

From: [Heather Lewis](#)
To: pvollmann@oaklandca.gov
Subject: Comments on Waterfront Ballpark District Project Draft Environmental Impact Report (case file ER18-016)
Date: Tuesday, April 27, 2021 4:00:46 PM
Attachments: [HT DEIR OU Comment 20210427.pdf](#)

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Dear Mr. Vollmann,

Please find attached the comments of Communities for a Better Environment, Public Advocates, East Bay Alliance for a Sustainable Economy, East Bay Community Law Center, Causa Justa: Just Cause, Urban Peace Movement, Urban Habitat, Alliance of Californians for Community Empowerment, and Faith in Action East Bay on the Waterfront Ballpark District Project Draft Environmental Impact Report (case file ER18-016).

Please let me know if you have any trouble accessing the attachment.

Sincerely,

Heather Lewis
Joseph Grib
David White
Chris Wilson
Environmental Law Clinic
University of California, Berkeley School of Law
353 Law Building
Berkeley, CA 94720-7200

COMMUNITIES
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EAST BAY



ACCE
Alliance of Californians for
Community Empowerment

April 27, 2021

City of Oakland Bureau of Planning
250 Frank H. Ogawa Plaza, Suite 2214
Oakland, CA 94612

Re: Comments on the Draft Environmental Impact Report for the Oakland Waterfront Ballpark District Project (ER18-016)

Dear Mr. Vollmann:

Communities for a Better Environment, Public Advocates, East Bay Alliance for a Sustainable Economy, Causa Justa: Just Cause, East Bay Community Law Center, Urban Peace Movement, Urban Habitat, Alliance of Californians for Community Empowerment, and Faith in Action East Bay respectfully submit these comments on the Draft Environmental Impact Report (DEIR) for the Oakland Waterfront Ballpark District Project (Project). We write as members of the Oakland United coalition to raise serious concerns about the analysis and legal validity of the DEIR that must be addressed prior to finalization of the environmental review process and certification of the Final EIR. The geographic scope and intensity of development contemplated by the DEIR will have widespread environmental impacts not just on the surrounding neighborhoods but on all of Oakland and the greater East Bay. Full and accurate environmental review is essential to ensuring that the public and decision-makers have all relevant information.

The Project's environmental impacts will be determined in large part by the housing and economic growth that results from this Project, and the DEIR cannot fully mitigate those impacts until they are thoroughly and accurately analyzed. The scope and intensity of the impacts on traffic, air quality, greenhouse gas (GHG) emissions, and numerous other environmental factors will necessarily be determined by the affordability of homes planned both at the Project site as well as other locations in Oakland, the wages of jobs created in the Howard Terminal location, and the displacement of low-income residents in surrounding neighborhoods. If the City

approves an EIR that fails to describe the full impacts of this Project, the City will miss a valuable opportunity to ensure that those impacts are mitigated by appropriate measures—such as a commitment to affordable housing, local hire policies, and living wage employment

This document fails to comply with the California Environmental Quality Act’s basic mandate to provide complete and accurate information about the foreseeable environmental impacts of the project and to consider and adopt mitigation measures to avoid or reduce these impacts. This DEIR:

- Fails to provide an accurate, stable, and finite project description;
- Fails to adequately and completely describe direct, indirect, and cumulative environmental impacts;
- Proposes ineffective mitigation measures and fails to support findings of efficacy with substantial evidence;
- Impermissibly defers the formulation of mitigation measures to some future time; and
- Provides insufficient detail for an adequate comparison of alternatives.

These failures thwart CEQA’s essential purpose of ensuring that government decision makers and the public are fully informed about the potential environmental impacts of proposed projects.

For the reasons further described below, we respectfully request that this DEIR be revised and recirculated. Recirculation is required when significant additional data or information is added after a draft EIR is issued for public review, such that the public has been deprived of a “meaningful opportunity to comment” upon an adverse impact, feasible mitigation measures, or feasible project alternatives.¹ The informational deficiencies of this DEIR have deprived the public of a meaningful opportunity to comment on the Project’s true impacts, as well as feasible mitigations measures and alternatives that could reduce those impacts, and as such the DEIR must be revised and recirculated for public comment.

I. The DEIR’s project description inadequately describes the proposed affordable housing plan.

The purpose of the project description is to provide public decision-makers and affected groups with an accurate view of the project, such that they can balance the project’s benefits against its environmental costs.² A project description is “fundamentally inadequate and misleading” if it “gives conflicting signals to decision makers and the public about the nature and scope of the project.”³ As such, an “accurate, stable, and finite” project description is an essential condition of a legally sufficient EIR.⁴

Additionally, CEQA requires that the entirety of a project be reviewed in a single EIR. An agency may not split a project into smaller pieces or segments to avoid a complete

¹ CEQA Guidelines, 14 Cal. Code Regs. § 15088.5(a)

² *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 192–93 (1977).

³ *Citizens for a Sustainable Treasure Island v. City & Cnty. of San Francisco*, 227 Cal. App. 4th 1036, 1052 (2014).

⁴ *Washoe Meadows Cmty. v. Dept’s of Parks & Recreation*, 17 Cal. App. 5th 277, 287 (2017) (citing *Cnty. of Inyo v. City of Los Angeles*, 71 Cal. App. 3d at 193).

environmental analysis.⁵ Courts have considered distinct activities as one CEQA project and required them to be reviewed together in one document in two situations: (1) when the purpose of the project under review is to provide the necessary first step toward a larger development,⁶ and (2) when development of the project under review requires or presumes completion of another activity.⁷

Here, the DEIR appears to commit to an affordable housing program, but provides no information about what the affordable housing program will actually entail, instead describing several options without committing to any one. A legally adequate project description would describe the proposed affordable housing program in detail, including impact analyses and mitigation measures. Especially given that the current project description proposes additional off-site development that is not analyzed anywhere in the EIR, the City must issue a revised DEIR that commits to an affordable housing program, and which describes and analyzes a concrete quantity of units in an identifiable location.

A. The DEIR fails as an informational document because it does not commit to a plan for implementing the affordable housing program, including how much affordable housing will be built and where.

The DEIR presents affordable housing as an important part of the Project, listing the creation of affordable housing units as a component of several project objectives.⁸ Yet the DEIR

⁵ *Berkeley Keep Jets Over the Bay v. Board of Port Comm'rs*, 91 Cal. App. 4th 1344, 1358 (2001).

⁶ See, e.g., *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 397–98 (1988) (EIR for university's development of part of a facility should have included university's plans to use the remainder of the facility, even when university's plans were not definite); *Bozung v. Local Agency Formation Comm'n*, 13 Cal. 3d 263, 283–84 (1975) (city's annexation of land must be considered together with the development it would facilitate); *City of Carmel-by-the-Sea v. Board of Supervisors*, 183 Cal. App. 3d 229, 244 (1986) (where a county rezoned land as "a necessary first step to approval of a specific development project").

⁷ *Nelson v. Cnty. of Kern* 190 Cal. App. 4th 252, 272 (1990) (EIR for reclamation plan should have included mining operations that compelled it).

⁸ DEIR at 3-15 (Project Objective 2: "Increase housing at a range of affordability levels;" Project Objective 6: "Construct high-quality housing...offering a mix of unit types, sizes, and affordability to assist Oakland in meeting its housing demand;" Project Objective 7: "support a comprehensive package of benefits, which may include...affordable housing."); see also Libby Schaaf, *Why Oakland should back the A's Howard Terminal plans*, Marin Independent Journal, Apr. 10, 2010, <https://www.marinij.com/2021/04/10/libby-schaaf-why-oakland-should-back-the-as-howard-terminal-ballpark> (Mayor Libby Schaaf explains that equitable and tangible affordable housing is a major part of her support for the project); Bill Shaikin, *Oakland's Athletics need a home. They may get one—and provide 6,000 more*, L.A. Times, Mar. 11, 2019, <https://www.latimes.com/sports/mlb/la-sp-oakland-ballpark-housing-crisis-20190310-story.html> ("[Mayor] Schaaf is focused on affordable housing, and the considerable help the Athletics might be able to lend. The Oakland housing crisis is about a city pricing out teachers, public safety workers and longtime renters, not about an absence of construction. . . . In the Giants' Mission Rock project—negotiated with the city of San Francisco and approved by voters there—40% of the residences are reserved for affordable housing."); Zach Spedden, *Housing a major component of A's Ballpark Proposal*, Ballpark Digest, Mar. 12, 2019, <https://ballparkdigest.com/2019/03/12/housing->

fails to provide any detail about the quantity or location of affordable housing that will be constructed as part of the Project. In the DEIR, the project description states that mixed-use development will include “up to 3,000 residential units.”⁹ However, a footnote states that the “Project will have an affordable housing program, which may include on-site or off-site affordable housing units and/or the payment of impact fees.”¹⁰ The affordable housing component of the Project is a primary concern among large segments of the surrounding community: while the DEIR appears to propose an affordable housing program, it suggests that some indeterminate number of additional residential units might be built at some place off-site as part of the Project.¹¹ However, these potential off-site units are not discussed further or analyzed in any of other part of the DEIR.

The DEIR provides no detail about what proportion of its residential development is set aside for affordable housing: in other words, whether affordable housing will be part of the 3,000 allotted mixed-use units or will be additional residential development *beyond* the 3,000 on-site units.¹² The DEIR says this affordable housing development may occur off-site, but doesn't identify, even generally, *where* this potential off-site residential development might be sited.¹³ This information is highly relevant for the affected public seeking to assess the environmental impacts of the project. For example, affordable housing close to the site for lower-wage workers at the ballpark or hotel would reduce emissions because those individuals may otherwise need to live farther from the site and commute from more affordable areas. By contrast, building the off-site development in a neighborhood removed from the project site could result in additional emissions, and could exacerbate displacement and gentrification in the neighborhoods surrounding the project. The DEIR does not concretely identify, or even loosely suggest, the scale or quantity of affordable housing units that may be constructed off-site, let alone discuss the impacts of the proposed development on the existing community and environment at that undisclosed location.¹⁴

Even though the DEIR commits to an affordable housing program, affordable housing might not actually be constructed as part of that program. The DEIR indicates that the A's could forego on-site or off-site affordable housing completely, and instead just pay impact fees.¹⁵ However, because the DEIR provides no information about the structure or amount of these impact fees, it is impossible for either the City or members of the public to assess whether this would be an effective option to address housing concerns. In addition to providing these details, a revised EIR should analyze impact fees' effect on displacement and gentrification, relative to actually constructing affordable units.

[a-major-component-of-as-ballpark-proposal/](#) (“Given the priority that Oakland officials, including mayor Libby Schaaf, are placing on the development of affordable housing in particular, the new units that would come from the A's plans could be a welcomed element.”).

⁹ DEIR at 3-26.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

Here, the DEIR's impact analysis only considers 3,000 on-site units. However, the project description states that a major project component and multiple core objectives may call for development beyond those 3,000 units, potentially off-site.¹⁶ For that reason, the DEIR's project description is unstable. A revised EIR must include a specific plan for the affordable housing program, including the location, proportion, and scale of additional on-site and off-site development. The revised EIR must also include an impact analysis and mitigation measures for this plan.

B. A revised DEIR should specify a fixed number of affordable housing units to avoid a conflict with the Oakland General Plan's Housing Element.

The DEIR's failure to provide a fixed number of affordable housing units to be constructed prevents the City from reliably evaluating the project's effects on the City's affordable housing production goals articulated in the Housing Element of the General Plan. Under its Regional Housing Needs Allocation, by 2023 the City must identify sites for 14,765 units of new housing, 6,949 of which must be designated as affordable housing units.¹⁷ As of 2020, only 1,506 affordable housing units have been permitted, leaving 5,443 affordable units yet to be built or even permitted to meet the Housing Element's goal, even as the City has already met (and exceeded) its market-rate housing production goals.¹⁸ With less than two years left under this current Housing Element, it is incumbent upon the City to ensure that projects approved for development further the City's attempts to fulfill its allocation. Further, given that full project buildout is not expected until 2029,¹⁹ the Project's lack of a definite plan for affordable housing renders it impossible to determine how this Project will impact the City's progress on its next Housing Element, post-2023.

Providing an accurate number of how many affordable units will be constructed if the City approves this project is necessary to adequately track the City's progress towards its Housing Element goals. Although the Howard Terminal site was not initially zoned for residential use or considered as one of the Housing Element's housing opportunity sites, it is now the largest major development project proposal being considered by the City and therefore represents a significant proportion of all potential affordable units.²⁰ Its 3,000 units of housing could go a long way towards meeting the City's 2023 affordable housing goals. By refusing to commit to the proportion of units that will be affordable, the project prevents the City from comparing it to project alternatives whose inclusion of affordable housing would better achieve these goals.

¹⁶ DEIR at 3-26, 3-15.

¹⁷ City of Oakland, *Housing Element 2015-2023* (Dec. 9, 2014) at 26, <https://www.oaklandca.gov/resources/read-the-2015-2023-housing-element>.

¹⁸ City of Oakland, *2020 Housing Element Annual Progress Report* (2020) Table B, https://cao-94612.s3.amazonaws.com/documents/Oakland2020_Locked.xlsx. As of 2020, the City had permitted 7,816 market-rate units, exceeding its Regional Housing Needs Allocation goal by 5,800 market-rate units. *Id.*

¹⁹ DEIR at 3-32 n.11.

²⁰ City of Oakland, *Major Development Projects List* (Jan. 20, 2021), <https://cao-94612.s3.amazonaws.com/documents/Major-Projects-List-for-Public-Distribution-March-5-2020.xlsx>.

Furthermore, ensuring that the City permits a sufficient number of affordable units impacts its eligibility for additional transportation improvement funds. As a site within one of the Housing Element's Priority Development Areas, development at Howard Terminal should be eligible for funding from MTC and One Bay Area Grant (OBAG) to support infrastructure and transportation improvements.²¹ Since 30% of OBAG funds are tied to a local jurisdiction's past and future affordable housing production, meeting the City's affordable housing goals will have a direct effect on the amount of funding received.²² Such funding would be an important opportunity for the City to improve its transportation infrastructure and could ultimately reduce GHGs and VMTs incurred by the development.

C. If the A's plan to build affordable housing off-site, they must include an impact analysis in this EIR.

If off-site residential development is contemplated as a part of the proposed Project, the DEIR must analyze the impacts of that development. CEQA prohibits piecemealing of analysis, which refers to splitting a single project into smaller pieces or segments to avoid a complete environmental analysis.²³

Building off-site housing is clearly meant as an extension of the same Project currently under review, as the project description pitches its affordable housing plan as being required to satisfy the central project objective to have some proportion of the 3,000 residences be affordable. If total housing (on-site and off-site) will be 3,000 units, then there is a piecemealing problem: the DEIR impermissibly breaks up the project into smaller pieces and analyzes the impacts separately. There could be increases in vehicle miles traveled at off-site housing, as discussed below in Part VIII, and all impacts must be considered in one DEIR.

Off-site residential development is a foreseeable consequence of the proposed Project, as the project description explicitly mentions it as a method by which the project may complete one of its "major project components:" the mixed-use development.²⁴ Additionally, project objectives 2, 6, and 7 all commit to the inclusion of affordable housing.²⁵ In this way, the DEIR presents its affordable housing program as a significant part of its plan, but provides little clarity as to its actual plan for the program. Because the DEIR presents off-site affordable housing as a potential part of the program, such development is sufficiently linked to the proposed project that it warrants analysis in the same EIR.

A thorough discussion of the sponsor's plan for proposed off-site residential development—and analysis of its impacts—is crucial for the public and relevant agencies to be informed participants in the environmental review process. The record does not indicate that the

²¹ City of Oakland, *Housing Element 2015-2023* (Dec. 9, 2014) at 294, <https://www.oaklandca.gov/resources/read-the-2015-2023-housing-element>.

²² Metropolitan Transportation Comm'n, *One Bay Area Grants – How Do Counties Get Funds?*, <https://mtc.ca.gov/our-work/fund-invest/investment-strategies-commitments/focused-growth/one-bay-area-grants>.

²³ See, e.g., *Berkeley Keep Jets Over the Bay v. Board of Port Comm'rs*, 91 Cal. App. 4th 1344, 1358 (2001).

²⁴ DEIR at 3-26.

²⁵ DEIR at 3-15.

Project sponsor is in direct control of any off-site land on which this development could occur. In part for that reason, it is difficult to ascertain where the development might take place. Wherever the development might take place, it is important that it prioritizes minimizing impacts related to emissions, dust, noise, and so on. For example, affordable housing located on or near the project site could reduce VMT (and therefore reduce air emissions) by allowing workers at the Howard Terminal site to forgo driving to work. Moreover, because the Howard Terminal area is relatively close to public transit, VMT would likely be lower than an off-site option that is farther from BART. A revised EIR should clarify a proposed location or locations for off-site residential development, and should provide a thorough analysis of foreseeable impacts and corresponding mitigation measures.

Off-site residential housing is *not* presented as a variant, alternative, or mitigation measure, but rather as part of the core project description.²⁶ It does not matter that off-site residential housing is offered as one of three options to satisfy the residential development project objective: while an EIR generally should have a clear and stable plan that is not splintered into various options, if it does include options within the plan, all proposed options should be described and analyzed sufficiently to foster informed public decision-making.²⁷ A project description that identifies variations in design is only permissible if all possible variations are fully described and separately evaluated, and the maximum possible scope of the project is clearly disclosed.²⁸ Because it fails to sufficiently describe or analyze its proposal for off-site affordable residential development, the DEIR is deficient.

The DEIR should be revised to describe in detail the plan to include affordable housing as part of the Project's residential development. With respect to on-site affordable housing, the project description should include the proposed proportion of affordable units within (or beyond) the total 3,000 units proposed. Additionally, the DEIR should be revised to adequately describe and analyze the proposed option to build affordable housing off-site. This description should clarify the development's specific location off-site, its scope, whether the units will be a subsection or in addition to the total 3,000 units proposed on-site. The revised EIR should analyze all relevant corresponding impacts and offer mitigation measures for significant impacts.

II. The DEIR provides an incomplete analysis of growth inducing impacts and fails to analyze the environmental and health impacts of economic indirect displacement.

The DEIR's methodology for evaluating growth-inducing impacts would render CEQA's mandate to study such impacts meaningless, as there is almost no imaginable project for which it would yield a finding of significant impact. The DEIR erroneously assumes that a single project exceeding City-wide population growth patterns by more than 100% will not have a growth inducing impact.²⁹

²⁶ DEIR at 3-26, 3-15.

