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December 5, 2018

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**Re: Comments on Draft Environmental Impact Report for the Olympic Tower Project (ENV-2015-4558-EIR; CPC-2015-4557-MCUP-CUX-ZV-TDR-SPR; VTT-73966-CN)**

Dear Mr. Ibarra, Ms. Bleemers:

On behalf of the Coalition for Responsible Equitable Economic Development (“CREED LA”), we submit these comments on the Draft Environmental Impact Report (“DEIR”) for the Olympic Tower Project (ENV-2015-4558-EIR; CPC-2015-4557-MCUP-CUX-ZV-TDR-SPR; VTT-73966-CN) (“Project”) proposed by Olymfig26, LLC (“Applicant”). The Project proposes to construct a 58-story high-rise tower building containing up to 65,074 square feet (“sf”) of retail/commercial space; 33,498 sf of office space; 10,801 sf of hotel conference center/ballroom space; 8,448 sf of residential condominium amenities; 373 hotel rooms; 374 residential condominium units; and 9,556 sf of penthouse amenity area. The Project is proposed to be located at 811 W. Olympic Boulevard, 813-815 W. Olympic Boulevard and 947-951 S. Figueroa Street in Los Angeles and within Central City Community Plan Area (APN 5138003014) (“Project Site”).

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Based on our review, it is clear that the DEIR fails to comply with the California Environmental Quality Act<sup>1</sup> (“CEQA”) in several respects. As explained more fully below, the DEIR fails to accurately disclose the extent of the Project’s potentially significant impacts on air quality, greenhouse gases (“GHG”), public health, traffic and transit, and from hazardous materials; fails to support its findings with substantial evidence; and fails to properly mitigate the Project’s potentially significant impacts. The City cannot approve the Project until the errors in the DEIR are remedied and a revised DEIR is circulated for public review and comment.

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We reviewed the DEIR and its appendices with the assistance of technical consultants, including air quality consultant Hadley Nolan of Soil Water Air Protection Enterprise (“SWAPE”),<sup>2</sup> and expert traffic engineer Daniel Smith, P.E.<sup>3</sup> The attached expert comments require separate responses under CEQA. We reserve the right to supplement these comments at a later date, and at any later proceedings related to this Project.<sup>4</sup>

**I. STATEMENT OF INTEREST**

CREED LA is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. The coalition includes the Sheet Metal Workers Local 105, International Brotherhood of Electrical Workers Local 11, Southern California Pipe Trades District Council 16, and District Council of Iron Workers of the State of California, along with their members, their families, and other individuals who live and work in the City of Los Angeles.

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Individual members of CREED LA and its member organizations include John Ferruccio, Jorge L. Aceves, John P. Bustos, Gerry Kennon, and Chris S. Macias. These individuals live, work, recreate, and raise their families in the City of Los Angeles and surrounding communities. Accordingly, they would be directly affected by the Project’s environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist onsite.

<sup>1</sup> Pub. Resources Code (“PRC”) §§ 21000 et seq.; 14 Cal. Code Regs. (“CCR”) §§ 15000 et seq.

<sup>2</sup> SWAPE’s technical comments and curriculum vitae are attached hereto as Exhibit A.

<sup>3</sup> Mr. Smith’s technical comments and curriculum vitae are attached hereto as Exhibit B.

<sup>4</sup> Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (“*Bakersfield*”) (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

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In addition, CREED LA has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making the area less desirable for new businesses and new residents. Continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

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## II. LEGAL BACKGROUND

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).<sup>5</sup> The EIR is the very heart of CEQA.<sup>6</sup> “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.”<sup>7</sup>

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.<sup>8</sup> “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.’”<sup>9</sup> 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.”<sup>10</sup>

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Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures.<sup>11</sup> The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways

<sup>5</sup> See, e.g., PRC § 21100.

<sup>6</sup> *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.

<sup>7</sup> *Comtys. for a Better Env’ v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 (“*CBE v. CRA*”).

<sup>8</sup> 14 CCR § 15002(a)(1).

<sup>9</sup> *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

<sup>10</sup> *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.

<sup>11</sup> 14 CCR§ 15002(a)(2) and (3); see also *Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.

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that environmental damage can be avoided or significantly reduced.”<sup>12</sup> 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.”<sup>13</sup>

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.*”<sup>14</sup> As the courts have explained, “a prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process.”<sup>15</sup>

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**III. THE DEIR FAILS TO ADEQUATELY ANALYZE, QUANTIFY, AND MITIGATE THE PROJECT’S POTENTIALLY SIGNIFICANT IMPACTS**

An EIR must fully disclose all potentially significant impacts of a Project, and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency’s significance determination with regard to each impact must be supported by accurate scientific and factual data.<sup>16</sup> An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.<sup>17</sup>

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Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.<sup>18</sup> Challenges to an agency’s failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project’s environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency’s

<sup>12</sup> 14 CCR §15002(a)(2).

<sup>13</sup> PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

<sup>14</sup> *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.

<sup>15</sup> *Berkeley Jets*, 91 Cal.App.4th at 1355; *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.

<sup>16</sup> 14 CCR § 15064(b).

<sup>17</sup> *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

<sup>18</sup> *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

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factual conclusions.<sup>19</sup> In reviewing challenges to an agency’s approval of an EIR based on a lack of substantial evidence, the court will ‘determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements.’<sup>20</sup>

Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not ‘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.’<sup>21</sup>

**A. The DEIR Fails to Adequately Disclose and Mitigate the Project’s Significant Construction Air Quality Impacts.**

Under CEQA a project has significant impacts if it “[v]iolate[s] any air quality standard or contribute[s] substantially to an existing or projected air quality violation.”<sup>22</sup> The South Coast Air Quality Management District (“SCAQMD” or “Air District”) maintains thresholds of significance for criteria air pollutants that are to be used in determining the significance of a project’s air quality impacts under CEQA.<sup>23</sup> The DEIR failed to accurately analyze and mitigate the Project’s construction emissions by using unsubstantiated input parameters used to estimate project emissions, by relying on ineffective mitigation which presumes the use of Tier 4 construction equipment without actually requiring it, and by failing to evaluate the cancer risk impacts resulting from exposure to toxic diesel particulate matter (“DPM”) emissions generated during Project construction and operation. As a result, the DEIR’s conclusions that the Project’s air quality and health risk impacts from emissions generated during Project construction and operation will fall below Air District thresholds are unsupported.

**1. The DEIR’s Emissions Modeling Contains Incorrect and Unsupported Factual Assumptions.**

SWAPE reviewed the DEIR’s air quality analysis, and concludes that its emissions modeling relies on input values that are not consistent with, or contradict, information

<sup>19</sup> *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

<sup>20</sup> *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

<sup>21</sup> *Berkeley Jets*, 91 Cal.App.4th at 1355.

<sup>22</sup> CEQA Appendix G.

<sup>23</sup> See SCAQMD Thresholds, available at <http://www.aqmd.gov/docs/default-source/ceqa/handbook/scaqmd-air-quality-significance-thresholds.pdf?sfvrsn=2>.



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disclosed in the DEIR. As a result, SWAPE concludes that the Project’s construction and operational emissions are greatly underestimated.

