RE: Notice of Availability: Fountain Alley Mixed-Use Project SEIR

Matthew Sasaki <MSasaki@valleywater.org>

Tue 8/2/2022 4:47 PM

To: Hawkins, Kara <Kara.Hawkins@sanjoseca.gov>

Hi Kara,

Comment A.1

The Santa Clara Valley Water District (Valley Water) has received the Notice of Availability of a Supplemental Environmental Impact Report (SEIR) for the proposed Fountain Alley Mixed-Use Project located along Second Street, between East Santa Clara Street and West San Fernando Street, on June 17, 2022.

In our review of the Notice of Preparation for this SEIR, Valley Water commented that a Water Supply Assessment (WSA) would be required, based on the revised number of residential dwelling units and the square footage of office space being proposed for the project. A copy of the WSA was not included as part of this SEIR. The City of San Jose will need to request that the San Jose Water Company prepare a WSA consistent with the requirements of SB610.

Comment A.2

Walley Water agrees with the recommendations made in the Geotechnical Investigation report prepared by Langan Engineering and Environmental Services for the Fountain Alley project with regards to waterproofing the basement walls and foundation. Valley Water further recommends that the waterproofing be designed in such a way that avoids the need for permanent dewatering. Valley Water also recommends that a detailed analysis of construction dewatering be conducted, including estimating dewatering volumes/durations and evaluating related impacts. A construction dewatering system should be designed such that the volume and duration of dewatering are minimized to the greatest extent possible.

Comment A.3

Valley Water does not have any right of way or facilities at the project site; therefore, in accordance with Valley Water's Water Resources Protection Ordinance, a Valley water encroachment permit is not required for the proposed improvements.

Comment A.4

The San Francisco Bay Regional Water Quality Control Board Municipal Regional Permit (MRP) was re-issued on 05/11/2022 and became effective on 07/01/2022. Page 58 of the Initial Study should be revised to reference the current MRP.

We appreciate the opportunity to comment on the SEIR document. Please let me know if you have any questions.

Thank you,

Matt Sasaki

Community Projects Review Unit
(408) 630-3776

From: Hawkins, Kara <Kara.Hawkins@sanjoseca.gov>
Sent: Friday, June 17, 2022 7:03 PM
Subject: Notice of Availability: Fountain Alley Mixed-Use Project SEIR

NOTICE OF AVAILABILITY OF
A DRAFT SUPPLEMENAL ENVIRONMENTAL IMPACT REPORT (EIR)
AND PUBLIC COMMENT PERIOD

A Draft Supplemental Environmental Impact Report (Draft SEIR) for the Fountain Alley Mixed-Use Project is available for public review.

Project Description: The 1.25-acre project site is currently developed with a surface-level parking lot and is listed as a non-contributing parcel within the San José Downtown Commercial Historic District. The project proposed to construct a 21-story curvilinear mixed-use building with up to 194 dwelling units, approximately 31,959 square feet of ground floor retail, and 405,924 square feet of office space. The building would have a maximum height of 267 feet to the top of the roof and 289 feet to the top of the mechanical penthouse. Parking would be provided in a four-level, below-grade parking garage containing up to 292 parking stalls. As proposed, construction would take place six days a week, Monday through Saturday, (7:00 AM to 10:00 PM Mondays through Fridays; 7:00 AM to 7:00 PM on Saturdays) for approximately 34 months.

Location: West of Second Street, between East Santa Clara Street and West San Fernando Street, in the Fountain Alley area of downtown San José. (Assessor Parcel Number [APN] 467-22-121).
Council District: 3

File Nos.: H20-037/ER20-242

The proposed project will have potentially significant environmental effects with regard to air quality, biological, cultural resources (historic and archeological resources), hazardous materials, and noise. The California Environmental Quality Act (CEQA) requires this notice to disclose whether any listed toxic sites are present at the project location. The project location is not included on a list of hazardous materials sites compiled pursuant to Government Code Section 65962.5.

The Draft EIR and documents referenced in the Draft EIR are available for review online at the City of San José's "Active EIRs" website at www.sanjoseca.gov/activeeirs and are also available at the following locations:

Department of Planning, Building,
and Code Enforcement
200 East Santa Clara St., 3rd Floor
San José, CA 95113
(408) 535-3555

Dr. MLK Jr. Main Library
150 E. San Fernando St.,
San José, CA 95112
(408) 277-4822

The public review period for this Draft EIR begins on **June 17, 2022 and ends on August 2, 2022.** Written comments must be received at the Planning Department by 5:00 p.m. on August 2, 2022, in order to be addressed as part of the formal EIR review process. Comments and questions should be referred to Kara Hawkins in the Department of Planning, Building and Code Enforcement at 408-535-7852, via e-mail: Kara.Hawkins@sanjoseca.gov or by regular mail at the mailing address listed for the Department of Planning, Building, and Code Enforcement, above (send to the attention of Kara Hawkins). For the official record, please your written comment letter and reference File Nos. H20-037/ER20-242.

Following the close of the public review period, the Director of Planning, Building, and Code Enforcement will prepare a Final Supplemental Environmental Impact Report that will include responses to comments received during the review period. At least ten days prior to the public hearing on the SEIR, the City's responses to comments received during the public review period will be available for review and will be sent to those who have commented in writing on the SEIR during the public review period.

From: Hawkins, Kara
To: Fiona Phung; Wang, Angela
Subject: Fw: Notice of Availability: Fountain Alley Mixed-Use Project SEIR
Date: Monday, August 8, 2022 9:27:38 AM

Hi Angela and Fiona,

Valley Water followed up on review of the EIR and WSA with the following email. Angela are there any similar conditions required already for the project?

Thanks,
Kara

From: Matthew Sasaki <MSasaki@valleywater.org>
Sent: Monday, August 8, 2022 8:40 AM
To: Hawkins, Kara <Kara.Hawkins@sanjoseca.gov>
Subject: RE: Notice of Availability: Fountain Alley Mixed-Use Project SEIR

Hi Kara,

Comment B.1

Thank you for sending over the WSA. We have reviewed the WSA and have the following comment:

The EIR concludes that the project is consistent with Downtown Strategy which determined that there are adequate water supplies to support development through 2040. The Downtown Strategy makes assumptions regarding the expansion of water conservation efforts throughout Santa Clara County to ensure there are adequate water supplies. To ensure that water conservation goals are met in the future, the City needs to require all available water conservation and demand management measures for the project. Potential opportunities to minimize water and associated energy use include requiring water conservation measures from the Model Water Efficient New Development Ordinance, which include:

- Require installation of separate submeters to each unit to encourage efficient water use - *studies have shown that adding submeters can reduce water use 15 to 30 percent*
- Require dedicated landscape meters where applicable
- Weather- or soil-based irrigation controllers.

Please let me know if you have any questions.

Thank you,

Matt Sasaki
Community Projects Review Unit

(408) 630-3776

From: Hawkins, Kara <Kara.Hawkins@sanjoseca.gov>
Sent: Wednesday, August 3, 2022 11:57 AM
To: Matthew Sasaki <MSasaki@valleywater.org>
Subject: Re: Notice of Availability: Fountain Alley Mixed-Use Project SEIR

Hi Matt,

Thank you for taking the time to provide comments on the Fountain Alley EIR. We will respond to all comments in a formal First Amendment Document that will be posted online 10 days before hearing.

Attached is the WSA that was prepared for the project in July 2021. I will also make sure that this is uploaded to the project's webpage.

Thanks,
Kara

From: Matthew Sasaki <MSasaki@valleywater.org>
Sent: Tuesday, August 2, 2022 4:47 PM
To: Hawkins, Kara <Kara.Hawkins@sanjoseca.gov>
Subject: RE: Notice of Availability: Fountain Alley Mixed-Use Project SEIR

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Matt Sasaki
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File Nos.: H20-037/ER20-242

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Of Counsel
MARC D. JOSEPH
DANIEL L. CARDOZO

August 2, 2022

Via Email and Overnight Mail
Kara Hawkins
Environmental Project Manager
City of San José
Department of Planning, Building and Code Enforcement
200 East Santa Clara Street, 3rd Floor Tower
San José CA 95113-1905
Email: kara.hawkins@sanjoseca.gov

Re: **Comments on the Draft Supplemental Environmental Impact Report – San José Fountain Alley Mixed-Use Project (File Nos. H20-037 & ER20-242)**

Dear Ms. Hawkins:

Comment C.1

We are writing on behalf of Silicon Valley Residents for Responsible Development ("Silicon Valley Residents" or "Commenters"), to provide comments on the Draft Supplemental Environmental Impact Report ("DSEIR") prepared by the City of San José ("City") for the San José Fountain Alley Mixed-Use Project ("Project") proposed by Westbank Corp, dba Project Fountain Alley, LLC ("Applicant").[1]

The Project proposes to develop a 21-story curvilinear mixed-use building containing 194 residential units, 31,259 square feet of ground floor retail and 405,924 square feet of office space. The building would have a maximum height of 267 feet to the roof and 289 feet to the top of the mechanical penthouse. The Project would contain 22,500 square feet of public open space area. The Project proposes to develop four below-grade level parking with up to 292 parking spaces. The Project site is 1.25-acres located at 35 South 2nd Street, San José, California, 95113, west of Second Street, between East Santa Clara Street and West San Fernando Street, in

[1] City of San Jose, Planning Building & Code Enforcement, Fountain Alley Mixed Use Project Draft SEIR (June 17, 2022). Available at: https://www.sanjoseca.gov/your-government/departments-offices/planning-building-code-enforcement/planning-division/environmental-planning/environmental-review/active-eirs/fountain-alley-mixed-use-project ("DSEIR").

the Fountain Alley area of downtown San José, Assessor Parcel Number ("APN") 467-22-121.

The Project tiers from the Downtown Strategy 2040 Final Environmental Impact Report ("Downtown Strategy 2040 FEIR").[2] The Downtown Strategy 2040 FEIR tiers off the 2040 General Plan EIR ("General Plan EIR").[3] The Project requires a Site Development Permit (File No. H20-037), Vesting Tentative Map, Demolition, Grading, and Building Permits, and other Public Works clearances.[4] The Project includes removal of twelve trees within the Project site. The Project is within the Downtown General Plan land use designation and Downtown Commercial (DC) zoning district and the Downtown Employment Priority Area Overlay. The Project is within the Downtown Commercial National Register District.[5]

We prepared our comments with the assistance of technical experts, including air quality, GHG emissions, and geologic hazards experts Matt Hagemann, P.G., C.Hg., and Paul E. Rosenfeld, Ph.D., at Soil / Water / Air Protection Enterprise ("SWAPE") whose technical comments and curriculum vitae are attached as **Exhibit A**[6].

I. STATEMENT OF INTEREST

Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. Residents includes San José residents Edmundo Escarcega, Ryan Jones, Johnny Bahr, the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104,

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[2] City of San Jose, Integrated Final EIR Downtown Strategy 2040, File Number PP14-102, State Clearinghouse Number 2003042127. Available at: https://www.sanjoseca.gov/home/showpublisheddocument/44054/637082061948370000 ("Downtown Strategy 2040 FEIR").

[3] City of San Jose, Planning Building & Code Enforcement, Envision San Jose 2040 General Plan. Available at: https://www.sanjoseca.gov/your-government/departments/planning-building-code-enforcement/planning-division/environmental-planning/environmental-review/completed-eirs/envision-san-jose-2040-general-plan-4-year/envision-san-jos-2040-general-plan.

[4] DSEIR, p. 13.

[5] San Jose Zoning Code § 20.70.110(A).

[6] See **Exhibit A**, Matt Hagemann, P.G., C.Hg., and Paul E. Rosenfeld, Ph.D., SWAPE Comments on the San José Fountain Alley Mixed-Use Project (File Nos. H20-037 & ER20-242) ("SWAPE Comments").

Sprinkler Fitters Local 483, along with their members, their families, and other individuals who live and work in the City of San José.

Individual members of Silicon Valley Residents live, work, recreate, and raise their families in the City and in the surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist on site.

In addition, Silicon Valley Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for businesses and industries to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. LEGAL STANDARD

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances).[7] The EIR is a critical informational document, the very heart of CEQA.[8] "The foremost principle in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."[9]

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.[10] "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR

[7] See, e.g., PRC § 21100.
[8] *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.
[9] *Comtys. for a Better Env't v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 ("*CBE v. CRA*").
[10] PRC § 21061; 14 CCR §§ 15002(a)(1); 15003(b)-(e); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 517 ("the basic purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect [that] a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.").

'protects not only the environment but also informed self-government.'"[11] The EIR has been described as "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."[12] As the CEQA Guidelines explain, "[t]he EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected."[13]

Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures.[14] The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced."[15] If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns."[16]

While the courts review an EIR using an "abuse of discretion" standard, "the reviewing court is not to 'uncritically rely on every study or analysis presented by a project proponent in support of its position. *A clearly inadequate or unsupported study is entitled to no judicial deference*."[17] As the courts have explained, "a prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process."[18]

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[11] *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.
[12] *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal. App. 4th 1344, 1354 ("*Berkeley Jets*"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[13] 14 C.C.R. § 15003(b).
[14] 14 C.C.R. § 15002(a)(2) and (3); *see also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.
[15] 14 C.C.R. §15002(a)(2).
[16] PRC § 21081; 14 C.C.R. § 15092(b)(2)(A) & (B).
[17] *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), *quoting, Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.
[18] *Berkeley Jets*, 91 Cal.App.4th at 1355; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.

Where, as here, a program EIR has been prepared that could apply to a later project, CEQA requires the lead agency to conduct a two-step process to examine the later project to determine whether additional environmental review is required.[19] First, the agency must consider whether the project will result in environmental effects that were not examined in the program EIR.[20] Second, if the agency finds the activity would have environmental effects that were not examined in the program EIR, it must then prepare an initial study to determine whether to prepare an EIR or negative declaration to address those effects.[21] A later EIR is required when the initial study or other analysis finds that the later project may cause significant effects on the environment that were not adequately addressed in the prior EIR.[22]

Here, the City does not provide substantial evidence to support its conclusions regarding impacts from hazardous materials, air quality and greenhouse gas emissions from the Project. At most, it suggests that compliance with the Downtown Strategy 2040 FEIR and General Plan EIR's mitigation measures absolves the City of its responsibility to mitigate the Project's air quality and public health impacts, analysis which the City promised the public would be performed after the DSEIR was certified. This is antithetical to the purpose of CEQA Guidelines Section 15168's tiered review. A program EIR is prepared to simplify later environmental review, "rather than to obviate further review."[23] The DSEIR's reliance on tiering from the prior EIRs attempts to obviate further review and mitigation of significant Project impacts. As demonstrated below and supported by substantial evidence, the Project may result in significant unmitigated impacts to air quality, greenhouse gas ("GHG"), and public health impacts specific to its development that were not analyzed or mitigated by the DSEIR, the Downtown Strategy 2040 EIR, nor the General Plan EIR.

Furthermore, tiering under CEQA Guidelines Sections 15168 and 15152 is limited to situations where the project is consistent with the general plan and zoning of the city or county in which the project is located.[24] Here, the Project is inconsistent with the zoning due to its nonconformance with the 2003 Historic

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[19] See 14 C.C.R. § 15168, subd. (c); S. Kostka & M. Zischke, Practice Under the California Environmental Quality Act 2d, § 10.16 (Mar. 2018).
[20] CEQA Guidelines, § 15168, subd. (c)(1).
[21] 14 C.C.R. § 15168, subd. (c)(1).
[22] 14 C.C.R. § 15152(f).
[23] S. Kostka & M. Zischke, Practice Under the California Environmental Quality Act 2d, § 10.19 (Mar. 2021).
[24] 14 CCR § 15152.

District Design Guidelines and is inconsistent with the General Plan for the same reasons, as well as the failure to mitigate the Project's greenhouse gas emissions pursuant to the General Plan's Greenhouse Gas Reduction Strategies.[25] Therefore, the DSEIR improperly tiers from the Downtown Strategy 2040 EIR and a revised and recirculated project-level EIR must be prepared which adequately addresses the Project's significant impacts.

The DSEIR has not demonstrated through substantial evidence that the significant and unmitigated Project impacts are infeasible to mitigate or that specific economic, legal, social, technological, or other considerations, including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the EIR. The City must circulate an EIR which adequately analyzes and mitigates the Project's significant environmental impacts.

