Carroll, John (BOS)

From: Navarrete, Joy (CPC)
Sent: Monday, December 07, 2015 11:56 AM
To: BOS-Supervisors; BOS-Legislative Aides; BOS Legislation, (BOS); mae@semlawyers.com; 'susanbh@preservationlawyers.com'; Carroll, John (BOS); lippelaw@sonic.net; Osha Meserve; patrick@semlawyers.com
Cc: Kern, Chris (CPC); Rodgers, AnMarie (CPC)
Subject: File No. 150990 GSW Event Center Supplemental Appeal Response
Attachments: GSW Supplemental Appeal Response_FINAL_120715 (2).pdf

Categories: 150990

In compliance with San Francisco's Administrative Code Section 8.12.5 "Electronic Distribution of Multi-Page Documents," the Planning Department, on behalf of OCII, attaches a multi-page supplemental appeal response to the Mission Bay Alliance Warriors SEIR CEQA Appeal, Appellants' Partial Briefs. Please let me know if you would like a hard copy.

Thanks,
Joy Navarrete

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office of
COMMUNITY INVESTMENT
and INFRASTRUCTURE

APPEAL OF CERTIFICATION OF FINAL SUBSEQUENT ENVIRONMENTAL IMPACT REPORT

Event Center and Mixed-Use Development at Mission Bay Blocks 29-32

Supplemental Appeal Response

DATE:	December 7, 2015
TO:	Angela Calvillo, Clerk of the Board of Supervisors
FROM:	Tiffany Bohee, Executive Director Sally Oerth, Deputy Director Chris Kern, Case Planner, Environmental Planning, (415) 575-9037
RE:	Board of Supervisors File No. 150990 OCII Case No. ER 2014-919-97; Planning Department Case No. 2014.1441E **Appeal of Certification of Final Subsequent Environmental Impact Report on the Event Center and Mixed-Use Development at Mission Bay Blocks 29-32**
HEARING DATE:	December 8, 2015
ATTACHMENTS:	Exhibit A — Supplemental Appeal Materials, Appellant's Partial Brief, submitted on November 30, 2015

PROJECT SPONSOR:	GSW Arena LLC
PROJECT CONTACT:	David Kelly, (510) 986-2200
APPELLANT:	Mission Bay Alliance

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INTRODUCTION

This memorandum and the attached documents (referred to as the "Supplemental Appeal Response") comprise a response to the supplemental appeal materials submitted to the Board of Supervisors ("the Board") regarding the issuance of a Final Subsequent Environmental Impact Report ("Final SEIR") on the proposed Event Center and Mixed-Use Development at Mission Bay Blocks 29-32 (the "proposed project" or "project"). The Final SEIR consists of the Draft SEIR, published by the Office of Community Investment and Infrastructure ("OCII") on June 5, 2015, and the Responses to Comments ("RTC") document, published on October 23, 2015. The Commission on Community Investment and Infrastructure ("OCII Commission") certified the Final SEIR on November 3, 2015. The Mission Bay Alliance[1] ("Appellant") filed an appeal ("Appeal Letter") on November 13, 2015, and OCII submitted an Appeal Response to the Board on November 30, 2015. The Appellant submitted supplemental appeal materials ("Supplemental Appeal") to the Board on November 30, 2015, consisting of two "Appellants' Partial Briefs, " one submitted by Thomas N. Lippe and one submitted by Patrick M. Soluri. The Supplemental Appeal materials are included as Exhibit A of this Supplemental Appeal Response.

The decision before the Board is whether to uphold the OCII Commission's decision to certify the Final SEIR and deny the appeal, or to overturn the OCII Commission's decision to certify the Final SEIR and return the project to OCII for further action to address any problems the Board found with the Final SEIR.

SUMMARY OF SUPPLEMENTAL APPEAL ISSUES AND OCII RESPONSES

The original Appeal Letter filed by the Mission Bay Alliance was a 30-page letter plus 6 exhibits; a total of 210 pages. The Appeal Letter identified the following 19 issue areas lettered from A to S: public comment; project description; tiering; AB 900 and administrative record; alternatives; air quality; transportation; hydrology, water quality and biological resources; noise; greenhouse gases emissions; geology and soils; hazards and hazardous materials; urban decay; wind; recreation; utilities and energy; land use; cultural resources; and CEQA findings and statement of overriding considerations. The grounds for the appeal were mainly a compilation and reiteration of comments on a wide range of issues that were previously submitted by the Appellant, either on the Draft SEIR, the RTC document, or the Final SEIR, with the Appeal Letter including over 350 references to previously submitted materials. OCII's Appeal Response provided written responses to the Board on all issues raised in the Appeal Letter.

The Supplemental Appeal consists of two reports ("Lippe Supplemental Appeal" and "Soluri Meserve Supplemental Appeal") augmented by 22 exhibits, for a total of 428 pages. Similar to the Appeal Letter, the Supplemental Appeal indicates that the grounds for the appeal are set forth in all previously submitted Appellant comment letters and their exhibits. The

[1] The Mission Bay Alliance is represented by four law firms and multiple counsel including: (1) Thomas N. Lippe, Law Offices of Thomas N. Lippe, APC; (2) Patrick M. Soluri and Osha R. Meserve, Soluri Meseve, a Law Corporation; (3) Susan Brandt-Hawley, Brandt-Hawley Law Group; and (4) Boies, Schiller & Flexner LLP.

Supplemental Appeal discusses a number of these grounds in more detail, and specifically the following 15 issue areas: public comment; air quality; transportation; hydrology/water quality; biological resources; noise; project description; tiering, AB 900, greenhouse gas emissions; geology and soils; hazards and hazardous materials; urban decay; wind and shadow; and recreation. In multiple instances, the Appellant asserts that recirculation is required.

In general, the issues raised in the Supplemental Appeal are the same as comments previously submitted by the Appellant. OCII has already prepared—and submitted to the Board—written responses to all previously submitted comments, either in the RTC document, dated October 23, 2015, and/or in the Appeal Response, dated November 30, 2015. Table 1 of this Supplemental Appeal Response lists the issues raised in the Supplemental Appeal (using the verbatim text from the Appellant). Rather than repeating information already provided to the Board, the table identifies the section and page number of the previously prepared written responses. In a few cases, however, the Supplemental Appeal material included slight variations of previous arguments, new analysis, or new information. Responses to these new issues are presented below in the same order those issues are described in the Final SEIR.

TABLE 1
RESPONSE TO SUPPLEMENTAL APPEAL TO CERTIFICATION OF FINAL SUBSEQUENT ENVIRONMENTAL IMPACT REPORT SUBMITTED TO THE SF BOARD OF SUPERVISORS NOVEMBER 30, 2015

Thomas N. Lippe, Appellants' Partial Brief ("Lippe Supplemental Appeal" with page number preceded by "L")
Patrick M. Soluri and Osha R. Meserve, Appellants' Partial Brief ("Soluri Meserve Supplemental Appeal" with page number preceded by "S")

Appellant Ref. No.	Issue as Stated by the Appellant	Page No. of Appellant Brief	Location of Detailed Response in Appeal Response and/or RTC Document	Page No. of Response
A. PUBLIC COMMENT (Lippe Supplemental Appeal)		L-3		
1.	The OCII Thwarted Public Comment on the SEIR.	L-3	Appeal Response, Exhibit A, Issue A.1., and Exhibit D, Response to Late Comment ERP-4	A-5 D-89
B. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO AIR QUALITY IMPACTS (Lippe Supplemental Appeal)		L-4		
1.	The City Cannot Use the SEIR's Thresholds of Significance for Criteria Air Pollutants until it Formally Adopts Them in a Rule-making Procedure.	L-4	Appeal Response, Exhibit A, Issue F.2; RTC Section 13.13.2, Response AQ-1a	A-10 RTC 13.13-4
2.	The DSEIR's Numerical Thresholds of Significance for Criteria Pollutants (Ozone Precursors, PM10, PM2.5) Borrowed from the BAAQMD Are Invalid.	L-5	Appeal Response, Exhibit A, Issue F.3, and Exhibit D, Response to Late Comment AQ-4; RTC Section 13.13.2, Response AQ-1b **See also OCII Response to Supplemental Appeal Issue AQ-1**	A-10 D-240 RTC 13.13-13
(a)	The DSEIR's impact assessments for construction related criteria pollutants (ozone precursors, PM_{10}, $PM_{2.5}$) and TAC emissions are invalid.	L-11	**Validity of thresholds** addressed in 2, above. **Availability of Tier 2 or better equipment**: Appeal Response, Exhibit A, Issue F.4, and Exhibit D, Response to Late Comment AQ-2; and RTC Section 13.13.7, Response AQ-6a **Haul trip length assumption**: Appeal Response, Exhibit A, Issue F.3; RTC Section 13.13.4, Response AQ-4	 A-13 D-216 RTC 13.13.53 A-11 RTC 13.13-40
(1)	Mitigation Measure M-AQ-1 does not comply with CEQA's legal requirements.	L-12	**Availability of Tier 2 or better equipment**: Appeal Response, Exhibit A, Issue F.4, and Exhibit D, Response to Late Comment AQ-2;and RTC Section 13.13.7, Response AQ-6a **Truck Idling Exceptions**: Appeal Response, Exhibit A, Issue F.4(b) RTC Section 13.13.7, Response AQ-6b **See also OCII Response to Supplemental Appeal Issue AQ-2**	 A-13 D-216 RTC 13.13-53 A-13 RTC 13.13-54
a.	The Response to Comment AQ-6a is Inadequate.	L-12	Appeal Response, Exhibit A, Issue F.4, and Exhibit D, Response to Late Comment AQ-2; RTC Section 13.13.7, Response AQ-6a	A-13 D-216 RTC 13.13-53

TABLE 1 (Continued)
RESPONSE TO SUPPLEMENTAL APPEAL TO CERTIFICATION OF FINAL SUBSEQUENT ENVIRONMENTAL IMPACT REPORT SUBMITTED TO THE SF BOARD OF SUPERVISORS NOVEMBER 30, 2015

Appellant Ref. No.	Issue as Stated by the Appellant	Page No. of Appellant Brief	Location of Detailed Response in Appeal Response and/or RTC Document	Page No. of Response
B. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO AIR QUALITY IMPACTS (Lippe Supplemental Appeal) (cont.)		L-4		
b.	The Response to Comment AQ-6e is Inadequate.	L-13	Appeal Response, Exhibit A, Issue F.4, and Exhibit D, Response to Late Comment AQ-2; and RTC Section 13.13.7, Response AQ-6c and RTC Section 13.13.7, Response AQ-6e	A-13 D-218 RTC 13.13-55 RTC 13.13-59
(b)	The DSEIR's impact assessments for operational criteria pollutants (ozone precursors, PM10, PM2.5) and TAC emissions are invalid.	L-15	Appeal Response, Exhibit A, Issue F.3; RTC Section 13.13.5, Response AQ-4c	A-10 RTC 13.13-48
(1)	The SEIR fails to include vehicle emissions from Warriors game traffic in its analysis of operational emissions.	L-16	Appeal Response, Exhibit A, Issue F.3(d), and Exhibit D, Response to Late Comment AQ-5; RTC Section 13.13.5, Response AQ-4a	A-10 D-243 RTC 13.13-44
(2)	Mitigation Measure M-AQ-2b does not comply with CEQA's legal requirements.	L-17	Appeal Response, Exhibit A, Issues F.3, Exhibit A, Issue F.5, Exhibit A, Issue F-12, Exhibit D, Response to Late Comment AQ-1; RTC Section 13.13.8, Response AQ-7	A-10 A-15 A-20 D-207 RTC 13.13-65
a.	The Response to Comment AQ-7 is Inadequate.	L-18	Appeal Response, Exhibit A, Issues F.3, Exhibit A, Issue F.5, Exhibit A, Issue F-12, Exhibit D, Response to Late Comment AQ-1; RTC Section 13.13.8, Response AQ-7	A-10 A-15 A-20 D-207 RTC 13.13-65
b.	New information and the refusal of the project sponsor to agree to Mitigation Measure M-AQ-2b since publication of the DSEIR require recirculation of a revised DSEIR.	L-19	Appeal Response, Exhibit D, Response to Late Comment AQ-1 **See also OCII Response to Supplemental Appeal Issue AQ-3**	D-207
3.	Changes to the Project Since Publication of the DSEIR Require Recirculation of a Revised DSEIR Due to New and More Severe Significant Impacts.	L-20	Appeal Response, Exhibit D, Response to Late Comment AQ-8	D-249
4.	The SEIR's Cancer and Health Risk Assessment for Toxic Air Contaminants Is Invalid, Based on Legal Errors and Not Supported by Substantial Evidence.	L-21	Appeal Response, Exhibit A, Issue F.6, and Exhibit D, Response to Late Comment AQ-3	A-16 D-233
(a)	The SEIR's threshold of significance for what is a cumulatively significant TAC impact is legally flawed.	L-21	Appeal Response, Exhibit A, Issue F.6, and Exhibit D, Response to Late Comment AQ-3	A-16 D-233
(b)	The SEIR's reliance on "the ambient cancer risk in the most pristine portions of the Bay Area" to support its chosen threshold of significance for TACs is incoherent and inconsistent with CEQA.	L-24	Appeal Response, Exhibit A, Issue F.6 RTC Section 13.13.2, Response AQ-1c **See also OCII Response to Supplemental Appeal Issue AQ-4**	A-16 RTC 13.13-27

TABLE 1 (Continued)
RESPONSE TO SUPPLEMENTAL APPEAL TO CERTIFICATION OF FINAL SUBSEQUENT ENVIRONMENTAL IMPACT REPORT SUBMITTED TO THE SF BOARD OF SUPERVISORS NOVEMBER 30, 2015

Appellant Ref. No.	Issue as Stated by the Appellant	Page No. of Appellant Brief	Location of Detailed Response in Appeal Response and/or RTC Document	Page No. of Response
B. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO AIR QUALITY IMPACTS (Lippe Supplemental Appeal) (cont.)		L-4		
(c)	The SEIR is inadequate because it omits a project-specific assessment of TAC health risks.	L-27	Appeal Response, Exhibit A, Issue F.6, and Exhibit D, Response to Late Comment AQ-3 **See also OCII Response to Supplemental Appeal Issue AQ-4**	A-16 D-233
(d)	The SEIR's assessment of cumulative TACs is invalid because it fails to include all sources of related impacts.	L-35	Appeal Response, Exhibit A, Issue F.6, and Exhibit D, Response to Late Comment AQ-3	A-16 A-235
(e)	The FSEIR fails to provide good-faith response to comments objecting to the analysis of TAC health risks, and the TAC analysis is inadequate because OCII failed to use its best efforts to use current science.	L-36	Appeal Response, Exhibit A, Issue F.6, and Exhibit D, Response to Late Comment AQ-3	A-16 A-236
5.	Changes to the Project since Publication of the DSEIR Require Recirculation for Public Comment Due to New and More Severe Significant Impacts.	L-40	Appeal Response, Exhibit A, Issue F.11, and Exhibit D, Response to Late Comment AQ-8	A-19 D-249
C. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO TRANSPORTATION IMPACTS (Lippe Supplemental Appeal)		L-41		
1.	The SEIR's Analysis of the Project's Construction-related Traffic Congestion and Delay Impacts Is Based on Invalid Criteria.	L-41	Appeal Response, Exhibit A, Issue G.5, and Exhibit D, Response to Late Comment TR-14; and RTC Section 13.11.11, Response TR-10	A-24 D-189 RTC 13.11-155
2.	The SEIR Fails to Assess the Project's Traffic Impacts on the Entire Affected Environment.	L-44	Appeal Response, Exhibit A, Issue G.2, and Exhibit D, Response to Late Comment TR-2; and RTC Section 13.11.3, Response TR-2b **See also OCII Response to Supplemental Appeal Issue TR-2**	A-22 D-148 RTC 13.11-25
3.	The SEIR Fails to Disclose the Severity of the Project's Impacts on Intersections and Freeway Ramps Which the Project Will Cause to Deteriorate to Level of Service (LOS) F.	L-51	Appeal Response, Exhibit A, Issue G.3 Exhibit D, Response to Late Comment TR-6; and RTC Section 13.11.3, Response TR-2f	A-23 D-162 RTC 13.11-48
4.	The SEIR Fails to Identify the Significance and Severity of the Project's Impacts on Intersections Where the Project Will Use Parking Control Officers.	L-54	Appeal Response, Exhibit A, Issue G.4 Exhibit D, Response to Late Comment TR-6; and RTC Section 13.11.3, Response TR-2f	A-23 D-162 RTC 13.11-52
5.	The SEIR's Analysis of the Project's Operational Traffic and Transit Congestion and Delay Impacts Is Legally Flawed.	L-55	Appeal Response, Exhibit A, Issue G.6, Exhibit D, Response to Late Comment TR-1, Exhibit D, Response to Late Comment TR-6; and RTC Section 13.11.3, Response TR-2a, RTC Section 13.11.3, Response TR-2d	A-25 D-143 D-158 RTC 13.11-8 RTC 13.11-41

TABLE 1 (Continued)
RESPONSE TO SUPPLEMENTAL APPEAL TO CERTIFICATION OF FINAL SUBSEQUENT ENVIRONMENTAL IMPACT REPORT SUBMITTED TO THE SF BOARD OF SUPERVISORS NOVEMBER 30, 2015

Appellant Ref. No.	Issue as Stated by the Appellant	Page No. of Appellant Brief	Location of Detailed Response in Appeal Response and/or RTC Document	Page No. of Response
C. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO TRANSPORTATION IMPACTS (Lippe Supplemental Appeal) (cont.)		L-41		
(a)	The DSEIR understates traffic and transit volumes in the PM peak period of 4:00 to 6:00 PM by using "time of arrival" at the Arena as a proxy measurement for "time of travel."	L-55	Appeal Response, Exhibit A, Issue G.6, and Exhibit D, Response to Late Comment TR-4; and RTC Section 13.11.3, Response TR-2d	A-25 D-158 RTC 13.11-41
(b)	The DSEIR only analyzes impacts of weeknight basketball games that start at 7:30 PM, not at other start times closer to the PM peak.	L-59	Appeal Response, Exhibit A, Issue G.6, and Exhibit D, Response to Late Comment TR-1; and RTC Section 13.11.3, Response TR-2a	A-25 D-143 RTC 13.11-8
6.	The SEIR's Analysis of the Project's Cumulative Transportation Impacts Does Not Comply With CEQA.	L-59	Appeal Response, Exhibit A, Issue G.7, and Exhibit D, Response to Late Comment TR-8; and RTC Section 13.11.3, Response TR-2h, and RTC Section 13.11.3, Response TR-2i	A-26 D-169 RTC 13.11-65 RTC 13.11-70
(a)	The 5% threshold of significance for impacts at intersections and freeway ramps operating at LOS E or F violates CEQA.	L-59	Appeal Response, Exhibit A, Issue G.7; and RTC Section 13.11.3, Response TR-2i	A-26 RTC 13.11-70
(b)	The year 2040 baseline for assessing the significance of the Project's cumulative impacts violates CEQA	L-61	Appeal Response, Exhibit A, Issue G.7, and Exhibit D, Response to Late Comment TR-8; and RTC Section 13.11.3, Response TR-2h	A-26 D-169 RTC 13.11-65
(c)	The SEIR's use of a "projection" based approach to the Project's cumulative impacts is misleading	L-62	Appeal Response, Exhibit A, Issue G.7, and Exhibit D, Response to Late Comment TR-8	A-26 D-169
7.	The DSEIR's Methodology for Analyzing Project Impacts on the Transit System Is Legally Flawed.	L-63	Appeal Response, Exhibit A, Issue G.6, Appeal Response, Exhibit A, Issue G.8, Exhibit D, Response to Late Comment TR-4 Exhibit D, Response to Late Comment TR-8 RTC Section 13.11.3, Response TR-2d, and RTC Section 13.11.3, Response TR-2g	A-25 A-27 D-158 D-165 RTC 13.11-41 RTC 13.11-59
(a)	The DSEIR's use of transit screenline and route capacities is misleading and unsupported.	L-63	Appeal Response, Exhibit A, Issue G.8, and Exhibit D, Response to Late Comment TR-8; RTC Section 13.11.3, Response TR-2g	A-27 D-165 RTC 13.11-59
(b)	The SEIR's Cumulative Analysis Fails to Consider and Analyze the Project in the Context of the City's Proposal to Remove the Northern Portion of I-280 as Far South as the Mariposa Street Interchange.	L-66	Appeal Response, Exhibit A, Issue G.7, and Exhibit D, Response to Late Comment TR-8 RTC Section 13.11.3, Response TR-2h	A-26 D-170 RTC 13.11-67

TABLE 1 (Continued)
RESPONSE TO SUPPLEMENTAL APPEAL TO CERTIFICATION OF FINAL SUBSEQUENT ENVIRONMENTAL IMPACT REPORT SUBMITTED TO THE SF BOARD OF SUPERVISORS NOVEMBER 30, 2015

Appellant Ref. No.	Issue as Stated by the Appellant	Page No. of Appellant Brief	Location of Detailed Response in Appeal Response and/or RTC Document	Page No. of Response
C. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO TRANSPORTATION IMPACTS (Lippe Supplemental Appeal) (cont.)		L-41		
8.	The SEIR's Discussion of Transportation Impacts Is Incomplete.	L-66	Appeal Response, Exhibit A, Issue G.16 RTC Section 13.11.3, Response TR-2j	A-32 RTC 13.11-74
(a)	The SEIR fails to disclose the significance or severity of transportation impacts when both a Giants game and a Warriors game occur without the Special Events Transit Service Plan.	L-66	Appeal Response, Exhibit A, Issue G.16, and Exhibit D, Response to Late Comment TR-8 RTC Section 13.11.3, Response TR-2a	A-32 D-141 RTC 13.11-8
(b)	The SEIR fails to disclose traffic delays the Project's office and retail operations will cause on days with Giants games but without Project-related events.	L-68	**See also OCII Response to Supplemental Appeal Issue TR-2**	
9.	The SEIR Impermissibly Characterizes Mitigation Measures for the Project's Transportation Impacts as Components of the Project.	L-69	Appeal Response, Exhibit A, Issue G.11, and Exhibit D, Response to Late Comment PD-1	A-30 D-107
(a)	The SEIR fails to consider other measures to reduce transportation impacts.	L-69	Appeal Response, Exhibit A, Issue G.11, and Exhibit D, Response to Late Comment PD-1	A-30 D-107
(b)	The SEIR fails to identify enforceable mitigation.	L-69	Appeal Response, Exhibit A, Issues G.12, Exhibit A, Issues G.13, and Exhibit D, Response to Late Comment PD-1; RTC Section 13.2.2, Response GEN-1, and RTC Section 13.7.3, Response IO-2 **See also OCII Response to Supplemental Appeal Issue TR-3**	A-30 A-31 D-107 RTC, 13.2-3 RTC, 13.7-3
10.	The SEIR's Identification of Numerous Mitigation Measures is Unlawful for Several Reasons, Including Deferral of Development and Lack of Evidence of Unavoidability.	L-73	Appeal Response, Exhibit A, Issue G.9, Appeal Response, Exhibit A, Issue G.10, and Exhibit D, Response to Late Comment TR-16 RTC Section 13.11.3, Response TR-12d	A-28 A-29 D-192 RTC 13.11-199
(a)	The SEIR Improperly Defers the Development of Mitigation Measures to Reduce the Project's Construction-related Traffic Impacts to less than Significant.	L-81	Appeal Response, Exhibit A, Issue G.10, and Exhibit D, Response to Late Comment TR-14 RTC Section 13.11.11, Response TR-10	A-28 D-189 RTC 13.11-157
11.	The SEIR's Transit and Traffic Analyses Understate Impacts Because They Rely on Outdated Baseline Data.	L-82	Appeal Response, Exhibit A, Issue G.14, Appeal Response, Exhibit A, Issue G.15, and Exhibit D, Response to Late Comment TR-3 RTC Section 13.11.3, Response TR-2c	A-31 A-32 D-153 RTC 13.11-31

TABLE 1 (Continued)
RESPONSE TO SUPPLEMENTAL APPEAL TO CERTIFICATION OF FINAL SUBSEQUENT ENVIRONMENTAL IMPACT REPORT SUBMITTED TO THE SF BOARD OF SUPERVISORS NOVEMBER 30, 2015

Appellant Ref. No.	Issue as Stated by the Appellant	Page No. of Appellant Brief	Location of Detailed Response in Appeal Response and/or RTC Document	Page No. of Response
C. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO TRANSPORTATION IMPACTS (Lippe Supplemental Appeal) (cont.)		L-41		
12.	The SEIR Fails to Consider the Disruptive Impacts of the At-grade Rail Crossing on LOS at 7th/ Mississippi and 16th Street.	L-83	Appeal Response, Exhibit A, Issue G.18, and Exhibit D, Response to Late Comment TR-3 RTC Section 13.11.3, Response TR-2f	A-33 D-163 RTC 13.11-55
13.	The SEIR concludes, without adequate foundation, that the project would not have an adverse impact on emergency access to UCSF hospitals.	L-83	Appeal Response, Exhibit A, Issue G.20, and Exhibit D, Response to Late Comment TR-13 RTC Section 13.11.10, Response TR-9	A-34 D-185 RTC 13.11-148
14.	The New Project Variant disclosed in the FSEIR requires recirculation due to new and more severe significant impacts.	L-83	Appeal Response, Exhibit A, Issue G.22 Exhibit D, Response to Late Comment TR-14	A-35 D-190
D. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO HYDROLOGY, WATER QUALITY, AND BIOLOGICAL IMPACTS (Lippe Supplemental Appeal)		L-84		
1.	The DSEIR Is Not Sufficient as an Informational Document with Respect to the Project's Wastewater Treatment Infrastructure Impacts (Comment UTIL-3).	L-84	Appeal Response, Exhibit A, Issue H.2, and Exhibit D, Response to Late Comment UTIL-1	A-37 D-272
(a)	The Response to Comment UTIL-3 is Inadequate.	L-86	Appeal Response, Exhibit A, Issue H.2, and Exhibit D, Response to Late Comment UTIL-1	A-37 D-272
2.	The DSEIR Is Not Sufficient as an Informational Document with Respect to the Project's Contaminated Wastewater (i.e., Combined Sewage and Stormwater) Impacts on San Francisco Bay Water Quality or Biological Resources (Including from Inadequately Treated Sewage and Toxic Chemicals (e.g., PCB's and Metals).	L-87	Appeal Response, Exhibit A, Issue H.3, and Exhibit D, Response to Late Comments HYD-1, HYD-3, and HYD-4	A-38 D-313, 324, and 328
(a)	The Responses to Comments Hyd-3 - Hyd-6 are Inadequate.	L-93	Appeal Response, Exhibit A, Issue H.3, and Exhibit D, Response to Late Comments HYD-1, HYD-3, and HYD-4	A-38 D-313, 324, and 328
3.	The DSEIR Is Not Sufficient as an Informational Document with Respect to Project Impacts on Biological Resources, Including Wetlands and Wildlife.	L-96	Appeal Response, Exhibit A, Issues H.4, and Exhibit D, Response to Late Comment BIO-1 Exhibit D, Response to Late Comment BIO-3 RTC Section 13.19.2, Response BIO-1	A-40 D-291 D-299 RTC 13.19-3
(a)	The SEIR's exclusion of the Project's impacts on biological resources is erroneous.	L-96	RTC Section 13.19.2, Response BIO-1	RTC 13.19-3

TABLE 1 (Continued)
RESPONSE TO SUPPLEMENTAL APPEAL TO CERTIFICATION OF FINAL SUBSEQUENT ENVIRONMENTAL IMPACT REPORT SUBMITTED TO THE SF BOARD OF SUPERVISORS NOVEMBER 30, 2015

Appellant Ref. No.	Issue as Stated by the Appellant	Page No. of Appellant Brief	Location of Detailed Response in Appeal Response and/or RTC Document	Page No. of Response
D. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO HYDROLOGY, WATER QUALITY, AND BIOLOGICAL IMPACTS (Lippe Supplemental Appeal) (cont.)		L-84		
(b)	The SEIR's exclusion of the Project's impacts on biological resources is erroneous because the lead agency failed to prepare any CEQA document that adequately describes the Project's environmental setting to allow an assessment of the Project's impacts on biological resources.	L-97	Appeal Response, Exhibit D, Response to Late Comment BIO-2 RTC Section 13.19.3, Response BIO-2	D-294 RTC 13.19-11
(c)	There is substantial evidence supporting a fair argument the Project will have a significant adverse effect on biological resources.	L-97	Appeal Response, Exhibit D, Response to Late Comment BIO-3, and Response to Late Comment BIO-4 RTC Section 13.19.2, Response BIO-1 RTC Section 13.19.4, Response BIO-3 RTC Section 13.19.5, Response BIO-4 RTC Section 13.19.6, Response BIO-5 RTC Section 13.19.7, Response BIO-6	 D-299 D-302 RTC 13.19-3 RTC 13.19-13 RTC 13.19-19 RTC 13.19-31 RTC 13.19-43
(d)	The Response to Comment Bio-5 is Inadequate.	L-100	Appeal Response, Exhibit A, Issues H.4, H.5, and Exhibit D, Response to Late Comment BIO-1; and RTC Section 13.19.6, Response BIO-5	A-40, A-41 D-291 RTC 13.19-31
E. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO NOISE IMPACTS (Lippe Supplemental Appeal)		L-102		
1.	The SEIR's Thresholds of Significance Are Unlawful under CEQA.	L-102	Appeal Response, Exhibit A, Issue I.2, and Exhibit D, Response to Late Comment NOI-1	A-45 D-197
(a)	The SEIR's use of regulatory thresholds of the San Francisco Noise Ordinance as its CEQA thresholds of significance is an error of law.	L-102	Appeal Response, Exhibit A, Issue I.2, and Exhibit D, Response to Late Comment NOI-1	A-45 D-197
(b)	The SEIR fails to use thresholds of significance based on human health and welfare.	L-103	Appeal Response Exhibit A, Issues I.3 and I.4, and Exhibit D, Response to Late Comment NOI-1	A-46 D-197
2.	The SEIR's Use of "Ambient plus Increment" Thresholds of Significance for All Noise Impacts Is Legal Error.	L-105	Appeal Response, Exhibit A, Issue I.3, and Exhibit D, Response to Late Comment NOI-1	A-46 D-197
3.	The Construction Refinements and New Project Require Recirculation.	L-106	Appeal Response, Exhibit D, Response to Late Comment NOI-2	D-200

TABLE 1 (Continued)
RESPONSE TO SUPPLEMENTAL APPEAL TO CERTIFICATION OF FINAL SUBSEQUENT ENVIRONMENTAL IMPACT REPORT SUBMITTED TO THE SF BOARD OF SUPERVISORS NOVEMBER 30, 2015

Appellant Ref. No.	Issue as Stated by the Appellant	Page No. of Appellant Brief	Location of Detailed Response in Appeal Response and/or RTC Document	Page No. of Response
A. PROJECT DESCRIPTION (Soluri Meserve Supplemental Appeal)		S-2		
	The SEIR repeatedly presents a shifting and inconsistent project description.	S-2	Appeal Response, Exhibit A, Issue B.1 **Events at Oracle Arena**: RTC Section 13.5.3, Response PD-2 **Two Office Towers**: Appeal Response, Exhibit D, Response to Late Comment GHG-1 **Open Space within the project site**: Appeal Response, Exhibit D, Response to Late Comment WS-1	A-5 RTC 13.5-12 D-260 D-263
B. TIERING (Soluri Meserve Supplemental Appeal)		S-3		
	The SEIR attempts to rely on and tier from EIRs prepared in 1990 and 1998 for Mission Bay Redevelopment planning efforts, yet tiering is not permissible because the Project is different than the project described in the prior EIRs.	S-3	Appeal Response, Exhibit A, Issue C.1 and Exhibit D, Response to Late Comment ERP-2; and RTC Section 13.3.8, Response ERP-7	A-6 D-74 RTC 13.3-22
C. AB 900 AND ADMINISTRATIVE RECORD (Soluri Meserve Supplemental Appeal)		S-5		
	The City has failed to comply with applicable requirements to compile and maintain a complete and adequately indexed Record, and also failed to timely make the Record made available online at the time of release of the DSEIR.	S-5	Appeal Response, Exhibit A, Issue D.1 and Exhibit D, Response to Late Comment AB-1; and RTC Section 13.4.3, Response AB-2	A-6 D-100 RTC 13.4-16
D. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO GREENHOUSE GAS EMISSION IMPACTS (Soluri Meserve Supplemental Appeal)		S-5		
	The SEIR is not sufficient as an informational document with respect to greenhouse gas emission impacts.	S-5	Appeal Response, Exhibit A, Issue J.1 and Exhibit D, Response to Late Comment GHG-1; and RTC Section 13.14.3, Response AB-2	A-48 D-256 RTC 13.14-5
E. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO GEOLOGY AND SOILS IMPACTS (Soluri Meserve Supplemental Appeal)		S-8		
	Special attention to geologic and seismic impacts of the proposed project is necessary because the arena is classified as a public use building (Risk Category 3).	S-8 – S-9	Appeal Response, Exhibit A, Issue K.1 Exhibit D, Response to Late Comment GEO-2 **See also OCII Response to Supplemental Appeal Issue GEO-1**	A-51 D-307
	There is substantial evidence supporting a fair argument that the Project will result in potentially significant Geology and Soils impacts or, alternatively, supplemental review is required under Public Resources Code section 21166.	S-9	Appeal Response, Exhibit A, Issue K.4 Exhibit D, Response to Late Comment GEO-1	A-55 D-304
	Reliance on the 1998 Mission Bay FSEIR is impermissible because the project is different than what was planned under the Mission Bay Plan. The SEIR and FSEIR provide no analysis at all of Geology and Soils impacts.	S-9, S-10 – S-11	Appeal Response, Exhibit A, Issue K.2 Exhibit D, Response to Late Comment GEO-1	A-52 D-304

TABLE 1 (Continued)
RESPONSE TO SUPPLEMENTAL APPEAL TO CERTIFICATION OF FINAL SUBSEQUENT ENVIRONMENTAL IMPACT REPORT SUBMITTED TO THE SF BOARD OF SUPERVISORS NOVEMBER 30, 2015

Appellant Ref. No.	Issue as Stated by the Appellant	Page No. of Appellant Brief	Location of Detailed Response in Appeal Response and/or RTC Document	Page No. of Response
E. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO GEOLOGY AND SOILS IMPACTS (Soluri Meserve Supplemental Appeal) (cont.)		S-8		
	The SEIR impermissibly defers development of mitigation measures necessary to ensure that Geology and Soils impacts are mitigated to a less than significant level.	S-9	Appeal Response, Exhibit A, Issue K.3 Exhibit D, Response to Late Comment GEO-2	A-54 D-307
	The FSEIR fails to adequately respond in good faith to comments regarding the inadequacy of the Geology and Soils impacts.	S-10	Appeal Response, Exhibit A, Issue K.5	A-56
F. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO HAZARDS AND HAZARDOUS MATERIALS IMPACTS (Soluri Meserve Supplemental Appeal)		S-11		
	The Phase II report for the project identified significant additional new contamination in the site soils that was not addressed in the 1998 Risk Management Plan or the 2006 Revised Risk Management Plan. This information was withheld from public disclosure in the NOP/IS and DSEIR and represents new information and/or changed circumstances requiring analysis and disclosure in a recirculated DSEIR.	S-11 – S-12	Appeal Response, Exhibit A, Issue L.3 Exhibit D, Response to Late Comment HAZ-1	A-59 D-336
	The DSEIR did not previously acknowledge the presence of asbestos on-site. The newly discovered presence of asbestos in the on-site soils represents a new significant impact of the project that requires recirculation. Mitigation Measure M-HZ-1b, included for the first time in the IS/NOP, is inappropriate in that it was formulated to address a new potentially significant impact that was not the subject of any EIR.	S-11 – S-12	Appeal Response, Exhibit A, Issue L.4 Exhibit D, Response to Late Comment HAZ-2 **See also OCII Response to Supplemental Appeal Issue HAZ-1**	A-61 D-343
	Screening levels have been updated since the 1999 Risk Management Plan was prepared, and 19 of the chemicals detected in the 2015 Phase II Environmental Site Assessment exceed at least one screening level. The contaminated fill is the result of backfilling activities in approximately 2015, subsequent to preparation of the 1999 Risk Management Plan.	S-12 – S-13	Appeal Response, Exhibit A, Issue L.3 Exhibit D, Response to Late Comment HAZ-1	A-59 D-336
	The 1999 Risk Management plan is outdated and no longer adequate to protect human health. Oversight by the RWQCB is no longer adequate to effectively manage the site for the protection of construction workers and the public.	S-13 – S-14	Appeal Response, Exhibit A, Issue L.2 Exhibit D, Response to Late Comment HAZ-1	A-57 D-336
	The information submitted by the Alliance constitutes substantial evidence of a fair argument that the Project will have a significant adverse effect regarding hazardous materials. In the alternative, per CEQA section 21166 and CEQA Guidelines section 15162, the facts described above constitute a change in circumstances since the 1998 Mission Bay FSEIR involving, and significant new information showing, a new significant effect not previously analyzed in the 1998 FSEIR.	S-14	Appeal Response, Exhibit A, Issue L.1 Exhibit D, Response to Late Comment HAZ-1 Exhibit D, Response to Late Comment HAZ-2	A-56 D-336 D-343

TABLE 1 (Continued)
RESPONSE TO SUPPLEMENTAL APPEAL TO CERTIFICATION OF FINAL SUBSEQUENT ENVIRONMENTAL IMPACT REPORT SUBMITTED TO THE SF BOARD OF SUPERVISORS NOVEMBER 30, 2015

Appellant Ref. No.	Issue as Stated by the Appellant	Page No. of Appellant Brief	Location of Detailed Response in Appeal Response and/or RTC Document	Page No. of Response
G. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO URBAN DECAY IMPACTS IN OAKLAND (Soluri Meserve Supplemental Appeal)		S-14		
	The SEIR is not sufficient as an informational document with respect to urban decay impacts in Oakland.	S-14	Appeal Response, Exhibit A, Issue M.1 to M.3, and Exhibit D, Response to Late Comment GEN-3 RTC Section 13.2.5, Response GEN-4	A-62 to A-63 D-60 RTC 13.2-18
H. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO WIND AND SHADOW IMPACTS (Soluri Meserve Supplemental Appeal)		S-16		
	The SEIR is not sufficient as an informational document with respect to wind and shadow impacts.	S-16	Appeal Response, Exhibit A, Issues N.1 to N.3, and Exhibit D, Response to Late Comment WS-1; RTC Section 13.15.2, Response WS-1	A-64 D-263 RTC 13.15-1
I. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO RECREATION IMPACTS (Soluri Meserve Supplemental Appeal)		S-18		
	The SEIR is not sufficient as an informational document with respect to recreation impacts.	S-18	Appeal Response, Exhibit A, Issue O.1 to O.5 and Exhibit D, Response to Late Comment WS-1; RTC Section 13.16.2, Response REC-1 RTC Section 13.22.10, Response HAZ-9	A-65 to A-66 D-268 RTC 13.16-2 RTC 13.22-37

Fiscal Feasibility

Supplemental Appeal Issue GEN-1

GEN-1. The Supplemental Appeal included a new technical report from Jon Haveman of Marin Economic Consulting dated November 29, 2015 regarding the effect of the project on San Francisco's General Fund, and updates a previous report by the same name and author dated November 2, 2015. (See Soluri Meserve Supplemental Appeal, Exhibit 4)

OCII Response to Supplemental Appeal Issue GEN-1

This response supplements Response to Late Comment GEN-1, Fiscal Feasibility, included in the Appeal Response, Exhibit D, starting on page D-27.

On November 29, 2015, Jon Haveman of Marin Economic Consulting submitted a 24-page report entitled "Warriors Stadium Economics: Uncertainty and Alternatives" as Exhibit 4 to the appellant's brief. The report proposes a biotechnology office alternative and provides the consultant's analysis of its relative economic value to the City.

In the report, Mr. Haveman claims that the arena funding estimates are "far from conservative" and they should exclude $1,709,165 in off-site transient occupancy and gross receipts taxes as "there is no way to accurately estimate NEW off-site revenues" and doing so "represents bad accounting, bad economics, and disingenuous communication with the public on the part of the City." This opinion directly contradicts an opinion that Mr. Haveman has previously expressed with respect to projects in the City. In his last analysis for the City and County during the 34th America's Cup in 2013, Mr. Haveman included IMPLAN modeling of Regional Economic Accounts and Social Accounting Matrices to "construct region-level multipliers that describe the response of the relevant regional economy to a change in demand or production as a result of the activities and expenditures related to the America's Cup."[2] In that earlier document, Mr. Haveman stated, "impact studies operate under the basic assumption that any increase in spending then has three effects: First, there is a direct effect on that industry itself. Second, there is a chain of indirect effects on all the industries whose outputs are used by the industry under observation. Third, there are induced effects that arise when employment increases and household spending patterns are expanded." The vast majority of America's Cup expenditures were necessarily off-site (including the associated revenue in the form of collection of transient occupancy, parking, sales and gross receipts taxes) and were included in his 2011 and 2013 Economic Impact studies. Therefore, while OCII agrees that off-site revenues are more difficult to accurately estimate, they can and regularly *are* estimated, and this is neither uncommon nor "far from conservative."[3]

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[2] "The *America's Cup: Economic Impacts of a Match on San Francisco Bay" prepared by the Bay Area Council Economic Institute (BACEI) and Beacon Economics, 2010. See Appendix B: IMPLAN Input-Output Methodology.*

[3] Some recent examples in San Francisco all of which similarly estimate the economic impact of offsite spending and increases to employment and tax receipts include for the 5M project (Office of Economic Analysis, *5M Project Development Agreement: Economic Impact Report*, November 5, 2015); UCSF (Economic and Planning Systems, Inc., *A Study of Economic and Fiscal Impact of the University of California, San Francisco*, June 2010), 34th America's Cup (*America's Cup: Economic Impacts of a Match on San Francisco Bay,* Bay Area Council Economic Institute (BACEI) and Beacon Economics, 2010); San Francisco Film Office (ICF Consulting, San Francisco Film Cluster Economic Analysis, April 2007); San Francisco Nightlife Businesses (Office of Economic Analysis, The Economic Impact of San Francisco's Nightlife Businesses, March 5, 2012); and the Moscone Convention Center (Office of Economic Analysis, *Certificates of Participation to Fund the Moscone Expansion Project: Economic Impact Report*, January 20, 2012).

The EPS and KMA estimates were constructed under specific City guidance to be conservative wherever uncertainty existed and are based on 205 events per year (20 fewer than the 225 assumed in the Final SEIR). KMA further independently concluded, "it is appropriate to include these off-site revenues for the following reasons:

a. Only demand generated by the event center has been included in the analysis – not demand generated by the 630,000+ square feet of office and retail tenants;

b. The assumed demand factors are based on a conservative application of the findings of the traffic demand study. For example, the transient occupancy tax projections reflect the assumption that only 10% of event attendees are potential overnight visitors and, of that potential, only 50% (or 5% of total attendees) generate hotel demand that is included in the study." (Page 3 of *Peer review of "San Francisco Multi-Purpose Venue Project: Fiscal Impact Analysis – Revenues" prepared by Economic & Planning Systems, Inc.* September 25, 2015)

Furthermore, the City's transportation service and public safety plans are scaled to match the needs of varying attendance levels. Should "attendance fail to materialize as predicted," the City's annual operating costs would be reduced commensurately. If there are fewer events or fewer attendees at the same number of events or "ride sharing or autonomous vehicles take over," the demand for City services would proportionately decrease and the City could downsize its operational plans and deploy fewer bus drivers, transit fare inspectors, police officers, parking control officers and/or street sweepers. The risk to the City and County is the fixed cost of providing the physical infrastructure to enable better transit. The City has proposed to apply one-time revenues of $25.4 million generated by the project to one-time capital costs of $55.3 million to increase the capacity of the transit network in San Francisco's neighborhood of greatest growth. While some of these expenditures are specific to the arena, many of them (new rail vehicles, augmented power, new crossover tracks) arguably would be required — or at least confer a significant benefit on the City — regardless of the final land use type onsite.

The Controller's Office and SFMTA Finance teams are currently working on a plan of finance to cover the remaining $29.9 million in costs, the annual expenditure for which the Budget Analyst estimates to be approximately $2.1 million per year or less than 20 percent of anticipated revenues. Unlike more speculative one-time special events such as the America's Cup or emerging businesses with less certain futures, it is hard to imagine a scenario where an established NBA franchise would not seek to recover its estimated $1.4 billion upfront investment by seeking to boost attendance and thereby fail to generate even 20 percent of anticipated City revenues. Thus, although there is always some uncertainty associated with making assumptions about future revenue, in this instance the Project Sponsor, having made a capital investment of $1.4 billion, will have significant incentive to achieve a reasonable rate of return on that investment and, in the process, to generate revenue for the City.

Mr. Haveman correctly separates the estimated $2.6 million in dedicated and restricted funds for voter-mandated set-asides such as the Children's, Library and Open Space funds and excludes them from estimated revenues. While OCII agrees that these funds are not and should not be eligible to cover arena-related expenses and are therefore separated in the

City's proposal, OCII disagrees that they should be excluded from the calculation of public benefit to the City.

In defense of the argument that project revenues are overestimated, Mr. Haveman points to the EPS Fiscal Feasibility real property transfer tax estimate of $4.2 million which is based on an estimated land sale of $172.5 million and notes that the actual sale was $150 million resulting in a transfer tax of $3.7 million. Mr. Haveman's statement is inaccurate. The land sale closed on October 9, 2015 for $155.1 million and did not include the separate transaction for rights to 132 parking spaces at 450 South Street, an estimated $5 million purchase. Taken together, these two property transfers produce an estimated $4 million transfer tax or less than a 5 percent difference between estimated and actual receipts. Mr. Haveman also points to a reduction in the Stadium Admissions Tax for the San Francisco Giants as evidence that "should the Warriors be granted a similar concession would turn the small surplus into a deficit." However, the voters enacted the Stadium Admissions Tax and the reduction for what is now AT&T Park was authorized at the ballot. For the Warriors to "be granted a similar concession" they would need to mount a campaign and have the voters of San Francisco support a reduction at the ballot or file a legal challenge arguing that the tax somehow does not apply to the arena. The City has no other way to grant a similar concession. The notion that the Warriors will wage such a campaign is purely speculative. OCII has heard nothing indicating that the Warriors have any interest in pursuing such a strategy. Whether such a strategy would succeed is also purely speculative. The City's estimate of Stadium Admissions Tax revenue is based on existing law. Any other approach would be speculative.

Mr. Haveman then concludes that because revenues are overestimated and uses may be underestimated there is a "razor thin margin for benefit" and a significant "likelihood of the City's General Fund running a deficit in any given year." This conclusion is perhaps the single largest error in the analysis. The Mission Bay Transportation Improvement Fund (MBTIF) preserves the aforementioned $2.6 million in dedicated and restricted funds and limits the City's commitment to a Maximum Annual Funding Amount equal to 90 percent of the remaining estimated revenues generated by the project in any given year. The MBTIF requires the Controller to update the Maximum Annual Funding Amount at least every five years, or more often if the Controller deems it necessary. This means that at a minimum, regardless of revenues collected, the City and County will receive all dedicated and restricted funds plus 10 percent of all remaining estimated revenues.

Should costs ever exceed revenues in any given year, responsibility for maintaining a set of quantifiable and enforceable performance standards – maximum auto mode share, transit performance and reliability, bicycle and pedestrian safety – will transfer to the project sponsor as detailed in Mitigation Measures M-TR-2b and M-TR-18. In no circumstance will the City be required to fund any more than the Maximum Annual Funding Amount on City services for the project.

Finally, Mr. Haveman proposes an alternative development that replaces the 18,000-seat arena with 522,000 square feet of biotech space and preserves the proposed 522,000 square feet of office space, 125,000 square feet of retail and 950 on-site parking spaces. This alternative incorrectly assumes that the site includes enough Floor Area Ratio and Prop M

office allocation to accommodate these total square footages. A more realistic alternative, based on real-world experience, would be consistent with the proposal by salesforce.com on the site in 2010. The salesforce.com proposal included 1 million square feet of office and 30,000 square feet of retail (139,000 less total square footage than Mr. Haveman's proposal). A March 2015 analysis by EPS of this non-arena alternative indicates that it would have generated $9.5 million in TIDF (rather than Mr. Haveman's estimated $10.9 million) and $6.7 million in annual revenues. On both accounts, this is approximately half of what the proposed arena project would generate. Mr. Haveman represents that replacing the arena with more space than is available "represents four times more employment for biotechnology than for the Event Center." In addition to overestimating biotechnology employment, Mr. Haveman uses the FTE employment of the Warriors at Oracle Arena as its denominator and excludes the up to 1,100 special event staff that serve concessions, run ticketing, hospitality and security during events. Converting the biotechnology numbers to available square footage and temporary arena staff to FTE equivalents would present a more balanced comparison of the jobs created in each proposal. Finally, Mr. Haveman uses the TIDF estimate as a proxy for one-time capital impacts for transportation but attributes zero operating costs to housing approximately 4,000 office employees. While it is true that office employees would not generate the same peaked arrivals and departures as an arena and therefore would not require an enlarged rail platform or additional parking control officers it is misleading to represent that they will not add any operating costs to the City's transportation or public safety networks particularly as they are more likely to travel during the peak morning and evening commute periods, and predominantly in the same direction as existing commuters.

City's Role in the Permit Process

Supplemental Appeal Issue ERP-1

ERP-1. The Appellant asserts that the City, and not OCII, is the lead agency under CEQA. (See Lippe Supplemental Appeal, pp. 2-3)

OCII Response to Supplemental Appeal Issue ERP-1

The Appellant argues that the CEQA appeal is authorized and governed by Public Resources Code sections 21151(c) and 21177 (from CEQA), not just OCII Commission Resolution No. 33-2015, and, therefore, the Board of Supervisors, must decide whether to certify the SEIR and whether it can make findings required by CEQA Guidelines section 15090(a) based on its consideration and determination of all issues presented using the Board's independent judgment. The Appellant argues also that OCII is a department of the City.

Please see Exhibit D, Response ERP-5 (pages D-90 to D-92) regarding (1) why the Board of Supervisors, acting in its capacity as the governing body of the successor agency to the redevelopment agency, together with OCII, to whom the Board, acting in such capacity, delegated decision-making authority over this project, is a separate legal entity from the City and County of San Francisco, and (2) why CEQA section 21151(c) is inapplicable to the project because the Board of Supervisors, acting in its capacity as the governing body of the successor agency, is not an elected decision-making body for this purpose.

Consistent with CEQA Guidelines section 15090, the Final SEIR was presented to the decision-making body, the OCII Commission, for OCII as the lead agency; and the decision-making body reviewed and considered the information contained in the Final SEIR prior to approving the project at the OCII Commission hearing held on November 3, 2015. As to the action that the Board of Supervisors will take in its capacity as the governing body of the successor agency, should it choose to affirm OCII Commission Resolution 69-2015 certifying the Final SEIR, the Board of Supervisors would adopt the proposed motion affirming the certification, in Board File No. 150991, which includes the findings required by CEQA Guidelines section 15090(a) regarding a determination that the Final SEIR was completed in compliance with CEQA, and the Final SEIR reflects the lead agency's independent judgment and analysis.

Following such action, the Board of Supervisors, acting in its capacity as the governing body of the City and County of San Francisco (and not as the governing body of the successor agency), and as a responsible agency under CEQA, may then choose to take discrete approval actions related to the project. If it does so, as a responsible agency, and in accordance with CEQA Guidelines Section 15096, the Board will adopt CEQA Findings required by CEQA Guidelines Sections 15091(a) and 15093. Those findings will state that the Board has considered the information contained in the final SEIR prior to taking such approval actions.

The Appellant acknowledges that "OCII is a separate legal entity with discrete responsibilities under the redevelopment law." (Brandt-Hawley Comment Letter, p. 1.) The Appellant is incorrect that OCII is a department of the City and, therefore, the Planning Commission and Board should certify the EIR and adopt lead agency findings. A similar argument was rejected in *No Wetlands Landfill Expansion v. County of Marin* (2012) 204 Cal.App.4th 573 (*No Wetlands*). In *No Wetlands*, the court held that the Marin County Environmental Health Services ("Marin EHS") was a separate and distinct agency from Marin County, and independently served as the lead agency for projects subject to its authority. Rather, EHS acted as an agent of the State of California (specifically of the State agency known as "Cal Recycle"). In reaching its holding, the court acknowledged that Marin EHS generally follows the Marin County's Environmental Impact Review Guidelines. Prior to Marin EHS taking action to certify an EIR, Marin EHS also provides the Marin County Planning Commission an opportunity to review such EIRs in an advisory role.

In *No Wetlands*, the interrelationship between Marin County and Marin EHS did not somehow transform the County Board of Supervisors into a lead agency decision-making body. The same is true here. The primary approval actions necessary for the project to proceed - approval of amendments to the Mission Bay South Design for Development, approval of the major phase and basic concept schematic design applications, and approval of secondary use findings by the Executive Director — are all actions related to "land use, development and design approval." OCII is properly acting as the lead agency under CEQA because it is "the public agency which has the principal responsibility for carrying out or approving the project which may have a significant effect upon the environment." (Pub. Resources Code, § 21067.) Under Health & Safety Code, § 34173, subd. (g), "[a] successor agency is a separate public entity from the public agency that provides for its governance and *the two entities shall not merge*." (Emphasis added.) As a separate legal entity from the

City and County of San Francisco, OCII properly prepared, reviewed, and certified the Final SEIR for the project, a project in a redevelopment plan area for which the California Department of Finance ("DOF") has finally and conclusively determined completion of the Mission Bay South Owner Participation Agreement to be an enforceable obligation pursuant to the Redevelopment Dissolution Law. (See Letter, J. Howard, DOF, to T. Bohee, OCII, Re: Request for Final and Conclusive Determination (Jan. 24, 2014), available at: http://www.dof.ca.gov/redevelopment/final_and_conclusive/Final_and_Conclusive_Letters/documents/San_Francisco_F&C_EO_Items_84-88_220_&_226.pdf)

The 1998 Redevelopment Plan for the Mission Bay South Redevelopment Project ("Plan") was jointly certified by the Planning Commission and the San Francisco Redevelopment Agency. But, under California Redevelopment Law, the Board of Supervisors had to approve the establishment of a redevelopment area and new redevelopment plan. (See Health & Safety Code, §§ 33007, 33346, 33351.) Once the ordinance approving the Plan was adopted and filed, the Redevelopment Agency was "vested with the responsibility for carrying out the plan." (Health & Safety Code, § 33372; see also SF Ordinance No. 335-98, § 6 (Nov. 2, 1998) [stating that "the Redevelopment Agency shall be vested with the responsibility for carrying out the [Mission Bay South] Redevelopment Plan"].) Under CEQA, this statutory authorization to carry out the Plan established the Redevelopment Agency as the lead agency for purposes of CEQA implementation. (CEQA Guidelines, § 15051, subd. (a).)

Under Redevelopment Dissolution Law, Health & Safety Code § 34170 et seq., successor agencies "succeed[ed] to the organizational status of the former redevelopment agency" to complete approved enforceable obligations. (Health & Safety Code, § 34173, subd. (g).) Although the dissolution of redevelopment agencies precludes the establishment of new redevelopment areas, the Redevelopment Dissolution Law provides successor agencies with the state authority to implement redevelopment plans for the purpose of completing those projects that survived the dissolution process. The Board of Supervisors, acting as the governing body of the separate legal entity that is the successor agency to the former San Francisco redevelopment agency, has delegated to the OCII Commission authority to:

> "approve all contracts and actions related to the assets transferred to or retained by the Successor Agency, including without limitation, the authority to exercise land use, development and design approval authority for [Mission Bay]."
>
> (SF Ordinance No. 215-12, Section 6.)

The Plan confirms the Redevelopment Agency's primary authority for implementation and provides the City with the limited role of cooperation with the Agency. The Plan unequivocally establishes that the Redevelopment Agency is the decision-maker with the "powers, duties, and obligations to implement and further the program generally formulated in this Plan for the redevelopment, rehabilitation, and revitalization of the Plan Area." (Plan, Section 101; see also id. at Section 700 ["Except as otherwise specified in Section 600 … [which provides that 'The City shall aid and cooperate with the Agency in carrying out this Plan . . .'], the administration and enforcement of this Plan, including the preparation and execution of any documents implementing this Plan, shall be performed by the Agency"].) Thus the OCII, as the successor to the Redevelopment Agency, is the agency with principal responsibility under CEQA for carrying out or approving the GSW Event Center project.

Transportation

Supplemental Appeal Issue TR-1

TR-1. The Supplemental Appeal included a new technical report from Dan Smith of Smith Engineering dated November 17, 2015 regarding the proposed modification to the Muni UCSF T Third Station. (See Lippe Supplemental Appeal, Exhibit 11)

OCII Response to Supplemental Appeal Issue TR-1

The Appellant states that the light rail platform operations assessment in the SEIR is flawed, and that the Muni UCSF/Mission Bay Station Variant would result in significant construction-related transportation impacts.

Impact TR-4 on SEIR pp. 5.2-142 – 5.2-143 presents the assessment of pre-event and post-event operations at the Muni UCSF/Mission Bay Station northbound and southbound platforms. The analysis was conducted in coordination with SFMTA based on its experience with pre-event and post-event conditions at AT&T Park.

The platforms are of standard width as their dimensions are similar to those found elsewhere on the T Third line. The quantitative analysis of the southbound platform was based on standard transit station capacity methodology and indicated that adequate room to accommodate passengers for pre-event conditions is available on the platform during a large event, at crowded but acceptable service levels. Passengers in the light rail vehicle are not trapped, as stated by the commenter, in the event that a train operator does not open the doors until the queue on the platform and ramp is dissipated. This is standard operating practice; for example, in the Market Street tunnel during peak passenger demand periods light rail vehicles wait, when necessary, for the preceding train to depart prior to pulling all the way into the station and opening the doors. Improvement Measure I-TR-4: Operational Study of the Southbound Platform at the T Third UCSF/Mission Bay Station was proposed as an improvement measure to further study platform operations and determine the feasibility and efficacy of enlarging the southbound platform to provide additional queuing area for passengers on the platform.

The Appellant's assertion that SFMTA PCOs would be unable to manage passenger flows is not supported. The techniques that would be employed pre-event and post-event at the proposed project site are based on extensive experience, and numerous discussions and assessment by the SFMTA staff that are responsible for managing pedestrians, vehicles and transit at AT&T Park and for the numerous special events in San Francisco. Mr. Smith's disagreement with this conclusion is noted. Nevertheless, SFMTA's experience shows that PCOs are effective at managing passenger flow.

As described on SEIR p. 5.2-143, with the extension of the northbound platform, two, two-car light rail trains would be accommodated at the platform. In addition, the existing painted median area adjacent to the northbound tracks between South and 16th Streets would be raised 6 inches, which would allow for additional staging of northbound light rail vehicles south of the northbound platform. The SEIR does not state that the southbound platform would be used as a staging point for light rail vehicles heading north.

Subsequent to the Draft SEIR, SFMTA engineers, including those reviewing the transit analysis included in the Draft SEIR, identified a different approach that would not require the extension of just the northbound platform; and this option is incorporated into the Final SEIR as the Muni UCSF/Mission Bay Station Variant. The fact that the variant may be preferable to extension of the northbound platform only, does not invalidate the analysis within the SEIR, which determined Muni transit impacts related to light rail platform operations to be less than significant.

Impact analysis of the Muni UCSF/Mission Bay Station Variant is presented on SEIR pp. 12-23 to 12-34 at an equal level of detail as the proposed project. The addition of the Muni UCSF/Mission Bay Station Variant does not result in new or substantially more severe construction-related transportation impacts than previously disclosed in the SEIR.

As indicated on SEIR pp. 12-25 to 12-26, during construction activities that involve track work or staging within the track area, motor coach substitution would be proposed for a portion of Muni's T Third light rail service. "Shoofly trackage around the entire construction site," as suggested in the comment, is not identified in the SEIR as a technique to maintain light rail service during construction of the platform, and would not be constructed. Furthermore, as stated on SEIR p. 12-25, construction activities would not be continuous for the entire period of 14 months, and would be limited to shorter periods of construction, generally on weekends during periods of low passenger demand and when traffic volumes on Third Street are lower. Temporary suspension of rail service and replacement with bus service in order to improve future Muni operations is standard practice. For example, the recent Central Subway Fourth and King Streets track installation project to connect the existing Muni T Third to the under-construction Central Subway, included a temporary bus substitution for the T Third light rail between the Sunnydale and Embarcadero stations. The SEIR determines that the Muni UCSF/Mission Bay Station Variant's construction-related transportation impacts would be similar to the proposed project, and not the same as stated by the commenter. While construction of a single center platform as part of the variant would involve more construction activities than the extension of the northbound platform as part of the proposed project, impacts on the transportation network would be similar, and would be less than significant.

The Appellant's allegations related to analysis of the proposed project's construction-related transportation impacts were addressed in RTC document Chapter 13, Section 11, Response TR-10 and Appeal Response Exhibit D, Late Comment Response TR-14.

Supplemental Appeal Issue TR-2

TR-2. The Supplemental Appeal included a new technical report from Dan Smith of Smith Engineering dated November 28, 2015 regarding walking distance to the proposed project, key intersection on emergency routes omitted from the analysis, severity of impact issues in the 16th Street corridor, failure to consider a critical scenario, and effect of at-grade rail crossing at 16th Street. (See Lippe Supplemental Appeal, Exhibit 12)

The Appellant also raised the issue regarding failure to include a scenario when both a Giants game and a Warriors game occur without the Special Events Transit Service Plan. (See Lippe Supplemental Appeal, page 68)

OCII Response to Supplemental Appeal Issue TR-2

This response addresses each of the issues raised in the November 28, 2015 Smith Engineering technical report.

Walking Distance

The Appellant refers to SEIR RTC Response TR-2b on SEIR pp. 13.11-27 – 13.11-28, and writes that the response states "people who work downtown would walk to the Warriors arena because people who work downtown tend to walk to AT&T Park." This is not accurate. The commenter has apparently misunderstood references to the fact that people walk from downtown to AT&T Park.

RTC Response TR-2b on SEIR p. 13.11-27 specifically states "Modes of travel and place of origin surveys of basketball game attendees conducted by the SF Giants, as well as available parking occupancy surveys, suggest that many of those game attendees that drove to work at their jobs in the Financial District and SoMa areas, tend to walk, ride transit, or take a taxi to AT&T Park, leaving their cars at their commuter parking locations in order to avoid the evening commute congestion that typically occurs near I-80 and AT&T Park, and having to re-park their cars at game-day rates. It is likely that a similar condition would occur with the proposed project, with many of those working in downtown riding Muni or special event shuttles, and taking taxis or TNC vehicles, such as Uber or Lyft to the event center, rather than driving and having to park again with limited space availability." This RTC Response TR-2b does *not* predict that people will walk from downtown to the proposed event center.

Thus, to summarize, Response TR-2b states that SF Giants game attendees who work in the Financial District and SoMa areas currently walk, ride transit, or take a taxi to AT&T Park, and further the response states that that event center attendees who work in the Financial District and SoMa areas would ride Muni or the special event shuttles, or take taxis or TNC vehicles (and therefore, would not walk). Thus, SEIR pp. 13.11-27 and 13.11-28 do not state that event attendees that work in downtown would walk to the event center.

The Appellant provides copious information regarding walking distances for non-event related travel, and primarily between mixed-use development and transit stations. As noted in RTC document Response TR-13, studies of sport facilities and special events have documented that most attendees will walk up to about 0.3 miles between their parking location and the nearest entrance to their destination, with even greater distances being acceptable at high attendance events. This acceptable greater walking distance for event attendees is supported by field observations of many SF Giants game attendees who currently walk along The Embarcadero or SoMa streets between AT&T Park and the Embarcadero Muni/BART station (a distance of approximately 1.2 miles), or those who currently park at the project site and then walk to AT&T Park (a distance of about 0.6 miles). Because OCII has not assumed that people will walk from downtown to the event center, the inclusion of the walking distance information does not affect any of the travel demand assumptions, impact analyses, or impact determinations contained in the SEIR.

Key Intersections on Emergency Routes Omitted from the Analysis

The Appellant states that intersections on The Embarcadero are along emergency routes to UCSF facilities and should have been included as part of the traffic analysis in the SEIR, and

cites information obtained through UCSF's website to support this claim. The UCSF Medical Center website referred to in the comment provides a link for Google Maps for directions to the hospital from an address, and does not provide a UCSF-determined "primary recommended route" or " advised emergency access route" as stated in the comment. Thus, the Appellant's claim that The Embarcadero is an emergency access route to the UCSF hospitals, and therefore should be analyzed in the SEIR is not supported by UCSF data.

The issue related to analysis locations is addressed in RTC document Chapter 13, Section 11, Response 2b and Appeal Response Exhibit D, Late Comment Response TR-2.

Severity of Impact Issues in the 16th Street Corridor

The issue related to presenting levels of severity for LOS F conditions is addressed in RTC document Chapter 13, Section 11, Response 2f and Appeal Response Exhibit D, Late Comment Response TR-6. The SEIR accurately presents the project-related traffic impacts at the intersections along the 16th Street corridor.

SEIR Fails to Consider a Critical Scenario

The Appellant states that traffic impacts at the intersection of Seventh/Mississippi/16th were not disclosed because the SEIR does not analyze the existing plus No Event scenario with an overlapping SF Giants evening game at AT&T Park. The No Event scenario includes the travel demand associated with the proposed office, retail and restaurant uses with no event at the project site, and was analyzed for the weekday p.m. peak hour as it represents the peak period during which background traffic volumes and travel demand associated with the office uses would be greatest. The SEIR identified project-specific traffic impacts at the intersection of Seventh/Mississippi/16th during the weekday p.m. peak hour for the existing plus project conditions without a SF Giants evening game at AT&T Park for the No Event, Convention Event and Basketball Game scenarios. The SEIR also identified a project-specific impact at this intersection during the weekday p.m. peak hour for the existing plus Basketball Game scenario with an overlapping SF Giants evening game at AT&T Peak. Thus, an additional scenario of existing plus No Event scenario with an overlapping SF Giants evening game at AT&T Park is not needed to confirm what the SEIR discloses – that the proposed project would result in a significant traffic impact at the intersection of Seventh/Mississippi/16th during the weekday p.m. peak hour without or with an overlapping SF Giants evening game. Having looked at a common scenario with a higher level of impact, OCII was not also required to look at an additional scenario with a lesser level of impact.

