



T 510.836.4200
F 510.836.4205

1939 Harrison Street, Ste. 150
Oakland, CA 94612

www.lozeaudrury.com
paige@lozeaudrury.com

Via Email

May 24, 2021

Leigha Schmidt, Senior Planner
Planning Division
City of Hayward
777 B Street
Hayward, CA 94541
Leigha.Schmidt@hayward-ca.gov

Re: Comment on Draft Environmental Impact Report, 4150 Point Eden Way Industrial Development Project (SCH No. 2020110180)

Dear Ms. Schmidt:

This letter is submitted on behalf of the Laborers International Union of North America, Local Union No. 304 and its members living and/or working in or around Hayward (“LIUNA”) regarding the Draft Environmental Impact Report (“DEIR”) prepared for the 4150 Point Eden Way Industrial Development Project (SCH No. 2020110180) (the “Project”). After reviewing the DEIR, we conclude that the DEIR fails as an informational document and fails to impose all feasible mitigation measures to reduce the Project’s impacts. LIUNA requests that the City of Hayward (“City”) address these shortcomings in a revised draft environmental impact report (“RDEIR”) and recirculate the RDEIR prior to considering approvals for the Project.

5.1

LIUNA’s comments have been prepared with the assistance of wildlife biologist Shawn Smallwood, Ph.D., and environmental consulting firm Soil/Water/Air Protection Enterprise (“SWAPE”). Dr. Smallwood’s comment and curriculum vitae are attached as Exhibit A hereto and are incorporated herein by reference and entirety. SWAPE’s comment and curriculum vitae are attached as Exhibit B hereto and are incorporated herein by reference in their entirety.

5.2

I. PROJECT DESCRIPTION

The Project proposes to demolish and remove the existing historic salt production structure and materials and develop a 114,059 square foot warehouse with an additional 2,785 square foot office, and associated surface parking, landscaping, and utility and drainage improvements on a parcel located at 4150 Point Eden Way in the City. The Project also proposes to establish a 32-acre open space/wetland preserve on the western portion of the Project site and proposes a land swap for the East Bay Regional Park District to relocate the Bay Trail from the current location along the eastern property line of the eastern component of the Project site to

5.3

meander along the southern property line and then to turn north to run along the western property line of the eastern component of the Project site.

5.3

II. LEGAL BACKGROUND

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report (“EIR”) (except in certain limited circumstances). *See, e.g.*, Pub. Res. Code § 21100. The EIR is the very heart of CEQA. *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. 14 Cal. Code Regs. (“CEQA Guidelines”) § 15002(a)(1). “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.’” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564. 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.” *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.

5.4

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures. CEQA Guidelines § 15002(a)(2) and (3); *see also, Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. 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.” CEQA Guidelines §15002(a)(2). 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.” Pub. Res. Code § 21081; CEQA Guidelines § 15092(b)(2)(A) & (B). The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 732.

The EIR is the very heart of CEQA “and the integrity of the process is dependent on the adequacy of the EIR.” *Berkeley Jets*, 91 Cal. App. 4th 1109, 1355. CEQA requires that a lead agency analyze all potentially significant environmental impacts of its proposed actions in an EIR. Pub. Res. Code § 21100(b)(1); Guidelines § 15126(a); *Berkeley Jets*, 91 Cal.App.4th 1344, 1354. The EIR must not only identify the impacts, but must also provide “information about how

adverse the impacts will be.” *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831. The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. *Kings County Farm Bureau*, 221 Cal.App.3d 692, 732. “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Communities for a Better Env’t*, 103 Cal.App.4th 98, 109.

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.’” *Berkeley Jets*, 91 Cal. App. 4th at p. 1355 (emphasis added) (quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 391 409, fn. 12). As the court stated in *Berkeley Jets*:

A 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.” (*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.)

5.4

More recently, the California Supreme Court has emphasized that:

When reviewing whether a discussion is sufficient to satisfy CEQA, a court must be satisfied that the EIR (1) includes sufficient detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues the proposed project raises [citation omitted], and (2) makes a reasonable effort to substantively connect a project's air quality impacts to likely health consequences.

Sierra Club v. Cty. of Fresno (2018) 6 Cal.5th 502, 510 (2018), citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 405. “Whether or not the alleged inadequacy is the complete omission of a required discussion or a patently inadequate one-paragraph discussion devoid of analysis, the reviewing court must decide whether the EIR serves its purpose as an informational document.” *Sierra Club v. Cty. of Fresno*, 6 Cal.5th at 516. Although an agency has discretion to decide the manner of discussing potentially significant effects in an EIR, “a reviewing court must determine whether the discussion of a potentially significant effect is sufficient or insufficient, i.e., whether the EIR comports with its intended function of including ‘detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’” 6 Cal.5th at 516, citing *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1197. “The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency’s factual conclusions.” 6 Cal.5th at 516. Whether a discussion of a potential impact is sufficient “presents a mixed question of law and fact. As such, it is generally subject to

independent review. However, underlying factual determinations—including, for example, an agency’s decision as to which methodologies to employ for analyzing an environmental effect—may warrant deference.” *Sierra Club v. Cty. of Fresno*, 6 Cal.5th at 516. As the Court emphasized:

[W]hether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence.