Comment C.2

III. THE DSEIR FAILS TO DISCLOSE AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS FROM HAZARDS

An EIR must fully disclose all potentially significant impacts of a project, and must implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.[26] An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.[27]

Comment C.3

A. The DSEIR Fails to Adequately Analyze the Project's Hazardous Materials Impacts

The Project site was occupied by a coffee roaster business from 1930 to 1955.[28] Per the Phase I Environmental Site Assessment ("ESA"), tetrachloroethene (PCE/PERC) was historically used to decaffeinate coffee beans until the 1970s, when it was banned for food preparation and pharmaceutical operations.[29] PCE/PERC can accumulate in soil and soil gas and migrate to groundwater and was

[25] DSEIR p. 116; City of San Jose, Department of Planning, Building and Code Enforcement, Greenhouse Gas Reduction Compliance Checklist. Available at: https://www.sanjoseca.gov/Home/ShowDocument?id=63603.
[26] 14 CCR § 15064(b).
[27] *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.
[28] DSEIR, p. 77.
[29] *Id.*

identified by the Phase I ESA as a recognized environmental condition (REC).[30] The site may contain significant levels of PCE/PERC, and potential residual petroleum hydrocarbon contamination.[31]

The DSEIR does not provide adequate disclosure of existing contamination or the additional impacts associated with mitigation to remediate the contamination, nor can it do so absent a Phase II ESA.[32] SWAPE concluded that if PCE is found at the Project site through sampling, excavation and offsite transport of contaminated soil may be necessary.[33] Installation of a soil vapor extraction system may also be necessary. These activities, through use of excavation equipment and trucks, would emit air pollutants and air toxins unaccounted for in the DSEIR.[34] If a mitigation measure would cause a significant impact in addition to those caused by the project itself, the effects of such mitigation must be discussed in the EIR.[35] The City's failure to allow for public review of a Phase II ESA in the DSEIR constitutes impermissibly deferred analysis in violation of CEQA.

By deferring environmental assessment to a future date, the DSEIR runs counter to CEQA's requirement of environmental review at the earliest feasible stage in the planning process.[36] In *Bozung v. Local Agency Formation Commission* the Supreme Court of California approved "the principle that the environmental impact should be assessed as early as possible in government planning."[37] A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking.[38] Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA.[39] The DSEIR recognized that "[c]onstruction associated with the proposed project could expose construction workers and nearby land uses to soil and/or groundwater contamination (e.g., tetrachloroethene) from the former coffee roaster business."[40] But, the DSEIR

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[30] *Id.*
[31] DSEIR, Appendix E, Phase I Environmental Site Assessment, pdf p. 1939-1940.
[32] SWAPE Comments, p. 2.
[33] *Id.*
[34] *Id.*
[35] 14 CCR § 15126.4(a)(1)(D).
[36] *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307; PRC § 21003.1; *No Oil, Inc. v. City of Los Angeles*, supra, 13 Cal.3d 68, 84.
[37] (1975) 13 Cal.3d 263, 282.
[38] *Sundstrom v. County of Mendocino*, supra, 202 Cal.App.3d 296, 307.
[39] *Id.*; *No Oil, Inc. v. City of Los Angeles*, supra, 13 Cal.3d 68, 81; *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal.App.3d 695, 706.
[40] DSEIR, p. 79.

failed to adequately analyze the full extent of the contamination in a Phase II ESA for public review and scrutiny, in violation of CEQA Guidelines Section 15126.2 subdivision (a). The City must circulate an adequate EIR to adequately address impacts associated with hazardous contamination and impacts associated with such cleanup.

Comment C.4

B. The DSEIR Fails to Adequately Mitigate the Project's Hazardous Materials Impacts

The DSEIR relies on Mitigation Measures HAZ-1.1 and HAZ-1.2 to purportedly reduce hazardous materials impacts to less than significant, but these measures constitute impermissibly deferred mitigation under CEQA.[41] "By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process."[42] CEQA Guidelines § 15126.4(a)(1)(B) provides that formulation of mitigation measures shall not be deferred until some future time.[43] The specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project's environmental review provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and *(3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will considered, analyzed, and potentially incorporated in the mitigation measure.*[44] Compliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measures that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards".[45] "An EIR is inadequate if '[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.' "[46]

Here, the Site Management Plan, Removal Action Workplan, and Health and Safety Plans called for by MM HAZ-1.2 would require additional analysis and

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[41] DSEIR, p. 79.
[42] *Sundstrom v. County of Mendocino*, supra, 202 Cal.App.3d at 305.
[43] 14 CCR 15126.4(a)(1)(B).
[44] *Id.*
[45] *Id.*
[46] *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, quoting *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92, quoting *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 670.

establish mitigation measures that should have been included for public review in the DSEIR. The DSEIR fails to identify the types of measures that may be included to mitigate the Project's potentially significant hazardous material impacts including measures that may be included in the Removal Action Plan and the Health and Safety Plan.[47] Without first assessing the extent of the potential PCE/PERC contamination and then providing details about the mitigation measures, the efficacy of mitigation measures HAZ-1.1 and HAZ-1.2 cannot be determined to be effective. The DSEIR fails as an informational document for impermissibly deferred analysis and mitigation.

Comment C.5

The DSEIR does not state why specifying these performance standards was impractical or infeasible at the time the DSEIR was drafted. In *Preserve Wild Santee v. City of Santee,* the city impermissibly deferred mitigation where the EIR did not state why specifying performance standards for mitigation measures "was impractical or infeasible at the time the EIR was certified."[48] The court determined that although the City must ultimately approve the mitigation standards, this does not cure these informational defects in the EIR.[49] Further, the court in *Endangered Habitats League, Inc. v. County of Orange*, held that mitigation that does no more than require a report to be prepared and followed, or allow approval by a county department without setting any standards is inadequate.[50]

Here, the fact that the Site Management Plan will be approved later by the Santa Clara County Department of Environment Health or State Department of Toxic Substances Control does not cure the informational defects in this DSEIR.[51] The City must circulate an adequate EIR which provides complete analysis and mitigation of the Project's hazardous materials impacts before the Project can be approved.

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[47] DSEIR, p. 79-80.
[48] *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.
[49] *Id.*
[50] *Endangered Habitats League, Inc. v. County of Orange,* (2005) 131 Cal.App.4th 777, 794.
[51] *See Cal. Clean Energy Comm. v. City of Woodland* (2014) 225 Cal.App.4th 173, 194.

Comment C.6

IV. THE DSEIR FAILS TO DISCLOSE AND MITIGATE POTENTIALLY SIGNIFICANT AIR QUALITY IMPACTS

A. The DSEIR Fails to Adequately Analyze the Project's Air Quality Impacts

The DSEIR's operational air emissions analysis is not supported by substantial evidence. The failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.[52] Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.[53] In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."[54]

Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.'"[55]

Comment C.7

i. Backup Generator Usage

The DSEIR states that the Project's "generators would be operated during periods of emergency and for maintenance and testing purposes with a maximum of 50 hours per year."[56] The City's conclusion that the backup generators ("BUGs") will be operated only 50 hours per year is flawed and results in an underestimation of the Project's operational air emissions.

The DSEIR's air quality analysis failed to include the substantial increase in operational emissions from BUGs in the Air Basin due to unscheduled events,

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[52] *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.
[53] *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.
[54] *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.
[55] *Berkeley Jets*, 91 Cal.App.4th at 1355.
[56] DSEIR, p. 28.

including but not limited to Public Safety Power Shutoff (PSPS) events and extreme heat events. Extreme heat events are defined as periods where in the temperatures throughout California exceed 100 degrees Fahrenheit. The total duration of the PSPS events lasted between 141 hours to 154 hours in 2019. In 2021, the Governor of California declared that during extreme heat events the use of stationary generators shall be deemed an emergency use under California Code of Regulations (CCR), title 17, section 93115.4 sub. (a) (30) (A)(2). The number of Extreme Heat Events is likely to increase in California with the continuing change in climate the State is currently undergoing.

According to the California Public Utilities Commission ("CPUC") de-energization report in October 2019, there were almost 806 PSPS events that impacted almost 973,000 customers (~7.5% of households in California) of which ~854,000 of them were residential customers, and the rest were commercial/industrial/medical baseline/other customers.[57] CARB's data also indicated that on average each of these customers had about 43 hours of power outage in October 2019.[58] Using the actual emission factors for each diesel BUG engine in the air district's stationary BUGs database, CARB staff calculated that the 1,810 additional stationary generators (like those proposed for the Project) running during a PSPS in October 2019 generated 126 tons of NOx, 8.3 tons or particulate matter, and 8.3 tons of diesel particulate matter ("DPM").[59] DPM has been identified as a toxic air contaminant, composed of carbon particles and numerous organic compounds, including over forty known cancer-causing organic substances. The majority of DPM is small enough to be inhaled deep into the lungs and make them more susceptible to injury. For every PSPS or Extreme Heat Event (EHE) triggered during the operational phase of the project, significant concentrations of DPM will be released.

The City must circulate an adequate EIR to include an analysis of the additional operation of the BUGs that will occur at the Project site that is not accounted for in the current air quality and GHG analyses.

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[57] California Air Resources Board, Potential Emissions Impacts of Public Safety Power Shutoff (PSPS) (January 30, 2020). Available at: https://ww2.arb.ca.gov/sites/default/files/2020-01/Emissions_Inventory_Generator_Demand%20Usage_During_Power_Outage_01_30_20.pdf.
[58] *Id.*
[59] *Id.*

Comment C.8

ii. Tier 4 Emissions Standards

The DSEIR relies on air emissions modeling that assumes the use of Tier 4 Final emissions standards, but the DSEIR does not require the use of Tier 4 Final engines. The DSEIR requires only Tier 4 engines, which may include Tier 4 Interim equipment which has higher emissions than Tier 4 Final equipment.[60] SWAPE concluded that the reliance on Tier 4 Final standards in the DSEIR's air quality modeling results in an underestimation of the Project's air quality and health risk impacts. The air quality and health risk analysis in the DSEIR is therefore not supported by substantial evidence. The DSEIR must be revised and recirculated to accurately reflect the air emissions associated with Project construction.

Comment C.9

B. The DSEIR Fails to Mitigate the Project's Air Quality Impacts

CEQA's purpose is to "[p]revent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the chances to be feasible."[61] CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures.[62]

"CEQA establishes a duty for public agencies to avoid or minimize environmental damage where feasible."[63] A public agency cannot approve a project if there are feasible alternatives or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment.[64] CEQA defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors."[65]

"The core of an EIR is the mitigation and alternatives sections."[66] The CEQA Guidelines define mitigation as a measure which (1) avoids the impact altogether by not taking a certain action or parts of an action, (2) minimizes the impact by

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[60] SWAPE Comments, p. 6.
[61] 14 CCR § 15002(a)(3).
[62] 14 CCR § 15002(a)(2) and (3); *see also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.
[63] 14 CCR § 15021(a).
[64] 14 CCR § 15021(a)(2).
[65] 14 CCR § 15364.
[66] *Citizens of Goleta Valley v. Bd. of Supervisors ("Goleta II")* (1990) 52 Cal.3d 553, 564.

limiting the degree or magnitude of the action and its implementation, (3) rectifies the impact by repairing, rehabilitating, or restoring the impacted environment, (4) reduces or eliminates the impact overtime by preservation and maintenance operations during the life of the action, and (5) compensates for the impact by replacing or providing substitute resources or environments.[67] "In deciding whether changes in a project are feasible, an agency may consider specific economic, environmental, legal, social, and technological factors."[68]

Findings as to mitigation measures must be supported by substantial evidence.[69] Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."[70] Substantial evidence "shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts,"[71] but it should not include "[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment."[72]

The DSEIR fails to incorporate all feasible mitigation measures to avoid or substantially lessen air emissions impacts, especially with respect to cumulative annual $PM_{2.5}$ emissions. The City must circulate an adequate EIR which incorporates all feasible measures recommended by Commenters to mitigate construction-related air emissions, including:

- For all construction equipment larger than 25 horsepower used at the site for more than two continuous days or 20 hours total, use equipment that meet U.S. Environmental Protection Agency (EPA) *Tier 4 Final emission standards* for particulate matter (PM10 and PM2.5)
- If Tier 4 *Final* equipment is not available, all construction equipment larger than 25 horsepower used at the site for more than two continuous days or 20 hours total shall meet U.S. EPA emission standards for Tier *4 Interim* engines and include particulate matter

[67] 14 CCR § 15370.
[68] 14 CCR § 15021(b).
[69] 14 CCR § 15091(b); *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 449.
[70] 14 CCR § 15384(a).
[71] 14 CCR § 15384(b).
[72] 14 CCR § 15384(a).

emissions control equivalent to CARB Level 3 verifiable diesel emission control devices that altogether achieve a 70 percent reduction in particulate matter exhaust in comparison to uncontrolled equipment.

- Ensure the cleanest possible construction practices and equipment are used. This includes eliminating the idling of diesel-powered equipment and providing the necessary infrastructure (e.g., electrical hookups) to support zero and near-zero equipment and tools.
- Implement, and plan accordingly for, the necessary infrastructure to support the zero and near-zero emission technology vehicles and equipment that will be operating on site. Necessary infrastructure may include the physical (e.g., needed footprint), energy, and fueling infrastructure for construction equipment, on-site vehicles and equipment, and medium-heavy and heavy-heavy duty trucks.
- In construction contracts, include language that requires all off-road equipment with a power rating below 19 kilowatts (e.g., plate compactors, pressure washers) used during project construction be battery powered.
- In construction contracts, include language that requires all heavy-duty trucks entering the construction site during the grading and building construction phases be model year 2014 or later. All heavy-duty haul trucks should also meet CARB's lowest optional low-oxides of nitrogen (NOx) standard.
- Include contractual language in tenant lease agreements that requires tenants to use the cleanest technologies available, and to provide the necessary infrastructure to support zero-emission vehicles and equipment that will be operating on site.
- Include contractual language in tenant lease agreements that requires all loading/unloading docks and trailer spaces be equipped with electrical hookups for trucks with transport refrigeration units (TRU) or auxiliary power units. This requirement will substantially decrease the amount of time that a TRU powered by a fossil-fueled internal combustion engine can operate at the project site. Use of zero-emission all-electric plug-in TRUs, hydrogen fuel cell transport refrigeration, and cryogenic transport refrigeration are encouraged and should also be included in lease agreements.
- Include contractual language in tenant lease agreements that requires all TRUs entering the project-site be plug-in capable.

- Include contractual language in tenant lease agreements that requires future tenants to exclusively use zero-emission light and medium-duty delivery trucks and vans.
- Include contractual language in tenant lease agreements that requires all service equipment (e.g., yard hostlers, yard equipment, forklifts, and pallet jacks) used within the project site to be zero-emission. This equipment is widely available and can be purchased using incentive funding from CARB's Clean Off-Road Equipment Voucher Incentive Project (CORE).
- Include contractual language in tenant lease agreements that requires all heavy-duty trucks entering or on the project site to be model year 2014 or later, expedite a transition to zero-emission vehicles, and be fully zero-emission beginning in 2023. A list of commercially available zero-emission trucks can be obtained from the Hybrid and Zero-emission Truck and Bus Voucher Incentive Project (HVIP).
- Include contractual language in tenant lease agreements that requires the tenant to be in, and monitor compliance with, all current air quality regulations for on-road trucks including CARB's Heavy-Duty (Tractor-Trailer) Greenhouse Gas Regulation, Advanced Clean Trucks Regulation, Periodic Smoke Inspection Program (PSIP), and the Statewide Truck and Bus Regulation.
- Include contractual language in tenant lease agreements restricting trucks and support equipment from idling longer than two minutes while on site.
- Include rooftop solar panels for each proposed building to the extent feasible, with a capacity that matches the maximum allowed for distributed solar connections to the grid.
- Include contractual language in tenant lease agreements, requiring the installing of vegetative walls or other effective barriers that separate loading docks and people living or working nearby to help mitigate noise impacts, air quality, health risk, and greenhouse gas emissions.
- Include contractual language in tenant lease agreements, requiring all emergency generators to be powered by a non-diesel fuel.
- The project should be constructed to meet CalGreen Tier 2 green building standards, including all provisions related to designated parking for clean air vehicles, electric vehicle charging, and bicycle parking.

The above mitigation measures should be discussed and adopted in a recirculated EIR.

Comment C.10

V. THE DSEIR FAILS TO DISCLOSE AND MITIGATE POTENTIALLY SIGNIFICANT GREENHOUSE GAS EMISSIONS IMPACTS

The DSEIR includes measures that purportedly reduce the Project's GHG emissions, but the measures are not binding mitigation and may be removed from the Project altogether. Including unenforceable mitigation is a violation of CEQA because the DEIR's GHG analysis assumes implementation of these mitigation measures in its underlying GHG emissions calculations, thus failing to disclose the severity of the Project's GHG impacts prior to mitigation, as required by CEQA.

Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.[73] Failure to include enforceable mitigation measures is considered a failure to proceed in the manner required by CEQA.[74] In order to meet this requirement, mitigation measures must be incorporated directly into the EIR to be enforceable.[75]

The court in *Lotus v. Department of Transportation* held that "[b]y compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA.[76] The EIR in that case was inadequate because "[t]he DEIR also contains other measures that should be listed as mitigation but which will only be done at the discretion of the contractor. These need to be measurable and enforceable and listed as mitigations."[77]

Comment C.11

Here, the DSEIR utilizes design features to purportedly reduce Project impacts. SWAPE determined that the DSEIR relies on unenforceable measures to artificially reduce the significance of Project GHG impacts. For example, the City relies on the use of recycled water, low water requirements, and onsite solar panels to support its conclusion that the Project conforms with the City's 2030 Greenhouse

[73] Id. at §15126.4(a)(2).
[74] *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 672.
[75] *Lotus v. Dept of Transportation* (2014) 223 Cal. App. 4th 645, 651-52.
[76] (2014) 223 Cal.App.4th 645, 656.
[77] *Id.*

Gas Reduction Strategy.[78] SWAPE concluded that, as a result of the reliance on these and other unenforceable measures, the DSEIR's analysis regarding GHG emissions and conformance with the General Plan GHG Reduction Strategy is not supported by substantial evidence.[79] The City must circulate an adequate EIR which adequately analyzes and mitigates the Project's potentially significant GHG emissions impacts.

Comment C.12

VI. THE DSEIR FAILS TO ANALYZE FEASIBLE ALTERNATIVES

CEQA Guidelines Section 15126.6(b) requires consideration of alternatives capable of eliminating or reducing significant environmental effects even though they may "impede to some degree the attainment of the project objectives, or would be more costly".[80] The Court of Appeals determined in *Citizens of Goleta Valley v. Board of Supervisors*, "[t]he fact that an alternative may be more expensive or less profitable is not sufficient to show that the California Public Utilities Commission alternative is financially infeasible. 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." [81]

The DSEIR fails to adequately analyze Project Alternatives. The Reduced Height (Four-Stories), Two Buildings Alternative would substantially reduce impacts to the Historic District. Under this alternative, the above-grade construction timeframe would be reduced from 34 to 28 months.[82] This would reduce air quality, health risk, and greenhouse gas emissions associated with Project construction. Additionally, this is the only Project alternative under which the Project can adequately tier from the 2040 Downtown Strategy EIR.

Likewise, the DSEIR fails to demonstrate that the Reduced Height (Four-Stories), Two Buildings Alternative is infeasible. The requirement that EIRs identify and discuss alternatives to the project stems from the fundamental CEQA policy that public agencies should require implementation of feasible alternatives or

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[78] SWAPE Comments, p. 11; City of San Jose, 2030 Greenhouse Gas Reduction Strategy (August 2020). Available at: https://www.sanjoseca.gov/home/showpublisheddocument/63605/637345707563600000.
[79] *Id.*
[80] 14 CCR § 15126.6(b).
[81] *Citizens of Goleta Valley v. Board of Supervisors* 197 Cal.App.3d 1167, 1181; see also *Kings County Farm Bureau v. City of Hanford* 221 Cal.App.3d 692, 736.
[82] DSEIR, p. 117.

feasible mitigation measures to reduce the project's significant impacts.[83] A public agency cannot approve a project if there are feasible alternatives or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment.[84] CEQA defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors."[85]

Here, the environmentally superior alternative is the Reduced Height (Four-Stories), Two Buildings Alternative, which is feasible and would reduce the Project's significant impacts. The DSEIR must be revised and recirculated to adequately analyze the feasibility of this alternative.

Comment C.13

VII. THE PROJECT FAILS TO COMPLY WITH GENERAL PLAN, ZONING, AND LOCAL REGULATION

A. The Project Fails to Conform with the Historic District Requirements

The DSEIR states that the project would not be compatible with the height, corner element, size, scale, proportion, massing, façades, rear façades, setbacks and stepbacks of the 2003 Historic District Design Guidelines.[86] The Historic District consists of one- to three-story commercial buildings (except for the Bank of Italy building which is 14 stories tall).[87] The proposed building would be 21 stories tall with a maximum height of 267 feet to the top of the roof.[88] The contributor buildings within the district have rectilinear footprints that occupy the entire width of their lots which create a continuous street wall.[89] The proposed building would be curvilinear at the northern and southern ends and would be set back from the western and southern property lines.[90] Additionally, the proposed building would not step down in height on all sides.[91] The building façades would not be broken up

[83] Pub. Res. Code § 21002.
[84] 14 CCR § 15021(a)(2).
[85] 14 CCR § 15364.
[86] DSEIR, p. 60; 116.
[87] *Id.* at 60.
[88] *Id.*
[89] *Id.*
[90] DSEIR p. 60.
[91] *Id.*

into elements consistent with the scale of the adjacent historic buildings.[92] The proposed building would overwhelm the adjacent historic buildings. For these reasons, the proposed project is not consistent with Standard 9 of the Secretary of the Interior's Standards, which provide that "new additions, exterior alterations or related new construction will not destroy historic materials, features, and spatial relationships that characterize the property. [93] The new work shall be differentiated from the old and will be compatible with the historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and its environment."[94] The DSEIR explicitly provides that the Project does not conform to the Historic District requirements.

Comment C.14

B. The Project's Failure to Conform with the Historic District Results in a Failure to Conform with the Zoning Code

The San Jose Zoning Code provides that "Any project within a historic district shall conform to applicable guidelines adopted, and as amended by the city council."[95] The DSEIR explicitly states that the Project does not conform with the character of the historic district as required by General Plan and Zoning Code. The failure to conform to the zoning code constitutes a significant impact under CEQA. Additionally, as shown above, the failure to conform with the Zoning Code precludes the City from relying on a tiered Supplemental EIR for the Project. Tiering under CEQA Guidelines Sections 15168 and 15152 are limited to situations where the project is consistent with the general plan and zoning of the city or county in which the project is located.[96] The City must circulate an adequate project-level EIR which adequately analyzes the Project's nonconformance with the Zoning Code.

Comment C.15

C. The Project Fails to Comply with the General Plan

CEQA requires the agency to determine whether the Project would "[c]ause a significant environmental impact due to a conflict with any land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect."[97] The Project conflicts with the San Jose 2040 General Plan.

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[92] *Id.*
[93] *Id.*
[94] DSEIR p. 58.
[95] San Jose Zoning Code Chapter 20.70.110(A).
[96] 14 CCR § 15152.
[97] 14 CCR § 15000 Appendix G.

General Plan Policy LU-13.7 provides that projects must reduce or avoid impacts related to cultural resources by "Designing new development, alterations, and rehabilitation/remodels within a designated or candidate Historic District to be compatible with the character of the Historic District and conform to the Secretary of the Interior's Standards for the Treatment of Historic Properties, appropriate State of California requirements regarding historic buildings and/or structures (including the California Historic Building Code) and to applicable historic design guidelines adopted by the City Council."[98] The Project admittedly fails to conform with the Historic District Design Guidelines, and therefore violates the General Plan. The failure to conform with the General Plan constitutes a significant impact under CEQA and precludes the City from relying on a tiered Supplemental EIR for the Project.[99] Tiering under CEQA Guidelines Sections 15168 and 15152 are limited to situations where the project is consistent with the general plan and zoning of the city or county in which the project is located.[100] The City must circulate an adequate project-level EIR which adequately analyzes the Project's nonconformance with the General Plan.

The Project also conflicts with the Downtown Strategy 2040 EIR. The Downtown Strategy 2040 EIR provides that "[a]t the time future actions are proposed, the City will review the future actions for consistency with the assumptions in this EIR (including conformance with the 2040 General Plan policies and measures included in the project)."[101] The Project's nonconformance with the General Plan results in a violation of the Downtown Strategy 2040 EIR as well. The City must revise and recirculate the DSEIR to adequately analyze the Project's significant impacts resultant from its nonconformance with local plans.

Comment C.16

D. The Project Fails to Conform with Local Ordinance

The City of San Jose's Park Impact Ordinance and Parkland Dedication Ordinance requires that residential developments provide three acres of parkland for every 1,000 new residents added by the project.[102] The City of San Jose Department of Parks, Recreation, and Neighborhood Services concluded that the Project is required to dedicate 0.87 acres for a public park, or pay an park-impact in

[98] DSEIR, p. 55.
[99] 14 CCR § 15152.
[100] *Id.*
[101] Downtown Strategy 2040 FEIR.
[102] San Jose Municipal Code Chapter 14.25.300.

lieu fee of $2,832,400.[103] The DSEIR is silent as to the inclusion of a 0.87 acre park or a payment of the requisite fee as part of the Project. The dedication of a new park requires analysis under CEQA. An adequate EIR must be circulated to clarify whether a park will be dedicated as required by local law.

Comment C.17

VIII. THE PROJECT FAILS TO COMPLY WITH THE SUBDIVISION MAP ACT

The DSEIR lacks substantial evidence to support the Subdivision Map Act's required factual findings to approve the Tentative Map, which require the City to find that a proposed subdivision is consistent with the general plan/specific plan, and does not have any detrimental environmental or public health effects.[104]

The purpose of the Subdivision Map Act is to regulate and control design and improvement of subdivisions with proper consideration for their relation to adjoining areas, to require subdividers to install streets and other improvements, to prevent fraud and exploitation, and to protect both the public and purchasers of subdivided lands.[105] Before approving a tentative map, the Subdivision Map Act requires the agency's legislative body to make findings that the proposed subdivision map, together with the provisions for its design and improvement, is consistent with the general plan and any specific plan.[106] The Subdivision Map Act also requires the agency's legislative body to deny a proposed subdivision map in any of the following circumstances:

> (a) the proposed map is ***not consistent with applicable general and specific plans*** as specified in Section 65451.
> (b) the design or improvement of the proposed subdivision is ***not consistent with applicable general and specific plans***.
> (c) the site is not physically suitable for the type of development.
> (d) the site is not physically suitable for the proposed density of development.
> (e) the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.

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[103] Letter from San Jose Department of Parks, Recreation & Neighborhood Services to Angela Wang, Planner II; Patrick Kelly, Supervising Planner; Tiffany Pong, Associate Engineer; Samuel Yung, Supervising Engineer re Development Permit H20-037 (Dec. 11, 2020).
[104] Gov Code §§66473.5, 66474.
[105] *Pratt v. Adams* (1964) 229 Cal.App.2d 602.
[106] Gov Code § 66473.5.

> (f) the ***design of the subdivision or type of improvements is likely to cause serious public health problems***.
> (g) the ***design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of, property within the proposed subdivision***. In this connection, the governing body may approve a map if it finds that alternate easements, for access or for use, will be provided, and that these will be substantially equivalent to ones previously acquired by the public. This subsection shall apply only to easements of record or to easements established by judgment of a court of competent jurisdiction and no authority is hereby granted to a legislative body to determine that the public at large has acquired easements for access through or use of property within the proposed subdivision.[107]

As discussed above, there is substantial evidence demonstrating that the Project is likely to have new and more severe impacts on air quality, public health, and greenhouse gas emissions than previously analyzed in the Downtown Strategy 2040 FEIR, and which are not adequately mitigated in the DSEIR. In addition, the Project does not conform with the General Plan because it is inconsistent with the Historic District Design Guidelines. As a result,, the Project fails to comply with mandatory Subdivision Map Act requirements and the City cannot make the requisite findings to approve the Project's Tentative Map.

Comment C.18

IX. CONCLUSION

"'[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA.' The error is prejudicial 'if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.'"[108]

For the reasons set forth herein, we urge the City of San José to fulfill its responsibilities under CEQA by withdrawing the DSEIR and preparing a legally adequate, project-level EIR to address the potentially significant impacts described in this comment letter and the attached expert comments. An EIR is necessary to

[107] Gov. Code § 66474 (emphasis added).
[108] *Napa Citizens for Honest Gov't v. Napa Cty. Bd. of Supervisors* (2001) 91 Cal. App. 4th 342, 355–56, *as modified* (Aug. 7, 2001), *as modified on denial of reh'g* (Sept. 4, 2001).

allow the decision-makers and public to ensure that the Project's significant environmental impacts are mitigated to less than significant levels.

Thank you for your attention to these comments.

Sincerely,

Kelilah D. Federman

Attachment
KDF:acp

5066-003acp

EXHIBIT A

SWAPE Technical Consultation, Data Analysis and Litigation Support for the Environment

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August 1, 2022

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Adams Broadwell Joseph & Cardozo
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Subject: **Comments on the San José Fountain Alley Mixed-Use Project (File Nos. H20-037 & ER20-242)**

Dear Ms. Federman,

Comment C.19

We have reviewed the June 2022 Draft Supplemental Environmental Impact Report ("DSEIR") for the San José Fountain Alley Mixed-Use Project ("Project") located in the City of San José ("City"). The Project proposes to remove an existing parking lot and construct a mixed-use building with 194 dwelling units, 31,959-square-feet ("SF") of retail space, 405,924-SF of office space, and 292 parking spaces on the 1.25-acre site.

Our review concludes that the DSEIR fails to adequately evaluate the Project's hazards, hazardous materials, air quality, health risk, and greenhouse gas impacts. As a result, emissions and health risk impacts associated with construction and operation of the proposed Project are underestimated and inadequately addressed. A revised EIR should be prepared to adequately assess and mitigate the potential air quality, health risk, and greenhouse gas impacts that the Project may have on the environment. Furthermore, the Reduced Height (Four-Stories), Two Buildings Alternative and the Reduced Height (17-Stories and 20-Stories), Two Buildings Alternative should be considered as environmentally superior options that would substantially lessen the proposed Project's impacts.

Comment C.20

Hazards and Hazardous Materials

Inadequate Disclosure and Analysis of Impacts

The DSEIR discloses that the Project site was occupied by a coffee roaster business from 1930 to 1955. The DSEIR states:

> "[T]etrachloroethene (PCE/PERC) was historically used to decaffeinate coffee beans until the 1970s, when it was banned for food preparation and pharmaceutical operations. PCE/PERC can accumulate in soil and soil gas and migrate to groundwater and was identified by the Phase I ESA as a recognized environmental condition (REC)" (p. 77).

The DSEIR calls for the following mitigation to address the potential for construction worker exposure to PCE contamination in soil and groundwater, stating:

> "MM HAZ-1.1: Prior to the issuance of any demolition or grading permit(s), the project applicant shall retain a qualified environmental professional to conduct a Phase II soil, soil gas and/or groundwater investigation to determine if the soil, soil gas, and groundwater from former uses of the site have contaminants in concentrations above established construction/trench worker and residential or commercial Regional Water Quality Control Board Environmental Screening Levels (ESLs). If the Phase II results indicate soil, soil gas and/or groundwater contamination above regulatory environmental screen levels, the project applicant must enter into the Santa Clara County Department of Environment Health (SCCDEH) Site Cleanup Program (SCP) to obtain regulatory oversight from SCCDEH. Any further investigation and remedial actions must be performed under regulatory oversight to mitigate the contamination and make the site suitable for the proposed residential development.
>
> MM HAZ-1.2: If soil, soil gas, or groundwater contamination is identified, the project applicant shall implement appropriate management procedures, such as removal of the contaminated soil and implementation of a Site Management Plan (SMP), Removal Action Workplan (RAP), or equivalent document under regulatory oversight from the SCCDEH or State Department of Toxic Substances Control (DTSC)" (p. 79).

This mitigation is inadequate because it defers disclosure of conditions at the Project site which may be significant and warrant specific mitigation measures. A revised EIR needs to be prepared to include the results of a Phase II Environmental Site Assessment ("ESA") to be completed before Project approval.

The Phase II ESA is necessary to provide for adequate disclosure of contamination that may exist, and impacts associated with mitigation to remediate the contamination. For example, if PCE is found at the Project site through sampling, excavation and offsite transport of contaminated soil may be necessary. Installation of a soil vapor extraction system may also be necessary. These activities, through use of excavation equipment and trucks, would emit air pollutants and air toxins unaccounted for in the DSEIR.

Comment C.21

Air Quality

Unsubstantiated Input Parameters Used to Estimate Project Emissions

The DSEIR's air quality analysis relies on emissions calculated with CalEEMod.2016.3.2 (p. 27).[1] CalEEMod provides recommended default values based on site-specific information, such as land use type, meteorological data, total lot acreage, project type and typical equipment associated with project

[1] "CalEEMod Version 2016.3.2." California Air Pollution Control Officers Association (CAPCOA), November 2017, *available at:* http://www.aqmd.gov/caleemod/archive/download-version-2016-3-2.

type. If more specific project information is known, the user can change the default values and input project-specific values, but the California Environmental Quality Act ("CEQA") requires that such changes be justified by substantial evidence. Once all of the values are inputted into the model, the Project's construction and operational emissions are calculated, and "output files" are generated. These output files disclose to the reader what parameters are utilized in calculating the Project's air pollutant emissions and make known which default values are changed as well as provide justification for the values selected.

When reviewing the Project's CalEEMod output files, provided in Fountain Alley Project Air Quality Assessment ("AQ Assessment") as Appendix B to the DSEIR, we found that several model inputs were not consistent with information disclosed in the DSEIR. As a result, the Project's construction and operational emissions are underestimated. As such, a revised EIR should be prepared to include an updated air quality analysis that adequately evaluates the impacts that construction and operation of the Project will have on local and regional air quality.

