



P: (626) 314-3821
F: (626) 389-5414
E: info@mitchtsailaw.com

Mitchell M. Tsai
Attorney At Law

139 South Hudson Avenue
Suite 200
Pasadena, California 91101

VIA E-MAIL

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Monique Swartz,
Associate Planner
City of Orange
300 E. Chapman Avenue
Orange, CA 92866
Em: mschwartz@cityoforange.org

RE: City of Orange's 840 The City Drive IS/MND Comment Letter

Dear Monique Swartz,

On behalf of the **Southwest Mountain States Regional Council of Carpenters** (“**Southwest Carpenters**” or “**SWMSRCC**”), my Office is submitting these comments for the City of Orange’s (the “**City**”) City Council meeting for the 840 The City Drive project (the “**Project**”).

The Southwest Carpenters is a labor union representing over 57,000 union carpenters in six states, including California, and has a strong interest in well-ordered land use planning and in 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 hearing and proceeding related to this Project. California Government Code (“**Gov. Code**”) § 65009, subd. (b); Public Resources Code (“**Pub. Res. Code**”) § 21177, subd. (a); see *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1199-1203; see also *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal.App.4th 1109, 1121.

The Southwest Carpenters incorporates by reference all comments raising issues regarding the IS/MND (the “**IS/MND**”) submitted prior to certification of the EIR for the Project. See *Citizens for Clean Energy v. City of Woodland* (2014) 225 Cal.App.4th

173, 191 (finding that any party who has objected to the project’s environmental documentation may assert any issue timely raised by other parties).

Moreover, the Southwest Carpenters requests that the City provide notice for any and all notices referring or related to the Project issued under the California Environmental Quality Act (“**CEQA**”) (Pub. Res. Code, § 21000 *et seq.*), and the California Planning and Zoning Law (“**Planning and Zoning Law**”) (Gov. Code, §§ 65000–65010). Pub. Res. Codes §§ 21092.2, and 21167(f) and Gov’t Code § 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.

I. THE CITY SHOULD REQUIRE THE USE OF A LOCAL WORKFORCE TO BENEFIT THE COMMUNITY’S ECONOMIC DEVELOPMENT AND ENVIRONMENT

The City should require the Project to be built using a local workers who have graduated from a Joint Labor-Management Apprenticeship Program approved by the State of California, 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 a state-approved apprenticeship training program.

Community benefits such as local hire 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 provide 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.

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

Workforce requirements promote the development of skilled trades that yield sustainable economic development. As the California Workforce Development Board

and the University of California, Berkeley Center for Labor Research and Education concluded:

[L]abor 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

Furthermore, workforce policies have significant environmental benefits given that they improve an area’s jobs-housing balance, decreasing the amount and length of job commutes and the associated greenhouse gas (“**GHG**”) emissions. In fact, on May 7, 2021, the South Coast Air Quality Management District found that that the “[u]se of a local state-certified apprenticeship program” can result in air pollutant reductions.²

Recently, the State of California verified its commitment towards workforce development through the Affordable Housing and High Road Jobs Act of 2022, otherwise known as Assembly Bill No. 2011 (“**AB2011**”). AB2011 amended the Planning and Zoning Law to

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.³

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

Moreover, local hire mandates and skill-training are critical facets of a strategy to reduce vehicle miles traveled (VMT). As planning experts Robert Cervero and Michael Duncan have noted, simply placing jobs near housing stock is insufficient to achieve VMT reductions given that the skill requirements of available local jobs must match those held by local residents.⁴ Some municipalities have even tied local hire and other workforce policies to local development permits to address transportation issues. Cervero and Duncan note that:

In nearly built-out Berkeley, CA, the approach to balancing jobs and housing is to create local jobs rather than to develop new housing. 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 negotiating corporate participation in First Source as a condition of approval for development permits.

Therefore, the City should consider utilizing local workforce policies and requirements to benefit the local area economically and to mitigate greenhouse gas, improve air quality, and reduce transportation impacts.

II. THE CITY SHOULD IMPOSE TRAINING REQUIREMENTS FOR THE PROJECT'S CONSTRUCTION ACTIVITIES TO PREVENT COMMUNITY SPREAD OF COVID-19 AND OTHER INFECTIOUS DISEASES

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-19.⁵

⁴ 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>.

⁵ Santa Clara County Public Health (June 12, 2020) COVID-19 CASES AT CONSTRUCTION SITES HIGHLIGHT NEED FOR CONTINUED VIGILANCE IN

Southwest Carpenters recommend that the Lead Agency adopt additional requirements to mitigate public health risks from the Project's construction activities. Southwest Carpenters 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 Southwest Carpenters' experience with safe construction site work practices, Southwest Carpenters recommends that the Lead Agency require that while construction activities are being conducted at the Project Site:

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 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 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.⁶

The United Brotherhood of Carpenters and Carpenters 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.

