LOZEAU DRURY LLP
T 510.836.4200
F 510.836.4205
1939 Harrison Street, Ste. 150
Oakland, CA 94612
www.lozeaudrury.com
richard@lozeaudrury.com

BY E-MAIL AND US MAIL

April 26, 2021

President Shamann Walton and
Honorable Members of the Board of Supervisors
c/o Angela Cavillo, Clerk of the Board of Supervisors
San Francisco City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102
Bos.legislation@sfgov.org

RE: Support of PODER, Greenaction and THoR for Resolution to Support SB 37 (Cortese) Contaminated Site Cleanup and Safety Act (File No. 210353).

President Walton and Honorable Members of the Board of Supervisors:

I am writing on behalf of People Organizing to Demand Environmental and Economic Rights (PODER), Greenaction for Health and Environmental Justice (Greenaction), and THoR, a group of residents living near a contaminated site located at 1776 Green Street], to support the adoption of the proposed resolution to support California State Senate Bill SB 37 (Cortese) Contaminated Site Cleanup and Safety Act ("SB 37"). The California Environmental Quality Act ("CEQA") provides that when a project is proposed to be built on a contaminated site listed on the State's Cortese List, it may not be exempted from CEQA review.[1] This ensures that the public, neighbors, construction workers and others can review and comment on the cleanup plan to ensure its adequacy. SB 37 is sponsored by the Laborers International Union of North America (LIUNA) in order to ensure the health and safety of their members who are often involved in excavation and earth moving activities. (Exhibit A).

SB 37 will close a loophole that has been improperly exploited by the San Francisco Planning Department to allow projects built on contaminated sites to evade CEQA review. SB 37 will help to safeguard public health and safety by ensuring that contaminated sites are properly cleaned up before development projects are allowed to proceed. The Planning Department has been aggressively lobbying against SB 37, claiming that it would cause delays and additional cost, and making false claims about how the bill would apply to certain projects, namely "ministerial" projects. As described below, any delays, additional cost or impact on the types of projects that would be subject to CEQA review would be immaterial or nonexistent, and certainly not justify the risk to public health and safety by avoiding CEQA review.

SB 37 was prompted by an investigative article in the *San Francisco Chronicle* revealing that the San Francisco Planning Department had a multi-year practice of illegally granting CEQA categorical exemptions for projects constructed on contaminated sites listed on the State's Cortese List. (Exhibit B). As a result, residences have been constructed on contaminated sites without the safeguards and public involvement required by CEQA.

[1] CEQA section 21084(d).

Subsequent to the *Chronicle* article, the Planning Department has admitted that its illegal practice of issuing categorical CEQA exemptions for projects on contaminated sites was "regrettable." However, the Department now contends that it may issue "common-sense" exemptions for these same projects. By advocating for the ability to grant common-sense exemptions for Cortese List sites, the Planning Department is in fact undermining the City's responsibility to promote and protect public health.

CEQA is unambiguous that common-sense exemptions can only be applied to projects "where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment."[2] Allowing common-sense exemptions for Cortese List sites means that contaminated sites would be allowed to be developed with absolutely no public review under CEQA. Clearly, if a site is contaminated with toxic chemicals, it cannot be seen "with certainty" that there is "no possibility" of a significant environmental effect. Indeed, the courts of appeal have ruled that the common-sense exemption is not allowed for projects on contaminated sites.[3] **SB 37 would help clarify existing law that projects proposed to be constructed on contaminated sites may not be exempted from CEQA review, regardless of whether the exemption is deemed "categorical" or "common-sense."**

The Planning Department has raised several specious arguments against SB 37. As discussed below, none have merit.

1. Local cleanup programs: The Planning Department argues that its local cleanup program, known as the Maher Ordinance, ensures adequate cleanup and that CEQA review would be redundant. This is demonstrably false, and one need only to consider the tragic public health disasters caused by the botched cleanups at Hunters Point, Treasure Island and elsewhere. City staff is clearly **not** ensuring adequate cleanup of contaminated sites through the Maher program, and these are prime examples of how a local oversight program doesn't equate to "certainty that there is no possibility that the activity in question may have a significant effect on the environment." Furthermore, the Maher Ordinance, unlike CEQA review, does not require a meaningful public comment period, response to comments, and administrative and judicial appeals. In a recent project at 1776 Green Street, the Department of Public Health proposed to "close" the site on the Cortese List, despite the presence of cancer-causing benzene at levels more than 200 times in excess of commercial standards and 900 times greater than residential standards. It was only as a result of public involvement and a CEQA appeal that the public was able to reverse the City staff's erroneous decision and ensure an adequate cleanup.

