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March 13, 2019

### **Via Email and Overnight Delivery**

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### **Via Email Only**

Richard Aschieris, Port Director ([raschieris@stocktonport.com](mailto:raschieris@stocktonport.com))

**Re: Preliminary Comments on the Draft Environmental Impact Report for Contanda Renewable Diesel Bulk Liquid Terminal Development Project (SCH No. 2018102008)**

Dear Mr. Cashman, Mr. Aschieris:

On behalf of **Safe Fuel and Energy Resources California**, Steven M Dickinson, David Gracian, and Tim Knoeb (collectively, "SAFER CA"), we submit these preliminary comments regarding the Draft Environmental Impact Report ("DEIR") for the Contanda Renewable Diesel Bulk Liquid Terminal Development Project (SCH No. 2018102008) ("Project"), proposed by Contanda Terminals, LLC ("Contanda" or "Applicant"). Contanda proposes to develop a new bulk liquid terminal at the Port of Stockton ("Port") to receive, store, and transfer renewable diesel. The Project includes the construction of sixteen aboveground storage tanks ("ASTs") of varying capacity at a vacant parcel at the Port, along with construction of secondary containment, truck racks, and pumps and piping to transfer liquids between the new ASTs, berth, rail cars, and trucks.<sup>1</sup> Following construction, Contanda would receive renewable diesel by rail and vessels and

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<sup>1</sup> DEIR, p. 9.  
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transfer it to ASTs for storage, then transfer the product from ASTs to trucks for deliveries to the local market.<sup>2</sup> The Project is proposed to operate for 20 years, and may operate longer if the Applicant's lease is further extended.<sup>3</sup>

This letter contains the preliminary comments of SAFER CA and its technical consultant based on an initial review of the DEIR and a limited set of DEIR reference documents. As discussed below, the Port failed to provide SAFER CA with timely access to the DEIR reference documents, as required by the California Environmental Quality Act<sup>4</sup> ("CEQA"). The Port also refused SAFER CA's March 8, 2019 request to extend the public comment period to allow additional time to review DEIR reference documents that were provided just days before, including some documents as little as one day before, the end of the DEIR public comment period. 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>5</sup> Due to the limited time provided for public comment and SAFER CA's 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>6</sup>

We have conducted our initial review of the DEIR and its technical appendices with the assistance of our technical consultant, air quality and hazardous resources expert Phyllis Fox, PhD, PE.<sup>7</sup> The attached expert comments require separate responses under CEQA.

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<sup>2</sup> DEIR, p. 9.

<sup>3</sup> DEIR, p. 9 (as part of the proposed project, Contanda would enter into a 15-year lease with five 5-year extension options with the Port).

<sup>4</sup> Pub. Resources Code ("PRC") §§ 21000 et seq.; 14 Cal. Code Regs. ("CCR") §§ 15000 et seq.; PRC § 21092(b)(1); 14 CCR § 15087(c)(5).

<sup>5</sup> PRC § 21092(b)(1); 14 CCR § 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>6</sup> Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* ("Bakersfield") (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

<sup>7</sup> Dr. Fox's technical comments and curriculum vitae are attached hereto as Exhibit A.  
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Based upon our initial review of the DEIR and reference documents, we conclude that the DEIR is substantially deficient and fails to fulfill its mandate under CEQA as an informational document in numerous ways. As explained more fully below, the DEIR fails to disclose the extent of the Project's potentially significant impacts on air quality and public health; fails to support its findings with substantial evidence; and fails to properly mitigate the Project's potentially significant air quality and public health impacts. The Port cannot approve the Project until the errors in the DEIR are remedied and a revised DEIR is circulated for public review and comment.

## **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 and transport projects. Failure to adequately address the environmental impacts of renewable or traditional fuel and other refinery product transport and refining processes poses a substantial threat to the environment, worker health, surrounding communities and the local economy.

Refineries and fuel transport 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 alternative 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

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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 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 San Joaquin County, including the city of Stockton. 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.

These comments are also submitted on behalf of Stockton, California residents Steven M Dickinson, David Gracian, and Tim Knoeb, who live and works in the vicinity of the Project.

## II. LEGAL STANDARD

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances).<sup>8</sup> The EIR is a critical informational document, the very heart of CEQA.<sup>9</sup> "The foremost principle in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."<sup>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

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<sup>8</sup> See, e.g., PRC § 21100.

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

<sup>10</sup> *Comtys. for a Better Env' v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 ("*CBE v. CRA*"). 4424-014acp

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 ‘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 “environmentally superior” alternatives and 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 the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. *A clearly inadequate or unsupported study is entitled to no judicial deference.*”<sup>18</sup> As the courts have explained, “a

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<sup>11</sup> PRC § 21061; 14 CCR §§ 15002(a)(1); 15003(b)-(e); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 517 (“the 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.”).