Southwest Carpenters 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.⁷

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

⁶ 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.

⁷ For details concerning Southwest Carpenters’ ICRA training program, see <https://icrahealthcare.com/>.

III. 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). “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.]” *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 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 Goleta 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 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).

B. The City Should Prepare an EIR for the Project

A strong presumption in favor of requiring preparation of an EIR is built into CEQA. This presumption is reflected in what is known as the “fair argument” standard, under which an agency must prepare an EIR whenever substantial evidence in the record supports a fair argument that a project may have a significant effect on the

environment. *Quail Botanical Gardens Found., Inc. v City of Encinitas* (1994) 29 CA4th 1597, 1602; *Friends of "B" St. v City of Hayward* (1980) 106 Cal.App.3d 988; 1002.

The fair argument test stems from the statutory mandate that an EIR be prepared for any project that "may have a significant effect on the environment." Pub Res C §21151; *No Oil, Inc. v City of Los Angeles* (1974) 13 C3d 68, 75; *Jensen v City of Santa Rosa* (2018) 23 CA5th 877, 884. Under this test, if a proposed project is not exempt and *may* cause a significant effect on the environment, the lead agency *must* prepare an EIR. Pub Res C §§21100(a), 21151; 14 Cal Code Regs §15064(a)(1), (f)(1). An EIR may be dispensed with only if the lead agency finds no substantial evidence in the initial study or elsewhere in the record that the project may have a significant effect on the environment. *Parker Shattuck Neighbors v Berkeley City Council* (2013) 222 CA4th 768, 785. In such a situation, the agency must adopt a negative declaration. Pub Res C §21080(c)(1); 14 Cal Code Regs §§15063(b)(2), 15064(f)(3).

"Significant effect upon the environment" is defined as "a substantial or potentially substantial adverse change in the environment." Pub Res C §21068; 14 Cal Code Regs §15382. See §13.2. A project "may" have a significant effect on the environment if there is a "reasonable probability" that it will result in a significant impact. *No Oil, Inc. v City of Los Angeles*, 13 C3d at 83 n16; *Sundstrom v County of Mendocino* (1988) 202 CA3d 296, 309. If any aspect of the project may result in a significant impact on the environment, an EIR must be prepared even if the overall effect of the project is beneficial. 14 Cal Code Regs §15063(b)(1). See *County Sanitation Dist. No. 2 v County of Kern* (2005) 127 CA4th 1544, 1580.

This standard sets a "low threshold" for preparation of an EIR. *Consolidated Irrig. Dist. v City of Selma* (2012) 204 CA4th 187, 207; *Nelson v County of Kern* (2010) 190 CA4th 252; *Pocket Protectors v City of Sacramento* (2004) 124 CA4th 903, 928; *Bowman v City of Berkeley* (2004) 122 CA4th 572, 580; *Citizen Action to Serve All Students v Thornley* (1990) 222 CA3d 748, 754; *Sundstrom v County of Mendocino* (1988) 202 CA3d 296, 310. If substantial evidence in the record supports a fair argument that the project may have a significant environmental effect, the lead agency must prepare an EIR even if other substantial evidence before it indicates the project will have no significant effect. See *Jensen v City of Santa Rosa* (2018) 23 CA5th 877, 886; *Clews Land & Livestock v City of San Diego* (2017) 19 CA5th 161, 183; *Stanislaus Audubon Soc'y, Inc. v County of Stanislaus* (1995) 33 CA4th 144, 150; *Brentwood Ass'n for No Drilling, Inc. v City of Los Angeles* (1982) 134 CA3d 491;

Friends of "B" St. v City of Hayward (1980) 106 CA3d 988. See also 14 Cal Code Regs §15064(f)(1).

As explained in full below, there is a fair argument that the Project will have a significant effect on the environment. As a result, the “low threshold” for preparation of an EIR has been met and the City must prepare an EIR.

C. CEQA Requires Revision and Recirculation of a Mitigated Negative Declaration When Substantial Changes or New Information Comes to Light

Once a negative declaration has been circulated, it may need to be recirculated for another round of review and comment if it is “substantially revised” after the public notice of the first circulation period has been given. CEQA Guidelines § 15073.5(a).

A substantial revision includes two situations (14 Cal Code Regs §15073.5(b)):

- A new, avoidable significant effect is identified, and to reduce that effect to a level of insignificance, mitigation measures or project revisions must be added.
- The lead agency finds that the mitigation measures or project revisions originally included in the negative declaration will not reduce potentially significant impacts to a level of insignificance, and new mitigation measures or project revisions are required.

New information will require recirculation when it amounts to a substantial revision of the negative declaration, which is defined to mean the identification of new significant environmental impacts or the addition of new mitigation that is required to avoid a significant environmental impact. CEQA Guidelines §15073.5(b). If the new information reveals a new significant impact that cannot be mitigated or avoided, then the lead agency must prepare an EIR before approving the project. CEQA Guidelines §15073.5(d).

