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BY EMAIL and OVERNIGHT MAIL

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**Re: DRC2015-00797
Santa Anita Warehouse – Oakmont Industrial Group
Initial Study | Mitigated Negative Declaration**

Dear Mr. Perez:

This letter is submitted on behalf of **Laborers International Union of North America, Local Union 783**, and its members living in San Bernardino County (collectively, "LIUNA" or "Commenters") concerning the City of Rancho Cucamonga's (the "City") Initial Study and Mitigated Negative Declaration ("IS/MND") prepared for the project known as DRC2015-00797, also known as the Santa Anita Warehouse, proposed by the Oakmont Industrial Group (the "Project").

Commenters request that the City withdraw the IS/MND and instead prepare an environmental impact report ("EIR") for the Project, as there is substantial evidence that the Project will have significant unmitigated impacts on the environment as discussed below. An EIR is required to analyze these impacts and to adopt feasible mitigation measures and alternatives to reduce the impacts to the extent feasible.

PROJECT DESCRIPTION

The project proposes the construction of a 338,470-square foot warehouse on 16.29 acres located north of 6th Street to the north of the termination of Santa Anita Avenue, Rancho Cucamonga, California. The warehouse includes 109,567 square feet

of landscaping, 191 automobile parking spaces, 36 trailer parking spaces, 36 loading docks, and 20 bicycle parking spaces (10 short term and 10 long term).

STANDING

Members of LIUNA Local Union No. 783 live, work, and recreate in the immediate vicinity of the Project site. These members will suffer the impacts of a poorly executed or inadequately mitigated Project, just as would the members of any nearby homeowners association, community group or environmental group. Hundreds of LIUNA Local Union No. 783 members live and work in areas that will be affected by air pollution generated by the project. Therefore, LIUNA Local Union No. 783 and its 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.

Pursuant to CEQA, LIUNA Local Union No. 783 submits these comments in response to the City's proposed IS/MND. Under the circumstances presented here, CEQA clearly requires the preparation of an EIR and accordingly, the City should decline to adopt the proposed IS/MND.

LEGAL STANDARD

As the California Supreme Court recently 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 Environment v. South Coast Air Quality Management 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.) “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 [“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, supra*, 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, supra*, 124 Cal.App.4th at 927.)

An EIR is required if “there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.” (Pub. Resources Code, § 21080(d); see also *Pocket Protectors, supra*, 124 Cal.App.4th at 927.) In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (14 Cal. Code Regs., § 15371 [“CEQA Guidelines”]), only if there is not even a “fair argument” that the project will have a significant environmental effect. (Pub. Resources Code, §§ 21100, 21064.) Since “[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process,” by allowing the agency “to dispense with the duty [to prepare an EIR],” negative declarations are allowed only in cases where “the proposed project will not affect the environment at all.” (*Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440.)

Where an initial study shows that the project may have a significant effect on the environment, a mitigated negative declaration may be appropriate. However, a mitigated negative declaration is proper *only* if the project revisions would avoid or mitigate the potentially significant effects identified in the initial study “to a point where clearly no significant effect on the environment would occur, and...there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.” (Public Resources Code §§ 21064.5 and 21080(c)(2); *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 331.) In that context, “may” means a *reasonable possibility* of a significant effect on the environment. (Pub. Resources Code, §§ 21082.2(a), 21100, 21151(a); *Pocket Protectors, supra*, 124 Cal.App.4th at 927; *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–905.)

Under the “fair argument” standard, 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. (CEQA Guidelines, § 15064(f)(1); *Pocket Protectors, supra*, 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, supra*, 124 Cal.App.4th at 928.)

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*, *supra*, 124 Cal.App.4th at 928 [emphasis in original].)

