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July 6, 2020

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### **Re: Preliminary Comments on the Draft Environmental Impact Report for Lehigh Southwest Stockton Terminal Project (SCH: 2019100510)**

Dear Mr. Cashman & Mr. Aschieris:

On behalf of **San Joaquin Residents for Responsible Industry** (“San Joaquin Residents”), we submit these preliminary comments on the Draft Environmental Impact Report (“DEIR”) for the Lehigh Southwest Stockton Terminal (“Project”)<sup>1</sup> prepared pursuant to the California Environmental Quality Act (“CEQA”)<sup>2</sup> by the Port of Stockton (“the Port”). The Project is proposed by Lehigh Southwest Stockton (“Applicant”) and would redevelop an existing bulk cementitious material receiving and distribution terminal at the Port to accommodate additional capacity and improve operational efficiency. The proposed project consists of: (1) Berth 2 rehabilitation; (2) ship unloader replacement; (3) rail trestle replacement; (4) barge loading component installation; and (5) upland facility improvements, including dome construction, truck loading station modifications, a new higher-capacity rail car loading station, demolition of structures and equipment, and existing bunker dust collector replacements. The Project is located at 205 Port Road 1 and the adjacent Berth 2 in Stockton, California.

<sup>1</sup> Anchor QEA, Draft Environmental Impact Report: Lehigh Southwest Stockton Terminal Project, State Clearinghouse Number: 2019100510, Prepared for the Port of Stockton (May 2020) (“DEIR”).

<sup>2</sup> Public Resources Code § 21000 *et seq.*; 14 Cal. Code Regs. (“C.C.R.”) §§ 15000 *et seq.*

This letter contains the preliminary comments of San Joaquin Residents and its technical consultants based on an initial review of the DEIR and a limited set of DEIR reference documents. As discussed below, the Port failed to provide San Joaquin Residents with timely access to the DEIR reference documents, as required by CEQA.<sup>3</sup> The Port also refused San Joaquin Residents' June 22, 2020 and July 1, 2020 requests to extend the public comment period to allow additional time to review DEIR reference documents that were provided just days before. The Port also withheld critical air pollution emissions data from disclosure, in violation of CEQA, the California Public Records Act, and the California Clean Air Act.<sup>4</sup> Due to the limited time provided for public comment and San Joaquin Residents' limited access to documents underlying the DEIR's analysis, we have not had adequate time to fully review and comment on the DEIR. We reserve the right to supplement these comments at a later date, and at any and all later proceedings related to this Project.<sup>5</sup>

Based on our preliminary review of the DEIR, we have concluded that it fails to comply with CEQA. The DEIR suffers from an unsupported throughput baseline and an incomplete and inconsistent project description. The Project poses significant air quality impacts from construction and operation that are both understated in the DEIR and inadequately mitigated. The DEIR also fails to conduct a quantitative health risk analysis to evaluate the public health consequences of toxic diesel emissions on nearby residences and workers from Project construction and operation. And the DEIR fails to commit to adequate mitigation measures to reduce significant greenhouse gas ("GHG") emissions impacts to the greatest extent feasible.

These comments were prepared with the assistance of air quality and health risk experts Phyllis Fox, Ph.D., P.E., and James Clark, Ph.D. Comments and curriculum vitae of Dr. Fox are attached to this letter as Attachment A.<sup>6</sup> Dr. Clark's

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<sup>3</sup> Pub. Resources Code § 21092(b)(1); 14 C.C.R. § 15087(c)(5).

<sup>4</sup> Pub. Resources Code § 21092(b)(1); 14 C.C.R. § 15087(c)(5); Gov. Code §6254.7(a), (e) ("Notwithstanding any other provision of law, all air pollution emission data, including those emission data which constitute trade secrets as defined in subdivision (d), are public records."); and Health and Safety Code §44346(h).

<sup>5</sup> Gov. Code § 65009(b); Pub. Resources Code § 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.

<sup>6</sup> **Attachment A:** Comments on the Draft Environmental Impact Report for the Lehigh Southwest Stockton Terminal Project by Phyllis Fox (July 6, 2020) ("Fox Comments").

comments and curriculum vitae are included as Attachment B.<sup>7</sup> Attachments A and B are fully incorporated herein and submitted to the Port herewith. Therefore, the Port must separately respond to the technical comments in Attachments A and B.

For the reasons discussed herein, and in the attached expert comments, San Joaquin Residents urges the Port to remedy the deficiencies in the DEIR by preparing a legally adequate revised DEIR and recirculating it for public review and comment.

## I. STATEMENT OF INTEREST

San Joaquin Residents is an unincorporated association of individuals and labor organizations whose members live, work, and recreate in San Joaquin County and are concerned about environmental and public health impacts from development in the region. The association includes the San Joaquin Building and Construction Trades Council (“SJBCTC”), their affiliate organizations, members, and families, and City of Stockton residents Steven M. Dickinson, David Gracian, and Tim Knoeb.

San Joaquin Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working and living environment for its individual members and member organizations. Industrial transport and distribution facilities are uniquely dangerous and capable of generating significant emission of air pollutants and toxic substances that adversely impact air quality, water quality, biological resources, and public health and safety. Absent adequate disclosure and mitigation of these impacts, terminal workers and surrounding communities may be subject to chronic health problems, reduced air quality, and even the risk of bodily injury and death.

Environmental degradation jeopardizes future jobs by causing construction moratoriums, eliminating protected species and habitat, and putting added stresses on the environmental carrying capacity of the state. In particular, poorly planned industrial distribution facility projects can adversely impact the economic wellbeing of people who perform construction and maintenance work in aggregate processing facilities, port terminals, refineries and other industrial facilities, and the

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<sup>7</sup> **Attachment B:** Letter from J. Clark to W. Mumby re Comment Letter on Draft Environmental Impact Report (DEIR) for Lehigh Southwest Stockton Terminal Project, Stockton, California, State Clearing House Number 2019100510 (July 5, 2020) (“Clark Comments”).

surrounding communities. This reduces future employment opportunities. In contrast, well designed projects that reduce the environmental impacts of industrial processing and transport improve long-term economic prospects and reduce adverse impacts on local communities and the environment.

Individual members of San Joaquin Residents and its affiliated labor organizations live, work, recreate, and raise their families in San Joaquin County. 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, therefore, be first in line to be exposed to any hazardous materials, air contaminants or other health and safety hazards that exist onsite. The members of San Joaquin Residents have an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members.

## II. LEGAL BACKGROUND

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an EIR.<sup>8</sup> The EIR is a critical informational document, the "heart of CEQA."<sup>9</sup> "The foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."<sup>10</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>11</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

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<sup>8</sup> Public Resources Code § 21100.

<sup>9</sup> *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 944 (citation omitted).

<sup>10</sup> *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390 (internal quotations omitted).

<sup>11</sup> Public Resources Code § 21061; 14 C.C.R. §§ 15002(a)(1); 15003(b)–(e); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 517 ("[T]he basic purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect [that] a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.").

‘protects not only the environment but also informed self-government.’”<sup>12</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>13</sup> As the CEQA Guidelines explain, “[t]he EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected.”<sup>14</sup>

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring consideration of environmentally superior alternatives and adoption of all feasible mitigation measures.<sup>15</sup> The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.”<sup>16</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>17</sup>

While 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>18</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>19</sup> “The ultimate inquiry, as case

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<sup>12</sup> *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564, quoting *Laurel Heights*, 47 Cal.3d at 392.

<sup>13</sup> *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; see also *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”) (purpose of EIR is to inform the public and officials of environmental consequences of their decisions *before* they are made).

<sup>14</sup> 14 C.C.R. § 15003(b).

<sup>15</sup> 14 C.C.R. § 15002(a)(2), (3); see also *Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.

<sup>16</sup> 14 C.C.R. § 15002(a)(2).

<sup>17</sup> Public Resources Code § 21081; 14 C.C.R. § 15092(b)(2)(A) & (B).

<sup>18</sup> *Berkeley Jets*, 91 Cal.App.4th 1344, 1355 (emphasis added), quoting *Laurel Heights*, 47 Cal.3d at 391, 409, fn. 12.

<sup>19</sup> *Berkeley Jets*, 91 Cal.App.4th at 1355; see also *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 (error is prejudicial if the failure to include relevant information precludes informed decision-making and informed public participation, thereby

law and the CEQA guidelines make clear, is whether the EIR includes enough detail ‘to enable who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’”<sup>20</sup>

### **III. THE PORT FAILED TO PROVIDE TIMELY ACCESS TO DEIR REFERENCE DOCUMENTS, WHICH MAY NECESSITATE FURTHER COMMENT SUBMISSION**

The Port failed to make all documents referenced or relied upon in the DEIR available for public review during the DEIR’s public comment period, thereby truncating the public comment period, in violation of CEQA.<sup>21</sup> As a result, San Joaquin Residents was unable to complete its review and analysis of the DEIR and its supporting evidence during the current public comment period. Our requests for a further extension were denied. We therefore provide preliminary comments on the DEIR and reserve our right to submit supplemental comments on the DEIR at a future date.

This office initially requested access to the DEIR reference documents from the Port on behalf of San Joaquin Residents member SJBTC on June 3, 2020, and received a partial production of documents from the Port on June 12, 2020.<sup>22</sup> Between June 12 and June 22, 2020, SJBTC sought access to the remaining DEIR reference documents, but was advised by the Port that access to outstanding responsive DEIR reference documents would not be provided until July 17, 2020, almost two weeks after the close of the DEIR comment period.<sup>23</sup>

On June 22, 2020, SJBTC submitted its first extension request to the Port, identifying approximately 40 outstanding DEIR reference documents that were

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thwarting the statutory goals of the EIR process); *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117 (decision to approve a project is a nullity if based upon an EIR that does not provide decision-makers and the public with information about the project as required by CEQA); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946 (prejudicial abuse of discretion results where agency fails to comply with information disclosure provisions of CEQA).

