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VIA E-MAIL AND HAND DELIVERY

June 18, 2019

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Re: Otay Ranch Planning Area 12 Project – Consideration of Addendum (IS17-0005) to Final Environmental Impact Report (FEIR) 02-04; Consideration of an amendment to the Otay Ranch Freeway Commercial GDP (MPA17-0012), SPA Plan (MPA17-0011) and associated regulatory documents

Honorable Mayor and Councilmembers:

I am writing on behalf of the Supporters' Alliance for Environmental Responsibility ("SAFER") and its members living in the City of Chula Vista ("SAFER") concerning the Otay Ranch Planning Area 12 Project, and the Third Addendum to the Final Environmental Impact Report ("EIR") for the Otay Ranch Freeway Commercial Sectional Planning Area (SPA) Plan Planning Area 12 (EIR-02-04 / SCH #1989010154). On May 22, 2019, the Chula Vista Planning Commission adopted a resolution recommending that the City Council consider the third Addendum to FEIR 02-04, approve a resolution amending the Otay Ranch GDP, and additional recommendations related to the development of 300 residential units to the northeastern portion of Planning Area 12, which is also referred to as Freeway Commercial North (FC-2) ("Project"). This letter hereby reincorporates by reference the comments that SAFER made regarding the Project in its May 21, 2019 letter to the Planning Commission.

The City of Chula Vista ("City") is proposing to approve the Project without review under the California Environmental Quality Act ("CEQA"), Pub. Res. Code section 21000, et seq., based on the assertion that the Project is consistent with the previously certified 2003 Final Environmental Impact Report for the Otay Ranch Freeway Commercial Sectional Planning Area (SPA) Plan Planning Area 12 (EIR-02-04 / SCH #1989010154) ("2003 EIR"). The City contends that under CEQA Guidelines sections 15162 and 15164, no further environmental review is required. Instead, the City relies on a brief addendum prepared for the Project, entitled "Third Addendum to EIR Otay Ranch Freeway Commercial Sectional Planning Area (SPA) Plan Planning Area 12" ("Third Addendum").

A number of highly qualified experts have reviewed the proposed Project and its environmental effects. Environmental consulting firm SWAPE; wildlife ecologist Shawn Smallwood, Ph.D; and traffic engineer Daniel Smith. Jr., P.E. have identified a number of significant impacts from the proposed Project including air quality impacts, impacts to biological resources, and traffic impacts, as well as omissions and flaws in the documents relied upon by staff. These comments are attached hereto as Exhibits A through C. SAFER will also be separately submitting additional expert comments from Certified Industrial Hygienist Francis "Bud" Offermann, PE, CIH.

By opting to proceed with an Addendum instead of the required EIR, the City has deprived the members of the public of the public review and circulation requirement available for EIRs. SAFER urges the City Council not to adopt the Third Addendum to FEIR 02-04 or approve the Project, and instead to direct staff to prepare a Draft EIR for the Project, and to circulate the Draft EIR for public review and comment prior to Project approval.

PROJECT DESCRIPTION

The Project plans to add 300 dwelling units to the northeastern portion of Planning Area 12, also known as FC-2. All 300 units would be added to the area east of Town Center Drive. The west portion of the FC-2 site would remain unchanged. The project site is surrounded by other Otay Ranch development areas including Village 6 to the west, Village 11 to the east, a portion of the existing Eastlake community to the north and northeast, Village 7 to the southwest, and the EUC to the south of Birch Road. Eastlake High School and a commercial area are located north of the project site and the Arco Olympic Training Center is located east of the project site, immediately adjacent to Otay Lake.

The additional units would be designed as a mid-rise style building, consisting of residential units and ground-floor retail which would wrap around an above-grade parking structure. This design feature would eliminate the need for large areas of surface parking lots and allow for an enhanced pedestrian-oriented design. It would also provide accessible parking for occupants as the residential units and ground-floor retail space would surround the parking structure. With this density increase proposed by this Addendum, the proposed modifications would also increase the maximum building height to 84 feet and 8 inches above-grade.

LEGAL STANDARD

CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the fair argument standard. Under that standard, a lead agency must prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment. (Pub. Res. Code § 21082.2; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1993) 6 Cal. 4th 1112, 1123 (*Laurel Heights II*); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.)

