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February 8, 2011

BY ELECTRONIC MAIL and FED EX OVERNIGHT

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RE: Comments on Mitigated Negative Declaration for Napa Valley Gateway/Napa Executive Center Use Permit Application № P08-00555-UP

Dear Ms. Shelton:

I am writing on behalf of the on behalf of Carpenters Local 751, its members, (collectively, "Local 751") concerning the proposed Mitigated Negative Declaration and its initial study and supporting documents ("MND") for Napa Valley Gateway/Napa Executive Center Use Permit Application № P08-00555-UP ("Project"). After reviewing the MND it is clear that the Project will have significant adverse environmental impacts which have not been adequately mitigated, and that an environmental impact report ("EIR") should therefore be prepared under the California Environmental Quality Act ("CEQA," Public Resources Code section 21000, et seq.) to fully analyze these impacts and propose feasible measures to mitigate those impacts.

I. INTRODUCTION.

The County of Napa, acting as CEQA lead agency, ("County" or "agency") proposes to approve the Napa Valley Gateway/Napa Executive Center Project with no EIR whatsoever. Instead, the County has concluded that the Project will have no adverse impacts of any sort and that a mitigated negative declaration may therefore be issued. As discussed below, the Project will have significant environmental impacts that have not been adequately mitigated, and an EIR is therefore required.

Napa Office LLC, proposes to construct a project located in the Napa Airport Industrial Area on a 4.33 acre lot located at the terminus of Gateway Road East bordered by Hwy 29 to the west, and Sheehy Creek to the south, within an IP:AC (Industrial Park: Airport Compatibility Zone D) zoning district. Approval of a Use Permit to allow the construction and operation of a three-story multi-tenant, office building totaling 67,930 square feet of gross floor area, with related site improvements including an exception to the Airport Area Specific Plan design standards for a 15% reduction of required parking spaces. A 72,731 sq. ft. parking lot will be constructed to provide for 203 parking spaces.

According to the Mitigated Negative Declaration, the proposed Project would have, if mitigation measures are not included, potentially significant environmental impacts in the areas of Greenhouse Gas Emissions and Transportation/Traffic. However, the MND fails to propose specific mitigation measures to reduce these impacts to below significance, relying instead on "deferred" mitigation. CEQA prohibited reliance on "deferred" mitigation, and the MND is therefore legally inadequate, and an EIR is required.

In addition, the Project will have significant cumulative impacts with numerous other projects being proposed in the area. The Project's cumulative impacts will be far above applicable significance thresholds for regional air pollutants, including nitrogen oxides (NOx), reactive organic gases (ROGs) and particulate matter (PM). The MND ignores the Project's cumulative impacts entirely, and an EIR is also required for this reason.

We urge the County to reject the mitigated negative declaration and prepare an EIR for the Project to analyze its impacts and to propose feasible mitigation measures and to consider feasible alternatives. Any new CEQA document will have to be recirculated for public review since it will necessarily contain significant new information and/or new mitigation measures. We reserve our right to submit supplemental written and oral comments at any hearing held by the County of Napa and any of its agencies ("County") concerning this matter.[1]

II. STANDING

Members of Local 751 live, work and recreate in the immediate vicinity of the Project site. These members will suffer the impacts of a poorly executed or inadequately mitigated Project, just as would the members of any nearby homeowners association, community group or environmental group. In addition, construction workers will suffer

[1] We reserve the right to supplement these comments at later hearings and proceedings for this Project. See, *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109.

many of the most significant impacts from the Project as currently proposed, such as from construction emissions, traffic and operational emissions. Therefore, Local 751 and its members have a direct interest in ensuring that the Project is adequately analyzed and that its environmental and public health impacts are mitigated to the full extent feasible. Hundreds of Local 751 members live in Napa County and want to ensure that the Project receives full environmental review so that the Project's environmental impacts will be reduced to the maximum extent feasible, while providing the community with the greatest economic and social benefits.