²⁷ See *Washoe Meadows Cmty. v. Dep't of Parks & Recreation*, 17 Cal. App. 5th 277, 287–89 (2017)

²⁸ *South of Market. Community. Action Network v. City & County. of San Francisco*, (2019) 33 Cal. App. 5th 321, 332–33 (2019).

²⁹ DEIR at 7-8 to -9.

First, the DEIR wrongfully concludes that “adding up to 3,000 new market rate and affordable residential units would increase the residential population on the site by” a mere 6,000 persons.³⁰ This necessarily assumes that each unit would only result in two new people in Oakland while providing no basis for this conclusion and ignoring existing household sizes and trends in Oakland, where households sizes are closer to three people on average.³¹

Next, the DEIR arbitrarily ignores historical growth rates, instead focusing only on future projections. As the DEIR acknowledges, the City’s population experienced “an average annual increase of approximately 1.2 percent from 2010 to 2018.”³² The Project anticipates a population growth of 6,000 new residents, which would amount to a 1.4% increase in residential population from a single project.³³ This single project will surpass annual residential population growth patterns by more than 100% when compared to the growth patterns that the City has actually experienced.

The DEIR erroneously focuses on growth projections that are expected for 2040 while ignoring that the proposed project is expected to reach full build out nearly a decade before the 2040. This is a massive project that will surpass annual growth patterns and will result in an increased need for public facilities, infrastructure, or housing that will result in an environmental impact.

Given population, housing, and employment growth of this magnitude, the DEIR’s conclusions that the project would not result in substantial induced population growth or a significant increase in housing demand are implausible, lack substantial evidence, and are clearly legally flawed. This incomplete housing analysis renders inadequate the DEIR’s analysis of growth inducing impacts, housing, transportation, air quality, greenhouse gas emissions, and other environmental impacts.

A. The DEIR provides a wholly inadequate analysis of displacement.

The DEIR erroneously concludes that “[i]mplementation of the proposed Project would not directly or indirectly displace substantial numbers of existing people or housing units necessitating the construction of replacement housing elsewhere.”³⁴ The DEIR appears to rely on the assumption that because “displacement is such a widespread phenomenon, it would be speculative to identify a singular causal relationship or contribution of increased land or housing costs attributable to the Project to indirect displacement” and states that because there are currently no residents in the proposed project area, no displacement will occur.³⁵

³⁰ *Id.* at 7-8.

³¹ U.S. Census Bureau, *Oakland City QuickFacts* (2019), <https://www.census.gov/quickfacts/fact/table/oaklandcitycalifornia/HSD310219> (2.58 persons per household).

³² DEIR at 4.12-2.

³³ DEIR at 4.12-2 (2018 population of 428, 827).

³⁴ *Id.* at 4.12-18.

³⁵ *Id.*

CEQA requires analysis of direct and indirect impacts, including impacts resulting from social and economic consequences of the project.³⁶ As discussed above, the DEIR is legally inadequate because the housing plan, and specifically the affordable housing plan, is entirely omitted from the project description and is not part of the environmental impact analysis. The DEIR provides no basis for its failure to adequately account for displacement that may occur as a result of new housing that will be built within the project location and housing that will need to be built outside of the project location in order to meet the new demand created by this project. For these reasons, any analyses of displacement, population growth, impacts on public facilities, and air quality are also legally insufficient. This massive project will surpass annual growth patterns and will result in an increased need for public facilities, infrastructure, and housing that will result in an environmental impact.

In fact, displacement in the surrounding neighborhood is likely to occur; however, we do not know what neighborhoods in Oakland or elsewhere in the region will experience an environmental impact because the DEIR has omitted this portion of the project description all together and therefore also omitted any analysis of its impacts. This displacement will have environmental impacts and significant social and economic effects, but these impacts are completely absent from the DEIR's analysis. The DEIR must therefore evaluate the physical, environmental, and health consequences associated with economic displacement. For example, among other steps, the DEIR should model displacement and identify likely trends in displacement, including areas likely to face pressure, number of households affected, the communities expected to absorb these households, and the location and quantity of resulting demand for additional housing construction.

Moreover, to analyze the environmental impacts only on the project area, as the DEIR does here, is unlawful, inconsistent, and illogical. CEQA requires that “[t]he EIR shall ... analyze any significant environmental effects the project might cause by bringing development and people into the area affected”³⁷ Specifically, an EIR must “[d]iscuss the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment.”³⁸

The DEIR states that “the Project would include infrastructure improvements necessary to serve the Project site, and would not extend services to other adjacent areas that could be redeveloped.”³⁹ It then goes on to conclude that:

Project-related growth would be adequately served by existing utility and public services providers and would require no additional

³⁶ 14 Cal. Code Regs. §§ 15064(e), 15131(b); see *Preserve Poway v. City of Poway*, 245 Cal. App. 4th 560, 575 n.7 (2016); *El Dorado Union High Sch. Dist. v. City of Placerville*, 144 Cal. App. 3d 123, 132 (1983) (holding that social effects of increased student enrollment and potential for overcrowding could lead to construction of new facilities and were thus relevant under CEQA); see also *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th 1184, 1215 (2004) (holding that the EIR improperly dismissed possibility that large shopping center could drive other retailers out of business as an economic effect when urban decay and other blight-like conditions could result).

³⁷ Cal. Code Regs. tit. 14, § 15126.2(a) (emphasis added).

³⁸ *Id.* § 15126.2(d).

³⁹ DEIR at 7-8.

public facilities that would have significant environmental effects. In summary, the increase in the residential and employment population on the Project site would not result in an unplanned increase in Oakland's population or extend services beyond the site boundary in a way that might indirectly foster unplanned growth.⁴⁰

The DEIR makes this conclusion even after recognizing that affordable housing may be built elsewhere in the City. This conclusion ignores CEQA guidelines, caselaw, and makes a mockery of CEQA legal requirements. Even after recognizing the magnitude of a new work force, the DEIR concludes that “most employees would already have housing in Oakland or elsewhere in the region, and some would be new residents and seek housing either on the Project site (which would provide up to 3,000 new units), or elsewhere in Oakland or the region.”⁴¹

Due to the specific vulnerability of surrounding low-income tenants, a foreseeable impact of the project is that market pressures will lead to displacement and an ongoing shortage of homes affordable to low-income households in the adjacent communities. By ignoring displacement, the DEIR omits an important analysis of environmental impacts.

III. The DEIR erroneously assumes that the project's induced economic growth is “well within the planned growth for Oakland.”

The DEIR wholly fails to consider the indirect and induced economic growth that will result from the project, which means that the full growth impact of the Project on the surrounding neighborhood is far higher than what the DEIR currently states. The DEIR also omits any analysis of the displacement impacts that the project is likely to cause as demand from highly paid executive employees drives up housing costs in the neighboring China Town and Old Oakland neighborhood, thereby forcing low-income residents to move far away and increase their auto usage and relating environmental impacts.

A. The DEIR fails to accurately analyze the number and type of jobs that will result from the Project, and therefore fails to assess and mitigate the environmental impacts associated with this development.

Properly assessing the employment growth that will result from the project is a bedrock issue on which numerous other aspects of the DEIR rests, including an assessment of growth inducing impacts, traffic, air quality, and greenhouse gas emissions. The DEIR fails to account for indirect and induced economic growth; fails to justify the assumptions underlying its job creation estimates; and fails to accurately analyze the types of jobs that will be created. For these reasons, the DEIR must be revised and recirculated.

The DEIR dramatically under-states the economic growth that will result from the project by completely failing to consider the indirect and induced job growth that it will cause. The DEIR ignores how economic growth dynamics work: the ballpark, event center, and hotel will need to make purchases from food wholesalers, and purchase a variety of supplies, and will expand the need for transportation services for its growing workforce, event goers, and full-time employees all generating additional employment. The DEIR omits any analysis of indirect and

⁴⁰ *Id.*

⁴¹ *Id.*

induced jobs, and with these omissions the DEIR itself concludes that the Project will result in significant and unavoidable emissions that cannot be reduced to a less than significant level.⁴²

The DEIR estimates full project buildout employment at 9,499, with 7,987 of those representing new jobs.⁴³ The DEIR then relies on job increase projections for 2040 and concludes that “[t]he estimated increase in full-time employment (i.e., not construction workers) under the Project would constitute approximately 18 percent of this increase in jobs, well within the planned growth for Oakland.⁴⁴” The total number of jobs in Oakland is projected to increase from 220,792 in 2018 to 272,760 by 2040, or 51,968 more than in 2018.⁴⁵ There is no dispute that no existing local or regional plan considered the environmental impacts of adding more than 7,987 new jobs to Oakland by 2029, when the Project is estimated to reach full buildout.⁴⁶ The growth analysis is legally inadequate and does not comply with CEQA standards because this figure omits indirect job growth and relies on growth projections that did not anticipate such a massive project in Oakland. As such the DEIR’s conclusion that this growth is “well within planned growth for Oakland” is implausible, lacks substantial evidence, and is clearly legally flawed.

The DEIR further fails to explain the underlying assumptions of its employment analysis. For example, the DEIR appears to rely upon the Coliseum Draft EIR for its assumptions of the average number of jobs that would be provided by each tenant, but the DEIR fails to explain why those assumptions were reasonable, or explain why the DEIR relies upon the *draft* Coliseum EIR, rather than the final, certified EIR.⁴⁷ The DEIR also fails to analyze whether these jobs already existed in Oakland, or the likelihood that job estimates for the office and retail spaces could fall below full capacity (instead, it bases its analysis on the assumption of full capacity).⁴⁸ The DEIR also omits any analysis on what portion of the economic growth at the Howard Terminal site might represent the relocation of pre-existing economic activity. The DEIR does not analyze whether it is likely that new businesses would be created in response to the construction of additional office space, or if the availability of new retail space would incentivize the expansion of existing retail businesses. Without further explanation, the Project’s true impact on job creation is unknown.

Finally, the DEIR does not distinguish the wage levels or skill levels of the jobs associated with the Project. These distinctions are essential because the type of job created will impact determine the level of environmental impact associated with each job. For example, lower-income households tend have lower daily vehicle miles traveled (VMT) than higher

⁴² DEIR at 4.2-70.

⁴³ DEIR at 4.12-17.

⁴⁴ DEIR at 7-8.

⁴⁵ DEIR at 4.12-5 (Table 4.12-3).

⁴⁶ DEIR at 3-32 n.11.

⁴⁷ DEIR at 4.12-17 (citing “Rates from City of Oakland, 2014b [Coliseum Draft EIR, SCH# 2013042066, August 2014]” as a source for the jobs estimates in Table 4.12-8).

⁴⁸ DEIR at 4.12-16.

income households, resulting in fewer GHG and air emissions.⁴⁹ This information is also essential for determining the jobs-housing fit, as discussed below. If the Project generates significant low-wage employment in excess of affordable housing availability, workers may endure longer commutes from more affordable areas, thereby increasing air emissions associated with commutes. The DEIR must be revised and recirculated to specify the types of jobs that will be created and to analyze and mitigate the impacts of these different types of jobs.

B. The DEIR’s conclusion that project-induced housing demand in Oakland would be less than significant is without substantial evidence and contrary to law.

Because the project will result in significant economic growth and opportunities that have not been previously accounted for in any plans or growth projections, it will necessarily drive housing demand and induce growth that has not been accounted for and that will necessitate the construction of additional housing to accommodate.

While this comment discusses many flaws in the DEIR’s treatment of growth-inducing impacts and increased housing demand, we note at the outset that there is a fundamental structural flaw that pervades the DEIR’s entire analysis of these issues. After dramatically understating the economic growth that will be created by the project indirectly and the number of housing units that will be needed to accommodate these workers, the DEIR further attempts to minimize the impacts of this housing demand by assuming that it will be distributed throughout an unknown geographic area.

It does so by assuming that “[m]ost employees would already have housing in Oakland or elsewhere in the region, and some would be new residents and seek housing either on the project site or elsewhere in Oakland.”⁵⁰ This assumption is completely at odds with standard methodology for impact fee nexus studies, where the creation of new jobs is expected to directly or indirectly bring new workers to the city, including low wage workers who qualify for affordable housing.⁵¹ This assumption masks the true extent of the impacts that will be created by adding an unplanned increase of many thousands of workers to Oakland’s work force. The assumption that any housing demand could be accommodated within existing and planned housing rests on multiple assumptions that are not supported by substantial evidence.

First, it is based on an inaccurate estimate of jobs creation that is unsupported by substantial evidence, as described above. Second, planning to export the Project’s induced housing need to many other cities and counties does not eliminate those impacts. The relevant required CEQA analysis is of the significance of the aggregate induced growth a project will

⁴⁹ Transform, *Why Creating and Preserving Affordable Homes Near Transit is a Highly Effective Climate Protection Strategy* (May 2014) at 9, <https://www.transformca.org/sites/default/files/CHPC%20TF%20Affordable%20TOD%20Climate%20Strategy%20BOOKLET%20FORMAT.pdf>.

⁵⁰ DEIR at 7-8.

⁵¹ See Vernazza Wolfe Assocs. & Hausrath Economics Grp., *Oakland Affordable Housing Impact Fee Nexus Analysis: Prepared for City of Oakland* (Mar. 10, 2016) at 14–21, <https://cao-94612.s3.amazonaws.com/documents/Oakland-Affordable-Housing-Impact-Fee-Nexus-Analysis.pdf>; David Paul Rosen & Assocs., *Commercial Development Linkage Fee Analysis, City of Oakland* (Sep. 13, 2001), <https://cao-94612.s3.amazonaws.com/documents/Commercial-Development-Nexus-Fee-Analysis-for-the-Jobs-Housing-Impact-Fee.pdf>.

generate, not of a number of artificially divided smaller portions of that growth. Total impact may still be significant even if distributed across a large geography. Third, the DEIR's analysis also ignores the fact that that projected housing growth is already fully subscribed based on the DEIR's job creation projections.

The DEIR must be revised and recirculated to accurately describe the impacts of the Project's induced growth, including an analysis of the additional housing units that would need to be constructed to accommodate employment growth, the proportion of units required by affordability level, and the potential locations of those housing units.⁵²

IV. The DEIR fails to discuss planned development at the Coliseum site, which is presumed as part of this Project's approval.

The entirety of a project must be reviewed in a single EIR. CEQA requires that "environmental considerations do not become submerged by chopping a large project into many little ones—each with minimal potential impact on the environment—which cumulatively may have disastrous consequences."⁵³ An agency cannot split a project into smaller pieces or segments to avoid a complete environmental analysis.⁵⁴

Courts have considered distinct activities as one CEQA project and required the activities to be reviewed together in one document in two situations: (1) when the purpose of the project under review is to provide the necessary first step toward a larger development,⁵⁵ and (2) when development of the project under review requires or presumes completion of another activity.⁵⁶ Here, moving the A's from the Coliseum site to the ballpark proposed at Howard Terminal is a necessary first step to realize the Coliseum redevelopment plan. At the same time, the Howard Terminal project presumes completion of the Coliseum redevelopment, as construction at Howard Terminal will rely upon proceeds from the redevelopment of the Coliseum complex.

A. The Howard Terminal Project is the first step to make the Coliseum redevelopment possible.

The DEIR must analyze impacts at the Coliseum site because approval of the Howard Terminal project is a necessary first step to begin development at the Coliseum. In *Laurel*

⁵² *Napa Citizens for Honest Gov't v. Napa Cnty. Board of Supervisors*, 91 Cal. App. 4th 342, 370–71 (2001) (EIR's growth inducement analysis was legally sufficient when it included the number of employees the project would add, the number of new housing units required by income, and explored possible locations of units).

⁵³ *Bozung v. Local Agency Formation Comm.*, 13 Cal. 3d 263, 283–284 (1975).

⁵⁴ *Berkeley Keep Jets Over the Bay v. Board of Port Comm'rs*, 91 Cal. App. 4th 1344, 1358 (2001).

⁵⁵ See, e.g., *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 397–98 (1988) (EIR for university's development of part of a facility should have included university's plans to use the remainder of the facility, even when university's plans were not definite); *Bozung v. Local Agency Formation Comm'n*, 13 Cal. 3d 263, 283–84 (1975) (city's annexation of land must be considered together with the development it would facilitate); *City of Carmel-by-the-Sea v. Board of Supervisors*, 183 Cal. App. 3d 229, 244 (1986) (where a county rezoned land as "a necessary first step to approval of a specific development project").

⁵⁶ *Nelson v. Cnty. of Kern* 190 Cal. App. 4th 252, 272 (1990) (EIR for reclamation plan should have included mining operations that compelled it).

Heights Improvement Association v. Regents of University of California, a university relocated its pharmacy school to a building which was 354,000 square feet in size, but only 100,000 square feet was available to the university since one-half of the building was occupied by the California Department of Transportation pursuant to a lease with the University which expired in 1990 with an option to extend until 1995.⁵⁷ The EIR analyzed the school's relocation into the 100,000 square feet of a building, but did not consider the additional environmental effects that would result from the university's use of the remaining 254,000 square feet when it became available in 1990.⁵⁸ The draft EIR stated that the University would occupy the entire facility when the remainder of the space became available, so the future expansion and general type of future use was reasonably foreseeable.⁵⁹

Similarly, here, the A's have stated their intention to significantly redevelop the Coliseum area into a mixed-use facility once the site becomes available.⁶⁰ Right now, their primary impediment to that redevelopment is the fact that the A's still occupy the Coliseum baseball stadium. So, moving the A's into a new stadium at Howard Terminal is a necessary first step to enable the planned Coliseum site redevelopment. In that sense, the public should view the Howard Terminal and the Coliseum development as one single interconnected project. To adequately serve as a public informational document, this DEIR should be revised to describe the planned construction at the Coliseum site, and should include a thorough analysis of the associated impacts and mitigation measures.

B. The Howard Terminal project presumes completion of the Coliseum project through reliance on funds from the Coliseum redevelopment to finance the Howard Terminal Project.