The City relies on CEQA Guidelines § 15162 and 15164 to claim that no CEQA review is required. The court of appeal recently stated, "The addendum is the other side of the coin from the supplement to an EIR. This section provides an interpretation with a label and an explanation of the kind of document that does not need additional public review." "It must be remembered that an addendum is prepared where '(2) **Only minor technical changes or additions are necessary to make the EIR under consideration adequate under CEQA; and (3) The changes to the EIR made by the addendum do not raise important new issues about the significant effects on the environment.**' ([Guideline] 15164, subd. (a).)" (*Save Our Heritage Org. v. City of San Diego* (2018) 28 Cal.App.5th 656, 664–65 [emphasis added].)

Section 15164(a) of the State CEQA Guidelines states that "the lead agency or a responsible agency shall prepare an addendum to a previously certified EIR if some changes or additions are necessary, but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred." Pursuant to Section 15162(a) of the State CEQA Guidelines, a subsequent EIR or Negative Declaration is only required when:

(1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
    (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
    (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
    (C) Mitigation measures or alternatives previously found not to be feasible would, in fact, be feasible and would substantially reduce one or more significant effects of the

project, but the project proponents decline to adopt the mitigation measure or alternative; or

(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

14 Cal. Admin. Code § 15162(a)-(b). Here, evidence indicates that the project contemplated by the 2003 EIR was entirely unrelated to residential uses and has undergone significant changes to requiring substantial revisions to the EIR, not surprisingly, that new information and mitigations are now available that must be considered in an EIR.

DISCUSSION

I. THE 2003 EIR HAS NO INFORMATIONAL VALUE TO THE RESIDENTIAL ASPECT OF THE PROJECT.

As the California Supreme Court explained in *San Mateo Gardens*, subsequent CEQA review provisions "can apply only if the project has been subject to initial review; they can have no application if the agency has proposed a new project that has not previously been subject to review." *Friends of College of San Mateo Gardens v. San Mateo* (2016) 1 Cal.5th 937, 950 ("*San Mateo Gardens*"). As the Supreme Court explains, "[a] decision to proceed under CEQA's subsequent review provisions must thus necessarily rest on a determination — whether implicit or explicit — that the ***original environmental document*** retains some informational value." *Id.* at 951 (emph. added). Only if the original environmental document retains some informational value despite the proposed changes, changes in circumstances or new substantial information does the agency proceed to decide under CEQA's subsequent review provisions whether such changes or substantial new information will require major revisions to the original environmental document because of the involvement of new, previously unconsidered significant environmental effects. 1 Cal.5th at 952. Reviewing the 2003 EIR, the City cannot reasonably claim that it addresses, *i.e.*, provides some informational value regarding the potential environmental impacts of the 300 residential units proposed as part of the Project.

The Project includes 300 units of residential housing that have never been analyzed in any previous CEQA document. **A thorough review of the 2003 EIR confirms that no mention is made of any residential aspect of the redevelopment project.** Instead, the 2003 EIR analyzed freeway-oriented commercial uses that are anticipated to occur within Planning Area 12 FC Site. It specifically stated that "***[n]o residential or industrial uses are proposed in Planning Area 12***." 2003 SPA EIR, p. 2-1 (emphasis added). Thus, none of the 2003 EIR's discussion provides any information that would assist the City in determining the potential environmental impacts of the proposed 300 residential units. The project considered in the 2003 EIR simply has no relevance to the environmental impact of the construction and occupancy of 300 residential housing units. Indeed, SWAPE observes that the land use changes in the proposed Project vary significantly from those contemplated in the 2003 EIR. SWAPE notes that " Further, SWAPE observes that"[t]hese land use changes present a substantial change in

the proposed Project as the 2003 EIR does not evaluate impacts resulting from residential or hotel land uses." Exhibit A, p. 4.

Since the 2003 EIR does not contain a description of residential components, it is a new project, and the City must start from the beginning of the CEQA process under section 21151, conduct an initial study, and determine whether there is substantial evidence of a fair argument that the project will have a significant environmental impact. *Friends of College of San Mateo Gardens v. San Mateo*, 1 Cal.5th at 951. The City Council should require CEQA review for the Project, and not approve the Project until CEQA review is completed.

II. EVEN IF THE 2003 EIR WAS STILL RELEVANT TO THE PROJECT, A SUPPLEMENTAL OR SUBSEQUENT EIR IS NECESSARY BECAUSE SUBSTANTIAL CHANGES WILL RESULT IN NEW AND MORE SIGNIFICANT ENVIRONMENTAL IMPACTS.