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First, SWAPE explains that the DEIR’s Air Quality Analysis underestimated the length of the Project’s construction haul truck trips in evaluating the Project’s construction-related on-road truck emissions. As a result, the truck emissions that are included in the DEIR’s Air Quality Analysis are less than the actual emissions that will be generated by the Project’s construction haul truck trips that are described in the DEIR.

The DEIR initially states that the Project’s construction waste will be transported to *one of two* landfills, either to the Chiquita Canyon Landfill in Castaic, which is located approximately 40 miles from the Project site, or to the Manning Pit in Irwindale, which is located approximately 23 miles from the Project site.”<sup>24</sup> The DEIR later states that there are *three* possible landfill locations for the Project’s construction waste, but fails to identify the name or location of a third landfill facility.<sup>25</sup> The DEIR then models haul trip emissions based on an unexplained 23.9 mile trip length, which does not correlate with any trip length identified in the DEIR.<sup>26</sup> SWAPE explains that, at a minimum, the DEIR should have estimated mobile-source emissions by using the scientifically justified average distance between the two landfill locations and the Project site, which would result in an average trip length of 31.5 miles.<sup>27</sup> This calculation would result in over 25% higher emissions than what was modeled in the DEIR.<sup>28</sup> By contrast, the DEIR’s arbitrarily short trip length of 23.9 miles causes the emissions to be underreported.<sup>29</sup> The DEIR’s conclusion that the Project’s construction haul truck emissions will result in less than significant air quality impacts is therefore unsupported.

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Second, the DEIR incorrectly calculates mitigated off-road construction emissions assuming the use of 100% “Tier 4 Final” construction equipment, which reduces NOx emissions by 90%. As a result, the DEIRs’ Air Quality analysis underestimates the actual emissions that will be generated by the Project’s on-site construction equipment.<sup>30</sup> The DEIR’s conclusion that the Project’s unmitigated construction emissions will only slightly exceed South Coast Air Quality Management District (“SCAQMD”) significance thresholds

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<sup>24</sup> Appen. C, p. 96; DEIR, p. III-49.

<sup>25</sup> Exhibit A, p. 6. In Appendix C, Table III-6 (pp. 96), Table IV.C-6 (pp. IV.C-6), and Table IV.I-14 (pp. 482) the DEIR states that “2,400 tons of development hauling off-site to *three off-site locations* an average of 23.9 miles away.”

<sup>26</sup> DEIR, in Table III-6 (pp. 96), Table IV.C-6 (pp. IV.C-6), and Table IV.I-14 (pp. 482).

<sup>27</sup> Exhibit A, p. 6.

<sup>28</sup> *Id.*

<sup>29</sup> See Appendix C, Table III-6 (pp. 96), Table IV.C-6 (pp. IV.C-6), and Table IV.I-14 (pp. 482).

<sup>30</sup> Exhibit A, p. 3.



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is therefore incorrect, and the DEIR’s conclusion that Mitigation Measure C-1 (“MM C-1”) will reduce those emissions to less than significant levels is not supported by substantial evidence.

As SWAPE explains, Tier 4 construction equipment is still relatively new to the California construction market, and requires additional effort by the Applicant to procure for a project of this size. U.S. EPA’s stringent Tier 4 emission standards were introduced by in 2004, and were phased in from 2008 to 2015.<sup>31</sup> These tiered emission standards, however, are only applicable to newly manufactured non-road equipment. According to the U.S. EPA, “if products were built before EPA emission standards started to apply, they are generally not affected by the standards or other regulatory requirements.”<sup>32</sup> As SWAPE further explains, as of 2014, only approximately 18% of all off-road construction engines were equipped with Tier 4 Interim engines (which reduce NOx emissions by 45%), and only 4% were equipped with Tier 4 Final engines (which reduce NOx emissions by 90%).<sup>33</sup> The construction market therefore offers more construction equipment meeting U.S. EPA’s lesser Tier 2 and Tier 3 emission standards than it does Tier 4 equipment.

Because Tier 4 engines have limited availability, they will require active procurement by the Applicant to obtain any, let alone *all*, pieces of construction equipment that will be required for Project construction. Therefore, the DEIR cannot simply assume that Tier 4 equipment will be used for the Project. Rather, additional feasibility analysis is required to determine whether and to what extent Tier 4 equipment will be available for the Project. Without demonstrating that the procurement and use of Tier 4 equipment is feasible, the DEIR lacks substantial evidence to support its reliance on Tier 4 emissions reductions to support the findings in its Air Quality Analysis. These unsupported conclusions do not constitute substantial evidence.<sup>34</sup>

**2. The Project Has Significant Construction Emissions that the DEIR Fails to Disclose and Mitigate.**

SWAPE performed an independent CalEEMod analysis that modeled the Project’s construction emissions using corrected input values for the factors discussed above, including using haul truck trip calculations that reflect the trip distances identified in the

<sup>31</sup> Exhibit A, p. 4.

<sup>32</sup> *Id.*

<sup>33</sup> Exhibit A, p. 4.

<sup>34</sup> Evidence which is clearly erroneous or inaccurate does not constitute substantial evidence. Pub. Res. Code 20180(e)(2); CEQA Guidelines 15384(a).



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DEIR, and mitting the use of “Tier 4 Final” construction equipment to calculate the Project’s mitigated emissions.

SWAPE fonnd that, when the Project’s construction emissions are modeled using the input parameters described in the DEIR, the Project’s construction emissions substantially exceed SCAQMD Localized Significance Thresholds (“LSTs”) for NO<sub>x</sub>, resulting in significant NO<sub>x</sub> impacts that the DEIR fails to disclose and mitigate, as follows<sup>35</sup>:

Unmitigated Maximum Daily Construction Emissions (lbs/day)	
Model	NO <sub>x</sub>
DEIR	139.8
SWAPE	211.8
<b>SCAQMD Thresholds (lbs/day)</b>	<b>100</b>
<i>Exceed?</i>	<b>Yes</b>

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SWAPE’s analysis demonstrates that the Project’s construction NO<sub>x</sub> emissions increase by approximately 52% and exceed SCAQMD’s established NO<sub>x</sub> threshold of 100 lbs/day by 111.8 lbs/day – more than double the LST threshold.<sup>36</sup> SWAPE’s analysis therefore demonstrates that the Project would result in more severe construction air quality impacts than were identified in the DEIR, including NO<sub>x</sub> emissions that exceed the applicable SCAQMD significance threshold, and which remain unmitigated by the measures proposed in the DEIR. The City must prepare a revised Air Quality Analysis and revised DEIR which discloses these impacts as significant, and which identifies mitigation measnres to reduce these emissions to less than significant levels.

**3. The DEIR Fails to Disclose and Mitigate the Project’s Significant Cancer Risk from Construction Emissions.**

The DEIR fails to inclnde a health risk analysis (“HRA”) to disclose the adverse health impacts from increased cancer risk that will be caused by exposnre to toxic air contaminants (“TACs”) from the Project’s construction and operational emissions. As a result, the DEIR fails to disclose the potentially significant cancer risk posed to nearby residents and children from TACs, and fails to mitigate it. Because the DEIR fails to

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<sup>35</sup> Exhibit A, p. 9.

<sup>36</sup> Exhibit A, p. 9.



