. v. City Council* (1983) 143 Cal.App.3d 1013, 1020)

The responses to comments on a draft EIR must state reasons for rejecting suggested mitigation measures and comments on significant environmental issues. “Conclusory statements unsupported by factual information” are not an adequate response. (14 CCR §15088(b, c); *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3rd 348) The need for substantive, detailed response is particularly appropriate when comments have been raised by experts or other agencies. (*Berkeley Keep Jets v. Bd. of Port Comm’rs* (2001) 91 Cal.App.4th 1344, 1367; *People v. Kern* (1976) 72 Cal.app.3d 761) A reasoned analysis of the issue and references to supporting evidence are required for substantive comments raised. (*Calif. Oak Found. v. Santa Clarita* (2005) 133 Cal.App.4th 1219)

The FEIR abjectly fails to meet these legal standards, as it is riddled with conclusory statements lacking any factual support or analysis.

DISCUSSION

1. The EIR Fails to Analyze Indoor Air Quality Impacts.

We submit herewith the comments of indoor air quality expert, Francis Offermann, PE, CIH. (Exhibit A). Mr. Offermann, a Certified Industrial Hygienist, concludes that it is likely that the Project will expose future residents to significant impacts related to indoor air quality, and in particular, emissions for the cancer-causing chemical formaldehyde. Mr. Offermann is one of the world's leading experts on indoor air quality and has published extensively on the topic.

Mr. Offermann explains that many composite wood products typically used in modern home construction contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. He states, "The primary source formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particle board. These materials are commonly used in residential building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims."

Formaldehyde is a known human carcinogen. Mr. Offermann states that there is a fair argument that residents of the Amare Project will be exposed to a cancer risk from formaldehyde of approximately 180 per million. This is far above the Bay Area Air Quality Management District (BAAQMD) CEQA significance threshold for airborne cancer risk of 10 per million. Mr. Offermann states:

Therefore, the cancer risk of a resident living in a median California home with the median indoor formaldehyde concentration of 36 $\mu\text{g}/\text{m}^3$, is 180 per million as a result of formaldehyde alone. Assuming the Amare project will be built using typical materials and construction methods used in California, there is a fair argument that future residents will experience a cancer risk from formaldehyde of approximately 180 per million. The CEQA significance threshold for airborne cancer risk is 10 per million, as established by the Bay Area Air Quality Management District (BAAQMD, 2017). There is a fair argument that the Amare project will expose future residents to a significant airborne cancer risk of 180 per million, which is 18 times above the CEQA significance threshold. This impact should be analyzed in an environmental impact report ("EIR"), and the agency should impose all feasible mitigation measures to reduce this impact. Several feasible mitigation measures are discussed below and these and other measures should be analyzed in an EIR.

Even if the Project uses modern "CARB-compliant" materials, Mr. Offermann concludes that formaldehyde will create a cancer risk more than ten times above the

CEQA significance threshold. Mr. Offermann concludes that this significant environmental impact should be analyzed in an EIR and mitigation measures should be imposed to reduce the risk of formaldehyde exposure.

When a Project exceeds a duly adopted CEQA significance threshold, as here, this alone establishes a fair argument that the project will have a significant adverse environmental impact and an EIR is required. Indeed, in many instances, such air quality thresholds are the only criteria reviewed and treated as dispositive in evaluating the significance of a project's air quality impacts. See, e.g. *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (County applies BAAQMD's "published CEQA quantitative criteria" and "threshold level of cumulative significance"). See also *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-111 ("A 'threshold of significance' for a given environmental effect is simply that level at which the lead agency finds the effects of the project to be significant"). The California Supreme Court made clear the substantial importance that an air district significance threshold plays in providing substantial evidence of a significant adverse impact. *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327 ("As the [South Coast Air Quality Management] District's established significance threshold for NOx is 55 pounds per day, these estimates [of NOx emissions of 201 to 456 pounds per day] constitute substantial evidence supporting a fair argument for a significant adverse impact"). Since expert evidence demonstrates that the Project will exceed the BAAQMD's CEQA significance threshold, there is a fair argument that the Project will have significant adverse and an EIR is required.

Mr. Offermann suggests several feasible mitigation measures, such as requiring the use of no-added-formaldehyde composite wood products, which are readily available. Mr. Offermann also suggests requiring air ventilation systems which would reduce formaldehyde levels. Since the EIR does not analyze this impact at all, none of these or other mitigation measures are considered.