Comment C.22

Underestimated Number of Saturday and Sunday Operational Vehicle Trip

According to the DSEIR:

> "The proposed project was estimated to generate up to 4,215 net new daily trips" (p. 33).

As such, the Project's model should have included trip rates that reflect the estimated number of average daily vehicle trips. However, review of the CalEEMod output files demonstrates that the "Fountain Alley, San Jose" model includes only 2,130.58 Saturday and 1,138 Sunday operational vehicle trips (see excerpt below) (Attachment B, pp. 94).

	Average Daily Trip Rate		
Land Use	Weekday	Saturday	Sunday
Apartments High Rise	473.36	560.66	411.28
Enclosed Parking with Elevator	0.00	0.00	0.00
General Office Building	2,727.78	608.88	259.79
Strip Mall	1,013.13	961.04	466.94
Total	4,214.27	2,130.58	1,138.00

As demonstrated above, the Saturday and Sunday vehicle trips are underestimated by approximately 2,084- and 3,077-trips, respectively.[2, 3] As such, the trip rates inputted into the model are underestimated and inconsistent with the information provided by the DSEIR.

These inconsistencies present an issue, as CalEEMod uses the operational vehicle trip rates to calculate the emissions associated with the operational on-road vehicles.[4] Thus, by including underestimated

[2] Calculated: 4,215 proposed daily trips – 2,130.58 modeled Saturday trips = 2084.42 underestimated Saturday trips.
[3] Calculated: 4,215 proposed daily trips – 1,138 modeled Sunday trips = 3077 underestimated Sunday trips.
[4] "CalEEMod User's Guide." California Air Pollution Control Officers Association (CAPCOA), May 2021, *available at:* https://www.aqmd.gov/caleemod/user's-guide, p. 36.

operational daily vehicle trips, the model underestimates the Project's mobile-source operational emissions and should not be relied upon to determine Project significance.

Comment C.23

Unsubstantiated Changes to Wastewater Treatment System Percentages

Review of the CalEEMod output files demonstrates that the "Fountain Alley, San Jose" model includes several changes to the default wastewater treatment system percentage (see excerpt below) (Appendix B, pp. 71).

Table Name	Column Name	Default Value	New Value
tblWater	AerobicPercent	87.46	100.00
tblWater	AerobicPercent	87.46	100.00
tblWater	AerobicPercent	87.46	100.00
tblWater	AerobicPercent	87.46	100.00
tblWater	AnaerobicandFacultativeLagoonsPercent	2.21	0.00
tblWater	AnaerobicandFacultativeLagoonsPercent	2.21	0.00
tblWater	AnaerobicandFacultativeLagoonsPercent	2.21	0.00
tblWater	AnaerobicandFacultativeLagoonsPercent	2.21	0.00

As demonstrated in the excerpt above, the model assumes that the Project's wastewater would be treated 100% aerobically. As previously mentioned, the CalEEMod User's Guide requires any changes to model defaults be justified.[5] According to the "User Entered Comments & Non-Default Data" table, the justification provided for these changes is:

> "WWTP 100% Aerobic" (Appendix B, pp. 51).

However, these changes remain unsupported. The IS, provided as Appendix A to the DSEIR, indicates that "[w]astewater treatment in San José is provided by the San José-Santa Clara Regional Wastewater Facility" (p. 107). Review of the San José-Santa Clara Regional Wastewater Facilities treatment process reveals the use of anaerobic bacteria in the digesters phase of treatment.[6] As such, the assumption that the Project's wastewater would be treated 100% aerobically is incorrect.

These unsubstantiated changes present an issue, as each type of wastewater treatment system is associated with different GHG emission factors, which are used by CalEEMod to calculate the Project's total GHG emissions.[7] Thus, by including unsubstantiated changes to the default wastewater treatment system percentages, the model may underestimate the Project's GHG emissions and should not be relied upon to determine Project significance.

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[5] "CalEEMod User's Guide." California Air Pollution Control Officers Association (CAPCOA), May 2021, *available at:* https://www.aqmd.gov/caleemod/user's-guide, p. 1, 14.

[6] "Treatment Process." San Jose-Santa Clara Regional Wastewater Facility, *available at:* https://www.sanjoseca.gov/your-government/environment/water-utilities/regional-wastewater-facility/treatment-process

[7] "CalEEMod User's Guide." California Air Pollution Control Officers Association (CAPCOA), May 2021, *available at:* https://www.aqmd.gov/caleemod/user's-guide, p. 45.

Comment C.24

Incorrect Application of Tier 4 Final Mitigation

Review of the CalEEMod output files demonstrates that the "Fountain Alley, San Jose" model assumes that the Project's off-road construction equipment fleet would meet Tier 4 Final emissions standards (see excerpt below) (Appendix B, pp. 52).

Table Name	Column Name	Default Value	New Value
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
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tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final
tblConstEquipMitigation	Tier	No Change	Tier 4 Final

As previously mentioned, the CalEEMod User's Guide requires any changes to model defaults be justified.[8] According to the "User Entered Comments & Non-Default Data" table, the justification provided for the inclusion of Tier 4 Final mitigation is:

> "Enhanced BMPs, Tier 4 final engines, electric cranes mitigation" (Appendix B, pp. 51).

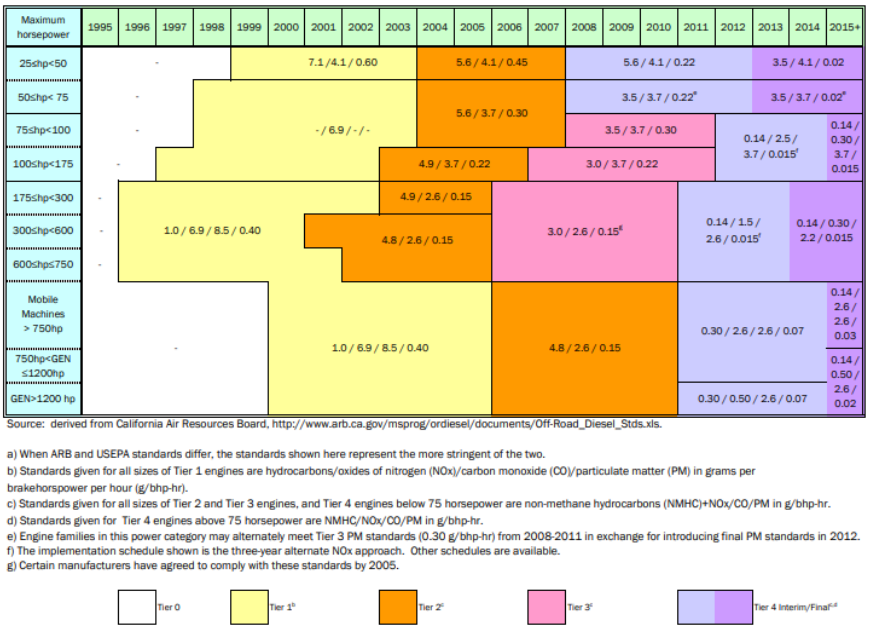
Furthermore, the DSEIR includes Mitigation Measure ("MM") AQ-1, which states:

> "MM AIR-1.1: Prior to the issuance of any demolition, grading and/or building permits (whichever occurs earliest), the project applicant shall prepare and submit a construction operations plan [...] The plan shall be accompanied by a letter signed by a qualified air quality specialist, verifying that the equipment included in the plan meets the standards set forth below.
>
> - For all construction equipment larger than 25 horsepower used at the site for more than two continuous days or 20 hours total, use equipment that meet U.S. Environmental Protection Agency (EPA) *Tier 4 emission standards* for particulate matter (PM10 and PM2.5)" (emphasis added) (p. 5).

However, the inclusion of Tier 4 Final emissions standards remains unsupported. As demonstrated above, the DSEIR fails to discuss the more efficient Tier 4 *Final* emission standards. The United States

[8] "CalEEMod User's Guide." California Air Pollution Control Officers Association (CAPCOA), May 2021, *available at:* https://www.aqmd.gov/caleemod/user's-guide, p. 1, 14.

Environmental Protection Agency ("U.S. EPA") has slowly adopted more stringent standards to lower the emissions from off-road construction equipment. Since 1994, Tier 1, Tier 2, Tier 3, Tier 4 Interim, and Tier 4 Final construction equipment have been phased in over time. Tier 4 Final represents the cleanest burning equipment and therefore has the lowest emissions compared to other tiers, including Tier 4 Interim equipment (see excerpt below):[9]



Source: derived from California Air Resources Board, http://www.arb.ca.gov/msprog/ordiesel/documents/Off-Road_Diesel_Stds.xls.

a) When ARB and USEPA standards differ, the standards shown here represent the more stringent of the two.
b) Standards given for all sizes of Tier 1 engines are hydrocarbons/oxides of nitrogen (NOx)/carbon monoxide (CO)/particulate matter (PM) in grams per brakehorspower per hour (g/bhp-hr).
c) Standards given for all sizes of Tier 2 and Tier 3 engines, and Tier 4 engines below 75 horsepower are non-methane hydrocarbons (NMHC)+NOx/CO/PM in g/bhp-hr.
d) Standards given for Tier 4 engines above 75 horsepower are NMHC/NOx/CO/PM in g/bhp-hr.
e) Engine families in this power category may alternately meet Tier 3 PM standards (0.30 g/bhp-hr) from 2008-2011 in exchange for introducing final PM standards in 2012.
f) The implementation schedule shown is the three-year alternate NOx approach. Other schedules are available.
g) Certain manufacturers have agreed to comply with these standards by 2005.

As demonstrated in the figure above, Tier 4 Interim equipment has higher emission levels than Tier 4 Final equipment. Therefore, by modeling construction emissions assuming a full Tier 4 Final equipment fleet, the DSEIR fails to account for higher emissions that may occur as a result of the use of Tier 4 Interim equipment. Since the DSEIR fails to specify whether the Project would use Tier 4 Interim or Tier 4 Final equipment, it is incorrect to model emissions assuming that the more efficient Tier 4 Final equipment would be implemented. Until a revised EIR is prepared requiring Tier 4 Final engines during all phases of construction, and not Tier 4 Interim equipment, the model should not be relied upon to determine Project significance.

Comment C.25

Incorrect Application of Energy-Related Operational Mitigation Measure

Review of the CalEEMod output files demonstrates that the "Fountain Alley, San Jose" model includes the following energy-related mitigation measure (see excerpt below) (Appendix B, pp. 95):

5.1 Mitigation Measures Energy

Percent of Electricity Use Generated with Renewable Energy

[9] "San Francisco Clean Construction Ordinance Implementation Guide for San Francisco Public Projects." August 2015, *available at:* https://www.sfdph.org/dph/files/EHSdocs/AirQuality/San_Francisco_Clean_Construction_Ordinance_2015.pdf, p. 6.

As previously mentioned, the CalEEMod User's Guide requires any changes to model defaults be justified.[10] According to the "User Entered Comments & Non-Default Data" table, the justification provided for this inclusion is:

> "SJCE 100% renewable no carbon electricity" (Appendix B, pp. 51).

However, this justification remains insufficient, as the above-mentioned energy-related mitigation measure refers to renewable energy generation *on-site*.[11] As such, electricity from the grid is not applicable and the inclusion of the energy-related operational mitigation measure in the model is incorrect. By incorrectly including an operational mitigation measure, the model overestimates the reduction to the Project's operational emissions and should not be relied upon to determine Project significance.

Comment C.26

Diesel Particulate Matter Emissions Inadequately Evaluated

The DSEIR concludes that the proposed Project would result in a less-than-significant health risk impact based on a quantified construction and operational health risk assessment ("HRA"). Specifically, the DSEIR estimates that the maximum incremental cancer risk posed to nearby, existing residential sensitive receptors associated with exposure to toxic air contaminant ("TAC") emissions during Project construction and operation would be 5.11 in one million, which would not exceed the BAAQMD significance threshold of 10 in one million (see excerpt below) (p. 33-34, Table 3.1-7).

Table 3.1-7: Construction and Operation Risk Impacts at Off-Site MEI

Source	Cancer Risk (per million)	Annual $PM_{2.5}$ ($\mu g/m^3$)	Hazard Index
Total/Maximum Project Impact (Years 0-30) **Mitigated**	5.11 (infant)	0.10	<0.01
BAAQMD Single-Source threshold	***>10.0***	***>0.3***	***>1.0***
Exceed Threshold? **Mitigated**	No	No	No

However, the DSEIR's evaluation of the Project's potential health risk impacts, as well as the subsequent less-than-significant impact conclusion, is incorrect because the DSEIR's construction HRA relies upon emissions estimates from a flawed air model. The DSEIR states:

> "A health risk assessment was completed to evaluate potential health effects to nearby sensitive receptors (within 1,000 feet of the project site) from construction emissions of DPM and $PM_{2.5}$. The CalEEMod and EMFAC2021 models were used which provides total annual PM_{10} exhaust emissions (DPM) for the off-road construction equipment and on-road vehicles" (p. 30).

As previously discussed, when we reviewed the Project's CalEEMod output files, provided in the AQ Assessment as Appendix B to the DSEIR, we found that several of the values inputted into the model are

[10] "CalEEMod User's Guide." California Air Pollution Control Officers Association (CAPCOA), May 2021, *available at:* https://www.aqmd.gov/caleemod/user's-guide, p. 1, 13-14.
[11] "CalEEMod User's Guide." California Air Pollution Control Officers Association (CAPCOA), May 2021, *available at:* https://www.aqmd.gov/caleemod/user's-guide, p. 58-59.

not consistent with information disclosed in the DSEIR. Specifically, the model incorrectly accounts for the more efficient Tier 4 Final emissions standards and overestimates the expected reduction to the Project's potential emissions. As such, the HRA utilizes an underestimated diesel particulate matter ("DPM") concentration to calculate the health risk associated with Project construction. As a result, the DSEIR's construction HRA and resulting cancer risk should not be relied upon to determine Project significance.

Comment C.27

Greenhouse Gas

Failure to Adequately Evaluate Greenhouse Gas Impacts

The IS, provided as Appendix A to the DSEIR, relies upon the Project's consistency with the City's 2030 Greenhouse Gas Reduction Strategy ("GHGRS") in order to conclude that the Project would result in a less-than-significant greenhouse gas ("GHG") impact (p. 59-60). However, review of *Table A: General Plan Consistency* and *Table B: 2030 Greenhouse Gas Reduction Strategy Compliance* within the Compliance Checklist, provided as Appendix H to the DSEIR, reveals that the Project is inconsistent with numerous measures, including but not limited to those listed below:

GHGRS Project Compliance Checklist[12]	
Table A: General Plan Consistency	
Implementation of Green Building Measures	
MS-2.2: Encourage maximized use of on-site generation of renewable energy for all new and existing buildings.	Here, the Compliance Checklist states: "PV arrays to be implemented on the roof and horizontal louvers of the building. Based on the area, it could provide up to 17% of the building's electricity. See 100%SD Sustainability Report for further details" (Appendix B, p. 5). However, this response is insufficient for two reasons. First, by simply stating that solar panels would be implemented on the roof and horizontal louvers, the Project commits to the bare minimum requirements. As such, the Compliance Checklist fails to demonstrate how the Project would encourage *maximized* use of on-site renewable energy for all new and existing buildings. As previously discussed, the use of on-site renewable energy is not included as a formal mitigation measure. This is incorrect, as according to the AEP *CEQA Portal Topic Paper* on mitigation measures: "While not "mitigation", a good practice is to include those project design feature(s) that address environmental impacts in the mitigation monitoring and reporting program (MMRP). Often the MMRP is all that accompanies building and construction plans through the permit process. If the design features

[12] "GHGRS Project Compliance Checklist." City of San Jose Department of Planning, Building, and Code Enforcement, *available at*: https://www.sanjoseca.gov/Home/ShowDocument?id=63603.

	are not listed as important to addressing an environmental impact, it is easy for someone not involved in the original environmental process to approve a change to the project that could eliminate one or more of the design features without understanding the resulting environmental impact."[13] As you can see in the excerpt above, project design features are not mitigation measures and may be eliminated from the Project's design. Here, as the DSEIR fails to require the Project to include solar panels on the rooftop of the Project, we cannot guarantee that this measure would be implemented, monitored, and enforced on the Project site. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.
Comment C.28 **MS-16.2**: Promote neighborhood-based distributed clean/renewable energy generation to improve local energy security and to reduce the amount of energy wasted in transmitting electricity over long distances.	Here, the Compliance Checklist states: "Solar panels are incorporated onto the roof to improve energy security. All exccess power generated will be sent back to the grid for distribution" (Appendix H, p. 2). However, this response is insufficient, as simply stating that the Project applicant would send excess power back to the grid fails to indicate any Project-specific measures that would encourage the promotion of neighborhood-based distributed clean energy. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.
Comment C.29	
Water Conservation and Urban Forestry Measures	
MS-3.1*:* Require water-efficient landscaping, which conforms to the state's Model Water Efficient Landscape Ordinance (MWELO), for all new commercial, institutional, industrial, and developer-installed residential development unless for recreation needs or other area functions.	Here, the Compliance Checklist states: "We are still working on developing our water strategy but we are targeting a 50% reduction in potable water use for landscape irrigation and 40% reduction in potable water use for indoor fixtures and cooling" (Appendix H, p. 8). However, this response is insufficient as the Compliance Checklist clearly states that the water strategy has yet to be developed. Furthermore, the DSEIR and associated documents fail to mention the Model Water Efficient Landscape Ordinance ("MWELO") whatsoever. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

[13] "CEQA Portal Topic Paper Mitigation Measures." AEP, February 2020, *available at:* https://ceqaportal.org/tp/CEQA%20Mitigation%202020.pdf, p. 6.