Coliseum redevelopment is necessary in order for the A's to make the development at Howard Terminal a reality: the A's have stated that they are relying on revenue from a redeveloped Coliseum site to finance the Howard Terminal project.⁶¹ The DEIR's phasing plan indicates that the project calls for building the ballpark first, as quickly as possible as part of Phase 1 so that the A's can move into it as their new ballpark.⁶² Then, while the DEIR models an 8-year total construction timeline, it repeatedly states that construction is likely to take longer or occur in more than two phases, as timing and feasibility rely on a variety of unpredictable market

⁵⁷ *Laurel Heights*, 47 Cal. 3d at 393.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Kevin Truong, *Alameda County Approves Coliseum Sale to the A's*, S.F. Business Times, Dec. 23, 2019, <https://www.bizjournals.com/sanfrancisco/news/2019/12/23/alameda-county-approves-colesium-sale-to-the-as.html> ("The A's are seeking to redevelop the Coliseum site into a mixed-use project that could include a tech campus, housing, a hotel, and retail"); Kevin Reichard, *Stewart Makes Bid for City Share of Oakland Coliseum Site*, Ballpark Digest, Jan. 17, 2021, <https://ballparkdigest.com/2021/01/17/stewart-makes-bid-for-city-share-of-oakland-coliseum-site/> ("once [the Howard Terminal] ballpark is done, redevelopment would begin at the East Bay Coliseum site, with the ballpark torn down and the area utilized as a mixed-use redevelopment.")

⁶¹ Reichard, *supra* note 60 ("According to the A's, both the downtown and Coliseum should be viewed in the same economic lens: proceeds of the Coliseum development will help fund the downtown development.").

⁶² DEIR at 3-32.

factors.⁶³ This is consistent with the notion that the Howard Terminal project plans an initial phase to relocate the A's to make way for Coliseum redevelopment, but also relies on Coliseum revenue to complete later phases of construction.

As such, approval of the Howard Terminal project presumes redevelopment of the Coliseum area. Because the City's approval of the Howard Terminal project assumes parallel redevelopment at the Coliseum, that parallel development should be described and analyzed along with the Howard Terminal impacts in this EIR. The Howard Terminal and the Coliseum developments are in essence two components of a single major mixed-use redevelopment plan. Each component relies on approval of the other to be possible. By omitting a description and analysis of Coliseum development, this DEIR improperly piecemeals and segments its analysis. This EIR is deficient until it is revised to describe proposed mixed-use redevelopment at the Coliseum and analyze the impacts of this proposed development under CEQA.

The prior CEQA review conducted for the Coliseum Area Specific Plan ("CASP") does not excuse the City from analyzing the impacts of this Project at the Coliseum site. The CASP EIR was adopted in April of 2015.⁶⁴ Among other things, the CASP EIR envisions three development scenarios depending on the decisions of Oakland's three professional sports franchises on whether to relocate elsewhere—notably, the CASP EIR only briefly considered a

⁶³ DEIR at 3-16 ("The proposed phasing for development of the Project is considered conservative from an impact perspective because it assumes development of non-ballpark uses within a relatively short period of time. *Actual build-out of non-ballpark uses would be influenced by market and financing considerations, and is likely to occur over a longer period of time than envisioned*") (emphasis added); DEIR at 3-55 ("For purposes of this Draft EIR, phasing of the balance of the Project site (Buildout) has conservatively been estimated to occur immediately following completion of Phase 1, with completion in four years. Site preparation (grading, utilities, remediation) would occur for nearly nine months, followed by three years of vertical construction. *However, the timing of construction of the remaining site development would be dependent on market conditions, and is likely to take longer than four years total.*") (emphasis added); DEIR at 3-32 (DEIR models build-out in the eighth year after construction begins, but states that "During and after Phase 1, the pace of building out the remainder of the site (Buildout) *would be dependent on market demand, absorption, financial feasibility, and construction practicalities.* Construction of Buildout could overlap with occupancy and use of Phase 1 buildings, and construction of multiple development parcels/blocks could occur concurrently. The analysis in this Draft EIR conservatively captures this possibility by modeling Buildout in the eighth year after construction begins (referred to as "Year 8").") (emphasis added); DEIR at 3-54 ("The analysis in this Draft EIR conservatively assumes that construction activities *would occur over seven years total.* The analysis also assumes the proposed Project would be developed in two phases, *though actually two or more phases or sub-phases could occur.*") (emphasis added); DEIR at 3-55 ("Phase 1 construction activity for the ballpark and the Phase 1 mixed-use development and hotel(s) would occur within four calendar years. Construction of the ballpark would overlap with concurrent construction of Phase 1 mixed-use development for approximately 24 months of the total duration. *However, as noted above, the construction of Phase 1 may take longer.*") (emphasis added).

⁶⁴ City of Oakland, *Coliseum Area Specific Plan*, Apr. 2015, <http://www2.oaklandnet.com/oakcal/groups/ceda/documents/report/oak053757.pdf>.

scenario where all three teams left the Coliseum area.⁶⁵ It assumes that each of these franchises will make “independent business decisions regarding whether to remain within the Plan Area.”⁶⁶ All three of these development scenarios include retaining the existing arena.⁶⁷ The CASP EIR states unequivocally that this “achievement of a regional Sports-Entertainment-Retail destination is critical to accomplishing the Specific Plan’s vision.”⁶⁸ Much of the analysis within the EIR revolves around Sub-Area A and the development of this sports-entertainment-retail destination at the current Coliseum location.⁶⁹ A lot has changed over the last six years, as the Coliseum site will now have zero professional sports teams. Therefore, the CASP EIR does not eliminate the need for new analysis of the development and new analysis is needed to reflect the changed circumstances.

V. The DEIR’s greenhouse gas analysis is fundamentally flawed, fails to adequately mitigate the project’s significant greenhouse gas impacts, and fails to consider reasonably available mitigation measures that may reduce the impacts to less than significant.

Greenhouse gas (“GHG”) emissions, such as CO₂, N₂O and methane,⁷⁰ contribute to global climate change and are considered pollutants under California and federal law.⁷¹ GHG emissions are an inherently cumulative impact problem, with significant impacts found where GHG emissions from a given project have a “cumulatively considerable” contribution to global climate change.⁷² This analysis may be done in accordance with statewide and local plans,⁷³ or it may deviate from such plans so long as there is substantial discussion explaining why the lead agency chose to deviate.⁷⁴

Furthermore, AB 734, which was signed by the Governor in September of 2018, requires the A’s to demonstrate that the Project will not result in any net additional emissions of greenhouse gases.⁷⁵ In particular, “to maximize public health, environmental, and employment benefits,” the A’s shall

reduce the emissions of greenhouse gases in the project area and in the neighboring communities of the baseball park.

⁶⁵ *Id.* at 48-50; Coliseum Area Specific Plan Draft EIR, SCH# 2013014066 (Aug. 2014) at 5-17 (identifying a “no new sports venues” scenario as “sub-alternative” 2E), <http://www2.oaklandnet.com/oakcal/groups/ceda/documents/report/oak048830.pdf>.

⁶⁶ *Coliseum Area Specific Plan*, *supra* note 64, at 50.

⁶⁷ *Id.* at 48-50.

⁶⁸ *Id.* at 44.

⁶⁹ *See generally id.*

⁷⁰ CEQA Guidelines § 15364.5 (defining Greenhouse Gas).

⁷¹ Cal. Health & Safety Code § 43018.5 et seq; *Massachusetts v. EPA*, 549 U.S. 497 (2007) (finding GHG’s to be a pollutant under the Clean Air Act).

⁷² CEQA Guidelines §§ 15130(a), 15064.4.

⁷³ *See Ass’n of Irrigated Residents v. State Air Res. Bd.*, 206 Cal. App. 4th 1487 (2012) (upholding the adoption of CARB’s scoping plan in an EIR).

⁷⁴ *See, e.g., Cleveland Nat’l Forest Found. v. San Diego Ass’n of Governments*, 3 Cal. 5th 497, 515-16 (2017).

⁷⁵ Cal. Pub. Res. Code § 21168.6.7(3)(A)(ii).

Not less than 50 percent of the greenhouse gas emissions reductions necessary to achieve the requirements of this clause, excluding the greenhouse gas emissions from residential uses of the project, shall be from *local, direct greenhouse gas emissions reduction measures* that give consideration to *criteria air pollutant and toxic air contaminant emissions reductions*.⁷⁶

In other words, to ensure no net increase in GHG emissions from the proposed Project, the A's must commit to at least 50% emission reduction from local, direct GHG reduction measures and may offset up to 50% of GHG emissions by other non-local measures.⁷⁷ The DEIR comments that this "no net additional threshold is an appropriate CEQA significance threshold for this Project given this special State legislation and the unique major league ballpark Project use."⁷⁸

However, the DEIR fails to meet the requirements set out in AB 734 and adopted as significance thresholds.⁷⁹ The DEIR significantly underestimates GHG emissions, relies on unrealistic mitigation measures, impermissibly defers the vast majority of GHG mitigation, and fails to provide adequate information to sufficiently analyze and understand the potential impacts. These legal failings require recirculation of the DEIR in order to allow the public to adequately analyze the additional information needed to fix these shortcomings.

A. The DEIR significantly underestimates GHG emissions.

The DEIR calculates that the total emissions of GHGs during construction to be 32,529 metric tons (MT) of carbon dioxide equivalent (CO₂e).⁸⁰ The operational emissions for the full project buildout peak at 58,453 MT CO₂e, totaling 1,420,039 MT CO₂e for the 30-year project lifetime.⁸¹ When subtracting out the A's related existing conditions emissions, the DEIR estimates the project's total GHG emissions for the 30-year project lifetime as 1,266,567 MT CO₂e.⁸²

1. The DEIR fails to account for the relocation of existing uses at Howard Terminal.

At Howard Terminal, one would expect an analysis of the GHG emissions from the existing operations, as well as the surrounding activities related to the Port of Oakland that will

⁷⁶ *Id.* (emphasis added).

⁷⁷ And in purchasing such offset credits within *only* the United States, "place the highest priority on the purchase of offset credits that produce emission reductions within the City of Oakland or the boundaries of the Bay Area Air Quality Management District." *Id.*

⁷⁸ DEIR at 4.7-37.

⁷⁹ Nor does the Governor's certification of the Project for streamlining under AB 734 excuse the DEIR from a full and complete analysis of impacts. *Mission Bay Alliance v. Office of Cmty. Investment & Infrastructure*, 6 Cal. App. 5th 160, 198 n.26 (2016) ("[T]he Governor's [streamlining] certification serves a distinct purpose and is not a substitute for a CEQA determination on the significance of greenhouse gas emissions.").

⁸⁰ DEIR at 4.7-55.

⁸¹ *Id.*

⁸² *Id.*

be altered and potentially displaced by the Project. However, the DEIR assumes that the existing tenants and users will “move to other locations” either in the Seaport, the City of Oakland, or somewhere in the Bay Area.⁸³ The DEIR claims that the trucks currently making trips at Howard Terminal will be making “the same number of trips” from their new locations into the Seaport.⁸⁴ However, the DEIR declines to calculate whether emissions would decrease or increase because this calculation would be “speculative,”⁸⁵ as if that justifies omitting an analysis. The DEIR did not consider that the displacement of container storage activities, for example, to an even slightly less convenient location would very likely generate an increase in GHG’s from the transportation of shipping containers back and forth by heavy emitting trucks. By locating this high-density development project amidst the complex operations of the Port of Oakland, it is unimaginable that altering the existing activities at the site will have no GHG emissions impact.

The DEIR could have assumed that the relocation of existing activities at Howard Terminal would result in increased GHG emissions. However, it chose to instead omit any analysis or calculations, providing the public with no information regarding how the project might impact these current activities. The public and decision makers simply cannot assess the GHG impacts of the project without further analysis showing whether emissions will increase significantly and where they will be displaced in the region. The DEIR must be revised to include:

- Analysis of the GHG emissions generated by existing activities on site, vaguely characterized in the DEIR as truck parking, container storage and staging, berthing vessels for maintenance and storage, and long-shore training facilities.⁸⁶
- Evaluation of whether the current parking and staging uses at Howard Terminal are stable or dynamic, and the implications for GHG emissions. This should include an analysis of other projects and developments ongoing at the Port and near-term Port operation plans. This is especially relevant given that the Port activities on site changed significantly as recently as 2014, when the Port stopped using the site as a shipping terminal.⁸⁷
- Spatial analysis of where displaced activities are likely to go, with a minimum specificity of understanding whether traffic will be displaced throughout local neighborhoods.

This basic first step is especially important here, where the existing activities are dynamic and include mobile emissions sources that produce co-pollutants harmful to human health. Displacement into the neighboring West Oakland community would increase the pollution burden for an already disproportionately burdened community, exposed to elevated levels of

⁸³ DEIR at 4.7-41.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ DEIR at 4.7-10.

⁸⁷ DEIR at 4.10-2.

particulate matter and ozone generated by ships, trucks and other industrial activities in and around the Port.⁸⁸

Notably, the A's AB734 application stated that the A's and the Port were continuing to gather information to develop a more complete analysis of the existing conditions at Howard Terminal.⁸⁹ Yet over two years of continued supplements and revisions to the GHG analysis, the A's have not supplemented the analysis of the existing activities and environmental setting. Further, in that time, the A's were provided with detailed stakeholder concerns related to how the project may impact Port operations, making the failure to provide adequate analysis particularly concerning.⁹⁰ Without a clear picture of the environmental setting, the public cannot evaluate the extent of impact to the physical environment posed by the Project.

2. The GHG analysis underestimates emissions because it uses an artificially short project lifetime.

Typically, under CEQA, an EIR must analyze foreseeable impacts, stopping where the analysis becomes too speculative.⁹¹ Throughout the DEIR, whether calculating emission factors or comparing with baseline emissions, the DEIR relies upon a thirty-year lifespan for the Project, but fails to provide sufficient information as to why it stops at thirty years. In fact, the Board of Port Commissioners approved a *66-year* lease duration for the Project.⁹²

Instead, the Applicant should explain why emissions estimates for year thirty-one onward are too speculative to be included. The Coliseum, for example, was renovated about 30 years after initial construction. Do the A's anticipate major renovation at the thirty-year mark? What about the rest of the development, surrounding the ballpark? At a minimum, the anticipated GHG impacts from years thirty-one to sixty-six should be addressed in general terms to provide a complete analysis in the EIR. The DEIR provides no citation to support the claim that the 30-year project lifetime is consistent with CEQA guidance.

In their AB 734 application, the A's justify the 30-year lifespan with "OPR precedent" that other AB 900 projects have also used 30 years for their analysis.⁹³ AB 900 is a more general

⁸⁸ See BAAQMD, *Owning Our Air: The West Oakland Community Action Plan* (2019) at 7–13, <https://www.baaqmd.gov/~/media/files/ab617-community-health/west-oakland/100219-files/final-plan-vol-1-100219-pdf.pdf?la=en>.

⁸⁹ See Ramboll, *Fourth Supplemental Memo Supporting AB 734 Certification, Oakland Sports and Mixed-Use Project at Howard Terminal* (Jul. 9, 2020) at 110, https://opr.ca.gov/ceqa/docs/ab900/20200710-AB734_Final_Application_Materials.pdf (“calculations provided in the application demonstrate methodology but may be updated with best available and current data at the time of Project implementation.”).

⁹⁰ See Port of Oakland, *Draft Memorandum Re: Seaport Compatibility Measures Conference: Summary of Maritime Stakeholder Feedback*, Dec. 19, 2019, https://www.portoakland.com/wp-content/uploads/StakeholderFeedback_SCM_Conference_19Dec2019-new.pdf.

⁹¹ CEQA Guidelines § 15064(d)(3).

⁹² Board of Port Commissioners Meeting, May 13, 2019.

⁹³ Letter from Mary Murphy, Gibson Dunn to Kate Gordon, Cal. Office of Planning & Research (Nov. 1, 2019) at 3, https://opr.ca.gov/ceqa/docs/ab900/20191105-AB_734_OaklandAthletics_Clarifications_on_Application.pdf; see also *id.* Attachment 3 (Table A: Treatment of Project Lifetimes from AB900 Applications).

predecessor statute to the Howard Terminal specific AB 734 streamlining statute. Both statutes allow for streamlined environmental review when a series of requirements are met, importantly including that the project will not result in any net GHG emissions.⁹⁴ However, AB 734 added constraints on how GHG's could be mitigated, requiring 50% of the GHG reductions to be done locally.⁹⁵ AB 900 projects, in contrast, were approved with simpler mitigation strategies, and allowed to simply purchase offsets. The evaluation that occurred in the AB 734 application streamlining effort is separate from the evaluation required under CEQA. CEQA requires that the agency "must use its best efforts to find out and disclose all that it reasonably can."⁹⁶ Because this Project involves implementation with multiple phases at varying timescales, a flat 30-year lifespan oversimplifies the analysis, and the DEIR must be revised to expand the project's lifetime or to adequately justify the current lifetime.

B. The DEIR makes unreasonable assumptions about electric vehicle charging as mitigation.

Under CEQA, mitigation measures must be supported by "substantial evidence."⁹⁷ CEQA Guideline Section 21082.2 defines substantial evidence as including "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." However, the DEIR makes unjustified and unreasonable assumptions in quantifying the emissions reduced from electric vehicle charging.

For example, the DEIR assumes that "[f]or land uses or events with high trip generation relative to available chargers (baseball games, hotel retail), the site would be charger limited and all chargers would be used."⁹⁸ This assumption, however, seems unrealistic. The A's provide no information regarding why they believe that 200 electric vehicle chargers will be fully used for every single baseball game. There is little discussion of the number of attendees that generally charge their vehicles at the ballpark, and even less discussion regarding the number of attendees that drive electric vehicles. Furthermore, the Air Appendix makes an even more unrealistic assumption regarding the miles charged by projected chargers per year:

For example, at 3-hour ball games, each of the 200 available chargers could feasibly charge 6 vehicles each for 30 minutes (12.5 miles/charge x 6 vehicles = 75 miles of EV range), or equivalent scenarios such as 3 vehicles each for 60 minutes (25 miles/charge x 3 vehicles = 75 miles of EV range), resulting in a maximum of 75 x 200 = 15,000 miles of EV range and around 1,200 cars to charge per ballgame in total. With EV VMT of over 15,000 miles and over 1,800 EV trips per ballgame in 2027, on average (as shown in Table 38), the ballgame chargers are thus fully utilized.⁹⁹

⁹⁴ Assembly Bill 900 § 1 (2011) (codified as Cal. Pub. Res. Code § 21183(c).)

⁹⁵ Assembly Bill 734; Cal. Pub. Res. Code § 21168.6.7(a)(3)(ii).

⁹⁶ CEQA Guidelines § 15144.

⁹⁷ Cal. Pub. Res. Code § 21081.5.