<sup>20</sup> *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516, quoting *Laurel Heights*, 47 Cal.3d at 405.

<sup>21</sup> **Attachment C:** Letter from ABJC to Port of Stockton re *Second Request to Extend the Public Review and Comment Period for the Draft Environmental Impact Report for Lehigh Southwest Stockton Terminal (SCH: 2019100510)* (July 1, 2020), pp. 1–2.

<sup>22</sup> *Id.* at 2–3.

<sup>23</sup> *Id.* at 3.

missing from the Port's June 12 response.<sup>24</sup> The Port did not inform SJBCTC that it had located the outstanding responsive documents until June 25, 2020.<sup>25</sup> The Port then further delayed the release of the outstanding DEIR reference documents to June 26, 2020, due to the Port's stated need for final review by Port Counsel.<sup>26</sup> The Port denied SJBCTC's first request for an extension.<sup>27</sup>

Our review of the Port's June 26, 2020 production of additional DEIR reference documents determined that at least three (3) sets of DEIR reference documents were still missing from the Port's response. On July 1, 2020, we submitted a second request for an extension of the DEIR public comment period which identified the missing reference documents and again requested access.

On July 2, 2020, counsel for the Port denied SJBCTC's second extension request, asserting that the DEIR reference documents would have been timely available if SJBCTC had appeared in person at the Port office asking to review the DEIR reference documents, rather than sending letters, emails, and making phone calls to the Port to request access to the documents.<sup>28</sup> Of course, Port counsel's response was inconsistent with SJBCTC's basic request for "access" to the DEIR reference documents in any form, and was inconsistent with written statements made by Port staff, which explained to SJBCTC that the Port did not locate outstanding responsive documents until June 25, 2020, and could not provide access to them until June 26, 2020, after review by Port counsel. As our July 1, 2020 letter explained, even if SJBCTC had sent a person to physically review the DEIR reference documents at the Port's office, the reference documents would not have been available until at least June 25, 2020.<sup>29</sup> Moreover, CEQA does not require the public to violate public health orders and COVID-19 social distancing protocols while risking serious viral infection to participate in a public comment process.<sup>30</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> **Attachment D:** Email from S. Herum to W. Mumby re Second Request to Extend the Public Review and Comment Period for the Draft Environmental Impact Report for Lehigh Southwest Stockton Terminal (SCH: 2019100510) (July 2, 2020).

<sup>29</sup> **Attachment C:** Letter from ABJC to Port of Stockton re *Second Request to Extend the Public Review and Comment Period for the Draft Environmental Impact Report for Lehigh Southwest Stockton Terminal (SCH: 2019100510)* (July 1, 2020), p. 3.

<sup>30</sup> *Id.* at 3–4.

CEQA requires that “all documents referenced in the draft environmental impact report” be available for review and “readily accessible” during the entire comment period.<sup>31</sup> Courts have held that the failure to provide even a few pages of an EIR for a portion of the CEQA public review period invalidates the entire CEQA process, and that such a failure must be remedied by permitting additional public comment.<sup>32</sup> Contrary to these clear mandates, and despite the Port’s failure to provide timely access to the DEIR reference documents, the Port refused to grant SJBCTC’s reasonable requests for an extension of the comment period.

The Port continues to withhold the following DEIR reference documents:

- Air quality modeling files relied upon for DEIR Appendix E in unlocked Excel/Word files as requested
- Caltrans (California Department of Transportation), 2015. Compendium of Pile Driving Sound Data. October 2015.
- NMFS (National Marine Fisheries Service), 2014. Biological Opinion for the Downtown San Francisco Ferry Terminal Expansion project, San Francisco, California. June 30, 2014.<sup>33</sup>

The Port also asserts that the Port is not required to provide access to the unlocked Excel spreadsheets containing the DEIR’s emissions calculations and air modeling inputs.<sup>34</sup> But CEQA affords the public a right of access to all documents referenced and relied upon to support the conclusions and findings in an EIR.<sup>35</sup> It is also well settled that an EIR may not rely on hidden studies or documents that are not provided to the public.<sup>36</sup> The DEIR’s emissions calculations and modeling files are referenced in the DEIR and are directly relied upon to support the DEIR’s conclusions regarding the nature and severity of the Project’s air quality impacts, and to support the DEIR’s conclusions regarding air quality mitigation. These files

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<sup>31</sup> Public Resources Code § 21092(b)(1) (emphasis added); 14 C.C.R. § 15072(g)(4).

<sup>32</sup> *Ultramar v. South Coast Air Quality Management District* (1993) 17 Cal.App.4th 689, 702–703.

<sup>33</sup> See **Attachment C**: Letter from ABJC to Port of Stockton re *Second Request to Extend the Public Review and Comment Period for the Draft Environmental Impact Report for Lehigh Southwest Stockton Terminal (SCH: 2019100510)* (July 1, 2020), p. 4.

<sup>34</sup> **Attachment D**: Email from S. Herum to W. Mumby re *Second Request to Extend the Public Review and Comment Period for the Draft Environmental Impact Report for Lehigh Southwest Stockton Terminal (SCH: 2019100510)* (July 2, 2020).

<sup>35</sup> Public Resources Code § 21092(b)(1); 14 C.C.R. § 15087(c)(5).

<sup>36</sup> *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 (“Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.”).



are therefore within the scope of documents that the public has a right to access under CEQA, and are necessary to facilitate an effective public review process.

Despite our month-long efforts to obtain “immediate access” to all materials referenced in the DEIR, the Port only granted us access to a portion of the reference materials, and in an untimely manner. The Port’s responses were provided in a piecemealed fashion, at the end of which the Port denied San Joaquin Residents’ right to access some of the DEIR’s most critical supporting materials for its air quality analysis. The Port’s actions flout CEQA’s disclosure requirements and have resulted in a violation of San Joaquin Residents’ due process rights.<sup>37</sup>

#### **A. Emissions Data and Modeling Files Used to Support the DEIR’s Air Quality Analysis are Not Exempt from Public Disclosure.**

The Port erroneously asserts that the unlocked air quality emissions and modeling files we requested are proprietary information exempt from disclosure under the Public Records Act.<sup>38</sup> Port Counsel also inaccurately claims that this office has never disputed the Port’s prior decisions to withhold emissions modeling data based on purported proprietary information.<sup>39</sup> This is false. Contrary to the Port’s assertions, and as Port Counsel is aware, we have disputed the Port’s claims of privilege related to emissions data on prior occasions, and have clearly explained that withholding this information is contrary to law.

The requested emissions data is not exempt from disclosure under the California Public Records Act or any other state law.<sup>40</sup> The Public Records Act states that “[a]ll information, analyses, plans, or specifications that disclose the nature, extent, **quantity, or degree of air contaminants** or other pollution which any article, machine, equipment or other contrivance will produce, which any . . . air quality management district, or any other state or local agency or district, requires

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<sup>37</sup> *Id.*; Gov. Code § 6253(a) (requires public records to be “open to inspection at all times during the office hours of the state or local agency” and provides that “every person has a right to inspect any public record.”).

<sup>38</sup> **Attachment D:** Email from S. Herum to W. Mumby re Second Request to Extend the Public Review and Comment Period for the Draft Environmental Impact Report for Lehigh Southwest Stockton Terminal (SCH: 2019100510) (July 2, 2020).

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

<sup>40</sup> See Gov. Code § 6254 (enumerating PRA exemptions and not stating any exemption for emissions data); *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1262 (statutory exemptions from mandatory disclosure under PRA must be narrowly construed where they limit the public’s right to access).

any applicant to provide before the applicant builds, erects, alters, replaces, operates, sells, rents, or uses the article, machine, equipment, or other contrivance, **are public records.**<sup>41</sup> The Public Records Act further states, “**Notwithstanding any other provision of law, all air pollution emission data**, including those emission data which constitute trade secrets as defined in subdivision (d), **are public records.**”<sup>42</sup> The Health and Safety Code further states that “[a]ll information collected pursuant to this chapter . . . shall be considered ‘air pollution emission data,’ for the purposes of this section.”<sup>43</sup>

Here, the Project would occur in the northern portion of the San Joaquin Valley Air Basin (“SJVAB”), within the jurisdiction of the San Joaquin Valley Air Pollution Control District (“SJVAPCD”).<sup>44</sup> In addition to permitting and rule compliance, air quality management at the local level is also accomplished through SJVAPCD imposition of mitigation measures on project EIRs. CEQA requires mitigation of air quality impacts that exceed certain significance thresholds set by the local air district. The DEIR explains that SJVAPCD’s CEQA significance thresholds are applicable to the Project, along with SJVAPCD Rules 4101, 4102, 4201, 4202, 8021, 8041, and 8061.<sup>45</sup> The DEIR’s emissions data is thus being used to assert that the Project complies with CEQA, SJVAPCD emissions limits, SJVAPCD’s CEQA thresholds, and with SJVAPCD rules related to localized emissions sources.<sup>46</sup> The emissions data sought by San Joaquin Residents clearly would “disclose the nature, extent, quantity or degree of air contaminants or other pollution which [the facility] will produce” within the meaning of the California Public Records Act and California Clean Air Act.<sup>47</sup> Therefore, it is clear under state law that the requested emissions records are not subject to trade secret or other proprietary protection, and are subject to disclosure under the Public Records Act pursuant to Gov. Code sections 6254.7(a) and (e).