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

<sup>13</sup> *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal. App. 4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

<sup>14</sup> 14 CCR § 15003(b).

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

<sup>16</sup> 14 CCR §15002(a)(2).

<sup>17</sup> PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

<sup>18</sup> *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), *quoting, Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.

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prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.”<sup>19</sup>

### III. LACK OF TIMELY ACCESS TO DEIR REFERENCE DOCUMENTS AND POTENTIAL NEED TO SUBMIT FURTHER COMMENTS

The Port violated CEQA and improperly truncated the DEIR public comment period by failing to make all documents referenced or relied on in the DEIR available for public review during the public comment period.<sup>20</sup> As a result, SAFER CA was unable to complete its review and analysis of the DEIR and its supporting evidence during the current public comment period. Our request for a further extension was denied. We therefore provide these initial comments on the DEIR and reserve our right to submit supplemental comments on the DEIR at a future date.

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>21</sup> The courts have held that the failure to provide even a few pages of a 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>22</sup>

On February 6, 2019, we submitted a letter to the Port, pursuant to CEQA Section 21092(b)(1), requesting “***immediate access to any and all documents referenced or relied upon***” in the DEIR (emphasis added).<sup>23</sup> On February 8, 2019, the Port provided a partial response which included a handful of electronic

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<sup>19</sup> *Berkeley Jets*, 91 Cal.App.4th at 1355; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.

<sup>20</sup> See PRC § 21092(b)(1); 14 CCR § 15087(c)(5).

<sup>21</sup> PRC §§ 21092(b)(1) (emphasis added); 14 Cal. Code Regs. (“CCR”) § 15072(g)(4).

<sup>22</sup> *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

<sup>23</sup> Letter from Adams, Broadwell, Joseph & Cardozo (“ABJC”) re Request for Immediate Access to Documents Referenced in the Draft Environmental Impact Report and Public Records – Contanda Renewable Diesel Bulk Liquid Terminal Development Project (SCH No. 2018102008) (February 6, 2019).

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reference documents and files. However, the Port's response omitted dozens of documents and files that are referenced in the DEIR, including the air pollution emissions modeling files used in the DEIR's air quality analysis, and the entire set of reference documents identified in DEIR Chapter 7, "*References*," that were not accompanied by weblinks.

On February 22, 2019, we submitted a second letter to the Port requesting access to the outstanding DEIR reference documents. Our letter included a list of over 54 missing documents that had not been provided in response to our original request, and requested a 45-day extension of the DEIR public review and comment period once the outstanding reference documents were produced, as required by CEQA.<sup>24</sup> On February 26, 2019, the Port provided a further response which included electronic attachments, a few emails, a weblink to an FTP site containing additional DEIR reference documents, and extended the DEIR public comment period from February 27, 2019 to March 13, 2019 (14-day extension).<sup>25</sup> However, the Port's second document production remained incomplete. The short 14-day extension failed to provide SAFER CA with the requisite 45-day public comment period required by CEQA, or even a meaningful amount of time to review and comment on the DEIR prior to the comment deadline.

On March 6, 2019, just one week before the close of the comment period, the Port provided a third set of DEIR reference documents in response to our February 22, 2019 letter. The Port's third response included a few of the missing files that the Port had failed to include in its February 26, 2019 production, but still remained incomplete. In particular, the Port's response continued to omit the electronic air pollution emissions modeling files that SAFER CA had requested on February 6, 2019, a month earlier.

On March 8, 2019, we sent a third letter to the Port requesting immediate access to the outstanding DEIR reference documents that had not been provided.

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<sup>24</sup> See *Ultramar*, 17 Cal.App.4th at 699; Letter from ABJC re Request to Extend the Public Review and Comment Period for the Draft Environmental Impact Report and Public Records – Contanda Renewable Diesel Bulk Liquid Terminal Development Project (SCH No. 2018102008) (February 22, 2019).

<sup>25</sup> February 26, 2019 emails from Jason Cashman and Melissa Whitener re Request to Extend the Public Review and Comment Period for the Draft Environmental Impact Report and Public Records – Contanda Renewable Diesel Bulk Liquid Terminal Development Project (SCH No. 2018102008). 4424-014acp

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Our letter requested, for a third time, the Port's electronic air pollution emissions modeling files that were used to calculate the Project's construction and operational emissions in the DEIR. On March 12, 2019, one day before the close of the public comment period, Port planner Mr. Cashman sent an email providing two additional missing documents, and, for the first time, asserting that the air pollution emissions modeling files were subject to trade secret privileges, and would not be provided. Mr. Cashman's March 12, 2019 email also advised SAFER CA that the Port refused to further extend the public comment period, despite its delayed and piecemealed production of DEIR reference documents that left SAFER CA with less than one day to consider the full set of reference materials received from the Port.

