

SHUTE MIHALY
& WEINBERGER LLP

396 HAYES STREET, SAN FRANCISCO, CA 94102
T: (415) 552-7272 F: (415) 552-5816
www.smwlaw.com

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Via Electronic Mail Only

Khamly Chuop
Port of Oakland
530 Water Street
Oakland, CA 94607
E-Mail: kchuop@portoakland.com

Re: Draft SEIR Comment - Eagle Rock Aggregates Oakland Terminal Project

Dear Ms. Chuop:

This firm represents the West Oakland Environmental Indicators Project (“WOEIP”) in connection with the proposed Eagle Rock Aggregates Oakland Terminal Project (“Project”). The Port has requested comments on the Project’s Draft Supplemental Environmental Impact Report (“DSEIR”). As demonstrated herein, the DSEIR and the Project utterly fail to comply with the California Environmental Quality Act (“CEQA”), Public Resources Code section 21000 et seq., and other state law.

WOEIP is a resident-led, community-based environmental justice organization located in West Oakland, California. WOEIP is dedicated to achieving healthy homes, healthy jobs, and healthy neighborhoods for all who live, work, learn, and play in West Oakland. Through engaging in research projects and participating in agency advisory committees as well as stakeholder groups, WOEIP focuses on leveraging community power to support residents in developing and achieving their own vision for healthy neighborhoods, which includes – but is not limited to – clean soil and vibrant surroundings, clean air and clean water, and a resident-led comprehensive vision for redevelopment and economic revitalization in and around West Oakland.

The Project here would directly and significantly impact people in West Oakland, who already experience environmental burdens far beyond most communities in the Bay Area, the State, and the nation. Increased air pollution is a particular concern. Applicant Eagle Rock Aggregates (“Applicant”) proposes an approximately 18-acre

marine terminal at the Port of Oakland to import, store, and distribute bulk construction aggregate (sand and gravel), displacing existing truck parking and container storage on the site.¹ The Project would import up to 2,500,000 tons of aggregate per year,² which would be stored in three 40-foot-tall uncovered stockpiles that could hold up to 329,000 tons of aggregate each.³ This activity would require up to 48 new ocean-going vessel (“OGV”) calls per year to the Port.⁴ The initial lease for the Project is for 12 years and could be extended to up to 27 years,⁵ exposing a whole new generation of West Oaklanders to increased air pollution from birth until adulthood.

The DSEIR is a supplement to the environmental impact report (“EIR”) for the Oakland Army Base Redevelopment Plan, which was certified by the City of Oakland nearly two decades ago in July 2002 (“2002 EIR”).⁶ There have been multiple addendums to the 2002 EIR since then, and the DSEIR refers to these collective documents as the “2002 EIR as Addended.”⁷ The Port has determined that a supplemental EIR is required here because the 2002 EIR as Addended analyzed development and use of the Port only for containerized cargo operations, and not for a bulk terminal like is proposed here.⁸

On behalf of WOEIP, we respectfully submit these comments to help ensure that the Port’s decisionmakers fully comply with CEQA. The environmental impact report is “the heart of CEQA.”⁹ It “is an environmental ‘alarm bell’ whose purpose is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return. The EIR is also intended ‘to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.’ Because the EIR must be certified or rejected by public officials, it is a document of accountability.”¹⁰

¹ Eagle Rock Aggregates Terminal Project, Draft Supplemental Environmental Impact Report (Nov. 2020) (“DSEIR”) at ES-1, 2-2.

² *Id.* at 2-12.

³ *Id.* at 2-27.

⁴ *Id.* at 2-12.

⁵ *Id.* at 2-14.

⁶ *Id.* at ES-2.

⁷ *Id.* at 1-2 – 3.

⁸ *Id.* at 1-4.

⁹ *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392 (“*Laurel Heights I*”) (citations omitted).

¹⁰ *Id.* (citations omitted).

After carefully reviewing DSEIR, we have concluded that it fails in numerous respects to comply with the requirements of CEQA. As explained below, the DSEIR violates CEQA because it fails to: (1) analyze and make significance determinations on whole categories of impacts, including greenhouse gases; (2) analyze the impact of altering the Applicant's operations at the Port of Richmond; (3) provide an adequate analysis of and mitigation for the Project's impacts to air quality and health, hazards and hazardous materials, hydrology and water quality, land use, noise, and transportation; (4) adequately analyze the Project's cumulative impacts; and (5) examine a reasonable range of alternatives.

Where, as here, the environmental review document fails to fully and accurately inform decisionmakers and the public of the environmental consequences of proposed actions, it does not satisfy the basic goals of CEQA. Specifically, “[t]he purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect that a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”¹¹ Here, the DSEIR contains such fundamental errors – especially its failure to determine the significance of whole categories of impacts – as to undermine the integrity of the document and prevent meaningful public review on the Project. The Port must revise and recirculate the DSEIR in order to permit an adequate understanding of the environmental issues at stake.¹²

In particular, WOEIP asks the Port to ensure that its environmental analysis is complete, including full analysis of environmental impacts and significance determinations regarding those impacts, regardless of whether the impacts were ignored in the 2002 EIR as Addended. Further, WOEIP urges the Port to adopt a full suite of effective and enforceable mitigation measures for the Project's impacts, especially its impacts on air quality and health. As explained in detail below, West Oakland already experiences disproportionate air pollution that harms its residents' health and increases their risk of respiratory and cardiovascular disease, cancer, and premature death. Any contribution to this burden from the Project must be adequately mitigated. WOEIP provides feasible and effective mitigation measures below and strongly urges the Port to evaluate and adopt them, as required by CEQA. Moreover, WOEIP describes a feasible alternative – relocation of the Peralta Street cement plant to the Project site – that must be fully evaluated in a revised and recirculated EIR. WOEIP likewise urges the Port to work with the Applicant and other stakeholders to evaluate and implement this alternative.

¹¹ See Pub. Resources Code § 21061.

¹² Cal. Code Regs., tit. 14 (“CEQA Guidelines”), § 15088.5.

I. THE DSEIR IMPROPERLY EXCUSES ITSELF FROM ANALYSIS OF WHOLE CATEGORIES OF ENVIRONMENTAL IMPACTS.

Perhaps the DSEIR's most glaring and significant flaw is its failure to analyze whole categories of environmental impacts, based on an incorrect interpretation of the law regarding supplemental EIRs. An agency may prepare a supplemental EIR (instead of a full subsequent EIR) where only minor additions or changes to the original EIR are required to account for (1) substantial changes to the proposed project; (2) substantial changes to the circumstances under which the project is undertaken; or (3) new information of substantial importance (that was not known and could not have been known at the time of preparation of the original EIR).¹³ The supplemental EIR must contain "the information necessary to make the previous EIR adequate for the project as revised."¹⁴

Here, the Port concludes that a supplemental EIR is required because the proposed project has changed. The 2002 EIR as Addended analyzed use of the Port for containerized cargo only.¹⁵ The Proposed Project would change use of a terminal from containerized cargo to bulk construction aggregates, which is a substantial change to the use contemplated under the original EIR.¹⁶

In addressing the changed environmental impacts of the Project, however, the DSEIR fails to fully analyze and provide significance determinations on whole categories of environmental impacts. For example, the DSEIR provides some information on the Project's PM_{2.5} impacts "for informational purposes,"¹⁷ but absolves itself of a CEQA-compliant analysis of PM_{2.5} impacts or legally mandated significance determination¹⁸ because the 2002 EIR as Addended failed to make such an analysis. The DSEIR takes a similar approach to greenhouse gas emissions, providing some information but avoiding a significance determination.¹⁹ And the DSEIR provides absolutely no information about or mitigation for the Project's energy impacts, as

¹³ *Id.* §§ 15162(a), 15163(a).

¹⁴ *Id.* § 15163(b).

¹⁵ DSEIR at 1-4.

¹⁶ *Id.*

¹⁷ *See, e.g., id.* at 3.4-29.

¹⁸ Pub. Resources Code § 21100(b)(1).

¹⁹ *See generally* DSEIR, Chapter 3.6.

required by Public Resources Code section 21100(b)(3) and CEQA Guidelines Appendix F, rendering the EIR “fatally defective.”²⁰

The DSEIR’s justification for these glaring omissions seems to be – based on discussion in Chapter 3.6, “Greenhouse Gas Emissions,” and Chapter 4, “Cumulative Impacts” – that because information about these categories of impacts “was known, or could have been known in 2002” at the time of the original EIR, this is not “legally ‘new information’” required to be analyzed in the DSEIR.²¹ However, this approach conflates the standards for *triggering* the need to prepare a supplemental EIR with the standards for the *contents* of a supplemental EIR and is not supported by CEQA and its case law.

As explained above, a supplemental EIR must be prepared when “[s]ubstantial changes are proposed in the project” that would involve “new significant environmental effects or a substantial increase in the severity of previously identified significant effects,” *or* when certain “[n]ew information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified” is discovered.²² These two situations defined in the Guidelines *trigger* when a supplemental EIR is required. And, crucially, the trigger for a supplemental EIR when there is a revision to the project is not limited to “new significant environmental effects” in categories that either were studied in or could not have been known at the time of the original EIR.²³

No case law supports the Port’s novel position that the supplemental EIR need only contain information necessary to make the previous EIR adequate *to 2002 standards*. The Port appears to rely on holdings in cases considering whether the requirement to prepare a supplemental EIR was *triggered* due to *new information*. In those cases, no supplemental EIR was required in light of new information or adoption of new guidelines regarding greenhouse gases because at the time of the original EIRs, information about the potential effects of greenhouse gases was generally known and could have been addressed in the original EIR.²⁴ Here, the trigger is not the presence of

²⁰ *Cal. Clean Energy Com. v. City of Woodland* (2014) 225 Cal.App.4th 173, 209 (quoting *People v. County of Kern* (1976) 62 Cal.App.3d 761, 774).

