Letter 10

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VIA EMAIL AND OVERNIGHT MAIL
Department of Development Services, Planning Bureau
ATTN: Scott Kinsey, AICP, Planner V
411 W. Ocean Boulevard,
3rd Floor Long Beach, CA 90802
Email: LBDS-EIR-Comments@longbeach.gov

Re: Preliminary Comments on the Draft Environmental Impact Report for the Intex Corporate Office and Fulfillment Center Project (SCH No. 2023040345)

Dear Mr. Kinsey:

We are writing on behalf of Coalition for Responsible Equitable Economic Development Los Angeles ("CREED LA") to provide comments on the Draft Environmental Impact Report ("DEIR") prepared by the City of Long Beach ("City") for the Intex Corporate Office and Fulfillment Center Project (SCH No. 2023040345) ("Project"), proposed by Unitex Management Corporation/Intex Properties Corporation ("Applicant").

10.1

The Project includes the construction of a new 60-foot-tall, 517,437 square foot combination warehouse and distribution center with accessory offices. The 26.47-acre Project site is located on a vacant property directly across Via Oro Avenue from the current Intex Recreation Corporation building at 4001 Via Oro Avenue in the City of Long Beach, California. The Project site comprises of Assessor Parcel Numbers of 7310-015-034, 7310-015-019, and 7310-015-023.

We reviewed the DEIR and its technical appendices with the assistance of air quality and public health expert James Clark, Ph.D.[1] The City must separately respond to these technical comments.

[1] Dr. Clark's technical comments and curricula vitae are attached hereto as **Exhibit A** ("Clark Comments")

Based upon our preliminary review of the DEIR and supporting documentation, we conclude that the DEIR fails to comply with the requirements of the California Environmental Quality Act ("CEQA").[2] The DEIR fails to adequately analyze the Project's cumulative health risk and air quality impacts in light of the community's existing pollution burden resulting from similar warehouse projects. The DEIR fails to adopt binding mitigation for the Project's potentially significant emissions of volatile organic compounds. The DEIR underestimates the Project's emissions of criteria air pollutants, toxic air contaminants ("TACs"), and greenhouse gases ("GHGs") by failing to analyze reasonably foreseeable backup generator emissions. The DEIR fails to adequately analyze and mitigate health risks from disturbance of arsenic-contaminated soils, which would result in potentially significant health risk impacts on construction workers and future Project occupants. The DEIR fails to analyze impacts associated with construction of infrastructure improvements. The DEIR's analysis of construction noise impacts fails to consider the increase over ambient noise levels. As a result of its shortcomings, the DEIR lacks substantial evidence to support its conclusions, violates CEQA's analytical requirements, and fails to properly mitigate the Project's significant environmental impacts. 10.2

CREED LA urges the City to remedy the deficiencies in the DEIR by preparing a legally adequate revised DEIR and recirculating it for public review and comment.[3] CREED LA reserves the right to provide supplemental comments at any and all later proceedings related to this Project.[4]

I. STATEMENT OF INTEREST

CREED LA is an unincorporated association of individuals and labor organizations formed to ensure that the construction of major urban projects in the Los Angeles region proceeds in a manner that minimizes public and worker health and safety risks, avoids or mitigates environmental and public service impacts, and fosters long-term sustainable construction and development opportunities. The association includes Long Beach residents Richard Smith, Alejandro Palma, Reza Jenab, the Sheet Metal Workers Local 105, International Brotherhood of Electrical Workers Local 11, Southern California Pipe Trades District Council 16, and District 10.3

[2] PRC § 21100 et seq.
[3] We reserve the right to supplement these comments at later hearings on this Project. Gov. Code § 65009(b); Public Resources 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.
[4] Gov. Code § 65009(b); PRC § 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.

Council of Iron Workers of the State of California, along with their members, their families, and other individuals who live and work in the City of Long Beach.

Individual members of CREED LA live in the City of Long Beach, and work, recreate, and raise their families in the City and surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health, and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist on site.

CREED LA has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making the area less desirable for new businesses and new residents. Continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities. 10.3 cont.

CREED LA supports the development of commercial, mixed use, and medical office projects where properly analyzed and carefully planned to minimize impacts on public health, climate change, and the environment. These projects should avoid adverse impacts to air quality, public health, climate change, noise, and traffic, and must incorporate all feasible mitigation to ensure that any remaining adverse impacts are reduced to the maximum extent feasible. Only by maintaining the highest standards can commercial development truly be sustainable.

II. LEGAL BACKGROUND

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an EIR.[5] "The foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."[6] 10.4

CEQA has two primary purposes. First, CEQA is designed to inform decisionmakers and the public about the potential significant environmental effects

[5] PRC § 21100.
[6] *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal ("Laurel Heights I")* (1988) 47 Cal.3d 376, 390 (internal quotations omitted).

of a project.[7] "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.'"[8] 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."[9] As the CEQA Guidelines explain, "[t]he EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected."[10]

Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring consideration of environmentally superior alternatives and adoption of all feasible mitigation measures.[11] 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."[12] 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" to the greatest extent feasible and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns."[13] 10.4 cont.

While 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."[14] As the courts have explained, a prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decision-making and informed public participation, thereby

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[7] Pub. Resources Code § 21061; CEQA Guidelines §§ 15002(a)(1); 15003(b)-(e); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 517 ("[T]he basic purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect [that] a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.").
[8] *Citizens of Goleta Valley,* 52 Cal.3d at p. 564 (quoting *Laurel Heights I*, 47 Cal.3d at 392).
[9] *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; *see also Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354 ("*Berkeley Jets*") (purpose of EIR is to inform the public and officials of environmental consequences of their decisions *before* they are made).
[10] CEQA Guidelines § 15003(b).
[11] CEQA Guidelines § 15002(a)(2), (3); *see also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at p. 564.
[12] CEQA Guidelines § 15002(a)(2).
[13] PRC § 21081(a)(3), (b); CEQA Guidelines §§ 15090(a), 15091(a), 15092(b)(2)(A), (B); *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883.
[14] *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (emphasis added) (quoting *Laurel Heights I*, 47 Cal.3d at 391, 409, fn. 12).

thwarting the statutory goals of the EIR process."[15] "The ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail 'to enable who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'"[16]

10.4 cont.

