ATTACHMENT B

August 29, 2016 Appeal by Oakland Residents for Responsible Development

CITY OF OAKLAND
APPEAL FORM
FOR DECISION TO PLANNING COMMISSION, CITY COUNCIL OR HEARING OFFICER

PROJECT INFORMATION

Case No. of Appealed Project: PLN 16-080

Project Address of Appealed Project: 277 27th Street and 300, 302, and 304 24th Street

Assigned Case Planner/City Staff: Peterson Vollmann

APPELLANT INFORMATION:

Printed Name: Christina Caro Phone Number: 650-589-1660

Mailing Address: 601 Gateway Blvd., Suite 1000 Alternate Contact Number: _____

City/Zip Code S. San Francisco, 94080 Representing: Oakland Residents for Responsible Development

Email: ccaro@adamsbroadwell.com

An appeal is hereby submitted on:

☐ **AN ADMINISTRATIVE DECISION (APPEALABLE TO THE CITY PLANNING COMMISSION OR HEARING OFFICER)**

YOU MUST INDICATE ALL THAT APPLY:

- ☐ Approving an application on an Administrative Decision
- ☐ Denying an application for an Administrative Decision
- ☐ Administrative Determination or Interpretation by the Zoning Administrator
- ☐ Other (please specify) _____

Please identify the specific Administrative Decision/Determination Upon Which Your Appeal is Based Pursuant to the Oakland Municipal and Planning Codes listed below:

- ☐ Administrative Determination or Interpretation (OPC Sec. 17.132.020)
- ☐ Determination of General Plan Conformity (OPC Sec. 17.01.080)
- ☐ Design Review (OPC Sec. 17.136.080)
- ☐ Small Project Design Review (OPC Sec. 17.136.130)
- ☐ Minor Conditional Use Permit (OPC Sec. 17.134.060)
- ☐ Minor Variance (OPC Sec. 17.148.060)
- ☐ Tentative Parcel Map (OMC Section 16.304.100)
- ☐ Certain Environmental Determinations (OPC Sec. 17.158.220)
- ☐ Creek Protection Permit (OMC Sec. 13.16.450)
- ☐ Creek Determination (OMC Sec. 13.16.460)
- ☐ City Planner's determination regarding a revocation hearing (OPC Sec. 17.152.080)
- ☐ Hearing Officer's revocation/impose or amend conditions (OPC Sec. 17.152.150 &/or 17.156.160)
- ☐ Other (please specify) _____

(Continued on reverse)

(Continued)

☑ **A DECISION OF THE CITY PLANNING COMMISSION (APPEALABLE TO THE CITY COUNCIL)** ☑ Granting an application to: **OR** ☐ Denying an application to:

YOU MUST INDICATE ALL THAT APPLY:

Pursuant to the Oakland Municipal and Planning Codes listed below:

- ☑ Major Conditional Use Permit (OPC Sec. 17.134.070)
- ☐ Major Variance (OPC Sec. 17.148.070)
- ☑ Design Review (OPC Sec. 17.136.090)
- ☑ Tentative Map (OMC Sec. 16.32.090)
- ☐ Planned Unit Development (OPC Sec. 17.140.070)
- ☐ Environmental Impact Report Certification (OPC Sec. 17.158.220F)
- ☐ Rezoning, Landmark Designation, Development Control Map, Law Change (OPC Sec. 17.144.070)
- ☐ Revocation/impose or amend conditions (OPC Sec. 17.152.160)
- ☐ Revocation of Deemed Approved Status (OPC Sec. 17.156.170)
- ☐ Other (please specify) CEQA Findings, Minor Variance

FOR ANY APPEAL: An appeal in accordance with the sections of the Oakland Municipal and Planning Codes listed above shall state specifically wherein it is claimed there was an error or abuse of discretion by the Zoning Administrator, other administrative decisionmaker or Commission (Advisory Agency) or wherein their/its decision is not supported by substantial evidence in the record, or in the case of Rezoning, Landmark Designation, Development Control Map, or Law Change by the Commission, shall state specifically wherein it is claimed the Commission erred in its decision. The appeal must be accompanied by the required fee pursuant to the City's Master Fee Schedule.

You must raise each and every issue you wish to appeal on this Appeal Form (or attached additional sheets). Failure to raise each and every issue you wish to challenge/appeal on this Appeal Form (or attached additional sheets), and provide supporting documentation along with this Appeal Form, may preclude you from raising such issues during your appeal and/or in court. However, the appeal will be limited to issues and/or evidence presented to the decision-maker prior to the close of the public hearing/comment period on the matter.

The appeal is based on the following: *(Attach additional sheets as needed.)*

Please see attached.

Supporting Evidence or Documents Attached. *(The appellant must submit all supporting evidence along with this Appeal Form;* however, the appeal will be limited evidence presented to the decision-maker prior to the close of the public hearing/comment period on the matter.

(Continued on reverse)

(Continued)

Signature of Appellant or Representative of Appealing Organization

8/26/16

Date

TO BE COMPLETED BY STAFF BASED ON APPEAL TYPE AND APPLICABLE FEE

APPEAL FEE: $_____

Fees are subject to change without prior notice. The fees charged will be those that are in effect at the time of application submittal. All fees are due at submittal of application.

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Oakland, CA 94612

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Klein, Heather

From: Geetika Sengupta <geets414@gmail.com>
Sent: Wednesday, October 12, 2016 2:41 PM
To: Geetika Sengupta
Cc: Scott Gregory; Klein, Heather
Subject: Oak Knoll Development - Comments [Case number ER15-004]

Hello,

My name is Geetika Sengupta and I am writing to express my concerns regarding the proposed Oak Knoll Development. I live off of Keller and we enjoy a peaceful lifestyle that we have considered worth the distance and inconvenience of not having a strong walk score. I am worried about the tremendous traffic and congestion issues that this development will cause and that have not been truly well considered so far in the proposal. I understand the desire to have funds come in from this project but I hope you will consider a much smaller footprint than what is currently planned.

Thank you very much,
Geetika

ADAMS BROADWELL JOSEPH & CARDOZO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037
TEL: (650) 589-1660
FAX: (650) 589-5062
ccaro@adamsbroadwell.com

DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
LAURA E. HORTON
MARC D. JOSEPH
RACHAEL E. KOSS

SACRAMENTO OFFICE
520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721
TEL: (916) 444-6201
FAX: (916) 444-6209

August 26, 2016

VIA EMAIL AND OVERNIGHT MAIL

Oakland Community and Economic Development Agency
Planning and Zoning Division
Attn: Peterson Z. Vollmann, Planner IV
City of Oakland, Bureau of Planning
250 Frank H. Ogawa, Suite 2114
Oakland, CA 94612
Email: pvollmann@oaklandnet.com

City Clerk
City of Oakland
One Frank H. Ogawa Plaza
Oakland, CA 94612
Email: cityclerk@oaklandnet.com

Re: 277 27th Street (24th and Harrison Streets Project, PLN 16-080) – Appeal to Oakland City Council

Dear Mr. Vollmann and City Clerk:

We write on behalf of Oakland Residents for Responsible Development ("Residents") to appeal the Oakland Planning Commission's August 17, 2016 decision to approve the following entitlements for the 277 27th Street Project, also known as the 24th and Harrison Streets Project (PLN 16-080) ("Project), and the CEQA Analysis prepared by the City of Oakland ("City") for the Project pursuant to the California Environmental Quality Act ("CEQA Analysis"):[1]

1. Affirming staff's environmental determination and adoption / approval the CEQA findings and Standard Conditions of Approval/Mitigation Monitoring and Reporting Program (SCAMMRP).

[1] Pub. Resources Code §§ 21000 et seq.

2. Approval of the Regular Design Review for a new mixed use development containing 437 dwelling units and approximately 65,000 square feet of retail; the Conditional Use Permit to allow the D-BV zone bonuses for Residential and Height, Minor Variance for off-street loading; and Vesting Tentative Map, subject to findings and conditions of approval, including the SCAMMRP.

The Project includes the demolition of existing structures, including an Acura car dealership and warehouse, surface parking lots, auto repair shops, and a fitness facility; and the construction of an 18-story mixed-use residential and retail building and parking garage, with an area of approximately 730,655 gross square feet. The proposed building would have a maximum height of 200 feet and would be built above one level of subterranean parking. The Project is located at 277 27th Street and 300, 302, and 304 24th Street in Oakland.

This appeal letter demonstrates that the Commission's decision was not supported by substantial evidence in the record. Specifically, we identified several flaws in the City's analysis, as well as information regarding new or more severe impacts than previously analyzed in the Broadway Valdez District Specific Plan ("BVDSP") environmental impact report ("EIR"), which were not adequately considered by the Commission. The City's CEQA Analysis fails to analyze and mitigate the Project's site contamination impacts and the construction health risks to workers, residents, and the surrounding community, which are new or more severe than previously analyzed. Therefore, the City lacks substantial evidence to support the conclusions in its CEQA Analysis and an EIR is required.

This appeal letter and attachments raises each and every issue that is contested, and includes all arguments and evidence in the record previously presented to the Planning Commission as required by Section 17.134.070 of the Oakland Planning Code. We previously filed comments on the Project on August 3, 2016 with the assistance of experts Matt Hagemann and Jessie Jaeger from Soil / Water / Air Protection Enterprise ("SWAPE"), which we incorporate herein by reference.[2] Furthermore, with the assistance of SWAPE, we reviewed the Staff

[2] *See* Letter and Attachments from C. Caro to the Oakland Planning Commission and Peterson Z. Vollmann re: 24th and Harrison Streets Project (PLN 16-080), August 3, 2016 ("PC Comments") including Letter from Matt Hagemann and Jessie Jaeger, SWAPE, to Christina Caro re: Comments on the 24th and Harrison Streets Project (hereinafter, "SWAPE I"), August 3, 2016, attached hereto as **Exhibit 2.**

Report for the August 17, 2016 continued Planning Commission hearing, along with new technical reports prepared for the City and Applicant Holland Partner Group ("Applicant") in response to our August 3, 2016 comments (collectively "Responses"). We submitted supplemental comments to the Commission on August 17, 2016 which addressed the Responses, along with expert comments from Jessie Jaeger of SWAPE, which we incorporate herein by reference.[3] Finally, Matt Hagemann of SWAPE has prepared supplemental comments regarding the Responses. His technical comments are submitted in support of this appeal letter, and is incorporated herein by reference.[4]

I. STATEMENT OF INTEREST

Oakland Residents for Responsible Development ("Oakland Residents") is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. The association includes Alan Guan, Risi Agbabiaka, Peter Lew, Bridgette Hall, Tanya Pitts, the International Brotherhood of Electrical Workers Local 595, Plumbers and Steamfitters Local 342, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, and their members and their families who live and/or work in the City of Oakland and Alameda County.

The individual members of Oakland Residents live, work, and raise their families in the City of Oakland. They would be directly affected by the Project's impacts. Individual members may also work on the Project itself. They will therefore be first in line to be exposed to any health and safety hazards that may exist on the Project site.

The organizational members of Oakland Residents also have an interest in enforcing the City's planning and zoning laws and the State's 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

[3] *See* Letter and Attachments from C. Caro to the Oakland Planning Commission and Peterson Z. Vollmann re: 24th and Harrison Streets Project (PLN 16-080), August 17, 2016, including August 17, 2016 letter from SWAPE to C. Caro re Supplemental Comments on the 24th and Harrison Streets Project ("SWAPE II"), attached hereto as **Exhibit 3.**

[4] See Letter from Matt Hagemann SWAPE, to C. Caro re: Comments on the 24th and Harrison Streets Project (hereinafter, "SWAPE III"), August 25, 2016, attached hereto as **Exhibit 1.**

the region, and by making it less desirable for businesses to locate and people to live there. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, Oakland Residents' members are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

II. THE CITY MAY NOT RELY ON PREVIOUS ENVIRONMENTAL ANALYSIS FOR PROJECT APPROVAL

CEQA has two basic purposes, neither of which is satisfied by the CEQA Analysis. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.[5] The EIR is the "heart" of this requirement.[6] 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."[7]

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."[8] An adequate EIR must contain facts and analysis, not just an agency's conclusions.[9] CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.[10]

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.[11] If an EIR identifies potentially significant impacts, it must then propose and evaluate

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[5] 14 Cal. Code Regs. § 15002(a)(1) ("CEQA Guidelines"); *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.