Revisions to a project to mitigate potentially significant environmental effects must be included in the negative declaration that is circulated for public review. Pub Res C §21080(c)(2); 14 Cal Code Regs §§15070(b), 15071(e).

Based on the arguments set forth below, in the alternative, Commenter requests that the City recirculate the IS/MND upon making any revisions.

D. The IS/MND Improperly Labels a Mitigation Measure as a “Project Design Feature.”

The IS/MND improperly labels mitigation measures for “Project Design Features” or “PDFs” which the IS/MND purports to “reduc[e] impacts to water quality, along with the implementation of MM GEO-1 and the project-specific construction BMPs shown in the SWPPP erosion and sediment control plans and grading plans would reduce potentially significant construction impacts to less than significant with mitigation incorporated.” (IS/MND p. 118). will reduce the potential for environmental effects.

Relying on the PDFs, the IS/MND concludes in many instances that the Project’s impacts are less than significant and that no mitigation is required.

However, it is established that “[a]voidance, minimization and / or mitigation measure’ . . . are not ‘part of the project.’ . . . compressing the analysis of impacts and mitigation measures into a single issue . . . disregards the requirements of CEQA.” *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 656.

When “an agency decides to incorporate mitigation measures into its significance determination, and relies on those mitigation measures to determine that no significant effects will occur, that agency must treat those measures as though there were adopted following a finding of significance.” *Lotus*, supra, 223 Cal.App.4th at 652 [citing CEQA Guidelines § 15091(a)(1) and PRC § 21081(a)(1)].

By labeling mitigation measures as project design features, the City violates CEQA by failing to disclose “the analytic route that the agency took from the evidence to its findings.” PRC § 21081.5; CEQA Guidelines § 15093; *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1035 (citing *Topanga Assn for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515).

The IS/MND’s use of “Project Design Features” further violates CEQA because such measures would not be included in the Project’s Mitigation Monitoring and Reporting Program CEQA requires lead agencies to adopt mitigation measures that are fully enforceable and to adopt a monitoring and/or reporting program to ensure that the measures are implemented to reduce the Project’s significant environmental effects to the extent feasible. PRC § 21081.6; CCR § 15091(d). Therefore, using Project Design Features in lieu of mitigation measures violates CEQA.

E. The IS/MND Fails to Support Its Findings with Substantial Evidence

When new information is brought to light showing that an impact previously discussed in the IS/MND but found to be insignificant with or without mitigation in the IS/MND's analysis has the potential for a significant environmental impact supported by substantial evidence, the IS/MND must consider and resolve the conflict in the evidence. (See *Visalia Retail, L.P. v. City of Visalia* (2018) 20 Cal. App. 5th 1, 13, 17; see also *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, 1109.) While a lead agency has discretion to formulate standards for determining significance and the need for mitigation measures—the choice of any standards or thresholds of significance must be “based to the extent possible on scientific and factual data and an exercise of reasoned judgment based on substantial evidence. (CEQA Guidelines § 15064(b); *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts* (2017) 3 Cal. App. 5th 497, 515; *Mission Bay Alliance v. Office of Community Inv. & Infrastructure* (2016) 6 Cal. App. 5th 160, 206.) And when there is evidence that an impact could be significant, an EIR cannot adopt a contrary finding without providing an adequate explanation along with supporting evidence. (*East Sacramento Partnership for a Livable City v. City of Sacramento* (2016) 5 Cal. App. 5th 281, 302.)

In addition, a determination that regulatory compliance will be sufficient to prevent significant adverse impacts must be based on a project-specific analysis of potential impacts and the effect of regulatory compliance. In *Californians for Alternatives to Toxics v. Department of Food & Agric.* (2005) 136 Cal.App.4th 1, the court set aside an EIR for a statewide crop disease control plan because it did not include an evaluation of the risks to the environment and human health from the proposed program but simply presumed that no adverse impacts would occur from use of pesticides in accordance with the registration and labeling program of the California Department of Pesticide Regulation. See also *Ebbetts Pass Forest Watch v Department of Forestry & Fire Protection* (2008) 43 Cal.App.4th 936, 956 (fact that Department of Pesticide Regulation had assessed environmental effects of certain herbicides in general did not excuse failure to assess effects of their use for specific timber harvesting project).

1. *The IS/MND Fails to Supports its Land Use Analysis with Substantial Evidence.*

The IS/MND claims that the Project is consistent with the City's General Plan. (IS/MND p. 125). However, the Project instead violates the General Plan. For instance, the Project does not provide for lower income individuals, at least it is not

plainly apparent if that is the case, which is in violation of the Orange General Plan (see Orange General Plan LU-33). The IS/MND's shortcut land use analysis is not adequate. A clear and direct conflict with a mandatory provision of a general or specific plan usually amounts to an inconsistency that will preclude project approval. See *Families Unafraid v. County of El Dorado* (1998) 62 Cal. App. 4th 1332, 1341 (project must satisfy mandatory general plan policy that is fundamental and unambiguous and does not allow discretion in interpretation and application). The IS/MND should be revised to include a deeper analysis of consistency to support its land use conclusion, rather than clear and present contradictions between the Project's provisions and consequences and the intentions and goals of the Orange General Plan.