III. THE DEIR FAILS TO ADEQUATELY ESTABLISH THE EXISTING BASELINE

CEQA requires that a lead agency include a description of the physical environmental conditions in the vicinity of the Project as they exist at the time environmental review commences.[17] As numerous courts have held, the impacts of a project must be measured against the "real conditions on the ground."[18] The description of the environmental setting constitutes the baseline physical conditions by which a lead agency may assess the significance of a project's impacts.[19] Use of the proper baseline is critical to a meaningful assessment of a project's environmental impacts.[20] An agency's failure to adequately describe the existing setting contravenes the fundamental purpose of the environmental review process, which is to determine whether there is a potentially substantial, adverse change compared to the existing setting.

10.5

Baseline information on which a lead agency relies must be supported by substantial evidence.[21] The CEQA Guidelines define "substantial evidence" as "enough relevant information and reasonable inferences from this information that

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[15] *Berkeley Jets*, 91 Cal.App.4th at p. 1355; *see also San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 (error is prejudicial if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process); *Galante Vineyards*, 60 Cal.App.4th at p. 1117 (decision to approve a project is a nullity if based upon an EIR that does not provide decision-makers and the public with information about the project as required by CEQA); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946 (prejudicial abuse of discretion results where agency fails to comply with information disclosure provisions of CEQA).

[16] *Sierra Club,* 6 Cal.5th at p. 516 (quoting *Laurel Heights I*, 47 Cal.3d at 405).

[17] CEQA Guidelines, § 15125, subd. (a).

[18] *Save Our Peninsula Com. v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121-22; *City of Carmel-by-the Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 246.

[19] CEQA Guidelines, § 15125, subd. (a).

[20] *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Ca.4th 310, 320.

[21] *CBE v. SCAQMD, supra,* 48 Ca.4th at 321 (stating "an agency enjoys the discretion to decide […] exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence"); *see Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

a fair argument can be made to support a conclusion."[22] "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts ... [U]nsubstantiated opinion or narrative [and] evidence which is clearly inaccurate or erroneous ... is not substantial evidence."[23]

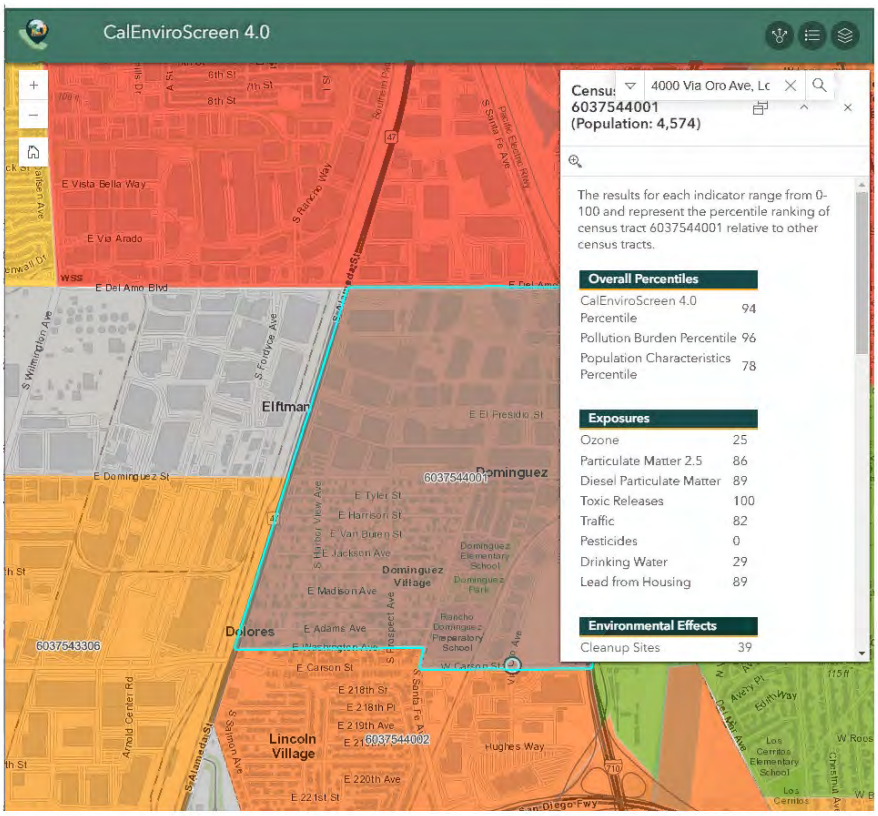
10.5 cont.

1. The DEIR Fails to Disclose the Community's High Existing Pollution Burden

The DEIR fails to disclose that the residential neighborhoods near the Project Site are designated as Senate Bill (SB) 535 Disadvantaged Communities.[24] The DEIR also fails to disclose that the communities in the vicinity of the Project site are within the top 4% of communities in the State of California impacted by pollution, according to the Office of Environmental Health and Hazard Assessment's ("OEHHA's") California Communities Environmental Health Screening Tool. As shown in figure below, the Project Site is in the top 11% of communities in the State of California impacted by diesel particulate matter ("DPM"), known to the State of California to be a human carcinogen.[25]

10.6

[22] CEQA Guidelines §15384.
[23] Pub. Resources Code § 21082.2(c).
[24] Clark Comments, pg. 3.
[25] Clark Comments, pg. 4.