Comment C.30

MS-3.2: Promote the use of green building technology or techniques that can help reduce the depletion of the City's potable water supply, as building codes permit. For example, promote the use of captured rainwater, graywater, or recycled water as the preferred source for non-potable water needs such as irrigation and building cooling, consistent with Building Codes or other regulations.	Here, the Compliance Checklist states: "We are still working on developing our water strategy but we are targeting a 50% reduction in potable water use for landscape irrigation and 40% reduction in potable water use for indoor fixtures and cooling" (Appendix H, p. 8). However, this response is insufficient as the Compliance Checklist clearly states that the water strategy has yet to be developed. Furthermore, the DSEIR and associated documents fail to consider the feasibility or incorporate the use of captured rainwater, graywater, or recycled water as the preferred source for non-potable water needs (such as irrigation and building cooling) into the Project design. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Comment C.31

MS-19.4: Require the use of recycled water wherever feasible and cost-effective to serve existing and new development.	Here, the Compliance Checklist states: "We are still working on developing our water strategy but we are targeting a 50% reduction in potable water use for landscape irrigation and 40% reduction in potable water use for indoor fixtures and cooling" (Appendix H, p. 9). Again, this response is insufficient as the Compliance Checklist clearly states that the water strategy has yet to be submitted. Furthermore, the DSEIR fails to explicitly require the use of recycled water wherever feasible and cost-effective to serve existing and new development in a formal mitigation measure. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Comment C.32

MS-21.3: Ensure that San José's Community Forest is comprised of species that have low water requirements and are well adapted to its Mediterranean climate. Select and plant diverse species to prevent monocultures that are vulnerable to pest invasions. Furthermore, consider the appropriate placement of tree species and their lifespan to ensure the perpetuation of the Community Forest.	Here, the Compliance Checklist states: "The landscape design is still being developed but all species will have low water requirements and be adapted to the Mediterranean climate" (Appendix H, p. 9). However, this response is insufficient as the Compliance Checklist clearly states that the landscape design strategy has yet to be developed. Furthermore, the DSEIR and associated documents fail to elaborate on the claim that the Project would feature plant species with low water requirements adapted to the Mediterranean climate. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Comment C.33

MS-26.1: As a condition of new development, require the planting and maintenance of both street trees and trees on private property to achieve a level of tree coverage in compliance with and that implements City laws, policies or guidelines.	Here, the Compliance Checklist states: "During construction the project will preserve existing trees along S 2nd Street. Only one existing tree will need to be removed to provide access to the site. There will be additional trees within the new Paseo and along the network alleys. The intermittent terraces and the two roof terraces will also have trees planted to provide shade and mitigate a heat island effect" (Appendix H, p. 9). However, this response is insufficient. Simply stating that the Project would include trees that provide shade and mitigate a heat island effect does not provide substantial evidence that this measure would be implemented, monitored, and enforced on the Project site. Furthermore, the DSEIR fails to explicitly require the planting and maintenance of both street trees and trees on private property to achieve a level of tree coverage in compliance with all City policies in a formal mitigation measure. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Comment C.34

ER-8.7: Encourage stormwater reuse for beneficial uses in existing infrastructure and future development through the installation of rain barrels, cisterns, or other water storage and reuse facilities.	Here, the Compliance Checklist states: "Stormwater reuse is not proposed. However, the project propose a media filter system to discharge storm water" (Appendix H, p. 10). However, this response is insufficient as the Compliance Checklist clearly states that stormwater reuse is not proposed. Furthermore, simply stating that the Project would include a media filter system does not excuse or justify the failure to install rain barrels, cisterns, or other water storage facilities on the Project site. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Comment C.35

Table B: 2030 Greenhouse Gas Reduction Strategy Compliance	
PART 2: RESIDENTIAL AND NON-RESIDENTIAL PROJECTS	
Renewable Energy Development 1. Install solar panels, solar hot water, or other clean energy power generation sources on development sites, or 2. Participate in community solar programs to support development of renewable energy in the community, or 3. Participate in San José Clean Energy at the Total Green level (i.e., 100% carbon-free electricity) for electricity accounts associated with the project. Supports Strategies: GHGRS #1, GHGRS #3.	Here, the Compliance Checklist states: "The proposed project includes solar photovolatic panels on the louvers surrounding the facade of the building and on the rooftop for on-site energy generation. The project would procure 100% green power beyond what the on-site photovolatics can provide. In addition, the project would pursue ILFI Zero Carbon Certification, which requires all electric buildings and 100% renewable energy" (Appendix H, p. 11). However, this response is insufficient for two reasons.

	First, the DSEIR and associated documents fail to provide substantial evidence indicating that the Project would actually be required to procure 100% green power beyond what the on-site photovoltaics would provide. Second, as the Compliance Checklist states that the Project would only "pursue" ILFI Zero Carbon Certification. As such, the Project may or may not become Zero Carbon certified. Thus, the Project's purported ILFI Zero Carbon Certification does not satisfy this measure. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.
Zero Waste Goal 1. Provide space for organic waste (e.g., food scraps, yard waste) collection containers, and/or 2. Exceed the City's construction & demolition waste diversion requirement. Supports Strategies: GHGRS #5	Here, the Compliance Checklist states that the project would implement both consistency options (Appendix H, p. 12) However, the Compliance Checklist fails to provide any information regarding the strategies that the Project would implement to support the Zero Waste Goal. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

Comment C.36

Comment C.37

As the above table indicates, the DSEIR fails to provide sufficient information and analysis to determine Project consistency with all of the measures required by the GHGRS. As a result, we cannot verify that the Project is consistent with the GHGRS, and the DSEIR's less-than-significant GHG impact conclusion should not be relied upon. We recommend that a revised EIR include further information and analysis demonstrating the Project's consistency with the GHGRS.

Comment C.38

Disclaimer

SWAPE has received limited discovery regarding this project. Additional information may become available in the future; thus, we retain the right to revise or amend this report when additional information becomes available. Our professional services have been performed using that degree of care and skill ordinarily exercised, under similar circumstances, by reputable environmental consultants practicing in this or similar localities at the time of service. No other warranty, expressed or implied, is made as to the scope of work, work methodologies and protocols, site conditions, analytical testing results, and findings presented. This report reflects efforts which were limited to information that was reasonably accessible at the time of the work, and may contain informational gaps, inconsistencies, or otherwise be incomplete due to the unavailability or uncertainty of information obtained or provided by third parties.

Sincerely,

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Qualified SWPPP Developer and Practitioner

Professional Experience:

Matt has 30 years of experience in environmental policy, contaminant assessment and remediation, stormwater compliance, and CEQA review. He spent nine years with the U.S. EPA in the RCRA and Superfund programs and served as EPA's Senior Science Policy Advisor in the Western Regional Office where he identified emerging threats to groundwater from perchlorate and MTBE. While with EPA, Matt also served as a Senior Hydrogeologist in the oversight of the assessment of seven major military facilities undergoing base closure. He led numerous enforcement actions under provisions of the Resource Conservation and Recovery Act (RCRA) and directed efforts to improve hydrogeologic characterization and water quality monitoring. For the past 15 years, as a founding partner with SWAPE, Matt has developed extensive client relationships and has managed complex projects that include consultation as an expert witness and a regulatory specialist, and a manager of projects ranging from industrial stormwater compliance to CEQA review of impacts from hazardous waste, air quality and greenhouse gas emissions.

Positions Matt has held include:

- Founding Partner, Soil/Water/Air Protection Enterprise (SWAPE) (2003 – present);
- Geology Instructor, Golden West College, 2010 – 2104, 2017;
- Senior Environmental Analyst, Komex H2O Science, Inc. (2000 -- 2003);

- Executive Director, Orange Coast Watch (2001 – 2004);
- Senior Science Policy Advisor and Hydrogeologist, U.S. Environmental Protection Agency (1989–1998);
- Hydrogeologist, National Park Service, Water Resources Division (1998 – 2000);
- Adjunct Faculty Member, San Francisco State University, Department of Geosciences (1993 – 1998);
- Instructor, College of Marin, Department of Science (1990 – 1995);
- Geologist, U.S. Forest Service (1986 – 1998); and
- Geologist, Dames & Moore (1984 – 1986).

Senior Regulatory and Litigation Support Analyst:

With SWAPE, Matt's responsibilities have included:

- Lead analyst and testifying expert in the review of over 300 environmental impact reports and negative declarations since 2003 under CEQA that identify significant issues with regard to hazardous waste, water resources, water quality, air quality, greenhouse gas emissions, and geologic hazards. Make recommendations for additional mitigation measures to lead agencies at the local and county level to include additional characterization of health risks and implementation of protective measures to reduce worker exposure to hazards from toxins and Valley Fever.
- Stormwater analysis, sampling and best management practice evaluation at more than 100 industrial facilities.
- Expert witness on numerous cases including, for example, perfluorooctanoic acid (PFOA) contamination of groundwater, MTBE litigation, air toxins at hazards at a school, CERCLA compliance in assessment and remediation, and industrial stormwater contamination.
- Technical assistance and litigation support for vapor intrusion concerns.
- Lead analyst and testifying expert in the review of environmental issues in license applications for large solar power plants before the California Energy Commission.
- Manager of a project to evaluate numerous formerly used military sites in the western U.S.
- Manager of a comprehensive evaluation of potential sources of perchlorate contamination in Southern California drinking water wells.
- Manager and designated expert for litigation support under provisions of Proposition 65 in the review of releases of gasoline to sources drinking water at major refineries and hundreds of gas stations throughout California.

With Komex H2O Science Inc., Matt's duties included the following:

- Senior author of a report on the extent of perchlorate contamination that was used in testimony by the former U.S. EPA Administrator and General Counsel.
- Senior researcher in the development of a comprehensive, electronically interactive chronology of MTBE use, research, and regulation.
- Senior researcher in the development of a comprehensive, electronically interactive chronology of perchlorate use, research, and regulation.
- Senior researcher in a study that estimates nationwide costs for MTBE remediation and drinking water treatment, results of which were published in newspapers nationwide and in testimony against provisions of an energy bill that would limit liability for oil companies.
- Research to support litigation to restore drinking water supplies that have been contaminated by MTBE in California and New York.

- Expert witness testimony in a case of oil production-related contamination in Mississippi.
- Lead author for a multi-volume remedial investigation report for an operating school in Los Angeles that met strict regulatory requirements and rigorous deadlines.
- Development of strategic approaches for cleanup of contaminated sites in consultation with clients and regulators.

Executive Director:

As Executive Director with Orange Coast Watch, Matt led efforts to restore water quality at Orange County beaches from multiple sources of contamination including urban runoff and the discharge of wastewater. In reporting to a Board of Directors that included representatives from leading Orange County universities and businesses, Matt prepared issue papers in the areas of treatment and disinfection of wastewater and control of the discharge of grease to sewer systems. Matt actively participated in the development of countywide water quality permits for the control of urban runoff and permits for the discharge of wastewater. Matt worked with other nonprofits to protect and restore water quality, including Surfrider, Natural Resources Defense Council and Orange County CoastKeeper as well as with business institutions including the Orange County Business Council.

Hydrogeology:

As a Senior Hydrogeologist with the U.S. Environmental Protection Agency, Matt led investigations to characterize and cleanup closing military bases, including Mare Island Naval Shipyard, Hunters Point Naval Shipyard, Treasure Island Naval Station, Alameda Naval Station, Moffett Field, Mather Army Airfield, and Sacramento Army Depot. Specific activities were as follows:

- Led efforts to model groundwater flow and contaminant transport, ensured adequacy of monitoring networks, and assessed cleanup alternatives for contaminated sediment, soil, and groundwater.
- Initiated a regional program for evaluation of groundwater sampling practices and laboratory analysis at military bases.
- Identified emerging issues, wrote technical guidance, and assisted in policy and regulation development through work on four national U.S. EPA workgroups, including the Superfund Groundwater Technical Forum and the Federal Facilities Forum.

At the request of the State of Hawaii, Matt developed a methodology to determine the vulnerability of groundwater to contamination on the islands of Maui and Oahu. He used analytical models and a GIS to show zones of vulnerability, and the results were adopted and published by the State of Hawaii and County of Maui.

As a hydrogeologist with the EPA Groundwater Protection Section, Matt worked with provisions of the Safe Drinking Water Act and NEPA to prevent drinking water contamination. Specific activities included the following:

- Received an EPA Bronze Medal for his contribution to the development of national guidance for the protection of drinking water.
- Managed the Sole Source Aquifer Program and protected the drinking water of two communities through designation under the Safe Drinking Water Act. He prepared geologic reports, conducted

public hearings, and responded to public comments from residents who were very concerned about the impact of designation.

- Reviewed a number of Environmental Impact Statements for planned major developments, including large hazardous and solid waste disposal facilities, mine reclamation, and water transfer.

Matt served as a hydrogeologist with the RCRA Hazardous Waste program. Duties were as follows:

- Supervised the hydrogeologic investigation of hazardous waste sites to determine compliance with Subtitle C requirements.
- Reviewed and wrote "part B" permits for the disposal of hazardous waste.
- Conducted RCRA Corrective Action investigations of waste sites and led inspections that formed the basis for significant enforcement actions that were developed in close coordination with U.S. EPA legal counsel.
- Wrote contract specifications and supervised contractor's investigations of waste sites.

With the National Park Service, Matt directed service-wide investigations of contaminant sources to prevent degradation of water quality, including the following tasks:

- Applied pertinent laws and regulations including CERCLA, RCRA, NEPA, NRDA, and the Clean Water Act to control military, mining, and landfill contaminants.
- Conducted watershed-scale investigations of contaminants at parks, including Yellowstone and Olympic National Park.
- Identified high-levels of perchlorate in soil adjacent to a national park in New Mexico and advised park superintendent on appropriate response actions under CERCLA.
- Served as a Park Service representative on the Interagency Perchlorate Steering Committee, a national workgroup.
- Developed a program to conduct environmental compliance audits of all National Parks while serving on a national workgroup.
- Co-authored two papers on the potential for water contamination from the operation of personal watercraft and snowmobiles, these papers serving as the basis for the development of nation-wide policy on the use of these vehicles in National Parks.
- Contributed to the Federal Multi-Agency Source Water Agreement under the Clean Water Action Plan.

Policy:

Served senior management as the Senior Science Policy Advisor with the U.S. Environmental Protection Agency, Region 9.

Activities included the following:

- Advised the Regional Administrator and senior management on emerging issues such as the potential for the gasoline additive MTBE and ammonium perchlorate to contaminate drinking water supplies.
- Shaped EPA's national response to these threats by serving on workgroups and by contributing to guidance, including the Office of Research and Development publication, Oxygenates in Water: Critical Information and Research Needs.
- Improved the technical training of EPA's scientific and engineering staff.
- Earned an EPA Bronze Medal for representing the region's 300 scientists and engineers in negotiations with the Administrator and senior management to better integrate scientific

principles into the policy-making process.
- Established national protocol for the peer review of scientific documents.

Geology:

With the U.S. Forest Service, Matt led investigations to determine hillslope stability of areas proposed for timber harvest in the central Oregon Coast Range. Specific activities were as follows:

- Mapped geology in the field, and used aerial photographic interpretation and mathematical models to determine slope stability.
- Coordinated his research with community members who were concerned with natural resource protection.
- Characterized the geology of an aquifer that serves as the sole source of drinking water for the city of Medford, Oregon.

As a consultant with Dames and Moore, Matt led geologic investigations of two contaminated sites (later listed on the Superfund NPL) in the Portland, Oregon, area and a large hazardous waste site in eastern Oregon. Duties included the following:

- Supervised year-long effort for soil and groundwater sampling.
- Conducted aquifer tests.
- Investigated active faults beneath sites proposed for hazardous waste disposal.