2. Delay: The Planning Department has argued that requiring CEQA review for projects on contaminated sites will lead to unreasonable delays. However, CEQA review most often takes the form of a mitigated negative declaration ("MND").[4] MND's are brief checklist documents and have a short 20-day comment period. A 20-day period to allow affected members of the public to review and comment on the cleanup plan to ensure its adequacy is not unreasonable and in fact, is easily justifiable when public health and safety are potentially at stake.

---

[2] 14 CCR 15061(b)((3)
[3] *McQueen v. Bd. of Directors,* 202 Cal.App.3d 1136, 1149 (1988); *Citizens for Responsible Equitable Envt'l Dev. v. City of Chula Vista ("CREED")* 197 Cal.App.4th 327, 331-333 (2011).).
[4] *Parker Shattuck Neighbors v. Berkeley City Council,* 222 Cal. App. 4th 768 (2013)).

3. Cost: The Planning Department has argued that CEQA review will impose significant additional costs on developers that may have a "chilling effect." However, CEQA imposes almost no additional cost. As the staff contends, a cleanup plan is already required under the Maher Ordinance. Therefore, the cost to develop the cleanup plan is necessary whether or not CEQA review is required. The only difference is that CEQA requires that the cleanup plan be presented to the public for a 20-day comment period. This affects only timing, not cost.

4. Red tape: Planning staff has argued that SB 37 will require that "every window replacement" and kitchen remodel will require CEQA review. This argument is completely invalid. CEQA only applies to "discretionary" projects, not "ministerial" projects[5] and clearly defines building permits to be "ministerial."[6] Therefore, permits for window replacements, interior remodeling, deck repairs, etc., are entirely excluded from any CEQA review. Furthermore, the courts have held that projects that do not involve soil disturbance may be exempted from CEQA review.[7]

In summary, SB 37 would help clarify existing law regarding contaminated site cleanup and safety and is necessary to close a loophole that has been improperly exploited by the San Francisco Planning Department to allow Cortese List sites to evade necessary CEQA review. SB 37 will help to safeguard the health of nearby neighbors, construction workers and future residents by ensuring that contaminated sites are properly cleaned up before development of public and private projects are placed on those sites. Any delay or additional cost would be immaterial and certainly not justify the risk to public health by avoiding CEQA review. Thank you for your consideration of our comments and concerns.

Sincerely,

Richard Toshiyuki Drury
LOZEAU DRURY LLP

Cc: President Shamann Walton (Shamann.Walton@sfgov.org)
Sup. Catherine Stefani (Catherine.Stefani@sfgov.org)
Sup. Aaron Peskin (Aaron.Peskin@sfgov.org)
Sup. Matt Haney (Matt.Haney@sfgov.org)
Sup. Rafael Mandelman (MandelmanStaff@sfgov.org)
Sup. Gordon Mar (Gordon.Mar@sfgov.org)
Sup. Dean Preston (Dean.Preston@sfgov.org)
Sup. Hillary Ronen (Hillary.Ronen@sfgov.org)
Sup. Ahsha Safai (Ahsha.Safai@sfgov.org)
Sup. Myrna Melgar (MelgarStaff@sfgov.org)
Sup. Connie Chan (ChanStaff@sfgov.org)

[5] CEQA section 21080(b)(1).
[6] CEQA Guidelines section 15268(b)(1).
[7] *Baird v. Contra Costa Co.*, 32 Cal.App.4th 1464 (1995).

EXHIBIT A

California State Council of Laborers

Laborers' International Union of North America

LiUNA!

Feel the Power

April 7, 20211

President Shamann Walton and
San Francisco Board of Supervisors
Attn: Sup. Gordon Mar
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

RE: Resolution Supporting SB 37—Contaminated Sites: The Hazardous Waste Site Clean Up and Safety Act Cortese.

Dear President Shamann Walton and San Francisco Board of Supervisors:

On behalf of the California State Council of Laborers, I write in strong SUPPORT of the San Francisco Board of Supervisors Resolution supporting Senate Bill 37.

