

Comment Letter O2

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VIA E-MAIL

April 11, 2022

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RIN: Draft Environmental Impact Report for the Alexan Mixed-Use Development Project (SCJ No. 2021070271)

Dear Lisa Flores,

On behalf of the Southwest Regional Council of Carpenters ("SWRCC" or "Southwest Carpenters"), my Office is submitting these comments on the City of Arcadia's ("City" or "Lead Agency") Draft Environmental Impact Report ("DEIR") (SCJ No. 2021070271) for the Alexan Mixed-Use Development Project ("Project").

The Southwest Carpenters is a labor union representing more than 50,000 union carpenters in six states and has a strong interest in well ordered land use planning and addressing the environmental impacts of development projects.

Individual members of the Southwest Carpenters live, work and recreate in the City and surrounding communities and would be directly affected by the Project's environmental impacts.

The Southwest Carpenters expressly reserves the right to supplement these comments at or prior to hearings on the Project, and at any later hearings and proceedings related to this Project. Cal. Gov. Code § 65009(b); Cal. Pub. Res. Code § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

SWRCC incorporates by reference all comments raising issues regarding the EIR submitted prior to certification of the EIR for the Project. *Citizens for Clean Energy v. City of Woodland* (2014) 225 Cal. App. 4th 175, 191 (finding that any party who has objected

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to the Project's environmental documentation may assert any issue timely raised by other parties).

Moreover, SWRCC requests that the Lead Agency provide notice for any and all notices referring or related to the Project issued under the California Environmental Quality Act ("CEQA"), Cal Public Resources Code ("PRC") § 21000 *et seq.*, and the California Planning and Zoning Law ("Planning and Zoning Law"), Cal. Gov't Code §§ 65000–65010. California Public Resources Code Sections 21092.2, and 21167(f) and Government Code Section 65092 require agencies to mail such notices to any person who has filed a written request for them with the clerk of the agency's governing body.

The City should require the Applicant provide additional community benefits such as requiring local hire and use of a skilled and trained workforce to build the Project. The City should require the use of workers who have graduated from a Joint Labor Management apprenticeship training program approved by the State of California, or have at least as many hours of on-the-job experience in the applicable craft which would be required to graduate from such a state approved apprenticeship training program or who are registered apprentices in an apprenticeship training program approved by the State of California.

Community benefits such as local hire and skilled and trained workforce requirements can also be helpful to reduce environmental impacts and improve the positive economic impact of the Project. Local hire provisions requiring that a certain percentage of workers reside within 10 miles or less of the Project Site can reduce the length of vendor trips, reduce greenhouse gas emissions and providing localized economic benefits. Local hire provisions requiring that a certain percentage of workers reside within 10 miles or less of the Project Site can reduce the length of vendor trips, reduce greenhouse gas emissions and providing localized economic benefits. As environmental consultants Matt Hagemann and Paul E. Rosenfeld note:

[A]ny local hire requirement that results in a decreased worker trip length from the default value has the potential to result in a reduction of construction-related GHG emissions, though the significance of the reduction would vary based on the location and urbanization level of the project site.

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March 8, 2021 SWAPE Letter to Mitchell M. Tsai re Local Hire Requirements and Considerations for Greenhouse Gas Modeling.

Skilled and trained workforce requirements promote the development of skilled trades that yield sustainable economic development. As the California Workforce Development Board and the UC Berkeley Center for Labor Research and Education concluded:

... labor should be considered an investment rather than a cost – and investments in growing, diversifying, and upskilling California's workforce can positively affect returns on climate mitigation efforts. In other words, well-trained workers are key to delivering emissions reductions and moving California closer to its climate targets.¹

Recently, on May 7, 2021, the South Coast Air Quality Management District found that the “[use of a local state-certified apprenticeship program or a skilled and trained workforce with a local hire component” can result in air pollutant reductions.²

Cities are increasingly adopting local skilled and trained workforce policies and requirements into general plans and municipal codes. For example, the City of Hayward 2040 General Plan requires the City to “promote local hiring ... to help achieve a more positive jobs-housing balance, and reduce regional commuting, gas consumption, and greenhouse gas emissions.”³

In fact, the City of Hayward has gone as far as to adopt a Skilled Labor Force policy into its Downtown Specific Plan and municipal code, requiring developments in its Downtown area to requiring that the City “[c]ontribute to the stabilization of regional construction markets by spurting applicants of housing and nonresidential developments to require contractors to utilize apprentices from state-approved, joint

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¹ California Workforce Development Board (2020) Putting California on the High Road: A Jobs and Climate Action Plan for 2030 at p. ii, available at <https://laborcenter.berkeley.edu/wp-content/uploads/2020/09/Putting-California-on-the-High-Road.pdf>

