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November 20, 2020

### **Via Email & Overnight Mail:**

Matthew Arms  
Director of Environmental Planning  
Port of Long Beach  
415 W. Ocean Blvd.  
Long Beach, CA 90802  
**Email:** [ceqa@polb.com](mailto:ceqa@polb.com)

### **Re: Comments on the Initial Study/Negative Declaration for World Oil Tank Installation Project (SCH: 2020100119)**

Dear Mr. Arms:

On behalf of **Safe Fuel and Energy Resources California (“SAFER CA”)**, we submit these comments on the Initial Study/Draft Negative Declaration (“IS/ND”) for the World Oil Tank Installation Project (“Project”)<sup>1</sup> prepared pursuant to the California Environmental Quality Act (“CEQA”)<sup>2</sup> by the Port of Long Beach (“Port”). The Project is proposed by Ribost Terminal, LLC dba World Oil Terminals (“Applicant”) and seeks to construct two new 25,000-barrel petroleum storage tanks at the existing World Oil Terminal owned by Applicant located at the Port.<sup>3</sup>

The terminal is 261,000 square feet (about 6 acres) and contains seven existing petroleum tanks of various sizes totaling a capacity of 502,000 barrels.<sup>4</sup> Three tanks contain crude oil and serve World Oil Refinery through the terminal loading rack, while the other four tanks are leased to Marathon Petroleum and

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<sup>1</sup> Aspen Environmental Group, Draft Negative Declaration/Application Summary Report, World Oil Tank Installation Project (October 2020) (“IS/ND”).

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

<sup>3</sup> IS/ND, p. 2-1.

<sup>4</sup> IS/ND, p. 1.

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Glencore for the purpose of storing fuel oil received and shipped via pipeline.<sup>5</sup> The new tanks would be installed in the northwest corner of the existing petroleum bulk station and terminal.<sup>6</sup> Construction is estimated to start in January 2021 and last approximately 10 months.<sup>7</sup>

The two tanks would provide additional storage capacity of petroleum for refining and distribution and could make more existing tanks available for lease by third-party vendors.<sup>8</sup> The IS/ND estimates a 10 percent increase in truck trips, as well as an increase in average barrel throughput of fuel oil, but not of crude oil.<sup>9</sup>

This letter contains the comments of SAFER CA and its technical consultant based on an initial review of the IS/ND and available IS/ND reference documents. Based on our preliminary review of the IS/ND, we have concluded that it fails to comply with CEQA. The IS/ND suffers from an incomplete and misleading Project description. The Project poses significant impacts to air quality and health risk. Furthermore, the Project is inconsistent with applicable plans, local regulations, and the California Coastal Act, which preclude the Port from approving the Project as proposed.

These comments were prepared with the assistance of environmental health and air pollution expert Phyllis Fox, Ph.D., P.E. Comments and curriculum vitae of Dr. Fox are attached to this letter as Attachment A.<sup>10</sup> Attachment A is fully incorporated herein and submitted to the Port herewith. Therefore, the Port must separately respond to the technical comments in Attachment A.

For the reasons discussed herein, and in the attached expert comments, SAFER CA urges the Port to remedy the deficiencies in the IS/ND by preparing a legally adequate EIR and circulating it for public review and comment.<sup>11</sup>

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<sup>5</sup> IS/ND, p. 2-3.

<sup>6</sup> IS/ND, p. 2-4.

<sup>7</sup> IS/ND, p. 2-6.

<sup>8</sup> IS/ND, p. 2-4.

<sup>9</sup> IS/ND, p. 2-8.

<sup>10</sup> **Attachment A:** Comments on the Initial Study & Negative Declaration for the World Oil Tank Installation Project by Phyllis Fox (Nov. 20, 2020) (“Fox Comments”).

<sup>11</sup> We reserve the right to supplement these comments at later hearings related to this Project. (Gov. Code § 65009(b); Pub. Res. Code § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1199–1203 (explaining exhaustion of administrative remedies under CEQA); see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal.App.4th 1109, 1121 (“As we read section 21177, any alleged grounds for noncompliance with CEQA provisions may be raised by

## I. STATEMENT OF INTEREST

SAFER CA advocates for safe processes at California refineries and fuel transport and distribution facilities to protect the health, safety, standard of life and economic interests of its members. For this reason, SAFER CA has a strong interest in enforcing environmental laws, such as CEQA, which require the disclosure of potential environmental impacts of, and ensure safe operations and processes for, California's fuel production, storage, and transport projects. Failure to adequately address the environmental impacts of renewable or traditional fuel and other refinery product transport, storage, and refining processes poses a substantial threat to the environment, worker health, surrounding communities and the local economy.

Refineries and fuel transport, storage, and distribution facilities are uniquely dangerous and capable of generating significant fires and the emission of hazardous and toxic substances that adversely impact air quality, water quality, biological resources, and public health and safety. Absent adequate disclosure and mitigation of hazardous materials and processes, refinery and fuel terminal workers and surrounding communities may be subject to chronic health problems and the risk of bodily injury and death. Additionally, rail transport of fuel and other refinery products has been involved in major explosions, causing vast economic damage, significant emissions of air contaminants and carcinogens and, in some cases, severe injuries and fatalities.

SAFER CA supports the sustainable development of fuel resources in California. However, poorly planned refinery and fuel distribution facility projects can adversely impact the economic wellbeing of people who perform construction and maintenance work in refineries, port terminals, fuel distribution facilities, and the surrounding communities. Plant and terminal shutdowns caused by accidental toxic releases and infrastructure breakdowns have caused prolonged work stoppages. Such nuisance conditions and catastrophic events impact local communities and the natural environment and can jeopardize future jobs by making it more difficult and more expensive for businesses to locate and people to live in the area. The participants in SAFER CA are also concerned about projects that carry serious environmental risks and public service infrastructure demands

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any person prior to the close of the public hearing on the project before the issuance of the notice of determination.”.)

without providing countervailing employment and economic benefits to local workers and communities.

The members represented by the participants in SAFER CA live, work, recreate and raise their families in Los Angeles County, including the City of Long Beach. Accordingly, these people would be directly affected by the Project's adverse environmental impacts. The members of SAFER CA's participating unions may also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants, and other health and safety hazards, that exist onsite.

## II. LEGAL BACKGROUND

### A. CEQA

CEQA is intended to provide the fullest possible protection to the environment. CEQA requires that a lead agency prepare and certify an EIR for any discretionary project that may have a significant adverse effect on the environment.<sup>12</sup> In order to set an accurate foundation for the analysis, an EIR must include a description of the "existing physical conditions in the affected area."<sup>13</sup> CEQA requires analysis of the "whole of an action," including the "direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."<sup>14</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>15</sup>

### B. An EIR is Required

"At the heart of CEQA is the requirement that public agencies prepare an EIR for any project that may have a significant effect on the environment."<sup>16</sup> A negative declaration is improper, and an EIR must be prepared, whenever it can be

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<sup>12</sup> Pub. Res. Code §§ 21002.1(a), 21100(a), 21151(a); 14 C.C.R. §§ 15064(a)(1), (f)(1), 15367.

<sup>13</sup> *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319–322; 14 C.C.R. § 15125.

<sup>14</sup> Pub. Res. Code § 21065; 14 C.C.R. § 15378(a).

<sup>15</sup> *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 (internal quotations omitted).

<sup>16</sup> *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 944 (internal citations and quotations omitted).

fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.<sup>17</sup> “[S]ignificant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in the environment.”<sup>18</sup> An effect on the environment need not be “momentous” to meet the CEQA test for significance; it is enough that the impacts are “not trivial.”<sup>19</sup> Substantial evidence, for purposes of the fair argument standard, includes “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.”<sup>20</sup>

In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact. Because “[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process” by allowing the agency to dispense with the duty to prepare an EIR, negative declarations are allowed only in cases where there is not even a “fair argument” that the project will have a significant environmental effect.<sup>21</sup>

An agency’s decision to rely on a negative declaration under CEQA is reviewed by a court for abuse of discretion under the fair argument standard.<sup>22</sup> To determine if there has been an abuse of discretion, a court reviews the agency’s factual conclusions de novo.<sup>23</sup>

Under the fair argument standard, a reviewing court may not uphold an agency’s decision to not prepare an EIR because of substantial evidence that the project would not have a significant environmental impact.<sup>24</sup> The reviewing court’s function is to determine whether substantial evidence supports the agency’s conclusion as to whether the prescribed fair argument could be made.<sup>25</sup> If there is substantial evidence that the proposed project might have a significant impact, evidence to the contrary is not sufficient to support a decision to dispense with

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<sup>17</sup> *Id.* at 957.