Effect of At-Grade Rail Crossing of 16th Street

The issue related to presenting levels of severity for LOS F conditions were addressed in RTC document Chapter 13, Section 11, Response TR-2f and Appeal Response Exhibit D, Late Comment Response TR-3. The SEIR accurately presents the project-related traffic impacts at the intersections along the 16th Street corridor.

Supplemental Appeal Issue TR-3

TR-3. The Appellant states that the SEIR fails to identify enforceable mitigation, related primarily to the funding of transportation improvements. (See Lippe Supplemental Appeal, page 69)

OCII Response to Supplemental Appeal Issue TR-3

The issue related to funding of the Muni Special Event Transit Service Plan and mitigation funding is discussed, as shown in Table 1, in RTC document Response GEN-1a and GEN-1b, Appeal Response Exhibit A, Issue G.12, and Exhibit A, Issue G.13.

On November 3, 2015, the SFMTA Board of Directors unanimously adopted the Resolution adopting the CEQA findings, approving the capital improvements and operating commitments, recommending that the Board of Supervisors adopt the Mission Bay Transportation Improvement Fund; and on November 9, 2015, the Board of Supervisors' Budget and Finance Committee unanimously recommended the ordinance creating the Mission Bay Transportation Improvement Fund.

The Appellant claims that the funding estimates are "far from conservative" and should exclude off-site transient occupancy, gross receipts and parking taxes. However, the Economic & Planning Systems and Keyser Marston Associates estimates are based on 205 events per year (20 fewer than the 225 assumed in the Final SEIR), and were constructed under specific City guidance to be conservative wherever uncertainty existed. Keyser Marston Associates further independently concluded that it is appropriate to include these off-site revenues for the following reasons:

a. Only demand generated by the event center has been included in the analysis – not demand generated by the 630,000+ square feet of office and retail tenants.

b. The assumed demand factors are based on a conservative application of the findings of the travel demand estimates. For example, the transient occupancy tax projections reflect the assumption that only 10 percent of event attendees are potential overnight visitors and, of that potential, only 50 percent (or 5 percent of total attendees) generate hotel demand that is included in the study." (Page 3 of Peer review of "San Francisco Multi-Purpose Venue Project: Fiscal Impact Analysis – Revenues" prepared by Economic & Planning Systems, Inc. September 25, 2015)

c. Furthermore, the City's transportation service and public safety plan is designed to meet the needs of varying attendance levels. Should "attendance fail to materialize as predicted" as suggested by the Appellant, the City's annual operating costs will be reduced commensurately leaving only the fixed costs of providing the physical infrastructure (four new light rail vehicles, T Third platform expansion, etc.). The Controller's Office and SFMTA Finance teams are currently working on a plan of finance to cover these costs, the annual expenditure for which is estimated to be approximately $2.7 million/year or less than twenty percent of anticipated revenues. Unlike more speculative one-time special events or untested emerging businesses, it is hard to imagine a scenario where an established NBA franchise would not seek to recover its estimated $1.4 billion investment by boosting attendance and therefore fail to generate even 20 percent of anticipated City revenues.

Mitigation Measure M-TR-18: Auto Mode Share Performance Standard and Monitoring was developed specifically to address impacts of the proposed project if for some unknown reasons in the future, the City is unable to implement the Muni Special Event Transit Service Plan. As part of this mitigation measure, the project sponsor would be responsible for

implementing TDM measures intended to reach an auto mode share performance standard for different types of events. This mitigation measure provides the flexibility for the project sponsor to implement feasible measures necessary to meet the identified performance standards, and it identifies the monitoring and reporting program for assessing compliance. The performance standard itself must be achieved; therefore, the mitigation measure is an enforceable obligation on the project sponsor if all or a portion of the Muni Special Event Transit Service Plan is not provided.

Air Quality

Supplemental Appeal Issue AQ-1

AQ-1. The Appellant suggests that an appropriate ozone precursor standard would be the Best Available Control Technology (BACT) trigger levels. (See Lippe Supplemental Appeal, page 7)

OCII Response to Supplemental Appeal Issue AQ-1

The Appellant's disagreement over the selected significance threshold is noted; however a lead agency is vested with discretion to choose the proper significance threshold and does not violate CEQA when it chooses to reject different thresholds proposed by a project opponent. (See *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 335-336 ("*CREED*") [rejecting petitioners' argument that the City erred by not applying a different significance threshold]; C*alifornia Oak Foundation v. Regents of University of California* (2010) 188 Cal. App. 4th 227, 282 [rejecting petitioner' s argument that a lead agency used the incorrect significance threshold in evaluating the biological significance of tree impacts]; *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal. App. 4th 1341, 1356-1357 [upholding a biological significance threshold used by Riverside County as supported by substantial evidence].)

The Appellant states that the New Source Review (NSR) standards are not appropriate CEQA significance thresholds. The Appellant also states that using the Best Available Control Technology (BACT) trigger levels in the NSR standards would be an appropriate threshold. The BACT trigger levels are lower than NSR standards; under permitting regulations adopted by the Bay Area Air Quality Management District (BAAQMD), BACT is required when ozone precursor (ROG or NOx) emissions exceed 10 pounds per day.

OCII disagrees with the Appellant's assertion. The significance criteria for ozone precursors used in the SEIR are based on standards recommended by the BAAQMD and are used for CEQA review of projects throughout San Francisco and the Bay Area. Moreover, BAAQMD advises that, "…utilization of the BACT Requirements as thresholds of significance for CEQA would result in achieving considerably more emission reductions from land use development than is needed to achieve air quality goals."[4] Thus, the BACT trigger levels are not appropriate CEQA significance thresholds because projects that emit ozone precursors at or above those levels would not necessarily violate air quality standards, contribute to an

[4] BAAQMD. *Revised Draft Options and Justification Report, California Environmental Quality Act Thresholds of Significance*. October 2009. Page 26.

existing or projected air quality violation, or result in a considerable net increase in criteria air pollutants in a non-attainment region. For this reason, NSR standards continue to be appropriate thresholds for purposes of determining whether air pollutant emissions are significant, as recommended by BAAQMD.

Supplemental Appeal Issue AQ-2

AQ-2. The Appellant asserts that Mitigation Measure M-AQ-1 does not comply with CEQA legal requirements. (See Lippe Supplemental Appeal, page 12)

OCII Response to Supplemental Appeal Issue AQ-2

OCII responded to all aspects of this issue in Appeal Response, Exhibit D, Response to Late Comment AQ-2 regarding mitigation of construction-related impacts (pp. D-216 to D-220). As part of this response, the Appeal Response included examples of compliance submittals to the SF Planning Department pursuant to a construction emissions minimization plan (CEMP). Further examples of CEMPs as additional documentation of the monitoring and enforcement of construction equipment mitigation requirements include the following projects: 510-520 Townsend Street project, 101 Polk Street project, and Town School project.[5] The record thus shows that Mitigation Measure M-AQ-1 is a reasonable and effective approach towards addressing the project's construction-related air pollutant emissions.

Supplemental Appeal Issue AQ-3

AQ-3. The Appellant asserts that BAAQMD announced that it would not participate in Mitigation Measure M-AQ-2b, emission offsets, because the City and project sponsor refuse to agree to BAAQMD's offset fees. (See Lippe Supplemental Appeal, page 19)

OCII Response to Supplemental Appeal Issue AQ-3

The Appellant misinterprets the BAAQMD letter dated November 2, 2015 as well as the City and project sponsor's intentions. As stated in Appeal Response, Exhibit D, Response to Late Comment AQ-1 (page D-207), the BAAQMD letter states that the mitigation fee identified in the Draft SEIR is insufficient to achieve the required reduction of 17 tons per year of ozone precursors; the letter states that, in BAAQMD's view, the amount of the fee should be $620,922 in order to achieve this reduction. The letter thus indicated that paying the fee is an appropriate form of mitigation; the difference of opinion focuses solely on the amount of the fee. In response to the BAAQMD letter, Mitigation Measure M-AQ-2b has been amended such that the amount of the BAAQMD offset fee is not capped. This revision will enable the project sponsor to continue discussions with BAAQMD to determine the amount of the appropriate fee. If BAAQMD and the project sponsor are unable to reach agreement, then this fee will not be paid to BAAQMD. If this were to occur, Mitigation Measure M-AQ-2b provides the project sponsor with a second option to directly implement an emissions offset project as an alternative to entering into an agreement with the BAAQMD.

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[5] Construction Emissions Minimization Plan information on 510-520 Townsend Street project, 101 Polk Street project, and Town School project.

In order to investigate the feasibility of Mitigation Measure M-AQ-2b, OCII and its consultant have conducted further research as to the appropriateness of the identified offset fee and BAAQMD's current practices regarding emissions reduction credits. The results indicate that the identified offset fee is adequate and appropriate, and that emissions reductions credits are available to cover the project. In particular, this investigation shows that the offset fee identified in Mitigation Measure M-AQ-2b is well above the current market prices for such offsets.[6]

Supplemental Appeal Issue AQ-4

AQ-4. The Supplemental Appeal included a new technical report from Paul Rosenfeld and Jessie Jaeger of SWAPE dated November 20, 2015 regarding the adequacy of the health risk assessment. (See Lippe Supplemental Appeal, Exhibit 1)

The SWAPE report includes assertions that the SEIR's reliance on "the ambient cancer risk in the most pristine portions of the Bay Area" to support its chosen threshold of significance for TACs is incoherent and inconsistent with CEQA. (See Lippe Supplemental Appeal, page 24)

OCII Response to Supplemental Appeal Issue AQ-4

This response address the following issues raised by the SWAPE report: adequacy of project health risk assessment; inclusion of all local sources in cumulative analysis; regional sources of toxic air contaminants; updated health risk assessment guidelines; and health risk at the Appellant-proposed alternative site near Pier 80.

Adequacy of Project Health Risk Assessment

The Appellant asserts that the RTC document failed to assess the project-specific health risks. This statement is incorrect. The FSEIR includes project-specific health risk assessments for both the proposed project and the Muni Center Platform Variant. The RTC document in fact tabulates the results of the project-specific health risk assessment (HRA) in Tables 5.4-10, Revised, and 5.4-11, Revised, (pages 14-120 and 14-121) and Appendix AQ2 (Refined Table 6.1-6 and Refined Table 6.1-8). For the Muni Variant, the results of the HRA are reported in RTC document Chapter 12 Table 12-5. Project-specific impacts are disclosed and supported by the documentation in Appendices AQ and AQ2 of the Draft SEIR and RTC document.

The Appellant states that the RTC document does not reduce the project's health risk impacts to "below applicable significance thresholds," going on to state that the RTC document incorrectly relies on a cumulative threshold of significance. Again, the Appellant's assertions are incorrect. As stated in the FSEIR, health risk impacts surrounding the project site are below the health risk threshold of significance, (see Tables 5.4-10, Revised, and 5.4-11, Revised, (pages 14-120 and 14-121), and Appendix AQ2, Refined Table 6.1-6 and Refined Table 6.1-8). Response AQ-1c of the RTC document addresses the Appellant's comments concerning the threshold used in the analysis, as does Response to Late Comment AQ-3 in the OCII Appeal Response, Exhibit D.

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[6] Michael Keinath and Catherine Mukai, Ramboll Environ. Memo to Paul Mitchell, ESA, regarding Ozone Precursor Offsets in the BAAQMD, dated December 3, 2015.

The Appellant states the project-specific threshold of 10 in one million increased cancer risk in the BAAQMD's May 2011 Draft CEQA guidance should have been used as a relevant threshold of significance. The BAAQMD draft CEQA guidance actually recommends two health risk thresholds: "Compliance with a Qualified Community Risk Reduction Plan OR Increased cancer risk of >10.0 in a million[7]." The significance thresholds used in the FSEIR were developed as part of San Francisco's preparation of a qualified Community Risk Reduction Plan (CRRP). While that effort is ongoing, the City-wide HRA modeling that was completed as part of the CRRP provides recent and comprehensive health risk information at a level of detail not available in most jurisdictions and is appropriate for use in CEQA documents in San Francisco. BAAQMD collaborated with the City in performing this modeling.

The significance thresholds used in the Final SEIR are the same as those used in the CRRP and have been developed with staff at BAAQMD and the San Francisco Department of Public Health. Furthermore, the City has proceeded with implementing early actions in the CRRP, namely updates to Health Code Article 38 (requiring enhanced ventilation; amended in 2014) and the Clean Construction Ordinance (requiring public projects to use the cleanest available construction equipment; amended in 2015). These legislative initiatives use the standards in the CRRP as a basis for determining when additional health protective actions are necessary. Thus, the CRRP's standards have been codified in City regulations used to protect the public from the adverse health effects of air pollution and are appropriate for use in the Final SEIR.

SF Planning has consistently used the CRRP standards as the threshold of significance under CEQA since approximately 2013.[8] The EIRs cited by the commenters are from before the advent of the City-wide HRA and development of CRRP standards. Because these EIRs predate the City's development of a City-wide HRA, these EIRs rely on the BAAQMD draft CEQA guideline numerical risk thresholds for individual projects (i.e., increased cancer risk of >10.0 in a million). The San Francisco City-wide HRA did not exist for the two EIRs cited by the commenters; therefore, it was impossible to apply the same methodology to those projects.

Inclusion of All Local Sources in Cumulative Analysis

The Appellant reiterates an earlier comment that the project HRA does not include all local mobile sources or foreseeable sources of particulate matter, particularly traffic from a full build-out of Mission Bay. The Appellant is mistaken. Build out of the Mission Bay Redevelopment Plan is accounted for in the CRRP. As part of the San Francisco City-wide CRRP, BAAQMD and the San Francisco Department of Public Health evaluated two time horizons, 2014 and 2025 and evaluated traffic based on the San Francisco County Chained Activity Modeling Process (SF- CHAMP) model. SF-CHAMP, the official travel forecasting tool for San Francisco, is an activity-based model that predicts future travel patterns for the city. The SF-CHAMP model files used to estimate traffic for the CRRP include activity for a number of large, foreseeable projects in the south-eastern part of the City, including Pier 70,

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7 Bay Area Air Quality Management District, *CEQA Air Quality Guidelines*, May 2011, page2-2.

8 See: 320-400 Paul Avenue Internet Services Exchange Final Mitigated Negative Declaration (Planning Department Case No. 2013.0522E), 200 Paul Avenue Final Mitigated Negative Declaration (Planning Department Case No. 2012.0153), Sunnydale-Velasco HOPE SF Master Plan Final EIR (Planning Department Case No. 2010.0305E), and 5M Project Final EIR, 925-967 Mission Street (Planning Department Case No. 2011.0409E).

Mission Rock, Candlestick Point – Hunter's Point Ship Yard and full buildout of Mission Bay. As such, the traffic identified by the comment has been explicitly evaluated and incorporated into the cumulative health risk analysis.

The project-specific HRA relies on the 2014 CRRP database for cumulative contributions. The 2014 database is the conservative choice for cancer risk, as the cumulative cancer risk declines over time in the CRRP. This is described more fully in the CRRP technical support documentation. $PM_{2.5}$ concentrations from on-road exhaust will decline over time as well, while $PM_{2.5}$ concentrations from fugitive emissions will increase over time. However, the changes to $PM_{2.5}$ concentrations in the 2025 CRRP—which includes additional on-road trips in Mission Bay and reasonably foreseeable projects—are not large enough to change the significance of the project $PM_{2.5}$ impact. The City also conducted modeling of 2040 roadways. Using the 2040 roadway results, changes to cancer risk and $PM_{2.5}$ impacts are not large enough to change the significance of the Project cancer risk or $PM_{2.5}$ impacts.

Therefore, the project HRA includes sources within the zone of influence and foreseeable project as explained in Appeal Response F.6(e) of the OCII Appeal Response, Exhibit A. The project HRA and the San Francisco City-wide HRA encompass the sources of air pollution determined to be relevant and in the zone of influence in preparation of the San Francisco CRRP. The methodology used to perform the project cumulative HRA is consistent with the methodology of the San Francisco City-wide CRRP.

Regional Sources of Toxic Air Contaminants

The Appellant states that the analysis of cumulative health risk impacts is inadequate because it does not consider regionally-transported contributions of risk.

As noted by the Appellant, the $PM_{2.5}$ concentrations do include the modeled effects of local sources of $PM_{2.5}$ as well as the ambient background of $PM_{2.5}$. The Appellant fails to indicate that there are both state and federal ambient air quality standards for $PM_{2.5}$, which provide a well-defined target for evaluation of a cumulative impact.

Unlike for $PM_{2.5}$, there is no state or federal ambient air quality standard for cumulative risk. As such, the BAAQMD relied upon federal risk assessment guidance, among other factors, in setting the cumulative risk threshold of 100 in a million, upon which the FSEIR's significance threshold is based.

As stated on page 13.13-27 of the RTC document, when BAAQMD developed its 100 in one million cumulative criterion characterized in its CEQA Air Quality Guidelines as reflective of air quality in a "pristine" portion of the Bay area, it was originally designated as its "Point Reyes" approach,[9] reflecting the air quality in this National Seashore that the U.S. Park Service identifies as a Class I Park and wilderness area. Consequently, even such pristine areas as Point Reyes National Seashore can have a sizeable background cancer risk, largely due to cumulative global atmospheric transport.

[9] BAAQMD, Bay Area Air Quality Management District CEQA Guidelines Public Workshop Presentation, "Developing Thresholds of Significance", Slide 10, February 26, 2009.

As stated on page A-16 of the Appeal Response, the SEIR's cancer risk threshold was developed in close coordination with BAAQMD staff and is based not solely on EPA regulations for what constitutes an "acceptable risk" level, but also on regional modeling demonstrating that the threshold of 100 per one million population reflects the air quality in the most pristine portions of the Bay Area (e.g., Point Reyes).

Thus, the City's health risk assessment threshold of 100 in one million considers the regional contribution of risk in a pristine location relative to the contributions from definable local sources for the purposes of a project-level analysis outside of an Air Pollution Exposure Zone, such as the project site. The fact that this threshold is derived from regional contributions does not preclude its use as a tool for assessing localized impacts under CEQA.

Updated Health Risk Assessment Guidelines

The Appellant states that there are 2015 guidance documents from the Cal/EPA Office of Environmental Health Hazard Assessment (OEHHA), and that the Health Risk Assessment should adhere to this guidance. This point is the same as made in the Appellant's comments on the Draft SEIR and RTC document and is addressed in Response AQ-5 of the RTC document and Appeal Response F.6(f) of the OCII Appeal Response, Exhibit A. Response to Late Comment AQ-3 in the OCII Appeal Response Exhibit D notes that BAAQMD is responsive to the amplified health effects on child receptors and has required the use of an Age Sensitivity Factor in health risk assessments since 2010. The project HRA uses Age Sensitivity Factors (ASF) to account for the increased sensitivity of child receptors. It is not clear whether SWAPE has considered the use of the ASF in the RTC document in preparing the revised tables on page 9 of its letter.

The Appellant states that the data required to update the cumulative analysis to its satisfaction were not available. OCII disagrees. The *Technical Support Documentation* for the San Francisco CRRP data is well documented and publicly available, and the database itself is available upon request from the San Francisco Planning Department.

Pier 80 Alternative, Health Risk

SWAPE notes that the Mission Bay Alliance identified an alternative site, the Pier 80 Alternative, which should be considered since it would "substantially reduce environmental impacts." This site and the surrounding area is primarily in an Air Pollutant Exposure Zone (APEZ). SWAPE claims that this site should be developed preferentially due to lack of nearby sensitive receptors. However, SWAPE admits that it did not perform a thorough sensitive receptor search, stating, "[w]e relied upon resources provided by the San Francisco Planning Department to determine if there were existing sensitive receptors within the area." In a brief search of the area, two condominium complexes were found to be directly north of the Pier 80 Alternative site. The closest is directly across the street from the site on the northeast corner of the intersection at Cesar Chavez Street and Indiana Street (1588 Indiana Street), and the other is another block north at the southeast corner of the intersection of 25th Street and Indiana Street. Both of these locations are within an APEZ, which means that either the modeled cancer risk already exceeds 100 in one million or the modeled $PM_{2.5}$ concentration is higher than 10 micrograms per cubic meter.

SWAPE also states that the "the entire site is not located within an APEZ," and notes that the arena could be built primarily in the non-APEZ area. However, the emissions of a development at this site would affect the surrounding area, most of which is considered an APEZ. Development in this region would cause further impacts to residents that are already in a health vulnerable area. Therefore, OCII disagrees with SWAPE's statement that "the proposed alternative would have a substantially reduced health impact."

For a discussion of other reasons why OCII rejected this alternative location proposed by the Appellant from further consideration, see Appeal Response, Exhibit D, Response to Late Comment ALT-1, page D-349.

Greenhouse Gases Emissions

Supplemental Appeal Issue GHG-1

GHG-1. The Appellant repeats assertions that the greenhouse gases emissions impact analysis in the SEIR is not adequate. (See Soluri Meserve Supplemental Appeal, pp. 5-8)

OCII Response to Supplemental Appeal Issue GHG-1

The Supplemental Appeal materials do not raise any issues concerning the greenhouse gas (GHG) analysis that have not already been addressed by OCII. (See Table 1 of this Supplemental Appeal Response for location of relevant responses.) However, OCII notes that a recent California Supreme Court decision, *Center for Biological Diversity v. California Department of Fish and Wildlife* (*CBD v. DFW*), provides lead agencies with further guidance on evaluating GHG emissions pursuant to CEQA. Specifically, *CBD v. DFW* addresses DFW's determination that the GHG impacts caused by an approximately 12,000 acre development in Southern California accommodating approximately 58,000 new residents in a "new town" were less than significant under DFW's selected significance threshold. As explained herein, this decision does not affect the validity of OCII's Final SEIR.

In *CBD v. DFW*, the Court upheld the respondent lead agency's significance threshold – whether the project was consistent with meeting statewide emission reduction goals under AB 32 – as "a legally permissible criterion of significance." (Slip Opinion, p. 2.) However, in addressing the EIR's significance determination, the Court held that the EIR's "finding that the project's emissions would not be significant under that criterion is not supported by a reasoned explanation based on substantial evidence." (Slip Opinion, p. 2.) Specifically, the Court found the EIR failed to support its conclusion that the project's 31 percent reduction in GHG emissions as compared to "business as usual" levels (which assume no regulatory actions were taken to address climate change) was sufficient to meet the statewide emission reduction goal of 29 percent as set forth in the "Scoping Plan" prepared by the California Air Resources Board in accordance with AB 32. In other words, the Court faulted the EIR for assuming that a 31 percent GHG reduction from a specific land use project would be consistent with the 29 percent reduction goal for the State. (*Id.*, p. 22.) Because the EIR lacked substantial evidence supporting this assumption, the Court found that "the analytical gap left by the EIR's failure to establish, through substantial evidence and reasoned explanation, a quantitative equivalence between the Scoping [P]lan's statewide comparison and the EIR's

own project-level comparison deprived the EIR of its 'sufficiency as an informative document.'" (*Id.*, p. 23.)

Here, the Final SEIR did not measure the significance of GHG emissions based upon the project's consistency with the State-wide Scoping Plan. Rather, the Final SEIR identified a significance threshold and a methodology for ascertaining the significance of GHG emissions that is based upon a project's consistency with San Francisco's adopted Greenhouse Gas Reduction Ordinance. The City has developed a strategy and documented its actions to achieve the goals of the Greenhouse Gas Reduction Ordinance in its Greenhouse Gas Reduction Strategy, which the BAAQMD has reviewed and concluded serves "as a model from which other communities can learn" in its "aggressive GHG reduction targets and comprehensive strategies . . . to help the Bay Area move toward reaching the State's AB 32 goals." (SEIR Volume 2, p. 5.5-9.)

Because the analysis in the Final SEIR does not rely on a comparison of project emissions to the statewide emissions reductions goals set forth in CARB's Scoping Plan, the Supreme Court's holding in *CBD v. DFW* is not applicable to the proposed project. Of note, however, the approach adopted by OCII to assess GHG impacts was identified by the Supreme Court as one potentially viable means of CEQA compliance. Specifically, the Court noted that local governments can rely on "geographically specific greenhouse gas emission reduction plans to provide a basis for the tiering or streamlining of project-level CEQA analysis," and further stated that CARB's Scoping Plan "encourages local jurisdictions to develop 'climate action plans' or greenhouse gas 'emissions reduction plans' for their geographic areas, and several jurisdictions have adopted or proposed such plans as tools for CEQA streamlining." (*Id*., p. 26.) As explained in the Final SEIR and appeal responses, San Francisco's Greenhouse Gas Reduction Ordinance, implementing actions set out in the Greenhouse Gas Reduction Strategy, and latest update on the progress in achieving its goals set out in the San Francisco Climate Action Strategy, 2013 Update, is similar to the climate action plan referenced by the Court and, in fact, San Francisco's GHG Reduction Strategy actions have already resulted in the City exceeding the statewide AB 32 GHG reduction goals. (SEIR, Volume 2, p. 5.5-8.) The Final SEIR's determination that the project would not result in significant GHG impacts was based primarily on the project's consistency with the City's aggressive GHG Reduction Ordinance goals and GHG Reduction Strategy actions (SEIR, Volume 5, p. 13.14-6), and therefore is consistent with the Supreme Court's guidance on this issue.

Geology and Soils

Supplemental Appeal Issue GEO-1

GEO-1. The Appellant states that special attention to seismic impacts are needed and includes a new email from its geotechnical consultant. (See Soluri Meserve Supplemental Appeal, Exhibit 3)

OCII Response to Supplemental Appeal Issue GEO-1

The Appellant provides a new email from its geotechnical consultant (Exhibit 3) to provide evidence of why it is important that public use facilities are designed to current building code standards. The email states that had the deteriorated concrete bleachers of the stadium Candlestick Park not been rebuilt to then current building standards, there may have been

injuries when the 1989 Loma Prieta Earthquake occurred at the same time as the World Series. This email is not applicable to the proposed project because the project does not include the renovation of any old structures. The project would be built according to current building code requirements as discussed in Impact GE-1 of the Initial Study, Response to Comment GEO-1, and Responses to Late Comments GEO-1 and GEO-2.

Hazards

Supplemental Appeal Issue HAZ-1

HAZ-1. The Appellant asserts that asbestos is present on the project site. (See Soluri Meserve Supplemental Appeal, page 11 and Exhibits 5, 6 and 7)

OCII Response to Supplemental Appeal Issue HAZ-1

The Appellant provides new information related to sampling of stockpiled soil near the project site by BAAQMD (Exhibit 5), U.S. EPA guidance regarding cleanup levels for asbestos in soil (Exhibit 6), and email correspondence with the Regional Water Quality Control Board (RWQCB) regarding asbestos containing material that was moved from the GSW project site (Exhibit 7).

The Appellant's statement that the soil sampled by the BAAQMD in August of 2015 was moved from the project site is incorrect. The soil sampled by the BAAQMD was stockpiled at the location of future Bayfront Park parcel P22 and portions of adjacent existing or future rights-of-way, all within the Mission Bay Plan area.[10] This location is not within the project site at Mission Bay Blocks 29-32. The stockpiled soil was originally excavated from locations wholly within public infrastructure improvement project areas serving the Mission Bay Plan area, and not from Blocks 29-32.

All soils within the Mission Bay Plan area are managed by multiple protective environmental requirements. Soils must be excavated and managed in accordance with an approved Risk Management Plan and Dust Mitigation Plan, which is overseen by the RWQCB and supported by other applicable agencies such as BAAQMD. Articles 22A and 22B of the San Francisco Health Code, which address among other things dust control and mitigation requirements, are incorporated as a part of the Risk Management Plan. Moreover, Asbestos Dust Mitigation Plans are either under review or have been approved for use within the Mission Bay Plan area for projects that are subject to the Asbestos Airborne Toxics Control Measure. The Asbestos Dust Monitoring Plans are consistent with the California Air Resources Board Asbestos Airborne Toxics Control Measure. Therefore, while a select sample of soil stockpiled at Parcel P22 (again, not on the site of the proposed project) may have contained chrysotile asbestos at concentrations greater than 3 percent, soil excavation and management throughout the Mission Bay Plan area is being managed appropriately under protective environmental requirements.

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[10] Email from Luke Stewart, Director of Design and Planning, Mission Bay Development Group, to Mary McDonald, Orion Environmental Associates. Mission Bay Soil Stockpile. December 4, 2015.

The information provided by the Appellant regarding sampling of the stockpiled soil is irrelevant to the proposed project because the stockpiled soil was neither excavated from nor stored on the project site. In fact, as also discussed in Response to Late Comment HAZ-2 (Appeal Response, Exhibit D, page D-343), the project sponsor has adequately addressed the presence of asbestos in soils that are within the project site through the completion of an Asbestos Dust Monitoring Plan prepared in accordance with Mitigation Measure M-HZ-1b of the Initial Study, and as required by BAAQMD under the Asbestos Air Toxics Control Measure. On November 16, 2015, BAAQMD concluded that the plan submitted by the project sponsor meets the requirements of the Asbestos ATCM and approved the Asbestos Dust Monitoring Plan. Impacts associated with exposure to naturally-occurring asbestos are adequately addressed in Impact HZ-1 of the Initial Study, which was circulated for public review along with the Notice of Preparation prior to publication of the Draft SEIR; no comments relating to naturally-occurring asbestos were received during the scoping period. The Initial Study is also included as an appendix of the SEIR. Thus, this is not a new impact identified subsequent to publication of the SEIR.

Information regarding cleanup levels for asbestos in soil are also irrelevant to the proposed project because once the project is constructed there would be no exposure to naturally-occurring asbestos in soil at the site. Site excavation would remove soil to a minimum depth of 12 feet as part of the site development, and clean engineered backfill would be used where needed. The site would be occupied by buildings or paved, and none of the existing soil on the site would be exposed at grade.

In sum, like the Appeal Letter, none of the issues raised in the Supplemental Appeal present new information that affects the analysis or conclusions of the Final SEIR on the project. The Appeal Response and the RTC document provide abundant substantial evidence that none of the circumstances identified in the CEQA Guidelines for recirculation apply to the SEIR and that recirculation is not warranted.

CONCLUSION

As recognized in a recent appellate court decision, *City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526, "the comment-and-response process can . . . be abused. At its worst, it could become an end in itself, simply a means by which project opponents can subject a lead agency's staff to an onerous series of busywork requests and 'go fetch' demands. As Presiding Justice McConnell wrote in *Citizens for Responsible Equitable Environmental Development v. City of San Diego* [citation omitted], the point of CEQA '"is to inform government decision makers and their constituency of the consequences of a given project, not to derail it in a sea of administrative hearings and paperwork."' This case is an example of the drowning in 'paperwork' Presiding Justice McConnell warned about." (*City of Irvine v. County of Orange, supra*, 238 Cal.App.4th at p. 558.)

OCII staff conducted an in-depth and thorough analysis of the potential physical environmental effects of the proposed project, consistent with CEQA and the CEQA Guidelines. Neither the Appeal Letter nor the Supplemental Appeal has demonstrated that

the Final SEIR is insufficient as an informational document, or that the OCII Commission's findings and conclusions, as set forth in the Final SEIR and certification resolution, are unsupported by substantial evidence. OCII staff conducted all necessary studies and analyses, and provided the OCII Commission with all necessary information and documents in accordance with the Planning Department's environmental checklist and Consultant Guidelines, and pursuant to CEQA and the State CEQA Guidelines. Substantial evidence supports the OCII Commission's findings and conclusions as set forth in the Final SEIR.

For the reasons provided in this Supplemental Appeal Response, OCII believes that the Final SEIR complies with the requirements of CEQA and the CEQA Guidelines, provides an adequate, accurate, and objective analysis of the potential environmental impacts of the proposed project, is sufficient as an informational document, is correct in its conclusions, and reflects the independent judgment and analysis of the OCII, and that the OCII Commission's certification findings are correct. Therefore, OCII respectfully recommends that the Board uphold the OCII Commission's certification of the Final SEIR.

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office of
COMMUNITY INVESTMENT
and INFRASTRUCTURE

EXHIBIT A

Supplemental Appeal Materials, Appellant's Partial Brief, submitted on November 30, 2015

OCII CASE NO. ER 2014-919-97; PLANNING DEPARTMENT CASE NO. 2014.1441E – EVENT CENTER AND MIXED-USE DEVELOPMENT AT MISSION BAY BLOCKS 29-32

CERTIFIED ON NOVEMBER 3, 2015

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List of Exhibits to Appellants' Partial Brief from Thomas N. Lippe, Law Offices of Thomas N. Lippe APC, on behalf of Mission Bay Alliance, submitted to SF Board of Supervisors on Appeal of SEIR for Warriors Arena Project on November 30, 2015[1]

Exhibit 1: SWAPE, Paul Rosenfeld and Jessie Jaeger letter to Thomas Lippe, 11/20/2015

Exhibit 2: Excerpts of Draft EIR, 901 Brannan and One Henry Adams Streets Project, Air Quality Impacts, 6/22/2011

Exhibit 3: Excerpts of Draft EIR, 706 Mission Street, Mexican Museum and Residential Tower Project, Air Quality Impacts, 6/27/2012

Exhibit 4: Screenshot of SF Dept of Public Health website on Article 38 of SF Health Code, 11/20/2015

Exhibit 5: Article 38 San Francisco Health Code, sections 3801 to 3814

Exhibit 6: Preliminary Project Assessment for 630-698 Brannan Street Project, San Francisco Planning Department, 7/29/2015

Exhibit 7: South Coast Air Quality Management District, Final Methodology to Calculate PM2.5 and PM 2.5 Significance Thresholds, October 2006

Exhibit 8: Screenshot of California Air Resources Board website on Diesel & Health Research, page last reviewed 6/21/2011

Exhibit 9: Excerpt from OCII Commission Resolution 62-2015, Approving an Amended Budget 7/1/2015 to 6/30/2016, with Attachment A: OCII FY 2015-16 Budget, 10/20/2015

Exhibit 10: CCSF BOS Budget and Legislative Analyst Report to the Budget and Finance Committee, 11/9/2015 meeting establishing Mission Bay Transportation Improvement Fund and Advisory Committee, 11/6/2015

Exhibit 11: Smith Engineering, Dan Smith letter report to Thomas Lippe, 11/17/2015

Exhibit 12: Smith Engineering, Dan Smith letter report to Thomas Lippe, 11/28/2015

Exhibit 13: Google Maps screenshots, Selected Walking Distance Maps, 555 California St to Third & South Street, 11/29/2015

Exhibit 14: Google Maps screenshots, Selected UCSF Emergy Access Routes, Oakland Bay Bridge, Transamerica Pyramid, Union Square, 11/24/2015

Exhibit 15: Transportation Excerpts from Draft EIRs for the following projects: 5 M Project; 801 Brannan and One Henry Adams; 222 Second St Office Project; 706

[1] Grey areas are exhibits that are not included in this submittal because they do not relate directly to the proposed project and have already been submitted directly to the Board of Supervisors from the Appellant.

Mission St Project; (PMND) 850 Bryant St, Hall of Justice; Academy of Art University Project; Art & Design Educational SUD, Addendum to EIR; Moscone Center Expansion Project; SF 2004 and 2009 Housing Element; Second St Improvement Project Supplemental EIR; SF Museum of Modern Art Expansion 255 Seventh St (Westbrook Plaza); Pier 70 Mixed Use District Project (NOP); SF 2004 and 2009 Housing Element; Second St Improvement Project Supp EIR, Append.; SF Museum of Modern Art Expansion

Before the San Francisco Board of Supervisors

Appeal of Subsequent Environmental Impact Report for the Warriors Arena Project
Commission on Community Investment and Infrastructure
Resolutions 69-2015 and 70-2015

Hearing Date: December 8, 2015

APPELLANTS' PARTIAL BRIEF

Re: Public Comment, Air Quality, Transportation, Water Quality, Biological, and Noise

Submitted By:
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List of Exhibits

1. Paul Rosenfeld and Jessie Jaeger, letter to Thomas Lippe, November 20, 2015.

2. Excerpts from EIR for the 801 Brannan St - 1 Henry Adams St Project, June 22, 2011, pp. 1, 265-266, 278-285, cited in Exhibit 1.[1]

3. Excerpts from EIR for 706 Mission Street- The Mexican Museum and Residential Tower Project, June 27, 2012, pp. 1, IV.G.20, IV.G.31 to IV.G.50, cited in Exhibit 1.[2]

4. San Francisco Department of Public Health description of Article 38 of the San Francisco Health Code.[3]

5. San Francisco Health Code, Article 38.

6. Preliminary Project Assessment, San Francisco Planning Department, July 29, 2015.[4]

7. South Coast Air Quality Management District, Final –Methodology to Calculate Particulate Matter (PM) 2.5 and PM 2.5 Significance Thresholds October 2006, cited in Exhibit 1, fn 10.

8. California Air Resources Board web page re Diesel And Health Research, cited in Exhibit 1, fn 11

9. Excerpt from Commission on Community Investment and Infrastructure Resolution No. 62 - 2015, Attachment A, FY 2015-16 Budget, Amended October 20, 2015.

10. November 6, 2015, Budget and Legislative Analyst Report to the Budget and Finance Committee ("Nov 6 Budget Analyst Report").

11. November 17, 2015, letter report to Thomas Lippe authored by traffic engineer Dan Smith regarding Third St. LRT station.

12. November 28, 2015, letter report Thomas Lippe authored by traffic engineer Dan Smith regarding SEIR.

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[1]Available at http://www.sfplanning.org/index.aspx?page=1828

[2]available at http://www.sf-planning.org/index.aspx?page=1828.

[3]Available at:https://www.sfdph.org/dph/EH/Air/Article38.asp.

[4]available at: http://www.sf-planning.org/ftp/files/notice/2015-004256PPA.pdf.

13. Selected Walking Distance Maps to Arena Site.

14. Selected UCSF Emergency Access Routes.

15. Excerpts from San Francisco CEQA Documents for the following projects: 5M, 222 Second Street, 801 Brannan and One Henry, 222 Second St, 706 Mission Street, 850 Bryant, Academy of Art, Eastern District Rezoning, Moscone Center Expansion, SF Housing Element, Second Street Improvement, SF Museum of Modern Art Expansion, 255 7th St, Pier 70.

Reference Abbreviations

Air Quality

July 19 Gilbert	July 19, 2015, letter from Greg Gilbert of Autumn Wind Associates at FSEIR, Vol.6, p. Com-96.
July 20 SWAPE	July 20, 2015, letter from Paul Rosenfeld and Jessie Jaeger of SWAPE at FSEIR, Vol.6, p. Com-104.
July 26 Lippe	July 26, 2015, letter from Thomas Lippe to OCII and Planning Department re Air Quality Impacts including all exhibits identified in and attached to said letter at FSEIR, Vol.6, p. Com-86.
October 30 Gilbert	October 30, 2015, letter from Greg Gilbert of Autumn Wind Associates, submitted to OCII on November 3, 2015.
Nov 2 Lippe FSEIR	November 2, 2015, letter from Thomas Lippe to OCII and Planning Department re: Comments on Final Subsequent Environmental Impact Report for the Warriors Arena Project Re Air Quality, Transportation, Hydrology, Water Quality, Biological, and Noise Impacts.
Nov 2 Farrow FSEIR	November 2, 2015, letter from John Farrow, attached as Exhibit A to Lippe Nov 2 FSEIR.
Nov 2 SWAPE	November 2, 2015, letter report from Paul Rosenfeld and Jessie Jaeger of SWAPE to Thomas Lippe, attached as Exhibit 1 to Nov 2 Farrow FSEIR.
Nov 2 Farrow FSEIR, Exhibit 2	"Health Risk Assessments for Proposed Land Use Projects," California Air Pollution Control Officers Association 2009, attached as.[5]
Nov 2 Farrow FSEIR, Exhibit 3	CEQA Air Quality Handbook, A Guide for Assessing the Air Quality Impacts for Projects Subject to CEQA Review, San Luis Obispo Air Pollution Control District 2012, attached as .[6]

[5]http://www.capcoa.org/wpcontent/uploads/2012/03/CAPCOA_HRA_LU_Guidelines_8-6-09.pdf.

[6]http://www.slocleanair.org/images/cms/upload/files/CEQA_Handbook_2012_v2%20%28Updated%20Sept%202015%29.pdf.

Nov 2 Farrow FSEIR, Exhibit 4
Mission Bay Land Use Plan, November 2005.[7]

Nov 2 Farrow FSEIR, Exhibit 5
"Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessment." Office of Environmental Health Hazard Assessment, February 2015.[8]

Nov 2 Farrow FSEIR, Exhibit 6
Adoption of the Revised Air Toxics Hot Spots Program Technical Support Document for Cancer Potency Factors, Office of Environmental Health Hazard Assessment, June 1, 2009.[9]

Nov 2 Farrow FSEIR, Exhibit 7
Adoption of the Revised Air Toxics Hot Spots Program Risk Assessment Guidelines: Revised Technical Support Document for Exposure Assessment and Stochastic Analysis, Office of Environmental Health Hazard Assessment, August 27.[10]

Nov 2 Farrow FSEIR, Exhibit 8
Technical Support Document for Exposure Assessment and Stochastic Analysis, Office of Environmental Health Hazard Assessment, August 2012.[11]

Nov 20 SWAPE — November 20, 2015, letter report from Paul Rosenfeld and Jessie Jaeger of SWAPE to Thomas Lippe, attached as Exhibit 1 to this brief.

Transportation

July 27 Lippe SEIR — July 27, 2015, letter from Thomas Lippe to OCII and Planning Department re Transportation Impacts at F, Vol. 6, p. Com-117, including all exhibits listed on page 20 thereof, including:

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[7]http://sfocii.org/Modules/ShowDocument.aspx?documentid=783.

[8]http://oehha.ca.gov/air/hot_spots/hotspots2015.html.

[9]http://www.oehha.ca.gov/air/hot_spots/tsd052909.html.

[10]http://www.oehha.ca.gov/air/hot_spots/tsd082712.html.

[11]http://www.oehha.ca.gov/air/hot_spots/pdf/2012tsd/Chapter3_2012.pdf.

July 23 Smith	Exhibit 1 thereto, July 23, 2015, letter to Tom Lippe from traffic engineer Dan Smith at FSEIR, Vol. 6, p. Com-127; and
July 21 Wymer	Exhibit 2 thereto, July 21, 2015, letter to Tom Lippe from traffic engineer Larry Wymer at FSEIR, Vol. 6, p. Com-141.
Nov 2 Lippe FSEIR	November 2, 2015, letter from Thomas Lippe to OCII and Planning Department re: Comments on Final Subsequent Environmental Impact Report for the Warriors Arena Project Re Air Quality, Transportation, Hydrology, Water Quality, Biological, and Noise Impacts.
Nov 2 Smith FSEIR	November 2, 2015, letter from Dan Smith, Exhibit F to Nov 2 Lippe FSEIR;
Nov 2 Wymer FSEIR	November 2, 2015, letter from Larry Wymer, Exhibit G to Nov 2 Lippe FSEIR;
Nov 10 Smith FSEIR Access	November 10, 2015, letter from Dan Smith to Tom Lippe re Emergency Access, which is attached hereto as Exhibit 4 to the Alliance's November 13, 2015, Notice of Appeal.
Nov 10 Smith FSEIR Port	November 10, 2015, letter from Dan Smith to Tom Lippe re Port Parking Facilities, which is attached hereto as Exhibit 5 to the Alliance's November 13, 2015, Notice of Appeal.
Nov 13 Smith FSEIR King	November 13, 2015, letter from Dan Smith to Tom Lippe re King Street Electrical Work, which is attached hereto as Exhibit 6 to the Alliance's November 13, 2015, Notice of Appeal.
Nov 17 Smith FSEIR 3rd St.	November 17, 2015, letter report to Thomas Lippe authored by traffic engineer Dan Smith regarding Third St. LRT station.
Nov 28 Smith FSEIR.	November 28, 2015, letter report Thomas Lippe authored by traffic engineer Dan Smith regarding SEIR.

Hydrology, Water Quality, and Biological

July 24 Lippe	July 24, 2015, letter from Thomas Lippe to OCII and Planning Department re Impacts on Hydrology, Water Quality, and Biological Resources at FSEIR, Vol. 6, p. Com-147, including:
July 21 Hageman	July 21, 2015, letter to Thomas Lippe from Matt Hageman at FSEIR, Vol. 6, p. Com-155.
July 21 Ringelberg	July 21, 2015, letter to Thomas Lippe from Erik Ringelberg and Kurt Balasek at FSEIR, Vol. 6, p. Com-159.
July 22 Cline	July 22, 2015, letter report by geotechnical engineer Martin Cline and Kurt Balasek, regarding Hazardous Materials at FSEIR, Vol. 6, p. Com-70 (attached as Exhibit B to July 26, 2015 Soluri Meserve letter to OCII re DSEIR at FSEIR, Vol. 6, p. Com-48.).
Nov 2 Lippe FSEIR	November 2, 2015, letter from Thomas Lippe to OCII and Planning Department re: Comments on Final Subsequent Environmental Impact Report for the Warriors Arena Project Re Air Quality, Transportation, Hydrology, Water Quality, Biological, and Noise Impacts.
Nov 2 Hageman	November 2, 2015, letter to Thomas Lippe from Matt Hageman, Exhibit H to Nov 2 Lippe FSEIR.
Nov 2 BSK	November 2, 2015, letter from Erik Ringelberg and Kurt Balasek of BSK Associates, Exhibit I to Nov 2 Lippe FSEIR.
Nov 2 Ringelberg	November 2, 2015, letter from Erik Ringelberg, Exhibit J to Nov 2 Lippe FSEIR.
July 16 BSK Wetland	July 16, 2015, BSK Technical Memorandum Regarding the Proposed Warrior Arena Wetland Features by Erik Ringelberg and Kevin Grove, Exhibit K to Nov 2 Lippe FSEIR.
Oct 29 BSK Wetland	October 29, 2015, Draft Waters and Wetland Delineation Report Proposed Mission Bay Development, Blocks 29-32 San Francisco, California, by Erik Ringelberg and Kevin Grove of BSK Associates, Exhibit L to Nov 2 Lippe FSEIR.

Oct 7, SM Law, CWA 404	October 7, 2015, Letter to the San Francisco Planning Department regarding Supplemental Comments on Environmental Review for Warriors Event Center and Mixed-Use Development at Mission Bay Blocks 29-32 – Clean Water Act 404 and CZMA Consistency

Noise

July 25 Lippe	July 25, 2015, letter from Thomas Lippe to OCII and Planning Department re Noise Impacts, at FSEIR, Vol. 6, p. Com-109, including all the exhibits attached thereto.
July 24 Hubach	July 24, 2015, letter to Thomas Lippe from acoustic engineer Frank Hubach at FSEIR, Vol. 6, p. Com-113,
Nov 2 Lippe FSEIR	November 2, 2015, letter from Thomas Lippe to OCII and Planning Department re: Comments on Final Subsequent Environmental Impact Report for the Warriors Arena Project Re Air Quality, Transportation, Hydrology, Water Quality, Biological, and Noise Impacts.
Nov 2 Hubach	November 2, 2015, letter to Thomas Lippe from acoustic engineer Frank Hubach, Exhibit S to Nov 2 Lippe FSEIR..

I. INTRODUCTION

This office represents the Mission Bay Alliance ("Alliance"), an organization dedicated to preserving the environment in the Mission Bay area of San Francisco, regarding the project known as the Event Center and Mixed Use Development at Mission Bay Blocks 29-32 ("Warriors Arena Project" or "Project").

The Mission Bay Alliance submits this brief in support of its appeal of Commission on Community Investment and Infrastructure Resolution 69-2015, certifying the Final Subsequent Environmental Impact Report for the Warriors Arena Project, and Resolution 70-2015, adopting CEQA Findings for the Warriors Arena Project, both approved on November 3, 2015.

The grounds for this appeal are set forth in this brief and the two companion briefs submitted by my co-counsel, Susan Brandt-Hawley and Soluri Meserve; in the Alliance's November 13, 2015, Notice of Appeal; and in all previously submitted Alliance comment letters and their exhibits.[12] This brief discusses certain of these grounds in more detail.

This brief discusses several categories of legal defects in the SEIR. First, the DSEIR omitted a large number of resource topics from its scope based on an erroneous use of CEQA "tiering." This issue is generally discussed in its own section in the brief submitted by Soluri Meserve, and also in the sections relating to specific resources where the evidence requires including of the resource in the SEIR.

Second, regarding resource topics included in the SEIR, the Draft SEIR's informational deficiencies are described in sections relating to each resource. Where new information, changed circumstances, or changes in the Project coming to light after close of comment on the DSEIR require recirculation of a revised DSEIR, this is also discussed in each section relating to each resource topic.

Third, where the Final SEIR's responses to substantive comments on the Draft SEIR are inadequate, this is described in relation to the Draft SEIR's informational deficiencies for each resource topic.[13]

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[12] References to previous comment letters are abbreviated. See "Reference Abbreviations."

[13] Where comments seek omitted facts or analysis essential to a draft EIR's conclusions, the failure to correct those omissions "renders the EIR defective as an informational document." (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1244.) The Final SEIR's responses to substantive comments on the Draft SEIR must contain fact-based analysis. (*People v. County of Kern* (1974) 39 Cal.App.3d 830, 841-842 (duty to provide "good faith, reasoned analysis in response"; Guidelines, § 15088(c) ["Conclusory statements unsupported by factual information will not suffice"]; *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 359; see also, *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* ("SCOPE") (2003) 106 Cal.App.4th 715, 723 ["Problems raised by the public and responsible experts require a good faith reasoned analysis in response. [Citation.] The

II. DISCUSSION

Preliminarily, the Alliance notes this Board's role and jurisdiction in this proceeding is not limited by Commission on Community Investment and Infrastructure Resolution No. 33-2015. Under both the Dissolution Law (Health and Safety Code § 34170 et seq) and Ordinance No. 215-12, this Board is the legislative authority governing the Successor Agency. Therefore, this appeal is authorized and governed by CEQA sections 21151(c) and 21177.

Also, the City's role in the permit process to date demonstrates the City is no mere responsible agency under CEQA. The City is the lead agency, because OCII is a department of the City. Alternatively, the City is a co-lead agency with OCII. The facts supporting this conclusion are manifold, including:

• The Commission on Community Investment and Infrastructure consists of five members appointed by the Mayor, subject to confirmation by a majority of the Board of Supervisors.

• OCII's budget must be approved by the Board of Supervisors.

• The SEIR preparers include only three people from OCII, but seven from the Planning Department, one from the City Attorneys office, two from the Mayor's Office of Economic Workforce and Development, and two from the City's Municipal Transportation Agency. (SEIR, Vol 3, pp. 9-1, 2.)

• The Notice of Availability of the DSEIR instructed that comments were to be submitted to "Ms Tiffany Bohee, OCII Executive Director, c/o Mr. Brett Bollinger, San Francisco Planning Department."

• The Mayor has been an outspoken advocate of bringing the Warriors to San Francisco and of building this Project in this location since the Warriors's first proposed it. (See news articles attached to November 30, 2015, Appeal Brief submitted by Susan Brandt-Hawley as Exhibit 1.)

• Of the 29 salaried employee positions at OCII, 21 work for the City, but on OCII projects. (See Commission on Community Investment and Infrastructure Resolution No. 62 - 2015, Attachment A, FY 2015-16 Budget, Amended October 20, 2015, attached hereto as Exhibit 1, p. 9.)

• The City is treating this Project like a City-sponsored public works project for which it would be the lead agency. The Transportation Management Plan ("TMP") and Transit Service Plan ("TSP"), which are defined as components of the Project, rely for their implementation on purely voluntary services by various City departments. See Section C.9 below. The Transportation Management Plan necessitates ongoing implementation by the SFMTA, the San Francisco Police

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requirement of a detailed analysis in response ensures that stubborn problems or serious criticism are not "swept under the rug."].)

Department, and Public Works. (See Exhibit 10, attached hereto.) Funding for both the TMP and TSP are by the City's voluntary appropriation of General Fund revenues, which are within the discretion of every future Board of Supervisors in perpetuity. (Exhibit 10, pp. 6-7.)

Consequently, the Board of Supervisors must decide whether to certify the SEIR and whether it can make the findings required by CEQA Guideline section 15090(a) based on its consideration and determination of all of the issues presented; and the Board must do so using its independent judgment.

A. PUBLIC COMMENT.

1. The OCII Thwarted Public Comment on the SEIR.[14]

The October 23, 2015, notice of publication of the Response to Comments informed the public they would have no further opportunity to comment on the FSEIR/RTC, stating:

> The Commission will consider certification of the Final SEIR on this project on November 3, 2015. ¶ The Commission does not conduct a hearing to receive comments on the Responses to Comments document, and no such hearing is required by the California Environmental Quality Act. The public review period on the Draft SEIR ended on July 27, 2015.

(FSEIR, Vol. 4.) But the OCII hearing agenda for November 3, 2015, published on October 29, 2015, suggested that public comment on the FSEIR/RTC would be heard at the hearing, stating:

> Special Meeting Agenda Given the Potential for a Large Number of Public Comments, the Commission May Limit the Time Allocated for Each Individual Speaker to Two Minutes or Less. It Is Strongly Recommended That Members of the Public Who Wish to Address the Commission Should Fill out a "Speaker Card" and Submit the Completed Card to the Commission Secretary.
>
> (Items 5(a), 5(b), 5(c) 5(d) and 5(e) related to Golden State Warriors Event Center and Mixed-Use Development on Blocks 29-32 *will be heard together*, but acted on separately)

(November 3, 2015, OCII Hearing Agenda, p. 2 (italics added).) Item 5(a) was Resolution 69-2015 certifying the SEIR, and Items 5(a), 5(b), 5(c) 5(d) and 5(e) were the only items on the agenda for hearing.

The October 23, 2015, notice of publication is inconsistent with CEQA section 21177(a), which contemplates public comment on EIRs up to the end of the hearing at which the project is

[14]Nov. 2 Lippe FSEIR, p. 1.

approved. Therefore, the October 23, 2015, notice of publication frustrated the ability of the public to comment. The Board should remedy this misstep by recirculating the FSEIR with full disclosure that the public may comment on the FSEIR/RTC.

B. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO AIR QUALITY IMPACTS.

1. The City Cannot Use the SEIR's Thresholds of Significance for Criteria Air Pollutants until it Formally Adopts Them in a Rule-making Procedure.

The DSEIR's thresholds of significance are:

> For the impacts analyzed in this section, the project would have a significant impact related to air quality if it were to:
> - Conflict with or obstruct implementation of the applicable air quality plan;
> - Violate any air quality standard or contribute substantially to an existing or projected air quality violation;
> - Result in a cumulatively considerable net increase of any criteria pollutant for which the project region is in nonattainment under an applicable federal or state ambient air quality standard (including releasing emissions that exceed quantitative thresholds for ozone precursors);
> - Expose sensitive receptors to substantial pollutant concentrations; or
> - Result in a cumulative air quality impact in combination with past, present and reasonably foreseeable future projects in the vicinity.

(DSEIR 5.4-23.)

For criteria pollutants, the DSEIR uses numerical thresholds of significance borrowed from the Bay Area Air Quality Management District ("BAAQMD") for ROG (54 lbs/day); NOx (54 lbs/day); Exhaust PM10 (82 lbs/day); Exhaust PM2.5 (54 lbs/day).

> The potential for a project to result in a cumulatively considerable net increase in criteria air pollutants that may contribute to an existing or projected air quality violation is based on the State and federal Clean Air Acts emissions limits for stationary sources. To ensure that new stationary sources do not cause or contribute to a violation of an air quality standard, BAAQMD Regulation 2, Rule 2 requires that any new source that emits criteria air pollutants above a specified emissions limit must offset those emissions. For ozone precursors ROG and NOx, the offset emissions level is an annual average of 10 tons per year (or 54 pounds (lbs.) per day). These levels represent emissions below which new sources are not anticipated to contribute to an air quality violation or result in a considerable net increase in criteria air pollutants that could result in increased health effects.

(DSEIR p. 5.4-25; see also p. 5.4-31.)

The City uses these numerical thresholds of significance for virtually all land use development projects in the city that require CEQA review. This is shown by excerpts from recent Environmental Impacts Reports and Negative Declarations attached to the July 26 Lippe letter as Exhibits 4 through 16. All of them use the BAAQMD numbers as the thresholds of significance for these pollutants. Therefore, the City is required to undertake its own rule-making proceeding to adopt these thresholds as its own and determine in a public process that they are supported by substantial evidence.

> (b) Thresholds of significance to be adopted for general use as part of the lead agency's environmental review process must be adopted by ordinance, resolution, rule, or regulation, and developed through a public review process and be supported by substantial evidence.
> (c) When adopting thresholds of significance, a lead agency may consider thresholds of significance previously adopted or recommended by other public agencies or recommended by experts, provided the decision of the lead agency to adopt such thresholds is supported by substantial evidence.

(CEQA Guideline, § 15064.7.) Since the City has not formally adopted the air quality significance thresholds in a public process supported by substantial evidence, but continues to consistently use these thresholds on virtually all CEQA Projects in the City, it cannot use these thresholds in this EIR. (See July 26 Lippe, p. 3; July 19 Gilbert, p. 14.)

The Alliance made these comments on the DSEIR. (See July 26 Lippe, p. 3; July 19 Gilbert, p. 14.) The RTC mostly ignores the comment, and takes the position that it can use the BAAQMD's thresholds on as many projects as it wants without formally adopting them. (FSEIR, Vol. 5, p. 13.3-5.) This position directly contradicts CEQA Guideline 15064.7.

2. The DSEIR's Numerical Thresholds of Significance for Criteria Pollutants (Ozone Precursors, PM10, PM2.5) Borrowed from the BAAQMD Are Invalid.

As noted above, for its impact assessment and mitigation strategy for criteria pollutants, the DSEIR uses numerical thresholds of significance borrowed from the BAAQMD. But the DSEIR cannot merely reference a project's compliance with another agency's regulations. Lead agencies must conduct their own fact-based analysis of project impacts, regardless of whether the project complies with other regulatory standards.

The result of using these thresholds is a deeply misleading impact assessment and mitigation strategy because using these invalid thresholds allows the DSEIR to avoid finding impacts are significant, and it allows the DSEIR to understate the severity of impacts deemed "significant" because it implies that most of the quantity of emissions below the thresholds are not "significant." Also, using these invalid thresholds underestimates the degree of mitigation

required to reduce significant impacts to less then significant, and therefore, the DSEIR curtails its consideration of the feasibility of additional mitigation measures that could further substantially reduce emissions.

The numerical thresholds borrowed from the BAAQMD are logically and legally invalid, and they are not supported by substantial evidence. The thresholds are contained in the BAAQMD's "CEQA Air Quality Guidelines."[15] But neither the DSEIR or the BAAQMD CEQA Air Quality Guidelines describe any evidence that might support the use of these thresholds. The same is true of BAAQMD's other publications relating to these thresholds, i.e., Appendix D of the BAAQMD CEQA Air Quality Guidelines, BAAQMD's Revised Draft Options and Justification Report, (October 2009), and the Bay Area AQMD Proposed Air Quality CEQA Thresholds of Significance, published May 3, 2010.

While these BAAQMD publications purport to include substantial evidence supporting the use of these thresholds for all criteria air pollutants for which the Bay Area is in non-attainment, they do not. Instead, the BAAQMD CEQA Air Quality Guidelines merely provide policy rationales for why it is a good idea to have thresholds of significance. Nowhere does the document actually provide evidence for why any number of pounds per day below, for example, 54 for NOx or ROG, is not "cumulatively considerable."

The BAAQMD's Revised Draft Options and Justification Report (October 2009) states the thresholds "are based on the trigger levels for the federal New Source Review (NSR) Program and BAAQMD's Regulation 2, Rule 2 for new or modified sources." (See page 2.) These New Source Review Program rules provides that any new source that will emit pollutants above the levels stated in the left hand column of Table 4 (e.g., 10 lbs/day of NOx and ROG) must impose "Best Available Control Technology ("BACT")." (Id. pp. 16-17.) These rules also provide that any new source emitting pollutants above the levels stated in the right hand column of Table 4 (e.g., 54 lbs/day of NOx and ROG) must offset all emissions. (Id. pp. 16-17.)

In addition to the inherent flaws in the NSR rules described above, it is inappropriate to base the EIR's significance determination for purposes of CEQA on the Air District's "triggers" for an entirely different regulatory program, i.e., New Source Review under the Clean Air Act ("CAA").[16] One of CEQA key purposes is to require "disclosure" of significant impact, and it allows agencies to approve projects where emissions exceed its thresholds of significance after feasible mitigations are first adopted and as long as the project's benefits outweigh the

[15]The BAAQMD CEQA Air Quality Guidelines were published May 2010, and updated May 3, 2011.

[16]The CAA establishes health-based ambient air quality standards and ranks air districts nationwide based on their level of attainment of those standards. The CAA also establishes a timetable for air districts to reach attainment, and authorizes specific penalties where a deadline is not met. CEQA, on the other hand, requires lead agencies to analyze and discuss significant impacts on air quality, and to continue to mitigate those impacts so long as they remain significant or no additional mitigation is feasible.

environmental harm. The CAA, in contrast, is not primarily concerned with public disclosure, and it provides absolute limits on emissions (i.e., the offset triggers in Table 4) that cannot be exceeded under any circumstances. A standard that shuts down economic activity (i.e., the CAA offset standard) is necessarily and appropriately different than a standard (i.e. a CEQA threshold of significance) that requires disclosure of the impact to the public and the adoption of feasible mitigation measures.

Indeed, if it is possible to borrow any CAA NSR standard for use as a CEQA threshold of significance, it would be the BACT triggers in Table 4 (i.e., when ROG or NOx emissions exceed only 10 lbs/day), because those standards force the adoption of feasible mitigation measures, similar to CEQA's thresholds of significance.

NSR Regulation 2, Rule 2 for new or modified sources requires that if ozone precursor emissions exceed 54 lbs per day (i.e., 10 tpy), the polluter must offset *all* emissions. In contrast, the DSEIR Mitigation Measure M-AQ-2b only requires offsetting emissions above 54 lbs per day (i.e., 10 tpy). This BACT standard is much lower than the NSR offset standard and the DSEIR's threshold of significance of 54 lbs/day. But, there is no parallel requirement in the DSEIR for imposing anything like BACT to this Project's construction or operational emissions that exceed 10 lbs/day.

Regarding NSR Regulation 2, Rule 2's offset standards (i.e., 54 lbs/day for ROG or NOx), the BAAQMD's Revised Draft Options and Justification Report (October 2009) observes: "These levels represent a cumulatively considerable contribution."[17] But there is no evidence that emissions below these thresholds are not also "cumulatively considerable."

Moreover, regardless of any evidence included in these other BAAQMD documents, no such evidence can overcome a fundamental logical and legal flaw in the EIR's assumption that these thresholds are appropriate for the purpose for which the DSEIR uses them. Using the DSEIR's logic, if the City finds that one project will add 53 lbs/day of ozone precursors, it is considered a less-than-significant impact, but if that project will add 55 lbs/day of ozone precursors, it is considered significant. Yet, if the City approved two new large projects in the area in the same 2- or 3-year period, or where operational impacts cause increased emissions, each emitting 53 lbs/day of ozone precursors, it is considered a less-than-significant impact even though the total of the two added together equals 106 lbs/day of ozone precursors!

This scenario is not hypothetical; it is unfolding in San Francisco, and in the Mission Bay area now. (See July 21 Wymer, Table 3, for a list of project undergoing or about to undergo construction in this area of San Francisco.)[18] As a result, the thresholds violate a fundamental CEQA principal that regardless of whether projects' incremental impacts are deemed

[17]July 26 Lippe, Exhibit 4, p. 2.

[18]July 27 Lippe, Exhibit 2.

insignificant in isolation, they may be cumulatively significant.

The RTC implies that because ozone pollution is getting better, the BAAQMD thresholds are validated. Air Quality specialist Greg Gilbert's October 30, 2015, comments on the OCII's responses are essential reading. The following excerpt provides a flavor of the evidence showing why the response is unfounded and unsupported:

> In our comments submitted previously on the DSEIR, we noted that the BAAQMD's CEQA thresholds of significance, applied by the Lead Agency to evaluate the Event Center project's emission impacts, were developed non-scientifically from NSR values that were designed to counterbalance anticipated growth in stationary source facility emissions under the jurisdiction of the BAAQMD. An inherent problem with using NSR emission thresholds for constructing CEQA thresholds is that the 9-county air basin's stationary sources represent no more than a small percentage of the total emissions inventory.
>
> Vehicle emissions within the basin, by contrast, represent the lion's share of criteria pollutants and are chiefly responsible for the basin's ozone nonattainment designations that stretch back decades. Similarly, the region's nonattainment of particulate standards has been heavily influenced by vehicle emissions. To exemplify, fully 84% of NOx (ozone precursor) emissions in the Bay Area air basin are emitted by vehicles, and not by stationary sources. The region has been designated nonattainment for PM2.5; fine particulate is generated almost entirely by combustion (including internal combustion occurring in vehicle engines), and monitored values in the region continue to climb annually; 28% of the total inventory is attributed to vehicles. Importantly, population (people) regionally continues its historical growth in lockstep with numbers of vehicles and vehicle-miles-traveled; despite substantial advances in technical on-vehicle controls and reductions in tailpipe emissions of both NOx and particulates over the years, the region continues to exceed federal and state air quality standards.
>
> As we noted previously, establishing CEQA thresholds of significance levels using NSR levels is to automatically undercut emission reductions that should be obtained from each new "indirect source" (such as the Event Center that will attract new vehicle trips and related emissions) subject to CEQA review. By using outdated, non-scientifically designed NSR values, CEQA thresholds adopted by BAAQMD and borrowed for use by OCII will automatically underrepresent air emission significance, particularly when evaluated against past nonattainment designations and PM2.5 ambient air monitoring values that, despite recession effects, continue to reflect a slowly worsening trend line.

(Oct 30 Gilbert, pp. 2-3.)

The significance of a cumulative impact depends on the environmental setting in which it occurs, especially the severity of existing environmental harm. (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120 ("*CBE*") ["[T]he relevant question"... is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether "any additional amount" of effect should be considered significant in the context of the existing cumulative effect. [footnote omitted] In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant. [footnote omitted]"]; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720-721.)

This area is in "non-attainment" status under federal and state clean air laws for these criteria pollutants; and this project, along with many others, will substantially contribute to that existing significant adverse impact. There is no evidence to the contrary. The City's untenable position is that public agencies in the Air Basin can approve project after project, each emitting (in the case of ozone precursors) up to 54 lbs/day of new and additional ozone precursors, without ever causing a cumulatively considerable increase in air pollution. This approach runs counter to the reason for conducting cumulative impact analysis. If the City (and other agencies in the Air Basin) continues to find that projects that make air quality worse - when it is already significantly degraded - do not have a significant adverse cumulative impact on air quality, then the City will have no legal obligation to adopt feasible mitigation measures to reduce the significant cumulative impact.