²¹ See DSEIR at 3.6-1, 4-13, 4-17.

²² CEQA Guidelines §§ 15162(a), 15163(a).

²³ Compare CEQA Guidelines § 15162(a)(1) with § 15162(a)(3).

²⁴ See, e.g., *Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1320; *Citizens for Responsible Equitable Env’t Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 532.

new information, but the fact that the Port now proposes a substantial change to Port operations considered under the 2002 EIR as Addended.

To be clear, the Port need not provide a new analysis of PM_{2.5}, greenhouse gas emissions, and energy impacts for the *entire* Oakland Army Base redevelopment project considered in the 2002 EIR as Addended; the new impacts analysis is required only for the changed aspect of the original project: the proposed bulk aggregates terminal. And when preparing a supplemental EIR in response to a Project change like the case here, the agency may – as the Port has done here for other impacts – limit its review to the environmental changes between what would have or has occurred under the original project and what would occur with the change to the project. However, the Port cannot use the narrowed scope of a supplemental EIR to simply ignore broad categories of impacts this new project would have because they were not previously considered. Instead, CEQA requires a robust environmental review of *all* of the changed aspect of the original project’s environmental impacts, including categories of impacts that may have been missed by the original EIR, as they can be known today. Indeed, to do anything here other than a full environmental analysis of the Proposed Project as it differs from the project considered in the 2002 EIR as Addended would undermine CEQA’s fundamental purpose to ensure the public and decisionmakers are fully informed of a project’s impacts.²⁵

Further, avoiding this analysis and CEQA’s mandate to make significance determinations and mitigate a project’s significant impacts would allow the Port to approve a project that will have undeniably significant impacts on the environment and public health of an overburdened community while ignoring its obligation to mitigate those impacts to the extent feasible.²⁶ Indeed, the DSEIR admits that the Project would result in impacts related to increased PM_{2.5} pollution,²⁷ cancer risk,²⁸ and greenhouse gas emissions²⁹ that would be significant under applicable thresholds. Yet, because of its attempted shortcut, the Port absolves itself completely of any attempt to identify mitigation.

Indeed, the evidence in the DSEIR about the Project’s air quality impacts indicates that a subsequent EIR would be the more appropriate level of analysis here. A supplemental EIR is appropriate where only minor revisions to an existing EIR are

²⁵ See CEQA Guidelines § 15002(a)(1).

²⁶ See Pub. Resources Code §§ 21002, 21000(a)(3).

²⁷ See DSEIR at 3.4-29.

²⁸ *Id.*

²⁹ See *id.* at 3.6-7, 4-17.

required.³⁰ But where “[s]ubstantial changes” to a project require “major revisions of the previous EIR” to account for “new significant environmental effects or a substantial increase in the severity of previously identified significant effects,” a subsequent EIR is necessary.³¹ Because of the substantial increase in air quality impacts that would result from a bulk aggregate operation, which is a wholly different kind of operation than the containerized cargo operation studied in the 2002 EIR as Addended, the Port should prepare a subsequent EIR here.

The omission of adequate impacts analyses and, most importantly, a significance determination and associated mitigation for PM_{2.5} pollution, cancer risk, greenhouse gas emissions, energy impacts, and any other ignored impacts, renders the DSEIR fatally flawed. The omission severely undermines the EIR’s purpose to act as “an environmental ‘alarm bell’ whose purpose is to alert the public and its responsible officials to environmental changes before they have reached . . . points of no return.”³² And it denies the public – especially the residents of West Oakland most impacted by these ignored impacts – the opportunity to meaningfully participate in evaluating the Project’s impacts. The Port therefore must revise the DSEIR to include this legally required information and then recirculate the DSEIR for further comment.³³

II. THE DSEIR IMPROPERLY SEGMENTS A LINKED PROJECT.

The DSEIR states that once the Project becomes operational, the Applicant would relocate its existing operations at the Richmond Marine Terminal to the Project site but is unclear how the Applicant will continue to use the Richmond Marine Terminal for related operations.³⁴ Longstanding CEQA law holds that where two projects are linked, they must be analyzed together.³⁵ An EIR may not segment a project into discrete components in order to limit environmental disclosure by ignoring development or other activity that will ultimately result from approval of a project.³⁶ Rather, “when one

³⁰ CEQA Guidelines § 15163(a)(2).

³¹ *Id.* § 15162(a)(1).

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

³³ CEQA Guidelines § 15088.5.

³⁴ DSEIR at 2-12, 2-13.

³⁵ *See Bozung v. Local Agency Formation Comm.* (1975) 13 Cal.3d 263, 279, 282; *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1231.

³⁶ *See City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1333-34.

activity is an integral part of another activity, the combined activities are within the scope of the same CEQA project.”³⁷

Here, the DSEIR recognizes that the Applicant “plans to move its current Richmond Marine Terminal activities to the Proposed Project site at the Port,” but asserts that “for the purposes of this SEIR, operations at the Richmond Marine Terminal are assumed to remain unchanged.”³⁸ The document provides no evidence or explanation in support of this assumption and does not make clear what remaining operations, if any, will continue at the Richmond Marine Terminal. Indeed, the assumption that the Applicant’s operations at the Richmond Marine Terminal would remain unchanged is nonsensical in light of the fact that a key purpose of the Project is to facilitate the Applicant relocating a bulk aggregate operation from the Richmond Marine Terminal to the Project site.³⁹ In particular, the DSEIR clearly indicates that the Applicant’s OGVs will completely stop visiting the Port of Richmond if this Project is approved, indicating some change of the Richmond operations *will* happen with this Project’s approval.⁴⁰ Nonetheless, the DSEIR claims that “modification or dismantling of the Richmond Marine Terminal is not part of the Proposed Project” and that “[i]n the future, ERA may repurpose the Richmond Marine Terminal to serve other bulk material needs, subject to the review and approval by municipal and regulatory agencies as required.”⁴¹ The DSEIR fails to provide any further information about the anticipated future repurposing of the Richmond Marine Terminal for “other bulk material needs.”

Where a future action is a reasonably foreseeable consequence of a project, an EIR must include an analysis of the environmental effects of that future action.⁴² Here, in addition to providing a detailed description of any current operations that will continue at the Richmond Marine Terminal after approval of the Project, the DSEIR must analyze the potential impacts of any reasonably foreseeable future changes in operations at the Richmond site that may occur as a result of the Project’s relocation of operations from the site. For example, if the Applicant starts to use the Richmond terminal for a different kind of aggregate or leases the Richmond site to another importer, the impact of those changes must be analyzed in this EIR. The DSEIR must analyze the environmental impacts of foreseeable changes to the Applicant’s Richmond operations, including all

³⁷ *Tuolumne County Citizens for Responsible Growth*, 155 Cal.App.4th at 1229.

³⁸ DSEIR at 2-12, 2-13.

³⁹ *Id.* at 2-12, 2-13.

⁴⁰ *See id.* at 2-9.

⁴¹ *Id.* at 2-13.

⁴² *Laurel Heights I*, 47 Cal.3d at 396.

reasonably foreseeable current and future impacts of alteration of uses at the Richmond site, because those changes are integrally linked to the proposed Project.⁴³ The Port must revise the DSEIR to disclose and analyze the foreseeable environmental impacts of relocating the Richmond operations and then recirculate the document.

III. THE DSEIR'S ANALYSIS OF AND MITIGATION FOR THE IMPACTS OF THE PROPOSED PROJECT ARE INADEQUATE.

The discussion of a proposed project's environmental impacts is at the core of an EIR.⁴⁴ As explained below, the DSEIR's environmental impacts analysis is deficient under CEQA because – in addition to leaving out analysis of broad swathes of the Project's environmental impacts – it also fails to provide the necessary facts and analysis to allow the Port and the public to make informed decisions about the Project.

An EIR must effectuate the fundamental purposes of CEQA: to “inform the public and responsible officials of the environmental consequences of their decisions before they are made.”⁴⁵ To do so, an EIR must contain facts *and* analysis, not just an agency's bare conclusions.⁴⁶ Thus, a conclusion regarding the significance of an environmental impact that is not based on an analysis of the relevant facts fails to fulfill CEQA's informational mandate. Because this is a supplemental EIR, the document must contain “the information necessary to make the previous EIR adequate for the project as revised.”^{47, 48}

Additionally, an EIR must identify feasible mitigation measures to mitigate significant environmental impacts.⁴⁹ An agency must have specific evidentiary support for a conclusion that mitigation will be effective and enforceable.⁵⁰ Under CEQA, “public agencies should not approve projects as proposed if there are . . . feasible

⁴³ See *Bozung*, 13 Cal.3d at 279, 282; *Tuolumne County Citizens*, 155 Cal.App.4th at 1231.

⁴⁴ See CEQA Guidelines § 15126.2(a) (“An EIR *shall* identify and focus on the significant effects of the proposed project on the environment.”) (emphasis added).

⁴⁵ *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123 (“*Laurel Heights II*”).

⁴⁶ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 568.

⁴⁷ CEQA Guidelines § 15163(b).

⁴⁸ Nonetheless, WOEIP maintains that a subsequent EIR is called for here. See Section I, *supra*.

⁴⁹ CEQA Guidelines § 15126.4.

⁵⁰ See, e.g., *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1168.

mitigation measures available which would substantially lessen the significant environmental effects of such projects.”⁵¹ In the context of a supplemental EIR, the agency must identify all feasible mitigation to address the significant environmental impacts of the changed aspects of a project.⁵² CEQA provides no excuse from this analysis for supplemental EIRs for changed projects.