Senate Bill 37 would expressly provide that a project that is included on a consolidated list created, distributed, and posted online by the Secretary for Environmental Protection shall also not be exempt from CEQA.

Construction workers are exposed to a variety of health hazards every day. Without proper knowledge and protective gear these men and women have the potential for becoming sick, ill, and disabled for life.

Soil and groundwater can become contaminated as a result of past or current activities on the project site or on adjacent areas. Many industrial activities use, store, or generate contaminated materials that can be spilled, dumped, or buried nearby. Other activities common in mixed-use neighborhoods—such as gas stations and auto repair shops—can also result in contamination due to improper management of raw product and/or waste materials, or inadvertent spills.

Subsurface soil and groundwater contamination may remain undetected for many years, without posing a threat to nearby workers, residents, passersby, or other receptors. Excavation, earthmoving, dewatering, and other construction activities can, however, expose the contaminants, provide a pathway of exposure and, if such contaminants are not properly managed, introduce potential risk to construction workers and others nearby.

Senate Bill 37 addresses an increasingly common problem where localities exempt highly contaminated sites entirely from CEQA review. The result is that construction workers and future residents may be exposed to highly toxic chemicals without their knowledge and without proper safeguards.

Joseph Cruz, Executive Director ■ 1121 L Street, Suite 502, Sacramento, California 95814 ■ (916) 447-7018 ■ cscl@calaborers.org ® GCC/IBT 1465-M

Unfortunately, most serious hazards on a construction site are the silent killers, the ones we cannot see. Senate Bill 37 will close a loophole in state law and help to ensure that construction workers are not unwittingly exposed to toxic chemicals in soil and groundwater, and that safeguards are put in place to ensure that workers and future residents are made award of historic soil contamination from leaking underground tanks and other sources so that proper measures can be imposed to clean-up the contamination safely.

For these reasons, the Laborers are in strong support of this important legislation and respectfully request the San Francisco Board of Supervisors approve the Resolution in support of Senate Bill 37.

Sincerely,

Joseph Cruz
Executive Director

cc: Richard Drury, Lozeau Drury LLP
Oscar De La Torre—LiUNA Vice President and NCDCL Business Manager
Jon P. Preciado—SCDCL Business Manager
Rocco Davis—LiUNA Vice President and PSW Regional Manager

EXHIBIT B

LOCAL // BAY AREA & STATE

Exclusive: How SF sidestepped state law on developing toxic sites

Cynthia Dizikes

June 7, 2020 | Updated: June 7, 2020 1:03 p.m.

Ben Ellis and daughter Emmy, 8, throw a football outside their house in San Francisco last year. They live across the street from a former auto repair garage that is on a state list of hazardous waste sites. Despite that status, the city planning department considered exempting a development on the site from the state's environmental review ...

Photo: Gabrielle Lurie / The Chronicle

Contaminated gas stations, vehicle repair shops and parking garages have become prized development commodities in San Francisco in recent years as the city struggles with a crushing housing shortage.

bypass environmental reviews required under state law, a Chronicle investigation has found.

The California Environmental Quality Act prohibits certain exemptions for the tens of thousands of properties on a statewide roster of hazardous-waste sites called the Cortese list. “Categorical” exemptions are only supposed to go to projects with no significant impact on the environment or human health. The prohibition was designed to protect the public, construction workers and future occupants from exposure to dangerous substances, environmental lawyers said.