CEQA affords the public a right of access to the reference documents and supporting evidence that the lead agency is relying on to support the conclusions and findings in an EIR.<sup>26</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>27</sup> Access to the Project's DEIR reference materials is essential to SAFER CA and other members of the public's review and evaluation of the DEIR. 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 these materials, and in an untimely manner. The Port's responses were provided in a piecemealed fashion, in which responsive documents trickled in over a period of 34 days, at the end of which the Port denied SAFER CA's 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 SAFER CA's due process rights.<sup>28</sup>

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<sup>26</sup> PRC § 21092(b)(1); 14 CCR § 15087(c)(5).

<sup>27</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.").

<sup>28</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.").



**A. Emissions Modeling Files Used to Support the DEIR's Air Quality Analysis are Not "Confidential Business Information" or Trade Secrets.**

The Port's refusal to provide access to the DEIR's air pollution emissions modeling files is also a violation of the Public Records Act and California Clean Air Act. The Port's March 12, 2019 email to the undersigned asserted that the electronic emissions modeling files that are referenced in DEIR's Air Quality section and Appendix E, Air Quality and Greenhouse Gas Report, "constitute confidential business information and trade secrets, as defined in Civil Code section 3426.1, subd. (d), and are therefore not subject to disclosure under the CPRA [California Public Records Act]."<sup>29</sup> The Port's email also stated that emissions modeling files "are not in the actual or constructive possession of the Port."<sup>30</sup> As discussed below, the Port's first assertion is legally incorrect. And if the Port's second assertion is true, then it constitutes an admission that the Port lacks substantial evidence to support the DEIR's conclusions regarding the Project's air quality and related public health impact impacts.

The requested emissions data is not exempt from disclosure under the California Public Records Act or any other state law.<sup>31</sup> The Public Records Act states that "all 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 pollution management district [ . . . ] requires any applicant to provide before the applicant [ . . . ] operates, sells, rents or uses the article, machine, equipment, or other contrivance, **are public records**."<sup>32</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

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<sup>29</sup> See **Exhibit B**, March 12, 2019 email from J. Cashman to C. Caro re Contanda Third Request for DEIR reference documents and extension.

<sup>30</sup> *Id.*

<sup>31</sup> See Gov. Code § 6254 (enumerated PRA exemptions – emissions data not listed); *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal. App. 4th 1250 (statutory exemptions from mandatory disclosure under PRA must be narrowly construed where they limit the public's right to access); *Center Citizens for Ceres v. Super. Ct.*, 2013 Cal. App. LEXIS 532 (Cal. Ct. App. 5th, July 8, 2013) (agency cannot claim work-product or atty-client privileges for any communications with an applicant made before project approval).

<sup>32</sup> Gov. Code §6254.7(a).  
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subdivision (d), *are public records.*”<sup>33</sup> The Health and Safety Code further states that “all information collected pursuant to this chapter . . . shall be considered ‘air pollution emission data,’ for the purposes of this section.”<sup>34</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>35</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. Specific to project construction emissions, 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 4624 and 4632.<sup>36</sup> The DEIR’s emissions data is thus being used to assert that the Project complies with SJVAPCD emissions limits, SJVAPCD’s CEQA thresholds, and SJVAPCD rules related to localized emissions sources.<sup>37</sup> The emissions data sought by SAFER CA 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>38</sup> Therefore, it is clear under state law that the requested emissions records are not subject to trade secret protection, and are subject to disclosure under the Public Records Act pursuant to Gov. Code sections 6254.7(a) and (e), regardless of whether the files do, or do not, constitute “trade secrets.”

SAFER CA again requests that the Port comply with CEQA, the Public Records Act, and the California Clean Air Act and produce the DEIR emissions modeling files requested by SAFER CA for public review. SAFER CA reserves the right to file supplemental DEIR comments upon receipt of those files.

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<sup>33</sup> Gov. Code §6254.7(e).

<sup>34</sup> Health and Safety Code § 44346(h).

<sup>35</sup> DEIR, p. 21.

<sup>36</sup> DEIR, p. 30.

<sup>37</sup> DEIR, pp. 23-26,

<sup>38</sup> Gov. Code §6254.7(a).

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#### IV. THE DEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE POTENTIALLY SIGNIFICANT AIR QUALITY AND PUBLIC HEALTH IMPACTS

An EIR must fully disclose all potentially significant impacts of a Project, and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.<sup>39</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>40</sup>

These standards apply to an EIR's analysis of air quality and public health impacts of a Project. The California Supreme Court recently 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>41</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>42</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>43</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>44</sup>

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<sup>39</sup> 14 CCR § 15064(b).

<sup>40</sup> *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

<sup>41</sup> *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502.

<sup>42</sup> *Sierra Club*, 6 Cal.5th at 516.

<sup>43</sup> 6 Cal.5th at 523, citing *Cleveland National Forest*, 3 Cal.5th at 514–515.