A. The DSEIR fails to adequately analyze and mitigate the Project’s impacts on air quality.

As explained above, air quality is perhaps the most important issue to the residents of West Oakland, who experience disproportionate burdens from polluted air compared to the rest of the Bay Area, the State, and the country. As such, it is exceedingly important that the DSEIR carefully analyze and disclose the Project’s impacts on air quality and adequately mitigate for those impacts, as CEQA requires. Unfortunately, the DSEIR has failed in this regard for the reasons described below.

1. The DSEIR inadequately describes the Project’s existing air quality setting, which is directly adjacent to a historically burdened community.

When analyzing a project’s adverse environmental impacts under CEQA, “[t]he significance of an activity depends on the setting.”⁵³ Thus, it is essential that an EIR accurately and fully describe a project’s environmental setting because this description forms the baseline for evaluating the project’s environmental impacts.⁵⁴ This requirement is crucial to a valid EIR: “[k]nowledge of the regional setting is critical to the assessment of environmental impacts The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered *in the full environmental context*.”⁵⁵ In other words, it is impossible for an EIR to fulfill its informational purpose when it does not adequately describe the existing environment that may be impacted by a project. Additionally, the CEQA Guidelines make clear that “a

⁵¹ Pub. Resources Code § 21002.

⁵² *Id.* (“[I]t is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects”).

⁵³ *Kings County Farm Bureau*, 221 Cal.App.3d at 718; *see also* CEQA Guidelines § 15125.

⁵⁴ *See* CEQA Guidelines § 15125(a).

⁵⁵ *Id.* § 15125(c) (emphasis added).

project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant.”⁵⁶ This highlights the heightened importance of carefully considering impacts from a project adjacent to West Oakland, where even impacts that elsewhere might be insignificant can have a significant impact.

In its description of the project location, the DSEIR provides a mere sentence about the Port’s nearest neighbor: “The closest residential community is located approximately one-half mile southeast of the Project site in the West Oakland Prescott neighborhood on the opposite (east) side of I-880.”⁵⁷ This perfunctory statement does little to adequately describe the adjacent historic and diverse community of West Oakland, which has suffered the impacts of environmental pollution, especially air pollution, for decades. Nor do the environmental setting discussions in the impact-specific sections, including and especially the Air Quality section, provide any description of the extraordinary environmental burden shouldered by the residents of West Oakland, despite this information being readily available in a document widely cited in the DSEIR, the West Oakland Community Action Plan. CEQA mandates this omission be remedied.

The West Oakland community is overburdened by both mobile and stationary pollution sources, including four major highways, the Port and marine vessels, railyards, warehouse and distribution facilities, truck-related businesses, and industrial facilities like cement plants. According to CalEnviroScreen 3.0⁵⁸ (which ranks each census tract in the state for pollution and vulnerability), the Project’s census tract and directly adjacent census tracts in West Oakland have a higher exposure to Diesel Particulate Matter (“DPM”) than 99 percent of the state. The area also ranks in the 99th to 100th percentile for hazardous materials cleanup sites, 95th to 100th percentile for groundwater threats, and 73rd to 97th percentile for hazardous waste generators.

CalEnviroScreen 3.0 data indicate that a resident of these areas of West Oakland is 98 to 99 percent more likely to have asthma than other California residents and 81 to 98 percent more likely to be born with low birth weight. In 2016, the life expectancy at birth for a member of the West Oakland community was 7.5 years shorter

⁵⁶ *Id.* § 15300.2(a).

⁵⁷ DSEIR at 2-5.

⁵⁸ The California Office of Environmental Health Hazard Assessment’s CalEnviroScreen 3.0 is available at <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-30>.

than the average person in Alameda County.⁵⁹ People who live in West Oakland are more likely than other Alameda County residents to visit the emergency room and be hospitalized for asthma and to die from cancer, heart disease, and stroke.⁶⁰ Notably, the West Prescott neighborhood, which is the nearest West Oakland neighborhood to the Project, has an alarming toxic air contaminant cancer risk of 272 per 1 million people⁶¹ – more than *nine times* the United States average of 30 in 1 million⁶² and more than two and a half times the United States Environmental Protection Agency’s 100 in 1 million threshold for elevated cancer risk mandating action.⁶³ DPM is responsible for over 90 percent of the total cancer risk in West Oakland.⁶⁴

West Oakland is home to historically oppressed groups. While only 6 percent of Bay Area residents are Black, 42 percent of the residents of West Oakland identify as such.⁶⁵ Eighteen percent of the West Oakland community is Hispanic, 11 percent is Asian, and 24 percent is white.⁶⁶ The community is relatively low income, with 52 percent of the population living below the Bay Area poverty level (two times the federal poverty level), compared to the Bay Area-wide poverty rate of 23 percent.⁶⁷ The community has long suffered from and continues to experience the effects of environmental racism.

It is little surprise, then, that West Oakland was one of the first communities identified under Assembly Bill 617 (“AB 617”) as an environmentally overburdened community and the first to go through the AB 617 emissions reduction planning process. AB 617 mandates that the California Air Resources Board (“CARB”) identify disadvantaged communities affected by high exposure burdens for toxic air

⁵⁹ Owing Our Air: The West Oakland Community Action Plan (“WOCAP”) at 2-9 (Oct. 2019), available at <https://www.baaqmd.gov/~/media/files/ab617-community-health/west-oakland/100219-files/final-plan-vol-1-100219-pdf.pdf?la=en>.

⁶⁰ *Id.* at 2-10.

⁶¹ *Id.* at 4-4.

⁶² U.S. Environmental Protection Agency, 2014 National Air Toxics Assessment: Fact Sheet, at 1, available at https://www.epa.gov/sites/production/files/2018-08/documents/2014_nata_overview_fact_sheet.pdf.

⁶³ *Id.* at 2.

⁶⁴ WOCAP at 4-4.

⁶⁵ *Id.* at 2-6.

⁶⁶ *Id.*

⁶⁷ *Id.*

contaminants and criteria air pollutants for development of a Community Emission Reduction Plan, which is intended to “result in emissions reductions in the community.”⁶⁸

When it came time to prepare the Community Emission Reduction Plan for West Oakland under AB 617, the Bay Area Air Quality Management District (“BAAQMD”) recognized the long and successful track record of WOEIP in advocating to control air pollution and improve community health in West Oakland and chose to partner with WOEIP to develop the plan, titled the West Oakland Community Action Plan (“WOCAP” or “Owning Our Air”). WOCAP targets include achieving the same air quality throughout West Oakland as in the average West Oakland neighborhood by 2025, and achieving the same air quality as the “cleanest” West Oakland neighborhoods across West Oakland by 2030.⁶⁹

Without this critical information about the Project’s sensitive environmental context, the DSEIR deprives the reader of essential information necessary to evaluate the Project’s impacts. In particular, the lack of information about West Oakland and its environmental burden prevents adequate analysis of the Project’s impacts on West Oakland’s residents, who are already disproportionately impacted by environmental degradation, especially air pollution. The DSEIR thus must be revised to provide this necessary description of the Project’s setting adjacent to a historically overburdened community.

2. The DSEIR improperly obscures the Project’s impacts by failing to discuss the Project’s impacts independent of proposed mitigation.

Another flaw running through the DSEIR’s air quality analysis is its failure to analyze the Project’s impacts separate from proposed mitigation. CEQA requires that an EIR analyze impacts in two steps: first, an EIR must set forth, in detail, all of a project’s significant environmental effects.⁷⁰ Next, the EIR must identify all feasible mitigation measures for each significant impact.⁷¹ This sequence – analyze impacts first, then identify mitigation – is crucial, as “[o]nly by [the agency] making this disclosure can

⁶⁸ Health & Saf. Code § 44391.2.

⁶⁹ WOCAP at ES-1.

⁷⁰ *Lotus v. Dept. of Transportation* (2014) 223 Cal.App.4th 645, 653 (citing Pub. Resources Code § 21100(b)).

⁷¹ *Id.*

others, be they courts or constituents, intelligently analyze the logic of the [agency's] decision.”⁷²

For example, in *Lotus v. Department of Transportation*, the Court of Appeal held that an agency could not characterize what were effectively mitigation measures as part of the project in order to reduce the appearance of the project's impacts.⁷³ But this is essentially what the DSEIR does here by assuming that a lease requirement that 25 percent of OGV calls be by OGVs meeting Tier 2 or better emissions standards is part of the Project.⁷⁴

By failing to consider the Project's impacts apart from the “proposed ‘avoidance, minimization and/or mitigation measures,’” the DSEIR avoids disclosing the full scope of the Project's impacts and “fails to consider whether other possible mitigation measures would be more effective.”⁷⁵ Such “shortcutting of CEQA requirements subverts the purposes of CEQA by omitting material necessary to informed decisionmaking and informed public participation. It precludes both identification of potential environmental consequences arising from the project and also thoughtful analysis of the sufficiency of measures to mitigate those consequences.”⁷⁶

Here, presuming the lease requirement as part of the Project means the public and decisionmakers have no idea of what the impact of the Project would be if, for some reason, it became impossible to ensure that 25 percent of the vessels serving the Project were Tier 2 or better or if the Applicant failed to comply with the lease terms. For example, what if the CSL Tecumseh (the only available Tier 2 ship identified in the DSEIR's appendices) goes out of service? As the DSEIR stands today, in such a case, the increased emissions would go undisclosed and unmitigated. Further, the lease requirement that 25 percent of vessels be Tier 2 or better – which is effectively mitigation for the Project's impacts – is not included in any enforceable mitigation program, in violation of CEQA.⁷⁷ And finally, relying on the lease requirement as de facto mitigation means the DSEIR fails to analyze whether other mitigation would be more effective at reducing the Project's OGV emissions.