<sup>18</sup> Pub. Res. Code § 21068; 14 C.C.R. § 15382; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1581.

<sup>19</sup> *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83 fn. 16.

<sup>20</sup> Pub. Res. Code § 21080(e)(1) (emphasis added); *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 331 (“*CREED*”).

<sup>21</sup> *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440; Pub. Res. Code §§ 21064, 21100.

<sup>22</sup> *Save the Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665, 675 (“*STACK*”).

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

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

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

preparation of an EIR and adopt a negative declaration.<sup>26</sup> Neither the lead agency nor a court may “weigh” conflicting substantial evidence to determine whether an EIR must be prepared in the first instance.<sup>27</sup> “The fair argument standard thus creates a low threshold for requiring an EIR, reflecting the legislative preference for resolving doubts in favor of environmental review.”<sup>28</sup>

Where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the effects to be significant and prepare an EIR.<sup>29</sup> In short, when “expert opinions clash, an EIR should be done.”<sup>30</sup> “It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project.”<sup>31</sup> Where substantial evidence is presented, “evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact.”<sup>32</sup>

In certain circumstances, a project with potentially significant impacts can be modified by the adoption of mitigation measures to reduce the impacts to a level of insignificance. In such cases, an agency may satisfy its CEQA obligation by preparing a mitigated negative declaration.<sup>33</sup> A mitigated negative declaration, however, is also subject to the fair argument standard. Thus, an MND is also inadequate, and an EIR is required, whenever substantial evidence in the record supports a “fair argument” that significant impacts may occur even with the imposition of mitigation measures.

As described below, substantial evidence is present here that the Project may cause a significant effect on the environment. In particular, these comments show that the Project may result in significant air quality and health risk impacts. Thus, the Port is required under CEQA to take a closer look at the potentially significant environmental impacts of the Project in a legally adequate EIR.

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

<sup>27</sup> *Id.* at 689.

<sup>28</sup> *Id.* at 676.

<sup>29</sup> *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 935; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317–1318; CEQA Guidelines § 15064(f)(5).

<sup>30</sup> *Pocket Protectors*, 124 Cal.App.4th at 928; *Sierra Club*, 6 Cal.App.4th at 1317–1318.

<sup>31</sup> *Pocket Protectors*, 124 Cal.App.4th at 935.

<sup>32</sup> *Sundstrom*, 202 Cal.App.3d at 310 (citation omitted).

<sup>33</sup> Pub. Res. Code § 21064.5; 14 C.C.R. § 15064(f)(2).

### III. THE IS/ND FAILS TO PROVIDE A COMPLETE AND ACCURATE PROJECT DESCRIPTION

CEQA requires that a project be described with enough particularity that its impacts can be assessed.<sup>34</sup> Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project's impacts and undermining meaningful public review.<sup>35</sup> "CEQA places the burden of environmental investigation on government rather than the public. If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences."<sup>36</sup>

An IS/ND must present a complete and accurate description of the project under consideration.<sup>37</sup> "The scope of the environmental review conducted for the initial study must include the entire project. . . . [A] correct determination of the nature and scope of the project is a critical step in complying with the mandates of CEQA."<sup>38</sup> A negative declaration is "inappropriate where the agency has failed either to provide an accurate project description or to gather information and undertake an adequate environmental analysis. An accurate and complete project description is necessary for an intelligent evaluation of the potential environmental impacts of the agency's action. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal . . . and weigh other alternatives in the balance."<sup>39</sup> For purposes of the description, "'Project' means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."<sup>40</sup>

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<sup>34</sup> *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 403–405.

<sup>35</sup> *Id.*

<sup>36</sup> *Sundstrom*, 202 Cal.App.3d at 311.

<sup>37</sup> See 14 C.C.R. § 15063(d)(1) (requiring an initial study to include a description of the project); *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 406 (explaining that a negative declaration must be supported by a complete and accurate project description).

<sup>38</sup> *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 267 (internal quotations and citations omitted).

<sup>39</sup> *Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156, 1171 (quotations and citations omitted).

<sup>40</sup> 14 C.C.R. § 15378(a).

In *Communities for a Better Environment v. City of Richmond* (“*CBE v. 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.<sup>41</sup> In certain parts of the EIR, it claimed that the project would allow flexibility in refining heavier crude oil, but elsewhere the EIR denied the project would allow heavier crude refining.<sup>42</sup> The stark contradictions led the Court to disapprove the EIR because it failed as an informational document under CEQA.<sup>43</sup>

Here, the IS/ND fails to accurately reflect all potential sources of emissions and therefore does not provide a complete and accurate description of the Project. Claims in the IS/ND that the Project would “not increase the permitted crude oil throughput for the crude oil loading racks or tanker truck transportation requirements for crude oil” are contradicted by other evidence that suggests a possible increase in crude throughput that could yield an increase in emissions from oil refining.<sup>44</sup> The Permits to Construct for each tank have conditions that operator shall limit tank throughput to no more than 75,000 barrels in any given calendar month, without specifying the type of oil.<sup>45</sup> The Harbor Development Permit (“HDP”) Application for the Project says that 70,000 barrels of crude/month and 50,000 barrels of fuel oil/month will be stored at the site.<sup>46</sup> Moreover, Tables 2-3 and 2-4 of the IS/ND show increases in loading rack truck traffic and the number of barrels of crude oil transported upon Project completion.<sup>47</sup> This information contradicts the statement purporting to describe the Project as not affecting the amount of crude oil throughput in the facility.

Indeed, as explained by Dr. Fox, “[a]n increase in storage generally implies an increase in crude oil throughput at the supported refinery and hence, an increase in refinery emissions.”<sup>48</sup> The internal inconsistencies in the IS/ND and the

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<sup>41</sup> *Communities for a Better Environment v. City of Richmond* (“*CBE v. Richmond*”) (2010) 184 Cal.App.4th 70, 89.

<sup>42</sup> *Id.* at 83.

<sup>43</sup> *Id.* at 89.

<sup>44</sup> IS/ND, p. 4-7.

<sup>45</sup> SCAQMD Permit to Construct for Tank No. TK-1, Application No. 614274, ID 111238 (Jan. 2, 2020); SCAQMD Permit to Construct for Tank No. TK-2, Application No. 614275, ID 111238 (Jan. 2, 2020).

<sup>46</sup> Application of Ribost Terminal, LLC for HDP or CEQA Determination, HDP No. 19-066 (Received Aug. 14, 2019) (“HDP Application”), p. 7.

<sup>47</sup> IS/ND, p. 2-8.

<sup>48</sup> Fox Comments, p. 6.



contradictory information from supporting permits and applications obfuscates the true nature of the Project's impacts on crude oil throughput and thereby masks how high emissions related to the Project could be.<sup>49</sup>

These inconsistencies in the description of crude oil throughput are akin to the contradictions that proved fatal to the EIR in *CBE v. Richmond*.<sup>50</sup> Similar to how the EIR in that case presented divergent visions of the project's role in allowing refining of heavier crude oil, the IS/ND and its supporting documentation provide a confusing and misleading picture of whether crude oil throughput, and consequently refining emissions, will increase.<sup>51</sup> Just as the Court of Appeal held that the EIR failed as an informational document, the IS/ND violates CEQA and must be revised to accurately and consistently describe the Project's impacts on crude oil production at the Port and how this will influence emissions from the World Oil Refinery.<sup>52</sup>

In addition, the IS/ND explains that the construction of the new tanks will free up other tanks to be leased to third parties, but it is unclear what third-parties will do with the existing tanks once they are leased out.<sup>53</sup> As explained by Dr. Fox, the Project description is inadequate for failing to "disclose information about the future use of the repurposed existing tanks required to estimate the change in emissions from their new use."<sup>54</sup> Depending how these tanks are utilized and what substances are stored in them, they could produce fugitive emissions and feed additional indirect refining emissions if they use heavier crude or other materials requiring more intensive refining.<sup>55</sup>

Furthermore, Dr. Fox explains that the information provided to the consultant that prepared the IS/ND by the Applicant did not "contain enough information to quantitatively estimate emission increases from operation of the new tanks."<sup>56</sup> "Specifically, the throughput is not known, the specific liquid to be stored is not known, and the effects to ground and marine transportation aren't known."<sup>57</sup> For the IS/ND to serve its role as an informational document under CEQA, the

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<sup>49</sup> Fox Comments, p. 6.