Sierra Club v. Cty. of Fresno, 6 Cal.5th at 514.

CEQA requires that an environmental document include a description of the project’s environmental setting or “baseline.” CEQA Guidelines, § 15063(d)(2). The CEQA “baseline” is the set of environmental conditions against which to compare a project’s anticipated impacts. *CBE v. SCAQMD*, 48 Cal.4th at 321. CEQA Guidelines section 15125(a) states, in pertinent part, that a lead agency’s environmental review under CEQA:

...must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time [environmental analysis] is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant.

See, *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124-125 (“*Save Our Peninsula*”).

III. DISCUSSION

A. The DEIR Fails to Adequately Address and Mitigate the Project’s Impacts on Biological Resources.

Expert wildlife biologist Shawn Smallwood, Ph.D., reviewed the DEIR and found that it inadequately evaluated the Project’s impacts on wildlife. See Exhibit A.

Dr. Smallwood performed a site visit at the Project site on May 11. Ex. A, p. 1. He detected 37 species of vertebrate wildlife, 7 of which are special-status species. *Id.* at 8. Dr. Smallwood noted that the site was heavily trafficked by wildlife and the site’s vertical vegetation structure and occupancy by California ground squirrels expands its attraction to nesting birds, foraging raptors, and the many species that utilize ground squirrel burrows. *Id.* at 1. Dr. Smallwood observed white-tailed kite, red-tailed hawk, Forster’s terns, Anna’s hummingbirds, Double-crested cormorants, California gulls and Canada goose, and great egrets among other species. *Id.* at 1-2. A full list of the species observed by Dr. Smallwood can be found in Table 1 of his attached comment. *Id.* at 7.

5.4

5.5

Based on his site visit and review of the DEIR, Dr. Smallwood concluded that the following factors render the DEIR's discussion of wildlife impacts insufficient:

1. The DEIR provides an inadequate baseline and fails to adequately analyze and mitigate the Project's impacts on biological resources.

As Dr. Smallwood points out, the DEIR's conclusion based on the Initial Study that no special-status species occur on the Project site is refuted by WRA's and Dr. Smallwood's survey results. Ex. A, p. 10. One or more unidentified biologists working for WRA surveyed the Project site on June 19, 2020 and detected 3 special-status species, including American white pelican, which is a Priority Level 1 California Species of Special Concern. *Id.* Between WRA's and Dr. Smallwood's surveys, 8 special-status species were detected, and in Dr. Smallwood's experience 8 special-status species is rich for one 8-acre site surveyed only twice. *Id.* However, the Initial Study characterizes it as empty of special-status species – it is not. *Id.*

Dr. Smallwood notes that WRA consulted many sources of wildlife species occurrences, including eBird. However, WRA's list of potentially occurring special-status species is much shorter than Dr. Smallwood's. *Id.* at 11; *see also id.* at 12-14. Dr. Smallwood found evidence in databases and on-site survey outcomes that would support potential occurrence likelihoods of 79 special-status species, whereas WRA only considers 10 of them. *Id.* at 11. Of these 10 species WRA considers, WRA determined one to have high potential, two to have moderate potential, three to have low potential, and four as unlikely. *Id.* Dr. Smallwood detected two of the three species WRA assigned low potential. *Id.* The third species of low potential, burrowing owl, was reportedly seen immediately adjacent to the Project site in 2015 and 2016. *Id.*

5.5

WRA also erroneously concludes special-status species of birds are unlikely due to the lack of suitable nesting habitat on the Project site. *Id.* However, Dr. Smallwood notes that WRA mischaracterizes habitat in order to pigeon-hole bird species into unrealistic narrow portions of the environment, which are then said to not occur at the Project site. *Id.* Dr. Smallwood states that there is no neat distinction between nesting habitat and alleged other types of habitat since habitat is that portion of the environment used by the species and no bird can successfully nest without having found sufficient forage and cover throughout the year. *Id.* Nor can a bird successfully nest without having survived migration and dispersal by locating stop-over and staging opportunities. *Id.*

In failing to establish an adequate baseline of biological resources, the DEIR fails to adequately analyze and mitigate the Project's impacts to biological resources.