⁷² *Id.* at 654 (citation omitted).

⁷³ *Id.* at 655-56.

⁷⁴ *See* DSEIR at 3.4-19.

⁷⁵ *See Lotus*, 223 Cal.App.4th at 657.

⁷⁶ *Id.* at 658.

⁷⁷ *See* CEQA Guidelines § 15126.4(a)(2) (requiring enforceable mitigation).

3. The DSEIR fails to adequately disclose health impacts resulting from Project's air quality impacts.

CEQA requires that an EIR make “a reasonable effort to discuss relevant specifics regarding the connection between . . . the general health effects associated with a particular pollutant and the estimated amount of that pollutant the project will likely produce.”⁷⁸ Only then can the public “make an informed decision [about the project], as CEQA requires.”⁷⁹ Here, the DSEIR's air quality analysis fails to provide this information.

First, the DSEIR fails to disclose the impacts of exposure to airborne crystalline silica. The DSEIR's hazardous waste analysis notes that the “handling and storage of . . . construction aggregates could expose employees, workers, and residents to respirable crystalline silica, *which can cause severe health effects.*”⁸⁰ The DSEIR then refers the reader to the Air Quality chapter, where it claims the issue of health impacts from crystalline silica is addressed. But the Air Quality chapter does no such thing. Instead, that section mentions once that the Project would generate respirable crystalline silica, but provides no discussion of the “severe health effects” that exposure to crystalline silica would cause, or what levels of crystalline silica exposure nearby residents or workers would experience, or what health effects could be expected from exposure to the Project's levels of crystalline silica.⁸¹

Second, the DSEIR lacks specific information about the health effects that can be expected from the Project's emissions of other pollutants, like ozone, PM₁₀, PM_{2.5}, and DPM. Instead, the DSEIR leaves the readers with bits and pieces of information that are impossible to put together to understand the actual health impacts the Project would have. For example, the DSEIR provides tables describing the Project's “Hazard Index for Chronic Effects” and “Hazard Index for Acute Effects,” without explaining what these indices mean.⁸² Then, pages later, the DSEIR notes that exposure to ozone, PM₁₀, and PM_{2.5} can cause a variety of health effects, including “aggravated asthma, acute bronchitis, respiratory symptoms, decreased lung function, heart attacks, and premature mortality” and “damage [to] the respiratory tract” and “increased blood pressure, heart disease, . . . [and] stroke.”⁸³ The omission is compounded by the fact that for ozone –

⁷⁸ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 521.

⁷⁹ *Id.*

⁸⁰ DSEIR at 3.7-7 (emphasis added).

⁸¹ *See id.* at 3.4-26.

⁸² *Id.* at 3.4-27 – 30 (Tables 3.4-9a, 3.4-9b, 3.4-10a, 3.4-10b).

⁸³ *Id.* at 3.4-35 – 36.

which is created by other emissions from the project like NO_x – the DSEIR gives no insight regarding how much ozone the Project would cause, making it completely impossible to understand what sort of ozone-related health effects might be likely. Nowhere does the DSEIR explain what the real impacts of the Project would be on those living and working in the vicinity, including in West Oakland.

These omissions leave the reader in exactly the situation that the California Supreme Court found to violate CEQA in *Sierra Club v. County of Fresno*.⁸⁴ Like in that case, the DSEIR deprives its audience of the essential information necessary to link emissions and health impacts and to understand what the Project’s real, on-the-ground impacts to human health will actually be.

4. The DSEIR fails to adequately analyze whether the Project conflicts with or obstructs applicable air quality plans.

The DSEIR also fails to provide a complete analysis of the Project’s consistency with applicable air quality plans. As explained in the DSEIR, this analysis was intended to evaluate each applicable air quality plan with respect to the following criteria: “1) does the Project support the primary goals of the plan, 2) would the Project comply with applicable air quality measures contained in the plan, and 3) would the Project disrupt or hinder implementation of any control measures in the plan?”⁸⁵ The DSEIR leaves significant gaps in its analysis, and thus its conclusion that the Project would be consistent with all plans except the BAAQMD 2017 Clean Air Plan (“CAP”) lacks support.

First, the DSEIR describes the Project’s “compliance approach” that would make it consistent with the BAAQMD 2017 CAP, but it does not explain where these compliance measures come from or how they would be enforced.⁸⁶ Indeed, some of listed measures are mentioned nowhere else in the DSEIR.

Second, the discussion fails to analyze the Project’s consistency with the Port’s Seaport Air Quality 2020 and Beyond Plan’s Intermediate-Term Equipment and Infrastructure Goals, such as how the Project will contribute to Goal I-2 regarding deploying zero-emission drayage trucks.⁸⁷

⁸⁴ (2018) 6 Cal.5th 502.

⁸⁵ DSEIR at 3.4-30.

⁸⁶ *Id.* at 3.4-30 – 31.

⁸⁷ *See id.* at 3.4-32.

Third, the DSEIR's analysis fails to explain whether and how the Project would support the West Oakland Community Action Plan's primary goal to "protect and improve community health by eliminating disparities in exposure to local air pollution," including ensuring that all West Oakland neighborhoods will have the same air quality as the average West Oakland neighborhood by 2025, and the same air quality as the "cleanest" West Oakland neighborhoods by 2030.⁸⁸ This analysis is important especially in light of the Project's proximity to the overburdened West Prescott neighborhood of West Oakland.

Fourth, the DSEIR fails to explain how the Project would comply with applicable air quality measures contained in the WOCAP, including those for DPM, PM_{2.5}, and cancer risk.⁸⁹ The DSEIR's failure to provide any discussion of this consistency is especially concerning in light of the fact that the DSEIR admits that the Project would worsen PM_{2.5} and cancer risk in West Oakland.⁹⁰

Fifth, and finally, the discussion does not explain how displacement of current truck parking operations at the Project site would be consistent with WOCAP implementing strategy number 26, under which the Port is supposed to "work to establish permanent locations for parking and staging of Port related trucks and cargo equipment."⁹¹

The DSEIR must correct these deficiencies in its analysis of the Project's consistency with applicable air quality plans to ensure the public and decisionmakers are fully informed regarding the Project's potential impacts.

5. The DSEIR fails to adequately mitigate the Project's significant impacts and should adopt further mitigation.

Finally, the DSEIR's air quality analysis fails to comply with CEQA because it does not adequately mitigate for the Project's significant impacts. CEQA requires that a lead agency adopt all feasible mitigation measures that can substantially lessen a project's significant impacts.⁹² The agency must ensure that these measures are "fully enforceable" through permit conditions, agreements, or other legally binding

⁸⁸ See WOCAP at 4-1.

⁸⁹ See *id.* at 4-5.

⁹⁰ See DSEIR at 4-13 (Table 4.5-2).

⁹¹ WOCAP at 6-23.

⁹² Pub. Resources Code § 21002.

instruments.⁹³ The requirement for enforceability ensures “that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded.”⁹⁴

To be enforceable, a mitigation measure must be detailed and specific. California courts have clarified that an EIR is inadequate where its proposed mitigation measures are so undefined that it is impossible to evaluate their effectiveness.⁹⁵ In particular, a mitigation measure must include criteria or performance standards against which the mitigation’s actual implementation can be measured.⁹⁶ The reader must be able to discern what steps will be taken to mitigate the project’s impacts.⁹⁷ Without such detail, there is no way for decisionmakers and the public to weigh whether the proposed measures would sufficiently mitigate a project’s impacts, causing the EIR to fail its core, informational purpose.

Here, the DSEIR’s proposed mitigation fails to mitigate any of the Project’s significant air quality impacts to a less-than-significant level – when it attempts to mitigate them at all. The DSEIR’s approach to mitigation for the Project’s air quality impacts is insufficient because the proposed mitigation measures are vague and unenforceable deferred mitigation, and the DSEIR fails to consider any feasible mitigation measures beyond changes to Port vehicles. These problems are compounded by the fact that, as explained above, the DSEIR avoids making significance determinations regarding the Project’s PM_{2.5} and cancer risk impacts.

The sole mitigation measure provided to mitigate the Project’s significant operational air quality impacts improperly defers defining the mitigation. Generally, an EIR must describe feasible mitigation, and “may not defer formulation of mitigation measures to a future time.”⁹⁸ However, where the agency has identified practical

⁹³ *Id.* §§ 21002, 21081.6(b); CEQA Guidelines §§ 15002(a)(3), 15126.4(a)(2); *City of Marina v. Bd. of Trustees of the Cal. State Univ.* (2006) 39 Cal.4th 341, 359, 368-69.

⁹⁴ *Federation of Hillside & Canyon Ass’ns v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261 (italics omitted); *see also* CEQA Guidelines § 15126.4(a)(2).

⁹⁵ *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 79.

⁹⁶ *See San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 670.

⁹⁷ *Id.*

⁹⁸ *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 280; *see also Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 519-20.

considerations that prevent formulation of specific mitigation at the time of the EIR's preparation,⁹⁹ identification of detailed mitigation measures can be deferred *only* if the EIR:

(1) commits [the agency] to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated into the mitigation measure.¹⁰⁰

Here, MM ERA AQ-1 requires the Applicant to “prepare an implement an Operations Air Quality Plan” that “shall describe operational measures that the Project applicant will implement upon commencement of Project operations.”¹⁰¹ The measure requires, at a minimum, use of Tier 4F hybrid-electric front-end loaders, use of an electric sweeper, and twice-daily road sweeping.¹⁰² The measures also requires the Applicant to annually inventory equipment used and “meet with the Port annually to discuss the inventory and evaluate the feasibility of using least-polluting or [zero emissions] equipment.”¹⁰³

As a preliminary matter, the DSEIR fails to explain why development of this mitigation plan must be delayed until after approval of the Project. Moreover, MM ERA AQ-1 fails to include *any* performance standards to make the mitigation measure actually enforceable. It does not even identify a goal for emissions reduction. The measure does not define whether all, or only some, equipment must meet the standards in the measure. The measure does not establish standards – for example, specific annual emissions reduction requirements – that must be met to comply with the mitigation obligation. Without specific, defined performance standards and clarity on specific requirements, the measure is vague, unenforceable, and deferred mitigation that fails to meet CEQA's requirements.