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support its conclusion that the Project will not have significant health impacts from diesel particulate matter (“DPM”) emissions with the necessary analysis, the DEIR’s finding that the Project will not have any significant health risk impacts from TAC emissions is not supported by substantial evidence.

One of the primary emissions of concern regarding health effects for land development projects is DPM, which can be released during Project construction and operation.<sup>37</sup> DPM consists of fine particles with a diameter less than 2.5 micrometer (“µm”), including a subgroup of ultrafine particles (ultrafine particles have a diameter less than 0.1 µm). Diesel exhaust also contains a variety of harmful gases and cancer-causing substances. Exposure to DPM is a recognized health hazard, particularly to children whose lungs are still developing and the elderly who may have other serious health problems.<sup>38</sup> According to the California Air Resources Board (“CARB”), DPM exposure may lead to the following adverse health effects: (1) aggravated asthma; (2) chronic bronchitis; (3) increased respiratory and cardiovascular hospitalizations; (4) decreased lung function in children; (5) lung cancer; and (6) premature deaths for people with heart or lung disease.<sup>39</sup>

The DEIR acknowledges that the greatest potential for TAC emissions during construction would be related to DPM emissions associated with heavy-duty equipment during excavation and grading activities. The DEIR explains that “[d]uring the construction phase, the primary emissions would be associated with the combustion of diesel fuels, which produce exhaust-related particulate matter that is considered a TAC by CARB.”<sup>40</sup>

However, the DEIR failed to perform a quantitative assessment of the Project’s DPM emissions to determine the extent of this impact. Instead, the DEIR simply concludes that the Project’s cancer risk from exposure to DPM would be less than significant based on the unsupported assertion that the Project would not generate a substantial number of truck trips that would result in long-term exposure to TACs.<sup>41</sup> The DEIR attempts to justify the omission of a quantitative assessment by stating that

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<sup>37</sup> See California Office of Environmental Health Hazard Assessment. Health Effects of Diesel Exhaust. www. [http://oehha.ca.gov/public\\_info/facts/dieselfacts.html](http://oehha.ca.gov/public_info/facts/dieselfacts.html).

<sup>38</sup> See DEIR, p. IV.C-5; CARB, Overview: Diesel Exhaust and Health, www.arb.ca.gov/research/diesel/diesel-health.htm, last reviewed by CARB April 12, 2016; CARB, Fact Sheet: Diesel Particulate Matter Health Risk Assessment Study for the West Oakland. Community: Preliminary Summary of Results, March 2008.

<sup>39</sup> *Id.*

<sup>40</sup> DEIR, Page IV.C-24.

<sup>41</sup> DEIR, Page IV.C-25.

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“[b]ased on the limited activity of TAC sources, the Project would not warrant the need for a health risk assessment associated with on-site activities. Therefore, Project impacts related to TACs would be less than significant.”<sup>42</sup> However, without a quantitative analysis, this conclusion lacks any evidentiary support. Rather, the DEIR appears to derive its conclusion based on the fact that it did not analyze the impact in the first place. This is the opposite of what CEQA requires.

CEQA expressly requires that an EIR discuss, inter alia, “health and safety problems caused by the physical changes” resulting from the project.<sup>43</sup> When a project results in exposure to toxic contaminants, this analysis requires a “human health risk assessment.”<sup>44</sup> Since 2002, SCAQMD guidance has also recommended that mobile source health risk assessments should be prepared for all projects involving vehicular trips.<sup>45</sup> SCAQMD’s *Health Risk Assessment Guidance for Analyzing Cancer Risks from Mobile Source Diesel Emissions* explains that “in the event that the proposed project generates or attracts vehicular trips, especially heavy-duty diesel-fueled vehicles, it is recommended that the lead agency perform a mobile source health risk assessment.”<sup>46</sup> OEHHA<sup>47</sup> guidance sets a recommended threshold for preparing an HRA of a construction period of two months or more.<sup>48</sup>

In this case, Project construction is expected to last 34 months – 17 times the threshold triggering a quantified health risk analysis pursuant to the OEHHA Guidance – and will admittedly generate substantial amounts of TACs from operation of the Project’s on-road and off-road construction equipment. The fact that the OEHHA Guidance is not a binding SCAQMD Rule does not excuse the City from its duty to quantify the health risk posed by human exposure to DPM and other TACs during Project construction, pursuant to CEQA, and the DEIR’s conclusion that an HRA is not required because Project

<sup>42</sup> DEIR, Page IV.C-25.

<sup>43</sup> 14 CCR § 15126.2(a).

<sup>44</sup> *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (“*Berkeley Jets*”) (2001) 91 Cal.App.4th 1344, 1369; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219–1220 (CEQA requires that there must be some analysis of the correlation between the project’s emissions and human health impacts).

<sup>45</sup> See “Mobile Source Toxics Analysis.” SCAQMD, available at:

<http://www.aqmd.gov/home/regulations/ceqa/air-quality-analysis-handbook/mobile-source-toxics-analysis>.

<sup>46</sup> *Id.*

<sup>47</sup> OEHHA is the organization responsible for providing recommendations and guidance on how to conduct health risk assessments in California. See OEHHA organization description, available at <http://oehha.ca.gov/about/program.html>.

<sup>48</sup> See “Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments.” OEHHA, February 2015, available at: [http://oehha.ca.gov/air/hot\\_spots/hotspots2015.html](http://oehha.ca.gov/air/hot_spots/hotspots2015.html) (“OEHHA Guidance”), p. 8-18.

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construction will not result in “chronic” exposure to TACs is entirely unsupported. The DEIR’s failure to perform quantified analysis of health risk is a clear violation of CEQA.

In order to conclude one way or the other whether the Project’s TAC emissions would result in significant health effects, the DEIR is required to include a quantified HRA of the Project’s construction and operational TAC emissions.<sup>49</sup> By failing to do so, the DEIR fails to comply with CEQA, and is inconsistent with OEHHA’s well-reasoned guidance. The City must revise and recirculate the DEIR to include a legally adequate analysis of the health risks posed by the Project’s construction emissions.

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a. **Substantial Evidence Demonstrates that the Project Will Pose a Potentially Significant Health Risk From Unmitigated Construction Emissions.**

SWAPE performed a screening level health risk assessment of the Project’s construction DPM emissions using the AERSCREEN model.<sup>50</sup> AERSCREEN is recommended by the Environmental Protection Agency (“EPA”) as the leading air dispersion model to conservatively evaluate health risk from air emissions.<sup>51</sup> SWAPE evaluated the Project’s construction-related impacts to sensitive receptors using the annual PM10 exhaust estimates from SWAPE’s updated CalEEMod model. Assumptions included in the SWAPE model included the DEIR’s construction duration estimate of 1,080 days, the DEIR’s statement that the closest sensitive receptors to the Project site are located within 100 feet of the Project site, and SWAPE’s CalEEMod modeling results, which indicated that Project construction activities will generate approximately 1,743 pounds of DPM over the 1,080-day construction period.<sup>52</sup> Consistent with recommendations set forth by OEHHA, SWAPE used a residential exposure duration of 30 years, starting from the infantile stage of life.<sup>53</sup>

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Using these Project input value factors, and CalEEMod emissions values correlated to the DEIR’s description of the Project, SWAPE found that unmitigated DPM emissions released during Project construction would result in an excess cancer risk to adults, children, infants, and 3rd trimester of pregnancy to the maximally exposed individual resident (“MEIR”) located approximately 25 meters away, over the course of Project

<sup>49</sup> Exhibit A, p. 10.