2. The EIR Fails to Address or Adequately Mitigate Significant Biological Impacts.

Wildlife biologist Dr. Shawn Smallwood, Ph.D., submits comments herewith. (Exhibit B). Dr. Smallwood concludes that the Project will have significant impacts on many special status species, contrary to the conclusions of the EIR.

According to the EIR (p.59), "Given the urbanized nature of the project site and surrounding area, there are no ... special-status animal or plant species on or adjacent to the site." Dr. Smallwood concludes that the EIR is mistaken. He states:

A quick review of eBird reveals 27 special-status species documented very close to the site of the proposed project (Table 1). Many of these species occurrences are on Mineta San Jose International Airport, but others occur in various open spaces near the site. A bald eagle was seen near the Gateway Crossings site only two weeks ago (eBird). Furthermore, the longest-running study of burrowing owls of which I am aware took place at the Airport (Barclay 2007, Barclay et al. 2011, Menzel 2014, 2018). Beginning in 1989 and continuing through 2011, this study invested heavily in efforts to encourage burrowing owl breeding success, which is critical because burrowing owls have declined to the point of near extirpation in the region. The study collected 14,088 burrowing owl records, which must be the most massive data base on burrowing owls collected anywhere. Forty breeding pairs of burrowing owls occupied the Airport in 2002, although the number has declined since then. Burrowing owl nest sites were located only 400 m from the site of the proposed Gateway Crossings Project. Additionally, Menzel (2014) listed bird species detected at the Airport during her burrowing owl research there, 7 of which are special-status species also reported in the area on eBird (Table 2).

The fact that the EIR failed to identify protected species such as the bald eagle and burrowing owl demonstrates that the EIR fails to include an adequate environmental setting analysis.

Dr. Smallwood concludes that the Project will have adverse impacts on various special status species. For example, placing tall buildings near burrowing owls will increase opportunities for predators to prey on burrowing owls since predator species perch on tall buildings and swoop down upon burrowing owls and other species.

Dr. Smallwood also concludes that the widespread use of large glass windows in the Project will result in collision deaths since birds will fly into those windows. Dr. Smallwood concludes that mitigation measures in the EIR are inadequate to mitigate bird collision impacts. Dr. Smallwood suggests numerous feasible measures to reduce bird collisions, but these measures are not analyzed in the EIR.

Dr. Smallwood concludes that the Project will interfere with wildlife movement, contrary to the conclusions of the EIR. He also concludes that the traffic generated by the Project will result in the death of special status species from vehicular collisions. Species likely to be affected by vehicular collisions include, Alameda whipsnake (*Masticophis lateralis euryxanthus*), California red-legged frog (*Rana draytonii*), California tiger salamander (*Ambystoma californiense*), and American badger (*Taxidea taxus*).

3. The EIR Fails to Adequately Mitigate the Project's Significant Traffic Impacts.

a. The EIR Uses an Improper Baseline.

The EIR uses an improper baseline. The EIR subtracts air quality emissions and traffic from the BAE project from the emissions and traffic of the proposed Project. This artificially makes it appear that Project emissions and traffic will be lower than they actually will be. This "baseline" approach is improper because the BAE project has been closed for more than two years and was closed at time of the Notice of Preparation. The DEIR (p. 25) states:

The former buildings were occupied by BAE systems until as recent as April 2016. The project site is currently vacant and undeveloped and has minimal physical features. The project site is secured by five to 10-foot chain link fencing around the perimeter of the property. As shown in Photos 1 and 2, most of the fencing is screened, obscuring views of the project site from the surrounding public right-of-way. The project site consists of bare ground with some areas covered with ruderal vegetation. There are several tall mounds of aggregate and/or dirt on-site and electricity poles and overhead wires. An existing Groundwater Extraction and Treatment System (GWETS) is located on the western boundary of the site, which can be seen from Brokaw Road. Existing mature trees are located at the southeastern corner of the project site (refer to Section 3.4 Biological Resources for more information about the trees on-site).

The Notice of Preparation (NOP) was posted on February 21, 2017 – one year after the closure of BAE in April 2016.