Further, the DSEIR's proposed mitigation falls far short of CEQA's requirements because MM ERA AQ-1 focuses narrowly on emissions from vehicles used on-site at the Port and dust control via on-site street sweeping. It completely ignores any mitigation that would reduce the Project's most substantial air quality and health impacts, which result from OGV transit, maneuvering, and hotelling; tugs; off-site trucks; and

⁹⁹ *Preserve Wild Santee*, 210 Cal.App.4th at 280.

¹⁰⁰ CEQA Guidelines § 15126.4(a)(1)(B).

¹⁰¹ DSEIR at 3.4-23 – 24.

¹⁰² *Id.*

¹⁰³ *Id.* at 3.4-24.

aggregate stockpiles and transfer.¹⁰⁴ Such a glaring omission is particularly concerning here, in light of the Project's substantial air quality and health impacts on the already overburdened residents of West Oakland.

MM ERA AQ-2, which is intended to mitigate the Project's construction impacts, is similarly ineffective. It is vague regarding when non-Tier 4 equipment can be used, and does not provide for oversight of the Applicant's decision to use non-Tier 4 equipment. Also, the measure does not identify when the "possible exception" can be invoked – does it mean that non-Tier 4 equipment may be used only when it truly does not exist? When it is too expensive? Who decides whether it is truly unavailable or uneconomical? What reduction in emissions must be achieved by use of Tier 4 equipment, overall? The measure must be revised to provide performance standards and oversight.

This is not a situation where alternate mitigation measures are unavailable. WOEIP has worked for years to help develop strategies to reduce the pollution burden in West Oakland, and urges their consideration here. Under CEQA, the Port has an obligation to consider all feasible mitigation measures that can substantially lessen a project's significant impacts.¹⁰⁵ Thus, the Port must at a minimum evaluate, and adopt when feasible, the following mitigation measures to reduce the Project's air quality and health impacts:

1. Require installation of shore power facilities at Berth 22.¹⁰⁶
2. Require development and implementation of a program to adapt vessels serving the Project to use shore power, or require use of an EPA verified exhaust capture and control system.¹⁰⁷
3. Require all tugs and OGVs serving the Project to be equipped with Tier 4 or cleaner engines.
4. Relocate the Central Concrete Supply Co. ready-mix plant at 2400 Peralta Street in West Oakland to the Project site, which would reduce truck trips

¹⁰⁴ *See id.* at 3.4-22 (Table 3.4-7a).

¹⁰⁵ Pub. Resources Code § 21002.

¹⁰⁶ Carl Moyer grant funding may be available for this measure. *See* <https://ww2.arb.ca.gov/our-work/programs/carl-moyer-program-marine-vessels/about>.

¹⁰⁷ Carl Moyer grant funding may be available for this measure. *See* <https://ww2.arb.ca.gov/our-work/programs/carl-moyer-program-marine-vessels/about>.

through West Oakland and reduce exposure of residents of West Oakland to emissions from the concrete plant.¹⁰⁸

5. Require all trucks transporting aggregate to be sprayed down (including tires and undercarriage) and covered prior to exiting the Project site.
6. Set emissions standards for control of dust from aggregate storage and transfer that must be met through watering or covering.
7. Require real-time perimeter air quality monitoring and identify response actions when exceedances are detected.
8. Require all service equipment used at the Project site to be completely zero emission.
9. Require development and implementation of a program to ensure that all heavy-duty trucks entering the Project site are zero emissions by 2030.
10. Work with the City of Oakland to modify weight and axle limits on Maritime Street, Seventh Street west of Maritime Street, and Middle Harbor Boulevard, which will accelerate adoption of electric tractors at the Port.
11. Set a goal to be using at least 100 electric tractors in the Port area by 2023.
12. Require tugs and other harbor craft be upgraded to use alternative power systems and renewable/low-emissions fuels.
13. Identify a community liaison who can be contacted if members of the community experience or are concerned about the Project's air quality impacts during its operation.

B. The DSEIR fails to adequately analyze the Project's hazards and hazardous materials impacts.

The DSEIR's analysis of the Project's hazards and hazardous materials impacts contains deficiencies that must be remedied. First, the analysis of whether the Project would create a substantial hazard to the public or environment related to hazardous materials fails to analyze impacts related to respirable crystalline silica. This

¹⁰⁸ This measure should also be considered as an alternative to the proposed Project. *See* Section V, *infra*.

section notes that the Project could expose employees, off-site workers, and residents to respirable crystalline silica, which can cause severe health effects.¹⁰⁹ The DSEIR goes on to perform no analysis, referring the reader to the Air Quality chapter, which, as explained above, does not perform the analysis either. Lacking this analysis, the DSEIR both fails its informational purpose and lacks support for its conclusion that the Project “would not create a substantial hazard to the public or the environment through the routine transport, use, or disposal of hazardous materials.”¹¹⁰

Second, the DSEIR fails to provide a meaningful analysis of potential risks from release of hazardous materials into the environment. The DSEIR mentions that construction and operation of the Project could potentially result in harmful releases of hazardous materials into the environment, but does not describe the impact those releases could have.¹¹¹ Instead, the DSEIR vaguely refers to “potential” significant hazards were there to be a release, then focuses on the fact that the Applicant would have to comply with certain regulatory standards.¹¹² Finally, the DSEIR concludes any impact would be less than significant based in part on the fact that the Applicant would have to comply with certain regulatory requirements when it applies for a Port Development Permit and for its general operations.¹¹³

But merely requiring compliance with agency regulations does not conclusively indicate that the Project would not have a significant and adverse impact. Those legal requirements may not be strong enough to protect against environmental impacts. In *Kings County Farm Bureau v. City of Hanford*, for example, the court found that the fact that the EPA and the local air pollution control district had issued the necessary air emission permits for the construction of a coal fired cogeneration plan did not nullify the CEQA requirement that the lead agency analyze the significant air quality impacts of the entire project.¹¹⁴ Similarly, here, the DSEIR cannot rely on permitting requirements to conclude that impacts would not be significant based on those requirements, without at least describing what those requirements are and how they would reduce the Project’s impacts to less than significance. In taking the approach it does, the DSEIR fails as an informational document, in violation of CEQA.

¹⁰⁹ DSEIR at 3.7-7.

¹¹⁰ *See id.*

¹¹¹ *Id.* at 3.7-7 – 8.

¹¹² *Id.* at 3.7-8.

¹¹³ *Id.*

¹¹⁴ (1990) 221 Cal.App.3d 692, 716.

C. The DSEIR fails to adequately analyze the Project’s hydrology and water quality impacts.

The DSEIR concludes that the “[t]he Proposed Project would not violate any water quality standards or waste discharge requirements” and that its water quality impacts (Impact HYD-1) would therefore be less than significant.¹¹⁵ However, the DSEIR lacks adequate evidence or analysis in support of this conclusion, and therefore provides no basis for its conclusion that the Project would not increase the severity of, or result in a change in, the less-than-significant water quality impacts previously identified in the 2002 EIR as Addended.

First, the DSEIR fails to adequately analyze the water quality impacts of Project construction. The DSEIR states that Project construction would require excavation activities that “could potentially encounter shallow groundwater and provide a pathway for sediment-laden and/or hazardous materials to enter groundwater.”¹¹⁶ It also acknowledges that Project construction would involve “transport, use, and disposal of hazardous materials” such as fuels, oils, and solvents which could pose a risk to groundwater.¹¹⁷ However, instead of quantifying or describing the potential water quality impacts from excavation or from the use of hazardous materials during construction, the DSEIR simply asserts that “[c]ompliance with applicable regulations and permit requirements would prevent substantial impacts to surface or groundwater quality from occurring.”¹¹⁸ The EIR does not provide any basis for this conclusion. As explained in the previous section, the Project’s asserted compliance with applicable regulations or permit requirements does not automatically mean that water quality impacts would be less than significant.¹¹⁹ Instead, the DSEIR must explain the specific impacts to water

¹¹⁵ DSEIR at 3.8-6 (Impact HYD-1).

¹¹⁶ *Id.* at 3.8-5.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 111-14 (compliance with regulations cannot displace an agency’s *separate* obligation to consider whether a project’s environmental impacts are significant) (overruled on other grounds by *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086); *Californians for Alternatives to Toxics v. Dept. of Food & Agriculture* (2005) 136 Cal.App.4th 1, 15-17 (same); *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1108–09 (environmental effect may be significant despite compliance with regulatory requirements).

quality the Project could cause, and then explain how the specific regulatory requirements would lessen or prevent those impacts.