Here, the BAAQMD CEQA Guidelines present ample evidence that the Bay Area's air quality is degraded and has been for a very long time. Therefore, the idea that agencies can forever approve multiple projects that each add 53 lbs of ROG and NOx to the air every day and never be deemed cumulatively considerable is absurd. Rather than explain why this is not true, the BAAQMD documents simply ignore the issue.

The DSEIR's use of the BAAQMD thresholds of significance is erroneous as a matter of law for several other reasons.[19] The DSEIR cannot merely reference a project's compliance with another agency's regulations. Lead agencies must conduct their own fact-based analysis of project impacts, regardless of whether the project complies with other regulatory standards. The DSEIR uses BAAQMD's thresholds of significance uncritically, without any factual analysis of its own, in violation of CEQA.[20] This uncritical application of the BAAQMD's thresholds of

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[19] *Endangered Habitats League v County of Orange* (2005) 131 Cal.App.4th 777, 793 ("The use of an erroneous legal standard [for the threshold of significance in an EIR] is a failure to proceed in the manner required by law that requires reversal.").

[20] *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 [underscore emphasis added], citing *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 114 ("*CBE*"); accord *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342 ["A threshold of significance is not conclusive...and does not relieve a public agency of the duty to consider the evidence under the fair argument standard."].)

significance represents a failure of the City to exercise its independent judgment in preparing the DSEIR.[21] Just as disagreement from another agency does not deprive a lead agency of discretion under CEQA to judge whether substantial evidence supports its conclusions,[22] agreement from another agency does not relieve a lead agency of separately discharging its obligations under CEQA. The BAAQMD CEQA Guidelines do not provide any factual explanation as to why the 54 lbs. per day standard represents an appropriate threshold for judging the significance of project-level ozone pollution impacts. More importantly, the DSEIR also fails to include any such explanation, and is therefore inadequate as a matter of law.[23] It is well-settled that compliance with other regulatory standards cannot be used under CEQA as a basis for finding that a project's effects are insignificant, nor can it substitute for a fact-based analysis of those effects.[24]

Also, the DSEIR's reliance on information not contained in the DSEIR for purposes of showing these thresholds are supported by substantial evidence violates CEQA's informational requirements. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 405 ["whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report"]; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442 ["[I]nformation 'scattered here and there in EIR appendices' or a report 'buried in an appendix,' is not a substitute for 'a good faith reasoned analysis'"], 443 ["The audience to whom an EIR must communicate is not the reviewing court but the public and the government officials deciding on the project. That a party's briefs to the court may explain or supplement matters that are obscure or incomplete in the EIR, for example,

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[21] *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446.

[22] *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.

[23] *Santiago County Water Dist. v. County of Orange*, *supra*, 118 Cal.App.3d 818.

[24] *See*, e.g., *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16 (lead agencies must review the site-specific impacts of pesticide applications under their jurisdiction, because "DPR's [Department of Pesticide Regulation] registration does not and cannot account for specific uses of pesticides..., such as the specific chemicals used, their amounts and frequency of use, specific sensitive areas targeted for application, and the like"); *Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture (*1986) 187 Cal.App.3d 1575, 1587-1588 (state agency applying pesticides cannot rely on pesticide registration status to avoid further environmental review under CEQA); *Oro Fino Gold Mining Corporation v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881-882 (rejects contention that project noise level would be insignificant simply by being consistent with general plan standards for the zone in question). *See also City of Antioch v. City Council of the City of Pittsburg* (1986) 187 Cal.App.3d 1325, 1331-1332 (EIR required for construction of road and sewer lines even though these were shown on city general plan); *Kings County Farm Bureau v. City of Hanford*, *supra*, 221 Cal.App.3d at pp. 712-718 (agency erred by "wrongly assum[ing] that, simply because the smokestack emissions would comply with applicable regulations from other agencies regulating air quality, the overall project would not cause significant effects to air quality.").

is irrelevant ... The question is therefore not whether the project's significant environmental effects *can* be clearly explained, but whether they *were*"] (emphasis in original).)

(a) The DSEIR's impact assessments for construction related criteria pollutants (ozone precursors, PM10, PM2.5) and TAC emissions are invalid.

DSEIR Table 5.4-8 shows construction-related daily emissions of the ozone precursor ROG at 47 lbs/day (mitigated by Tier 2 and NOx VDECS engines) or 49 lbs/day (mitigated by Tier 4 engines) and of the ozone precursor NOx at 144 lbs/day (mitigated by Tier 2 and NOx VDECS engines) or 73 lbs/day (mitigated by Tier 4 engines).

The DSEIR's impact assessments for construction-related ozone precursor emissions are invalid because the DSEIR uses the invalid thresholds of significance discussed above.

Because NOx construction-related emissions are reported as higher than the applicable (but invalid) threshold of significance for ROG (i.e., 54 lbs/day), the DSEIR concludes the Project's impact on ozone pollution is significant. While this conclusion is correct, it is also misleading because it understates the severity of the impact deemed "significant." The DSEIR implies that the only fraction of the Project's NOx emissions that are "significant" is the fraction above 54 lbs/day. But as discussed above, this threshold of significance is invalid. Using this invalid threshold implies that most of the quantity of emissions below the threshold are not "significant." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831 ["The conclusion that one of the unavoidable adverse impacts of the project will be the 'increased demand upon water available from the Santiago County Water District' is only stating the obvious. What is needed is some information about how adverse the adverse impact will be"].)

The DSEIR assumes that adoption of Mitigation Measure M-AQ-1, requiring use of off-road equipment with engines meeting Tier 2 or Tier 4 standards, will reduce construction-related ROG emissions to 47 or 49 pounds per day, respectively, which are both below the applicable (but invalid) threshold of significance for ROG (i.e., 54 lbs/day). (DSEIR, p. 5.4-33, Table 5.4-8.) But equipment meeting Tier 2 or Tier 4 standards are not sufficiently available to meet either requirement. (See July 26 Lippe, Exhibit 2.) Therefore, the impact assessment must be recalculated to more realistically estimate the percentage of construction equipment that will meet Tier 2 or 4 standards.

Also, the DSEIR incorrectly utilizes a default hauling trip length of 20-miles, provided by the California Emissions Estimator Model ("CalEEMod"), to determine the on-road hauling emissions that would occur during construction. Using this default value, rather than a site-specific trip length to the actual haul destination, results in an underestimation of the Project's construction emissions. Therefore, the impact assessment must be recalculated to realistically account for the actual haul destination of the excavation spoils. (See July 26 Lippe, p. 10; July 20 SWAPE, 2-6.)

(1) Mitigation Measure M-AQ-1 does not comply with CEQA's legal requirements.

Mitigation Measure M-AQ-1 (at DSEIR, p. 5.4-35) does not comply with CEQA's legal requirements. As discussed above, the requirement that off-road equipment meet Tier 2 standards is illusory, and therefore ineffective, because the Project Sponsor will not be able to obtain enough equipment meeting this standard. (July 26 Lippe, p. 9; July 20 SWAPE, 6-8; October 30 Gilbert, pp. 10-14.)

M-AQ-1 includes a limit on idling time of two minutes, and provides exceptions to this limit as provided in state law (DSEIR, p. 5.4-36), but utterly fails to describe what these exceptions are. The DSEIR must fully describe this measure in order for the public and City decision makers to assess its effectiveness. (See July 26 Lippe, p. 10.)

M-AQ-1 requires the Project Sponsor prepare a Construction Emissions Minimization Plan, and the Project Sponsor must certify compliance with the Plan. (DSEIR, p. 5.4-36.) This is asking the fox to guard the henhouse. (See July 26 Lippe, p. 10; July 19 Gilbert, pp. 7-10; October 30 Gilbert, pp. 14-16.)

a. The Response to Comment AQ-6a is Inadequate.[25]

Mitigation Measure M-AQ-1 requires the use of Tier 2 or better engines for all off-road equipment. The "step-downs" from Tier 4 to Tier 3 to Tier 2, or from Tier 3 to Tier 2, are allowed when Tier 4 (or Tier 3) is not "commercially available." But step-downs from Tier 2 are not available under any scenario.

Mr. Gilbert's July 19, 2015, letter commented that this mitigation is not feasible because there are not enough Tier 2 or better equipment available for the Project Sponsor to use. The response to this comment states that "in 2014 approximately 59 percent of all off-road equipment in the state were operating with Tier 2 engines or better" and, therefore, it appears the measure is feasible. (RTC, p. 13.13-53.)

But the response does not specify whether the diesel off-road equipment sampled included equipment in private or government fleets that are not potentially available to the Project Sponsor to use, or alternatively, whether it consisted only of equipment that is potentially available to the Project Sponsor to use. If the former is true, then the 59% sampling result is meaningless, because the relevant population to sample is equipment that is potentially available to the Project Sponsor to use. A review of Figure 4 in the document cited in footnote 20 on RTC page 13.13-53 appears to indicate that the population of equipment sampled is all equipment, including equipment that is not potentially available to the Project Sponsor to use. Therefore, the 59% sampling result appears to be meaningless.

[25] July 26 Lippe, p. 9; July 20 SWAPE, 6-8; October 30 Gilbert, pp. 10-14.

Moreover, even if the population of equipment sampled is equipment that is potentially available for the Project Sponsor to use, the idea that the Project Sponsor will be able to acquire 100% of its equipment at Tier 2 or better when only 59% of the potentially available equipment is Tier 2 or higher is illogical. It is more plausible that the Project Sponsor will be able to acquire only about 59% of its equipment at Tier 2 or better.

As stated in the Nov 2 Gilbert report:

> Further, the statistic provided by the Lead Agency does not say that 59% of all construction equipment vehicles in CA will meet Tier 2 or better status – rather, it says that all **off-road** vehicles do (as of 2014). All off-road vehicles are not all construction vehicles; in fact, construction vehicles are a small subset of all off-road vehicles. Moreover, the rate of compliance for construction vehicles, particularly large, expensive, long-lived ones (scrapers, excavators, pile drivers, etc.) will be far lower than the average for all off-road vehicles that include such non-construction equipment as ground support vehicles at airports, agricultural forklifts, and myriad other off-road, nonconstruction equipment types. Because the statistic represents all off-road vehicles in CA and not construction vehicles, it cannot be used to even roughly determine the proportion of construction vehicles supposedly available to the project with Tier 2 engines, VDECs, and 40% NOx control; hence, the statistic is irrelevant to the Events Center project environmental review and does nothing to refute our concerns expressed clearly at the SDEIR review stage.

(November 2 Gilbert, p. 11.)

b. The Response to Comment AQ-6e is Inadequate.[26]

Mr Gilbert's July 19, 2015, letter commented that:

> Further, M-AQ-1 specifies numerous sub-part requirements (A 1 through 5) to be included in the Construction Emissions Mitigation Plan, and in each case compliance with those sub-parts is left to the "project sponsor." So, too, is compliance with the Measure's additional duties required under M-AQ-1 items B and C. This is not appropriate when considering the extent, complexity, and costs that will be incurred for effective mitigation measure compliance across the 26-month construction period; permitting the project sponsor to create, implement, report, and determine compliance with the Measure is akin to having the fox guard the henhouse and must not be allowed. As written, the measure is not enforceable due to the subjective, undefined nature of "Air Quality Specialist" who will approve the project sponsor's Construction Emissions Mitigation Plan.

[26] July 26 Lippe, p. 10; July 19 Gilbert, pp. 7-10; October 30 Gilbert, pp. 14-16.

> Further, it is unacceptable that the Measure will permit the project sponsor to determine compliance with each of the measure's components, record and report information signifying compliance, and then, under part C certify their own compliance with the Plan and its various requirements. We have inspected construction project sites, under air district contract, to determine compliance with air district-imposed construction equipment mitigations and have found uniformly poor compliance; to exemplify, at one residential subdivision project in south Sacramento County we determined that only one off-road construction vehicle out of nearly twenty were actually compliant with the mitigation requirements that had been imposed on the project by the Lead Agency. This is because there has traditionally been very little, if any, post- EIR follow-through to verify mitigation compliance by Lead Agencies or by the local air district after the CEQA project has been approved for development and construction has started. Knowing this, construction and development firms commonly let air quality mitigations go unmet, although records purporting to show compliance can be easily formulated and submitted post hoc in order to fulfill a paper requirement. Without an independent, qualified 3rd party contractor onsite each day to track, verify, and record emissions- and activity-related information on construction vehicles used at the project site to ensure the EIR's mitigations are implemented effectively, the project is very unlikely to produce more than a token of the emission reductions claimed in the DSEIR.

The Responses to Comments (RTC) codes this comment as "AQ-6e." (Volume 5, p. 13.13-60.) The response to comment AQ-6e states:

> The City and OCII have successfully monitored implementation of emissions minimization requirements on numerous construction projects over the past several years. Examples of past and ongoing projects with CEMP emissions minimization requirements include Candlestick Point-Hunters Point Shipyard Phase II Development Project, which requires staged increases in the percentage of Tier 4 equipment; the Seismic Upgrade of BDPL Nos. 3 & 4 at Hayward Fault Project, which had one year of tiered engine requirements for on-road spoils hauling trucks and off-road construction equipment; and the Pacific Rod and Gun Club Upland Soil Remedial Action Project, which also had tiered engine requirements for off-road construction equipment.

(Volume 5, p. 13.13-60.)

The RTC's assertion is made without any evidentiary support. Well before the Response to Comments issued, the Alliance attempted to discover if the City or the OCII have any evidence to support the DSEIR's assumption that the Project's compliance with adopted air quality mitigation measures will be effectively monitored. In this regard, on August 13, 2015, I submitted a request to the City and OCII for:

> All records relating to monitoring or enforcement of compliance with mitigation measures adopted to reduce potentially significant air quality impacts of development projects approved by the City, the Redevelopment Agency of the City and County of San Francisco, or the Successor Agency to the Redevelopment Agency of the City and County of San Francisco, including any records reflecting audits of such compliance.

(See Nov 2 Lippe FSEIR, Exhibit D attached thereto). In my email to the OCII and City dated September 30, 2015, I provided further definition to this request, stating:

> With respect to all construction projects in these areas for which the EIR identified significant air quality impacts from construction activities that could not be entirely avoided, the City, Redevelopment Agency, or the Successor Agency would have adopted mitigation measures to reduce the projects' significant air quality impacts and would have adopted a Mitigation Monitoring and Reporting Plan ("MMRP"). These MMRPs should have resulted in the generation of reports documenting the project's compliance, or lack thereof, with these adopted air quality impact mitigation measures. I want to obtain these reports."

(See Nov 2 Lippe FSEIR, Exhibit E attached thereto [email exchanges between this author and OCII and City dated September 11 through September 30 of 2015].)

Despite these requests, neither OCII nor the City have produced a single record showing they have either themselves conducted monitoring of CEQA required air quality mitigation measures or have taken steps to ensure that Project Sponsors tasked with self-monitoring their own compliance have faithfully done so. The agencies' failure to produce any such records leads inescapably to the conclusion that Mr. Gilbert's observation applies to the OCII and the City, and no such records exist because no such monitoring has been done.

(b) The DSEIR's impact assessments for operational criteria pollutants (ozone precursors, PM10, PM2.5) and TAC emissions are invalid.

The operational impact assessments for ozone precursor, PM10, PM2.5 and TAC emissions is invalid for many reasons.

DSEIR Table 5.4-9 shows operational daily emissions of criteria pollutants as follows:

ROG:	79 lbs/day [14 tpy]
NOx:	124 lbs/day [23 tpy]
PM10:	80 lbs/day [14.6 tpy]
PM2.5:	25 lbs/day [4.5 tpy]

(DSEIR, p. 5.4-39.)

The DSEIR's impact assessments for these criteria pollutants emissions are invalid because they are based on the invalid thresholds of significance discussed above.

Because construction-related emissions of ROG and NOx are higher than the applicable (but invalid) threshold of significance for these pollutants, the DSEIR concludes the Project's impact on ozone pollution is significant. As discussed above, while correct, this conclusion is misleading because it understates the severity of the impact deemed "significant" by implying that the only fraction of the Project's NOx emissions is are "significant" is the fraction above 54 lbs/day.

(1) The SEIR fails to include vehicle emissions from Warriors game traffic in its analysis of operational emissions.[27]

The DSEIR's impact assessment for operational ozone precursor emissions is also misleading because it omits from its quantitative tally of criteria pollutants the emissions the Project will generate in San Francisco and the Mission Bay neighborhood from basketball game-associated "vehicle miles traveled" (DSEIR, p. 5-37.) The DSEIR's rationale for this startling omission is that moving the Warriors games from Oakland to San Francisco will reduce the same number of "vehicle miles traveled" in Oakland that the Project will generate in San Francisco and the Mission Bay neighborhood.

This rationale is based on the unstated, but incorrect, assumption that the environmental setting at Oracle Arena and the Mission Bay site are identical. These settings are very different, in many crucial respects. The Mission Bay neighborhood and the surrounding areas of San Francisco are populated by San Franciscans, not Oaklanders. The residents, citizens, and registered voters of San Francisco are entitled to know what the Project's air quality impacts will be *on them*, regardless of whether the residents, citizens, and registered voters of Oakland will experience an air quality benefit as a result of the move. (July 26 Lippe, pp. 10-11.)

Also, Oracle Arena sits in the middle of a vast parking lot. To the west is I-880, various commercial properties, wetlands, and the Bay. To the east is the Coliseum, railroad tracks, ABC Supply (provider of industrial equipment), East Bay Truck and Auto Repair, BART tracks and the Coliseum BART Station, and then, over 2,000 feet away to the northeast there is a group of apartment buildings. To the north and south stretch commercial properties for well over a mile without any residences. This stands in stark contrast to the dense residential population surrounding the Mission Bay site.

The DSEIR's suggestion that respiratory disease, heart disease, and cancer-causing air pollution is fungible and transferable, without regard to the location or environmental setting in which it occurs, is unsupported.

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[27] July 26 Lippe, p. 11; July 19 Gilbert, p. 10; October 30 Gilbert, pp. 6-10.

(2) Mitigation Measure M-AQ-2b does not comply with CEQA's legal requirements.[28]

Mitigation Measure M-AQ-2b requires the Project Sponsor pay a fee to the BAAQMD that the BAAQMD will use to purchase ozone precursor offsets. The purpose is to offset the amount by which the project's ozone precursors emissions exceed the numerical thresholds discussed in the previous section of this letter.

Therefore, to the extent the thresholds are invalid, as argued above, M-AQ-2b fails to reduce ozone precursor emissions to less-than-significant levels. Further, the DSEIR does not even consider the feasibility or effectiveness of more robust mitigation strategies that could reduce ozone precursor emissions further below the (invalid) thresholds. (See DSEIR, p. 5.4-39, Table 5.4-9, "Estimated Emissions Reduction Required".)

The amount of the offset fee required by M-AQ-2b is calculated by multiplying the total amount of *annual* criteria pollutant emissions exceeding the annual (invalid) thresholds by $18,030 per weighted ton of criteria pollutant emissions; then adding 5% of that product for BAAQMD's administrative fees, as follows:[29]

ROG tons	4.4
NOx tons	12.6
PM tons x 20	0
Subtotal	17
Fee per ton	$18,030.00
Subtotal	$306,510.00
Admin fee 5%	0.05
Admin fee	$15,325.50
Total Fee	$321,835.50

The DSEIR indicates M-AQ-2b requires the Project Sponsor to pay only $321,835.50, which is the amount required to offset one year's worth of the Project's operational criteria pollutant emissions. (See DSEIR, p. 5.4-41.) But the sports and entertainment arena portion of this Project has an operational life of at least 50 years, probably much longer,[30] and the office towers will last even longer. In contrast, the life spans of offset credit sources are much shorter than the expected life span of this Project. (See July 26 Lippe, July 19 Gilbert.) Therefore, the actual amount required to offset the Project's above-threshold ozone precursor emissions is much higher than $321,835.50. Therefore, the DSEIR's premise that M-AQ-2b will achieve a complete offset of

[28]Nov 2 Lippe FSEIR, pp. 5-6; October 30 Gilbert, pp. 17-19; 19-21.

[29]54 lbs per day of ROG emissions equals 10 tons per year.

[30]Oracle Arena was built in 1966, 49 years ago, and is still functional.

the Project's above threshold construction and operational criteria pollutant emissions is misleading and false.[31]

To address this deficiency, M-AQ-2b must be amended. The DSEIR must disclose the average life span of the offset credit sources the BAAQMD typically buys, then amend M-AQ-2b to require recalculation of the offset fee or other offset requirement after the average life span of such offset credit sources to account for their limited life span, changes in emissions, changes in attainment status, etc. In addition, M-AQ-2b must be amended to include a mechanism, in the event that BAAQMD does not spend the offset fee and returns it, to ensure the required offsets are purchased through another bona fide, verifiable offset program.

Accepting, *arguendo*, the validity of the 17 ton offset requirement, the DSEIR's discussion of Mitigation Measure M-AQ-2b leaves many questions unanswered regarding BAAQMD's offset program. For example, the effectiveness of the measure depends directly on the validity of numerous assumptions, including: (1) the assumption that $18,030 is enough to purchase a ton of criteria pollutant emissions; (2) the assumption that the offset market has 17 tons of criteria pollutant emissions that can be reduced by engine retrofits or other offset techniques; (3) the assumption the Project Sponsor will accurately measure actual construction and operational emissions for purpose of determining how many tons of criteria pollutants must be offset; and (4) the assumption that BAAQMD has and will have reliable verification procedures in place ensuring that 17 tons of offset will actually be achieved.

a. The Response to Comment AQ-7 is Inadequate.

Comment AQ-7 is that the per ton charge for emission offsets is too low to achieve complete offset of the Project's emissions. The response is cagey on this point, but it appears the BAAQMD agreed with the comment, because the response states:

> SF Planning has been in communication with BAAQMD with regard to its suggestion that a higher fee may be warranted to offset project emissions to a less than significant level and found that BAAQMD could not establish that an increased rate beyond that of the Carl Moyer Program plus a five percent administrative fee could meet the "rough proportionality" standard required under CEQA.

(RTC, p. 13.13-67.) The RTC's rationale for contending that a higher offset fee would not meet the "rough proportionality" standard is that offsets fees in other areas of the state are not higher than the offset fee proposed in the DSEIR. This is an error of law. The "rough proportionality" requirement requires a comparison of the cost of the mitigation to the degree of severity of the impact. The fee charged in other areas of the state are irrelevant to "rough proportionality."

[31] The DSEIR indicates that construction-related criteria pollutant emissions are mitigated by including them in the operational period emission mitigation strategy. (DSEIR, p. 5.4-34.)

b. New information and the refusal of the project sponsor to agree to Mitigation Measure M-AQ-2b since publication of the DSEIR require recirculation of a revised DSEIR.[32]

By letter dated November 2, 2015 (i.e., after the RTC was issued), to the OCII, the Bay Area Air Quality Management District announced that it would not participate in Mitigation Measure M-AQ-2b's offset plan because the City and Project Sponsor refuse to agree to BAAQMD's offset fees. BAAQMD confirmed that the offset fees stated in the SEIR are insufficient to achieve the complete offset of ozone precursor emissions above the thresholds of significance and that unless the Project Sponsor and OCII agreed to the higher fees demanded, then BAAQMD would not participate in the offset program. The OCII has refused to require the Project Sponsor pay the higher fee. This eliminates a key basis for finding the Project's significant ozone precursor emissions to be substantially reduced and therefore, requires recirculation of the Draft SEIR.

The City cannot find that "Impact AQ-4: Potential conflicts with BAAQMD's 2010 Clean Air Plan" is less than significant with mitigation because the City and Project Sponsor refuse to agree to BAAQMD's offset fees per Mitigation Measure M-AQ-2b. (See November 2, 2015, letter from BAAQMD and November 2, 2015, OCII Memorandum re same.)

There is also no evidence that the "Option 2" offset within Mitigation Measure M-AQ-2b is feasible. There are too many unanswered questions regarding Option 2, including lack of assured verification of offsets to ensure their effectiveness, and lack of assurance that offset sources are available in the quantity required. BAAQMD's offset program at least answers some, if not all, of these questions.

The City and OCII cannot find that all feasible mitigation measures that would substantially reduce "Impact AQ-1: Impacts of Criteria Air Pollutants from Construction" have been adopted as required by CEQA section 21081, because there is no evidence that paying the offset fees demanded by BAAQMD is infeasible. Also, as discussed above, there is no evidence that the "Option 2" offset idea within Mitigation Measure M-AQ-2b is feasible; therefore, it is not an adequate substitute for BAAQMD's offset program. This also applies to Impact AQ-2: Impacts of Criteria Air Pollutants from Project Operations;" Impact C-AQ-1: Project Contribution to Regional Air Quality Impacts; and Impact C-AQ-1: Project Contribution to Regional Air Quality Impacts.

[32]Lippe Nov 2 FSEIR, pp. 5-6; October 30 Gilbert, pp. 17-18; Oral testimony of Thomas N. Lippe at November 3, 2015, OCII hearing.

3. Changes to the Project Since Publication of the DSEIR Require Recirculation of a Revised DSEIR Due to New and More Severe Significant Impacts.[33]

Under CEQA, if the project changes after publication of the Draft EIR, and these changes create a new significant impact not identified in the Draft EIR, or a substantial increase in severity of a significant impact that was identified in the Draft EIR, the lead agency must recirculate the draft EIR for public comment. (CEQA section 21092.1.)

Here, the RTC describes a number of "construction refinements", including using dewatering generators, using a soil treatment pug mill, and removing rapid impact compaction from the construction plan. With respect to the air quality impacts of these "construction refinements" the RTC states:

> The addition of the construction refinements would not substantially increase (approximately 2 percent for ROG and 4 percent for NOx) the average daily construction-related emissions disclosed in the Draft SEIR. This would not result in a substantial increase in the severity of the previously identified significant and unavoidable impact, and the same mitigation measures would apply requiring the project sponsor to minimize construction emissions.

(RTC, p 12-22.)

The RTC also describes a new variant, the Muni UCSF/Mission Bay Station Variant, and discloses that:

> The Muni UCSF/Mission Bay Station Platform Variant would not substantially increase (approximately 2 percent for ROG and 5 percent for NOx) the average daily emissions disclosed in the Draft SEIR for the proposed project (see Table 5.4-7, page 5.4-31). Furthermore, Mitigation Measure M-AQ-1 (Construction Emissions Minimization) would also apply to the variant. While the estimated construction emissions under the variant shown in Table 12-2 are slightly higher than those identified for the proposed project in the Draft SEIR, this impact is not substantially more severe than the previously identified significant and unavoidable impact.

(RTC, p 12-22.)

There are several problems with these assertions. First, the RTC does explain whether construction refinement caused increases of 2 and 4 percent for ROG and NOx, respectively, are included within or additive to the Platform Variant caused increases of 2 and 5 percent for ROG and NOx. Without this information, the public does not know what additional quantum of ozone

[33]Lippe Nov 2 FSEIR, pp. 6-7.

pollution the RTC deems insubstantial.

Assuming for the moment that the construction refinement caused increases are included within or the Platform Variant caused increases, the RTC offers no rationale why the 2 and 5 percent increases are not considered a "substantial" increase in the severity of the previously identified significant effect that Project construction will have on ozone precursor pollution. The RTC authors apparently believe these numbers speak for themselves. They do not. In fact, reliance on these appears to reflect a silent assumption that these increases above the previously identified quantities of emissions for these pollutants is "de minimis." It must be remembered, however, that these increases are not above a previously identified less-than-significant quantity of emissions; the previously identified quantities were significant!

The RTC thus commits the exact errors of law rejected by the Court of Appeal in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98 ("*CBE*"), i.e., using a "de minimis" rationale or any type of simple numerical ratio of the incremental impact compared to the pre-existing impact. "[T]he relevant question... is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether 'any additional amount' of effect should be considered significant in the context of the existing cumulative effect. [footnote omitted] In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." (Id. At p. 120; see also *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720-721.)

These increases should be considered substantial and the SEIR recirculated for public comment. Instead, the October 23, 2015, notice of publication of the Response to Comments informed the public they would have no opportunity to comment on the environmental effects of these changes in the Project.

4. The SEIR's Cancer and Health Risk Assessment for Toxic Air Contaminants Is Invalid, Based on Legal Errors and Not Supported by Substantial Evidence.

(a) The SEIR's threshold of significance for what is a cumulatively significant TAC impact is legally flawed.

Quoting the discussion of cumulative risk levels in BAAQMD's 2009 *Revised Draft Options and Justification Report, California Environmental Quality Act Thresholds of Significance*, the DSEIR explained that the 100 in one million excess cancer risk threshold was based on USEPA guidance for "acceptable" risk. (DSEIR, p. 5.4-13.) The announced basis of that threshold for toxic air pollutants is identified as the 1989 preamble to the benzene National Emissions Standards for Hazardous Air Pollutants (NESHAP) rulemaking, which is focused on providing the "maximum feasible protection against risks to health ..." (*Id.,* emphasis added.)

In comments on the DSEIR, The Alliance objected that the DSEIR's reliance on the 100

excess cancer threshold to determine cumulative significance was legally flawed because it improperly imports considerations of the cost and feasibility of mitigation into a determination of significance, even though CEQA requires that these two determinations be made in distinct steps.[34] The Alliance also objected that the DSEIR's purported justification of the 100 excess cancer threshold as representative of "pristine" conditions was not coherent or explained by the DSEIR or the 2009 BAAQMD reports cited by the DSEIR.

The FSEIR response to these comments objecting to the 100 excess cancer cumulative threshold argues that it is justified as the "upper limit of acceptability" under USEPA guidance. (FSEIR, p. 13.13-27.) The FSEIR explained that "pristine" conditions are those that are affected only by cumulative global atmospheric transport of TACs. (Id.) These responses are inconsistent with CEQA.

The SEIR's use of the 100 excess cancers per million threshold was legally flawed for several reasons. First, "a threshold of significance cannot be applied in a way that would foreclose the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant." (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109.) In light of the obvious conclusion that the risk of the first 100 cancers in one million represent a material and significant health impact, the agency may not simply apply a regulatory standard from the USEPA "as an automatic determinant that the effect is or is not significant." (*Id.*)

Also, the EIR uncritically relies on an appeal to another agency's standards without justification, even though it is well-settled that mere compliance with another agency's regulatory standards cannot be used under CEQA as a sufficient basis for determining that a project's effects are insignificant. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712-718 (improper to conclude that reliance with air quality regulations precludes significant impact); *Ebbetts Pass Forest Watch v. California Department of Forestry & Fire Protection* (2008) 43 Cal4th 936, 957 (err to conclude that compliance with pesticide restrictions precludes significant impact); *Oro Fino Gold Mining Corporation v County of El Dorado* (1990) 225 Cal.App.3d 872, 881-882 (meeting general plan noise standard does not preclude significant impact).) An agency must conduct its own fact-based analysis of project impacts, regardless of compliance with other regulatory standards. (*Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16; C*itizens for Non-Toxic Pest Control v. Department of Food & Agriculture* (1986) 187 Cal.App.3d 1575, 1587-1588.) The OCII's failure to exercise independent judgment, evident in its uncritical reliance on other agency standards, violates CEQA. (CEQA Guidelines, §15084(e); *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446, 1452.)

In addition, the DSEIR fails to provide any explanation for why cumulative TACs that do

[34]Thomas Lippe, letter to Tiffany Bohee, July 26, 2015, pp. 16-18.

cause the first 100 excess cancers are "acceptable." An EIR must contain facts and analysis, not just a bare conclusion, e.g., a conclusion as to "acceptable" risk. (*Santiago County Water District v County of Orange* (1981) 118 Cal.App.3d 818, 831.) The EPA standard borrowed by OCII and BAAQMD as the threshold for significant cumulative impact was designed to support a different regulatory scheme, not to support determinations of significance under CEQA. The EPA is permitted and required to consider factors of cost and feasibility in its regulation of toxics under the Clean Air Act. (See July 26 Lippe, pp. 16-18.) However, CEQA neither requires nor allows OCII to use EPA's judgment of "acceptable" cancer risk to determine the significance of cumulative TAC impacts. The determination of "acceptable" environmental harm arises at the end of the CEQA analysis in the context of a statement of overriding considerations, not at the beginning of the process, in determining whether impacts are significant. (*See, e.g.*, *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 368-369.)

Also, the SEIR relies on a simplistic misrepresentation of actual EPA policy. (See July 26 Lippe, pp. 13-18.) The EPA's actual policy is to assess increased cancer risk based on a host of site-specific factors within a range of values from 1 in one million to 100 in one million. This policy reflects the agency's attempt to balance the costs and benefits of protecting public health in its implementation of a host of federal environmental laws, including the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, CERCLA (Superfund), etc. (See July 26 Lippe, Exhibit 3.)[35]

Instead of following this analytic approach, the DSEIR selects one value at the least environmentally protective end of the EPA's "acceptable risk" range and uses it to determine the significance of the Project's impacts, but without regard to the Project's site-specific

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[35] "In the proposed NCP [Superfund National Contingency Plan], the Agency [EPA] had defined the acceptable risk range as being from 10^{-4} to 10^{-7}, meaning that when the excess risk to an individual of contracting cancer due to a lifetime exposure to a certain concentration of a carcinogen falls between approximately 1 in 10,000 [100 in one million] and 1 in 10 million, it is judged to be an acceptable exposure. As a measure of additional protection, the proposal provided that there should be a "point of departure" of 10^{-6}, toward the more protective end of the scale, that should be used in setting preliminary remediation goals; if conditions warranted, the final remedy could achieve a level elsewhere within the range. ¶ The final rule maintained the point of departure of 10^{-6}, but narrowed the risk range to 10^{-4} through 10^{-6}. This action was taken in response to public comment and concerns that the Superfund range went below the accepted de minimis level used by other EPA programs and those of other federal agencies. ... the Agency has retained the discretion to select a cleanup level outside the range in appropriate circumstances (e.g., where concerns about sensitive populations, synergistic effects among chemical mixtures, etc., suggest that the remedy should attain a level below 10^{-6}. The use of a range of acceptable risk is general practice for most government programs. As discussed below in the section on role of cost, it affords the Agency the flexibility to take into account different situations, different kinds of threats, and different kinds of technical remedies. If a single risk level had been adopted, (e.g., at the more stringent end of the risk range), fewer alternatives would be expected to pass the protectiveness threshold and qualify for consideration in the balancing phase of the remedy selection process." (Id., 20 ELR 10237 [footnotes omitted].)

considerations. Again, the DSEIR has cherry-picked a threshold of significance to avoid finding the Project's cancer risk impact significant.

Also, CEQA neither requires nor allows the City to use the EPA's judgment of "acceptable" cancer risk to determine the significance of the Project's impacts. The City's discretion to decide that significant environmental harm is "acceptable" in light of the project's benefits arises at the end of the CEQA analysis, in the context of a statement of overriding considerations, not at the beginning of the process, in determining whether impacts are significant.

> A statement of overriding considerations is required, and offers a proper basis for approving a project despite the existence of unmitigated environmental effects, only when the measures necessary to mitigate or avoid those effects have properly been found to be infeasible. (Pub. Resources Code, § 21081, subd. (b).) Given our conclusion the Trustees have abused their discretion in determining that CSUMB's remaining effects cannot feasibly be mitigated, that the Trustees' statement of overriding circumstances is invalid necessarily follows. CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible. Such a rule, even were it not wholly inconsistent with the relevant statute (id., § 21081, subd. (b)), would tend to displace the fundamental obligation of "each public agency [to] mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so" (id., § 21002.1, subd. (b)).

City of Marina v. Board of Trustees of the California State University (2006) 39 Cal.4th 341, 368-69.

This is a critical distinction, because where the Project does not exceed thresholds of significance that are erroneously inflated by the concept of "acceptable risk," the City is absolved of further legal obligation to mitigate the impact. As a result, the public cannot know whether the City will allow an unknown number of cancer cases to occur that it could have feasibly avoided had it scrupulously followed CEQA. Nor does the public know, had the EIR determined that 46 additional child cancer cases per one million persons is significant, whether or not the City would have found the Project's benefits outweigh its environmental and adverse human health effects.

(b) The SEIR's reliance on "the ambient cancer risk in the most pristine portions of the Bay Area" to support its chosen threshold of significance for TACs is incoherent and inconsistent with CEQA.

In its comments on the DSEIR, the Alliance criticized the DSEIR's attempt to support its

"100 in a million excess cancer cases" threshold by stating: "The 100 in a million excess cancer cases is also consistent with the ambient cancer risk in the most pristine portions of the Bay Area based on the District's recent regional modeling analysis." (DSEIR p. 5.4-13, citing the 2009 BAAQMD Justifications report, p. 67). (See July 26 Lippe, pp. 16-18.) As the Alliance pointed out, neither the DSEIR nor the 2009 BAAQMD Justification report explains what this means. For example, how are "excess" cancer cases "consistent" with "ambient" cancer risk? What does "most pristine" mean? On a scale of 1 to 10, are Mission Bay and the "most pristine areas" separated by 1 unit, or 10 units, or somewhere in between? (See July 26 Lippe, p. 18.)

The RTC responds that: "It should be noted that when BAAQMD developed its 100 in one million cumulative criterion characterized in its CEQA Air Quality Guidelines as reflective of air quality in a 'pristine' portion of the Bay area, it was originally designated as its "Point Reyes" approach, reflecting the air quality in this National Seashore that the U.S. Park Service identifies as a Class I Park and wilderness area. Consequently, even such pristine areas as Point Reyes National Seashore can have a sizeable background cancer risk, largely due to cumulative global atmospheric transport." (FSEIR, Vol. 4, p. 13.13-27.)

This is a remarkable revelation, because here, the SEIR's calculation of this Project excess cumulative cancer risk is based on modeling only <u>local</u> TAC sources in the immediate vicinity of the Project and excludes any consideration of this admitted background risk from regional or global sources. As Paul Rosenfeld and Jessie Jaeger explain, the excess cancer risk from cumulative non-Project sources identified in the SEIR (26 excess cancers at Hearst Tower and 44 excess cancers at UCSF Hospital) was based on modeling that takes into account only local sources such as San Francisco's roadways and Caltrain.[36] Indeed, the documentation for the modeling of Air Pollution Exposure Zones cited by the DSEIR specifically states:

When discussing the maps and drawing conclusions from them, it is important to consider what they portray and how they were produced. Specifically, the dispersion modeling, from which the maps are derived, produced concentrations and risk estimates from direct emissions. The maps themselves therefore portray concentrations of directly emitted PM2.5 and cancer risk associated with directly emitted TAC *at locations near the sources of these emissions. The results do not reflect regional or long-range transport of air pollutants*. Nor do they include the effects of the chemical transformation (formation or loss) of pollutants.[37]

As a result of its exclusive focus on local sources, the SEIR's assessment of this Project's excess cumulative cancer risk improperly excludes the ambient cancer risk from regional, statewide, or globally transported TACs from the pre- project, existing-conditions, "baseline."

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[36] Nov 20 SWAPE, Exhibit 1 hereto, pp. 4-7.

[37] BAAQMD, SFDPH, and SFPD, *The San Francisco Community Risk Reduction Plan: Technical Support Documentation*, December 2012, p. 37.

The omission was material. This Project's modeled excess cancer risk is 18 in one million for children resident in the UCSF Hearst Tower and 12 in one million for children at the UCSF Hospital. (FSEIR, Table 5.4-11, Revised, p. 14-121.) The HRA reports that the cumulative risk for these receptors, caused by TAC sources from the citywide modeling of local sources and by the Project sources, will be 44 and 56 excess cancers respectively. (*Id.*) But as the RTC now reveals, and Rosenfeld and Jaeger further explain, this risk does not include the baseline risk from regional or globally transported TACs. [38] When that non-local risk is included (i.e., 100 cancers per million), the resulting sum is well over 100 cancers per million. Yet the SEIR fails to disclose this as a significant impact.

Furthermore, in its justification of the cumulative threshold of significance, the SEIR does not explain why it makes sense to count only those excess cancers caused by local sources against the limit of 100 "acceptable" excess cancers. Indeed, the DSEIR's initial reference to "pristine" conditions affected only by the cumulative global atmospheric transport of TACs was incoherent. But when pressed, the RTC now discloses that the SEIR, without explanation or justification, simply ignores the contribution of regionally or globally transported TACs to this Project's cumulative excess cancer risk. The fact that TACs from a particular source may attenuate with distance does not explain why the cumulative background TACs from all sources, including more distant sources, should be ignored in a cumulative analysis.[39] CEQA requires consideration of all related sources of risk in cumulative analysis.

The regionally or globally transported background TACs responsible for 100 excess cancers are not included in, or related to, the SEIR's analysis in any fashion. The SEIR evaluates non-project cumulative TAC impacts by modeling TAC concentrations attributable to specifically identified local TAC sources.[40] Significance is determined by comparing the excess cancers from the modeled local sources to the 100 per million excess cancer threshold. However, if background regionally or globally transported TACs are already responsible for 100 excess cancers, then the SEIR should start with the conclusion that existing global projects are already responsible for a significant cumulative impact. Instead, the SEIR has committed the fundamental error of failing to add the Project's effects to the complete baseline for purposes of

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[38] As Rosenfeld and Jaeger explain, the SEIR's focus on local sources in evaluating cumulative excess cancers may be consistent with BAAQMD guidance, which restricts cumulative analysis to sources within a 1,000 foot radius. (20 SWAPE, Exhibit 1 hereto, p. 4) BAAQMD guidance justifies ignoring non-local sources because at 1,000 feet the risk from a particular source is sufficiently attenuated as to be indistinguishable from the background TAC risk. However, that does not mean that the background risk is zero or that the background risk should be ignored in cumulative analysis. BAAQMD guidance cannot justify violating CEQA's requirement to consider all related source of a cumulative impact.

[39] For example, the SEIR does not propose to ignore the cumulative effects of globally transported greenhouse gasses.

[40] Nov 20 SWAPE, Exhibit 1, pp. 4-5.

determining significance.[41]

As a result, the SEIR unjustifiably limits the geographic scope of its cumulative impact analysis to local sources, while admitting that the risk is affected materially by regionally or globally transported sources. An agency may not arbitrarily limit the geographic scope of cumulative analysis or omit relevant projects.[42] Lead agencies must "define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used." (CEQA Guidelines, § 15130(b)(3), emphasis added; *Citizens to Preserve the Ojai v. County of Ventura* (1985) 126 Cal.App.3d 421, 430 (failure to explain limited scope of cumulative analysis is error); *Bakersfield Citizens, supra,* 124 Cal.App.4th at 1216 (same).) Here, the SEIR provides no explanation, reasonable or otherwise, for omitting the 100 excess cancers attributed to non-local, regionally or globally transported TACs from its analysis.

(c) The SEIR is inadequate because it omits a project-specific assessment of TAC health risks.

The DSEIR identified TACs as a health risk, particularly to children, and explained that BAAQMD requires a Health Risk Assessment (HRA) if there is a potential public health risk. (DSEIR, p. 5.4-11.) The DSEIR provides an HRA in the Air Quality Appendix and summarizes its result in Table 5.4-11. (DSEIR, p. 5.4-49.) The HRA shows that, even after mitigation, the Project's TACs will cause an excess cancer risk of 46 in one million for children resident in the UCSF Hearst Tower and 42 in one million for children at the UCSF Hospital. (DSEIR, Table 5.4-11, p. 5.4-49.) The HRA reports that the cumulative risk for these receptors, caused by the Project's TAC sources and by background TAC sources, will be 72 and 86 excess cancers respectively. (*Id.*)

The DSEIR adopts the following threshold of significance for the health risk analysis for TACs:

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[41] *See San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722-723; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 881-882. Indeed, the significance of a cumulative impact depends on the environmental setting in which it occurs, including the severity of existing environmental harm. (*Communities for a Better Environment v. California Resources Agency* ("*Communities* ") (2002) 103 Cal.App.4th 98, 120 ["[T]he relevant question"... is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether "any additional amount" of effect should be considered significant in the context of the existing cumulative effect. [footnote omitted] In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant"].)

[42] *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 721-724 (error to confine cumulative air quality analysis to County where evidence showed sources were basin-wide); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1213-1214 (ignoring other impact sources was "overarching legal flaw").

> The threshold of significance used to evaluate health risks from new sources of TACs associated with the project is based on the potential for the proposed project to substantially affect the extent and severity of the Air Pollutant Exposure Zone 41 at sensitive receptor locations. The health protective standards used for determining the Air Pollutant Exposure Zone and evidence supporting these standards are discussed in the Setting section above and were developed in consultation with BAAQMD staff as part of the preparation of a Community Risk Reduction Plan.[] The project site is not within an identified health vulnerable zip code; therefore the Air Pollutant Exposure Zone criteria for this location is based on: (1) cumulative PM2.5 concentrations greater than 10 µg/m3, and/or (2) excess cancer risk from the contribution of emissions from all modeled sources greater than 100 per one million population. For projects that could result in sensitive receptor locations meeting the Air Pollutant Exposure Zone criteria that otherwise would not occur without the project, a proposed project that would emit PM2.5 concentration above 0.3 µg/m3 or result in an excess cancer risk greater than 10.0 per million would be considered a significant impact. The 0.3 µg/m3 PM2.5 concentration and the excess cancer risk of 10.0 per million persons exposed are the levels below which the BAAQMD considers new sources not to make a considerable contribution to cumulative health risks. [] For those locations already meeting the Air Pollutant Exposure Zone criteria, a lower significance standard is required to ensure that a proposed project's contribution to existing health risks would not be significant. Since the project is not within an Air Pollutant Exposure Zone, the above thresholds apply to the proposed project.

(DSEIR, p. 5.4-27, emphasis added, footnotes omitted.) Thus, the DSEIR would find a TAC "significant impact" based on excess cancers only if 1) the cumulative risk from all sources were greater than 100 excess cancers and 2) the project itself contributed more than 10 excess cancers. Similarly, the DSEIR would find a TAC "significant impact" based on PM2.5 concentrations only if 1) cumulative PM2.5 concentrations were greater than 10 ug/m3 and 2) the project itself contributed more than 0.3 ug/m3 to that PM2.5 concentration.

Although the HRA reports that the Project would cause well over 10 excess cancers (DSEIR, Table 5.4-11, p. 5.4-49) and its operations would increase PM2.5 concentrations more than 0.3 ug/m3 (DSEIR, Table 5.4-10, p. 5.4-48), the DSEIR concludes that the "cancer risk would be less than significant with mitigation" because no offsite receptors would meet the Air Pollution Exposure Zone (APEZ) criteria of PM2.5 concentration over 10 ug/m3 or 100 excess cancers.[43] (DSEIR, pp. 5.4-48, 5.4-49.)

[43] The DSEIR reports that the City and BAAQMD modeled health risks from TACs throughout the City from roadways, permitted stationary sources, port and maritime sources, and Caltrain sources in 2012 to identify areas in which the excess cancer risk from all modeled sources was greater than 100 in one million to identify Air Pollution Exposure Zones and that the Project is not located in such a zone. (DSEIR, p. 5.4-12.)

The DSEIR's discussion of the methodology for its analysis of cumulative TAC impacts equates the project-level and cumulative analyses as follows:

> ... the HRA takes into account the cumulative contribution of localized health risks to sensitive receptors from sources included in the Citywide modeling plus the proposed project's sources. Other future projects, whose emissions have not been incorporated into the existing Citywide health risk modeling, such as Pier 70 and Seawall Lot 337/Pier 48 would similarly be subject to CEQA requirements to analyze the health risk impact of their project. However, health risk impacts are localized, and health risks from sources decrease substantially with increasing distance.[] Thus cumulative impacts from the Pier 70 and Seawall Lot 337/Pier 48 would not combine with the proposed project's emissions to substantially increase health risks within the project vicinity. Thus, because the project-level analysis includes health risks from all known existing sources, the project-level analysis is also a cumulative health risk analysis.

(DSEIR, p. 5.4-28, emphasis added, footnote omitted.)

In comments on the DSEIR, The Alliance objected that the DSEIR ignored BAAQMD's stated threshold of risk of 10 excess cancers for single source impacts and instead relied only on the BAAAQMD 100 excess cancer risk for assessing cumulative impacts.[44] The Alliance objected that the acknowledged Project-caused risks of 46, 38, and 42 excess cancers (to child residents of Hearst Tower, adult residents of Hearst Tower, and child residents of UCSF Hospital respectively) exceed the BAAQMD thresholds for determining the significance of single source impacts.[45]

In support of these comments, the Alliance provided a technical letter from Paul Rosenfeld and Jessie Jaeger explaining that the DSEIR should have applied the BAAQMD threshold of 10 excess cancers or an increase of PM2.5 concentrations greater than 0.3 ug/m3 to the Project's individual impact. (July 20 SWAPE, pp, 8-10.) Rosenfeld and Jaeger explained that BAAQMD intended that the 10 in one million excess cancer threshold apply to all sources of emissions from a single project.

The FSEIR response AQ-1c to these DSEIR comments objecting to the lack of a project-specific TAC significance determination argues that the DSEIR did not ignore BAAQMD's 10 excess cancer threshold for individual projects because the DSEIR thresholds "are based on a combination of the BAAQMD 2010 CEQA Guidelines and assessments by the City of localized sources of toxic air contaminants and proximity to sensitive receptors." (FSEIR, p. 13.13-25, emphasis added.) The FSEIR argues that the "the project site conditions were such that the [10

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[44] July 26 Lippe, pp. 13-18.

[45] *Id.* at 13-15.

in one million excess cancer] threshold did not apply in this instance as further explained below." *Id.* The explanation is that the DSEIR would only apply the 10 excess cancer threshold for individual projects only if there is a significant cumulative impact, i.e., only if the Project's sensitive receptors were located in an APEZ:

> The City in partnership with the BAAQMD has identified the Air Pollutant Exposure Zone in the City – areas with poor air quality under existing and cumulative conditions[]. The project site is not located within an Air Pollutant Exposure Zone. The SEIR states that in such a case, if the project could result in sensitive receptor locations meeting the Air Pollutant Exposure Zone criteria that otherwise would not occur without the project, a significant impact would occur if the proposed project results in an excess cancer risk greater than 10.0 per million (page 5.427). The analysis demonstrated that the project would not result in sensitive receptor locations meeting the Air Pollutant Exposure Zone criteria. Therefore, the 10.0 per million excess cancer risk criterion does not apply.

(FSEIR, p. 13.13-25, emphasis added, footnotes omitted.)

The FSEIR also provides a new HRA based on changes to the project description that relocate three emergency diesel generators and reduce Project-caused excess cancers. (FSEIR, p. 13.13-27; FSEIR, Appendix AQ2, pp. 9-17.) Because the revised Table 5.4-11 no longer shows unmitigated cumulative TAC impacts greater than 100 excess cancers and because the FSEIR accordingly determines that mitigation is not required for this impact, the FSEIR concludes that the impact is "less than significant" rather than "less than significant with mitigation." (FSEIR, p. 14-121.)

The Alliance responded to the FSEIR by reiterating that the DSEIR fails to provide a project specific assessment of TAC health risks.[46] The Alliance explained that this omission is prejudicial by submitting a letter report from Paul Rosenfeld and Jessie Jaeger explaining that the Project's impacts exceed the 10 excess cancer in one million risk thresholds for project-specific analysis used by BAAQMD and the majority of California air districts.[47]

As the attached letter from Paul Rosenfeld and Jessie Jaeger explains, the FSEIR's new HRA also fails to assess individual health risk from proposed project by comparing it to a project-specific threshold of significance. [48] The project will still, by itself, cause excess cancers in excess of the 10 excess cancer threshold used by the majority of California air districts to determine the significance of project-specific impacts. In particular, child residents of Hearst

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[46]Nov 2 Farrow, pp. 1-3.

[47]Nov 2 SWAPE, pp. 2-4.

[48]Nov 20 SWAPE, Exhibit 1, pp. 2-4.

Tower will suffer a risk of 18 excess cancers and child residents of UCSF Hospital will suffer a risk of 12 excess cancers. (FSEIR, Table 5.4-11, p. 14-121.)

The SEIR's failure to provide a project-specific assessment of the Project's TAC impact was legally erroneous and prejudicial to informed public participation and decision making.

As the Alliance objected, the DSEIR fails to provide a project-specific assessment of TAC health risks because it does not adopt and does not apply a threshold of significance for the project-specific impact. The SEIR's only thresholds of significance for TACs are thresholds for cumulative impacts. The SEIR's thresholds would find a considerable contribution to a significant cumulative impact only if (1) there were 100 excess cancers from all sources and (2) the project itself contributed 10 excess cancers. The SEIR's approach is wrong as a matter of law because it conflates project-specific and cumulative analysis and because it assumes without justification that the only relevant thresholds are the thresholds for cumulative impacts. This ignores the significance of the actual cancers the Project causes, by itself, independent of the cumulative context.

CEQA requires that an EIR assess both project-specific and cumulative impacts. (CEQA Guidelines, §§ 15126.2, 15130.) Because assessment of project-specific and assessment of cumulative impacts are distinct obligations, they require distinct thresholds of significance. Whereas a project-specific analysis requires only that an EIR compare a project's effects to a single threshold, cumulative analysis requires two thresholds because cumulative impact analysis is a two-step process. In cumulative analysis an agency must separately (1) determine whether the impacts of the project in combination with those from other projects with related impacts are cumulatively significant by comparing that total impact to a "step-one" threshold, and (2) if so, determine whether the project's own effect is a considerable contribution by comparing the project's own effect to a "step-two" threshold. (CEQA Guidelines, § 15130(a); *see* Kostka and Zischke, *Practice Under the California Environmental Quality Act* (2nd Ed., 2011 Update), §§ 13.39. 15.52; Remy, Thomas, et al, *Guide to CEQA* (11th Ed., 2007), pp. 474-475.)

CEQA recognizes that the thresholds used for project-specific analysis and for the second step of cumulative analysis differ. The step-two threshold of significance in cumulative analysis is used to determine whether the project's contribution to a significant cumulative impact is "considerable," i.e., "whether 'any additional amount' of effect should be considered significant in the context of the existing cumulative effect." (*Communities for a Better Environment v. California Resources Agency* ("*CBE*") (2002) 103 Cal.App.4th 98,119.) Even if a project's impact is "individually minor" and, thus, not found significant in a project-specific analysis, it may make a considerable contribution because it is "collectively significant." (*Id. at* 119-120; *Los Angeles Unified School Dist. v. City of Los Angeles* ("*LAUSD*")(1997) 58 Cal.App.4th 1019, 1025-1026.) Indeed, the step-two threshold may need to be a sliding scale because "the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." *CBE*, supra, 103 Cal.App.4th at 120. In sum, because CEQA specifically recognizes that the step-two threshold in cumulative analysis

may be lower than the threshold to determine whether an impact is individually significant, there can be no *a priori* assumption that the project-specific threshold is the same as the threshold for step-two in a cumulative analysis.

Here, the SEIR does not provide, much less justify, any threshold for a project-specific analysis. The only form of analysis is the two-step cumulative analysis under which the SEIR first determines whether cumulative risk exceeds 100 cancers and then goes on to consider whether the a project makes a considerable contribution. The SEIR simply declines to consider whether the Project's TAC impacts would be individually significant.

Not only is the omission of a separate project-specific analysis erroneous as a matter of law, it runs counter to the BAAQMD guidance. BAAQMD's 2009 Justification Report recommends a CEQA threshold for siting a new project of 10 excess cancers, applicable to stationary, area, and mobile sources of TAC emissions.[49] This is a project-specific, not a cumulative threshold. The 2009 Justification Report separately recommended cumulative threshold: 100 excess cancers from all sources within 1,000 feet.[50] Similarly, the May 2010 BAAQMD Guidelines identify separate thresholds for individual projects and for cumulative sources. Under that guidance, risk from an individual project is significant if it increases cancer risk by more than 10 in one million.[51] Risk from all sources is cumulatively significant if the risk from any source results in a total risk greater than 100 excess cancers.[52] Furthermore, the May 2010 BAAQMD Guidelines specifically provides that the "cumulative threshold sets a level beyond which any additional risk is significant."[53, 54] Thus, contrary to the SEIR's implication,

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[49] BAAQMD, Revised Draft Options and Justification Report, October 2009, pp. 66-67.

[50] *Id.* at 68.

[51] BAAQMD, California Environmental Quality Act Guidelines Update, Proposed Air Quality CEQA Thresholds of Significance, May 3, 2010, p. 33.

[52] *Id*. at 34; *see also id.* at 46 ("Projects proposed in areas where a CRRP [Community Risk Reduction Plan] has not been adopted and that have the potential to expose sensitive receptors or the general public to emissions-related risk in excess of the following thresholds from the aggregate of cumulative source would be considered to have a significant air quality impact. ... Emissions from a new source or emissions affecting a new receptor would be considered significant where ground-level concentrations of carcinogenic TACs from any source result in an increased cancer risk greater than 100.0 in one million.")

[53]BAAQMD, California Environmental Quality Act Guidelines Update, Proposed Air Quality CEQA Thresholds of Significance, May 3, 2010, p. 36, emphasis added.

[54] These risk thresholds for evaluating the significance of the risks from single source impacts and from cumulative sources are also set out in BAAQMD's 2011 update. *See* BAAQMD, California Environmental Quality Act Air Quality Guidelines, updated May 2011, pp. 5-3 (identifying 10 excess cancers as the threshold of significance for siting an individual new project), 5-15 (identifying 100 excess cancers as the cumulative threshold of significance). The individual project and cumulative risk thresholds are separately

the BAAQMD guidance does not permit an additional 10 excess cancers without mitigation where the cumulative risk is under 100.

The fact that BAAQMD calls for a cumulative significance determination and for mitigation when cumulative excess cancers from sources within the 1,000 foot zone of influence are over 100 per million if a project adds any excess cancers does not vitiate the validity of a project-level threshold of 10 per million. A project may make a considerable contribution to a significant cumulative impact even when the project-specific impact is individually minor and not significant. (*CBE, supra,* 103 Cal.App.4th at 119-120; *LAUSD, supra,* 58 Cal.App.4th at 1025-1026.) Conversely, a project make cause a significant impact by itself even if the cumulative impact is not significant. The SEIR simply ignores this fact. But this project level impact must be evaluated and disclosed in the SEIR.

The City of San Francisco has in the past applied the BAAQMD thresholds to provide distinct project-specific and cumulative analyses. For example, the 801 Brannan and One Henry Adams Streets Project DEIR states:

> The following are thresholds for project-specific impacts: (1) an increase in lifetime cancer risk of 10 chances in one million, (2) an increase in the noncancer risk equivalent to a chronic or acute "Hazard Index" greater than 1.0,[ft] or (3) an increase in the annual average concentration of PM2.5 in excess of 0.3 micrograms per cubic meter. BAAQMD **also** recommends cumulative thresholds of 100-in-one-million cancer risk, a Hazard Index greater than 10.0, and a PM2.5 concentration greater than 0.8 micrograms per cubic meter.[55]

Accordingly, that EIR separately evaluates and identifies both project-specific impacts and cumulative impacts by preparing distinct analyses as to whether 1) the project itself causes more than 10 excess cancers or 2) cumulative sources cause more than 100 excess cancers.[56] This is as it should be, because CEQA recognizes that the project-specific and cumulative analyses are distinct obligations.

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stated and not dependent on each other. Individual risks are significant if the project causes over 10 excess cancers. (*Id.* at 5-3.) And where the cumulative risk is over 100 excess cancers there is no minimum contribution required from a project to trigger a cumulative significance determination with the obligation to mitigate: "A project would have a significant cumulative impact if the total of all past, present, and foreseeable future sources within a 1,000 foot radius (or beyond where appropriate) from the fence line of a source, or from the location of a receptor, plus the contribution from the project exceeds the following: . .. [a]n excess cancer risk levels of more than 100 in one million ... or 0.8 ug/m3 annual average PM2.5." (*Id.* at 5-15.)

[55] 810 Brannan and One Henry Adams Streets Project DEIR, Exhibit 2, p. 266.

[56] *Id.*, pp. 281-284 (separately determining that project-specific impacts would be significant because excess cancers are over 10 and that cumulative impacts would be significant because over 100).

The City has also in the past found project-specific impacts to be significant because individual project TAC risk exceeds 10 excess cancers *even when the cumulative risk does not exceed 100 excess cancers*. For example, the EIR for the 706 Mission Street project concluded that cumulative TAC impacts from that would not be significant because excess cancers would not exceed 100.[57] The same EIR determined that the project-specific construction TAC impact would be significant because construction would cause 27.3 excess cancers.[58] Accordingly, mitigation was proposed to reduce risk below the project-specific threshold of 10 excess cancers.

Here, based on the SEIR's own analysis, the result should be the same as occurred in 706 Mission Street project EIR: the individual risk is acknowledged to be over 10 excess cancers even though the cumulative risk is reported to be under 100. Thus, the consequence of the omission of a project-specific analysis is the failure to disclose that the project will cause a significant impact, by itself, regardless of the cumulative context. It is undisputed that the Project will cause a risk of at least 12 excess cancers to child residents of the UCSF Hospital and at least 18 excess cancers to child residents of Hearst Tower (FSEIR, p. 14-121) and that this increased risk exceeds the project-specific threshold of significance recommended by the majority of California air districts, including BAAQMD.[59]

Because OCII did not propose, justify, or apply a threshold of significance for project-specific impacts, the EIR is legally inadequate. Regardless of the conclusion that the EIR might have reached had it provided and justified a project-specific threshold of significance and applied it in a project-specific analysis, the EIR is insufficient as an informational document without this analysis. The omission is prejudicial because there is substantial evidence that a project-specific analysis would have disclosed a significant unmitigated impact. Under the circumstances, the EIR must be revised and recirculated.

The FSEIR fails to address the gravamen of the comments objecting to the absence of a project-specific analysis. The FSEIR responds to these objections by claiming that the DSEIR "did not ignore the threshold of 10 per one million for individual projects emissions," arguing that this BAAQMD threshold simply did not apply because cumulative impacts are not significant. (FSEIR, p. 13.13-25.) This response simply conflates the project-specific and cumulative analyses, as explained above.

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[57] 706 Mission Street- The Mexican Museum and Residential Tower Project DEIR, June 27, 2012, Exhibit 3, pp. IV.G47 to IV.G.50.

[58] Exhibit 3, at pp. IV.G31 to IV.G.36.

[59] Nov 20 SWAPE, Exhibit 1, p. 2.

(d) The SEIR's assessment of cumulative TACs is invalid because it fails to include all sources of related impacts.

The DSEIR's analysis of cumulative TAC sources other than the Project-caused sources was based on a local-scale citywide modeling effort conducted in 2012. (DSEIR, p. 5.4-11 to 5.4-12, 5.4-28.) Thus, the background cumulative non-Project risk of excess cancers from TACs was taken from "the Citywide HRA database for all receptors." (DSEIR, Appendix AQ, Table 6.1-8, fn 5; *see also* FSEIR, Appendix AQ2, Table 6.1-8, fn. 6 (same).) This cumulative background risk is stated as 44 excess cancers in one million for child receptors at the UCSF Hospital and 26 in one million for child and adult receptors at the Hearst Tower. *Id.* The DSEIR acknowledges that the prior environmental review for the Mission Bay project did not quantitatively assess TACs. (DSEIR, p. 5.4-50.)

The Alliance has objected that the cumulative analysis did not in fact evaluate all sources of TACs that would affect sensitive receptors because it omits foreseeable future sources of TACs from adjacent development already approved as part of the Mission Bay redevelopment program. (Nov 2 Farrow FSEIR, p. 3.) The Alliance demonstrated that the omission was prejudicial by submitting a technical report from Paul Rosenfeld and Jessie Jaeger explaining that the SEIR fails to include foreseeable future development in its analysis of cumulative TAC health risks.[60] Rosenfeld and Jaeger explain that the City's designation of Air Pollution Exposure Zones does not include TAC impacts in the Project area from the future redevelopment of the Mission Bay area. This build-out was projected in the Mission Bay EIR to generate 218,549 vehicle trips and 2,684 truck trips per day. This level of additional traffic has the potential to cause excess cancers greater than the 100 cancer threshold identified by the EIR for a significant cumulative impact.

Cumulative analysis must include <u>all</u> sources of "related impacts," including past, present, <u>and potential future</u> projects. (CEQA Guidelines, § 15130(a)(1), (b).) The unjustified omission of related sources of TACs is an error because without this disclosure the public and decision makers cannot "determine whether such information would have revealed a more severe impact." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720, 724.) The future development of the rest of the Mission Bay project is clearly foreseeable because it has already been approved at the program level. The Warriors Arena Project is but one phase of the overall Mission Bay project. The California Supreme Court has held that it is error for an EIR for one phase of a project to omit impacts from future phases in its analysis of cumulative impacts. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396.) The omission of this foreseeable future development is error.

The DSEIR implies that impacts from future development may be ignored because "[o]ther future projects, whose emissions have not been incorporated into the existing Citywide health risk modeling ... would similarly be subject to CEQA requirements to analyze the health

[60]Nov. 2 SWAPE, pp. 4-12.

risk impact of their project."[61] (DSEIR, p. 4.4-28.) However, the SEIR may not tier from future environmental reviews: "CEQA's informational purpose 'is not satisfied by simply stating information will be provided in the future.'" (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 440-441 (emphasis in original).)

(e) The FSEIR fails to provide good-faith response to comments objecting to the analysis of TAC health risks, and the TAC analysis is inadequate because OCII failed to use its best efforts to use current science.

The SEIR's HRA determines the number of excess cancers from the Project itself based on the modeled concentration of TACs from construction and operation of the Project, toxicity values for those TACs and a number of exposure parameters. (DSEIR, Appendix AQ, pp. 9-17; FSEIR Appendix AQ2, pp. 9-17.) The exposure parameters are intended "to estimate excess lifetime cancer risks for all potentially exposed populations for the construction and operation" of the Project. (FSEIR, App. AQ2, p. 13.) These exposure parameters include daily breathing rate, exposure time, exposure frequency, exposure duration, averaging time, and intake factor for inhalation. (DSEIR, Appendix AQ, p. 14; FSEIR Appendix AQ2, p. 14.) The SEIR reports that the exposure parameters are based on 2003 guidance from Cal/EPA's Office of Environmental Health Hazard Assessment (OEHHA) and 2010 guidance from BAAQMD.

As noted above, the DSEIR's analysis of cumulative TAC sources other than the project-caused sources was based on citywide modeling in 2012. (DSEIR, p. 5.4-11 to 5.4-12, 5.4-28.) The background cumulative non-Project risk of excess cancers from TACs was taken from "the Citywide HRA database for all receptors." (DSEIR Appendix AQ, Table 6.1-8, fn 5.) The SEIR does not report the exposure parameters that were used for that 2012 modeling.

