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Via Email

June 28, 2022

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**Re: Comment on EIR, The Oaks Specific Plan
(EIR 2021-71100; SCH 2022010527)**

Dear Mayor Engler, Mayor Pro Tem Jones, and Honorable Councilmembers:

I am writing on behalf of **Supporters Alliance for Environmental Responsibility ("SAFER")** regarding the Environmental Impact Report ("EIR") prepared for the project known as The Oaks Specific Plan (EIR 2021-71100; SCH 2022010527), including all actions related or referring to the proposed construction of four multi-family residential buildings with a total of 264 residential units and 274 subterranean parking spaces (Planning Area 1), and one four-story parking structure (Planning Area 2), located at 1 Baxter Way in the City of Thousand Oaks ("Project").

After reviewing the EIR, we conclude that the EIR fails as an informational document and fails to impose all feasible mitigation measures to reduce the Project's impacts. SAFER requests that the City Council address these shortcomings in a revised Environmental Impact Report ("REIR") and recirculate the REIR prior to considering approvals for the Project.

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This comment has been prepared with the assistance of expert wildlife ecologist Dr. Shawn Smallwood (Exhibit A) and environmental consulting firm Soil Water Air Protection Enterprise (“SWAPE”) (Exhibit B). We incorporate the Smallwood and SWAPE comments herein by reference.

I. 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.

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 at pp. 1344, 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 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; 14 Cal. Code Regs. § 15092(b)(2)(A) & (B). The lead agency may deem a particular impact to be insignificant only if it produces

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rigorous analysis and concrete substantial evidence justifying the finding. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 732.

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.)

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

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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. We find that the EIR prepared by the City here is inadequate for the reasons set forth below.

II. Discussion.

A. There is Substantial Evidence that the Project Will Have Significant Adverse Impacts on Biological Resources.

1. The EIR inadequately characterized the existing environmental setting as it relates to biological resources.

Dr. Smallwood’s analysis of the Project’s impacts is supported by a site visit conducted by Noriko Smallwood, a wildlife biologist with a Master’s Degree from California State University of Los Angeles. Noriko visited the site on June 19, 2022. Ex. A, p. 1. Noriko reconnoitered the area from 6:38 AM to 9:28 AM and surveyed the site using binoculars. *Id.* During that visit, she observed the presence of 22 species of vertebrate wildlife at and near the Project site, five of which are special-status species. *Id.*, see Ex. A, Table 1, p. 3. Based on Noriko’s observations, Dr. Smallwood concluded that the site “provides ample habitat value to wildlife, including to multiple special-status species of wildlife.” *Id.* at 3.

Every CEQA document must start from a “baseline” assumption. The CEQA “baseline” is the set of environmental conditions against which to compare a project’s anticipated impacts. *Communities for a Better Env’t. v. So. Coast Air Qual. Mgmt. Dist.* (2010) 48 Cal. 4th 310, 321. Dr. Smallwood found that the biological survey conducted by Helix for the Project (“Helix report”) was “too cursory to reflect the true inventory of wildlife species that occur at a site.” Ex. A, p. 9. Additionally, the Helix report failed to give information such as the time of day the survey started, how

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long the survey lasted, or the weather conditions at the time of the survey, details which are important to contextualize their survey outcomes. *Id.* An inadequate baseline such as the one used by the City here ultimately “mislead(s) the public” by engendering inaccurate analyses of environmental impacts, mitigation measures and cumulative impacts for biological resources. *See San Joaquin Raptor Rescue Center*, 149 Cal.App.4th 645, 656; *Woodward Park Homeowners*, 150 Cal.App.4th 683, 708-711.

Furthermore, Dr. Smallwood determined that the Helix report analyzed the occurrence likelihoods of too few special-status species, thereby further mischaracterizing the environmental setting. Ex. A at 10. The Helix report relied only on the California Natural Diversity Data Base, but did not consult eBird or iNaturalist, which would have shown that 83 special-status species of wildlife potentially use the site at one time or another. *Id.*, see, Exhibit A, Table 2, p. 12-15. The species identified in Table 2 may benefit from the trees on the Project site, the “unobstructed portion of the site’s aerosphere,” or the “lift of heated air above the site.” Ex. A, p. 10-11. Regarding the western mastiff bat in particular, the Helix report and DEIR determine that its likelihood onsite is low due to its habitat being isolated and limited in acreage, the development surrounding the site, and the lack of recent observations of the species in the immediate vicinity of the Project. However, Dr. Smallwood points out that the DEIR does not provide data or cite to sources regarding the findings about acreage, isolation and development. *Id.* at 11.

Dr. Smallwood and Noriko’s identification of species both in-person and in a database review presents substantial evidence that the Project may have adverse impacts on biological resources. These potential impacts must be discussed and analyzed in a revised EIR to ensure species are accurately detected and that any impacts are mitigated to a less than significant level.