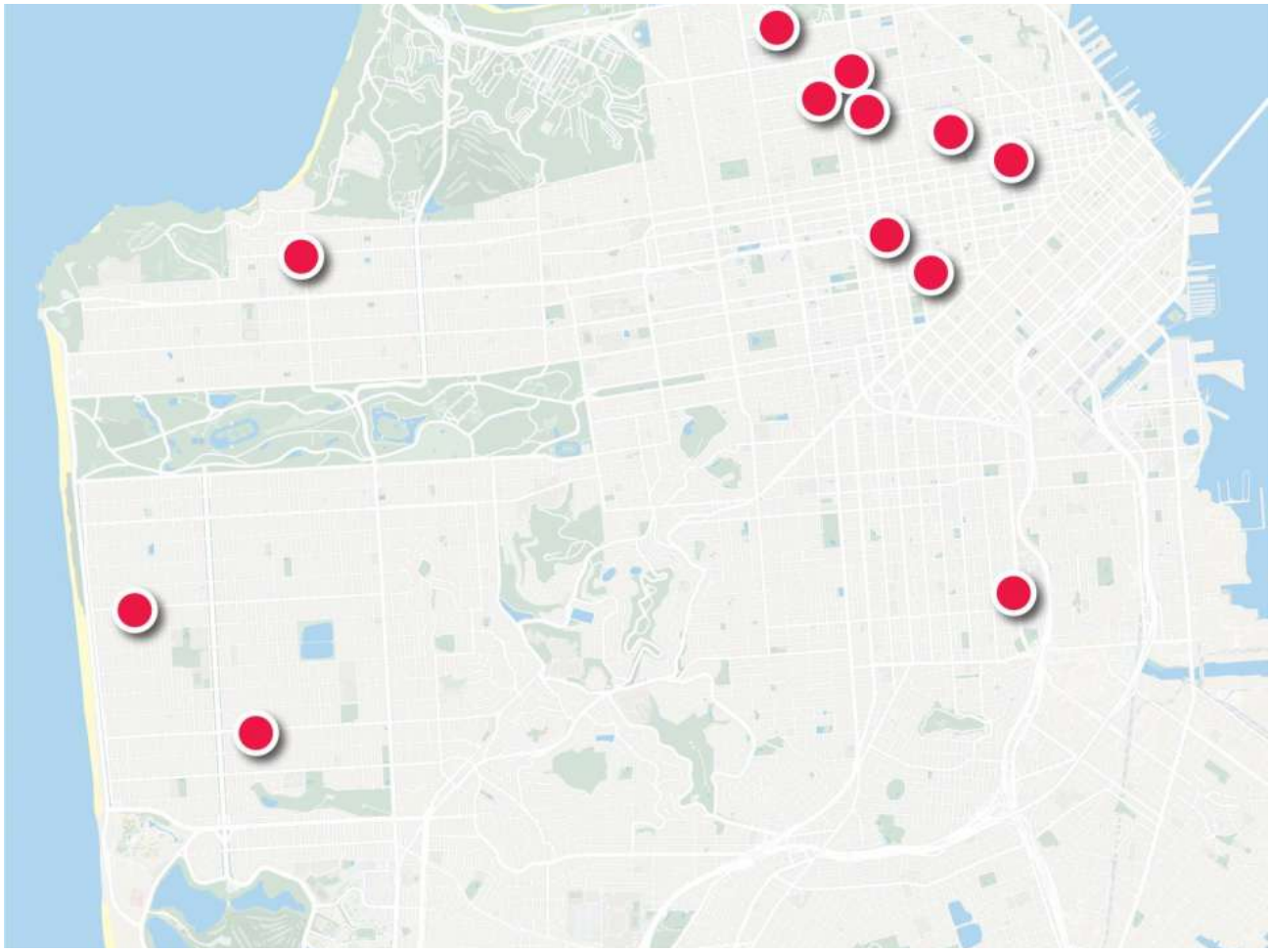
The state law mandates transparency and requires local governments to notify the public about potential hazards at a site before development begins. It allows the public to demand health protections and additional levels of cleanup, and requires formal consideration of those comments. To enforce compliance, people can sue agencies they think are failing to adhere to the law.

But in the past five years, the San Francisco Planning Department granted or considered categorical exemptions for at least a dozen projects on Cortese list sites, a Chronicle

The mixed-use residential development at 2255 Taraval St. in San Francisco. The city granted the development an exemption from the state's environmental review process, despite the site's presence on a state list of hazardous waste sites.

The city exempted nine of those projects from the state's public environmental review process. At four of the sites, work hasn't begun. Two are under construction. The final three have newly built condominiums, and at least one of those is occupied.

The city considered exempting the three other projects — including a condo development on the site of a vacant auto repair garage at 1776 Green St. in Cow Hollow, despite the presence of high levels of cancer-causing benzene in the soil and groundwater. The city abandoned that plan in February after neighbors hired a lawyer to fight it.



Then, following inquiries about the exemptions from The Chronicle in early March, before the coronavirus shut down the economy, the Planning Department said it will stop giving categorical exemptions to projects on the Cortese list.

"The Planning Department is revising its approach to projects on these sites," spokeswoman Gina Simi said.

Simi said the city relied on state guidance in granting some of the exemptions. Despite repeated requests from The Chronicle to see the guidance, however, Simi has not provided it.