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<sup>41</sup> Gov. Code § 6254.7(a) (emphasis added).

<sup>42</sup> Gov. Code § 6254.7(e) (emphasis added).

<sup>43</sup> Health & Safety Code § 44346(h) (emphasis added).

<sup>44</sup> DEIR, p. 71.

<sup>45</sup> DEIR, pp. 80–81.

<sup>46</sup> DEIR, pp. 80–81, 87–90.

<sup>47</sup> Gov. Code § 6254.7(a).

#### **IV. THE DEIR'S BASELINE FOR THE PROJECT'S AIR POLLUTION IMPACTS FAILS TO COMPLY WITH CEQA**

An unsupported baseline renders an EIR deficient under CEQA.<sup>48</sup> In *Communities for a Better Environment v. South Coast Air Quality Management District*, the California Supreme Court held that the baseline used in a CEQA analysis should reflect “established levels of particular use.”<sup>49</sup> The environmental analysis conducted by the air district in that case improperly used a theoretical level of NO<sub>x</sub> emissions that did not match actual operations.<sup>50</sup> The Court explained that failure to represent actual operational conditions, undermines the purpose of CEQA to fully inform decision makers and the public.<sup>51</sup>

In *Association of Irrigated Residents v. Kern County Board of Supervisors* (“*AIR v. Kern County*”), the Court of Appeal held that substantial evidence supports an agency’s choice of a baseline when there is evidence showing that the baseline emissions numbers selected by the lead agency are representative of typical operations.<sup>52</sup> In *AIR v. Kern County*, the Court of Appeal reasoned that the County’s 2007 figure of crude oil barrel throughput at a refinery was a suitable baseline because there was substantial evidence in the EIR showing that the baseline number was close to average of throughput from 2001 to 2008.<sup>53</sup>

##### **A. The DEIR’s Selection of a 2018 Baseline is Unsupported**

The DEIR selected 2018 throughput at the existing terminal on the Project site as its baseline to calculate the emissions increases from the Project. The 2018 baseline data included 883,793 tons of cement using 18,720 trucks, 587 rail cars, and 9 ships and represented the most recent full year of data.<sup>54</sup> As Dr. Fox observes, the DEIR acknowledges fluctuations in throughput since 2016, but asserts, without supporting evidence, that 2018 was a representative year of baseline operations.<sup>55</sup>

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<sup>48</sup> *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (“*CBE v. SCAQMD*”) (2010) 48 Cal.4th 310, 328.

<sup>49</sup> *CBE v. SCAQMD*, 48 Cal.4th at 322.

<sup>50</sup> *Id.* at 320–322, 328.

<sup>51</sup> *Id.* at 328.

<sup>52</sup> *Association of Irrigated Residents v. Kern County Board of Supervisors* (“*AIR v. Kern County*”) (2017) 17 Cal.App.5th 708, 728–729.

<sup>53</sup> *Id.*

<sup>54</sup> DEIR, pp. 31–32.

<sup>55</sup> DEIR, p. 32; Fox Comments, p. 10.

Without evidence demonstrating that the 2018 throughput amounts used in the DEIR track closely with typical operations and were not an outlier year, the Port lacks substantial evidence to support the DEIR's claim that this baseline selection complies with CEQA's requirement that the baseline reflects "establish levels of particular use" and properly informs decision makers and the public of an appropriate frame of reference.<sup>56</sup> Moreover, unlike in *AIR v. Kern County*, the DEIR here lacks any evidentiary support that the choice of baseline is representative of typical throughput prior to implementation of the Project.<sup>57</sup>

A revised DEIR which establishes a legally adequate baseline supported by substantial evidence is necessary to comply with CEQA.

### **B. The DEIR's Baseline for NO<sub>x</sub> Emissions Is Underestimated by the Port's Own Calculations**

The DEIR substantially underestimates the Project's baseline NO<sub>x</sub> emissions by failing to accurately disclose baseline daily NO<sub>x</sub> emissions. Dr. Clark used the annual average NO<sub>x</sub> emissions from Table 12 of the DEIR and converted tons/year to lbs/day to show that the baseline emissions derived from the DEIR's own emissions calculations are 53.26 lbs of NO<sub>x</sub>/day, an emissions rate that is much higher than the DEIR's reported 17.1 lbs/day.<sup>58</sup> Thus, the reported baseline for daily emissions is about two-thirds less than it should be, based on the DEIR's own analysis.<sup>59</sup>

An inaccurate baseline renders an EIR deficient under CEQA.<sup>60</sup> As discussed above, in *Communities for a Better Environment v. South Coast Air Quality Management District*, the California Supreme Court held that the baseline used in a CEQA analysis should reflect emissions associated with actual operations.<sup>61</sup> Failure to represent actual operational conditions, undermines the purpose of CEQA to fully inform decision makers and the public.<sup>62</sup>

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<sup>56</sup> *CBE v. SCAQMD*, 48 Cal.4th at 322, 328.

<sup>57</sup> *AIR v. Kern County*, 17 Cal.App.5th at 728–729.

<sup>58</sup> Clark Comments, p. 2.

<sup>59</sup> Clark Comments, p. 4.

<sup>60</sup> *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (“*CBE v. SCAQMD*”) (2010) 48 Cal.4th 310, 328; *Communities for a Better Environment v. City of Richmond* (“*CBE v. City of Richmond*”) (2010) 184 Cal.App.4th 70, 89.

<sup>61</sup> *CBE v. SCAQMD*, 48 Cal.4th at 320–322, 328.

<sup>62</sup> *Id.* at 328.

In *Communities for a Better Environment v. City of Richmond*, the Court of Appeal held that an EIR failed as an informational document because inconsistencies in the project description obscured the degree to which the project would enable the refinery to process heavier crude oil and because the EIR completely failed “to properly establish, analyze, and consider an environmental baseline.”<sup>63</sup> The Court of Appeal reasoned that when an EIR “omits relevant baseline information, the agency cannot make an informed assessment of the project’s impacts.”<sup>64</sup>

As with the CEQA documents in both of the above cases, the DEIR here mischaracterizes information relevant to the baseline air pollution levels and how the Project will impact air quality.<sup>65</sup> The DEIR must clearly state the baseline level of daily NO<sub>x</sub> emissions under current operational conditions in order to lay the foundation for an accurate environmental analysis.<sup>66</sup> Given that the DEIR contains inconsistent information about its baseline for daily operational NO<sub>x</sub> emissions and apparently underreports daily emissions under current operations, the DEIR is deficient as an informational document under CEQA. The DEIR must be revised to provide an accurate and clear baseline description that reflects actual conditions.

## **V. THE DEIR FAILS TO PROVIDE A COMPLETE AND ACCURATE PROJECT DESCRIPTION**

CEQA requires that an EIR “set forth a project description that is sufficient to allow an adequate evaluation and review of the environmental impact.”<sup>67</sup> Yet, the DEIR states that it does not know how many trucks will visit the Project terminal.<sup>68</sup> The absence of information about the number of trucks that will pass through the terminal after the Project is complete renders the DEIR’s analysis of the Project’s operational air quality impacts from mobile sources unsupported and potentially inaccurate. The lack of information about Project truck trips also casts doubt on the efficacy of truck-related mitigation measures, such as the idling restrictions in Air Quality Mitigation Measure 3 (“MM-AQ-3”), and renders the DEIR’s conclusions

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<sup>63</sup> *CBE v. City of Richmond*, 184 Cal.App.4th at 89.

<sup>64</sup> *Id.*

<sup>65</sup> *CBE v. SCAQMD*, 48 Cal.4th at 320–322, 328; *CBE v. City of Richmond*, 184 Cal.App.4th at 89.

<sup>66</sup> *CBE v. SCAQMD*, 48 Cal.4th at 320–322, 328; *CBE v. City of Richmond*, 184 Cal.App.4th at 89.

<sup>67</sup> *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654 (citing 14 C.C.R. § 15124).

<sup>68</sup> DEIR, p. 96.

regarding truck mitigation equally unsupported.<sup>69</sup> The project description requirements of CEQA mandate that this piece of information—which is central to the analysis of the Project’s air quality impacts—be investigated and disclosed to the public.

In addition, the Project description suffers from inconsistencies regarding the proximity of sensitive receptors that could be subjected to heightened health risk from emissions of toxic air contaminants (“TACs”), such as diesel particulate matter (“DPM”). While the DEIR’s air quality analysis claims that the nearest sensitive receptors are residences 1,300 feet away from the Project site, the DEIR contradicts itself by stating elsewhere that the “closest sensitive receptor to the terminal is a residential area located approximately 500 feet to the south.”<sup>70</sup> Furthermore, the Project’s Authority to Construct Application to SJVAPCD documents a residence within 690 feet of a Project truck/railroad loading spout.<sup>71</sup>

Dr. Clark’s comments describe these inconsistencies and explain that they undermine the DEIR’s claim that health risk from air pollution is negligible.<sup>72</sup> The proximity of sensitive receptors to the sources of the Project’s TAC emissions is a key factor in evaluating the nature and severity of the Project’s health risk impacts. If sensitive receptors are closer to TAC emissions sources than the DEIR considered for purposes of evaluating health risk, then the DEIR’s conclusions regarding health risk are entirely inaccurate and unsupported. The proximity of sensitive receptors within 1000 feet of the Project site also provides additional support for the need to conduct a quantitative health risk assessment—an analysis the Port neglected to include in the DEIR.

Without a complete and accurate project description, the DEIR fails as an informational document under CEQA. A revised EIR must be prepared.