Even assuming that the 2003 EIR has some relevance to evaluating the environmental impacts of this Project, numerous substantial changes in the development plans have occurred such as the inclusion of 300 new residential units, information included in the previous addenda, new information of substantial importance has arisen, and substantial changes in circumstances have taken place that require a revision of the dated 2003 EIR.

When changes to a project's circumstances or new substantial information comes to light subsequent to the certification of an EIR for a project, the agency must prepare a subsequent or supplemental EIR if the changes are "[s]ubstantial" and require "major revisions" of the previous EIR. *Friends of Coll. of San Mateo Gardens v. San Mateo Cty. Cmty. Coll. Dist.* (2016) 1 Cal.5th 937, 943. "[W]hen there is a change in plans, circumstances, or available information after a project has received initial approval, the agency's environmental review obligations "turn[ ] on the value of the new information to the still pending decisionmaking process." *Id.*, 1 Cal.5th at 951–52. The agency must "decide under CEQA's subsequent review provisions whether project changes will require major revisions to the original environmental document because of the involvement of new, previously unconsidered significant environmental effects." *Id.*, 1 Cal.5th at 952. Section 21166 and CEQA Guidelines § 15162 "do[] not permit agencies to avoid their obligation to prepare subsequent or supplemental EIRs to address new, and previously unstudied, potentially significant environmental effects." *Id.*, 1 Cal.5th at 958.

All of the evidence indicates that the project considered by the 2003 EIR has undergone significant changes to the project and its circumstances requiring substantial revisions to that 16-year old EIR.

A. A New EIR is Required Because the 2003 EIR Relies on an Inaccurate Traffic Analysis.

The comment of traffic engineer Daniel Smith is attached as Exhibit C ("Smith Comment"). Mr. Smith's concerns are summarized below.

Mr. Smith notes the significant deficiency of the transportation analysis in the 2003 EIR. That analysis was performed under the assumption that State Route 125 ("SR 125") would be developed to 10 lanes north of Olympic Parkway and to 8 lanes south of Olympic Parkway. Smith Comment, p. 2. However, SR 125 remains just 4 lanes with no signs of future widening. *Id.* Mr. Smith notes that the San Diego Association of Governments ("SANDAG") does not have any plans to widen SR 125 until 2050, and then only to 8 lanes. *Id.* As Mr. Smith notes, "the FEIR was prepared under transportation system assumptions that are no longer relevant to the current situation or this Addendum and the prior addendums." *Id.* This is a substantial change with respect to the 2003 EIR and triggers the preparation of a subsequent EIR and the preparation of an EIR for the specific Project.

B. A New EIR is Required Because the Addition of 300 Residential Units is a Substantial Change from the 2003 EIR and there is Substantial Evidence that the Residential Element of the Project Will Result in Emissions of Formaldehyde to the Air that Will Have a Significant Health Impact on Future Residents.

Even if the 2003 EIR was somehow relevant to the current Project, the City would still be required to prepare a supplemental EIR. The inclusion of 300 new residential units as part of the Project (and 600 residential units from the first two addenda) is a substantial change from the 2019 project. "The purpose behind the requirement of a subsequent or supplemental EIR or negative declaration is to explore environmental impacts not considered in the original environmental document." *Friends of College of San Mateo Gardens v. San Mateo* (2016) 1 Cal.5th 937, 949 (quoting *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, 1296).

As discussed in the supplemental letter from Mr. Offermann, the expert opinion of Mr. Offermann constitutes substantial evidence that the residential component of the Project will result in a significant air quality impact to residential occupants of the Project. This impact is significant and new. It could not have been known in 2003 because there was no residential element of the Project at that time. Accordingly, the City violated CEQA by not preparing a supplemental EIR to analyze and mitigate this new significant impact.

There is no substantial evidence in the record to support a conclusion that the Project will not have a new significant indoor air quality impact as a result of significant changes to the Project when compared to the project analyzed in the 2003 EIR. Accordingly, the City's decision to prepare an Addendum rather than an SEIR is not supported by substantial evidence, and approval of the Project based on the Third Addendum would constitute an abuse of discretion.

III. THE ADDENDUM'S CONCLUSIONS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND THERE IS SUBSTANTIAL EVIDENCE OF A FAIR ARGUMENT THAT THE PROJECT WILL HAVE SIGNIFICANT ENVIRONMENTAL IMPACTS.