Comments on the DSEIR objected that the health risk assessment fails to use the most recent OEHHA Air Toxics Hotspots Program Risk Assessment Guidelines. (July 19 Gilbert, pp. 13-14.) The comments pointed out that current OEHHA exposure parameters call for the use of differential breathing rates for each age period in a health-risk analysis and incorporate higher breathing rates for children than those used in the SEIR's HRA. The comments conclude that the SEIR's HRA likely underestimates potential excess cancer risks due to its use of out-of-date data. The comments requested that the EIR recalculate excess cancers using differential breathing rates, including the correct daily breathing rate for children.

In response, the FSEIR does not dispute the validity of the new OEHHA guidance. Indeed, the FSEIR admits that BAAQMD intends to use the revised guidance in the future. (FSEIR, p. 13.13-50.) However, the FSEIR declines to provide a new assessment of health risks based on differential breathing rates, including the current understanding of children's breathing

[61] The DSEIR mentions Pier 70 and Seawall Lot 337/Pier 48 as examples of such future projects, and then dismisses their impacts because they are allegedly too distant to affect the same receptors. (DSEIR, p. 5.4-28.) But the DSEIR ignores the Mission Bay buildout adjacent to the project.

rates, or to discuss the likely effect of the use of correct breathing rates in the analysis. The FSEIR argues 1) that the new OEHHA guidance post-dates the Notice of Preparation, 2) that air districts may not always adopt OEHHA guidance timely, and 3) that the San Joaquin Valley Air Pollution Control District responded to the new breathing rates by increasing its threshold of significance to one that is less stringent than OEHHA recommends. (*Id*.) The FSEIR also argues that because the analysis in the DSEIR is consistent with the methods previously used to determine existing risks it "represents a valid conservative estimate of incremental health risk." *Id.*

As noted, the FSEIR also provides a new HRA based a change to the Project description, which relocates three emergency diesel generators. (FSEIR, p. 13.13-27; FSEIR, Appendix AQ2, pp. 9-17.) Despite the necessity of recalculating all of the Project-caused excess cancers, the new HRA does not use the current OEHHA breathing rates.

The Alliance objected that the FSEIR had not provided the requested analysis.[62] The Alliance objected that the FSEIR response fails to acknowledge that OEHHA had recommended the higher children's breathing rates in guidance issued in 2012, well before the 2014 Notice of Preparation. *Id*. The Alliance provided technical analysis demonstrating that the effect of the increased breathing rate can be to approximately double the excess cancer risk for children for some TAC sources compared to analysis using the out-of-date breathing rate assumption. *Id.*

Paul Rosenfeld and Jessie Jaeger reiterate that the effect of the currently recommended differential breathing rates can be to materially increase the excess cancer risk for children from Project-caused TACs compared to analysis using the out-of-date breathing rate assumption (see Exhibit 1).[63] Using the data for Project-caused TAC risks from the SEIR rather than the hypothetical exposure scenario in their November 2, 2015 letter, Rosenfeld and Jaeger determined the Project-caused excess cancers for child and adult receptors at Hearst Tower and child receptors at the UCSF Hospital using the currently recommended differential breathing rates. Excess cancer risk from project-caused TACs would increase materially compared to the risks determined using the out-of-date breathing rates – from 42% to 71%. For example, risk for a child resident of the Hearst Tower from Project-caused sources would increase 71%, from 18 to 31 excess cancers.

For the TAC risks from cumulative sources, Rosenfeld and Jaeger explain that the SEIR does not disclose the necessary information to calculate excess cancers using the 2012 and 2015 OEHHA guidance. For example, the SEIR does not provide either the TAC concentrations or the exposure parameters used to determine the cumulative non-Project excess cancers, i.e., the "2014 background risk" identified in the Appendices AQ and AQ2, Table 6.1-8. However, Rosenfeld and Jaeger explain that it is apparent from the FSEIR's characterization of these data that the

[62]Nov. 2 Farrow, pp. 4-5; Nov 2 SWAPE, pp. 12-15.

[63]Nov 20 SWAPE, Exhibit 1, pp 4-6.

cumulative non-Project background risk was not calculated with the differential breathing rate recommended by OEHHA in its 2012 and 2015 guidance. Accordingly, Rosenfeld and Jaeger conclude that the SEIR materially understates total risk and that the actual risk may in fact exceed the 100 excess cancer cumulative threshold for some receptors.

Comments by responsible experts raised a substantive issue regarding the currency of the data on children's breathing rates that was used to determine TAC risks. The response was anything but good-faith reasoned analysis. Even though the FSEIR provided an entirely new HRA to reflect changes to the project, the FSEIR did not provide the requested analysis, or even discuss the likely effect of the use of current data regarding children's breathing rates on the SEIR's analysis. (FSEIR, p. 13.13-50.) Instead of providing the information requested, or a discussion of its effect on the analysis, the FSEIR offered formalistic evasion.

For example, the fact that BAAQMD has not yet revised its guidance is simply irrelevant to a discussion of the substantive issue raised in the comments, i.e., the actual risk to children. The facts of children's breathing rates determine the impact, not whether BAAQMD has yet incorporated those facts into a guidance document. OCII is obliged to "use its best efforts to find out and disclose all that it reasonably can." (CEQA Guidelines, § 15144.) This requires a substantive response to the issue raised in comments.

The FSEIR responds that, in response to the information that higher children's breathing rates result in risks that are higher than they understood them to be, the San Joaquin Valley Air Pollution Control District (SJVAPCD) has apparently chosen to adopt less stringent health protection than it previously required. That response is also irrelevant and evasive. If the SJVAPCD had previously set a health-protective risk level, it is difficult to understand how its discovery that the risk to children is higher than it had understood could justify relaxing that health-protective standard. If SJVAPCD's previous threshold was set and then relaxed based on considerations of cost or feasibility of mitigation, e.g., as a standard of "acceptable" risk, that was improper for the reasons discussed in section 6(a) above. Regardless, the FSEIR's response does not suggest that OCII or BAAQMD have changed the threshold of significance and does not suggest any basis for doing so; so the response does not address the concern in comments that the SEIR has failed to disclose the actual level of the risk. The comment requested that OCII disclose the actual risk based on current science, not that OCII re-characterize the significance of that risk.

Finally, as Rosenfeld and Jaeger explain, it is simply not true that OEHHA had not already recommended use of age-specific breathing rates, including the 1,090 L/kg-day rate for children, at the time of the Notice of Preparation.[64] OEHHA published and recommended use of higher, differential breathing rates for children in its *Technical Support Document for Exposure Assessment and Stochastic Analysis* in August 2012 well before the November 2014 Notice of Preparation and well before the SEIR's HRAs were prepared. This recommendation was made

[64]Nov 2 SWAPE, p. 13.

pursuant to a mandate from the Children's Environmental Health Protection Act. And, as noted, the second HRA post-dates the OEHHA March 2015 guidance, in which OEHHA again recommended use of the higher differential breathing rates. Despite this, the FSEIR argues that it is somehow relevant that the second OEHHA guidance on this topic had not been issued prior to the DSEIR. (FSEIR, p. 13.13.50.) The implication of the FSEIR that the breathing rates were not well understood or established or that they somehow remained controversial is simply disingenuous.

Refusal to respond to responsible comments from experts regarding analytic parameters with reasoned analysis, as well as mischaracterization of the currency of those parameter, are failures to meet CEQA's disclosure obligations. For example, a court set aside an analysis of TACs that was based on outdated CARB guidance after comments pointed out this flaw and the final EIR declined to provide corrected analysis:

> ... the use in the final EIR of data extrapolated from CARB's 1991 speciation profile # 508 for measuring aircraft emission of TAC's did not meet the standard of "a good faith effort at full disclosure" required by CEQA. (Guidelines, § 15151.) "[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response." [citation omitted] By using scientifically outdated information derived from the 1991 profile, we conclude the EIR was not a reasoned and good faith effort to inform decision makers and the public about the increase in TAC emissions that will occur as a consequence of the Airport expansion.

(*Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, 1367 [111 Cal.Rptr.2d 598, 615], *as modified on denial of reh'g* (Sept. 26, 2001.)

Here, the failure to meet CEQA's mandate to use best efforts at analysis and to provide reasoned good-faith facts and analysis in response to comments was clearly prejudicial. Rosenfeld and Jaeger demonstrate that if excess cancers were determined using the OEHHA guidance for children's breathing rate rather than the outdated 2000 guidance, excess cancers would be materially increased and may exceed the threshold for a significant cumulative impact.[65] Because the FSEIR failed to respond substantively to the DSEIR comments and the SEIR fails to provide adequate information to determine how the changes to breathing rate data would affect the cumulative analysis, the SEIR fails as a disclosure document.

Here, the EIR should be revised and recirculated to provide a health risk assessment that is based on current science regarding the parameters that determine actual risk to children. The areas of maximum vulnerability to TACs from the Project include child receptors. (FSEIR, p. 14-

[65]Nov 2 SWAPE, pp. 14-15; Nov 20 SWAPE, Exhibit 1, pp. 5-6.

114, 14-121.) And children are the most vulnerable to TAC exposure, as evidenced by the elevated excess cancer rates for children as compared to adults. (*See*, e.g., FSEIR, Table 5.4-11, p. 14-121).

5. Changes to the Project since Publication of the DSEIR Require Recirculation for Public Comment Due to New and More Severe Significant Impacts.[66]

Under CEQA, if the project changes after publication of the Draft EIR, and these changes create a new significant impact not identified in the Draft EIR, or a substantial increase in severity of a significant impact that was identified in the Draft EIR, the lead agency must recirculate the draft EIR for public comment. (CEQA section 21092.1.)

Here, the RTC describes a number of "construction refinements", including using dewatering generators, using a soil treatment pug mill, and removing rapid impact compaction from the construction plan. With respect to the air quality impacts of these "construction refinements" the RTC states:

> The addition of the construction refinements would not substantially increase (approximately 2 percent for ROG and 4 percent for NOx) the average daily construction-related emissions disclosed in the Draft SEIR. This would not result in a substantial increase in the severity of the previously identified significant and unavoidable impact, and the same mitigation measures would apply requiring the project sponsor to minimize construction emissions.

(RTC, p 12-22.)

The RTC also describes a new variant, the Muni UCSF/Mission Bay Station Variant, and discloses that:

> The Muni UCSF/Mission Bay Station Platform Variant would not substantially increase (approximately 2 percent for ROG and 5 percent for NOx) the average daily emissions disclosed in the Draft SEIR for the proposed project (see Table 5.4-7, page 5.4-31). Furthermore, Mitigation Measure M-AQ-1 (Construction Emissions Minimization) would also apply to the variant. While the estimated construction emissions under the variant shown in Table 12-2 are slightly higher than those identified for the proposed project in the Draft SEIR, this impact is not substantially more severe than the previously identified significant and unavoidable impact.

(RTC, p 12-22.)

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[66]Nov. 2 Lippe FSEIR, pp 6-7.

There are several problems with these assertions. First, the RTC does not explain whether construction refinement caused increases of 2 and 4 percent for ROG and NOx, respectively, are included within or additive to the Platform Variant caused increases of 2 and 5 percent for ROG and NOx. Without this information, the public does not know what additional quantum of ozone pollution the RTC deems insubstantial.

Assuming for the moment that the increases caused by the construction refinements and the increases caused by the Platform Variant are summed together to reach the 2 and 5 percent numbers, the RTC offers no rationale why the 2 and 5 percent increases are not considered a "substantial" increase in the severity of the previously identified significant effect that Project construction will have on ozone precursor pollution. The RTC authors apparently believe these numbers speak for themselves. They do not. In fact, reliance on these numbers appears to reflect a silent assumption that these increases above the previously identified quantities of emissions for these pollutants is "de minimis." It must be remembered, however, that these increases are not above a previously identified less-than-significant quantity of emissions; the previously identified quantities were significant!

The RTC thus commits the exact error of law rejected by the Court of Appeal in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98 ("*CBE*"), i.e., using a "de minimis" rationale or any type of simple numerical ratio of the incremental impact compared to the pre-existing impact. "[T]he relevant question... is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether 'any additional amount' of effect should be considered significant in the context of the existing cumulative effect. [footnote omitted] In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." (Id. At p. 120; see also *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720-721.)

These increases should be considered substantial and the SEIR recirculated for public comment. Instead, the October 23, 2015, notice of publication of the Response to Comments informed the public they would have no opportunity to comment on the environmental effects of these changes in the Project.

C. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO TRANSPORTATION IMPACTS.

1. The SEIR's Analysis of the Project's Construction-related Traffic Congestion and Delay Impacts Is Based on Invalid Criteria.[67]

The DSEIR's analysis of the Project's construction related traffic congestion and delay impacts is legally flawed because it is based on invalid criteria, it fails to lawfully assess the

[67]July 27 Lippe, pp. 5-7; July 23 Smith, p. 15; Nov 2 Smith FSEIR p. 22.

Project's cumulative construction period impacts, and it improperly defers the development of mitigation measures to reduce the Project's construction-related traffic impacts to less than significant.

The DSEIR states "Construction related impacts generally would not be considered significant due to their temporary and limited duration." (DSEIR, p. 5.2-46.) This statement is placed in the section describing the DSEIR's thresholds of significance. Therefore, it appears this conclusion reflects a policy decision rather than a fact-based assessment.

In the impacts analysis section, the DSEIR similarly states: "Construction related impacts generally would not be considered significant due to their temporary and limited duration." (DSEIR p 5.2-111). Elsewhere the DSEIR quantifies the construction period's "temporary and limited duration" as 26 months. (DSEIR, p. 5.2-112.) However, the notion that the DSEIR can determine the Project's construction related traffic impacts to be "less than significant" based primarily on their temporary duration is legally and logically flawed because from a cumulative standpoint, the Project's construction impacts are part of an essentially permanent, not temporary, condition of ongoing construction in this part of San Francisco. Indeed, the DSEIR's discussion of the Project's cumulative construction period impacts recognizes there are numerous other construction projects planned in Mission Bay and that the construction related traffic impacts of these projects will combine with this Project's construction related impacts. (DSEIR, p. 5.2-210 (Impact C-TR-1.)

However, the DSEIR's discussion of the Project's cumulative construction period impacts is flawed because it is constrained by several artificial limits. First, as discussed in section I.A above, the impact assessment is limited to impacts and intersections and freeway ramps within the artificially restricted geographic "study area." Second, the impact assessment considers only construction projects within the Mission Bay neighborhood without regard to whether other "past, present, or reasonably foreseeable future projects" may be "closely related" because their impacts may combine with the Project's impacts.

Third, the DSEIR's analysis of cumulative traffic impacts for *construction* of the project only references a handful of foreseeable projects located very close to the Project, and the DSEIR's discussion of these projects is solely in terms of whether their construction periods overlap with construction of this Project, as if the operational impacts of other "past, present, and reasonably foreseeable future projects" are not "closely related." (See DSEIR, p. 5.2-10 and 11.)[68] This is incorrect because "closely related" simply means the other projects' impacts may

[68]These projects are:
• 1.13 million gsf of UCSF LRDP projects under construction at the Mission Bay Campus, including the UCSF East Campus project on Blocks 33/34,
• Construction of Bayfront Park,
• realignment of Terry A. Francois Boulevard,
• construction of a neighborhood park on the north side of Mariposa Street east of Owens Street,

combine with the Project's impacts.

Table 3 in the July 21 Wymer, report shows that it is possible to include a broader range of projects - across both time and area - in the assessment of the Project's cumulative construction period traffic impacts, and that when this is done, there are many Projects that will be under construction or operational in the period before, during, and after construction of the Project whose effects will combine with those of the Warriors Arena construction. Therefore, the Project's construction impacts are part of an essentially permanent, not temporary, condition of ongoing construction and increasing operational impacts from new projects in this part of San Francisco. Therefore, the SEIR errs by artificially separating the Project's construction period impacts from its operational impacts and then basing its determination of significance on the "limited duration" of the construction period. (DSEIR, p. 5.2-212.)

The second basis for the DSEIR's less-than-significant determination is the DSEIR's statement that "construction activities would be ... required to be conducted in accordance with City requirements." (DSEIR, p. 5.2-212.) This vague assurance is meaningless because the SEIR does not specify what these "City requirements" are, does not specify a performance standard that these City requirements would either impose or achieve, and presents no evidence that these unspecified "City requirements" are likely to avoid significant cumulative construction related traffic effects. (See *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 95 (*CBE*); *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359; 1394 (*Gentry*).

The third and final basis for the DSEIR's less-than-significant determination is "Improvement Measure I-TR-1: Construction Management Plan and Public Updates." The DSEIR suggests this Plan would help avoid significant cumulative construction related traffic effects. (DSEIR, p. 5.2-212.) But it is improper for the DSEIR to rely on Improvement Measure I-TR-1 to help reduce impacts to less than significant because it is not identified as a mitigation measure necessary to substantially reduce significant Project impacts; therefore, it is not enforceable. (CEQA Guideline 15126.4(a)(4).)

Finally, the DSEIR fails to quantify the Projects' construction period impacts, presumably based on its qualitative conclusion that unspecified "City requirements" and "Improvement Measure I-TR-1" will avoid significant impacts. This puts the cart before the horse.[69]

• the Exchange project on Mission Bay Block 40,
• the Family House project on Mission Bay Block 7 East,
• the Residential and Hotel project on Mission Bay Block 1,
• the 360 Berry Street project on Mission Bay Block N4/P3, and
• Caltrain's Peninsula Corridor Electrification Project.

[69]CEQA does not permit an agency to simply adopt mitigation measures in lieu of fully assessing a project's potentially significant environmental impacts because mere acknowledgment that an impact would be significant is inadequate; the EIR must include a detailed analysis of "how adverse" the impact would be.

The RTC acknowledges that construction impacts, even if temporary, may be significant:

> While in most instances, construction-related transportation impacts are determined to be less than significant, some projects involving concurrent construction of multiple buildings on a constrained site, prolonged construction period, high intensity of construction activities, and with likely impacts to adjacent or nearby traffic, transit, pedestrian, and bicycle circulation have been determined to have significant and unavoidable construction-related transportation impacts (e.g., 5M Project).

(FSEIR vol. 4, p. 13.11-155). Thus, the City cannot simply dismiss these impacts as less than significant without independent analysis of the project itself, rather than an assumption that a temporary impact is by its very nature less than significant.

The RTC also argues the Planning Department's qualitative (rather than quantitative) analysis in this case is based on a several types of information that support the SEIR's "less-than-significant" conclusion. (FSEIR, Vol. 5, p. 13.11-155.) The problem with the SEIR's qualitative analysis is that, other than identifying these types of sources of information, it does not disclose either the specific *items* of information that support the SEIR's "less-than-significant" conclusion or *how* these sources of information support that conclusion.

2. The SEIR Fails to Assess the Project's Traffic Impacts on the Entire Affected Environment.[70]

The DSEIR studies Project-induced increases in congestion and delay, for both incremental and cumulative impacts, at twenty-two (22) intersections and six (6) freeway ramps, as shown in Table 1.

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(*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 655-56 *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1123*; Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.)

[70]July 27 Lippe, p. 1; July 23 Smith, p. 8; July 21 Wymer, pp. 1-12; Nov 2 Smith FSEIR pp. 5-8; Nov 2 Wymer FSEIR.

Table 1

Incremental Impact Assessment (With Implementation of the Special Events Transit Service Plan)	Incremental Impact Assessment (Without Implementation of the Special Events Transit Service Plan)	Cumulative Impact Assessment
Intersections at DSEIR, p. 5.2-18, Table 5.2-34 p. 5.2-121, Table 5.2-35 p. 5.2-123, Table 5.2-36 p. 5.2-172, Table 5.2-47 p. 5.2-174, Table 5.2-48	Intersections at DSEIR, p. 5.2-192, Table 5.2-53 p. 5.2-193, Table 5.2-54	Intersections at DSEIR, p. 5.2-214, Table 5.2-59 p. 5.2-217, Table 5.2-60.
Freeway ramps at DSEIR, p. 5.2-133, Table 5.2-37 p. 5.2-133, Table 5.2-38 p. 5.2-134, Table 5.2-39 p. 5.2-181, Table 5.2-49 p. 5.2-181, Table 5.2-50	Freeway ramps at DSEIR, p. 5.2-198, Table 5.2-55 p. 5.2-198, Table 5.2-66	Freeway ramps at DSEIR, p. 5.2-221, Table 5.2-61 p. 5.2-221, Table 5.2-62

Remarkably, the DSEIR fails to disclose the criteria the City used to *exclude* other intersections and freeway ramps. The omission of this fundamentally important information renders the DSEIR so legally inadequate as an informational document that it frustrates CEQA's goal of providing the public with a meaningful opportunity to comment on the DSEIR.

Also, as shown in the letter reports from traffic engineers Larry Wymer and Dan Smith, the DSEIR omitted from its area of study numerous intersections and freeway ramps that will also suffer potentially substantial increases in traffic congestion and delay. (July 23 Smith, p. 8; July 21 Wymer, pp. 1-12; Nov 2 Smith FSEIR pp. 5-8; Nov 2 Wymer FSEIR.) The omission of these intersections and freeway ramps from the DSEIR's analysis of the Project's effect on traffic also renders the DSEIR so legally inadequate as an informational document that it frustrates CEQA's goal of providing the public with a meaningful opportunity to comment on the DSEIR.

How did this happen? The DSEIR simply states: "The traffic impact assessment for the proposed project was conducted for 23 study intersections and six freeway ramp locations in the vicinity of the project site" (DSEIR, p. 5.2-72),[71] with no further explanation. The same is true for the six freeway ramps. (DSEIR, p. 5.2-74.)

The DSEIR does inform the reader that:

[71]The DSEIR actually studies 22 intersections, not 23, in the tables listed in footnote 1.

> The impacts of the proposed project on the surrounding transportation network were analyzed using the Transportation Impact Analysis Guidelines issued by the Planning Department in 2002 (SF Guidelines 2002), which provides direction for analyzing transportation conditions and in identifying the transportation impacts of a proposed project.

(DSEIR, p. 5.2-69.) These Guidelines provide:

> 2. Project Setting
> The setting information shall be presented immediately following the Project Description as a discrete chapter or report section. The goal is to provide a brief but complete description of existing transportation infrastructure and conditions in the vicinity of the project. Normally, the described vicinity is a radius between two blocks and 0.25 mile, however, a larger area may be determined in the scoping process. *The specific perimeters of the study area, for both setting and project impact analysis, are to be confirmed as part of the approval for the scope of work.*

(Transportation Impact Analysis Guidelines (October 2002), pp.6-7 (italics added).) Based on this text, the reader would expect to find the criteria and rationale for delimiting "the specific perimeters of the study area" in the Scope of Work which the City approved pursuant to these Guidelines as a prerequisite to preparation of the DSEIR. Unfortunately, this expectation is disappointing, because the City-approved Scope of Work is also silent on the topic. (DSEIR, Appendix TR, pp. TR-8 to TR 14.)

The RTC's responses are inadequate. The RTC relies on the fact that similar approaches were used in other EIRs.[72] This is not relevant because the other referenced EIRs are not before this Board and are not adjudicated in a published Court of Appeal decision.

The RTC also responds that the lead agency has discretion to determine the geographic scope of the assessment area. (RTC, p. 13.11-25.) This response is not relevant to the comment here, i.e., on these facts the lead agency abused its discretion. These facts include the many recently built and approved projects in the downtown area whose traffic impacts will combine with the Projects impacts at many intersections outside the study area.

The RTC also responds that:

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[72] "The depth and approach of the analysis of freeway conditions presented in the SEIR is consistent with similar evaluations of transportation conditions conducted a s part of recently completed or ongoing large planning studies in San Francisco, including the Central Corridor EIR, UCSF 2014 Long Range Development Plan (LRDP) EIR, California Pacific Medical Center LRDP EIR, etc. The 1998 Mission Bay FSEIR also did not address freeway ramp operation or queuing as a distinct transportation topic." (RTC, p. 13.11-25.)

> The study intersections were selected because they a) represent access points to the regional highway system, b) are located along major street corridors serving the Mission Bay Area, or c) are located in the immediate vicinity of the project site, and because they are the intersections most likely to be potentially affected by traffic generated by the proposed project. As stated on SEIR p. 5.2-15, the freeway ramps were selected for ramp operations analysis (i.e., four on-ramps and two off-ramps) as they represent the regional highway facilities most likely to be impacted by traffic generated by the proposed project.

(RTC, p. 13.11-25, 26.) Reasons a) and b) are non-responsive to the comment that the DSEIR failed to explain why it excluded large areas of the affected environment from the study area, because even if they support, including the intersections and ramps that were *included*, they say nothing about why additional intersections and ramps that were *excluded*.

Reason c), that "they are the intersections most likely to be potentially affected by traffic generated by the proposed project" is entirely conclusory and circular because the RTC justifies this unsupported assertion from the DSEIR by simply repeating it. Reason c) is also non-responsive, because the fact that intersections outside the study area are somewhat less likely than intersections within the study area to be affected does not mean they will not be affected in a potentially significant way. In sum, instead of data to support the exclusion of large portions of affected environment, the RTC offers up empty verbiage.

The RTC also relies to an unstated extent on "the Transportation Impact Analysis Guidelines issued by the Planning Department in 2002 (SF Guidelines)" which "suggests that a project study area would encompass a radius between two blocks and 0.25 miles, but that a larger area may be determined depending on the type of project." (RTC, p. 13.11-27.) This document cannot lawfully excuse the lead agency from basing the size and location of the study area on the relevant facts of the case, including but not limited to "the type of project."[73]

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[73] *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 [underscore emphasis added], citing *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 114 ("*CBE*"); accord *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342 ["A threshold of significance is not conclusive...and does not relieve a public agency of the duty to consider the evidence under the fair argument standard."]; *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16 (lead agencies must review the site-specific impacts of pesticide applications under their jurisdiction, because "DPR's [Department of Pesticide Regulation] registration does not and cannot account for specific uses of pesticides..., such as the specific chemicals used, their amounts and frequency of use, specific sensitive areas targeted for application, and the like"); *Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture (*1986) 187 Cal.App.3d 1575, 1587-1588 (state agency applying pesticides cannot rely on pesticide registration status to avoid further environmental review under CEQA); *Oro Fino Gold Mining Corporation v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881-882 (rejects contention that project noise level would be insignificant simply by being consistent with general plan standards for the zone in question). *See also City of Antioch v. City Council of the City of Pittsburg* (1986) 187 Cal.App.3d 1325, 1331-1332 (EIR required for construction of road and

The RTC rejects the comment that the study area must include many South of Market intersections between downtown and Mission Bay because:

> A comment noted that because some of the basketball game attendees would be arriving from the San Francisco downtown and Financial District areas, they would be required to pass through SoMa to arrive at the project site, so that additional intersections in the SoMa area would have to be evaluated. Mode of travel and place of origin surveys of baseball game attendees conducted by the SF Giants, as well as available parking occupancy surveys, suggest that many of those game attendees that drove to work at their jobs in the Financial District and SoMa areas, tend to walk, ride transit, or take a taxi to AT&T Park, leaving their cars at their commuter parking locations in order to avoid the evening commute congestion that typically occurs near I-80 and AT&T Park and having to re-park their cars at game-day rates. It is likely that a similar condition would occur with the proposed project, with many of those working in downtown riding Muni or special event shuttles, and taking taxis or TNC vehicles2, such as Uber or Lyft to the event center, rather than driving and having to park again with limited space availability.

(RTC, pp. 13.11-27, 28.)

The idea that people who work downtown would walk to the Warriors Arena because people who work downtown tend to walk to AT&T Park is unfounded and unsupported. A look at actual data suggests otherwise. According to Google Maps, walking from the Bank of America Building at California and Montgomery to AT&T Park takes 25 minutes; but to the Arena site, 41 minutes. Walking from the Transamerica Building at Washington and Montgomery to AT&T Park takes 29 minutes; but to the Arena site, 44 minutes. There is a time-of-walking tipping point beyond which people tend not to walk. The EIR's assumption that people will be willing to walk from downtown to Warriors games than it takes to walk to Giants games is unsupported.[74]

The idea that people who work downtown would take taxis or an Uber or Lyft type ride service to the Warriors Arena because people who work downtown tend to do so to AT&T Park supports the Alliance's comment, and more so, because these vehicles will travel through SOMA during the extremely congested peak PM time period, thereby making many intersections not included in the study area worse, and then they will return from the Arena in the same time

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sewer lines even though these were shown on city general plan); *Kings County Farm Bureau v. City of Hanford*, *supra*, 221 Cal.App.3d at pp. 712-718 (agency erred by "wrongly assum[ing] that, simply because the smokestack emissions would comply with applicable regulations from other agencies regulating air quality, the overall project would not cause significant effects to air quality.")..)

[74]See Nov 28 Smith, p. 1-2 and Exhibit A thereto.

period!

This response also ignores the fact that some people on the way to a Warriors game, after checking their online traffic maps, will exit from the Bay Bridge at Fremont and Harrison Streets and travel to the Arena through the SOMA intersections identified by Mr. Wymer as operating at LOS E or F but excluded from the study area. These people are traveling "from the downtown area" but are not considered in the response to comments because they do not "work" downtown.

In addition, the City's response assumes that SOMA is so congested before game time that people would rather walk through SOMA than drive. If the environmental setting within a mile of the Arena is that heavily impacted (and the Alliance agrees it is), the SEIR cannot lawfully omit a full description of these conditions. (See *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722-723; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 881-882.) Indeed, the significance of a cumulative impact depends on the environmental setting in which it occurs, including the severity of existing environmental harm. (*Communities for a Better Environment v. California Resources Agency* ("*Communities* ") (2002) 103 Cal.App.4th 98, 120 ["[T]he relevant question"... is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether "any additional amount" of effect should be considered significant in the context of the existing cumulative effect. [footnote omitted] In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant. [footnote omitted]"]; *Kings County*, *supra*, 221 Cal. App. 3d at 720-721.) Therefore, the omission of this information from the SEIR represents a prejudicial failure to disclose required information.

The SEIR's failure to study the affected area and to respond to comments on this issue are ably discussed by traffic engineer Dan Smith in his November 2, 2015, letter submitted to the OCII on November 3, 2015 (at pages 5-8 thereof). Reading his report is essential, but for present purposes I highlight one of his points: i.e., the SEIR excludes from its study area many intersections that are on the access route to and from the two UCSF hospitals located a block from the Project.

For example, using UCSF's web interface for directions to the Medical Center to identify recommended emergency routes for Hyde and Bay, the primary recommended route is the Embarcadero to King, then Third. The secondary route is Hyde, then 8th. For the Transamerica building, the primary route is Clay/Drumm/Washington to Embarcadero, King, Third. The secondary route is Davis/Beale/Bryant/Embarcadero/Third. For Union Square, the primary is west on Geary, down Hyde/8th/Brannan/7th/16th. For the Bay Bridge, the primary is off at 8th and Harrison, down 8th/Brannan/7th/16th.[75] These documented emergency routes, and you could run plenty of other examples, demonstrate why the intersections along Eighth and along the Embarcadero should have been studied. The key intersections are the nine along the

[75]See Nov 28 Smith, p. 2; Exhibit 14 to this brief

Embarcadero with Broadway, Washington, Market, Mission, Howard, Folsom, Harrison, Bryant and Brannan and the six on Eighth with Market, Mission, Howard, Folsom, and especially Harrison and Bryant.

Mr. Smith also refutes the response as follows:

> the response cites 9 intersections along the Embarcadero and 15 along or east of Fourth Street that we claimed should have been studied. It claims that because the Project is shifted to its current location farther south-west from the originally proposed location on Piers 30-32, the primary routes to and from the Project site from Downtown, SOMA, the northern parts of the City and from the North Bay and the I-80 ramps would be shifted farther west, away from these intersections. But this is not true. Except for the relatively few instances in which there is a concurrent evening Giants game at AT&T park, the routes along the Embarcadero and along and east of Fourth Street remain the most effective and imageable routes to the currently proposed Project site and the parking facilities that serve it from much of the Downtown, SOMA, northern parts of the City, the North Bay and the I-80 ramps to and from the East Bay. Those paths are only likely to be altered on evenings with a concurrent Giants game. And if a massive shift of traffic further west was assumed in the City's thinking as it scoped the current SEIR and excluded the intersections along the Embarcadero and on and east of Fourth on that assumption, why didn't it add more intersections in the Eighth Street corridor (including but not limited to the ramps and intersections at Eighth and Harrison, Eighth and Bryant) and other intersections in the Van Ness, Franklin, Gough, Octavia corridors for example? The City has no good answer.

(Nov 2 Smith FSEIR p. 7.)

The RTC studies one intersection outside the study area, at 8th St and Brannan. But as Mr. Smith points out, this anecdotal approach is not a reliable indicator of effects at other intersections identified by Mr. Wyer as needing study, because this unusual intersection is "anomalous rather than exemplar of anything elsewhere" (Nov 2 Smith FSEIR p. 8.)

Consequently, the City must revise the DSEIR to include an analysis of the Project's congestion and delay impacts on the excluded intersections and freeway ramps and then recirculate the Revised DSEIR for at least 45 days for public review and comment.

3. The SEIR Fails to Disclose the Severity of the Project's Impacts on Intersections and Freeway Ramps Which the Project Will Cause to Deteriorate to Level of Service (LOS) F.[76]

In comments on the DSEIR, The Alliance objected that the DSEIR fails to disclose the severity of the Project's congestion and delay impacts on intersections and freeway ramps which the Project will cause to deteriorate to Level of Service (LOS) F. (July 27 Lippe, pp. 3-4.) For intersections and freeway ramps in the study area where Project-induced increases in congestion and delay will cause deterioration to LOS F, the DSEIR fails to provide a full measurement of the degree of severity of the significant impact. Instead, for intersections pushed to LOS F, instead of presenting a measure of average delay, the DSEIR provides a "greater than" measurement of "80 seconds per vehicle." (See 5.2-74 and Tables cited above.) For freeway ramps pushed to LOS F, instead of providing the average density, the DSEIR provides no measurement of "existing plus project" density. Instead, the severity of the Project's impacts at intersections and freeway ramps pushed to LOS F has no upper limit, and remains undisclosed, other than to note that "demand exceeds capacity." (See 5.2-75, Table 5.2-19 and Tables cited above.)

Thus, the DSEIR fails to comply with CEQA because, other than making the binary determination that the Project's impacts on these intersections and freeway ramps are significant, the DSEIR fails to disclose the severity of these significant impacts. (See *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831 ["The conclusion that one of the unavoidable adverse impacts of the project will be the 'increased demand upon water available from the Santiago County Water District' is only stating the obvious. What is needed is some information about how adverse the adverse impact will be"].) Consequently, the City must revise the DSEIR to include this missing information, then recirculate the Revised DSEIR for at least 45 days for public review and comment.

The RTC's response is inadequate for several reasons. First, it caricatures the Alliance's comments, stating:

> The comment appears to state that an EIR, having determined that a project would cause or contribute to LOS F conditions, must also identify the specific number of seconds of delay expected to occur. That is, the comment appears to state that the EIR must state not merely that delay would be in excess of 80 seconds per vehicle, and therefore unacceptable; rather, the comment states the EIR must also identify how many seconds of delay, beyond the 80 seconds of average control delay signified by "LOS F," would occur.

(RTC, p. 13-11.49.) The RTC then argues that "CEQA does not require this." (RTC, p. 13-11.49.) The Alliance's actual comment is that, in addition to identifying these impacts as

[76] July 27 Lippe, p. 3; July 23 Smith, p. 11; July 21 Wymer, p. 12-13; Nov 2 Smith FSEIR, p. 16-18; Nov 28 Smith, pp. 2-3.

significant, the SEIR must disclose their severity. The lead agency, not the Alliance, chose to use a "seconds of delay" metric. Having done so, the agency cannot refuse to disclose the severity of the impacts on the ground that CEQA does not require using this particular metric.

A good example of the SEIR's failure to disclose relative severity of significant impacts is its impact assessment for the intersection of 7th/ Mississippi and 16th Street. Figure 1 contrasts the impact assessment data for this intersection for the Weekday PM Peak Hour (i.e., 4 - 6 p.m) and Weekday Evening time periods as shown in the DSEIR, at Table 5.2-34 (p. 5.2-118) and Table 5.2-47 (p. 5.2-172) with the impact assessment data for this intersection shown in the Appendix containing the transportation analysis raw data (i.e., SEIR, Vol. 3, Appendix-TR.)

Figure 1: 7th/Mississippi and 16th St

	Existing Without Giants Game	Existing Plus Project - Without Giants Game			Existing With Giants Game	Existing Plus Project - With Giants Game
	Existing	No Event	convention	Basketball Game	Existing	Basketball Game
Time Period	Delay LOS	Delay LOS	Delay LOS	Delay LOS	Delay LOS	Delay LOS
DSEIR, PM Peak	68.6 E *Table 5.2-34*	>80 F *Table 5.2-34*	>80 F *Table 5.2-34*	>80 F *Table 5.2-34*	>80 F *Table 5.2-47*	>80 F *Table 5.2-47*
Appendix, PM Peak *Appendix Page #*	68.6 E *TR-179*	87.8 F *TR-275*	83 F *TR-299*	80.8 F *TR-311*	84.7 F *TR-191*	151.9 F *TR-323*
DSEIR, Evening	60.1 E *Table 5.2-35*	NA	NA	>80 F *Table 5.2-35*	75.6 E *Table 5.2-48*	>80 F *Table 5.2-48*
Appendix, Evening *Appendix Page #*	68.6 E *TR-203*	NA	NA	107.6 F *TR-335*	75.6 E *TR-215*	178.7 F *TR-347*

As this table shows, for certain conditions, the LOS data in the Appendix shows much greater LOS impacts for than the SEIR discloses in its summary tables, in some cases showing double or more than double the ">80" figure used in the summary tables (see yellow highlighted cells). This example is only one of 22 intersections in the study area.

The RTC argues that LOS metrics are not "reliable" above LOS F.[77] As traffic engineer Smith points out, where the above-LOS F delay calculations are substantial, they are meaningful even if somewhat imprecise, and should have been disclosed. (Nov 2 Smith FSEIR p. 17 ["where "the results might be 27 seconds added instead of a half-minute or 55 seconds added instead of a minute"]; Nov 28 Smith, pp 203.)

Also, the RTC's response that LOS metrics are not "reliable" above LOS F is non-responsive to the Alliance's actual comment (i.e., the SEIR must disclose the severity of significant impacts), rather than the RTC's caricature of the comment focused solely on LOS metrics. If another metric is better, the SEIR should use it.

The RTC also argues that the Legislature has delegated to the Secretary of Resources the authority to change the legal standards governing an EIR's analysis of traffic impacts in this location. (RTC, p. 13-11.51, 52.) Since such changes have not occurred, and may never occur, the possibility that they could occur cannot excuse the lead agency's compliance with the law in effect now.

The RTC also suggests that increased traffic congestion is not an "environmental" impact under CEQA at all, stating: "In general, the effects of worsened congestion translate primarily into increased inconvenience to people, but not into adverse effects on public health or ecosystems." (RTC, p. 13-11.51.) But the lead agency has demonstrated no courage in this conviction since it devoted hundreds of pages and thousands of dollars to the SEIR's analysis of traffic impacts. Moreover, the Legislature's amendment of CEQA to delegate authority to the Secretary of Resources to change the legal standards governing an EIR's analysis of traffic impacts conclusively demonstrates that traffic impacts are "environmental" impacts under CEQA.

The RTC also argues that using LOS F as a metric for significance without disclosing the severity of the impacts at these intersections is sufficient for purposes of considering mitigation measures to reduce these impacts. (RTC, p. 13-11.50.) Even if this is true, the SEIR remains informationally deficient in this regard because without a legally adequate description of the nature and extent of the Project's environmental harm, the lead agency cannot properly weigh whether the Project's benefits outweigh that harm.

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[77] RTC, p. 13-11.50 ["LOS F reflects unstable traffic conditions whose severity is not reliably replicated for future conditions by the traffic LOS analysis tools used for traffic impact studies"].

4. The SEIR Fails to Identify the Significance and Severity of the Project's Impacts on Intersections Where the Project Will Use Parking Control Officers.

The Alliance commented that the DSEIR failed to provide quantitative impact assessments for two intersections (King/Third and King/Fourth) when the Project's basketball games coincide with a Giants' game in the Weekday PM/Saturday Evening Peak Hour and Weekday Evening/Late Evening Peak Hour time periods. (DSEIR, p. 5.2-172, Table 5.2-47; p. 5.2-174, Table 5.2-48)"). Because the DSEIR provides no LOS or delay measurements for Project impacts with a Giants' game at these times, it does not inform the public whether the Project's congestion and delay impacts on these intersections are significant, and if so, the severity of these significant impacts. (July 27 Lippe, p. 4, July 23 Smith, p. 11; Nov 2 Smith FSEIR pp. 16-18.)[78]

The RTC responds that "the intersection LOS and delay values for the intersections of King/Third and King/Fourth are provided on SEIR Table 5.2-34 through Table 5.2-36 for the various analysis hours." (FSEIR, Vol. 4, p. 13.11-53.) This is non-responsive because these tables describe the Project's impacts *without a Giant's game*.

The RTC also responds that: "the analytical tools and measurements appropriate for assessing the effectiveness of mechanized systems do not apply to PCO-controlled intersections. For all of these reasons, the intersection LOS at PCO-controlled intersections does not provide meaningful information and is not presented for those locations where PCOs already actively manage intersection operations." (FSEIR, Vol. 4, p. 13.11-53.) As discussed in section II.C.3 above, if another metric is better, the SEIR should use it, and the lack of precision in above-LOS F delay calculations are not relevant where the delays are substantial and the margin of error is slight (e.g., where "the results might be 27 seconds added instead of a half-minute or 55 seconds added instead of a minute." (Nov 2 Smith FSEIR p. 17.)

The RTC also responds that: "PCOs are an effective way to minimize traffic impacts that may occur otherwise." (FSEIR, Vol. 4, p. 13.11-53.) This is non-responsive because, under CEQA, mitigating impacts occurs after determining their significance and severity, not before. (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 655-56.)

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[78]Instead, the DSEIR indicates that the Project calls for posting Parking Control Officers (PCOs) at these intersections at the times indicated. But the adoption of a mitigation measure cannot substitute for disclosing whether the Project's impacts on these intersections are significant or their severity CEQA does not permit an agency to simply adopt mitigation measures in lieu of fully assessing a project's potentially significant environmental impacts because mere acknowledgment that an impact would be significant is inadequate; the EIR must include a detailed analysis of "how adverse" the impact would be. (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 655-56 *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1123*; Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.)

The RTC also responds that the SEIR "describes the potential impacts at the study intersections in detail without the implementation of any of the proposed mitigation measures." (FSEIR, Vol. 4, p. 13.11-54.) This is simply not true for overlapping Giants and Warriors games in the PM Peak and Evening hours at the King/Third and King/Fourth intersections (see SEIR, Vol 1, pp. 5.2-171-180.)

5. The SEIR's Analysis of the Project's Operational Traffic and Transit Congestion and Delay Impacts Is Legally Flawed.

(a) The DSEIR understates traffic and transit volumes in the PM peak period of 4:00 to 6:00 PM by using "time of arrival" at the Arena as a proxy measurement for "time of travel."

The Alliance commented on the DSEIR that it used insufficient information and patently flawed logic in assuming only 5% of basketball game attendees will be traveling in the "study area" in the PM peak period of 4:00 to 6:00 p.m. (July 27 Lippe, pp. 7-11; July 23 Smith, p. 1; July 21 Wymer, p. 12-13; Nov 2 Smith FSEIR p. 13-16).

Table 5.2-21 states that 5% of arrivals are expected before 6:00 p.m. for 7:30 p.m. weekday basketball games; another 11% will arrive between 6:00 and 6:30 p.m. (DSEIR, p. 5.2-83.) This data is based on turnstile counts of people entering the arena. As explained by Dan Smith, this proxy measurement does not provide reliable data as to when game or event attendees are actually traveling through affected intersections or freeway ramps or using affected transit routes, and this error infects the entire analysis of the Project's transit and traffic impacts. (July 23 Smith, p. 3.)[79]

Common sense indicates that many or most of the 11% that the DSEIR says arrive at the turnstile between 6:00 and 6:30 p.m. would be traveling to the event in the PM peak period of 4:00 to 6:00 pm. This minimal adjustment alone changes the assumption on which the modeling is based from 5% to 16% traveling in the "study area" in the PM peak period of 4:00 to 6:00 pm. As shown by Mr. Smith, this minimal adjustment more than doubles the Project's contribution of traffic to affected intersections, and would change the DSEIR's determination from less-than-significant to significant at some intersections. (July 23 Smith, p. 3.)

This issue was flagged in public scoping comments on the DSEIR. (DSEIR, p. 2-15.)

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[79]In his analysis, Mr. Smith found: "it seems highly probable that as much as one-third or more of the trips that the DSEIR considers to take place in the 6 to 7 PM period and the 7 to 8 PM period would actually be on the transportation system in the more critical 5 to 6 PM commute peak hour. That would put 7,466 event-related travelers on the transportation system in the 5 PM to 6 PM period instead of the 1,866 assumed in the DSEIR, a difference that would likely result in transportation impacts not disclosed in the DSEIR and/or intensification of impacts and mitigation needs of those that were disclosed." (July 23 Smith, p. 3.)

Yet, somehow, the DSEIR did not adjust its reliance on turnstile data to develop a reliable metric to use instead. Instead, the DSEIR offers a series of weak or irrelevant rationales for its methodology, including:

> because basketball games typically start at 7:30 p.m. a higher percentage of inbound event attendees would travel to the event center during the 6:00 to 8:00 p.m. period than during the 4:00 to 6:00 p.m. commute peak period.

(DSEIR p. 5.2-71); and

> the SF Guidelines do not include travel demand characteristics for the specialized uses (e.g., sports events, conventions, and other events) that would take place at the proposed event center. Similarly, standard trip generation resources, such as the Institute of Transportation Engineer's Trip Generation Manual, do not include sufficiently detailed trip generation data for such specialized uses. Therefore, the travel demand for the event center component of the proposed project was based on the estimated attendance, as well as information on current travel characteristics of Golden State Warriors basketball attendees at the Oracle arena in Oakland.

(DSEIR, p. 5.2-81); and

> The data are based on information provided by the Golden State Warriors for their current facility, which was then adjusted to provide for earlier arrival patterns based on comparable information collected at similar NBA facilities to account for the increased availability of retail and restaurant uses at the proposed project site compared to Oracle Arena in Oakland. A summary of this data is provided in the travel demand technical memorandum included in Appendix TR.

(DSEIR, p. 5.2-82.)[80]

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[80] In the "Travel Demand Methodology and Results" section of Chapter 5.2, the DSEIR states:

> The Basketball Game scenario reflects the travel demand of the office, retail and restaurant uses, plus an evening basketball game. The transportation impact analysis of the Basketball Game scenario was conducted for four analysis hours (weekday p.m., weekday evening, weekday late evening, and Saturday evening), for conditions without and with an overlapping SF Giants evening game at AT&T Park.
>
> Table 5.2-21 presents the expected temporal distribution of arrival and departure patterns for basketball game attendees of the proposed project. The data are based on information provided by the Golden State Warriors for their current facility, which was then adjusted to provide for earlier arrival patterns based on comparable information collected at similar NBA facilities to account for the increased availability of retail and restaurant uses at the

A discussion and summary of the data from other venues than Oracle is provided in DSEIR, Appendix TR, at pp. TR-21 to TR-25 and TR-37 [Appendix A, p. A-9]. The table at page TR-37 provides time of arrival data from, in addition to Oracle, six purportedly "comparable" venues, namely: Icon Venue Group, Houston, Phoenix, Sacramento, Brooklyn (2013-2014), and Brooklyn (2014-2015). An interesting fact about this table is that the data for 4:00 to 6:00 p.m. arrivals at four of these six venues (i.e., Icon Venue Group, Houston, Phoenix, Sacramento) is "included in" the data for later time periods. So, in fact, the only purportedly comparable venue for which the DSEIR presents supporting data is Brooklyn (2013-2014 and 2014-2015). The venue with the largest proportion of arrivals in the 4:00 to 6:00 p.m. period is Brooklyn (2014-2015), with 4.1%.

In short, the City and the Warriors failed to develop accurate, reliable data on the key variable in the entire transportation analysis, i.e., the number of people traveling to events in the peak PM time period when traffic and transit crowding are at their worst. A lead agency "must use its best efforts to find out and disclose all that it reasonably can." (CEQA Guideline, § 15144.)

The above quoted rationales do not excuse this failure. The scoping comments flagging this issue were submitted to the City between November 19, 2014, and December 19, 2014, during the middle of the basketball season. (DSEIR, p. 2-8 and 2-9, 2-15.) The Warriors played fifty-seven (57) games between December 19, 2014, through the close of the regular season on April 15, 2015.[81] There are thirty (30) teams in the NBA.[82] That means there were approximately eight-hundred and fifty five (i.e., 15 x 57 = 855) regular season games played in the 2014-2015 regular season after December 19, 2014. In the playoffs following the regular season, sixteen teams played a total of seventy-nine games after April 15, 2015.[83]

> proposed project site compared to Oracle Arena in Oakland. A summary of this data is provided in the travel demand technical memorandum included in Appendix TR. Based on this information, it was assumed that approximately 5 percent of arrivals to a basketball game would occur during the p.m. peak hour (5:00 to 6:00 p.m.), and up to 66 percent of arrivals would occur during the evening peak hour (7:00 to 8:00 p.m.). Similarly, up to 70 percent of the departures would occur during the late evening peak hour (9:00 to 10:00 p.m.). Event staff for basketball games would be expected to arrive between 4:30 and 5:00 p.m. and would be on post prior to the gate opening time; event staff would leave between 11:00 and 11:30 p.m.

(DSEIR, p. 5.2-82.)

[81]http://www.nba.com/warriors/schedule

[82]http://www.nba.com/teams/?ls=iref:nba:gnav

[83]http://www.nba.com/playoffs/

Therefore, both the Warriors and the City had ample opportunity to conduct market research by interviews and exit polling of a sample of the hundreds of thousands of fans attending these games to discover how far in advance of arriving at the turnstile they traveled through the traffic and transit impacted area surrounding the venue. The City's and Warriors' decision to pass up this opportunity after being informed of the issue does not satisfy their duty to use best efforts to find out and disclose all they reasonably can.

Indeed, the City was fully aware of the need to gather information more relevant to fans "time of travel" than turnstile counts and made some efforts to do so. But it failed to disclose that there are alternative metrics for "time of travel" or the results of its efforts in this regard. For example, an email exchange dated January 12, 2015, between the City's EIR consultant (ESA) and City Planning officials includes data on arrivals before 6:00 p.m. at the Arco Arena parking lot for a 7:00 p.m. Sacramento Kings game and arrivals before 6:00 p.m. in buildings for other NBA venues. (See July 27 Lippe, Exhibit 3.) Thus, the City was aware of other measurements (e.g., parking lot entry rather than turnstile counts) that could more accurately predict peak PM period travel to games.

Also, the arrival numbers cited in this email exchange show 14% arriving at the Arco Arena parking lot before 6 p.m. for one 7 p.m. game and 9% arriving before 6 p.m. in buildings for other NBA venues. These numbers indicate the DSEIR's assumption that 5% of fans will be traveling through the study area before 6 p.m. for 7:30 p.m. games is vastly understated. Yet the DSEIR fails to reference these numbers.

The RTC responds by reciting the information presented in the DSEIR from other NBA venues that the Alliance's comment on the DSEIR critiqued as irrelevant. (See July 27 Lippe, pp. 9-11; FSEIR, Vol. 4 pp. 13.11-41, 42.) The RTC also responds that: "Additional surveys of attendee arrivals at the Oracle Arena where the Golden State Warriors currently play or other NBA facilities, as suggested in a comment, were deemed unnecessary, because, as noted above, arrivals to the Oracle Arena during the 5:00 to 6:00 p.m. peak hour are low (about 1 percent of the total) and because data from another location with similar urban and development conditions to the proposed project (i.e., Barclays Center in Brooklyn, New York) was already available." FSEIR, Vol. 4 pp. 13.11-42.) These responses, however, are non-responsive to the comments that turnstile data, no mater what venue it is from, is not a valid proxy for travel in the 4-6 PM peak period for a 7:30 PM game time, and the Warriors and City's failure to gather relevant data renders the SEIR informationally deficient.

The RTC also responds by contesting Mr. Smith's estimate that as many as one-third of game patrons may be traveling to the Arena in the 4-6 PM park period, stating: "Though some of the points raised in the comments seem intuitively believable, actual data from comparable situations show that the comments have exaggerated the likely numbers of people would arrive before 6:00 p.m. for a 7:30 p.m. event." (FSEIR, Vol 4, p. 13.11-41.) This response, however, is non-responsive to the "common sense" point made above that many or most of the 11% that the DSEIR says arrive at the turnstile between 6:00 and 6:30 p.m. would be traveling to the event in

the PM peak period of 4:00 to 6:00 pm, and even this minimal adjustment would change the DSEIR's determination from less-than-significant to significant at some intersections. (July 27 Lippe, p. 8; July 23 Smith, p. 3.)

(b) The DSEIR only analyzes impacts of weeknight basketball games that start at 7:30 PM, not at other start times closer to the PM peak.[84]

The Alliance commented on the SEIR that it fails to include reasonably foreseeable weekday Warriors basketball games starting at 6:00 pm rather than 7:30 pm, and this omission is important because even using the SEIR's turnstile count as a proxy for travel time to the Arena, 6:00 pm games require that fans travel in the 4-6 pm peak period, and this scenario should have been included in the impact assessment. (See July 23 Smith, p. 5 at COM-129.)

The RTC responds that "The variability of preseason and postseason games' timing is due in part to TV deals, opposing team traveling schedules, and/or outcomes of postseason series that are beyond the scope of Golden State Warriors control" (FSEIR, Vol. 4, p. 3.11-11) and that it is not precisely known how many of these games there will be. This is non-responsive, because under CEQA, the test for whether future activities associated with a project must be included in the impact assessment is not whether such activities are under the Project Sponsor's exclusive control, it is whether the future activities are reasonably foreseeable and may contribute to significant environmental effects. (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 395-396.) Here, both parts of the test are met. The Warriors have played in Oakland for 50 years and have won two NBA championships in that time period. Therefore, the frequency of 6:00 pm games in the past 50 years is known, and can easily be translated into an annual average that could be used for the next 50 years when the Warriors intend to play in San Francisco. Also, because traffic conditions are so bad already, small increments are enough to register as cumulatively significant. (*Communities for a Better Environment v. California Resources Agency* ("*CBE*") (2002) 103 Cal.App.4th 98,119-120.) Therefore, the omission of 6:00 pm games from the Project description and impact assessment is prejudicial.

6. The SEIR's Analysis of the Project's Cumulative Transportation Impacts Does Not Comply With CEQA.

(a) The 5% threshold of significance for impacts at intersections and freeway ramps operating at LOS E or F violates CEQA.[85]

For intersections operating at LOS E or F, the DSEIR uses a threshold of significance of "a contribution of 5 percent or more to the traffic volumes at the critical movements operating at

[84]July 23 Smith, p. 5; July 21 Wymer, pp. 12-13; Nov 2 Smith FSEIR pp. 3-5.

[85]July 27 Lippe, p. 11. [Comment 2i.]

LOS E or LOS F" (DSEIR, p. 5.2-73-74.) For freeway ramps operating at LOS E or F, the DSEIR uses a threshold of significance of "a contribution of 5 percent or more to the traffic volumes on the ramp." (DSEIR, p. 5.2-74.)[86]

No rationale for the 5% threshold is provided. Indeed, blind reliance on this number ignores the law governing the assessment of cumulative impacts, which requires a fact based assessment that takes into account the severity of preexisting impacts. A one-size-fits-all "ratio" violates CEQA. (See *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120 ("*Communities*"); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720-21 (*Kings County*). *Communities* and *Kings County* teach that the significance of a cumulative impact depends on the environmental setting in which it occurs, especially the severity of existing environmental harm, and that focusing on the magnitude (i.e., "ratio") of the Project's incremental contribution to severe preexisting harm is inconsistent with the definition of cumulative impacts under CEQA.[87]

The RTC says: "Using their expertise regarding traffic analysis in the city, the City and its traffic consultants determined that using a '5 percent contribution' as the threshold of significance was appropriate." (FSEIR, Vol. 4, p. 13.11-72.) But invoking the agency's expertise can only go so far. That expertise must be "supported by facts" and cannot be "unsubstantiated." (CEQA Guideline 15384.) "A clearly inadequate or unsupported study is entitled to no judicial deference." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 410, ft. 12.) Here, the Planning Department's "expert opinion" is based on legal error because it views transportation impacts as less deserving of scrupulous compliance with CEQA information disclosure requirements as other types of environmental. (See FSEIR, Vol. 4, p. 13.11-73.) Again, as noted above, the Legislature's amendment of CEQA to delegate authority to the Secretary of Resources to change the legal standards governing an EIR's analysis

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[86]"The project may result in significant adverse impacts at intersections that operate at LOS E or LOS F under existing conditions depending upon the magnitude of the project's contribution to the worsening of the average delay per vehicle." (DSEIR, p. 5.2-45.)

[87](*Communities,* 103 Cal.App.4th at p. 120 ["[T]he relevant question"... is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether "any additional amount" of effect should be considered significant in the context of the existing cumulative effect. [footnote omitted] In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant. [footnote omitted]"]; *Kings County,* 221 Cal.App.3d at pp. 720-21 ["They contend in assessing significance the EIR focuses upon the ratio between the project's impacts and the overall problem, contrary to the intent of CEQA.... We find the analysis used in the EIR and urged by GWF avoids analyzing the severity of the problem and allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling. Under GWF's 'ratio' theory, the greater the overall problem, the less significance a project has in a cumulative impacts analysis. We conclude the standard for a cumulative impacts analysis is defined by the use of the term 'collectively significant' in Guidelines section 15355 and the analysis must assess the collective or combined effect of energy development"].)

of traffic impacts conclusively demonstrates that traffic impacts are "environmental" impacts under CEQA.

(b) The year 2040 baseline for assessing the significance of the Project's cumulative impacts violates CEQA.[88]

The SEIR's excessively distant time frame and massive development assumptions masks the Project's nearer term cumulative impacts. The SEIR assesses the Project's incremental traffic and transit impacts and its cumulative traffic and transit impacts pegged to the year 2040, which is 25 years in the future.[89] While the Alliance supports such long range forecasting in general, as used in this SEIR the year 2040 baseline for assessing the significance of the Project's cumulative impacts is misleading, for two reasons.

First, this approach overlooks the Project's cumulative traffic and transit impacts pegged to its first 1 to 10 years of operations. This time period is of immediate interest to the citizens of San Francisco because the traffic mess predicted by the DSEIR will be upon them then. And who among them know whether they will even be in the City by the year 2040. Thus, while including a year 2040 baseline is not in itself objectionable, the omission of a baseline 5 to 10 years in the future renders the DSEIR informationally defective.

Second, by using a baseline projected to the year 2040, the SEIR inflates the denominator in the 5% "ratio" it uses to determine the significance of Project cumulative impacts at LOS E and F intersections, thereby masking actual near-term significant effects. (See July 23 Smith, p. 25.)

The RTC states: "CEQA contains no rule fixing the time horizon for cumulative impacts analyses." (FSEIR, Vol. 4, p. 13.11-65.) This is true, but all it means it that the time horizon or horizons selected must provide meaningful public disclosure of the Project's environmental effects. The SEIR fails to disclose the significance of the Project's cumulative impacts for the next 25 years!

The SEIR fails to respond to the Alliance's comment that using the projection based approach over a 25 year future time horizon inflates the denominator in the calculation that is compared to the 5% threshold used to determine the significance of Project cumulative impacts at LOS E and F intersections. Elsewhere, the RTC contends that increasing the geographic scope the traffic study area risks diluting the Project's contribution to impacts to the point of masking

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[88] July 27 Lippe, p. 12; July 23 Smith, pp. 25-26; Nov 2 Smith FSEIR pp. 20-22. [Comment 2h.]

[89] "Future 2040 cumulative traffic volumes were estimated based on cumulative development and growth identified by the San Francisco County Transportation Authority SF-CHAMP travel demand model, using model output that represents Existing conditions and model output for 2040 cumulative conditions." (DSEIR, p. 5.2-110.)

the Project's impacts. (FSEIR, Vol. 4, p. 13.11-26 ["As noted in CEQA case law related to the analysis of cumulative impacts, a geographic scope that is too extensive may dilute the significance of potential impacts"].) This risk also applies to the time horizon as well as geographic space. The amount of "cumulative" traffic against which this Project's contribution must be judged in terms of whether it is "cumulatively considerable" is higher the more future years are included. Using a 25 year horizon only, and ignoring a 10 or 15 year horizon makes it that much more difficult for this Project's contribution to tip the 5% threshold.

(c) The SEIR's use of a "projection" based approach to the Project's cumulative impacts is misleading.[90]

The DSEIR states that:

> Future 2040 cumulative traffic volumes were estimated based on cumulative development and growth identified by the San Francisco County Transportation Authority SF-CHAMP travel demand model, using model output that represents Existing conditions and model output for 2040 cumulative conditions. .... The 2040 cumulative traffic volumes take into account cumulative development projects in the project vicinity, such as the build-out of the Mission Bay Area, completion of the UCSF Research Campus and the UCSF Medical Center, the Mission Rock Project at Seawall Lot 337, Pier 70, etc., as well as the additional vehicle trips generated by the proposed project.

(DSEIR, p. 5.2-110.)[91]

The DSEIR presents no evidence supporting the DSEIR's assumption that the year 2040 projection is reliable for predicting future traffic and transit demand, other than the vague assertion that the "SF-CHAMP travel demand model, using model output that represents Existing conditions and model output for 2040 cumulative conditions ... has been validated to represent future transportation conditions in San Francisco." (DSEIR, p. 5.2-110.) But, as explained by Mr

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[90] July 27 Lippe, p. 13.

[91] In the section titled "Approach to Cumulative Impact Analysis" (DSEIR 5.1-6, § 5.1.5), the DSEIR asserts that the CEQA Guidelines provide "two approaches to a cumulative impact analysis ... (a) the analysis can be based on a list of past, present, and probable future projects producing related or cumulative impacts; or (b) a summary of projections contained in a general plan or related planning document can be used to determine cumulative impacts. The projections model includes individual projects and applies a quantitative growth factor to account for other growth that may occur in the area." (DSEIR, p. 5.1-7.) The DSEIR asserts that "The analyses in this SEIR employ both the list-based approach and a projections-based approach, depending on which approach best suits the individual resource topic being analyzed ... the Transportation and Circulation analysis relies on a citywide growth projection model that also encompasses many individual projects anticipated in and surrounding the project site vicinity, which is the typical methodology the San Francisco Planning Department applies to analysis of transportation impacts." (DSEIR, p. 5.1-7.)

Smith, the SF-CHAMP model's margin of error is greater than the 5% threshold used to determine the significance of Project cumulative impacts at LOS E and F intersections. (See July 23 Smith, p. 25.) Therefore, SF-CHAMP is the wrong tool for the task.

Further, given the sheer number of developments in this area of the City (see July 21 Wymer, Table 3) and the breakneck pace of their approval and implementation, the projection approach is misleading, not informative. Therefore, the DSEIR's cumulative impact assessment must use a list based approach to forecast reasonably foreseeable travel demand, and do so in a meaningful time frame.

The RTC does not specifically respond to this Alliance comment, but it does offer a general justification for using the projection approach, which is that the CEQA Guidelines authorize, and the City has a longstanding practice of, doing so. (FSEIR, Vol. 4, p. 13.11-65.) But these justifications fail where, as here, the analysis is misleading or fails to provide required information.

7. The DSEIR's Methodology for Analyzing Project Impacts on the Transit System Is Legally Flawed.

The DSEIR summarizes its methodology for analyzing Project Impacts on the transit system, as follows:

> The impact of additional transit ridership generated by the proposed project on local and regional transit providers was assessed by comparing the projected ridership to the available transit capacity at the maximum load point. Transit "capacity utilization" refers to transit riders as a percentage of the capacity of the transit line, or group of lines combined and analyzed as screenlines across which transit lines travel. The transit analyses were conducted for the peak direction of travel for each of the analysis time periods.

(DSEIR, p. 5.2-75.)

This methodology contains two flaws. First, it suffers from the same unwarranted and unsupported assumptions about basketball fans' time of travel to the arena for games described above. Second, the DSEIR's use of transit screenline and route capacities is also misleading and unsupported.

(a) The DSEIR's use of transit screenline and route capacities is misleading and unsupported.[92]

The SEIR's use of transit screenline and route capacities is misleading and unsupported,

[92] July 27 Lippe, p. 14; July 23 Smith, pp. 5-8; Nov 2 Smith FSEIR p. 18-20.

so the City's process for evaluating a project's impacts on public transit evades disclosure of significant impacts. The SEIR's use of a project specific threshold of significant impact of 100 percent of screenline capacity rather than the normal 85 percent of screenline capacity exacerbates overcrowding impacts on the regular user community of and is unsupported and unwarranted.

For its Project specific (or incremental) transit impact analysis, the DSEIR uses the following thresholds of significance:

> The proposed project was determined to have a significant transit impact if project-generated transit trips would cause downtown or regional screenlines, and, where applicable, directly affected routes, operating at less than its capacity utilization standard under existing conditions, to operate at more than capacity utilization standard. For Muni, the capacity utilization standard is 85 percent for conditions without an event at the project site, and 100 percent for conditions with an event at the project site. For regional operators, the capacity utilization standard is 100 percent for conditions without and with an event at the project site.

(DSEIR, p. 5.2-76, 77.)

For its cumulative transit impact analysis, the DSEIR uses the following thresholds of significance:

> Under 2040 cumulative conditions, the proposed project was determined to have a significant cumulative impact if its implementation would cause the capacity utilization at the Muni and regional screenlines and/or corridors within the screenlines to exceed the capacity utilization standard noted above for conditions without and with an event at the project site, or if its implementation would contribute considerably to a screenline or corridor projected to operate at greater than the capacity utilization standard under 2040 cumulative plus project conditions (i.e., a contribution of 5 percent or more to the transit ridership on the screenline or route). In addition, if it was determined that the proposed project would have a significant project-specific transit impact under existing plus project conditions, then the impact would also be considered a significant cumulative impact under 2040 cumulative conditions.

(DSEIR, p. 5.2-76, 77.)