III. LEGAL STANDARD: AN EIR IS REQUIRED SINCE THERE IS A "FAIR ARGUMENT" SUPPORTED BY EXPERT EVIDENCE THAT THE PROJECT MAY HAVE ADVERSE ENVIRONMENTAL IMPACTS

As the Supreme Court has held, "If no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." (*Communities for a Better Environment v. South Coast Air Quality Management Dist. (ConocoPhillips)* (2010) 48 Cal. 4th 310, 319-320 ("*CBE v. SCAQMD*"), citing, *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d at pp. 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal. App. 3d 491, 504–505) "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.)

The EIR is the very heart of CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1214; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App. 4th 903, 927) The EIR is an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return." *Bakersfield Citizens*, 124 Cal.App.4th at 1220. The EIR also functions as a "document of accountability," intended to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." *Laurel Heights Improvements Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392. The EIR process "protects not only the environment but also informed self-government." *Pocket Protectors*, 124 Cal.App.4th 927.

An EIR is required if "there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment." Pub. Res. Code § 21080(d) (emphasis added); see also *Pocket Protectors*,

124 Cal.App.4th at 927. In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (CEQA Guidelines § 15371), only if there is not even a "fair argument" that the project will have a significant environmental effect. Pub. Res. Code §§ 21100, 21064. Since "[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process," by allowing the agency "to dispense with the duty [to prepare an EIR]," negative declarations are allowed only in cases where "the proposed project will not affect the environment at all." *Citizens of Lake Murray v. San Diego*, 129 Cal.App.3d 436, 440 (1989). CEQA contains a "***preference for resolving doubts in favor of environmental review***." *Pocket Protectors*, 124 Cal.App.4th at 927 (emphasis in original).

A negative declaration is improper, and an EIR is required, whenever substantial evidence in the record supports a "fair argument" that significant impacts may occur. Under the "fair argument" standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency's decision. CEQA Guidelines § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931; *Stanislaus Audubon v. Stanislaus* (1995) 33 Cal.App.4th 144, 150-151 (1995); *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal. App. 4th 1597, 1602. The "fair argument" standard creates a "low threshold" favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. *Pocket Protectors*, 124 Cal.App.4th at 928.

The "fair argument" standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

> This 'fair argument' standard is very different from the standard normally followed by public agencies in making administrative determinations. Ordinarily, public agencies weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact. The lead agency's decision is thus largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

Kostka & Zischke, *Practice Under CEQA*, §6.29, pp. 273-274. The Courts have explained that "it is a question of law, not fact, whether a fair argument exists, and the

courts owe no deference to the lead agency's determination. Review is de novo, with a ***preference for resolving doubts in favor of environmental review***." *Pocket Protectors*, 124 Cal.App. 4th at 928 (emphasis in original).

As a matter of law, "substantial evidence includes . . . expert opinion." Pub.Res.Code § 21080(e)(1); CEQA Guidelines § 15064(f)(5). CEQA Guidelines demand that where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the environmental effects to be significant and prepare an EIR. CEQA Guidelines § 15064(f)(5); Pub. Res. Code § 21080(e)(1); *Pocket Protectors*, 124 Cal.App. 4th at 935. Substantial evidence exists if the agency's own experts have identified a significant environmental impact, but have failed to impose adequate mitigation. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; *Gentry v. Murietta* (1995) 36 Cal.App.4th 1359) "Significant environmental effect" is defined very broadly as "a substantial or potentially substantial adverse change in the environment." Pub. Res. Code § 21068; see also Guidelines 15382. An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial." *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 83. In the *Pocket Protectors* case, the court explained how expert opinion is considered. The Court limited agencies and courts to weighing the admissibility of the evidence. *Id.* In the context of reviewing a Negative Declaration, "neither the lead agency nor a court may 'weigh' conflicting substantial evidence to determine whether an EIR must be prepared in the first instance." *Id.* Where a disagreement arises regarding the validity of a negative declaration, the courts require an EIR. As the *Pocket Protectors* court explained, "It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project." *Id.*

As discussed below, the record clearly establishes that the Project may have significant adverse environmental impacts that have not been mitigated. An EIR is therefore required.