<sup>44</sup> 6 Cal.5th at 523-524. CEQA's statutory scheme and legislative intent also include an express mandate that agencies consider and analyze human health impacts, acknowledges that human beings are an integral part of the "environment", and mandates that public agencies determine whether a the "***environmental effects of a project will cause substantial adverse effects on***" 4424-014acp

In *Berkeley Jets*, the Court of Appeal held that an EIR must analyze the impacts from human exposure to toxic substances.<sup>45</sup> In *Berkeley Jets*, the Port of Oakland approved a development plan for the Oakland International Airport. 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>46</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>47</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>48</sup>

The failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.<sup>49</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>50</sup> In reviewing challenges to an agency’s approval of an EIR based on a lack of substantial evidence, the court will ‘determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements.’<sup>51</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

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***human beings, either directly or indirectly,***” PRC § 21083(b)(3), (d) (emphasis added), and 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.” See PRC §21000 et seq. (emphasis added).

<sup>45</sup> 91 Cal.App.4th 1344, 1369.

<sup>46</sup> *Id.* at 1364.

<sup>47</sup> *Id.*

<sup>48</sup> 14 CCR § 15003(b).

<sup>49</sup> *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

<sup>50</sup> *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

<sup>51</sup> *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102. 4424-014acp

support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.”<sup>52</sup>

### **A. The DEIR’s Emissions Calculations are Unsupported.**

The DEIR’s air quality and health risk assessment analyses depend on criteria pollutant and hazardous air pollutant (“HAP”) emissions from a variety of sources, including truck transit, onsite truck idling, line haul locomotives, switcher locomotives, oceangoing vessels (“OGVs”) at berth, OGVs in transit, tugboats in transit, and tugboats at berth.<sup>53</sup> As explained above, and in Dr. Fox’s comments, the DEIR’s conclusions regarding emissions generated by these emissions sources are wholly unsupported because the DEIR fails to include (and the Port either fails to possess or refuses to disclose) the underlying modeling files and calculations used to prepare the DEIR’s air quality analysis.

As Dr. Fox explains, Project emissions must be estimated from activity data (e.g., number of trips), engine model (e.g., Tier 1, 2), and emission factors (e.g., grams per gallon of fuel). These emission estimates involve complex Excel spreadsheet calculations, which are required to be provided to the public upon request so that reviewers can evaluate the accuracy of the estimates.<sup>54</sup> The Port failed to provide these calculations to SAFER CA or other members of the public. Dr. Fox’s review of the DEIR’s air quality and health risk modeling discloses that the DEIR incorporates numerous emissions assumptions that do not apply to the Project or that require additional mitigation measures and enforceable conditions to assure implementation. These errors and omissions, discussed below and in Dr. Fox’s comments, disclose significant air quality and health impacts that were not identified in the DEIR, and which require recirculation. As a result, the DEIR’s air quality analysis and conclusions remain unsupported by any substantial evidence.

### **B. The Project’s Emissions Are Underestimated.**

The DEIR substantially underestimated the Project’s emissions by omitting numerous emissions onsite emissions sources and offsite emissions sources that

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<sup>52</sup> *Berkeley Jets*, 91 Cal.App.4th at 1355.

<sup>53</sup> See DEIR, p. 32; Appendix B: Emission Calculation Tables; Appendix E: Air Quality and Greenhouse Gas Report.

<sup>54</sup> Fox Comments, p. 4.  
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occur outside of the SJVAPCD. As Dr. Fox explains, these omissions result in significant underestimations of air quality, greenhouse gases, and health impacts beyond those disclosed in the DEIR.<sup>55</sup> The Port's failure to include all emission sources in the DEIR's air quality and health risk assessment requires that a revised DEIR be prepared and recirculated for public review

### **1. The DEIR Omits Onsite Emissions Sources.**

The DEIR omits potentially significant emissions from the transport of the Project's renewable diesel fuel, including emissions from both rail car unloading and truck loading.

The Project includes 3,600 rail car visits per year.<sup>56</sup> Dr. Fox explains that the DEIR omitted ROG emissions from unloading of railcars, including from fugitive components (PRVs, pressure relief vents, manways, bottom and top fittings), connecting and disconnecting railcars to the loading rack, and sumps that collect spills and predictable drips during railcar unloading.<sup>57</sup> The DEIR states that the imported renewable diesel received at the Project site would be loaded into trucks and transported to markets in Northern California.<sup>58</sup> Dr. Fox further explains that the DEIR omitted ROG emissions that are commonly released during truck loading, including from drips, hose disconnects, and sumps that collect fuel spills. As a result of these omissions, Dr. Fox concludes that the DEIR substantially underestimated emissions associated with the Project's inbound rail car shipments of renewable diesel and subsequent outbound truck trips.