For both Project specific (incremental) and cumulative impacts, the DSEIR uses "capacity utilization standards" as baselines against which to measure the Project's impacts. Capacity utilization standards are specific percentages of the theoretical maximum capacity of a transit screenline or transit line.

For Project specific (or incremental) thresholds of significance for Muni, the DSEIR uses two different capacity utilization standards against which to measure the Project's impacts. For conditions without an event at the Project site, the capacity utilization standard is 85 percent of maximum theoretical capacity of the transit screenline or line. For conditions with an event at the Project site, the capacity utilization standard is 100 percent of maximum theoretical capacity.

If the question to be answered by the transit impact analysis is whether the Project will inflict significant suffering on people riding Muni, why does the DSEIR use two different baselines for its impact assessment. If exceeding 85% inflicts suffering without an event, then exceeding 85% will inflict suffering with an event.

The DSEIR does not examine this use of inconsistent baselines. However, the June 21, 2013, Planning Department Memorandum "Transit Data for Transportation Impact Studies" (at Appendix-TR, p. TR-624) states:

> The SFMTA Board has adopted an "85 percent" capacity utilization standard for transit vehicle loads. In other words, transit lines should operate at or below 85 percent capacity utilization. The SFMTA Board has determined that this threshold more accurately reflects actual operations and the likelihood of "pass-ups" (i.e., vehicles not stopping to pick up more passengers). The Planning Department, in preparing and reviewing transportation impact studies, has similarly utilized the 85 percent capacity utilization as a threshold of significance for determining peak period transit demand impacts to the SFMTA lines.

(DSEIR, Appendix-TR, p. TR-624.) Thus, the 85 percent capacity utilization threshold apparently has nothing to do with the suffering of Muni's passengers; it simply reflects the reality of Muni's operations. And even if 85% of capacity is the break point at which Muni drivers tend to refuse to pick up more passengers due to overcrowding, then using 100% of capacity as a threshold of significance is entirely unsupportable.

For its cumulative impact analysis, the DSEIR uses the same baselines and thresholds of significance discussed above plus one more if the Project "would contribute considerably to a screenline or corridor projected to operate at greater than the capacity utilization standard under 2040 cumulative plus project conditions (i.e., a contribution of 5 percent or more to the transit ridership on the screenline or route)."

The 5% threshold for determining a Project's contribution to be "considerable" is stated at Appendix-TR, p. TR-625. No rationale for this number is provided. This approach leads to illogical and unsupportable results. For example, a Project contributing 1% more capacity utilization to a screenline that usually operates at 84%, resulting in a total capacity utilization of 85%, would be deemed to contribute considerably to a significant impact, while a Project contributing 1% more capacity utilization to a screenline that usually operates at 94%, resulting in a total capacity utilization of 95%, would be deemed to not contribute considerably to a

significant impact, even though the latter scenario should be deemed a more significant change than the former. (See *Communities, supra; Kings County, supra*.) In short, a one-size-fits-all "ratio" violates CEQA.

(b) The SEIR's Cumulative Analysis Fails to Consider and Analyze the Project in the Context of the City's Proposal to Remove the Northern Portion of I-280 as Far South as the Mariposa Street Interchange.

This issue is discussed in July 23 Smith, at page 13which is incorporated herein by reference.

8. The SEIR's Discussion of Transportation Impacts Is Incomplete.[93]

(a) The SEIR fails to disclose the significance or severity of transportation impacts when both a Giants game and a Warriors game occur without the Special Events Transit Service Plan.

The SEIR analyzes transportation impacts in two broad scenarios: with and without implementation of the Special Events Transit Service Plan. But the DSEIR failed to provide a quantitative analysis of the significance or severity of the scenario in which both a Giants game and a Warriors game occur without the Special Events Transit Service Plan. The RTC admits this fact, but offers several justifications for this omission. (FSEIR, Vol 4, p. 13.11-9.)

The RTC's argues that "it represents a worst-of-the-worst scenario, which would be expected to occur, on average, about nine times a year." (FSEIR, Vol 4, p. 13.11-9.) This justification fails because the RTC also admits that this scenario's additional impacts are on top of the significant impacts already identified in the "basketball game only - without Special Events Transit Service Plan" scenario. (FSEIR, Vol 4, p. 13.11-9.) The fact that the impact is significant is only part of the information required by CEQA. The other part is disclosing how severe the significant impact is. (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.) The SEIR fails in this regard.

As a result, the public was deprived of information essential to meaningful public participation. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 ["An EIR is an 'environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.' [citations] 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'"].)

Moreover, without information regarding the extent of the Project's significant

[93] July 27 Lippe, p. 18; Nov 2 Smith FSEIR p. 1-3.

environmental harm, the OCCI and the City cannot weigh whether the Project's benefits outweigh that harm, which is the final step in the CEQA process where, as here, the impact remains significant after mitigation.[94]

The RTC also argues that the "Giants and Warriors game without Special Events Transit Service Plan" scenario is "unlikely" because there is a planned funding mechanism (i.e., the Transportation Improvement Fund Ordinance currently pending before this Board) for the Transit Service Plan. (FSEIR, Vol 4, p. 13.11-9.) This justification fails for two reasons.

First, said funding is not assured, even if the Board adopts the Transportation Improvement Fund Ordinance ("Fund Ordinance"). Since the Fund Ordinance is not a Charter amendment, every future appropriation is subject to discretionary approval by future Boards of Supervisors. (*McMahan v. City and County of San Francisco* (2005) 127 Cal.App.4th 1368.) Setting this deficiency aside, SFMTA has acknowledged that the Budget and Finance Committee purported to make the Warriors responsible for any future budget shortfalls to the Fund Ordinance, yet all that the Warriors are actually required to do in this instance is engage in other transportation-related mitigation measures, much of it deferred, that is unrelated to the specific transportation mitigation measures specified by the MTA and funded by the Fund Ordinance. (See Exhibit 10, November 6, 2015, Budget and Legislative Analyst Report to the Budget and Finance Committee ("Nov 6 Budget Analyst Report"), p. 10 ["the Warriors will be responsible to provide additional transportation services to comply with EIR Mitigation Measures TR-2b and TR-18".) Thus, funding for critical transportation mitigation is in no way assured.

Second, Under CEQA, an impact cannot be both significant and unlikely to occur. The likelihood of an impact occurring is a factor considered in the threshold determination of whether an impact is "reasonably foreseeable" and thus must be analyzed in an EIR/SED. (See CEQA Guidelines, § 15064, subd. (d).) The likelihood of an impact occurring is also a factor in the discussion of cumulative impacts. (See CEQA Guidelines, § 15030, subd. (b) [cumulative impacts shall reflect the severity of the impacts and their likelihood of occurrence].) Here, the SEIR determined that the "Warriors game without Special Events Transit Service Plan" scenario is likely enough to occur to identify the scenario as having significant impacts. Having done so, the agency cannot discharge its obligation to disclose the increased severity of impacts in the "Giants and Warriors game without Special Events Transit Service Plan" scenario by characterizing the "without Special Events Transit Service Plan" portion of the scenario as unlikely to occur.

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[94]See OCII Resolution No. 70-2015, pp. 43-45, ¶'s 7-10 [Impact TR-18. Effect of Project on Traffic Without Muni Special Event Transit Service Plan (DSEIR p. 5.2-191, RTC, Response TR-2); Impact TR-19: Effect of Project Traffic on Freeway Ramps Without Muni Special Event Transit Service Plan (DSEIR p. 5.2-197); Impact TR-20: Effect of Project Transit Demand Without Muni Special Event Transit Service Plan (DSEIR p. 5.2-199; RTC, Response TR-2; Response TR-5); Impact TR-21: Effect of Project Regional Transit Demand Without Muni Special Event Transit Service Plan (DSEIR p. 5.2-202, RTC, Response TR-2).

(b) The SEIR fails to disclose traffic delays the Project's office and retail operations will cause on days with Giants games but without Project-related events.

Figure 1 above also illustrates the SEIR's failure to disclose traffic delays the Project's office and retail operations will cause on days with Giants games but without Project-related events (i.e., convention, basketball game, or concert). And, using the delay numbers in the transportation appendix creatively reveals that such impacts are significant, at least for certain locations and time periods.

For example, in the PM peak period at the 7th/Mississippi and 16th St intersection, DSEIR page TR-179 shows "existing without Giants game" delay is 68.6 seconds; while page TR-275 shows "existing plus project without Giants game" delay is 87.8 seconds. This is an increment of 19.2 seconds of delay represents the contribution of traffic to the intersection from the Project's office and retail operations only, and is more than enough to tip this intersection from LOS E to F, which is a significant change.

Page TR-191 shows "existing with Giants game" delay is 84.7 seconds. The SEIR does not disclose, either in the body of the EIR or in its Appendices, the delay for "existing plus project with Giants game but without a Project-related event." To approximate this number, one can add the 19.2 second increment derived above (i.e., the contribution of traffic to the intersection from the Project's office and retail operations only) to 84.7 seconds. The result is 103.9 second of delay, a significant increase in the severity of existing significant delay.

According to the 2016 Giants schedule, the team will play 44 weekday evening regular season games plus 2 weekday evening preseason games (against the A's which are normally sold out) between the beginning of April to the end of September. If the team went all the way to the World Series and each of the playoff series went the maximum number of games, the team could play a maximum of about 11 weekday evening games in October. That totals 46 to 57 weekday evening games in a 7 month period. The use of the Warriors proposed event center is more difficult to assess. According to the information contained on DSEIR Volume 3, Appendix TR, page TR-19, Table 2, the proposed Warriors event facility could host a maximum of about 59 weekday events over the same beginning of April through end of October period (mix of Warriors regular season and playoff games, concerts, family-oriented shows, other sporting and convention/corporate events at average occurrences described in the referenced table). In that 7-month period, there are 156 weekdays. So there could be as many as 57 days per year where there is a weekday evening Giants game and no Warriors event center event, i.e., the undisclosed scenario described above. Also, the above example is just one of 22 intersections in the study area and at least 25 intersections outside the study area that will be affected to an unknown degree.

9. The SEIR Impermissibly Characterizes Mitigation Measures for the Project's Transportation Impacts as Components of the Project.[95]

(a) The SEIR fails to consider other measures to reduce transportation impacts.

The SEIR buries measures to reduce the Project's significant transportation impacts in the "project description" instead of identifying them as mitigation measures. These measures include both one-time capital improvements and ongoing expenditures as set forth in the Transportation Management Plan ("TMP") and Transit Service Plan ("TSP"). This conflation of design features and mitigation measures violates CEQA because it insulates the measures from the analysis applicable to mitigation measures, i.e., are they feasible and effective. (See, *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 657 [the EIR "fail[s] to consider whether other possible mitigation measures would be more effective"].) For example, as discussed in section C.8.(a) above, the SEIR fails to provide assess the significance or severity of the scenario in which both a Giants game and a Warriors game occur without the Special Events Transit Service Plan. As a result, potentially significant transportation impacts are completely unanalyzed, and unmitigated.

(b) The SEIR fails to identify enforceable mitigation.

The SEIR's conflation of design features and mitigation measures undermines the Mitigation Monitoring and Reporting Plan ("MMRP') because the TMP and TSP are not identified as enforceable mitigation measures, but rather "summarized" in a segregated "Section D" that is not adopted by the City as part of its findings for the Project or certification of the FSEIR. (Even if they are adopted as mitigation measures, however, the operational components of the TMP and TSP are unenforceable. (See July 23 Smith, at FSEIR, Vol. 4, pp. Com-135 - 139.)

Also, the SFMTA concedes that the TMP and TSP are unenforceable because necessary funding is not guaranteed, stating in relevant part:

> The SFMTA cannot unequivocally guarantee future funding for the TSP at the levels analyzed in the Project Description in perpetuity; nevertheless, I am confident the SFMTA will be able to deliver the proposed service for the following reasons: ...
> The SFMTA supports the Project with the understanding that the City, the Golden State Warriors, and SFMTA do not expect the SFMTA operating and capital budgets to experience any adverse impact associated with implementing the proposed Transit Service Plan and the capital investments to support it. SFMTA is further encouraged by the proposed ordinance that will establish The Mission Bay

[95]Nov 3 Soluri Meserve to SFMTA, pp. 1-3; July 26 Smith at FSEIR, Vol. 6, pp. Com-135-139; July 27 Lippe at FSEIR, p. Com-126.

Transportation Improvement Fund and Designated Overlapping Event Reserve, funds from which would be appropriated by the Board of Supervisors as needed.

(MTA staff report dated November 3, 2015, enclosure 3.)

This error also obscures the City's massive public subsidy for the Project. A fundamental principle of CEQA is that development projects should mitigate their impacts to the extent feasible. (See, e.g., Pub. Resources Code, § 21002; see also CEQA Guidelines, § 15126.4.) With respect to the Project's transportation impacts, however, the City purports to adopts a "fair share" fee program to mitigate Project-level impacts. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173 ("Anderson First").) As a threshold matter, the SEIR never clearly discloses to the public that it relies upon purported "fair share" payments to fund transportation improvement to reduce the Project's significant transportation impacts. This renders the SEIR defective as an informational document because the omitted information is required to assess the feasibility of the TMP and TSP.

In addition, the purported "fair share" is not fully enforceable, and therefore, cannot be considered part of an "effective" mitigation plan. The payment of impact fees may constitute adequate mitigation if "part of a reasonable plan of actual mitigation that the relevant agency commits itself to implementing." (Id.) The *Anderson First* decision identified the information that is required in an EIR to establish the adequacy of a "fair share" mitigation measure, which includes the following: (I) identification of the required improvement; (ii) estimate of the cost of the required improvement; (iii) sufficient information to determine how much the project would pay towards the improvement; and (iv) the fees must be part of a reasonable, enforceable plan or program sufficiently tied to the actual mitigation of the impacts at issue. (*Anderson First, supra*, 130 Cal.App.4th at 1189-90.) The SEIR fails to provide this necessary information.

While the SEIR mentions the TMP and TSP as reducing the Project's transportation impacts, the SEIR fails to identify the total costs of the improvements, the Project's allocated contribution, and the reasonable and enforceable program to pay for the Project's impacts. Although withheld from the Project's CEQA documentation, important information bearing on these questions is contained in the November 6 Budget Analyst Report (Exhibit 10), released after certification of the SEIR. The November 6 Budget Analyst Report makes the following "Key Points:"

• The proposed ordinance establishes the Mission Bay Transportation Improvement Fund (Fund) as a category four fund, setting aside General Fund monies to pay for services provided by SFMTA, SFPD, and DPW to the Warriors Project. It is anticipated that the revenues to be realized from the Warriors Project will provide for the needed funding sources to the General Fund.

Fiscal Impact

• SFMTA's estimated costs to purchase four new light rail vehicles and make other transportation system improvements to accommodate the Warriors Project

are $55.3 million. Estimated revenues generated by the Warriors Project to pay these costs are $25.4 million, resulting in a revenue shortfall of $29.9 million. The estimated revenue shortfall of $29.9 million will be financed through sale of SFMTA revenue bonds or other financing source. Annual debt service is projected to be paid from tax revenues generated by the Warriors Project.
• SFMTA's expenditures for transportation services to the Warriors Project will be paid by SFMTA fare and parking revenues generated by these services. The Mission Bay Transportation Improvement Fund will pay for SFMTA service to the Warriors Project not covered by these fare and parking revenues, and for SFPD and DPW services to the Warriors Project.
• City departments' estimated annual expenditures to provide services to the Warriors Project are $10.1 million. These expenditures will be funded by an estimated $11.6 million in revenues generated by the Warriors Project, resulting in net revenues of $1.5 million.

Policy Consideration

• If the Warriors Project generates insufficient General Fund tax revenues to pay for all of SFMTA's costs to provide transportation services to the Warriors Project, the Warriors will need to directly provide some transportation services.
• Only General Fund tax revenues directly generated by the Warriors Project should be included in the Controller's estimates of Project revenues to the City.

Recommendations

• Amend the proposed ordinance to specify that if the annual cap of 90 percent of General Fund revenues from the Project site and events at the Event Center is insufficient to cover SFMTA's expenditures for transportation services to the Warriors Project, then the Warriors will be responsible to provide the additional transportation services to comply with EIR Mitigation Measures TR.2b and TR.18.
• Amend the proposed ordinance to specify that only tax revenues generated on-site by the Warriors Project are included in the Controller's estimates of General Fund revenue generated by the Warriors Project for the purpose of calculating the annual General Fund contribution to the Mission Bay Transportation Improvement Fund.

(November 6 Budget Analyst Report, pp. 1-2.)

Thus, documents prepared outside the CEQA process concede the project applicant is not being asked to bear the full cost of its own project-level mitigation. Moreover, the SEIR and the November 6 Budget Analyst Report fail to disclose that the "estimated revenues generated by the Warriors Project to pay these costs" are not payments directly by the project applicant, but rather the re-direction of sales and other taxes generally attributable to Project operations that would otherwise flow to the City's General Fund for other citywide services or transportation improvements. This information was hidden in the Event Center Expenditure Plan, which the SFMTA approved on November 3, 2015 ("Expenditure Plan"). (See Enclosure 3 to SFMTA

staff report dated November 3, 2015.)

In other words, rather than simply require the project applicant to be financially responsible for the capital improvements needed to mitigate its project-level impacts, the City is establishing a fee program that does not even require the applicant to pay the cost of the needed improvements. Instead the City is voluntarily giving up tax generated General Fund revenues that would otherwise support other City programs and services. By cloaking this deficient mitigation strategy as a design feature of the Project, the City never engages in a meaningful analysis of potentially feasible mitigation measures involving the project applicant actually mitigating these project-level impacts. Therefore, the first three categories of information required by *Anderson First* are completely missing from the Project's CEQA documentation.

The fourth category of information required by *Anderson First*, namely information about a reasonable and enforceable plan, is lacking altogether because there simply is no enforceable plan to cover the funding gap for project-level mitigation. The November 6 Budget Analyst Report speculates that the acknowledged $29.9 million funding gap can be "financed through sale of SFMTA revenue bonds or other financing source." (November 6 Budget Analyst Report, p. 1.) Incredibly, as of three days after FSEIR certification, there was no plan at all, much less an enforceable plan, about how to fund the shortfall and ensure the necessary project-level mitigation gets implemented.

In an attempt to address the lack of an actual plan, the November 6 Budget Analyst Report states, "Annual debt service is projected to be paid from tax revenues generated by the Warriors Project." (November 6 Budget Analyst Report, p.1.) This speculation, however, fails for at least three reasons. First, the available information calls into question whether such tax revenues will be adequate to actually cover the annual debt service. The November 6 Budget Analyst Report estimates annual costs for project-level transportation mitigation at $10.1 million and total Project tax revenues at 11.6 million that could be redirected to pay for these costs. As explained by economist Jon Haveman, however, these revenue estimates are far from conservative.[96] In fact, should attendance fail to materialize as predicted, revenues may not be adequate to cover the estimate annual payments on the speculative finance mechanism for the $29.9 million infrastructure costs.

Second, implicitly acknowledging the speculative nature of the Project's revenue and expense projections, the November 6 Budget Analyst Report claims that the project applicant should be required to make up any annual shortfall based on the Mission Bay Transportation Improvement Fund ("Fund"). However, it is not at all clear that the referenced provision of the Fund ordinance requiring the project applicant to cover any deficiencies in annual expenses also applies to the cost associated with debt service on the outstanding $29.9 million in addition to the

[96]"Warriors Stadium Economics: Uncertainty and Alternatives, version 2.0," prepared by Jon Haveman, Ph.D. of Marin Economic Consulting, dated November 29, 2015, is attached to the November 30, 2015 "Appeal Brief" submitted by Soluri Meserve as Exhibit 4.

ongoing annual operational expenses. Further, the revision to the Fund ordinance recommended by the Budget Analyst requiring the Warriors to "directly provide some transportation services" in the event of a General Fund shortfall does not actually require the Warriors to make up the financial deficiency, but rather to engage in other, unrelated transportation mitigation measures set forth in M-TR-2b and M-TR-18. (November 6 Budget Analyst Report , p. 10.) The Legislative Analyst's proposal therefore provides no greater certainty that the mitigation measures identified in the TMP, and funded by the Fund ordinance, will actually be implemented.

Third, since the vast majority of the project applicant's financial contributions to transportation mitigation going forward is not based on a payments to a dedicated impact fee program but rather the City's voluntary redirection of General Fund revenues, a Charter amendment would be required to actually bind future Boards (McMahan v. City and County of San Francisco (2005) 127 Cal.App.4th 1368) and thereby establish an enforceable program as contemplated in *Anderson First* and its progeny.

10. The SEIR's Identification of Numerous Mitigation Measures is Unlawful for Several Reasons, Including Deferral of Development and Lack of Evidence of Unavoidabilility.[97]

One of the main purposes of an EIR is to identify ways to mitigate or avoid potentially significant impacts. Pub. Res. Code §§ 21002.1(a), 21061. CEQA therefore requires that the lead agency propose and describe mitigation measures aimed at minimizing any significant impact identified in an EIR. Pub. Res. Code §§ 21002.1(a), 21100(b)(3); 14 Cal. Code Regs. §§ 15121(a), 15126.4.

The SEIR takes the position that the City and the project proponent can devise specific mitigation measures later, well after the public has had its opportunity to review the SEIR and comment on the efficacy of mitigation measures. Mitigation Measure TR-2b states that:

> The project sponsor ***shall work with the City to pursue and implement, if feasible, additional strategies*** to reduce transportation impacts. In addition, the City shall pursue and implement, if feasible, additional strategies that could be implemented by the City or other public agency (e.g., Caltrans). These strategies could include the following… .

(DSEIR, p. 5.2-129 (emphasis added). The strategies compound the problem by including measures that include equivocal language such as "explore," "work to identify off-site parking lot(s)" (which should have been done as part of the preparation of the SEIR), "work to include," "seek partnerships," "meet to discuss," and "encourage." (DSEIR, p. 5.2-129 to 130). The above referenced language does not commit the City or the project sponsor to any course of action to

[97]July 27 Lippe, p. 16; July 23 Smith, pp. 17-25.

mitigate the identified environmental impacts. Mitigations that are "not guaranteed to occur at any particular time or in any particular manner" are inadequate. *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281; *see also*, *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260 (remote and speculative mitigations were inadequate); *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1119 (mitigation measure rejected because it identified general goal for mitigation rather than a specific performance standard).

Mitigation TR-9d makes the same mistake regarding a serious safety issue at the UCSF helipad. In this instance, the City simply defers the development of a lighting plan that fails to include specific measures. It only requires consultation with SFO staff concerning the effects of lighting on pilots and consultations and approvals regarding firework displays and laser light shows with advance notification to UCSF. Furthermore, the DSEIR calls for the development of "specialized lighting guidelines." (DSEIR, p. 5.2-272). Mitigation TR-9a has a similar flaw.

The FSEIR's response to comments actually supports the Alliance's point. The response cites CEQA Guideline § 15126.4(a)(1)(B) to support the notion that deferral is appropriate. While the response stretches the meaning of section 15126.4(a)(1)(B) and the cases interpreting it, these authorities stand for the proposition that deferral is permissible if there are specified performance standards and the mitigations can be accomplished in more than one way. Then the response to comments states that "performance criteria must be sufficiently definite to ensure that the potential impacts would be mitigated." (SFEIR, p. 13.11-201.) That is the problem with TR-2b. There are no performance criteria at all, let alone sufficiently definite ones. The mitigation is simply a menu of options for the City and the project sponsor to consider at a later date.

Mitigation TR-11c suffers from the same infirmity because it merely requires "the project sponsor to *continue to work with the City* to pursue additional strategies to reduce impacts during overlapping events." (DSEIR p. 13.11-174 (emphasis added)). In fact, TR-11c is even worse, because the SEIR admits there is no evidence the mitigation is feasible, stating:

> However, due to the physical limitations of the City's street grid, land may not be available for City purchase that would allow for the expansion of street width to accommodate additional travel lanes or other design techniques to achieve the standard of LOS D or better, and City policies disfavor expansion of roadway capacity in order to achieve the City's Transit First and other goals that attempt to limit private vehicle use. Consequently, it cannot be determined what mitigation measures may be available for affected areas, and then whether the measures would be feasible given the physical constraints of the street network and the availability of funding to implement the measures. The City would implement those measures *that it deems feasible*… .

(DSEIR, p. 13.11-175 (italics added).) Not only is the City deferring the formulation of the mitigation, it has not even made the pre-requisite determination of whether a mitigation is even

available or feasible. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 [agreement that called for purchase of replacement groundwater was an inadequate mitigation measure because there was no indication that such water was even available]. A vague and unenforceable promise to simply examine matters later is not a mitigation at all.

Mitigation TR-11c adds even more wiggle room to allow the project sponsor to escape implementation. For additional strategies to reduce impacts, Mitigation TR-11c adds that "The project sponsor shall exercise *commercially reasonable efforts*" to "avoid scheduling non-Golden State Warriors events of 12,500 or more event center attendees that start within 60 minutes of the start (respectively) of events at AT&T Park," and to "negotiate with the event promoter to stagger start times… ." It also requires that "the project sponsor shall: (1) make *commercially reasonable efforts* to negotiate with the Port of San Francisco" regarding parking "and (2) (if such negotiations are successful) provide free shuttles" from such parking. (DSEIR, p. 13.11-180 (italics added).) The determination whether efforts are "commercially reasonable" is within the discretion of the project sponsor, and therefore unenforceable and illusory.

Also, "commercially reasonable efforts" is not the correct standard for determining a mitigation's feasibility. "What is required is evidence that the *additional* costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project" if the Sponsor is *required* to avoid scheduling non-Golden State Warriors events of 12,500 or more attendees within the start of events at AT&T Park. (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 599 (emphasis added).)

TR-11c also states that:

> in the event the off-site parking lots at 19th Street and the Western Pacific site are implemented, the SFMTA shall consult with Caltrans in assessing the feasibility of signalizing the intersection of Pennsylvania/I-280 southbound off-ramp. If determined feasible by the SFMTA and Caltrans, the SFMTA and Caltrans shall establish the level of traffic volumes that would trigger the need for a signal, and the project sponsor shall fund its fair share…

(DSEIR, p. 13.11-180 (italics added).) Again, the SEIR defers all the analysis concerning its feasibility.

Mitigation TR-13 states that to accommodate Muni transit demand during overlapping events at both AT&T Park and the proposed project, "the project sponsor shall work with the Ballpark/Mission Bay Transportation Coordinating Committee to coordinate with the SFMTA to provide additional shuttle buses between key Market Street locations and the project. Examples of the additional service include…" Again, there is no definite mitigation provided and the City is simply asking the project proponent to discuss the matter in the future. (DSEIR, p. 5.2-184).

A similar requirement is set forth in Mitigation TR-11b:

> As a mitigation measure to optimize effectiveness of the transportation management strategies for day-to-day operations and events in the Mission Bay area, at AT&T Park, UCSF Mission Bay campus, and the proposed project, the project sponsor shall actively participate as a member of the Ballpark/Mission Bay Transportation Coordinating Committee in order to ***evaluate and plan*** for operations of all three facilities (i.e., AT&T Park, UCSF Mission Bay Campus, and the proposed event center)... .
>
> The Transportation Coordinating Committee ***shall consult on changes to and expansion of transit services, and for developing and implementing strategies within their purview that address transportation issues*** and conflicts as they arise.

(DSEIR, Vol 1, p. 5.2-179 (emphasis added)). This mitigation highlights the illegality of the City's approach. The Committee will "evaluate and plan" and shall "develop" strategies later. This is required to be considered as part of the environmental review process, not deferred to a later date, after project approval.

With respect to TR-5a, TR-5b and TR-14 (requiring the Project Sponsor to ask Caltrain, ferry operators, and BART, to provide additional service for Project events, the RTC simply states the impact is significant and unavoidable: "Therefore, the SEIR does not rely on these measures to find the corresponding impacts less than significant, but rather determines the impact would be significant and unavoidable without mitigation." (FSEIR, p. 13.11-200). In this scenario, the finding of "unavoidability" is defective because there is no evidence it is infeasible to require the Project Sponsor to execute a contract with some or all of these third-party transit service providers to provide additional service for Project events. (*City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 350, 355-356, 360-361.)

> The SEIR states that:
>
> In order to accommodate the additional transit demand to the South Bay during weekday and Saturday evening conditions, one additional train car (average capacity of 130 passengers per car) on at least one inbound train per hour would be needed. For the weekday late evening period, two additional train cars (average capacity of 130 passengers per car) on at least one outbound train per hour would be needed. Alternatively, the transit demand could be accommodated within one special outbound train (total capacity up to 650 passengers) at the end of the basketball game, similar to the service currently being offered to SF Giants home games (two special outbound trains).
>
> In order to accommodate the additional transit demand to the North Bay, four additional Golden Gate Transit buses (40 passengers per bus) plus one ferry boat (250 to 350 passengers per boat) per hour, or alternatively seven additional buses per hour would need to be provided.

(DSEIR, p. 5.3-146).[98] While the SEIR clearly identifies the need, Mitigation TR-5 completely misses the mark. Instead of providing concrete requirements to address this lack of transit, the mitigation states as follows:

> However, since the provision of additional South Bay and North Bay service is uncertain and full funding for the service has not yet been identified, implementation of both mitigation measures remain uncertain. Accordingly, the proposed project's significant impacts to Caltrain, Golden Gate Transit and WETA transit capacity would remain *significant and unavoidable with mitigation.*

(DSEIR, p. 5.3-146 to 147; *see also*, DSEIR 5.2-185). This approach has been condemned by the courts.

> CEQA requires the agency to find, based on substantial evidence, that the mitigation measures are "required in, or incorporated into, the project"; or that the measures are the responsibility of another agency and have been, or can and should be, adopted by the other agency; or that mitigation is infeasible and overriding considerations outweigh the significant environmental effects. (§ 21081; Guidelines, § 15091, subd. (b).) In addition, the agency "shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures" ([Public Resources Code] § 21081.6, subd. (b)) and must adopt a monitoring program to ensure that the mitigation measures are implemented ([Public Resources Code] § 21081.6, subd. (a)). *The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded*. (See § 21002.1, subd. (b).)… .
>
> The city acknowledged in the TIMP that there was great uncertainty as to whether the mitigation measures would ever be funded or implemented. Although the city adopted the mitigation measures, it did not require that they be implemented as a condition of the development allowed under the GPF and made no provision to ensure that they will actually be implemented or "fully enforceable" (§ 21081.6, subd. (b)). We therefore conclude that there is no substantial evidence in the record to support a finding that the mitigation measures have been "required in, or incorporated into" (§ 21081, subd. (a)(1)) the GPF in the manner contemplated by CEQA, and the city failed to provide that the mitigation measures would actually be implemented under the GPF (§ 21081.6, subd. (b)).

Federation of Hillside & Canyon Associations v. City of Los Angeles (2000) 83 Cal.App.4th

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[98] The SEIR admits that these are "*new significant* impacts not previously identified in the Mission Bay FSEIR." (DSEIR, p. 5.2-147).

1252, 1260–126 (italics in original, fn. omitted)[99]; *see also*, *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188 ("To be adequate, these mitigation fees, in line with the principle discussed above, must be part of a reasonable plan *of actual mitigation that the relevant agency commits itself to implementing*.")

Mitigation TR-5 suffers from the flaws identified in this line of cases. Again, the SEIR and lead agency uses the determination that the impact is significant and unavoidable as a justification for having an unenforceable mitigation, but the finding of "unavoidability" is defective because there is no evidence it is infeasible to require the Project Sponsor to execute a contract with third-party transit service providers to provide additional service for Project events. Further, the approving agencies have failed to fill this gap, because these Mitigations do not commit these agencies to implement these measures.

TR-5a also uses equivocal language and further states that "the project sponsor shall work with Caltrain to provide additional Caltrain service to and from San Francisco on weekdays and weekends. The need for additional service shall be based on surveys of event center attendees conducted as part of the TMP." (DSEIR, p. 5.2-147). TR-5b contains nearly identical language providing that the project sponsor shall work with Golden Gate Transit regarding providing ferry and bus service. (DSEIR, p. 5.2-147). The problem with these mitigation measures are two-fold. First, the SEIR identifies the need for additional transit with specificity (e.g., two additional train cars), then the mitigation simply ignores the analysis and says the mitigation will be based on "surveys of event center attendees." If the problem has been identified, a subsequent survey, without specified parameters or controls, cannot dictate the required transportation needs. And, the City may not cede responsibility for assessing an impact to a project proponent. *California Clean Energy Committee v. City of Woodland, supra,* 225 Cal.App.4th 173, 194. The public and decisionmakers are entitled to be informed of the transit need, as the SEIR has identified, and then mitigations must be developed to address that identified need. Second, while the impact has been identified, and the mitigation for the impact also identified (e.g., two additional train cars), the mitigation only requires the project sponsor to "work" on transportation issues, but does not require it to pay its fair share to fund the actual mitigation.

Caltrain, for its part, invited the City and the project sponsor to work with it to develop the appropriate mitigation, stating:

> Caltrain agrees with the DSEIR's analysis of capacity impacts to our service, the conclusion that additional service has the potential to mitigate a portion of these impacts, and the statement that additional Caltrain service has not yet been defined, funded or agreed to. Caltrain understands the importance of the regional

[99] The court in *Federation of Hillside & Canyon Associations v. City of Los Angeles* used the substantial evidence test, but the Alliance believes based on subsequent construction of the standard of review by the courts, that the failure to require implementation of a mitigation measure is a failure to proceed in a manner required by law.

> transportation services we provide and we look forward to working collaboratively with the City and County of San Francisco and the project sponsors to address the transportation challenges and opportunities presented by this unique project. As the project advances through the environmental process we encourage the City and the project sponsors to engage with us directly to more formally define, analyze and identify funding for any contemplated increase in Caltrain service.

(FSEIR, Vol. 6, p. COM-20 [Caltrain letter dated July 27, 2015].) The mitigation measure provides no assurance that the mitigation will happen and dismisses the mitigation by simply calling the impact significant and unavoidable when there is a potentially feasible mitigation present.

The SEIR makes the same mistake with respect to Mitigation TR-14 regarding impacts on BART during overlapping events at AT&T Park and the proposed project. The SEIR simply says "since the provision of additional East Bay, South Bay, and North Bay Service is uncertain and full funding for the service has not yet been identified, implementation of these mitigation measures remain uncertain." The SEIR then states that

> the project sponsor shall work with the Ballpark/Mission Bay Transportation Coordinating Committee to coordinate with BART to provide additional service from San Francisco following weekday and weekend evening events. The additional East Bay BART service could be provided by operating longer trains. The need for additional BART service shall be based on characteristics of the overlapping events… .

(DSEIR, p. 5.2-185).

The response to comments attempts to rehabilitate these fatal flaws in the SEIR by stating:

> because some or all of the additional demand could be accommodate (sic) by other transit providers serving the East Bay, North Bay, and South Bay (e.g., BART also serves the South Bay and not projected to operate at more than 100 percent capacity utilization), the actual additional service needed to accommodate the demand may be less than identified in the SEIR. Thus, in order to provide additional transit most efficiently, the amount of additional service should be responsive to the actual travel patterns, as determined during monitoring of events.

(FSEIR, p. 13.11-193). There are several problems with this response. First, the SEIR attempts to have it both ways. On the one hand it provides analysis of the transportation need, then on the other it attempts to downplay the need by saying it may not reflect the situation accurately. This

argument either calls into question the SEIR's impacts analysis, or is an attempt to avoid mitigating the clearly significant impact. Second, it allows the project sponsor to determine the need for additional transportation at a later date. There are no parameters specified as to the conduct of the surveys, and no way to tell whether the surveys will be accurate. There is no indication as to whether the City will verify the accuracy of the surveys. Third, it still does not solve the problem of providing the funding for the mitigation. The response further states:

> Neither the project sponsor nor the City has the legal authority and logistical ability to provide the additional service to and/or from the North Bay and South Bay, or to commit to funding of the additional service. However, the proposed TMP and Mitigation Measures require that the City and project sponsor to work with the regional transit agencies to provide additional service. Despite the lack of any guaranteed outcome, such efforts might well bear fruit, based on past experience. The provision of additional regional transit service during special events is common in San Francisco. As noted in the SEIR, additional service can include adding cars to scheduled trains, or provision of special event trains.

(FSEIR, p. 13.11-183). There are multiple problems with this response. First, the notion that the City can simply shed its responsibility to provide for mitigations because other agencies are responsible for implementation was rejected in *City of Marina v. Board of Trustees of the California State University*, *supra*, and *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 97–98. Second, as stated above, a promise to "work with regional transit agencies" is not a mitigation. Third, if the provision of additional service during special events is common in San Francisco, there should be no barriers to providing the necessary mitigations for these impacts.

CEQA requires the City to identify "both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects." Pub. Res. Code § 21002; 14 Cal. Code Regs. § 15126.4(a)(1). Here, the SEIR identifies both the effects and the necessary solution. But, the SEIR does not mandate the solution as a mitigation. "Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." Pub. Res. Code § 21002.1(b). "The core of an [Environmental Impact Report (EIR)] is the mitigation and alternatives sections." *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1350. It is completely feasible to mitigate the significant effect by funding the fair share of the transit impact. Caltrain is willing to work with the City and the project sponsor to craft the mitigation. The City simply fails to require a feasible mitigation.

The CEQA Guidelines specifically recognize that requiring a project to implement or fund its "fair share" of a measure designed to mitigate a cumulative impact is an effective way to address the project's contribution to the impact. 14 Cal. Code Regs. § 15130(a)(3). Even where fees are required, the courts have required that fees translate into actual mitigations. "A commitment to pay fees without any evidence that mitigation will actually occur is inadequate."

Save Our Peninsula Committee v. Monterey County Bd. of Supervisors (2001) 87 Cal.App.4th 99, 140. Here, the problem is worse. No mitigation fees are even required to be paid for an identified significant impact. CEQA requires that an EIR propose specific mitigations to reduce identified traffic impacts. *Federation of Hillside & Canyon Associations v. City of Los Angeles, supra,* 83 Cal.App.4th at 1261 (EIR invalid because mitigation measures were not "required in, or incorporated into" (§ 21081, subd. (a)(1)) the General Plan Framework (GPF) in the manner contemplated by CEQA, and the city failed to provide that the mitigation measures would actually be implemented under the GPF (§ 21081.6, subd. (b)).) For these reasons, mitigations for transit impacts are inadequate.

(a) The SEIR Improperly Defers the Development of Mitigation Measures to Reduce the Project's Construction-related Traffic Impacts to less than Significant.[100]

With respect to cumulative construction impacts related to ground transportation (Impact C-TR-1), the SEIR asserts the impacts are less than significant. (FSEIR Vol. 4, p. 13.11-157; DSEIR vol. 1, p. 5.2-212.) The Alliance discusses this conclusion in section II. C. above.

Since the impact was improperly determined to be less than significant, mitigation is necessary to reduce the impact. However, Improvement Measure I-TR-1, which calls for the preparation of a Construction Management Plan and Public Updates, was improperly deferred. I-TR-1 merely calls for the project sponsor to require the contractor to:

> prepare a Construction Management Plan for the project construction period. The preparation of a Construction Management Plan could be a requirement included in the construction bid package. Prior to finalizing the Plan, the project sponsor/construction contractor(s) shall meet with DPW, SFMTA, the Fire Department, Muni Operations and other City agencies to coordinate feasible measures to include in the Construction Management Plan to reduce traffic congestion, including temporary transit stop relocations and other measures to reduce potential traffic, bicycle, and transit disruption and pedestrian circulation effects during construction of the proposed project. This review should consider other ongoing construction in the project vicinity, such as construction of the nearby UCSF LRDP projects and construction on Blocks 26 and 27.

(DSEIR, p. 1-14). The mitigation has no performance standards or other specific requirements. It is simply at the discretion of the project sponsor and the contractor. Meeting and coordinating with City officials, without any specific requirements or performance standards, is an illusory mitigation at best. And, there is no basis in which the public can understand the efficacy of the measures. The Construction Management Plan "could" "encourage" carpools, transit, bicycles and walking for construction workers, identify parking for construction workers, and "could" provide construction updates to businesses and residents. (DSEIR, p. 5.2-116 to 117). There are

[100] July 27 Lippe, pp. 5-7; July 23 Smith, p. 15; Nov 2 Smith FSEIR p. 22.

no specific mandates included in I-TR-1. The CEQA Guidelines require that "Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments. In the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design." 14 Cal. Code Regs. 15126.4(a)(2). Nothing in I-TR-1 is enforceable, let alone fully enforceable, through conditions, agreements or other legally binding instruments. The measure cannot even be quantified since it relies on future contractors hired by the Project sponsor. Therefore, it is wholly inadequate as a mitigation measure.

11. The SEIR's Transit and Traffic Analyses Understate Impacts Because They Rely on Outdated Baseline Data.[101]

The Alliance commented that the SEIR's transit and traffic analyses understate impacts because they rely on outdated baseline data. "In assessing the impact of a proposed project on the environment, the lead agency should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published, or where no notice of preparation is published, at the time environmental analysis is commenced." (*Save Our Peninsula Committee v. Monterey County Bd. Of Supervisors* (2001) 87 Cal.App.4th 99, 123, citing CEQA Guideline § 15126.2*;* see also, *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 953; CEQA Guideline § 15125(a).)

However, the case law also recognizes that factors after the issuance of the NOP may influence the selection of the correct baseline. "Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods." *Save Our Peninsula Committee v. Monterey County Bd. Of Supervisors* (2001) 87 Cal.App.4th at 125. Speaking specifically to traffic, the Court stated: "Since the environmental review process can take a number of years, *traffic levels as of the time the project is approved may be a more accurate representation of the existing baseline against which to measure the impact of the project*. (See, e.g. *Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238 [maximum estimated traffic was appropriate baseline].)" *Ibid.* at 126 (emphasis added).

The RTC contends the transit and traffic data used were up-to-date and adjusted to account for recent developments and growth. This is incorrect, both factually and legally. As shown by traffic engineer Smith, the SEIR does not present baseline data current to either the issuance of the NOP, or a later time that would account for the continued phenomenal growth in Mission Bay and the surrounding environs. Instead, the City relies on stale data that meets neither legal test and results in an underestimate of the environmental transit and traffic impacts. (Nov 2 Smith FSEIR, p. 9-13.)

Smith shows the transit data is from 2010 and 2011, well before the NOP was issued. Smith notes that when the NOP was issued, large number of development projects were

[101] July 23 Smith, p. 9; Nov 2 Smith FSEIR pp. 9-13.

completed and occupied and the recovering economy increased ridership considerably. The City claims it took steps to ensure that the data was up-to-date, but Smith provides detailed analysis of why the City actually did not update the analysis, and that some of the data being represented as updated is actually old data from 2012 and 2013. It is certainly not up-to-date and is not representative of existing conditions at the time the NOP was issued in November of 2014, nor takes into account additional development since then. As Smith notes, BART's comment on the DSEIR states that "Given strong job expansion in San Francisco, BART has experienced unprecedented ridership growth (~25% over the last four years) which creates a number of peak period capacity challenges." (Nov 2 Smith FSEIR, p. 10 [FSEIR Vol. 4, p. COM-19].)

Smith also shows the traffic data fails to include traffic volumes associated with developments in northern Mission Bay, SOMA and the C-3 that were completed after 2013 or were nearing completion by 2015. (Nov 2 Smith FSEIR, p. 9-13.)

12. The SEIR Fails to Consider the Disruptive Impacts of the At-grade Rail Crossing on LOS at 7th/ Mississippi and 16th Street.

This issue is discussed in July 23 Smith at page 14; the FSEIR's responses to comments at Vol. 4, pp. 13.11-55, 56; Nov 2 Smith FSEIR, at page 18, and Nov 28 Smith FSEIR (Exhibit 12 hereto) at pages 4-7, all of which are incorporated herein by reference.

13. The SEIR concludes, without adequate foundation, that the project would not have an adverse impact on emergency access to UCSF hospitals.

This issue is discussed in July 23 Smith at page 16; Nov 2 Smith FSEIR at page 22; Nov 10 Smith FSEIR Access; and Nov 28 Smith FSEIR (Exhibit 12 hereto) at page 2, all of which are incorporated herein by reference.

14. The New Project Variant disclosed in the FSEIR requires recirculation due to new and more severe significant impacts.[102]

The new project variant will dig up King Street for six months and Third Street for fourteen months. (FSEIR, pp. 12-11, 12-25.) This will exacerbate construction phase impacts on traffic, creating new significant impacts not previously identified in the SEIR.

This issue is discussed in Nov 13 Smith FSEIR King St., and Nov 17 Smith FSEIR 3rd St., all of which are incorporated herein by reference.

[102]Nov 13 Smith FSEIR King St., Nov 17 Smith FSEIR 3rd St.

D. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO HYDROLOGY, WATER QUALITY, AND BIOLOGICAL IMPACTS.

1. The DSEIR Is Not Sufficient as an Informational Document with Respect to the Project's Wastewater Treatment Infrastructure Impacts (Comment UTIL-3).[103]

The DSEIR concedes the Project's cumulative wastewater flow, in combination with other approved projects, will exceed the Mariposa Pump Station's capacity, and therefore, the Project will have a significant and unavoidable impact because it "would require or result in the construction of new wastewater treatment facilities or expansion of existing facilities, the construction of which could cause significant environmental effects." (DSEIR, p. 5.7-13 - 5.7-20 [Impact C-UT-2].) But the DSEIR's disclosure of the nature and severity of the potentially significant impacts of building these new wastewater treatment facilities falls far short of CEQA's requirements.

The DSEIR generally describes the type of new wastewater treatment facilities that might be built. (DSEIR, p. 5.7-14.) The DSEIR then identifies a number of potentially significant impacts of constructing new wastewater treatment facilities necessitated by the Project, stating:

> These construction activities would be expected to result in temporary increases in truck and construction employee traffic, noise, and air pollutant and greenhouse gas emissions. In addition, depending on the site-specific design and location, the pump station improvements could result in physical effects on cultural resources, biological resources, water quality, and hazardous materials.

(DSEIR, p. 5.7-14.) The DSEIR then vaguely suggests that these impacts could be mitigated to less than significant levels by adopting "typical" mitigation measures, stating:

> Most, if not all, of these potential impacts can generally be mitigated to a less-than-significant level with typical mitigation measures, similar to those identified in the Initial Study and the SEIR for this project. Long-term operational impacts would likely be less than significant because operation of the pump stations would be similar to existing operations of these facilities.

(DSEIR, p. 5.7-14.)

These vague descriptions fail to discharge the City's legal obligations under CEQA to fully describe the Project, including its "reasonably foreseeable consequence" of necessitating the construction of additional wastewater treatment facilities, and to include an "analysis of the

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[103] July 26 Lippe, pp. 1-10; July 19 Gilbert, pp. 2-3; Nov 2 Lippe FSEIR, pp. 8-12, Nov 2 BSK; Nov 2 Ringelberg..

environmental effects" of this future action and the mitigation measures that may reduce those impacts. (See e.g., *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396 (*Laurel Heights I*) ["an EIR must include a analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects].)

As shown in both the DSEIR's analysis of mitigation measures and the Mission Bay Alliance's comments on many types of impacts that construction of additional wastewater treatment facilities will cause (e.g., air quality, noise, traffic), the "mitigation measures ... identified in the Initial Study and the SEIR for this project" do not ensure that "impacts can generally be mitigated to a less-than-significant level."

Finally, the DSEIR states:

> In the event that additional future wastewater flows would exceed the pump station capacities before the needed wastewater system improvements could be completed, it is assumed that the SFPUC would make internal operational or piping changes to accommodate the additional flows in the interim in order to remain in compliance with RWQCB permit requirements. The interim system modifications would be subject to the approval of the RWQCB under the terms of the Bayside NPDES permit. Approval by the RWQCB would ensure that water quality of the Bay would be protected during the interim period. Any interim system modifications are assumed to be operational or internal to the existing pump stations and therefore would not result in any physical environmental effects.

This remarkable passage suggests that the City is prepared to approve and allow construction of this Project without ensuring the construction of additional, adequate, sewage treatment capacity required by the Project. This is the opposite of responsible planning. Moreover, the City is apparently poised to take this action based on several unsupported assumptions. First, the DSEIR assumes, without discussion or evidentiary support, that interim modifications will not have a significant effect on the environment.

Second, the DSEIR assumes the Project's wastewater impacts on the Bay will only be "interim" until the SFPUC builds or expands permanent new wastewater treatment facilities; and that in this supposedly "interim" period, the Regional Water Quality Control Board will mitigate any "interim" impacts to less than significant. But there is no evidence to support the assumption the Project's wastewater can be treated to avoid significant adverse effects on Bay water quality before the SFPUC builds or expands permanent wastewater treatment facilities. Nor is there evidence that Regional Water Quality Control Board regulation during any purported "interim" period would avoid significant adverse effects on Bay water quality. Nor is there any evidence as to how long this purportedly "interim" period will last, or how many other projects that will

cumulatively exceed the Mariposa Pump Station's capacity will commence operations during this purportedly "interim" period.

Indeed, this DSEIR's approach represents a total abdication of the City's legal responsibility under CEQA to identify the Project's significant effects, to identify mitigation measures that would substantially reduce those effects, and to adopt all feasible mitigation measures that would substantially reduce those effects. To put it colloquially, punting the problem to the SFPUC or Regional Water Quality Control Board does not pass muster under CEQA.

(a) The Response to Comment UTIL-3 is Inadequate.[104]

The RTC for Comment UTIL-3 essentially says that the Project is "first come, first served" for purposes of using up remaining sewer system capacity in the Mariposa sub-basin. (FSEIR, Vol. 5, pp. 13.17-11.) But the assertion that the cumulative future projects listed in the referenced report by Hydroconsult Engineers (i.e., Blocks 25b, 33-34, 40 and Hospital Phase 2),[105] will be operational further in the future than the Project is unsupported. In fact, these cumulative future projects are not even listed in the cumulative future projects list at DSEIR, pages 5.1-8 - 10. As a result, the SEIR's assertions are unsupported and untestable.

The response's assertion that "Future improvements in the SFPUC's wastewater system are beyond the project sponsor's control" is also unsupported; in fact, it is contradicted by overwhelming evidence. Where it is advantageous to the project, the SEIR assumes the City will do things over which the project sponsor has no control to support the project, e.g., comply with its NPDES permit, provide transportation infrastructure to handle the crowds, etc. Indeed, the City is named as a responsible party or is directly involved in dozens of mitigation measures identified in the proposed Mitigation Monitoring and Reporting Program.[106] But here, the SEIR takes an inconsistent position, disclaiming any Project Sponsor control over a different matter within the City's control, i.e., expansion of the sewer system, apparently for no reason other than it is advantageous to the project to do so.[107]

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[104] July 26 Lippe, pp. 1-10; July 19 Gilbert, pp. 2-3; Nov 2 Lippe FSEIR, pp. 8-12, Nov 2 BSK; Nov 2 Ringelberg..

[105] Hydroconsult Engineers, Inc. 2015. Combined Sewer Impact Analysis, Golden State Warriors Arena EIR. February 25, referenced on RTC, p. 13.17-15, n 8.

[106] One example is Mitigation Measure M-TR-2b: Additional Strategies to Reduce Transportation Impacts: "The project sponsor shall work with the City to pursue and implement commercially reasonable, if feasible, additional strategies (i.e., in addition to those included in the project TMP) to reduce transportation impacts. In addition, the City shall pursue and implement, if feasible, additional strategies to that could be implemented by the City or other public agency (e.g., Caltrans)."

[107] The San Francisco Public Utilities Commission is a department of the City and County of San Francisco.

2. The DSEIR Is Not Sufficient as an Informational Document with Respect to the Project's Contaminated Wastewater (I.e. Combined Sewage and Stormwater) Impacts on San Francisco Bay Water Quality or Biological Resources (Including from Inadequately Treated Sewage and Toxic Chemicals (E.g., Pcb's and Metals) (Comments Hyd-3 - Hyd-6).[108]

In the chapter on the Project's Water Quality impacts, the DSEIR evaluates the impact of Combined Sewage Discharges (CSDs or CSOs) to the Bay that exceed treatment capacity of the Mariposa Pump Station due to the combination of increased storm water flows combined with sewage wastewater flows. The DSEIR uses two thresholds of significance based on the City's NPDES permit, stating:

> ● Wet weather flows to combined sewer system: The impact analysis examines whether project related increases in wastewater flows would contribute to combined sewer discharges during wet weather. The impact is considered less than significant if the increased flows would not increase the frequency of combined sewer discharges above the long-term average specified in the NPDES permit for the SEWPCP, the North Point Wet Weather Facility, and Bayside wet-weather facilities.
>
> ● Effluent discharges from SEWPCP: For the analysis of impacts related to changes in the quality of effluent discharges from the SEWPCP, the analysis considers whether discharges of wastewater to the combined sewer system would cause effluent quality to exceed the discharge limitations of the NPDES permit for the SEWPCP. If not, the impact is considered less than significant.

(DSEIR, p. 5.9-30.)

Thus, for purposes of complying with CEQA's requirement that it identify the Project's significant impacts, the DSEIR makes two unsupported assumptions: (1) that City compliance with its NPDES permits will avoid significant impacts, and (2) that the City will in fact comply with its NPDES permits. The DSEIR must support these assumptions with evidence.

In addition, the first threshold quoted above only looks at "frequency of combined sewer discharges above the long-term average" and ignores increases in quantity and duration of overflows. (See DSEIR, pp. 5.9-34 to 5.9-36.) The DSEIR notes:

> The model analyzed the effects of discharging the average flows from the proposed project in combination with the existing average flows in the drainage area. Under this scenario, the frequency of CSDs would not increase, but the

[108] July 24 Lippe, pp. 4-10; Nov 2 Lippe FSEIR, pp. 10-12; July 21 Hageman; Nov 2 Hageman; Nov. 2 BSK; July 22 Cline, pp. 1-15.

> volume of the CSDs would increase from 5.34 to 5.63 million gallons and the duration would increase from 17.2 to 17.3 hours.

(DSEIR, 5.9-35.) The DSEIR finds this impact less than significant because it defines "significance" solely in terms of the *number* of CSD events and compliance with the City's NPDES permit, regardless of the *quantity* of sewage discharged, stating:

> Because average and peak wastewater flows from the project site would not increase the frequency of CSD events from the Mariposa sub-basin and would be consistent with the requirements of the NPDES permit, project level water quality impacts related to contributions to an increase in CSD frequency would be *less than significant.*

(DSEIR, 5.9-35, 36.) The DSEIR makes the same finding for the Project's cumulative impact based on the same evidence and the same rationale. (DSEIR, 5.9-35, 36.)

This is a legal error because the DSEIR cannot merely reference a project's compliance with another agency's regulations. Lead agencies must conduct their own fact-based analysis of project impacts, regardless of whether the project complies with other regulatory standards.[109]

The 1998 Mission Bay FSEIR sets the stage for this legal error in its finding that CSO impacts on the Bay are less than significant, stating:

> The same conclusions for the proposed project apply to the cumulative effects of Bayside projects, in that the cumulative increase in pollutant mass load from these projects would have a less-than-significant effect on water quality. As shown in Table V.K.8, the project would represent less than 3% of the increased total pollutant load from the Bayside. The cumulative loads for pollutants would

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[109] *See*, e.g., *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16 (lead agencies must review the site-specific impacts of pesticide applications under their jurisdiction, because "DPR's [Department of Pesticide Regulation] registration does not and cannot account for specific uses of pesticides..., such as the specific chemicals used, their amounts and frequency of use, specific sensitive areas targeted for application, and the like"); *Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture (*1986) 187 Cal.App.3d 1575, 1587-1588 (state agency applying pesticides cannot rely on pesticide registration status to avoid further environmental review under CEQA); *Oro Fino Gold Mining Corporation v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881-882 (rejects contention that project noise level would be insignificant simply by being consistent with general plan standards for the zone in question). *See also City of Antioch v. City Council of the City of Pittsburg* (1986) 187 Cal.App.3d 1325, 1331-1332 (EIR required for construction of road and sewer lines even though these were shown on city's general plan); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712-718 (agency erred by "wrongly assum[ing] that, simply because the smokestack emissions would comply with applicable regulations from other agencies regulating air quality, the overall project would not cause significant effects to air quality.").

> generally increase by 4-6%. Thus, the project would cause approximately half of this cumulative increase for the Bayside. To put this in context, City discharges are a very small portion of the region-wide discharges to the Bay. Compared to municipal dischargers in the Bay Area, the load contribution of the Southeast Plant represents about 12% of all other municipal dischargers, and the Mission Bay project would represent less than 3% of that 12% (or 0.36% of all municipal wastewater discharged to the Bay). In addition, besides municipal wastewater, other sources of pollutant loading to San Francisco Bay include riverine inputs, nonurban runoff, urban runoff, point sources, dredging/sediment disposal, spills, and atmospheric deposition. Of these sources, point sources, including municipal dischargers and other permitted industrial dischargers, represent about 1-6% of the total load input to the Bay-Delta estuary. Regarding stormwater discharges, San Francisco Bayside stormwater flows are about 1.8% of the total regional urban storm flow to the Bay. Considering the contribution of the project and of the cumulative Bayside projects in the context of all the other pollutant inputs to the Bay, the cumulative pollutant loading from Bayside projects would be extremely small.

(1998 MB FSEIR, p. V.K.52.)

This logic reflects the "de minimis" and "ratio" rationales rejected in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120 ("*CBE*") ["[T]he relevant question"... is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether "any additional amount" of effect should be considered significant in the context of the existing cumulative effect. [footnote omitted] In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant. [footnote omitted]"], and *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720-21 ["They contend in assessing significance the EIR focuses upon the ratio between the project's impacts and the overall problem, contrary to the intent of CEQA.... We find the analysis used in the EIR and urged by GWF avoids analyzing the severity of the problem and allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling. Under GWF's 'ratio' theory, the greater the overall problem, the less significance a project has in a cumulative impacts analysis. We conclude the standard for a cumulative impacts analysis is defined by the use of the term 'collectively significant' in Guidelines section 15355 and the analysis must assess the collective or combined effect of energy development"].) *Communities* and Kings *County* teach that the significance of a cumulative impact depends on the environmental setting in which it occurs, especially the severity of existing environmental harm.

Therefore, accepting the Hydroconsult numbers at face value, the starting point for

assessing whether adding 2.9 million gallons per year[110] of incompletely treated CSD pollution to the existing condition of San Francisco Bay is significant is the existing condition of San Francisco Bay.[111] The DSEIR says very little on the topic. The 1998 Mission Bay FSEIR provides some information, but the DSEIR does not discuss how much of the 1998 Mission Bay FSEIR's information may be outdated as a result of the passage of seventeen years, and is, therefore, unknown.

> The 1998 Mission Bay FSEIR characterizes "municipal wastewater" as follows:
>
> Municipal wastewater is a relatively strong waste stream containing high concentrations of organic matter that will decompose (measured as biochemical oxygen demand because the decomposition requires oxygen), inorganic particulates (measured as total suspended solids), nutrients (measured as total nitrogen and phosphorus), and pathogenic microorganisms. It also contains oil and grease and small quantities of toxic metals, pesticides, solvents, and plasticizers (additives in plastics that maintain softness and pliability). Conventional secondary treatment, as employed by San Francisco at its Southeast Water Pollution Control Plant, greatly reduces the concentrations of most substances in municipal wastewater. On the other hand, dissolved metals and organic substances that are resistant to breakdown by bacteria, may pass through the plant relatively unaltered. This waste stream, after treatment, is referred to as municipal wastewater effluent in this SEIR.

(1998 MB FSEIR, p. V.K.4.)

> The 1998 Mission Bay FSEIR characterizes "urban stormwater " as follows:
>
> Urban stormwater is a large-volume wastewater stream. Pollutants contained in urban runoff include street litter, sediment (mostly inorganic particulates, measured as total suspended solids), oil and grease, oxygen-demanding substances, pathogenic microorganisms, toxic metals, and pesticides. The concentrations of oxygen-demanding substances, nutrients, and pathogenic microorganisms are much lower than in untreated municipal wastewater. CSOs exhibit a blend of the untreated characteristics of municipal wastewater and urban

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[110] 5.63 – 5.34 = 0.29 x 10 = 2.9.

[111] "If the rainstorm is a large one, and the capacity of the storage/transport box sewers is exceeded, treated combined sewer overflows (CSOs) occur at outfalls along the City's shoreline. When combined sewage is temporarily stored in transport/storage structures, floating materials are removed from the water surface and some solids settle to the bottom of the structures. The accumulated solids are then flushed to the treatment plant after the storm has subsided. The treatment that occurs within the structures is approximately equivalent to primary treatment." (1998 MB FSEIR, p. V.K.8-9.)

stormwater runoff.

(1998 MB FSEIR, p. V.K.4.)

The 1998 Mission Bay FSEIR characterizes the "impairment of Central San Francisco Bay" as follows:

> The State Water Resources Control Board (SWRCB) has listed central San Francisco Bay as impaired on the basis of field surveys of the water column, sediments, sediment toxicity, bivalve bioaccumulation, and water toxicity. The determination relates to mercury, copper, selenium, diazinon, and polychlorinated biphenyls (PCBs).
> • Mercury. The main source of mercury in the Bay is erosion and drainage from abandoned gold and mercury mines. Other sources include natural sources, atmospheric deposition, and various industrial and municipal sources.
> • Copper. Copper enters the Bay through municipal sources, stormwater runoff (primarily through automobile brake pad dust), and other nonpoint sources (such as soils and abandoned mines). These are the three main sources, and they contribute roughly equivalent amounts.
> • Selenium. Selenium enters the Bay through industrial point sources (e.g., oil refineries), agriculture, and natural sources. Control programs are in place to address selenium discharges from oil refineries
> • Diazinon. Diazinon is a pesticide that enters the Bay as runoff from agriculture and, to a lesser extent, residential land uses. Diazinon is a primary component of insecticides. Homeowner pesticide use peaks in late spring and early summer.
> • PCBs. Although PCBs are no longer manufactured in the U.S., PCBs previously released to the environment enter the Bay through stormwater runoff and transport through the food chain. PCB levels in fish have resulted in health advisories for fish consumption.

(1998 MB FSEIR, p. V.K.8-9.)

The above information shows the existing environmental harm (or "preexisting cumulative effect" in the words of *Communities, supra*) is severe, and this Project will make it worse. Therefore, the DSEIR's finding that the Project's cumulative CSD impacts on the Bay are less-than-significant is erroneous as a matter of law. It is based on two legal errors: (1) the exclusion of CSD *quantity* from its threshold of significance, which reflects the "de minimis" and "ratio" rationales rejected in *Communities, supra* and *Kings County, supra*; and (2) the DSEIR's reliance on another agency's regulatory standards (i.e., the NPDES permit) to determine significance under CEQA.

As discussed in July 21 Hageman, Nov 2 Hageman, and Nov 2 Ringelberg, the Project's CEQA documents (i.e., the 1998 Mission Bay FSEIR, 2014 NOP/IS, and 2015 DSEIR), fail to

analyze or develop mitigation measures to reduce the Project's likely contribution of a suite of toxic chemicals, including PCBs, to San Francisco Bay in amounts deleterious to the Bay's biota.

Further, it is impossible to place the discussion of this entire issue (at DSEIR pages 5.9-34 to 5.9-36) in a meaningful context, because the DSEIR does not inform the reader if the discussion assumes construction or expansion of permanent wastewater treatment facilities by the SFPUC.

Also, the DSEIR says: "the [Hydroconsult] model estimated the annual average frequency, volume, and duration of CSDs that would occur once the Mariposa wet- and dry-weather pump stations reach the combined capacity of 11.2 mgd under existing and project conditions. The model estimates that under existing conditions, CSDs from the Mariposa sub-basin occur approximately 10 times per year with an average volume of 5.34 million gallons and duration of 17.2 hours." (DSEIR, p. 5.9-35.) This text implies that the "Hydroconsult" model includes wet-weather flows and wet-weather CSDs. But the only Hydroconsult memo cited and included in Appendix HYD states:

> Three scenarios were analyzed: base case, project, and cumulative. The base case scenario includes existing conditions plus developments and improvements expected to be substantially complete previous to occupancy of the GSW arena. The project scenario adds the DWF from the arena only and the cumulative scenario adds the project DWF plus DWF from reasonably foreseeable projects in the basin. In all three scenarios, the wet weather flow (stormwater runoff) is assumed to not contribute to the CSS; rather is treated and pumped directly to the Bay. All DWF from the proposed GSW arena is assumed to flow to the Mariposa pump station (MPS), therefore Mariposa is the only basin analyzed.

(DSEIR, Appendix HYD, p.1.) The statement "wet weather flow (stormwater runoff) is assumed to not contribute to the CSS; rather is treated and pumped directly to the Bay" makes sense if it refers only to stormwater from the Mission Bay Redevelopment Area, because all of that stormwater will be separated from wastewater flows when the separate stormwater system for Mission Bay is completed in 2015. (See DSEIR, p. 5.7-4.)[112] But the DSEIR also states that storm water from areas outside Mission Bay will continue to combine with wastewater flows to

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[112] "The separate stormwater system for the Mission Bay South Plan area is currently being implemented by the master developer and includes four drainage zones within the geographic boundaries of the reconfigured Central sub-basin that have already been constructed and one drainage zone within the geographic boundaries of the reconfigured Mariposa sub-basin which is currently under construction. Stormwater in each of the drainage zones flows by gravity to one of five stormwater pump stations in the locations shown on **Figure 5.7-2**, including Pump Station SDPS-5 near the east end of 16th Street. When construction of the fifth drainage basin is completed (anticipated in 2015, prior to construction and operation of the proposed project), all stormwater runoff from Mission Bay South will be conveyed through the separate stormwater system and discharged to the Bay and China Basin Channel (Mission Creek)." (DSEIR, p. 5.7-4 (pdf151).)

the Mariposa Pump Station and will contribute to wet weather CSDs. (DSEIR, p. 5.7-7.)[113] If this is correct, then the Hydroconsult dry-weather analysis is beside the point.

Also, the numbers for Mariposa Pump Station capacity and wastewater or stormwater flows are confusing. For example, DSEIR page 5.9-35 says the Mariposa wet- and dry-weather pump stations have a "combined capacity of 11.2 mgd." DSEIR page 5.7-7 also refers to "the combined capacity of the Mariposa pump station and transport/storage structure (11.2 mgd)."[114] But DSEIR page 5.9-34 says: "The potential effect would be greatest in the reconfigured Mariposa sub-basin, which has a *wet weather capacity of 12 mgd* (italics added)."

(a) The Responses to Comments Hyd-3 - Hyd-6 are Inadequate.