[6] *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

[7] *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

[8] CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

[9] *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

[10] Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

[11] CEQA Guidelines § 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass'n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

mitigation measures to minimize these impacts.[12] CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.[13] Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding instruments.[14] A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.[15] This approach helps "insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."[16]

Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to determine whether to prepare an EIR or negative declaration, identify whether a program EIR, tiering, or other appropriate process can be used for analysis of the project's environmental effects, or determine whether a previously prepared EIR could be used with the project, among other purposes.[17] CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.[18] A negative declaration may be prepared instead of an EIR when, after preparing an initial study, a lead agency determines that a project "would not have a significant effect on the environment."[19]

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[12] Pub. Resources Code §§ 21002.1(a), 21100(b)(3).
[13] *Id.*, §§ 21002-21002.1.
[14] CEQA Guidelines § 15126.4(a)(2).
[15] *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).
[16] *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.
[17] CEQA Guidelines §§ 15060, 15063(c).
[18] *See, e.g.*, Pub. Resources Code § 21100.
[19] *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

When an EIR has previously been prepared that could apply to the Project, CEQA requires the lead agency to conduct subsequent or supplemental environmental review when one or more of the following events occur:

(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;

(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or

(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.[20]

The CEQA Guidelines explain that the lead agency must determine, on the basis of substantial evidence in light of the whole record, if one or more of the following events occur:

(1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant effects or a substantial increase in the severity of previously identified effects;

(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:

(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

[20] Pub. Resources Code § 21166.

(B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

(C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or

(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.[21]

Only where ***none*** of the conditions described above calling for preparation of a subsequent or supplemental EIR have occurred may the lead agency consider preparing a subsequent negative declaration, an Addendum or no further documentation.[22] For Addendums specifically, which is one of several CEQA exemption/streamlining avenues that the City claims is applicable to the Project, CEQA allows Addendums to a previously certified EIR if minor changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.[23]

Here, the City has failed to demonstrate that the Project can be lawfully approved based on the CEQA Analysis provided. Indeed, as explained in this letter, the City must disclose, analyze, and mitigate the Project's significant impacts in an EIR. Otherwise, the City's approval of the Project would violate CEQA.

A. The Project is Not Consistent with CEQA Addendum and Exemption Requirements

The City relies on three CEQA provisions in proposing to approve the Project without an Environmental Impact Report ("EIR").[24] Those provisions include the

[21] CEQA Guidelines § 15162(a)(1)-(3).
[22] CEQA Guidelines § 15162(b).
[23] CEQA Guidelines § 15164; CEQA Analysis, p. 9.
[24] CEQA Analysis, pp. 2-3, Attachments B and C.

Community Plan Exemption,[25] Qualified Infill Exemption,[26] and Addendum to the Broadway Valdez District Specific Plan ("BVDSP").[27] However, the City's reliance on these provisions is misplaced.

The CEQA Analysis does not simply provide "minor changes or additions are necessary" to the EIR as is allowed under the Addendum provision. Rather, it includes a new substantive analysis for a large development project which was not specifically analyzed in the BVDSP.[28] The City must discontinue this practice, which clearly violates CEQA. Second, as explained further below, the Project will result in new or more severe significant impacts than analyzed in previous EIRs, and there are new mitigation measures that were not considered in the previous EIRs, but that could reduce those impacts to a less than significant level. In any case, the City's decision must be supported by substantial evidence.[29] Here, the City's decision not to prepare a subsequent or supplemental EIR for the Project is not supported by substantial evidence.

The City also relies on additional CEQA provisions that allow approval of projects without an EIR in narrow circumstances. Specifically, the City relies on CEQA Guidelines Sections 15183 (Community Plan)[30] and 15183.3 (Qualified Infill)[31] for Project approval. However, the City's determination that exemptions also apply is not supported by substantial evidence.

The exemptions apply only when a Project does not have impacts peculiar to the proposed project that are new or more significant than previously analyzed or can be substantially mitigated by uniformly applicable development policies or standards. The Project fails to meet these requirements because the site is highly contaminated and could pose a significant risk to construction workers, residents and off-site receptors which was not fully disclosed or analyzed under the BVDSP.

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[25] CEQA Guidelines Section 15183.
[26] CEQA Guidelines Section 15183.3.
[27] CEQA Guidelines Section 15164.
[28] See CEQA Analysis, p. 2. The City has also improperly used the Addendum provisions of CEQA on other recent projects as demonstrated in comments and evidence submitted by Oakland residents (*See* 226 13th Street Project (PLN15320) http://www2.oaklandnet.com/oakca1/groups/ceda/documents/report/oak058739.pdf; *See also* 2400 Valdez Street Project (PLN15-336), http://www2.oaklandnet.com/oakca1/groups/ceda/documents/report/oak057878.pdf).
[29] *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).
[30] CEQA Guidelines Section 15183.
[31] CEQA Guidelines Section 15183.3.

Furthermore, the City's own air quality analysis concluded that the Project's health risks from diesel particulate matter ("DPM") emissions during construction will be significant unless the Applicant uses exclusively Tier 4 diesel emissions control equipment for Project construction. The City has failed to provide evidence demonstrating that the Applicant will feasibly be able to obtain Tier 4 equipment prior to commencing construction. This lack of evidence of feasibility undermines the City's determination that Standard Conditions of Approval ("SCAs") required under the BVDSP would effectively mitigate these significant health impacts. Unfortunately, the BVDSP did not fully address these peculiar and more significant impacts, and there are mitigation measures not previously identified that would reduce these significant impacts.

Thus, the Project will have new or more severe significant impacts than previously analyzed in the BVDSP EIR. In addition, as described below, the site-specific analysis conducted for the Project is legally deficient in several ways and the CEQA Analysis fails to incorporate all feasible mitigation. Therefore, the City may not rely on the CEQA Analysis for Project approval, and must provide detailed analysis of the Project's impacts in a subsequent or supplemental EIR.

B. The CEQA Analysis Fails To Adequately Analyze and Mitigate On-Site Hazards

1. Project Site Contamination Has Not Been Adequately Disclosed and Mitigated

Our PC Comments explained that the CEQA Analysis inaccurately concluded that existing soil and groundwater contamination at the Project site is insignificant, when in fact, the City's own Environmental Site Assessments ("ESAs") disclose that there is widespread soil and groundwater contamination present at the Project site at levels which exceed applicable health-protective Environmental Screening Levels ("ESLs"). The Responses fail to meaningfully respond to these comments, and misconstrue the plain language of the City's own ESAs.

The Project site has a long history of industrial use as a gas station, an automotive dealer and service facility, and a furniture company. Two Phase II ESAs were completed for contaminated sites within the Project boundaries – at 277 27th Street and 304 to 322 24th Street. Both ESAs disclosed substantial levels of contamination at levels exceeding applicable health standards.

The Phase II ESA completed for the 277 27th Street parcel collected 30 soil and groundwater samples. Of these samples, TPH-diesel ("TPH-d") and TPH-motor oil ("TPH-mo") were detected in 8 shallow soil samples at concentrations exceeding the San Francisco Bay Regional Water Quality Control Board ("SFRWQCB") ESLs. In groundwater, TPH-d was detected in 9 of the samples and exceeded the ESL in 3 samples. TPH-mo exceeded the ESL in 1 sample.[32] Nevertheless, the CEQA Analysis concluded that the results of the 277 27th Street Phase II showed that "no significant contamination was detected."[33]

As SWAPE explained in its original comments, the findings of the 277 27th Street Phase II ESA *squarely contradict* the conclusions articulated in the CEQA Analysis, and demonstrate that there are significant levels of existing contamination at the site which pose a potentially significant health risk to the public.[34] With regard to soil contamination, the Phase II ESA concluded that, "[b]ased on the prior and current soil data, it appears that shallow soil contamination is present in the fill soils in the areas of historic and present vehicle servicing."[35] With regard to groundwater contamination, the Phase II concluded that "consideration will have to be given to the presence of petroleum hydrocarbons in groundwater if dewatering of foundation elements (e.g. elevator pit and pile borings) is required."[36] SWAPE concluded that the CEQA Analysis contains "a mischaracterization of the sample results and of the Phase II conclusions" which "incorrectly portrays contamination at the Project site as insignificant."[37]

The Phase II ESA conducted for the 304 to 322 24th Street portion of the Project site similarly discloses significant levels of soil and groundwater contamination. The 304 to 322 24th Street Phase II ESA detected concentrations of TPH-d and TPH-mo in both soil samples and a groundwater sample. TPH-mo was detected in one of the two groundwater samples at 270 ug/L,[38] a concentration which is more than twice the ESL of 100 ug/L. SWAPE explains that this detection discloses that the Project site contains significant levels of contamination.[39] The

[32] See 277 27th Street Phase II ESA at p. 55.
[33] CEQA Analysis, p. 5-7.
[34] SWAPE I, p. 9.
[35] See 277 27th Street Phase II at pp. 6-10.
[36] *Id.*
[37] SWAPE I, p. 9.
[38] See 304 to 322 24th Street Phase II ESA, p. 4.
[39] SWAPE I, p. 9.

CEQA Analysis failed to disclose this as a significant impact, and instead erroneously states that the 304 to 322 24th Street Phase II results as "all below ESLs."[40]

Because the CEQA Analysis failed to disclose the Project's significant levels of contamination, it also failed to analyze the potentially significant health effects of the Project. In particular, the CEQA Analysis failed to include any quantified study or discussion of the health risks that may result when Project construction workers encounter contaminated soil when conducting earthmoving activities, or from tracking that contamination off-site. The CEQA Analysis also failed to evaluate the potential that future residents, Project site workers and visitors will contact contaminated soil. SWAPE explains that any such persons who come into contact with Project-site contaminants may be subject to central nervous system impairments and effects to the blood, immune system, lungs, skin, and eyes[41] when touching contaminated soil or breathing contaminated dust.[42] This is a potentially significant impact that the City must disclose and analyze in an EIR.

The CEQA Analysis also failed to provide for any effective mitigation that would target and remove the sources of TPH and mitigate potential health risks from exposure to the chemicals. The CEQA Analysis relies on Specific Plan Standard Conditions of Approval ("SCAs") SCA HAZ-1 and SCA-2 to mitigate potentially significant hazardous materials impacts. However, SCA HAZ-1 and SCA-2 merely includes general provisions to address "unexpected" contamination that is encountered after earth-moving activities have commenced. SCA HAZ-1 and SCA-2 rely on measures for visual and olfactory detection (i.e. sight and smell). In its original comments, SWAPE found that these measures are inadequate because "[t]he TPH-d and TPH-mo contamination that is documented at the site may be hazardous to health at concentrations which cannot be seen or smelled in the soil, rendering provisions in SCA-HAZ-1 and SCA-HAZ-2 ineffective."[43]

The CEQA Analysis next assumed, without analysis, that "if new or more significant contamination is encountered during site redevelopment earthwork, the project sponsor shall confirm that any cleanup actions are performed consistent

[40] CEQA Analysis, p. 56.
[41] http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=423&tid=75.
[42] SWAPE I, p.9.
[43] *Id.*

with applicable laws and local agency requirements as required."[44] However, as case law has shown, compliance with applicable regulations does not automatically obviate the need for further analysis of impacts at this pre-approval stage of the Project.

In *Keep our Mountains Quiet v. County of Santa Clara*, neighbors of a wedding venue sued over the County's failure to prepare an EIR due to significant noise impacts. The court concluded that "a fair argument [exists] that the Project may have a significant environmental noise impact" and reasoned that although the noise levels would likely comply with local noise standards, "compliance with the ordinance does not foreclose the possibility of significant noise impacts."[45] The court ordered the County to prepare an EIR. The ruling demonstrates the possibility that a project may be in compliance with an applicable regulation and still have a significant impact.

In *Communities for a Better Env't v. California Res. Agency*, the court struck down a CEQA Guideline because it "impermissibly allow[ed] an agency to find a cumulative effect insignificant based on a project's compliance with some generalized plan rather than on the project's actual environmental impacts."[46] The court concluded that "[i]f there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding that the project complies with the specified plan or mitigation program addressing the cumulative problem, an EIR must be prepared for the project."[47] Thus, the ruling supports the notion that despite assured compliance with applicable standard outside of the CEQA process, a lead agency still has an obligation to consider substantial evidence and analyze and mitigate potentially significant impacts.

In *Leonoff v. Monterey County Bd. of Supervisors*, the court held that conditions requiring compliance with regulations are proper "where the public agency had meaningful information reasonably justifying an expectation of mitigation of environmental effects."[48] The ruling suggests that an agency that merely provides a bare assertion that the project will be in compliance with

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[44] CEQA Analysis, p. 56.
[45] *Keep our Mountains Quiet v. County of Santa Clara* (2015) Case No. H039707, p. 21.
[46] *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453.
[47] *Id.*
[48] *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1355.

applicable regulations, without further explanation or enforceability, may not fulfill the requirements of CEQA.