Every CEQA document must start from a "baseline" assumption. The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. *Communities for a Better Environment v. So Coast Air Qual. Mgmt. Dist.* (2010) 48 Cal. 4th 310, 321. Section 15125(a) of the CEQA Guidelines (14 C.C.R., § 15125(a)) states in pertinent part that a lead agency's environmental review under CEQA:

An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist **at the time the notice of preparation is published**, or if no notice of preparation is published, at the time environmental analysis is commenced, 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. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives.

(See, *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124-125 (“*Save Our Peninsula*.”) As the court of appeal has explained, “the impacts of the project must be measured against the ‘real conditions on the ground,’” and not against hypothetical permitted levels. (*Save Our Peninsula*, 87 Cal.App.4th 99, 121-123.) As the court has explained, using such a skewed baseline “mislead(s) the public” and “draws a red herring across the path of public input.” (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 656; *Woodward Park Homeowners v. City of Fresno* (2007) 150 Cal.App.4th 683, 708-711.)

Since the BAE facility was closed at the time the NOP was published, it was legally erroneous for the EIR to subtract the BAE emissions and traffic from the proposed Project’s traffic. This created a false impression for the public that the Project’s impacts will be less significant than they will actually be when compared to the true baseline of a vacant site.

Traffic Engineer Daniel T. Smith, PE, demonstrates that the baseline traffic counts for the EIR were conducted when the BAE project was still operational in 2014 and 2015. Thus, the EIR uses an improper baseline for traffic analysis. Mr. Smith concludes that this results in a very significant underestimation of Project traffic:

This results in an 18.37 percent reduction in the net new daily trips, a 37.8 percent reduction in the AM peak trips and a 27.29 percent reduction in the PM trips actually generated by the Project. As a result, the Project’s transportation impacts are greatly underestimated

The Final EIR (p. 39) admits that the traffic baseline was conducted while the BAE facility was still operational, but the FEIR does not correct this error. This constitutes an inadequate response to comments, as well as a failure to utilize a proper baseline.

b. The EIR Fails to Adequately Mitigate the Project's Significant Traffic Impacts.

The DEIR identified 21 freeway segment impacts and states that the Project Developer will provide a voluntary contribution toward the VTA US 101 Double Express Lanes project. Voluntary contributions are not adequate mitigation. Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments. 14 CCR § 15126.4(a)(2). See *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal. App. 4th 683, 730 (project proponent's agreement to a mitigation by itself is insufficient; mitigation measure must be an enforceable requirement). A voluntary contribution is by definition not enforceable.

The EIR relies on a VMT reduction plan that has not yet been developed. CEQA prohibits this type of deferred mitigation. The DEIR states:

a Vehicle Miles Traveled (VMT) Reduction Plan shall be developed and implemented. As described in Section 2.2.1.4 of the Draft EIR, the VMT Reduction Plan shall achieve a 20 percent reduction in project VMT, half of which (a 10 percent reduction) shall be achieved with Transportation Demand Management (TDM) measures.

"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 v. County of Mendocino* (1988) 202 Cal.App.3d 296, 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.)

4. The Project Lacks Affordable Housing in Conflict with the General Plan.

The Project does not include any affordable housing units, in complete disregard of the applicable General Plan policies. This is of particular concern to LIUNA members who are increasingly priced out of the area.

The General Plan policies for the Santa Clara Station Focus Area, in which the Project is located, specifically calls for the development of affordable housing within the Focus Area.

5.4.3-P20 Highly encourage the development of affordable housing and senior housing that is well designed and compatible with adjacent uses in the Santa Clara Station Focus Area.

According to the California Department of Housing and Community Development, the City has made “insufficient progress” toward its Lower Income Regional Housing Needs Allocation (RHNA), which includes housing for very low and low income.

The Final EIR rejects comments made concerning affordable housing, arguing that the issue is socio-economic and not environmental, and therefore not within the scope of CEQA. This is mistaken. It is well-established that urban decay is a CEQA issue. The lack of affordable housing has led to an increase in homelessness, which is a prime contributor to urban decay. In *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) (124 Cal.App.4th 1184) (*Bakersfield Citizens*), the court expressly held that an EIR must analyze a project’s potential to cause urban decay if there is substantial evidence showing that the project may lead to such impacts. The court pointed out that CEQA requires the project proponent to discuss the project’s economic and social impacts where “[a]n EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes caused in turn by the economic and social changes.” (CEQA Guidelines §§ 15131(a) and 15064(f).)