The Alliance's comments letter regarding hydrology, water quality and biological impacts observed that the DSEIR's heavy reliance on City compliance with its NPDES permit to ensure the Project's combined stormwater and sewage impacts are less than significant is an unsupported assumption. (July 24 Lippe, p. 4-10.) The RTC simply repeats this unsupported assumption many times. (See RTC at pp. 13.21-17; 13.18.)

> Compliance with these plans, policies, and water quality criteria and objectives as enforced through the Bayside NPDES permit ensures that discharges of treated effluent from the SEWPCP are protective of water quality in San Francisco Bay. Therefore, compliance with the Bayside NPDES permit effluent and receiving water limitations is protective of water quality and it is appropriate to use the requirements of the NPDES permit as a threshold of significance for effluent discharges from the SEWPCP. Using this threshold, the SEIR properly concluded that water quality impacts related to effluent discharges from the SEWPCP are less than significant as described in Impact HYD-6 (pp. 5.9-33 to 5.9-41).

(RTC at p. 13.21-19.)

The Alliance's previous comment requested that the City support this assumption with

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[113] "The 240-acre reconfigured Mariposa sub-basin of the combined sewer system is divided into two tributary areas that direct flow to the Mariposa Pump Station. Tributary B includes Potrero Hill to the south of Mariposa Street and is outside of the Mission Bay Plan area; this tributary area directs both rainwater and wastewater to the pump station. Tributary A includes areas to the north of Mariposa Street that are located within the Plan area; in this area, stormwater flows are directed to the separate stormwater system constructed for the Mission Bay South development, and only wastewater flows are directed to the Mariposa Pump Station." (DSEIR, p. 5.7-7.)

[114] "In the event that wet weather flows in the Mariposa subbasin exceed the combined capacity of the Mariposa pump station and transport/storage structure (11.2 mgd), the excess flows are discharged to the Bay as a combined sewer discharge after receiving flow-through treatment in the transport and storage structure."

evidence. The RTC fails to do so. Therefore, the Alliance gathered that evidence, and it shows the City has a continuous, consistent, and pervasive pattern of violating its NPDES permits. (See Nov 2 Lippe FSEIR, Exhibit M.) Therefore, the SEIR's assumed basis for finding water quality impacts less than significant is false.

My July 24, 2015, comment letter regarding hydrology, water quality and biological impacts observed that the DSEIR's threshold of significance for the effect of untreated wastewater discharges to the Bay, which consists of limiting such discharges to 10 per year, ignores the quantity and duration of such discharges. The response stresses the work the City must do to prevent municipal wastewater from degrading water quality in the Bay, stating:

> As described in the permit, and on p. 5.9-20 of the SEIR, the SFPUC must implement the following nine minimum controls in accordance with the Combined Sewer Overflow Policy to reduce the frequency of combined sewer discharges and their effect on receiving water quality:
> 1. Conduct proper operation and regular maintenance programs for the combined sewer system and combined sewer discharge outfalls;
> 2. Maximize the use of the collection system for storage;
> 3. Review and modify pretreatment programs to minimize the effect of non-domestic discharges to the collection system;
> 4. Maximize flow to the SEWPCP and North Point Facility for treatment;
> 5. Prohibit combined sewer discharges during dry weather;
> 6. Control solids and floatable materials in combined sewer discharges;
> 7. Develop and implement a pollution prevention program focused on reducing the effect of combined sewer discharges on receiving waters;
> 8. Notify the public of combined sewer discharges; and
> 9. Monitor to effectively characterize combined sewer discharge effects and the efficacy of combined sewer discharge controls.
> These controls represent the best conventional and best available technology economically achievable as required under the Clean Water Act. The City is currently implementing these controls as required by the Combined Sewer Overflow Control Policy.

(RTC at p. 13.21-26.) This is all good and important work, but it is non-responsive to the Alliance's comment. The fact that these measures are the best the City can, or is legally required to do, is not relevant to whether the impact is significant. It may be relevant to whether further mitigation of the impact is feasible or effective, but these considerations cannot affect whether the impact is deemed significant.

The top two paragraphs on page 13.21-27 of the RTC assert that all waste water is treated. This is beside the point that the City anticipates and is allowed by its NPDES permit up to 10 discharges per year of waste water subject to only primary, rather than secondary, treatment.

The RTC appears to reject the Alliance's comment that the SEIR ignores duration and quantity, not just frequency, of the 10 discharges per year on grounds the NPDES permit does not address the duration and quantity of these discharges. But the issue here is whether impacts on Bay water quality are significant. CEQA does not allow the use of the NPDES permit terms as an absolute proxy for that determination.

In addition, the RTC fails to adequately respond to the Alliance's comments that the Project will cause potentially significant harm by mobilizing and transporting hazardous materials, including PCBs, to the Bay in stormwater runoff.

As hydrologist Matt Hageman states:

> Our comments noted the detection of PCB in soil at the Project site and the need to implement measures during soil disturbing construction activities to prevent the transport of contamination to San Francisco Bay via stormwater. Response HYD-2 simply states that stormwater BMPs for PCBs must be consistent with best available technology economically achievable to meet requirements of the California Construction General Permit (p. 13.21-12). However, the Response does not specify BMPs that would meet this requirement. It is key that certification of the FSEIR is upheld until BMPs specific to preventing the spread of PCB contamination are identified.

(See Nov 1 SWAPE, p. 1.) Biologist Erik Ringelberg makes the same points for a broader range of materials, stating:

> Stormwater Mitigation. The biological effects of stormwater on the environment are not properly analyzed. The offered responses to comments regarding stormwater mitigation are particularly ironic given that the site has demonstrably failed to maintain its Best Management Practices (BMPs) and has visible waste material literally clogging its stormwater drains. (See BSK comments.) The concept that simply stating that a BMP will work, without analyzing the nature of the impacts, and without maintaining those BMPs calls into question every part of the DSEIR that relates to sediment, toxins and wildlife exposures. For illustration, the BMPs at the site currently are not properly maintained and have been filled in or partly filled in with sediment, or breached completely. However, even if these sediment BMPs had been installed correctly and maintained, they do nothing for dissolved-fraction toxic chemicals. The project fails to implement the sediment BMPs correctly and does not even offer readily implementable BMPs for dissolved-fraction chemicals found at the site 4, 5, 6, 7. Yet, the Response states unequivocally, any potential effects associated with contaminated stormwater runoff into San Francisco Bay would be avoided during construction through compliance with the Construction General Permit and implementation of a Stormwater Pollution Prevention Plan (SWPPP) as described in the Section

13.21, Response HYD-2. (p. 13.19-22) The SWPPP is solely intended to manage ordinary construction sediment and has no specific intent to manage hazardous waste, and in any case does nothing for dissolved hazardous chemicals.

(Nov 2 Ringelberg, pp. 10-11.)

3. The DSEIR Is Not Sufficient as an Informational Document with Respect to Project Impacts on Biological Resources, Including Wetlands and Wildlife.[115]

(a) The SEIR's exclusion of the Project's impacts on biological resources is erroneous.

The lead agencies' decision to exclude the Project's impacts on biological resources from the DSEIR (see DSEIR, p. 5.1-1) is erroneous as a matter of law. Both the NOP/IS and the DSEIR announce that their analyses are "tiered" to the 1998 Mission Bay FSEIR pursuant to CEQA Guideline 15168(c). (IS, p. 23-24; DSEIR, pp. 1-1, 5.1-2, 3.) Both the NOP/IS and the DSEIR also announce that the standards used to exclude resource topics from the DSEIR are the standards used to determine if a subsequent EIR is required under CEQA section 21166 and Guideline section 15162. (See NOP/IS, pp. 23-25; DSEIR, p. 5.1-3.)

Based on these predicates, the City decided to prepare a focused EIR, and to conduct no environmental review with respect to the following resources: Biological Resources, Aesthetics, Land Use Cultural Resources, Paleontological Resources, Geology and Soils, Recreation, Hazardous Materials, and Population and Housing. As discussed in more detail in the July 27, 2015, letter from the Mission Bay Alliance's legal counsel regarding "tiering," the City's assumption that it may prepare an EIR for this Project that tiers to the 1998 Mission Bay FSEIR is legally incorrect. As discussed in several comment letters submitted on behalf of the Mission Bay Alliance, and below regarding the Project's impacts on biological resources, the evidence relating to these excluded resource topics meets both the "fair argument" standard, as well as the CEQA section 21166 standards. Moreover, the SEIR's exclusion of the Project's impacts on biological resources is an omission of required information under CEQA that is reviewed de novo by the courts. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1207-08.) Therefore, the City must prepare and recirculate for public review a Revised Draft EIR addressing all of the Project's environmental impacts.

[115] July 26 Lippe, pp. 11-15; July 16 BSK Wetland; July 21 Ringelberg; Oct 29 BSK Wetland; Nov 2 Lippe FSEIR, pp. 10-15; Nov 2 BSK; Nov 2 Ringelberg; October 7, 2015, letter to OCII from Soluri Meserve regarding Clean Water Act 404 and CZMA Consistency.

(b) The SEIR's exclusion of the Project's impacts on biological resources is erroneous because the lead agency failed to prepare any CEQA document that adequately describes the Project's environmental setting to allow an assessment of the Project's impacts on biological resources.

The principal BSK Associates reports referenced here establish that the SEIR fails to adequately describe the environmental setting.[116] "An EIR must contain an accurate description of the project's environmental setting. ... There is good reason for this requirement: 'Knowledge of the regional setting is critical to the assessment of environmental impacts.'" (*Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 874.)

The full range of environmental setting information which the SEIR fails to describe is discussed in the four BSK Associates reports referenced here which are incorporated herein by this reference.

(c) There is substantial evidence supporting a fair argument the Project will have a significant adverse effect on biological resources.

While the NOP/IS give short shrift to on-site biological resources, there is substantial evidence, in the NOP/IS and in July 21 Hageman, Nov 2 Hageman, July 21 Ringelberg, Nov 2 BSK, and Nov 2 Ringelberg, supporting a fair argument the Project may have significant effects on (1) migratory birds; (2) off-site special status species downstream of the Project, including steelhead (Oncorhynchus mykiss); and (3) the on-site wetland and its ecology and associated wildlife.

With respect to migratory birds, the NOP/IS admits that the 1998 Mission Bay FSEIR did not assess the Redevelopment Plan's effects on migratory birds. (NOP/IS, p. 81.) In addition, the NOP/IS concedes the Project may have significant impacts on migratory birds because it recommends the adoption of mitigation measures to substantially reduce these impacts, stating: "With implementation Mitigation Measures M-BI-4a, Preconstruction Surveys for Nesting Birds, and M-BI-4b, Bird Safe Building Practices, the project would not result in any new or substantially more severe significant impacts on resident or migratory bird species than those identified in the FSEIR." (NOP/IS, p. 81.)

This approach violates CEQA in a number of ways. First, as discussed above, the Project is a separate project from the 1998 Redevelopment Plan, or at a minimum, is not within the scope of the 1998 Mission Bay FSEIR. This fact precludes the City from "tiering" to the 1998 FSEIR for any resource, including impacts on biological resources such as migratory birds.[117] Second, trying to mitigate significant impacts before assessing their nature and extent puts the cart before

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[116] July 21 Ringelberg, Nov 2 BSK, Nov 2 Ringelberg, July 16 BSK Wetland, and Oct 29 BSK Wetland.

[117] *Sierra Nevada Conservation, supra.*

the horse.[118] Third, as discussed above, the NOP/IS's concession that the Project may have significant impacts on migratory birds is substantial evidence supporting a fair argument the Project will have a significant adverse effect on migratory birds; therefore, the City is required to include an assessment of these impacts in the DSEIR.[119] Fourth, even if the City's assumption that CEQA section 21166 applies is correct, the addition of a 750,000 square foot sports arena and an additional 160 foot office tower to the Mission Bay Redevelopment Plan are substantial changes in the Redevelopment Plan that give rise to new potentially significant effects on birds that must be analyzed in the subsequent EIR.

With respect to impacts on special status species, the NOP/IS states:

> At the time of preparation of the Mission Bay FSEIR, the project site contained several buildings and facilities and was noted as lacking any notable vegetative habitat, with no state listed threatened, endangered or rare plants, or rare, threatened or endangered animal species known to occur in the upland portion of the Mission Bay plan area, including the project site. Subsequent to that time, the project site has been subject to building removal, grading, excavation, and construction of paved surface parking lots, fencing and utilities on portions of the site. Other than the creation of the depression as a result of remediation actions, no other changes in the site since the preparation of the FSEIR have altered the characteristics of the site in relation to biological habitat. These changes in conditions on the project site have not altered the fact that the site provides no suitable habitat for any sensitive or special status species due to the sparse and ruderal nature of onsite vegetation, as well as the site's location in a densely urbanized environment, as confirmed through the reconnaissance survey and database review of special status species occurrences within the vicinity of the project site. In addition, there have been no substantial changes with respect to the circumstances under which the project would be undertaken, nor has any new information become available that demonstrates new or more severe impacts associated with the proposed project.

(NOP/IS, pp. 78-79.)

But as Mr Ringelberg points out:

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[118]CEQA does not permit an agency to simply adopt mitigation measures in lieu of fully assessing a project's potentially significant environmental impacts because mere acknowledgment that an impact would be significant is inadequate; the EIR must include a detailed analysis of "how adverse" the impact would be. (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 655-56; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1123*; Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.)

[119]*Protect the Historic Amador Waterways*, *supra*.

> the potential project impacts to the closest federally designated critical habitat is steelhead Oncorhynchus mykiss are ignored. This habitat runs directly adjacent to the project area. In addition, San Francisco manzanita (Arctostaphytos franciscana) critical habitat is present approximately 2.6 miles to the west and should also have been identified and analyzed. The federal critical habitat analysis is missing, and the provided analysis itself is defective. The potential project's impact(s) to these listed species and their critical habitat are therefore unexamined. The project's dust, stormwater, surface flooding, and groundwater place those species at risk from hazardous chemicals.

(July 21 Ringelberg, p. 11.)

As both Mr. Hageman and Mr. Ringelberg point out, none of the Project's CEQA documents assess the effects of toxic chemical runoff on Bay biota, including steelhead. Where, as here, the lead agency fails to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record because deficiencies in the record may enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.)

Further, there is substantial evidence in July 21 Hageman, Nov 2 Hageman, July 21 Ringelberg, Nov 2 BSK, and Nov 2 Ringelberg, supporting a fair argument the Project may have significant effects on steelhead from toxic runoff. Again, even if CEQA section 21166 applies, CEQA requires including this issue in the subsequent EIR. The Phase 11 reports showing the site is contaminated with a suite of toxic compounds is significant new information showing the potential for new significant effects not previously identified.[120]

With respect to potential impacts on the on-site wetland, the NOP/IS indicates the DSEIR will not assess impacts on the wetland even though the 1998 FSEIR did not, and could not have, analyzed the wetland since it was apparently created sometime after 2005. (See July 21 Ringelberg, Figure 1 and accompanying text.)

Typically, if there is a potential wetland resource, there would be a formal delineation prior to release of the DEIR so the resource can be analyzed, and appropriate mitigation developed. Here, the NOP/IS claims it may not be jurisdictional (p. 80), and at the same time attempts to suggest mitigation (p. 81) in case it is. But the mitigation suggested is not enforceable, in violation of CEQA. Further, as discussed above, trying to mitigate impacts before assessing their significance puts the cart before the horse. (*Lotus v. Department of*

[120] See Letter to Marty Glick re: Phase 2 Subsurface Investigation Approval, Golden State Warriors Arena, Blocks 29-32, San Francisco, CA 94158; Phase II Environmental Site Assessment, Golden State Warriors Arena, Blocks 29-32, Mission Bay, San Francisco, California.

Transportation, *supra*.)[121]

In addition, the NOP/IS' evidentiary basis for dismissing the wetland from the DSEIR is flimsy, stating:

> Because the excavation depressions on the site are small, isolated features resulting from recently completed hazardous materials remediation activities and are surrounded by paved areas and urban development, these features do not provide the important biological habitat functions and values that are typically associated with federally protected wetlands.

(NOP/IS, pp. 78-79.) But as Mr. Ringelberg points out:

> Conversely, and in rebuttal to their prior assertion that there are readily substitutable habitats nearby, small wetland features can have exceptional ecological value, in particular if they are one of the few remaining features in an urban setting.

(July 21 Ringelberg, p. 6.)

Further, there is substantial evidence in the report from Erik Ringelberg supporting a fair argument the Project may have a significant effect by destroying the on-site wetland. Again, even if CEQA section 21166 applies, CEQA requires, including this issue in the subsequent EIR, because the presence of the wetland is a change in circumstances since certification of the 1998 FSEIR that gives rise to the potential for new significant effects not previously identified.

(d) The Response to Comment Bio-5 is Inadequate.

The FSEIR argues that the wetland feature on the site is not a state or federal wetland. Yet Response BIO-5 provides no evidence of consultation with either the U.S. Army Corps of Engineers ("Corps") or the State Water Resources Control Board ("SWRCB") regarding the status of the feature. With respect to the jurisdiction of the Corps, the FSEIR claims that under draft regulations that are stayed, the feature would be exempted from jurisdiction. This interpretation is not supported by any specific language in the referenced Sixth Circuit Court of Appeals decision, and thus has no authority.

The FSEIR also argues that the site was never abandoned such that the feature would have been "recaptured" as a wetland under the Clean Water Act. Yet no explanation is provided for the lack of any activities at the site or changes to the wetland feature between 2007 and 2014, a period of seven years. This inactivity at the site is demonstrated in the plates included in the July 16 BSK Wetland report, at Figures 2a-2e.

[121] Also, the NOP/IS fails to even mention the state wetland policy (WRAPP) under Porter Cologne (fn. 49).

The FSEIR also makes the circular argument that the existence of priority pollutants within the wetland feature is irrelevant because the City does not consider the wetland feature to be jurisdictional. Again, no credible evidence is provided to support the argument that the wetland is not subject to federal jurisdiction in the first place.

The FSEIR incorrectly relies exclusively on federal law and ignores the broader jurisdiction of the state over all of its waters, including wholly constructed features. As such the SEIR fails to adequately describe the sites physical features, the relevant regulatory requirements, and the avoidance, minimization and mitigation requirements it would be subject to. State waters are more broadly defined than waters of the U.S.: "'Waters of the state' means any surface water or groundwater, including saline waters, within the boundaries of the state." (Wat. Code, 13050, subd. (e).) This has been interpreted by the SWRCB to literally "include all waters within the state's boundaries, whether private or public, including waters in both natural and artificial channels." Contrary to RTC BIO-5, the fact that the remediation at the site was at one time overseen by the San Francisco Regional Water Quality Control Board ("RWQCB") has no bearing on whether the feature would be considered jurisdictional by the SWRCB. While the SWRCB may choose to follow jurisdictional determinations by the Corps, the SWRCB has much broader authorities and may also assert jurisdiction under the parameters of Water Code section 13050, subdivision (e). As the FSEIR cannot point to any jurisdictional determination by the Corps, there is nothing for the SWRCB to follow; therefore, it would follow its own regulations and orders.[122]

As explained in comments submitted by the Alliance, the need for a Clean Water Act ("CWA") section 404 fill permit also requires the Corps to prepare a Coastal Zone Management Act ("CZMA") consistency finding, as required by the Bay Conservation Development Commission. (See Oct 7, SM Law, CWA 404.) The FSEIR's attempted rebuttal of the need for a Coastal Zone Management Act ("CZMA") consistency determination is also incorrect. In addition to claiming that the requirement does not apply because the City (not the Corps or the SWRCB) has determined that the feature is not jurisdictional, the FSEIR argues that filling the wetland would have no effect on resources in the coastal zone. As explained below, however, the wetland complex has significant habitat value to biological resources and supports coastal resources. As a result, a CZMA consistency determination is required.

To further substantiate the existence of the wetland features on the site, BSK Associates has prepared a desktop delineation for submittal to the Corps to finally resolve the issue of

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[122] See Executive Order W-59-93 attached as Exhibit N to Nov 2 Lippe FSEIR; State Water Resources Control Board Memorandum, January 25, 2001, Effect of SWANCC v. United States on the 401 Certification Program attached as Exhibit O to Nov 2 Lippe FSEIR; State Water Resources Control Board Guidance, June 25, 2004, for Regulation of Discharges to "Isolated" Waters attached as Exhibit P to Nov 2 Lippe FSEIR; State Water Resources Control Board Order NO. 2004-0004-DWQ attached as Exhibit Q to Nov 2 Lippe FSEIR; State Water Resources Control Board Resolution NO. 2008-0026 attached as Exhibit P to Nov 2 Lippe FSEIR.

jurisdiction. (See Exhibit L to Nov 2 Lippe FSEIR.) BSK determined there are 0.51 acres of permanent wetlands at the site. The delineation also explains that the wetland provides the following nexus functions with the San Francisco Bay: (I) Sediment trapping, (ii) Nutrient recycling,(iii) Pollutant trapping, transformation, filtering, and transport, (iv) Retention and attenuation of flood waters, (v) Runoff storage, (vii) Export of organic matter, (viii) Export of food resources, and (ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species.

The purpose of environmental review is to inform the public of the likely effects of carrying out a project. Here, the IS/NOP failed to accurately describe the wetland on the site, or to even provide a process by which the feature would be further investigated and the appropriate mitigation required. The information submitted by the Alliance constitutes substantial evidence of a fair argument that the Project will have a significant adverse effect on biological resources. In the alternative, per CEQA section 21166 and CEQA Guidelines section 15162, the facts described above constitute a change in circumstances since the 1998 SEIR involving, and significant new information showing, a new significant effect not previously analyzed in the 1998 SEIR. Under either standard, the OCII and the City must prepare and circulate for public comment an environmental impact report to review the Project's impacts on this wetland resource.

Despite the existence of likely jurisdictional wetlands on the site, the DSEIR ignores the Project's need for a 404 CWA fill permit and the accompanying CZMA consistency determination in the list of project approvals. (DSEIR, pp. 3-51 to 52.) The DSEIR also fails to address the potential jurisdiction of the SWRCB over wetland and other biological resources on the site. As a result of these omissions, the DSEIR fails as an informational document.

E. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO NOISE IMPACTS.[123]

1. The SEIR's Thresholds of Significance Are Unlawful under CEQA.

(a) The SEIR's use of regulatory thresholds of the San Francisco Noise Ordinance as its CEQA thresholds of significance is an error of law.[124]

For purposes of both operational nosie sources such as crowds and traffic and construction noise sources such as both impact and non-impact equipment, the SEIR uses regulatory thresholds of the San Francisco Noise Ordinance as thresholds of significance for CEQA purposes. This is an error of law, because it injects the question of what is "allowed," the which is the final step in the CEQA process, into the determination of "significance," which is

[123] July 25 Lippe; July 24 Hubach; Nov 2 Lippe FSEIR, pp. 1-2, 14-15; Nov 2 Hubach.

[124] July 25 Lippe; July 24 Hubach; Nov 2 Lippe FSEIR, pp. 1-2, 14-15; Nov 2 Hubach.

the first step in the CEQA process. The question of what is allowed, in both the final step of the CEQA process and in San Francisco's legislative decision to set regulatory thresholds in the Noise Ordinance, involves weighing considerations relating to the social and economic benefits of the Project. The determination of "significance" under CEQA does not.

Injecting consideration of what is "allowed" into the determination of "significance" subverts the integrity of the entire analysis. For projects for which an EIR has been prepared, both the EIR and the mandatory findings required by CEQA section 21081, the analysis starts with whether an impact is significant. A finding of significance triggers the obligation to identify and adopt feasible mitigation measures that are effective in substantially reducing the significant impact. Once all feasible and effective mitigation measures have been identified and adopted, if the impact remains significant, the agency may approve the project if it finds that social or economic considerations outweigh environmental harm. Each of these steps in the analysis is distinct.

The RTC's responses to comments conflate and confuse these steps, and thereby undermine the integrity of the analysis. This conflation of the distinct steps in the analysis explains why the FSEIR/RTC's insistence on using the San Francisco Police Code's regulatory requirements (i.e., the City's final resolution of what is allowed and what is not allowed) as thresholds of significance is inconsistent with CEQA. The Police Code's regulatory requirements reflect the City's effort to balance the protection of people from harmful noise against the need for social and economic activity. That balance does not necessarily reflect the point at which impacts become significant. Under CEQA, such balancing is also required, but not where significance is determined. In short, even where the lead agency believes an activity should be "allowed" because the social or economic considerations outweigh the environmental harm, the EIR must still disclose whether the impact is significant.

(b) The SEIR fails to use thresholds of significance based on human health and welfare.[125]

The SEIR's use of regulatory thresholds of the San Francisco Noise Ordinance as its CEQA thresholds of significance and its reliance on other agencies' thresholds of significance are errors of law because the SEIR fails to use thresholds of significance based on human health and welfare. The DSEIR refers to the World Health Organization (WHO) as "perhaps the best source of current knowledge regarding the health effects of noise impacts because European nations have continued to study noise and its health effects, while the United States Environmental Protection Agency all but eliminated its noise investigation and control program in the 1970s." (DSEIR, p. 5.3-4.) The DSEIR also cites WHO's Guidelines for Community Noise and its thresholds for adverse effects of noise on people.

In contrast to many other environmental problems, noise pollution continues to

[125] July 25 Lippe, pp. 4-7; July 24 Hubach, pp. 3-6, Nov 2 Lippe FSEIR, pp. 1-2, 14-15; Nov 2 Hubach.

> grow and it is accompanied by an increasing number of complaints from people exposed to the noise. The growth in noise pollution is unsustainable because it involves direct, as well as cumulative, adverse health effects.

(WHO, Guidelines for Community Noise, p. vii.)

> Specific effects to be considered when setting community noise guidelines include: interference with communication; noise-induced hearing loss; sleep disturbance effects; cardiovascular and psycho-physiological effects; performance reduction effects; annoyance responses; and effects on social behaviour.

(WHO, Guidelines for Community Noise, p. v.)

> The scope of WHO's effort to derive guidelines for community noise is to consolidate actual scientific knowledge on the health impacts of community noise and to provide guidance to environmental health authorities and professionals trying to protect people from the harmful effects of noise in non-industrial environments.

(WHO, Guidelines for Community Noise, p. iii.)

> As discussed by Mr. Hubach:
>
> WHO's night-time standard for sleep disturbance inside bedrooms is 30 dBA, and outside bedrooms with "window open (outdoor values)" is 45 dBA. WHO's night-time and daytime standard for "speech intelligibility and moderate annoyance" for inside dwellings is 35 dBA. For outdoor living areas, WHO's daytime and evening standard for moderate annoyance is 50 dBA and for serious annoyance is 55 dBA.

(July 24 Hubach, p. 3.) Yet, despite citing the WHO Guidelines, the DSEIR fails to use these standards as its thresholds of significance, and finds that "ambient plus project" noise levels much higher than the WHO's standards for harmful noise are less than significant.

> Another human health and welfare based standard is provided by the State of California:
>
> State regulations include requirements for the construction of new hotels, motels, apartment houses, and dwellings other than detached single-family dwellings that are intended to limit the extent of noise transmitted into habitable spaces. These requirements are collectively known as the California Noise Insulation Standards and are found in Title 24 of the California Code of Regulations.
>
> The State of California updated its Building Code requirements with respect to

> sound transmission, effective January 2014. Section 1207 of the California Building Code (Title 24 of the California Code of Regulations) establishes material requirements in terms of sound transmission class (STC) 13 rating of 50 for all common interior walls and floor/ceiling assemblies between adjacent dwelling units or between dwelling units and adjacent public area. The previous code requirements (before 2014) set an interior performance standard of 45 dBA from exterior noise sources. This requirement will be re-instated in July of 2015.

(DSEIR, p. 5.3-10.) DSEIR does not tell us what buildings in area comply with this code. (See DSEIR § 5.3.3.4 [Sensitive Receptors], and Table 5.3-4.) However, as Mr. Hubach observes:

> Table 5.3-8 shows that all three receptors chosen for analysis will add construction noise to pre-existing ambient noise levels that already exceed the health and welfare based standards discussed above. As a result of construction operations (assuming all noise producing construction operations occur at the same time, noise levels at the Madrone Residential Tower will rise from 70.1 to 70.9 dBA (hourly Leq), at the Hearst Residential Tower from 71.2 to 80.8 dBA (hourly Leq), and at UCSF Hospital from 67 to 72.8 dBA (hourly Leq).

(July 24 Hubach, p. 4.) Since the Project's noise, when added to background or ambient noise, exceeds the above health and welfare based standards, the impact is significant even if the impact does not violate the San Francisco Police Code.

2. The SEIR's Use of "Ambient plus Increment" Thresholds of Significance for All Noise Impacts Is Legal Error.[126]

As described by Mr. Hubach in the context of operational noise impacts (Impact NO-5), the DSEIR uses a series of "ambient plus increment" thresholds. As discussed by Mr. Hubach, using "ambient plus increment" thresholds where existing noise levels are already high:

> disregards the fact the Project will make severe conditions worse. In addition, using these "ambient plus increment" thresholds for operational noise results in an unsustainable gradual increase in ambient noise. It is a formula for ever-increasing noise levels because each new project establishes a new, higher, baseline; then when the next project is approved, the incremental change will be added to the new baseline.

(July 24 Hubach, p. 5.)

By ignoring the severity of existing noise levels and only looking to the "de minimis" nature of the Project's incremental effect, the DSEIR's noise impact determinations violate

[126] July 25 Lippe; July 24 Hubach Nov 2 Lippe FSEIR, pp. 1-2, 14-15; Nov 2 Hubach.

CEQA. (See *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120 ("*CBE*") ["[T]he relevant question"... is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether "any additional amount" of effect should be considered significant in the context of the existing cumulative effect. [footnote omitted] In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant. [footnote omitted]"].)[127] *Communities* and *Kings County* teach that the significance of a cumulative impact depends on the environmental setting in which it occurs, especially the severity of existing environmental harm.

3. The Construction Refinements and New Project Require Recirculation.

As noted above, the RTC describes a number of "construction refinements," including using dewatering generators, using a soil treatment pug mill, and removing rapid impact compaction from the construction plan and a new Project Variant. With respect to the air quality impacts of these construction refinements and new Project Variant, the RTC finds these changes do not create a new significant noise impact, or a substantial increase in severity of a previously identified significant noise impact, and therefore, recirculation is not required.

As described in the Nov 2 Hubach letter, the construction refinements and new Project Variant will create new significant impacts. The RTC's findings to the contrary reflect the same flawed "existing ambient plus project increment" thresholds of significance discussed above regarding noise impacts.

III. CONCLUSION

For the reasons described above, the Board of Supervisors should grant this appeal and void the OCII's certification of the SEIR.

Very Truly Yours,

Tom Lippe

Thomas N. Lippe

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[127] *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720-21 ["They contend in assessing significance the EIR focuses upon the ratio between the project's impacts and the overall problem, contrary to the intent of CEQA.... We find the analysis used in the EIR and urged by GWF avoids analyzing the severity of the problem and allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling. Under GWF's 'ratio' theory, the greater the overall problem, the less significance a project has in a cumulative impacts analysis. We conclude the standard for a cumulative impacts analysis is defined by the use of the term 'collectively significant' in Guidelines section 15355 and the analysis must assess the collective or combined effect of energy development"].)

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November 20, 2015

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Subject: Comments on the Event Center and Mixed-Use Development Project at Mission Bay Blocks 29-32

Dear Mr. Lippe:

We previously reviewed the October 23, 2015 Final Subsequent Environmental Impact Report (FSEIR) for the Event Center and Mixed-Use Development at Mission Bay Blocks 29-32 Project ("Project") and submitted a November 2, 2015 letter addressing deficiencies in the FSEIR's impact analyses. After submission of our November 2 letter, we reviewed the CEQA findings rejecting the alternative project site proposed by Mission Bay Alliance (MBA) and the new health risk assessment in the FSEIR. We have determined that the rejection of the MBA alternative location based on the claim that it would have more severe air quality impacts is unjustified. We have also confirmed that the new health risk assessment in the FSEIR does not alter the conclusions in our November 2, 2015 letter that the SEIR fails to adequately evaluate the Project's health risks.

Failure to Adequately Evaluate Project Health Risk

In our November 2 letter, we found that the health risk assessment conducted in the FSEIR was inadequate for the following three reasons:

1. The FSEIR failed to provide a project-specific health risk assessment for the Project;
2. The FSEIR's cumulative health risk assessment does not account for all foreseeable sources of toxic air contaminant (TAC) emissions; and
3. The FSEIR failed to incorporate updated child breathing rates, set forth by the Office of Environmental Health Hazard Assessment (OEHHA) in their 2012 and 2015 recent guidance.

We have reviewed the FSEIR's updated health risk assessment, and have determined that it does not change the conclusions made in our November 2 letter.

Failure to Assess Individual Health Risk from Proposed Project

The FSEIR's updated health risk assessment is based on revisions to the Project description that would make a number of changes affecting toxic air contaminants, including locating the proposed emergency generators above grade, rather than within the parking structure on Lower Parking Level 1, as originally proposed in the DSEIR (FSEIR, p. 14-118). While this change in location reduces the Project's health risk impact, it does not reduce it to below applicable significance thresholds, nor does it change the fact that both the DSEIR and FSEIR incorrectly rely upon cumulative criteria used to identify Air Pollutant Exposure Zone (APEZ) communities to make significance determinations.

As previously discussed in our November 2 letter, the FSEIR fails to assess the Project's individual health risk. Instead, the FSEIR assesses only the Project's cumulative health risk impact. This approach, however, is inadequate, as CEQA requires the assessment of both cumulative and project-specific impacts. The Project's individual health risk should have been be compared to a threshold of significance for project-specific impacts, such as the Bay Area Air Quality Management District's (BAAQMD) project-level significance threshold of 10 in one million.[1] This is the threshold of significance used by the majority of California air districts.[2]

Our November 2 letter demonstrated that the Project's excess cancers were well in excess of the 10 in one million threshold used by BAAQMD (see table below) (DSEIR, Table 5.4-11, p. 5.4-49).

DSEIR Health Risk Assessment			
Sensitive Receptor	**Project Risk**	**Threshold**	**Exceed?**
	Excess Cancers in One Million		
UCSF Hearst Tower Child Resident	46	10	***Yes***
UCSF Hearst Tower Adult Resident	38	10	***Yes***
UCSF Hospital Child Resident	42	10	***Yes***

This analysis relied upon data from the DSEIR's health risk assessment. When the Project-level risk from the FSEIR's health risk assessment is compared to this same threshold, we still find that the Project poses a significant health risk at three of the four sensitive receptors (see table below) (FSEIR, Table 5.4-11 Revised, p. 14-121).

FSEIR Health Risk Assessment			
Sensitive Receptor	**Project Risk**	**Threshold**	**Exceed?**
	Excess Cancers in One Million		
UCSF Hearst Tower Child Resident	18	10	***Yes***
UCSF Hearst Tower Adult Resident	8	10	*No*
UCSF Hospital Child Resident	12	10	***Yes***

[1] "California Environmental Quality Act Air Quality Guidelines." BAAQMD, May 2011, *available at:*http://www.baaqmd.gov/~/media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines_May%202011_5_3_11.ashx, p. 5-3

[2] "Health Risk Assessments for Proposed Land Use Projects," California Air Pollution Control Officers Association 2009, page 11, *available at:* http://www.capcoa.org/wp-content/uploads/2012/03/CAPCOA_HRA_LU_Guidelines_8-6-09.pdf.

The health risk posed to a child resident of 18 in one million at the UCSF Hearst Tower well exceeds the 10 in one million threshold, nearly doubling it. Therefore, even using these updated risk values, the Project will still, by itself, have a significant health risk impact.

Failure to Include All Local Sources in Cumulative Analysis

In our November 2, 2015 letter we explained that, by relying on citywide modeling that omits local impacts from new mobile-source emissions within the Project vicinity, the DSEIR's cumulative health risk assessment is not representative of all foreseeable sources of diesel particulate matter. We pointed out that the Mission Bay EIR provides that, at buildout, the proposed developments are anticipated to generate approximately 218,549 vehicle trips per day, and approximately 2,684 truck trips per day.[3] We demonstrated that a significant portion of that new development would occur within the 1,000 foot radius used by the SEIR to evaluate cancer risk. We also pointed out that construction emissions from major developments within the area, while analyzed, were not included in the citywide model. We concluded that the DSEIR greatly underestimated the cumulative health risk by omitting these foreseeable future sources.

The FSEIR's new health risk assessment does not correct these omissions. The new assessment uses the same values, assumptions, and sources for the non-Project "2014 Background Risk" as the analysis in the DSEIR (see tables below).

DSEIR Background Cancer Risk (DSEIR, Volume 3, pdf p. 1225)

Source	UCSF Hearst Tower		UCSF Hospital Receptor
	Child Resident	Adult Resident	Child Resident
Background at the maximally impacted receptor	26	26	~~44~~

FSEIR Background Cancer Risk (FSEIR, Volume 6, pdf p. 412)

Scenario	Units	Dormitory Receptor		Hospital Child Receptor
		Child Resident	Adult Resident	
Diesel PM Cancer Potency Factor (CPF)[1]	[mg/kg-day]$^{-1}$	1.1	1.1	1.1
Excess Cancer Risk from Uncontrolled Construction Emissions[2,3]	[in a million]	~~54~~ 55	~~2.8~~ 2.9	28
Excess Cancer Risk from Tier 4 Controlled Construction Emissions[2,3]	[in a million]	~~7.7~~ 8.6	~~0.40~~ 0.45	~~4.0~~ 4.1
Excess Cancer Risk from Tier 2 + ARB NOx VDECS Controlled Construction Emissions[2,3]	[in a million]	~~9.2~~ 11	~~0.48~~ 0.55	~~4.8~~ 4.9
Excess Cancer Risk from Operational Traffic Emissions[4]	[in a million]	7.2	7.2	7.2
~~Excess Cancer Risk from Emergency Diesel Generators[4]~~	~~[in a million]~~	~~30~~	~~30~~	~~30~~
Excess Cancer Risk from South Street Tower Emergency Diesel Generator[5]	[in a million]	0.085	0.050	0.0045
Excess Cancer Risk from 16th Street Tower Emergency Diesel Generator[5]	[in a million]	0.033	0.019	0.013
Excess Cancer Risk from GSW Arena Emergency Diesel Generators[5]	[in a million]	0.12	0.072	0.038
2014 Background Risk[6]	[in a million]	26	26	44

Accordingly, the objection that this non-Project cumulative risk does not include all foreseeable sources as set out in our November 2 letter still applies.

[3] "Final Mission Bay Subsequent Environmental Impact Report." San Francisco Planning Department, September 17, 1998, *available at*: http://www.sfocii.org/index.aspx?page=61

Cumulative Analysis Omits Excess Cancers Caused by Regional TAC Sources

The SEIR states that it relies upon a radius of 1,000 feet from the Project fence line to assess cumulative risk (p. 5.4-17, 5.4-50, 5.4-56). This buffer distance is consistent with BAAQMD guidance,[4] which requires the consideration of all "sources within 1,000 foot radius" when determining cumulative health risk impacts.[5] The DSEIR also notes that this buffer distance is consistent with studies conducted by the California Air Resources Board (CARB), in which it found "ground-level TAC emissions to return to background levels" at a distance beyond 1,000 feet (p. 5.4-56).[6] However, regardless whether a particular source attenuates at 1,000 feet, it is improper to ignore regional transport of TACs from sources beyond 1,000 feet where there is evidence that the combined effect of those sources would result in a substantial increase in cancer risk. Ignoring material levels of regional TAC sources that are generated from multiple sources beyond 1,000 feet results in a failure to assess the actual excess cancers attributable to all cumulative sources of TACs. Because the SEIR does in fact ignore the excess cancers attributable to regional or global background TACs, cumulative health risk impacts at the Project site are greatly underestimated.

The SEIR utilizes risk values from a local-scale citywide modeling effort conducted in 2012 to represent background ambient risk at the Project site (DSEIR p. 5.4-11 to 12), and then combines the Project's health risk with this "background" risk to determine whether or not the Project would have a cumulatively considerable impact (DSEIR, App. AQ, Table 6.1-8; FSEIR, App. AQ2, Refined Table 6.1-8). This citywide model, however, is not representative of ambient background risks, as it only takes into account risk from local emission sources. According to *The San Francisco Community Risk Reduction Plan: Technical Support Documentation*, which describes the methods and specific emission sources used within this model, "…the dispersion modeling, from which the maps are derived, produced concentrations and risk estimates from direct emissions. The maps themselves therefore portray concentrations of directly emitted PM2.5 and cancer risk associated with directly emitted TAC at locations near the sources of these emissions. The results do not reflect regional or long-range transport of air pollutants. Nor do they include the effects of the chemical transformation (formation or loss) of pollutants."[7] As such, the "background" risk used by the SEIR, in combination with the Project-specific risk, does not accurately represent the cumulative risk within the Project area.

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[4] "California Environmental Quality Act Air Quality Guidelines." BAAQMD, May 2011, p. 5-15
"The risk and hazards analysis for assessing potential cumulative impacts should follow the risk screening guidance described in *Recommended Methods for Screening and Modeling Local Risks and Hazards*…"

[5] "Recommended Methods for Screening and Modeling Local Risks and Hazards." BAAQMD, May 2011, *available at:* http://www.baaqmd.gov/~/media/Files/Planning%20and%20Research/CEQA/BAAQMD%20Modeling%20Approach.ashx?la=en, p. 6

[6] See also California Environmental Quality Act Guidelines Update, Proposed Thresholds of Significance, May 3, 2010, BAAQMD, pp.41, 43 (finding that TAC concentrations from identified sources approach background levels at 1,000 feet).

[7] "The San Francisco Community Risk Reduction Plan: Technical Support Documentation." BAAQMD, December 2012, *available at:* http://www.gsweventcenter.com/Draft_SEIR_References%5C2012_12_BAAQMD_SF_CRRP_Methods_and_Findings_v9.pdf, p. 37

The DSEIR attempts to justify limiting cumulative sources to those generated within 1,000 feet, stating that because "the contribution of project emissions would be greatly dispersed through both distance and intervening structures…their contribution would be expected to be minimal" (p. 5.4-56). This statement, however, addresses only the dispersal of a particular project's emissions and the attenuated effect of that particular project on receptors beyond 1,000 feet. The statement provides no justification for ignoring the combined effects of multiple projects that may have impacts at a particular location even if they are not within 1,000 feet of the Project site. Considering such effects is one of the purposes of a cumulative analysis.

Other air districts, such as the South Coast Air Quality Management District (SCAQMD), and CARB recognize the importance of considering regional transport of TACs in cumulative analysis. According to CARB's *Air Quality and Land Use Handbook: A Community Health Perspective*, ("Land Use Handbook"), "The broad concept of cumulative air pollution impacts reflects the combination of regional air pollution levels and any localized impacts. Many factors contribute to air pollution levels experienced in any location. These include urban background air pollution, historic land use patterns, the prevalence of freeways and other transportation corridors, the concentration of industrial and commercial businesses, and local meteorology and terrain.[8] The Land Use Handbook continues on to state, "Urban background levels are a major contributor to the overall risk from air toxics in urban areas…When localized elevated air pollutant levels were measured, they were usually associated with local ground-level sources of toxic pollutants. The most common source of this type was busy streets and freeways. The impact these ground-level sources had on local air quality decreased rapidly with distance from the source. Pollutant levels usually returned to urban background levels within a few hundred meters of the source. These results indicate that tools to assess cumulative impacts must be able to account for both localized, near-source impacts, as well as regional background air pollution."[9] Therefore, it is extremely important that "both localized, near-source impacts, as well as regional background air pollution" be considered when assessing cumulative health risk impacts.

Simply because emission concentrations from individual sources significantly decrease with distance does not mean that these sources do not contribute to overall risk from air toxics in urban areas. As is explained in SCAQMD's *Final Methodology to Calculate Particulate Matter (PM) 2.5 and PM2.5 Significance Thresholds*, "When fugitive dust enters the atmosphere, the larger particles of dust typically fall quickly to the ground, but smaller particles less than 10 microns in diameter may remain suspended for longer periods, giving the particles time to travel across a regional area and affecting receptors at some distance from the original emissions source. Fine PM2.5 particles have even longer atmospheric residency times."[10] Since diesel exhaust particulate matter, a known toxic air contaminant (TAC), is composed of

[8] "Air Quality and Land Use Handbook: A Community Health Perspective." CARB, April 2005, *available at:* http://www.arb.ca.gov/ch/handbook.pdf, p. 39

[9] "Air Quality and Land Use Handbook: A Community Health Perspective." CARB, April 2005, *available at:* http://www.arb.ca.gov/ch/handbook.pdf, Appendix C, p. C-3

[10] "Final Methodology to Calculate Particulate Matter (PM) 2.5 and PM2.5 Significance Thresholds." SCAQMD, October 2006, *available at*: http://www.aqmd.gov/docs/default-source/ceqa/handbook/localized-significance-

both coarse (PM10) and fine particulate matter (PM2.5), impacts from regional, long-transporting PM should have been included in the SEIR's cumulative health risk assessment.[11]

There is evidence to further support our conclusion that regional sources contribute substantially to background health risks, and that health risk from these regional sources were not included in the SEIR's cumulative analysis. First, the DSEIR states that "the 100 per million excess cancer cases is…consistent with the ambient cancer risk in the most pristine portions of the Bay Area based on BAAQMD regional modeling," which suggests that the regional contribution to background excess cancers at the Project site would, at the very least, be equal to approximately 100 in one million (p. 5.4-13). Furthermore, the FSEIR states that this background excess cancer risk is due to globally transported TACs (p. 13.13-27). Therefore, if the health risk from both regional and local sources were included in the SEIR's cumulative impact assessment, contributions from background sources alone would exceed the 100 in one million threshold. Since this is not the case with regards to the SEIR's analysis, it is clear that regional sources were not included.

Second, although the citywide model did not include health risk impacts from regional sources, the model did disclose a substantial citywide background concentration of PM2.5 from non-local sources.[12] This background PM2.5 concentration was determined by measuring the actual PM2.5 concentrations at each monitoring station, and then by subtracting the modeled PM2.5 concentrations from the measured value. This resulted in a regional background PM2.5 value of 8.06 $\mu g/m^3$, which is an order of magnitude higher than the modeled PM2.5 values, which, on average, were equal to approximately 0.55 $\mu g/m^3$. Based on the relation of modeled PM2.5 to measured PM2.5, it is evident that actual concentrations of PM2.5 are primarily derived from regional or global sources, not from local sources.. Diesel Particulate Matter (DPM), which is a known TAC, is largely composed of fine particulate matter (PM2.5); thus PM2.5 can be used as a proxy for DPM in health risk assessments. Based on the high levels of measured PM2.5 that are not accounted for in the local citywide model, we conclude that there may be substantial sources of regional DPM that are not accounted for.

Again, it is important to note that the citywide model used to determine Air Pollution Exposure Zones did not include the health risks from regional emission sources:

> When discussing the maps and drawing conclusions from them, it is important to consider what they portray and how they were produced. Specifically, the dispersion modeling, from which the maps are derived, produced concentrations and risk estimates from direct emissions. The maps

thresholds/particulate-matter-(pm)-2.5-significance-thresholds-and-calculation-methodology/final_pm2_5methodology.pdf?sfvrsn=2

[11] Background on Diesel Health Effects, CARB, June 21, 2011, *available at:* http://www.arb.ca.gov/research/diesel/diesel-health.htm

[12] "The San Francisco Community Risk Reduction Plan: Technical Support Documentation." BAAQMD, December 2012, *available at:* http://www.gsweventcenter.com/Draft_SEIR_References%5C2012_12_BAAQMD_SF_CRRP_Methods_and_Findings_v9.pdf, p. 37

themselves therefore portray concentrations of directly emitted PM2.5 and cancer risk associated with directly emitted TAC at locations near the sources of these emissions. The results do not reflect regional or long-range transport of air pollutants. Nor do they include the effects of the chemical transformation (formation or loss) of pollutants.
The modeling results, in particular maps of impacts of all sources combined, are intended to aid local planning efforts by identifying areas where emission reductions or other efforts may be implemented to help protect current and future residents from major local sources of air pollution. Impacted areas were identified by comparing modeled results of local contributions to CRRP thresholds. For cancer risk, this local contribution was used directly for comparison to a CRRP threshold. For PM2.5, the local contribution was added to a background concentration for comparison to a CRRP threshold.

To estimate the background concentration of PM2.5, monitored levels from six locations (Figure 10) were compared to the value predicted from dispersion modeling for the base year (2010) at those locations. Monitoring data from a special study conducted in 2008 were used along with routinely collected data from the BAAQMD routine monitoring site at the Arkansas Street site for the same year.

Table 14. Measured and modeled $PM_{2.5}$ concentrations (µg/m3) and their differences at San Francisco monitoring sites.

Monitoring Location	Measured Value (µg/m^3)	Modeled Value (µg/m^3)	Difference (µg/m^3)
BAAQMD Arkansas St	9.10	0.88	8.22
SFDPH Arkansas St	8.90	0.88	8.02
Southeast Community Center	9.30	0.84	8.46
Muni Maintenance Yard	8.90	0.44	8.46
Potrero Recreation Center	7.60	0.21	7.39
Malcolm X Academy	7.90	0.06	7.84
Average Difference			**8.06**

The average difference between the monitored and modeled values (8.06 µg/m^3; Table 14) was used as the citywide ambient level for PM2.5. This difference was added to the predicted value at each receptor site for comparison to the CRRP threshold for PM2.5.[13]

In sum, the SEIR omits regional sources of TACs in its cumulative health risk assessment. This omission is material because regionally or globally transported TACs substantially contribute to health risk impacts. As such, the SEIR's cumulative health risk assessment is not representative of all cumulative sources, as the background health risks relied upon only account for local sources.

[13] *Id.*

Failure to Utilize Values from Updated Health Risk Assessment Guidelines

As comments on the DSEIR objected, the DSEIR failed to incorporate recommended age specific inhalation rates set forth by OEHHA in their 2012 and 2015 guidance into their health risk assessment. We discussed the consequences of this failure in our November 2 letter; however, we relied upon information from the DSEIR's outdated health risk assessment. Therefore, in an effort to determine if this same conclusion can be made with regard to the new health risk assessment provided in the FSEIR, we reviewed that updated health risk assessment.

Review of both health risk assessments demonstrates that the DSEIR and the FSEIR fail to use these updated age-specific breathing rates for children and infants in their health risk assessments, and as a result, the Project's health risk impacts are greatly underestimated. We maintain that prior to certification of the FSEIR an updated health risk assessment should be prepared to include these updated values.

As was discussed in our November 2 letter, we conducted a simple analysis in an effort to demonstrate the effect that use of these updated breathing rates can have on estimated health risk values. Our analysis demonstrated that if all other exposure variables are held constant, the use of current recommended breathing rates would nearly double a child resident's health risk, when compared to a health risk that uses outdated breathing rates, such as in the DSEIR and FSEIR. This simple analysis did not use site specific information, and was intended to provide an example of the effect that adjustments to this critical parameter can have on health risk. In an effort to provide a more site-specific assessment, we conducted an additional analysis, as discussed herein.

The FSEIR uses the following default values and input parameters to estimate health risk (Volume 6, Table 6.1-7, pp. 411).

Exposure Parameter		Units	Child Resident		Adult Resident		Hospital Child	
			Construction	Operation	Construction	Operation	Construction	Operation
DBR	Daily Breathing Rate	L/kg-day	581	302	302	302	581	581
ET	Exposure Time	hrs/24 hrs	1	1	1	1	1	1
EF	Exposure Frequency	days/year	350	350	350	350	365	365
ED	Exposure Duration	years	2	70	2	70	1	1
AT	Averaging Time	days	25550	25550	25550	25550	25550	25550
IF	Intake Factor	(m^3/kg-day)	0.016	0.290	0.0083	0.290	0.0083	0.0083
ASF	Age Sensitivity Factor	-	10	1.7	1	1	10	10
MAF	Modeling Adjustment Factor	-	-	-	-	-	-	-

While the old OEHHA guidance allowed for only one breathing rate for a child (581 L/kg-day), and one breathing rate for an adult (302 L/kg-day), the updated OEHHA guidance requires that different

breathing rates be used for an infant from ages zero to two (1090 L/kg-day), for a child from ages two to sixteen (745 L/kg-day), and for an adult from ages sixteen to seventy (290 L/kg-day) (see table below).[14]

Table 3.1. Recommended Point Estimates for Long-Term Daily Breathing Rates

	3rd Trimester	0<2 years	2<9 years	2<16 years	16<30 years	16<70 years
	L/kg-day					
Mean	225	658	535	452	210	185
95th Percentile	361	1090	861	745	335	290
	m^3/day					
Mean	15.3	6.2	10.7	13.3	15.0	13.9
95th Percentile	23.4	11.2	16.4	22.6	23.5	22.9

Furthermore, the updated OEHHA guidance requires that an age sensitivity factor (ASF) of 10 be used for infant exposures, and an ASF of 3 be used for child exposures. Therefore, using these updated breathing rates and age sensitivity factors, calculating and summing age specific risks for each age bracket, and using the FSEIR's other exposure parameters as listed in the table above, we estimated the following project-specific health risk (see table below).

Total Project Cancer Risk	Child Resident	Adult Resident	Hospital Child
FSEIR Assessment	18	8	12
BAAQMD Threshold	10	10	10
Exceed?	***Yes***	*No*	***Yes***
SWAPE Assessment	31	11	17
BAAQMD Threshold	10	10	10
Exceed?	***Yes***	***Yes***	***Yes***
Percent Increase	71%	42%	45%

As you can see, when age specific breathing rates from the updated OEHHA guidance are used, the Project's health risk increases by as much as 71 percent.[15] Furthermore, the adult resident health risk increases from 8 in one million to 11 in one million, which exceeds the 10 in one million threshold. By relying upon outdated breathing rates, the FSEIR is greatly underestimating the Project's health risk.

[14] "Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessment." Office of Environmental Health Hazard Assessment, February 2015, *available at*: http://oehha.ca.gov/air/hot_spots/hotspots2015.html

[15] We calculated a 70-year health risk in an effort to demonstrate the effects of the updated breathing rates compared to the breathing rates used in the FSEIR. When a 30-year exposure duration is used, as is recommended in the updated OEHHA guidance, changes to the health risk are negligible. For example, the health risk for a child resident for a 70-year exposure is 31 in one million and for a 30-year exposure is 30 in one million. Similarly, the adult resident health risk is 11 in one million for both exposure durations. This is due to the adjustment in breathing rates between the 16 to 30 year age bracket (335 L/kg-day) and the 16 to 70 year age bracket (290 L/kg-day).

We were unable to conduct an updated cumulative analysis due to lack of data available to us. As previously discussed, the background risks used in the SEIR were taken from a citywide modeling effort. However, neither the DSEIR nor the FSEIR provide the annual average concentrations these background risks were derived from. According to the FSEIR, the methods used in this citywide model follow "BAAQMD's existing health risk assessment methodology protocols," which means that the background risks were estimated using the same outdated breathing rates as the FSEIR (p. 13.13-50). Furthermore, the FSEIR relies upon the BAAQMD County Surface Street Screening Tables for San Francisco County to estimate emissions from mobile sources (Volume 6, Table 6.1-4, pp. 408). Similar to the citywide model, this screening tool also estimates a 70-year cancer risk using these outdated breathing rates. As such, the cancer risk from these mobile sources is also likely to increase when updated breathing rates are applied.

Even though we were unable to conduct a cumulative health risk assessment, our analysis demonstrates that when these updated breathing rates are applied, the health risk at each sensitive receptor substantially increases. As a result, when the background risk and risk from mobile-sources are estimated using OEHHA's updated breathing rates, the cumulative risk at each sensitive receptor location will substantially increase, which may result in an exceedance of the 100 in one million cumulative health risk threshold.

Unjustified Rejection of Pier 80 Alternative Site Based on Health Risks

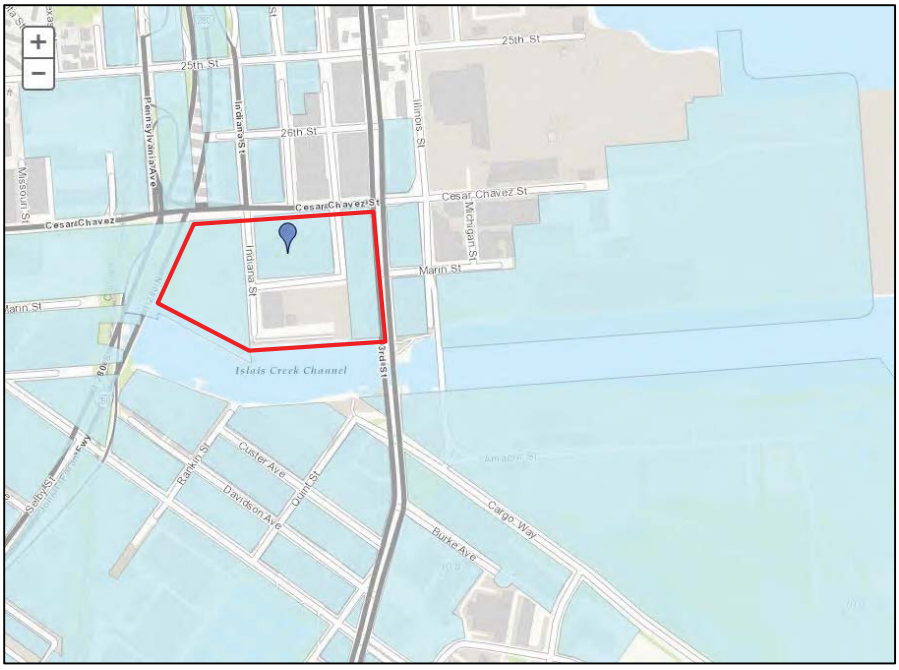
The Mission Bay Alliance submitted comments in which they identified an alternative site located near San Francisco's Pier 80 that would both meet fundamental Project objectives and substantially reduce environmental impacts. The Project's CEQA findings reject this site. The rejection is based in part on the finding that, because the MBA Alternative Site is located in an Air Pollution Exposure Zone, it would result in substantially more severe air quality health risk impacts than the Project.

Our analysis, based on available data from the City of San Francisco, demonstrates the contrary. Specifically, we evaluated the health risk impacts of the alternative location, and compared them to Project location's impacts, as proposed in the FSEIR. Our findings demonstrate that the health risk impacts at the alternative location would be substantially less when compared to the health risk impacts at the proposed Project site.

The alternative location identified by the Mission Bay Alliance is an approximately 21-acre site located just east of Pier 80. Consistent with the methods used in the FSEIR to determine health risk impacts, we determined what portion of the Project site was located within an Air Pollutant Exposure Zone (APEZ). Using the San Francisco Property Information Map[16] we found that approximately 75 percent of this site is located within an APEZ (see figure below).[17]

[16] San Francisco Property Information Map, *available at:* http://propertymap.sfplanning.org/?dept=planning

[17] Parcels located within an APEZ are highlighted in blue, and the alternative site is outlined in red in the figure below.



Even though the alternative site would place some portion of the Project within an APEZ, it is still the superior option when compared to the currently proposed location for several reasons.

First, the entire site is not located within an APEZ. Of the 21-acre site, approximately 15 acres are within an APEZ, and approximately 6 acres are not within an APEZ. The Project is much smaller than the alternative location, only taking up a portion of the site. For example, the arena would only require 7 acres of the 21-acre site. Therefore, if placed strategically, only a fraction of the arena would need to be located within an APEZ. The figure below demonstrates how this could be achieved.

Second, although the Project would be located within an APEZ at this alternative site, it would not be required to comply with the enhanced ventilation requirements set forth by Article 38, as it is not a sensitive use development.[18] The purpose of Article 38 is to protect the public health and welfare by establishing an Air Pollutant Exposure Zone and imposing an enhanced ventilation requirement for all urban infill sensitive use development within the Air Pollutant Exposure Zone. Sensitive use developments are defined as any building or facility designed for residential use, or any facility containing child daycares, schools, and hospitals.[19] Using this definition, the Project is not considered to be a sensitive use development, and as such, is not subject to the enhanced ventilation requirement under Article 38.

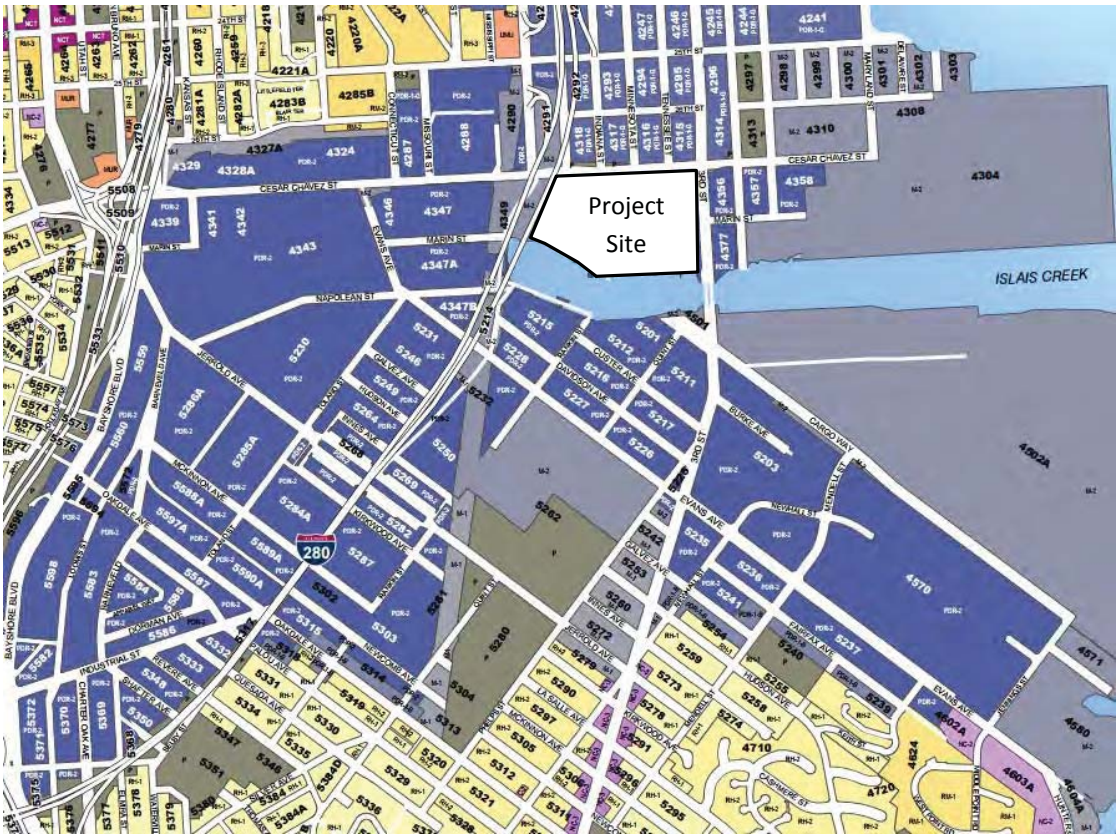
This conclusion is further supported by the San Francisco Planning Department. According to a July 29, 2015 Preliminary Project Assessment, when a "project site is located within an Air Pollutant Exposure Zone, as mapped and defined by Health Code, Article 38… Should the proposed project include new sensitive land uses (for example, day care facilities), those facilities would be subject to the requirements of Health Code Article 38."[20]

In addition to the enhanced ventilation requirement, projects located within an Air Pollutant Exposure Zone would also need to: (1) require that all stationary sources (i.e. backup diesel generators) meet Tier

[18] Article 38 of the San Francisco Health Code, *available at:* https://www.sfdph.org/dph/EH/Air/Article38.asp
[19] Article 38, Section 3804, *available at:* http://library.amlegal.com/nxt/gateway.dll/California/health/article38enhancedventilationrequiredforu?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca
[20] Preliminary Project Assessment, San Francisco Planning Department, July 29, 2015 *available at:* http://www.sf-planning.org/ftp/files/notice/2015-004256PPA.pdf

4 requirements, and (2) quantify and minimize construction emissions. According to the FSEIR, the proposed diesel generators will already meet these Tier 4 requirements (p. 14-118). Furthermore, the FSEIR is proposing to implement multiple mitigation measures, such as the use of Tier 2 off-road equipment, to minimize construction emissions (p. 14-120). Therefore, relocating the Project at this alternative site would not require implementation of additional mitigation measures.

Third, because the proposed land uses would be farther from sensitive receptors, the MBA Alternative Site would reduce health risk impacts caused by the Project itself compared to the preferred location. The Project would generate new sources of toxic air contaminants including, diesel generators, on-road vehicles, and off-road equipment. Since the Project does not propose to locate sensitive receptors on-site, it would not expose on-site sensitive receptors to toxic air contaminants. Accordingly, we assessed the impacts to existing and foreseeable future off-site receptors. Based on the San Francisco July 2015 Zoning Map, the majority of the areas surrounding the alternative Project site are zoned for industrial, commercial, and other non-residential uses (see figure below).[21, 22]



[21] San Francisco Zoning Map, July 2015, available at: http://www.sf-planning.org/modules/showdocument.aspx?documentid=9016

[22] The parcels colored in dark blue are zoned as Production, Distribution, and Repair Districts (PDR). According to Section 210.7 of Article 2 of the San Francisco Planning Code, PDR "districts provide space for a wide variety of PDR (production, distribution and repair) and other non-residential activities in districts where these uses are free from inherent economic and operational competition and conflicts with housing, large office developments, and large-scale retail, which are not permitted in these districts."

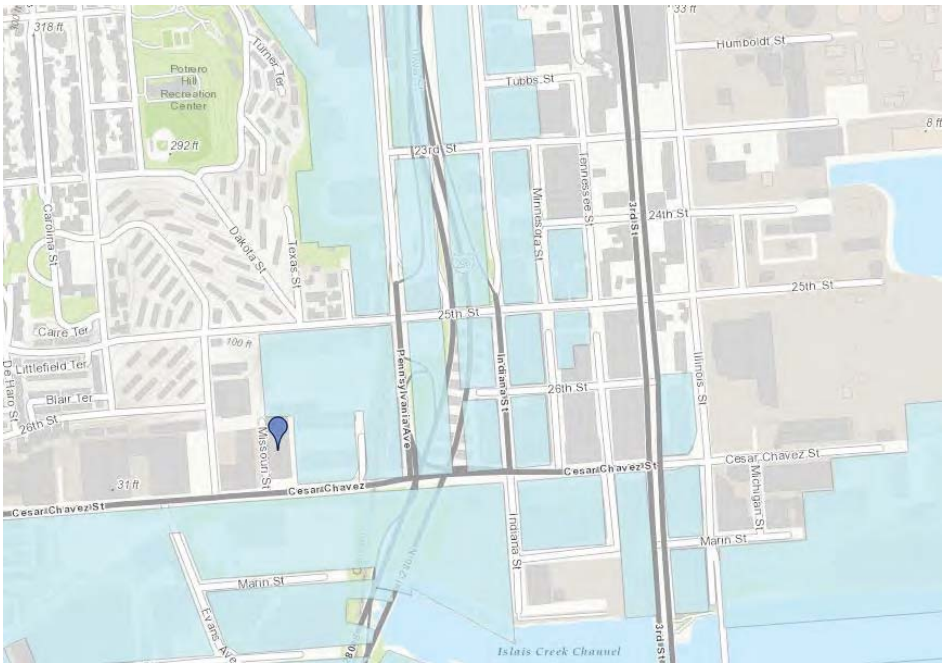
As a result, there should be few, if any, sensitive receptors permitted in the future within the vicinity of this alternative site because residential use is not permitted. We relied upon resources provided by the San Francisco Planning Department to determine if there were existing sensitive receptors within the area. Utilizing the same 1,000-foot zone of influence as the FSEIR to assess health risks from Project emissions, we identified two sensitive receptors: (1) the Rise Institute approximately 760 feet northwest of the site; and (2) an affordable housing development approximately 1,020 feet north of the site (see figure below).