² South Coast Air Quality Management District (May 7, 2021) Certify Final Environmental Assessment and Adopt Proposed Rule 2305 – Warehouse Industrial Source Rule – Warehouse Actions and Investments to Reduce Emissions Program, and Proposed Rule 316 – Fees for Rule 2305, Submit Rule 2305 for Inclusion into the SIP, and Approve Supporting Budget Actions, available at <http://www.aqmd.gov/docs/default-source/Agendas/Governing-Board/2021/2021-May7-027.pdf?sfvrsn=10>

³ City of Hayward (2014) Hayward 2040 General Plan Policy Document at p. 3-99, available at https://www.hayward-ca.gov/sites/default/files/documents/General_Plan_FINAL.pdf.

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labor-management training programs, . . .”⁴ In addition, the City of Hayward requires all projects 30,000 square feet or larger to “utilize apprentices from state-approved, joint labor-management training programs.”⁵

Locating jobs closer to residential areas can have significant environmental benefits. As the California Planning Roundtable noted in 2008:

People who live and work in the same jurisdiction would be more likely to take transit, walk, or bicycle to work than residents of less balanced communities and their vehicle trips would be shorter. Benefits would include potential reductions in both vehicle miles traveled and vehicle hours traveled.⁶

In addition, local hire mandates as well as skill training are critical facets of a strategy to reduce vehicle miles traveled. As planning experts Robert Cervero and Michael Duncan noted, simply placing jobs near housing stock is insufficient to achieve VMT reductions since the skill requirements of available local jobs must be matched to those held by local residents.⁷ Some municipalities have tied local hire and skilled and trained workforce policies to local development permits to address transportation issues. As Cervero and Duncan note:

In nearly built-out Berkeley, CA, the approach to balancing jobs and housing is to create local jobs rather than to develop new housing.⁸ The city’s First Source program encourages businesses to hire local residents, especially for entry- and intermediate-level jobs, and sponsors vocational training to ensure residents are employment-ready. While the program is voluntary, some 300 businesses have used it to date, placing more than 3,000 city residents in local jobs since it was launched in 1986. When needed, these carrots are matched by sticks, since the city is not shy about

⁴ City of Hayward (2019) Hayward Downtown Specific Plan at p. 5-24, available at <https://www.hayward.ca.gov/sites/default/files/Hayward%20Downtown%20Specific%20Plan.pdf>.

⁵ City of Hayward Municipal Code, Chapter 10, § 28.5.3.020(C).

⁶ California Planning Roundtable (2008) Deconstructing Jobs-Housing Balance at p. 6, available at <https://cproundtable.org/static/media/uploads/publications/cpr-jobs-housing.pdf>.

⁷ Cervero, Robert and Duncan, Michael (2006) Which Reduces Vehicle Travel More: Jobs-Housing Balance or Retail-Housing Mixing? Journal of the American Planning Association 72 (4), 475-490, 482, available at http://reconnectingamerica.org/assets/Uploads/UTCT_825.pdf.

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negotiating corporate participation in First Source as a condition of approval for development permits.

The City should consider utilizing skilled and trained workforce policies and requirements to benefit the local area economically and mitigate greenhouse gas, air quality and transportation impacts.

The City should also require the Project to be built to standards exceeding the current 2019 California Green Building Code to mitigate the Project's environmental impacts and to advance progress towards the State of California's environmental goals.

I. THE PROJECT WOULD BE APPROVED IN VIOLATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

A. Background Concerning the California Environmental Quality Act

CEQA has two basic purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.¹⁴ California Code of Regulations ("CCR" or "CEQA Guidelines") § 15002(a)(1).¹⁵ "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.' [Citation.]"¹⁶ *Citizens of Colusa 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 kept Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal. App. 4th 1344, 1354 ("Berkeley Jets"); *County of Yolo v. Yerby* (1973) 32 Cal. App. 3d 795, 810.

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures. CEQA Guidelines § 15002(a)(2) and (3). *See also, Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Colusa Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal. 3d 376, 400. The EIR serves to

* The CEQA Guidelines, codified in Title 14 of the California Code of Regulations, section 15000 *et seq.*, are regulatory guidelines promulgated by the state Natural Resources Agency for the implementation of CEQA. Cal. Pub. Res. Code § 21083. The CEQA Guidelines are given "great weight in interpreting CEQA except when . . . clearly unauthorized or erroneous." *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal. 4th 204, 217.