### **2. The DEIR Omits Offsite Project Emissions Occurring Outside the SJVAPCD.**

The DEIR explains that the Project would receive shipments of renewable diesel via inbound trains from Union Pacific and BNSF Railway, and from vessels

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<sup>55</sup> Fox Comments, pp. 4-9. Due to inadequate review time and lack of supporting documents, we were unable to provide estimates for the missing emission sources. SAFER CA reserves the right to submit supplemental comments and perform independent emissions estimates to further analyze the Project's emissions.

<sup>56</sup> DEIR, Table 4, pdf 35.

<sup>57</sup> Fox Comments, p. 4.

<sup>58</sup> DEIR, p. 12.

berthed at the Port's Wharf 8. The trains would originate from various production facilities located throughout the United States, would be offloaded at the Contanda Port Road A site, and then transferred to the Project site via a new pipeline.<sup>59</sup> The imported renewable diesel would then be loaded onto trucks and transported to customers in various locations in Northern California.<sup>60</sup>

The DEIR estimated emissions that occur within the boundary of the SJVAPCD, where the Project site is located, but failed to estimate any rail, truck, or vessel emissions that will occur outside the SJVAPCD during the Project's fuel transit operations. Dr. Fox identifies six key emissions factors that will occur outside of the SJVAPCD's jurisdiction, but which were completely excluded from the DEIR's analysis, including: (1) emissions from trucks in transit, (2) emissions from oceangoing vessels, (3) emissions from trains in transit, (4) locomotive emissions, (5) rail car evaporative emissions, (6) ambient air quality impacts.<sup>61</sup> As a result, the DEIR's air quality analysis is significantly flawed and incomplete.

As Dr. Fox explains, the majority of the Project's emissions will be from truck, rail, and ship transport, all of which will pass through up to 20 other air basins, each under the jurisdiction of a different air district, as illustrated below:

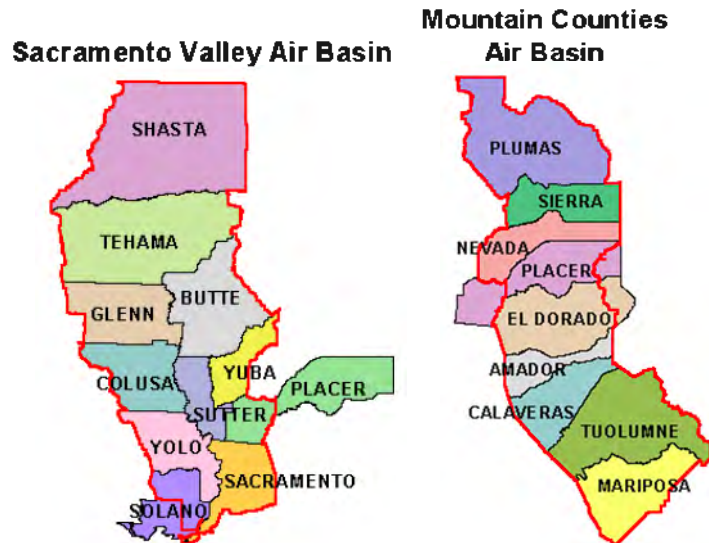
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<sup>59</sup> DEIR, p. 32, pdf 51 and Appendix E, Sec. 3.1.3.3, pdf 51.

<sup>60</sup> *Id.*; DEIR, p. 12.

<sup>61</sup> Fox Comments, pp. 5-9.

### Air Basins Affected by the Project



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Because the DEIR only evaluated emissions from the Project site to the SJVAPCD boundary, or 15 miles for OGVs and 88 miles, one way, for trucks,<sup>63</sup> Dr. Fox concludes that the DEIR fails entirely to disclose or mitigate the emissions resulting from the Project that will occur outside the San Joaquin Air Basin. The DEIR also fails to identify key facts contributing to the nature and extent of emissions, including the source(s) and destination(s) of the product, the route(s) that the trains would take to the Terminal, the destination of the renewable diesel, or the miles traveled in any location other than the hosting air district.<sup>64</sup> These are serious omissions.<sup>65</sup>

Emissions resulting from the Project that occur anywhere in California must be similarly quantified and evaluated, including emissions generated by the transport of materials used during Project construction and operation, and by the outgoing transport of renewable diesel fuel from the Project site outside the hosting air district. The DEIR must be revised and recirculated to disclose Project emissions from all sources within the State.

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<sup>62</sup> Fox Comments, p. 8.

<sup>63</sup> DEIR, Table 4, pdf 243.

<sup>64</sup> Fox Comments, p. 5.