It should be noted that the two identified sensitive receptors would only be within or close to 1,000 feet of the alternative site if the Project were built directly adjacent to Interstate 280, which would most likely not occur. As demonstrated in the figure below, when a 1,000 foot radius is taken from the center of the site, both of the identified sensitive receptors are well out of range of the alternative site, with the Rise Institute approximately 1,600 feet away, and the affordable housing development approximately 1,800 feet away.

Assuming that the Project would not be developed directly adjacent to Interstate 280, we find that this alternative location would not expose sensitive receptors to substantial air pollutants because all would be beyond the 1,000 foot zone of influence used in the SEIR. Furthermore, even if the Project were developed directly adjacent to Interstate 280, the nearest sensitive receptor, the Rise Institute, would be 760 feet from the project, which is much farther from the Project than the nearest sensitive receptors are from the Project at the preferred location. For example, at the preferred location the Project is only 200 feet from sensitive receptors at the Hearst Tower and only 560 feet from the UCSF Hospital. Note that neither the DSEIR (p. 5.4-49) nor the FSEIR (p. 14-121) determines that the risk to sensitive receptors located 800 feet from the Project at the Madrone Mission Bay Residential Towers would be greater than 10 excess cancers. When compared to the health risk impact of the Project itself at the currently proposed site, which would exceed the project-level health risk threshold of 10 in one million at three of the four sensitive receptors, we find that the alternative location is the better option.

Fourth, the Rise Institute, the existing sensitive receptor that is potentially within the 1,000 foot zone of influence used by the SEIR to evaluate cumulative impacts is not itself within an APEZ (see figure below).[23]

[23] San Francisco Property Information Map, *available at:* http://propertymap.sfplanning.org/?dept=planning



Thus, based on the SEIR's own approach to determining significance, there would be no significant impact to this receptor from the Project. Due to lack of available data, we were unable to conduct a full, site-specific health risk assessment to determine health risk impact values at this alternative location. However, even without a health risk assessment, based on the location of sensitive receptors and the APEZ we can still conclude that, when compared to the current Project site, the proposed alternative site would have a substantially reduced health risk impact.

Sincerely,

Paul Rosenfeld

Paul Rosenfeld, PhD

Jessie Jaeger

EXHIBIT 11

November 17, 2015

Mr. Tom Lippe
Law Offices of Thomas N. Lippe, APC
201 Mission Street, 12th Floor
San Francisco, CA 94105

Subject: Subsequent Environmental Impact Report for Event Center and Mixed Use Development at Mission Bay Blocks 29-32. SCN:2014112045

P15003

Dear Mr. Lippe:

This is an addendum to my November 2, 2015 comments of the Responses to Comment ("the RTC") on the Subsequent Environmental Impact Report (hereinafter "the SEIR") on the above referenced Project in the City and County of San Francisco (hereinafter "the City"). This addendum focuses on an addition to the Project that is different from a feature addressed in the DSEIR. This concerns the proposed modification to the Muni UCSF T Third Station

My qualifications to perform this review were thoroughly documented in my letter of comment on the DSEIR dated July 26, 2015 and are incorporated herein by reference.

Original MUNI UCSF/Mission Bay T Third Station – Impact Analysis Flawed

An original component of the Project was to extend the existing 160 foot northbound and southbound platforms of MUNI's UCSF/Mission Bay T Third LRT station to 320 feet so that the station could accommodate to two-car LRT trains stopping at either directional platform at the same time. The DSEIR found that passenger usage of the MUNI's UCSF/Mission Bay T Third LRT station during pre-event and post-event periods of large events at the Project's "event center" would not exceed thresholds of significance related to the capacity of the station's platforms. This finding is implausible since the platforms are only 9 feet

wide and accessed/egressed by ramps only 4 feet wide. The DSEIR's claim that thresholds of significant impact on these platforms will not be exceeded was arrived at only through evasive assumptions inconsistent with the good faith effort to disclose impact that CEQA demands. These evasions include:

- assuming that, in the pre-event period, if the platform were already crowded, that a subsequently arriving LRT train would not open its doors, thereby trapping riders aboard until the crowd on the platform dissipated, and
- assuming that PTOs would corral departing event patrons in a separate area whenever it appeared that the boarding platforms were becoming overcrowded.

Both of these assumed actions are actually de-facto admissions that there actually would be significant transit impacts related to station platform capacity (we also note that the excessive station dwell times when operators stop but keep the doors closed to keep debarking passengers from overloading station platform capacity is both a significant transit impact and social justice impact on those who rely on the T Third to travel farther south). Instead of disclosing that there is a significant transit impact and proposing effective mitigation, in this instance the DSEIR claims there is no significant impact and defined what appears as a gratuitous improvement, Improvement Measure I-TR-4 to "study" operations and safety at the LRT platforms and determine the need for and feasibility of operational improvements at the platforms, with the study to be performed by a qualified transportation professional approved by SFMTA[1].

The problems with the proposal assumed as part of the Project to extend the existing northbound and southbound platforms are obvious.

- The existing platforms are only 9 feet wide and accessed by ramps that are only 4 feet wide, insufficient widths for event crowds to access or egress the platforms quickly.
- While lengthening the platforms creates the space for a second train to stop, it doesn't add any width to allow the crush crowds to move off the platform efficiently.
- Moreover, in the post-event period, the west (southbound) platform would only service the relatively small numbers of patrons headed south on the T Third. It is fairly useless as a staging point for loading turnback shuttles headed north.

The MUNI UCSF/Mission Bay T Third Station Variant

Between the intervening time between when the DSEIR was circulated and the time the SEIR was prepared, transportation professionals specialized in LRT operations and design were apparently able to get involved instead of just the

[1] Such a study appears to be a deferred mitigation that is improper under CEQA.

professionals who prepare environmental documents. The result is what the SEIR describes as the ”Muni UCSF/Mission Bay Station Platform Variant”.

The Muni UCSF/Mission Bay Station Platform Variant replaces the split northbound and southbound side platforms with a single center-platform and located in the block between South and Sixteenth Streets. The new center-platform concept is clearly operationally superior to the flawed original proposal to simply extend the existing side platforms and add crossovers for shuttle turn-backs.

- It will have a 17-foot width accessed and egressed by 13-foot wide ramps at both ends of the platform, obviously better suited to dealing with heavy event crowds than the existing side-platform configuration (even if the lengths were doubled as proposed in the DSEIR) that have only 9-foot widths and 4-foot access/egress ramps at one end only.
- Both sides of the proposed center-platform can be readily used by turn-back shuttles, providing much greater operational flexibility for integrating the turn-backs with normal operational flows.

This “variant” is so far superior in ultimate performance to the flawed original proposal for modifying the LRT station that it is now clearly a component of the Project, not just a potential alternative.

Substitution of the New MUNI UCSF/Mission Bay T Third Station Plan Requires Recirculation of the SEIR in Draft Status

The SEIR claims in Volume 4, page 12-23 that the Muni UCSF/Mission Bay Station Platform Variant is analyzed at an equal level of detail as the station platform improvement proposal included in the Project Description for the proposed Project and therefore the variant analysis satisfies all CEQA requirements. However, this interpretation ignores the fact that the variant involves very different and more impactful consequences during construction than the original station platform proposal.

In the original proposal, the basic trackwork would remain the same, the crossovers could be installed over a 3-day weekend period and extension of the platforms could be undertaken largely without interference to services to the existing portion of the platforms or to operations further south along the T Third. In the variant, the entire trackwork between South and Sixteenth Streets would have to be torn up to allow center platform construction, the existing side platforms demolished, and either shoofly trackage around the entire construction site would have to be constructed (likely involving full-time traffic lane closures) or bus services substituted for T Third operations south of China Basin and Mission Rock Streets. This disruptive construction would take place over a 14 month period. The SEIR mentions these significant differences in disruption of

services and transportation operations but implausibly claims they are the same as for the originally proposed Project. Clearly this is not the case.

Under CEQA, if the project changes after publication of the Draft EIR, and these changes create a new significant impact not identified in the Draft EIR, or a substantial increase in severity of a significant impact that was identified in the Draft EIR, the lead agency must recirculate the draft EIR for public comment. (CEQA section 21092.1.). Although the SEIR makes the conclusory statement that the station variant would not result in new or more severe impacts than previously disclosed, the impacts disclosed in the SEIR are new, more severe and clearly support an opposite conclusion. Hence, the SEIR should have been recirculated in draft for a further 45 day public comment period.

Sincerely,

Smith Engineering & Management
A California Corporation

Daniel T. Smith Jr., P.E.
President

EXHIBIT 12

November 28, 2015

Mr. Tom Lippe
Law Offices of Thomas N. Lippe, APC
201 Mission Street, 12th Floor
San Francisco, CA 94105

Subject: Subsequent Environmental Impact Report for Event Center and Mixed Use Development at Mission Bay Blocks 29-32. SCN:2014112045

P15003

Dear Mr. Lippe:

This is an addendum to my November 2, 2015 comments of the Responses to Comment ("the RTC") on the Subsequent Environmental Impact Report (hereinafter "the SEIR") on the above referenced Project in the City and County of San Francisco (hereinafter "the City"). This addendum focuses on topics concerning walking distance to the proposed Project, exclusion from the analysis of key intersections that are clearly potentially impacted by the project and that are on identified emergency routes to the UCSF Mission Bay hospitals, severity of impact, a key scenario not analyzed in the SEIR and considerations regarding the effect of the at-grade rail crossing of Sixteenth Street on intersections in the Sixteenth Street corridor.

My qualifications to perform this review were thoroughly documented in my letter of comment on the DSEIR dated July 26, 2015 and are incorporated herein by reference.

Re Walking Distance

The walking distance issue of concern relates to the SEIR Response to Comment located at p p13.11-27, 28. This part of the response expresses the notion that people who work downtown would walk to the Warriors Arena because people who work downtown tend to walk to AT&T Park. This response

is illogical and unreasonable because a) the Warriors Arena is much farther from downtown than AT&T Park and b) because there are limits on how far, in terms of time or distance, the vast majority of able-bodied people are willing to walk on purposeful trips. AT&T Park is within 25 minutes walk distance from the Bank of America Building at California and Montgomery Streets. The Arena site is about 41 minutes walk distance from that downtown location. The Transamerica building located at Washington and Montgomery is about a 29 minute walk from AT&T Park. It is about a 44 minute walk from the Arena site. A compendium of urban planning literature, attached as Exhibit A, mostly related to access to transit, suggests that most people are unwilling to walk more than 30 minutes on purposeful trips. Hence, while AT&T Park is within reasonable walking distance for many working downtown, the Arena site is not.

Re Key Intersections On Emergency Routes Omitted From the Analysis

My letter of November 3, 2015 on page 7 stated: "Many of the intersections and ramps on logical access/egress routes to/from the Project that, at the City's discretion, the SEIR failed to analyze are on the advised emergency access routes from various points in the City and region to the hospitals and are posted on the UCSF web site," I used UCSF's web site interface for directions to the Medical Center to identify recommended emergency routes. (See www.ucsfmissionbay hospitals.org/gethere/ and click on "Get Directions" tab.) For Hyde and Bay, the primary recommended route is the Embarcadero to King, then Third. The secondary route is Hyde, then 8th. For the Transamerica building, the primary route is Clay/Drumm/Washington to Embarcadero, King, Third. The secondary route is Davis/Beale/Bryant/Embarcadero/Third. For Union Square, the primary is west on Geary, down Hyde/8th/Brannan/7th/16th. For the Bay Bridge, the primary is off at 8th and Harrison, down 8th/Brannan/7th/16th. . These documented emergency routes demonstrate why the intersections along Eighth and along the Embarcadero should have been studied. The key intersections are the nine along the Embarcadero with Broadway, Washington, Market, Mission, Howard, Folsom, Harrison, Bryant and Brannan and the six on Eighth with Market, Mission, Howard, Folsom, and especially Harrison and Bryant.

Severity of Impact Issues in the Sixteenth Street Corridor

In prior communications we have discussed the SEIR's failure to distinguish differences in the severity of impacts when intersections are within the LOS F range. That is to say, the SEIR merely reports conditions as LOS F as if all were equivalent when in fact one scenario may involve traffic demands producing delays two, three or four seconds over the LOS F delay threshold of 80 seconds while another involves vastly greater traffic demand producing predicted delays

perhaps 50 percent or 100 percent above the LOS F 80 second delay threshold[1]. This situation is particularly marked in the case of the intersection of Sixteenth, Seventh and Mississippi Streets. In this case, Table 5.2-47 reports the scenario of Existing + Giants Game + No GSW Project and the scenario of Existing + Giants Game + GSW Project + Basketball Game as equivalent LOS F conditions. However, buried in the details of Synchro LOS/delay computation sheets contained in Appendix TR for the pm peak hour it is found at page TR-191 that the Existing + Giants Game + No GSW Project is computed to have a delay level of 84.7 seconds per vehicle (slightly less than 6 percent over the 80 second LOS F threshold) while on page TR-323 the Existing + Giants Game + GSW Project + Basketball Game scenario traffic is found to cause a delay of 151.9 seconds per vehicle (almost 90 percent over the 80 second LOS F threshold). While differences in predicted delay above the LOS F threshold are not as precisely reliable as those below the LOS F threshold, vast differences such as the above are clearly indicative of significant differences in severity of impact. And at an intersection such as that of Sixteenth, Seventh and Mississippi Streets which is on a key emergency and normal access route to the UCSF Mission Bay hospitals, the failure to report change in severity of impact is a critical flaw in the SEIR. Similar results are reported for the Early Evening hour.

SEIR Fails to Consider a Critical Scenario

Considering the details of severity of impacts at the key intersection of Sixteenth, Seventh and Mississippi Streets reveals another flaw. In the Existing + Giants Game scenario, as noted above the subject intersection functions just above the LOS F threshold (delay 84.7 seconds per TR-191). The SEIR and Appendix TR do not consider the scenario of Existing + Giants Game + Project + No Event. However, comparison of the Existing + No Giants scenario (delay 68.6 seconds/LOS E per TR-179) to the Existing + No Giants + Project + No Event scenario (delay 87.8 seconds/LOS F per TR275) reveals a differential of 19.2 seconds delay increment caused by the Project without an arena event. Hence, by extrapolation, the Existing + Giants + Project + No Event scenario would cause an overall delay at Sixteenth, Seventh and Mississippi Streets in the pm peak hour of 103.9 seconds or worse. This is almost 30 percent above the LOS F threshold. So adding the Project, even without a Project arena event, would cause a substantial increase in severity of pm peak impact at Sixteenth, Seventh and Mississippi Streets whenever there is a Giants game.

How often would this more severe but unanalyzed condition affecting the key emergency access intersection to the UCSF Mission Bay hospitals occur? The maximum number of Giants games that could be played on weeknights between April 1 and October 30 reflecting current schedule patterns and assuming the

[1] The formal definition of 80 seconds average control delay per vehicle is implied in these statements.

team reaches the World Series and that all playoff series go the maximum number of games is about 57 games. Based on the event expectations for the Project's arena disclosed on Appendix TR, page TR-19, there could probably be about 60 weekday events at the Project over those same 7 months when the Giants could be playing. There are about 156 weekdays in that 7 month period. So if there are no overlaps, the unstudied, increased severity condition could occur up to 57 times. However, when overlaps do occur, the almost doubled severity condition that was studied would occur.

Effect of At-Grade Rail Crossing of Sixteenth Street

We have carefully re-examined the SEIR response to comment on the effect of the SEIR response to our comment on the effect of the Caltrain grade crossing of 16th on the operation of the intersection of Seventh/Mississippi/16th. The SEIR response on this issue from SEIR Volume 4, pages 13.11-55 and 13.11-56 is reproduced indented and in distinctive font, with our further observations in normal font and margins.

> The SEIR analysis did not explicitly include the delay associated with the at-grade crossing of Caltrain at the study intersections of Seventh/Mississippi/16th and Seventh/Mission Bay Drive, but the delay and LOS presented in the summary tables does reflect traffic conditions, including automatic gate operations.

How the delay and LOS does reflect gate closure during rail preemption is not made evident in the subsequent discussion in any way. The only thing clear is that "the SEIR analysis did not explicitly include the delay associated with the at-grade crossing of Caltrain".

> As noted on SEIR page 5.2?6, the analysis of existing conditions assumes implementation of the 22 Fillmore Transit Priority Project, which includes converting one of the two mixed-flow travel lane in each direction on 16th Street to a side-running transit-only lane.

Changing the number of general traffic lanes which pass through the subject intersection and the at-grade rail crossing is a confounding assumption which makes any comparison to observed conditions irrelevant.

> Prior to incorporating the 22 Fillmore Transit Priority Project into the intersection LOS analysis, the LOS conditions were verified based on field surveys of intersection operations conducted as part of this project and the UCSF Long Range Development Plan (LRDP) analysis. The results were also compared to the LOS analysis for existing conditions presented in the EIR prepared for the Caltrain electrification project[9]. The LOS results obtained for

> these two study intersections for the weekday p.m. peak hour were found to be generally consistent with field observations and the analyses presented at the two aforementioned reports.

This is disguised and misleading self-referencing, not validation relative to independently performed studies. Fehr & Peers, the consultants that did the Synchro delay/LOS calculations for the SEIR also did the work on both the Caltrain study and the UCSF LRDP study. It is entirely unclear what "generally consistent" means since the only "existing condition" analyzed in the DSEIR at the subject location assumes the general traffic lane reductions associated with the 22 Fillmore project to be in place, those in the other cited studies actually only analyzed the intersection under the actual existing configuration with Sixteenth having 2 through lanes in each direction.

The Caltrain EIR had the 2013 "existing condition" in the PM peak hour at 45.9 seconds/LOS D (with or without Giants game not specified) but without taking two through lanes off 16th to create the bus priority lanes. This is dramatically better than the 68.6 seconds delay the SEIR projects for the Existing No Giants scenario assuming the 22 Fillmore bus lanes in place. The Caltrain future forecasts are confusing. They show a delay of 67.7 seconds for year 2020 with no electrification project but a slightly lesser 4.5 seconds delay with the electrification project – this despite the admission that the electrification project would increase the crossing gate down time at 16th from 8 minutes/6 seconds to 11 minutes/38 seconds, an increase of 3 minutes/32 seconds. Hence, the future forecast findings of the Caltrain study at this location are completely illogical and no basis for justification of what was done in the SEIR.

The UCSF LRDP EIR reports the pm peak at the subject intersection at 44 seconds delay in 2014 – fairly comparable to the existing condition compiled in the Caltrain study – and a future condition upon completion of the LRDP of 46 seconds delay. But both of these values relate to the existing condition of 16th Street – without the bus priority lanes taking away 2 of the 4 general traffic lanes that exist on the street.

The SEIR never presented an Existing No Fillmore Priority Lanes computation. So the words in the response "generally consistent with field observations and the analyses presented at the two aforementioned reports" are unsupported because "field observations" cannot validate a future change in field conditions (i.e., dedicating one lane each direction to bus priority) that does not yet exist, and the previous studies did not consider this future change.

> At the intersection of Seventh/Mississippi/16th, the SEIR and both analysis efforts identified LOS D for weekday p.m. peak hour conditions for conditions without a SF Giants evening game.

This is incorrect and misleading. Both the Caltrain Electrification and the UCSF LRDP EIRs identified the Existing Condition without a weekday evening Giants game as LOS D with delays of 45.9 and 44 seconds respectively. However, the SEIR identifies the Existing without Giants game as LOS E, not D, with a delay of 68.6 seconds (see Appendix TR-179). This significant difference, apparently mostly attributable to the change on 16th to provide the 22 Fillmore priority lanes, provides no basis for concluding things are "generally consistent" or adequately reflect the interruptions in traffic due to rail crossings.

The response continues, finding every other pm peak scenario and the 'early evening' scenarios involving a basketball game at LOS F, without differentiating among severity. This is an important flaw for two reasons. First, while most scenarios are just a few seconds over the 80 second LOS F threshold, three scenarios - the pm peak with the project and overlapping basketball and Giants games superimposed on existing traffic, and the early evening hour with the project and a basketball game superimposed on existing traffic with or without a Giants game – all have delay levels from almost double to more than double the 80 second LOS F threshold. This means the critical intersection of Seventh/Mississippi/16th will be vastly more severely gridlocked at those times and scenarios than the others. Second, because the intersection will be at LOS F in most pm and early evening scenarios, queues that build when trains interrupt traffic operations will not be able to dissipate and will continue to build.

The response concludes as follows:

> As a reference, the Peninsula Corridor Electrification Project Final EIR included an analysis of the impacts associated with Caltrain electrification, including the additional delay associated with the extra trains that would be implemented as part of that project. At the intersection of Seventh/Mississippi/16th, the average aggregate gate down time during the weekday p.m. peak hour, which is currently about 8 minutes 6 seconds, is projected to increase to 11 minutes 38 seconds. These represent an additional average delay of approximately five seconds per vehicle per traffic signal cycle (212 additional seconds of delay divided by 45 cycles per hour). Project vehicles would also be subject to the increased delay.

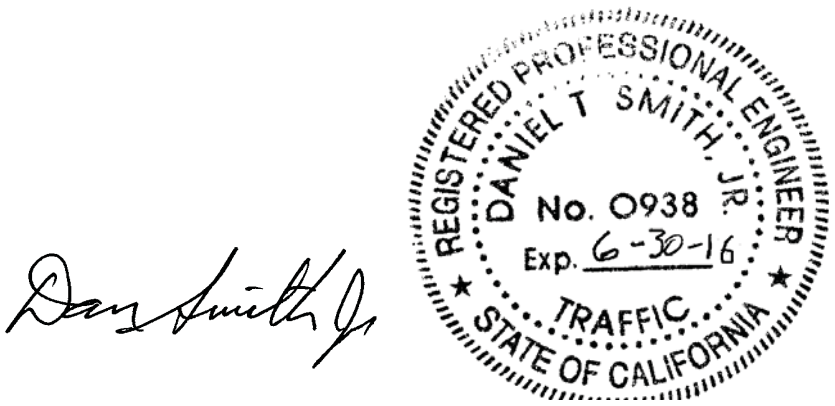
Although the information regarding gate down time is factually correct, the assumption that the down time can be cut up and spread in average amounts over all signal cycles in an hour is a misrepresentation of the situation. When the gates come down, they stay down for about 45 seconds, directly impacting one or possibly two signal cycles. During that down time large queues build. If the intersection is at or close to LOS F, it does not have the capability of dissipating those queues that build while the gates are down. Further compounding the situation is the fact that the train preemptions – when the gates are down – do not occur at even intervals.

Some crossings are closely bunched. This is a set of circumstances that can only be analyzed by a scientific simulation using a program such as VISSIM which is why we make that recommendation. Any computation through an averaging technique to approximate the effect of the rail grade crossing preemption unreasonably understates and minimizes the disclosure of impact in this particular situation.

Thank you for the opportunity to make these additional comments.

Sincerely,

Smith Engineering & Management
A California Corporation



Daniel T. Smith Jr., P.E.
President

Qualitative Studies/Statements:

Calthorpe Associates: Project Sheets-TOD Guidelines
http://www.calthorpe.com/Project%20Sheets/TOD%20Guidelines.pdf

> Briefly defines TODs as mixed-use districts within a comfortable walking distance of transit – about 2,000 feet

Dittmar, H., and G. Ohland, eds. *The New Transit Town: Best Practices in Transit-Oriented Development*. 2004. Island Press. Washington, D.C. p. 120.

> "Locate development close to transit. Effective TOD places residential and office space as close to transit as possible. The optimal walking distance between a transit station or stop and a place of employment is 500 to 1,000 feet. Residents are willing to walk slightly longer distances to get to transit, between a quarter- and a half-mile."

Envisioning Neighborhoods with Transit-Oriented Development Potential
http://transweb.sjsu.edu/publications/envisioning/Envisioning.htm

> Defines walking distance (<1/2 mile), bicycling distance (<2 miles), and five-mile driving or transit distance. These ranges of analysis include the areas where residents of possible TODs might work, shop, or prefer to go for services. Case studies are from bay Area of San Francisco (Campbell light rail, Fruitvale BART in Oakland, Hayward BART, Mountain View CalTrain/light rail, Redwood City CalTrain, and the Sacramento 65th Street Station). Study uses these distances as a starting point, not as a point of research.

TOD Manuals from Other Jurisdictions/Transit Agencies

Jurisdiction	**Walking Distance Referenced**
Mass Transit Administration (Maryland)	1500 ft. (0.28 mi.)
Mid-America Regional Council (Kansas City, Missouri)	1500 ft. (0.28 mi.)
NJTransit (New Jersey)	¼ - ½ mi
Ontario Ministry of Transportation	400m (0.25 mi.)
Regional Plan Association (NY, CT, NJ Tri-metro area	¼ mi.
Snohomish County Trans. Authority (Snohomish Cty, Washington)	1000 ft. (0.19 mi.)

EXHIBIT A

Mass Transit Administration (1988) *Access by Design: Transit's Role in Land Development*. Maryland Department of Transportation.

> Recommended spacing for bus stops is calculated based on a cachment area of 1500 feet (0.28 mi.) from each side of the road traveled, defined as the are from which most passengers can easily walk to access transit service. Passengers within this distance are considered to be "adequately served." Closer spacing is recommended for higher density areas (section 5.1.2).

Mid-America Regional Council (No Date) *Transit-Supportive Development Guidebook*. (Kansas City, Missouri). http://www.marc.org/transportation/TSD%20Guidebook.pdf

> Indicates most people are willing to walk 1500 feet (0.28 mi.) to shopping or transit (Chapter 4, Pedestrian Scale Blocks, p. 48), and suggests that short, walkable blocks increase the attractiveness of pedestrian transit.

NJTransit (1994) *Planning for Transit-Friendly Land Use A Handbook for New Jersey Communities*.

> Defines reasonable walking distance by general understanding of willingness to walk 5-15 minutes to get to or from a transit stop, corresponding to ¼ to ½ mile, but varies based on topography, sense of safety and security, presence of interesting activity (Section 1.3).

Ontario Ministry of Transportation (1992) *Transit-Supportive Land Use Planning Guidelines*. Ontario Ministry of Municipal Affairs. http://www.mah.gov.on.ca/userfiles/page_attachments/business/transuppguid/transuppguid-e.pdf

> Transit-oriented design guidelines developed by the Ontario Ministry of Transportation reference 400m (1/4 mile) walking distance throughout this document as a basis for recommendations.

Regional Plan Association (1997) *Building Transit-Friendly Communities A Design and Development Strategy for the Tri-State Metropolitan Region.* (New York, New Jersey, Connecticut).

> Defines transit-friendly communities as intensively developed areas within ¼ - ½ mile of rail stations. A distance that can be comfortably walked in 5-10 minutes and a distance most people are willing to walk to train stations or other community uses. These areas include mixed uses, pedestrian connections, and traffic calming design. Cites a study showing that residents living within ¼ mi. of

rail stations are five-to-seven times more likely to use rail than other area residents (Relationship Between Transit and Urban Form Handbook, Transit Cooperative Research Program TCRP H-1, November 1995, page 29.)

Snohomish County Transportation Authority (1989) *A Guide to Land Use and Public Transportation for Snohomish County, Washington*. (Snohomish County, Washington). http://ntl.bts.gov/DOCS/GL.html

"People can be expected to walk no more than 1,000 feet to a bus stop or a park-and-ride parking space. The walking distance increases slightly, to 1,320-1,758 feet (1/4 to 1/3 of a mile), for rail station access." (Chapter 3).

Quantitative Studies:

Ewing, R. (1999) *Best Development Practices: A Primer*. EPA Smart Growth Network, pp. 1-29. http://www.epa.gov/dced/pdf/BestDevprimer.pdf

> See p. 8. Suggest destinations to which we expect people to walk should be no further than ¼ mile distance. (References data from: Tabulations from the 1990 Nationwide Personal Transportation Survey (NPTS).)

Ewing, R. (2000) *Pedestrian- and Transit-Friendly Design: A Primer for Smart Growth*. EPA Smart Growth Network, pp. 1-22. http://www.epa.gov/dced/pdf/ptfd_primer.pdf

> Also cites the same 1990 NPTS Study (see page 5). These documents both present brief summary of quantitative analysis not discussed in these publications. References: P.N. Seneviratne, "Acceptable Walking Distances in Central Areas," Journal of Transportation Engineering, Vol. 3, 1985, pp. 365-376 (Abstract can be found at: http://www.pubs.asce.org/WWWdisplay.cgi?8501920 . For registered subscribers of The Journal of Transportation Engineering, full text is available at: http://scitation.aip.org/getabs/servlet/GetabsServlet?prog=normal&id=JTPEDI000129000006000684000001&idtype=cvips&gifs=yes) From footnote: "Travel distances were estimated assuming everyone walked at the National Personal Transportation Survey average speed of 3.16 mph. Curves were smoothed to account for people's tendency to round off travel times."

Bureau of Transportation Statistics:
http://www.bts.gov/programs/national_household_travel_survey/

National Household Travel Survey: http://nhts.ornl.gov/2001/index.shtml

TCRP Report 102: "Transit-Oriented Development in the United States: Experiences, Challenges and Prospects" Transportation Research Board, 2004.
http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_rpt_102.pdf

> Cites 1987 WMATA study by JHK and Associates (Development-Related Survey I)
> *See attached Table 8.1 "Modal Splits for Residential Projects Near Metrorail Stations, Washington (D.C.) Metropolitan Area, 1987.

Relationship Between Transit and Urban Form Handbook, Transit Cooperative Research Program TCRP H-1, November 1995, page 29
Digest version: http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_rrd_07.pdf

> Study of ridership among housing and commercial developments near 4 rail stations in Canada found a "walking impact zone" as far as 4,000 feet (3/4 mile) from a station, a "distance that can accommodate around 1,200 acres of development, sufficient to create strong transit-oriented communities."

Study by JHK and Associates in 1986, 1989 showed that the "share of trips by rail or bus transit declined by around .65 percent for every 100-foot increase in distance of a residential site from a Metrorail station portal."

Cervero et. al 1993—In the Bay Area, 92 percent of those living within ¼ mile of a BART station and commuting to San Francisco where parking costs were over $2 per day commute via rail transit.

Paget, Donnelly, Price, Williams and Associates. Rail Transit Impact Studies: Atlanta, Washington, San Diego. March 1982. p. 28. (used in Fairfax County Metro Station Areas Study, 1982)

In the Washington metropolitan area, it was found that the average walk to/from a Metrorail station ranged between ¼ to 1/3 mile.
Walking time/distance ratios appear to coincide with actual land use development in the stations vicinity—station area development had occurred primarily within ¼ mile of the station.

BART's First Five Years; Transportation and Travel Impacts (April 1979) DOT-P-30-79-8. (used in Fairfax County Metro Station Areas Study, 1982)

(This study surveyed mode of access which was then converted to distance)

In the San Francisco Bay Area Rapid Transit System (BART), 80% of the pedestrians using BART during peak hour periods walked less than 10 minutes to the station, while somewhat over half of those pedestrians walking under 6 minutes to reach their destination. The distance for a 6 minute walk was estimated to be a quarter of a mile.

1976 survey data included in Appendix:

- 30% of trips walked to BART station
- Of that 30% who walked, **80% walked less than 10 minutes** (45% walked under 6 minutes (approximately 1350 feet) and 35% walked between 6-10 minutes, approximately 1350 to 2250 feet)
- **Distance for a 6 minute walk was estimated to be about ¼ mile**
- Overall average walking time for all who walked to the BART stations was 8.8 minutes
- Generally considered that the average person walks about 225 feet per minute
- Overall average length of walk was probably about 1,980 feet (.375 miles)
- Average walking time for walkers to their destination at end of trip was 7.2 minutes or about 1,600 feet (1/3 mile)

Gladstone Associates. Northern Virginia Metro Station Impact Study: Development Potentials at Metro Stations. June 1974, p. 23. (used in Fairfax County Metro Station Areas Study, 1982)

Gladstone study identified a primary area of development potential within 1000 feet (.19 miles) of a Metrorail entrance and a secondary area within one half mile of the station site. Planned station areas in Alexandria and Arlington County generally reflect this concept.

Alexandria's King Street Station study area is within a 5 minute walk (approx. 1300 feet, .25 miles) of the station with the remaining area within a 10 minute, one half mile walk.

Arlington's Ballston and Courthouse planning areas encompass acreage generally within .4 and .3 miles, respectively, of the station.)

Montgomery County's Takoma Park station had a primary transit impact area within 1000 foot radius of the station with the secondary area of impact encompassing acreage within a half mile radius. The transit impact area for the Forest Glen, Glenmont and White Flint stations was identified as acreage within a 2000 foot radius from the station.

Note that natural or man-made barriers such as floodplains, railroads and highways affected that actual area studied (for example King Street's adjacent railroad right-of-way formed the western boundary to the study area even though a portion of the acreage on the opposite side was within ¼ mile of the station.

Gruen, Victor, The Heart of Our Cities. The Urban Crisis: Diagnosis and Cure. Simon and Schuster 1964, New York, p. 250: (used in Fairfax County Metro Station Areas Study, 1982)

Chart to illustrate people's tolerance for walking:

	Minutes	Feet
In a highly attractive, completely weather-protected and artificially climatized environment	20	5,000
In a highly attractive environment in which sidewalks are protected from sunshine and rain	10	2,500
In an attractive but not weather-protected area during periods of inclement weather	5	1,250
In an unattractive environment (parking lot, garage, traffic-congested streets)	2	600

Ritter, Paul, Planning for Man and Motor, Pergamon Press, New York, 1964, p. 14
(used in Fairfax County Metro Station Areas Study, 1982)

> "An average walk is at a speed of 2.5 miles per hour. This converts to 13,200 feet per hour or 220 feet per minute. On this basis, a 5-minute walk would be 1,100 feet and a 10-minute walk would be 2,200 feet."

Pushkarev and Zupan. Public Transportation and Land Use Policy. Indiana University Press from a study by Regional Plan Association of New York (RPA).
(used in Fairfax County Metro Station Areas Study, 1982)

- "In Montreal, in order to maximize pedestrian access to stations, the stations were planned 0.6 miles apart assuming maximum reasonable walking distance of .3 miles.
- Tri-State Regional Planning Commission's 1963 Home Interview Survey indicates that, outside downtown areas, people reported their walk to a bus to be, on the average, in the 3-4 minute range, their walk to a subway or rail station to be in the 5-10 minute range, and their drive to rail stops to average 7-15 minutes.
- The pedestrian access trip to stations responds to station spacing only in a very limited manner. The median walk to subway stations does increase

from 0.17 miles in midtown Manhattan, where stations are very closely spaced, to about 0.32 miles at the edge of the subway-served territory.

- **It appears that no matter how station-spacing increases, 50 percent of the people will not walk more than 6 minutes or 0.3 miles to a non-downtown rail station, even if there is a fraction of 1 percent who will walk over 30 minutes or more than 1.5 miles.** This is not inconsistent with the finding that a distance of 2,500 feet or a 9-minute walking time (assuming, all the while, an average walking speed of 3.1 miles per hour), 50 percent or more of those traveling that distance will prefer a feeder bus to walking, even in a low-income area, with a double fare."

WMATA 2005 Development Related Ridership Survey Final Report, March 2006
http://www.wmata.com/bus2bus/jd/2005_Development-Related_Ridership_
Update to 1989 survey to determine if changes in population growth, the regional economy, and the built environment had affected modal splits at certain types of land uses in Metrorail station areas, and if certain physical attributes of these land uses impact transit ridership. Dunn Loring station in Fairfax County included in survey.

"2005 survey results confirmed previous findings that the walking distance between a site and the Metrorail station affects transit ridership. In general, the closer a site is to the station, the greater the likelihood those traveling to/from a site choose Metrorail as their travel mode. Based on the survey results, this relationship was stronger for residential sites than for office sites."

*See attached Table S-2, Figure 14 and Figure 15

O'Sullivan, Sean and John Morrall. Walking Distances to and from Light-Rail Transit Stations. Transportation Research Record 1538.
http://scholar.google.com/scholar?hl=en&lr=&q=cache:oEPEiEPfnFAJ:www.enhancements.org/trb%255C1538-003.pdf+O%27Sullivan+S.+and+Morrall,+J

Abstract:
"…For the city of Calgary the average walking distance to suburban stations is 649 m with a 75th-percentile distance of 840 m. At CBD stations the average walking distance is 326 m and the 75th-percentile distance is 419 m."

- Average walking distance to suburban station=649m=2129 feet=0.4 miles
  - 75th percentile (suburban stations): 840m=0.52 miles
- In CBD, average walking distance = 326m=0.2 miles
  - 75th percentile (CBD): 419m=0.26 miles
- Calgary, Canada: pedestrians are more than 25% of peak-period trips to or from suburban stations
- General walking distance is about 5 minutes or 400m (.25 miles)
- Analysis in San Francisco and Edmonton, Canada found that 1750m (1.08 mi) was maximum that people would walk to a

station, and that walking accounts for more than 50% of the access mode from distances up to approximately 900m (0.56 mi).

- Survey of walking distance guidelines used by North American companies
    - Canada: guidelines range from 300m to 900m (0.18 mi to 0.56 mi)
    - U.S.: generally between 400m and 800m (0.25 mi to 0.50 mi)

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List of Exhibits to Appellants' Partial Brief from Patrick M. Soluri, Soluri Meserve, on behalf of Mission Bay Alliance, submitted to Board of Appeals on November 30, 2015[2]

Exhibit 1: List of previous comment letters relied upon in this appeal

Exhibit 2: U.S. Environmental Protection Agency, "Questions and Answers" handout regarding "Greenhouse Gas Emissions from a Typical Passenger Vehicle," dated May 2014

Exhibit 3: Facsimile from Lawrence B. Karp, dated July 23, 2015

Exhibit 4: "Warriors Stadium Economics; Uncertainty and Alternatives, Version 2.0" dated November 29, 2015 by Jon Haveman of Marin Economic Consuting

Exhibit 5: BAAQMD Asbestos Samples, dated August 8, 2015

Exhibit 6: USEPA Asbestos Memorandum, dated August 10, 2004

Exhibit 7: Email Correspondence from Regional Water Quality Control Board, dated November 23, 2015

[2] Grey areas are exhibits that are not included in this submittal because they do not relate directly to the proposed project and have already been submitted directly to the Board of Supervisors from the Appellant.

Before the San Francisco Board of Supervisors

Appeal of Subsequent Environmental Impact Report for the
Warriors Arena Project
Commission on Community Investment and Infrastructure
Resolutions 69-2015 and 70-2015

Hearing Date: December 8, 2015

APPELLANTS' PARTIAL BRIEF

Re: Project Description, Tiering, AB 900, Greenhouse Gas Emissions, Geology and Soils, Hazards and Hazardous Materials, Urban Decay, Wind and Shadow, and Recreation

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This office represents the Mission Bay Alliance ("Alliance"), an organization dedicated to preserving the environment in the Mission Bay area of San Francisco, regarding the project known as the Event Center and Mixed Use Development at Mission Bay Blocks 29-32 ("Warriors Arena Project" or "Project").

The Alliance submits this brief in support of its appeal of Commission on Community Investment and Infrastructure Resolution 69-2015, certifying the Subsequent Environmental Impact Report ("SEIR", "DSEIR" or "FSEIR" as appropriate) for the Warriors Arena Project, and Resolution 70-2015, adopting CEQA Findings for the Warriors Arena Project, both approved on November 3, 2015.

The grounds for this appeal are set forth in the Alliance's November 13, 2015, Notice of Appeal, and is based on all of the Alliances' comments letters and associated exhibits to those comments submitted to date (see References List, attached as **Exhibit 1**) as well as the materials physically attached as exhibits to this brief. (**Exhibits 2–7**.)

The grounds for this appeal are set forth in this brief and the two companion briefs submitted by our co-counsel, Thomas H. Lippe and Susan Brandt-Hawley, in the Alliance's November 13, 2015, Notice of Appeal, and all previously submitted Alliance comment letters and supporting exhibits. This brief discusses certain of these grounds in more detail.

A. PROJECT DESCRIPTION.

The SEIR repeatedly presents a shifting and inconsistent project description that thwarts informed decision-making and public participation about the project.

The FSEIR is fundamentally flawed because the project description is internally inconsistent, thereby thwarting intelligent public participation about the Project and its impacts. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 197.) Changing the project description to avoid dealing with a difficult environmental issue appears to have become a recurring strategy employed by the City with respect to its analysis of the Project.

As first noted in the July 26, 2015 letter by Soluri Meserve, the DSEIR took internally inconsistent positions with respect to whether the Project included significantly reduced events at Oracle Arena. (July 26, SM Law, DSEIR.)[1] This strategy was

[1] To facilitate review, short form citations are used for the Alliance's previously submitted materials, and are identified in the References List attached as **Exhibit 1**.

employed in the AB 900 application as well as the DSEIR in order to justify the City's assertion that the Project would be carbon neutral. Although including reduced events at Oracle arena in the project description in the context of GHG emissions, the DSEIR omitted analysis of the consequences from such reduced events including, but not limited to, urban decay in Oakland.

The FSEIR also took inconsistent positions with respect to whether the Project included the two office towers. (Nov 2, SM Law, FSEIR, p. 5.) The Project's AB 900 application as well as the DSEIR took the incredible position that the two massive office towers were not components of the Project for purposes of the GHG analysis because they were somehow "vested." Setting aside the factual and legal deficiency associated with attempting to avoid CEQA review based on so-called "vested rights," it is noted that the FSEIR's energy analysis of the Project included analysis of the energy consumption associated with operation of the towers. The FSEIR attempts to side-step this inherent inconsistency by claiming that the FSEIR never, in fact, analyzed the Project's GHG emissions on a quantitative basis. As demonstrated below, however, that claim is false.

Finally, the FSEIR took internally inconsistent positions on the issue of whether the open space within the Project site was considered publicly available or purely private open space. (Nov 2, SM Law, FSEIR, p. 6.) In order to avoid disclosing a significant wind impact within these onsite open spaces, the FSEIR asserted that they were exempt from analysis because the spaces were "publically [sic] accessible but private recreational areas." (FSEIR, p. 13.15-1.) This characterization, however, was inconsistent with the FSEIR's characterization of this open space as counting towards the Project's requirement to construct 0.46 acres of open space for each 1.0 acre of development area, which the FSEIR characterizes as "directly serv[ing] the project's demand for recreational facilities." (FSEIR, p. 13.16-3.)

By repeatedly shifting the project description to avoid troublesome environmental issues, the City has thwarted informed decision-making about the Project, its impacts and mitigation measures. (See, e.g., *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655-656 ("By giving such conflicting signals to decision makers and the public about the nature and scope of the activity being proposed, the Project description was fundamentally inadequate and misleading").) The City will need to recirculate a revised DSEIR based on a stable and consistent project description.

B. TIERING.

The SEIR attempts to rely on and tier from EIRs prepared in 1990 and 1998 for Mission Bay Redevelopment planning efforts, yet tiering is not permissible because the

Project is different than the project described in the prior EIRs. Under CEQA Guidelines section 15152, "'Tiering' refers to using the analysis of general matters contained in a broader EIR (such as one prepared for a general plan or policy statement) with later EIRs and negative declarations on narrower projects; incorporating by reference the general discussions from the broader EIR; and concentrating the later EIR or negative declaration solely on the issues specific to the later project." Tiering is only appropriate where the prior EIR has adequately addressed environmental effects that would not be substantially different than those related to the proposed project. (See CEQA Guidelines, § 15152, subd. (f).) When a program EIR has been prepared, an agency may determine that a project is within the scope of the previously prepared program EIR. (CEQA Guidelines, § 15168.) But in order to address those effects adequately, the project must be similar, if not the same as, the previously analyzed project.

A subsequent EIR must concentrate on issues specific to the later project that were not previously addressed in the prior EIR. (CEQA Guidelines, § 15152, subd. (a).) Here, reliance on the 1990 and 1998 EIRs for analysis of the impact areas excluded from consideration in the SEIR was impermissible because new information and/or changes in circumstances rendered the prior analyses inapplicable to the currently proposed Project. Contrary to the SEIR, the Project is not consistent with the Mission Bay Redevelopment Plan. (See July 26, Brandt-Hawley, DSEIR, pp. 1-2; Nov 2, Brandt-Hawley, Secondary Use, pp. 2-4.) As explained in the Alliance's comments, the Project is neither a permitted use, nor a secondary use within Mission Bay South. As a result, the proposed Project is not within the scope of the previously prepared program EIRs, and those EIRs do not disclose the impacts of the Project.

The Record also contains substantial evidence supporting a fair argument that the Project will result in potentially significant impacts associated with the resource areas excluded from consideration in the SEIR or, alternatively, the record demonstrates that supplemental review is required under Public Resources Code section 21166 for those same resource areas. (July 26, MBA, Tiering, pp. 2-3; November 2, SM Law, FSEIR, pp. 1-3.) The SEIR's approach to environmental review, including relying on environmental documents almost two decades old as well as numerous subsequently prepared reports and other documents prepared outside of the CEQA process fails to provide a cohesive, understandable document meeting CEQA's mandates for adequacy, completeness, and a good faith effort at full disclosure. (June 30, oral comments by Osha Meserve, FSEIR, Vol. 6, p. PH-45.)

Moreover, the NOP/IS improperly determined that the project would have no new significant or substantially more severe impacts than analyzed in the 1998 SEIR. The determinations in the NOP/IS are not supported by substantial evidence in the Record.

Additional information regarding the inadequacy of the City's approach to review with respect to analysis of specific resource areas is provided below.

C. AB 900 AND ADMINISTRATIVE RECORD.

The City has failed to comply with applicable requirements to compile and maintain a complete and adequately indexed Record, and also failed to timely make the Record made available online at the time of release of the DSEIR. Therefore, the Project may not rely on AB 900 litigation fast tracking.

The City did not post all of the documents comprising the Record at the time of DSEIR release, contrary to Public Resources Code section 21186, subdivision (b). The City failed to include numerous pieces of correspondence that were clearly within the documents comprising the Record under Public Resources Code sections 21186, subdivision (b) and 21167.6, subdivision (e). The City also failed to post references to the 1990 and 1998 EIRs, upon which the FSEIR relies for analysis of about half of the resource topics that are typically analyzed in an EIR. Examples of those missing documents were described in various comments submitted by the Alliance. (See, e.g., July 9, SM Law, pp. 1-2; July 26, MBA, Record, 1-3; see also Nov 2, 2015, SM Law, FSEIR, p. 3.) Moreover, the City admits that the Record is not located on the gsweventcenter.com website as required by Public Resources Code section 21168. The CEQA Findings do not refer to the gsweventcenter.com website as the location of the Record, but rather the Project files at the OCII. (CEQA Findings, p. 18.)

As a result of these and other related failures with respect to the Record, the City is not eligible for AB 900 litigation fast tracking for CEQA claims that may be lodged in the future. In addition, the purely legal argument inappropriately contained in the OCII CEQA Findings (p. 14) that all challenges to the Project—whether related to CEQA or not—would be subject to AB 900 fast tracking, would not be entitled to any deference by a reviewing court simply because it is bootstrapped in a document normally setting forth factual findings that may be entitled to deference. In any event, this legal argument is incorrect and contrary to the plain language of the referenced legal authority. Thus, any future litigation would progress according to normally applicable statutory timelines, not the timelines within AB 900.

D. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO GREENHOUSE GAS EMISSION IMPACTS.

The DSEIR stated that it "focuses on the project's contribution to cumulatively significant GHG emissions." (DSEIR, p. 5.5-9.) The DSEIR points to the certification of

the project as an AB 900 "Leadership Project" to reach its less than significant determination, stating that the proposed project "would not result in any net additional GHG emissions" after purchase of offsets from a "qualified greenhouse gas emissions broker." (DSEIR, p. 5.5-11 to 5.5-12.) The FSEIR, in an about-face, then claimed that the less than significant determination" is based on finding consistency of the project with the San Francisco Greenhouse reduction Strategy" (FSEIR, p. 13.14-6), explaining that commenters were somehow confused (FSEIR, p. 13-14-5). In yet another about-face, the FSEIR claims that instead of being a quantitative analysis as one would have gathered from the DSEIR, it was actually a *qualitative analysis*. All the while, neither the DSEIR nor the FSEIR clearly describe the GHG implications of the Project. This approach fails in several respects.

As quantitative methods of assessing Project-level GHG emissions are available, the EIR's lack of quantification of the impact was a failure to proceed in the manner provided by law. The Alliance has demonstrated that ample information was available that allows the City to quantify the Project's GHG emissions, consistent with regulatory guidance. (Nov 2, SCS, GHG, pp. 2-3.) Thus, while the City might ordinarily have discretion to utilize a qualitative analysis, that discretion is constrained because extensive quantitative data has already been prepared for the Project that was readily available to the City. (*Berkeley Keep Jets Over the Bay Committee v. Board of Board Commissioners of the City of Oakland* (2001) 91 Cal.App.4th 1344, 1371 (agency abused discretion by not quantifying project's air emissions).)

The FSEIR's conclusion that GHG emissions from the Project would result in a less than significant impact is not supported by substantial evidence in the Record. In particular, the allegedly quantitative analysis in the AB 900 Leadership application failed to include the entire Project; the 700,000 square feet of retail and office uses in the Project's towers were inexplicably not counted at all). The application also made unsubstantiated assertions regarding a 76 percent reduction in GHG emissions from Oracle Arena. (July 26, SM Law, DSEIR, pp. 3-6; see also July 20, SCS, pp. 1, 4-6.) The allegedly *qualitative* analysis of the Project's consistency with the San Francisco GHG Reduction Strategy also fails to meet minimum CEQA standards. CEQA allows lead agencies to consider whether the Project complies with an adopted local plan, for instance, in making a determination as to the significance of the Project's GHG impact. (CEQA Guidelines, § 15064.4, subd. (b)(3).) Yet here, the EIR fails to provide any meaningful analysis of how the Projects alleged compliance with the SF GHG Reduction strategy actually results in a less than significant impact. (See FSEIR, pp. 13.14-6 (simply listing regulations that the Project would comply with).)

Under CEQA Guidelines section 15088.5, subdivision (a)(4), recirculation is required when meaningful public review is precluded by a fundamentally inadequate EIR. Here, recirculation of the DSEIR was required due to the FSEIR's change in approach to GHG analysis from the quantitative analysis described in the DSEIR that relied on the faulty GHG inventory prepared for AB 900 Leadership Development Project certification concluding there would be "no net emissions" to a "qualitative" analysis stating GHG emissions would be less than significant based on the Project's consistency with the local GHG reduction plan. (Nov 2, SM Law, DSEIR, p. 2.) While the DSEIR initially relied on the faulty AB 900 quantification of GHG emissions to reach a less than significant conclusion; when the FSEIR changed the approach to a "qualitative" approach, recirculation was required.

Even the flawed AB 900 GHG inventory revealed that the Project would result in very large GHG emissions, including: (1) 4,099 metric tons per year of carbon dioxide ("CO2") emissions during project operations; and (2) 10,066 metric tons of CO2 emissions over the two year construction period. (AB 900 Application, p. 8.)[2] According to the U.S. Environmental Protection Agency, a typical passenger car emits 4.7 metric tons of CO2 per year.[3] With the Project emitting almost 200,000 tons of CO2 over the 30-year period considered the life of the Project for purposes of the AB 900 analysis, the Project's GHG emissions are about the same as adding about 42,500 cars to the road for an entire year. Is this really a less than significant impact?

The SEIR also includes wholly inadequate mitigation for these substantial GHG emissions. In addition to allegedly being consistent with the SF GHG Reduction Strategy, the EIR includes an "Improvement Measure" that requires purchase of offset for the nearly 200,000 tons of GHG emissions that the AB 900 application stated the Project would emit. (FSEIR, MMRP-51.) Yet as described in the Alliance's comments, the measure does not specify purchase of any particular type of offsets, such as offsets certified by the California Air Resources Board, to ensure that the offsets are real, additional, quantifiable, permanent, verifiable, and enforceable. (July 20, SCS, p. 2.) Without any specification of offset type, the Project may make the claim that it is "GHG neutral" by purchasing offsets that may cost as little as $1.00 per ton, with an overall cost to the Project of just $200,000. Moreover, unlike other projects, there is no requirement that the offsets be purchased

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[2] Available at: http://www.gsweventcenter.com/AB_900/2015_0217_GSW_Blocks29-32_AB900_Application_Submission.pdf.

[3] USEPA, GHG Emissions from a Typical Passenger Vehicle, p. 2, available at: http://www3.epa.gov/otaq/climate/documents/420f14040a.pdf, attached as **Exhibit 2**.

locally, which can create other local environmental benefits in addition to reducing GHG emissions.

The SEIR also impermissibly conflates conflating analysis of the Project's design features (Improvement Measures) and mitigation measures, and thus fails to consider whether other possible mitigation measures would be more effective. The SEIR refers to the GHG reduction measure as an "Improvement Measure" rather than a mitigation measure. (FSEIR, MMRP-51.) To the extent that the City intends to incorporate the purchase of offsets as a "design feature" or otherwise incorporate it into the project description, this strategy violates CEQA's mandate to disclose project impacts and separately address feasible mitigation measures. (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 655-56 (incorporating mitigation measures for redwood trees into the project description violated CEQA "[b]y compressing the analysis of impacts and mitigation measures into a single issue . . ."].)

Last, the FSEIR fails to adequately respond in good faith to comments about the GHG analysis, including but not limited to explaining why it was proper to exclude the office towers from the GHG emissions inventory. (CEQA Guidelines, § 15088.) In fact, the FSEIR fails to respond at all to comments concerning the legitimacy of excluding GHG emissions from the office towers from the AB 900 Leadership Project calculations. Though the FSEIR now claims that it does not rely on the AB 900 analysis to make its less than significant determination, the DSEIR referenced the AB 900 analysis as support for the determination. As a result of this shifting and unsupported approach to GHG analysis, the FSEIR misled the public and is deficient as an informational document.[4]

E. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO GEOLOGY AND SOILS IMPACTS.

Geology and Soils is one of the resource areas that the City determined it was unnecessary analyze in the SEIR. Yet, in the City of San Francisco, it is difficult to imagine a more important issue than seismic safety. For instance, it was the seismic upgrades at Candlestick park made before the 1989 Loma Prieta earthquake that undoubtedly saved countless lives. (See July 23, Karp, Loma Prieta, attached as **Exhibit 3**.) Given the complexity of the site, which is located on Bay fill placed after the 1906 Earthquake, as well as the fact that the arena is classified as Risk Category III under the

[4] In addition to the materials cited above, the following materials contain additional detail regarding the flawed approach to GHG analysis: July 27, 2015, letter from Susan Vaughn, Sierra Club, FSEIR, Vol. 6, COM-180 - COM 181.

California Building Code (public assembly with more than 300 people), special attention to these impacts is necessary. (July 20, BSK, Geology, p. 4.)

The Record contains substantial evidence supporting a fair argument that the Project will result in potentially significant Geology and Soils impacts or, alternatively, supplemental review is required under Public Resources Code section 21166. Additionally, the failure to include an up to date analysis of Geology and Soils is subject to "de novo review," as it constitutes a "failure to include required information." (See *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1207-08.) Evidence in the Record reveals significant concerns with respect to seismic safety, liquefaction, tsunami hazards, and evacuation, among other impacts. (July 26, SM Law, DSEIR, pp. 13-20; Nov 2, SM Law, FSEIR, pp. 9-11; July 21, pp. 1-7; July 20, BSK, Geology, pp. 1-18, Nov 2, BSK, Geology.)

Reliance on the 1998 SEIR analysis of Geology and Soils was impermissible because the Project is much different than the project described in the 1998 FSEIR. For example, the Mission Bay Redevelopment Plan was a land use plan for mixed use development that did not contain any public assembly uses. Such uses have entirely different standards with respect to seismic safety. (July 20, BSK, Geology, p. 4.) Additionally, the 1998 FSEIR relies on outdated data and methodology to analyze impacts, and conditions have changed such that the 1998 FSEIR does not describe the present conditions at the site. (July 26, SM Law, DSEIR, pp. 13-20; July 21, Karp, Geology, pp. 1-5; July 20, BSK, Geology, pp. 5-6,8.)

Rather than include a cohesive discussion of Geology and Soils impacts in the context of the specific Project and today's standards, the City has presented a hodgepodge of outdated information that is not tailored to the known Project and risks at hand. The FSEIR attempts to excuse the lack of information with the statement that an "EIR must achieve a balance between technical accuracy and public understanding." (FSEIR, p. 13.20-12.) Yet, the SEIR provides *no analysis at all* of Geology and Soils Impacts, and instead relies on analysis in the outdated and inapplicable 1998 SEIR.

The SEIR also impermissibly defers development of mitigation measures necessary to ensure that Geology and Soils impacts are mitigated to less than significant levels. (July 26, SM Law, DSEIR, pp. 18-20; Nov 2, SM Law, FSEIR, pp. 9-11.) While the FSEIR refers to the importance of mitigation measures and compliance with building codes as means to address these issues (FSEIR, pp. 13.20-13 to 13.20-14) , there are *no mitigation measures provided* to reduce Geology and Soils impacts to less than significant levels. (CEQA Findings, pp. 24-25; see also, FSEIR, p. 13.20-17.) With respect to building code, moreover, the Alliance's expert explained that "Seismic response of

structures located on soft or liquefiable soils is non-linear and requires a site specific seismic response analysis." (Nov 2, BSK, Geology, p. 2.) Thus, while certain design issues may properly be deferred and developed in accordance with applicable building code, it was necessary in this instance for Geology and Soils impacts to be analyzed in the context of an EIR, rather than a patched together network of new reports and excuses. As a result of the significant new information presented during the course of the review period regarding substantially more severe Geology and Soils impacts, recirculation of the SEIR was required. (CEQA Guidelines, § 15088.5, subd. (a).)

The FSEIR fails to adequately respond in good faith to comments regarding the inadequacy of the Geology and Soils analysis. For instance, the FSEIR does not adequately address comments regarding the interrelationship of liquefaction hazards around the site and the crucial need for attendees at events to be able to effectively evacuate the area. (Nov 2, BSK, Geology, pp. 2, 5.) In particular, expert comments explained that "liquefaction induced sand boils that may develop along the surface streets surrounding the project. Sand boils that may occur during an earthquake could result in significant settlements that would render the roads unusable for evacuation or emergency response. This issue has not been evaluated and considering that 18,000 people may be trying to evacuate from the area into unusable roads, this is a significant impact that has not been addressed." (Nov 2, BSK, Geology, p. 4.) Instead of addressing this specific concern, the FSEIR simply referred to compliance with building codes. (FSEIR, p. 13.20-12.)

With respect to the adequacy of the SEIR's analysis of Geology and Soils, the California Supreme Court's opinion in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 443 is instructive:

> The audience to whom an EIR must communicate is not the reviewing court but the public and the government officials deciding on the project. That a party's briefs to the court may explain or supplement matters that are obscure or incomplete in the EIR, for example, is irrelevant, because the public and decision makers did not have the briefs available at the time the project was reviewed and approved. The question is therefore not whether the project's significant environmental effects can be clearly explained, but whether they were.

Here, the analyses in the 1990 and 1998 are no longer pertinent. The City admits that none of the mitigation measures developed during that time even apply now. Subsequent brief descriptions in the IS/NOP also fail to characterize the full nature and extent of the seismic and other hazards that will result from construction of the Project.

Now, the FSEIR includes yet additional analysis and information regarding how impacts related to Geology and Soils will be addressed later through future regulatory processes and building codes. This review process does not clearly explain the effects of the Project to the public, and therefore violates CEQA.

F. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO HAZARDS AND HAZARDOUS MATERIALS IMPACTS.

Hazards and hazardous materials is one of the resource areas that the City determined it was unnecessary analyze in the SEIR, which is surprising since the Project site as well as the surrounding properties have a long history of extensive soil and groundwater contamination. (July 26, SM Law, DSEIR; July 22, BSK, Hazards.) The SEIR failed to include an analysis of the Project's impacts with respect to Hazards and Hazardous materials because of the flawed determination that there were no new or more significant impacts in this category than addressed in the 1998 FSEIR (NOP/IS, pp. 106-107; DSEIR, p. 1-9.) Although the NOP/IS determined that no additional analysis was required of these issues in the DSEIR, changed circumstances and/or new information following the 1998 SEIR requires recirculation of the DEIR that includes adequate analysis and disclosure of the Project's potentially significant impacts with respect to hazards and hazardous materials.

First, the DSEIR did not previously acknowledge the presence of asbestos on-site. Following release of the DSEIR, the Bay Area Air Quality Management District ("BAAQMD") staff sampled the stockpiles within the Operable Unit identified in the Revised Risk Management Plan (2006) and Risk Management Plan (collectively "RMP") for the site, which identified the presence of asbestos above regulatory limits. (Nov 2, SM Law, FSEIR; Oct 20, SM Law, Health Risk.) According to sampling by the BAAQMD, stockpiles of materials adjacent to the Project site contain more than 3 percent asbestos. (See **Exhibit 5**, BAAQMD Asbestos Results, August 7, 2015.) According to the sampling, stockpiles of materials adjacent to the Project site contain more than 3 percent asbestos, well above the USEPA's historically used upper limit of percent soil as a benchmark for defining hazardous levels of asbestos in soils. (See **Exhibit 6**, USEPA Asbestos Memorandum, dated August 10, 2004.)

In response to this newfound hazard from the presence of asbestos in onsite soils, the applicant prepared an Asbestos Dust Mitigation Plan ("ADMP") in order to mitigate the significant public health risk. This Mitigation Measure, included for the first time in the IS/NOP (HZ 1b, NOP/IS, p. 113), is improper in that it was formulated to address a new potentially significant impact that was not the subject of any EIR. (See NOP/IS, p.

113 (improperly assuming the asbestos is naturally occurring).) The ADMP, dated October 9, 2015, was released to the public just prior to the FSEIR. In any case, the newly-discovered presence of asbestos in soils onsite, not previously disclosed in the DSEIR or the prior EIRs prepared for the Mission Bay Redevelopment Plan, represents a new significant impact of the Project that requires recirculation.

Second, following release of the NOP/IS,[5] the applicant's consult prepared a Phase II report that identified significant additional contamination in soils onsite. (Nov 2, SM Law, FSEIR; July 26, SM Law, DSEIR; July 22, BSK, Hazards.) The Phase II report shows that significant amounts of both previously existing and subsequently-imported hazardous waste remain on the site today. (July 22, BSK, Hazards.) Backfill used in this area contained Class 1 and 2 hazardous materials that were not present before the excavation and partial removal of petroleum contaminated materials. These materials are not addressed in the 1998 RMP or 2006 Revised RMP. The FSEIR now acknowledges the existence of this contaminated backfill (FSEIR, 13.22-20), which was withheld from public disclosure in the NOP/IS and DSEIR.

The presence of newly-revealed contamination, viewed in isolation, represents new information and/or a changed circumstance requiring analysis and disclosure in a recirculated DSEIR.[6] Additionally, the Alliance retained an independent toxicologist to compare the results of the Phase II to the health screening levels in the 1998 RMP (and included in the 2006 RRMP) and current standards. The report prepared by Damian Applied Toxicology, LLC ("DAT"): (1) provides updated screening levels for the constituents at the site; (2) provides newly applicable screening levels that did not exist at the time of the 1998 EIR; (3) compares the new and old screening levels; and (4) compares the updated screening levels to the most recent site investigation data from the Project site. (Nov 2, SM Law, FSEIR; Oct 20, SM Law, Health Risk.)

The DAT Report shows that the prior screening levels are completely outdated and do not protect public health. Using updated screening levels that address a wide range of relevant potential receptors and exposure pathways, the DAT Report concludes that 19 chemicals (18 in soil and 1 in groundwater) that were detected in the 2015 Phase II

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[5] Hazards and Hazardous Materials is one of the subjects determined by the City to not warrant any analysis in the DSEIR.

[6] Evidence regarding the presence of asbestos within the Operable Unit that contains the site and described in the RMP dates back to at least August 2015, prior to OCII's certification of the SEIR. The asbestos results would alternatively warrant preparation of supplemental review under Public Resources Code section 21166 and CEQA Guidelines section 15162.

investigation at the site exceed at least one screening level. (Oct 20, SM Law, Health Risk.) The DAT Report did not include applicable screening levels for asbestos, as the Alliance had no information pointing to the presence of asbestos on the site until the BAAQMD asbestos sampling results were recently provided pursuant to a Public Records Act request. In any case, contamination documented previously in the Phase II as well as more recently in the BAAQMD asbestos testing, reveals that the Project poses potentially significant hazards due to impacts to the shallow water table, risks to construction workers exposed to site soils, including backfill, risks to commercial workers at the planned development project, and risks from transport and disposal of this hazardous waste, to the extent it may be taken off site. These hazards are not addressed in the RMP/RRMP, and represent new significant impacts that require recirculation of the DSEIR. (Nov 2, SM Law, FSEIR.)

The FSEIR mischaracterizes the record in an attempt to dismiss the significance of this newly-discovered contamination that is well above screening levels. First, the FSEIR suggests that it is contamination is not the result of subsequent activities at the Project site, stating, "The fill unit is . . . likely related to debris from the 1906 earthquake and resulting fire." (FSEIR, 13.22-21.) This statement is misleading because is conceals from the public the fact, recognized in both the applicant's Phase II report and the prior BSK report, that this material was deposited onto the Project site in approximately 2005 following excavation to remediate petroleum free-product found onsite. (July 22, BSK, Hazards, p. 3.) Thus, available facts indicate that this contaminated soil was the result of activities that took place following the 1998 SEIR, not the 1906 earthquake.