⁹⁸ DEIR at 4.7-49.

⁹⁹ DEIR Appendix AIR-1 at 147 n.8 (Table 38).

The assumption above is just unrealistic: the A's have not described any valet service that would be required to charge multiple cars in a single EV charger, nor have the A's demonstrated that demand for EV charging at the stadium is such that the chargers would achieve full utilization for every single baseball game. Additionally, the A's have not shown that such demand for electric vehicle charging during the baseball game even exists; it provides no evidence how new sports facilities, like the Chase Center in San Francisco, have faced from electric vehicle owners wanting to charge their vehicles during the sports event.

The DEIR must be revised to correct these unrealistic assumptions, or, in the alternative, to provide substantial evidence justifying why these assumptions are realistic.

C. The DEIR fails to demonstrate that mitigation is feasible because it does not evaluate the availability of sufficient GHG offset credits.

The DEIR states that the purchase of carbon offset credits will only be used as a GHG reduction measure when at least 50% net new GHG emissions have been reduced through the implementation of local direct measures.¹⁰⁰ However, even a project purporting to generate no net GHG emissions based on a commitment to purchase offsets may be inadequate if the promise of future offset purchases does not provide adequate assurance that adequate offsets can be purchased.¹⁰¹ Here, while the DEIR lists the order of geographic priority that offsets will be obtained,¹⁰² it contains no discussion regarding the availability of carbon offsets in the locations listed. Additionally, the DEIR contains no evidence, calculations, or information regarding the number of offsets that will be needed, which could end up being greater than 600,000 MT CO₂e. While carbon offsets are envisioned as a flexible mitigation measure, the DEIR must be revised to include information and substantial evidence regarding the projected availability of carbon offsets.

D. The DEIR defers mitigation by improperly relying on a future GHG reduction plan.

The DEIR fails to describe with specificity how the Project will reduce more than 1.2 million MT CO₂e to achieve no net increase in GHG emission. Instead, the DEIR identifies a single mitigation measure—the future development of a GHG reduction plan.¹⁰³ This mitigation measure lists a handful of reduction measures that will be included, and then lists a “menu of additional emission reduction measures” that may or may not be included in the plan.¹⁰⁴

¹⁰⁰ DEIR at 4.7-62. Additionally, the DEIR specifies that carbon offset credits will not be used for non-transportation sector, non-ballpark, and non-hotel uses until physical design features or operational features located on the project site or off-site within the City of Oakland have reduced project emissions levels to at or below 0.6 MTCO₂e/service population in keeping with the City's GHG emission reduction target. *Id.*

¹⁰¹ See *Golden Door Properties v. Cnty. of San Diego*, 50 Cal. App. 5th 467, 518–25 (2020) (EIR's carbon offset mitigation was not supported by substantial evidence and therefore the County abused its discretion in certifying a supplemental EIR).

¹⁰² DEIR at 4.7-63 (listing the following locations from highest to lowest priority: “(1) off-site within the neighborhood surrounding the Project site, including West Oakland; (2) the greater City of Oakland community; (3) within the San Francisco Bay Area Air Basin; (4) the State of California; and (5) the United States of America”).

¹⁰³ DEIR at 4.7-56.

¹⁰⁴ DEIR at 4.7-58 to -62.

Nowhere does the DEIR provide evidence that some combination of these measures can reduce the Project's GHG emissions. The only reduction measures that the DEIR quantifies demonstrate that the Project's GHG emissions could be reduced by 1,300 to 6,300 MT CO₂e per year, leaving 1,125,315 MTCO₂e still to be mitigated.¹⁰⁵ The DEIR must be revised and recirculated to correct this impermissible deferred mitigation.

1. The DEIR describes an inadequate process for the creation of a future GHG reduction plan with no place for public input.

The DEIR provides a menu of additional emission reduction measures, both onsite and offsite, that will be included in the future GHG reduction plan “as necessary to meet the requirements of this mitigation measure and the ‘no net additional’ GHG emissions requirement for the Project.”¹⁰⁶ However, the DEIR does not itself unveil such a GHG reduction plan that would demonstrate how these different mitigation measures will successfully meet the “no net additional” requirements. Instead, the DEIR proposes to develop a GHG Reduction Plan after the EIR is certified. This plan would be developed by a qualified air quality consultant who will identify GHG reduction measures sufficient “to reduce or offset these emissions” in accordance with CEQA and AB 734,¹⁰⁷ and the plan would be submitted to the City for approval before construction on the project begins.¹⁰⁸

In the process proposed in the DEIR, the City would certify that the chosen GHG reduction measures will be implemented in the development of the project before issuing any permits.¹⁰⁹ The City would need to confirm that these measures are included as part of the final inspection for a Temporary Certificate of Occupancy (“TCO”).¹¹⁰ In the case of the carbon offsets, the City would confirm receipt of the verification reports and serial numbers. Finally, the DEIR outlines that the A's would submit an annual report to the City, which shall have the power to review and request a Corrective Action Plan should the GHG Reduction Measures are either not taken or not successful.¹¹¹

At no point throughout this entire process is public input involved in reviewing the adequacy of this plan. During the EIR process, the public can submit a written comment as well as give an oral comment during the public hearing. However, the process described above allocates no place for the public to review. The public will have no opportunity to double check the calculations used to determine whether the proposed mitigation measures will succeed. The public will have no opportunity to suggest additional mitigation measures that might be more effective. The public will have no opportunity to recommend changes to the annual report. Public

¹⁰⁵ DEIR Appendix AIR-1 at 183 (Table 58).

¹⁰⁶ DEIR at 4.7-59 to -62.

¹⁰⁷ DEIR at 4.7-56.

¹⁰⁸ DEIR at 4.7-63.

¹⁰⁹ DEIR at 4.7-64.

¹¹⁰ *Id.* In the case of carbon offsets, the City “shall confirm receipt of verification reports and serial numbers” prior to issuance of a building permit or a TCO. *Id.*

¹¹¹ DEIR at 4.7-65.

participation cannot be merely discarded but is an “essential part” that lies at the heart “of the CEQA process.”¹¹² This DEIR must be revised to give the public the opportunity to participate.

2. CEQA and California courts prohibit the deferred formulation of GHG mitigation plans.

The “formulation of mitigation measures shall not be deferred until some future time.”¹¹³ California courts have made it clear that deferred mitigation is not allowed under CEQA. As the First District Court of Appeal stated in *Communities for a Better Environment v. City of Richmond*, “[n]umerous cases illustrate that reliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA’s goals of full disclosure and informed decisionmaking; and consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment.”¹¹⁴

The DEIR identifies no legal authority to permit it to defer the creation of a GHG mitigation plan to a later date. That is because there is no legal authority that would permit this type of deferred mitigation. In *Communities for a Better Environment v. City of Richmond*, the court found that the mitigation plan at issue was inadequate to ensure no net increase in emissions from the Chevron refinery. The project would have increased production of gasoline by approximately 6%, or 300,000 gallons per day.¹¹⁵ The DEIR at issue “explicitly declined” to state any conclusions about the extent of GHG impacts or potential mitigation.¹¹⁶ The Final EIR, in response to comments made by concerned parties, stated that Chevron would create a mitigation plan to achieve complete reduction of GHG emissions over the baseline no later than one year after approval of the conditional use permit.¹¹⁷ In creating this mitigation plan, Chevron would consider the implementation of a menu of measures designed to mitigate GHG emissions.¹¹⁸

In holding that this mitigation plan was deficient, the court reasoned that “[n]o effort is made to calculate what, if any, reductions in the Project’s anticipated greenhouse gas emissions

¹¹² CEQA Guideline § 15021; *see also* CEQA Guideline § 15200 (describing that the purposes for public review include sharing expertise, disclosing agency analyses, checking for accuracy, detecting omissions, discovering public concerns, and soliciting counter proposals).

¹¹³ CEQA Guidelines § 15126.4.

¹¹⁴ 184 Cal. App. 4th 70, 92–93 (2010); *see also Gentry v. City of Murrieta* 36 Cal. App. 4th 1359, 1396 (1995) (conditioning a permit on “recommendations of a report that had yet to be performed” constituted improper deferral of mitigation); *Defend the Bay v. City of Irvine* 119 Cal. App. 4th 1261, 1275 (2004) (deferral is impermissible when the agency “simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report”); *Endangered Habitats League v. Cnty. of Orange*, 131 Cal. App. 4th 777, 794 (2005) (“mitigation measure [that] does no more than require a report be prepared and followed, . . . without setting any standards” found improper deferral); *Sundstrom v. City of Mendocino*, 202 Cal. App. 3d 296, 306–07 (1988) (future study of hydrology and sewer disposal problems held impermissible); *Quail Botanical Gardens Found. v. City of Encinitas*, 29 Cal. App. 4th 1597, 1605 n.4 (1994) (city is prohibited from relying on “postapproval mitigation measures adopted during the subsequent design review process”).

¹¹⁵ *Communities for a Better Environment*, 184 Cal. App. 4th at 76.

¹¹⁶ *See id.* at 90.

¹¹⁷ *Id.* at 91.

¹¹⁸ *Id.* at 92.

would result from each of these vaguely described future mitigation measures.”¹¹⁹ The court criticized the mitigation plan proposed because

- the plan was nonexclusive, undefined, and untested;
- the only criterion for success was the judgment of City Council; and
- the process for choosing the mitigation measures would occur between the project proponent and the lead agency after project approval and would not be an open process involving the public.¹²⁰

The court then articulated a three-part test, permitting a “lead agency to defer the formulation of specific mitigation measures” only if the lead agency:

- 1) Undertook a complete analysis of the significance of the environmental impact,
- 2) Proposed potential mitigation measures early in the planning process, and
- 3) Articulated specific performance criteria that would ensure that adequate mitigation measures were eventually implemented.¹²¹

The court distinguished the Chevron EIR from cases where mitigation was permissibly deferred for multiple reasons. First, the lead agency “offered no assurance that the plan for how the Project’s greenhouse gas emissions would be mitigated to a net-zero standard was both feasible and efficacious.”¹²² Additionally, the lead agency “created no objective criteria for measuring success.”¹²³

The court emphasized that the “the time to analyze the impacts of the Project and to formulate mitigation measures to minimize or avoid those impacts was during the EIR process, *before* the Project was brought to the Planning Commission and City Council for final approval.”¹²⁴ And while the available scientific information about GHGs is constantly expanding in this complex scientific field, this is not a shield that the lead agency can hide behind to prevent committing to a specific GHG reduction plan. The court notes that “once mitigation measures are publicly reviewed and identified, nothing prevents the City from incorporating guidelines to continue utilizing new scientific information as it becomes available.”¹²⁵

3. The sole GHG mitigation measure proposed in the DEIR is a textbook example of deferred mitigation.

The DEIR provides a menu of options of potential GHG mitigation measures, but it does not commit to which measures shall be used, nor does it demonstrate how these measures will help mitigate the substantial amount of GHG emissions produced during the lifetime of the project. Because it will be produced after completion of the Final EIR, it therefore constitutes an invalid form of deferred mitigation.

¹¹⁹ *Id.* at 93.

¹²⁰ *Id.* at 94.

¹²¹ *Id.* at 95.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 96.

The similarities between the DEIR at issue here and the EIR at issue in *City of Richmond* are striking. Both cases involved the proposal to create a GHG reduction plan after the final EIR. Both cases describe a process that excludes the public from participating in the creation of the plan. Both cases involve listing a menu of potential mitigation measures without demonstrating how those measures will effectively mitigate the GHG emissions. Finally, both cases involve inadequate information that prevents the public from adequately evaluating the strength and weaknesses of each potential mitigation measure.

For example, the DEIR's Air Appendix has some calculations regarding how the described mitigation measures might contribute to mitigating the project's substantial GHG emissions of 1,266,567 MT CO₂e. These calculations, however, are inadequate. Footnote 6 of Table 58 states that "the Project has quantified a number of potential additional reductions," which were included "as an example of how the threshold could be met."¹²⁶ However, Table 58 shows that reductions from EV charging stations, reduced emergency generator hours, obtaining 100% electricity from zero carbon resources, no natural gas in residential units, and constructing additional EV chargers will reduce the total GHG emissions to 1,125,315 MTCO₂e.¹²⁷ This decrease in GHG emissions is not enough to meet the "no net additional" threshold. Without additional information regarding the assumptions underlying these calculations or about the remaining mitigation reduction measures, the public cannot adequately evaluate how the GHG Reduction Plan will effectively mitigate the GHG emissions.

Additionally, the DEIR also states that it will consider mitigation measures not listed in the menu of options. It states that the GHG reduction plan will consider mitigation measures included in the 2030 Equity Climate Action Plan (ECAP) that was recently revised by the City of Oakland in 2020.¹²⁸ Additionally, the DEIR also states that the future GHG reduction plan will consider:

Pathways to Deep GHG Reductions in Oakland: Final Report (City of Oakland, 2018b), BAAQMD's latest CEQA Air Quality Guidelines (May 2017, as may be revised), the California Air Resources Board Scoping Plan (November 2017, as may be revised), the California Air Pollution Control Officers Association (CAPCOA) Quantifying Greenhouse Gas Mitigation Measures (August 2010, as may be revised), the California Attorney General's website, and Reference Guides on LEED published by the U.S. Green Building Council.¹²⁹

With such a large number of plans containing such a large number of mitigation measures, it is impossible to know exactly which measures the City is truly considering.

This uncertainty regarding the plethora of mitigation measures, coupled with the lack of public input into the process, the inadequacy of the DEIR's information regarding calculations,

¹²⁶ DEIR Appendix AIR-1 at 184 n.6 (Table 58).

¹²⁷ DEIR Appendix AIR-1 at 183 (Table 58).

¹²⁸ See City of Oakland, *2030 Equitable Climate Action Plan* (Jul. 2020), <https://www.oaklandca.gov/projects/2030ecap>.

¹²⁹ See DEIR at 4.7-57.

and the vagueness of whether the city’s GHG reduction plan will actually succeed, combine to create a flawed DEIR as it pertains to GHG emissions. The City must revise the DEIR to include a concrete, well-defined GHG mitigation plan, and to describe how and why that mitigation plan will ensure no net additional GHG emissions from the Project

E. The DEIR fails to consider feasible mitigation measures.

The DEIR declines to consider several mitigation measures that could reduce GHG emissions, while also mitigating air quality, transportation, and displacement impacts. As discussed above in Part I, including on-site or near-site affordable housing could reduce commute times for lower-income households, who might otherwise undertake long car commutes from exurban areas where housing is more affordably. Similarly, a local hire policy at the Project would mitigate GHG emissions by reducing commute distances and increasing the likelihood that local employees would travel by public transit, bicycle, or by foot. Both of these mitigation measures would have the added benefit of reducing air pollution, traffic congestion, and displacement of low-income residents. The DEIR should be revised to include an analysis of these mitigation measures.

VI. The DEIR does not adequately analyze and mitigate air quality impacts on human health in an area already overburdened by harmful air pollution.

The DEIR does not adequately consider and mitigate air quality impacts that will exacerbate health problems in an historically burdened environmental justice community. While guidance documents from the Bay Area Air Quality Management District (“BAAQMD”) suggest standards and mitigation measures, these are not minimal requirements. Assessments of air quality impacts on human health consequences are crucial when considering mitigation measures and alternatives for projects. The California Supreme Court has held that “[w]hen reviewing whether a discussion is sufficient to satisfy CEQA, a court must be satisfied that the EIR . . . makes a reasonable effort to substantively connect a project’s air quality impacts to likely health consequences.”¹³⁰ Because West Oakland suffers from significantly greater toxic air pollution than the rest of the Bay Area, the DEIR must ascribe to higher standards and provide stricter mitigation measures than the threshold suggestions from BAAQMD and the City of Oakland.

A. The DEIR must analyze the Project’s adverse impacts on environmental justice.

The DEIR estimates that the Project will have numerous significant and unavoidable adverse air quality impacts. These impacts will further burden an already disproportionately impacted community. Principles of environmental justice in California law impose a responsibility on the Project and the City to address concerns related to the unjust air quality impacts that the Project will inflict on West Oakland.

1. The Project will bring even more pollution to a historically burdened environmental justice community.

West Oakland is one of the most historically polluted and disadvantaged communities in California. The communities living near the Project site in West Oakland have been subjected to numerous pollution sources and are disproportionately impacted in relation to the rest of the Bay Area. West Oakland is surrounded by several major highways, creating a high baseline

¹³⁰ *Sierra Club v. Cnty. of Fresno*, 6 Cal. 5th 502, 510 (2018).

concentration of diesel particulate matter (“DPM”) in the community. In fact, West Oakland neighborhoods have the highest levels of DPM in the Bay Area.¹³¹ About 42 percent of local DPM impacts and cancer risk come from heavy-duty trucks and about 38 percent of PM_{2.5} (particulate matter less than 2.5 micrometers in diameter) impacts come from road dust.¹³² This Project’s introduction of additional diesel-burning vehicles, machines, and generators will only exacerbate the negative health impacts these communities are already burdened by. Facilities emitting toxic air contaminants (“TAC”) in West Oakland include manufacturing plants, a wastewater treatment plant, and the neighboring Schnitzer Steel. BAAQMD indicates that there are approximately 50 permitted TAC sources within a 1,000-meter radius of the Project site.¹³³ Other sources of pollution include waterborne vessels associated with the Port of Oakland, freight and passenger rail, and numerous industrial and commercial stationary sources.¹³⁴ The pollution local to West Oakland unjustly and disproportionately impacts communities of color and must be reduced.

West Oakland’s pollution burden has created significant and disproportionate negative health impacts for the community. West Oakland residents are 1.75 times more likely than other Alameda County residents to be hospitalized for asthma-related illnesses.¹³⁵ According to the California Department of Public Health, childhood asthma affects about eighteen percent of Oakland’s youth, which is twice the national average.¹³⁶ Twenty-five percent of students at the West Oakland Middle School have asthma or breathing problems.¹³⁷ Air pollution related diseases, including cancer, heart disease, stroke, and chronic lower respiratory disease, are some of the leading causes of death in the community.¹³⁸ Due to these cumulative health risks, life expectancy is almost seven years lower in areas of West Oakland when compared to Alameda County.¹³⁹ These severe health impacts stemming from air pollution make it imperative to mitigate the Project’s air quality impacts as much as possible.