2. *The IS/MND Fails to Support its Findings on Greenhouse Gas Impacts with Substantial Evidence.*

CEQA Guidelines § 15064.4 allow a lead agency to determine the significance of a project's GHG impact via a qualitative analysis (e.g., extent to which a project complies with regulations or requirements of state/regional/local GHG plans), and/or a quantitative analysis (e.g., using model or methodology to estimate project emissions and compare it to a numeric threshold). So too, CEQA Guidelines allow lead agencies to select what model or methodology to estimate GHG emissions so long as the selection is supported with substantial evidence, and the lead agency "should explain the limitations of the particular model or methodology selected for use." CEQA Guidelines § 15064.4(c).

CEQA Guidelines sections 15064.4(b)(3) and 15183.5(b) allow a lead agency to consider a project's consistency with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of GHG emissions.

CEQA Guidelines §§ 15064.4(b)(3) and 15183.5(b)(1) make clear qualified GHG reduction plans or CAP should include the following features:

- (1) Inventory: Quantify GHG emissions, both existing and projected over a specified time period, resulting from activities (e.g., projects) within a defined geographic area (e.g., lead agency jurisdiction);
- (2) Establish GHG Reduction Goal: Establish a level, based on substantial evidence, below which the contribution to GHG emissions from activities covered by the plan would not be cumulatively considerable;

- (3) Analyze Project Types: Identify and analyze the GHG emissions resulting from specific actions or categories of actions anticipated within the geographic area;
- (4) Craft Performance Based Mitigation Measures: Specify measures or a group of measures, including performance standards, that substantial evidence demonstrates, if implemented on a project-by-project basis, would collectively achieve the specified emissions level;
- (5) Monitoring: Establish a mechanism to monitor the CAP progress toward achieving said level and to require amendment if the plan is not achieving specified levels;

Collectively, the above-listed features tie qualitative measures to quantitative results, which in turn become binding via proper monitoring and enforcement by the jurisdiction—all resulting in real GHG reductions for the jurisdiction as a whole, and the substantial evidence that the incremental contribution of an individual project is not cumulatively considerable.

Second, it is not enough for an environmental document to conclude there is no significant GHG emissions impacts based upon a determination of consistency with a GHG Reduction Plan, without also making a determination based upon substantial evidence of the project's actual cumulative contributions to GHG emissions. In other words, a determination of consistency is only a starting point.⁸ Compliance or non-compliance is merely one factor to be considered. The lead agency must explain how reliance on any particular plan or regulation addresses a potential impact.

Here, however, the IS/MND fails to demonstrate consistency with the 2017 Scoping Plan Update addressing the SB 32 targets (IS/MND p. 101) that the GHG Reduction Plan includes the above-listed requirements to be considered a qualified CAP or GHG Reduction Plan for the City. As such, the IS/MND leaves an analytical gap showing that compliance with said plans can be used for a project-level significance determination for the Project. Second, the IS/MND fails to explain how compliance with the 2017 Climate Change Scoping Plan Update leads to a less than significant

⁸ Cal. Nat. Res. Agency, Final Statement of Reasons for Regulatory Action, Amendments to the State CEQA Guidelines, OAL Notice File No. Z-2018-0116-12 (Nov. 2018), at p. 95; see also *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal. App. 4th 1170, 1207 (“[A]n inconsistency between a project and other land use controls does not in itself mandate a finding of significance. [Citations.]”)

impact (IS/MND pp. 101-106), and specifically offsetting the increased GHG emissions due to increased traffic, nor does it acknowledge updated Scoping Plan Updates since 2017 that have been released or proposed since the drafting of the IS/MND.

3. *The IS/MND Fails to Demonstrate How Compliance or Consistency with Applicable Greenhouse Gas Reduction Plans Will Lead to a Less than Significant Impacts on Greenhouse Gas Emissions.*

Second, the IS/MND fails to explain or analyze how compliance with the GHG Reduction Plan, even if it qualified for a consistency evaluation, will lead to a less than significant impact. The lead agency should explain how implementing the particular requirements in the plan, regulation or program ensure that the project's incremental contribution to the cumulative effect is not cumulatively considerable" (emphasis added).⁹

Here, the IS/MND merely concludes that the proposed project would not conflict with the reduction measures proposed in SB 32 or with any of the General Plan metrics, or any applicable plan, policy, or regulation adopted to reduce GHG emissions. (IS/MND p. 105). This conclusion is dubious. Not only do none of the tables attend to the necessary increase in vehicular traffic due to the increase housing and commercial density, it assumes that a planned, but not confirmed reduction of lanes for bicycles or the widening of walkways would reduce vehicle emissions. "Formulation of mitigation measures should not be deferred until some future time." CEQA Guidelines § 15126.4(a)(1)(B); *see also 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]; *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281 [city improperly deferred mitigation to butterfly habitat by failing to provide standards or guidelines for its management].