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provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to “identify ways that environmental damage can be avoided or significantly reduced.” CEQA Guidelines § 15002(a)(2). If the project has a significant effect on the environment, the agency may approve the project only upon finding 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” specified in CEQA section 21081. CEQA Guidelines § 15092(b)(2)(A–B).

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.’¹⁰ *Berkeley Jets*, 91 Cal. App. 4th at 1344, 1355 (emphasis added) (quoting *Lawn Heights*, 47 Cal. 3d at 391, 409 fn. 12). Drawing this line and determining whether the EIR complies with CEQA’s information disclosure requirements presents a question of law subject to independent review by the courts. *Sierra Club v. City of Fresno* (2018) 6 Cal. 5th 502, 515; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102, 131. As the court stated in *Berkeley Jets*, 91 Cal. App. 4th at 1355:

A prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.

The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. The EIR’s function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been considered. For the EIR to serve these goals it must present information so that the foreseeable impacts of pursuing the project can be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made. *Communities for a Better Environment v. Richmond* (2010) 184 Cal. App. 4th 70, 80 (quoting *Vinyard Area Citizen for Responsible Growth, Inc. v. City of Rancho Cucamonga* (2007) 40 Cal. 4th 412, 449–450).

B. CEQA Requires Revision and Recirculation of an Environmental Impact Report When Substantial Changes or New Information Comes to Light

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Section 21092.1 of the California Public Resources Code requires that “[w]hen significant new information is added to an environmental impact report after notice has been given pursuant to Section 21092 ... but prior to certification, the public agency shall give notice again pursuant to Section 21092, and consult again pursuant to Sections 21104 and 21153 before certifying the environmental impact report” in order to give the public a chance to review and comment upon the information. CEQA Guidelines § 15088.5.

Significant new information includes “changes in the project or environmental setting as well as additional data or other information” that “deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative).” CEQA Guidelines § 15088.5(a). Examples of significant new information requiring recirculation include “new significant environmental impacts from the project or from a new mitigation measure,” “substantial increase in the severity of an environmental impact,” “feasible project alternative or mitigation measure considerably different from others previously analyzed” as well as when “the draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” *Id.*

An agency has an obligation to recirculate an environmental impact report for public notice and comment due to “significant new information” regardless of whether the agency opts to include it in a project’s environmental impact report. *Cadiz Land Co. v. Rail Cycle* [2000] 83 Cal. App. 4th 74, 95 [finding that in light of a new expert report disclosing potentially significant impacts to groundwater supply “the EIR should have been revised and recirculated for purposes of informing the public and governmental agencies of the volume of groundwater at risk and to allow the public and governmental agencies to respond to such information.”]. If significant new information was brought to the attention of an agency prior to certification, an agency is required to revise and recirculate that information as part of the environmental impact report.

C. Due to the COVID-19 Crisis, the City Must Adopt a Mandatory Finding of Significance that the Project May Cause a Substantial Adverse Effect on Human Beings and Mitigate COVID-19 Impacts

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CEQA requires that an agency make a finding of significance when a Project may cause a significant adverse effect on human beings. PRC § 21083(b)(3); CEQA Guidelines § 15065(a)(4).

Public health risks related to construction work requires a mandatory finding of significance under CEQA. Construction work has been defined as a Lower to High-risk activity for COVID-19 spread by the Occupational Safety and Health Administration. Recently, several construction sites have been identified as sources of community spread of COVID-19.⁹

SWRCC recommends that the Lead Agency adopt additional CEQA mitigation measures to mitigate public health risks from the Project's construction activities. SWRCC requests that the Lead Agency require safe on-site construction work practices as well as training and certification for any construction workers on the Project Site.

In particular, based upon SWRCC's experience with safe construction site work practices, SWRCC recommends that the Lead Agency require that while construction activities are being conducted at the Project Site:

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Construction Site Design:

- The Project Site will be limited to two controlled entry points.
- Entry points will have temperature screening technicians taking temperature readings when the entry point is open.
- The Temperature Screening Site Plan shows details regarding access to the Project Site and Project Site logistics for conducting temperature screening.
- A 48-hour advance notice will be provided to all trades prior to the first day of temperature screening.
- The perimeter fence directly adjacent to the entry points will be clearly marked indicating the appropriate 6-foot social distancing position for when you approach the screening

⁹ Santa Clara County Public Health (June 12, 2020) COVID-19 CASES AT CONSTRUCTION SITES HIGHLIGHT NEED FOR CONTINUED VIGILANCE IN SECTORS THAT HAVE REOPENED, available at <https://www.sccgov.org/sites/covid19/Pages/press-release-06-12-2020-cases-at-construction-sites.aspx>.

area. Please reference the Apex temperature screening site map for additional details.