As the California Supreme Court held, "[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319-320 ["CBE v. SCAQMD"], citing, *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505. "Significant environmental effect" is defined very broadly as "a substantial or potentially substantial adverse change in the environment." Pub. Res. Code ["PRC"] § 21068; see also 14 CCR § 15382. An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial." *No Oil, Inc.*, 13 Cal.3d at 83. "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. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109 ["*CBE v. CRA*"].

The EIR is the very heart of CEQA. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927. The EIR is an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return." *Bakersfield Citizens,* 124 Cal.App.4th at 1220. The EIR also functions as a "document of accountability," intended to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." *Laurel Heights Improvements Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392. The EIR process "protects not only the environment but also informed self-government." *Pocket Protectors*, 124 Cal.App.4th at 927.

Under the "fair argument" standard applicable to environmental review under Pub. Res. Code § 21151, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency's decision. 14 CCR § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931; *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-15; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602. The "fair argument" standard creates a "low threshold" favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. *Pocket Protectors,* 124 Cal.App.4th at 928. An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial." *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83.

The "fair argument" standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

> This 'fair argument' standard is very different from the standard normally followed by public agencies in making administrative determinations. Ordinarily, public agencies weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact. The lead agency's decision is thus largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

Kostka & Zishcke, *Practice Under CEQA*, §6.29, pp. 273-274. The Courts have explained that "it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, with a preference for resolving doubts in favor of environmental review." *Pocket Protectors,* 124 Cal.App.4th at 928. As a matter of law, "substantial evidence includes . . . expert opinion." Pub.Res.Code § 21080(e)(1); 14 Cal. Code Regs. § 15064(f)(5). CEQA Guidelines demand that where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the environmental effects to be significant and prepare an EIR. 14 Cal. Code Regs. § 15064(f)(5); Pub. Res. Code § 21080(e)(1); *Pocket Protectors*, 124 Cal.App.4th at 935.

B. The 2019 Addendum Relies on Unsubstantiated Parameters that Underestimate Project Air Quality Impacts.

SWAPE notes that while the Third Addendum relies on emissions calculated from the California Emissions Estimator Model Version CalEEMod.2016.3.1 ("CalEEMod"), several of the values that were input into this model are not consistent with the information that was include with the Project's documents. Exhibit A ("SWAPE Comment"), pp. 1-2. SWAPE notes that this results in a significant underestimation of the emissions associated with the Project. *Id*, p. 2.

i. The 2019 Emission Estimates Underestimate the Amount of Grading Hauling Trips.

SWAPE compared the CalEEMod modeling for the 2003 EIR to the CalEEMod for the proposed Project and found that the proposed Project is modeled assuming 14,891 less hauling trips during the grading phase of construction than the 2003 Project, despite both projects requiring the same amount of material import and the Project Applicant comparing the Project's 2019 emissions to 2003 emissions to determinate significant impacts. *Id*., pp. 2-3. SWAPE notes that this results in a significant underestimation of the Project's emissions that the "2019 Addendum's claim that there are no new significant sources of construction air emissions is based on a flawed analysis." *Id*., p. 3. Thus, an updated air model should be prepared.

ii. Estimated NOx Emissions from the Project Exceed Applicable Thresholds

SWAPE prepared an updated CalEEMod model of the proposed Project with corrected input parameters. They found that the Project's construction-related NOx emissions exceed the 250 pounds per day (lbs/day) threshold set forth by the San Diego Air Pollution Control District ("SDAPCD"). *Id.*. They also found that these emissions are more significant than those associated with the project described in the 2003 EIR:

Maximum Daily Construction Emissions (lbs/day)	
Model	**NOx**
2003 Project	257.9
SWAPE 2019 Project	260.4
SDAPCD Thresholds	**250**
Exceed?	***Yes***

Id., p. 4. Because of these significant impacts, an EIR should be prepared that includes an updated air pollution model to adequately estimate the Project's emissions, and the EIR should additional feasible mitigation measures to reduce these emissions.

C. The Addendum Fails to Provide Substantial Evidence that the Project Will Not Result in a New Significant Health Risks to Nearby Sensitive Receptors.