Dr. Clark explains that increasing the emissions of DPM and other TACs within the community via the construction and operation of the Project will increase the pollution burden on the community.[26]

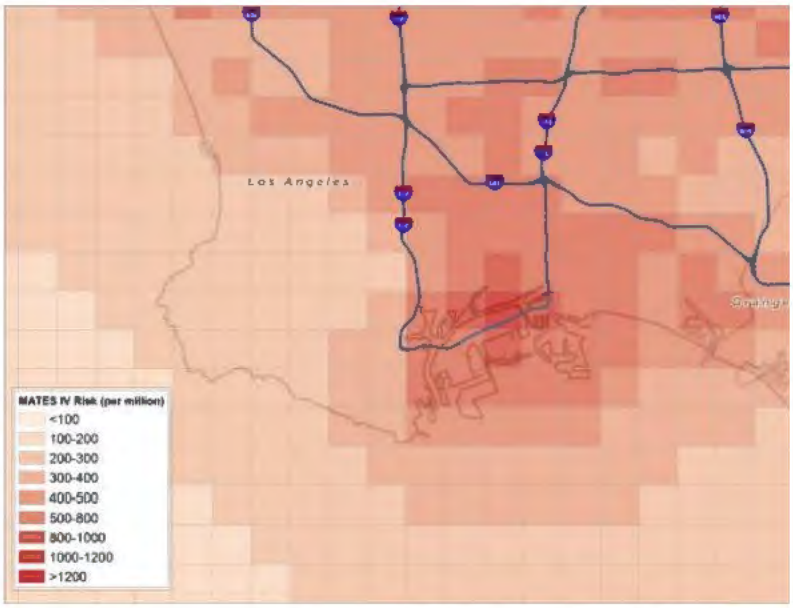
The DEIR also fails to disclose that this Project is located near communities with a high pollution burden resulting from emissions associated with the Ports of Long Beach and Los Angeles ("Ports"). The San Pedro Bay Ports Clean Air Action Plan ("CAAP") states that residents nearest the Ports face higher pollution-related health risks than the rest of the Southern California population.[27]

10.6 cont.

[26] *Id.*

[27] San Pedro Bay Ports Clean Air Action Plan (November 2017), pg. 20, 21, available at https://kentico.portoflosangeles.org/getmedia/9d371f7b-9812-4c75-bcfd-23e83a191435/CAAP_2017_Draft_Document-Final.

Figure 2: Ports Area Simulated Air Toxic Cancer Risk, MATES IV, 2012



The CAAP explains that a major source of this pollution is goods movement-related sources like diesel truck trips made to and from the Ports.[28] The CAAP explains that health consequences of this pollution include heightened rates of asthma and Chronic Obstructive Pulmonary Disease.[29]

10.6 cont.

In *Bakersfield Citizens for Local Control v. City of Bakersfield*, the court found that the EIR's description of health risks were insufficient and that after reading them, "the public would have no idea of the health consequences that result when more pollutants are added to a nonattainment basin."[30] Likewise, in *Sierra Club v. County of Fresno*,[31] the California Supreme Court held that the EIR's discussion of health impacts associated with exposure to the named pollutants was too general and the failure of the EIR to indicate the concentrations at which each pollutant would trigger the identified symptoms rendered the report inadequate.[32] Some connection between air quality impacts and their direct, adverse effects on human health must be made. As the Court explained, "a sufficient discussion of significant impacts requires not merely a determination of whether an impact is

10.7

[28] *Id.* at 22, 33.
[29] *Id.* at 21.
[30] *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1220.
[31] *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502
[32] *Sierra Club*, at 521.

significant, but some effort to explain the nature and magnitude of the impact."[33] CEQA mandates discussion, supported by substantial evidence, of the nature and magnitude of impacts of air pollution on public health.[34]

Here, the DEIR fails to disclose the necessary information for the public and decisionmakers to understand that this Project would be increasing the pollution burden on a disadvantaged community already experiencing health impacts from the same pollutants that would be emitted by the Project. The DEIR discloses that the Project region is out of attainment for the federal and State one-hour and eight-hour ozone standards, State PM10 standards, federal 24-hour PM2.5 standard, and federal and State annual PM2.5 standard, but fails to disclose the magnitude of the resultant health risk impacts on nearby communities.[35] The DEIR also fails to disclose the Project's contribution to pollution resulting from Port-related industrial activities. This Project would generate truck trips to and from the Ports of Long Beach and Los Angeles,[36] and would combine with existing and proposed Port-related warehouses to increase the existing pollution burden on nearby communities. In sum, the DEIR fails to adequately disclose the baseline health risk impacts currently experienced by communities near the Project site and fails to analyze the cumulative health risk impacts of the Project. The DEIR must be revised to disclose this information.

10.7 cont.

10.8

IV. THE DEIR FAILS TO DISCLOSE, ANALYZE AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS

An EIR must fully disclose all potentially significant impacts of a Project and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.[37] An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.[38]

10.9

Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not 'uncritically rely on every study or analysis presented by a project proponent in

[33] *Id.* at 519, citing *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 514–515.
[34] *Sierra Club*, 6 Cal.5th at 518–522.
[35] DEIR, pg. 4.1-24.
[36] DEIR, ES-3.
[37] CEQA Guidelines § 15064(b).
[38] *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.'"[39]

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.[40] Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.[41] In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."[42] 10.9 cont.

Additionally, CEQA requires agencies to commit to all feasible mitigation measures to reduce significant environmental impacts.[43] In particular, the lead agency may not make required CEQA findings, including finding that a project impact is significant and unavoidable, unless the administrative record demonstrates that it has adopted all feasible mitigation to reduce significant environmental impacts to the greatest extent feasible.[44] 10.10

A. The DEIR Fails to Adequately Analyze and Mitigate Potentially Significant Air Quality Impacts

1. The DEIR Fails to Disclose and Mitigate Potentially Significant Construction-Related VOC Emissions

The DEIR states that a significant impact would occur if the Project's construction activities would emit 75 lbs/day of volatile organic compounds ("VOCs"). [45] Table 4.1-6 shows that emissions would be 74.8 lbs/day – barely below the 75 lbs/day threshold.[46] The DEIR states that impacts would thus be less than significant: 10.11

[39] *Berkeley Jets*, 91 Cal.App.4th at 1355.
[40] *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.
[41] *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.
[42] *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.
[43] CEQA Guidelines § 15002(a)(2).
[44] PRC § 21081(a)(3), (b); CEQA Guidelines §§ 15090, 15091; *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883.
[45] DEIR, pg. 4.1-20.
[46] *Id.*

> As shown therein, construction-related emissions would not exceed SCAQMD thresholds. Because ***it is assumed*** that the architectural coating phase duration would be at least 38 or more constructions days, which would avoid exceeding SCAQMD VOC regional thresholds, use of low VOC coating is encouraged to reduce VOC emissions but is not required.