IV. THERE IS A FAIR ARGUMENT THAT THE PROJECT MAY HAVE SIGNIFICANT UNMITIGATED ADVERSE ENVIRONMENTAL IMPACTS

There is a "fair argument" that the Project may have significant unmitigated adverse environmental impacts. Therefore, an EIR must be prepared to analyze and propose mitigation for those impacts. (*CBE v. SCAQMD*, 48 Cal. 4th at 319-320; *Mejia v. Los Angeles* (2005) 130 Cal.App.4th 322; *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903)

A. The Project Will Have Significant Inadequately Mitigated Traffic Impacts.

The MND concludes that the Project will have significant adverse traffic impacts unless adequate mitigation is imposed. (MND p. 17; Notice of Planning Commission Meeting for the Project). However, the only mitigation proposed to reduce this impact is a traffic mitigation fee.

An agency may only rely upon a mitigated negative declaration only when it has imposed mitigation measures that will eliminate all significant impacts of the project. (Pub. Res. Code §21064.5, 21080(c)(2); 14 Cal.Code Regs. §15064(f)(2), 15070(b); see *Perley v. Bd. of Sups.* (1982) 137 Cal.App.3d 424) A lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved. An agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation because there was no evidence that replacement water was available)) This approach helps "insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug." (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935) A lead agency may not conclude that an impact is significant and unavoidable without requiring the implementation of all feasible mitigation measures to reduce the impacts of a project to less than significant levels. (CEQA Guidelines §§ 15126.4, 15091)

The MND relies on a County Traffic Impact Fee Program. Payment of impact fees alone does not relieve the Project from mitigation of the significant traffic impacts that it will create in the near term and under cumulative conditions. This mitigation is therefore not adequate to reduce the impact to a level of insignificance and the impact therefore remains significant and must be addressed in an EIR.

Mitigation fees are not adequate mitigation unless the lead agency can show that the fees will fund a specific mitigation plan that will actually be implemented in its entirety. (*Napa Citizens for Honest Gov. v. Bd. Of Supervisors* (2001) 91 Cal.App.4th 342 (no evidence that impacts will be mitigated simply by paying a fee); *Anderson First Coal. v. City of Anderson* (2005) 130 Ca.App.4th 1173 (traffic mitigation fee is inadequate because it does not ensure that mitigation measure will actually be implemented); *Kings Co. Farm Bureau v. Hanford* (1990) 221 Cal.App.3d 692. But see, *Save Our Peninsula Comm v. Monterey Co.* (2001) 87 Cal.App.4th 99 (mitigation fee

allowed when evidence in the record demonstrates that the fee will fund a specific mitigation plan that will actually be implemented in its entirety); *California Native Plant Society v. County of El Dorado et al.* (2009) 170 Cal. App. 4th 1026 (fee program had to have gone through CEQA review for an agency to say that the payment of the fee alone is adequate CEQA mitigation); *Endangered Habitats League v. County of Orange* (2005); *Gray v. County of Madera* (2008).

In this case, the agency can not conclude that the mitigation fee will fund a specific program that will actually be implemented and that will actually fully mitigate the impact. The MND does not even point to a specific program or mitigation measure that will be funded. There can be no assurance that the mitigation fee payment will be used in any manner that will mitigate the Project's admittedly significant traffic impacts. The MND therefore may not rely on the mitigation measure of uncertain efficacy.