The City also attempts to dismiss the significance of this contamination by asserting, "[T]he Phase II ESA determined that these concentrations are not considered a health concern to construction workers." (FSEIR, 13.22-21.) First, it is the function of a health risk assessment, and not a Phase II environmental site assessment, to make a determination of human health risk. Indeed, the completely inappropriate and inadequate nature of this conclusion in the Phase II is demonstrated with clarity in the DAT Report, discussed above, establishing that some of these contaminants are found in this fill material at up to ten times current screening levels. The City's misstatements on these critical human health issues fall well below its duty of good faith.

Finally, it is noted that the FSEIR repeatedly relies on compliance with the existing 1999 RMP under the San Francisco Bay Regional Water Quality Control Board ("RWQCB") oversight to ensure that impacts are less than significant. (FSEIR, 13.22-8 – 12.) Notably, compliance with the RMP is not even listed as a mitigation measure in the Mitigation Monitoring and Reporting Program, is and is instead listed as a Regulation. (OCII adopted MMRP-58.) In addition to establishing that the RMP itself is outdated

and no longer adequate to protect human health, the attached correspondence establishes that oversight by the RWQCB is no longer adequate to effectively manage the site for the protection of construction workers and the public. (**Exhibit 7**, RWQCB Email Correspondence, dated November 23, 2015.) In particular, there is no record of required air quality monitoring or tracking of movement of hazardous materials within the Operable Unit that includes the Project site. There has apparently been a complete failure to comply with even the most basic terms of the RMP, which in itself is inadequate to protect public health given the changes in circumstances described above. Whether a regulation or a mitigation, this measure is not functioning effectively to protect the public, including onsite workers, from onsite hazards, and is insufficient to reduce Hazard and Hazardous Materials impacts to less than significant levels.

In summary, the information submitted by the Alliance constitutes substantial evidence of a fair argument that the Project will have a significant adverse effect regarding hazardous materials. In the alternative, per CEQA section 21166 and CEQA Guidelines section 15162, the facts described above constitute a change in circumstances since the 1998 SEIR involving, and significant new information showing, a new significant effect not previously analyzed in the 1998 SEIR. Under either standard, the City must prepare and circulate for public comment an environmental impact report to review the Project's impacts on hazardous materials. Moreover, the identified mitigations/regulations to reduce Hazards and Hazardous Materials impacts have been proven to be ineffective and are therefore inadequate under CEQA.

G. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO URBAN DECAY IMPACTS IN OAKLAND.

"Under CEQA, a lead agency must address the issue of urban decay in an EIR when a fair argument can be made that the proposed project will adversely affect the physical environment." (*California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173 (*CCEC*).) An EIR is to disclose and analyze the direct and the reasonably foreseeable indirect environmental impacts of a proposed project if they are significant. (CEQA Guidelines, §§ 15126.2, 15064, subd. (d)(3).) Economic and social impacts of proposed projects are outside CEQA's purview. (CEQA Guidelines, § 15131.) When there is evidence, however, that economic and social effects caused by a project, could result in a reasonably foreseeable indirect environmental impact, such as urban decay or deterioration, then the CEQA lead agency is obligated to assess this indirect environmental impact. (*CCEC*, *supra*, 225 Cal.App.4th at 188; *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1182; *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 446 ("The potential economic

problems caused by the proposed project could conceivably result in business closures and physical deterioration of the downtown area").)

Here, the DSEIR explained that the project includes relocating the Warriors home games from the existing Oracle Arena in Oakland to San Francisco. (DSEIR, p. 1-3.) In addition to relocating all NBA games from Oakland to San Francisco, the project description also includes relocating half of all existing non-NBA games from Oakland to San Francisco. (AB 900 Application; DSEIR, p. 5.5-11.) Thus, a direct economic impact of the project is to reduce Oracle Arena events from 89 to 21 per year. As explained by economist Philip King, this is a severe direct economic impact from the project. (July 22, King, Urban Decay, pp. 6-7.)

Such a dramatic economic impact may reasonably be expected to have indirect impacts. Dr. King explains that revenues from a mere 21 events per year will not likely justify the ongoing operational costs of maintaining such a facility. (July 22, King, Urban Decay, pp. 7-8.) As such, a likely indirect impact is the ultimate shuttering of Oracle Arena. Repurposing such a massive facility is difficult to impossible, and so it is very likely that the facility will likely stand dormant and invite the physical deterioration that is characteristic of urban decay. (July 22, King, Urban Decay, pp. 8-9; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 184, 1212 (urban decay characteristic of "long-term vacancies that deteriorate and encourage graffiti and other unsightly conditions").)

Implicitly acknowledging that the DSEIR impermissibly ignored this issue, the FSEIR included an analysis purporting to explain how there was never any potential for urban decay in the first place. However, as explained by economist Philip King, the FSEIR's technical report was so riddled with methodological errors and omissions including, for example, its repeated misuse of economic data and its sheer speculation that urban decay can be avoided by another professional sports team moving into Oracle Arena. Properly accounting for the numerous methodological flaws, the information contained in that report actually supports Dr. King's conclusion of a fair argument that urban decay may result in Oakland. (Nov 2, King, Urban Decay.) Thus, rather than demonstrate that urban decay is a non-issue, the FSEIR's report constitutes new information of a new potentially significant impact that requires recirculation of the DSEIR.

Rather than prepare the required analysis in good faith and recirculate the RDEIR with this new information as required by CEQA, the City instead hired a consultant to prepare a *post hoc* rationalization for why no analysis was required in the first place. (See FSEIR, Appendix UD.) As explained by Dr. King, the FSEIR's analysis does not

actually respond to Dr. King's original analysis explaining why it is a potentially significant impact requiring analysis. (Nov 2, King, Urban Decay.)

H. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO WIND AND SHADOW IMPACTS.

According to the DSEIR, a wind impact would be significant if it would alter wind in a manner that would substantially affect public areas. (DSEIR, p. 5.6-6.) However, the wind analysis only addressed offsite areas and not the public spaces within the Project site. (DSEIR, pp. 5.6-10 to -13.) While the DSEIR included a discussion of wind impacts in these areas, it did so only for "informational purposes." (DSEIR, p. 5.6-18.)

The Alliance commented that the DSEIR failed to analyze the Project's impact on on-site open space, which rendered it defective as an informational document. (FSEIR, p. 13.15-1.) The FSEIR's response to this comment was not made in good faith, and instead was intended to conceal a significant impact (and thereby avoid recirculation) and improperly deferred mitigation.

The FSEIR first suggested that the open space provided on-site was somehow exempted from analysis because it consists of "publically [sic] accessible but private recreational areas." (FSEIR, p. 13.15-1.) This characterization, however, is inconsistent with the FSEIR's characterization of this open space as counting towards the Project's requirement to construct 0.46 acres of open space for each 1.0 acre of development area, which the FSEIR characterizes as "directly serv[ing] the project's demand for recreational facilities." (FSEIR, p. 13.16-3.) It is also inconsistent with the project applicant's own application materials, which plainly characterized these areas as public open spaces. (Golden State Warriors Even Center and Mixed-Use Development Combined Basic Concept/Schematic Design Submittal, Blocks 29-32: Open Space, Gatehouse & Parking and Loading, p. 5.)

In other words, the FSEIR characterizes this open space as "private" to avoid a wind analysis, but "public" for purposes of dismissing impacts to recreational facilities. The FSEIR's characterization of this space as "private" is also inconsistent with the project applicant's repeated representations about this space. This type of shifting project description is misleading and thwarts informed decision-making. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 197.)

What is more, the FSEIR's attempt to narrow the scope of the required wind analysis by reference to Planning Code section 148 is misplaced. Indeed, if one were to simply apply the scope of that code section directly, it would not apply at all because the

Project is being developed in a redevelopment area. Here, the 1998 Mitigation Monitoring and Reporting Program did not limit the application of a wind analysis to only those instances where Section 148 would apply on its own terms, but rather much more broadly:

> Require a qualified wind consultant to review specific designs for buildings 100 feet or more in height for potential wind effects. The Redevelopment Agency would conduct wind review of high-rise structures above 100 ft. Wind tunnel testing would also be required unless, upon review by a qualified wind consultant, and with concurrence by the Agency, it is determined that the exposure, massing, and orientation of buildings are such that impacts, based on a 26-mile-per-hour hazard for a single hour of the year criterion, will not occur. The purpose of the wind tunnel studies is to determine design-specific impacts based on the above hazard criterion and to provide a basis for design modifications to mitigate these impacts. Projects within Mission Bay, including UCSF, would be required to meet this standard or to mitigate exceedances through building design.

(1998 EIR, p. VI.6, Mitigation Measure D.7.)

Thus, by its own terms this mitigation measure applies to "high-rise structures above 100 ft." within any land use designation, and the scope of the affected area to review is in no way limited to "public open space" rather than so-called "private open space." Nor is there any explanation that the scope of affected area is to be limited by Section 148.

The FSEIR also disclosed, for the first time, that the Project would "exceed the wind hazard criterion" at no less than "three test points on the project site," which constitutes a new significant impact that requires recirculation of the DSEIR. The FSEIR dismisses the significance of those exceedances because "wind effects at these locations are not considered significant impacts on the environment." (FSEIR, p. 13.15-3.) The FSEIR reaches this strained legal conclusion in order to avoid the factual issue that the de facto mitigation offered for that significant impact is both ineffective and impermissibly deferred under CEQA. This legal analysis is flawed, however and will be offered no deference by a reviewing court. The SEIR must be recirculated based upon these newly-disclosed wind exceedances that constitute new significant impacts from the Project.

I. THE SEIR IS NOT SUFFICIENT AS AN INFORMATIONAL DOCUMENT WITH RESPECT TO RECREATION IMPACTS.

The DSEIR improperly failed to include any analysis of impacts to recreation based on the NOP/IS's determination there would be no new or more severe impacts than identified in the 1998 SEIR based on the incorrect assertion that "[t]he increase in demand for recreational facilities generated by the project would generally be consistent with that described in the Mission Bay FSEIR." (NOP/IS, pp. 61-64.) This conclusion is completely unsupported by any citation or factual support whatsoever. Rebutting this statement is the Project description itself: the Project includes a massive arena with a capacity of more than 18,000 seats holding up to 225 events per year.

These huge crowds, in addition to employees associated with the 580,000 square feet of commercial uses, would all be crammed into an 11 acre parcel. These thousands of additional arena visitors are in addition to the people associated with the 580,000 square feet of office space, the 125,000 square feet of retail space, and all other people within the larger Mission Bay area who are anticipated to use Bayfront Park. Since the 1998 SEIR limited its consideration to 50,000 square feet of entertainment uses and not a massive 750,000 square foot arena, the open space needs of these arena crowds were never contemplated in the 1998 SEIR. Accordingly, the Project will result in significantly accelerated physical deterioration of Bayfront Park than disclosed in the 1998 SEIR, which is a significant impact under CEQA. (CEQA Guidelines, Appendix G, section XV(a).)

The Project would also result in undisclosed impacts to recreation by constructing and operating Bayfront Park at a site with existing and historical soil and groundwater contamination. (July 22, BSK, Hazards; see also **Exhibit 5**, BAAQMD Asbestos Sampling.) While the development of Bayfront Park is considered a separate project for purposes of CEQA, the DSEIR acknowledged the development of the Project triggers development of Bayfront Park and must be completed prior to occupancy of the Project. (DSEIR, p. 3-37-38.) In other words, development of the Project requires construction of Bayfront Park. (See, e.g., CEQA Guidelines, Appendix G, section XV(b).) By failing to comply with the City's duty to analyze construction of Bayfront Park at a project level, serious questions are left unaddressed about whether construction of Bayfront Park along with the Project will result in adverse physical effects on the environment due to the presence of hazardous contamination on that site. (*Ibid*.) The failure to follow the procedures required in the RMP for the Operable Unit, also call into question the effectiveness of any existing requirements to adequately protect the public. (See **Exhibit 7**, RWQCB Email Correspondence.)

The potentially significant impacts regarding hazardous materials use, transport, disposal and public exposure are exacerbated in the context of Bayfront Park because that will be a ground-level landscaped park. Having failed to disclose that the soil underlying Bayfront Park is contaminated, the NOP/IS also failed to explain whether such contaminated soil will be left in place and thereby expose visitors to hazardous materials. There is no discussion of whether an impermeable cap will be used, for instance, to protect future park visitors from the existing contaminated soil.

The failure to address these critical issues supports a fair argument that the Project will require construction of a recreational facility (i.e., Bayfront Park) that will have an adverse effect on the environment by facilitating the exposure of contaminated soils to humans and the environment. (CEQA Guidelines, Appendix G, section XV(b)).

The FSEIR failed to provide good faith responses to these comments. Rather than actually cite any report or analysis, the FSEIR merely restates its prior unsubstantiated claims. (DSEIR, p. 13.16-2.) Thus, there is no evidence whatsoever supporting the conclusions with respect to Recreation impacts.

In the absence of any meaningful analysis regarding the Project's demand for recreational facilities, the FSEIR claims that the Project will not substantially degrade Bayfront Park in part because of "the inclusion of on-site publically accessible open space proposed by the project that would directly serve the project's demand for recreational facilities." (FSEIR, 13.16-3.) Yet this characterization of the Project's "open space" is inconsistent with the FSEIR's treatment of these areas in its wind analysis, which it characterizes as "publicly accessible but private recreational areas," (FSEIR, 13.15-1.) The FSEIR's inconsistent treatment of this important component of the Project thwarts informed decision-making and public participation.

The FSEIR also failed to respond in good faith to comments about hazardous materials exposure associated with construction and occupancy of Bayfront Park. The City first claimed that Bayfront Park is somehow a separate CEQA project notwithstanding the fact that its existence is triggered by construction of the arena. (FSEIR, 13.16-4.) Setting aside the FSEIR's attempted legal obfuscation, the FSEIR then conclusively asserted that all issues concerning hazardous materials at Bayfront Park are satisfied because a RMP has been approved for the area. (FSEIR, 13.16-5.) This response, however, ignores that the RMP itself is not sufficiently protective of human health because it is: (i) premised on outdated screening levels that are significantly higher than now utilized; (ii) does not address contaminated soil that was subsequently imported onto the Project site; and (iii) does not even address several contaminants that have been recently identified onsite at levels well above current screening levels. (Oct

20, SM Law, Health Risk; July 22, BSK, Hazards.) Moreover, the RMP is not being followed. (See **Exhibit 7**, RWQCB Email Correspondence.) As a result, the SEIR fails to adequately analyze Recreation Impacts, and must be revised and recirculated to correct this deficiency.

For all the reasons described about, the Alliance respectfully requests that the Board of Supervisors grant the Alliance's appeal and reverse OCII's certification of the SEIR and the associated Project approvals.

Respectfully submitted,

SOLURI MESERVE
A Law Corporation

By: 
Patrick M. Soluri

By: 
Osha R. Meserve

Attached Exhibits:

1. List of previous comment letters relied upon in this appeal
2. U.S. Environmental Protection Agency, "Questions and Answers" handout regarding "Greenhouse Gas Emissions from a Typical Passenger Vehicle," dated May 2014
3. Facsimile from Lawrence B. Karp, dated July 23, 2015
4. "Warriors Stadium Economics: Uncertainty and Alternatives, Version 2.0," dated November 29, 2015, by Jon Haveman, Ph.D, of Marin Economic Consulting
5. BAAQMD Asbestos Samples, dated August 8, 2015
6. USEPA Asbestos Memorandum, dated August 10, 2004
7. Email Correspondence from Regional Water Quality Control Board, dated November 23, 2015

EXHIBIT 3

July 23, 2015

Osha, when writing the review letter concerning an earthquake that would affect the proposed Warriors arena, an experience with another stadium came to mind. In 1985, when I was involved with a study of how Candlestick Park would perform in a serious seismic event, I was at a summary meeting in City Hall with Norm Karasick, the City architect. The discussion was about the cost of rebuilding the deteriorated concrete bleachers to then-current standards. It was recognized that one or more sections could collapse in an earthquake. Karasick pointed out that the City probably would not want to spend the money to strengthen the bleachers saying: "What are the odds there would be an earthquake during a game?" Well, in the end the City decided to do the work and on October 18, 1989 the Loma Prieta earthquake, centered near Santa Cruz, occurred during a World Series game. Nobody was injured at the game. All damages in the Bay Area were from liquefaction of sand (Marina District) and amplification of ground motion in soft ground (Cypress overpass). At the engineering team leader's retirement dinner almost 20 years later a toast to him was made by another engineer who thanked him for pushing the retrofit because his two sons had been at the game sitting below one of the rebuilt overhanging concrete bleachers. LBK

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EXHIBIT 4

Warriors Stadium Economics: Uncertainty and Alternatives

Version 2.0

Produced by:

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November 29, 2015

Contents

Executive Summary

This report provides both a cash flow analysis of the arena development and a comparison with a plausible alternative. The focus in the report is on the effect of the project on San Francisco's General Fund. It also provides a discussion of some of the assumed revenues associated with the Golden State Warriors (GSW) project. The project is currently expected to result in a small surplus in each year, but that surplus may not materialize. Either cost overruns in ensuring the flow of traffic during events or revenue shortfalls could erase the razor thin margin for benefit.

This report provides an update to a report by the same name originally released on November 2, 2015. Since that time, much has changed regarding the parameters of the agreement. An update of the analysis is provided herein.

Fundamental Changes to the Analysis

1. City's Budget and Legislative Analyst has made it clear that off-site and dedicated and restricted revenues estimated in the fiscal impact report should not be included in stadium revenue calculations. Transit fare and parking revenues resulting from events at the arena, however, should be included. This makes the relevant revenue estimate $11.6 million rather than $14.1 million.

2. SFMTA's annual operating costs associated with the arena are now estimated to be $6.9 million. The previous $6.1 figure was a cost estimate net of fare and parking revenues associated with transit use by Event Center attendees.

3. It has been estimated that the one-time revenues ($25.4 million) available to offset one-time transportation infrastructure related expenses ($55.3 million) will fall short by $29.9 million. Annual debt service payments associated with this shortfall are estimated to be $2.1 million.

4. Total City departments' annual ongoing expenditures related to the Event Center are estimated to be $10.1 million, including debt servicing.

5. Net revenues associated with the GSW are estimated to be $1.5 million (= $11.6 million − $10.1 million), far less than previous estimates.

6. The final sales price on the 12-acre parcel has been established as $150 million. This has implications for transfer tax revenues.

These changes make it clear that the City's Budget and Legislative Analyst (BLA) is in agreement with our prior conclusion that off-site changes should not be included in anticipated revenues associated with the GSW project. The BLA has also, rightly, focused on revenues and commitments associated with the City's General Fund.

Unfortunately, the Board of Supervisors has failed to adopt this recommendation from the BLA. In the absence of very extensive and sophisticated surveys of the activities of those attending events at the Event Center, and surveys of those who would otherwise have contributed to the off-site economy (a completely unidentifiable set of people), there is no way to accurately estimate *NEW* off-site revenues; off-site revenues that do not merely displace economic activity that would otherwise have occurred. Including highly flawed estimates off-site revenues that represent additions rather than diversions of General Fund revenues will do nothing other than cover up the true costs of the Event Center to the general public. Including off-site revenues represents bad accounting, bad economics, and disingenuous communication with the public on the part of the City.

The BLA has estimated that annual expenditures related to the Arena will be $10.1 million and that on-site or direct revenues will be approximately $11.5 million, yielding net revenues of $1.5 million. A comparison with the biotechnology alternative reveals an annual difference in revenue to the General Fund of $4.5 million. Annual net revenues associated with the biotechnology alternative are estimated to be $6.0 million. The difference in one-time net revenues is $38.5 million in favor of biotechnology.

The City's General Fund is on the hook for revenue short falls and cost overruns in providing transit and traffic support to the arena. Although the ordinance establishing the Mission Bay Transportation Improvement Fund has been amended to require GSW work with the city to reduce overruns associated with the SFMTA, there are other expenses —debt servicing, police presence, and DPW expenses —that remain obligations of the General Fund. These obligations are estimated to be $3.2 million per year and will come at the expense of other City services.

> **Important note:** If it is ever the case that revenues are less than SFMTA expenses, it will necessarily be the case that the General Fund will run a deficit of between $2.1 and $3.2 million. The requirement that the Warriors provide transit services in this case does *nothing* to cover these other Event Center related obligations.

There is sufficient uncertainty in future projects to be concerned about this scenario. As was pointed out by Controller Ben Rosenfield in a memo dated October 6, 2015, revenues associated with the project are "highly sensitive to actual attendance and the number of

events at the Event Center, local economic conditions when the Event Center opens, and other cyclical factors." With a slim margin of benefit and sensitive revenues, the likelihood of the City's General Fund running a deficit in any given year is significant.

The bottom line of this report is that an alternative agreement is expected to add to General Fund revenues between $3.6 and $7.4 million per year in present discounted value terms, or between $80 and $163 million over the first 20 years of arena operations. These figures can be thought of as the amount that San Franciscans are paying to bring the Warriors to town. It is the amount of revenues that the City would forgo with the GSW project, relative to a plausible alternative. This is not to say that the project is a bad idea, but merely to point out what is being given up in order to accommodate the Warriors' move.

Key Findings

1. A cash flow analysis of the arena through the first twenty years of operation suggests net revenues for San Francisco's General Fund of $22.1 million. This is after City expenses of approximately $159 million during this time for transit and traffic mitigation. (Both figures are in present discounted value.)

2. This $159 million of City spending in support of the Arena represents an implicit subsidy to the project. The City is funding transit infrastructure and the mitigation of traffic and transportation issues related to arena operations.

3. Despite claims to the contrary, the City is heavily subsidizing the Event Center.

4. Although the Arena generates significant revenues for San Francisco, the City's costs will exceed its revenues from the development for at least the first nine years of Arena operation, in the absence of financing.

5. There are elements of the estimates of City revenues that are filled with uncertainty. Numbers of spectators attending, taking mass transit, or parking, the general state of the economy. These all have implications for net revenues.

6. It is forecast that net revenues will be on the order of $1.5 million per year. The City's contribution to annual arena expenses is capped at 90% of estimated revenues. It is possible that revenues will not be sufficient to cover expenses.

7. If revenues are insufficient to cover expenses, the City's General Fund will be responsible for covering the resulting shortfall of $3.2 million.

8. If an alternative development, one suited to biotechnology, were pursued, the City's net General Fund revenues would be $80.2 million higher and possibly as much as $163.2 million higher over 22 years, or $7.4 million per year.

9. An alternative development would have considerably larger economic impacts for the rest of the San Francisco economy than would an arena, creating significantly more jobs —more than 2,000 on-site. Oracle Arena currently generates just 494 jobs.

10. An alternative development would generate as much as $1 billion in direct economic activity on-site.

11. Forgoing the biotechnology development and pursuing the Arena reduces net revenues to the City of San Francisco's General Fund by $3.6 to $7.4 million per year - and potentially much more. 6

1: Introduction

In 2017, the Golden State Warriors are expected to begin playing in San Francisco. Although this is an exciting development for the City of San Francisco, the economics of the Warriors presence in the City are unclear. There are likely to be significant revenue benefits for the City, but welcoming the Warriors will also involve significant infrastructure investments and ongoing expenses for the City and County of San Francisco. The net effects of these revenues and costs have not been adequately addressed.[1]

It is not clear whether San Francisco is importing a lucrative asset or a financial burden; that is, it is not clear whether the revenues associated with the Warriors play in San Francisco exceed the considerable upfront investments that the City must make. It is also an open question as to what exactly the City might be giving up in order to host the Warriors. The 12-acre parcel on which the arena is to be built is a valuable piece of real estate. In 2010, Salesforce paid $278 million for a 14-acre site that includes the property in question. The property, located as it is across the street from UCSF and near a variety of biotech companies, seems a likely candidate for a biotech friendly building.[2] Were this to happen, it would yield significant benefits for the City. Whether or not these financial benefits exceed those associated with the Warriors is the subject of this report.

The report proceeds to review the costs and benefits associated with the Warriors, as they have been made public. The focus of the report is on the City's General Fund. The General Fund receives the majority of the revenues associated with the project, and also bears the liability for any shortfalls. This is followed by an estimate of the likely benefits of a biotech development occupying the same space. The benefits of the GSW plan are then examined from a perspective of robustness, whether or not they are likely to come to pass.

This report provides a cash flow analysis of the GSW project's effect on the General Fund and compares that analysis with an alternative development that includes a biotechnology-oriented commercial structure in place of the arena. The GSW project is cash flow positive, but not until at least the *tenth* year of operations. Relative to the alternative development, even after 20 years of operating, the GSW project falls short in terms of net government revenues by at least $80 million, or $3.6 million per year over 22 years, but potentially by as much as $163 million, or $7.4 million per year over 22 years. The alternative brings about these revenues without the need for heavy subsidization on the part of the City in

[1] Accepting the team also results in a significant revenue hole for the City of Oakland in that most events that currently take place at Oracle Arena are projected to move to the new arena.

[2] Its neighbors would include UCSF, Celgene Corporation, National Multiple Sclerosis Society, venBio, Nurix, Clovis Oncology, FibroGen, and Illumina, among others.

the early years. From a purely financial perspective, the GSW project is a significant drain on the City's General Fund revenues potentially on its own, but certainly relative to what alternative developments might yield.[3]

2: Benefits and Costs of Hosting the Warriors

As with any economic activity, there are certainly financial benefits for the City of San Francisco associated with hosting the Warriors. A report has been produced for the City of San Francisco that provides a fiscal analysis of the GSW project.[4] Subsequently, the BLA produced estimates of the effects of the project on the City's General Fund. The General Fund is the primary recipient of revenues directly attributable to the project, and also bears the burden of liabilities. The BLA memo and this report both focus on revenues that are directly attributable to the project as well as those that originate on the site of the project. This is comparable to the assignment of obligations in the agreement between the City and the GSW as outlined in the ordinance establishing the Mission Bay Transportation Improvement Fund.

These benefits are derived from one-time revenues from the purchase of the land and subsequent construction and ongoing benefits associated with the events that the stadium hosts. The ongoing benefits also include revenues from commercial and retail activity built into the project.

– Benefits/Revenues

Table 1 provides a summary of an estimate of those benefits. Annually, stadium, retail, and office operations associated with the development are estimated to provide just over $11.6 million in revenues to the City of San Francisco's General Fund. Of these revenues, $9.8 million are a direct result of activities on the project site while $1.8 million are the result of City transportation use by those attending events at the Event Center.

[3]The methodology used in this report is comparable to the methods and assumptions used by EPS in producing its fiscal impact analysis of the GSW arena and used by the City's Budget and Legislative Analyst in its November 9, 2015 memo to the Board of Supervisors Budget and Finance Committee.

[4]Economic Planning Systems, *San Francisco Multi-Purpose Venue Project - Fiscal Impact Analysis: Revenues*, 9/25/15. (EPS)

Table 1. Summary of San Francisco General Fund Revenues from Ongoing Stadium Operations (Thousands of 2014 dollars)

Annual Project-Generated Revenues	General Fund Revenues
Revenues From on-Site Businesses	$9,804 (85%)
Revenues From Transit Fares and Parking	$1,773 (15%)
Total Annual Project-Generated Revenues	$11,577 (100%)

Source: San Francisco Budget and Leg. Analyst report for Nov. 9, 2015 Budget and Finance Committee Meeting.

Table 2 provides estimates of detailed categories of revenues directly associated with ongoing economic activity once the development is completed.[5] The largest categories of revenue include the stadium admission tax ($4.3 million), gross receipts taxes ($2.4 million), and property taxes ($1.8 million, including both general fund and in lieu of VLF). These three categories account for the vast majority of revenues ($9.8 million) associated with the development. Revenues associated with transportation to and from events at the Event Center add an additional $1.8 million, bringing the total to $11.6 million.

Table 2. Details of San Francisco Revenues from Ongoing Stadium Operations (2014 dollars)

Item	Amount
Annual General Revenue	
Property Tax (General Fund)	$912,000
Property Tax in Lieu of VLF	$868,000
Sales Tax	$521,000
Parking Tax	$482,000
Stadium Admission Tax	$4,336,000
Gross Receipts Tax	$2,431,000
Utility User Tax	$254,000
Subtotal	$9,804,000
Annual Transit Related Revenue	
Event Related Fares	$869,000
Event Related Parking	$904,000
Subtotal	$1,773,000
Total Ongoing Revenues	$11,577,000

Source: BLA Report, 11/9/15, Table 3

[5] Whether or not revenues associated with transit usage are appropriately labeled *direct*, it seems reasonable to include them in the analysis. Their exclusion, however, would eliminate the General Fund surplus that is forecast to result from the project.

As mentioned, there will also be one-time General Fund revenues associated with the construction of the arena and the accompanying office and retail space (Table 3). These benefits amount to just over $25.4 million, the vast majority of which is associated with the TIDF, or Transportation Impact Development Fee.[6] Another significant source of one-time revenue comes in the form of a Property Transfer Tax, $3.7 million. Sales taxes and gross receipts taxes collected during construction add another $5.4 million.

In its analysis, the City's Budget and Legislative Analyst's report indicates just $25.4 million.[7] This number appears to omit contributions for Child Care and to use an outdated figure for "Sales Taxes During Construction" of $1.7 million, rather than the $2.4 million figure included in the table, a practice with which we agree.[8]

Table 3. Summary of One-Time Revenues from Stadium Construction (2014 dollars)

Item	Difference
City Fees (per gross building sq. ft.)	
Transit Impact Development Fee	$17,436,000
Other One-Time Revenues	
Transfer Tax and Construction Gross Receipts and Sales Taxes	$7,956,000
Total One-Time Revenues	$25,392,000

Source: BLA Report, 11/9/15, Table 2

– Costs

As with the benefits, there are also one-time and ongoing costs. The one-time costs are primarily those associated with enhancing transportation infrastructure and amount to $55.3 million.[9] These costs include transit investments (the purchase of light rail vehicles), the installation of crossovers, the construction of a new center boarding platform, power aug-

[6] http://www.sf-planning.org/ftp/files/legislative_changes/new_code_summaries/120523_TIDF_Transportation_Impact_Development_Fee_Update.pdf Medical and Health Services, and Retail/Entertainment economic activity categories was increased to $13.30 per square foot, except that the rate for museums, a subcategory of CIE, are $11.05 per square foot, a reduction from the current amount. The rate for the Management, Information and Professional Services (MIPS) and Visitor Services economic activity categories was increased to $12.64 per square foot, and the rate for the Production/Distribution/Repair (PDR) category was reduced to $6.80 per square foot.

[7] November 9, 2015 Budget and Finance Committee Meeting memo.

[8] There is a difference of $200 thousand between the BLA's figure and ours, but we defer to the BLA.

[9] One-time costs are from SFMTA, **Capital and Operating Cost Estimates for the Event Center and Mixed Use Development at Mission Bay Blocks 29-32**, 10/6/2015. Estimates are in 2014 dollars.

ments to idling event trains, traffic/signals engineering investments, and a Mariposa Street restriping study.

These expenses are spread out over a four-year period, with the vast majority of expenses occurring in the 2016-17 MTA fiscal year. A major expenditure on light rail vehicles is slated to take place in the 2017-18 FY, when the Event Center begins operating. The costs to MTA are heavily loaded in the early years of the project, before ongoing revenues have begun. Estimated one-time revenues will be available during this time to cover expenses, but they will fall short of the total by $29.9 million.[10] This difference will be borrowed and paid back over time.

Table 4 provides the details of the City's estimates of ongoing expenses related to the operation of the Event Center. In the BLA's November report, estimated annual ongoing costs associated with operations at the Event Center amount to $10.1 million.[11] The vast majority, $6.9 million, are associated transit costs. Other expenses include nearly $1 million in additional policing, and $100 thousand in expenses incurred by DPW. Given that the infrastructure expense shortfall is likely to be financed, the BLA's estimate of debt service payments, $2.1 million, is also included.

Table 4. Ongoing Costs of the Arena (millions of 2014 dollars)

Agency	5/18 Estimates	10/6 Revisions	11/9 Revisions
City Operating Costs			
SFMTA	$5.5	$5.1	$6.9
SFPD	$0.9	$0.9	$1.0
DPW	$0.2	$0.2	$0.1
Sub-Total	$6.6	$6.2	$8.0
Payments for Capital Improvements			$2.1
Total	$6.6	$6.2	$10.1

Source: Golden State Warriors Arena: Event Management OCII Commission Presentation, May 18, 2015, and MTA, October 6, 2015.
Nov. 6, 2015 from Budget and Legislative Analyst report.

– Net Benefits

The project comes with considerable costs and benefits. Both upfront net costs and ongoing net revenues are considerable. The benefits presented here are significantly less than

[10]This figure is the difference between $55.3 million, the total estimated capital uses estimate allocated to the project, and the total one-time revenues from the Budget and Legislative Analysts' report ($25.4).

[11]City Operating Costs in the first two columns are net of revenues from fares and parking from riders going to events at the arena. These revenues amount to approximately $1.8 million, split roughly evenly between the two sources. They are included in the final column because we support the notion of making both revenues and expenditures clear.

those discussed elsewhere. This is because the analysis here is limited to the direct benefits associated with the project and omits revenues accruing to dedicated and protected accounts. It is our view that the initial fiscal impact study inappropriately included those extra revenues. Their inclusion not only projects a false impression of the overall benefit of the project, but fails to highlight the budget obligations that befall the City's General Fund should costs rise or revenues fall short.

Table 5 summarizes the net benefits associated with the project in terms of net contributions to the City's General Fund. The table illustrates the $29.9 million hole that the project introduces into the General Fund. It also illustrates how slowly that hole would be filled. Although a surplus of $1.5 million is projected in each year, that includes debt servicing. Without the debt servicing, the surplus would be $3.6 million, which would still take in excess of eight years to fill the hole.

Table 5. Net Benefits of GSW Event Center Project (Millions of 2014 dollars)

	Benefits	Costs	Net Benefits
One-Time	$25.4	$55.3	−$29.9
Ongoing	$11.6	$10.1	$1.5

Source: Calculations by Marin Economic Consulting.

It is important to note that the annual surplus is just $1.5 million, or 13% of projected General Fund revenues. This is a relatively slim margin. Should one-fourth of the projected spectators fail to materialize, the surplus is likely to evaporate. If spectators fail to materialize, the revenues associated with the project (stadium admissions taxes and transit fares and parking, in particular) decline accordingly. However, the costs associated with managing the events do not. Should the number of events be lower, costs would then also decline.

It is also important to note that any last minute concessions by the City in terms of the Stadium Admissions Tax could eliminate the surplus in its entirety rendering a discussion of inaccuracies in spectator forecasts or economic activity unnecessary with regard to whether or not the General Fund is likely to be in surplus or deficit. The Giants currently enjoy a reduced stadium admissions tax that should the Warriors be granted a similar concession would turn the small surplus into a deficit.

A Cash Flow Analysis

In order to assess the rate at which the hole would be filled, a cash flow analysis is required. It is our view that the original EPS report was incomplete in not considering the implications of the project over time. It failed to provide a comparison of overall costs and benefits

associated with the GSW project. The reviewer, Keyser Marston Associates, appeared to agree with the EPS approach, saying that a "cash flow approach is appropriate to evaluate a multi-phase project, which does not apply to this project." We respectfully disagree. There are two stages to this project: first, the one-time infrastructure investments and revenue implications of construction and parcel purchase, and second, the ongoing costs and revenues. The project's benefits to the City come inherently in two stages. If both stages yielded a net benefit, the need for a cash flow approach would not be nearly as acute. As the first stage is significantly negative, the overall net benefits must be evaluated over time in order to properly evaluate the project.

This has not been publicly done. Here, we consider a 20-year period following the construction of the Event Center. Given that many of these revenues accrue many years in the future, it is necessary to discount them to today's dollars. The bottom line is the present discounted value of the net stream of revenues to the City of San Francisco.

Assumptions crucial to the present value discount calculation:

1. Discount Rate: 4.5%
2. Rate of inflation: 2.5% (2% for property taxes, as per Proposition 13)

Table 6 provides an estimate of the present discounted value of net revenues to the City of San Francisco, using estimates from the EPS report of September 25, 2015 and from documents from the City of San Francisco. Once the facility has been operating for 20 years, net present discounted revenues are expected to be on the order of $22.1 million, or approximately $1 million per year over a 22-year period including two years of construction and 20 years of operation.[12] This estimate includes the upfront expenses incurred by the City as well as the ongoing expenses associated with event traffic mitigation.

Table 6. Net Benefits of GSW Event Center Project over 22 years (Millions of Present Discounted 2014 dollars)

	Benefits	Costs	Net Benefits
One-Time	$25.4	$55.3	−$29.9
Financed			$29.9
Ongoing	$181.4	$159.4	$22.1
Total	$206.8	$214.7	$22.1

Source: Calculations by Marin Economic Consulting.

[12]This differs from the $1.5 million per year surplus in the Budget Analyst's report because the values are presented in discounted value terms.

The project pencils out as estimated, but with a net benefit over two decades that is unimpressive. Additionally, this calculus begs two important questions:

1. This is a 12-acre plot of land in the middle of a biotechnology hub. Are there better uses for this land from a revenue perspective?
2. Estimating the costs associated with event management is a more certain endeavor than estimating the benefits. How certain is it that the benefits will materialize?

For a project of this magnitude, it is vitally important to evaluate the potential for plausible alternatives to provide more benefits than the project in question. It is also important to consider robustness tests for the revenues in question. Neither of these issues has been publicly addressed. This report will present plausible revenues associated with an alternative development, a space designed with biotech in mind, and will discuss weak points in the revenue estimates presented above.

3: On the Economics of Biotech as an Alternative

When evaluating the benefits of an economic endeavor, an exploration of alternatives is vital to understanding the full implications of an investment. Suppose that instead of building a 750,000-square-foot arena, the amount of commercial space on the property were doubled. In this section, we consider such an investment following as closely as possible the assumptions contained in the EPS estimate of revenues associated with the GSW project.

Important assumptions associated with this analysis include:[13]

1. Instead of a 750,000-square-foot arena, a commercial facility is constructed that provides 522,000 square feet of space. This constitutes an exact doubling of the commercial space in the GSW plan. This alternative development is otherwise comparable to the Warriors plan, including the original commercial, retail, and parking structures.
2. The space is designed with biotechnology in mind, which brings with it significant laboratory space. As such, it has a relatively high amount of space per worker associated with it: 250 square feet per employee.[14]

[13] It was previously assumed that a commercial facility would have ancillary benefits in terms of indirect and induced economic activity in San Francisco. Consistent with the BLA memo, we have omitted these benefits from the analysis.

[14] This is an extremely conservative assumption. Some estimates suggest that a ratio of 150 to 11 is possible. This would considerably increase employment and hence output at the site, increasing the resulting income to both City residents and City coffers.

3. The transaction price for the land is $150 million.[15]

4. It is assumed that just two-thirds of the biotech revenues generated onsite are subject to gross receipts taxation in San Francisco.[16]

With the addition of these assumptions, an exercise similar to that undertaken by EPS is performed for the new development. The new development includes the same retail revenues and costs, the same parking revenues, and essentially double the revenues associated with commercial development. Doubling the office space and maintaining other assets leads to an assessed value of at least $605.5 million. This is considerably less than the project's assessed value with an arena.

Support for the notion that this construction is feasible comes not only from the 750,000-square-foot arena that the buildings will be replacing, but also from a similar planned development. UCSF was planning to build 500,000 square feet on four acres of blocks 33-34, right next to the site.[17] A new building of the size being considered is clearly feasible on the space currently to be occupied by the arena.

Table 7 presents a comparison of the one-time revenues and expenditures associated with the Event Center versus doubling the commercial space on the 12-acre property. While the Event Center brings with it a need for considerable infrastructure to accommodate the development, it is not clear that a doubling of the commercial space does. Accordingly, the Event Center brings with it a net upfront cost of $38.5 million, relative to a commercial facility in place of the Center.

Although capital expenditures related to the Event Center are significantly higher than the revenues brought in through the TIDF, such is not expected to be the case for additional commercial space. The TIDF was put in place with developments such as this alternative in mind. Therefore, the transit costs associated with the development are better approximated using the TIDF taxation formula. The TIDF collected from the hypothetical alternative development (including the commercial, retail and parking in the GSW project) will serve as our estimate of related transit costs, $10,901.

In the analysis above, the sales price for the property on which the event center and accompanying commercial and retail structures will be built is $150 million. Property transfer tax would result regardless of the purchaser and the end use, but conceivably at a higher price.

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[15]The actual transaction price has been announced as $150 million. San Francisco Times, **Warriors buy Mission Bay arena site from Salesforce**, 10/13/2015. This will result in differences in the values presented here and in the EPS report.

[16]There are several avenues through which revenues may be exempt from gross receipts taxes in San Francisco. This analysis is extremely conservative in assuming that this is more likely the case for biotechnology firms (perhaps because of significant revenues accruing through pass-through companies) than for firms in other industries.

[17]**UCSF, Salesforce in talks for S.F. Mission Bay land deal**, SFGate, March 15, 2014.

Table 7. Summary of One-Time Revenues from Development
(Thousands of 2014 Dollars)

Category	Biotech	GSW Arena	Difference
Property Transfer Tax	3,651	3,651	0
City Fees - TIDF	10,902	17,436	-6,534
Construction			
- Sales Taxes	1,617	1,352	-265
- Gross Receipts Taxes	2,028	2,953	-925
Total	19,461	25,392	-5,931
One-Time Expenses Associated with Development			
Infrastructure Improvements	10,901	55,308	-44,407
Net One-Time Revenues Associated with Development			
Immediate Net Revenue Impact	8,560	-29,916	38,476

Source: BLA Report (11/9/15) and calculations by Marin Economic Consulting.

Salesforce originally paid $278 million dollars for 14 acres (including the space in question) in 2010. The actual sales price was $150 million for 12 acres. The plot of land in question represents the majority of the plot originally purchased by Salesforce, and is the largest single contiguous piece. Property values have also increased substantially since the original purchase by Salesforce.[18] It seems likely then that the value of the land would have increased significantly over the last five years as San Francisco is currently starved for commercial real estate. In the end, the price that the Warriors have paid for the land is surprisingly low. It represents the bulk of a property that was valued at $278 million in 2010 and market values have only increased in the intervening years. Therefore, the actual market value of the land may well be higher than the price the Warriors have been offered and have paid, with correspondingly higher transfer taxes resulting from some alternative development.

Table 8 provides an analysis of the annual City revenues and expenses that can be attributed to each of the projects.[19] The first column is for the alternative development which targets the biotechnology industry.[20] The second column reflects estimates regarding the current Golden State Warriors project, and the final column presents the difference in expected revenue between the two.

[18] **Salesforce.com Is Said to Plan Sale of San Francisco Land**, Bloomberg Business, March 11, 2014.

[19] This alternative is chosen because it will allow the use of most of the EPS parameters and assumptions in producing annual revenues for the alternative project. See the Appendix to the first version of this report for a comparison of calculations between this project and the EPS report.

[20] The City seems to have performed its own analysis of a 100% commercial alternative. This can be found on page 1 of **Warriors Handout Sierra Club 11.17.15.pdf**. The estimates presented here are somewhat higher, in particular for sales taxes. This is in part because they eliminated retail in their estimates. Overall, the estimate here is just $737 thousand more than in the City's estimates.

Table 8. Summary of Annual Revenues and Expenses (in Thousands of 2014 Dollars)

Category	Biotech	GSW Arena	Difference
Annual Direct General Revenue			
Property Tax (General Fund)	$603	$912	-$309
Property Tax in Lieu of VLF	$570	$868	-$298
Sales Tax	$253	$521	-$268
Parking Tax	$243	$482	-$239
Stadium Admission Tax	$0	$4,336	-$4,336
Gross Receipts Tax	$4,078	$2,431	$1,647
Utility User Tax	$249	$254	-$5
Transit Related	$0	$1,773	-$1,773
Total Annual Revenues	$5,996	$11,577	-$5,581
Annual Development-Related Expenses			
SFMTA	$0	$6,912	-$6,912
SFPD	$0	$952	-$952
DPW	$0	$95	-$95
Debt Service	$0	$2,123	-$2,123
Total Annual Expenses	$0	$10,082	-$10,082
Annual Net Revenues	$5,996	$1,495	$4,501

Source: BLA Report and calculations by Marin Economic Consulting.

In most categories, the annual revenues are greater for the Event Center than for a development with additional commercial space. The exception is in the Gross Receipts Taxes, where a biotech firm occupies the additional commercial space. Taken as a whole, annual revenues from a purely commercial development are $5.6 million less than for the project under consideration. Accounting for expenses related to the different projects, the commercial development results in $4.5 million more in General Fund revenues annually than would the arena (last line of Table 8). From a net revenue perspective, a commercial development clearly dominates the construction of the Event Center.

As discussed above, merely calculating the one-time costs and an estimate of the ongoing revenue is insufficient. Were it sufficient, a commercial project focused on biotech would clearly dominate the current project. Table 9 provides an evaluation of the 22-year net benefits of an alternative development with space devoted to biotechnology comparable to the evaluation for the current project.[21]

According to these calculations, an alternative development would provide an extra $80.2 million in revenues for the City of San Francisco (as in Table 10). Net present discounted

[21]Net one-time benefits for the GSW project are zero, which follows the assumption that the deficit brought on by infrastructure developments will be financed. The debt service payments are incorporated in the ongoing net benefits line.

Table 9. Net Benefits of Alternative Developments after 22 Years
(Millions of Present Discounted 2014 Dollars)

	Biotechnology		Net Benefits		
	Benefits	Costs	Biotech	GSW	Difference
One-Time	$19.5	$10.9	$8.6	$0.0	$8.6
Ongoing	$93.7	$0.0	$93.7	$22.1	$71.7
Total	$113.2	$10.9	$102.3	$22.1	$80.2

Source: Calculations by Marin Economic Consulting

revenues for the project with an Event Center are $22.1 million, while a project with commercial space devoted to attracting biotechnology firms has a discounted value of net revenues expected to be $102.3 million, a difference of $80.2 million dollars, or an additional $3.6 million each year on average over the 22 years.

From a cash flow perspective, there is a deep hole early on with the Event Center. The first three columns of Table 10 present annual present discounted flows of revenues into San Francisco City coffers. The second set of three columns provide a cash flow, or cumulative contribution to City coffers. The final column indicates the annual cash flow position of the City were it to cover the deficit without financing. Several things are immediately apparent from the table:

1. The Event Center puts an enormous hole in the City's budget in the first year (row 1, last column).
2. It will take *ten* years of operation of the Event Center to dig the City out of the hole (last column).
3. Substituting a commercial development is cash flow positive in the first year (row 3, column 4).
4. Although the gap in annual discounted net revenue closes over time, it remains significant even in year 20 (last row, column 4).
5. In year 20 of Event Center operations, there remains a surplus of revenue in the amount of $80.2 million for the biotechnology development (last row, column 7), which continues to grow in subsequent years.

A final issue that differentiates a biotechnology-centric development over an arena is one of economic impact. It is clear from the economics literature that sports stadiums and arenas provide little economic boost to the local economy. At the same time, it is clear that these facilities are responsible for generating some local economic activity. The failure to

Table 10. Stream of Net Revenues over Time
(Thousands of 2014 Discounted Dollars)

	Annual			Cumulative			GSW Balance
Year	Biotech	GSW	Difference	Biotech	GSW	Difference	w/o Financing
One-Time Net Revenues:							
2016	$8,559	$0	$8,560	$8,559	$0	$8,560	-$29,908
Start of On-Going Revenues:							
2017	$5,642	$1,386	$4,256	$14,201	$1,386	$12,815	-$26,519
2018	$5,529	$1,352	$4,177	$19,730	$2,738	$16,993	-$23,202
2019	$5,418	$1,318	$4,100	$25,148	$4,056	$21,092	-$19,956
2020	$5,309	$1,286	$4,024	$30,458	$5,342	$25,116	-$16,780
2021	$5,203	$1,254	$3,949	$35,660	$6,595	$29,065	-$13,672
2022	$5,099	$1,222	$3,876	$40,759	$7,817	$32,942	-$10,631
2023	$4,996	$1,192	$3,804	$45,755	$9,009	$36,746	-$7,655
2024	$4,896	$1,162	$3,734	$50,652	$10,172	$40,480	-$4,742
2025	$4,798	$1,133	$3,665	$55,450	$11,305	$44,145	-$1,893
2026	$4,702	$1,105	$3,597	$60,152	$12,410	$47,742	$896
2027	$4,608	$1,078	$3,530	$64,760	$13,488	$51,272	$3,625
2028	$4,516	$1,051	$3,465	$69,275	$14,539	$54,737	$6,296
2029	$4,425	$1,025	$3,400	$73,700	$15,563	$58,137	$8,909
2030	$4,336	$999	$3,337	$78,037	$16,562	$61,474	$11,466
2031	$4,250	$974	$3,276	$82,286	$17,536	$64,750	$13,969
2032	$4,165	$950	$3,215	$86,451	$18,486	$67,965	$16,418
2033	$4,081	$926	$3,155	$90,532	$19,412	$71,120	$18,815
2034	$4,000	$903	$3,097	$94,532	$20,315	$74,216	$21,161
2035	$3,920	$881	$3,039	$98,452	$21,196	$77,256	$23,456
Year 20 of Event Center operation:							
2036	$3,841	$859	$2,983	$102,293	$22,055	$80,238	$25,702

Source: Marin Economic Consulting

add to a region's economy is because they tend to displace other entertainment purchases from the broader economy rather than to stimulate new spending. An individual may go to a basketball game instead of to a play, opera, symphony, or rock concert. These facilities are therefore not additive to the economy.

Nonetheless, it has been estimated that economic activity associated with Oracle Arena accounts for $44.9 million in economic Activity and 494 jobs in Alameda County.[22] It seems likely that the impact of the new arena will be of a similar magnitude.

By comparison, a 522,000 square foot biotechnology facility, with a ratio of space to employee of 250 to 1 can accommodate more than 2,000 employees. That represents four times more employment for biotechnology than for the Event Center It is also consistent

[22]Memo to Patrick Soluri, Attorney at Law, from Philip King, Ph.D., regarding Urban Decay Analysis of Proposed Relocation of Golden State Warriors from Oakland to San Francisco, page 9.

with an estimate of economic output on the order of $1 billion, an order of magnitude higher than for the Arena. Accordingly, the biotechnology development can serve as a much more significant engine of economic growth for the region than can the new event center.

4: Questioning the Benefits and Costs of the GSW Project

There are few guarantees with economic endeavors. Assuming that the conditions that exist today will exist tomorrow, the day after that, or 20 years from now is of dubious merit. Conditions change. The level of success of a basketball team ebbs and flows (though hopefully not for the Warriors), the economy grows and shrinks, and modes of transportation change.

This certainly holds true for the construction of an arena. While it is quite likely that the Warriors will play at the arena for the foreseeable future and experience a high level of success for some time, it is not certain that the estimated revenues will materialize. As a case in point, the EPS study assumes a sales price for the land of $172,546,000. The actual sales price was $150,000,000. That represents a reduction in sales price of 13%, with a corresponding reduction in revenues that are tied to the sales price: transfer taxes and ongoing property taxes. Although the long-term implications of a decline in ongoing property taxes is likely small, the transfer tax is reduced from $4.2 million to $3.65 million, a reduction in one-time revenues of $549,000. Granted, this is just one percent of the one-time transit costs associated with the project, but it is more than half a million dollars no longer available for other city needs.

Of the sources of General Fund revenue, only two are relatively secure. Property taxes and utility user taxes are both likely to materialize in the projected amounts, securing only about $2 million out of $11.5. The gross receipts taxes are highly dependent on the occupants of the commercial facilities and all of the other sources are dependent on numbers of and the behavior of event attendees.

Most important assumptions regarding both revenues and costs surround the number of event attendees and their mode of transportation. If they drive, walk, or ride bikes more often than is anticipated, transit revenues will fall. If ride sharing or autonomous vehicles take over, parking revenue will fall. If attendees fail to materialize, then both revenues from transit and other sources will fall. Whether or not costs do is an open question. Costs are related to numbers of events, so if there are fewer events, costs may also fall.

The City also has a history of relaxing stadium admissions taxes. From the general City code, tickets to Giants games are granted an exemption. Whereas most tickets to a Giants game would be subject to a stadium admissions tax of $1.50, they are currently taxed at $0.25 per ticket. Were such an exemption to be granted to the Warriors, General Fund revenues would decline by $2 each, or approximately $1.5 million. Such an act would wipe out the General Fund surplus. Were the exception granted to all events at the Event Center, that would reduce revenues by $3.6 million.

The point of this discussion is that estimated revenues are suspect, while estimated costs are much more likely accurate. Fixed investments, in particular, are known and not subject to market whims. However in this case, there are unknowns lurking in the cost estimates. It is likely that the revenue implications are biased high, resulting in uncertainty over their future stream with more downside risk than upside. It is already the case that actual one-time revenues have turned out to be less than anticipated (such as the transfer tax, which was lower by $549,000). Clearly, there is great uncertainty in almost all of these estimates.

5: Some Sensitivity Analysis

The revenue estimates relating to the GSW project and the revenue estimates relating to a biotechnology center are both uncertain. It is therefore worthwhile to experiment with basic assumptions to better understand the implications for City revenues. Table 11 offers some evidence for the implications of particular assumptions. We provide three separate alternatives that relax in different ways the assumptions inherent in the baseline analysis. The top line of the table presents the baseline results of the analysis, the estimates of present discounted net revenues accruing to the City (corresponding to the last row in Table 8). In the case of the biotechnology development net present discounted revenues are $102.3 million whereas they are just $22.1 million for the GSW project, a difference of $80.2 million.

The first alternative assumes a greater density of employment in the new commercial facility, leaving the existing commercial plans constant. If there are 200 square feet per employee, rather than 250, revenues associated with the new facility increase by more than $8.2 million relative to the baseline. This increase in revenue stems largely from an increase in the output produced by the building's occupants, resulting in increased gross receipts tax revenues. Further reducing the space per employee will have correspondingly larger increases in revenues.

A second alternative assumes a larger facility is constructed, with 722,000 square feet of space rather than 522,000 square feet of space. This increases the number of employees

Table 11. Summary of Net Present Discounted Value Associated with Alternatives (22 Years, 2015-2036) Comparing the Multi-Purpose Venue with a Biotechnology Center (Millions)

Item	Biotech	GSW	Difference Over 22 Years	Difference Per Year
Baseline	$102.3	$22.1	$80.2	$3.6
Alternative 1	$110.6	$22.1	$88.4	$4.0
- Area to employee ratio for Biotech of 200/1		$Over Baseline$:	$8.2	
Alternative 2	$116.5	$22.1	$94.3	$4.3
- Add 200,000 sq ft to New Commercial Space		$Over Baseline$:	$14.0	
Alternative 3 (Extreme)	$185.3	$22.1	$163.2	$7.4
- Area to employee ratio for Biotech of 150/1		$Over Baseline$:	$83.0	
- 100% of Biotech revenues are subject to GRT				
- Add 200,000 sq ft to New Commercial Space				

Source: Marin Economic Consulting

working in the space by nearly 40%, maintaining the assumption of 250 square feet per employee. With greater space comes increased employment and increased output. Accordingly, revenues are estimated to increase by $14.0 million with an expanded space. Under this scenario, the net discounted value of City revenues increases by $94.3 million relative to the GSW project. Even larger spaces would have a correspondingly larger impact on City revenues.

Finally, an extreme alternative is offered. Alternative 4 allows for a 150 to 1 ratio of square feet to employees, assumes that all of the revenues accruing to the biotech occupants are subject to the GRT, and involves a building with 722,000 square feet. Under this alternative, City revenues increase by $83.0 million relative to the baseline, with biotechnology revenues exceeding GSW revenues by $163.2 million over 22 years and $7.4 million per year.

These alternatives are not put forward to suggest that there is $163.2 million being left on the table (though there may be), but rather to illustrate the range of differences that underlying assumptions can make. At the same time, even the extreme alternative is plausible.

6: Re-Evaluating the Net Benefits of Hosting the Warriors

There are two fundamental points made in this report:

1. Estimates of costs and revenues are highly speculative, and the evidence suggests that there is more downside risk to the GSW project than upside.
2. There is significant revenue that is forgone by the City in order to bring the Warriors to town.

Both of these points raise significant questions about the Warriors arena project from a financial perspective. First, how comfortable are taxpayers in their understanding of the implications of this development? Second, is this the right development?

The respective answers are "not very" and "quite possibly no." There is uncertainty in the information available and replacing the Event Center in the project with additional commercial space has the potential to increase City revenues significantly.

Another way of thinking about the differences in revenues between the GSW project and a biotechnology development is that these differences reflect the price the City is paying in order to bring the Warriors to town. There are certainly other more tangible costs, but these costs are also real.

The above analysis indicates that even with relatively conservative assumptions, in particular those regarding employment in the new development and the size of the new development, a biotechnology center would increase City revenues significantly relative to the Event Center. Under the baseline scenario, the difference is $80.2 million over 22 years. Under the most extreme, yet plausible, scenario presented, an additional $163 million could be raised over the 22-year period. This analysis suggests that the citizens of San Francisco, through lower levels of revenue in the City's General Fund, are paying between $3.6 and $7.4 million per year to host the Warriors.

Every economic development represents a choice. That choice is between the proposed development and plausible alternatives. The City has chosen to pursue a basketball team without exploring or disclosing the relative merits of the project compared with plausible alternatives. This report is not designed to condemn the choice, but rather to better inform the debate on the implications of this choice.

Aside from foregone revenue, it is quite possible that the GSW project could require additional General Fund expenditures. The ordinance establishing the Mission Bay Transportation Improvement Fund spells out shares of GSW revenues that are to be spent on transportation, including a cap of 90% of estimated revenues directly associated with the project. This would appear to guarantee that the General Fund will be increased by at least 10% of revenues from the project. The ordinance has even been amended to indicate that if SFMTA's expenses exceed the revenues from the Warriors project, "□ [I]f the revenue cap

is insufficient to cover SFMTA s expenditures for transportation services to the Warriors Project, then the Warriors will be responsible to provide additional transportation services to comply with EIR mitigation measures TR-2b and TR-18. (Nov. 9 staff report, p. 10). It is not clear the extent to which this language obligates GSW to do anything other than work with the City to pursue one or more of a list of strategies. This language is not necessarily strong enough to ensure that future shortfalls will not occur.

This provision appears to be a guarantee that the General Fund will at worst be left whole. However, this amendment applies only to the SFMTA expenditures. There are other expenditures, including police, DPW, and debt servicing that are not covered by this amendment. If it does happen that SFMTA's expenses exceed revenues from the Warriors project, the City's General Fund will still be responsible for these expenses, which amount to $3.2 million. In a year where SFMTA expenses are high and revenues are low, the existence of the Event Center will result in the balance of the General Fund being reduced by $3.2 million, with correspondingly fewer general services provided by the City to its residents.

> **Important note:** If it is ever the case that revenues are less than SFMTA expenses, it will necessarily be the case that the General Fund will run a deficit of between $2.1 and $3.2 million. The requirement that the Warriors provide transit services in this case does *nothing* to cover these other Event Center related obligations.[23]

In the ordinance, the City has also made a commitment to ameliorate any remaining congestion issues related to the functioning of the hospital at UCSF. Remaining congestion issues and any sense of their cost are significant unknowns. Should they be significant, this would represent another financial obligation of the City's General Fund.

There has also been language used that indicates that there is no public subsidy of the Arena. In announcing the deal, Warriors COO Rick Welts said:

> "We're the only sports team in America doing this all w/ private funds, on private land, with *no public subsidy*." (Italics added.)

This is simply not true. Any economic activity coming to the City will generate revenues. Some of these revenues, from the TIDF, for instance, are expected to support the activity. The remaining revenues are expected to supplement the services provided by the City to its residents. In the case of the GSW project, $25.4 million in one-time revenues and $10.1 million in revenues in each subsequent year will be spent to facilitate the Event Center. These funds represent a clear and present public subsidy of the project.

[23] Confirmed with the Budget and Legislative Analyst's office, 11/24/15.

EXHIBIT 5

Osha Meserve

From: Public Records <PublicRecords@baaqmd.gov>
Sent: Monday, November 16, 2015 5:37 PM
To: osha@semlawyers.com
Subject: PRA Request
Attachments: N007359_REP01 Mission Bay NOA sample.pdf; N007358_REP01 Mission Bay NOA sample 2.pdf

Good evening,

Attached are the lab reports. In speaking with the supervisor there are no additional reports. Your request is not considered closed.

Rochelle Reed
Public Records Coordinator
415-749-4784
Publicrecords@baaqmd.gov

Bulk Asbestos Material Analysis

(Air Resources Board Method 435, June 6, 1991)

Bay Area Air Quality Mgmt. District
Project Manager

939 Ellis St
San Francisco, CA 94109

Client ID: 2763
Report Number: N007359
Date Received: 08/06/15
Date Analyzed: 08/07/15
Date Printed: 08/07/15

Job ID/Site: Pump Station #5, 16th St. + Terry Francois Blvd.

PLM Report Number: N/A

FALI Job ID: 2763
Total Samples Submitted: 1
Total Samples Analyzed: 1

Sample Preparation and Analysis:

Samples were analyzed by the Air Resources Board's Method 435, Determination of Asbestos Content of Serpentine Aggregate. Samples were ground to 200 particle size in the laboratory. Approximately 1 pint was retained for analysis. Samples were prepared for observation according to the guidelines of Exception I and Exception II as defined by the 435 Method. Samples which contained less than 10% asbestos were prepared for observation according to the point count technique as defined by the 435 Method. This analysis was performed with a standard cross-hair reticle.

Sample ID	Lab Number	Layer Description
1	11671293	**Grey/Green Stones**

Point Count Results:

Number of asbestos points counted:	15
Number of non-empty points:	400
Matrix percentage of entire	100
Percent asbestos in matrix:	**3.8**
Visual estimation percentage:	2.0
Asbestos type(s) detected:	Chrysotile

Comment:

Tad Thrower

Tad Thrower, Laboratory Supervisor, Hayward Laboratory

Note: Limit of Quantification (LOQ) = 0.25%. Trace denotes the presence of asbestos below the LOQ. ND = None Detected.

3777 Depot Road, Suite 409, Hayward, CA 94545 / Telephone: (510) 887-8828 (800) 827-FASI / Fax: (510) 887-4218

Bulk Asbestos Material Analysis

(Air Resources Board Method 435, June 6, 1991)

Bay Area Air Quality Mgmt. District
Project Manager

939 Ellis St
San Francisco, CA 94109

Client ID: 2763
Report Number: N007358
Date Received: 08/06/15
Date Analyzed: 08/07/15
Date Printed: 08/07/15

Job ID/Site: Mission Bay Development Group Property Stockpile, 16th St. + Terry Francois Blvd.

PLM Report Number: N/A

FALI Job ID: 2763
Total Samples Submitted: 1
Total Samples Analyzed: 1

Sample Preparation and Analysis:

Samples were analyzed by the Air Resources Board's Method 435, Determination of Asbestos Content of Serpentine Aggregate. Samples were ground to 200 particle size in the laboratory. Approximately 1 pint was retained for analysis. Samples were prepared for observation according to the guidelines of Exception I and Exception II as defined by the 435 Method. Samples which contained less than 10% asbestos were prepared for observation according to the point count technique as defined by the 435 Method. This analysis was performed with a standard cross-hair reticle.

Sample ID	Lab Number	Layer Description
1	11671292	**Grey/Green Stone**

Point Count Results:

Number of asbestos points counted:	13
Number of non-empty points:	400
Matrix percentage of entire	100
Percent asbestos in matrix:	**3.3**
Visual estimation percentage:	2.0
Asbestos type(s) detected:	Chrysotile

Comment:

Tad Thrower

Tad Thrower, Laboratory Supervisor, Hayward Laboratory

Note: Limit of Quantification (LOQ) = 0.25%. Trace denotes the presence of asbestos below the LOQ. ND = None Detected.

3777 Depot Road, Suite 409, Hayward, CA 94545 / Telephone: (510) 887-8828 (800) 827-FASI / Fax: (510) 887-4218

EXHIBIT 7

Osha Meserve

From: Prowell, Cheryl@Waterboards <Cheryl.Prowell@waterboards.ca.gov>
Sent: Monday, November 23, 2015 9:44 AM
To: Meserve, Osha@semlawyers.com
Cc: Lee, Randy@Waterboards; Hill, Stephen@Waterboards; Pettijohn, Julie@DTSC; Toth, Karen@DTSC
Subject: RE: Status of Mission Bay Wastes

Osha,

Thank you for your email. We have been looking into the issues that you have raised. Randy Lee is working to get the regular monitoring reports documenting compliance with the Risk Management Plan uploaded to our GeoTracker database. I anticipate that these reports will address the majority of your concerns. We will give you a more detailed answer once these reports are publically available.

Cheryl

From: Osha Meserve [mailto:osha@semlawyers.com]
Sent: Friday, November 20, 2015 4:33 PM
To: Prowell, Cheryl@Waterboards
Cc: Lee, Randy@Waterboards; Hill, Stephen@Waterboards; Pettijohn, Julie@DTSC; Toth, Karen@DTSC
Subject: Status of Mission Bay Wastes

Hi Cheryl,
It has come to my attention that the piles of asbestos containing fill have been moved from the proposed Warrior's arena site, and possibly transported to a landfill or to a property immediately northeast. We respectfully request information regarding the tracking of the staged wastes at, and between, sites (including the Warriors site) within the Mission Bay Development area.

The documented asbestos containing materials are required to have a specific Asbestos Dust Management Plan before it is disturbed (ADMP). It is not clear to us that the development activities have been completing and following these plans. In particular, we further request evidence that this was created and applied to the recent asbestos contaminated soil removal activities.

In addition to the ADMP, we request documentation that a site mitigation plan for the hazardous materials was created and applied to the site for the prior remedial activities, the staged soil management, and the recent removal action. We also request a copy of the Site Specific Health and Safety Plan (SSHSP) that should have been completed for these three same site activities, as well as evidence that this was submitted to DPH. It appears that the SSHSP is only for the excavation of the foundation of the proposed buildings and not for the staged soils.

We also again request that the stormwater Best Management Practices be appropriately applied to, and maintained on, Terry François Boulevard. The stormwater drains remain clogged with soil, and the BMPs damaged, including the 'Protect the Bay' placards, on the western side of the street along the site.

Thank you,
Osha

Osha R. Meserve

Soluri Meserve
1010 F Street, Suite 100
Sacramento, CA 95814

☎ *tel:* 916.455.7300 ▪ 🖷 *fax:* 916.244.7300 ▪  *mobile:* 916.425.9914 ▪ ✉ *email:* osha@semlawyers.com