¹³¹ Bay Area Air Quality Management District & West Oakland Environmental Indicators Project, *Owning Our Air: The West Oakland Community Action Plan – A Summary* (Oct. 2019) at 3, <https://www.baaqmd.gov/~media/files/ab617-community-health/west-oakland/100219-files/owning-our-air-plan-summary-pdf.pdf?la=en> (hereinafter “Owning Our Air Summary”).

¹³² *Id.* at 4.

¹³³ DIER at 4.2-9.

¹³⁴ DEIR at 4.2-2.

¹³⁵ Muntu Davis, *Air Pollution Risks & Vulnerability to Health Impacts: A Look at West Oakland* (Mar. 28, 2018) at 4, https://ww2.arb.ca.gov/sites/default/files/2018-03/capp_consultation_group_march_2018_alameda_county_health_presentation.pdf.

¹³⁶ Casey Smith & Ali DeFazio, *Oakland’s Air Quality Problem: Can First-of-its-kind Legislation Solve it?*, OAKLAND NORTH (Dec. 11, 2018), <https://oaklandnorth.net/2018/12/11/oaklands-air-quality-problem-can-first-of-its-kind-legislation-solve-it/>.

¹³⁷ Ananya Roy, *Traffic Pollution Causes 1 in 5 New Cases of Kids’ Asthma*, Environmental Defense Fund (Apr. 29, 2019), <http://blogs.edf.org/health/2019/04/29/traffic-pollution-causes-1-in-5-new-cases-of-kids-asthma-in-major-cities-how-data-can-help/>.

¹³⁸ Davis, *supra* note 135, at 8-9.

¹³⁹ Muntu Davis, *Asthma & Cumulative Health Risks In West Oakland* (2018) at 3, <https://www.portofoakland.com/files/PDF/Air%20Pollution%20and%20Health%20Risks%20ACPHD.pdf>.

2. The Project has a duty under California State Law and CEQA not to adversely impact environmental justice communities.

Under California state law, “‘environmental justice’ means the fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins, with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations and policies.”¹⁴⁰ This means that everyone should be able to benefit from a healthy environment, and that the impacts of pollution should not be concentrated on historically burdened and marginalized communities.¹⁴¹ California governmental entities have a crucial role to play in ensuring environmental justice for all of California’s residents. Because a project’s environmental impacts can burden some communities more than others, generalized policies are insufficient to achieve the environmental justice goals implied in California state law and CEQA. Instead, environmental justice requires a tactical approach to work collaboratively with the impacted communities to address existing and potential problems, apply solutions, and plan for the future.

Local governments also have an obligation under state law to ensure that environmental benefits and burdens are fairly distributed among California residents. California Government Code Section 11135, subdivision (a) states that no person in the state will be denied the benefits of or subjected to discrimination under any state administered or funded program on the basis of certain immutable characteristics.¹⁴² Under section 11135, the local governments have a responsibility to ensure that their actions do not “result in the unmitigated concentration of polluting activities near communities that fall into the categories defined in Government Code section 11135.”¹⁴³

In aiming to address environmental impacts, the California Environmental Quality Act also has an implied goal of achieving environmental justice. Vice President Kamala Harris, as Attorney General for the state of California, stated that “the importance of a healthy environment for all of California’s residents is reflected in CEQA’s purposes.”¹⁴⁴ In enacting CEQA, the Legislature determined that the government must “identify any critical thresholds for the health and safety of the people of the state and take *all coordinated actions necessary* to prevent such thresholds being reached.”¹⁴⁵

B. The DEIR should use stricter significance thresholds for air quality impacts.

CEQA requires that lead agencies consider how the environmental and public health burdens of a project might disproportionately affect low-income communities and communities of color.¹⁴⁶ It is well established that “[t]he significance of an activity [analyzed under CEQA]

¹⁴⁰ Cal. Gov. Code § 65040.12(e).

¹⁴¹ See Kamala Harris, Cal. Office of the Attorney General, *Environmental Justice at the Local and Regional Level – Legal Background* (2012) at 1, https://oag.ca.gov/sites/all/files/agweb/pdfs/environment/ej_fact_sheet.pdf.

¹⁴² Cal. Gov. Code. § 11135(a).

¹⁴³ Harris, *supra* note 141, at 2.

¹⁴⁴ Harris, *supra* note 141, at 2.

¹⁴⁵ Cal. Pub. Res. Code § 21000(d) (emphasis added).

¹⁴⁶ Harris, *supra* note 141, at 3.

depends upon the setting.”¹⁴⁷ Because West Oakland experiences higher-than-average rates of asthma and has historically been subjected to a disproportionate amount of toxic air pollution, the Project will produce greater health impacts than if it were located elsewhere. There is a strong correlation between greater sensitivity to pollution and a community’s low income levels and other socioeconomic factors.¹⁴⁸ Because a project’s impacts can be more significant based on where the project is located, a project should be held to a stricter significance threshold where it is disproportionately impacting an environmental justice community.¹⁴⁹

The DEIR states that cancer risk from DPM during construction and operation will be below the City’s significance threshold of ten in one million after mitigation.¹⁵⁰ Over 90 percent of cancer risk from local air pollution comes from DPM.¹⁵¹ Significance criteria must be “supported by substantial evidence.”¹⁵² Here, the DEIR uses the City of Oakland’s significance guidelines from 2016. Since 2016, the California Air Resources Board (“CARB”) has recognized West Oakland as a Community Air Protection Program (“CAPP”) community under Assembly Bill (“AB”) 617, which aims to reduce air pollution exposure in communities most impacted by air pollution. In 2019, BAAQMD adopted the West Oakland Community Action Plan to address the “unacceptably high” air pollution and poor health conditions in West Oakland.¹⁵³ As a CAPP community, West Oakland requires greater scrutiny regarding air pollution in the area. The CAPP designation indicates new evidence that must be considered in determining a significance threshold. Therefore, the 2016 guidelines are outdated and the cancer risk thresholds of significance for West Oakland must be lowered to hold projects polluting in West Oakland to a higher standard. Because West Oakland has been historically burdened with DPM pollution and the Project will release more DPM into to the community, exacerbating negative health impacts, the Project must be held to a higher standard and be required to implement greater mitigation measures.

C. The DEIR does not adequately mitigate the Project’s air quality impacts.

AB 617 demonstrates the State’s environmental justice priorities by requiring a stronger focus on local air pollution in overburdened communities.¹⁵⁴ The legislation requires CARB to prepare community-led plans to reduce emissions of toxic air contaminants and criteria

¹⁴⁷ *Kings Cnty. Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692, 718 (1990) (citing CEQA Guidelines, § 15064(b)).

¹⁴⁸ Cal. Office of Environmental Health Hazard Assessment, *Cumulative Impacts: Building a Scientific Foundation* (Dec. 2010), Exec. Summary, p. ix, <http://oehha.ca.gov/ej/cipa123110.html>.

¹⁴⁹ See Harris, *supra* note 141, at 4.

¹⁵⁰ DEIR at 4.2-107.

¹⁵¹ Owing Our Air Summary at 4; *see also* DEIR at 4.2-10 (stating that “health risk from ambient concentrations of DPM are much higher than the risk associated with any other TAC routinely measured in the region”).

¹⁵² Ca. Pub. Res. Code §§ 21168, 21168.5; *Californians for Alternatives to Toxics v. Dep’t of Food & Agric.*, 136 Cal. App. 4th 1, 12 (2005).

¹⁵³ BAAQMD, *Owning Our Air: The West Oakland Community Action Plan – Volume 1: The Plan* (2019) at ES-1, <https://www.baaqmd.gov/~media/files/ab617-community-health/west-oakland/100219-files/final-plan-vol-1-100219-pdf.pdf?la=en>.

¹⁵⁴ Owing Our Air Summary at 3.

pollutants.¹⁵⁵ Due to its significant pollution burden, West Oakland was selected as one of the first communities to develop an emissions reduction plan.¹⁵⁶ The Project has a responsibility to adhere to the plan set forth by AB 617 and CARB as its environmental impacts will weigh on a recognized environmental justice community. To achieve the goals set forth by the West Oakland community through AB 617, the City should require that stricter mitigation measures be levied on the Project.¹⁵⁷

1. The DEIR defers mitigation by refusing to commit to specific mitigation measures.

The Project will further exacerbate the negative health effects of criteria air pollutants and TACs in the area. Even with mitigation, the Project's operational emissions will surpass the City's thresholds of significance for reactive organic gasses ("ROG"), nitrogen oxides ("NOx"), and PM_{2.5}. Evidence suggests that PM_{2.5} is the most harmful air pollutant in the Bay Area in terms of associated impact on public health.¹⁵⁸ During construction, the combined average Project emissions would exceed the City's significance thresholds for NOx in Years 2 through 8 and would exceed the City's significance thresholds for ROG in Year 3 and Year 6 through 8.¹⁵⁹ With mitigation, the Project's construction emissions will still surpass the City's thresholds of significance for NOx during Year 2.¹⁶⁰ NOx emissions can contribute to the development of asthma and increase susceptibility to respiratory infection requiring hospital admissions.¹⁶¹ Infants and children are particularly at risk for exposure to nitrogen oxides.¹⁶² ROG and NOx are precursor compounds for ozone, which can cause breathing problems for those exposed to it.¹⁶³

The DEIR should commit to specific mitigation measures that will reduce air quality impacts to less than significant levels. The West Oakland Community Action Plan ("WOCAP") includes proposed measures to reduce air pollution and resident exposure to TACs. The plan identifies eighty-nine potential community-level strategies and control measures intended to reduce criteria pollutant and TAC emissions to improve community health, such as replacing fossil-fuel generators with energy storage systems and adopting more stringent air quality construction and operation requirements.¹⁶⁴ While the DEIR lists many of the control measures mentioned in the WOCAP, it does not commit the Project to following them. Under CEQA the

¹⁵⁵ BAAQMD, *San Francisco Bay Area Community Health Protection Program* (2019) at 1, https://www.baaqmd.gov/~media/files/ab617-community-health/2019_0325_ab617onepager-pdf.pdf?la=en.

¹⁵⁶ *Id.*

¹⁵⁷ See *Owning Our Air Summary* at 11 (stating the 2025 and 2030 targets for reduced pollution and health risk in West Oakland).

¹⁵⁸ DEIR at 4.2-7.

¹⁵⁹ *Id.* at 4.2-63.

¹⁶⁰ *Id.* at 4.2-69.

¹⁶¹ *Id.* at 4.2-6.

¹⁶² *Id.*

¹⁶³ *Id.* at 4.2-4.

¹⁶⁴ DEIR at 4.2-30; BAAQMD, *Owning Our Air: The West Oakland Community Action Plan – Volume 1: The Plan* (2019) at 6-22, 6-23, <https://www.baaqmd.gov/~media/files/ab617-community-health/west-oakland/100219-files/final-plan-vol-1-100219-pdf.pdf?la=en>.

“formulation of mitigation measures shall not be deferred until some future time.”¹⁶⁵ The DEIR must articulate specific performance criteria to ensure that adequate mitigation measures would be implemented.¹⁶⁶ Therefore, the Project should incorporate these strategies as mitigation measures to adequately reduce the Project’s air quality impacts.

2. The mitigation measures offered in the DEIR are not supported by substantial evidence.

While electric vehicle (“EV”) chargers are an important tool in reducing air pollution and tackling climate change, their benefit is improperly exaggerated in the DEIR. The DEIR states that ten percent of the parking spaces at the Project site will be equipped with EV chargers.¹⁶⁷ It further argues that these chargers will discourage the use of fossil fuel vehicles.¹⁶⁸ This assertion is presented without any supporting evidence. Mitigation measures must be supported by substantial evidence.¹⁶⁹ The DEIR must adequately analyze the potential impacts of EV chargers, demonstrating how the chargers will discourage fossil fuel passenger vehicle use. As described above in Part V.B, the DEIR makes unreasonable assumptions in its analysis of EV charging as mitigation. If the EV-charger-equipped parking spaces are reserved for EVs, then the EV parking spots will have the same impact on traditional vehicle use as simply constructing fewer parking spots. This does not actively discourage fossil fuel vehicle use. However, if EV-charger-equipped parking spaces are not reserved for EVs, then there would not be an influence on fossil fuel vehicle use at all. Instead, the availability of parking equipped with EV chargers will make EV use more convenient. This might incentivize people with EVs to drive to the Project, increasing traffic. This increase in traffic could increase emissions from fossil fuel vehicles in the vicinity of the Project and offset potential benefits from the EV-charger-equipped parking spaces. The DEIR must analyze these potential impacts to properly inform the public of the Project’s environmental burden.

3. Because of the Project’s significant and unavoidable impacts on environmental justice communities, the City should require greater mitigation for the Project.

“CEQA’s ‘substantive mandate’ prohibits agencies from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that would substantially lessen or avoid those effects.”¹⁷⁰ As discussed above, the Project will have multiple significant and unavoidable air quality impacts. Because these significant and unavoidable impacts to air quality will particularly harm a community and sensitive subgroup, the Project’s mitigation analysis should address strategies and mitigation measures to reduce or eliminate impacts to that community or subgroup.¹⁷¹

¹⁶⁵ CEQA Guidelines § 15126.4.

¹⁶⁶ See *Communities for a Better Env’t v. City of Richmond*, 184 Cal. App. 4th 70, 94 (2010).

¹⁶⁷ DEIR at 4.2-38.

¹⁶⁸ See *id.*

¹⁶⁹ Cal. Pub. Res. Code § 21081.5.

¹⁷⁰ Harris, *supra* note 141, at 4 (citing *Mountain Lion Found. v. Fish & Game Comm’n*, 16 Cal. 4th 105, 134 (1997)).

¹⁷¹ See Harris, *supra* note 141, at 4 (citing CEQA Guidelines § 15041(a)).

Additionally, the development of mitigation measures is meant to be an open process that involves other interested agencies and the public.¹⁷² Because the Project will have a disproportionate impact on the environmental justice community in West Oakland, the Project should implement supplemental mitigation measures proposed by this community. The community should also be involved in CEQA's monitoring and reporting requirements for the Project "to ensure that feasible mitigation measures will actually be implemented . . . and not merely adopted and then neglected or disregarded."¹⁷³

Finally, the City should not approve the Project without requiring further mitigation because the Project's detrimental air quality and health impacts outweigh any expected benefits to the region. Under CEQA, a local government must exercise its judgment to "balance a variety of public objectives, including economic, environmental, and social factors and in particular the goal of providing a decent home and satisfying living environment for every Californian."¹⁷⁴ If the City chooses to approve the Project, despite its environmental impacts, it must explain in a statement of overriding consideration why it chose to put a price on human life.¹⁷⁵ More specifically, why a new ballpark was more valuable than protecting the health of the diverse and resilient community of West Oakland. For these reasons, the DEIR should be revised and recirculated to commit the Project to stricter mitigation, reducing the expected harm on the historically burdened environmental justice community in West Oakland.

VII. The DEIR's analysis of hazards is legally insufficient.

The DEIR identifies upwards of 50 different hazardous contaminants in soils and groundwater at the Project site.¹⁷⁶ Of these, at least 22 were detected at concentrations in excess of safe exposure "screening levels" and are therefore identified as "constituents of particular concern."¹⁷⁷ Maps contained in the DEIR show that contamination in excess of screening levels is present across almost the entirety of the Project site.¹⁷⁸ Contamination at the site is so severe that in 2003, the Department of Toxic Substances Control (DTSC) and the Port of Oakland

¹⁷² *Communities for a Better Env't v. City of Richmond*, 184 Cal. App. 4th 70, 93 (2010).

¹⁷³ *Fed'n of Hillside and Canyon Assns. v. City of L.A.*, 83 Cal. App. 4th 1252, 1261 (2000).

¹⁷⁴ CEQA Guidelines § 15021(d).

¹⁷⁵ *See id.* § 15093.

¹⁷⁶ ENGeo, *Athletics Ballpark Development Human Health and Ecological Risk Assessment* (Aug. 24, 2020) at Table 2, https://s3-us-west-1.amazonaws.com/waterfrontballparkdistrict.com/16_ReferencesintheDraftEIR-Section4-8Haz/2020-0824-Engeo-HHRA.pdf. Though the specific chemicals are listed in the Risk Assessment, the DEIR is more circumspect, describing contamination by categories without specifying which materials are present. Compare DEIR at 4.8-9 to -10 (referring to "heavy metals (e.g., lead)" and "volatile organic compounds") with ENGeo 2020 at 26 (identifying three metals (arsenic, cobalt, and lead), TPH-g, TPH-d, TPH-mo, 1,2-dichloro-3-chloropropane, naphthalene, eleven SVOCs, and two PCB mixtures as constituents of particular concern).

¹⁷⁷ ENGeo Risk Assessment, *supra* note 176, at 26.

¹⁷⁸ DEIR at 4.8-12 to -14 (Figures 4.8-2, 4.8-3, and 4.8-4).

entered into a land use covenant that prohibits the use of the site for several purposes, including residences, hospitals, schools, day care centers, or parks.¹⁷⁹

Despite this significant hazardous contamination and restrictions on use of the land for residential purposes, the DEIR concludes that a yet-to-be-developed Remedial Action Workplan (RAW) will mitigate any impacts to less than significant levels.¹⁸⁰ The DEIR appears to conclude that because the RAW will ultimately require DTSC approval, the RAW will be guaranteed to remediate the toxic contamination to safe levels.¹⁸¹ Given DTSC's poor enforcement history and the A's recent lawsuit against DTSC for failure to enforce state law,¹⁸² it is unreasonable for the DEIR to rely upon DTSC approval, and it is unreasonable to expect the City and the public to trust that the site will be remediated on these grounds alone. The DEIR's conclusions are unsupported by evidence in the record, and the DEIR must be revised to correct for this.

A. The DEIR's hazards analysis is flawed and must be revised to allow the City and the public to evaluate the risks to human health.

The DEIR must be revised to include additional information about the risks to human health and the environment. The DEIR lists the contaminants present in the soil and groundwater but fails to provide any quantification in the DEIR or its appendices of the risks associated with those levels of contamination. The DEIR must be revised to quantify the risks to all users of the site—including construction workers who would have direct contact with contaminated soil, and residents or visitors who visit the open space to recreate or picnic.