Teaching:

From 1990 to 1998, Matt taught at least one course per semester at the community college and university levels:

- At San Francisco State University, held an adjunct faculty position and taught courses in environmental geology, oceanography (lab and lecture), hydrogeology, and groundwater contamination.
- Served as a committee member for graduate and undergraduate students.
- Taught courses in environmental geology and oceanography at the College of Marin.

Matt is currently a part time geology instructor at Golden West College in Huntington Beach, California where he taught from 2010 to 2014 and in 2017.

Invited Testimony, Reports, Papers and Presentations:

Hagemann, M.F., 2008. Disclosure of Hazardous Waste Issues under CEQA. Presentation to the Public Environmental Law Conference, Eugene, Oregon.

Hagemann, M.F., 2008. Disclosure of Hazardous Waste Issues under CEQA. Invited presentation to U.S. EPA Region 9, San Francisco, California.

Hagemann, M.F., 2005. Use of Electronic Databases in Environmental Regulation, Policy Making and Public Participation. Brownfields 2005, Denver, Coloradao.

Hagemann, M.F., 2004. Perchlorate Contamination of the Colorado River and Impacts to Drinking Water in Nevada and the Southwestern U.S. Presentation to a meeting of the American Groundwater Trust, Las Vegas, NV (served on conference organizing committee).

Hagemann, M.F., 2004. Invited testimony to a California Senate committee hearing on air toxins at schools in Southern California, Los Angeles.

Brown, A., Farrow, J., Gray, A. and **Hagemann, M.**, 2004. An Estimate of Costs to Address MTBE Releases from Underground Storage Tanks and the Resulting Impact to Drinking Water Wells. Presentation to the Ground Water and Environmental Law Conference, National Groundwater Association.

Hagemann, M.F., 2004. Perchlorate Contamination of the Colorado River and Impacts to Drinking Water in Arizona and the Southwestern U.S. Presentation to a meeting of the American Groundwater Trust, Phoenix, AZ (served on conference organizing committee).

Hagemann, M.F., 2003. Perchlorate Contamination of the Colorado River and Impacts to Drinking Water in the Southwestern U.S. Invited presentation to a special committee meeting of the National Academy of Sciences, Irvine, CA.

Hagemann, M.F., 2003. Perchlorate Contamination of the Colorado River. Invited presentation to a tribal EPA meeting, Pechanga, CA.

Hagemann, M.F., 2003. Perchlorate Contamination of the Colorado River. Invited presentation to a meeting of tribal repesentatives, Parker, AZ.

Hagemann, M.F., 2003. Impact of Perchlorate on the Colorado River and Associated Drinking Water Supplies. Invited presentation to the Inter-Tribal Meeting, Torres Martinez Tribe.

Hagemann, M.F., 2003. The Emergence of Perchlorate as a Widespread Drinking Water Contaminant. Invited presentation to the U.S. EPA Region 9.

Hagemann, M.F., 2003. A Deductive Approach to the Assessment of Perchlorate Contamination. Invited presentation to the California Assembly Natural Resources Committee.

Hagemann, M.F., 2003. Perchlorate: A Cold War Legacy in Drinking Water. Presentation to a meeting of the National Groundwater Association.

Hagemann, M.F., 2002. From Tank to Tap: A Chronology of MTBE in Groundwater. Presentation to a meeting of the National Groundwater Association.

Hagemann, M.F., 2002. A Chronology of MTBE in Groundwater and an Estimate of Costs to Address Impacts to Groundwater. Presentation to the annual meeting of the Society of Environmental Journalists.

Hagemann, M.F., 2002. An Estimate of the Cost to Address MTBE Contamination in Groundwater (and Who Will Pay). Presentation to a meeting of the National Groundwater Association.

Hagemann, M.F., 2002. An Estimate of Costs to Address MTBE Releases from Underground Storage Tanks and the Resulting Impact to Drinking Water Wells. Presentation to a meeting of the U.S. EPA and State Underground Storage Tank Program managers.

Hagemann, M.F., 2001. From Tank to Tap: A Chronology of MTBE in Groundwater. Unpublished report.

Hagemann, M.F., 2001. Estimated Cleanup Cost for MTBE in Groundwater Used as Drinking Water. Unpublished report.

Hagemann, M.F., 2001. Estimated Costs to Address MTBE Releases from Leaking Underground Storage Tanks. Unpublished report.

Hagemann, M.F., and VanMouwerik, M., 1999. Potential Water Quality Concerns Related to Snowmobile Usage. Water Resources Division, National Park Service, Technical Report.

VanMouwerik, M. and **Hagemann, M.F**. 1999, Water Quality Concerns Related to Personal Watercraft Usage. Water Resources Division, National Park Service, Technical Report.

Hagemann, M.F., 1999, Is Dilution the Solution to Pollution in National Parks? The George Wright Society Biannual Meeting, Asheville, North Carolina.

Hagemann, M.F., 1997, The Potential for MTBE to Contaminate Groundwater. U.S. EPA Superfund Groundwater Technical Forum Annual Meeting, Las Vegas, Nevada.

Hagemann, M.F., and Gill, M., 1996, Impediments to Intrinsic Remediation, Moffett Field Naval Air Station, Conference on Intrinsic Remediation of Chlorinated Hydrocarbons, Salt Lake City.

Hagemann, M.F., Fukunaga, G.L., 1996, The Vulnerability of Groundwater to Anthropogenic Contaminants on the Island of Maui, Hawaii. Hawaii Water Works Association Annual Meeting, Maui, October 1996.

Hagemann, M. F., Fukanaga, G. L., 1996, Ranking Groundwater Vulnerability in Central Oahu, Hawaii. Proceedings, Geographic Information Systems in Environmental Resources Management, Air and Waste Management Association Publication VIP-61.

Hagemann, M.F., 1994. Groundwater Characterization and Cleanup at Closing Military Bases in California. Proceedings, California Groundwater Resources Association Meeting.

Hagemann, M.F. and Sabol, M.A., 1993. Role of the U.S. EPA in the High Plains States Groundwater Recharge Demonstration Program. Proceedings, Sixth Biennial Symposium on the Artificial Recharge of Groundwater.

Hagemann, M.F., 1993. U.S. EPA Policy on the Technical Impracticability of the Cleanup of DNAPL-contaminated Groundwater. California Groundwater Resources Association Meeting.

Hagemann, M.F., 1992. Dense Nonaqueous Phase Liquid Contamination of Groundwater: An Ounce of Prevention... Proceedings, Association of Engineering Geologists Annual Meeting, v. 35.

Other Experience:

Selected as subject matter expert for the California Professional Geologist licensing examinations, 2009-2011.

SWAPE Technical Consultation, Data Analysis and Litigation Support for the Environment

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Paul Rosenfeld, Ph.D.

Chemical Fate and Transport & Air Dispersion Modeling

Principal Environmental Chemist

Risk Assessment & Remediation Specialist

Education

Ph.D. Soil Chemistry, University of Washington, 1999. Dissertation on volatile organic compound filtration.

M.S. Environmental Science, U.C. Berkeley, 1995. Thesis on organic waste economics.

B.A. Environmental Studies, U.C. Santa Barbara, 1991. Thesis on wastewater treatment.

Professional Experience

Dr. Rosenfeld has over 25 years' experience conducting environmental investigations and risk assessments for evaluating impacts to human health, property, and ecological receptors. His expertise focuses on the fate and transport of environmental contaminants, human health risk, exposure assessment, and ecological restoration. Dr. Rosenfeld has evaluated and modeled emissions from oil spills, landfills, boilers and incinerators, process stacks, storage tanks, confined animal feeding operations, industrial, military and agricultural sources, unconventional oil drilling operations, and locomotive and construction engines. His project experience ranges from monitoring and modeling of pollution sources to evaluating impacts of pollution on workers at industrial facilities and residents in surrounding communities. Dr. Rosenfeld has also successfully modeled exposure to contaminants distributed by water systems and via vapor intrusion.

Dr. Rosenfeld has investigated and designed remediation programs and risk assessments for contaminated sites containing lead, heavy metals, mold, bacteria, particulate matter, petroleum hydrocarbons, chlorinated solvents, pesticides, radioactive waste, dioxins and furans, semi- and volatile organic compounds, PCBs, PAHs, creosote, perchlorate, asbestos, per- and poly-fluoroalkyl substances (PFOA/PFOS), unusual polymers, fuel oxygenates (MTBE), among other pollutants. Dr. Rosenfeld also has experience evaluating greenhouse gas emissions from various projects and is an expert on the assessment of odors from industrial and agricultural sites, as well as the evaluation of odor nuisance impacts and technologies for abatement of odorous emissions. As a principal scientist at SWAPE, Dr. Rosenfeld directs air dispersion modeling and exposure assessments. He has served as an expert witness and testified about pollution sources causing nuisance and/or personal injury at sites and has testified as an expert witness on numerous cases involving exposure to soil, water and air contaminants from industrial, railroad, agricultural, and military sources.

Professional History:

Soil Water Air Protection Enterprise (SWAPE); 2003 to present; Principal and Founding Partner
UCLA School of Public Health; 2007 to 2011; Lecturer (Assistant Researcher)
UCLA School of Public Health; 2003 to 2006; Adjunct Professor
UCLA Environmental Science and Engineering Program; 2002-2004; Doctoral Intern Coordinator
UCLA Institute of the Environment, 2001-2002; Research Associate
Komex H_2O Science, 2001 to 2003; Senior Remediation Scientist
National Groundwater Association, 2002-2004; Lecturer
San Diego State University, 1999-2001; Adjunct Professor
Anteon Corp., San Diego, 2000-2001; Remediation Project Manager
Ogden (now Amec), San Diego, 2000-2000; Remediation Project Manager
Bechtel, San Diego, California, 1999 – 2000; Risk Assessor
King County, Seattle, 1996 – 1999; Scientist
James River Corp., Washington, 1995-96; Scientist
Big Creek Lumber, Davenport, California, 1995; Scientist
Plumas Corp., California and USFS, Tahoe 1993-1995; Scientist
Peace Corps and World Wildlife Fund, St. Kitts, West Indies, 1991-1993; Scientist

Publications:

Remy, L.L., Clay T., Byers, V., **Rosenfeld P. E.** (2019) Hospital, Health, and Community Burden After Oil Refinery Fires, Richmond, California 2007 and 2012. *Environmental Health.* 18:48

Simons, R.A., Seo, Y. **Rosenfeld, P**., (2015) Modeling the Effect of Refinery Emission On Residential Property Value. Journal of Real Estate Research. 27(3):321-342

Chen, J. A, Zapata A. R., Sutherland A. J., Molmen, D.R., Chow, B. S., Wu, L. E., **Rosenfeld, P. E.,** Hesse, R. C., (2012) Sulfur Dioxide and Volatile Organic Compound Exposure To A Community In Texas City Texas Evaluated Using Aermod and Empirical Data. *American Journal of Environmental Science*, 8(6), 622-632.

Rosenfeld, P.E. & Feng, L. (2011). *The Risks of Hazardous Waste.* Amsterdam: Elsevier Publishing.

Cheremisinoff, N.P., & **Rosenfeld, P.E.** (2011). *Handbook of Pollution Prevention and Cleaner Production: Best Practices in the Agrochemical Industry*, Amsterdam: Elsevier Publishing.

Gonzalez, J., Feng, L., Sutherland, A., Waller, C., Sok, H., Hesse, R., **Rosenfeld, P.** (2010). PCBs and Dioxins/Furans in Attic Dust Collected Near Former PCB Production and Secondary Copper Facilities in Sauget, IL. *Procedia Environmental Sciences*. 113–125.

Feng, L., Wu, C., Tam, L., Sutherland, A.J., Clark, J.J., **Rosenfeld, P.E.** (2010). Dioxin and Furan Blood Lipid and Attic Dust Concentrations in Populations Living Near Four Wood Treatment Facilities in the United States. *Journal of Environmental Health*. 73(6), 34-46.

Cheremisinoff, N.P., & **Rosenfeld, P.E.** (2010). *Handbook of Pollution Prevention and Cleaner Production: Best Practices in the Wood and Paper Industries.* Amsterdam: Elsevier Publishing.

Cheremisinoff, N.P., & **Rosenfeld, P.E.** (2009). *Handbook of Pollution Prevention and Cleaner Production: Best Practices in the Petroleum Industry*. Amsterdam: Elsevier Publishing.

Wu, C., Tam, L., Clark, J., **Rosenfeld, P**. (2009). Dioxin and furan blood lipid concentrations in populations living near four wood treatment facilities in the United States. *WIT Transactions on Ecology and the Environment, Air Pollution,* 123 (17), 319-327.

Tam L. K.., Wu C. D., Clark J. J. and **Rosenfeld, P.E.** (2008). A Statistical Analysis Of Attic Dust And Blood Lipid Concentrations Of Tetrachloro-p-Dibenzodioxin (TCDD) Toxicity Equivalency Quotients (TEQ) In Two Populations Near Wood Treatment Facilities. *Organohalogen Compounds*, 70, 002252-002255.

Tam L. K.., Wu C. D., Clark J. J. and **Rosenfeld, P.E.** (2008). Methods For Collect Samples For Assessing Dioxins And Other Environmental Contaminants In Attic Dust: A Review. *Organohalogen Compounds*, 70, 000527-000530.

Hensley, A.R. A. Scott, J. J. J. Clark, **Rosenfeld, P.E.** (2007). Attic Dust and Human Blood Samples Collected near a Former Wood Treatment Facility. *Environmental Research*. 105, 194-197.

Rosenfeld, P.E., J. J. J. Clark, A. R. Hensley, M. Suffet. (2007). The Use of an Odor Wheel Classification for Evaluation of Human Health Risk Criteria for Compost Facilities. *Water Science & Technology* 55(5), 345-357.

Rosenfeld, P. E., M. Suffet. (2007). The Anatomy Of Odour Wheels For Odours Of Drinking Water, Wastewater, Compost And The Urban Environment. *Water Science & Technology* 55(5), 335-344.

Sullivan, P. J. Clark, J.J.J., Agardy, F. J., **Rosenfeld, P.E.** (2007). *Toxic Legacy, Synthetic Toxins in the Food, Water, and Air in American Cities.* Boston Massachusetts: Elsevier Publishing

Rosenfeld, P.E., and Suffet I.H. (2004). Control of Compost Odor Using High Carbon Wood Ash. *Water Science and Technology*. 49(9),171-178.

Rosenfeld P. E., J.J. Clark, I.H. (Mel) Suffet (2004). The Value of An Odor-Quality-Wheel Classification Scheme For The Urban Environment. *Water Environment Federation's Technical Exhibition and Conference (WEFTEC) 2004.* New Orleans, October 2-6, 2004.

Rosenfeld, P.E., and Suffet, I.H. (2004). Understanding Odorants Associated With Compost, Biomass Facilities, and the Land Application of Biosolids. *Water Science and Technology*. 49(9), 193-199.

Rosenfeld, P.E., and Suffet I.H. (2004). Control of Compost Odor Using High Carbon Wood Ash, *Water Science and Technology*, 49(9), 171-178.

Rosenfeld, P. E., Grey, M. A., Sellew, P. (2004). Measurement of Biosolids Odor and Odorant Emissions from Windrows, Static Pile and Biofilter. *Water Environment Research*. 76(4), 310-315.

Rosenfeld, P.E., Grey, M and Suffet, M. (2002). Compost Demonstration Project, Sacramento California Using High-Carbon Wood Ash to Control Odor at a Green Materials Composting Facility. *Integrated Waste Management Board Public Affairs Office*, Publications Clearinghouse (MS–6), Sacramento, CA Publication #442-02-008.

Rosenfeld, P.E., and C.L. Henry. (2001). Characterization of odor emissions from three different biosolids. *Water Soil and Air Pollution*. 127(1-4), 173-191.

Rosenfeld, P.E., and Henry C. L., (2000). Wood ash control of odor emissions from biosolids application. *Journal of Environmental Quality.* 29, 1662-1668.

Rosenfeld, P.E., C.L. Henry and D. Bennett. (2001). Wastewater dewatering polymer affect on biosolids odor emissions and microbial activity. *Water Environment Research*. 73(4), 363-367.

Rosenfeld, P.E., and C.L. Henry. (2001). Activated Carbon and Wood Ash Sorption of Wastewater, Compost, and Biosolids Odorants. *Water Environment Research*, 73, 388-393.

Rosenfeld, P.E., and Henry C. L., (2001). High carbon wood ash effect on biosolids microbial activity and odor. *Water Environment Research*. 131(1-4), 247-262.

Chollack, T. and **P. Rosenfeld. (**1998). Compost Amendment Handbook For Landscaping. Prepared for and distributed by the City of Redmond, Washington State.

Rosenfeld, P. E. (1992). The Mount Liamuiga Crater Trail. *Heritage Magazine of St. Kitts*, 3(2).

Rosenfeld, P. E. (1993). High School Biogas Project to Prevent Deforestation On St. Kitts. *Biomass Users Network*, 7(1).