<sup>50</sup> Exhibit A, pp. 12-15.

<sup>51</sup> Exhibit A, p. 12; see AERSCREEN user guide, available at [https://www3.epa.gov/scram001/models/screen/aerscreen\\_userguide.pdf](https://www3.epa.gov/scram001/models/screen/aerscreen_userguide.pdf)

<sup>52</sup> Exhibit A, p. 12.

<sup>53</sup> Exhibit A, p. 13.



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construction and operation are 40, 390, 770, and 31.7 in one million, respectively.<sup>54</sup> Furthermore, the excess cancer risk over the course of a residential lifetime (30 years) at the MEIR is approximately 1,230 in one million.<sup>55</sup> This risk is substantially above the SCAQMD significance threshold for cancer of ten in one million, and is therefore a significant impact requiring mitigation.<sup>56</sup>

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The DEIR must be revised and recirculated to disclose the Project’s significant health risks, and to require feasible and effective mitigation to reduce those impacts to less than significant levels.

**4. The DEIR Fails to Include Effective and Enforceable Mitigation to Reduce the Project’s Construction Air Quality Impacts to Less Than Significant Levels.**

**a. Mitigation Measure C-1 Fails to Require Feasible and Enforceable Actions to Reduce Construction Emissions.**

CEQA requires the lead agency to adopt feasible mitigation measures that will substantially lessen or avoid a project’s potentially significant environmental impacts,<sup>57</sup> and describe those mitigation measures in the EIR.<sup>58</sup> A public agency may not rely on mitigation measures of uncertain efficacy or feasibility.<sup>59</sup> Mitigation measures must also be enforceable through conditions of approval, contracts or other means that are legally binding.<sup>60</sup> This requirement is intended to ensure that mitigation measures will actually be implemented, not merely adopted and then ignored.<sup>61</sup> Mitigation Measure C-1 (“MM C-1”) fails to meet these basic CEQA requirements because the DEIR fails to demonstrate that the use of Tier 4 equipment is feasible, and fails to contain enforceable terms requiring the actual procurement of Tier 4 construction equipment for use during Project construction. Thus, MM C-1 fails to ensure that it will effectively reduce the Project’s construction emissions to less than significant levels, as the DEIR claims. MM C-1 also fails to include enforceable terms requiring the Applicant to use the emissions control

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<sup>54</sup> DEIR, p. 14,

<sup>55</sup> See Exhibit A, p. 9.

<sup>56</sup> Exhibit A, p. 14; *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (EIR must disclose an impact as significant when it exceeds a duly adopted CEQA significance threshold).

<sup>57</sup> PRC §§ 21002, 21081(a).

<sup>58</sup> PRC § 21100(b)(3); 14 CCR §n 15126.4.

<sup>59</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727.

<sup>60</sup> PRC § 21081.6(b); 14 CCR § 15126.4(a)(2); *Lotus v. Dep’t of Transp.* (2014) 223 Cal. App. 4th 645, 651-52.

<sup>61</sup> *Fed’n of Hillside & Canyon Ass’n v. City of Los Angeles* (2000) 83 Cal. App. 4th 1252, 1261; *Anderson First Coal. v. City of Anderson* (2005) 130 Cal.4th 1173, 1186

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technology necessary to reduce the NOx emissions from the Project’s haul trucks to less than significant levels.

MM C-1 states that all Project construction equipment greater than 50 horsepower must meet USEPA Tier 4 emission standards, but only “where available.”<sup>62</sup> The DEIR contains no supporting analysis to determine the actual availability of Tier 4 equipment for use on the Project site, and fails to state whether the Applicant has already procured, or even investigated whether it can feasibly procure, Tier 4 equipment for use during Project construction. The DEIR therefore lacks any supporting evidence to demonstrate that MM C-1’s Tier 4 requirement is feasible. In order to be feasible, mitigation measures must be “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.”<sup>63</sup> Concerns about whether a specific mitigation measure “will actually work as advertised,” whether it “can ... be carried out,” and whether its “success ... is uncertain” go to the feasibility of the mitigation measure.<sup>64</sup> Actual use of Tier 4 equipment is a technological factor which is determinative of the MM C-1’s success. Because the DEIR fails to require that the Project will actually use Tier 4 equipment and in what quantity, the measure remains infeasible and ineffective.

Use of the qualifying term “where available” also renders MM C-1 unenforceable. The DEIR omits any discussion regarding how the availability of Tier 4 equipment will be determined, how the term “where available” will be applied to the Project, and how (or whether) it will be enforced against the Applicant if the Project fails to utilize 100% Tier 4 equipment for Project construction. Indeed, MM C-1’s inclusion of the term “where available” demonstrates that MM C-1 contains no binding requirement that the Applicant use Tier 4 equipment at all, let alone for 100% of the Project’s off-road construction needs, as assumed in the DEIR. As a result, MM C-1’s purported requirement that the Applicant use Tier 4 equipment “where available” is unenforceable. The DEIR therefore lacks any evidence to demonstrate that MM C-1’s Tier 4 terms would actually be enforced during construction. The term “where available” must be removed from MM C-1 in order to make the use of Tier 4 equipment a binding, enforceable requirement under MM C-1.

The DEIR cannot rely on mitigation measures of uncertain efficacy, nor can the DEIR assume unsubstantiated emissions reductions from cleaner burning equipment without first mandating the use of it with binding and enforceable mitigation measures.<sup>65</sup>

<sup>62</sup> DEIR, p. I-9.

<sup>63</sup> PRC § 21061.1.

<sup>64</sup> *Id.*; See *California Native Plant Soc. v. City of Rancho Cordova*, 172 Cal.App.4th at 622.

<sup>65</sup> PRC §§ 21002.1(a), 21100(b)(3); *Kings County Farm Bureau*, 221 Cal.App.3d at 727.



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The DEIR must be revised and recirculated to either require the use of Tier 4 equipment and EPA as binding mitigation supported by a feasibility analysis, or revise its construction emissions modeling to account for the type of construction equipment that will actually be procured and used at the Project site.

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b. **The DEIR Fails to Require Effective Mitigation for the Project’s On-Road Construction Equipment.**

CEQA prohibits lead agencies from relying on mitigation measures of uncertain efficacy.<sup>66</sup> The DEIR violates this basic requirement by incorporating mitigation for on-road NOx emissions that the DEIR admits may be ineffective. The DEIR then provides no additional mitigation for on-road emissions of NOx, which the DEIR admits is a significant construction impact, in violation of CEQA.