Neither the 2003 EIR nor the Third Addendum conducted a health risk assessment ("HRA") to evaluate the health risk of diesel particulate matter ("DPM") to nearby sensitive receptors during construction and operation of the Project. The Third Addendum claims the following:

> [N]o new significant sources of construction or operational air emissions or health risk impacts beyond those identified in the FEIR would occur with implementation of the proposed modifications to the proposed project.

Third Addendum, p. 114. However, SWAPE finds "[t]his justification is entirely unsubstantiated, as the 2003 EIR failed to evaluate the health risk impacts associated with any Project activities. SWAPE Comment, p. 5. SWAPE demonstrates the proximity of residential land uses to the Project site and notes that potential health-related impacts to these local residential sensitive receptors have not been evaluated in any document. *Id.*, pp 6-7. The development of new sensitive receptors near the Project site is a substantial change in circumstances from the 2003 EIR that must be evaluated in a subsequent EIR that evaluates health risks to these local receptors.

The California Office of Environmental Health Hazard Assessment ("OEHHA") recommends that all short-term projects, such as Project construction, lasting at least two months be evaluated for cancer risks to nearby sensitive receptors and that exposure from projects lasting

more than six 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. SWAPE Comment, p. 7. Thus, in order to quantify and evaluate the health risk posed by the Project from DPM, SWAPE conducted a screening-level HRA. *Id.*, pp. 8-10. SWAPE found the following cancer risks:

The Maximum Exposed Individual at an Existing Residential Receptor (MEIR)					
Activity	**Duration (years)**	**Concentration (µg/m³)**	**Breathing Rate (L/kg-day)**	**ASF**	**Cancer Risk**
Construction	0.25	0.0718	361	10	9.8E-07
3rd Trimester Duration	***0.25***			***3rd Trimester Exposure***	***9.8E-07***
Construction	2.00	0.0718	1090	10	2.4E-05
Infant Exposure Duration	***2.00***			***Infant Exposure***	***2.4E-05***
Construction	0.25	0.0718	572	3	4.6E-07
Operation	13.75	0.1831	572	3	4.7E-05
Child Exposure Duration	***14.00***			***Child Exposure***	***4.7E-05***
Operation	14.00	0.1831	261	1	7.4E-06
Adult Exposure Duration	***14.00***			***Adult Exposure***	***7.4E-06***
Lifetime Exposure Duration	**30.00**			**Lifetime Exposure**	**7.9E-05**

Id., p. 10. The child and infant cancer risks are thus 47 and 24 in one million, respectively, and the excess cancer risk of the course of a residential lifetime is approximately 79 in one million. Comparing this to the appropriate CEQA threshold, SWAPE found that "the child, infant, and lifetime cancer risks all exceed the SDAPCD's threshold of 10 in one million, thus resulting in a potentially significant impact not previously addressed or identified by the 2019 Addendum." *Id.* Because the 2003 EIR and the Third Addendum failed to conduct an HRA, the Third Addendum fails to provide substantial evidence that the health risk posed by the Project's construction and operation is less-than-significant. Moreover, because the 2003 EIR never conducted an HRA, the health risk posed by the Project is new information which must be analyzed in an EIR or a Mitigated Negative Declaration rather than an Addendum.

D. Failure to Include Feasible Mitigation Measures Related to Construction NOx Emissions and Construction and Operational DPM Emissions

Because there is new information regarding construction impacts associated with the Project that was not known at the time of the 2003 EIR, the City must include feasible mitigation measures for the Project. SWAPE notes that the Project's construction NOx and construction and operational DPM emissions may result in significant impacts that were not identified earlier. Moreover, the Third Addendum fails to implement additional mitigation measures beyond those included in the 2003 EIR. Accordingly, SWAPE recommend a number of feasible mitigation

measures to reduce these impacts.

With respect to construction emissions, SWAPE suggests the following:

- Limiting construction equipment idling beyond regulation requirements.
- Requiring the implementation of diesel control measures, recommended by the Northeast Diesel Collaborative.
- Repowering or replacing older construction equipment engines.
- Installing retrofit devices on existing construction equipment.
- Implementing a construction vehicle inventory tracking system.
- A series of "Enhanced Exhaust Control Practices," recommended by the Sacramento Air Quality Management District.

Id., pp. 11-15.

With respect to operational emissions, SWAPE recommends the following:

- Incorporate bike lane street design on the site of the Project.
- Limit parking supply.
- Provide ride-sharing programs.
- Implement a subsidized or discounted transit program.
- Price workplace parking.
- Implement employee parking "cash-out."

Id., pp. 15-17.