As explained in the excerpt above, the DEIR assumes a 38-day architectural coating phase, without providing any discussion, evidence, or binding conditions ensuring that architectural coating application would actually be limited to 38 days. The DEIR then relies on this unsupported assumption to conclude that the Project's VOC emissions would just barely scrape below the significance threshold, rather than reflecting a longer architectural coating phase more typical for a structure of this size or providing mitigation measures that would be imposed if VOC emissions reach the 75 lbs/day threshold.. The DEIR's conclusion that VOC impacts are less than significant is therefore unsupported, and its analysis improperly compresses discussion of the Project's impacts and mitigation measures by assuming a limited duration for the coating phase that is not set forth in any binding requirement. 10.11 cont.

In *Lotus v. Department of Transportation*,[47] the court addressed the adequacy of an EIR analyzing proposed highway construction adjacent to old-growth redwood trees.[48] The EIR concluded that the construction would not result in a significant effect on the environment, assuming that the project would be conditioned to require actions such as restorative planting, removal of invasive plants, and the use of an arborist and specialized equipment.[49] The court held that the EIR's "avoidance, minimization and/or mitigation measures," are not "part of the project," but are de facto mitigation measures.[50] "By compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA."[51]

Here, the DEIR concludes that no significant impacts would result due to the imposition of a 38-day or more architectural coating phase. This 38-day duration is not a Project design feature, is not required by any binding mitigation measure, and appears to be assumed solely for the purpose of avoiding a significant air quality impact. The DEIR fails to support its reliance on a 38-day architectural coating phase and fails to quantify projected VOC emissions if the coating phase exceeds 38 days. The DEIR also fails to disclose that the Project may have significant VOC

[47] 223 Cal.App.4th 645,
[48] *Id.* at 647–648.
[49] *Id.* at 648–649.
[50] *Id.* at 656.
[51] *Id.*

emissions without a 38-day limit on architectural coatings. The DEIR thus improperly compresses its analysis of the Project's VOC impacts and potential (non binding) mitigation into a single unsupported determination.

The DEIR must be revised and recirculated to disclose the Project's potentially significant VOC impact, and separately identify mitigation that would reduce the impact to a less-than-significant level if the 75 lbs/day threshold is exceeded. The mitigation measure must be binding and included in the Project's mitigation monitoring and reporting program.

10.11 cont.

2. The DEIR Fails to Analyze Operational Emissions from Backup Generators

The DEIR underestimates the Project's operational emissions of criteria pollutants and TACs. The DEIR fails to disclose whether the Project would include backup generators,[52] and fails to account for generator emissions in its air quality calculations.[53] Generators can emit criteria air pollutants, greenhouse gases, and toxic air contaminants. Backup generators commonly rely on fuels such as natural gas or diesel,[54] and thus can significantly impact public health through DPM emissions.[55] Diesel back-up generators also emit significant amounts of Nitrogen Oxides ("NOx"), sulfur dioxides ("SO2"), particulate matter ("PM10"), carbon dioxide

10.12

[52] DEIR, pg. 3-14.
[53] Clark Comments, pg. 5.
[54] SCAQMD, Fact Sheet on Emergency Backup Generators, http://www.aqmd.gov/home/permits/emergency-generators ("Most of the existing emergency backup generators use diesel as fuel").
[55] California Air Resources Board, Emission Impact: Additional Generator Usage Associated with Power Outage (January 30, 2020), available at https://ww2.arb.ca.gov/resources/documents/emissions-impact-generator-usage-during-psps (showing that generators commonly rely on gasoline or diesel, and that use of generators during power outages results in excess emissions); California Air Resources Board, Use of Back-up Engines for Electricity Generation During Public Safety Power Shutoff Events (October 25, 2019), available at https://ww2.arb.ca.gov/resources/documents/use-back-engines-electricity-generation-during-public-safety-power-shutoff ("When electric utilities de-energize their electric lines, the demand for back-up power increases. This demand for reliable back-up power has health impacts of its own. Of particular concern are health effects related to emissions from diesel back-up engines. 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 (air districts)").

("CO2"), carbon monoxide ("CO"), and volatile organic compounds ("VOC").[56] Dr. Clark explains that omission of a generator system results in an underestimation of the Project's air quality, greenhouse gas, and health risk impacts.[57]

Backup generator emissions must be analyzed because they are a reasonably foreseeable consequence of the Project due to increasingly common Public Safety Power Shutoff ("PSPS") events and extreme heat events. Extreme heat events ("EHE") are defined as periods where in the temperatures throughout California exceed 100 degrees Fahrenheit.[58] From January 2019 through December 2019, Southern California Edison reported 158 of their circuits underwent a PSP event.[59] In Los Angeles County, two circuits had 4 PSPS events during that period, lasting an average of 35 to 38 hours. The total duration of the PSPS events lasted between 141 hours to 154 hours in 2019. According to the California Public Utilities Commission (CPUC) de-energization report[60] in October 2019, there were almost 806 PSPS events that impacted almost 973,000 customers (~7.5% of households in California) of which ~854,000 of them were residential customers. The California Air Resources Board estimates that with 973,000 customers impacted by PSPS events in October 2019, approximately 125,000 back-up generators were used by customers to provide electricity during power outages.[61] The widespread use of back-up generators to adapt to PSPS and EHE events suggests that back-up generators are a reasonably foreseeable consequence of the Project.

10.12 cont.

The DEIR must be revised to account for this source of emissions.

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[56] University of California, Riverside Bourns College of Engineering—Center for Environmental Research and Technology, Air Quality Implications Of Backup Generators In California, (March 2005), pg. 8, available at https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=84c8463118e4813a117db3d768151a8622c4bf6b; South Coast AQMD, Fact Sheet on Emergency Backup Generators ("Emissions of Nitrogen Oxides (NOx) from diesel-fired emergency engines are 200 to 600 times greater, per unit of electricity produced, than new or controlled existing central power plants fired on natural gas. Diesel-fired engines also produce significantly greater amounts of fine particulates and toxics emissions compared to natural gas fired equipment."), available at http://www.aqmd.gov/home/permits/emergency-generators#Fact2.

[57] Clark Comments, pg. 5.

[58] Governor of California. 2021. Proclamation of a state of emergency. June 17, 2021.

