



Betsy Lake  
Deputy City Administrator for Real Estate and Major Projects  
City of Oakland, City Administrator's Office  
One Frank H. Ogawa Plaza, 11th Floor  
Oakland, CA 94612

February 3, 2022

Re: Oakland Waterfront Ballpark District – Grade Separation

Dear Ms. Lake:

On January 6, 2022, the Oakland A's submitted a letter addressing comments made on the Howard Terminal Ballpark District (Project) Draft Environmental Impact Report (DEIR) regarding railroad grade separation. That letter provided additional information regarding the infeasibility of having multiple vehicle grade separations onto the project site. As noted in that letter, the Project has always included a large set of railroad safety measures, and those measures have only been strengthened over time. In addition, the Final EIR states that, in response to comments, the at-grade railroad safety improvements will be extended eastward along the Jack London Square corridor (Mitigation Measure TRANS-3a). The EIR also identifies additional pedestrian and bicycle grade separation as a proposed mitigation measure (Mitigation Measure TRANS-3b). Finally, the EIR analyzes an alternative (Alternative 3) that provides for an additional grade separation. These mitigation measures and alternatives, taken together, would further strengthen the Project's extensive railroad safety measures.

The January 6, 2022, letter also noted that railroad safety issues are an existing concern in this area. The Draft EIR includes a detailed description of the existing setting as it relates to transportation and the presence of the UPRR rail line that passes through the area. (See Draft EIR, pp. 4-15-39 – 4.15-42.) The letter explained that the Project will improve these existing conditions in a variety of ways by constructing railroad safety improvements along the Embarcadero West corridor. These improvements include increasing pedestrian queue space, installing or upgrading traffic signals, and installing fencing and safety gates.

These improvements will benefit not only the Project, but also residents, businesses, and visitors who already travel through the area. Indeed, the grade separations included in Alternative 3, and the pedestrian and bicycle crossing included as Mitigation Measure TRANS-3b, would provide major benefits for Oakland residents and the public generally, beyond the benefits directly tied to the Project. In addition, because the Project includes significant public



parks and open spaces, including a waterfront park and a trail that closes the gap in the existing Bay Trail and links to existing bicycle and pedestrian networks, these mitigation measures and Alternative 3 would benefit the public at large.

Pedestrian and vehicle safety has long been an issue due to the number of people that cross the at-grade tracks along Embarcadero to reach the waterfront and other amenities in the area. The safety issue in this area has been noted in the Capitol Corridor's Rail Vision Plan, with the 2016 Vision Implementation Plan noting that "infill development of condominiums and apartments [are] creating increased demand for pedestrian access to the waterfront," and acknowledging the existence of "safety concerns due to increased conflicts between trains and pedestrian/vehicles."<sup>1</sup> Thus, the potential for conflicts between trains and pedestrian/vehicles is an issue that pre-dates the proposed ballpark development and the number of people accessing the waterfront in this area was expected to increase before the Howard Terminal Project was proposed.

If approved by the City Council, the grade separations included in Alternative 3 and Mitigation Measure TRANS-3b would help address this existing issue. These grade-separated crossings would provide safer access to the waterfront not only for ballpark visitors, but for all City residents. In fact, ballpark visitors are only a fraction of the many people that would benefit from the grade-separations. Jack London Square alone regularly attracts thousands of visitors, not including festivals and other major events that are held there throughout the year. Future development in the area will likely attract even more visitors to the area. So will the publicly accessible trails, parks and open space incorporated into the Project. Given the current lack of a vehicle grade separation in the area, and limited pedestrian/bicycle crossings, the Project will greatly improve safety for all visitors to the area.

These vehicle, pedestrian and bicycle grade separations are one example of how the Project can provide immense public benefits for the City of Oakland, including for residents and visitors who do not directly visit the ballpark or other Project amenities. Visitor safety is one of the A's top priorities, and we remain committed to limiting disruptions to rail operations. We believe the Project achieves those goals, in addition to providing extra safety and access benefits for the public. If the City Council elects to approve the grade separation alternative and Mitigation Measure TRANS-3b, those benefits would be even greater.

Thank you for your consideration.