⁹ Natural Resources Agency (Nov. 2018) Final Statement of Reasons For Regulatory Action: Amendments To The State CEQA Guidelines ("2018 Final Statement of Reason"), p. 6, http://resources.ca.gov/ceqa/docs/2018_CEQA_Final_Statement_of%20Reasons_111218.pdf;

4. *The IS/MND Fails to Evaluate Cumulative Project GHG Impacts.*

An IS/MND must discuss cumulative impacts when they are significant and the project's incremental contribution is "cumulatively considerable." CEQA Guidelines §15130(a). A project's incremental contribution is cumulatively considerable if the incremental effects of the project are significant "when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." CEQA Guidelines §15065(a)(3).

Here, there is no evidence that the IS/MND's Air Quality, Energy, Greenhouse Gas Emissions, and Health Risk Assessment Impact Analysis evaluated the Project's cumulative project GHG emissions.

Southwest Carpenters concurs with SAFER's GHG appeal analysis. Specifically, the failure of the IS/MND to commit or accord with California's Executive Order B-55-18 as one of the state's long-term climate goals, as held in *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204. The IS/MND excludes from its project design all-electric buildings or EV charging infrastructure and as such, is dubiously consistent with Executive Order B-55-18 (Appeal p. 5). The MND also fails to evaluate consistency with updated plans, such as CARB's 2022 Carbon Neutrality Scoping Plan and instead uses the outdated 2017 Scoping Plan, or the South Coast Air Quality Management Plan for its 3,000 MTC02e annual GHG threshold and its consistency with the 2022 CARB Scoping Plan (Appeal p. 5).

The IS/MND needs to conduct a cumulative GHG impacts analysis, and if there is a potentially significant impact, impose adequate and all feasible measures.

5. *The IS/MND Fails to Analyze Cumulative Project Air Quality Impacts.*

The IS/MND indicates that the Project would have less than significant impacts across all domains. (IS/MND p. 53). However, the air quality analysis fails to attend to all the nearby sensitive receptors, such as all surrounding single-family residences, the Vista Del Rio Apartments, Memory Lane Park, Santa Ana River-Trail Honeycomb Pocket Park, Park City Apartment Homes, Neighborhood Park, the Oakmont of Orange Assisted Living Facility, the Best Western Plus Hotel, Riverdale Elementary School, Lampson Elementary School, Islander Apartments, Portofino Apartments, and many others. This is inappropriate. Whether these nearby receptors are impacted, and to what extent, may not end up being significant, but the City nonetheless has a duty to attend to these variables. An agency may not avoid its responsibility to prepare proper

environmental analysis by failing to gather relevant data. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311. The problem with this, especially concerning the skilled nursing facility, is that no analysis was done to establish an impact to these sensitive communities, especially when air quality could have significant impacts on these elderly communities.

Despite these serious considerations, the IS/MND concludes that the impacts would be less than significant (IS/MND p. 53), even though there is a low likelihood that the Project would not increase air quality impacts given that the project site is currently mostly a surface parking lot and will be improved with significant parking accommodations and retail and residential space, especially when an influx of traffic due to the additional retail and residential space will increase congestion and decrease air quality in the area. These reductions in air quality are likely to impact at least some, if not all of the surrounding sensitive receptors, especially the elderly at the assisted living facility.

The IS/MND needs to conduct a cumulative air quality impacts analysis, and if there is a potentially significant impact, impose adequate and all feasible measures. An agency may not avoid its responsibility to prepare proper environmental analysis by failing to gather relevant data. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311. Here, the relevant data would be the unaccounted sensitive receptors and how the increased emissions would impact the residents of the Project itself when they utilize the various pool facilities, walkways, and other amenities that would involve substantial movement at and around the Project site.

Beyond this, the Southwest Carpenters concurs with the SAFER appeal concerning air quality impacts and production of toxic diesel emissions, and the IS/MND's failure to include qualified health risk assessments, and further CEQA violations for failure to provide adequate toxic air contaminant emissions and their adverse impacts as required by *Sierra Club v. City of Fresno* (2018) 6. Cal.5th 502, 518, and a failure to consider the diesel particulate matter ("DPM") from construction activities, which is especially egregious since DPM is a known carcinogen (Appeal p. 4), and the proximity of the multitude of nearby sensitive receptors to the Project.

6. *The IS/MND Fails to Adequately Disclose, Analyze the Project's Significant Noise Impacts.*

The IS/MND discloses that the Project will not have significant construction noise impacts, proposes mitigation measures for one metric, but improperly concludes those assertions (IS/MND p. 131).