Here, the City failed to provide any information explaining how compliance with the outside laws and regulations would reduce the risks posed to workers and residents from the high levels of TPH contamination on the site. The City may not rely solely on compliance with regulations or laws as reducing impacts without a full analysis of impacts or enforceable mitigation. Furthermore, reliance on the BVDSP EIR is improper because the BVDSP EIR did not conduct a site-specific investigation of the highly contaminated site.

CEQA requires that the City describe all components of the Project that may have a significant impact, and adequately analyze and require mitigation for all potentially significant impacts related to on-site hazards. Here, the City failed to do so in its CEQA Analysis. SWAPE concludes that Project construction should not be allowed until a full EIR has been prepared to include a thorough assessment and cleanup of the contamination.[49] An EIR must be prepared to remedy the defects in the City's CEQA Analysis of hazardous materials impacts. In particular, this analysis must include proper disclosure and assessment of site contaminants, the risk they pose to the health of construction workers, site visitors and future occupants, and a regulatory agency-approved cleanup plan to address any health risks that the contaminants pose.

2. The City's Responses Fail to Adequately Respond to Comments Regarding Potentially Significant Soil Contamination

Matt Hagemann of SWAPE reviewed the City's Responses and explains that the Responses fail to remedy the CEQA Analysis' inaccurate conclusions that existing soil and groundwater contamination at the Project site are insignificant when, in fact, the City's own ESAs discloses widespread soil and groundwater contamination present at the Project site at levels which exceed health-protective ESLs.[50] SWAPE explains that the Responses mischaracterize the results of the Phase II ESAs and fail to remedy the inadequacies in the CEQA Analysis' reliance on SCA-HAZ-1 and SCA-HAZ-2 to address potentially significant soil contamination that may be unearthed during Project construction.

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[49] SWAPE I, p. 9.
[50] SWAPE III, pp. 1-3.

First, the Responses state that findings in the Phase II ESA completed for the 277 27th Street parcel with respect to the TPH-d (diesel) interpret the chemical to actually be biogenic interference from naturally occurring organic materials.[51] As explained by Mr. Hagemann, this statement is wholly inaccurate. The Phase II clearly states that the petroleum detections exceeding established ESLs at the Project site are considered to be related to petroleum hydrocarbon releases associated with historic site operations.[52]

Second, the Responses fail to meaningfully respond to SWAPE's observations that SCA-HAZ-1 and SCA-HAZ-2 do not impose adequately health-protective or regulatory-compliant procedures to ensure adequate detection and removal of the type of contaminants located at the Project site. As SWAPE previously commented, SCA-HAZ-1 and SCA-HAZ-2 include only general provisions to address "unexpected" contamination that is encountered after earth-moving activities have commenced, by relying on measures for visual and olfactory detection (i.e. sight and smell). SWAPE found that these measures are inadequate because "[t]he TPH-d and TPH-mo contamination that is documented at the site may be hazardous to health at concentrations which cannot be seen or smelled in the soil, rendering provisions in SCA-HAZ-1 and SCA-HAZ-2 ineffective."[53] The Responses merely reiterate the erroneous conclusions from the CEQA Analysis, which SWAPE again concludes fail to address this gap in proposed hazardous materials mitigation, and fail to provide for any effective mitigation that would target and remove the sources of TPH and mitigate potential health risks from exposure to the chemicals.[54] Therefore, the City's response is inadequate.

Finally, the Responses state that the City will rely on the deferred creation of a Site Management Plan to require implementation of specific sampling and handling and transport procedures for reuse or disposal of contaminated soil and groundwater.[55] However, the Responses admit that "the exact method employed or plan to be implemented" has not yet been determined. The City cannot defer further analysis of the site's soil contamination to a future, post-approval stage. That analysis must be performed prior to Project approval and included in a proposed Site Management Plan that is disclosed to the public.

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[51] Responses, p. 4.
[52] See SWAPE III, pp. 1-2; Phase II ESA, p. 5-7.
[53] See SWAPE I.
[54] SWAPE III, p. 3.
[55] See Responses, p. 4.

The Site Management Plan must also include adequate mitigation measures to address the nature of contamination at the site. SWAPE recommends that the City require the following measures in the Site Management Plan:

- Be prepared by a qualified Environmental Professional and signed and stamped by a Professional Geologist ("P.G.") or Professional Engineer ("P.E."), who shall oversee its execution.
- Include sampling and detection monitoring procedures to identify contaminated soil and groundwater during construction, and provisions for managing, removing, transporting and disposing of any such materials if encountered, in accordance with applicable State, Federal, and local regulatory requirements.
- Describe procedures for soil and groundwater testing (e.g., sampling frequencies, test methods, and action levels, etc.) for petroleum hydrocarbons, and shall include mandatory procedures to be followed for the temporary stockpiling of soil and collection of groundwater for testing, off-site disposal and/or discharge of collected soil and groundwater under applicable stormwater discharge permit(s), health and safety considerations, documentation and reporting. These procedures shall comply with all applicable regulatory requirements, including, but not limited to, the Hazardous Materials Regulations. These procedures shall include, at a minimum, the following:

    - The P.G. or P.E. shall document the occurrence of any water table encountered during excavation activities.

    - If a water table is encountered during excavation activities, groundwater present at those locations shall be sampled for petroleum hydrocarbons.

A site-specific Health and Safety Plan ("HASP") shall be prepared and implemented during construction. The HASP shall identify potential health and safety risks associated with petroleum-contaminated soil and groundwater, along with appropriate protective responses if encountered. The HASP shall include provisions for air monitoring, identify action levels based on health risk-based standards, and describe mandatory responses, including upgrades in personal protective equipment, evacuation of the work area, and/or enhanced ventilation. The Construction Contractor shall ensure that adequate protective equipment is

available for worker use at all times. Protective equipment shall include the equipment described in 29 Code of Federal Regulations Section 1910.120 Appendix B, Level C or Level D, depending on the results of field monitoring and testing conducted pursuant to this section. Workers shall be made aware of site-specific health and safety risks and hazards through an initial orientation and routine meetings during field work.[56]

3. Dewatering Impacts Have Not Been Adequately Addressed

Under CEQA, a project may have a significant impact if it would violate any water quality standards or waste discharge requirement, create or contribute runoff water that would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff, or otherwise substantially degrade water quality.[57] CEQA and applicable case law require the City to describe all aspects of the Project, and, as explained above, disclose the significance of all impacts and provide separate and enforceable mitigation.[58]

The CEQA Analysis states that dewatering would be required during construction.[59] The CEQA Analysis also states that the Project would involve grading and excavation activities up to depths of approximately 13 feet below grade to construct the building.[60] Thus, dewatering will most likely be required at those depths. In its initial comments, SWAPE explained that the contaminated groundwater generated from the dewatering process may pose a potentially significant water quality issue, and that any contaminated groundwater encountered during Project construction must be handled and disposed in accordance with the San Francisco Bay Regional Water Quality Control Board's NPDES General Permit requirements.[61] SWAPE further noted that the CEQA Analysis fails to consider that groundwater that would be dewatered is known to be contaminated with TCE and other compounds.[62] Nevertheless, the City is still required under CEQA to fully describe, analyze, and mitigate potential impacts from dewatering in its CEQA document.

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[56] August 17, 2016 personal communication with M. Hagemann of SWAPE.
[57] CEQA Guidelines, Appendix G.
[58] *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645.
[59] CEQA Analysis, p. 18.
[60] *Id.*
[61] SWAPE I, p. 10.
[62] *Id.*

SWAPE concluded that an EIR must be prepared to analyze the impact and identify the Regional Board's dewatering requirements and how they will be met during Project construction.[63]

C. The City Lacks Substantial Evidence on Which to Conclude that the Construction Emissions Identified in the Applicant's Health Risk Assessment Will Be Reduced Below Levels of Significance

Our PC Comments included a screening level health risk assessment ("HRA") prepared by SWAPE which concluded that the Project's construction emissions would result in an excess cancer risk to adults, children, and infants of 7.06, 40.7, and 136 in one million, respectively.[64] The child and infantile exposures calculated by SWAPE vastly exceeded the Bay Area Air Quality Management District . ("BAAQMD") threshold of 10 in one million.

In response to SWAPE's analysis, the Applicant's consultant, Firstcarbon Solutions, prepared its own project level construction HRA for the Project ("Firstcarbon HRA"). SWAPE's review of the Firstcarbon HRA demonstrates that the Project's unmitigated construction emissions would result in a significant health risk impact to infants located in the residential communities approximately 25 meters away from the Project site. In an effort to mitigate this risk, the Firstcarbon HRA incorporates an assumption that the Project will use exclusively Tier 4 off-road equipment during construction pursuant to SCA-AIR-1, resulting in an 85% reduction in toxic diesel particulate matter ("DPM"). The Firstcarbon HRA concludes, that, with the use of Tier 4 equipment, the Project's health risk impact to infants would be mitigated to less than significant levels.[65]

While both the Firstcarbon HRA and the City's CEQA Analysis rely on compliance with SCA-AIR-1 to obligate the Applicant to use exclusively Tier 4 construction equipment, neither report assesses the feasibility of actually implementing this SCA-AIR-1 if the Project is approved. The Firstcarbon HRA states:

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[63] *Id.*
[64] See SWAPE I.
[65] Firstcarbon HRA, p. 2.

> As noted in the project's CEQA Analysis, implementation of subsections (w) and (x) of SCA-AIR-1, which require equipment and diesel trucks to be equipped with Best Available Control Technology and meet the California Air Resources Board's most recent certification standard, would reduce emissions of diesel particulate matter during construction. In order to comply with subsections (w) and (x) of SCA-AIR-1, the project sponsor would be required to ensure that construction equipment meet Tier 4 emissions standards, which can reduce emissions of diesel particulate matter by at least 85 percent relative to equipment without emission control technologies installed.[66]

However, this conclusion is unsupported by any evidence of feasibility, and is therefore speculative, because neither the City nor the Applicant have performed any due diligence to demonstrate that Tier 4 equipment can be reasonably procured for this Project. SCA-AIR-1 is an SCA that was generally adopted as part of the BVDSP, but no feasibility analysis was performed in the BVDSP for the application of SCA-AIR-1 to this Project. That analysis has yet to be performed because neither the Firstcarbon HRA nor the CEQA Analysis discuss the feasibility of actually obtaining an entirely Tier 4 fleet.

As SWAPE explained, although off-road Tier 4 equipment is available for purchase, it is new technology that may not yet be readily available at all construction equipment vendors, may require special procurement by the Applicant, and is more costly than lower tier equipment. [67] It is therefore unreasonable to presume, without analysis, that all construction equipment that will be used for the Project will automatically have Tier 4 engines simply because SCA-AIR-1 calls for it.

Until the feasibility of implementing SCA-AIR-1 is demonstrated through a meaningful feasibility analysis, the City cannot rely on compliance with SCA-AIR-1 alone to reduce the Project's admittedly significant construction emissions below levels of significance. Rather, the City must confirm, through a detailed analysis supported by fact, whether and how the Applicant will procure exclusively Tier 4 equipment for the Project. The City must also identify alternative mitigation measures that are technologically feasible in the event that the Applicant is unable to procure all Tier 4 equipment necessary to construct the Project.

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[66] Firstcarbon HRA, p. 3.
[67] See SWAPE II, p. 2-3.

III. CONCLUSION

For these reasons, we urge the City Council to vacate the Planning Commission's approval of the Project, and remand the Project to Staff to prepare a revised analysis in an EIR, as required by CEQA. The new analysis must identify and implement all feasible mitigation measures available to reduce the Project's potentially significant site-specific impacts to less than significant levels before the City reconsiders approving the Project.

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

Sincerely,

Christina M. Caro

CMC:ljl

Attachments

3620-004j

EXHIBIT 1

SWAPE Technical Consultation, Data Analysis and Litigation Support for the Environment

2656 29th Street, Suite 201
Santa Monica, CA 90405

Matt Hagemann, P.G, C.Hg.
(949) 887-9013
mhagemann@swape.com

August 25, 2016

Christina M. Caro
Adams Broadwell Joseph & Cardozo
601 Gateway Blvd., Suite 1000
South San Francisco, CA 94080

Subject: Comments on the 24th and Harrison Streets Project

Dear Ms. Caro:

We have reviewed the August 11, 2016 Memorandum, Subject: 24th and Harrison Streets Project – Response to Comment Letter from Adams Broadwell Joseph and Cardozo ("Responses"), which addressed technical comments we made in an August 3, 2016 letter on the Project. We find the Responses unsatisfactory and recommend an agency-led review of contamination found at the Project site in soil and groundwater to ensure protection of health and the environment.