Furthermore, a CEQA document may not rely upon a mitigation measure that will be developed after project approval. CEQA disallows deferring the formulation of mitigation measures to post-approval studies. (CEQA Guidelines § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309.) An agency may only defer the formulation of mitigation measures when it possesses "'meaningful information' reasonably justifying an expectation of compliance." (*Sundstrom* at 308; see also *Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-29 (mitigation measures may be deferred only "for kinds of impacts for which mitigation is known to be feasible").) A lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation because there was no evidence that replacement water was available).) This approach helps "insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug." (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.)

Moreover, by deferring the development of specific mitigation measures, the Applicant has effectively precluded public input into the development of those measures. CEQA prohibits this approach. As explained by the *Sundstrom* court:

> An EIR [is] subject to review by the public and interested agencies. This requirement of "public and agency review" has been called "the strongest assurance of the adequacy of the EIR." The final EIR must respond with

> specificity to the "significant environmental points raised in the review and consultation process." . . . Here, the hydrological studies envisioned by the use permit would be exempt from this process of public and governmental scrutiny. (*Sundstrom*, 202 Cal.App.3d at 308.)

The traffic mitigation fee will be funding some unspecified measures that have not even been proposed yet. The MND therefore may not rely upon these post-approval mitigation measures to mitigate the Project's significant traffic impacts. An EIR is required to describe this mitigation measure to the public and explain how and whether it will adequately mitigate the Project's traffic impacts.

B. The Project Will Have Significant Inadequately Mitigated Greenhouse Gas Impacts.

The MND concludes that the Project will have significant Greenhouse Gas ("GHG") impacts. (MND p. 10) The MND states:

> The Bay Area Air Quality Air District (BAAQMD) has established a significant threshold and screening criteria related to criteria air pollutants and greenhouse gas emissions (GHG) for new development. The District's screening table (BAAQD Air Quality guidelines, Table 3.1) addresses offices and is given ***a screening criteria of 53,000 square feet, this project exceeds that criteria*** and therefore we preformed our own Urban Land Use Emissions Model (URBEMIS). Inputting the operational characteristics into our URBEMIS air quality analysis for the project indicates, the facility, once complete, will result in area source emissions of 546.25 metric tons per year of carbon dioxide equivalents (MT/Y CO2e) and operational (vehicle) emissions of 1,063.93 MT/Y CO2e. According to the URBEMIS analysis, the project's total ongoing carbon dioxide emissions (area source plus operational emissions) are predicted to total 1,163.36 MT/Y CO2e.
>
> Effective June 2, 2010, the BAAQMD adopted qualitative and quantitative thresholds that are instructive in this regard. Specifically, the BAAQMD suggests that development projects which will emit less than 1,100 MT/Y CO2e may be considered to have a less than significant impact relative to GHG emissions (both individually and cumulatively). ***At a URBEMIS modeled operational emissions rate of 1,163.36 MT/Y CO2e, the subject project exceeds the BAAQMD's 1,100 MT/Y CO2e threshold of significance***.
>
> (MND p. 10 (emphasis added))

The MND goes on to conclude that unspecified migration measures will reduce the Project's significant GHG impacts to less than significant. However, none of the proposed mitigation measures are imposed pursuant to a binding mitigation monitoring program, and the County conducts no analysis to determine whether any reductions achieved will reduce GHG impacts to below the level of significance. Therefore, these mitigation measures are legally inadequate to reduce the impact to below significance. The MND states:

> However, the BAAQMD's list of feasible mitigation measures for operational, mobile, and area-source Emissions (page 4-13 of the BQAAMD 2010 Guidelines) include sector reductions that this project qualifies for as follows:
>
> Transit Service 0-15% reduction
> Bike & Pedestrian 0- 9% reduction
> Reduction of parking supply 0-50% reduction
> Planting of shade trees/shading the structure 30% reduction
>
> Given that the project only needs a 0.6% reduction, the proposed listed sustainable design elements, the ultimate reduction could be entirely mitigated, however most likely close to a 30% reduction based on the above design elements. The current project incorporates greenhouse gas reduction methods and offsets including bicycle and pedestrian-friendly facilities and improvements, permanent preservation of riparian habitat and a landscape easement, high efficiency irrigation, recycled water use, low VOC materials, the planting of more than 48 new trees (of which 46 of them will be native), designs that take advantage of passive natural cooling and heating, and a building which is designed to support the structural loads associated with roof-mounted solar arrays. As required by Mitigation Measure number 1 and 2 below, project impacts related the GHG emission and global warming will be less than significant.
>
> (MND p. 10)