First, the IS/MND fails to account for many of the nearby sensitive receptors, such as all surrounding single-family residences, the Vista Del Rio Apartments, Memory Lane Park, Santa Ana River-Trail Honeycomb Pocket Park, Park City Apartment Homes, Neighborhood Park, the Oakmont of Orange Assisted Living Facility, the Best Western Plus Hotel, Riverdale Elementary School, Lampson Elementary School, Islander Apartments, Portofino Apartments, and many others. This is inappropriate. Whether these nearby receptors are impacted, and to what extent, may not end up being significant, but the City nonetheless has a duty to attend to these variables. An agency may not avoid its responsibility to prepare proper environmental analysis by failing to gather relevant data. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

The IS/MND also indicates that details were not available pertaining to proposed rooftop mechanical ventilation systems, and instead, its analysis used average noise levels for similar systems. (IS/MND p. 134). This is inappropriate. Average estimates are irrelevant in determining noise impacts because they are simply too speculative relative to the specific needs of the Project. The actual noise contributions due to these systems could far exceed legal maximums, thereby skirting the legal requirements for reducing noise levels of new development projects. An agency may not avoid its responsibility to prepare proper environmental analysis by failing to gather relevant data. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311. As such a new IS/MND must be prepared to include proper analysis.

It is also unlikely the permanent dBA increase would only amount to a 0.1 as suggested by the table provided (IS/MND p. 135). The Project is replacing a large parking lot and offices that are mostly only used during business hours with a multi-use residential and commercial development that will reach seven stories (the IS/MND is also not consistent with how many stories, as some description list six stories and others list seven, see IS/MND pp. 6-7), host 225 multi-family residential units, which includes 9,000 square feet of retail and restaurant space, which would include a fitness center and lounge area, a pool, two courtyards, as well as a 3-story basement parking structure

(IS/MND pp. 6-7). Significantly, the pool and courtyard is elevated atop the 5-foot parking podium (IS/MND p. 9). The Project is also incorporating 434 new parking spaces for residents in addition to the new parking structure to offset the loss of parking spaces currently occupying the anticipated project site (IS/MND pp. 9-11). However, the IS/MND also indicates it cannot offer the required allotment of parking under the law, and is seeking a 10% parking adjustment for failing to meet the 481 vehicular spaces required by code (IS/MND p. 11). This will naturally offset and burden the other proposed parking structure, thereby increasing noise and traffic to that structure. It is unlikely this redirection would result in a net decrease in noise levels, given that the second parking structure is a surface structure rather than a subterranean parking structure.

7. *The IS/MND Fails to Adequately Analyze Hazards and Hazardous Materials Impacts.*

The IS/MND's analysis of Hazards and Hazardous Materials Impacts is deficient. In it, it references various mitigation measures for those requiring them (IS/MND p. 107), and claims that at most, impacts would be less than significant with mitigation incorporated, and specifically, significant impacts concerning the project's potential location on a list of hazardous materials within a quarter mile of a school. (IS/MND p. 107).

Significantly, the data gathered is partially based on the Phase I Environmental Site Assessment that was prepared nearly four years ago, on or about July 18, 2019, and two years ago for the parking garage section on January 27, 2021. (IS/MND p. 107). These reports are likely too attenuated now in terms of their data collection to provide adequate evidence for the conclusions drawn by the hazards and hazardous material impacts section. An agency may not avoid its responsibility to prepare proper environmental analysis by failing to gather relevant data. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

While this would be inappropriate for any analysis section, it is especially egregious given the hazards and hazardous impacts and their potential impacts to the nearby sensitive receptors, including Memory Lane Park, Santa Ana River-Trail Honeycomb Pocket Park, Park City Apartment Homes, Neighborhood Park, the Oakmont of Orange Assisted Living Facility, the Best Western Plus Hotel, Riverdale Elementary School, Lampson Elementary School, Islander Apartments, Portofino Apartments, and many others. Insufficient hazards and hazardous materials analysis, or lack thereof, is

most likely to impact, and significantly, the Oakmont of Orange Assisted Living Facility and the Riverdale Elementary School and Lampson Elementary School, although all nearby residents would almost assuredly care to remain abreast of outdated hazards and hazardous materials analyses adjacent to their homes. This is also inconsistent with the City's General Plan, which presumes to concentrate hazards and hazardous materials within its industrial area. (IS/MND p. 108) Yet, the project site is not in an industrial zone, and is clearly in and surrounded by residences, schools, parks, small businesses and other commercial uses, and a litany of other sensitive receptors. Therefore, it is not enough to suggest compliance with local, state, and federal laws (IS/MND p. 108) would suffice when the project site does not exist where the IS/MND pretends that it does, i.e., in an industrial zone.

The IS/MND also ignores potential wildfire dangers near the proposed project site, namely, the Santa Ana River Trail-Honeycomb Pocket Park to the southeast, a massive park that was not acknowledged in its wildfire analysis (IS/MND pp. 114-115), and should have been considering the scale and size of the park, and its proximity to the project site.