<sup>50</sup> *CBE v. Richmond*, 184 Cal.App.4th at 83, 89.

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

<sup>52</sup> *Id.* at 89.

<sup>53</sup> IS/ND, pp. 2-1, 4-3.

<sup>54</sup> Fox Comments, p. 2.

<sup>55</sup> Fox Comments, pp. 2, 6-7, 23, 28.

<sup>56</sup> Fox Comments, p. 6.

<sup>57</sup> Fox Comments, pp. 6-7.

Project description must provide more information regarding how the Project may influence operational emissions.

#### **IV. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT MAY RESULT IN POTENTIALLY SIGNIFICANT AIR QUALITY IMPACTS**

An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.<sup>58</sup> The failure to provide information required by CEQA is a failure to proceed in the manner required by law.<sup>59</sup>

As explained below, the IS/ND fails to acknowledge potentially significant air quality impacts likely to stem from the Project. Therefore, the Port's conclusions that there will be no significant environmental impacts are unsupported and there is a fair argument of significant impacts requiring preparation of an EIR.

##### **A. There is Substantial Evidence Supporting a Fair Argument that the Project Will Produce Significant Levels of Construction Emissions Which the IS/ND Fails to Disclose**

The IS/ND concludes that construction emissions will be less than significant.<sup>60</sup> However, the Port reaches this determination using CalEEMod modeling that assumes the use of Tier Final 4 engines, the most stringent low-emission construction equipment available, without a binding commitment to use this equipment for the Project and without disclosing how high emissions would be if less efficient equipment is used.<sup>61</sup> As a result, the IS/ND discloses only mitigated construction emissions, and does not disclose unmitigated emissions, in violation of CEQA.

Under CEQA, it is improper to attempt to disguise mitigation measures as part of the project's design if this obfuscates the potential significance of

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<sup>58</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 732.

<sup>59</sup> *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

<sup>60</sup> IS/ND, pp. 4-8-4-9.

<sup>61</sup> Pages 1 and 13 of the document "20180914\_RIBOST\_CalEEMod\_ALL\_ATT 1.PDF" provided to us by the Port in response to our records requests state that the Port requires Tier 4 engines for off-road equipment, but the CalEEMod Air Quality Analysis in Appendix A of the IS/ND contains no such language.

environmental impacts.<sup>62</sup> In *Lotus v. Department of Transportation*, an EIR prepared by the California Department of Transportation (“CalTrans”) contained measures to help minimize potential stress on redwood trees during highway construction, such as restorative planting, invasive plant removal, watering, and use of an arborist and specialized excavation equipment.<sup>63</sup> The Court of Appeal held that the EIR improperly compressed the analysis of impacts and mitigation measures into a single issue because the EIR did not designate the measures as mitigation and concluded that because of the measures, no significant impacts were anticipated.<sup>64</sup> The Court explained that a significance determination must be made independent of mitigation first, then mitigation can be incorporated, and the effectiveness of those measures can be evaluated.<sup>65</sup> “Absent a determination regarding the significance of the impacts to the root systems of the old growth redwood trees, it is impossible to determine whether mitigation measures are required or to evaluate whether other more effective measures than those proposed should be considered.”<sup>66</sup>

By contrast, in *Mission Bay Alliance v. Office of Community Investment & Infrastructure*, the Court of Appeal distinguished *Lotus* and held that certain project features are inherent in the project design and need not be identified as mitigation measures.<sup>67</sup> Petitioners had challenged certification of an EIR for a basketball arena, arguing in part that inclusion of a special event transit service plan (“TSP”) as part of the Transportation Management Plan (“TMP”) without calling it a transportation mitigation measure precluded consideration of alternative feasible mitigation measures.<sup>68</sup> According to the Court of Appeal, the characterization of the TSP as part of the project rather than as a mitigation measure did not interfere with the identification of significant impacts or analysis of measures to mitigate those consequences, as was the case in *Lotus*.<sup>69</sup> “Unlike the situation in *Lotus*, the environmental impacts of the project on vehicle traffic and

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<sup>62</sup> *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 658 (compression of mitigation measures into project design without acknowledging potentially significant impact if effects were not mitigated violates CEQA)

<sup>63</sup> *Id.* at 650.

<sup>64</sup> *Id.* at 656.

<sup>65</sup> *Id.* at 654–656.

<sup>66</sup> *Id.* at 656.

<sup>67</sup> *Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 185.

<sup>68</sup> *Id.* at 184.

<sup>69</sup> *Id.* at 185.

transit are fully disclosed in the FSEIR.”<sup>70</sup> Because the FSEIR included analysis of transit impacts both with and without the TSP, the FSEIR was upheld.<sup>71</sup>

Here, the IS/ND assumes the use of lower-emitting Tier 4 Final engines for the Project’s construction equipment without explicitly committing to using this equipment for the Project or disclosing how high emissions would be in the absence of the equipment.<sup>72</sup> Unlike port cargo handling equipment, which was required to meet Tier 4 Final standards by December 2017,<sup>73</sup> Tier 4 construction equipment is not currently mandated for 100 percent of construction use. Rather, Tier 4 equipment (interim and final) is required to be phased into to all California construction fleets over several years pursuant to EPA’s “Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel; Final Rule.”<sup>74</sup> Tier 1 engines will not be fully phased out until 2029; Tier 2 and Tier 3 engines may remain in use in limited supply even after 2029.<sup>75</sup>

As Dr. Fox explains, without specific requirements in the CEQA document for the engine tier for all construction equipment stated in the IS/ND, the Applicant is “free to use the cheapest, highest emitting, Tier 1 equipment to build the Project.”<sup>76</sup> Given that Tier 1 construction equipment would yield much higher levels of pollution than Tier 4 equipment, with NO<sub>x</sub> emissions increased 35 times and PM<sub>10</sub> emissions increased 15 times compared to Tier 4 equipment, it is improper for the Port to fail to disclose the likely significant levels of unmitigated emissions.<sup>77</sup> In fact, assuming the Applicant uses Tier 1 equipment instead of Tier 4, NO<sub>x</sub> emissions

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Fox Comments, pp. 3–4; pages 1 and 13 of the document

“20180914\_RIBOST\_CaleEEMod\_ALL\_ATT 1.PDF” provided to us by the Port in response to our records requests state that the Port requires Tier 4 engines for off-road equipment, but the CaleEEMod Air Quality Analysis in Appendix A of the IS/ND contains no such language.

<sup>73</sup> 13 C.C.R. § 2479(e).

<sup>74</sup> Vol. 69, No. 124 Fed. Reg. pp. 38957–39273, June 29, 2004; 13 C.C.R. § 2423 (Exhaust Emission Standards and Test Procedures - Off-Road Compression-Ignition Engines); see CARB In-Use Off-Road Diesel-Fueled Fleets Regulation Overview, Revised October 2016 (“CARB Off-Road Fact Sheet”), available at [https://ww3.arb.ca.gov/msprog/ordiesel/fag/overview\\_fact\\_sheet\\_dec\\_2010-final.pdf](https://ww3.arb.ca.gov/msprog/ordiesel/fag/overview_fact_sheet_dec_2010-final.pdf) (last visited 11/20/20).

<sup>75</sup> CARB Off-Road Fact Sheet, pp. 5–7.

<sup>76</sup> Fox Comments, pp. 2–4.