These mitigation measures are insufficient to reduce the Project GHG impacts to below the level of significance. First, the MND does not require the implementation of the measures pursuant to a binding mitigation monitoring program. Therefore, there can be no assurance that the measures will actually be implements. Second, most of the measures result in GHG reductions of between 0 -15% or more. Thus, it is possible that implementation of even a majority of the measures will result in zero percent reduction in GHGs. Clearly, this is not sufficient to reduce the impact to below significance. Finally, the County has conducted no quantitative or qualitative analysis to determine how

whether the measures that will be implemented will be sufficient to reduce GHGs to below the level of significance. CEQA requires that an EIR must not only identify the impacts, but must also provide "information about how adverse the impacts will be." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831). The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692). The MND for this Project fails to do so.

An EIR is required to specify precisely which mitigation measures will be imposed to reduce the Project's significant GHG impacts, and to calculate whether the mitigation measures will be sufficient to reduce the Project's GHG impacts to below the level of significance. If the GHG impacts remain significant, then a statement of overriding considerations will be required.

C. The Project will have Significant Adverse Impacts on Air Quality.

1. Construction Phase Air Emissions will be Significant.

The MND concludes that the Project will have nitrogen oxide (NOx) emissions from construction of 51.42 lbs/day. The MND states that "construction emissions from the 2010 Bay Area Air Quality Management District (BAAQMD) thresholds of significance are 54 lbs/day of ROG and NOx." (MND p. 6) NOx is one of the two primary components of smog.

Since the Project's NOx emissions are calculated to be 51.42 lbs/day, which is less than the BAAQMD CEQA significance threshold of 54 lbs/day, the MND concludes that this impact is insignificant.

The MND ignores entirely the Project's cumulative impacts together with the many other recently proposed, approved and pending projects in the area. The proposed Project is located less than two miles away from several other proposed projects which will cumulatively have far more than 2 lbs/day of NOx emissions.

For example, the recently approved Napa 34 Holdings Commerce Center project ("Napa 34") is located less than 1000 feet from the proposed Napa Valley Gateway Project. The Revised Recirculated MND for the Napa 34 project noted that atmospheric scientist Dr. James Clark calculated that the construction emissions for the Napa 34 project would be ***91 lbs/day*** of NOx. As a result of these significant NOx emissions, the

County required Napa 34 to implement extensive mitigation measures. (See, Exhibit A, Revised Recirculated MND for the Napa 34 project).

The cumulative construction NOx emissions of the proposed Project and recently approved Napa 34 project will be far greater than the 54 lb/day NOx CEQA significance threshold. (52.42 lbs/day + 91 lbs/day = 143 lbs/day). In addition, there are numerous other projects under consideration or recently approved in the immediate vicinity of the proposed Project. The proposed Project will clearly have cumulatively considerable NOx impacts when considered together with these other projects.

The following projects are in the immediate vicinity of the proposed Project, are currently under consideration by the County, or have recently been approved. They will have cumulatively considerable air quality impacts together with the proposed Project that must be analyzed in an EIR:

Project name	**Project Location**	**Square Footage**	**Status**
Napa Commerce Center, PH II	Devlin Road/South Kelly Road	2,026,600	NOP Issued 11/22/11
Napa 34 Commerce Center	CA-29 and Airport Boulevard	490,500	Approved by Planning 7/2010
Greenwood Commerce Center	Airport Blvd. and Devlin Rd.	374,926	NOD issued 10/2008

An EIR must be prepared to calculate the cumulative air quality impacts of the many projects currently under consideration or recently approved in the immediate vicinity of the Project, and to propose feasible mitigation measures to reduce those impacts. The proposed Project will have cumulatively significant NOx impacts that must be analyzed and mitigated in an EIR.