An attorney with the State Water Resources Control Board, which oversees the largest part of the Cortese list with regional water boards, said he was unaware of any such guidance issued by the agency.

properties to state and regional standards under a local ordinance carried out by the Public Health Department, regardless of whether a project receives an exemption from the state's environmental review process, she said.

"We strongly disagree with the false assertion that the city's local process is not as rigorous or as transparent as what is required under (state law), that it doesn't consider public comment or concerns, and that we intend to circumvent the state's environmental law," Simi said. "The city's environmental review procedures are meticulous."

But several environmental lawyers told The Chronicle that the California Environmental Quality Act allows far more scrutiny of development on toxic sites than the city's process alone. Under state law, the public can require safer measures be taken to reduce significant impacts on the environment and health, and can more easily sue if they are not. They said the city flouted state law and, in doing so, deprived the public of the ability to vet developments.

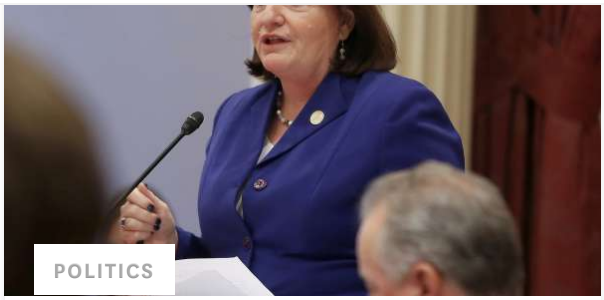
Related Stories

Coronavirus Local Food Election Sporting Green Biz+Tech Culture Desk Datebook US & World Op

LOCAL

BY HEATHER KNIGHT

Tenderloin sinks deeper into misery, and no one is coming to...



POLITICS

BY ALEXEI KOSEFF

CA housing shortage: More duplexes, apartments in lawmakers'...

LOCAL

BY PHIL MAT

Ambitio growth c

"The city made a huge mistake and has been blatantly violating state law for years, thereby potentially placing an untold number of city residents at risk of exposure to highly toxic chemicals," said Richard Drury, an environmental lawyer representing neighbors of the vacant auto repair garage on Green Street.

by the city's lengthy approval process and bans on apartments in large swaths of San Francisco, have turned to polluted land, including former garages and gas stations where toxic substances in underground tanks have leaked into the soil and groundwater.

The city and developers are motivated, as with any project, to get these properties developed as soon as possible — and exemptions from the state law can speed the process by reducing procedural hurdles, legal hangups and costs.

San Francisco has more than 2,000 leaky underground storage tank sites on the Cortese list, named for former state Assemblyman Dominic Cortese of San Jose. Nearly all of them, about 97%, have been cleaned to some extent, records show. Yet many may still contain contamination that could be hazardous.

The Chronicle looked at projects on Cortese list sites for which the city granted or considered categorical exemptions. There were at least 20 such projects since 2015, according to city data. The Chronicle focused on 12 where developers planned to excavate thousands of cubic yards of soil to build hundreds of new residential units.

Public documents for five of the 12 sites show the city also tried a second method to avoid state review and fast-track development: "common sense" exemptions.

State law restricts such exemptions to projects that present "no possibility" of significant hazards.

A sign at 986 South Van Ness Ave. in San Francisco where the city considered exempting a proposed development from the state's environmental review process. The site is on a state list of hazardous waste sites that prohibits such exemptions.

That wouldn't apply to the five sites, however. Developing them would mean disturbing a great deal of potentially contaminated soil: from 1,400 to nearly 17,000 cubic yards, depending on the site, said Douglas Carstens, an environmental lawyer near Los Angeles.

"Transparency is sorely needed," Carstens said. "So the cleanup is not just a bilateral negotiation between the project proponent and the city."

One of those sites is 2255 Taraval St. in the Outer Sunset neighborhood, where a former auto garage and laundromat left toxic residue behind.

The site is so clean "we could bring it down to the beach," said the project's general contractor one recent afternoon as a crew built a wooden frame on the property. The development will be a four-story, mixed-use building with 10 residential units.

fumes at bay on the property. He asked that his name not be used because he wasn't authorized to speak publicly about the project.

He said the property now has a "serious vapor barrier and a probe buried under 2 feet of concrete." The equipment, though, will have to be tested every few years to ensure it continues to contain the hazards, he said.

"If there's gas, then they might have to put in a fan," he said.