<sup>77</sup> Fox Comments, pp. 2–4.

would be a whopping 1060.5 lb/day, well in excess of the significance threshold of 100 lb/day.<sup>78</sup>

By failing to make a significance determination about air quality impacts independent of mitigation before incorporating emissions reductions measures into the calculations, the IS/ND commits the same fatal error critiqued by the Court of Appeal in *Lotus*. Just as use of specialized equipment and practices to limit impacts to the roots of redwood trees should have been classified as mitigation measures, not design features in *Lotus*, the use of off-road construction equipment with Tier 4 engines and other best practices to reduce emissions are mitigation measures that should have been acknowledged as such in the IS/ND.<sup>79</sup> The Port's failure to acknowledge the higher levels of construction emissions without the mitigation measures obscures the significance of air quality impacts and prevents the public from properly evaluating the effectiveness of the mitigation measures proposed.<sup>80</sup>

The Port cannot plausibly claim the choice of construction equipment and practices are inherent features of project design as was done in *Mission Bay*. As explained above, specialized equipment and mitigating practices are more analogous to the measures deemed mitigation measures in *Lotus* than they are to the TSP in *Mission Bay*, which was a plan to handle traffic during special events, an inherent feature of a sports arena.<sup>81</sup> Moreover, the agency in *Mission Bay* fully disclosed transit impacts in its CEQA document so there were no issues in comprehending the significance of impacts.<sup>82</sup> Here, not only did the IS/ND fail to disclose the level of construction emissions in the absence of cleaner equipment, it failed to even clearly reveal its intentions to use such equipment in its discussion of air quality impacts from construction.

Furthermore, while the HDP Application suggests that Tier 4 engines will be used for construction equipment, there is no commitment to do so in the IS/ND in the form of a legally binding mitigation measure.<sup>83</sup> In fact, the term "Tier 4" does not appear in the IS/ND at all, so it is improper to assume emissions reductions from construction equipment with cleaner engines. As Dr. Fox explains, the

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<sup>78</sup> Fox Comments, p. 4. Dr. Fox multiplied the 30.3 lb/day calculated in the IS/ND by 35 to show how much the use of dirtier equipment could impact the emissions levels from construction. (*Id.*)

<sup>79</sup> *Lotus*, 223 Cal.App.4th at 650, 654–656.

<sup>80</sup> *Id.* at 654–656.

<sup>81</sup> *Mission Bay*, 6 Cal.App.5th at 184.

<sup>82</sup> *Id.* at 185.

<sup>83</sup> HDP Application, p. 3.

Applicant has a financial incentive to use cheaper, higher polluting equipment, so if there is no compulsory condition of Project approval that construction will occur using Tier 4 equipment or other equipment with retrofits with similarly effective emissions controls, it is not reasonable to assume the emissions reductions will occur.<sup>84</sup>

The IS/ND's reliance on Tier 4 Final equipment in the CalEEMod modeling without demonstrating feasibility and including it as a binding mitigation measures violates key principles of CEQA that mitigation measures be both effective and enforceable through legally binding instruments.<sup>85</sup> An EIR must be prepared to disclose the Project's unmitigated construction emissions and incorporate effective and binding mitigation measures into the Project to reduce construction emissions impacts to below significant impacts.

**B. There is Substantial Evidence Supporting a Fair Argument that the Project Will Produce Significant Levels of Operational VOC Emissions**

Dr. Fox shows that there will be potentially significant impacts from VOC emissions by pointing to several major problems with the IS/ND's VOC emissions analysis, including inaccurate modeling, an incorrect significance threshold, failure to include all emissions sources, and improper mitigation.<sup>86</sup>

**i. The IS/ND's Reliance on the U.S. EPA TANKS Program Model Yields Underestimated VOC Emissions**

Dr. Fox discusses numerous studies demonstrating that the U.S. EPA TANKS Program model used to calculate fugitive VOC emissions from oil tanks consistently and substantially underestimates these emissions.<sup>87</sup> In particular, the TANKS model does not accommodate tanks that receive warmer-than-ambient stock—which potentially includes the Project—and do not accurately capture variations in vapor pressure or fugitive emissions from internal floating roof tanks, or decreased tank performance.<sup>88</sup> Dr. Fox explains that the TANKS 4.09 model

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<sup>84</sup> Fox Comments, pp. 2–4.

<sup>85</sup> 14 C.C.R. § 15126.4(a)(2); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727–728.

<sup>86</sup> Fox Comments, pp. 5–6.

<sup>87</sup> Fox Comments, pp. 6–17.

<sup>88</sup> Fox Comments, pp. 6–7.

used by the Applicant is based on algorithms developed by the American Petroleum Institute for “ideal new installations,” and does not account for variations during operation or degradations in tank performance which occur over time.<sup>89</sup>

For these reasons, the TANKS model is recognized as unreliable and U.S. EPA no longer recommends using it to calculate tank emissions.<sup>90</sup> Its website includes a disclaimer that the software supporting the TANKS model is now outdated and the model should only be used “at your own risk.”<sup>91</sup> Dr. Fox explains that the FluxSense Report, study of refinery tank emissions commissioned by the South Coast Air Quality Management District (“SCAQMD”), concluded that VOC emissions were underestimated by an average factor of 6.2, compared to emissions levels reported to SCAQMD in emissions inventories.<sup>92</sup> Studies of floating roof tanks, which as proposed for the Project, found VOC emissions underestimated by a factor of 121.<sup>93</sup> Some other studies have shown that TANKS can underestimate VOC emissions by as much as a factor of 132.<sup>94</sup>

Applying these well-supported underestimation factors as a multiplier to the IS/ND’s estimate of 9.7 lb/day of VOC emissions yields significant levels of emissions. Dr. Fox initially selected an underestimation factor of 67—a midpoint in the range of factors uncovered by various studies—and calculated that VOC emissions from the Project would be about 650 lb/day.<sup>95</sup> Assuming an underestimation by a factor of 121, as occurred in studies of internal floating roof tanks, as proposed for the Project, the VOC emissions would reach 1,174 lb/day.<sup>96</sup> Finally, “even assuming a more modest underestimation factor of 6.2—the average factor found by the FluxSense study commissioned by SCAQMD—VOC emissions from the tanks would be 60 lb/day.”<sup>97</sup> All three of these emissions levels exceed the SCAQMD significance threshold of 55 lb/day for operational VOC emissions.<sup>98</sup>

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<sup>89</sup> Fox Comments, p. 8.

<sup>90</sup> Fox Comments, pp. 6–8.

<sup>91</sup> EPA, TANKS Emissions Estimation Software, Version 4.09D; <https://www3.epa.gov/ttnchie1/software/tanks/>.

<sup>92</sup> Fox Comments, pp. 16–17.

<sup>93</sup> Fox Comments, pp. 10–11.

<sup>94</sup> Fox Comments, pp. 9–10.

<sup>95</sup> Fox Comments, pp. 17–18.

<sup>96</sup> Fox Comments, p. 18.

<sup>97</sup> Fox Comments, p. 18.

<sup>98</sup> Fox Comments, p. 18. Dr. Fox notes that the IS/ND incorrectly uses a threshold of 75 lb/day, which is the threshold for VOC construction emissions, not operational emissions. (*Id.*; IS/ND, p. 4-10;

Therefore, there is substantial evidence supporting a fair argument that VOC emissions from the tanks will be highly significant, which the IS/ND fails to disclose or mitigate. The Port must prepare an EIR to accurately analyze and mitigate these significant air quality impacts.

**ii. The IS/ND Omits Numerous Sources of VOC Emissions and Fails to Consider Indirect Emissions**

In addition to the serious underestimation of emissions from reliance on the TANKS model, numerous sources of VOC emissions from the Project were not even included in the model and were not otherwise disclosed in the IS/ND. As a result, VOC emissions are likely to be even more significant than explained above. The omitted sources of emissions include roof landing, degassing, cleaning, water draw, truck loading rack disconnect, and valve and connector leaks.<sup>99</sup>

As Dr. Fox explains, the Project will use two internal floating roof storage tanks, meaning that the roofs of the tanks will float on the surface of the liquid inside the tank.<sup>100</sup> Evaporative losses can occur when the contents of the tank reach the level where the roof sits on deck legs near the bottom of the tank.<sup>101</sup> These losses occur when the floating roof has landed on the deck legs and stands idle while oil vapor is lost through a breather vent.<sup>102</sup> Losses also occur through the breather vent while the tank is being refilled until the liquid in the tank rises to the level of the roof being refloated on the liquid's surface.<sup>103</sup>

Dr. Fox explains that the TANKS model does not account for roof landings and the IS/ND did not conduct any supplemental analysis to calculate these additional sources of VOC emissions.<sup>104</sup> Given that roof landing losses “are large typically comprising about a quarter . . . of total tank emissions,” the omission of analysis of these evaporative losses seriously undermines the IS/ND’s VOC emissions analysis.<sup>105</sup>

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SCAQMD, South Coast AQMD Air Quality Significance Thresholds, <http://www.aqmd.gov/docs/default-source/ceqa/handbook/scaqmd-air-quality-significance-thresholds.pdf>.)