Dave Kaval  
President

Oakland Athletics

Oakland Coliseum | 7000 Coliseum way, Oakland

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<sup>1</sup> <https://images.capitolcorridor.org/wp-content/uploads/2016/12/CCVIP-Final-Report-Appendices-v2.pdf>



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February 8, 2022

VIA EMAIL – [elake@oaklandca.gov](mailto:elake@oaklandca.gov)

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Re: Oakland Waterfront Ballpark District – Hazardous Materials

Dear Ms. Lake:

The Oakland Waterfront Ballpark District Draft EIR provides an extensive discussion of the presence of hazardous materials at the Howard Terminal site, and the extent to which the project may have a significant impact with respect to these substances. (Draft EIR, Chapter 4.4.) The City received several comments concerning this analysis. In addition to responding to individual comments, the Final EIR provides a comprehensive “consolidated response” – Consolidated Response 4.16 – addressing these comments.

On behalf of the A’s, we believe the Draft EIR’s analysis and the Final EIR’s responses meet the requirements of CEQA. Because this issue continues to be raised by some commenters, however, we believe it may be helpful to address how the City’s approach is consistent with CEQA’s requirements.

#### Description of Environmental and Regulatory Setting

Some commenters stated that the EIR contains insufficient information about the presence and extent of hazardous materials at the site. As the EIR explains, however, numerous site investigations have been performed over the years. The Draft and Final EIRs include lengthy and detailed descriptions of each of the areas on the site where chemicals of concern have been detected. The discussion identifies the historic uses of each of the sites, the chemicals of concern present there, the key documents concerning site investigations and remediation, and land-use controls and management plans currently in place to ensure that the presence of these chemicals does not have a substantial adverse impact on human health or the environment. (Draft EIR, § 4.8.1; Final EIR, § 4.16.2; see Responses to Comments O-27-45, O29-1-52.)

As described in the Draft and Final EIRs, these investigations have included sampling soil, soil gas and groundwater. Hundreds of samples have been taken. ENGEO performed a further investigation of the entire site in 2019. As part of this investigation, ENGEO obtained additional samples of soil, soil gas and groundwater. Based on this investigation supplemented by the results of prior investigations, ENGEO identified specific chemicals of concern, and then evaluated whether these chemicals were present at concentrations above the conservative screening levels adopted by regulatory agencies. Such screening levels are established at concentrations well below those at which adverse impacts would occur; they are used to determine whether further investigation is necessary, or whether the potential for impacts is sufficiently low that no further investigation needs to be performed. (See Final EIR, Response to Comment O29-1-63.)

ENGEO submitted its 2019 Site Investigation Report to DTSC. DTSC approved the report in April 2020. The Draft EIR summarizes the report and its findings. (Draft EIR, pp. 4.8-9 – 4.8-15.)

ENGEO then used all the data to perform a Human Health and Ecological Risk Assessment (Risk Assessment). The Risk Assessment identified exposure pathways that had the potential to expose future residents, workers, construction workers, visitors, and off-site residents to chemicals of concern at concentrations that could result in adverse effects. As the Draft EIR summarizes:

The results of the Risk Assessment developed Target Cleanup Levels to be incorporated into the [Remedial Action Plan] In soil, Target Cleanup Levels were developed for the metals arsenic, cobalt and lead; TPH as gasoline, diesel, and motor oil; the PCBs Aroclor 1254 and 1260; the pesticide dieldrin; and various SVOCs including PAHs. In soil gas, Target Cleanup Levels were developed for TPH as gasoline, and various VOCs. The Risk Assessment also concluded that observed levels of [chemicals of concern] at Howard Terminal do not pose a significant risk to the environment, including aquatic organisms at the groundwater-Inner Harbor interface. Therefore, there are no Target Cleanup Levels for groundwater.

(Draft EIR, p. 4.8-17.)

DTSC determined that sufficient data exists to support the analysis and conclusions in the Risk Assessment prepared for the site. (DTSC, Letter Approving Human Health and Ecological Risk Assessment (October 22, 2020).) The environmental response measures that will be undertaken after approval by DTSC will comply with the DTSC-approved Target Cleanup Levels identified in the Risk Assessment.

The Draft and Final EIRs and cited reports are posted on the City's dedicated web site for the project. The information is therefore readily available to the public. Taken together, the information constitutes substantial – indeed, encyclopedic – evidence regarding the environmental setting with respect to hazardous materials. The information more than suffices to provide the

public and decision-makers with an understanding of the chemicals of concern present at the site, and the extent to which they present a threat to human health and the environment.