The DSEIR's analysis of the Project's operational water quality impacts is similarly inadequate. The Project site is entirely paved, is located immediately adjacent to San Francisco Bay, and includes "five storm drain outfalls on the site's northern perimeter, which empty directly into the Harbor."¹²⁰ The DSEIR notes that the Project differs from the original OAB Area Redevelopment Plan because it would replace the container cargo terminal analyzed in the 2002 EIR as Addended with a facility that would process bulk construction aggregates.¹²¹ Aggregates would be stored in three uncovered, outdoor stockpiles on the site, which would have a combined capacity of 325,000 tons.¹²² The DSEIR acknowledges that "[d]uring operation, higher sediment loads from aggregate piles, in addition to polluted runoff originating from elsewhere on the site, could enter receiving waters and potentially violate water quality standards."¹²³ However, the DSEIR makes no attempt to actually quantify or describe the sediments and contaminants that could impact water quality during Project operations. It does not include any information on how the sediment or pollutant loads from the Project's uncovered aggregate piles would compare to the sediment and pollutant loads from the previous container cargo uses analyzed in the 2002 EIR as Addended. The DSEIR must be revised to include this information and analysis and to mitigate for any significant impacts identified.

Next, the DSEIR states that the Project would employ Best Management Practices (BMPs) to reduce operational water quality impacts, including a bioretention system, retention pond, and hydrodynamic separator systems ("HDS").¹²⁴ It asserts that "runoff originating from aggregate piles would flow through subsurface HDS, which would filter out sediment and other pollutants prior to being conveyed to the storm drain outfalls."¹²⁵ The DSEIR concludes that "[g]iven these post-construction measures, it is not anticipated that water quality violations or waste discharge violations would occur," but provides no basis for this conclusion.¹²⁶ The document includes no evidence or analysis regarding the effectiveness of the HDS, bioretention system, or retention pond in reducing water quality impacts. The DSEIR makes no attempt to quantify the amount of

¹²⁰ DSEIR at 3.8-2.

¹²¹ *Id.* at 3.8-4.

¹²² *Id.* at 2-28.

¹²³ *Id.* at 3.8-5.

¹²⁴ *Id.* at 2-30.

¹²⁵ *Id.* at 3.8-5.

¹²⁶ *Id.* at 3.8-6.

pollution or sediment that would ultimately enter the harbor despite implementation of the stormwater BMPs. Without this analysis, the DSEIR fails its informational purpose.

The DSEIR's analysis of water quality impacts from erosion or siltation (Impact HYD-2) is also inadequate. It concludes that "[t]he Proposed Project would not result in substantial erosion or siltation on or off site that would affect the quality of receiving waters," but fails to provide any basis for this conclusion.¹²⁷ The document acknowledges that during Project construction, "there is potential for sediment, debris, and other contaminants to enter receiving waters, which could adversely impact fish and other aquatic species," and that "[d]uring operation, siltation could potentially occur from runoff originating from aggregate piles."¹²⁸ However, the DSEIR again fails to include any analysis of these potential impacts, and does not quantify or describe the sediment or contaminants that could impact water quality. Instead, it asserts that compliance with regulatory requirements including a Stormwater Pollution Prevention Plan ("SWPPP") required as part of the Project's Port Development Permit application and a City grading permit "would serve to avoid or minimize substantial erosion or siltation" during construction and that impacts would be less than significant.¹²⁹ As explained above, the DSEIR cannot rely on asserted compliance with applicable regulations or permit requirements to avoid a thorough analysis and to conclude that Project impacts would be less than significant.¹³⁰ The DSEIR again asserts that BMPs including the subsurface HDS would filter out sediment and prevent significant operational water quality impacts, but provides no evidence or analysis regarding the effectiveness of these measures.¹³¹

The DSEIR's analysis of the Project's impacts on stormwater runoff (Impact HYD-4) suffers from the same deficiencies. The DSEIR concludes that "[t]he Proposed Project would not create or contribute runoff that would be an additional source of polluted runoff."¹³² Again, the document fails to provide adequate evidence or analysis in support of this conclusion. The DSEIR acknowledges that "once in operation, potentially higher sediment loads from aggregate piles could create another source of polluted runoff during rain events, and from daily moistening of aggregate" using water

¹²⁷ *Id.* at 3.8-6 (Impact HYD-2).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See Communities for a Better Environment*, 103 Cal.App.4th at 111-14 (overruled on other grounds); *Californians for Alternatives to Toxics*, 136 Cal.App.4th at 15-17; *Protect the Historic Amador Waterways*, 116 Cal.App.4th at 1108-09.

¹³¹ DSEIR at 3.8-6.

¹³² *Id.* at 3.8-8 (Impact HYD-4).

pumped from the holds of oceangoing ships, which “would have the potential to be a source of stormwater pollution.”¹³³ However, the document again improperly relies on asserted compliance with regulatory requirements to conclude that the Project’s impacts would be less than significant. The DSEIR asserts that the discharge of ship hold water “would not pose a threat to the Bay” because “recent water quality tests indicate that . . . ship hold water did not pose any exceedances” for certain listed contaminants.¹³⁴ The DSEIR claims that implementation of a SWPPP, as part of the Project’s Port Development Permit application, “would eliminate or reduce discharge of materials to stormwater” and that “[c]ompliance with these measures would prevent substantial impacts to surface or groundwater quality from occurring.”¹³⁵

As explained above, asserted compliance with applicable regulations or permit requirements does not mean that Project impacts would be less than significant and cannot be used as an excuse to avoid a full analysis of those impacts.¹³⁶ The DSEIR again asserts that the subsurface HDS and other post-construction BMPs would ensure that the Project’s stormwater runoff impacts would be less than significant, but does not provide any evidence that these measures would be effective.¹³⁷ The DSEIR must be revised to include this analysis.

D. The DSEIR does not provide an adequate analysis of the Project’s consistency with applicable land use plans.

The DSEIR’s analysis of the Project’s consistency with the West Oakland Specific Plan is conclusory and often strains credulity. For example, the DSEIR concludes that the Project would be consistent with the Specific Plan’s Environmental and Sustainable Development Objective #3, to “promote the environmental health of the community,” and Objective #8, to “continue[] to enhance the well-being of the residents of West Oakland.”¹³⁸ The DSEIR claims this consistency would be achieved by “incorporating on-site green stormwater infrastructure . . . and low-emission

¹³³ *Id.* at 3.8-7.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See Communities for a Better Environment*, 103 Cal.App.4th at 111-14 (overruled on other grounds); *Californians for Alternatives to Toxics*, 136 Cal.App.4th at 15-17; *Protect the Historic Amador Waterways*, 116 Cal.App.4th at 1108-09.

¹³⁷ DSEIR at 3.8-8.

¹³⁸ *Id.* at 3.9-3; *see also* West Oakland Specific Plan at 2-12 (June 2014), *available at* <http://www2.oaklandnet.com/Government/o/PBN/OurOrganization/PlanningZoning/OA K028334>.

equipment.”¹³⁹ This conclusion blithely ignores the fact – disclosed in the DSEIR itself – that the Project would expose West Oakland residents to significantly higher PM_{2.5} concentrations and cancer risk than the already-high levels they currently experience. The DSEIR must explain in this consistency analysis how exposing the residents of West Oakland to significantly more pollutants and increasing their risk of cancer “promote[s] the environmental health of the community” and “enhance[s]” their “well-being.”

The DSEIR also lacks a basis to conclude the Project is consistent with the Specific Plan’s Environmental and Sustainable Development Objective #6 to “[p]romote energy efficiency throughout all aspects of new development and redevelopment,”¹⁴⁰ when the DSEIR has failed to provide the energy impacts analysis required by CEQA¹⁴¹

Finally, the DSEIR fails to provide information on whether the Project would be consistent with Transportation and Infrastructure Objective #4 to “[r]educe truck traffic impacts on residential neighborhoods.”¹⁴² The Project would result in significant truck traffic in the area, including truck traffic to a cement plant located in West Oakland. The DSEIR must explain whether such impacts are consistent with the West Oakland Specific Plan.

E. The DSEIR’s noise analysis is inadequate.

The DSEIR does not explain why it fails to provide updated information for the environmental setting for noise, like it does for other impacts analyzed in the document. The DSEIR generally uses existing conditions on the ground today as the baseline for its environmental impact analysis, as required by CEQA.¹⁴³ But in its update to the environmental setting for noise, the DSEIR does not provide updated information about current noise levels in the Project area, instead relying on outdated information from the 2002 EIR as Addended.¹⁴⁴ To provide an accurate analysis of the Project’s noise impacts, the DSEIR must measure and disclose current baseline noise conditions, like it did with other impacts.

The analysis itself also falls short. Specifically, the DSEIR’s discussion regarding vibration impacts is conclusory. The DSEIR states that “vibration generated by

¹³⁹ DSEIR at 3.9-3.

¹⁴⁰ *Id.*; see also West Oakland Specific Plan at 2-12.

¹⁴¹ See Section I, *supra*.

¹⁴² West Oakland Specific Plan at 2-11.

¹⁴³ DSEIR at 3.1-1.

¹⁴⁴ *Id.* at 3.10-1.

operational activities would not be perceptible and the nearest residential receptors,”¹⁴⁵ but it does not disclose how much vibration would actually be generated by operations, including truck loading and aggregate conveyors. Without quantifying the vibration the Project would generate, there is no basis for the DSEIR to conclude it would be “imperceptible.” West Oakland residents already suffer from significant noise and vibration impacts; adding even a small increase would be a significant impact.

F. The DSEIR inadequately describes and mitigates for the Project’s transportation impacts.

1. The DSEIR’s proposed mitigation of the Project’s traffic congestion impacts is inadequate.

The DSEIR fails to adequately mitigate the impacts of Project traffic on congestion at nearby intersections. The DSEIR acknowledges that Project-generated traffic would cause the Level of Service (“LOS”) at the intersection of Maritime Street and 17th Street to degrade from LOS D to LOS E during the afternoon peak hour, a new significant impact not previously identified in the 2002 EIR as Addended.¹⁴⁶ To address this impact, the DSEIR proposes a new mitigation measure (Mitigation Measure ERA TRANS-1), which calls for the Applicant to submit a plan for the optimization of signal timing at this intersection during the afternoon peak hour and coordination of signal timing changes at this intersection with adjacent intersections.¹⁴⁷ The DSEIR asserts that “[w]ith implementation of Mitigation Measure ERA TRANS-1, the Maritime Street/17th Street intersection would operate at LOS C during the p.m. peak hour,” which would assertedly reduce the LOS impact at this intersection to a less than significant level.¹⁴⁸ However, the DSEIR provides no evidence that Mitigation Measure ERA TRANS-1 would be effective in achieving LOS C at the intersection, and therefore fails to support its conclusion that impacts would be less than significant after mitigation. Moreover, the DSEIR improperly defers implementation of Mitigation Measure ERA TRANS-1 until after Project approval without appropriate performance standards.