Where a local or regional policy of general applicability, such as an ordinance, is adopted in order to avoid or mitigate environmental effects, a conflict with that policy in itself indicates a potentially significant impact on the environment. (*Pocket*

Protectors v. Sacramento (2005) 124 Cal.App.4th 903.) Indeed, any inconsistencies between a proposed project and applicable plans must be discussed in an EIR. (14 CCR § 15125(d); *City of Long Beach v. Los Angeles Unif. School Dist.* (2009) 176 Cal. App. 4th 889, 918; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 874 (EIR inadequate when Lead Agency failed to identify relationship of project to relevant local plans).) A Project's inconsistencies with local plans and policies constitute significant impacts under CEQA. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4, 32 Cal.Rptr.3d 177; see also, *County of El Dorado v. Dept. of Transp.* (2005) 133 Cal.App.4th 1376 (fact that a project may be consistent with a plan, such as an air plan, does not necessarily mean that it does not have significant impacts).)

A supplemental EIR should be prepared to analyze the impacts of the Project's lack of affordable housing and the impact on urban decay. It should propose feasible mitigation measures, such as requiring more affordable housing in the Project, contributions to low-income housing funding, etc.

5. The EIR Fails to Adequately Analyze or Mitigate the Project's Significant Air Quality Impacts.

The expert consulting firm, Soil, Water, Air Protection Enterprise (SWAPE), demonstrates that the EIR improperly calculates air quality impacts. SWAPE concludes that the Project will have significant nitrogen oxide (NOx) and reactive organic compound (ROG) emissions, contrary to the conclusion of the EIR. SWAPE states:

When correct, site-specific input parameters are used to model emissions, we find that the Project's operational ROG and NOx emissions increase significantly when compared to the DEIR's CalEEMod model emission estimates for full Project build out. Furthermore, we find that ROG and NOx emissions exceed the 54 pounds per day (lbs/day) thresholds set for by the BAAQMD (see table below)...

As you can see in the table above, when emissions are modeled correctly, both ROG and NOx emissions would exceed BAAQMD thresholds. Specifically, our analysis demonstrates that operational activity would emit approximately 61 lbs/day of ROG emissions and approximately 57 lbs/day of NOx emissions, which is higher than what the DEIR previously estimated.

The Final EIR inadequately responds to these comments. First, the FEIR states that there is no requirement to consider overlapping construction and operational emissions. This is incorrect. The courts have held that an agency may not piecemeal a project and consider emissions from different sources separately. For example, in *Kings County Farm Bureau v. Hanford*, the court held that it was legal error to consider mobile source emissions separately from stationary source emissions. See *Kings County Farm Bureau v. Hanford* (1990) 221 Cal.App.3d 692, 716-17 (agency must consider “the whole of an action” including indirect truck impacts, together with direct power plant impacts).

SWAPE calculates that the Project will have highly significant airborne cancer risk impacts, far above CEQA significance thresholds. SWAPE calculates that the Project will create an airborne cancer risk of 107 per million – far above the BAAQMD CEQA significance threshold of 10 per million. The FEIR dismisses this comment, stating that the Project will comply with BAAQMD requirements, and that “Sources of air pollutant emissions complying with all applicable BAAQMD regulations generally are not be considered to have a significant air quality community risk impact.” (FEIR p. 31).

This analysis is incorrect. The courts have held that compliance with Air District rules is not sufficient to render an impact less than significant for CEQA purposes. In *Kings County Farm Bureau v. Hanford* (1990) 221 Cal.App.3d 692, 716, the court held that that EPA and local Air District issued permits for plant does not establish no significant effect under CEQA.

The Final EIR also conducts a different health risk assessment that allegedly shows a cancer risk less than 10 per million. However, the HRA used in the FEIR fails to comply with the recent California Office of Environmental Health Hazard Assessment (OEHHA) methodology. The lead agency is required to use the agency-approved methodology, not some other obsolete methodology. *Endangered Habitats League v. Orange* (2005) 131 Cal.App.4th 777.

CONCLUSION

For the foregoing reasons, and for the reasons set forth by other commenters (which are incorporated herein by reference), the EIR for the Gateway Crossing Project is legally inadequate. A revised EIR is required to analyze and mitigate the proposed Project's significant impacts.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard Drury", written over a horizontal line.

Richard Drury