The analysis of hazardous materials is consistent with published case law. For example, *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362 (*City of Maywood*) demonstrates that, in this case, the EIR’s description of the presence of hazardous materials is sufficient. In that case, a school district proposed to construct a high school at a site encompassing parcels with a history of using hazardous materials. The district had been denied access to some of the parcels, so limited information was available on the potential presence of hazardous materials in soil. The EIR stated that, considering the risk posed by the potential presence of contaminated soil, the district would perform a supplemental site investigation, and develop a “removal action work plan” for removing contaminated soil, subject to the approval of DTSC. Ultimately, DTSC would have to certify that the site did not pose an unacceptable health risk. The petitioner argued this approach impermissibly deferred the district’s investigation. The court disagreed, analogizing the school district’s approach with the City of Oakland’s analysis of seismic safety in *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884 (*Oakland Heritage*):

As in *Oakland Heritage*, the [Final EIR] explained that the [district] conducted an extensive preliminary investigation of the project site to determine whether the site exhibited contamination from hazardous materials. Based on this investigation, the [district] concluded that additional investigation and remediation would be necessary. As in *Oakland Heritage*, these further investigatory steps were subject to numerous environmental rules and regulations described in the EIR and would be overseen by another governmental agency—the DTSC. Finally, construction would not start until DTSC determined that no further action was necessary.

(208 Cal.App.4th at p. 412; see also *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1056 [citing the EIR’s “extensive information on the presence and location of [] hazardous substances” at a former military base to be transferred and redeveloped for civilian uses]; *Old East Davis Neighborhood Assn. v. City of Davis* (2022) – Cal.App.5th – [slip op. dated December 20, 2021] [city’s environmental assessment provided sufficient information regarding the potential presence of petroleum-impacts soils at project site].)

In this case, multiple site investigations have been performed, DTSC has approved those investigations as sufficient to characterize the site, DTSC has approved the Target Cleanup Levels that will govern the environmental response measures at the site, and the Draft and Final EIR’s summarize this information. This information far exceeds that which was found to be adequate in *City of Maywood* and in other cases.

### Deferral of Mitigation

The City also received comments stating that mitigation measures addressing the presence of hazardous materials are improperly deferred. As explained below, these comments are incorrect.

Many of these comments focused on Mitigation Measure HAZ-1a. As set forth in the Draft EIR, this measure requires the preparation of, among other things, a consolidated Remedial Action Plan (RAP) covering the entire site; this workplan would replace the existing land-use covenants, restrictions and plans that regulatory agencies have already approved, and that already apply to different areas at the site.

As the Final EIR explains, the A's propose to prepare a consolidated Remedial Action Plan, and Mitigation Measure HAZ-1a has been revised to reflect this proposal. (Final EIR, Consolidated Response 4.16.4.)

Some commenters stated that revised clean-up plans (whether in the form of a RAP or a Removal Action Workplan, or RAW) should be prepared now, so that the public can evaluate the sufficiency of these plans as part of the EIR. (E.g., Comment O-27-20.) A primary consequence of the shift from a RAW to a RAP, however, is that the public will be afforded greater opportunities for public input in DTSC's consideration of a RAP. (Final EIR, Consolidated Response 4.16.4.) Because grading and construction cannot commence until after DTSC has approved the RAP, the public will have ample to review remediation plans.

Indeed, as stated in the Final EIR, because DTSC has jurisdiction over the decision whether to approve the RAP, DTSC serves as a responsible agency that will rely upon the City's certified EIR in making its decision. As such, DTSC cannot approve the RAP until after the City has determined whether to certify the EIR. (CEQA Guidelines, § 15096.)

The approach reflected in Mitigation Measure HAZ-1a is consistent with CEQA's requirements. The State CEQA Guidelines recognize that mitigation measures requiring compliance with regulatory standards are appropriate. (CEQA Guidelines, § 15126.4, subd. (a)(1)(B).) Case law interpreting CEQA reaches the same conclusion. (See, e.g., *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 524-526 [rejecting claim of improper mitigation deferral]; *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 646-648 [requiring consultation with resource agencies; mitigation upheld]; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 944-947 [upholding measure requiring follow-up surveys and preparation of mitigation plans in consultation with resource agencies]; *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 236-237 [upholding mitigation requiring regulatory compliance]; *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 934 [upholding mitigation requiring compliance with energy efficiency standards]; *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1126-1127 [mitigation measure to address night-time glare adequate because measure included lighting specifications]; *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777,

794 [upholding measure requiring preparation of fuel modification plan consistent with adopted guidelines]; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275-1277 [requiring compensation for lost habitat at specified ratio in consultation with resource agencies]; *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1366 [upholding deferral of design of protective fencing pending further study of migration habits of target species]; *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 25-28 [final design of diversion structures not required].)