E. The Third Addendum Fails to Adequately Assess Greenhouse Gas Impacts

SWAPE notes the complete failure of the Third Addendum to evaluate or mention the greenhouse gas ("GHG") emissions associated with the Project. *Id.*, p. 17. SWAPE further details the flawed reasoning in the 2017 Memorandum on the Air Quality and GHG Impacts for Planning Area 12 ("2017 AQ/GHG Memo"), which ignores the on ground situation with respect to the project described in the 2003 EIR. *Id.* SWAPE ultimately concludes that there is inadequate information to determine the significance of GHG emissions with respect to the Project:

> The 2017 AQ/GHG Memo's incorrect methodology coupled with the 2019 Addendum's omission of any GHG emissions assessment does not reflect a good-faith effort to describe the GHG emissions or impacts resulting from the 2019 Project. As a result, the Applicant fails to prepare an adequate assessment of the Project's GHG emissions impact, and therefore the 2019 Addendum should not be relied upon to determine Project significance. Prior to Project approval, the Applicant must prepare an EIR which adequately evaluates and mitigates the Project's GHG emissions.

Id., p. 18.

F. The Third Addendum Fails to Provide Substantial Evidence that the Project Will Not Result in New Significant Impacts on Biological Resources.

The comment of Dr. Shawn Smallwood is attached as Exhibit B ("Smallwood Comment'). Dr. Smallwood has identified several issues with the Addendum for the Project. His concerns are summarized below.

i. There Is New Information Not Known At the Time of the 2003 EIR That Shows That The Project Will Have Significant Effects.

Dr. Smallwood finds several factors showing that there is new information with respect to the Third Addendum that was not available nor analyzed at the time of the 2003 EIR. This information all must be analyzed and mitigated in a subsequent EIR.

First, there have been 26 species of vertebrate wildlife known to occur in the project area that have been assigned special status signifying greater conservation concern since 2003. Dr. Smallwood notes that the Third Addendum "does not address potential project impacts or mitigation related to tricolored blackbird or any of the 26 special-status species that our state or federal governments have recognized as in need of greater conservation concern since 2003." Smallwood Comment, p. 2. Much of Dr. Smallwood's comments relate to window collisions, and many of these 26 species are the types of birds that typically collide with windows of houses and building façades during migration or dispersal. *Id.*

Second, Dr. Smallwood finds that "since the 2003 FEIR there has been the proliferation of structural glass in building construction and an increase in window-to-wall ratios." *Id.* Dr. Smallwood observes that the increased use of glass in new structures increases the bird-window collision hazard of developments. *Id.*

Third, Dr. Smallwood notes that there was very sparse research in 2003 regarding wildlife-automobile collision on roadways. *Id.* His letter describes much of the research that has occurred since the 2003 EIR and would show the proposed Project could result in significant mortality to wildlife. *Id.*, p. 15.

Finally, Dr. Smallwood also notes that the standard protocol for detection surveys for burrowing owls was released in 2012, years after the 2003 EIR. *Id.*, p. 16.

ii. The Third Addendum Fails to Analyze and Mitigate the Impact of Window Collisions on Birds at the Project Site.

Dr. Smallwood describes how window collisions, which are typically from glass-façades of buildings are often characterized one of the main sources of human-caused bird mortality. *Id.*, pp. 5-7. These impacts were not analyzed in the Third Addendum. Using conservative factors and based on information provided in the 2003 EIR as well as the three addenda for the 2003 EIR, he predicts that the proposed Project would result in 6,033 bird-window collision fatalities

per year. *Id.*, p. 8. The 50-year toll from this annual fatality rate would be 101,640 bird deaths. *Id.* Dr. Smallwood finds that "[t]his impact would be significant, especially considering that the predicted fatality rate can be prevented by implementing appropriate mitigation measures." *Id.*, p. 9.

iii. The Third Addendum Fails to Address the Potential Adverse Impact on Wildlife from Vehicle Collisions Due to Increased Traffic from the Project.

Dr. Smallwood notes that according to the Third Addendum, the Project would generate 7,681 daily traffic trips. *Id.*, p. 15. He states that these trips have the potential to kill wildlife (including special-status species) at locations well beyond the Project's footprint. *Id.* The impacts are not analyzed in the 2003 EIR or the Third Addendum.