That kind of uncertainty is precisely why contaminated sites should go through the state-mandated environmental review process, Drury said.

The state process allows the public to demand greater levels of cleanup so that measures such as vapor barriers — which are effective, but can fail — are not necessary.

Drury said the Green Street garage site is a case in point for why public involvement matters.

For years, the auto repair business stored gasoline in four large underground storage tanks. The tanks were removed in 2016, but crews later found they had leaked benzene and other hazardous substances into the soil and groundwater.

Nevertheless, last October the Planning Department considered a categorical exemption for a five-unit condo that developers planned to build on the site.

Drury protested. But rather than drop its effort to exempt the project, the city added a common-sense exemption to its options. Drury argued that the site remained significantly contaminated, pointing to the city's own records showing that benzene in the groundwater exceeded safety thresholds by about 900 times.

The city then tried a third tactic: announcing that the developer could investigate and clean the site without going through the public environmental review process.

Alarmed neighbors appealed to the Board of Supervisors.

process.

This prompted Drury to fire off another written objection in April. He and the Green Street neighbors are still waiting for a response.

One of the neighbors who hired Drury last fall is Dr. Youjeong Kim, who lives across the street from the garage with her two children and husband, Ben Ellis.

The group of neighbors has spent many months and thousands of dollars trying to get the city to run the development through the state's environmental review.

"As a doctor and a parent it is really concerning and upsetting to me that of all places on Earth, we in San Francisco are going to skirt the law that is there to protect us," Kim said. "If we hadn't had the time and the resources to press this issue, they would have just exempted it."

San Francisco Chronicle staff writer Nanette Asimov and newsroom developer Evan Wagstaff contributed to this report.

Cynthia Dizikes is a San Francisco Chronicle staff writer. Email: cdizikes@sfchronicle.com Twitter: @CDizikes

April 7, 20211

President Shamann Walton and
San Francisco Board of Supervisors
Attn: Sup. Gordon Mar
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

RE: Resolution Supporting SB 37—Contaminated Sites: The Hazardous Waste Site Clean Up and Safety Act Cortese.

Dear President Shamann Walton and San Francisco Board of Supervisors:

On behalf of the California State Council of Laborers, I write in strong SUPPORT of the San Francisco Board of Supervisors Resolution supporting Senate Bill 37.

Senate Bill 37 would expressly provide that a project that is included on a consolidated list created, distributed, and posted online by the Secretary for Environmental Protection shall also not be exempt from CEQA.

Construction workers are exposed to a variety of health hazards every day. Without proper knowledge and protective gear these men and women have the potential for becoming sick, ill, and disabled for life.

Soil and groundwater can become contaminated as a result of past or current activities on the project site or on adjacent areas. Many industrial activities use, store, or generate contaminated materials that can be spilled, dumped, or buried nearby. Other activities common in mixed-use neighborhoods—such as gas stations and auto repair shops—can also result in contamination due to improper management of raw product and/or waste materials, or inadvertent spills.

Subsurface soil and groundwater contamination may remain undetected for many years, without posing a threat to nearby workers, residents, passersby, or other receptors. Excavation, earthmoving, dewatering, and other construction activities can, however, expose the contaminants, provide a pathway of exposure and, if such contaminants are not properly managed, introduce potential risk to construction workers and others nearby.

Senate Bill 37 addresses an increasingly common problem where localities exempt highly contaminated sites entirely from CEQA review. The result is that construction workers and future residents may be exposed to highly toxic chemicals without their knowledge and without proper safeguards.

Unfortunately, most serious hazards on a construction site are the silent killers, the ones we cannot see. Senate Bill 37 will close a loophole in state law and help to ensure that construction workers are not unwittingly exposed to toxic chemicals in soil and groundwater, and that safeguards are put in place to ensure that workers and future residents are made award of historic soil contamination from leaking underground tanks and other sources so that proper measures can be imposed to clean-up the contamination safely.

For these reasons, the Laborers are in strong support of this important legislation and respectfully request the San Francisco Board of Supervisors approve the Resolution in support of Senate Bill 37.

Sincerely,

Joseph Cruz
Executive Director

cc: Richard Drury, Lozeau Drury LLP
Oscar De La Torre—LiUNA Vice President and NCDCL Business Manager
Jon P. Preciado—SCDCL Business Manager
Rocco Davis—LiUNA Vice President and PSW Regional Manager