<sup>65</sup> *Id.*



### **C. The DEIR Fails to Require All Feasible Mitigation Measures to Reduce Air Quality Impacts to the Greatest Extent Feasible.**

The DEIR concluded that Project operation within the SJVAPCD would result in significant air quality impacts, including: (1) conflicting with and/or obstructing implementation of air quality control plans (AQ-1);<sup>66</sup> (2) annual operational emissions of NO<sub>x</sub> exceeding 19 ton/yr (AQ-2);<sup>67</sup> and (3) a cumulatively considerable net increase in NO<sub>x</sub>.<sup>68</sup> To mitigate these significant impacts, the DEIR proposes only two mitigation measures—truck idling reductions (MM-AQ-1) and the use of clean trucks (MM-AQ-2)—concluding that emissions would remain significant after mitigation because NO<sub>x</sub> emissions largely originate from locomotives and trucks that are not within Contanda’s power to mitigate.<sup>69</sup> No mitigation is proposed for the significant cumulative NO<sub>x</sub> impacts. The DEIR concludes that these impacts remain significant after this mitigation. Therefore the DEIR must implement additional mitigation to reduce the Project’s air quality impacts to less than significant levels.<sup>70</sup>

Dr. Fox explains that there is additional, feasible mitigation available to reduce the Project’s air quality impacts to less than significant levels. Dr. Fox explains that the Project’s significant NO<sub>x</sub> emissions could be fully mitigated using Voluntary Emission Reduction Agreements (“VERAs”).<sup>71</sup> The SJVAPCD uses VERAs to address mitigation requirements under CEQA. Under a VERA, the developer (in this case Contanda) would be required to fully mitigate project emission impacts by providing funds to the SJVAPCD. The funds are then used by SJVAPCD to administer emission reduction projects on behalf of the developer. These agreements are incorporated into the SJVAPCD’s CEQA Guidelines.<sup>72</sup>

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<sup>66</sup> DEIR, pp. 32-33, pdf 51-52.

<sup>67</sup> DEIR, Table 13, pdf 53-54.

<sup>68</sup> DEIR, p. 37, pdf 56.

<sup>69</sup> DEIR, p. 33-37, pdf 52-56.

<sup>70</sup> PRC §§ 21002.1(a), 21100(b)(3).

<sup>71</sup> Fox Comments, p. 13.

<sup>72</sup> See SJVAPCD Guidance for Assessing and Mitigating Air Quality Impacts, March 19, 2015, available at

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjrVLG3hIDhAhWFMH0KHV8nBFcQFjAAegQIChAC&url=http%3A%2F%2Fwww.valleyair.org%2Ftransportation%2FGAMAQI\\_3-19-15.pdf&usg=AOvVaw3oG7uHuccUqo4EC-ZrXiK](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjrVLG3hIDhAhWFMH0KHV8nBFcQFjAAegQIChAC&url=http%3A%2F%2Fwww.valleyair.org%2Ftransportation%2FGAMAQI_3-19-15.pdf&usg=AOvVaw3oG7uHuccUqo4EC-ZrXiK).

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In this case, because the Project will cause excess NO<sub>x</sub> emissions in numerous air districts, Dr. Fox explains that implementation of a VERA by SJVAPCD would likely require Contanda to make a one-time payment for its ROG and NO<sub>x</sub> emissions in excess of significance thresholds to each affected air district.<sup>73</sup> The SJVUAPCD has found that the cost for NO<sub>x</sub> reductions is \$8,123 per ton.<sup>74</sup> Thus, Dr. Fox concludes that the cost of a feasible VERA could be easily calculated based on the Project's (accurately calculated) projected NO<sub>x</sub> emissions.<sup>75</sup>

The Port should require use a VERA as binding mitigation to reduce the Project's significant and unavoidable air quality impacts.

**D. The Project is Likely to Cause Significant Health Risks from Human Exposure to Toxic Air Contaminants Released During Project Construction and Operation that the DEIR Fails to Disclose and Mitigate.**

The DEIR includes a health risk assessment ("HRA") that was used to estimate potential cancer and chronic non-cancer health impacts from exposure to toxic air contaminants ("TACs") during Project construction and operation.<sup>76</sup> Dr. Fox reviewed the HRA, and concludes that it failed to follow accepted regulatory protocol for estimating health risks, and relies on inaccurate and underreported Project emissions to calculate the Project's related TAC emissions. As a result, the HRA fails to accurately disclose or mitigate potentially significant health impacts at critical sensitive receptors. The DEIR's conclusion that health risks are less than significant is therefore inaccurate and unsupported.

First, the DEIR asserts that the HRA was conducted in accordance with SJVAPCD HRA guidance (SJVAPCD 2018) and the Office of Environmental Health

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<sup>73</sup> Fox Comments, p. 13.

<sup>74</sup> SJVAPCD 2017, Table 3, pdf 11.

<sup>75</sup> Fox Comments, p. 13.