Response 1 states that our findings regarding TPH-d (diesel) were incorrect. We stand on our original comment that additional evaluation of the TPH-d detections above San Francisco Bay Regional Water Quality Control Board Environmental Screening Levels (ESLs) in soil and groundwater is necessary to protect health of construction workers, who could be directly expose to unmitigated contamination or track contamination off-site, and future residents and visitors to the Project site.

The Responses state (p. 4):

> Findings for the Phase II ESA completed for the 277 27th Street parcel with respect to the TPH-d (diesel) exceedance are misrepresented in the comment letter, which does not acknowledge that the Phase II ESA interprets the so-called "diesel" to be biogenic interference from naturally occurring organic materials.

This response is in direct contradiction with the Phase II ESA which states (p. 5-7):

> Based on previous experience with other petroleum hydrocarbon release sites and the observed high organic content in Site soil during drilling, AECOM believes that many of the low level detections are likely the result of biogenic interference from naturally occurring material at the Site. These low-level detections also do not match the laboratory diesel standard and suggests that a diesel-range product may not be present. The petroleum detections exceeding

established ESLs are considered to be related to petroleum hydrocarbon releases associated with historic site operations.

The Response 1 assertion that our August 3, 2016 comment letter did "not acknowledge that the Phase II ESA interprets the so-called "diesel" to be biogenic interference from naturally occurring organic materials" is incorrect. Only the low-level TPH-d detections were found, based on the consultant's "previous experience," to be attributed to biogenic interference. As quoted above, the higher level detections above ESLs were interpreted in the Phase II to "be related to petroleum hydrocarbon releases associated with historic site operations."

The exceedance of an ESL generally prompts further evaluation in the form of additional sampling. The San Francisco Regional Water Quality Control Board 2016 ESL User's Guide states:

> The presence of a chemical at concentrations in excess of an ESL does not necessarily indicate adverse effects on human health or the environment, rather that additional evaluation is warranted. [1]

No additional sampling at the Project site has been conducted. The only additional evaluation that has been completed for inclusion in the Responses is the incorrect attempt to explain the TPH-d detections in excess of the ESL to be a result of biogenic interference. Since that is an incorrect Response 1 conclusion, further evaluation is warranted as specified in the ESL guidance.

The TPH-d detection of 290 mg/kg in soil as found in the Phase II ESA, which is above the 2016 residential ESL of 230 mg/kg[2], should be evaluated further under a sampling program subject to regulatory review. Further review is necessary considering the pattern of the TPH detections, as characterized in the Phase II as:

> Based on the prior and current soil data, it appears that shallow soil contamination is present in the fill soils in the areas of historic and present vehicle servicing (p. 6-10).

Groundwater ESL exceedances for TPH-d, which we documented in our comment letter, were not addressed in Response 1 and were only addressed in the context of dewatering requirements.

The conclusions reached in the Phase II (p. 6-9):

> indicated that historic Site vehicle servicing and repair operations appear to have impacted the Site soil and groundwater quality.

We agree, in light of the ESL exceedances for soil and groundwater. Response 1 fails to acknowledge the ESL exceedances, stating (p. 4):

> The CEQA Analysis summarizes the findings of the Phase I and II ESAs and states that no significant contamination was detected and the site will be managed in accordance with the recommendations of the Phase II ESA, including the preparation of a Site Management Plan, and the applicable SCAs that include SCA-HAZ-1 and SCA-HAZ-2, referred to in the CEQA Analysis.

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[1] http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/ESL/ESL%20Users%20Guide_22Feb16.pdf, p. 3

[2] http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/ESL/ESL%20Workbook_ESLs_Interim%20Final_22Feb16_Rev3_PDF.pdf, Summary of Soil ESLs, residential, shallow soil

The detection of a soil sample above the 2016 ESL for TPH-d and the groundwater detections above the 2016 TPH-d ESL indicate contamination that may impact the health of construction workers and future residents and which may pose impacts to groundwater quality. The investigations that have been conducted to-date have been led by the developer's consultant without regulatory oversight. We recommend an agency review of the investigations and the ESL exceedances and further assessment of the Project site as necessary prior to Project approval to ensure conditions are safe for workers, neighboring residents and businesses, future residents, and visitors to the Project site.

Site Conditions of Approval, including SCA-HAZ-1 and SCA-HAZ-2, are inadequate to address the ESL exceedances. SCA-HAZ-1 and SCA-HAZ-2, as paraphrased in Response 1 (p. 4), do not provide for any evaluation of the soil and groundwater ESL exceedances.

> SCA HAZ-1 (Hazardous Materials Related to Construction) requires the use of best management practices and includes provisions in the event that soil, groundwater, or other environmental medium with suspected contamination is encountered unexpectedly during construction activities and SCA-HAZ-2 (Site Contamination) requires the implementation of Phase I and II ESA recommendations and a Health and Safety Plan to protect workers during construction. SCA-HAZ-2 would require implementation of specific sampling and handling and transport procedures for reuse or disposal in accordance with applicable local, state, and federal requirements.

Further evaluation of the soil and groundwater ESL exceedances is necessary before Project approval. An appropriate regulatory agency, i.e. Alameda County Environmental Health or the San Francisco Bay Regional Water Quality Board, should be engaged before Project approval to review sampling results to-date and recommend whatever measures would be appropriate for further evaluation of the ESL exceedances.

Sincerely,

Matt Hagemann, P.G., C.Hg.

SWAPE Technical Consultation, Data Analysis and Litigation Support for the Environment

2503 Eastbluff Dr., Suite 206
Newport Beach, California 92660
Tel: (949) 887-9013
Fax: (949) 717-0069
Email: mhagemann@swape.com

Matthew F. Hagemann, P.G., C.Hg., QSD, QSP

Geologic and Hydrogeologic Characterization
Industrial Stormwater Compliance
Investigation and Remediation Strategies
Litigation Support and Testifying Expert
CEQA Review

Education:

M.S. Degree, Geology, California State University Los Angeles, Los Angeles, CA, 1984.
B.A. Degree, Geology, Humboldt State University, Arcata, CA, 1982.

Professional Certification:

California Professional Geologist
California Certified Hydrogeologist
Qualified SSWPP Developer and Practitioner

Professional Experience:

Matt has 25 years of experience in environmental policy, assessment and remediation. He spent nine years with the U.S. EPA in the RCRA and Superfund programs and served as EPA's Senior Science Policy Advisor in the Western Regional Office where he identified emerging threats to groundwater from perchlorate and MTBE. While with EPA, Matt also served as a Senior Hydrogeologist in the oversight of the assessment of seven major military facilities undergoing base closure. He led numerous enforcement actions under provisions of the Resource Conservation and Recovery Act (RCRA) while also working with permit holders to improve hydrogeologic characterization and water quality monitoring.

Matt has worked closely with U.S. EPA legal counsel and the technical staff of several states in the application and enforcement of RCRA, Safe Drinking Water Act and Clean Water Act regulations. Matt has trained the technical staff in the States of California, Hawaii, Nevada, Arizona and the Territory of Guam in the conduct of investigations, groundwater fundamentals, and sampling techniques.

Positions Matt has held include:

- Founding Partner, Soil/Water/Air Protection Enterprise (SWAPE) (2003 – present);
- Geology Instructor, Golden West College, 2010 – present;
- Senior Environmental Analyst, Komex H2O Science, Inc (2000 -- 2003);

- Executive Director, Orange Coast Watch (2001 – 2004);
- Senior Science Policy Advisor and Hydrogeologist, U.S. Environmental Protection Agency (1989–1998);
- Hydrogeologist, National Park Service, Water Resources Division (1998 – 2000);
- Adjunct Faculty Member, San Francisco State University, Department of Geosciences (1993 – 1998);
- Instructor, College of Marin, Department of Science (1990 – 1995);
- Geologist, U.S. Forest Service (1986 – 1998); and
- Geologist, Dames & Moore (1984 – 1986).

Senior Regulatory and Litigation Support Analyst:

With SWAPE, Matt's responsibilities have included:

- Lead analyst and testifying expert in the review of numerous environmental impact reports under CEQA that identify significant issues with regard to hazardous waste, water resources, water quality, air quality, greenhouse gas emissions and geologic hazards.
- Lead analyst and testifying expert in the review of environmental issues in license applications for large solar power plants before the California Energy Commission.
- Stormwater analysis, sampling and best management practice evaluation at industrial facilities.
- Manager of a project to provide technical assistance to a comunity adjacent to a former Naval shipyard under a grant from the U.S. EPA.
- Technical assistance and litigation support for vapor intrusion concerns.
- Manager of a project to evaluate numerous formerly used military sites in the western U.S.
- Manager of a comprehensive evaluation of potential sources of perchlorate contamination in Southern California drinking water wells.
- Manager and designated expert for litigation support under provisions of Proposition 65 in the review of releases of gasoline to sources drinking water at major refineries and hundreds of gas stations throughout California.
- Expert witness on two cases involving MTBE litigation.
- Expert witness and litigation support on the impact of air toxins and hazards at a school.
- Expert witness in litigation at a former plywood plant.

With Komex H2O Science Inc., Matt's duties included the following:

- Senior author of a report on the extent of perchlorate contamination that was used in testimony by the former U.S. EPA Administrator and General Counsel.
- Senior researcher in the development of a comprehensive, electronically interactive chronology of MTBE use, research, and regulation.
- Senior researcher in the development of a comprehensive, electronically interactive chronology of perchlorate use, research, and regulation.
- Senior researcher in a study that estimates nationwide costs for MTBE remediation and drinking water treatment, results of which were published in newspapers nationwide and in testimony against provisions of an energy bill that would limit liability for oil companies.
- Research to support litigation to restore drinking water supplies that have been contaminated by MTBE in California and New York.
- Expert witness testimony in a case of oil production-related contamination in Mississippi.
- Lead author for a multi-volume remedial investigation report for an operating school in Los Angeles that met strict regulatory requirements and rigorous deadlines.

- Development of strategic approaches for cleanup of contaminated sites in consultation with clients and regulators.

Executive Director:

As Executive Director with Orange Coast Watch, Matt led efforts to restore water quality at Orange County beaches from multiple sources of contamination including urban runoff and the discharge of wastewater. In reporting to a Board of Directors that included representatives from leading Orange County universities and businesses, Matt prepared issue papers in the areas of treatment and disinfection of wastewater and control of the dischrge of grease to sewer systems. Matt actively participated in the development of countywide water quality permits for the control of urban runoff and permits for the discharge of wastewater. Matt worked with other nonprofits to protect and restore water quality, including Surfrider, Natural Resources Defense Council and Orange County CoastKeeper as well as with business institutions including the Orange County Business Council.

Hydrogeology:

As a Senior Hydrogeologist with the U.S. Environmental Protection Agency, Matt led investigations to characterize and cleanup closing military bases, including Mare Island Naval Shipyard, Hunters Point Naval Shipyard, Treasure Island Naval Station, Alameda Naval Station, Moffett Field, Mather Army Airfield, and Sacramento Army Depot. Specific activities were as follows:

- Led efforts to model groundwater flow and contaminant transport, ensured adequacy of monitoring networks, and assessed cleanup alternatives for contaminated sediment, soil, and groundwater.
- Initiated a regional program for evaluation of groundwater sampling practices and laboratory analysis at military bases.
- Identified emerging issues, wrote technical guidance, and assisted in policy and regulation development through work on four national U.S. EPA workgroups, including the Superfund Groundwater Technical Forum and the Federal Facilities Forum.

At the request of the State of Hawaii, Matt developed a methodology to determine the vulnerability of groundwater to contamination on the islands of Maui and Oahu. He used analytical models and a GIS to show zones of vulnerability, and the results were adopted and published by the State of Hawaii and County of Maui.

As a hydrogeologist with the EPA Groundwater Protection Section, Matt worked with provisions of the Safe Drinking Water Act and NEPA to prevent drinking water contamination. Specific activities included the following:

- Received an EPA Bronze Medal for his contribution to the development of national guidance for the protection of drinking water.
- Managed the Sole Source Aquifer Program and protected the drinking water of two communities through designation under the Safe Drinking Water Act. He prepared geologic reports, conducted public hearings, and responded to public comments from residents who were very concerned about the impact of designation.

- Reviewed a number of Environmental Impact Statements for planned major developments, including large hazardous and solid waste disposal facilities, mine reclamation, and water transfer.