As a matter of law, "substantial evidence includes . . . expert opinion." (Pub. Resources Code, § 21080(e)(1); CEQA Guidelines, § 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. (CEQA Guidelines § 15064(f)(5); Pub. Res. Code § 21080(e)(1); *Pocket Protectors*, *supra*, 124 Cal.App.4th at 935.) "Significant environmental effect" is defined very broadly as "a substantial or potentially substantial adverse change in the environment." (Pub. Resources Code, § 21068; see also CEQA Guidelines, § 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.*, *supra*, 13 Cal.3d at 83.) In *Pocket Protectors*, the court explained how expert opinion is considered. The Court limited agencies and courts to weighing the admissibility of the evidence. (*Pocket Protectors*, *supra*, 124 Cal.App.4th at 935.) In the context of reviewing a negative declaration, "neither the lead agency nor a court may 'weigh' conflicting substantial evidence to determine whether an EIR must be prepared in the first instance." (*Id.*) Where a disagreement arises regarding the validity of a negative declaration, the courts require an EIR. As the Court explained, "[i]t is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project." (*Id.*)

DISCUSSION

A. AN EIR IS REQUIRED BECAUSE THE PROJECT WILL MAY HAVE SIGNIFICANT UNMITIGATED ENVIRONMENTAL IMPACTS.

An EIR is required whenever substantial evidence in the entire record before the agency supports a fair argument that a project may have a significant effect on the environment. (*CBE v. SCAQMD*, *supra*, 48 Cal.4th at 319-20; Public Resources Code § 21080(d); *see also, Pocket Protectors*, *supra*, 124 Cal.App.4th at 927.) As set forth below, there is a fair argument supported by substantial evidence that the Project may result in significant environmental impacts from the operation of the Project. Therefore, the City is required to prepare an EIR to evaluate the Project's impacts and analyze mitigation measures needed to reduce such impacts to a less than significant level.

1. Substantial Evidence Supports a Fair Argument that the Project Will Result in Significant Unmitigated Impacts to Air Quality.

The IS/MND used the California Emissions Estimator Model Version CalEEMod.2013.2.2 ("CalEEMod") to calculate emissions from the Project. However, on information and belief we conclude that several of the assumptions used and values input into CalEEMod were inconsistent with both information disclosed in the IS/MND as well as recommended procedures and values set forth by the South Coast Air Quality Management District ("SCAQMD") for a high-cube warehouse (the type of Project at issue). Had the Project's emissions been calculated using the correct parameters, the Project would have a potentially significant impact on air quality. As such, the Project's air quality impacts have not been properly analyzed and mitigated. Accordingly, the following points constitute substantial evidence that support a fair argument that the IS/MND failed to properly calculate the Project's emissions and that the Project will thus have significant unmitigated impacts.

The Initial Study calculates that the Project's operational emissions of nitrogen oxides ("NOx") is 52 pounds per day ("ppd") – just slightly below 55 ppd CEQA significance threshold set by the South Coast Air Quality Management District. (Initial Study page 13 ("IS 13")). Given that this figure is only 3 ppd less than the CEQA significance threshold, there is a fair argument that the Project's emissions will be significant. This could be due to any calculation errors or if there is even a slight increase in traffic related to the Project. "[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts. 'If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.' (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 311; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal. App. 4th 1544).

Furthermore, the Project will have significant cumulative NOx impacts. Under CEQA, the EIR must analyze the relevant area affected in its analysis of cumulative impacts. (14 CCR §15130(b)(3)). The area affected depends on the nature of the impact being analyzed. (Id.) For example, for air quality impacts, the relevant region for cumulative impacts would be the air basin. *Kings Co. Farm Bureau v. Hanford*, 221 Cal.App.3d 692, 721; *Citizens to Preserve the Ojai v. County of Ventura*, 176 Cal.App.3d 421, 430 (1985). For urban decay impacts the relevant geographic area would be the urban region. *Bakersfield Citizens v. Bakersfield*, 124 Cal.App.4th 1184, 1216 (2004). Since NOx is a regional pollutant, which contributes to regional ozone pollution, the relevant area is the South Coast Air Basin.

Rather than looking at the cumulative impacts of foreseeable projects in the air basin, the Initial Study improperly limits its cumulative impact analysis to only the City of Rancho Cucamonga. IS 14.