<sup>99</sup> Fox Comments, pp. 18–23.

<sup>100</sup> Fox Comments, pp. 18–20.

<sup>101</sup> Fox Comments, pp. 18–20.

<sup>102</sup> Fox Comments, pp. 18–20.

<sup>103</sup> Fox Comments, pp. 18–20.

<sup>104</sup> Fox Comments, pp. 20–21.

<sup>105</sup> Fox Comments, p. 21.



Losses in the form of VOC emissions also occur during tank inspection and cleaning. Dr. Fox explains that degassing and cleaning losses are “essentially uncontrolled tank emissions and can be larger than normal operating emissions.”<sup>106</sup> The IS/ND fails to disclose these emissions and does not commit to any special degassing equipment during tank cleaning that could help reduce these emissions.<sup>107</sup>

In addition, Dr. Fox explains that crude oil storage facilities typically have a filtration system to remove water that accumulates in the crude oil.<sup>108</sup> This water draw is often transferred from the storage tanks into a smaller water draw surge tank for processing prior to disposal.<sup>109</sup> However, over time, layers of crude oil can form in the water draw surge tank which then emits VOCs and other hazardous air pollutants.<sup>110</sup> Because the IS/ND does not disclose or estimate emissions from any of these sources—in addition to probable leaks in valves or during loading or unloading of the tanks—the IS/ND greatly underestimates emissions and fails as an informational document under CEQA.<sup>111</sup>

The IS/ND also omitted emissions from repurposed tanks, which will be leased out to third parties. As explained with respect to the inadequate Project description, the IS/ND fails to consider indirect emissions resulting from potential changes to management of the repurposed tanks and the expansion of crude oil storage that would likely impact emissions from the World Oil Refinery.

There is more than a fair argument all these aggregated omissions of emission sources combined with the underestimation from TANKS modeling yields a highly significant air quality impact from VOC emissions. The Port must prepare an EIR which discloses these impacts, and provides specific mitigation measures to reduce impacts to the greatest extent feasible.

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<sup>106</sup> Fox Comments, p. 22.

<sup>107</sup> Fox Comments, p. 22.

<sup>108</sup> Fox Comments, p. 23.

<sup>109</sup> Fox Comments, p. 23.

<sup>110</sup> Fox Comments, p. 23.

<sup>111</sup> Fox Comments, p. 23.

### **iii. The IS/ND Improperly Relies on Emissions Offsets to Reduce VOC Emissions**

As explained above, there is a fair argument that VOC emissions from the Project will be highly significant. The IS/ND claims to address VOC emissions with emissions reduction credits (“ERC”).<sup>112</sup> There are two problems with this approach. First, the offsets are intended to reduce the impacts of the Project’s VOC emissions due to exceedances of SCAQMD’s New Source Review Rule. As the IS/ND explains, “[t]he facility’s existing potential to emit is above the SCAQMD New Source Review Rule VOC offset threshold of 4 tons per year; therefore, the new tank emissions were required to be offset.”<sup>113</sup> VOC emissions from the Project’s new tanks will exacerbate the existing potential for excess VOC emissions and further exceed SCAQMD’s offset threshold, resulting in a significant impact.<sup>114</sup> The ERCs for the Project are proposed as mitigation to address the impact. Mitigation cannot be included in an IS/ND. The Port must include any proposed mitigation to reduce VOC emissions in an EIR.

Second, emissions offsets such as this are not valid mitigation for VOC emissions under CEQA and could not be claimed as mitigation in a revised CEQA document.<sup>115</sup> Dr. Fox explains that historically banked ERCs only reflect emissions reductions in the past and do nothing to reduce emissions at the time and location where the air quality impacts are occurring.<sup>116</sup> Thus, ERCs are more appropriately considered part of the existing baseline of air quality conditions in the region.<sup>117</sup> Project emissions in the near future, regardless of whether they are covered by historically banked ERCs, constitute a deviation from that baseline and an exacerbation of existing air pollution.

Here, the ERCs proposed to offset VOC emissions were issued December 14, 1993, 27 years ago.<sup>118</sup> Consequently, relying on the ERCs does nothing to actually mitigate the serious air quality concerns in the region in the present day.<sup>119</sup> VOC

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<sup>112</sup> See IS/ND, p. 4-8–4-9, Table 4.3-1 .

<sup>113</sup> IS/ND, p. 4-9.

<sup>114</sup> 14 C.C.R. § 15126.2(a).

<sup>115</sup> IS/ND, p. 4-9, Table 4.3-2; Fox Comments, p. 23.

<sup>116</sup> Fox Comments, pp. 23–24.

<sup>117</sup> Fox Comments, pp. 23–24.

<sup>118</sup> SCAQMD, Certificate of Proof for Registered Emission Reduction Credit, Certificate No. AQ001032, Reissued to Ribost Terminal, LLC, Issued December 5, 2019.

<sup>119</sup> Fox Comments, pp. 23–24.

emissions will increase in the Project area and currently nothing will be done to reduce those impacts.<sup>120</sup> CEQA prohibits reliance on ineffective mitigation measures such as the ERCs proposed in the IS/ND.<sup>121</sup>

Therefore, even with ERCs, the VOC emissions from the Project would still be significant when they are adjusted for all the flaws identified by Dr. Fox above. Even if adequate and effective mitigation could be adopted, a mitigated negative declaration would be necessary to comply with CEQA in lieu of the IS/ND. In the absence of mitigation, an EIR is required.

## **V. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT WILL PRODUCE CUMULATIVELY CONSIDERABLE AIR QUALITY IMPACTS**

CEQA requires analysis of cumulative impacts, defined as “two or more individual effects which, when considered together, are considerable.”<sup>122</sup> Such impacts may “result from individually minor but collectively significant projects taking place over a period of time.”<sup>123</sup> Cumulatively considerable means that “the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.”<sup>124</sup>

CEQA Guidelines section 15130(b)(1) provides two options for analyzing cumulative impacts: (A) list “past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency, or” (B) summarize “projection contained in an adopted local, regional or statewide plan, or related planning document that describes or evaluates conditions contributing to the cumulative effect.”<sup>125</sup> “When relying on a plan, regulation or program, the lead agency should explain how implementing the particular requirements in the plan, regulation or program ensure that the project's

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<sup>120</sup> Fox Comments, pp. 23–24.

<sup>121</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727–728.

<sup>122</sup> 14 C.C.R. § 15355.

<sup>123</sup> 14 C.C.R. § 15355(b).

<sup>124</sup> 14 C.C.R. § 15064(h)(1).

<sup>125</sup> 14 C.C.R. § 15130(b)(1).

incremental contribution to the cumulative effect is not cumulatively considerable.”<sup>126</sup>

In *Communities for a Better Environment v. California Resources Agency* (“*CBE v. CRA*”), the Court of Appeal rejected now nonexistent provisions of the CEQA Guidelines that allowed agencies to dismiss the potential for cumulative impacts if the Project’s contribution to a cumulative problem was “de minimis.”<sup>127</sup> The case relied heavily on *Kings County Farm Bureau v. City of Hanford* to conclude that even individually minor contributions to an environmental problem can produce cumulatively considerable impacts requiring careful analysis under CEQA.<sup>128</sup> As a result, controlling CEQA law was inconsistent with CEQA Guidelines sections 15064(i)(4) and 15130(a)(4) as they existed at the time because “they measure a proposed project’s de minimis incremental impact relative to the existing cumulative impact, rather than focus on the combined effects of these impacts.”<sup>129</sup>

In *Kings County Farm Bureau*, the City of Hanford prepared an EIR for a 26.4-megawatt coal-fired cogeneration plant.<sup>130</sup> Notwithstanding the fact that the EIR found that the project region was out of attainment for PM<sub>10</sub> and ozone, the City failed to incorporate mitigations for the project’s cumulative air quality impacts from project emissions because it concluded that the Project would contribute “less than one percent of area emissions for all criteria pollutants.”<sup>131</sup> The Court held that it was an error for the City to not take into account the nonattainment with air quality standards.<sup>132</sup> Regarding ozone, the Court reasoned that “[t]he relevant question to be addressed in the EIR is not the relative amount of [ozone] precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin.”<sup>133</sup> In addition, the Court generally held that the EIR improperly sidestepped

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<sup>126</sup> *Id.*; see *id.* § 15130(a) (stating that the lead agency shall describe its basis for concluding that an incremental effect is not cumulatively considerable).