- There will be clear signage posted at the project site directing you through temperature screening.
- Provide hand washing stations throughout the construction site.

Testing Procedures:

- The temperature screening being used are non-contact devices.
- Temperature readings will not be recorded.
- Personnel will be screened upon entering the testing center and should only take 1-2 seconds per individual.
- Hard hats, head coverings, sweat, dirt, sunscreen or any other cosmetics must be removed on the forehead before temperature screening.
- Anyone who refuses to submit to a temperature screening or does not answer the health screening questions will be refused access to the Project Site.
- Screening will be performed at both entrances from 5:30 am to 7:30 am; main gate [ZONE 1] and personnel gate [ZONE 2].
- After 7:30 am only the main gate entrance [ZONE 1] will continue to be used for temperature testing for anybody gaining entry to the project site such as returning personnel, deliveries, and visitors.
- If the digital thermometer displays a temperature reading above 100.0 degrees Fahrenheit, a second reading will be taken to verify an accurate reading.
- If the second reading confirms an elevated temperature, DHS will instruct the individual that he/she will not be allowed to enter the Project Site. DHS will also instruct the

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individual to promptly notify his/her supervisor and his/her human resources (HR) representative and provide them with a copy of Annex A.

Planning

- Require the development of an Infectious Disease Preparedness and Response Plan that will include basic infection prevention measures (requiring the use of personal protection equipment), policies and procedures for prompt identification and isolation of sick individuals, social distancing (prohibiting gatherings of no more than 10 people including all-hands meetings and all-hands lunches) communication and training and workplace controls that meet standards that may be promulgated by the Center for Disease Control, Occupational Safety and Health Administration, Cal/OSHA, California Department of Public Health or applicable local public health agencies.¹⁰

The United Brotherhood of Carpenters and Joiners International Training Fund has developed COVID-19 Training and Certification to ensure that Carpenter union members and apprentices conduct safe work practices. The Agency should require that all construction workers undergo COVID-19 Training and Certification before being allowed to conduct construction activities at the Project Site.

SWRCC has also developed a rigorous Infection Control Risk Assessment (“ICRA”) training program to ensure it delivers a workforce that understands how to identify and control infection risks by implementing protocols to protect themselves and all others during renovation and construction projects in healthcare environments.¹¹

ICRA protocols are intended to contain pathogens, control airflow, and protect patients during the construction, maintenance and renovation of healthcare facilities.

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¹⁰ See also The Center for Construction Research and Training, North America's Building Trades Unions (April 27 2020) NABTU and CPWR COVID-19 Standards for U.S. Construction Sites, available at https://www.cpwr.com/sites/default/files/NABTU_CPWR_Standards_COVID-19.pdf; Los Angeles County Department of Public Works (2020) Guidelines for Construction Sites During COVID-19 Pandemic, available at https://dpw.lacounty.gov/building-and-safety/docs/pw_guidelines-construction-sites.pdf.

¹¹ For details concerning SWRCC's ICRA training program, see <https://icrahealthcare.com/>.

ICRA protocols prevent cross contamination, minimizing the risk of secondary infections in patients at hospital facilities.

The City should require the Project to be built using a workforce trained in ICRA protocols.

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II. THE ENVIRONMENTAL IMPACT REPORT IS INADEQUATE

A. The DEIR Fails to Establish the Existing Conditions for Hazards and Hazardous Materials

1. *Background on Phase I and II Environmental Site Assessments*

The preparation of a Phase I Environmental Site Assessment (“ESA”) is often undertaken in the preparation of CEQA documents to identify hazardous waste issues that may present impacts to the public, workers, or the environment, and which may require further investigation, including environmental sampling and cleanup.

Standards for performing a Phase I ESA have been established by the US EPA and the American Society for Testing and Materials Standards (ASTM)¹². Phase I ESAs are conducted to identify conditions that would indicate a release of hazardous substances and include:

- A review of all known sites in the vicinity of the subject property that are on regulatory agency databases undergoing assessment or cleanup activities;
- An inspection;
- Interviews with people knowledgeable about the property; and
- Recommendations for further actions to address potential hazards.

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Phase I ESAs may conclude with the identification of any “recognized environmental conditions” (“RECs”) and recommendations to address such conditions.

A REC is defined by the American Society for Testing and Materials (ASTM) E1527 as “the likely presence of hazardous substances or petroleum products in, on or at the subject property due to a release or likely release to the environment”¹³.

If past land uses include RECs, a Phase II ESA must be prepared in order to properly



¹² Available at: <http://www.astm.org/Standards/E1527.htm>

¹³ Ibid.

evaluate the extent of the contamination identified on the Phase I ESA; and mitigate such impacts; as well as, the need for cleanup to reduce exposure potential to the public.