Matt served as a hydrogeologist with the RCRA Hazardous Waste program. Duties were as follows:

- Supervised the hydrogeologic investigation of hazardous waste sites to determine compliance with Subtitle C requirements.
- Reviewed and wrote "part B" permits for the disposal of hazardous waste.
- Conducted RCRA Corrective Action investigations of waste sites and led inspections that formed the basis for significant enforcement actions that were developed in close coordination with U.S. EPA legal counsel.
- Wrote contract specifications and supervised contractor's investigations of waste sites.

With the National Park Service, Matt directed service-wide investigations of contaminant sources to prevent degradation of water quality, including the following tasks:

- Applied pertinent laws and regulations including CERCLA, RCRA, NEPA, NRDA, and the Clean Water Act to control military, mining, and landfill contaminants.
- Conducted watershed-scale investigations of contaminants at parks, including Yellowstone and Olympic National Park.
- Identified high-levels of perchlorate in soil adjacent to a national park in New Mexico and advised park superintendent on appropriate response actions under CERCLA.
- Served as a Park Service representative on the Interagency Perchlorate Steering Committee, a national workgroup.
- Developed a program to conduct environmental compliance audits of all National Parks while serving on a national workgroup.
- Co-authored two papers on the potential for water contamination from the operation of personal watercraft and snowmobiles, these papers serving as the basis for the development of nation-wide policy on the use of these vehicles in National Parks.
- Contributed to the Federal Multi-Agency Source Water Agreement under the Clean Water Action Plan.

Policy:

Served senior management as the Senior Science Policy Advisor with the U.S. Environmental Protection Agency, Region 9. Activities included the following:

- Advised the Regional Administrator and senior management on emerging issues such as the potential for the gasoline additive MTBE and ammonium perchlorate to contaminate drinking water supplies.
- Shaped EPA's national response to these threats by serving on workgroups and by contributing to guidance, including the Office of Research and Development publication, Oxygenates in Water: Critical Information and Research Needs.
- Improved the technical training of EPA's scientific and engineering staff.
- Earned an EPA Bronze Medal for representing the region's 300 scientists and engineers in negotiations with the Administrator and senior management to better integrate scientific principles into the policy-making process.
- Established national protocol for the peer review of scientific documents.

Geology:

With the U.S. Forest Service, Matt led investigations to determine hillslope stability of areas proposed for timber harvest in the central Oregon Coast Range. Specific activities were as follows:

- Mapped geology in the field, and used aerial photographic interpretation and mathematical models to determine slope stability.
- Coordinated his research with community members who were concerned with natural resource protection.
- Characterized the geology of an aquifer that serves as the sole source of drinking water for the city of Medford, Oregon.

As a consultant with Dames and Moore, Matt led geologic investigations of two contaminated sites (later listed on the Superfund NPL) in the Portland, Oregon, area and a large hazardous waste site in eastern Oregon. Duties included the following:

- Supervised year-long effort for soil and groundwater sampling.
- Conducted aquifer tests.
- Investigated active faults beneath sites proposed for hazardous waste disposal.

Teaching:

From 1990 to 1998, Matt taught at least one course per semester at the community college and university levels:

- At San Francisco State University, held an adjunct faculty position and taught courses in environmental geology, oceanography (lab and lecture), hydrogeology, and groundwater contamination.
- Served as a committee member for graduate and undergraduate students.
- Taught courses in environmental geology and oceanography at the College of Marin.

Matt currently teaches Physical Geology (lecture and lab) to students at Golden West College in Huntington Beach, California.

Invited Testimony, Reports, Papers and Presentations:

Hagemann, M.F., 2008. Disclosure of Hazardous Waste Issues under CEQA. Presentation to the Public Environmental Law Conference, Eugene, Oregon.

Hagemann, M.F., 2008. Disclosure of Hazardous Waste Issues under CEQA. Invited presentation to U.S. EPA Region 9, San Francisco, California.

Hagemann, M.F., 2005. Use of Electronic Databases in Environmental Regulation, Policy Making and Public Participation. Brownfields 2005, Denver, Coloradao.

Hagemann, M.F., 2004. Perchlorate Contamination of the Colorado River and Impacts to Drinking Water in Nevada and the Southwestern U.S. Presentation to a meeting of the American Groundwater Trust, Las Vegas, NV (served on conference organizing committee).

Hagemann, M.F., 2004. Invited testimony to a California Senate committee hearing on air toxins at schools in Southern California, Los Angeles.

Brown, A., Farrow, J., Gray, A. and **Hagemann, M.**, 2004. An Estimate of Costs to Address MTBE Releases from Underground Storage Tanks and the Resulting Impact to Drinking Water Wells. Presentation to the Ground Water and Environmental Law Conference, National Groundwater Association.

Hagemann, M.F., 2004. Perchlorate Contamination of the Colorado River and Impacts to Drinking Water in Arizona and the Southwestern U.S. Presentation to a meeting of the American Groundwater Trust, Phoenix, AZ (served on conference organizing committee).

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Other Experience:

Selected as subject matter expert for the California Professional Geologist licensing examination, 2009-2011.

EXHIBIT 2

ADAMS BROADWELL JOSEPH & CARDOZO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062
ccaro@adamsbroadwell.com

DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
LAURA E. HORTON
MARC D. JOSEPH
RACHAEL E. KOSS

SACRAMENTO OFFICE
520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721
TEL: (916) 444-6201
FAX: (916) 444-6209

August 3, 2016

VIA EMAIL and HAND DELIVERY

Chair Jim Moore and
Planning Commission
Oakland City Hall
One Frank H. Ogawa Plaza, Hearing Room No. 1
Oakland, CA 94612
Email: jmoore.ocpc@gmail.com; nagrajplanning@gmail.com; cmanusopc@gmail.com; amandamonchamp@gmail.com; jmyres.oakplanningcommission@gmail.com; pattillo@pgadesign.com; EW.Oakland@gmail.com

Peterson Z. Vollmann, Planner IV
City of Oakland, Bureau of Planning
250 Frank H. Ogawa, Suite 2114
Oakland, CA 94612
Email: pvollmann@oaklandnet.com

Re: Comments on 24th and Harrison Streets Project (PLN 16-080)

Dear Chair Moore, Honorable Members of the Oakland Planning Commission and Mr. Vollmann:

These comments are submitted on behalf of Oakland Residents for Responsible Development regarding Agenda Item No. 6, the 24th and Harrison Streets Project (PLN 16-080) ("Project), and the CEQA Analysis prepared by the City of Oakland ("City") for the Project pursuant to the California Environmental Quality Act ("CEQA Analysis").[1] The Project includes the demolition of existing structures, including an Acura car dealership and warehouse, surface parking lots, auto repair shops, and a fitness facility; and the construction of an 18-story mixed-use residential and retail building and parking garage, with an area of

[1] Pub. Resources Code §§ 21000 et seq.

approximately 730,655 gross square feet. The proposed building would have a maximum height of 200 feet and would be built above one level of subterranean parking. The Project is located at 277 27th Street and 300, 302, and 304 24th Street in Oakland.

The CEQA Analysis evaluates the Project's potential environmental impacts and consistency with the Broadway Valdez District Specific Plan ("BVDSP"). The Project is located within the Central Business District area of the BVDSP. We reviewed the CEQA Analysis in conjunction with our technical consultants, and have identified a number of significant deficiencies in the City's analysis, as well as new and more severe impacts than previously analyzed in the BVDSP. Furthermore, we identified several mitigation measures not previously analyzed that would reduce significant impacts. Specifically, the CEQA Analysis fails to analyze the Project's high levels of site contamination as well as the construction health risks to the surrounding community, which are new or more severe than previously analyzed. Therefore, the City lacks substantial evidence to support the conclusions in its CEQA Analysis and an EIR is required.

We reviewed the CEQA Analysis, Staff Report, BVDSP, and other plans and EIRs with the help of experts Matt Hagemann and Jessie Jaeger of Soil / Water / Air Protection Enterprise ("SWAPE"). Their attached technical comments are submitted in addition to the comments in this letter.[2] Accordingly, they must be addressed and responded to separately. The curricula vitae of these experts are also attached as exhibits to this letter.

I. STATEMENT OF INTEREST

Oakland Residents for Responsible Development ("Oakland Residents") is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. The association includes Alan Guan, Risi Agbabiaka, Peter Lew, Bridgette Hall, Tanya Pitts, the International Brotherhood of Electrical Workers Local 595, Plumbers and Steamfitters Local 342, Sheet Metal Workers Local 104, Sprinkler

[2] *See* Letter from Matt Hagemann and Jessie Jaeger, SWAPE, to Christina Caro re: Comments on the 24th and Harrison Streets Project (hereinafter, "SWAPE Comments"), August 3, 2016, **Exhibit A.**

Fitters Local 483, and their members and their families who live and/or work in the City of Oakland and Alameda County.

The individual members of Oakland Residents live, work, and raise their families in the City of Oakland. They would be directly affected by the Project's impacts. Individual members may also work on the Project itself. They will therefore be first in line to be exposed to any health and safety hazards that may exist on the Project site.

The organizational members of Oakland Residents also have an interest in enforcing the City's planning and zoning laws and the State's 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 it less desirable for businesses to locate and people to live there. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, Oakland Residents' members are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

II. THE CITY MAY NOT RELY ON PREVIOUS ENVIRONMENTAL ANALYSIS FOR PROJECT APPROVAL

CEQA has two basic purposes, neither of which is satisfied by the CEQA Analysis. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.[3] The EIR is the "heart" of this requirement.[4] 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."[5]

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[3] 14 Cal. Code Regs. § 15002(a)(1) ("CEQA Guidelines"); *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.

[4] *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

[5] *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."[6] An adequate EIR must contain facts and analysis, not just an agency's conclusions.[7] CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.[8]

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.[9] If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.[10] CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.[11] Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding instruments.[12] A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.[13] This approach helps "insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."[14]

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[6] CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.
[7] *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.
[8] Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).
[9] CEQA Guidelines § 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass'n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.
[10] Pub. Resources Code §§ 21002.1(a), 21100(b)(3).
[11] *Id.*, §§ 21002-21002.1.
[12] CEQA Guidelines § 15126.4(a)(2).
[13] *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).
[14] *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to determine whether to prepare an EIR or negative declaration, identify whether a program EIR, tiering, or other appropriate process can be used for analysis of the project's environmental effects, or determine whether a previously prepared EIR could be used with the project, among other purposes.[15] CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.[16] A negative declaration may be prepared instead of an EIR when, after preparing an initial study, a lead agency determines that a project "would not have a significant effect on the environment."[17]

When an EIR has previously been prepared that could apply to the Project, CEQA requires the lead agency to conduct subsequent or supplemental environmental review when one or more of the following events occur:

(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;

(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or

(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.[18]

The CEQA Guidelines explain that the lead agency must determine, on the basis of substantial evidence in light of the whole record, if one or more of the following events occur:

(1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new

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[15] CEQA Guidelines §§ 15060, 15063(c).
[16] *See, e.g.*, Pub. Resources Code § 21100.
[17] *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).
[18] Pub. Resources Code § 21166.

significant effects or a substantial increase in the severity of previously identified effects;

(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:

(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

(B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

(C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or

(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.[19]

Only where ***none*** of the conditions described above calling for preparation of a subsequent or supplemental EIR have occurred may the lead agency consider preparing a subsequent negative declaration, an Addendum or no further

[19] CEQA Guidelines § 15162(a)(1)-(3).

documentation.[20] For Addendums specifically, which is one of several CEQA exemption/streamlining avenues that the City claims is applicable to the Project, CEQA allows Addendums to a previously certified EIR if minor changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.[21]

Here, the City has failed to demonstrate that the Project can be lawfully approved based on the CEQA Analysis provided. Indeed, as explained in this letter, the City must disclose, analyze, and mitigate the Project's significant impacts in an EIR. Otherwise, the City's approval of the Project would violate CEQA.

A. The Project is Not Consistent with CEQA Addendum and Exemption Requirements

The City relies on three CEQA provisions in proposing to approve the Project without an Environmental Impact Report ("EIR").[22] Those provisions include the Community Plan Exemption,[23] Qualified Infill Exemption,[24] and Addendum to the Broadway Valdez District Specific Plan ("BVDSP").[25] However, the City's reliance on these provisions is misplaced.