Vehicle collisions can significantly impact all kinds of wildlife. In terms of avian mortality, it is estimated that vehicle collisions result in the death of 89 million to 340 million birds per year. *Id.* Dr. Small wood related a number of relevant studies of traffic caused wildlife mortality. He finds that "[a]n analysis is needed of whether increased traffic on roads in and around Otay Ranch Planning Area 12 would similarly result in intense local impacts on wildlife." *Id.* Without analyzing the impacts of vehicle collision on wildlife, the Third Addendum fails to provide substantial evidence that the Project's impacts on biological resources would be less than significant.

Factors that affect the rate of vehicle collision with wildlife include: the type of roadway, human population density, temperature, extent of vegetation cover, and intersections with streams and riparian vegetation. *Id.* The City should formulate mitigation measures based on those factors in an EIR.

iv. The Third Addendum Lacks Analysis of Cumulative Impacts.

Dr. Smallwood finds that the Third Addendum fails to provide a cumulative impacts analysis related to bird-window collisions and road mortality. *Id.*, p. 16. This analysis must be included in an EIR for the Project.

v. A Subsequent EIR Should Be Prepared that Includes Feasible Mitigation Measures.

Dr. Smallwood discusses a number of bird-window collision factors and their applicability to the proposed Project. *Id.*, pp. 9-12. He utilizes these factors to recommend mitigation measures related to bird collisions for the Project. Mitigation measures for bird-window collision or road mortality of wildlife include the following:

- Detection surveys
- Post-construction fatality monitoring
- Retrofitting to reduce impacts

- Siting and Designing to minimize impacts
- Monitoring for adaptive management to reduce impacts
- Use of material to minimize the effects of transparency and reflectance in building materials.
- Compensatory mitigation to fund wildlife rehabilitation facilities to cover the costs of injured animals.

Id., pp. 12-14, 16-17. These mitigation measures should be included in an EIR for the Project.

G. There is Substantial Evidence Supporting a Fair Argument that the Project Will Result in Significant Indoor Air Quality Impacts.

SAFER references the separately submitted letter from Bud Offermann regarding the indoor air quality impacts associated with the Project. Mr. Offerman concludes that it is likely that the Project will expose future residents of the Project's residential units to significant impacts related to indoor air quality, and in particular, emissions of 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.

The Third Addendum fails to address formaldehyde emissions, which is contrary to the California Supreme Court's decision in *California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 ("*CBIA*"). At issue in *CBIA* was whether the Air District could enact CEQA guidelines that advised lead agencies that they must analyze the impacts of adjacent environmental conditions on a project. The Supreme Court held that CEQA does not generally require lead agencies to consider the environment's effects on a project. *CBIA*, 62 Cal.4th at 800-801. However, to the extent a project may exacerbate existing adverse environmental conditions at or near a project site, those would still have to be considered pursuant to CEQA. *Id.* at 801 ("CEQA calls upon an agency to evaluate existing conditions in order to assess whether a project could exacerbate hazards that are already present"). In so holding, the Court expressly held that CEQA's statutory language required lead agencies to disclose and analyze "impacts on ***a project's users or residents*** that arise ***from the project's effects*** on the environment." *Id.* at 800 (emphasis added).)

The carcinogenic formaldehyde emissions identified by Mr. Offermann are not an existing environmental condition. Those emissions to the air will be from the Project. Residents will be users of the residential units, and employees will be users of the hotel and offices. Rather than excusing the City from addressing the impacts of carcinogens emitted into the indoor air from the project, the Supreme Court in *CBIA* expressly finds that this type of effect by the project on the environment and a "project's users and residents" must be addressed in the CEQA process.

The Supreme Court's reasoning is well-grounded in CEQA's statutory language. CEQA expressly includes a project's effects on human beings as an effect on the environment that must be addressed in an environmental review. "Section 21083(b)(3)'s express language, for example, requires a finding of a 'significant effect on the environment' (§ 21083(b)) whenever the

'environmental effects of a project will cause substantial adverse effects *on human beings,* either directly or indirectly.'" *CBIA*, 62 Cal.4th at 800 (emphasis in original). Likewise, "the Legislature has made clear—in declarations accompanying CEQA's enactment—that public health and safety are of great importance in the statutory scheme." *Id*., citing e.g., §§ 21000, subds. (b), (c), (d), (g), 21001, subds. (b), (d). It goes without saying that the future residents and employees at the Project are human beings and the health and safety of those workers is as important to CEQA's safeguards as nearby residents currently living near the project site.