CEQA allows a lead agency to defer formulation of specific mitigation only when: (1) an EIR contains criteria, or performance standards, to govern future actions implementing the mitigation; (2) practical considerations preclude development of the measures at the time of initial project approval; and (3) the agency has assurances that the

¹⁴⁵ *Id.* at 3.10-10.

¹⁴⁶ *Id.* at 3.11-16.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

future mitigation will be both “feasible and efficacious.”¹⁴⁹ Here, the DSEIR has met none of these requirements. Mitigation Measure ERA TRANS-1 calls for the Applicant to submit signal optimization plans for the intersection to the City’s Transportation Engineering Division and to Caltrans for review and approval, but defers the signal upgrade until after Project approval and does not impose performance standards to guide implementation of the measure.¹⁵⁰ While the DSEIR asserts that the mitigation measure would achieve LOS C at the intersection, the actual text of Mitigation Measure ERA TRANS-1 does not require that this LOS be achieved and contains no other performance standards. The DSEIR does not explain why practical considerations require the deferral of the mitigation measure and contains no assurances that the measure will be effective. Because the DSEIR fails to ensure the mitigation measure’s effectiveness, the signal optimization may fail to achieve the intended LOS, resulting in an unmitigated significant impact.

2. The DSEIR’s analysis of impacts from Project-displaced parking and AMS uses is inadequate.

The DSEIR’s transportation discussion also fails to adequately analyze the Project’s impacts on parking in surrounding neighborhoods. The DSEIR concludes that the Project “would not result in inadequate parking capacity or increase the number and incidence of large vehicles parking within surrounding communities or on streets not designated for such uses” and that mitigation is unnecessary because the Project “would not substantially increase the severity of, or result in a change in, the previously identified less-than-significant impact of the OAB Area Redevelopment Plan disclosed in the 2002 EIR as Addended.”¹⁵¹ However, the DSEIR fails to provide adequate evidence or analysis in support of this conclusion.

The DSEIR acknowledges that its analysis of the Project’s transportation impacts must consider not only “project-generated” parking impacts, but also “project-displaced” parking impacts, which are expressly included among the document’s thresholds for significant impacts.¹⁵² The DSEIR states that “[p]roject-displaced parking results from the project’s removal of standard on-street parking and legally required off-

¹⁴⁹ *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94-95; *San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at 669-71; CEQA Guidelines § 15126.4(a)(1)(B).

¹⁵⁰ DSEIR at 3.11-16.

¹⁵¹ *Id.* at 3.11-19.

¹⁵² *Id.* at 3.11-12, 3.11-18.

street parking (non-public parking which is legally required).”¹⁵³ Here, the DSEIR’s analysis fails to adequately consider Project-displaced parking impacts, despite acknowledging that these impacts must be evaluated.

The DSEIR recognizes that the Project site is currently used for ancillary marine services (“AMS”), which include “overnight truck parking and shipping container/chassis storage and staging to support Port maritime activities.”¹⁵⁴ The DSEIR notes that the Project would eliminate approximately 18 acres of existing AMS uses.¹⁵⁵ However, the DSEIR fails to adequately disclose or analyze the environmental impacts of displacing the AMS operation. The DSEIR concludes that the Project’s displacement of existing AMS operations “would not result in inadequate parking capacity or increase the number and incidence of large vehicles parking within surrounding communities.”¹⁵⁶ However, the DSEIR fails to provide adequate evidence or analysis in support of this conclusion. Moreover, the DSEIR fails to analyze any of the other environmental impacts of displacing existing AMS operations from the Project site.

An EIR must identify and analyze the environmental impacts of a project, including reasonably foreseeable indirect impacts that will occur as a result of the project.¹⁵⁷ Here, construction of the Project will require the permanent displacement of 18 acres of AMS uses, including truck parking, container storage, and staging.¹⁵⁸ The relocation of this large AMS operation to other sites is a necessary consequence of the Project. In addition to transportation, traffic, and parking impacts, the Project’s relocation of these existing AMS uses to other sites will have additional indirect impacts not analyzed in the DSEIR, including but not limited to impacts on air quality and noise. Once relocated, truck parking, staging, and container storage would generate air pollutant emissions and noise from truck operations in their new locations, which may not have been considered in the 2002 EIR as Addended. The DSEIR must be revised to disclose all reasonably foreseeable environmental effects of these displaced AMS operations, including impacts on surrounding communities where truck parking, container storage, and staging may be relocated.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at ES-1; 2-2; 3.1-1; 3.9-1.

¹⁵⁵ *Id.* at 3.11-18, 3.11-19.

¹⁵⁶ *Id.* at 3.11-19 (Impact TRANS-4).

¹⁵⁷ *El Dorado Union High Sch. Dist. v. City of Placerville* (1983) 144 Cal.App.3d 123; *City of Hayward v. Board of Trustees of Cal. State Univ.* (2015) 242 Cal.App.4th 833, 859; CEQA Guidelines §§ 15126.2(a), 15064(d).

¹⁵⁸ DSEIR at 3.11-18, 3.11-19.

This analysis is particularly important due to the Port's known need for extensive truck parking. The DSEIR cites a recent study that concluded that the Port will require 30 acres of overnight truck parking and container storage to meet anticipated growth through 2050, and acknowledges that "the 2001 amendment to the BCDC Seaport Plan required that 30 acres of truck-related ancillary services, including overnight truck tractor parking and container/chassis staging, be provided collectively by the Port and the City."¹⁵⁹ The 18 acres of AMS uses that would be removed from the Project site help to satisfy this 30-acre requirement.

The DSEIR states that "[t]he Port currently has 40 acres for public truck parking including 15 acres at Roundhouse (an area formerly occupied by Union Pacific located south of Adeline Street, east of the Matson Terminal, and west of Schnitzer Steel) and 25 acres at Howard Terminal."¹⁶⁰ The DSEIR appears to assume, without explicitly stating, that the Roundhouse and Howard Terminal sites could accommodate all of the displaced parking and staging from the Project, and that the displaced AMS uses from the Project site would in fact be relocated to those sites, but provides no evidence in support of either assumption.

As an initial matter, some or all of the parking at the Howard Terminal site will be lost when the planned new Oakland Athletics stadium is constructed at the site. Elsewhere, the DSEIR notes that "the Howard Terminal facility is not currently available" as an alternative location for the proposed Project "because the Board of Port Commissioners approved an Exclusive Negotiation Agreement with the Oakland Athletics on May 13, 2019."¹⁶¹ The DSEIR must address the likelihood that the 25-acre Howard Terminal site will not be available for truck parking in the future, and therefore will not be able to accommodate displaced AMS uses from the Project site. Moreover, the planned stadium aside, the DSEIR does not indicate how much of the truck parking capacity at the Roundhouse and Howard Terminal sites is currently utilized, and how much remains available. It is therefore impossible to evaluate whether those sites have enough excess parking capacity to absorb the 18 acres of AMS uses that would be displaced from the Project site. The DSEIR must be revised to analyze whether the Roundhouse and Howard sites have sufficient space for the displaced AMS uses, and whether those uses would in fact be relocated there.

Given the impending redevelopment of the Howard Terminal site and the increased utilization of truck parking capacity at the Roundhouse site that is likely to

¹⁵⁹ *Id.* at 3.11-19.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 5-8.

result, the DSEIR must consider the likelihood that AMS uses displaced from the Project site may end up relocating to other sites. The DSEIR must therefore be revised to identify the other possible locations where those where truck parking, container storage, and staging may be relocated, and to analyze all reasonably foreseeable environmental effects of displaced AMS operations.

WOEIP is concerned that displaced truck parking, container storage, and staging is likely to spill over to surrounding communities, as had already occurred. Until the DSEIR is revised to include this analysis, the Port has no basis to conclude that the Project “would not result in inadequate parking capacity or increase the number and incidence of large vehicles parking within surrounding communities or on streets not designated for such uses,” or that mitigation is unnecessary.¹⁶²

IV. THE DSEIR’S CUMULATIVE IMPACTS ANALYSIS IS INADEQUATE.

Under CEQA, an EIR must discuss significant “cumulative impacts.”¹⁶³ A legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable future projects with impacts that might compound or interrelate with those of the project at hand.¹⁶⁴ Such analysis is necessary because “environmental damage often occurs incrementally from a variety of small sources [that] appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.”¹⁶⁵ Given the existing pollution burden experienced by residents of West Oakland, this analysis is particularly important.

The DSEIR, however, utterly fails to provide useful or legally sufficient cumulative impact information, especially with respect to air quality. The DSEIR professes to take a “projection approach,” whereby the Project’s emissions are to be analyzed in conjunction with “a summary of projections contained in an adopted local, regional, or statewide plan, or related planning document.”¹⁶⁶ This approach can be useful where an agency has access to analysis that already anticipates how past, present, and future projects will contribute to environmental impacts.

¹⁶² *Id.* at 3.11-19.

¹⁶³ CEQA Guidelines § 15130(a).

¹⁶⁴ *Id.* § 15355(b).