The CEQA Analysis does not simply provide "minor changes or additions are necessary" to the EIR as is allowed under the Addendum provision. Rather, it includes a new substantive analysis for a large development project which was not specifically analyzed in the BVDSP.[26] The City must discontinue this practice, which clearly violates CEQA. Second, as explained further below, the Project will result in new or more severe significant impacts than analyzed in previous EIRs, and there are new mitigation measures that were not considered in the previous EIRs, but that could reduce those impacts to a less than significant level. In any

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[20] CEQA Guidelines § 15162(b).
[21] CEQA Guidelines § 15164; CEQA Analysis, p. 9.
[22] CEQA Analysis, pp. 2-3, Attachments B and C.
[23] CEQA Guidelines Section 15183.
[24] CEQA Guidelines Section 15183.3.
[25] CEQA Guidelines Section 15164.
[26] See CEQA Analysis, p. 2. The City has also improperly used the Addendum provisions of CEQA on other recent projects as demonstrated in comments and evidence submitted by Oakland residents (*See* 226 13th Street Project (PLN15320) http://www2.oaklandnet.com/oakca1/groups/ceda/documents/report/oak058739.pdf; *See also* 2400 Valdez Street Project (PLN15-336), http://www2.oaklandnet.com/oakca1/groups/ceda/documents/report/oak057878.pdf).

case, the City's decision must be supported by substantial evidence.[27] Here, the City's decision not to prepare a subsequent or supplemental EIR for the Project is not supported by substantial evidence.

The City also relies on additional CEQA provisions that allow approval of projects without an EIR in narrow circumstances. Specifically, the City relies on CEQA Guidelines Sections 15183 (Community Plan)[28] and 15183.3 (Qualified Infill)[29] for Project approval. However, the City's determination that exemptions also apply is not supported by substantial evidence.

The exemptions apply only when a Project does not have impacts peculiar to the proposed project that are new or more significant than previously analyzed or can be substantially mitigated by uniformly applicable development policies or standards. The Project fails to meet these requirements because the site is highly contaminated and could pose a significant risk to construction workers, residents and off-site receptors which was not fully disclosed or analyzed under the BVDSP. Furthermore, the Project's health risks from diesel particulate matter ("DPM") emissions during construction may be highly significant. In particular, because the BVDSP did not actually quantify project-level health risks, the absence of any previous project-specific analysis undermines the City's determination that Standard Conditions of Approval ("SCAs") would mitigate the impact. Unfortunately, the BVDSP did not fully address these peculiar and more significant impacts, and there are mitigation measures not previously identified that would reduce these significant impacts.

Thus, the Project will have new or more severe significant impacts than previously analyzed in the BVDSP EIR. In addition, as described below, the site-specific analysis conducted for the Project is legally deficient in several ways and the CEQA Analysis fails to incorporate all feasible mitigation. Therefore, the City may not rely on the CEQA Analysis for Project approval, and must provide detailed analysis of the Project's impacts in a subsequent or supplemental EIR.

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[27] *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).
[28] CEQA Guidelines Section 15183.
[29] CEQA Guidelines Section 15183.3.

B. The CEQA Analysis Fails To Adequately Analyze and Mitigate On-Site Hazards

1. Project Site Contamination Has Not Been Adequately Disclosed and Mitigated

The CEQA Analysis inaccurately concludes that existing soil and groundwater contamination at the Project site is insignificant, when in fact, the City's own Environmental Site Assessments ("ESAs") disclose that there is widespread soil and groundwater contamination present at the Project site at levels which exceed applicable health-protective Environmental Screening Levels ("ESLs").

The Project site has a long history of industrial use as a gas station, an automotive dealer and service facility, and a furniture company. Two Phase II ESAs were completed for contaminated sites within the Project boundaries – at 277 27th Street and 304 to 322 24th Street. Both ESAs disclosed substantial levels of contamination at levels exceeding applicable health standards.

The Phase II ESA completed for the 277 27th Street parcel collected 30 soil and groundwater samples. Of these samples, TPH-diesel ("TPH-d") and TPH-motor oil ("TPH-mo") were detected in 8 shallow soil samples at concentrations exceeding the San Francisco Bay Regional Water Quality Control Board ("SFRWQCB") ESLs. In groundwater, TPH-d was detected in 9 of the samples and exceeded the ESL in 3 samples. TPH-mo exceeded the ESL in 1 sample.[30] Nevertheless, the CEQA Analysis concluded that the results of the 277 27th Street Phase II showed that "no significant contamination was detected."[31]

As SWAPE explains, the findings of the 277 27th Street Phase II ESA *squarely contradict* the conclusions articulated in the CEQA Analysis, and demonstrate that there are significant levels of existing contamination at the site which pose a potentially significant health risk to the public.[32] With regard to soil contamination, the Phase II ESA concluded that, "[b]ased on the prior and current soil data, it appears that shallow soil contamination is present in the fill soils in the

[30] See 277 27th Street Phase II ESA at p. 55.
[31] CEQA Analysis, p. 5-7.
[32] SWAPE Comments, p. 9.

areas of historic and present vehicle servicing."[33] With regard to groundwater contamination, the Phase II concluded that "consideration will have to be given to the presence of petroleum hydrocarbons in groundwater if dewatering of foundation elements (e.g. elevator pit and pile borings) is required."[34] SWAPE concludes that the CEQA Analysis contains "a mischaracterization of the sample results and of the Phase II conclusions" which "incorrectly portrays contamination at the Project site as insignificant."[35]

The Phase II ESA conducted for the 304 to 322 24th Street portion of the Project site similarly discloses significant levels of soil and groundwater contamination. The 304 to 322 24th Street Phase II ESA detected concentrations of TPH-d and TPH-mo in both soil samples and a groundwater sample. TPH-mo was detected in one of the two groundwater samples at 270 ug/L,[36] a concentration which is more than twice the ESL of 100 ug/L. SWAPE explains that this detection discloses that the Project site contains significant levels of contamination.[37] The CEQA Analysis fails to disclose this as a significant impact, and instead erroneously states that the 304 to 322 24th Street Phase II results as "all below ESLs."[38]

Because the CEQA Analysis fails to disclose the Project's significant levels of contamination, it also fails to analyze the potentially significant health effects of the Project. In particular, the CEQA Analysis fails to include any quantified study or discussion of the health risks that may result when Project construction workers encounter contaminated soil when conducting earthmoving activities, or from tracking that contamination off-site. The CEQA Analysis also fails to evaluate the potential that future residents, Project site workers and visitors will contact contaminated soil. SWAPE explains that any such persons who come into contact with Project-site contaminants may be subject to central nervous system impairments and effects to the blood, immune system, lungs, skin, and eyes[39] when touching contaminated soil or breathing contaminated dust.[40] This is a potentially significant impact that the City must disclose and analyze in an EIR.

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[33] See 277 27th Street Phase II at pp. 6-10.
[34] *Id.*
[35] SWAPE Comments, p. 9.
[36] See 304 to 322 24th Street Phase II ESA, p. 4.
[37] SWAPE Comments, p. 9.
[38] CEQA Analysis, p. 56.
[39] http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=423&tid=75.
[40] SWAPE Comments, p.9..

The CEQA Analysis also fails to provide for any effective mitigation that would target and remove the sources of TPH and mitigate potential health risks from exposure to the chemicals. The CEQA Analysis relies on Specific Plan Standard Conditions of Approval ("SCAs") SCA HAZ-1 and SCA-2 to mitigate potentially significant hazardous materials impacts. However, SCA HAZ-1 and SCA-2 merely includes general provisions to address "unexpected" contamination that is encountered after earth-moving activities have commenced. SCA HAZ-1 and SCA-2 rely on measures for visual and olfactory detection (i.e. sight and smell). SWAPE finds that these measures are inadequate because "[t]he TPH-d and TPH-mo contamination that is documented at the site may be hazardous to health at concentrations which cannot be seen or smelled in the soil, rendering provisions in SCA-HAZ-1 and SCA-HAZ-2 ineffective."[41]

The CEQA Analysis next assumes, without analysis, that "if new or more significant contamination is encountered during site redevelopment earthwork, the project sponsor shall confirm that any cleanup actions are performed consistent with applicable laws and local agency requirements as required."[42] However, as case law has shown, compliance with applicable regulations does not automatically obviate the need for further analysis of impacts at this pre-approval stage of the Project.

In *Keep our Mountains Quiet v. County of Santa Clara*, neighbors of a wedding venue sued over the County's failure to prepare an EIR due to significant noise impacts. The court concluded that "a fair argument [exists] that the Project may have a significant environmental noise impact" and reasoned that although the noise levels would likely comply with local noise standards, "compliance with the ordinance does not foreclose the possibility of significant noise impacts."[43] The court ordered the County to prepare an EIR. The ruling demonstrates the possibility that a project may be in compliance with an applicable regulation and still have a significant impact.

In *Communities for a Better Env't v. California Res. Agency*, the court struck down a CEQA Guideline because it "impermissibly allow[ed] an agency to find a cumulative effect insignificant based on a project's compliance with some

[41] *Id.*
[42] CEQA Analysis, p. 56.
[43] *Keep our Mountains Quiet v. County of Santa Clara* (2015) Case No. H039707, p. 21.

generalized plan rather than on the project's actual environmental impacts."[44] The court concluded that "[i]f there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding that the project complies with the specified plan or mitigation program addressing the cumulative problem, an EIR must be prepared for the project."[45] Thus, the ruling supports the notion that despite assured compliance with applicable standard outside of the CEQA process, a lead agency still has an obligation to consider substantial evidence and analyze and mitigate potentially significant impacts.

In *Leonoff v. Monterey County Bd. of Supervisors*, the court held that conditions requiring compliance with regulations are proper "where the public agency had meaningful information reasonably justifying an expectation of mitigation of environmental effects."[46] The ruling suggests that an agency that merely provides a bare assertion that the project will be in compliance with applicable regulations, without further explanation or enforceability, may not fulfill the requirements of CEQA.

Here, the City failed to provide any information explaining how compliance with the outside laws and regulations would reduce the risks posed to workers and residents from the high levels of TPH contamination on the site. The City may not rely solely on compliance with regulations or laws as reducing impacts without a full analysis of impacts or enforceable mitigation. Furthermore, reliance on the BVDSP EIR is improper because the BVDSP EIR did not conduct a site-specific investigation of the highly contaminated site.

CEQA requires that the City describe all components of the Project that may have a significant impact, and adequately analyze and require mitigation for all potentially significant impacts related to on-site hazards. Here, the City failed to do so in its CEQA Analysis. SWAPE concludes that Project construction should not be allowed until a full EIR has been prepared to include a thorough assessment and cleanup of the contamination."[47] An EIR must be prepared to remedy the defects in the City's CEQA Analysis of hazardous materials impacts. In particular, this analysis must include proper disclosure and assessment of site contaminants, the

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[44] *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453.
[45] *Id.*
[46] *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1355.
[47] SWAPE Comments, p. 9.

risk they pose to the health of construction workers, site visitors and future occupants, and a regulatory agency-approved cleanup plan to address any health risks that the contaminants pose.

2. Dewatering Impacts Has Not Been Adequately Addressed

Under CEQA, a project may have a significant impact if it would violate any water quality standards or waste discharge requirement, create or contribute runoff water that would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff, or otherwise substantially degrade water quality.[48] CEQA and applicable case law require the City to describe all aspects of the Project, and, as explained above, disclose the significance of all impacts and provide separate and enforceable mitigation.[49]

The CEQA Analysis states that dewatering would be required during construction.[50] The CEQA Analysis also states that the Project would involve grading and excavation activities up to depths of approximately 13 feet below grade to construct the building"[51] Thus, dewatering will most likely be required at those depths. SWAPE explains that the contaminated groundwater generated from the dewatering process may pose a potentially significant water quality issue, and that any contaminated groundwater encountered during Project construction must be handled and disposed in accordance with the San Francisco Bay Regional Water Quality Control Board's NPDES General Permit requirements [52] SWAPE further notes that the CEQA Analysis fails to consider that groundwater that would be dewatered is known to be contaminated with TCE and other compounds.[53] Nevertheless, the City is still required under CEQA to fully describe, analyze, and mitigate potential impacts from dewatering in its CEQA document.