*City of Maywood, supra*, 208 Cal.App.4th 362, is particularly noteworthy. In that case, a preliminary assessment concluded that contamination at a proposed school site could pose a health risk exceeding regulatory standards. The EIR stated the district would perform a supplemental site investigation and develop a “removal action work plan” (RAW), both of which required DTSC oversight and approval. DTSC would also have to certify that, following remediation, the site did not pose an unacceptable health risk. (*Id.* at pp. 404-405.) The EIR concluded that “with the implementation of required response actions approved by DTSC, such as conducting additional investigation and completing the RAW under the DTSC oversight, the proposed Project would have a less than significant hazardous materials impact to the public and the environment.” (*Ibid.*) Further investigation of the site was “subject to numerous environmental rules and regulations described in the EIR and would be overseen by another governmental agency – the DTSC.” (*Id.* at p. 412.) “[C]onstruction would not start until DTSC determined that no further action was necessary.” (*Ibid.*) The Court concluded that these measures were adequate. (*Id.* at pp. 409-413.)

Similarly, in *Oakland Heritage, supra*, 195 Cal.App.4th 884, the EIR described seismic hazards, summarized building codes aimed at ensuring seismic safety, and the city adopted a mitigation measure requiring preparation of geotechnical studies for individual buildings to demonstrate that building designs met these identified standards. (195 Cal.App.4th at pp. 906-912.)

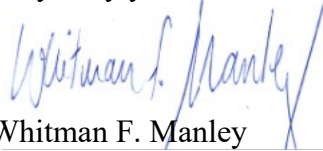
These cases contrast with other instances in which the courts have found improper deferral because mitigation measures called for further study, without identifying the standards that would have to be attained or providing any indication of whether or how the measures would be implemented. (E.g., *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 93-95 [no evidence showed how goal of mitigation—no net increase of greenhouse gas emissions—would be attained]; *Poet, LLC v. California Air Resources Bd.* (2013) 217 Cal.App.4th 1214 [in adopting regulations designed to encourage bio-diesel use, agency impermissibly deferred formulation of mitigation for pollutant emissions because adopted measure contained no standards to assess effectiveness of mitigation]; *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 656 [EIR for highway expansion project did not identify the standard used to determine whether impacts on redwood trees would be “significant,” referred to vague “special construction techniques” that were “optional” for the contractor, and provided no information on how these techniques would avoid impacts to the trees].)

In this case, the EIR's approach is consistent with CEQA's requirements. The site has a lengthy history of oversight by DTSC. Controls – cap maintenance, monitoring, dust control, land-use restrictions, etc. – are already in place. As described in the EIR, these restrictions and controls apply to those portions of the site where the release of hazardous materials has been determined to require a response. Mitigation Measures HAZ-1a will require that these various restrictions and controls be consolidated into a single RAP covering the entire site. The Risk Assessment identifies specific Target Cleanup Levels that must be attained for chemicals of concern, where exposures have the potential to exceed screening levels. This Assessment accounts for updated and expanded data on site conditions based on ENGE0's 2019 investigation. The Assessment also accounts for the fact that, if the project is approved, uses at the site will change. Target Cleanup Levels have been devised to account for these facts.

The Risk Assessment was prepared and revised with significant input from DTSC, culminating in DTSC's approval. The Target Cleanup Levels thus function in CEQA terms as specific performance standards that must be attained. The RAP – also subject to review and approval by DTSC – will have to adhere to these standards. So will the implementation plans that follow. All the mechanisms currently in place to protect human health and the environment – cap maintenance, monitoring, dust control, land-use restrictions, etc. – will continue to be used. Everything will occur subject to DTSC oversight. The subject matter is highly regulated, and DTSC has significant expertise and experience implementing these regulations. The EIR describes these regulations and DTSC's role in implementing them, both in general and in the context of this specific site. The record thus contains ample evidence that the Target Cleanup Levels are attainable, and that potential impacts from the presence of hazardous materials can be avoided.

We appreciate the opportunity to share this perspective with the City. Thank you for your consideration.

Very truly yours,



Whitman F. Manley