## **VI. THE DEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE SIGNIFICANT AIR QUALITY 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

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<sup>69</sup> DEIR, pp. 95–96.

<sup>70</sup> DEIR, pp. 71, 100.

<sup>71</sup> Authority to Construct Application: Lehigh Southwest Cement Co., Stockton, CA, Facility No. N-153, San Joaquin Valley Air Pollution Control District (December 2019).

<sup>72</sup> Clark Comments, pp. 9–13.

levels. The lead agency's significance determination for each impact must be supported by accurate scientific and factual data.<sup>73</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>74</sup> The failure to provide information required by CEQA is a failure to proceed in the manner required by law.<sup>75</sup> In *Sierra Club v. County of Fresno*, the California Supreme Court affirmed the importance CEQA's informational disclosure requirements by holding that an EIR fails as an informational document when it fails to disclose the public health impacts from air pollutants that would be generated by a development project.<sup>76</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>77</sup>

As explained below, the DEIR fails to adequately support its analysis of construction impacts with substantial evidence and underestimates significant construction and operational emissions. The DEIR also understates the degree to which annual operational emissions of NO<sub>x</sub> exceed applicable thresholds of significance, misrepresents the daily operational emissions from the Project, and fails to require all feasible mitigation measures to reduce significant air quality impacts, as required by CEQA.

#### **A. The DEIR Lacks Support for its Analysis of Project Construction and Underestimates Significant Construction Emissions**

While the DEIR relies on CalEEMod 2016.3.1 to estimate construction emissions, Dr. Fox explains that the use of this model requires supporting construction plans, including a schedule identifying equipment, detailed

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<sup>73</sup> 14 C.C.R. § 15064(b).

<sup>74</sup> *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

<sup>75</sup> *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

<sup>76</sup> *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 518–522.

<sup>77</sup> *Berkeley Jets*, 91 Cal.App.4th at 1355.

descriptions of construction equipment activity, and other data.<sup>78</sup> Appendix E to the DEIR includes a summary of the Project's construction schedule, but Dr. Fox points out that it omits key construction data, such as hours of use per day for each piece of equipment, horsepower, and engine tiers.<sup>79</sup> As Dr. Fox explains, Moreover, the DEIR, Appendix E, and materials produced in response to our record requests only included the CalEEMod output and not any of the underlying modeling files with the inputs used. Without the unlocked modeling files, the construction calculations cannot be verified without detailed information about the construction equipment, a detailed construction schedule, and a description of the engine tier used for each piece of equipment.<sup>80</sup>

In addition, Dr. Fox explains that the CalEEMod model fails to calculate windblown dust as a source of PM<sub>10</sub> and PM<sub>2.5</sub>.<sup>81</sup> The DEIR's reliance on SJVAPCD Rule 8021 to control fugitive dust during construction does not replace CEQA's requirement to analyze the potential for particulate emissions generated by Project construction and windblown dust.<sup>82</sup> For example, Dr. Fox explains that the Diablo winds can reach speeds of up to 50 miles per hour and produce substantial dust particulate matter.<sup>83</sup> This condition may be exacerbated by Project construction, and could be particularly problematic for graded areas and stockpiles, yet the intensity of the winds is not reflected by the DEIR's CalEEMod modeling.<sup>84</sup> Dr. Fox concludes that air dispersion modeling is necessary to evaluate the Project's potential for crate potentially significant dust impacts on local ambient air quality and public health.<sup>85</sup>

Relatedly, the DEIR fails to include any calculations of wind erosion emissions.<sup>86</sup> Using U.S. EPA's generic construction emissions factor of 1.2 tons of total suspended material per acre per month of activity, Dr. Fox calculated wind erosion emissions of 208 lbs of total suspended particulate ("TSP")/day.<sup>87</sup> Dr. Fox explains that PM10 accounts for 34 to 52 percent of TSP when water is used for

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<sup>78</sup> Fox Comments, pp. 3–8.

<sup>79</sup> DEIR, Appendix E, at PDF p. 385; Fox Comments.

<sup>80</sup> Fox Comments, pp. 3–8.

<sup>81</sup> Fox Comments, pp. 3–8.

<sup>82</sup> DEIR, p. 80; Fox Comments, pp. 3–8.

<sup>83</sup> Fox Comments, pp. 3–8.

<sup>84</sup> Fox Comments, pp. 3–8.

<sup>85</sup> Fox Comments, pp. 3–8.

<sup>86</sup> Fox Comments, pp. 3–8.

<sup>87</sup> Fox Comments, pp. 3–8. Dr. Fox acknowledged inconsistencies in the DEIR about the appropriate acreage to be graded during construction but stated her assumptions in her calculations.



dust control.<sup>88</sup> Therefore, up to 108 lbs/day of PM<sub>10</sub> could be generated during earthmoving activities, even assuming compliance with SJVAPCD Rule 8021.<sup>89</sup> This amount is in excess of the significance threshold of 100 lbs/day.<sup>90</sup> The DEIR fails to analyze these impacts and presents no proposed mitigation measures to reduce potentially significant impacts to less than significant levels.<sup>91</sup> Therefore, the DEIR fails as an informational document as it does not analyze or address a potentially significant environmental impact with potential for severe public health consequences.

### **B. The DEIR Misrepresents the Severity of Daily and Annual Operational Emissions<sup>92</sup>**

The DEIR misrepresents the daily emissions amounts attributable to the Project based on the data disclosed in the DEIR. Dr. Clark identifies several emissions sources that are omitted from the DEIR's daily emissions analysis, including transiting ocean-going vessels ("OGVs") and harbor crafts passing through the SJVAB, rail car movement into the Port, employee vehicle emissions, and truck emissions transiting to and from the site.<sup>93</sup> These omissions account for another 36.06 lbs/day of unreported NO<sub>x</sub> emissions.<sup>94</sup> Therefore, Dr. Clark explains, daily operational emissions in Year 1 of Project operation should actually be 107.5 lbs/day, 85 lbs/day higher than the DEIR states.<sup>95</sup> Consequently, Year 1, Year 5, and Year 15 of the Project all have daily operational emissions rates that exceed the significance threshold of 100 lbs/day.<sup>96</sup>

Dr. Fox remodeled the DEIR's daily emission calculations to include all omitted emissions sources while assuming just 312 days/year of operation

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<sup>88</sup> Fox Comments, pp. 3–8.

<sup>89</sup> Fox Comments, pp. 3–8.

<sup>90</sup> Fox Comments, pp. 3–8.

<sup>91</sup> Fox Comments, pp. 3–8.

<sup>92</sup> Dr. Fox explains in her comments that the operational emissions calculations cannot be verified due to the Port's failure to provide unlocked Excel spreadsheets with the supporting data. (Fox Comments, p. 11.) Nevertheless, Dr. Clark and she used the information available to critique the DEIR's conclusions.

<sup>93</sup> Clark Comments, pp. 2–5.

<sup>94</sup> Clark Comments, pp. 2–5.

<sup>95</sup> Clark Comments, pp. 2–5.

<sup>96</sup> Clark Comments, pp. 2–5.

(approximately 6 days/week).<sup>97</sup> The results, summarized in her comments, indicate significant daily NO<sub>x</sub> emissions in the SJVAB that were not disclosed in the DEIR.<sup>98</sup>

Under both Dr. Clark's and Dr. Fox's analysis, the Project results in significant daily NO<sub>x</sub> emissions which exceed the estimates presented in the DEIR. In its current form, the DEIR fails to disclose the extent of this significant air quality impact and fails to analyze the consequences it may have on regional air quality, as required by CEQA.<sup>99</sup> As explained by Dr. Clark, "[t]he Port must provide an accurate accounting of emissions in a revised DEIR."<sup>100</sup>

In addition, while the DEIR acknowledges that annual operational emissions of NO<sub>x</sub> from the Project exceed the SJVAPCD significance threshold and are therefore significant, the DEIR still underestimates these emissions. The DEIR consistently explains that emissions modeling is based on one-way trips rather than roundtrip travel of trucks, ships, and trains.<sup>101</sup> Therefore, as Dr. Fox explains, emissions as report in the DEIR are merely half of what they should be.<sup>102</sup> The DEIR should be revised to fully reflect the degree to which the significance thresholds for NO<sub>x</sub> and the Project's other mobile source air pollutant emissions will be exceeded and to consider feasible mitigation in light of these potentially severe air quality impacts.

### **C. The DEIR Fails to Require All Feasible Air Quality Mitigation Measures to Reduce Air Pollution and Toxic Air Contaminants from Project Construction and Operation to the Greatest Extent Feasible**

CEQA requires agencies to commit to all feasible mitigation measures to reduce significant environmental impacts.<sup>103</sup> In particular, the lead agency may not make required CEQA findings, including finding that a project impact is significant and unavoidable, unless the administrative record demonstrates that it has adopted all feasible mitigation to reduce significant environmental impacts to the greatest

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<sup>97</sup> Fox Comments, pp. 13–14.

<sup>98</sup> Fox Comments, pp. 13–14.

<sup>99</sup> See *Sierra Club*, 6 Cal.5th at 518–522.

<sup>100</sup> Clark Comments, p. 6.

<sup>101</sup> DEIR, Tables E2.11, E2.22 (PDF pp. 287, 435.)

<sup>102</sup> Fox Comments, p. 13.

<sup>103</sup> 14 C.C.R. § 15002(a)(2).

extent feasible.<sup>104</sup> Yet, as explained below, the DEIR falls far short of this mandate by adopting mitigation measures that are vague, ineffective, and unenforceable and by failing to commit to other feasible and effective mitigation strategies to address significant air quality impacts of the Project.