2. The EIR fails to analyze the Project’s impact on lost breeding capacity.

Dr. Smallwood found that the Project would contribute to a decline in birds in North America, a trend that has been happening over the last approximately 50 years largely due to habitat loss and fragmentation and would be further exacerbated by this project. Ex. A, p. 16. Based on studies on the subject, Dr. Smallwood estimates that the presence of the Project on the site could prevent the production of 479 fledglings per year, which would in turn contribute to the lost capacity of 485 birds per year. *Id.* The City must address this impact in a revised EIR.

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3. The EIR fails to analyze the Project's impact on wildlife movement.

The EIR's assessment of whether the Project would interfere with wildlife movement is flawed. Ex. A at 16-17. The EIR states that the Project is not located within any wildlife corridors or linkages, and that the site does support opportunities for local wildlife movement but does not function as a regional wildlife corridor. The EIR therefore implies that "only disruption of the function of a wildlife movement corridor can interfere with wildlife movement in the region." *Id.* at 17. However, Dr. Smallwood states:

The primary phrase of the CEQA standard goes to wildlife movement regardless of whether the movement is channeled by a corridor. A site such as the proposed project site is critically important for wildlife movement because it composes an increasingly diminishing expanse of open space within a growing expanse of anthropogenic uses, forcing more species of volant wildlife to use the site for stopover and staging during migration, dispersal, and home range patrol (Warnock 2010, Taylor et al. 2011, Runge et al. 2014). The project would cut wildlife off from stopover and staging opportunities, forcing volant wildlife to travel even farther between remaining stopover sites. The project, with its large parking structure and two apartment buildings, would interfere with wildlife movement in the region.

Id. A Revised EIR should be prepared to properly analyze this impact.

4. The EIR fails to analyze the project's impacts on wildlife from additional traffic generated by the Project.

The EIR estimates that the Project would lead to 2,287,101 vehicle miles traveled (VMT), yet it contains no analysis of the impacts on wildlife that will be caused by the traffic on the roadways servicing the Project. 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: ". . . 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)." Ex. A, p. 17.

Using the Project's VMT estimates and information from a scientific study on road mortality, Dr. Smallwood was able to predict the Project-generated traffic impacts to wildlife. *Id.* at 19. Dr. Smallwood calculates that operation of the Project over 50 years would cause an accumulated 62,650 wildlife fatalities – more than 1,200 fatalities per year. *Id.* He therefore states that "the project-generated traffic would cause substantial, significant impacts to wildlife." *Id.* A revised EIR should be prepared which includes analysis and mitigation of the result increased traffic from the Project will have on wildlife.

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5. The EIR fails to account for the increased possibility of bird-window collision mortality that will be caused by the Project.

According to Dr. Smallwood, the Project will most likely have a significant impact on birds as a result of window collisions. The City has not analyzed or mitigated these potential impacts to special-status birds.

Dr. Smallwood identifies the now widely-recognized impact of bird collisions with windows and other building structures:

Window collisions are often characterized as either the second or third largest source or [sic] human-caused bird mortality. The numbers behind these characterizations are often attributed to Klem's (1990) and Dunn's (1993) estimates of about 100 million to 1 billion bird fatalities in the USA, or more recently Loss et al.'s (2014) estimate of 365-988 million bird fatalities in the USA or Calvert et al.'s (2013) and Machtans et al.'s (2013) estimates of 22.4 million and 25 million bird fatalities in Canada, respectively.

Ex. A, p. 19. Dr. Smallwood's site visit confirmed the presence of many bird species that would travel through the Project site's air space. *Id.* He also notes that "many of the special-status species in Table 2 [of his comment] have been documented as window collision fatalities and are therefore susceptible to new structural glass installations." *Id.* at 20.

In an effort to assess the scope of the Project's impacts on bird species using the area, Dr. Smallwood has calculated an estimate of the number of bird fatalities that would result from collisions with the Project. Ex. A, p. 20-21. Dr. Smallwood has reviewed and processed results of bird collision monitoring at 213 buildings and facades. *Id.* at 20. Based on the amount of glass per square foot of other residential units in California projects, Dr. Smallwood estimated that the extent of glass that would be used on the Project would be 4,046 m². *Id.* at 20. Based on Dr. Smallwood's own data and review of a number of scientific studies, the mean fatality rate of bird deaths per m² of glass per year is 0.073. *Id.* He therefore estimates that the project could result in 296 bird deaths per year, a number which could be up to 3 times higher when accounting for fatalities removed by scavengers or missed by fatality searchers. *Id.* at 20-21. This death rate would continue every year until the structure were either renovated to reduce bird collisions, or was removed. *Id.* at 21.