[59] SCAQMD. 2020. Proposed Amendment To Rules (PARS) 1110.2, 1470, and 1472. Dated December 10, 2020. http://www.aqmd.gov/docs/default-source/rule-book/Proposed-Rules/1110.2/1110-2_1470_1472/par1110-2_1470_wgm_121020.pdf?sfvrsn=6.

[60] https://www.cpuc.ca.gov/deenergization/ as cited in CARB, 2020. Potential Emission Impact of Public Safety Power Shutoff (PSPS), Emission Impact: Additional Generator Usage associated With Power Outage..

[61] California Air Resources Board, Emission Impact: Additional Generator Usage Associated with Power Outage (January 30, 2020), available at https://ww2.arb.ca.gov/resources/documents/emissions-impact-generator-usage-during-psps.

3. The DEIR's Analysis of Operational Emissions Fails to Account for Use of Cargo Handling Equipment Onsite.

Dr. Clark reviewed the DEIR's operational air quality analysis and observes that it does not reflect emissions from onsite service vehicles that may be used to move products between the warehouse area and the loading bays.[62] Dr. Clark explains that cargo handling equipment (e.g., forklifts, yard goats, and pallet jacks), may include diesel powered, compressed natural gas powered, and gasoline powered equipment emitting criteria air pollutants, TACs, and/or GHGs. The air quality study thus underestimates the Project's operational emissions. These sources of emissions must be included in a revised DEIR. 10.13

B. The DEIR Fails to Adequately Disclose, Analyze and Mitigate the Project's Cumulative Impacts

An EIR must evaluate a cumulative impact if the project's incremental effect combined with the effects of other projects is "cumulatively considerable."[63] This determination is based on an assessment of the project's incremental impacts "viewed in connection with the effects of past project, the effects of other current projects, and the effects of probable future projects."[64] Proper cumulative impact analysis is vital because "the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact."[65] 10.14

1. The DEIR's Cumulative Air Emissions Analysis Does Not Comply with CEQA or Attorney General Warehouse Guidance

The DEIR fails to adequately analyze the significance of the Project's cumulative air quality emissions. The DEIR asserts that, under South Coast Air Quality Management District ("SCAQMD") guidance, any exceedance of a regional or localized threshold for criteria pollutants also is considered to be a cumulatively-considerable effect, while air pollutant emissions that fall below applicable regional

[62] Clark Comments, pg. 9.
[63] CEQA Guidelines § 15130(a).
[64] *Id.,* §§ 15065(a)(3), 15355(b).
[65] *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 114.

and/or localized thresholds are not considered cumulatively-considerable.[66] The DEIR's analysis of cumulative health risks is flawed for the same reason as the air quality analysis. The DEIR provides that projects' health risk impacts that exceed the project-specific significance thresholds are considered by the SCAQMD to be cumulatively considerable, and vice versa.[67] This approach is inadequate because it fails to analyze the Project's cumulative effects with the existing and proposed warehouses surrounding the Project site.

The DEIR's approach has been rejected by the courts for failing to comply with CEQA's requirement that a project mitigate impacts that are "cumulatively considerable."[68] The leading case on this issue is *Kings County Farm Bureau v. City of Hanford*.[69] In *Kings County*, the city prepared an EIR for a 26.4-megawatt coal-fired cogeneration plant. Notwithstanding the fact that the EIR found that the project region was out of attainment for PM_{10} and ozone, the city failed to incorporate mitigation for the project's cumulative air quality impacts from project emissions because it concluded that the Project would contribute "less than one percent of area emissions for all criteria pollutants."[70] The city reasoned that, because the project's air emissions were small in ratio to existing air quality problems, that this necessarily rendered the project's "incremental contribution" minimal under CEQA. The court rejected this approach, finding it "contrary to the intent of CEQA." The court stated:

10.14 cont.

> We find the analysis used in the EIR and urged by GWF avoids analyzing the severity of the problem and allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling. Under GWF's "ratio" theory, the greater the over-all problem, the less significance a project has in a cumulative impacts analysis. We conclude the standard for a cumulative impacts analysis is defined by the use of the term "collectively significant" in Guidelines section 15355 and the analysis must assess the collective or combined effect of energy development. The EIR improperly focused upon the individual project's relative effects and omitted facts relevant to an analysis of

[66] DEIR, pg. 4.1-24.
[67] *Id.*
[68] PRC § 21083(b)(2); 14 CCR § 15130; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 719-21.
[69] *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692 ("Kings County"); *see also, Friends of Oroville v. City of Oroville* (2013) 219 Cal. App. 4th 832, 841-42.
[70] *Kings County, supra,* at 719.

> the collective effect this and other sources will have upon air quality.[71]

Here, the DEIR's analysis is flawed because while the DEIR admits that the Project region is out of attainment for the federal and State one-hour and eight-hour ozone standards, State PM10 standards, federal 24-hour PM2.5 standard, and federal and State annual PM2.5 standard,[72] the City reasons that cumulative impacts would be less than significant based on a project-specific threshold. Given that there are multiple existing and proposed warehouses in the vicinity of the proposed Project site, as well as the proliferation of warehouse projects in Long Beach and other areas near the ports, the DEIR is inadequate in its analysis of the Project's potentially significant cumulative air quality impacts.

10.14 cont.

In *People of the State of California v. City of Fontana,* the Attorney General's petition for writ of mandate challenged a Mitigated Negative Declaration ("MND") that erroneously applied SCAQMD guidance in the same way as the instant EIR.[73] The petition explained:

> [T]he MND's cumulative air quality impact analysis does not account for—or even acknowledge—the multitude of other warehouses near the Project. Rather than consider the environmental setting within which the Project will be situated, the MND simply states that the Project will not result in a cumulatively considerable increase in emissions because the Project's individual air quality impacts will be less than significant. The MND even applies this reasoning to its analysis of health impacts from localized emissions, despite making no attempt to determine or disclose the severity of the existing health impacts from localized emissions in the community.[74]

The Attorney General further explained that merely citing to SCAQMD guidance does not justify a failure to analyze a Project's cumulative impacts:

> The MND cites Appendix D of an August 2003 white paper published by the South Coast Air Quality Management District ("SCAQMD") entitled "White Paper on Potential Control Strategies to Address Cumulative Impacts from

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[71] *Id.* at 721.
[72] DEIR, pg. 4.1-24.
[73] *People of the State of California v. City of Fontana,* Case No. CIVSB2121829, Petition for Writ of Mandate, available at https://climatecasechart.com/wp-content/uploads/case-documents/2021/20210723_docket-CIVSB2121829_petition-for-writ-of-mandate.pdf.
[74] *People of the State of California v. City of Fontana,* Case No. CIVSB2121829, Petition for Writ of Mandate, pg. 9, paragraph 32, available at https://climatecasechart.com/wp-content/uploads/case-documents/2021/20210723_docket-CIVSB2121829_petition-for-writ-of-mandate.pdf.