According to the American Society for Testing and Materials (ASTM) E1903 in its standard practice guidelines for preparing Phase II Environmental Assessments,¹⁴ data gaps in Phase I ESAs indicate a need to prepare a Phase II ESA, even in the absence of any identified RECs.

The scope of the environmental due diligence process should include the Project's environmental effects relating to emerging contaminants; such as 1,2,3-Trichloropropene (1,2,3-TCP), Perchlorate; As well as per- and polyfluorooctyl substances (PFAS), which are highly fluorinated manmade compounds.

Any contamination that is identified above regulatory screening levels, including California Department of Toxic Substances Control Soil Screening Levels, should be further evaluated and cleaned up, if necessary, in coordination with the Regional Water Quality Control Board and the California Department of Toxic Substances Control.

2. *The DEIR Fails to Include a Phase II ESA to Evaluate the Extent of the Project's Impacts Relating to Those REC's Identified on the Phase I ESA*

The “Hazards and Hazardous Materials” section of the DEIR describes the affected environment and regulatory setting for hazards and hazardous materials in the Project site, as well as the project’s potential impacts on residences and other sensitive receptors that could be exposed to these hazards. The DEIR states that “the historical clearing use was identified as a recognized environmental condition (REC) and potential vapor encroachment condition (VEC).” DEIR, p. 4.7-4.

The Project’s RECs include tetrachloroethylene (PCE) (DEIR, p. 4.7-3), asbestos (DEIR, p. 4.7-4), petroleum hydrocarbons (DEIR, p. 4.7-6), solvents (DEIR, p. 4.7-6).

The DEIR failed to prepare a Phase II Environmental Site Assessment to properly evaluate the above recognized environmental conditions RECs. This lack of information regarding the Project site is a failure to establish the existing setting for the Project.

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¹⁴ Available at: <https://www.astm.org/e1903-19.html>

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According to the American Society for Testing and Materials (ASTM) E1903 in its standard practice guidelines for preparing Phase II Environmental Assessments,¹⁵ a Phase II ESA must contain nine sections and four appendices.

The DEIR states that “[i]n response to these findings, a soil and soil vapor investigation was completed.” DEIR, p. 4.7-3. However, these two investigations fail to evaluate the entire Project site environmental setting. A Phase II ESA that covers the whole of the Project’s site is required to properly set the existing conditions for the project, as required under CEQA.

Further, the ESA fails to discuss the Project’s impacts relating to emerging contaminants.

Therefore, the City must prepare a Phase II ESA and recirculate the DEIR.

B. The EIR Fails to Properly Evaluate and Mitigate the Project’s Impact Relating to the Diesel Fuel Above Ground Storage Tanks “AST”

The DEIR identifies the existence of Diesel Fuel Above Ground Storage Tanks “AST” on the Project site; Yet, it fails to evaluate such impacts.

The DEIR states that “[t]he presence of the two emergency backup generators with self-contained diesel fuel ASTs is a potential concern. However, the quantity of fuel in the generator ASTs is not considered significant . . . As such, the presence of the ASTs is considered a de minimis condition.” DEIR, App. F1, p. 6.

However, a de minimis condition conclusion is unsubstantiated; The EIR confirms that “[a]ccess into the generator containment area was not granted.” (DEIR, App. F1, p. 5) and an inspection report states that the Los Angeles County Fire Department - Health Hazardous Materials Division previously “[i]nspected cellular equipment and battery storage building as well as one outdoor diesel fuel aboveground storage tank” (DEIR, Appendix F1, Appendix e)

The EIR must include backup generators in the project description, and analyze the impacts of those generators. A failure to identify backup generators impacts the adequacy of the EIR’s environmental analyses. Backup generators commonly rely on fuels such as natural gas or diesel, and thus can significantly impact air quality, GHG

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¹⁵ Available at <https://www.astm.org/e1903-19.html>

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emissions, and public health through toxic diesel particulate (“DPM”) emissions.¹⁶ Backup generators increase operational emissions during testing periods and unscheduled. Diesel particulate matter (DPM) has been identified as a toxic air contaminant, composed of carbon particles and numerous organic compounds, including over forty known cancer-causing organic substances. The majority of DPM is small enough to be inhaled deep into the lungs and make them more susceptible to injury. Much of the back-up power produced during PSPS events is expected to come from engines regulated by CARB and California’s 35 air pollution control and air quality management districts.