The DEIR includes Mitigation Measure C-2 (“MM C-2”) which purports to address NOx emissions from the Project’s construction haul trucks. MM C-2 provides:

C-2: The Project Applicant shall use of 2010 or newer diesel haul trucks (e.g., material delivery trucks and soil import/export), and if the Lead Agency determines that 2010 model year or newer diesel trucks cannot be obtained, the Lead Agency shall require trucks that meet USEPA 2007 model year NOx emissions requirements.<sup>67</sup>

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However, the DEIR goes on to explain that “the effectiveness of this measure at reducing emissions cannot be calculated.”<sup>68</sup> The DEIR then attempts to justify the inclusion of MM C-2 by stating that it “is a measure that SCAQMD recommends that Lead Agencies implement,” and appears to rely on MM C-1’s assumed NOx emissions reductions for the Project’s off-road construction equipment, which assume use of Tier 4 Final construction equipment. This is an unacceptable approach to mitigation because the DEIR admittedly fails to include any effective mitigation for on-road haul trucks, which are a different source of NOx emissions than the off-road equipment addressed in MM C-1. The DEIR’s approach fails to comply with CEQA’s requirement that the lead agency adopt feasible mitigation measures that will substantially lessen or avoid a project’s potentially significant environmental impacts.<sup>69</sup>

<sup>66</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727.

<sup>67</sup> DEIR, Pages I-7, IV.C-27;

<sup>68</sup> DEIR, Page IV.C-28.

<sup>69</sup> PRC §§ 21002, 21081(a).

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First, the City cannot fail to mitigate potentially significant emissions from a known emissions source. A lead agency may not make the required CEQA findings regarding a project unless the administrative record clearly shows that all uncertainties regarding the mitigation of significant environmental impacts have been resolved. By the DEIR’s own calculations, the Project will require approximately 22,892 on-road haul truck trips to remove soil during construction grading.<sup>70</sup> The DEIR acknowledges that construction haul truck trips are a major source of NOx emissions, as well as DPM.<sup>71</sup> Both the DEIR and SWAPE’s analysis conclude that construction NOx is a significant impact of the Project.<sup>72</sup> An EIR must contain mitigation measures sufficient to minimize the significant adverse environmental impacts identified in the document.<sup>73</sup> Therefore, because the DEIR identifies haul trucks as a source of significant NOx impacts, it *must* incorporate mitigation measures that will effectively reduce the Project’s on-road haul truck trips to less than significant levels. Because the City is unable to demonstrate that the use of USEPA 2007 model year NOx emissions requirements (“EPA 2007 trucks”) will reduce the Project’s significant construction haul truck NOx emissions to less than significant levels, the City must incorporate additional mitigation measures that are proven to be effective at reducing on-road NOx emissions.

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Second, MM C-1 is ineffective and cannot be relied on to reduce NOx emissions. The DEIR acknowledges that Project construction will result in significant NOx emissions,<sup>74</sup> notwithstanding the fact that it significantly under-calculated those emissions.<sup>75</sup> When calculated correctly, SWAPE concludes the Project’s construction NOx emissions exceed SCAQMD’s LST (100 lbs/day NOx) by more than double (Project = 211.8 lbs/day NOx).<sup>76</sup> As discussed above, one of the principal failures of the DEIR’s Air Quality Analysis is that it relies on the use of 100% “Tier 4 Final” off-road construction equipment to reduce the Project’s construction NOx to less than significant levels. This unsupported assumption led to the DEIR’s equally unsupported conclusion that the use of Tier 4 Final engines addressed in MM C-1 will reduce construction NOx to less than significant levels. However, as explained above, Tier 4 Final engines are in limited supply, and the DEIR contains no evidence demonstrating that they will be available or procured for the

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<sup>70</sup> Appendix A, p. 483; Exhibit A, p. 7 (59 x 194 = 11,446 one-way trips. In order to calculate the total number of hauling truck trips needed to remove the soil, which includes a way one trip to and from the Project site, we multiplied the number of hauling trips by 2 (11,446 one-way trips x 2 = 22,892 total hauling truck trips)).

<sup>71</sup> See DEIR, Pages IV.C-5, IV.C-17, IV.C-21.

<sup>72</sup> SWAPE also concludes that haul trucks contribute to the Project’s significant DPM emissions. Exhibit A, pp. 12-14.

<sup>73</sup> PRC §§ 21002.1(a), 21100(b)(3).

<sup>74</sup> DEIR, Page IV.C-22.

<sup>75</sup> Exhibit A, pp. 8-9.

<sup>76</sup> Exhibit A, p. 9.

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Project.<sup>77</sup> Thus, the DEIR’s assumption that MM C-1 will reduce NOx emissions to less than significant levels is unsupported. Its companion assertion that the ineffectiveness of MM C-2 doesn’t matter because NOx will be addressed by MM C-1 is equally unsupported and constitutes a prejudicial abuse of discretion.

Moreover, there is recent substantial evidence demonstrating that EPA 2007 trucks are far less effective at reducing NOx emissions than previously thought. Therefore, any assertion that the DEIR may have that MM C-2 “might” be effective is rebutted by this substantial evidence.<sup>78</sup> A series of recent emissions studies prepared for SCAQMD by the University of California Riverside’s Center for Environmental Research and Technology (“CE-CERT”) demonstrate that the use of EPA 2007 trucks will result in substantially lower NOx reductions – and consequently substantially *higher* NOx emissions – than previously assumed. The CE-CERT studies, prepared between 2013 and 2017, conducted real-time in-use studies of truck emissions using heavy-duty chassis dynamometers to measure actual NOx and other air pollutant emissions from on-road trucks, including EPA 2007 trucks. The studies concluded that EPA 2007 trucks emit NOx at levels that are 5 to 18 times higher than the levels assumed in the original 2007 EPA certification standard.<sup>79</sup> Because MM C-1 relies exclusively on the use of trucks that comply with USEPA 2007 NOx emissions standards, MM C-1 will therefore result in higher, unmitigated NOx emissions that are 5 to 18 times higher than the levels assumed in the DEIR. There is therefore substantial evidence demonstrating that MM C-2 will be ineffective at reducing the Project’s on-road NOx emissions to less than significant levels.

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<sup>77</sup> Exhibit A, pp. 3-6.

<sup>78</sup> MM C-1 requires model year 2010 trucks or EPA 2007 trucks. Both types of trucks contain the same USEPA 2007 NOx emissions reduction capabilities. EPA’s 2007 emissions standards were “phased in” over a 3-year period between 2007 and 2010. EPA’s Rulemaking on the 2007 NOx emissions standards explains in greater detail that 50 percent of Model Year 2007 trucks are required to comply with EPA 2007 emissions standards, whereas 100 percent of Model Year 2010 trucks are required to comply with the standards. 66 Fed. Reg. 5002 (“new emission standards will begin to take effect in model year 2007”); 66 Fed. Reg. 5005 (“[t]he phase-in will be on a percent- of-sales basis: 50 percent from 2007 to 2009 and 100 percent in 2010.”). Therefore, the use of model year 2010 trucks would automatically include USEPA 2007 NOx emission reduction engines.

<sup>79</sup> See Exhibit C, Durbin, Thomas D, et al. (February 2017). Final Report: Heavy-Duty Chassis Dynamometer Test Program, p. 60; Miller, Wayne, et. al. (September 2013). In-Use Emissions Testing and Demonstration of Retrofit Technology for Control of On-Road Heavy-Duty Engines, available at [http://www.cert.ucr.edu/research/efr/2013\\_AQMD\\_inuse\\_retrofit\\_Miller.pdf](http://www.cert.ucr.edu/research/efr/2013_AQMD_inuse_retrofit_Miller.pdf); see Durbin, Thomas D, et al. (February 2017). Final Report: Heavy-Duty Chassis Dynamometer Test Program, p. 60; Miller, Wayne, et. al. (September 2013). In-Use Emissions Testing and Demonstration of Retrofit Technology for Control of On-Road Heavy-Duty Engines, available at [http://www.cert.ucr.edu/research/efr/2013\\_AQMD\\_inuse\\_retrofit\\_Miller.pdf](http://www.cert.ucr.edu/research/efr/2013_AQMD_inuse_retrofit_Miller.pdf); see also [http://www.cert.ucr.edu/research/efr/2016%20CWI%20LowNOx%20NG\\_Finalv06.pdf](http://www.cert.ucr.edu/research/efr/2016%20CWI%20LowNOx%20NG_Finalv06.pdf).