Air Quality Mitigation Measure 2 (“MM-AQ-2”) requires the use of equipment with Tier 4 engines or equivalent for construction.<sup>105</sup> However, as Dr. Clark explains, the DEIR is vague about whether this requirement is for Tier 4 Interim or Tier 4 Final construction equipment.<sup>106</sup> The U.S. EPA has gradually adopted improving tiers of cleaner off-road construction equipment since 1994: Tier 1, Tier 2, Tier 3, Tier 4 Interim, and Tier 4 Final.<sup>107</sup> Tier 4 Final is the “cleanest burning equipment and therefore has the lowest emissions compared to other tiers, including Tier 4 Interim equipment.”<sup>108</sup> In fact, as Dr. Clark explains, Tier 4 Final technology can remove more than 90 percent of PM<sub>2.5</sub> emissions, whereas Tier 4 Interim only removes between 80 percent to 90 percent of PM<sub>2.5</sub> exhaust.<sup>109</sup>

The disparity in emissions reduction potential between Tier 4 Final and Tier 4 Interim equipment undermines the effectiveness of MM-AQ-2.<sup>110</sup> Dr. Fox also explains that it is impossible to determine the engine tiers assumed in the CalEEMod modeling because the modeling inputs are omitted from the DEIR and were not produced in response to our records requests.<sup>111</sup> Therefore, Dr. Fox was unable to verify the effectiveness of the use of Tier 4 equipment in mitigating air quality effects and the potential for significant construction emissions impacts.<sup>112</sup> CEQA forbids a public agency from relying on mitigation measures of uncertain efficacy.<sup>113</sup> MM-AQ-2 should be revised to commit to using Tier 4 Final equipment to maximize potential construction emissions reductions.

Furthermore, MM-AQ-2 fails to define “specialized equipment,” excludes equipment of 50 horsepower or less from the Tier 4 requirement, and does not

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<sup>104</sup> Pub. Res. Code § 21081(a)(3), (b); 14 C.C.R. §§ 15090, 15091; *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883.

<sup>105</sup> DEIR, p. 95.

<sup>106</sup> Clark Comments, pp. 13–15.

<sup>107</sup> Clark Comments, pp. 13–15.

<sup>108</sup> Clark Comments, pp. 13–15.

<sup>109</sup> Clark Comments, pp. 13–15.

<sup>110</sup> Clark Comments, pp. 13–15.

<sup>111</sup> Fox Comments, p. 8.

<sup>112</sup> Fox Comments, p. 8.

<sup>113</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727–728.

require Tier 4 engines where they are “not available.”<sup>114</sup> These are potentially gaping exceptions given that “specialized equipment” and “available” are not defined<sup>115</sup> The DEIR indicates that generator sets and welders used in the CalEEMod analysis are less than the 50 horsepower exclusion.<sup>116</sup> Therefore, there is substantial evidence in the DEIR demonstrating that at least some of the Project’s construction equipment are not subject to MM AQ-2. Finally, it is unclear what retrofits for equivalent Tier 4 reductions means or how retrofits will be documented to ensure compliance.<sup>117</sup> Thus, MM-AQ-2 should be revised to clarify what is actually required and to close these mitigation loopholes, in order to assure that MM-AQ-2’s claimed construction emissions reductions are actually achieved.

The DEIR also relies on ineffective mitigation measures and improperly dismisses other potentially effective measures. Mitigation measures must be enforceable through binding conditions.<sup>118</sup> Yet, Air Quality Mitigation Measure 4 (“MM-AQ-4”) reads, “**Where possible**, Lehigh will encourage the use of clean trucks (defined as model year 2017 or newer) to transport cementitious material.”<sup>119</sup> This mitigation measure’s use of weak, noncommittal language makes it virtually useless in reducing air quality impacts.<sup>120</sup> Qualifying language like “where possible” creates a massive loophole that Lehigh can exploit to avoid the use of clean trucks altogether.<sup>121</sup> Moreover, as written, MM-AQ-4 merely requires Lehigh to “encourage” the use of clean trucks.<sup>122</sup> It does not require the use of clean trucks. Therefore, MM-AQ-4 lacks the enforceability to assure that any clean trucks will be used for the Project, and, as a result, fails to guarantee that MM-AQ-2 will be effective at reducing the Project’s admittedly significant NOx and GHG emissions from on-road trucks, as required by CEQA.<sup>123</sup>

As Dr. Fox explains, the DEIR’s emission calculations already assume the use of 2017 trucks.<sup>124</sup> This assumption is unsupported because neither MM-AQ-2, nor any other mitigation measure in the DEIR, affirmatively require the use of

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<sup>114</sup> DEIR, p. 95.

<sup>115</sup> DEIR, p. 95.

<sup>116</sup> DEIR, Appendix E (PDF pp. 399–400.)

<sup>117</sup> Fox Comments, p. 9.

<sup>118</sup> 14 C.C.R. § 15126.4(a)(2).

<sup>119</sup> DEIR, p. 95 (emphasis added).

<sup>120</sup> Clark Comments, p. 8.

<sup>121</sup> Clark Comments, p. 8.

<sup>122</sup> Clark Comments, p. 8.

<sup>123</sup> 14 C.C.R. § 15126.4(a)(2); *Kings County*, 221 Cal.App.3d at 727–728.

<sup>124</sup> Fox Comments, p. 15.

clean trucks. The Port therefore lacks substantial evidence to support the DEIR's on-road truck emissions calculations, and MM-AQ-4 fails to assure that the significant emissions from trucks will be mitigated.<sup>125</sup>

In addition, Dr. Clark notes that the DEIR fails to properly evaluate the feasibility of obtaining clean trucks.<sup>126</sup> The Port should consider the following information in revising the mitigation measure to require feasible and meaningful steps to reduce truck emissions associated with the Project: CARB recently began its Advanced Clean Trucks Program, which will require increasing percentages of truck sales to be zero-emissions.<sup>127</sup> By 2024, five percent of Class 7-8 tractor group trucks sold will be zero-emission vehicles.<sup>128</sup> By 2035, 40 percent of truck tractor sales for Classes 4-8 will be zero-emission trucks.<sup>129</sup> While zero-emission trucks may be difficult to come by now, the infeasibility argument against requiring such vehicles will become less persuasive over time. Therefore, MM-AQ-4 should be revised to not only commit to using clean trucks without exception, but to require use of zero-emission trucks to the extent they are available for purchase during the Project's operational life. With sales of zero-emission trucks ramping up between 2024 and 2035, it is reasonable to expect feasible access to zero-emission trucks for the Project by at least 2030. In light of this readily available information, the burden is on the Port to explain specifically why such additional mitigation is not feasible.<sup>130</sup>

Air Quality Mitigation Measure 5 ("MM-AQ-5") requires obtaining clean yard equipment whenever new or replacement equipment is purchased.<sup>131</sup> However, the DEIR concedes that yard equipment was not included in the air quality emissions modeling anyway and may not be a significant source of emissions, meaning that any reductions would not help reduce emissions below the significance threshold.<sup>132</sup>

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<sup>125</sup> Fox Comments.

<sup>126</sup> Clark Comments.

<sup>127</sup> NY Times, New Rule in California Will Require Zero-Emissions Trucks (June 25, 2020), available at [https://www.nytimes.com/2020/06/25/climate/zero-emissions-trucks-california.html?campaign\\_id=49&emc=edit\\_ca\\_20200626&instance\\_id=19776&nl=california-today&regi\\_id=77081991&segment\\_id=31936&te=1&user\\_id=8130478fe5d425835020177bbd142aaa](https://www.nytimes.com/2020/06/25/climate/zero-emissions-trucks-california.html?campaign_id=49&emc=edit_ca_20200626&instance_id=19776&nl=california-today&regi_id=77081991&segment_id=31936&te=1&user_id=8130478fe5d425835020177bbd142aaa).

<sup>128</sup> California Air Resources Board, Advanced Clean Trucks Fact Sheet, available at <https://ww2.arb.ca.gov/resources/fact-sheets/advanced-clean-trucks-fact-sheet>.

<sup>129</sup> *Id.*

<sup>130</sup> See *Covington* 43 Cal.App.5th at 879–883 (holding that revised EIR was required where respondent failed to explain why the petitioners' proposed mitigation measure was not feasible).

<sup>131</sup> DEIR, p. 96.

<sup>132</sup> Fox Comments.

Dr. Clark explains that, although a substantial portion of NO<sub>x</sub> emissions come from ships, the DEIR neglects to incorporate mitigation measures to address those “substantial sources” of pollution.<sup>133</sup> The DEIR estimates that emissions from ships at berth, ships maneuvering through the SJVAB, and tugboats account for 51.5 percent of the baseline NO<sub>x</sub> emissions and 60 to 65 percent of operational NO<sub>x</sub> emissions in the following years.<sup>134</sup> By year 15, the emissions from ships increase 172 percent from the baseline emissions.<sup>135</sup> At that time, truck emissions will account for about 30 percent of NO<sub>x</sub> emissions from the Project.<sup>136</sup> Therefore, Dr. Clark explains that the Port must implement additional mitigation measures to reduce substantial NO<sub>x</sub> emissions from non-truck sources.<sup>137</sup>

Dr. Fox explains that NO<sub>x</sub> emissions can be mitigated using the Voluntary Emissions Reduction Agreement (“VERA”) program offered by SJVAPCD.<sup>138</sup> The DEIR claims that the Port cannot require VERAs as mitigation for the Project based on the erroneous assumption that VERAs cannot ensure timely and effective CEQA mitigation of on-site emissions.<sup>139</sup> To the contrary, as explained by Dr. Fox and the SJVAPCD, VERAs and other similar mitigation agreement programs have been used many times to reduce air pollution emissions impacts—a testament to its feasibility and effectiveness.<sup>140</sup>

VERAs have been consistently and effectively used since 2005 to reduce NO<sub>x</sub>, VOC, and ROG emissions from development projects within the San Joaquin Air Basin. “Since 2005, the [SJVAPCD] has entered into 42 VERAs with project proponents to mitigate air quality impacts of their projects. These VERAs have generated over \$105 million that the District has invested in local emission reduction projects.”<sup>141</sup> As of 2019, in addition to avoiding approximately 15,230 tons of NO<sub>x</sub> and PM<sub>10</sub> emissions from new development through the incorporation of on-site mitigation and clean-air design measures into projects subject to Rule 9510, SJVAPCD has confirmed approximately 10,286 tons of reductions in NO<sub>x</sub> and PM<sub>10</sub> emissions have been achieved through the investment of ISR and VERA funds in its

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<sup>133</sup> Clark Comments.