Therefore, the City cannot approve the Project until the errors in the EIR are remedied and substantial evidence supporting its conclusions is provided in an environmental impact report

C. The EIR Fails to Properly Evaluate and Mitigate the Project's Indoor Air Quality and Vapor Intrusion Impacts

1. *Background on Indoor Air Quality Impact*

Indoor air quality (IAQ) directly impacts the comfort and health of building occupants, and the achievement of acceptable IAQ in newly constructed and renovated buildings is a well-recognized design objective. For example, IAQ is addressed by major high-performance building rating systems and building codes. California Building Standards Commission, 2014; USGBC, 2014.

Indoor air quality in homes is particularly important because occupants, on average, spend approximately ninety percent of their time indoors with the majority of this time spent at home (EPA, 2011). Some segments of the population that are most susceptible to the effects of poor IAQ, such as the very young and the elderly, occupy their homes almost continuously. Additionally, an increasing number of adults are working from home at least some of the time during the workweek. Indoor air quality also is a serious concern for workers in hotels, offices and other business establishments.

¹⁶ California Air Resources Board, Emission Impact: Additional Generator Usage Associated with Power Outage (January 30, 2020), available at, https://ww2.arb.ca.gov/sites/default/files/2020-01/Emissions_Inventory_Generator_Demand%20Usage_During_Power_Outage_01_30_20.pdf

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The concentrations of many air pollutants often are elevated in homes and other buildings relative to outdoor air because many of the materials and products used indoors contain and release a variety of pollutants to air. Hodgson et al., 2002; Olfertmann and Hodgson, 2011. With respect to indoor air contaminants for which inhalation is the primary route of exposure, the critical design and construction parameters are the provision of adequate ventilation and the reduction of indoor sources of the contaminants.

2. Background on Vapor Intrusion

Vapor forming chemicals (VFC) are volatile chemicals that USEPA recommends be routinely evaluated during a site-specific vapor intrusion assessment when it is present as a subsurface contaminant (USEPA, 2015a). A volatile chemical is defined as a chemical with a vapor pressure greater than 1 milliliter of mercury, or Henry's law constant greater than 10⁻⁵ atmosphere-meter cubed per mole.

Vapor intrusion (VI) is the migration of chemical vapors from the subsurface into buildings and is a frequent problem at contaminated sites. If uncontrolled, chemical vapors can migrate into buildings and pose a risk to human health. Vapor migration in the subsurface, through building foundations, and within buildings is complex and influenced by many natural and human-caused factors.

These factors include climate (e.g., temperature, pressure, precipitation), building conditions (e.g., foundation type and status, age, size), and heating, ventilation, and air conditioning (HVAC) operation.

The combination of these factors can result in significant spatial and temporal variability in subsurface and indoor air vapor concentrations. With the potential for such high variability, the probability of false negatives increases – a concern that potential risks associated with VI into indoor air will be underestimated.

3. The DEIR Fails to Properly Evaluate and Mitigate the Project's Health Risk Impacts of Toxic Air and Vapor Intrusion

The DEIR fails to properly evaluate the health risk impacts of toxic air contaminant ("TAC") emissions contributed by the proposed project as well as cumulatively with other nearby TAC sources.

The Project's air quality impacts is not limited to TAC. The Project site contain a series of vapor forming chemicals ("VFC") which need to be evaluated for potential risks

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associated with exposure to VOCs migrating from contaminated soil into new or existing buildings to ensure adequate protection of human health.

The Project's indoor air According to the DEIR's Subsurface Soil and Soil Vapor Investigation:

Detecte VOCs in soil vapor samples that exceeded at least one human health screening level for vapor intrusion based on a residential land use setting included benzene (15-foot bgs probe of MPS), and PCE (all probe intervals).

The lateral and vertical extent of PCE in soil vapor has not been assessed beneath the Site.

Indoor air sampling would be required to assess if vapor intrusion is occurring at the Site. Future residential structures with slab-on-grade construction may require a vapor intrusion mitigation system (e.g. – sub-slab vapor barrier).

DEIR, App. F 4, p. 9.

The Project's “[g]rading is estimated to result in approximately 57,000 cubic yards of excavation/export” of soil. DEIR p. 4.2-22. The DEIR fails to mention logistics regarding testing, soil remediation, or disposal of the soil at a facility appropriate for polluted soil. Excavation poses the risk of carcinogenic VOCs and polluted soil escaping into the air breathed by neighboring residents and the Project's construction crew. These same VOCs pose a risk of vapor intrusion into the new construction, endangering the construction workers and future building occupants.

Therefore, the EIR should be revised to include a Vapor Intrusion assessment to properly evaluate and mitigate the Project's potential risk to occupant health, screening the vulnerability of individual buildings to vapor intrusion, and identifying nature of contaminant/vapor mobility over time.