<sup>76</sup> DEIR, Appendix E, Air Quality and Greenhouse Gas Report, Section 3. Health Risk Assessment, pdf 244-296.  
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Hazard Assessment (“OEHHA”) Guidance,<sup>77</sup> using US EPA’s AERMOD dispersion model and CARB’s Hotspots Analysis Reporting Program (“HARP”), and the Risk Assessment Standalone Tool (“RAST”).<sup>78</sup> Dr. Fox reviewed the DEIR’s HRA, and concludes that it did not follow OEHHA guidance and did not properly use HARP or RAST. For example, as Dr. Fox explains, the Port produced selected modeling files<sup>79</sup> which stated that AERMOD was run using a grid with over 1,000 receptors. However, Dr. Fox’s review of the risk calculations reported in the DEIR’s modeling files and the DEIR do not match this statement. Instead, the DEIR discloses that the health risk calculations were performed for just a single reference point. As Dr. Fox explains, this error resulted in the HRA’s omission of many of the locations and sensitive receptors that are likely to be impacted by the Project’s TAC emissions.<sup>80</sup>

Second, as discussed above, the Project’s overall air emissions were underestimated. This resulted in a corresponding underestimation of TAC emissions. Dr. Fox identified additional inaccuracies in the HRA’s emissions factors, including unsupported assumptions that included restricted hours of Project operation to avoid periods when ambient concentrations of TACs are the highest, and unsubstantiated modifications to emissions source locations that were inconsistent with information included in the DEIR.<sup>81</sup> Dr. Fox opines that these unexplained changes in the HRA’s emissions factors may have been made to avoid disclosing health impacts in residential areas.<sup>82</sup> These, and other factual assumptions made in the HRA, are not supported by any substantial evidence in the DEIR. The HRA’s conclusion that the Project’s health risk is less than significant is therefore similarly unsupported.

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<sup>77</sup> Office of Environmental Health Hazard Assessment (OEHHA), Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments, February 2015; available at <https://oehha.ca.gov/media/downloads/crn/2015guidancemanual.pdf>.

<sup>78</sup> DEIR, Appendix E, pdf 244.

<sup>79</sup> The modeling files produced by the Port included only a limited subset of the air pollution emissions modeling data requested by SAFER CA.

<sup>80</sup> Fox Comments, p. 16.

<sup>81</sup> Fox Comments, pp. 13-17.

<sup>82</sup> *Id.* at p. 16.

**1. Updated Health Risk Analysis Discloses Significant Residential Cancer Risk.**

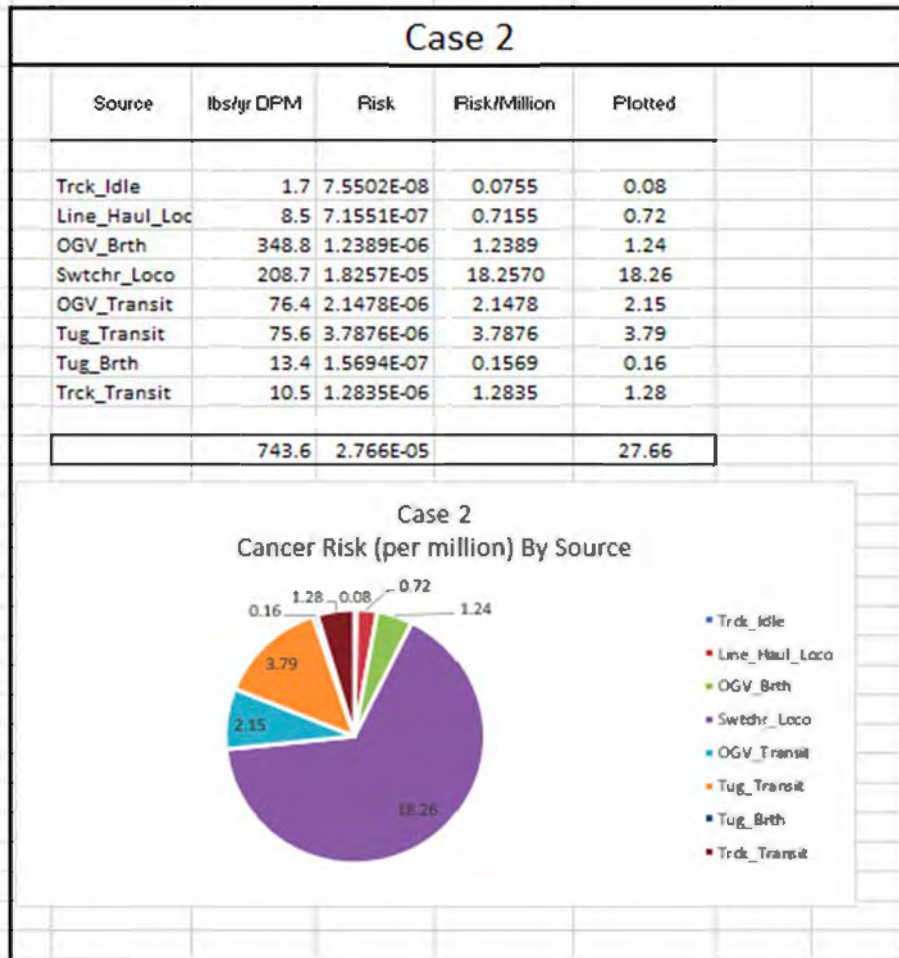
Dr. Fox prepared a revised health risk analysis using recommended agency protocols, corrected emissions factors, and updated modeling assumptions using the Project description contained in the DEIR. Dr. Fox's revised analysis assumes switcher DPM emissions of 208.7 lb/yr (instead of 54.7 lb/yr, modeled in the DEIR) that occur around the clock, and switcher and truck routes adjacent to residential areas, but otherwise retained the DEIR's assumptions.<sup>83</sup>