The DEIR's analysis relies primarily on a 2020 Human Health and Ecological Risk Assessment prepared by ENGEO, though this document is not attached as an appendix to the DEIR, nor are its findings clearly summarized in the DEIR. This Risk Assessment describes soil samples taken, identifies contaminants present in those samples, and establishes "target risk levels" for several contaminants which would reduce cancer risks to 1 in 1,000,000.¹⁸³

There are several flaws with the Risk Assessment's analysis. First, the Risk Assessment fails to provide any measure of the relative magnitude of risk of different exposure levels beyond the target risk levels. This amounts to a failure to quantify the unmitigated risks of the hazardous materials present at the site. Though DTSC recommended that the Risk Assessment be modified

¹⁷⁹ Port of Oakland & Cal. Dep't of Toxic Substances Control, *Covenant to Restrict Use of Property, Environmental Restriction: Charles P. Howard Terminal Site* (Mar. 3, 2003), Article 4.01, at 6, https://s3-us-west-1.amazonaws.com/waterfrontballparkdistrict.com/17_ReferencesintheDraftEIR-Section4-9WQ/2003-0303-dtsc-luc.pdf.

¹⁸⁰ DEIR at 4.8-50.

¹⁸¹ *Id.* at 4.8-50 to -52.

¹⁸² See Order on Demurrers and Petition for Writ of Mandate in *The Athletics Investment Group v. Cal. Dep't of Toxic Substances Control*, Alameda Superior Court Case No. RG20069917 (Mar. 23, 2021) (finding in favor of the Athletics in a case challenging DTSC for failure to enforce state law at the Schnitzer Steel facility).

¹⁸³ ENGEO Risk Assessment, *supra* note 176, at 31.

to include an estimate of the of the human health risk that each contaminant target level represents, the Risk Assessment was not modified in response to DTSC’s recommendation.¹⁸⁴

Second, the Risk Assessment includes unrealistic assumptions that are unsupported (and in fact contradicted by) the record. The target risk level for residents during ongoing construction was calculated assuming only one year of exposure—given that the DEIR estimates Phase II buildout to take at least 8 years, a one-year exposure duration is unsupported by the record.¹⁸⁵ Additionally, as discussed below, the target risk levels fail to take into account existing cancer risk from toxic air contaminants in West Oakland, thereby underestimating the total cancer risk that workers, residents, and visitors would be exposed to.¹⁸⁶

Finally, in at least one case, the target risk levels established in the Risk Assessment appear to be *less protective* than screening levels set by state and federal regulators. The Risk Assessment found concentrations of antimony (a heavy metal) in excess of screening levels but concluded that antimony was not a chemical of particular concern because the concentrations of antimony present were lower than the target level established in the Risk Assessment.¹⁸⁷ The DEIR does not explain why the target clean up level is less protective than state or federal screening levels, nor does it provide any justification for this finding.

The DEIR must be revised to provide the above information in order to enable the City and the public to evaluate the impacts of the hazardous contamination at the Howard Terminal site.

B. The DEIR fails to analyze the cumulative impacts of exposure to hazardous materials.

The DEIR concludes that hazardous materials impacts are cumulatively considerable only if two or more hazardous materials releases occurred over the same time period before cleanup is completed, and also overlap the same location.¹⁸⁸ Because “[n]one of the other nearby hazardous materials sites have affected soils or groundwater at the Project site,” the DEIR concludes that the Projects’ impacts are not cumulatively considerable.¹⁸⁹

The DEIR should be revised to consider the cumulative impacts of on-site contamination and surrounding industrial activity, like the neighboring Schnitzer Steel facility. The DEIR appears to assume that hazardous materials from the Schnitzer Steel facility could not encroach upon the Howard Terminal site, but the DEIR does not explain why this is so, or provide any evidence to support this assumption.

Additionally, the Risk Assessment that the DEIR relies upon does not consider the additive or cumulative impacts of multiple sources of toxic exposures. The target risk levels identified in the Risk Assessment did not take into account existing cancer risk from toxic air

¹⁸⁴ *Id.* at Appendix A (Response to DTSC Comments, Comment 1).

¹⁸⁵ *Id.* at 32.

¹⁸⁶ *Id.* at 33.

¹⁸⁷ *Id.* at 26.

¹⁸⁸ DEIR at 4.8-56.

¹⁸⁹ *Id.* at 4.8-57.

contaminants in West Oakland.¹⁹⁰ In other words, the Risk Assessment set target risk levels without taking into account existing risks from ambient air. Since workers, residents, and visitors will undoubtedly be breathing the ambient air while coming into contact with potentially contaminated soil and groundwater, the DEIR must be revised to account for the cumulative effects of these exposures.

C. The DEIR’s mitigation measures are vague, unclear, and impermissibly deferred.

The DEIR acknowledges that construction of the Project would require removing the asphalt cap that currently protects users of the site from contact with the hazardous materials in the soil and groundwater.¹⁹¹ Workers on the construction site would be directly exposed to these contaminated materials after the cap is removed. In addition, if the soil and groundwater are not sufficiently remediated, users of the project site—residents, workers, ballgame attendees, members of the public who visit the public open space—could be exposed to remaining hazardous materials, particularly in park and open space areas where direct contact with soil is likely.

To mitigate these impacts, the DEIR proposes Mitigation Measure HAZ-1a, which promises to prepare a Remedial Action Workplan and to submit the plan to DTSC for approval. This RAW will be prepared “[p]rior to Project-related grading or construction onsite.”¹⁹² Mitigation Measure HAZ-1a contemplates that the RAW will identify known areas with hazardous materials, describe “remedial methods” for each contaminant, describe procedures for removing contaminated materials, and describe cap restoration activities.¹⁹³ The DEIR then identifies a second mitigation measure, HAZ-1b, which stipulates that the A’s will comply with the RAW prior to issuance of any grading, building, or construction permit.¹⁹⁴

The proposed mitigation measures are vague, incomplete, and ill-defined, and are therefore impermissibly deferred. While the DEIR identifies types of clean-up activities that may be undertaken at the site, it does not commit to any specific remediation methods, instead deferring that until after the DEIR has been approved. “Impermissible deferral of mitigation measures occurs when an EIR puts off analysis or orders a report without either setting standards or demonstrating how the impact can be mitigated in the manner described in the EIR.”¹⁹⁵ Here, the DEIR has not demonstrated how the menu of options of remedial methods will mitigate the contamination at the Project site. Instead, the DEIR asserts that the yet-to-be-developed plan “would specify how the construction contractor(s) would remove, handle, transport, and dispose of all excavated materials in a safe, appropriate, and lawful manner.”¹⁹⁶ The effectiveness of a

¹⁹⁰ ENGEO Risk Assessment, *supra* note 176, at 33.

¹⁹¹ DEIR at 4.8-48.

¹⁹² *Id.* at 4.8-51.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 4.8-52.

¹⁹⁵ *Preserve Wild Santee v. City of Santee*, 210 Cal. App. 4th 260, 280–81 (2012) (holding that mitigation was impermissibly deferred when the EIR contained measures to mitigate an impact but failed to specify performance standards or provide other guidelines for mitigation actions).

¹⁹⁶ DEIR at 4.8-49.

Removal Action Workplan cannot be analyzed before the workplan has been developed, and the DEIR's reliance on this non-existent workplan constitutes deferred mitigation.

Further, the DEIR does not contain sufficient information to determine if these mitigation measures would be effective. As discussed above, the target risk levels identified in the Risk Assessment are not supported by substantial evidence. Mitigation Measures HAZ-1a and HAZ-1b rely on achieving those unsupported target risk levels. To the extent that these mitigation measures rely upon the target risk levels as a performance standard, the effectiveness of the mitigation measures is not supported by substantial evidence.

In *Sacramento Old City Association v. City Council*, the court found that “for kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process (e.g., at the general plan amendment or rezone stage), the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval.”¹⁹⁷ However, it is no longer early in the planning process. It is time to make a clear and feasible plan for the public to comment on. The DEIR does not identify specific “practical considerations” that prohibit devising clear and reliable mitigation measures, and as such should be revised to include the Removal Action Workplan.¹⁹⁸

D. The DEIR fails to address the possibility that DTSC may not approve an updated land use covenant.

The DEIR acknowledges that residential and open space uses are currently prohibited on the Howard Terminal site, but the DEIR does not acknowledge the possibility that these restrictions might remain in place. Instead, the DEIR assumes approval of a new set of land use covenants which will permit residential and open space use, and identifies those land use covenants as a mitigation measure for the hazardous contamination at the site.

The DEIR does contain enough information for the City and the public to determine if it is likely that the site can be sufficiently remediated so that housing and open space uses are safe. As discussed above, the Risk Assessment that the DEIR relies upon does not describe the relative risks levels of different levels of contamination, nor does the DEIR include any information about the effectiveness of various remediation methodologies. Consequently, the City and the public have no way to determine how likely it is that cleanup to target risk levels is feasible, nor do they have any way of determining what the risks to workers, residents, and visitors may be if remediation does not achieve the target risk levels. For these reasons, the DEIR fails as an informational document and must be revised.

The DEIR does not discuss or even acknowledge the possibility that updated land use covenants may not be approved, instead treating the updated land use covenants as if their approval is predetermined. The DEIR must be revised to acknowledge and analyze the possibility that DTSC may not approve an updated land use covenant, and that residential and open space use on the site may continue to be prohibited. If the project were to move forward without residential or open space use, it appears immensely unlikely that the Project's benefits to

¹⁹⁷ *Sacramento Old City Ass'n v. City Council*, 229 Cal. App. 3d 1011, 1028–29 (1991).

¹⁹⁸ *Id.* at 1029.

the people of Oakland would outweigh the significant and unavoidable impacts on air quality and human health. The DEIR must be revised and recirculated to analyze this possibility.

E. The DEIR attempts to circumvent CEQA review by relying upon the City’s certification of this EIR for future DTSC approvals.

The DEIR is clear that “[t]he objective is also for DTSC to rely on this Project EIR for CEQA compliance for its decision to approve the new RAW.”¹⁹⁹ In other words, the DEIR contemplates that DTSC could avoid CEQA analysis for the forthcoming Removal Action Workplan, because that Workplan was approved in this DEIR. This flies in the faces of logic and CEQA precedent. How can DTSC rely on this DEIR for approval of the RAW, when the RAW is not analyzed in this DEIR, and will not be developed until after this EIR is certified?

Additionally, Mitigation Measure HAZ-1a says the RAW will use Target Cleanup Levels developed in the Risk Assessment.²⁰⁰ As discussed above, there are several significant flaws with the target levels established in that Risk Assessment. Yet here, the DEIR seeks approval of those Target Cleanup Levels without providing any justification in the DEIR itself of why those levels are appropriate and sufficiently protective for this Project, relying instead on DTSC’s approval of the Risk Assessment. The DEIR neglects to mention that DTSC expressed concern over the Risk Assessment’s use of risk-based target levels and recommended that the Risk Assessment be modified to include an estimate of the human health risk that each contaminant target level represents.²⁰¹

If the A’s plan to rely upon this City’s certification of this EIR for DTSC’s approval of the RAW, then the RAW must actually be developed and described in this DEIR.

VIII. The DEIR’s transportation and circulation analysis contains insufficient detail, defers mitigation, and presents alarming, unavoidable impacts.

The Project will have significant and unavoidable transportation and circulation consequences that should be unacceptable to the City. There are four impacts related to commuter safety and congestion that the DEIR concedes will be significant and unavoidable. The DEIR also states an intention not to formulate a Construction Management Plan or Transportation Demand Management plan until after Project approval, thereby impermissibly deferring mitigation of otherwise-significant congestion and VMT impacts. Moreover, the DEIR concludes without sufficient analysis that the Project’s conflict with local plans and restriction of existing commuter lanes will not result in significant impacts.

A. The Project creates several Significant and Unavoidable Impacts related to commuter safety and roadway congestion.

The DEIR concludes that four transportation impacts will be significant and unavoidable: impacts TRANS-3 and TRANS-3.CU (related to at-grade railroad crossings) and impacts TRANS-6 and TRANS-6.CU (related to increased congestion on important roadway

¹⁹⁹ DEIR at 4.8-38.

²⁰⁰ *Id.* at 4.8-51.

²⁰¹ ENGEO Risk Assessment, *supra* note 176, Appendix A (Response to DTSC Comments, Comment 1).

segments).²⁰² The City should not approve a project that fails to reduce these impacts to less than significant.

1. The Project poses a significant and unavoidable public safety risk, by increasing at-grade traffic across the active railroad line on Embarcadero.

The DEIR states that “the Project would generate additional multimodal traffic traveling across the at-grade railroad crossings on Embarcadero that would expose roadway users (e.g., motorists, pedestrians, bus riders, bicyclists) to a permanent or substantial transportation hazard.”²⁰³ The DEIR characterizes this impact as “Significant and Unavoidable with Mitigation.”²⁰⁴

All commuter routes to the Project site cross the railroad line at Embarcadero West. The Howard Terminal development would drastically increase the volume of traffic crossing the railroad at-grade, in turn increasing risk of accidents. This increased circulation will be a mix of pedestrian, bicycle, and vehicle traffic. The Market Street crossing is projected to be most significant point of vehicle traffic crossing the tracks (estimated at 2,200 vehicles for an at-capacity game).²⁰⁵ The Washington Street crossing is projected to be most significant point of pedestrian traffic crossing tracks (estimated at up to 4,300 people crossing hourly).²⁰⁶ Approximately 42 trains run through the area per day, which each can shut down the intersection for seven to nineteen minutes.²⁰⁷ The DEIR offers a mitigation measure that includes installing some additional fencing and signaling around the crossings, but even with this measure the DEIR characterizes the impact as significant and unavoidable.²⁰⁸ A revised EIR should consider additional mitigation measures that would reduce or avoid this public safety risk.

2. The Project would cause significant and unavoidable traffic congestion on several major roadways, in conflict with Alameda County Congestion Management Program.

The Project will cause the Posey Tube in the eastbound direction between Alameda and Oakland, and the Webster Tube in the westbound direction between Oakland and Alameda to become significantly more congested.²⁰⁹ Cumulatively, sections of I-880 (northbound between 23rd Avenue and Embarcadero), SR 24 (eastbound between Broadway and SR 13), Market Street (northbound between 12th and 14th, and southbound between Grand and 18th), and the Posey and Webster Tubes will become more congested.²¹⁰ These roadways will become more congested to a degree that conflicts with the county Congestion Management Program (CMP).²¹¹ This DEIR offers no mitigation measures for this impact. The DEIR explains that even with its Transportation Demand Management Plan (TDM) and Transportation Management Plan (TMP)

²⁰² DEIR at 4.15-233, 243, 246, 248.

²⁰³ DEIR at 4.15-233.

²⁰⁴ DEIR at 4.15-233, -247.

²⁰⁵ DEIR at 4.15-234.

²⁰⁶ DEIR at 234.

²⁰⁷ DEIR at 234.

²⁰⁸ DEIR at 4.15-235 to -236.

²⁰⁹ DEIR at 4.15-243.

²¹⁰ DEIR at 4.15-248.

²¹¹ DEIR at 4.15-243, -248.

in place, increased traffic congestion on these roadways would still be “significant and unavoidable.”²¹² Congestion on these segments would impact not only new commuters to the Project site, but also pre-existing commuters in the area. This impact should carry substantial weight in the City’s review.

B. The DEIR is deficient with respect to transportation impacts related to Non-Ballpark development.

In Impact TRANS-1A, the DEIR states that VMT generated by the residential and commercial components of the Project will not exceed significance thresholds after the application not-yet-developed TDMs.²¹³ However, the DEIR underestimates transportation impacts and impermissibly defers mitigation of those impacts. The DEIR must be revised and recirculated to correct these errors.

1. The DEIR does not discuss or analyze VMT and VRT impacts related to proposed off-site affordable housing.

In the project description, the DEIR proposes affordable off-site residential units at some unidentified location, presumably in the surrounding community.²¹⁴ The DEIR’s transportation and circulation discussion contains no mention or analysis of this potential off-site construction. In a revised EIR, this affordable housing proposal should be fully fleshed out, as discussed above in Part I of this comment. Impacts on traffic circulation—which could vary greatly depending on the specific location and scope actually proposed—should be analyzed as part of a revised EIR, along with adequate mitigation measures.

2. The DEIR defers mitigation by proposing that individual building owners independently formulate and seek approval on their own Transportation Demand Management (TDM) plans at a later date, after the Project is approved.

The DEIR presents Mitigation Measure TRANS-1A to ensure that the Project achieves a 20 percent VTR for non-ballpark development.²¹⁵ Mitigation Measure TRANS-1A is a Transportation and Parking Demand Management (TDM) Plan. However, the DEIR says that each individual building owner will formulate their own TDM Plan, separate from this DEIR, for review by the City at a later date after Project approval.²¹⁶

Under CEQA, it is legally improper to “defer the formulation of mitigation measures until after project approval.”²¹⁷ Here, the DEIR says that each building owner must submit its plan before their respective building is occupied, but it appears that the individual plans can only be formulated after the project is approved, and in fact only after buildings are constructed and leased or sold out to individual owners. By proposing that each individual building owner create their own TDM plan for approval at some point in the future, the DEIR does not sufficiently

²¹² DEIR at 4.15-243, -249.

²¹³ DEIR at 4.15-178.

²¹⁴ DEIR at 3-26 n.10.

²¹⁵ DEIR at 4.15-183.

²¹⁶ DEIR at 4.15-183.

²¹⁷ *Cal. Native Plant Soc’y v. City of Rancho Cordova*, 172 Cal. App. 4th 603, 621(2009).

demonstrate that it will actually meet the 20% vehicle trip reduction required by AB 734.²¹⁸ A revised EIR must remedy this deferred mitigation.

C. The DEIR inadequately explains how decreasing existing commuter vehicle road lanes near the Project site would improve traffic circulation in the area.

The DEIR assumes without analysis that converting half of Broadway’s lane capacity to bus-only lanes will cause a critical mass of commuters to switch to public transit; the DEIR also fails to analyze the more intuitive likelihood of bottleneck congestion. The DEIR presents Mitigation Measure TRANS-1d—*Implement Bus-Only Lanes on Broadway*—as a method to “improve transit reliability and improve transit connectivity.”²¹⁹ The measure calls for converting one motor vehicle lane in each direction on Broadway between Embarcadero West and 11th Street to bus-only lanes.²²⁰ The DEIR does not flesh out the ramifications of this proposal. One can assume that additional bus-only lanes would ease the commute into the Project site for bus riders and may encourage increased ridership on public transportation. However, this section of Broadway will continue to be a major thoroughfare for local commuters, and the DEIR does not actually analyze what proportion of would-be commuters would be compelled to switch to public transit due to implementation of a bus-only lane. This is relevant because those who continue to commute in personal vehicles, either to the Project site or simply to the surrounding area, would be compressed from two lanes into a single lane on Broadway.