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4. *The DEIR Improperly Defers Development of Vapor Intrusion Environmental Mitigation Measures*

CEQA mitigation measures proposed and adopted into an environmental impact report are required to describe what actions that will be taken to reduce or avoid an environmental impact. CEQA Guidelines § 15126.4(a)(1)(B) (providing “[f]ormulation of mitigation measures should not be deferred until some future time.”). While the same Guidelines section 15126.5(a)(1)(B) acknowledges an exception to the rule against deferrals, but such exception is narrowly proscribed to situations where “measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.” (*Id.*) Courts have also recognized a similar exception to the general rule against deferral of mitigation measures where the performance criteria for each mitigation measure is identified and described in the EIR. *Sacramento Old City Ass'n v. City Council* (1991) 229 Cal.App.3d 1011.

Impermissible deferral can occur when an EIR calls for mitigation measures to be created based on future studies or describes mitigation measures in general terms but the agency fails to commit itself to specific performance standards. *Protect Wild Santa* n. *City of Santa* (2012) 210 Cal.App.4th 260, 281 (city improperly deferred mitigation to butterfly habitat by failing to provide standards or guidelines for its management); *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 671 (EIR failed to provide and commit to specific criteria or standard of performance for mitigating impacts to biological habitats); see also *Cleveland Nat'l Forest Found. v San Diego Ass'n of Gov'ts* (2017) 17 Cal.App.5th 413, 442 (generalized air quality measures in the EIR failed to set performance standards); *California Clean Energy Comm. v City of Woodland* (2014) 225 Cal.App.4th 173, 195 (agency could not rely on a future report on urban decay with no standards for determining whether mitigation required); *POET, LLC v State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 740 (agency could not rely on future rulemaking to establish specifications to ensure emissions of nitrogen oxide would not increase because it did not establish objective performance criteria for measuring whether that goal would be achieved); *Gray v County of Marin* (2008) 167 Cal.App.4th 1099, 1119 (rejecting mitigation measure requiring replacement water to be provided to neighboring landowners because it identified a general goal for mitigation rather than specific performance standard); *Endangered Habitats League*,

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In re County of Orange (2005) 131 Cal.App.4th 777, 794 (requiring report without established standards is impermissible delay).

According to the DEIR, mitigation measure MM-1 LAZ 3 states that “[t]he construction contractor shall incorporate vapor mitigation design features into building plans that reduce potential vapor intrusion in buildings and enclosed structures on the Project site below DTSC Screening Levels.” DEIR 4.27 24. However, the DEIR fails to identify or mention any of such mitigation design features.

Therefore, the EIR should be revised to properly mitigate its vapor intrusion impacts.

D. The EIR Fails to Properly Evaluate and Mitigate the Project's Hydrology Impacts

1. The Project Improperly Relies on Regulatory Compliance and to Support that an Environmental Effect is Less than Significant

The Project improperly relies on regulatory compliance to reduce the potential for environmental effects. For example, the DEIR states that “[c]ompliance with existing regulations would prevent violation of water quality standards and minimize the potential for contributing sources of polluted runoff. Therefore, compliance with existing regulations would ensure that the Project would not violate any water quality standards or waste discharge requirements or otherwise substantially degrade surface quality from demolition and construction activities. Impacts would be less than significant, and no mitigation is required.” DEIR, p. 4.8-15.

Further, the DEIR states that “[a]s a result of compliance with existing regulations, the Project would not violate any water quality standards or waste discharge requirements or otherwise substantially degrade surface or groundwater quality during the long-term Project operations. Impacts would be less than significant, and no mitigation is required.” DEIR, p. 4.8-17.

According to the DEIR:

With compliance with applicable regulations, the proposed Project does not include any facilities or land uses that could generate pollutants that could result in substantial water quality impacts. As discussed in Threshold 3.8(a), compliance with the City's Stormwater Management requirements would protect the water quality of watercourses in a manner pursuant to and consistent with the Federal Clean Water Act, and pursuant to the

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NPDES CGP No. 2009-0009-DWQ. Restrictions in this Ordinance are applicable to both construction activities and operations. Additionally, compliance with CGP issued by the SWRCB would require implementation of BMPs during construction to address the potential for pollutants from entering downstream waters. The Project's potential to violate any water quality standards or waste discharge requirements or otherwise substantially degrade surface water or groundwater quality would be less than significant and no mitigation is required.

DEIR, p. 4.8-19.

The improper reliance on regulatory compliance extends to all other Project's impacts. For example, relating to noise impacts, the DEIR states that "the proposed Project would comply with existing noise regulations and restrictions designated for the Project site and no noise mitigation would be required." (DEIR, p. 4.9-40). And "[t]he proposed Project would comply with existing regulations governing noise and no noise mitigation would be required," DEIR, p. 4.9-41.