SWAPE concludes that an EIR must be prepared to analyze the impact and identify the Regional Board's dewatering requirements and how they will be met during Project construction.[54]

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[48] CEQA Guidelines, Appendix G.
[49] *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645.
[50] CEQA Analysis, p. 18.
[51] *Id.*
[52] SWAPE Comments, p. 10.
[53] *Id.*
[54] *Id.*

C. The CEQA Analysis Fails To Adequately Analyze The Project-Specific Health Risk And Fails To Incorporate Conditions And Measures Identified in the Broadway Valdez District Specific Plan

The BVDSP EIR determined that development under the plan could generate substantial levels of Toxic Air Contaminants ("TACs"), resulting in significant health risks to sensitive receptors during construction activities and project operations. The BVDSP EIR further determined that new operational sources, such as backup diesel generators, could result in significant impacts on new and existing receptors.[55] SCAs and mitigation measures were identified to reduce the impacts.[56]

Despite the SCAs and mitigation measures, the BVDSP EIR determined that the TAC exposure resulting generally from the Project would remain significant and unavoidable. This conclusion, however, was based primarily on operational exposures, and the BVDSP EIR did not evaluate in detail the potential health risk to sensitive receptors during *construction*. The BVDSP EIR did not address construction related exposures because "the specificity of detail necessary to conduct a health risk assessment is not available at the Specific Plan stage."[57] The BVDSP EIR thus deferred the assessment of health risks from construction activities to the project level stage where project-specific impacts and mitigation measures could be determined.

As explained by SWAPE, however, the CEQA Analysis completely fails to evaluate the health risk posed to nearby sensitive receptors from exposure to diesel particulate matter ("DPM") emissions released during Project construction.[58] The CEQA Analysis concludes that, "[b]ased on an examination of the analysis, findings, and conclusions of the BVDSP EIR, implementation of the proposed project would not substantially increase the severity of significant impacts identified in the BVDSP EIR, nor would it result in new significant impacts related to air quality that were not identified in the BVDSP EIR."[59] This conclusion is incorrect.

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[55] BVDSP EIR, p. 4.2-28.
[56] *Id.*, at 4.2-28 – 29.
[57] *Id.*, at 4.2-27.
[58] SWAPE Comments, p. 5.
[59] CEQA Analysis, p. 37.

While an operational health risk assessment ("HRA") was prepared, the risks from exposure to DPM emissions during construction were not quantified, nor were they compared to applicable numerical thresholds.[60] Although the CEQA Analysis states that the Project would require implementation of SCAs and Transportation Demand Management ("TDM") to control construction emissions,[61] SWAPE notes that the risk must still be quantified in order to determine whether all necessary SCAs and mitigation measures have been applied if the measures will adequately reduce DPM emissions.[62]

Furthermore, SWAPE explains that by failing to quantify the risk associated with Project construction, the CEQA Analysis "is inconsistent with guidance set forth by the Office of Environmental Health Hazard Assessment ("OEHHA")," the organization responsible for providing recommendations for HRAs in California.[63] The February 2015 OEHHA guidance document describes the types of projects that warrant the preparation of an HRA.[64] According to SWAPE, construction of the Project will produce emissions of DPM, a human carcinogen, through the exhaust stacks of construction equipment over a construction period of 30 months, as stated in the CEQA Analysis.[65] OEHHA recommends that all short-term projects lasting longer than two months be evaluated for cancer risks to nearby sensitive receptors.[66] SWAPE explains that "[t]his recommendation reflects the most recent HRA policy, and as such, the health risk for Project construction should be quantified and evaluated against the numerical significance threshold established by the Bay Area Air Quality Management District ("BAAQMD")."[67]

SWAPE prepared a simple screening-level HRA, which demonstrates that construction-related DPM emissions would exceed BAAQMD health risk thresholds.[68] SWAPE's model indicates that construction activities will generate

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[60] *Id.*
[61] *Id.*
[62] SWAPE Comments, pp. 5-6.
[63] *Id.*, at 10.
[64] "Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments." OEHHA, February 2015, *available at:* http://oehha.ca.gov/air/hot_spots/2015/2015GuidanceManual.pdf.
[65] SWAPE Comments, p. 10.
[66] OEHHA, Risk Assessment Guidelines, at 8-18.
[67] SWAPE Comments, p. 6.
[68] *Id.* at pp. 7-8.

approximately 429.2 pounds of DPM over a 372-day construction period.[69] SWAPE then calculated the excess cancer risk for each sensitive receptor location, for adults, children, and/or infant receptors using applicable HRA methodologies prescribed by OEHHA. As SWAPE explains, OEHHA recommends the use of Age Sensitivity Factors ("ASFs") to account for the heightened susceptibility of young children to the carcinogenic toxicity of air pollution.[70] SWAPE's findings are included below.

Parameter	Description	Units	Adult	Child	Infant
C_{air}	Concentration	ug/m^3	1.52	1.52	1.52
DBR	Daily breathing rate	L/kg-day	302	581	581
EF	Exposure Frequency	days/year	350	350	350
ED	Exposure Duration	years	1.02	1.02	1.02
AT	Averaging Time	days	25550	25550	25550
	Inhaled Dose	(mg/kg-day)	6.4E-06	1.2E-05	1.2E-05
CPF	Cancer Potency Factor	1/(mg/kg-day)	1.1	1.1	1.1
ASF	Age Sensitivity Factor	-	1	3	10
	Cancer Risk		**7.06E-06**	**4.07E-05**	**1.36E-04**

As demonstrated in the table, SWAPE found that excess cancer risk to adults, children, and infants during Project construction for the sensitive receptors located 25 meters away are 7.06, 40.7, and 136 in one million, respectively. The child and infantile exposures vastly exceed the BAAQMD threshold of 10 in one million. Thus, SWAPE's findings constitute substantial evidence of a potentially significant health risk that the CEQA Analysis failed to disclose or adequately mitigate. SWAPE concludes that "a refined health risk assessment must be prepared and included in [an EIR] to examine air quality impacts generated by Project construction using site-specific meteorology and specific equipment usage schedules."[71]

Furthermore, the CEQA Analysis fails to identify or incorporate all SCAs and mitigation required under the BVDSP. The CEQA Analysis not only fails to

[69] *Id.* at p. 7.
[70] *Id.*; OEHHA, Risk Assessment Guidelines.
[71] SWAPE Comments, p. 8.

quantify the construction health risk to determine whether all necessary SCAs and mitigation have been incorporated (which were not even clearly identified in the BVDSP), but also fails to incorporate Mitigation Measure AIR-4: Risk Reduction Plan to address the Project's use of an emergency generator, which can introduce new TACs as stated in the CEQA Analysis.[72]

AIR-4 states that "[a]pplicants for projects that would include backup generators shall prepare and submit to the City, a Risk Reduction Plan for City review and approval. . . The applicant shall implement the approved plan."[73] The BVDSP appears to require this measure for all projects with backup generators, such as this Project, to address cumulatively considerable health risks from multiple new sources.[74] However, even though the BVDSP clearly anticipated cumulatively considerable health risks from new sources of TACs, such as emergency generators, the CEQA Analysis ignores this analysis and concludes that AIR-4 is not required.[75] This is contrary to the requirements of the BVDSP.

The CEQA Analysis is therefore inconsistent with the BVDSP because it fails to incorporate all mitigation required under the BVDSP to reduce health risks to the surrounding community. In addition, the health risk impact disclosed by SWAPE from DPM emissions during construction presents new information showing a significant impact, which the BVDSP explained could not be known at the Project level, and which was not discussed in the BVDSP EIR. Therefore, an EIR is required for the Project and the City may not rely on the CEQA Analysis for Project approval.

D. The CEQA Analysis Fails To Adequately Analyze Project-Specific Greenhouse Gas Emissions And Fails To Incorporate Conditions And Measures Identified In The Broadway Valdez District Specific Plan

The BVDSP EIR analyzed GHG emission impacts resulting from build-out of the entire plan, which were determined to be significant and unavoidable. Several mitigating SCAs were identified and incorporated into the BVDSP. Those SCAs,

[72] CEQA Analysis, p. 21 ("[The Project] would have an emergency generator, thereby introducing new sources of TACs.").
[73] BVDSP EIR, p. 4.2-28.
[74] *Id.*
[75] CEQA Analysis, p. 37.

such as a GHG Reduction Plan, apply to Projects that meet certain thresholds for GHG emissions. According to the CEQA Analysis, a GHG screening analysis ("GHG Analysis") was conducted to determine if the proposed Project would meet the thresholds requiring the development of a GHG Reduction Plan under SCA F in the BVDSP (or SCA 38 as the CEQA Analysis's GHG Analysis refers to it).[76]

Under SCA F, if the Project emits more than 1,100 metric tons of CO_2e per year ($MTCO_2e/yr$) and generates more than 4.6 metric tons of CO_2e per year per service population ($MTCO2_2/yr/sp$), the Project would have a significant GHG impact, and the Project Applicant would be required to develop a GHG Reduction Plan.[77] The CEQA Analysis concluded that the Project does not exceed the applicable thresholds, and thus would have a less than significant GHG impact.[78] No SCAs or mitigation measures were applied to the Project.

However, SWAPE finds that the City's conclusion regarding GHG impacts is inaccurate and based on emissions generated by an incorrect model.[79] As explained by SWAPE, the GHG Analysis relies on emissions calculated from the California Emissions Estimator Model Version CalEEMod.2013.2.2 ("CalEEMod").[80] CalEEMod provides recommended default values based on site specific information, such as land use type, meteorological data, total lot acreage, project type and typical equipment associated with project type. If more specific project information is known, the user can change the default values and input project-specific values, but CEQA requires that such changes be justified by substantial evidence.[81] Once all the values are inputted into the model, the Project's construction and operational emissions are calculated and "output files" are generated. These output files disclose to the reader what parameters were utilized in calculating the Project's air pollution emissions, and make known which default values were changed as well as provide a justification for the values selected.[82]

When reviewing the construction and operational CalEEMod output files for the GHG analysis, SWAPE found that several of the assumptions used and values

[76] BVDSP EIR, Section 4.6; Addendum, Attachment F; see CEQA Analysis, p. 51.
[77] *Id.*
[78] CEQA Analysis, pp. 51-52.
[79] SWAPE Comments, p.2.
[80] *Id.*; CalEEMod website, *available at*: http://www.caleemod.com/.
[81] CalEEMod User Guide, pp. 2, 9.
[82] *Id.*, at 7, 13.

inputted into the model are "not consistent with information disclosed in the CEQA Analysis and the GHG Screening Analysis."[83] SWAPE explains that the GHG Analysis relied on an incorrect distribution of operational trip type and trip purpose in calculating operational GHG emissions. These inaccuracies skewed the City's calculations such that GHG emissions appear to have been substantially underestimated.[84] As a result, SWAPE concludes that the GHG emissions associated with the construction and operation of the Project are underestimated.[85]

First, the "trip type" percentages identified in the CEQA Analysis do not correspond with the "trip types" that were input into the GHG Analysis. According to Appendix A of the CalEEMod User's Guide, "the trip type breakdown describes the purpose of the trip generated at each land use," and "multiplying the total trips for a land use by trip type breakdown percentage yields trips for a given trip type."[86] Pursuant to the User Guide, the trip type for residential land uses are defined as home-work (H-W), home-shop (H-S), and home-other (H-O), while the trip types for non-residential land uses are defined as commercial-customer (C-C), commercial-work (C-W), and commercial-nonwork (C-NW).[87] However, the GHG Analysis applied inconsistent and unsupported values for the Project's residential land use. The City's CalEEMod emissions model states that 26.10 percent of trips were assigned to H-W, 29.10 percent were assigned to H-S, and 44.80 percent were assigned to H-O. For the commercial land use, 16.30 percent were assigned to C-W, 64.70 percent were assigned to C-C, and 19.00 percent were assigned to C-NW.[88]

However, as SWAPE explains, these trip type percentages represent a variety of vehicle types, including passenger vehicles with lower emissions than commercial trucks. The GHG Analysis' emissions model did not model passenger vehicle trips, and instead modeled only truck trips, which have longer default trip lengths. Thus, SWAPE explains that, "[b]ecause trips utilized by passenger car vehicles to and from the Project site were not modeled and only truck trips were modeled, 100 percent of the trips should have been allocated to H-O and C-NW trip

[83] SWAPE Comments, p. 2.
[84] *Id.*
[85] *Id.*
[86] "CalEEMod User's Guide, Appendix A: Calculation Details for CalEEMod." SCAQMD, *available at:* http://www.aqmd.gov/docs/default-source/caleemod/caleemod-appendixa.pdf?sfvrsn=2, p. 20.
[87] CalEEMod User Guide, p. 28, *available at:* http://www.caleemod.com/.
[88] See CEQA Analysis, p. 52.

types."[89] SWAPE concludes that, by failing to allocate the correct percentage of operational trips to the appropriate trip type category, the actual vehicle miles travelled by the operational trips appear to have been underestimated, causing the Projects total operational emissions to be similarly underestimated.[90]

The second error in the GHG Analysis was in the City's trip purpose analysis, which spread out the trip purpose percentage amongst primary, diverted, and pass-by trips for both the residential and commercial land uses. As SWAPE explains, the truck trips modeled do not represent diverted or pass-by trips and only represent primary trips.[91] By spreading the trip purpose percentages amongst the three categories, the GHG Analysis therefore used shorter trip lengths in its modeling, causing a further reduction in the total vehicle miles traveled. Based on the trip purposes identified in the CEQA Analysis, SWAPE concludes that 100 percent of the trip purpose should have been allocated to primary trips.[92]

The GHG Analysis concluded Project operational GHG emissions would be 1,061 MTCO2e/year, just slightly under the City's applicable GHG threshold of 1,100 MTCO2e/year (or 4.6 MTCO2e/service population/year).[93] SWAPE concludes that, because the operational emissions identified in the GHG Analysis are very close to exceeding the threshold of significance, and the GHG Analysis contains erroneously minimizing input factors, "it is reasonable to assume that when the Project is modeled correctly, GHG emissions may exceed the threshold."[94]

This determination is critical to the implementation of GHG mitigation measures for the Project. If the proposed Project was to exceed one of the City's applicable thresholds (1,100 MTCO2e/year or 4.6 MTCO2e/service population/year), the Project would then meet the criteria of the BVDSP EIR's Scenario B, which would require the preparation of a GHG Reduction Plan.[95] Given the inaccuracies in the City's GHG modeling that are identified by SWAPE, an updated GHG analysis must be prepared that accurately models the Project's operational trips in accordance with the Project information disclosed in the CEQA Analysis.