<sup>127</sup> *Communities for a Better Environment v. California Resources Agency* (“*CBE v. CRA*”) (2002) 103 Cal.App.4th 98, 121, disapproved of on other grounds in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1098.

<sup>128</sup> *Id.* at 118–121.

<sup>129</sup> *Id.* at 121.

<sup>130</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 706.

<sup>131</sup> *Id.* at 719.

<sup>132</sup> *Id.* at 718–721.

<sup>133</sup> *Id.* at 718.

the cumulative impacts analysis when it “focused on the individual project’s relative effects and omitted facts relevant to an analysis of the collective effect this and other sources will have upon air quality.”<sup>134</sup>

The IS/ND fails to conduct a proper cumulative air quality impacts analysis as it does not list “past, present, and probable future projects producing related or cumulative impacts” or explain compliance with a local, regional, or statewide plan that would ensure that air quality impacts would not be cumulatively considerable, as required by CEQA.<sup>135</sup> Rather, the IS/ND cursorily claims that the Project would not contribute to cumulatively considerable impacts because of “the relatively nominal level and area of impact, highly developed industrial surroundings, and temporary nature of the proposed project.”<sup>136</sup>

This justification is strikingly similar to the “de minimis” approach to cumulative impacts analysis that the Court of Appeal rejected in *CBE v. CRA*.<sup>137</sup> The provision of the CEQA Guidelines that permitted agencies to conclude air emissions would be cumulatively insignificant because they are small in the grand scheme of things has been struck down by the Courts. Indeed, as was recognized in *CBE v. CRA* and *Kings County Farm Bureau*, the relevant analysis is not the relative amount of emissions from the Project compared with other emissions, but “whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin.”<sup>138</sup> Just as the City of Hanford violated CEQA when it did not consider nonattainment with air quality standards, the Port has violated CEQA by fixating on the individually small amount of emissions it claims are attributable to the Project without evaluating the existing air quality problems and the collective effect of this Project and other nearby projects on these issues.<sup>139</sup>

In any event, Dr. Fox explains that SCAQMD’s own cumulative impact guidance says that cumulative impacts are considerable where a project’s individual emissions exceed significance thresholds.<sup>140</sup> SCAQMD’s guidance also specifically

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<sup>134</sup> *Id.* at 721.

<sup>135</sup> 14 C.C.R. § 15130(b)(1).

<sup>136</sup> IS/ND, p. 4-65.

<sup>137</sup> *CBE v. CRA*, 103 Cal.App.4th at 121.

<sup>138</sup> *Id.* at 118–121; *Kings County Farm Bureau*, 221 Cal.App.3d at 718.

<sup>139</sup> *Kings County Farm Bureau*, 221 Cal.App.3d at 718–721.

<sup>140</sup> Fox Comments, p. 28.

rejects the de minimus approach.<sup>141</sup> Dr. Fox has made a fair argument that VOC emissions will exceed SCAQMD's operational emissions significance threshold.<sup>142</sup> Therefore, cumulative impacts are significant and an EIR must be prepared.<sup>143</sup>

Furthermore, the South Coast Air Basin is in extreme nonattainment of National Ambient Air Quality Standards for 1-hour and 8-hour ozone and in nonattainment for California Ambient Air Quality Standards for both types of ozone as well.<sup>144</sup> Dr. Fox explains that zip code 90802, where the Project is located, has the highest levels of ozone pollution in the country.<sup>145</sup> In fact, the Los Angeles-Long Beach area has topped the American Lung Association's ("ALA") worst ozone pollution list for 20 out of the 21 years in its annual State of the Air Report.<sup>146</sup> Ozone pollution has serious health effects, especially for children and teens, anyone 65 or older, people with existing lung diseases, or people who frequently work or exercise outdoors.<sup>147</sup> ALA estimates that, in 2020, 10 million people with pre-existing conditions were at risk from ozone pollution in the Los Angeles-Long Beach area, plus another 15 million otherwise sensitive individuals.<sup>148</sup> Dr. Fox further details in her comments serious public health impacts of ozone, including premature death, developmental harm, reproductive harm, lung irritation, asthma, increased susceptibility to respiratory infection, and cardiovascular harm.<sup>149</sup>

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<sup>141</sup> SCAQMD, White Paper on Potential Control Strategies to Address Cumulative Impacts from Air Pollution, Appendix D – Cumulative Impact Analysis Requirements Pursuant to CEQA, August 2003, p. D-2, available at <http://www.aqmd.gov/docs/default-source/Agendas/Environmental-Justice/cumulative-impacts-working-group/cumulative-impacts-white-paper-appendix.pdf> (last visited 11/20/20).

<sup>142</sup> Fox Comments, p. 28.

<sup>143</sup> Fox Comments, p. 28.

<sup>144</sup> National Ambient Air Quality Standards (NAAQS) and California Ambient Air Quality Standards (CAAQS) Attainment Status for South Coast Air Basin, available at <http://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/naaqs-caaqs-feb2016.pdf>

<sup>145</sup> Fox Comments, p. 30; American Lung Association, State of the Air (2020), p. 22, available at <https://www.stateoftheair.org/assets/SOTA-2020.pdf>; see also <https://www.stateoftheair.org/city-rankings/most-polluted-cities.html> (ranking of most polluted cities); <https://www.stateoftheair.org/city-rankings/states/california/los-angeles.html> (annual weighted average number of high ozone days in the Los Angeles area).

<sup>146</sup> American Lung Association, State of the Air (2020), p. 7, available at <https://www.stateoftheair.org/assets/SOTA-2020.pdf>.

<sup>147</sup> Fox Comments, pp. 30–33.

<sup>148</sup> Fox Comments, pp. 30–33.

<sup>149</sup> Fox Comments, pp. 30–33.

Underestimated VOC and NO<sub>x</sub> emissions could yield cumulatively considerable air quality impacts because they are ozone precursor emissions that react in the presence of sunlight to produce even more ozone and exacerbate already dangerous ozone pollution in the region.<sup>150</sup> Analysis of cumulative effects of precursor emissions is particularly critical given the close proximity of residences, elementary schools, and parks to the Project site.<sup>151</sup> To comply with CEQA, the Port's cumulative impacts analysis must draw the connection between individually small emissions and potentially considerable collective impacts.

Dr. Fox considered a variety of other nearby projects and concluded that the cumulative air quality impacts appear highly significant. The Los Angeles International Airport ("LAX") expansion projects—including terminal upgrades, runway rehabilitation, bus yard and other transit construction, various water pipelines, and other miscellaneous improvements—is estimated to produce significant air quality impacts on its own.<sup>152</sup> Given that the Project and the LAX projects will both occur in the South Coast Air Basin, the Port should have considered the cumulative air quality impacts of these Projects on regional air quality. The failure to do so renders the IS/ND's air quality analysis deficient.

There is a fair argument of cumulatively considerable air quality impacts requiring the preparation of an EIR.

## **VI. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT MAY RESULT IN POTENTIALLY SIGNIFICANT HEALTH RISK IMPACTS**

A lead agency's significance determination must be supported by accurate scientific and factual data.<sup>153</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>154</sup>

These standards apply to an agency's analysis of public health impacts of a project under CEQA. In *Sierra Club v. County of Fresno*, the California Supreme Court affirmed CEQA's mandate to protect public health and safety by holding that

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<sup>150</sup> Fox Comments, p. 29.