> Air Pollution" ("2003 SCAQMD White Paper"). **To the extent that the 2003 SCAQMD White Paper asserts that any project with less than significant individual air quality impacts also necessarily has less than significant cumulative air quality impacts, it is inconsistent with CEQA** for at least the reasons stated above. Moreover, the 2003 SCAQMD White Paper lacks substantial evidence to support such a contention, and thus the MND's reliance on it violates CEQA. (Cal. Code Regs., tit. 14, § 15064.7, subd. (c).) The MND further violated CEQA by failing to provide substantial evidence to support its reliance on the 2003 SCAQMD White Paper, Appendix D as "guidance." (Ibid.) Finally, even if the MND's reliance on the 2003 SCAQMD White Paper were proper and supported by substantial evidence, the MND did not consider other evidence—such as public comments and the existence of many other sources of pollution near the Project site—showing that the Project could have a significant cumulative air quality impact. (See Cal. Code Regs., tit. 14, § 15064, subd. (b).) [emphasis added][75]

10.14 cont.

The Attorney General's litigation resulted in a settlement which requires compliance with an ordinance adopted on April 12, 2022 that establishes sustainability standards for warehouses in Fontana, including standards intended to address cumulative air quality impacts. For example, the standards include requirements that rooftop solar panels supply 100% of power for non-refrigerated portions of facilities with buildings over 400,000 square feet, trees in automobile parking areas, zero emission motorized operational equipment, other equipment electrification requirements, and solar-ready buildings roofs.[76] The City of Fontana's decision to suspend its erroneous reliance on SCAQMD's drop-in-the-bucket approach and to address the cumulative impacts of warehouse projects in the City as a component of its settlement with the Attorney General's office reflects an approach consistent with CEQA. The Fontana settlement also demonstrates that there are feasible mitigation available to reduce cumulative air quality impacts from warehouse projects, in compliance with CEQA.

In addition to violating CEQA, the SCAQMD approach used in the DEIR also directly conflicts with the recent Attorney General guidance document setting forth best practices for evaluating the environmental impacts of warehouse projects like

[75] *People of the State of California v. City of Fontana,* Case No. CIVSB2121829, Petition for Writ of Mandate, pg. 13, paragraph 49.
[76] *Id.*, Stipulation For Entry Of Final Judgment On Consent, available at https://climatecasechart.com/wp-content/uploads/case-documents/2022/20220414_docket-CIVSB2121605-CIVSB2121829_stipulation.pdf.

this one under CEQA.[77] With respect to cumulative air quality and GHG emissions analysis, the Attorney General's guidance states that best practices include "[w]hen analyzing cumulative impacts, thoroughly considering the project's incremental impact in combination with past, present, and reasonably foreseeable future projects, *even if the project's individual impacts alone do not exceed the applicable significance threshold* [emphasis added]."[78] 10.14 cont.

The DEIR also fails to note that SCAQMD's cumulative impacts significance thresholds, adopted in 2003, are being revised to reflect current conditions.[79] The updates are statedly being prepared in response to recent CEQA cases such as *People of the State of California v. City of Fontana*.[80] The updated cumulative impacts significance thresholds will reflect projects' existing background MATES cancer risk and additional criteria such as whether the project would generate a high volume of diesel-fueled trucks.[81] 10.15

In sum, the DEIR's cumulative air quality impacts analysis does not comply with CEQA. The City must prepare a revised EIR that properly evaluates and mitigates such impacts.

C. The DEIR Fails to Adequately Analyze and Mitigate Health Risks from Disturbance of Contaminated Soils

The DEIR's Phase II ESA states that arsenic was detected at concentrations above the construction worker Environmental Screening Level ("ESL") of 0.98 milligram per kilogram [mg/kg) and commercial ESL of 0.31 mg/kg in soil at the Project site.[82] The DEIR states that because these arsenic concentrations are consistent with background concentrations of arsenic in California, impacts would be less than significant and no mitigation would be required.[83] This conclusion fails 10.16

[77] *Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act* (Updated September 2022), available at https://oag.ca.gov/system/files/media/warehouse-best-practices.pdf .
[78] *Id.*, pg. 7.
[79] See e.g., http://www.aqmd.gov/docs/default-source/ceqa/documents/wgm-3_20230124.pdf?sfvrsn=6.
[80] San Bernardino Superior Court, Case No. CIVSB2121829; SCAQMD Working Group Meeting # 4, Cumulative Impacts from Air Toxics for CEQA Projects (June 6, 2023) pg. 6;
[81] SCAQMD Working Group Meeting # 4, Cumulative Impacts from Air Toxics for CEQA Projects (June 6, 2023) https://www.aqmd.gov/docs/default-source/ceqa/documents/wgm-4_20230602_final.pdf?sfvrsn=16; SCAQMD Working Group Meeting #5, Cumulative Impacts from Air Toxics for CEQA Projects (March 20, 2024) https://www.aqmd.gov/docs/default-source/ceqa/documents/wgm-5-20240320-final.pdf?sfvrsn=20.
[82] DEIR, Appendix L, pg. 3.
[83] *Id.*; DEIR, pg. 4.7-16.

to meet CEQA's requirements to analyze and mitigate health impacts from human exposure to toxic substances, which apply regardless of the origin of the substances.