<sup>134</sup> DEIR, Table E2-2; Clark Comments.

<sup>135</sup> Clark Comments.

<sup>136</sup> Clark Comments.

<sup>137</sup> Clark Comments.

<sup>138</sup> Fox Comments.

<sup>139</sup> DEIR, p. 97; Fox Comments.

<sup>140</sup> Fox Comments.

<sup>141</sup> SJVAPCD Staff Report: Approve VERA with Contanda Terminals LLC (September 19, 2019).

emission reduction incentive programs.<sup>142</sup> VERAs have also been implemented for other Port projects to offset operational NO<sub>x</sub> emissions from both on-site and off-site sources.<sup>143</sup>

There is also substantial evidence in SJVAPCD's annual VERA reports that VERA funds are used annually to implement direct NO<sub>x</sub> reduction projects within the SJVAB, with no shortage of NO<sub>x</sub> reduction projects in queue for VERA funding.<sup>144</sup> The DEIR's contention that there is no guarantee that VERA funds would be used to offset NO<sub>x</sub> in a timely manner is unsupported by any evidence and is belied by the substantial evidence of ongoing NO<sub>x</sub> reduction projects contained in SJVAPCD's annual VERA reports.

SJVAPCD has designed flexibility into the VERA such that the final mitigation can be based on actual emissions related to the project as determined by actual equipment used, hours of operation, etc. After the project is mitigated, the District certifies to the Lead Agency that the mitigation is completed, providing the Lead Agency with an enforceable mitigation measure demonstrating that project specific emissions have been mitigated to less than significant levels.<sup>145</sup>

Finally, the DEIR's claim that VERAs are infeasible because they provide only off-site NO<sub>x</sub> mitigation is a red herring. NO<sub>x</sub> is a regional pollutant, and an ozone precursor. As such, NO<sub>x</sub> reductions in any location within the SJVAB effectively result in regional reductions of NO<sub>x</sub> emissions. There is substantial evidence demonstrating that "[VERA] dollars provided by the project proponent are reinvested in the Valley to reduce emissions."<sup>146</sup> Additionally, a large component of the Project's operational NO<sub>x</sub> emissions will come from truck and vessel transport. These emissions will occur off-site, as well as on-site. Off-site NO<sub>x</sub> mitigation must therefore be evaluated and implemented for the Project in order to reduce NO<sub>x</sub> emissions to the greatest extent feasible, as required by CEQA.

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<sup>142</sup> SJVAPCD, 2019 Annual Report: Indirect Source Review Program (July 1, 2018 to June 30, 2019), p. 2.

<sup>143</sup> SJVAPCD Staff Report: Approve VERA with Contanda Terminals LLC (September 19, 2019).

<sup>144</sup> SJVAPCD, 2019 Annual Report: Indirect Source Review Program (July 1, 2018 to June 30, 2019), pp. 2, 12.

<sup>145</sup> SJVAPCD, Guidance for Assessing and Mitigating Air Quality Impacts (February 19, 2015), pp. 116–117.

<sup>146</sup> SJVAPCD Staff Report: Approve VERA with Contanda Terminals LLC (September 19, 2019).

Furthermore, Dr. Fox explains that the VERAs can be tailored to fund measures with localized NO<sub>x</sub> reduction effects.<sup>147</sup> Some examples include:

- Emissions from ships and rail lines that pass through irrigated farmland could be mitigated under VERAs by electrifying irrigation pumps or replacing old, dirty tractors with cleaner equipment.<sup>148</sup>
- Emissions impacting residential neighborhoods could be mitigated by installing solar panels or by replacing fireplaces with more efficient heating methods.<sup>149</sup>
- Emissions from trucks that transport product to market could be mitigated by upgrading to cleaner engines.<sup>150</sup>

Therefore, the DEIR should, in accordance with SJVAPCD recommendations, require \$8,123 per ton of NO<sub>x</sub> in excess of the significance threshold as part of a VERA as a mitigation measure.<sup>151</sup> A revised DEIR should be prepared and recirculated.

Notably, the DEIR's discussion of VERAs mentions that NO<sub>x</sub> emissions will exceed the threshold of 10 tons/year by 4.1 tons/year by year 5 and 6.1 tons/year by year 15.<sup>152</sup> But this information is inaccurate and contradicted by DEIR Table 12, which shows that the annual operational NO<sub>x</sub> emissions exceed the threshold by 9.62 tons in year 1, by 14.3 tons in year 5, and by 15.87 tons in year 15.<sup>153</sup> Therefore, it is crucial that any NO<sub>x</sub> offsets purchases as part of a VERA address the correct amount of excess pollution rather than the erroneous numbers mentioned in the DEIR.

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<sup>147</sup> Fox Comments.

<sup>148</sup> Fox Comments.

<sup>149</sup> Fox Comments.

<sup>150</sup> Fox Comments.

<sup>151</sup> Fox Comments.

<sup>152</sup> DEIR, p. 97.

<sup>153</sup> Clark Comments; DEIR, pp. 88–89, 97.



## VII. THE DEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE POTENTIALLY SIGNIFICANT HEALTH RISK IMPACTS FROM DPM EMISSIONS

A lead agency's significance determination must be supported by accurate scientific and factual data.<sup>154</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>155</sup>

These standards apply to an EIR's analysis of public health impacts of a Project. In *Sierra Club v. County of Fresno*, the California Supreme Court affirmed CEQA's mandate to protect public health and safety by holding that an EIR fails as an informational document when it fails to disclose the public health impacts from air pollutants that would be generated by a development project.<sup>156</sup> In *Sierra Club*, the Supreme Court held that the EIR for the Friant Ranch Project—a 942-acre master-planned, mixed-use development with 2,500 senior residential units, 250,000 square feet of commercial space, and open space on former agricultural land in north central Fresno County—was deficient as a matter of law in its informational discussion of air quality impacts as they connect to adverse human health effects.<sup>157</sup> As the Court explained, “a sufficient discussion of significant impacts requires not merely a determination of whether an impact is significant, but some effort to explain the nature and magnitude of the impact.”<sup>158</sup> The Court concluded that the County's EIR was inadequate for failing to disclose the nature and extent of public health impacts caused by the project's air pollution. As the Court explained, the EIR failed to comply with CEQA because after reading the EIR, “the public would have no idea of the health consequences that result when more pollutants are added to a nonattainment basin.”<sup>159</sup> CEQA mandates

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<sup>154</sup> 14 C.C.R. § 15064(b).

<sup>155</sup> *Kings County Farm Bureau*, 221 Cal.App.3d at 732.

<sup>156</sup> *Sierra Club*, 6 Cal.5th at 518–522.

<sup>157</sup> *Id.* at 507–508, 518–522.

<sup>158</sup> *Id.* at 519, citing *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 514–515.

<sup>159</sup> *Id.* at 518. CEQA's statutory scheme and legislative intent also include an express mandate that agencies analyze human health impacts and determine whether the “***environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.***” (Public Resources Code § 21083(b)(3) (emphasis added).) Moreover, CEQA directs agencies to “take immediate steps to identify any critical thresholds for the ***health and safety of the people*** of the state and take all coordinated actions necessary to prevent such thresholds being reached.” (Public Resources Code § 21000(d) (emphasis added).)

discussion, supported by substantial evidence, of the nature and magnitude of impacts of air pollution on public health.<sup>160</sup>

Furthermore, in *Berkeley Jets*, the Court of Appeal held that an EIR must analyze the impacts from human exposure to toxic substances.<sup>161</sup> In that case, the Port of Oakland approved a development plan for the Oakland International Airport.<sup>162</sup> The EIR admitted that the Project would result in an increase in the release of TACs and adopted mitigation measures to reduce TAC emissions, but failed to quantify the severity of the Project's impacts on human health.<sup>163</sup> The Court held that mitigation alone was insufficient, and that the Port had a duty to analyze the health risks associated with exposure to TACs.<sup>164</sup> As the CEQA Guidelines explain, "[t]he EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected."<sup>165</sup>

The failure to provide information required by CEQA makes meaningful assessment of potentially significant impacts impossible and is presumed to be prejudicial.<sup>166</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 factual conclusions.<sup>167</sup> Courts reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."<sup>168</sup>

Here, the DEIR asserts that CEQA "does not require comprehensive quantification of health risk for every project," and incorrectly claims that the DEIR is justified in not conducting a quantitative health risk analysis ("HRA") for the Project's emissions of TACs, including DPM.<sup>169</sup> As explained by Dr. Clark, without a

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<sup>160</sup> *Sierra Club*, 6 Cal.5th at 518–522.

<sup>161</sup> *Berkeley Jets*, 91 Cal.App.4th at 1369–1371.