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Finally, the City of Los Angeles has already begun moving towards requiring the requirement of alternative fuel vehicles as a means of reducing CO<sub>2</sub>, NO<sub>x</sub>, and DPM emissions.<sup>80</sup> There is abundant evidence demonstrating that alternative fuel trucks, such as electric, natural gas, and biofueled trucks, are effective at reducing NO<sub>x</sub> and DPM emissions, emissions of concern for the Project.<sup>81</sup> The City must prepare a revised EIR which analyzes whether the use of alternative fuel trucks is feasible for the Project. If feasible, the City should require the use of alternative fuel trucks as binding mitigation to address the Project’s significant NO<sub>x</sub> emissions from on-road trucks.

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**B. The DEIR Fails to Adequately Evaluate the Project’s Significant Greenhouse Gas Impacts.**

Instead of identifying a quantitative GHG significance threshold or relying on SCAQMD’s interim GHG thresholds of 4.8 MTCO<sub>2e</sub> per service population as a 2020 target and 3.0 MTCO<sub>2e</sub> per service population as a 2035 target,<sup>82</sup> the DEIR relies on the Project’s compliance with various regulatory plans and policies designed to reduce GHG emissions pursuant to Section 15064.4(b)(3) of the CEQA Guidelines. Section 15064.4(b)(3) allows agencies conducting CEQA review to assess the significance of a project’s GHG emissions pursuant to thresholds that have been “adopted by the relevant public agency through a public review process,” and which will actually reduce or mitigate the project's incremental contribution of GHG emissions.<sup>83</sup>

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<sup>80</sup> See Exhibit D, e.g. LAX Alternative Fuel Vehicle Requirement Program, available at <https://www.lawa.org/en/lawa-environment/lax/lax-alternative-fuel-vehicle-requirement-program>, and <https://www.lawa.org/-/media/lawa-web/environment/files/alt-fuel-faqs-2-06-18.ashx?la=en&hash=808E00E1DFAB4C25772FAFDD2AB89EEEECEF75665>, and [https://www.greencarcongress.com/2006/12/lax\\_to\\_purchase.html](https://www.greencarcongress.com/2006/12/lax_to_purchase.html); LA Sanitation Alternative Fuel Vehicles, [https://www.lacitysan.org/san/faces/home/portal/s-lsh-es/s-lsh-es-si/s-lsh-es-si-af;jsessionid=c7uACswE1BTJinphor3OKZNKzo9LF0ucXNOwdu-l3KO7UUHxK19C!-848985586!-2071038950?\\_afLoop=2986382952452430&\\_afWindowMode=0&\\_afWindowId=null&\\_adf.ctrl-state=12zhe7ldaa\\_1#!%40%40%3F\\_afWindowId%3Dnull%26\\_afLoop%3D2986382952452430%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D12zhe7ldaa\\_5](https://www.lacitysan.org/san/faces/home/portal/s-lsh-es/s-lsh-es-si/s-lsh-es-si-af;jsessionid=c7uACswE1BTJinphor3OKZNKzo9LF0ucXNOwdu-l3KO7UUHxK19C!-848985586!-2071038950?_afLoop=2986382952452430&_afWindowMode=0&_afWindowId=null&_adf.ctrl-state=12zhe7ldaa_1#!%40%40%3F_afWindowId%3Dnull%26_afLoop%3D2986382952452430%26_afWindowMode%3D0%26_adf.ctrl-state%3D12zhe7ldaa_5);

<sup>81</sup> See Exhibit E, e.g. CARB Technology Assessment: Low Emission Natural Gas And Other Alternative Fuel Heavy-Duty Engines, available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwieh8rmw4nfAhUkGDQIHah-DgcQFjAAegQICRAC&url=https%3A%2F%2Fwww.arb.ca.gov%2Fmsprog%2Ftech%2Ftechreport%2Fng\\_tech\\_report.pdf&usg=AOvVaw3Nr5wr9Kg7in0PrH\\_b\\_Cba](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwieh8rmw4nfAhUkGDQIHah-DgcQFjAAegQICRAC&url=https%3A%2F%2Fwww.arb.ca.gov%2Fmsprog%2Ftech%2Ftechreport%2Fng_tech_report.pdf&usg=AOvVaw3Nr5wr9Kg7in0PrH_b_Cba).

<sup>82</sup> DEIR, Page IV.F-13.

<sup>83</sup> DEIR, p. 4.D-31; 14 CCR sec. 15064.4(b)(3).

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The DEIR concludes that the Project will not have significant GHG impacts because it will comply with Executive Orders S-3-05 and B-30-15, Assembly Bill 32 (“AB 32”) Scoping Plan, SCAG’s 2016-2040 RTP/SCS, City of Los Angeles Mobility 2035 Plan, City of Los Angeles ClimateLA Implementation Plan, and the City of Los Angeles Green Building Ordinance.<sup>84</sup> However, the DEIR’s reliance on compliance with these plans, policies, and regulations is unsupported because some of the plans were not adopted through a public review process and contain no measures that are binding on the Project and that will effectively reduce or mitigate GHG impacts, in violation of the requirements of CEQA Guidelines Section 15064.4(b)(3). For example, the City’s ClimateLA Implementation Plan is an implementation program for action items discussed in the GreenLA plan released by the City of Los Angeles in May 2007. It is not a guidance document adopted after a noticed public review period. The Green Building Ordinance contains standards aimed at conserving energy and reducing GHG emissions; it was not adopted through a public process. The DEIR’s reliance on these plans to determine whether or not the Project will result in significant GHG emissions is unsupported, and does not comply with the requirements of CEQA Guidelines Section § 15064.4(b)(3). An updated GHG analysis must be prepared in a revised EIR that adequately evaluates the Project’s GHG impacts.

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**C. The DEIR Fails to Adequately Disclose and Mitigate the Project’s Significant Traffic and Transportation Impacts.**

**1. The DEIR Relies on Outdated Traffic Studies to Establish the Baseline for the Project’s Traffic Impacts.**

An EIR must describe the existing baseline conditions in the Project vicinity at the time the Notice of Preparation (“NOP”) is issued.<sup>85</sup> An accurate description of the affected environment is essential because it establishes the baseline physical conditions against which a lead agency can then determine whether an impact is significant.<sup>86</sup> The DEIR’s Transportation Impact Analysis (“TIA”) relies on traffic data and traffic manuals from 2013-2015, which pre-date the NOP by as much as 3 years. The DEIR therefore relies on stale data which fails to establish an accurate baseline against which to measure the Project’s traffic impacts.