In *Cal. Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.*,[84] the California Supreme Court held that the disturbance of contaminated soil is a potentially significant impact which requires disclosure and analysis of health and safety impacts in an EIR.[85] The Court explained that "when a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users."[86] In *ACE v. Yosemite*, the court held that an EIR must disclose, analyze, and cleanup existing lead contamination on a site from an old shooting range because lead contamination could spread at the removal site as well as the site receiving the salvageable portions.[87]

And in *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* ("*Berkeley Jets*"), the Court of Appeal held that a CEQA document must analyze the impacts from human exposure to toxic substances.[88] In that case, the Port of Oakland approved a development plan for the Oakland International Airport.[89] The EIR admitted that the Project would result in an increase in the release of TACs and adopted mitigation measures to reduce TAC emissions, but failed to quantify the severity of the Project's impacts on human health.[90] The Court held that mitigation alone was insufficient, and that the Port had a duty to analyze the health risks associated with exposure to TACs.[91] As the CEQA Guidelines explain, "[t]he EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected."[92]

10.16 cont.

Here, the City's argument that no mitigation is required because arsenic levels are consistent with background levels ignores that the Project's activities would expose people to arsenic concentrations in excess of the risk-based screening levels. As in *Cal. Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist*, the Project's construction would disturb contaminated soil, resulting in potential health impacts on workers or neighbors who will breathe in contaminated dust or

[84] (2015) 62 Cal.4th 369.
[85] 62 Cal.4th at 388-90; 14 CCR § 15126.2(a).
[86] 62 Cal.4th at 377.
[87] *Association For A Cleaner Environment v. Yosemite Comm. College Dist.* (2004) 116 Cal.App.4th 629, 640 ("*ACE v. Yosemite*")
[88] 91 Cal.App.4th at 1369–1371.
[89] *Id.* at 1349–1350.
[90] *Id.* at 1364–1371.
[91] *Id.*
[92] 14 C.C.R. § 15003(b).

otherwise be exposed to contaminated soil that would previously have been encased underground. Even if arsenic concentrations at the Project site do not exceed background levels, the Project's disturbance of the arsenic would result in health impacts. A determination that arsenic levels do not exceed background levels does not mean that the exceedance of ESLs would not result in health risks – the arsenic ESLs were established with the understanding that background and ambient arsenic levels are known to often exceed the risk-based screening levels.[93]

10.16 cont.

CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.[94] Here, despite arsenic levels exceeding worker and commercial health risk thresholds, no mitigation for workers or future occupants is provided. This could result in direct exposure to on-site workers and offsite receptors to unhealthful levels of arsenic. A revised DEIR must be prepared that discloses, analyzes and mitigates health impacts from human exposure to arsenic on the Project site.

1. Substantial Evidence Shows that Arsenic Concentrations on the Project Site Exceed Background Concentrations

The DEIR's claim that arsenic concentrations on the Project site are consistent with background arsenic levels is not supported by substantial evidence. The DEIR claims that arsenic concentrations on the Project site are consistent with background levels reported in the Kearny Foundation Special Report on Background Concentrations of Trace and Major Elements in California Soils.[95] The levels documented in the report ranged from 0.6 mg/kg to 11 mg/kg.[96] Dr. Clark's comments discuss authority showing how to correctly compare site-specific arsenic concentrations to background levels. DTSC guidance provides that the 95 percent

10.17

[93] California Department of Toxic Substances Control, Determination of a Southern California Regional Background Arsenic Concentration in Soil, https://www.sandiegocounty.gov/content/dam/sdc/pds/ceqa/Bagley-Major-Grading-Plan-Change/Determination-of-Background-Arsenic.pdf ("Arsenic is especially problematic since the risk-based soil concentration is 100-times below typical ambient concentrations."); DTSC (December 28, 2020), Human Health Risk Assessment (HHRA) Note Number 11 – Southern California Ambient Arsenic Screening Level, available at https://dtsc.ca.gov/wp-content/uploads/sites/31/2018/01/Background-Arsenic.pdf ("Background and ambient concentrations of some inorganic elements can exceed risk-based concentrations. This includes arsenic, where background as well as ambient concentrations exceed the risk-based soil concentration of 0.11 mg/kg").

[94] CEQA Guidelines, § 15002, subd. (a)(2)-(3); *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.,* 91 Cal.App.4th at 1354.

[95] DEIR, Appendix L, pg. 3.

[96] Clark Comments, pg. 6.

upper confidence limit ("UCL") of the arithmetic mean of project-specific arsenic concentrations should be compared to the 95% UCL of background levels.:

> Southern California site-specific soil concentrations which exceed 12 mg/kg may be indicative of releases of arsenic. Comparison of a site-specific 95% UCL of the mean to the 12 mg/kg upper bound concentration are statistically incorrect. The comparison, or statistical test, of site-specific 95% UCL of the mean should be to the southern California 95%UCL of the mean arsenic soil concentration of 3.1 mg/kg.[97]

10.17 cont.

This guidance suggests that although exceedance of the upper bound concentration may be indicative of releases of arsenic, the site-specific 95% UCL of the mean should be compared to the southern California 95% UCL of the mean arsenic soil concentration of 3.1 mg/kg.

Dr. Clark's analysis of the data shows that the 95% UCL for arsenic across the site is 7.091 mg/kg.[98] This level of arsenic exceeds the background concentration level of 3.1 mg/kg for arsenic. Thus, exposure to arsenic caused by disturbance of soils by the Project is a significant impact.[99] The DEIR must be revised and recirculated to analyze and mitigate this impact.

D. Substantial Evidence Demonstrates that the Project May Result in Potentially Significant Public Utilities Impacts

10.18

Under CEQA, a public utilities impact is considered significant if a project would "[r]equire or result in the relocation or construction of new or expanded water, wastewater treatment or storm water drainage, electric power, natural gas, or telecommunications facilities the construction or relocation of which could cause significant environmental effects."[100] The DEIR states that development of the proposed project may require installation of water connections, hydrants, and sewer connections.[101] The DEIR states that construction of these infrastructure

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[97] California Department Of Toxic Substances Control Human And Ecological Risk Office (HERO), Human Health Risk Assessment (HHRA) Note Number 11: Southern California Ambient Arsenic Screening Level (December 28, 2020), pg. 7, available at https://dtsc.ca.gov/wp-content/uploads/sites/31/2018/01/Background-Arsenic.pdf.
[98] Clark Comments, pg. 8.
[99] *Comtys. for a Better Env't v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 110-111; *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960; *CBE v. SCAQMD*, 48 Cal.4th at 327 (impact is significant because exceeds "established significance threshold for NOx … constitute[ing] substantial evidence supporting a fair argument for a significant adverse impact").
[100] DEIR, pg. 4.13-14.
[101] DEIR, pg. 4.13-14.

improvements would not substantially increase the project's disturbance area or otherwise cause significant environmental effects beyond those already identified throughout this EIR.[102]

The DEIR's analysis is not supported by substantial evidence because the DEIR fails to analyze the extent of the required improvements. Without analyzing the extent of improvements required for the Project, the DEIR cannot analyze the environmental effects of constructing these improvements, as is required by the CEQA Guidelines.