Relying on mere consistency with regulatory standards, the EIR conclude in many instances that the Project's impacts are less than significant, and that no mitigation is required.

However, it is established that, "[c]ompliance with the law is not enough to support a finding of no significant impact under . . . CEQA." *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal. App. 4th 1, 15 – 17 (finding that a lead agency "abused its discretion by relying on DPR's regulatory scheme as a substitute for performing its own evaluation of the environmental impacts of using pesticides."). Bare conclusions or opinions of the agency are not sufficient to satisfy an agency's obligation under CEQA to adequately support their environmental determinations. *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 403 – 404. "To facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions. . . . [to] enable[] the decision-makers and the public to make an 'independent, reasoned judgment' about a proposed project." *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935 (quoting *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831).

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As the Court noted in *East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal. App. 5th 281, 301, compliance with a regulatory scheme “in and of itself does not insulate a project from the EIR requirement, where it may be fairly argued that the project will generate significant environmental effects.” (Internal quotations omitted.) A project’s effects can be significant even if they are not greater than those deemed acceptable in a general plan or other regulatory law. *Gentry v. City of Menifee* (1995) 36 Cal.App.4th 1359, 1416; see also *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 732 (finding that a full environmental impact report is required “if substantial evidence supports a fair argument that the Project may have significant unmitigated noise impacts, even if other evidence shows the Project will not generate noise in excess of the County’s noise ordinance and general plan.”).

A public agency cannot apply a threshold of significance or regulatory standard “in a way that forecloses the consideration of any other substantial evidence showing there may be a significant effect.” *Mojia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342. Where comments from a responsible sister agency, such as the Water District, disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored based on a conclusory statement about compliance with regulatory standards; there must be a good faith, reasoned analysis. *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comm.* (2001) 91 Cal. App. 4th 1344, 1367. The District’s approach fails to meet its obligation to engage in good faith reasoned analysis to provide the public, public agencies and decisionmakers with detailed information about the effects that the Project will have on the environment, ways to mitigate those effects, as well as alternatives. PRC § 21061.

An agency must “explain how the particular requirements of that environmental standard reduce project impacts, including cumulative impacts, to a level that is less than significant, and why the environmental standard is relevant to the analysis of a project that is less than significant. CEQA Guidelines § 15067.7.

The City’s reliance on compliance with regulations does not obviate the need for further analysis of environmental impacts, nor does compliance with regulations provide any substantial evidence that the Project will not have significant environmental impacts. The courts have held that compliance with regulations alone is insufficient to conclude that a project will not have significant environmental impacts.

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The City's reliance on the Project's anticipated compliance does not provide any substantial evidence that the Project will not have significant environmental impacts. Therefore, the EIR must be revised to properly mitigate the Project's Hydrology impacts.

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2. *The EIR also fails to Adequately Evaluate and Mitigate the Project's Environmental Impacts Because the EIR Compresses the Analysis of Impacts and Mitigation Measures into a Single Issue.*

CEQA requires a lead agency to consider a proposed project, evaluate its environmental impacts and, if significant impacts are identified, to describe feasible mitigation measures to reduce the impacts. Failure to evaluate the effect of these measures in the impact analysis violates the legal requirement to provide a logical argument, supported by substantial evidence, for each impact conclusion in an environmental document. *J. Am. v. Department of Transportation*, (2014) 223 Cal.App.4th 645.

The court explained, "[j]simply stating there will be no significant impacts because the project incorporates 'special construction techniques' is not adequate or permissible." (*Ibid.*) and this "short-circuiting of CEQA requirements ... precludes both identification of potential environmental consequences arising from the project and also thoughtful analysis of the sufficiency of measures to mitigate those consequences." (*Ibid.*)

For example, as discussed above, the EIR Compressed the Analysis of the Project's Hydrology and Noise Impacts and their Mitigation Measures into a Single Issues.

By compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA.

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III. CONCLUSION

The Southwest Carpenters request that the City revise and resubmit the Project's environmental impact report to address the aforementioned concerns. If the City has any questions or concerns, feel free to contact my Office.

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Sincerely,



Mitchell M. Trask
Attorneys for the Southwest
Regional Council of Carpenters

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Attached:

March 8, 2021 SWAPE Letter to Mitchell M. Tsai re Local Hire Requirements and Considerations for Greenhouse Gas Modeling (Exhibit A);

Air Quality and GHG Expert Paul Rosenfeld CV (Exhibit B); and

Air Quality and GHG Expert Matt Hagemann CV (Exhibit C).