Without additional information, it is impossible to know whether Mitigation Measure TRANS-1d would in fact be detrimental to transit reliability and connectivity. A revised EIR should concretely support the implied statement that implementing bus lanes will compel a major shift from personal vehicle use to public transportation, such that compressing personal vehicle traffic into a single lane would not create a serious traffic bottleneck. A revised EIR should consider the possibility of serious bottleneck congestion resulting from removing one of only two vehicle lanes in each direction on Broadway and converting them to bus-only lanes. Because impacts TRANS-1A,²²¹ TRANS-1B,²²² TRANS-5,²²³ and TRANS-5.CU²²⁴ all rely on the flawed mitigation measure TRANS-1d to be characterized as “less than significant,” the revised EIR should consider how increased congestion on Broadway would in turn affect this range of impacts. If increased congestion is found to be likely, the revised EIR should also offer further mitigation measures to alleviate this impact.

D. The Project will conflict with the Oakland Bike Plan.

The City of Oakland’s 2019 Bike Plan calls for building bike lanes on several street segments near the Project site.²²⁵ However, the proposed Project precludes the construction of

²¹⁸ See DEIR at 4.15-183 to -187.

²¹⁹ DEIR at 4.15-129, -242.

²²⁰ DEIR at 4.15-198.

²²¹ DEIR at 4.15-198, -200.

²²² DEIR at 4.15-198, -200.

²²³ DEIR at 4.15-242.

²²⁴ DEIR at 4.15- 248.

²²⁵ DEIR at 4.15-204 to -209.

several of these bike lanes, thereby conflicting with the Bike Plan. For example, the Bike Plan call for constructing a Class 2 bike lane on Adeline Street between 3rd and 7th Streets.²²⁶ The proposed Project construction would make this bike lane impossible, and instead would enhance Adeline Street for vehicle access, especially truck access to and from the seaport.²²⁷ Likewise, the Bike Plan calls for Class 2B buffered bike lanes on Broadway between Bay Trail and 6th Street.²²⁸ However the proposed Project instead plans to enhance Broadway for bus access and would make it impossible to build these bike lanes.²²⁹ Similarly, the Project calls for improving Market Street for auto and truck traffic, intended to improve vehicle traffic flow between the Project site and Schnitzer Steel.²³⁰ This makes impossible the Bike Plan's recommended Class 4 protected bike lanes on Market Street between Embarcadero West and 18th Street.²³¹ As one further example, the West Oakland Specific Plan calls for converting one existing traffic lane to a class 2 bike lane between 36th and 3rd Streets on Adeline Street.²³² Instead, the Project plans to prioritize the entire roadway on Adeline for truck traffic as the primary thoroughfare for seaport traffic.²³³

The DEIR suggests that this contradiction with the Bike Plan is insignificant because it is mitigated by measures TRANS-2a, 2b, and 2c. Each of these mitigation measures is simply the construction of another small segment of bike lane that the Bike Plan also prescribes on 7th Street, Martin Luther King, Jr. Way, and Washington Street.²³⁴ Constructing these other pre-planned bike lanes does not negate the fact that the Bike Plan explicitly calls for an even more extensive network of new bike lanes. The Bike Plan calls for construction of lanes not only on 7th, MLK, and Washington, but also on Broadway, Adeline, Market, and others. For that reason, it is unclear how constructing only the 7th, MLK, and Washington Street bike lanes can properly be offered as mitigation measures for making construction of the Broadway, Adeline, and Market Street bike lanes impossible.

Expanding ease and access to bike transit is a priority in Oakland. The Bike Plan indicates that 72% of West Oakland residents want to bike more, as do 68% of downtown residents.²³⁵ Yet the DEIR describes a Project that fails to comply with the City of Oakland's Bike Plan, and in fact directly conflicts with the Plan by precluding construction of a number of prescribed bike lanes. Nevertheless, the DEIR characterizes this contradiction with a local plan as less than significant.

²²⁶ DEIR at 4.16-206.

²²⁷ DEIR at 4.15-206.

²²⁸ DEIR at 4.15-206.

²²⁹ DEIR at 4.15-206.

²³⁰ DEIR at 4.15-208.

²³¹ DEIR at 4.15-208.

²³² DEIR at 4.15-215.

²³³ DEIR at 4.15-215.

²³⁴ DEIR at 4.15-230.

²³⁵ City of Oakland & Department of Transportation, *Let's Oakland: 2019 Oakland Bike Plan* (Jul. 2019) at 25, https://cao-94612.s3.amazonaws.com/documents/LBOakland_FinalDraft_20190807_web.pdf.

E. The Project improperly defers mitigation of construction-related congestion by relying on a future Construction Management Plan, which is yet-to-be formulated.

Under CEQA, it is legally improper to “defer the formulation of mitigation measures until after project approval.”²³⁶ Here, absent mitigation, construction-related congestion (Impact TRANS-4) is a significant Project impact. The DEIR asserts that a CMP will mitigate construction-related congestion to “less than significant.”²³⁷ However, no CMP is included with the DEIR. Rather, a CMP will be formulated at a later point, subject to agency approval.²³⁸

The DEIR identifies that construction around the Project site will take place over several years—though the duration is unknown and subject to change—and that related closures will extend out into surrounding area.²³⁹ Cumulatively, the DEIR notes that “the Project would be constructed in an area that is seeing additional construction, including housing and commercial development in Downtown and near the West Oakland BART, and street improvements throughout Downtown, and could contribute to a significant transportation hazard due to construction activity.”²⁴⁰ The DEIR says that a CMP will mitigate this otherwise significant impact. However, the CMP will only be formulated separately after approval, and this DEIR provides no Project-specific details about how the ongoing construction will be managed so as to mitigate roadway congestion over several years.²⁴¹ Rather, the DEIR provides abstract categories of measures that a future CMP may contain, but offers no Project-specific measures. For example, the DEIR explains:

The CMP *shall* provide project-specific information including descriptive procedures, approval documentation, and drawings (such as a site logistics plan, fire safety plan, construction phasing plan, proposed truck routes, traffic control plan, complaint management plan, construction worker parking plan, litter/debris clean-up plan, and others as needed) *that specify how potential construction impacts will be minimized* and how each construction-related requirement will be satisfied throughout construction of the project.²⁴²

Those components of the future CMP should be detailed as part of this document, and not deferred. Features like a construction phasing plan, site logistics plan, and others are relevant to this DEIR because they influence the degree of Impact TRANS-4 (construction-related congestion) and whether or not the mitigation measure will be sufficient. Mitigation Measure TRANS-4 (CMP) cannot be properly analyzed if no Project-specific components are described.²⁴³ This DEIR fails to provide a concrete basis from which to ascertain whether a hypothetical CMP is feasible and sufficient to mitigate extensive construction-related congestion.

²³⁶ *Cal. Native Plant Soc’y v. City of Rancho Cordova*, 172 Cal. App. 4th 603, 621 (2009).

²³⁷ DEIR at 4.15-241.

²³⁸ DEIR at 4.15-240 to -241.

²³⁹ DEIR at 4.15-240.

²⁴⁰ DEIR at 4.15-247.

²⁴¹ DEIR at 4.15-240 to -241.

²⁴² DEIR at 4.15-241 (emphasis added).

²⁴³ DEIR at 4.15-241.

Because the DEIR fails to include this information, it defers mitigation of a significant impact and prematurely concludes that Impact TRANS-4 will be less than significant after mitigation. A revised EIR must expand upon the as-yet unformulated CMP, with a plan specific enough to apply to the Project and properly analyze the quality and feasibility of as a mitigation measure.

IX. The DEIR's analysis of the project's energy use is outdated and inaccurate.

CEQA requires lead agencies to analyze whether a proposed project would result in wasteful, inefficient, or unnecessary consumption of fuel or energy.²⁴⁴ As part of this analysis, a lead agency must analyze proposed project's impacts on "local and regional energy supplies and on requirements of additional capacity," as well as the project's impacts on "peak and period demands for electricity and other forms of energy."²⁴⁵ The DEIR's analysis of these factors relies on broad generalizations and outdated information, and must be revised to correct these deficiencies.

A. The DEIR must provide additional information regarding PG&E's assurances that there will not be significant impacts on local and regional energy supplies.

The DEIR concludes that the Project's energy use could result in a significant impact without mitigation,²⁴⁶ but dismisses any concerns about on local and regional energy supplies by stating that "PG&E has established contracts and commitments to ensure there is adequate electricity generation and natural gas capacity to meet its current and future energy loads."²⁴⁷ In support of this statement, the DEIR cites a September 17, 2019 "personal communication with Jordan Baculpo, PG&E Senior Account Manager, and Jeff Caton, ESA Senior Greenhouse Gases Analysis."²⁴⁸ This e-mail communication contains no supporting materials; rather, a PG&E representative simply states that there will be adequate capacity.²⁴⁹ Though this personal communication makes reference to an engineering survey prepared by PG&E, that survey does not appear in the materials appended to the DEIR.

A blanket statement made one-and-a-half years ago about PG&E's procurement policies is insufficient to address the question of whether adequate supply exists to serve the Project. The DEIR should be revised to include specific assurances that PG&E can serve the new load at the Howard Terminal site. As last summer's rolling blackouts showed, PG&E operates in increasingly extreme climate conditions, which are rapidly changing PG&E's ability to serve its customers.²⁵⁰ And as the DEIR notes, PG&E filed for Chapter 11 bankruptcy in January 2019,

²⁴⁴ Cal. Pub. Res. Code § 21100(b)(3); CEQA Guidelines § 15126.2(b).

²⁴⁵ CEQA Guidelines Appendix F, §§ II.C.2, II.C.3

²⁴⁶ DEIR at 4.5-37.

²⁴⁷ DEIR at 4.5-33.

²⁴⁸ DEIR at 4.5-33, 4.5-50.

²⁴⁹ Personal communication with Jordan Baculpo, PG&E Senior Account Manager, and Jeff Caton, ESA Senior Greenhouse Gases Analysis, Sept. 17, 2019, https://s3-us-west-1.amazonaws.com/waterfrontballparkdistrict.com/13_ReferencesintheDraftEIR-Section4-5Energy/2019-11-17-pge-personalcommunicationwithjordanbaculpo.pdf.

²⁵⁰ D. Kahn & C. Bermel, *California has first rolling blackouts in 19 years—and everyone faces blame*, Politico, Aug. 18, 2020, <https://www.politico.com/states/california/story/2020/08/18/california-has-first-rolling-blackouts-in-19-years-and-everyone-faces-blame-1309757>.

and the utility's reorganization plan was only recently approved.²⁵¹ Not only was PG&E held liable for multiple wildfires in recent years, but it has increasingly relied upon Public Safety Power Shutoff events to limit its liability. All of these factors indicate that the DEIR must provide more than general assurances about energy supply.

The DEIR must provide additional, up-to-date, site-specific information regarding PG&E's assurances that they can adequately provide enough energy to the proposed project. As the DEIR states, the proposed project's electricity, natural gas, and gasoline fuel impact will represent 0.55%, 0.19% and 0.55%, respectively, of Alameda County's total consumption from 2018.²⁵² These numbers are significant enough that additional information regarding any communication between the project sponsor and PG&E is needed to ensure this project is adequately supplied power.

B. The DEIR underestimates electricity use because it fails to comply with Oakland's ban on natural gas in new buildings.

An EIR must consider whether a proposed project will conflict or obstruct state or local plans for renewable energy or energy efficiency.²⁵³ Here, the DEIR acknowledges that the City of Oakland prohibits natural gas in new buildings,²⁵⁴ yet the proposed project has only committed to electrifying 50% of residential buildings.²⁵⁵ By not committing to electrifying 100% of residential buildings, the proposed project would conflict with multiple local plans. The City of Oakland Equitable Climate Action Plan (ECAP) Measure B-1 specifies that by 2023, Oakland must "prohibit new buildings and major renovations from connecting to natural gas infrastructure."²⁵⁶ Furthermore, City of Oakland Ordinance 13632, enacted in December 2020, prohibits newly constructed buildings from connecting to or rely on natural gas and propane, with a few exceptions.²⁵⁷

Here, the DEIR recognizes that the project would be required to comply with "any changes to the City's building code that eliminate the use of natural gas, including the provisions of Ordinance 13632 prohibiting most newly constructed buildings (both residential and commercial) from connecting to natural gas or propane as applicable."²⁵⁸ While the DEIR mentions that a waiver might be granted for restaurants and other land uses, the Ordinance seems to be clear: newly constructed buildings must be disconnected from the natural gas

²⁵¹ DEIR at 4.5-5.

²⁵² DEIR at 4.5-33.

²⁵³ CEQA Guidelines, Appendix G, § IV.

²⁵⁴ DEIR at 4.5-20.

²⁵⁵ DEIR at 4.7-59 (GHG mitigation plan shall "electrify a minimum of 50% of the residential units as required by CARB).

²⁵⁶ City of Oakland, *2030 Equitable Climate Action Plan* (Jul. 2020) at 55, <https://www.oaklandca.gov/projects/2030ecap>.

²⁵⁷ City of Oakland, Ordinance 13632 (Dec. 16, 2020),

https://library.municode.com/ca/oakland/ordinances/code_of_ordinances?nodeId=1065428.

²⁵⁸ DEIR at 4.5-34.

infrastructure.²⁵⁹ Not only would this significantly lower impacts to the natural gas grid, but this would also help mitigate the indirect GHG impacts of the project's operations.

The DEIR's failure to comply with the City's ordinance is not only a conflict that must be addressed in the DEIR, but as a result the DEIR drastically underestimate's the Project's electricity use. The DEIR indicates that electrifying all residential development would increase the Project's residential energy use by 40 percent.²⁶⁰ The DEIR must be revised to reflect compliance with City law, and to analyze the Project's true impacts on local and regional energy supplies.

X. The DEIR fails to adequately analyze the Project's impacts related to biological resources.

The DEIR does not sufficiently analyze the significant environmental effects on biological resources in and around the Project site. The DEIR should be revised to ensure that the birds including the peregrine falcon (*Falco peregrinus anatum*), fish and aquatic mammals, bats, special status plants, and other species and sensitive resources are adequately protected.

CEQA requires a lead agency to find that a project will have a significant impact on biological resources if the project will: "[1] substantially reduce the habitats of a fish or wildlife species; [2] cause a fish or wildlife population to drop below self-sustaining levels; [3] threaten to eliminate a plant or animal community; [or 4] substantially reduce the number or restrict the range of an endangered, rare or threatened species."²⁶¹ Upon finding any of these conditions will occur, the EIR must analyze the impact in depth, "discuss feasibility of alternatives or mitigation measures," and implement alternatives or mitigation measures where feasible.²⁶²

A. The DEIR fails to analyze special-status species and other sensitive receptors that could potentially occur within the Project study area.

The DEIR states that "[s]pecial-status species or other sensitive resources determined to . . . have [a] low potential to occur in the Project study area . . . are not considered in the impact analysis."²⁶³ This is inadequate. An EIR's standard of significance can be "impermissibly lenient" because it is narrower than the standards set forth in the CEQA guidelines.²⁶⁴ The DEIR provides no evidence to support the implied assertion that there will not be substantial impacts on protected species that have a low potential to occur in the Project study area.²⁶⁵ Therefore, the

²⁵⁹ The Ordinance provides exceptions for buildings not deemed newly constructed buildings, accessory dwelling units, and projects that obtained vested rights through either a development agreement or a vesting map prior to the date of the ordinance. Oakland Mun. Code § 15.37.040. The Ordinance also includes an infeasibility waiver when circumstances make it infeasible to prohibit natural gas. Such circumstances include, but are not limited to, where there is a conflict with any other city regulations, when there is a lack of commercially available materials and technologies, and when applying this requirement would constitute an unconstitutional taking of property. *Id.* § 15.037.050.

²⁶⁰ DEIR Appendix Energy, Tables at 21 (Table 14).

²⁶¹ 14 Cal. Code Regs. § 15065(a)(1).

²⁶² *Id.* § 15065(c).

²⁶³ DEIR at 4.3-31.

²⁶⁴ *Endangered Habitats League v. County of Orange*, 131 Cal. App. 4th 777, 793 (2005).

²⁶⁵ See DEIR at 4.3-31.

DEIR must be revised and recirculated to explain why the Project will not substantially reduce the number or restrict the range of special-status species with a low potential to occur in the project study area.

The DEIR notes several special-status species that have potential to occur in the study area, but which the DEIR excludes from its analysis. Some of these species include: the bald eagle, the monarch butterfly, the tricolored blackbird, the black turnstone, the San Francisco common yellowthroat, the marbled godwit, the long-billed curlew, the Rufous hummingbird, and the willet.²⁶⁶ These species have either a low or a moderate potential to occur in the Project study area and are not included in the impact analysis. The DEIR should be revised to analyze impacts on these special-status species.

The DEIR also fails to analyze several species that are listed as threatened or endangered under the Federal Endangered Species Act. As the United States Fish and Wildlife Service informed the City in 2019, threatened or endangered species include the California clapper rail, the green sea turtle, the delta smelt, and the tidewater goby.²⁶⁷ The DEIR omits analysis of the California clapper rail and fails to explain why this species was excluded. While the DEIR mentions a few species listed above in the BIO appendix, it does not provide further explanation as to why those species were excluded from the analysis, and the DEIR must be revised to include this justification.

To remedy this oversight and inadequate analysis, the DEIR must be revised to include analysis and discussion of the potential impacts to all of the special-status species and other potential receptors that might occur within the Project site. Nothing less than this careful research and analysis is sufficient to uphold the goal of CEQA to “prevent the elimination of fish or wildlife species due to man’s activities.”²⁶⁸

B. The DEIR does not properly analyze the Project’s impacts on protected birds.

The DEIR states that bird nesting is not expected in the interior of the ballpark or any areas that would be subject to extreme noise generated from events or concerts.²⁶⁹ This assumption is unwarranted. The ballpark is a large structure and there will be periods during the nesting season when birds will have the opportunity to nest somewhere within the ballpark. The DEIR states that the noise would deter birds from nesting. However, it is unlikely that there will be such a great amount of continuous noise such that birds will never enter the ballpark to forage on food scraps and food litter. During periods in between noisy games and concerts, birds will have an opportunity to enter the ballpark and find a place to nest.