For example, the DEIR fails to disclose the fire flow requirements for this Project, whether that fire flow would be met by existing infrastructure, and the environmental impacts resulting from construction of any necessary improvements. This information is necessary to evaluate whether new and upsized water mains are required, or whether new hydrants must be constructed. Construction of improvements to water infrastructure serving the Project site, if needed, would have environmental impacts not analyzed in the DEIR. Construction of water infrastructure upgrades typically require street excavation and subsequent repair to access water mains. Excavation would require demolition, disruption, and removal of portions of the street along the entire length of water main upgrade. This would entail excavation and removal of asphalt, soils, and trench backfill materials. These construction activities may result in significant environmental impacts in several areas, including traffic, noise, vibration, and health risk. Impacts may occur closer to sensitive receptors than analyzed in the DEIR because construction of utilities improvements may occur offsite and potentially closer to sensitive receptors. 10.18 cont.

Because this Project is likely to require construction of utilities improvements, the Project has potentially significant impacts unanalyzed in the DEIR. The DEIR fails as an informational document and fails to support its finding of a less-than-significant impact with substantial evidence. The DEIR must be revised to analyze the potentially significant public utilities impacts.

E. The DEIR's Noise Significance Thresholds Are Unsupported by Substantial Evidence 10.19

[102] DEIR, pg. 4.13-15.

Appendix G of the CEQA Guidelines provides that the Project would cause a significant noise impact if it would result in "[g]eneration of a substantial temporary or permanent increase in ambient noise levels in the vicinity of the project in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies."[103] For this Project, the DEIR provides that construction noise impacts would be less than significant so long as impacts at residential receptors do not exceed 80 dBA, commercial receptors do not exceed 85 dBA, and industrial receptors do not exceed 90 dBA.[104] The DEIR fails to support its reliance on this threshold with substantial evidence.

California courts have clearly held that "the lead agency should consider both the increase in noise level and the absolute noise level associated with a project".[105] The courts have held that reliance on a maximum noise level as the sole threshold of significance for noise impacts violates CEQA because it fails to consider whether the magnitude of changes in noise levels is significant.[106] In *Keep our Mountains Quiet v. County of Santa Clara*,[107] neighbors of a wedding venue sued over the County of Santa Clara's failure to prepare an EIR for a proposed project to allow use permits for wedding and other party events at a residential property abutting an open space preserve. Neighbors and their noise expert contended that previous events at the facility had caused significant noise impacts that reverberated in neighbors' homes and disrupted the use and enjoyment of their property.[108] Similar to the City's construction noise threshold in this case, the County's EIR relied on the noise standards set forth in its noise ordinance as its thresholds for significant noise exposure from the project, deeming any increase to be insignificant so long as the absolute noise level did not exceed those standards.[109] The Court examined a long line of CEQA cases which have uniformly held that conformity with land use regulations is not conclusive of whether or not a project has significant noise impacts[110] in holding that the County's reliance on the project's compliance with

10.19 cont.

[103] DEIR, pg. 4.9-9.
[104] DEIR, pg. 4.9-10, Table 4.9-7.
[105] *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 733; see *King and Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 894 (citing *Keep Our Mountains Quiet*).
[106] *King & Gardiner Farms, LLC,* 45 Cal.App.5th at 865.
[107] *Keep our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714.
[108] *Id*. at 724.
[109] *Id.* at 732.
[110] *Id., citing Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1338; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881–882; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1416 (project's effects can be significant even if "they are not greater than those deemed acceptable in a general plan"); *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350,

noise regulations did not constitute substantial evidence supporting the County's finding of no significant impacts.[111]

In *King and Gardiner Farms, LLC v. County of Kern*,[112] the Court of Appeal cited *Keep our Mountains Quiet* and decisions cited therein when it rejected the use of a single "absolute noise level" threshold of significance (construction and operational noise impacts were only deemed significant if they exceeded 65 dBA CNEL) on the grounds that the sole use of such a threshold fails to consider the magnitude or severity of increases in noise levels attributable to the project in different environments. The Court explained the lead agency failed to "refer to evidence showing why the magnitude of an increase was irrelevant in determining the significance of a change in noise."[113] 10.19 cont.

Here, the DEIR's construction noise threshold violates CEQA's requirement that the lead agency consider both the increase in noise level and the absolute noise level associated with a project. As in *King and Gardiner Farms*, the DEIR's current threshold fails to consider the increase in noise and absolute noise level, without referring to any evidence showing why these metrics are irrelevant in determining the significance of a change in noise. Per *Keep our Mountains Quiet*, conformity with the City's noise ordinance is not conclusive of whether or not a project has significant noise impacts. An EIR must be prepared that applies a legally adequate construction noise threshold.

II. CONCLUSION

For the reasons discussed above, the DEIR for the Project remains wholly inadequate under CEQA. It must be thoroughly revised to provide legally adequate analysis of, and mitigation for, all of the Project's potentially significant impacts. These revisions will necessarily require that the DEIR be recirculated for public review. Until the DEIR has been revised and recirculated, as described herein, the City may not lawfully approve the Project. 10.20 cont.

Thank you for your attention to these comments. Please include them in the record of proceedings for the Project.

354, ("CEQA nowhere calls for evaluation of the impacts of a proposed project on an existing general plan").

[111] *Id.* at 732-734; see also *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 893, as modified on denial of rehearing (Mar. 20, 2020).

[112] *King and Gardiner Farms, LLC, supra,* 45 Cal.App.5th 814.

[113] *Id.* at 894.

Sincerely,

Aidan P. Marshall

Attachment
APM:acp