<sup>162</sup> *Id.* at 1349–1350.

<sup>163</sup> *Id.* at 1364–1371.

<sup>164</sup> *Id.*

<sup>165</sup> 14 C.C.R. § 15003(b).

<sup>166</sup> *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236–1237.

<sup>167</sup> *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

<sup>168</sup> *Id.* (internal quotations omitted).

<sup>169</sup> DEIR, p. 98.

quantitative HRA, the DEIR's conclusion that the Project will pose a less than significant health risk impact is entirely unsupported.<sup>170</sup> Citing extensive scientific and state regulatory evidence, Dr. Clark explains that TACs such as DPM present severe acute and long-term health risks that warrant an analysis separate from the Port's criteria pollutant analysis.<sup>171</sup> Specifically, DPM contains toxins, unlike other particulates, and has been linked to respiratory disease, lung damage, cancer, and premature death.<sup>172</sup>

Moreover, the need for a site-specific HRA of the Project's construction and operational emissions was identified by both the California Air Resources Board ("CARB") and SJVAPCD when those agencies commented on the Notice of Preparation ("NOP") for the Project's DEIR.<sup>173</sup> CARB explained that the Project would result in more than doubling the number of bulk marine vessels, heavy-duty trucks, and trains visiting the Port and that the increased activity could negatively impact local and regional air quality.<sup>174</sup> Therefore, CARB requested that an HRA be prepared in accordance with OEHHA guidance.<sup>175</sup>

SJVAPCD similarly urged the Port to conduct a screening analysis that included all sources of emissions to further evaluate the need for a site-specific HRA.<sup>176</sup> A screening analysis establishes a prioritization score based on the proximity potentially impacted residences and the degree of health risk to those receptors.<sup>177</sup> A prioritization score of 10 or higher is considered significant and

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<sup>170</sup> Clark Comments, pp. 7–12.

<sup>171</sup> Clark Comments, pp. 7–8.

<sup>172</sup> Clark Comments, pp. 7–8.

<sup>173</sup> Clark Comments, p. 9; Letter from Karen Magliano, California Air Resources Board, to Jason Cashman, Port of Stockton re Comment on Notice of Preparation for Lehigh Southwest Stockton Terminal Project DEIR (January 10, 2020), available at PDF p. 321 of DEIR; SJVAPCD. 2019. Comment Letter Project: Notice of Preparation/Initial Study for Lehigh Southwest Stockton Terminal Project District CEQA Reference No: 20191267, available at PDF p. 354 of DEIR.

<sup>174</sup> Letter from Karen Magliano, California Air Resources Board, to Jason Cashman, Port of Stockton re Comment on Notice of Preparation for Lehigh Southwest Stockton Terminal Project DEIR (January 10, 2020), available at PDF p. 321 of DEIR

<sup>175</sup> *Id.*

<sup>176</sup> SJVAPCD. 2019. Comment Letter Project: Notice of Preparation/Initial Study for Lehigh Southwest Stockton Terminal Project District CEQA Reference No: 20191267, available at PDF p. 354 of DEIR; CAPCOA. 2009. Health Risk Assessments For Proposed Land Use Projects: A CAPCOA Guidance Document, p. 10, available at [http://www.valleyair.org/transportation/CAPCOA\\_HRA\\_LU\\_Guidelines\\_8-6-09.pdf](http://www.valleyair.org/transportation/CAPCOA_HRA_LU_Guidelines_8-6-09.pdf).

<sup>177</sup> *Id.*

triggers the need to prepare a refined HRA.<sup>178</sup> SJVAPCD added that projects that result in significant health risk should not be approved.<sup>179</sup>

The DEIR calculated a prioritization score of 7.67 using the baseline DPM values for OGVs at berth, harbor crafts servicing OGVs, and trucking idling on site.<sup>180</sup> However, Dr. Clark explains that the analysis omitted emissions from trucks traveling to the Project site (rather than just idling).<sup>181</sup> These emissions account for 43.35 lbs/year and results in a prioritization score of 11.7.<sup>182</sup> By year 5, the DPM emissions yield a prioritization score of 18.3 for the closest receptors.<sup>183</sup> Because these values exceed the SJVAPCD's prioritization threshold of 10, the need for a refined HRA is clearly established.

Instead of conducting a quantitative HRA, the DEIR asserts, without supporting evidence, that operation of the proposed project would result in incremental DPM emissions of less than 0.2 tons and produce an insignificant health risk of 6.7 in 1 million.<sup>184</sup>

The DEIR attempts to support this claim by citing to an HRA completed for a different Port project in 2019, which showed an increased risk of 6.7 million in 1 million at 1 ton of PM per year.<sup>185</sup> The DEIR assumes that the two projects are comparable enough to conclude that health risk would be the same for the Lehigh Project as it was for the other.<sup>186</sup> Yet, the DEIR admits that the projects are not comparable. The DEIR explains that their "receptors are not identical" and the projects' air dispersion patterns, while "similar," are not the same.<sup>187</sup> Moreover, Dr.

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<sup>178</sup> SJVAPCD. 2019. Comment Letter Project: Notice of Preparation/Initial Study for Lehigh Southwest Stockton Terminal Project District CEQA Reference No: 20191267, available at PDF p. 354 of DEIR; CAPCOA. 2009. Health Risk Assessments For Proposed Land Use Projects: A CAPCOA Guidance Document, p. 10, available at [http://www.valleyair.org/transportation/CAPCOA\\_HRA\\_LU\\_Guidelines\\_8-6-09.pdf](http://www.valleyair.org/transportation/CAPCOA_HRA_LU_Guidelines_8-6-09.pdf).

<sup>179</sup> SJVAPCD. 2019. Comment Letter Project: Notice of Preparation/Initial Study for Lehigh Southwest Stockton Terminal Project District CEQA Reference No: 20191267, available at PDF p. 354 of DEIR.

<sup>180</sup> Clark Comments.

<sup>181</sup> Clark Comments.

<sup>182</sup> Clark Comments.

<sup>183</sup> Clark Comments.

<sup>184</sup> DEIR, p. 99.

<sup>185</sup> DEIR, pp. 99–100.

<sup>186</sup> DEIR, p. 100.

<sup>187</sup> DEIR, p. 100.

Clark explains that the DEIR fails to consider other critical differences between the two projects which make the nature and extent of their health risk impacts different, including the distance of each project from the ship channel, the sources of DPM emissions, the condition of the homes affected by the emissions, and the proximity of sensitive receptors.<sup>188</sup> The DEIR also fails to consider the potential cumulative health risks posed by the Project in conjunction with other 2020 projects at the Port. In sum, “[t]he two projects are clearly different” and the differences between the projects demonstrate that an HRA performed for the 2019 Contanda project “cannot substitute for the required analysis of health risks posed by this project.”<sup>189</sup> Therefore, the DEIR contains no analysis of the health risk posed by this Project’s unique conditions—a violation of CEQA.

The Port’s next assertion, based on a 2005 CARB study, that exposure from TACs decline approximately 70 percent at 500 feet from the emission source is a red herring which does not support the DEIR’s health risk conclusions.<sup>190</sup> Dr. Clark explains that the 2005 study involved roadway emissions and did not include stacked sources, such as OGV smokestacks.<sup>191</sup> Moreover, as discussed above, the DEIR contains inconsistent information regarding the proximity of sensitive receptors, rendering the Port’s reliance on the CARB study as a basis not to perform an HRA additionally unsupported.<sup>192</sup> While page 100 DEIR’s air quality analysis claims that the nearest sensitive receptors are 1,300 feet away, page 71 of the DEIR states that the “closest sensitive receptor to the terminal is a residential area located approximately 500 feet to the south.”<sup>193</sup> In addition, PDF page 66 of the Project’s Authority to Construct Application to SJVAPCD shows a residence within 690 feet of a truck/railcar loading spout.<sup>194</sup> As explained by Dr. Clark, these inconsistencies “undermine the DEIR’s claim that health risk from air pollution is negligible, and further demonstrate that a quantitative health risk analysis is required for the project.”<sup>195</sup>

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<sup>188</sup> Clark Comments.

<sup>189</sup> Clark Comments.

<sup>190</sup> DEIR, p. 100; Clark Comments.

<sup>191</sup> Clark Comments.

<sup>192</sup> Clark Comments.

<sup>193</sup> DEIR, pp. 71, 100.

<sup>194</sup> Authority to Construct Application: Lehigh Southwest Cement Co., Stockton, CA, Facility No. N-153, San Joaquin Valley Air Pollution Control District (December 2019).

<sup>195</sup> Clark Comments.

In light of the above shortcomings, the DEIR fails to provide the public with basic information about the Project's health impacts, as required by CEQA.<sup>196</sup> As explained by Dr. Clark, "the DEIR made no attempt to quantify potentially significant health risks that would occur to nearby sensitive receptors, including workers, school children at nearby Washington Elementary, and residents within the Seaport Neighborhood" running along Interstate Highway 5 where trucks will travel.<sup>197</sup>

The Port's subsequent conclusion that there will be negligible health risks without actually evaluating the nature and magnitude of the impacts of DPM emissions from the Project is entirely unsupported, and runs afoul of the holding of *Sierra Club v. County of Fresno*.<sup>198</sup> Furthermore, just as the Port of Oakland in *Berkeley Jets* could not get away with its failure to quantify the severity of the impacts of TACs on human health, the Port here cannot neglect to conduct an HRA to measure the likely health impacts of the Project's DPM emissions.<sup>199</sup> In fact, the Port's position here is even more attenuated than the Port of Oakland's in *Berkeley Jets*. While the Port of Oakland assumed significance and adopted mitigation measures, the Port in this case did neither, instead opting to assume less than significant impacts without conducting a complete HRA.<sup>200</sup>

The Port attempts to rely on the 2019 Contanda HRA and the CARB 2005 study to argue that health risks will not be significant, but these are precisely the kinds of unsupported and inapplicable analyses that *Berkeley Jets* held was not entitled to deference.<sup>201</sup> With clear discrepancies between the Contanda project and this one and with inconsistent information regarding the proximity of sensitive receptors undermining the applicability of the CARB 2005 study, the Port lacks substantial evidence to support its conclusion that the Project's health risk impacts will be less than significant, and its decision to forgo including an HRA in the DEIR is a violation of law.