2. The DEIR fails to adequately analyze the Project's impacts on wildlife movement.

According to the DEIR, the Project site provides marginal wildlife corridor value due to the proximity to Eden Landing and substantial barriers to terrestrial passage, as well as the sparse nature of vegetation present within the Project site. DEIR, p. 4.1-9 – 4.1-10. However, Dr. Smallwood states there are two fundamental flaws in the DEIR's analysis of whether the Project

5.6

would interfere with wildlife movement in the region. Ex. A, p. 17. According to the DEIR and to WRA, “To account for potential impacts to wildlife movement/migratory corridors, biologists reviewed maps from the California Essential Connectivity Project” and “habitat connectivity data available through the CDFW Biogeographic Information and Observation System.” DEIR, App. A, p. 12. However, Dr. Smallwood states that the first problem with this statement is that it implies the Project site must serve as a movement corridor as a prerequisite for determining that the Project would interfere with wildlife movement. Ex. A, p. 17. With this implication, the DEIR adopts a CEQA standard that does not exist. *Id.* The CEQA standard is whether a project would interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors. *Id.* “The primary phrase of the standard goes to wildlife movement regardless of whether the movement is channeled by a corridor.” *Id.* Wildlife movement includes stopover habitat used by birds and bats, and staging habitat during dispersal, and migration or home range patrol. *Id.* Dr. Smallwood notes that many species of wildlife likely use the Project site for movement across the region and the Project would cut wildlife off from stopover and staging habitat, lengthening the distances wildlife must travel before finding alternate stopover habitat. *Id.* Therefore, the Project would interfere with wildlife movement in the region. The second problem with the DEIR’s analysis of wildlife movement is that it misapplies the California Essential Habitat Connectivity Project. *See id.* A revised EIR must be prepared to address these flaws in the DEIR’s analysis of the Project’s impacts on wildlife movement.

5.6

3. The DEIR fails to address the impacts on wildlife from additional traffic generated by the Project.

The DEIR did not address the impacts on wildlife mortality from traffic generated by the Project. Ex. A, p. 18. According to the DEIR, the Project will generate an additional 1,192,862 vehicle miles traveled (“VMT”) annually yet the DEIR provides no analysis of the impacts on wildlife that will be caused by an increase in traffic on the roadways servicing the Project. *Id.*

Vehicle collisions with special-status species is not a minor issue, but rather results in the death of millions of species each year. Dr. Smallwood explains:

5.7

Across North America traffic impacts have taken devastating tolls on wildlife (Forman et al. 2003). In Canada, 3,562 birds were estimated killed per 100 km of road per year (Bishop and Brogan 2013), and the US estimate of avian mortality on roads is 2,200 to 8,405 deaths per 100 km per year, or 89 million to 340 million total per year (Loss et al. 2014). Local impacts can be more intense than nationally.

Id. Dr. Smallwood estimated that the Project’s additional traffic would cause 654 wildlife fatalities per year, and 32,681 wildlife fatalities over 50 years of operations. *Id.* at 20. An RDEIR is required to analyze and mitigate this potentially significant impact on wildlife.

B. The DEIR Inadequately Analyzed and Mitigated the Project’s Hazards and Hazardous Materials.

5.8

Matt Hagemann, P.G., C.Hg., and Dr. Paul E. Rosenfeld, Ph.D., of the environmental consulting firm SWAPE reviewed the DEIR’s analysis of the Project’s impacts on hazards, hazardous materials, air quality, and greenhouse gases (“GHG”). SWAPE’s comment letter and CVs are attached as Exhibit B.

According to the DEIR, Cornerstone Earth Group prepared a Phase I Environmental Site Assessment (“ESA”) for the Project site in March 2017. DEIR, p. 4.3-1. The Phase I ESA recommended an update to the 2014 Risk Management Plan (“RMP”) that was prepared to “control potential hazardous contamination and exposure.” Ex. B, p. 1. Specifically, Cornerstone Earth Group stated:

We recommend preparing an RMP [risk management plan] Addendum that presents the planned development earthwork/grading, soil and ground water management protocol and vapor intrusion mitigation measures. The purpose of the RMP Addendum will be to provide more specific details regarding the development, and will propose any changes to the RMP to accommodate the proposed development. The RMP Addendum should describe earthwork required for geotechnical soil improvements, such as over-excavation and re-compaction of fills or other ground improvements. The RMP Addendum should be submitted to the Water Board for their review and approval prior to construction.

5.8

DEIR, App. A, App. E, p. 22.