¹⁶⁵ *Communities for a Better Environment*, 103 Cal.App.4th at 114 (overruled on other grounds).

¹⁶⁶ DSEIR at 4-2, 4-6.

The DSEIR, however, does not include that information. It claims that Table 4.4-1 “lists relevant projections,” but that table indicates only the topic areas included in various plans; it provides no information, for instance, of projected air quality in the City of Oakland or the affected communities.¹⁶⁷ Instead, Tables 4.5-1 and 4.5-2 include information about *current* air quality at the Port and in West Oakland.¹⁶⁸ This information does not give the public or decisionmakers any information about how the Project’s admitted pollution will interact with other pollution from regional growth and future projects. This omission is particularly egregious given the potential impacts from the Howard Terminal project, which the DSEIR ignores.¹⁶⁹ The EIR must be revised to comply with CEQA’s direction to analyze how the project interacts with past, present, and future projects.

The cumulative air quality analysis also suffers from the same flaws identified elsewhere in the DSEIR. While the DSEIR admits that cumulative air quality impacts will be significant and the Project’s contribution will be cumulatively considerable, the DSEIR provides no information to inform the public or decisionmakers of the actual, on-the-ground health impacts. Knowing that the Project is likely to result in a 65 percent increase in PM_{2.5}, when the community already suffers from PM levels that are twice the BAAQMD threshold is clearly troubling.¹⁷⁰ But the DSEIR offers no actual information for community members on what health impacts they might expect from any approval.¹⁷¹

Other impact analyses are also flawed. The DSEIR fails to provide any information on greenhouse gas emissions, even though courts have routinely recognized that “we cannot afford to ignore even modest contributions to global warming.”¹⁷² And for other impact areas, such as hydrology, water quality, and transportation, the DSEIR takes the impermissible shortcut of assuming that a cumulative impact is insignificant

¹⁶⁷ *Id.* at 4-8.

¹⁶⁸ *Id.* at 4-12, 4-13.

¹⁶⁹ *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 430. (projection approach improper where the plan or prior environmental document does not include all possible sources).

¹⁷⁰ DSEIR at 4-13.

¹⁷¹ *See Sierra Club v. County of Fresno*, 6 Cal.5th at 521.

¹⁷² *Center for Biological Diversity v. National Highway Traffic Safety Admin.* (9th Cir. 2007) 508 F.3d 508, 550.

solely because the Project's contribution to an unacceptable existing environmental condition is relatively small.¹⁷³ The DSEIR must be revised to address these flaws.

V. THE DSEIR'S ANALYSIS OF ALTERNATIVES IS INADEQUATE.

The DSEIR's analysis of alternatives falls short. Under CEQA, a proper analysis of alternatives is essential to comply with the Act's mandate that significant environmental impacts be avoided or substantially lessened where feasible.¹⁷⁴ Indeed, the analysis of alternatives lies at the "core of an EIR."¹⁷⁵ As the Supreme Court has stated, "[w]ithout meaningful analysis of alternatives in the DEIR, neither the courts nor the public can fulfill their proper roles in the CEQA process [Courts will not] countenance a result that would require blind trust by the public, especially in light of CEQA's fundamental goal that the public be fully informed as to the consequences of action by their public officials."¹⁷⁶ Properly developing, evaluating, and comparing project alternatives is key to a meaningful environmental review process. The DSEIR's efforts in this regard are wholly inadequate.

First, the DSEIR dismisses a number of potentially viable alternatives from consideration as "uneconomical" without fully exploring available funding mechanisms. Specifically, the DSEIR rejects from further analysis an alternative to require installation of shore power at the Project site¹⁷⁷ and an alternative requiring installation of an emissions capture-and-control system to reduce OGV emissions.¹⁷⁸ Both alternatives would contribute significantly to reducing the Project's massive air pollutant emissions. However, the DSEIR fails to recognize that installation of shore power, retrofitting ships for shore power use, and purchase of exhaust capture-and-control systems are all eligible for funding through CARB's Carl Moyer Memorial Air Quality Standards Attainment Program.¹⁷⁹ Before dismissing these alternatives – which would greatly reduce the Project's severe air quality impacts – as uneconomical, the EIR must evaluate the availability of funding assistance. CEQA requires any claim of economic infeasibility to

¹⁷³ *Kings County Farm Bureau*, 221 Cal.App.3d at 718.

¹⁷⁴ Pub. Resources Code § 21002; CEQA Guidelines §§ 15002(a)(3), 15021(a)(2), 15126(d); *Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 443-45.

¹⁷⁵ *Citizens of Goleta Valley*, 52 Cal.3d at 564.

¹⁷⁶ *Laurel Heights I*, 47 Cal.3d at 404.

¹⁷⁷ DSEIR at 5-6.

¹⁷⁸ *Id.* at 5-7.

¹⁷⁹ See Cal. Air Resources Board, Carl Moyer Program: Marine Vessels, [available at https://ww2.arb.ca.gov/our-work/programs/carl-moyer-program-marine-vessels/about](https://ww2.arb.ca.gov/our-work/programs/carl-moyer-program-marine-vessels/about).

be supported by substantial evidence that demonstrates that additional costs would make the project impractical.¹⁸⁰ Without evaluating the availability of funding assistance, such an analysis is necessarily incomplete.

Second, the DSEIR fails to provide an adequate analysis comparing the alternatives' respective environmental impacts. Under CEQA, the alternatives analysis "must contain sufficient detail to help ensure the integrity of the process of decision-making by precluding stubborn problems or serious criticism from being swept under the rug."¹⁸¹ An EIR that does not produce adequate information regarding alternatives cannot achieve the EIR's dual purposes of enabling the reviewing agency to make an informed decision and ensuring that the decisionmaker's reasoning is accessible to the public.¹⁸² Readers must be able to "evaluate [alternatives'] comparative merits."¹⁸³ A thorough comparison of the Project alternatives' impacts is therefore crucial to a successful environmental document.

Unfortunately, the DSEIR fails to provide this information, instead opting for the most perfunctory of analyses. In its scant comparison of the environmental impacts of "Alternative 1 – Stockpile Storage in a Building" to the Proposed Project, the DSEIR acknowledges that housing the stockpiles in an enclosed building "would capture and eliminate nearly all the localized migration of PM_{2.5} resulting from dust."¹⁸⁴ This is no small difference from the Project, which would produce substantial PM_{2.5} and impact the health of workers and residents of West Oakland. The alternatives analysis must be revised to provide a robust discussion of the differences between the air quality *and* related health impacts, and all other impacts, of Alternative 1 and the Project.

Pursuant to CEQA Guidelines section 15204(a), WOEIP also urges the Port to evaluate another alternative aimed at reducing pollution, traffic, and other significant impacts experienced by the communities in West Oakland: the relocation of the Peralta Street cement plant to the Project site. The Central Concrete Supply Company plant, located at 2400 Peralta Street, is a significant source of air pollution, traffic, and noise for the surrounding community. The cement plant is owned by U.S. Concrete, which owns Polaris Materials, of which the Applicant is a subsidiary. The Project's aggregate imports are intended to serve the plant on Peralta Street, with 16 percent of truck trips

¹⁸⁰ *Kings County Farm Bureau*, 221 Cal.App.3d at 737; *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 884.

¹⁸¹ *Kings County Farm Bureau*, 221 Cal.App.3d at 733 (citing cases).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ DSEIR at 5-9.

leaving the Project going to the plant.¹⁸⁵ Co-locating a relocated cement plant with the Project would likely bring significant economic and environmental efficiencies, while also directly offsetting a significant source of local air pollution. WOEIP urges the Port to seriously consider this alternative, which would positively impact air quality and other environmental conditions in West Oakland, in a revised and recirculated EIR.

VI. THE DSEIR MUST BE RECIRCULATED.

Under California law, the present DSEIR cannot properly form the basis of a final supplemental EIR, for the reasons explained above. CEQA and its Guidelines describe the circumstances that require recirculation of a draft EIR. Such circumstances include: (1) the addition of significant new information to the EIR after public notice is given of the availability of the draft EIR but before certification, or (2) the draft EIR is so “fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.”¹⁸⁶

Here, both circumstances apply. Decisionmakers and the public cannot possibly assess the Project’s impacts, or even its feasibility, through the present DSEIR, which is fundamentally flawed, as explained above. In particular, the DSEIR’s failure to adequately describe the Project’s setting in an environmentally overburdened, historically disadvantaged community and its failure to provide significance determinations regarding and full analysis of whole categories of impacts render it fundamentally inadequate. Further, the DSEIR’s reliance on vague and unenforceable mitigation will require substantial revision of the mitigation measures of associated discussion. In order to resolve these issues, the Port must prepare a revised EIR that would necessarily include substantial new information demanding recirculation.

VII. CONCLUSION

As set forth above, the Eagle Rock Aggregates Oakland Terminal Project DSEIR suffers from numerous deficiencies, many of which would independently render it inadequate under CEQA. Taken as a whole, the deficiencies of the DSEIR necessitate extensive revision of the document and recirculation for public comment. WOEIP respectfully requests that the Port reevaluate the Project and make changes – especially considering design alternatives and adopting mitigation, as discussed above – that would

¹⁸⁵ *Id.* at 3.11-13.

¹⁸⁶ CEQA Guidelines § 15088.5.

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reduce the Project's impacts on the already environmentally overburdened community of West Oakland.

Best Regards,

SHUTE, MIHALY & WEINBERGER LLP



Laura D. Beaton
beaton@smwlaw.com



Sara A. Clark
clark@smwlaw.com



Patrick L. Woolsey
pwoolsey@smwlaw.com

CC: Ms. Margaret Gordon, WOEIP
Brian Beveridge, WOEIP

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