When modeled correctly, Dr. Fox concludes that the Project's TAC emissions are likely to result in significant health risks from increased residential cancer risk that are not disclosed or mitigated in the DEIR, as follows:

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<sup>83</sup> Fox Comments, p. 33.  
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Revised Health Risk Assessment



Dr. Fox’s health risk analysis demonstrates that the 30-year cancer risk at the nearest home (receptor #269) is 27.7 per million, compared to the DEIR’s cancer significance threshold of 20 per million.<sup>84</sup> Thus, residential cancer risks are significant.

<sup>84</sup> Fox Comments, p. 34; DEIR, p. 37 (ground-level concentrations of carcinogenic TACs that would increase the probability of contracting cancer for the maximally exposed individual by 20 in one million or more is significant impact).  
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## **2. Acute Health Risks Are Significant.**

The HRA asserts that the proposed Project would not result in significant “acute health hazards,” relying on DEIR, Appendix E, Table 15, for this conclusion. However, a review of Table 15 demonstrates that it does not report the results of an acute health impact analysis at all.<sup>85</sup> The DEIR elsewhere claims that the Port could not analyze acute health hazards because an acute Hazard Index, which evaluates the probability of TACs to cause adverse health effects due to short-term exposure, was not quantified for the Project because the chief pollutant of concern is DPM, for which OEHHA has not established an acute reference exposure level (“REL”).<sup>86</sup>

Dr. Fox explains that the absence of an OEHHA acute risk exposure level does not excuse the Applicant from evaluating acute health risks. Dr. Fox explains that the significance of acute exposures *is* generally assessed using the Hazard Index approach. A Hazard Index is calculated as sum of the ratio of the calculated 1-hour concentrations for each HAP, divided by their respective reference exposure level, in this case 10 g/m<sup>3</sup>.<sup>87</sup> The SJVAPCD significance threshold for acute exposures is a hazard index of 1 for the maximally exposed individual.<sup>88</sup>

Using this approach, Dr. Fox conducted an acute risk assessment for Project construction, using the DEIR’s DPM emission rate (366 lb/yr) and assuming construction between 8 AM and 4 PM.<sup>89</sup> Dr. Fox’s analysis found that significant acute health impacts (HI= $\geq$ 1; DPM concentration  $\geq$  10  $\mu\text{g}/\text{m}^3$ ) occur within 35 meters to the south and 80 meters to the west of the Project site boundary, in locations where workers would be found, including at the adjacent Contanda Terminal.<sup>90</sup> Dr. Fox conducted a similar acute risk assessment for Project operation using the Project’s highest 25 1-hour DPM concentrations, which range from 232 to 344  $\mu\text{g}/\text{m}^3$ . Dr. Fox found that all concentrations exceeded the acute REL of 10  $\mu\text{g}/\text{m}^3$  and a hazard index of 1 in both cases by a significant amount.<sup>91</sup> Thus, Dr,

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<sup>85</sup> DEIR, Appendix E, Table 15; Fox Comments, p. 36.

<sup>86</sup> DEIR, Appendix E, pdf 245.

<sup>87</sup> Fox Comments, p. 36.

<sup>88</sup> *Id.*

<sup>89</sup> Dr. Fox Comments, p. 37.

<sup>90</sup> *Id.*

<sup>91</sup> Fox Comments, p. 37.

Fox concludes that the Project's acute health impacts to construction workers, Project users and residents, and adjacent receptors in the vicinity of the Project remain significant and unmitigated.<sup>92</sup>

The DEIR must be revised and recirculated to accurately disclose and mitigate these significant health risks.

## V. CONCLUSION

For all of the reasons discussed above, the DEIR for the Project remains wholly inadequate under CEQA. It must be thoroughly revised to provide analysis of, and mitigation for, all of the Project's 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 consideration of these comments. Please include them in the record of proceedings for the Project.

Sincerely,



Christina M. Caro

CMC:acp

Attachments

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<sup>92</sup> *Id.* at pp. 37-38.  
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