<sup>151</sup> Fox Comments, p. 31.

<sup>152</sup> Fox Comments, p. 28.

<sup>153</sup> 14 C.C.R. § 15064(b).

<sup>154</sup> *Kings County Farm Bureau*, 221 Cal.App.3d at 732.

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>155</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>156</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>157</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>158</sup> CEQA mandates discussion, supported by substantial evidence, of the nature and magnitude of impacts of air pollution on public health.<sup>159</sup>

Furthermore, in *Berkeley Jets*, the Court of Appeal held that a CEQA document must analyze the impacts from human exposure to toxic substances.<sup>160</sup> In that case, the Port of Oakland approved a development plan for the Oakland International Airport.<sup>161</sup> The EIR admitted that the Project would result in an increase in the release of toxic air contaminants (“TACs”) and adopted mitigation measures to reduce TAC emissions, but failed to quantify the severity of the Project’s impacts on human health.<sup>162</sup> The Court held that mitigation alone was

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<sup>155</sup> *Sierra Club*, 6 Cal.5th at 518–522.

<sup>156</sup> *Id.* at 507–508, 518–522.

<sup>157</sup> *Id.* at 519, citing *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 514–515.

<sup>158</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).)

<sup>159</sup> *Sierra Club*, 6 Cal.5th at 518–522.

<sup>160</sup> *Berkeley Jets*, 91 Cal.App.4th at 1369–1371.

<sup>161</sup> *Id.* at 1349–1350.

<sup>162</sup> *Id.* at 1364–1371.



insufficient, and that the Port had a duty to analyze the health risks associated with exposure to TACs.<sup>163</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>164</sup>

The IS/ND discusses a screening health risk assessment (“HRA”) done for construction DPM emissions and SCAQMD’s operational HRA conducted for TACs and concluded that the combined health risk would be “well below the SCAQMD health risk CEQA significance thresholds.”<sup>165</sup> Relying on the SCAQMD HRA, the IS/ND concluded that cancer risk at the closest residential receptor from TAC emissions from the tanks was  $1.85 \times 10^{-7}$  or 0.185 in one million.<sup>166</sup> While the IS/ND provides the results of those analyses, the actual modeling was not provided with the IS/ND and had to be obtained separately from the Port in response to our public record requests for documents referenced under CEQA, rendering the IS/ND legally deficient in addition to being factually inaccurate.<sup>167</sup>

Moreover, as explained by Dr. Fox, the HRA underestimates the degree of health risk posed by the Project in several ways. VOC emissions are underestimated, which by extension means that emissions of hazardous air pollutants (“HAPs”)/TACs are also underestimated.<sup>168</sup> Assuming VOC emissions were underestimated by a factor of 121 would yield a cancer risk of 22 in one million, which exceeds the significance threshold of 10 in one million.<sup>169</sup> Assuming that VOC emissions were underestimated by a factor of 67 would yield an estimated cancer risk of about 12 in one million, also a significant impact.<sup>170</sup>

Dr. Fox further explains that the FluxSense Report concluded that benzene emissions (a TAC/HAP) were underestimated by an average factor of 34.<sup>171</sup> Assuming increased benzene emissions coupled with VOC emissions

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<sup>163</sup> *Id.*

<sup>164</sup> 14 C.C.R. § 15003(b).

<sup>165</sup> IS/ND, pp. 4-10–4-12.

<sup>166</sup> IS/ND, p. 4-12

<sup>167</sup> See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442 (“information scattered here and there in EIR appendices or a report buried in an appendix is not a substitute for a good faith reasoned analysis.”), citing *California Oak*, 133 Cal.App.4th at 1239 (internal quotations omitted).

<sup>168</sup> Fox Comments, p. 24.

<sup>169</sup> Fox Comments, pp. 25–26.

<sup>170</sup> Fox Comments, pp. 25–26.

<sup>171</sup> Fox Comments, pp. 25–26.

underestimated by a factor of 121 yields a highly significant 810 in one million cancer risk.<sup>172</sup>

These significant health impacts are currently undisclosed and warrant deeper analysis in an EIR. Indeed, the failure to analyze the substantial health risks from VOC and benzene emissions commit the same mistakes as the EIRs in *Sierra Club* and *Berkeley Jets*. As with the County of Fresno in *Sierra Club*, the Port here failed to evaluate the full nature and magnitude of the health impact of air pollution associated with the Project.<sup>173</sup> CEQA requires a discussion of the health consequences of the Project to properly inform the public of significant impacts.<sup>174</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 fully and accurately analyze the impacts of VOCs and benzene emissions on the health of nearby receptors.<sup>175</sup> The Port here did not even acknowledge the significance of these emissions or attempt to mitigate them, meaning that the Port here has committed an even more egregious violation of CEQA.<sup>176</sup>

The IS/ND also failed to accurately evaluate impacts to all the sensitive receptors in the vicinity of the Project.<sup>177</sup> Dr. Fox explains that the Permit To Construct Application which contains the HRA relied on by the IS/ND assumed the closest residential receptor was about 925 meters or 0.6 miles away.<sup>178</sup> However, the IS/ND indicates the nearest residence is 0.5 miles away.<sup>179</sup> Furthermore, Dr. Fox explains that while the IS/ND identified elementary school receptors near the Project site, her search revealed additional undisclosed receptors that could be at risk from the Project's emissions such as Golden Park, Cesar E. Chavez Park, Drake Park, Drake Park Soccer Field, Edison Child Development Center, and numerous

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<sup>172</sup> Fox Comments, pp. 25–26.

<sup>173</sup> *Sierra Club*, 6 Cal.5th at 518–522.

<sup>174</sup> *Id.*

<sup>175</sup> *Berkeley Jets*, 91 Cal.App.4th at 1364–1371.

<sup>176</sup> *Id.*

<sup>177</sup> Fox Comments, pp. 25, 31.

<sup>178</sup> Fox Comments, p. 25.

<sup>179</sup> IS/ND, p. 4-10.

additional homes.<sup>180</sup> These errors and omissions undermine the reliability of the IS/ND's HRA and require an updated analysis to comply with CEQA.

In addition, the HRA failed to evaluate health impacts from increases in ozone concentrations in the vicinity of the Project due to increases in emissions of VOCs and other ozone precursors.<sup>181</sup> Especially when considered in light of other nearby emitting projects and the serious ozone pollution problems in the Los Angeles-Long Beach area, as discussed above, this omission results in a serious underestimation of health risk.<sup>182</sup> As Dr. Fox explains, recent EIRs, including two in the South Coast Air Basin, have assessed the human health impacts from significant emissions of ozone precursors, meaning that the Port has no excuse to do so here.<sup>183</sup>

This is again like the situation in *Sierra Club*, where a failure to make an effort to connect the dots between the project pollution, poor existing air quality, and public health of local community rendered the EIR deficient as an informational document under CEQA.<sup>184</sup> The IS/ND echoes those flaws by turning a blind eye to its contributions to the air basin's severe ozone problem and the repercussions this has for public health. Dr. Fox's analysis constitutes evidence supporting a fair argument of significant health risk impacts to nearby residents. Unless the Port commits to adequate mitigation, an EIR must be prepared.

## **VII. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT MAY PRODUCE POTENTIALLY SIGNIFICANT LAND USE IMPACTS**

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>185</sup> Under State Planning and Zoning Law, a project cannot be found consistent with a general plan if it conflicts with a general plan policy that is "fundamental, mandatory, and clear," regardless of whether it is

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<sup>180</sup> Fox Comments, p. 31.

<sup>181</sup> Fox Comments, p. 24.

<sup>182</sup> Fox Comments, pp. 29–33.

<sup>183</sup> Fox Comments, p. 32.

<sup>184</sup> *Sierra Club*, 6 Cal.5th at 518–522.