The DEIR also states that nesting falcons and raptors would not be impacted by night-time fireworks displays as long as there is a reasonable spatial buffer between the fireworks and

²⁶⁶ DEIR at Appendix BIO-9 to -14.

²⁶⁷ U.S. Fish and Wildlife Service, *Letter regarding threatened and endangered species relevant to Oakland Waterfront Project* (May 9, 2019), http://waterfrontballparkdistrict.com.s3.amazonaws.com/11_ReferencesintheDraftEIR-Section4-3BiologicalResources/2019-0509-USFWS-ThreatenedSpeciesList.pdf; see also DEIR at 4.3-1.

²⁶⁸ See Cal. Pub. Res. Code § 21001(c).

²⁶⁹ DEIR at 4.3-40.

nesting sites.²⁷⁰ The DEIR suggests a buffer of 500 feet.²⁷¹ Furthermore, the DEIR states that the firework displays would not adversely affect birds nesting beyond the Project site.²⁷² This unsubstantiated claim allows the Project to skirt responsibility related to its impacts beyond the immediate Project area. Instead, the DEIR should proceed on the side of caution and analyze potential impacts on bird populations that typically nest beyond the project site, but still within range of the impacts of fireworks. The study the DEIR cites in support of its conclusion that a spatial buffer would preclude fireworks from impacting nearby nesting falcons and raptors concedes that the birds may be agitated by the noise generated from the firework displays.²⁷³ If a bird has been agitated during nesting, then it has been disturbed. Disturbance could adversely affect bird breeding and nesting behavior, which could lead to significant impacts like reducing animal habitats, causing wildlife to fall below self-sustaining levels, or reducing the number of or restricting the range of a species. This disturbance must be analyzed more closely to determine whether it will have a significant impact on birds under CEQA and that it will not violate other avian protection statutes.²⁷⁴ The California Department of Fish and Wildlife shares this concern.²⁷⁵ The study relied upon in the DEIR also states that birds will habituate to the ballpark noise, however the DEIR states elsewhere that as project construction progresses and the level of disturbance increases, nesting birds are less likely to be attracted to the site. This is a contradiction that must be resolved. Either birds will habituate to the noise, or they will be disturbed enough such that their nesting in the area will decrease.

The DEIR states that a qualified biologist will survey and monitor the Project site, and video monitoring will assist in documenting bird behavior.²⁷⁶ While this monitoring may help mitigate impacts to these protected species, the DEIR does not provide sufficient evidence to demonstrate that the Project's impacts will be adequately mitigated. The Project site spans many acres and a single biologist along with several cameras will be not able to adequately document enough bird behavior to make educated decisions regarding mitigation. Without more information, there is a strong possibility that decisions will be made that will have a detrimental effect on protected bird populations.

²⁷⁰ *Id.* at 4.3-41.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 4.3-41 to -42; *see also* H.T. Harvey and Associates, Memorandum from Jeff Smith, Ph.D., Senior Raptor Ecologist, and Scott Terrill, Ph.D., Senior Ornithologist to Crescentia Brown, ESA, "Oakland A's Stadium Fireworks and Potential for Peregrine Falcon Disturbance, Project #4294-01, Oct. 10, 2019, https://s3-us-west-1.amazonaws.com/waterfrontballparkdistrict.com/11_ReferencesintheDraftEIR-Section4-3BiologicalResources/2019-1010-HTA-OaklandAFireworksDisturbance.pdf.

²⁷⁴ *See* 14 Cal. Code. Regs. § 15065(a)(1).

²⁷⁵ *See* Letter from Craig Shuman, Marine Regional Manager, Cal. Dep't of Fish and Wildlife, to Peterson Vollmann, Apr. 12, 2021, https://s3-us-west-1.amazonaws.com/waterfrontballparkdistrict.com/32_Documents%20Received%20between%20Publication%20of%20the%20Draft%20EIR%20&%20the%20NOD/2021-04-12_A-2_CDFW.pdf.

²⁷⁶ DEIR at 4.3-42 to -43.

Lastly, the DEIR states that the Project will cease monitoring bird behavior if nesting within the Project site is not identified for more than three consecutive seasons.²⁷⁷ This policy creates incentives adverse to CEQA and bird-protection goals. It incentivizes inadequate monitoring so that monitoring can cease in the future. It also incentivizes the Project to pursue other actions that would deter bird nesting within the site. Furthermore, this policy assumes that birds will not return after more than three seasons. With a Project lifespan of over 30 years, using three seasons as a threshold to cease monitoring bird behavior is misleading and inadequate.

C. The DEIR does not adequately analyze the Project’s impacts on fish and marine mammals.

The DEIR states that the limited scope of proposed in-water work makes a substantial impact to marine movement corridors unlikely.²⁷⁸ This analysis is inadequate because the DEIR fails to discuss the marine movement corridors and why the in-water work is unlikely to impact marine life during movement and migration. Without this information, the DEIR fails to adequately inform the public and decisionmakers about the impacts of the Project, frustrating the purpose of CEQA. The Project could potentially harm numerous protected aquatic species and could cause irreparable damage to Bay Area ecosystems.

Furthermore, the DEIR does not discuss the effect of increased commercial and recreational watercraft on fish. This is an improper oversight of the DEIR that must be remedied through a detailed discussion of how the Project will directly or indirectly increase the density of watercraft in the area and adversely impact marine life. If increased use of commercial and recreational watercraft due to the Project will not impact fish, the DEIR must explain why not instead of ignoring the issue. The DEIR must remedy this issue otherwise the public and decisionmakers will not have adequate information regarding the Project’s impacts, violating CEQA.

XI. The DEIR fails to properly mitigate the Project’s impacts on hydrology and water quality.

The DEIR does not sufficiently analyze the Project’s impacts and potential harms associated with stormwater runoff at Howard Terminal and does not sufficiently analyze the Project’s flood risks. The DEIR should be revised to ensure that these impacts are properly analyzed and mitigated.

A. The DEIR does not adequately mitigate Project impacts on surface water and groundwater quality.

The DEIR states that pesticides, cleaners, oil, grease, and other household products and mechanical compounds could enter stormwater runoff from the Project site.²⁷⁹ The chemicals in these products can create a significant pollution burden on surface water and groundwater quality. The DEIR states that the Project “shall not result in a substantial increase in stormwater runoff volume or velocity to creek or storm drains.”²⁸⁰ However, the DEIR is impermissibly

²⁷⁷ *Id.* at 4.3-43.

²⁷⁸ *Id.* at 4.3-57.

²⁷⁹ *Id.* at 4.9-21.

²⁸⁰ *Id.* at 4.9-24.

vague because it does not explain why there will not be an increase in stormwater runoff during the operational phase of the project. Under CEQA, the “formulation of mitigation measures shall not be deferred until some future time.”²⁸¹ While the DEIR does state that a Creek Protection Plan will include site design measures as post-construction best management practices, the DEIR does not specify the kinds of design measures the plan will implement.²⁸² This is impermissible deferred mitigation. The DEIR must be revised, with remedied analysis so that the public and decisionmakers are informed regarding the Project’s proposed mitigation measures. Otherwise, unchecked toxic runoff from the Project could create drastic adverse impacts on human and biological resource health.

B. The DEIR’s refusal to propose a concrete flood contingency plan constitutes impermissible deferred mitigation.

The DEIR states that the Project sponsor shall develop a final adaptive management and contingency plan for sea level rise prior to the issuance of the first grading permit for the Project.²⁸³ The DEIR further states that the plan will “include enforceable strategies” and will “establish a monitoring and compliance program.”²⁸⁴ While these are commendable goals, the DEIR is impermissibly vague by not providing specific performance standards. Impermissible deferral of mitigation measures “occurs when an EIR puts off analysis or orders a report without either setting standards or demonstrating how the impact can be mitigated in the manner described in the EIR.”²⁸⁵ Here, the DEIR has not sufficiently demonstrated how the proposed adaptive management and contingency plan will mitigate future flood risks. The effectiveness of the proposed flood mitigation measures cannot be analyzed until it is clear to the public and decisionmakers what will be included in the DEIR’s proposed management and contingency plan. The DEIR’s reliance on this plan constitutes deferred mitigation. The DEIR must be revised to ensure that flood risks are mitigated and unnecessary damage is avoided in the future.

XII. The DEIR provides insufficient detail for an adequate comparative analysis of alternatives to the Project.

CEQA requires an EIR to include a detailed discussion of alternatives to a proposed project.²⁸⁶ In the California Supreme Court’s view, “the core of an EIR is the mitigation and alternatives sections.”²⁸⁷ The EIR should compile a range of alternatives sufficient to “foster informed decision-making and public participation.”²⁸⁸ The discussion of a given alternative must include sufficient concrete information that “a meaningful evaluation, analysis, and comparison with the proposed project” is possible.²⁸⁹ The EIR must provide a rationale for selecting the alternatives that do appear in the EIR, as well as identify and explain the reasoning

²⁸¹ 14 Cal. Code Regs. § 15126.4(a)(1)(B).

²⁸² DEIR at 4.9-24.

²⁸³ *Id.* at 4.9-36.

²⁸⁴ *Id.*

²⁸⁵ *Preserve Wild Santee v. City of Santee*, 210 Cal. App. 4th 260, 280–81 (2012).

²⁸⁶ Cal. Pub. Res. Code § 21100(b)(4).

²⁸⁷ *Citizens of Goleta v. Bd. of Supervisors*, 52 Cal. 3d 553, 565 (1990).

²⁸⁸ 14 Cal. Code Regs. § 15126.6(a).

²⁸⁹ *Id.* at § 15126.6(d).

for rejecting any alternatives from the discussion.²⁹⁰ Here, the DEIR is deficient because it does not provide enough information about each alternative and omits an alternative that may avoid significant Project impacts.

A. The DEIR improperly uses the Coliseum Area Specific Plan EIR Alternative 2C to represent impacts of the Off-Site Alternative 2.

The DEIR does not provide sufficient information to evaluate Alternative 2, the off-site alternative. Under this alternative, Howard Terminal would remain in its current use, and the A's would instead construct a new ballpark and their proposed mixed-use development at the site of the Oakland Coliseum. This off-site alternative would consist of demolishing the existing Coliseum ballpark and constructing a new ballpark for the A's in its place.²⁹¹ The alternative would redevelop the surrounding Coliseum site with the same mix and density of uses as planned for Howard Terminal, while retaining the existing Oakland Arena basketball stadium.²⁹²

In particular, the DEIR fails to adequately describe potential impacts of this alternative. The DEIR claims that potential impacts would mirror those identified in the Coliseum Area Specific Plan (CASP) EIR from 2015. It foregoes new analysis of the alternative's specific features and instead relies entirely on those impacts from the CASP EIR Alternative 2C.²⁹³ However, this alternative is sufficiently different from the CASP that it would require an amendment to that Plan, which was adopted by the City after an EIR process in 2015. The development mix and density would be different, warranting an independent impact analysis.

The CASP addressed a much larger project area than just the existing ballpark: it also rezoned some of the surrounding neighborhood. The "Coliseum District" site analyzed in CASP EIR Alternative 2C is 253 acres, whereas this proposed off-site alternative sits on only 120 acres.²⁹⁴ Nevertheless, the DEIR uses the CASP Alternative 2C analysis to represent the off-site alternative, even though it would have nearly the same amount of development on half the lot size. The DEIR characterizes this as an "apples to apples" comparison, without explaining how this size discrepancy factors into its analysis.²⁹⁵ Additionally, the proposed off-site alternative includes constructing a 3,500 seat performance venue, whereas the CASP EIR Alternative 2C did not include or analyze the construction of a new performance venue.²⁹⁶ These are significant differences, such that impacts from CASP EIR Alternative 2C are not sufficiently similar to adequately represent the proposed alternative here. The off-site alternative could be a superior option to the proposed Project, but the current impact analysis is insufficient to ascertain this. A revised EIR must formulate an impact analysis specific to the proposed alternative, rather than relying on an analysis conducted several years ago for a different construction plan.

²⁹⁰ *Id.* at §15126.6(c).

²⁹¹ DEIR at 6-11.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ DEIR at 6-13.

B. The DEIR’s comparative analysis contains insufficient detail about significant impacts of each alternative and precludes a meaningful comparison to the Project.

The level of detail required in an EIR’s alternatives analysis is subject to a rule of reason.²⁹⁷ The discussion need not be exhaustive,²⁹⁸ but it must “include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project.”²⁹⁹ The analysis must contain concrete information about each alternative sufficient to allow a fact-based comparison of the alternatives with the project.³⁰⁰ Here, the DEIR’s comparisons omit concrete comparative metrics for many significant impacts. Withholding this concrete information frustrates the City’s ability to choose a potentially superior alternative.

This DEIR compares the alternatives to the Project impact-by-impact using a matrix table.³⁰¹ A matrix table “showing the major characteristics and significant environmental effects of each alternative” can be adequate for a comparative analysis,³⁰² but the table provided in this DEIR is not reasonably detailed enough for an adequate comparison. Many impacts are not quantified using any concrete metrics, which are essential for members of the public and public agencies to understand how much the alternatives’ impacts will differ from the Project’s impacts.³⁰³ The table often indicates that an impact *may* be “likely less than” the Project, but gives no indication, or even a range, of how much less.³⁰⁴ For example, impacts AIR-1 and AIR-4 (for Alternative 4), and impacts AIR-5 and AIR-2.CU (for both Alternative 4 and Alternative 2) are listed in the table as “not quantified” but also asserted as “likely less than the Project” without direct support.³⁰⁵ These impacts include significant and unavoidable Project impacts like cancer risk from emissions.³⁰⁶

In order to properly compare the merits of the alternatives to the proposed project, it is essential for members of the public—and the public agency ultimately deciding whether an alternative may be superior to the Project—to understand the degree of difference between the impacts. Is the impact only slightly less than the Project, or is it significantly less such the alternative may be a worthwhile option? Naturally, the project sponsor would prefer that none of the alternatives are approved instead of the Project. The alternatives analysis seems intentionally to withhold concrete comparative details, so as to obscure the public’s full understanding about how much a given alternative may actually lessen significant Project impacts.

A revised EIR should quantify the impacts of each alternative using concrete metrics, even if it presents a range, so that the City has adequate grounds to identify an environmentally superior alternative. This quantification should be feasible using the same methodology the

²⁹⁷ *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 407 (1988).

²⁹⁸ *Sierra Club v. City of Orange*, 163 Cal. App. 4th 523, 548 (2008).

²⁹⁹ 14 Cal. Code Regs. § 15126.6(d).

³⁰⁰ *Id.*

³⁰¹ DEIR at 6-42 to -56.

³⁰² 14 Cal. Code Regs. § 15126.6(d).

³⁰³ DEIR at 6-52, -54 to -56.

³⁰⁴ DEIR at 6-52, -54 to -56.

³⁰⁵ DEIR at 6-52, -54 to -56.

³⁰⁶ DEIR at 6-56.

DEIR uses to calculate the impacts of the actual Project, especially given that each alternative proposes a specific and concrete quantity and mix of development.

C. The DEIR should consider an alternative that avoids the significant and unavoidable impacts of the Project.

The purpose of an EIR’s alternatives section is to identify ways to mitigate or avoid the significant effects that a project may have on the environment.³⁰⁷ For that reason, the CEQA guidelines dictate that the discussion of alternatives “shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.”³⁰⁸ In this DEIR, with a few exceptions in the Off-site Alternative, all of the Project’s “significant and unavoidable” impacts—on air quality,³⁰⁹ wind hazards,³¹⁰ aesthetics,³¹¹ cultural resources,³¹² noise and vibration,³¹³ and transportation and circulation³¹⁴—are also “significant and unavoidable” in each of the three alternatives chosen for inclusion (setting aside the no-project alternative). The DEIR also seems to erroneously identify the reduced project alternative— rather than the off-site alternative—as the environmentally superior alternative, even though it reduces no significant impacts to “less than significant.”³¹⁵ The alternatives analysis is deficient because the DEIR did not focus on including alternatives that avoid significant impacts of the project.

A revised EIR should at least discuss an alternative that avoids the significant and unavoidable impacts of the project. Because the alternatives section is meant to identify alternatives that would avoid the Project’s significant impacts, as an informational document the section should have analyzed a reduced project alternative where development is decreased to a degree that avoids the significant impacts. It is crucial for members of the public and public agencies to know what level of development would be possible without producing significant impacts. If there is an option where some Project objectives can be met without producing major impacts, even if some other project objectives are left out, such an alternative would be valuable to include in the EIR as an informational document.

XIII. The DEIR does not demonstrate that the City complied with tribal consultation requirements.

AB 52 requires lead agencies to give notice in writing to California Native American Tribes that are traditionally and culturally affiliated with the geographic area of the project, and requires to the lead agency to engage in a consultation process with the tribe if the tribe requests consultation.³¹⁶ The DEIR notes that the City contacted eight Native American tribes in January

³⁰⁷ 14 Cal. Code Regs. § 15126.6(d); Cal. Pub. Res. Code § 21002.1.

³⁰⁸ 14 Cal. Code Regs. §15126.6(d).

³⁰⁹ DEIR at 6-42 to -43.

³¹⁰ DEIR at 6-42.

³¹¹ *Id.*

³¹² DEIR at 6-44.

³¹³ DEIR at 6-47 to -48.

³¹⁴ DEIR at 6-49 to -50.

³¹⁵ DEIR at 6-60.

³¹⁶ Cal. Pub. Res. Code § 21080.3.1.

2019 offering consultation.³¹⁷ However, the Native American Heritage Coalition lists ten tribes that are culturally affiliated with the historical range of the Ohlone people, where the Howard Terminal site is located.³¹⁸ The DEIR should be revised to account for this discrepancy.

XIV. Conclusion

For the reasons described above, the undersigned organizations respectfully request that this DEIR be revised and recirculated.

Sincerely,

Communities for a Better Environment
Public Advocates
East Bay Alliance for a Sustainable Economy
East Bay Community Law Center
Causa Justa: Just Cause
Urban Peace Movement
Urban Habitat
Alliance of Californians for Community Empowerment
Faith in Action East Bay

³¹⁷ DEIR at 4.4-31.

³¹⁸ Native American Heritage Comm'n, Ohlone – NAHC Digital Atlas, <http://nahc.ca.gov/cp/p10ohlone/>; *see also* Cal. Native American Heritage Comm'n, Digital Atlas of California Native Americans, <http://nahc.ca.gov/cp/>