The Third Addendum fails to disclose, analyze, or mitigate these new significant impacts. Because Mr. Offermann's expert review is substantial evidence of a fair argument of a significant environmental impact to future users of the project, an EIR must be prepared to disclose and mitigate those impacts.

IV. The Project Description is Insufficient.

A. The Project Description is Inadequate to Evaluate Environmental Impacts.

The adequacy of an EIR's project description is closely linked to the adequacy of the EIR's analysis of the project's environmental effects. As a result, one of the important requirements of CEQA is that the project description not be confusing, shifting, or open-ended. This is to ensure that project impacts are analyzed properly and accurately. "An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.

One aspect of the Project description that is particularly important to determining a residential project's environmental impacts is the number of people expected to live in a new housing development. Many environmental impacts are dependent on the number of residents, including GHG emissions, energy use, traffic, public services, among others. Here, the Third Addendum does not disclose even an estimate of how many people will live the in 300 proposed units. Indeed, the Third Addendum does not disclose how many bedrooms each unit will be. The number of bedrooms per unit will have a direct impact on the number of people inhabiting the 300 new units, and the environmental impacts of those units. Without even an estimate of the proposed residential population, the Project's description is incomplete.

Moreover, CEQA requires an analysis of the full build out of a project, meaning the maximum size project that could be built under the entitlements sought. *Stanislaus Natural Heritage Project b. County of Stanislaus* (1996) 48 Cal.App.4th 182, 195-206. Without a limit on how many bedrooms each unit will be, the CEQA analysis must assume the units will all be built with the maximum number of bedrooms permitted. This was not what was analyzed in the Third Addendum.

B. The Project Description Improperly Piecemeals the Project.

CEQA mandates "that environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment --

which cumulatively may have disastrous consequences." *Bozung v. LAFCO*, 13 Cal.3d 263, 283-84 (1975); *City of Santee v. County of San Diego*, 214 Cal.App.3d 1438, 1452 (1989). Before undertaking a project, the lead agency must assess the environmental impacts of all reasonably foreseeable phases of a project and a public agency may not segment a large project into two or more smaller projects in order to mask serious environmental consequences. As the Court of Appeal stated:

> The CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, **covering the entire project, from start to finish**. . . the purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind.

Natural Resources Defense Council v. City of Los Angeles, 103 Cal.App.4th 268 (2002) (emphasis added).

Similarly, an initial study must consider the "whole of an action." 14 Cal. Code Regs. § 15378(a). That means:

> [T]he environmental review accompanying the first discretionary approval must evaluate the impacts of the ultimate development authorized by that approval. ... Even though further discretionary approvals may be required before development can occur, the agency's environmental review must extend to the development envisioned by the initial approvals. It is irrelevant that the development may not receive all necessary entitlements or may not be built. Piecemeal environmental review that ignores the environmental impacts of the end result will not be permitted.

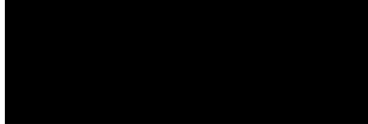
See Kostka, et al., *Practice Under the California Environmental Quality Act*, § 6.52, p. 298.

Here, the Third Addendum considers potential impacts associated with the development of 300 residential units. It fails to consider the commercial and residential development in FC-2 associated with the first two addenda to the 2003 EIR. The courts have rejected precisely this type of "piecemealing" or failure to consider cumulative impacts. In *Arviv Ent., Inc. v. South Valley Area Planning Com.* (2002) 101 Cal.App.4th 1333, 1341, a developer received a series of categorical exemptions for a series of projects in the same area: 5 units, then 2 units, then 14 units (negative declaration), and finally 5 units, calling them all separate "projects." The court rejected this approach and held that the developer had "failed to consider the cumulative impacts of the project as a whole." *Id.* at 1346. The court held that therefore the actions were part of the same "project as a whole" and had to be analyzed together in a single CEQA environmental impact report. CEQA requires that "environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimum potential impact on the environment – which cumulatively may have disastrous consequences." *Bozung*, 13 Cal.3d at 283-84. Thus, an EIR must be prepared for the Project that considers the cumulative aspects of the Project as a whole.

CONCLUSION

For the above and other reasons, the City Council should direct Planning Staff to prepare and circulate an EIR for the proposed Project for public review.

Sincerely,



Douglas Chermak