<sup>185</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).

consistent with other general plan policies.<sup>186</sup> Any subordinate land use action that is not consistent with a city's general plan is similarly "invalid at the time it is passed."<sup>187</sup> This consistency requirement applies to permits because "the validity of the permit process derives from compliance with this hierarchy of planning laws."<sup>188</sup> "[A] building permit for a proposed project may not be approved unless it complies with . . . the general plan."<sup>189</sup>

The Harbor Development Permit ("HDP") required for this Project is a combination of a Coastal Development Permit ("CDP") required under the California Coastal Act and a building permit.<sup>190</sup> Therefore, the consistency requirement for subordinate land use actions like approval of a building permit applies to the HDP sought for this Project.<sup>191</sup> The potential for significant environmental impacts discussed above renders the Project inconsistent with the City's General Plan and the Port's Master Plan such that the Port must address these impacts before it may approve it.

#### **A. The Project is Inconsistent with the City's General Plan**

The Land Use Element of the City's General Plan says that it is a policy of the City to work with California, the Ports of Long Beach and Los Angeles, and other agencies and organizations to improve air quality around the ports and reduce vessel, truck, rail and other equipment emissions from Port operations.<sup>192</sup>

As demonstrated above, absent effective mitigation the Project will produce significant construction and operational emissions and contribute to severe cumulative impacts on air quality in a region that already suffers from the worst ozone pollution in the country. Relatedly, these emissions will drive significant increases in health risk to local residences, schools, and parks. Because the Port is

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<sup>186</sup> *Id.* at 782–783; see also *Families Unafraid to Uphold Rural El Dorado County v. Bd. of Supervisors* (1998) 62 Cal.App.4th 1332, 1341–1342 (holding that project was clearly inconsistent with fundamental policy within land-use element of Draft General Plan).

<sup>187</sup> *Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 544; see Gov. Code § 65860 (requiring consistency with general plan).

<sup>188</sup> *Neighborhood Action Group for the Fifth District v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1184.

<sup>189</sup> *Collier v. City & County of San Francisco* (2007) 151 Cal.App.4th 1326, 1341.

<sup>190</sup> Port of Long Beach, Draft Port Master Plan Update 2020 (July 2019), p. 8-1.

<sup>191</sup> See *Collier v. City & County of San Francisco* (2007) 151 Cal.App.4th 1326, 1341 ("[A] building permit for a proposed project may not be approved unless it complies with . . . the general plan.")

<sup>192</sup> General Plan, p. 121 (LU Policy 16-4).

failing in its duty to grapple with air quality and related health impacts of this Project, the Project runs afoul of the General Plan.

### **B. The Project is Inconsistent with the Port's Master Plan**

The Port's Master Plan includes environment and sustainability goals to reduce environmental and health impacts from Port operations; preserve and enhance natural resources at the Port so that all communities may benefit from them; and mitigate the potential impacts on coastal resources from proposed developments.<sup>193</sup>

There is a fair argument that the Project's air quality and health risk impacts make the Project inconsistent with each of the goals listed above. The IS/ND fails to acknowledge the significant impacts to air quality and public health posed by the Project. Unless the Port takes measures to reduce these impacts to below significant levels, the Project will fail to comply with the goal to reduce environmental and health impacts from Port operations. Relatedly, the Port's goals of preserving natural resources and mitigating impacts to those resources are flouted by the Project's clear negative impacts on already bad air quality. Public enjoyment of coastal resources is inhibited by poor air quality. The Port has a duty to do more to mitigate the significant health impacts from the Project's significant contributions to local air pollution.

In addition, the Project is inconsistent with the Master Plan's permitting policies.<sup>194</sup> Per section 1215 of the Long Beach City Charter, no person may construct a structure within the Harbor District without first applying for and securing from the Board of Harbor Commissioners a permit to do so. The Board of Harbor Commissioners approves HDPs, which are a consolidation of a building permit and Coastal Development Permit under the California Coastal Act.<sup>195</sup>

Level I Permits are for developments occurring within the Harbor District that are emergency, administrative, or minor and expected to have insignificant impacts on the Port or surrounding environment.<sup>196</sup> These include projects with:

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<sup>193</sup> Master Plan Update, p. 5-5 (Environment and Sustainability Goals 1, 2, and 6).

<sup>194</sup> Master Plan Update, pp. 8-1–8-4.

<sup>195</sup> Master Plan Update, p. 8-1.

<sup>196</sup> Master Plan Update, pp. 8-2–8-3.

- Minimal capital resources
- Development costs at or below those established by Port for minor projects
- No major change in land and/or water use
- Minimal changes in density or intensity of use
- No significant adverse environmental impacts

Level II Permits are for development of new Port facilities such as marine terminals; modification of structures for recreational purposes; creation of new landfills; dredging of water areas not presently used for navigation, maneuvering, or berthing; and in general major or minor alterations that are not exempt.<sup>197</sup> Level II development projects include those with:

- Capital expenditures greater than Level I limits;
- Potential minor or major environmental impacts that can be mitigated;
- Potential unavoidable adverse impacts that cannot be mitigated; and
- Potential changes in land and water use.

The Master Plan explains that “[a]ny vote on an application may be taken only at a properly noticed public hearing, after the requirements of the California Environmental Quality Act (CEQA) have been met, and following completion of staff reports and recommendations.”<sup>198</sup> Regardless of the permit level, this Project presents significant environmental impacts that must be mitigated. As a result, the requirements of CEQA have not been met and the Board of Harbor Commissioners may not approve an application for the HDP.

## **VIII. APPROVAL OF THE PROJECT WOULD VIOLATE THE CALIFORNIA COASTAL ACT**

Section 30708 of California Coastal Act requires all Port-related developments to minimize substantial adverse environmental impacts.<sup>199</sup> Under section 30715, “[d]evelopments for storage, transmission, and processing liquefied natural gas and crude oil in such quantities as would have a significant impact on the oil and gas supply of the state and/or nation” can be appealed to the California Coastal Commission prior to approval by the Board of Harbor Commissioners

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<sup>197</sup> Master Plan Update, p. 8-3.

<sup>198</sup> Master Plan Update, p. 8-4.

<sup>199</sup> Pub. Res. Code § 30708(a).

(“BHC”).<sup>200</sup> Per section 30715.5, BHC shall not approve or grant an application for a permit for any development within the Harbor District unless a determination has been made by the Board that either (i) the development conforms with the certified Port Master Plan or (ii) the development is exempt from the Coastal Act.<sup>201</sup>

In contravention of the policies of the Coastal Act, the Project fails to minimize substantial adverse environmental impacts by failing to acknowledge and mitigate significant negative impacts to air quality and public health.<sup>202</sup> The deficiencies in the IS/ND’s Project description discussed above also obscure the significance of impacts of the Project on state oil supplies which is pertinent to whether there are grounds to appeal the development to the California Coastal Commission prior to approval by the BHC.<sup>203</sup> Finally, in violation of section 30715.5, the Project does not conform with the Port Master Plan as explained above. Moreover, no exemption in section 30610 applies to the Project, so the BHC is forbidden from granting HDP application.<sup>204</sup> Unless adequate mitigation measures can be adopted to reduce impacts below significant levels, an EIR must be prepared to evaluate the severity of those impacts on coastal resources before any permit may be approved.

## **IX. CONCLUSION**

For the reasons discussed above, the IS/ND for the Project is wholly inadequate under CEQA. It must be thoroughly revised and recirculated as an EIR to provide legally adequate analysis of, and mitigation for, all the Project’s potentially significant impacts. These revisions will necessarily require that the CEQA document be recirculated for additional public review. Until the Port has

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<sup>200</sup> Pub. Res. Code § 30715.

<sup>201</sup> Pub. Res. Code § 30715.5. Exemptions from Coastal Development Permits include: improvements to existing single-family residences; improvements to any structure other than a single-family residence or a public works facility that does not involve a risk of adverse environmental effect, adverse public access effect, or change in use contrary to Coastal Act policies; maintenance dredging of existing navigation channels; repair or maintenance that do not result in addition or enlargement of activities; any category of development in a specific area exempted by two-thirds vote of appointed members of Commission; the installation, testing, or replacement of any necessary utility connection between an existing service facility and any development approved pursuant to this division; and replacement of structure destroyed by disaster. (Pub. Res. Code. § 30610.)

<sup>202</sup> Pub. Res. Code § 30708(a).

<sup>203</sup> Pub. Res. Code § 30715.

<sup>204</sup> Pub. Res. Code §§ 30610, 30715.5.

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complied with these requirements for revision and recirculation 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

Attachment

4943-007acp