A CEQA document must discuss significant cumulative impacts. CEQA Guidelines section 15130(a). This requirement flows from CEQA section 21083, which requires a finding that a project may have a significant effect on the environment if "the possible effects of a project are individually limited but cumulatively considerable. . . . 'Cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." "Cumulative impacts" are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." CEQA

Guidelines section 15355(a). "[I]ndividual effects may be changes resulting from a single project or a number of separate projects." CEQA Guidelines section 15355(a).

"The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." *Communities for a Better Environment v. Cal. Resources Agency ("CBE v. CRA")*, (2002) 103 Cal.App.4th 98, 117. A legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable probable future projects whose impacts might compound or interrelate with those of the project at hand. "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." CEQA Guidelines § 15355(b).

As the court stated in *CBE v. CRA,* 103 Cal. App. 4th at 114:

> Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

In *Kings County Farm Bureau v. City of Hanford,* 221 Cal.App.3d at 718, the court concluded that an EIR inadequately considered an air pollution (ozone) cumulative impact – just as in this case. The court said: "The [ ] EIR concludes the project's contributions to ozone levels in the area would be immeasurable and, therefore, insignificant because the [cogeneration] plant would emit relatively minor amounts of [ozone] precursors compared to the total volume of [ozone] precursors emitted in Kings County. The EIR's analysis uses the magnitude of the current ozone problem in the air basin in order to trivialize the project's impact." The court concluded: "The relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin."[2] The *Kings County* case was reaffirmed

[2] *Los Angeles Unified v. City of Los Angeles*, 58 Cal.App.4th at 1024-1026 found an EIR inadequate for concluding that a project's additional increase in noise level of another 2.8 to 3.3 dBA was insignificant given that the existing noise level of 72 dBA already exceeded the

in *CBE v. CRA,* 103 Cal.App.4th at 116, where the court rejected cases with a narrower construction of "cumulative impacts."

Similarly, in *Friends of Eel River v. Sonoma County Water Agency,* (2003) 108 Cal. App. 4th 859, the court held that the EIR for a project that would divert water from the Eel River had to consider the cumulative impacts of the project together with other past, present and reasonably foreseeable future projects that also divert water from the same river system. The court held that the EIR even had to disclose and analyze projects that were merely proposed, but not yet approved. The court stated, CEQA requires "the Agency to consider 'past, present, and probable future projects producing related or cumulative impacts . . . .' (Guidelines, § 15130, subd. (b)(1)(A).) The Agency must interpret this requirement in such a way as to 'afford the fullest possible protection of the environment.'" *Id.*, at 867, 869. The court held that the failure of the EIR to analyze the impacts of the project together with other proposed projects rendered the document invalid. "The absence of this analysis makes the EIR an inadequate informational document." *Id.,* at 872.

The court in *Citizens to Preserve the Ojai v. Bd. of Supervisors,* 176 Cal.App.3d 421 (1985), held that an EIR prepared to consider the expansion and modification of an oil refinery was inadequate because it failed to consider the cumulative air quality impacts of other oil refining and extraction activities combined with the project. The court held that the EIR's use of an Air District Air Emissions Inventory did not constitute an adequate cumulative impacts analysis. The court ordered the agency to prepare a new EIR analyzing the combined impacts of the proposed refinery expansion together with the other oil extraction projects.