However, SWAPE notes that this recommendation has not been incorporated into the DEIR. Ex. B, p. 2. SWAPE states that an updated RMP is necessary for inclusion in a revised DEIR, and the revised DEIR needs to demonstrate the engagement of the San Francisco Bay Regional Water Quality Control Board in the review of an updated RMP and mitigation that is necessary to ensure that the public and workers are not exposed to known contaminants at the site, including benzene and petroleum hydrocarbons. *Id.*

Additionally, SWAPE states that the selection of a vapor barrier as mitigation for contaminated vapors, as proposed in the DEIR, should not be pre-selected, but instead, the applicant should consider a range of alternatives. *Id.* The City should document its consideration of a wide range of alternatives to address contaminated vapors, including soil vapor extraction and groundwater containment or extraction and treatment in a revised DEIR. *Id.*

5.9

C. The DEIR Inadequately Analyzed and Mitigated the Project’s Impacts on Air Quality.

1. The DEIR underestimated the Project’s emissions.

SWAPE found that the DEIR underestimated the Project’s emissions and therefore cannot be relied upon to determine the significance of the Project’s air quality impacts. Ex. B, p. 2. The DEIR relies on emissions calculated from the California Emissions Estimator Model

5.10

Version CalEEMod.2016.3.2 (“CalEEMod”). *Id.* This model, which is used to generate a project’s construction and operational emissions, relies on recommended default values for site-specific information related to a number of factors. *Id.* CEQA requires any changes to the default values to be justified by substantial evidence. *Id.*

SWAPE reviewed the Project’s CalEEMod output files and found that the values input into the model were unsubstantiated or inconsistent with information provided in the DEIR. *Id.* As a result, the DEIR’s air quality analysis cannot be relied upon to determine the Project’s emissions.

Specifically, SWAPE found that the following values used in the DEIR’s air quality analysis were either inconsistent with information provided in the DEIR or otherwise unjustified:

- i. Use of an underestimated land use size. Ex. B, p. 3.
- ii. Failure to consider cold storage. Ex. B, pp. 3-4.
- iii. Unsubstantiated reductions to CH₄, CO₂, and N₂O intensity factors. Ex. B, pp. 4-5.
- iv. Unsubstantiated reductions to architectural coating emission factors. Ex. B, pp. 5-6.
- v. Failure to model material import. Ex. B, p. 6.
- vi. Failure to substantiate demolition. Ex. B, pp. 6-7.
- vii. Unsubstantiated change to architectural coating phase length. Ex. B, pp. 7-9.

5.10

As a result of these errors in the DEIR, the Project’s construction and operational emissions are underestimated and cannot be relied upon to determine the significance of the Project’s air quality impacts. A revised DEIR is necessary to address these errors.

2. An updated analysis indicates that the Project may have a potentially significant air quality impact.

In an effort to more accurately estimate the project’s construction-related emissions, SWAPE prepared an updated CalEEMod model using Project-specific information in the DEIR. Ex. B, p. 9. SWAPE’s updated analysis estimates that the Project’s construction-related VOC emissions would be 63.6 pounds per day, exceeding the applicable daily maximum BAAQMD threshold of 54 pounds per day. *Id.* SWAPE’s model demonstrates that the Project would result in a potentially significant air quality impact that was not previously identified or addressed in the DEIR. An updated EIR should be prepared to adequately assess and mitigate the potential air quality impacts that the Project may have on the surrounding environment.

5.11

D. The DEIR Fails to Adequately Analyze the Project’s GHG Impacts.

The DEIR estimates that the Project would generate 447.6 metric tons of carbon dioxide equivalents per year (“MT CO₂e/year”) and would therefore not exceed the bright-line threshold of 660 MT CO₂e/year resulting in a less than significant impact related to GHG emissions.

5.12

DEIR, p. 1-7. However, SWAPE notes that the DEIR's GHG analysis, and subsequent less-than-significant impact conclusion, is incorrect for two reasons. Ex. B, p. 10.

First, the DEIR's GHG analysis relies on a flawed air model, as discussed above. *Id.* Second, SWAPE's updated modeling demonstrates that the Project's mitigated emissions would include approximately 620 MT CO₂e/year of total construction emissions and approximately 1,301 MT CO₂e/year of net annual operational emissions. *Id.* When amortizing the Project's construction related GHG emissions over a period of 30 years and summing them with the Project's operational GHG emissions, SWAPE estimates net annual GHG emissions of 1,322 MT CO₂e/year, which greatly exceeds the BAAQMD threshold of 660 MT CO₂e/year. *Id.* at 10-11. An updated EIR is required and should provide additional information and analysis to conclude less than significant GHG impacts.

5.12

IV. CONCLUSION

For the foregoing reasons, LIUNA believes that the DEIR is wholly inadequate. LIUNA urges the City to prepare an RDEIR that conforms with CEQA, as described above.

5.13

Sincerely,



Paige Fennie
LOZEAU DRURY LLP