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[89] SWAPE Comments, p. 3.
[90] SWAPE Comments, p. 3.
[91] *Id.* at p. 4.
[92] *Id.* at p. 4.
[93] *Id.* at p. 5; CEQA Analysis, p. 52.
[94] SWAPE Comments, p. 5.
[95] See GHG Screening Analysis, p. 3.

III. CONCLUSION

The City failed to comply with CEQA's procedural and evidentiary standards in its CEQA Analysis. As explained above, the CEQA Analysis fails to analyze and mitigate the Project's high levels of TPH contamination and the Project's significant health risks posed to the surrounding community from DPM emissions. Both of these significant impacts are new or more severe than previously analyzed, and mitigation measures, which are considerably different from those analyzed in the BVDSP EIR, would substantially reduce these significant effects, but have not been required in the CEQA Analysis. For these reasons, we urge the City to prepare a revised analysis in an EIR, as required by CEQA and to identify and implement all feasible mitigation measures available to reduce the Project's potentially significant site-specific impacts to less than significant levels before the City considers approving the Project.

Sincerely,

Christina M. Caro

CMC:ric

Attachments

3620-002rc

EXHIBIT 3

ADAMS BROADWELL JOSEPH & CARDOZO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037
TEL: (650) 589-1660
FAX: (650) 589-5062
ccaro@adamsbroadwell.com

DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
LAURA E. HORTON
MARC D. JOSEPH
RACHAEL E. KOSS

SACRAMENTO OFFICE
520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721
TEL: (916) 444-6201
FAX: (916) 444-6209

August 17, 2016

VIA EMAIL and HAND DELIVERY

Chair Adhi Nagraj and
Honorable Members of the City of Oakland Planning Commission
Oakland City Hall
One Frank H. Ogawa Plaza, Hearing Room No. 1
Oakland, CA 94612
Email: nagrajplanning@gmail.com;
cmanusopc@gmail.com; amandamonchamp@gmail.com;
jmyres.oakplanningcommission@gmail.com;
pattillo@pgadesign.com; EW.Oakland@gmail.com

Peterson Z. Vollmann, Planner IV
City of Oakland, Bureau of Planning
250 Frank H. Ogawa, Suite 2114
Oakland, CA 94612
Email: pvollmann@oaklandnet.com

Re: Agenda Item No. 6: 277 27th Street (24th and Harrison Streets Project, PLN 16-080)

Dear Chair Nagraj, Honorable Members of the Oakland Planning Commission and Mr. Vollmann:

These comments are submitted on behalf of Oakland Residents for Responsible Development ("Residents") regarding Agenda Item No. 6, 277 27th Street, also known as the 24th and Harrison Streets Project (PLN 16-080) ("Project), and the CEQA Analysis prepared by the City of Oakland ("City") for the Project pursuant to the California Environmental Quality Act ("CEQA Analysis").[1]

[1] Pub. Resources Code §§ 21000 et seq.

Residents and its expert consultants from Soil / Water / Air Protection Enterprise ("SWAPE")[2] have reviewed the Staff Report for the August 17, 2016 continued Planning Commission ("Commission") hearing, along with new technical reports prepared for the City and Applicant Holland Partner Group ("Applicant") in response to our August 3, 2016 comments (collectively "Responses"). Based on our review, it is clear that the City failed to adequately respond to our comments regarding the need for further analysis, disclosure, and mitigation of existing soil contamination at the site. The City has also failed to support its conclusion that the potentially significant health risks to children and infants from the Project's construction emissions will be less than significant based on the Applicant's purported future compliance with Standard Condition of Approval ("SCA") SCA-AIR-1.

For the reasons discussed herein, the City's CEQA Analysis remains inadequate. Residents renews its request that the City prepare a project-level environmental impact report ("EIR") to fully analyze and mitigate the Project's potentially significant environmental and public health impacts.[3]

A. The City's Responses Fail to Adequately Respond to Comments Regarding Potentially Significant Soil Contamination.

SWAPE explained that the CEQA Analysis inaccurately concluded that existing soil and groundwater contamination at the Project site is insignificant when, in fact, the City's own Environmental Site Assessments ("ESAs") discloses widespread soil and groundwater contamination present at the Project site at levels which exceed health-protective Environmental Screening Levels ("ESLs"). The Responses mischaracterize the results of the Phase II ESAs and fail to remedy the inadequacies in the CEQA Analysis' reliance on SCA-HAZ-1 and SCA-HAZ-2 to address potentially significant soil contamination that may be unearthed during Project construction.

[2] See August 17, 2016 letter from SWAPE to C. Caro re Supplemental Comments on the 24th and Harrison Streets Project, attached hereto as Exhibit A ("SWAPE Comments"). The SWAPE Comments are incorporated by reference as if fully set forth herein.

[3] REsidents reserve the right to supplement these comments at later hearings on this Project. 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.

First, the Responses state that findings in the Phase II ESA completed for the 277 27th Street parcel with respect to the TPH-d (diesel) interpret the chemical to actually be biogenic interference from naturally occurring organic materials.[4] This statement is wholly inaccurate. The Phase II clearly states that the petroleum detections exceeding established ESLs at the Project site are considered to be related to petroleum hydrocarbon releases associated with historic site operations.[5]

Second, the Responses fail to meaningfully respond to SWAPE's observations that SCA-HAZ-1 and SCA-HAZ-2 do not impose adequately health-protective or regulatory-compliant procedures to ensure adequate detection and removal of the type of contaminants located at the Project site. As SWAPE previously commented, SCA-HAZ-1 and SCA-HAZ-2 include only general provisions to address "unexpected" contamination that is encountered after earth-moving activities have commenced, by relying on measures for visual and olfactory detection (i.e. sight and smell). SWAPE found that these measures are inadequate because "[t]he TPH-d and TPH-mo contamination that is documented at the site may be hazardous to health at concentrations which cannot be seen or smelled in the soil, rendering provisions in SCA-HAZ-1 and SCA-HAZ-2 ineffective."[6] The Responses merely reiterate the erroneous conclusions from the CEQA Analysis, which failed to address this gap in proposed hazardous materials mitigation, and fails to provide for any effective mitigation that would target and remove the sources of TPH and mitigate potential health risks from exposure to the chemicals. Therefore, the response is inadequate.

Finally, the Responses state that the City will rely on the deferred creation of a Site Management Plan to require implementation of specific sampling and handling and transport procedures for reuse or disposal of contaminated soil and groundwater.[7] However, the Responses admit that "the exact method employed or plan to be implemented" has not yet been determined. The City cannot defer further analysis of the site's soil contamination to a future, post-approval stage. That analysis must be performed prior to Project approval and included in a proposed Site Management Plan that is disclosed to the public.

[4] Responses, p. 4.
[5] See Phase II ESA, p. 5-7.
[6] See August 3, 2016 SWAPW comments.
[7] See Responses, p. 4.

The Site Management Plan must also include adequate mitigation measures to address the nature of contamination at the site. SWAPE recommends that the City require the following measures in the Site Management Plan:

- Be prepared by a qualified Environmental Professional and signed and stamped by a Professional Geologist ("P.G.") or Professional Engineer ("P.E."), who shall oversee its execution.
- Include sampling and detection monitoring procedures to identify contaminated soil and groundwater during construction, and provisions for managing, removing, transporting and disposing of any such materials if encountered, in accordance with applicable State, Federal, and local regulatory requirements.
- Describe procedures for soil and groundwater testing (e.g., sampling frequencies, test methods, and action levels, etc.) for petroleum hydrocarbons, and shall include mandatory procedures to be followed for the temporary stockpiling of soil and collection of groundwater for testing, off-site disposal and/or discharge of collected soil and groundwater under applicable stormwater discharge permit(s), health and safety considerations, documentation and reporting. These procedures shall comply with all applicable regulatory requirements, including, but not limited to, the Hazardous Materials Regulations. These procedures shall include, at a minimum, the following:

    - The P.G. or P.E. shall document the occurrence of any water table encountered during excavation activities.

    - If a water table is encountered during excavation activities, groundwater present at those locations shall be sampled for petroleum hydrocarbons.

    - A site-specific Health and Safety Plan ("HASP") shall be prepared and implemented during construction. The HASP shall identify potential health and safety risks associated with petroleum-contaminated soil and groundwater, along with appropriate protective responses if encountered. The HASP shall include provisions for air monitoring, identify action levels based on health risk-based standards, and describe mandatory responses, including upgrades in

> personal protective equipment, evacuation of the work area, and/or enhanced ventilation. The Construction Contractor shall ensure that adequate protective equipment is available for worker use at all times. Protective equipment shall include the equipment described in 29 Code of Federal Regulations Section 1910.120 Appendix B, Level C or Level D, depending on the results of field monitoring and testing conducted pursuant to this section. Workers shall be made aware of site-specific health and safety risks and hazards through an initial orientation and routine meetings during field work.[8]

B. The City Lacks Substantial Evidence on Which to Conclude that the Construction Emissions Identified in the Applicant's Health Risk Assessment Will Be Reduced Below Levels of Significance.

Our August 3, 2016 comments to the Commission included a screening level health risk assessment ("HRA") prepared by SWAPE which concluded that the Project's construction emissions would result in an excess cancer risk to adults, children, and infants of 7.06, 40.7, and 136 in one million, respectively.[9] The child and infantile exposures calculated by SWAPE vastly exceed the Bay Area Air Quality Management District ("BAAQMD") threshold of 10 in one million.

In response to SWAPE's analysis, the Applicant's consultant, Firstcarbon Solutions, prepared its own project level construction HRA for the Project ("Firstcarbon HRA"). SWAPE's review of the Firstcarbon HRA demonstrates that the Project's unmitigated construction emissions would result in a significant health risk impact to infants located in the residential communities approximately 25 meters away from the Project site. In an effort to mitigate this risk, the Firstcarbon HRA incorporates an assumption that the Project will use exclusively Tier 4 off-road equipment during construction pursuant to SCA-AIR-1, resulting in an 85% reduction in toxic diesel particulate matter ("DPM"). The Firstcarbon HRA concludes, that, with the use of Tier 4 equipment, the Project's health risk impact to infants would be mitigated to less than significant levels.[10]

[8] August 17, 2016 personal communication with M. Hagemann of SWAPE
[9] See August 3, 2016 SWAPE Comments.
[10] Firstcarbon HRA, p. 2.

alone to reduce the Project's admittedly significant construction emissions below levels of significance. Rather, the City must confirm, through a detailed analysis supported by fact, whether and how the Applicant will procure exclusively Tier 4 equipment for the Project. The City must also identify alternative mitigation measures that are technologically feasible in the event that the Applicant is unable to procure all Tier 4 equipment necessary to construct the Project.

C. CONCLUSION

For these reasons, we urge the City to prepare a revised analysis in an EIR, as required by CEQA, and to identify and implement all feasible mitigation measures available to reduce the Project's potentially significant site-specific impacts to less than significant levels before the City considers approving the Project.

Sincerely,

Christina M. Caro

CMC:ric

Attachments

3620-003rc