Under both CEQA and the Guidelines, an EIR must be prepared when certain types of environmental impacts could result from a project. (Pub. Res. Code § 21083(a); CEQA Guidelines § 15065.) In effect, a finding by the lead agency that such conditions exist makes the project's environmental effects "significant" as a matter of law. Under the Guidelines, an agency *must* find that a project may have a significant environmental effect, and thus prepare and EIR, if, *inter alia*, the possible environmental effects of the

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regulatory recommended maximum of 70 dBA. The court concluded that this "ratio theory" trivialized the project's noise impact by focusing on individual inputs rather than their collective significance. The relevant issue was not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any additional amount of traffic noise should be considered significant given the nature of the existing traffic noise problem.

project are cumulatively considerable.[3] (Pub. Res. Code § 21083(b)(2); CEQA Guidelines § 15065(c).)

Dr. Clark's expert analysis (Exhibit B), in addition to the MND itself, shows that the proposed Project will have significant cumulative NOx impacts. An EIR is therefore required to analyze and mitigate this impact.

2. The MND Fails to Impose Feasible Mitigation Measures for Construction Emissions.

There are dozens of feasible mitigation measures that could reduce the Project's construction-phase impacts. However, since the MND erroneously concludes that the Project will not have significant construction emissions, the document failed to analyze these measures. Mitigation measures can dramatically reduce emissions of NOx and diesel engine exhaust, both of which can have serious impacts on the health of construction workers. Diesel engine exhaust is a known human carcinogen that has been linked to an increased risk of lung cancer among construction workers, an issue of particular importance to the members of Local 751.

Numerous control measures are available to reduce emissions of diesel particulate matter, NOx, and other pollutants from construction equipment. Options include requiring the use of best practices in construction management and the use of newer equipment. Depending on the engine type of on-road or off-road equipment, the use of alternative fuels in combination with retrofit technologies, *e.g.*, diesel particulate filters, selective catalytic reduction, exhaust gas recirculation in new equipment can achieve emission reductions of up to 89% PM10, 90% carbon monoxide ("CO"), 93% reactive organic gases ("ROG"), and 40% nitrogen oxides ("NOx"). (California Air Resources Board, Currently Verified Technologies, http://www.arb.ca.gov/diesel/verdev/vt/cvt.htm)

A combination of these options provides the greatest benefit and is frequently required as CEQA mitigation. For example, the Sacramento Metropolitan Air Quality Management District ("SMAQMD") requires as standard CEQA mitigation that all heavy-duty (>50 hp) off-road vehicles to be used in a construction project shall achieve a project-wide fleet-average 20 percent NOx reduction and 45 percent particulate reduction compared to the most recent CARB fleet average at time of construction. When the

[3] "'Cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects as defined in Section 15130." (CEQA Guidelines § 15065(c).)

standard mitigation does not reduce the impact to below the threshold, the SMAQMD recommends a mitigation fee of $16,000 per ton of emissions. A combination of mitigation measures should be required for Project construction to avoid adversely impacting sensitive receptors in the vicinity and contributing to the region's existing problems with high concentrations of diesel soot and ozone.

An EIR should be prepared to consider "clean fuels," such as, emulsified diesel, biodiesel, fuel borne-catalysts, compressed natural gas, liquefied natural gas, propane, ethanol, and methanol. The EIR should also consider retrofit controls. One of the most effective ways to reduce diesel pollution from existing equipment is to combine the cleaner fuels, with retrofit technology. Retrofit technologies can be geared towards PM or NOx reduction, though many also reduce CO and hydrocarbon ("HC") emissions as well.

Retrofit technologies are available for a variety of applications, which could considerably reduce construction equipment exhaust emissions. For example, diesel oxidation catalysts, selective catalytic reduction, lean NOx catalysts, and exhaust gas recirculation have been successfully retrofitted on off-road vehicles and these technologies offer opportunities to greatly reduce PM10, CO, ROG, and NOx emissions. In addition, many projects have demonstrated the feasibility of installing verified on-road technologies on construction equipment.