Because this impact was not addressed in the EIR and Dr. Smallwood has presented substantial evidence that the Project's windows will impact birds, the City

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must prepare a Revised EIR to analyze and mitigate the impact of window collisions on bird species.

6. The EIR fails to address the impact that house cats introduced by the Project may have on vertebrate wildlife and the environment.

Dr. Smallwood concluded that the house cats introduced to the Project site by residents would have adverse impacts on wildlife due to the wildlife they kill and the downstream loading of toxins from their feces. Ex. A at 21.

House cats serve as one of the largest sources of avian mortality in North America. *Id.*, Dauphine and Cooper 2009, Blancher 2013, Loss et al. 2013, Lloyd et al. 2017. The EIR does not mention whether house cats will be allowed as part of the Project, so Dr. Smallwood reasonably assumes their presence. *Id.* Based on data showing that there are 0.44 cats per human, Dr. Smallwood assumes that the Project would add 307 house cats. Studies show that each cat kills an estimated 122 vertebrate animals per year, which would add up to 37,454 vertebrate wildlife killed per year by house cats introduced as part of this Project. *Id.* Even assuming there are only 102 new house cats added, there is still the potential for cats to kill 12,444 vertebrate wildlife per year. *Id.* Both of these estimates represent significant impacts which were not analyzed in the EIR.

Additionally, cats are the only known definitive hosts of the parasite *Toxoplasma gondii*. *Id.* Cats catch this parasite through hunting birds and rodents and offload it into the environment through their feces, which can then end up as fecal pathogens polluting the sea through runoff. *Id.* This represents an additional significant impact which must be assessed in a revised EIR.

7. The EIR failed to address the cumulative impacts of past, ongoing, and future projects on wildlife.

Lastly, Dr. Smallwood finds that the EIR inaccurately characterizes what qualifies as a cumulative impact. Ex. A at 21-22. The EIR implies that project impacts are cumulatively considerable only when they have not been fully mitigated. *Id.* However, this in turn “implies that cumulative impacts are really residual impacts left over by inadequate mitigation at the project.” *Id.* Instead, CEQA Guidelines Section 15355 defines cumulative impacts as “the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects.” 14 CCR § 15355(b). The City must prepare a Revised EIR which adequately assesses cumulative biological impacts.

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8. There are several feasible mitigation measures available to mitigate the Project's potential impacts on biological resources.

Dr. Smallwood recommends several mitigation measures which the City could consider in a revised EIR to limit impacts on biological resources:

- Habitat Protection: Offsite habitat should be permanently protected in the form of fee title or a conservation easement, and habitat impacts should be mitigated internally through replacing lawns and ornamental shrubs with natural vegetation or xeric-adapted plants.
- Road Mortality: Wildlife crossings should be funded at strategic locations along roads used by the Project.
- Guidelines on Building Design to Minimize Bird-Window Collisions: The Project should adhere to Bird-Safe Guidelines such as those prepared by the American Bird Conservancy and by the cities of New York and San Francisco.
([https://sfplanning.org/sites/default/files/documents/reports/bird safe bldgs/Standards%20for%20Bird%20Safe%20Buildings%20-%202011-30-11.pdf](https://sfplanning.org/sites/default/files/documents/reports/bird%20safe%20bdgs/Standards%20for%20Bird%20Safe%20Buildings%20-%202011-30-11.pdf))
- House Cats: A fund should be established for long-term management of house cats in the Project.
- Measures to Rectify Impacts: Compensatory mitigation should be implemented which funds contributions to wildlife rehabilitation facilities to cover the costs of animals injured by the Project.

B. There is Substantial Evidence that the Project Will Have Significant Adverse Impacts Regarding Health Risks and Greenhouse Gases.

Matt Hagemann, P.G., C.Hg., and Dr. Paul E. Rosenfeld, Ph.D., of the environmental consulting firm SWAPE reviewed the EIR's analysis of the Project's impacts on health risks and greenhouse gases. SWAPE's comment letter and CVs are attached as Exhibit B and their comments are briefly summarized here.

1. There is Substantial Evidence that the Project May Have a Significant Health Impact as a Result of Diesel Particulate Emissions.