Lastly, Southwest Carpenters concurs with the analysis in SAFER's appeal. Specifically, the Voluntary Cleanup Agreement with the Department of Toxic Substances Control ("DTSC") for assessing the tetrachloroethene ("PCE") release due to the dry-cleaning business located on the residential portion of the Project (Appeal p. 7) should be reviewed and reviewable in approving the Project. Despite a failure to do so, the IS/MND still compliance with local, state, and federal laws without first obtaining a No Further Action letter prior to the issuance of any building permits or disclosure of investigation activities that occurred in October and September of 2022.

8. *The IS/MND Fails to Adequately Analyze Significant Traffic and Transportation Impacts.*

As was mentioned in the prior analyses, the abundance of nearby sensitive receptors, such as all surrounding single-family residences, the Vista Del Rio Apartments, Memory Lane Park, Santa Ana River-Trail Honeycomb Pocket Park, Park City Apartment Homes, Neighborhood Park, the Oakmont of Orange Assisted Living Facility, the Best Western Plus Hotel, Riverdale Elementary School, Lampson Elementary School, Islander Apartments, Portofino Apartments, and many others would likely impact traffic and transportation in at the site and nearby the site. Despite this likelihood, the IS/MND concludes that impacts will either be less than significant

with mitigation incorporated, or less than significant (IS/MND p. 152). These are dubious conclusions. First, the increase in hundreds of available parking spaces and existence of retail space in place of surface-level parking will necessarily increase traffic and transportation issues in the area, especially, as the IS/MND notes, to LOS and intersection impacts (IS/MND p. 163). The mitigation measure involves the implementation of additional traffic signals and signs, and indicates that the project applicant will be fully responsible for the construction of these signs (IS/MND p. 163). However, responsibility for elements of a project is hardly sufficient mitigation for what are likely to be significant increases and burdens placed on nearby traffic in the area, especially considering proximity to the 22 Freeway and major intersections like The City Drive and Garden Grove. Attending to a what appears to be a largely irrelevant mitigation tool, on its own, in the comprehensive traffic and transportation analysis ignores congestion issues likely to arise due to the project's potential implementation is insufficient to address pertinent factors of traffic impacts to the nearby sensitive receptors and other businesses in the area. An agency may not avoid its responsibility to prepare proper environmental analysis by failing to gather relevant data. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

9. *The IS/MND Fails to Adequately Analyze Significant Biological Impacts.*

The IS/MND analyzes biological impacts and finds no potential for a significant impact that would be mitigated through mitigation measures (IS/MND p. 70).

Significantly, the proposed project is located adjacent to several parks, including Memory Lane Park and Santa Ana River Trail-Honeycomb Pocket Park.

Next, the last field survey was conducted almost three years ago (IS/MND p. 70), only one time during the year, and only conducted the survey at one time during the day (10 am). This hardly offers a sufficient sample of the flora and fauna likely to be impacted throughout the year, and whether certain flora and fauna would be impacted more during one season of the year compared other seasons. This is especially important considering the fifty-nine (59) special status species found at the proposed project site (IS/MND p. 71). The IS/MND suggests that it is unlikely any of the special status species would be impacted on-site (IS/MND p. 71), but this too is unlikely for exactly the reason recognized in the IS/MND, namely, due to the proximity of the riparian habitat at the Santa Ana River. Yet it is precisely because of the close proximity to the river that these species would likely be impacted to a nearby potential project, be it to a disruption in a habitat they create at the project site, or nearby.

Specifically, the BIO-1 nesting bird avoidance mitigation, which is in large part deferred mitigation efforts that require a survey that has yet to be conducted (IS/MND p. 4-32). This is inappropriate. “Formulation of mitigation measures should not be deferred until some future time.” CEQA Guidelines § 15126.4(a)(1)(B); *see also 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]; *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281 [city improperly deferred mitigation to butterfly habitat by failing to provide standards or guidelines for its management]. As such, the BIO-1 mitigation measure is inappropriate and does not sufficiently reduce the environmental impact to less than significant levels through its deferred mitigation measures in violation of CEQA.

10. *The IS/MND Fails to Adequately Analyze Significant Recreation Impacts.*

The IS/MND indicates that the proposed project would have a less than significant impact on the increase usage of regional parks or other recreational facilities to the point of substantial physical deterioration or that the proposed project’s construction would involve the expansion or development of recreational facilities that might have an adverse physical effect on the environment. (IS/MND p. 150).