Retrofits are remarkably cost-effective when compared to other means of reducing air pollution. For example, the average cost for most applications of a diesel oxidation catalyst is approximately $2,500 (excluding installation) and for a diesel particulate filter between $7,000–12,000 (excluding installation). The California Air Resources Board ("CARB") estimates that the average cost of retrofitting an engine of 275 horsepower with a catalyzed diesel particulate filter ranges between $6,900–$9,000. By comparison, the average base price for a 200 to 300-hp wheel loader is $275,000. Retrofitting an engine with a catalyzed diesel particulate filter in this price range or with a $2,500-diesel oxidation catalyst costs only a small fraction (2.5 to 3.2% and less than 1%, respectively) of the cost of replacing the entire vehicle with one that pollutes less.

These technologies have been required as mitigation measures for other projects and should be required for this Project to reduce its significant emissions from construction.

D. Since the Project will have Significant Unmitigated Environmental Impacts, an EIR is Required, Including Evidence to Support a Statement of Overriding Considerations.

As discussed above, the Project will have significant, unmitigated environmental impacts. As a result an EIR and a statement of overriding considerations will be required. Under CEQA, when an agency approves a project with significant environmental impacts that will not be fully mitigated, it must adopt a "statement of overriding considerations" finding that, because of the project's overriding benefits, it is approving the project despite its environmental harm. (14 Cal.Code Regs. §15043; Pub. Res. Code §21081(B); *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222) A statement of overriding considerations expresses the "larger, more general reasons for approving the project, such as the need to create new jobs, provide housing, generate taxes and the like." (*Concerned Citizens of South Central LA v. Los Angeles Unif. Sch. Dist.* (1994) 24 Cal.App.4th 826, 847)

A statement of overriding considerations must be supported by substantial evidence in the record. (14 Cal.Code Regs. §15093(b); *Sierra Club v. Contra Costa Co.* (1992) 10 Cal.App.4th 1212, 1223)) The agency must make "a fully informed and publicly disclosed" decision that "specifically identified expected benefits from the project outweigh the policy of reducing or avoiding significant environmental impacts of the project." (15 Cal.Code Regs. §15043(b)) As with all findings, the agency must present an explanation to supply the logical steps between the ultimate finding and the facts in the record. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515)

Key among the findings that the lead agency *must* make is that:

> "Specific economic, legal, social, technological, or other considerations, including ***the provision of employment opportunities for highly trained workers,*** make infeasible the mitigation measures or alternatives identified in the environmental impact report.. [and that those] benefits of the project outweigh the significant effects on the environment."

(Pub. Res. Code §21081(a)(3), (b))

Thus, the agency must make specific findings, supported by substantial evidence, concerning both the environmental impacts of the Project, and the economic benefits including "the provision of employment opportunities for highly trained workers" created. The MND fails to provide substantial evidence to support a statement of overriding considerations. The City has no substantial evidence on which to base any

determination that the economic benefits of the Project outweigh its admittedly significant environmental impacts.

CEQA expressly requires an analysis of: "Specific economic, legal, social, technological, or other considerations, including ***the provision of employment opportunities for highly trained workers.***" (Pub. Res. Code §21081(a)(3), (b)) The MND makes no attempt to determine whether new jobs created by the Project, in either the construction phase or the operational phase, will be for "highly trained workers," and what the likely salary and wage ranges of these jobs will be. Without this information, the agency lacks substantial evidence to make any statement of overriding considerations.

In short, the agency cannot find that the economic benefits of the Project outweigh the environmental costs if it does not know what the economic benefits will be. A DEIR is required to provide this information.

V. CONCLUSION

For the foregoing reasons, Local 751 respectfully requests that the County not approve the proposed Mitigated Negative Declaration, require preparation of an Environmental Impact Report for the Project, and refrain from issuing any Project approvals unless and until an EIR is circulated for public comment and certified as complete, including implementation of all feasible mitigation measures and alternatives. We request written notice of any actions, hearings or decisions related to this Project. Thank you for considering our comments.

Sincerely,

Richard Drury

Richard Drury

Attachments