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<sup>84</sup> DEIR, Pages IV.F-27, IV.F-34

<sup>85</sup> 14 CCR § 15125(a).

<sup>86</sup> *Comtys. For A Better Env’t v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 328; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 952; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal. App 4th 1109, 1121-22.



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Mr. Smith explains that the DEIR’s reliance on outdated traffic data prejudiced the DEIR’s traffic analysis in several ways. First, the DEIR failed to analyze the transportation/traffic implications of 2 to 3 or more years of ambient traffic growth through 2022, as required for an accurate assessment of the Project’s traffic impacts.<sup>87</sup>

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Second, the DEIR failed to analyze the transportation/traffic implications of relevant downtown projects that became reasonably certain after 2013-2015. The Los Angeles Department of Transportation (“LADOT”) maintains a concurrent project list. Mr. Smith notes that the Memorandum of Understanding (“MOU”) between the Project Sponsor and LADOT regarding details of the TIA, which is incorporated in the DEIR Appendix I-B, is dated December 8, 2015 (the year prior to the NOP). While the MOU incorporated the most up-to-date listing of concurrent related projects at the time, the list contains only 92 project entries. Other downtown development projects that were initiated slightly later in 2016 than the Project have “relevant projects” lists totaling in excess of 110 developments.<sup>88</sup>

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As Mr. Smith explains, publicly available data demonstrates that several other downtown development projects are likely to be completed by this Project’s anticipated 2022 operations date, including as many as 160 or more projects.<sup>89</sup> These projects will have cumulative traffic and transportation impacts on the Project that must be analyzed in the DEIR in order to provide an accurate assessment of the Project’s transportation impacts. For example, Mr. Smith explains that street configuration changes planned for the nearby My Fig project will implement physical changes on the Project’s traffic and transit routes. These changes will include modifications to Figueroa and Cottage Place, after which Project users will be restricted to only right turn in / right turn out entry and exit access from the Project site. This access will be further restricted due to the LA Downtown Streetcar, which will operate in a street-running configuration along Figueroa from 11th Street to 7th Street.<sup>90</sup> These street modifications will be in effect by the time the Project becomes operational in 2022, yet the DEIR fails to analyze them entirely.

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Finally, the DEIR relies on the Institute of Transportation Engineers publication Trip Generation, 9th Edition as a source for trip generation data. As Mr. Smith explains, since 2017, that publication has been rendered obsolete by publication of Trip Generation, 10th Edition.<sup>91</sup> Since the Project has not yet been approved, and the DEIR’s traffic

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<sup>87</sup> Exhibit B, p. 1.

<sup>88</sup> See Exhibit B, p. 2.

<sup>89</sup> Exhibit B, p. 2.

<sup>90</sup> Exhibit B, p. 2.

<sup>91</sup> Exhibit B, p.3.

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analysis purports to analyze a project that will become operational in 2022, the DEIR must analyze the Project’s traffic impacts using accurate and current methodology. The DEIR’s reliance on outdated traffic analysis methodology is unsupported.

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The TIA must be updated to account for current, relevant traffic conditions that have arisen since the 2013-2015 time period in which the TIA’s data was collected, and to use relevant methodology to analyze the Project’s transportation impacts.

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**2. The DEIR’s Trip Generation Analysis Is Flawed.**

Mr. Smith concludes that the DEIR significantly underestimates the Project’s trip generation analysis by failing to account for numerous trips related to the Project’s proposed commercial and hotel uses.

First, the DEIR underestimates trips that will be generated by the Project’s shopping center by failing to apply a “fitted curve” factor that is recommended by the Trip Generation manual. As Mr. Smith explains, use of the fitted curve would have resulted in a gross daily trip generation calculation of the Project’s 65,074 square foot retail component to be 3,221 trips, instead of the 2,779 gross daily trips estimated in the DEIR, and pm peak gross trips at 478 trips instead of 241.<sup>92</sup> The trip values derived by following the current Trip Generation methodology are respectively 15.9 and 98.8 percent greater than the outdated gross trip estimates for this component of the Project included in the DEIR. The DEIR fails to explain its omission of the “fitted curve” factor, or provide any evidence demonstrating the accuracy of its own estimates.

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Second, the DEIR improperly discounted hotel and restaurant guest trips. The DEIR assumes that 15% of hotel and restaurant guests will arrive by public transit, which is the maximum discounted trip generation rate identified in the outdated version of Trip Generation, 9<sup>th</sup> Edition, on which the DEIR relies. The DEIR does not cite supporting evidence for its reliance on the maximum discounted rate. Mr. Smith explains that, under current trip count methodology, it is improbable that hotel or restaurant guests would rely on transit for 15 percent of their trips, and that the maximum discounted trip rate should only apply to hotel and restaurant employees.<sup>93</sup>

<sup>92</sup> Exhibit B, p. 3.

<sup>93</sup> Exhibit B, p. 3.

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Third, the DEIR fails to account for the impacts of the rise of Transportation Network Companies (“TNCs”), sometimes referred to as ride-sharing services such as Uber and Lyft. As Mr. Smith explains, these services, which did not exist when the now-outdated Trip Generation, 9th Edition, was researched and published, nor when the LADOT guidelines on which the DEIR’s TIA relies were issued, have been found to cause “induced trips,” i.e. trips that would not have been made had the services not existed, or private vehicle trips to more distant destinations. Mr. Smith further explains that TNC trips create a huge distortion to traditional trip generation rates, because each passenger trip causes 2 or more vehicle trips – one responding to the call, another delivering the passenger(s), and possibly a third trip circulating until a call for a new trip is received.<sup>94</sup> The DEIR fails to include any analysis of the impacts of TNC on Project-generated trips.

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The DEIR must be revised to include an updated transportation analysis that takes into account current cumulative projects, current transportation methodology, and current trip generation estimates.

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**D. The DEIR Improperly Defers Analysis and Mitigation of Potentially Significant Soil Contamination Impacts.**

The DEIR explains that the Project site was formerly used as a gas station and carwash, beginning in 1979-1981, which installed five underground storage tanks (“USTs”) at the Project site.<sup>95</sup> These USTs were removed in 1998 and replaced with one split (9,000/6,000) gasoline UST and one 10,000 gasoline UST. The new USTs were placed in the location of the historic five USTs.<sup>96</sup> At that time, a leaking UST (“LUST”) was discovered, and the Los Angeles Fire Department (“LAFD”) opened an LUST case based on the presence of gasoline and related constituents in site soils. A soil and groundwater investigation was conducted in 2002, and five rounds of quarterly groundwater sampling were conducted from 2002-2003. Oversight was transferred from LAFD to the Los Angeles Regional Water Quality Control Board (“LARWQCB”). The LARWQCB conducted soil and groundwater sampling around the LUST in late 2011. The two tanks installed in 1998 were removed in January 2013.<sup>97</sup> The LARWQCB closed the LUST case in July 2013.<sup>98</sup> However, the past cleanup of the LUSTs remains a historical recognized environmental condition (“REC”). The DEIR also explains that residual contamination remains in soil and groundwater beneath the Project site, and acknowledges that this contamination

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<sup>94</sup> Exhibit B, p. 3.