Rosenfeld, P. E. (1998). Characterization, Quantification, and Control of Odor Emissions From Biosolids Application To Forest Soil. Doctoral Thesis. University of Washington College of Forest Resources.

Rosenfeld, P. E. (1994). Potential Utilization of Small Diameter Trees on Sierra County Public Land. Masters thesis reprinted by the Sierra County Economic Council. Sierra County, California.

Rosenfeld, P. E. (1991). How to Build a Small Rural Anaerobic Digester & Uses Of Biogas In The First And Third World. Bachelors Thesis. University of California.

Presentations:

Rosenfeld, P.E., "The science for Perfluorinated Chemicals (PFAS): What makes remediation so hard?" Law Seminars International, (May 9-10, 2018) 800 Fifth Avenue, Suite 101 Seattle, WA.

Rosenfeld, P.E., Sutherland, A; Hesse, R.; Zapata, A. (October 3-6, 2013). Air dispersion modeling of volatile organic emissions from multiple natural gas wells in Decatur, TX. *44th Western Regional Meeting, American Chemical Society.* Lecture conducted from Santa Clara, CA.

Sok, H.L.; Waller, C.C.; Feng, L.; Gonzalez, J.; Sutherland, A.J.; Wisdom-Stack, T.; Sahai, R.K.; Hesse, R.C.; **Rosenfeld, P.E.** (June 20-23, 2010). Atrazine: A Persistent Pesticide in Urban Drinking Water. *Urban Environmental Pollution*. Lecture conducted from Boston, MA.

Feng, L.; Gonzalez, J.; Sok, H.L.; Sutherland, A.J.; Waller, C.C.; Wisdom-Stack, T.; Sahai, R.K.; La, M.; Hesse, R.C.; **Rosenfeld, P.E.** (June 20-23, 2010). Bringing Environmental Justice to East St. Louis, Illinois. *Urban Environmental Pollution.* Lecture conducted from Boston, MA.

Rosenfeld, P.E. (April 19-23, 2009). Perfluoroctanoic Acid (PFOA) and Perfluoroactane Sulfonate (PFOS) Contamination in Drinking Water From the Use of Aqueous Film Forming Foams (AFFF) at Airports in the United States. *2009 Ground Water Summit and 2009 Ground Water Protection Council Spring Meeting*, Lecture conducted from Tuscon, AZ.

Rosenfeld, P.E. (April 19-23, 2009). Cost to Filter Atrazine Contamination from Drinking Water in the United States" Contamination in Drinking Water From the Use of Aqueous Film Forming Foams (AFFF) at Airports in the United States. *2009 Ground Water Summit and 2009 Ground Water Protection Council Spring Meeting*. Lecture conducted from Tuscon, AZ.

Wu, C., Tam, L., Clark, J., **Rosenfeld, P**. (20-22 July, 2009). Dioxin and furan blood lipid concentrations in populations living near four wood treatment facilities in the United States. Brebbia, C.A. and Popov, V., eds., *Air Pollution XVII: Proceedings of the Seventeenth International Conference on Modeling, Monitoring and Management of Air Pollution*. Lecture conducted from Tallinn, Estonia.

Rosenfeld, P. E. (October 15-18, 2007). Moss Point Community Exposure To Contaminants From A Releasing Facility. *The 23rd Annual International Conferences on Soils Sediment and Water.* Platform lecture conducted from University of Massachusetts, Amherst MA.

Rosenfeld, P. E. (October 15-18, 2007). The Repeated Trespass of Tritium-Contaminated Water Into A Surrounding Community Form Repeated Waste Spills From A Nuclear Power Plant. *The 23rd Annual International*

Conferences on Soils Sediment and Water. Platform lecture conducted from University of Massachusetts, Amherst MA.

Rosenfeld, P. E. (October 15-18, 2007). Somerville Community Exposure To Contaminants From Wood Treatment Facility Emissions. The *23rd Annual International Conferences on Soils Sediment and Water*. Lecture conducted from University of Massachusetts, Amherst MA.

Rosenfeld P. E. (March 2007). Production, Chemical Properties, Toxicology, & Treatment Case Studies of 1,2,3-Trichloropropane (TCP). *The Association for Environmental Health and Sciences (AEHS) Annual Meeting*. Lecture conducted from San Diego, CA.

Rosenfeld P. E. (March 2007). Blood and Attic Sampling for Dioxin/Furan, PAH, and Metal Exposure in Florala, Alabama. *The AEHS Annual Meeting.* Lecture conducted from San Diego, CA.

Hensley A.R., Scott, A., **Rosenfeld P.E.,** Clark, J.J.J. (August 21 – 25, 2006). Dioxin Containing Attic Dust And Human Blood Samples Collected Near A Former Wood Treatment Facility. *The 26th International Symposium on Halogenated Persistent Organic Pollutants – DIOXIN2006*. Lecture conducted from Radisson SAS Scandinavia Hotel in Oslo Norway.

Hensley A.R., Scott, A., **Rosenfeld P.E.,** Clark, J.J.J. (November 4-8, 2006). Dioxin Containing Attic Dust And Human Blood Samples Collected Near A Former Wood Treatment Facility. *APHA 134 Annual Meeting & Exposition.* Lecture conducted from Boston Massachusetts.

Paul Rosenfeld Ph.D. (October 24-25, 2005). Fate, Transport and Persistence of PFOA and Related Chemicals. Mealey's C8/PFOA. *Science, Risk & Litigation Conference.* Lecture conducted from The Rittenhouse Hotel, Philadelphia, PA.

Paul Rosenfeld Ph.D. (September 19, 2005). Brominated Flame Retardants in Groundwater: Pathways to Human Ingestion, *Toxicology and Remediation PEMA Emerging Contaminant Conference*. Lecture conducted from Hilton Hotel, Irvine California.

Paul Rosenfeld Ph.D. (September 19, 2005). Fate, Transport, Toxicity, And Persistence of 1,2,3-TCP. *PEMA Emerging Contaminant Conference.* Lecture conducted from Hilton Hotel in Irvine, California.

Paul Rosenfeld Ph.D. (September 26-27, 2005). Fate, Transport and Persistence of PDBEs. *Mealey's Groundwater Conference.* Lecture conducted from Ritz Carlton Hotel, Marina Del Ray, California.

Paul Rosenfeld Ph.D. (June 7-8, 2005). Fate, Transport and Persistence of PFOA and Related Chemicals. *International Society of Environmental Forensics: Focus On Emerging Contaminants*. Lecture conducted from Sheraton Oceanfront Hotel, Virginia Beach, Virginia.

Paul Rosenfeld Ph.D. (July 21-22, 2005). Fate Transport, Persistence and Toxicology of PFOA and Related Perfluorochemicals. *2005 National Groundwater Association Ground Water And Environmental Law Conference*. Lecture conducted from Wyndham Baltimore Inner Harbor, Baltimore Maryland.

Paul Rosenfeld Ph.D. (July 21-22, 2005). Brominated Flame Retardants in Groundwater: Pathways to Human Ingestion, Toxicology and Remediation. *2005 National Groundwater Association Ground Water and Environmental Law Conference.* Lecture conducted from Wyndham Baltimore Inner Harbor, Baltimore Maryland.

Paul Rosenfeld, Ph.D. and James Clark Ph.D. and Rob Hesse R.G. (May 5-6, 2004). Tert-butyl Alcohol Liability and Toxicology, A National Problem and Unquantified Liability. *National Groundwater Association. Environmental Law Conference*. Lecture conducted from Congress Plaza Hotel, Chicago Illinois.

Paul Rosenfeld, Ph.D. (March 2004). Perchlorate Toxicology. *Meeting of the American Groundwater Trust*. Lecture conducted from Phoenix Arizona.

Hagemann, M.F., **Paul Rosenfeld, Ph.D.** and Rob Hesse (2004). Perchlorate Contamination of the Colorado River. *Meeting of tribal representatives*. Lecture conducted from Parker, AZ.

Paul Rosenfeld, Ph.D. (April 7, 2004). A National Damage Assessment Model For PCE and Dry Cleaners. *Drycleaner Symposium. California Ground Water Association*. Lecture conducted from Radison Hotel, Sacramento, California.

Rosenfeld, P. E., Grey, M., (June 2003) Two stage biofilter for biosolids composting odor control. *Seventh International In Situ And On Site Bioremediation Symposium Battelle Conference* Orlando, FL.

Paul Rosenfeld, Ph.D. and James Clark Ph.D. (February 20-21, 2003) Understanding Historical Use, Chemical Properties, Toxicity and Regulatory Guidance of 1,4 Dioxane. *National Groundwater Association. Southwest Focus Conference. Water Supply and Emerging Contaminants*.. Lecture conducted from Hyatt Regency Phoenix Arizona.

Paul Rosenfeld, Ph.D. (February 6-7, 2003). Underground Storage Tank Litigation and Remediation. *California CUPA Forum*. Lecture conducted from Marriott Hotel, Anaheim California.

Paul Rosenfeld, Ph.D. (October 23, 2002) Underground Storage Tank Litigation and Remediation. *EPA Underground Storage Tank Roundtable*. Lecture conducted from Sacramento California.

Rosenfeld, P.E. and Suffet, M. (October 7- 10, 2002). Understanding Odor from Compost, *Wastewater and Industrial Processes. Sixth Annual Symposium On Off Flavors in the Aquatic Environment. International Water Association*. Lecture conducted from Barcelona Spain.

Rosenfeld, P.E. and Suffet, M. (October 7- 10, 2002). Using High Carbon Wood Ash to Control Compost Odor. *Sixth Annual Symposium On Off Flavors in the Aquatic Environment. International Water Association*. Lecture conducted from Barcelona Spain.

Rosenfeld, P.E. and Grey, M. A. (September 22-24, 2002). Biocycle Composting For Coastal Sage Restoration. *Northwest Biosolids Management Association*. Lecture conducted from Vancouver Washington..

Rosenfeld, P.E. and Grey, M. A. (November 11-14, 2002). Using High-Carbon Wood Ash to Control Odor at a Green Materials Composting Facility. *Soil Science Society Annual Conferenc*e. Lecture conducted from Indianapolis, Maryland.

Rosenfeld. P.E. (September 16, 2000). Two stage biofilter for biosolids composting odor control. *Water Environment Federation.* Lecture conducted from Anaheim California.

Rosenfeld. P.E. (October 16, 2000). Wood ash and biofilter control of compost odor. *Biofest.* Lecture conducted from Ocean Shores, California.

Rosenfeld, P.E. (2000). Bioremediation Using Organic Soil Amendments. *California Resource Recovery Association*. Lecture conducted from Sacramento California.

Rosenfeld, P.E., C.L. Henry, R. Harrison. (1998). Oat and Grass Seed Germination and Nitrogen and Sulfur Emissions Following Biosolids Incorporation With High-Carbon Wood-Ash. *Water Environment Federation 12th Annual Residuals and Biosolids Management Conference Proceedings*. Lecture conducted from Bellevue Washington.

Rosenfeld, P.E., and C.L. Henry. (1999). An evaluation of ash incorporation with biosolids for odor reduction. *Soil Science Society of America*. Lecture conducted from Salt Lake City Utah.

Rosenfeld, P.E., C.L. Henry, R. Harrison. (1998). Comparison of Microbial Activity and Odor Emissions from Three Different Biosolids Applied to Forest Soil. *Brown and Caldwell.* Lecture conducted from Seattle Washington.

Rosenfeld, P.E., C.L. Henry. (1998). Characterization, Quantification, and Control of Odor Emissions from Biosolids Application To Forest Soil. *Biofest.* Lecture conducted from Lake Chelan, Washington.

Rosenfeld, P.E, C.L. Henry, R. Harrison. (1998). Oat and Grass Seed Germination and Nitrogen and Sulfur Emissions Following Biosolids Incorporation With High-Carbon Wood-Ash. Water Environment Federation 12th Annual Residuals and Biosolids Management Conference Proceedings. Lecture conducted from Bellevue Washington.

Rosenfeld, P.E., C.L. Henry, R. B. Harrison, and R. Dills. (1997). Comparison of Odor Emissions From Three Different Biosolids Applied to Forest Soil. *Soil Science Society of America*. Lecture conducted from Anaheim California.

Teaching Experience:

UCLA Department of Environmental Health (Summer 2003 through 20010) Taught Environmental Health Science 100 to students, including undergrad, medical doctors, public health professionals and nurses. Course focused on the health effects of environmental contaminants.

National Ground Water Association, Successful Remediation Technologies. Custom Course in Sante Fe, New Mexico. May 21, 2002. Focused on fate and transport of fuel contaminants associated with underground storage tanks.

National Ground Water Association; Successful Remediation Technologies Course in Chicago Illinois. April 1, 2002. Focused on fate and transport of contaminants associated with Superfund and RCRA sites.

California Integrated Waste Management Board, April and May, 2001. Alternative Landfill Caps Seminar in San Diego, Ventura, and San Francisco. Focused on both prescriptive and innovative landfill cover design.

UCLA Department of Environmental Engineering, February 5, 2002. Seminar on Successful Remediation Technologies focusing on Groundwater Remediation.

University Of Washington, Soil Science Program, Teaching Assistant for several courses including: Soil Chemistry, Organic Soil Amendments, and Soil Stability.

U.C. Berkeley, Environmental Science Program Teaching Assistant for Environmental Science 10.

Academic Grants Awarded:

California Integrated Waste Management Board. $41,000 grant awarded to UCLA Institute of the Environment. Goal: To investigate effect of high carbon wood ash on volatile organic emissions from compost. 2001.

Synagro Technologies, Corona California: $10,000 grant awarded to San Diego State University.
Goal: investigate effect of biosolids for restoration and remediation of degraded coastal sage soils. 2000.

King County, Department of Research and Technology, Washington State. $100,000 grant awarded to University of Washington: Goal: To investigate odor emissions from biosolids application and the effect of polymers and ash on VOC emissions. 1998.

Northwest Biosolids Management Association, Washington State. $20,000 grant awarded to investigate effect of polymers and ash on VOC emissions from biosolids. 1997.

James River Corporation, Oregon: $10,000 grant was awarded to investigate the success of genetically engineered Poplar trees with resistance to round-up. 1996.

United State Forest Service, Tahoe National Forest: $15,000 grant was awarded to investigating fire ecology of the Tahoe National Forest. 1995.

Kellogg Foundation, Washington D.C. $500 grant was awarded to construct a large anaerobic digester on St. Kitts in West Indies. 1993

Deposition and/or Trial Testimony:

In the Circuit Court Of The Twentieth Judicial Circuit, St Clair County, Illinois
Martha Custer et al., Plaintiff vs. Cerro Flow Products, Inc., Defendants
Case No.: No. 0i9-L-2295
Rosenfeld Deposition, 5-14-2021
Trial, October 8-4-2021

In the Circuit Court of Cook County Illinois
Joseph Rafferty, Plaintiff vs. Consolidated Rail Corporation and National Railroad Passenger Corporation d/b/a AMTRAK,
Case No.: No. 18-L-6845
Rosenfeld Deposition, 6-28-2021

In the United States District Court For the Northern District of Illinois
Theresa Romcoe, Plaintiff vs. Northeast Illinois Regional Commuter Railroad Corporation d/b/a METRA Rail, Defendants
Case No.: No. 17-cv-8517
Rosenfeld Deposition, 5-25-2021

In the Superior Court of the State of Arizona In and For the Cunty of Maricopa
Mary Tryon et al., Plaintiff vs. The City of Pheonix v. Cox Cactus Farm, L.L.C., Utah Shelter Systems, Inc.
Case Number CV20127-094749
Rosenfeld Deposition: 5-7-2021

In the United States District Court for the Eastern District of Texas Beaumont Division
Robinson, Jeremy et al *Plaintiffs*, vs. CNA Insurance Company et al.
Case Number 1:17-cv-000508
Rosenfeld Deposition: 3-25-2021

In the Superior Court of the State of California, County of San Bernardino
Gary Garner, Personal Representative for the Estate of Melvin Garner vs. BNSF Railway Company.
Case No. 1720288
Rosenfeld Deposition 2-23-2021

In the Superior Court of the State of California, County of Los Angeles, Spring Street Courthouse
Benny M Rodriguez vs. Union Pacific Railroad, A Corporation, et al.
Case No. 18STCV01162
Rosenfeld Deposition 12-23-2020

In the Circuit Court of Jackson County, Missouri
Karen Cornwell, *Plaintiff,* vs. Marathon Petroleum, LP, *Defendant.*
Case No.: 1716-CV10006
Rosenfeld Deposition. 8-30-2019

In the United States District Court For The District of New Jersey
Duarte et al, *Plaintiffs,* vs. United States Metals Refining Company et. al. *Defendant.*
Case No.: 2:17-cv-01624-ES-SCM
Rosenfeld Deposition. 6-7-2019