One of the primary emissions of concern regarding health effects for land development projects is diesel particulate matter ("DPM"), which can be released during Project construction and operation. DPM consists of fine particles with a diameter less than 2.5 micrometers including a subgroup of ultrafine particles (with a

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diameter less than 0.1 micrometers). Diesel exhaust also contains a variety of harmful gases and cancer-causing substances. Exposure to DPM is a recognized health hazard, particularly to children whose lungs are still developing and the elderly who may have other serious health problems. According to the California Air Resources Board (“CARB”), DPM exposure may lead to the following adverse health effects: aggravated asthma; chronic bronchitis; increased respiratory and cardiovascular hospitalizations; decreased lung function in children; lung cancer; and premature deaths for those with heart or lung disease.¹

The EIR concluded that the Project would have a less-than-significant health risk impact without conducting a quantified construction or operational health risk assessment (“HRA”). Ex. B, p. 1. The EIR’s conclusion about health risks was based on its finding that the Project’s short-term construction schedule would not result in substantial toxic air contaminant (“TAC”) emissions and also based on the limited amount of delivery trucks accessing the site. DEIR, p.3.2-29. SWAPE identifies three main reasons for why the EIR’s evaluation of health risk impacts and subsequent less-than-significant conclusion is incorrect.

First, by failing to prepare a quantified construction-related and operational HRA, the Project failed to substantively connect the Project’s air-quality impacts to likely health consequences as required by CEQA. Ex. B at 2. Construction of the Project would produce DPM emissions through exhaust stacks of construction equipment for approximately 40 months. *Id.* The Project is also expected to generate 1,797 daily vehicle trips which would produce additional exhaust emissions and expose nearby sensitive receptors to DPM emissions. *Id.* In failing to connect TAC emissions to potential health risks to nearby receptors, the Project fails to meet the CEQA requirement that projects correlate increases in project-generated emissions to adverse impacts on human health caused by those emissions. *Id.*; See *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 510.

Second, the California Department of Justice recommends the preparation of a quantitative HRA pursuant to the Office of Environmental Health Hazard Assessment (“OEHHA”), the organization responsible for providing guidance on conducting HRAs in California, as well as local air district guidelines. OEHHA released its most recent guidance document in 2015 describing which types of projects warrant preparation of an HRA. See “Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments.” OEHHA, February 2015, available at: https://oehha.ca.gov/media/downloads/crn/2015guidance_manual.pdf. The OEHHA document recommends that all short-term projects lasting at least 2 months assess cancer risks. Ex. B at 3. Additionally, if a project is

¹ See CARB Resources - Overview: Diesel Exhaust & Health, available at <https://ww2.arb.ca.gov/resources/overview-diesel-exhaust-and-health>).

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expected to last over 6 months, the exposure should be evaluated throughout the project. *Id.* The Project's anticipated construction exceeds both the 2-month and 6-month requirements and should therefore be evaluated for the entire 40-month construction period. *Id.*

Furthermore, OEHHA recommends that an exposure duration of 30 years should be used to estimate the individual cancer risk of the Maximally Exposed Individual Resident ("MEIR"). *Id.* Based on its extensive experience, SWAPE reasonably assumes that the Project will last at least 30 years, and therefore recommends that the Project be evaluated for the entire 30-year residential exposure duration. *Id.* A Revised EIR is therefore required to analyze these impacts.

Third, by failing to complete a quantified constructional or operational HRA for nearby, existing sensitive receptors, the EIR also fails to compare the Project's excess cancer risk to the Ventura County Air Pollution Control District's ("VCAPCD") threshold of 10 in one million. *Id.* at 3-4. This assessment should be completed and the results compared to the relevant threshold.

2. The EIR Failed to Adequately Analyze the Project's Greenhouse Gas Impacts and Thus the Project May Result in Significant Greenhouse Gas Emissions.

The EIR estimates that the Project would generate net annual GHG emissions of 2,191 metric tons of carbon dioxide equivalent per year ("MT CO₂e/year"). DEIR, p. 3.7-23. The EIR relies on the Project's consistency with CARB's 2017 *Scoping Plan*, SCAG's 2020-2045 RTP/SCS, Ventura County's General Plan, and the City of Thousand Oaks General Plan to conclude that GHG impacts would be less than significant. Ex. B at 4-5; DEIR, p. 3.7-25. However, SWAPE states that the EIR's conclusion about a less-than-significant greenhouse gas impact is incorrect for two reasons:

- (1) The EIR fails to consider the performance-based standards under CARB's *Scoping Plan*; and
- (2) The EIR fails to consider the performance-based standards under SCAG's *RTP/SCS*.

SWAPE's analysis demonstrates potentially significant health risk and GHG impacts from the project that necessitate mitigation. A Revised EIR should be prepared which includes an updated health risk and GHG analysis and which proposes feasible measures to mitigate any significant impacts.

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III. Conclusion.

For the foregoing reasons, SAFER believes that the EIR is wholly inadequate. SAFER urges the City Council to refrain from recommending certification of the FEIR or recommending approval of the Project in order to allow staff additional time to address the concerns raised herein. Thank you for considering our comments and please include this letter in the record of proceedings for this project.

Sincerely,

A handwritten signature in black ink that reads "Amalia Bowley Fuentes". The signature is written in a cursive, flowing style.

Amalia Bowley Fuentes
Lozeau Drury LLP