<sup>95</sup> DEIR, p. IV.G-19.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

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“could pose an unknown environmental risk under certain site development activities such as site grading, excavation, and/or extraction of groundwater.”<sup>99</sup>

The Phase I Environmental Site Assessment (“ESA”) included in the DEIR discusses the historic RECs the Project site, and documents some past levels of soil contaminants detected at the site.<sup>100</sup> However, neither the DEIR nor the Phase I ESA contain any discussion or analysis of whether these residual contaminants are located in areas of the Project site that will be disturbed by Project excavation or grading activities, whether these contaminants will be disturbed, and in what quantities, and whether this disturbance would pose a potentially significant health risk to workers or off-site receptors. Given that the Project proposes to develop the entire Project site with new buildings, new underground parking, and new uses, there is a high likelihood that Project construction activities will encounter and disturb these residual contaminants. Nevertheless, the DEIR fails entirely to analyze the impacts that the Project will have from disturbing contaminated soil and groundwater.

Instead, the DEIR attempts to rely on the Phase I ESA and Mitigation Measure G-1 to conclude that the Project will not result in any significant impacts from disturbing contaminated soil and groundwater.<sup>101</sup> But neither the Phase I ESA nor Mitigation Measure G-1 disclose the extent to which contaminated soil will be disturbed, discuss whether significant levels of contaminants are likely to be released, or describe what steps the Applicant will be required to take to mitigate these potentially significant impacts.

The stated purpose of the Phase I ESA was to identify any potential RECs in connection with the Project site.<sup>102</sup> The Phase I ESA did not assess the levels of residual contamination at the site, or the likelihood that existing contamination would be disturbed by excavation, grading, and other soil disturbing activities during Project construction. Rather, the Phase I relied solely on a “visual survey of the subject property,” along with owner interviews and review of regulatory databases to document historical chemical releases.<sup>103</sup> The Phase I acknowledges that it “did not attempt to independently verify the accuracy or completeness of all information reviewed or received” during the course of its investigation.<sup>104</sup> This is because, as the Phase I explains, “[t]he primary purpose of this

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<sup>99</sup> DEIR, p. IV.G-20, I-11.

<sup>100</sup> See Phase I ESA, pp. 3-4, 18.

<sup>101</sup> DEIR, p. I-10, pp. IV.G-19 to 20.

<sup>102</sup> Phase I ESA, p. 4.

<sup>103</sup> Phase I ESA, p. 5.

<sup>104</sup> Phase I ESA, p. 5.

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Phase I Environmental Site Assessment Report (the Report) is to assist Client, in its underwriting of a proposed mortgage loan on the subject property.”<sup>105</sup>

Rather than perform further analysis in the DEIR itself, and identify the mitigation measures needed to reduce potentially significant exposure to soil contaminants, the DEIR relies on Mitigation Measure G-1 (“MM G-1”) to conclude that soil contamination impacts will be less than significant with this mitigation in place. However, MM G-1 is not a mitigation measure, it is a measure providing for deferred analysis of soil impacts which proposes to allow the Applicant to create a post-approval Soil Management Plan to identify and remediate potentially significant soil contamination after the Project has been approved.<sup>106</sup> MM G-1 would illegally postpone to a post-approval stage two critical steps that are required by CEQA to be included in the DEIR disclosure of impacts, and selection of mitigation measures. This violates CEQA’s basic requirement that an EIR must fully disclose all potentially significant impacts of a project, and implement all feasible mitigation to reduce those impacts to less than significant levels *before* a project can be approved.

First, MM G-1 allows deferred detection of the nature and extent of soil contamination impacts by proposing to allow the Applicant to “address the delineation of the vertical and lateral extent of residual gasoline-related constituent impacts in Project site soil” as part of the Soil Management Plan.<sup>107</sup> MM G-1 fails to even require that a Phase II ESA be prepared by a qualified environmental consultant to quantify these impacts, an analytical step which is commonly included in EIR’s for contaminated sites. MM G-1 therefore unlawfully defers its analysis of soil contamination impacts, in violation of CEQA.<sup>108</sup>

Second, MM G-1 defers the selection of mitigation measures and procedures for removing contaminated soil to subsequent determination in the Soil Management Plan. MM G-1 proposes to allow the Plan to “set forth procedures to be followed during the Project’s excavation and development phases to properly manage the soil and minimize risks to workers and the public during construction.”<sup>109</sup> The procedures to be selected include measures, such as separating hazardous soil from non-hazardous soil during excavation, and measures to “describe the transport and disposal of the soil at an

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<sup>105</sup> Phase I ESA, p. 4.

<sup>106</sup> DEIR, p. I-11.

<sup>107</sup> *Id.*

<sup>108</sup> *Madera Oversight Coalition, Inc., v. County Of Madera* (2011) 199 Cal. App. 4th 48.

<sup>109</sup> DEIR, p. I-11.



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appropriate waste management facility.”<sup>110</sup> These procedures should have been described to the public in the DEIR, but were not.

Moreover, the DEIR lacks substantial evidence on which to conclude that the Soil Management Plan will effectively reduce soil contamination impacts to less than significant levels because there is no analysis of the severity of the impacts that it proposes to mitigate in the first place. Even if the City contends that subsequent regulatory oversight will ensure that contamination is cleaned up to regulatory levels, that does not remedy the lack of information included in the DEIR itself. MM G-1 also lacks performance standards (such as preparation of a Phase II ESA by a qualified consultant, or engaging a qualified soil remediation consultant to develop the Soil Management Plan) to ensure that the mitigation measures that are subsequently selected will be effective at reducing impacts to less than significant levels, another basic requirement of CEQA.<sup>111</sup>

The DEIR acknowledges that “No specific Project Design Features are proposed with regard to hazards and hazardous materials.”<sup>112</sup> Therefore, the Soils Plan is the only proposed mitigation for potentially hazardous soil or groundwater contamination present at the Project site.

The DEIR’s analysis and proposed mitigation measure for hazardous impacts is inadequate. The City cannot conclude that the Project’s hazardous materials impacts are less than significant unless it first conducts the full and rigorous impact analysis required by CEQA, and produces concrete substantial evidence and adequate mitigation measures to justify the finding.<sup>113</sup> A revised EIR must be prepared to include a Phase II ESA, and the DEIR cannot be certified until all significant impacts from the release of potentially significant soil contamination during Project construction are fully mitigated.

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<sup>110</sup> DEIR, p. I-11.

<sup>111</sup> CEQA requires the lead agency to adopt feasible mitigation measures that will substantially lessen or avoid a project’s potentially significant environmental impacts (PRC §§ 21002, 21081(a)) and describe those mitigation measures in the EIR. PRC § 21100(b)(3); CEQA Guidelines section 15126.4. A public agency may not rely on mitigation measures of uncertain efficacy or feasibility. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727.

<sup>112</sup> DEIR Page IV.G-18.

<sup>113</sup> *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

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**IV. CONCLUSION**

The DEIR is inadequate as an environmental document because it fails to fully disclose and mitigate the Project's potentially significant impacts on air quality, transportation, public health, and hazardous materials. Moreover, its findings regarding Project impacts are not supported by substantial evidence. The City cannot approve the Project until it prepares a revised DEIR that resolves these issues and complies with CEQA's requirements.

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Thank you for your attention to these comments. Please include them in the record of proceedings for the Project.

Sincerely,



Christina Caro

CMC:ljl

Attachments