In the United States District Court of Southern District of Texas Galveston Division
M/T Carla Maersk, *Plaintiffs,* vs. Conti 168., Schiffahrts-GMBH & Co. Bulker KG MS "Conti Perdido" *Defendant.*
Case No.: 3:15-CV-00106 consolidated with 3:15-CV-00237
Rosenfeld Deposition. 5-9-2019

In The Superior Court of the State of California In And For The County Of Los Angeles – Santa Monica
Carole-Taddeo-Bates et al., vs. Ifran Khan et al., Defendants
Case No.: No. BC615636
Rosenfeld Deposition, 1-26-2019

In The Superior Court of the State of California In And For The County Of Los Angeles – Santa Monica
The San Gabriel Valley Council of Governments et al. vs El Adobe Apts. Inc. et al., Defendants
Case No.: No. BC646857
Rosenfeld Deposition, 10-6-2018; Trial 3-7-19

In United States District Court For The District of Colorado
Bells et al. Plaintiff vs. The 3M Company et al., Defendants
Case No.: 1:16-cv-02531-RBJ
Rosenfeld Deposition, 3-15-2018 and 4-3-2018

In The District Court Of Regan County, Texas, 112th Judicial District
Phillip Bales et al., Plaintiff vs. Dow Agrosciences, LLC, et al., Defendants
Cause No.: 1923
Rosenfeld Deposition, 11-17-2017

In The Superior Court of the State of California In And For The County Of Contra Costa
Simons et al., Plaintiffs vs. Chevron Corporation, et al., Defendants
Cause No C12-01481
Rosenfeld Deposition, 11-20-2017

In The Circuit Court Of The Twentieth Judicial Circuit, St Clair County, Illinois
Martha Custer et al., Plaintiff vs. Cerro Flow Products, Inc., Defendants
Case No.: No. 0i9-L-2295
Rosenfeld Deposition, 8-23-2017

In United States District Court For The Southern District of Mississippi
Guy Manuel vs. The BP Exploration et al., Defendants
Case: No 1:19-cv-00315-RHW
Rosenfeld Deposition, 4-22-2020

In The Superior Court of the State of California, For The County of Los Angeles
Warrn Gilbert and Penny Gilber, Plaintiff vs. BMW of North America LLC
Case No.: LC102019 (c/w BC582154)
Rosenfeld Deposition, 8-16-2017, Trail 8-28-2018

In the Northern District Court of Mississippi, Greenville Division
Brenda J. Cooper, et al., *Plaintiffs,* vs. Meritor Inc., et al., *Defendants*
Case Number: 4:16-cv-52-DMB-JVM
Rosenfeld Deposition: July 2017

In The Superior Court of the State of Washington, County of Snohomish
Michael Davis and Julie Davis et al., Plaintiff vs. Cedar Grove Composting Inc., Defendants
Case No.: No. 13-2-03987-5
Rosenfeld Deposition, February 2017
Trial, March 2017

In The Superior Court of the State of California, County of Alameda
Charles Spain., Plaintiff vs. Thermo Fisher Scientific, et al., Defendants
Case No.: RG14711115
Rosenfeld Deposition, September 2015

In The Iowa District Court In And For Poweshiek County
Russell D. Winburn, et al., Plaintiffs vs. Doug Hoksbergen, et al., Defendants
Case No.: LALA002187
Rosenfeld Deposition, August 2015

In The Circuit Court of Ohio County, West Virginia
Robert Andrews, et al. v. Antero, et al.
Civil Action N0. 14-C-30000
Rosenfeld Deposition, June 2015

In The Iowa District Court For Muscatine County
Laurie Freeman et. al. Plaintiffs vs. Grain Processing Corporation, Defendant
Case No 4980
Rosenfeld Deposition: May 2015

In the Circuit Court of the 17th Judicial Circuit, in and For Broward County, Florida
Walter Hinton, et. al. Plaintiff, vs. City of Fort Lauderdale, Florida, a Municipality, Defendant.
Case Number CACE07030358 (26)
Rosenfeld Deposition: December 2014

In the County Court of Dallas County Texas
Lisa Parr et al, *Plaintiff*, vs. Aruba et al, *Defendant.*
Case Number cc-11-01650-E
Rosenfeld Deposition: March and September 2013
Rosenfeld Trial: April 2014

In the Court of Common Pleas of Tuscarawas County Ohio
John Michael Abicht, et al., *Plaintiffs,* vs. Republic Services, Inc., et al., *Defendants*
Case Number: 2008 CT 10 0741 (Cons. w/ 2009 CV 10 0987)
Rosenfeld Deposition: October 2012

In the United States District Court for the Middle District of Alabama, Northern Division
James K. Benefield, et al., *Plaintiffs*, vs. International Paper Company, *Defendant*.
Civil Action Number 2:09-cv-232-WHA-TFM
Rosenfeld Deposition: July 2010, June 2011

In the Circuit Court of Jefferson County Alabama
Jaeanette Moss Anthony, et al., *Plaintiffs*, vs. Drummond Company Inc., et al., *Defendants*
Civil Action No. CV 2008-2076
Rosenfeld Deposition: September 2010

In the United States District Court, Western District Lafayette Division
Ackle et al., *Plaintiffs*, vs. Citgo Petroleum Corporation, et al., *Defendants*.
Case Number 2:07CV1052
Rosenfeld Deposition: July 2009

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August 2 2022

Kara Hawkins
Environmental Project Manager
City of San José Department of Planning, Building and Code Enforcement
200 East Santa Clara Street, 3rd Floor Tower
San José CA 95113-1905

VIA EMAIL (kara.hawkins@sanjoseca.gov)

RE: Fountain Alley Mixed Use Project (H20-037/ER20-242) SEIR PAC*SJ COMMENTS

Dear Ms. Hawkins,

Comment D.1

The Preservation Action Council of San Jose (PAC*SJ) appreciates the opportunity to provide Comment on the SEIR for the proposed Fountain Alley Mixed Use Project located in the Fountain Alley area of downtown San Jose (1.25-acre Assessor Parcel Number 467-22-121) in the center of the National register listed San Jose Downtown Commercial Historic District. As currently described, the developer proposes to build one massive 21-story curvilinear mixed-use building with up to 194 dwelling units, ~31,959 sq. ft. of ground floor retail, and 405,924 sq. ft. of office space. The height of the proposed project is 289' at the roof top and 289'at the top of the mechanical structure. Below grade parking with 292-stalls is proposed.

As was noted in PAC*SJ's Scoping Comments for this project, PAC*SJ (in general) supports infill development within downtown San Jose as described with the Envision 2040 Plan for the provision of commercial, retail, and residential space. And, that support may include new projects that are within historic districts as long as the projects do not directly or indirectly damage the setting, integrity, prominence, public view, access, landmark eligibility, operational viability of historic buildings and districts. As you know, PAC*SJ supports the preservation of building and districts that enable its citizens to enjoy a unique sense of place that pays tribute to San Jose's unique architecture and culture. PAC*SJ seeks to ensure that buildings are not only preserved but activated as this ensures a stewardship of our history and culture that would not otherwise be possible.

Comment D.2

PAC*SJ is opposed to the project as currently proposed. The City's own report concludes:

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"The proposed project would impact the overall integrity of the San Jose Downtown Commercial Historic District (Historic District) as it does not comply with: the 2003 Historic District Design Guidelines (e.g., building height, corner element, massing, façades, rear façades, and setbacks and stepbacks) and the 2019 Guidelines and Standards. • And, that the Project's ground disturbing activities could result in a substantial adverse change in the significance of unknown archaeological resources."

The SEIR Report for this project includes an analysis by TreanorHL that references National, State and local guidelines and standards that point back to the same overarching and still unanswered question: "Was a project of this magnitude truly contemplated within the City's last and only Commercial Historic District by the City prior to this project, or is this a project that is so inconsistent with standards and guidelines that it should be reconsidered altogether. If not, what example of a project can be cited as being rejected based on the project's lack of compliance with the City's published guidelines and standards

Comment D.3

As for the Report's analysis of the project's success in meeting **the Secretary of the Interior's Standards**, here is the complete quote from the report with a highlighting of key conclusions that evidence TreanorHL's understanding of the project's lack of compliance with key standards:

"The parcel (a parking lot) was identified as a noncontributing site within the National Register listed San Jose Downtown Commercial Historic District. As such the proposed project would not cause direct impacts to any built historic resources within the boundaries of the subject parcel. Even though the project site does not include any built historic resources, the proposed project entails constructing a new building within the boundaries of the National Register-listed San Jose Downtown Commercial Historic District (a historic resource). A review of project conformance with the Standards was undertaken, because generally, a project that has been determined to conform with the Standards can be considered to be a project that will not cause a significant impact per CEQA. In summary the Standards analysis for the proposed project showed that Standards 1-7 are not applicable to the proposed project. Standard 8 is related to archaeological resources and is beyond the scope of this report. The project does not comply with Standard 9 since the building is not compatible with the historic district in terms of features, size, scale, proportion, and massing. The building is only compatible in terms of materials. …… Since this project does not fully conform with the Standards, TreanorHL subsequently conducted an integrity analysis of the San Jose Downtown Commercial District to assess possible impacts. To be listed in the NRHP, a property must not only be shown to be significant under the NRHP criteria, but it also must maintain sufficient integrity in order to convey its historic significance. The historic district

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and multiple district contributors adjacent to the project site could be indirectly affected by the proposed project as a result of the alteration of their immediate surroundings and thereby, potentially to their historic integrity. Although the proposed project would diminish the integrity of design, setting (partial), and feeling (partial) of the historic district, it would retain its overall historic character that qualifies it for listing as a historic resource. The impact of the proposed project to the San Jose Downtown Commercial Historic District would be less-than-significant."

PAC*SJ does not necessarily agree or disagree with the TreanorHL report's conclusion as to the likely impact of this project, but notes that it does not state its underlying assumptions for their conclusion regarding the significance of the impacts of this project. In short, the risk of losing the integrity of the Historic District is not a matter to be taken lightly.

Comment D.4

As for achieving the projects objectives, PAC*SJ has noted that the City only evaluated the following Project Options:

- Location Alternative
- No Project – No Development Alternative and Development under Downtown General Plan Designation
- Reduced Height (Four-Stories), Two Buildings Alternative
- Reduced Height (17-Stories and 20-Stories), Two Buildings Alternative

While these may be reasonable alternatives in isolation, it is very concerning that the City may accept significant impacts without even a consideration of alternatives to the design of the building itself, designs that could minimize the impact of the project.

Comment D.5

PAC*SJ has repeatedly requested that the design of the Fountain Alley Project reflect the Historic District's buildings all the way down to street level. PAC*SJ provided the following comments within its Scoping Comments:

"In terms of the impact of this project, its mass and scale is immense and totally disproportionate to the Historic District. It is a project that will shadow and overwhelm everything else around it. It will be the focal point of the entire District, not due to its intrinsic design, but by its sheer mass alone and completely . The City has made clear though its recently updated Downtown Design Guidelines what they deem appropriate for the people of San Jose as noted in Section 4.2.4 of the Guidelines regarding Massing Standards & Historic Adjacency

a. Relate Podium Level building massing to the scale of Historic Context buildings by breaking a large building into masses of similar scale to Historic Context buildings.

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b. Design buildings with rectilinear rather than curved and diagonal forms where rectilinear forms are typical of the Historic Context buildings.

Given the dissonance of the current curvilinear design (versus rectilinear) and massive, unbroken/unarticulated bases along 2nd Street, and many other design differences with the existing historic district's elements, there was clearly limited to no effort by the project's architect to do anything but ignore these guidelines altogether.

Comment D.6

PAC*SJ requested that the scope and content of the analysis of the cultural and historic impact of this project include massing, shadowing, parking, vehicle and pedestrian traffic volume, and any other items that might cause direct and indirect impacts to a historic building's or district's historic status, physical integrity and economic impact. These comments were not substantially addressed within the report. Even if some would argue this is beyond CEQA's scope, PAC*SJ believes that this analysis needed to take into account anything that would affect operational viability of a historic resource. For example, if a retail building is preserved within the project boundary, but removes customer parking, the delivery of materials critical to the business, or other resources that are vital to meeting the establishment's ability to host customers, those impacts need to be forecast and analyzed with just as much importance as the physical impact to the structural integrity of a building.

As noted in PAC*SJ's Scoping Comments, this SEIR should also include a detailed analysis of the direct and indirect impact of the proposed development on other nearby/adjacent historic structures and potential Districts as a whole, along with a detailed analysis of multiple alternatives that eliminate or substantially reduce the impact of this project on San Jose's historic resources. The Report includes a summary of adjacent off-site impacts that includes a listing of individual properties, but the current Report is lacking in its coverage of the impact to these building individually and in aggregate.

The Project SEIR does not adequately address the cumulative impact of this project in the context of all other projects currently underway or envisioned in the immediate vicinity of the Fountain Alley Mixed Use Project.

Section 15130(b) of the State CEQA Guidelines defines consideration of the following two elements as necessary to provide an adequate discussion of cumulative impacts: (A) a list of past, present, and reasonably anticipated future projects producing related or cumulative impacts, including those projects outside the control of the Agency, or (B) a summary of projections contained in a local, regional or statewide plan, or related planning document, that describes or

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evaluates conditions contributing to the cumulative effect.

Projects that should be taken into account in a revision of the Fountain Alley Mixed Use Project SEIR include but should not be limited to the SuZaCo, ICON/ECHO, Tower 27, Bank of Italy, and any other Project(s) that the City has already reviewed or reasonably anticipates. All of these projects are within the Land Use Control of the City of San Jose. It is worth noting that VTA has provided scoping comments that suggest the need for an evaluation of the impact of construction and operation of planned VTA/BART projects on San Jose's historic fabric. As required by CEQA, a list of development and transportation projects should be added to and reconciled with the conclusions of this Project Report.

Comment D.7

In the TreanorHL DESIGN GUIDELINES AND STANDARDS COMPLIANCE REVIEW, the author notes that the proposed project represents a risk to the integrity of one of San Jose's most significant historic district as follows: "The activities related to the physical undertaking of the project….have the potential to physically damage the adjacent historic resources (district contributors and designated City Landmarks), which could cause a substantial adverse change in the significance of historic resources and therefore require mitigation measures." As a result, TreanorHL recommends four measures (Measures 1a through 1d) for evaluating and mitigating potential construction-related project impacts to "identified" historic resources as a key step towards reducing impacts to less-than-significant. Please see the following summary of those recommended Mitigation Measures:

1a. If pile-driving is to be included as part of the construction, then the adjacent historic resources should first be surveyed to determine the existing condition.

1b. A professional with expertise in ground vibration and its effect on existing structures, shall prepare a study of the potential of vibrations caused by excavation and construction activities.

1c. Prepare and implement a Historical Resources Protection Plan (HRPP) to protect the historic building fabric of the adjacent historic resources from direct or indirect impacts during construction activities (i.e., due to damage from operation of construction equipment, staging, and material storage).

1d. A team of at least one qualified historical architect and one qualified structural engineer shall monitor the mitigation measures.

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The Report notes that if substantial adverse impacts to the historic resource related to construction activities are found during construction, the monitoring team shall inform the project's sponsor, as well as the City's HPO, or equivalent, and the project sponsor shall adhere to the monitoring team's recommendations for corrective measures, including potentially halting construction in situations where construction activities would imminently endanger the historic resources. The project sponsor shall ensure that if repairs occur, in the event of damage to the historic resources during construction, repair work shall comply with the Secretary of the Interior's Standards for the Treatment of Historic Properties and shall restore the character-defining features in a manner that does not affect their historic status.

PAC*SJ believes the City should not minimize the significance of the potential risk to the City's Historic District by this project and should ensure that the Mitigation Measures recommend in its SEIR be unquestionably established prior to, not after entitlement

Comment D.8

In summary, the SEIR for this project confirms that the project doesn't meet the Guidelines & Standards that have been established for the good of the people and that the project (as currently proposed) will have a significant but potentially mitigated impact on the Historic District within which it is located. The SEIR asserts, without substantial evidence, that despite these admissions of impact to the integrity of the district, that it will not cause it (the Historic District) to be ineligible for listing on the National Registry. PAC*SJ respectfully asks the City for high level (not HABs) documentation of the District before the project is started to fully address the anticipated impact of the project in the hope of putting forward a project alternative that meets the majority of the project objectives without so terribly impacting the Historic District to the degree currently anticipated.

Finally, a robust summary of financial and physical mitigation measures applicable to this project should be provided in advance of project consideration should the City decide to approve this project via a statement of overriding consideration to justify any aspect of this project. PAC*SJ is particularly interested as to how the historic fabric in the vicinity of this proposed project will be preserved and how San Jose will be able to fund the protection of its historic fabric as it simultaneously seeks to meet it Envision 2040 Program Goals on a project-by-project basis. If the City determines that negative impacts are unavoidable, PAC*SJ asks that mitigation funding be provided to the City by the Project Developer for preservation projects within the District and perhaps beyond.

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Sincerely,

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