These conclusions are drawn without a full assessment of nearby parks. For instance, the City’s analysis does not include recognition or acknowledgement of the nearby Santa Ana River Trail-Honeycomb Pocket Park, Memory Lane Park, Neighborhood Park, or other nearby recreational areas and facilities specific and adjacent to the proposed project site which are likely to see increases in patron use given the nontrivial expansion of residences and businesses that will attract not only permanent patrons of these parks because of the new residential accommodations, but also due to the proposed business and commercial uses likely to see an influx of additional patrons who can utilize these nearby recreational areas and facilities. An agency may not avoid its responsibility to prepare proper environmental analysis by failing to gather relevant data. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

IV. THE PROJECT VIOLATES THE STATE PLANNING AND ZONING LAW AS WELL AS THE CITY'S GENERAL PLAN

A. Background Regarding the State Planning and Zoning Law

An IS/MND must identify, fully analyze and mitigate any inconsistencies between a proposed project and the general, specific, regional, and other plans that apply to the project. CEQA Guidelines § 15125(d); *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1566; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 881. There does not need to be a direct conflict to trigger this requirement; even if a project is “incompatible” with the “goals and policies” of a land use plan, the IS/MND must assess the divergence between the project and the plan, and mitigate any adverse effects of the inconsistencies. *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 378-79; *see also Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903 (holding under CEQA that a significant impact exists where project conflicts with local land use policies); *Friends of “B” Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 998 (held county development and infrastructure improvements must be consistent with adopted general plans) (citing Gov. Code 65302).

B. The Proposed Land Use Amendments and Entitlements Conflict with SB 375 and SCAG's 2020 Regional Transportation Plan and Sustainable Communities Strategy

In 2008, Senate Bill 375 amended CEQA and empowered metropolitan planning organizations (MPOs) to enact regional plans to reduce GHG emissions from passenger vehicles. MPOs are required to prepare regional transportation plans (RTP) and sustainable community strategies (SCS) in an effort to meet CARB's GHG reduction goals under SB 375. Gov. Code § 65080(b)(2)(B). SB 375 specifically targets GHG emissions from passenger vehicles by linking land use decisions to transportation planning. *Id.* If the regional SCS/RTP plan does not achieve CARB's GHG reduction targets, then the MPO is required to create an alternative planning strategy (APS) that shows how the targets can be achieved through other mechanism such as alternative development patterns, infrastructure decisions, or other alternative transportation measures or policies that can still achieve CARB's reduction targets. Gov. Code § 65080(b)(2)(I).

For this Project, the applicable plan is SCAG’s 2020-2045 RTP/SCS plan adopted on September 3, 2020.

The IS/MND fails to analyze the Project’s consistency with SCAG’s 2020-2045 RTP/SCS plan given the many unverified and unanalyzed transportation impacts and the strong likelihood of increases to VMT rather than decreases due to the Project’s development on land that consists mostly of parking spaces which will be replaced with substantial residential, commercial, and hotel uses, as well as no indication of transit discounts or improvements to accessibility to the Amtrak commuters during construction or how it impacts their commute or use after the Project’s completion, or how the Project’s significant patronage, resident, and hotel occupant increases would affect demand on the surrounding area and transportation networks. For example, SCAG’s 2020 RTP/SCS requires or suggests the following that the Project fails to consider or adopt in the IS/MND:

- Land Use Policies: pursuing affordable housing or providing more transportation options for short trips;¹⁰
- Transportation Network Strategies: providing transit fare discounts; providing transit integration strategies such as integration of active transportation and transit by improving pedestrian access and bicyclist access;¹¹
- Transportation Demand Management Strategies: encourage use and implementation of TDM strategies such as rideshare incentives, parking management, parking subsidies for carpoolers, incentives for telecommuting, integrated mobility hubs, or additional investments in active transportation infrastructure,¹² and
- Clean Vehicle Technology Strategies: use of neighborhood electric vehicles (NEVs), and anticipating shared mobility platforms, car-to-car communication or automated vehicle technologies.¹³

The IS/MND fails to demonstrate consistency with the most recent SCAG 2020-2045 RTP / SCS Plan and should be revised to meet its goals and policies.

¹⁰ SCAG (Sep. 2020) 2020 RTP/SCS, pp. 25-36.

¹¹ *Id.*

¹² *Id.*

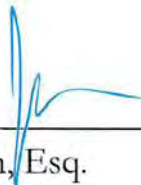
¹³ *Id.*

V. CONCLUSION

Based on the foregoing, we respectfully request the City deny the Project, its IS/MND, and order the applicant to revise the Project to ensure its consistency with all applicable laws and regulations as detailed above, as well as to study the “whole of the action” and use the accurate *bona fide* project description and baseline for purposes of CEQA review. “CEQA contemplates *serious* and not superficial or pro forma consideration of the potential environmental consequences of a project. *Leonoff v. Monterey County Bd. Of Supervisors* (1990) 222 Cal.App.3d 1337, 1347, 272 Cal.Rptr. 372; emphasis added; *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 593, fn. 3.

If the City has any questions or concerns please do not hesitate to contact our office.

Sincerely,



Jason A. Cohen, Esq.
Attorneys for Southwest Regional
Council of Carpenters

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).