There are literally millions of square feet of similar warehouse projects being proposed and constructed throughout the air basin. All of these projects are reasonably foreseeable. Together, they will have significant cumulative NOx impacts, adding to already unacceptable ozone levels in the region. (*Kings Co Farm Bureau, supra*). For example, there is the Renaissance Specific Plan Amendment project in the nearby City of Rialto (16 miles away), which contains 4 million square feet of warehouse space. http://yourrialto.com/wp-content/uploads/2015/06/REN-DSEIR_Print-Version-2106.06.27_foxit.pdf. The Colony Commerce Center Project in the nearby City of Ontario will have 1.3 million square feet of warehouse space. <http://www.ontarioca.gov/planning/reports/environmental-impact-reports/colony-commerce-center-specific-plan-draft-eir>. These projects together with the proposed DRC2015-00797 project will clearly have significant cumulative NOx impacts. Therefore an EIR is required.

2. The Project Will Have Significant Unmitigated Biological Impacts.

The Initial Study and biological survey conclude that the protected San Diego Black-tailed Jackrabbit is found on site. IS 17. However, the IS proposes no mitigation, stating:

San Diego black-tailed jackrabbit was identified on-site by Michael Baker in 2014 during a standard habitat assessment and again 2016 during a focused habitat suitability assessment. No additional mitigation is proposed for this species. No relocation will be required, as jackrabbits readily scatter when disturbed and Mitigation Measure 3 is assumed to partially mitigate for the loss of habitat for this species to achieve a less than significant Impact.

This conclusion that no mitigation is required because rabbits “scatter when disturbed” is simply preposterous, and may constitute a violation of the Endangered Species Act. Species are “taken” and adversely impacted by the destruction of habitat. If an animal’s home is destroyed, this adversely affects a species, even if the species is a fast jackrabbit and can outrun a bulldozer. In short, forcing a protected species to “run away” does not mitigate the impact. In fact, the act of “scattering” protected species is itself a significant adverse impact requiring an EIR. *Center for Biological Diversity v. Department of Fish & Wildlife*, 62 Cal. 4th 204, 231 (Cal. 2015).

Similarly, the Initial Study indicates that the Los Angeles Pocket Mouse (LAPM) has been positively identified on site. IS 17. The IS proposes a mitigation measure to trap and relocate the species. IS 17. However, the process of trapping and relocating will necessarily result in protected species being killed either during the relocation process or after. For example, in the case of *Center for Biological Diversity v. Department of Fish & Wildlife*, 62 Cal. 4th 204, 231 (2015), the Department of Fish and Wildlife proposed to capture and relocate of the stickleback as a conservation measure to protect the fish and aid in its recovery. The Supreme Court held that since the protected fish would be injured and possibly killed during relocation, “the agency may not rely in a CEQA document on the prospect of capture and relocation as mitigating a project’s adverse impacts.” *Center for Biological Diversity v. Department of Fish & Wildlife*, 62 Cal. 4th 204, 232 (Cal. 2015). This measure fails to reduce impacts to less than significant and an EIR is required to analyze this impact and propose all feasible mitigation measures and alternatives.

The California Department of Fish and Wildlife (DFW) has submitted written comments on the project concluding that the environmental baseline has not been adequately described, there may be several additional species on the site, and impacts have not been adequately mitigated. (Exhibit A). The Initial Study fails to adequately respond to DFW’s comments. DFW’s comments create a fair argument that the Project may have significant unmitigated environmental impacts.

3. The Project will Have Significant Impacts Because it will Fill-In a Streambed.

As discussed by DFW, the Project involves entirely filling a streambed, which runs directly through the center of the site. (Exhibit A). DFW concludes that the wetland delineation prepared for the Project may underestimate the streambed and wetlands on site. Filling a wetland or streambed is a significant impact under CEQA. *Mira Monte Homeowners Ass’n v. County of Ventura*, 165 Cal. App. 3d 357 (1985). The failure to adequately delineate the streambed, and the act of filling the streambed

constitute significant adverse impacts that must be analyzed in an EIR so that adequate mitigation measures and alternatives may be considered.

CONCLUSION

For the foregoing reasons, the IS/MND for the Project should be withdrawn, an EIR should be prepared and the draft EIR should be circulated for public review and comment in accordance with CEQA. We reserve the right to supplement these comments during public hearings concerning the Project. *Galante Vineyards v. Monterey Peninsula Water Management Dist.*, 60 Cal. App. 4th 1109, 1121 (1997). Thank you for considering our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard Drury", with a long horizontal flourish extending to the right.

Richard Drury
Lozeau Drury LLP