As Dr. Clark recommends, "a site-specific dispersion modeling of emissions from all sources associated with the Project to assess the Project's direct and

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<sup>196</sup> See *Sierra Club*, 6 Cal.5th at 518–522 (mandating discussion of the nature and magnitude of impacts of air pollution on public health with substantial evidentiary support).

<sup>197</sup> Clark Comments.

<sup>198</sup> *Sierra Club*, 6 Cal.5th at 518–522.

<sup>199</sup> *Berkeley Jets*, 91 Cal.App.4th at 1364–1371.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 1355, quoting *Laurel Heights*, 47 Cal.3d at 409, fn.12.

cumulative health impacts to construction workers and the community” must be conducted by the Port.<sup>202</sup> A revised DEIR should be prepared which incorporates an HRA with a thorough description of the public health hazards presented by the Project. This revised DEIR must then be recirculated for public comment.

## VIII. THE DEIR FAILS TO ADEQUATELY MITIGATE SIGNIFICANT GREENHOUSE GAS (“GHG”) EMISSIONS IMPACTS

CEQA requires the lead agency to use scientific data to evaluate GHG impacts directly and indirectly associated with a project.<sup>203</sup> The analysis must “reasonably reflect evolving scientific knowledge and state regulatory schemes.”<sup>204</sup> In determining the significance of GHG emissions impacts, the agency must consider the “extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions.”<sup>205</sup>

The DEIR concludes that GHG emissions are significant and unavoidable. As explained above, Mitigation Measures AQ-1 through AQ-4 fail to significantly reduce construction and mobile emissions. For the same reasons, these mitigation measures fail to reduce the Project’s GHG emissions to the greatest extent feasible, in violation of CEQA. Dr. Fox recommends the use of VERAs and carbon offsets as effective and feasible mitigation measures required under CEQA.<sup>206</sup> Dr. Fox explains that other DEIR’s have committed to such measures to offset GHG

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<sup>202</sup> Clark Comments.

<sup>203</sup> See 14 C.C.R. § 15064.4(a) (lead agencies “shall make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project); 14 C.C.R. § 15064(d) (evaluating significance of the environmental effect of a project requires consideration of reasonably foreseeable indirect physical changes caused by the project); 14 C.C.R. § 15358(a)(2) (defining “effects” or “impacts” to include indirect or secondary effects caused by the project and are “later in time or farther removed in distance, but are still reasonably foreseeable” including “effects on air”); CEQA Guidelines, Appendix G, § VIII: Greenhouse Gas Emissions (stating agencies should consider whether the project would “generate greenhouse gas emissions, **either directly or indirectly**, that may have a significant impact on the environment.”) (emphasis added).

<sup>204</sup> 14 C.C.R. § 15064.4(b); see also *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 504 (holding that lead agencies have an obligation to track shifting regulations and to prepare EIRs in a fashion that keeps “in step with evolving scientific knowledge and state regulatory schemes”).

<sup>205</sup> 14 C.C.R. § 15064.4(b)(3).

<sup>206</sup> Fox Comments.

emissions by paying for investments in building retrofits, solar panels, and energy efficient lighting.<sup>207</sup>

Furthermore, GHG Mitigation Measure 3 (“MM-GHG-3”) can and should be improved to comply with CEQA’s requirements. MM-GHG-3 requires the development of an energy use reduction plan by the Applicant.<sup>208</sup> The plan will in turn require replacement of less-efficient light bulbs with more efficient ones and installation of LED or other energy-saving lighting within two years of the effective date of a new lease.<sup>209</sup> Lehigh will also evaluate the applicability of solar on the terminal.<sup>210</sup>

This mitigation measure suffers from two key flaws. First, CEQA forbids delayed implementation of mitigation measures. Once a project “reaches the point where activity will have a significant adverse effect on the environment, the mitigation measures must be in place.”<sup>211</sup> The DEIR fails to explain why it would require two years to install energy efficient lighting at the terminal. The DEIR acknowledges significant GHG emissions impacts, but fails to commit to a feasibly expedited timeline to install energy efficiency measures before work on the Project commences. The DEIR therefore lacks substantial evidence to conclude that MM-GHG-3 will effectively reduce GHG emissions in any reasonable timeframe.

Second, CEQA prohibits deferring identification of mitigation measures when there is uncertainty about the efficacy of those measures.<sup>212</sup> An agency may only defer formulation of mitigation measures when there is a clear commitment to mitigation that will be measured against specific performance criteria.<sup>213</sup> Here,

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<sup>207</sup> Fox Comments.

<sup>208</sup> DEIR, p. 151.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *King & Gardiner Farms LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 860 (quoting *POET, LLC v. California Air Res. Bd.* (2013) 218 Cal.App.4th 681, 738.

<sup>212</sup> 14 C.C.R. § 15126.4(a)(1)(B); *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 366; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308–309.)

<sup>213</sup> *POET, LLC v. California Air Res. Bd.* (2013) 218 Cal.App.4th 681, 736, 739–740, as modified on denial of reh’g (Aug. 8, 2013), review denied (Nov. 20, 2013); see also *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281 (EIR deficient for failure to specify performance standards in plan for active habitat management of open space preserve); *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 (EIR’s deferral of acoustical report demonstrating structures designed to meet noise standards without setting the actual standards is inadequate for purposes of CEQA).



MM-GHG-3 improperly defers formulation of the plan to reduce energy use and the evaluation of the potential for solar panels on the site. The plan for energy use reduction lacks any specific performance criteria to measure success, such as what measurable energy efficiency improvements the plan must achieve. Moreover, the measure improperly defers the evaluation of the potential for solar to some later date, potentially after Project approval. There is no reason why Lehigh could not conduct this study of solar potential in advance of Project approval such that solar panels too could be included as a binding mitigation measure to help reduce significant GHG emissions impacts.

Therefore, the DEIR must be revised to include additional feasible mitigation requirements as mandated by CEQA.

#### **IX. THE DEIR FAILS TO ANALYZE AND ADDRESS INCONSISTENCIES WITH THE POLICIES OF THE CITY OF STOCKTON'S GENERAL PLAN**

Under CEQA, a significant environmental impact results if there is a conflict with any land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect.<sup>214</sup> The DEIR acknowledges inconsistencies with the City of Stockton General Plan associated with the Project's GHG and climate impacts but fails to take adequate feasible action to address these impacts and remedy the inconsistencies. In particular, General Plan Policy TR-3.2 requires new development and transportation projects to reduce travel demand and GHG emissions and support electric vehicle charging.<sup>215</sup> While the DEIR has some measures to reduce GHG emissions, they do not reduce GHG emission below significant levels and, as explained above, there are several feasible mitigation measures that the DEIR currently fails to adopt. Also, the DEIR says nothing about electrical vehicle charging, whether for employee passenger vehicles or for future zero-emission trucks. The DEIR must commit to more effective and feasible GHG emissions measures, including electric vehicle charging infrastructure if it is to claim compliance with this General Plan Policy.

Furthermore, the DEIR fails to even consider other inconsistencies with the General Plan. General Plan Policy SAF-4.1 requires reduction of air impacts from

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<sup>214</sup> *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783–784 (Project's inconsistencies with local plans and policies constitute significant impacts under CEQA).

<sup>215</sup> DEIR, p. 145.

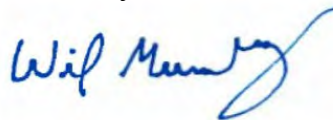
mobile and stationary sources of air pollution, including through entering into VERAs with SJVAPCD.<sup>216</sup> The DEIR attempts to finagle its way out of this requirement by claiming infeasibility and ineffectiveness. Yet, as our comments show, there is substantial evidence to show that the Port's assertions about these air quality improvement measures are baseless. The inclusion of these in the Stockton General Plan's clean air policies is additional evidence of the Port's failure to adopt all feasible and effective mitigation measures to reduce significant environmental impacts. And the DEIR's conflict with the General Plan is additional evidence of significant impacts that the Port has failed analyze, in direct contravention of the requirements of CEQA.<sup>217</sup> A revised EIR is necessary to commit to all feasible mitigation and remedy inconsistencies with the City of Stockton's clean air goals.

## X. CONCLUSION

For the reasons discussed above, the DEIR for the Project remains wholly inadequate under CEQA. It must be thoroughly revised to provide legally adequate analysis of, and mitigation for, all of the Project's potentially significant impacts. These revisions will necessarily require that the DEIR be recirculated for public review. Until the DEIR has been revised and recirculated, as described herein, the Port may not lawfully approve the Project.

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

Sincerely,



William Mumby

WM:acp

Attachments

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<sup>216</sup> Envision Stockton: 2040 General Plan (December 4, 2018), p. 5-24 (Policy SAF-4.1).

<sup>217</sup> See *Sierra Club*, 6 Cal.5th at 516–519 (holding that omission of a required discussion or a patently inadequate analysis renders an EIR deficient as an informational document).