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Sent: Tuesday, February 20, 2024 11:06 PM

To: Reena Rao <RRao@fremont.gov>; Charles Liu <cliu@fremont.gov>; Craig Steckler <CSteckler@fremont.gov>; Benjamin Yee <BYee@fremont.gov>; Jasmine Basrai <jbasrai@fremont.gov>; Yonggang Zhang <yzhang@fremont.gov>; Shobana Ramamurthi <sramamurthi@fremont.gov>

Cc: Mark Hungerford <mhungerford@fremont.gov>; Joel Pullen <JPullen@fremont.gov>

Subject: Feb 22 items 4.2 & 4.3 -- support staff recommendation

Dear Fremont Planning Commissioners,

As someone who cares about housing affordability, solving climate change, and walkable communities, I urge you to support staff recommendation on items 4.2 and 4.3: deny the appeals and maintain the approval of the two mixed-use housing projects at Fremont Hub and Gateway Plaza, respectively.

I'm a neighbor of Fremont Hub, and I know from personal experience that it would be a fantastic location for mixed-use, dense, walkable infill housing. It's hard to be car-free in Fremont, but living right next to Fremont Hub makes it possible. We can access groceries, restaurants, pet supplies, and a veterinarian all within a 15-minute walk. It would be even better to live *in* Fremont Hub, in a project that's designed to improve sidewalk access and prioritize people over cars. That's also a great location for bus access, with relatively frequent buses on both Fremont and Mowry.

Gateway Plaza is even better as far as transit access. It's shocking how few apartments are near Fremont BART. That scarcity drives up the price of apartments in that area (which, incidentally, is why my household decided to live a half-hour walk away when we moved here in 2018). Gateway Plaza has the benefit of being a short walk from a major transit hub, as well as being full of retail businesses that meet daily needs such as groceries, coffee, and restaurants.

Dense infill housing that makes it easier to live car-free is *good* for the environment. The alternative is suburban sprawl, which adds vehicle-miles-traveled (thus worsening climate change) and destroys valuable natural lands and habitats. Attacking dense infill projects on environmental grounds is ignoring the big picture.

Please keep these mixed-use housing projects moving forward, and deny the appeals in items 4.2 and 4.3.

Sincerely,
Lisa Danz

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February 22, 2024

Via Hand Delivery and Email

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Re: Agenda Item 2 - Supplemental Comments on Appeal to Planning Commission of Zoning Administrator Approval of Fremont Hub Mixed-Use Project Discretionary Design Review Permit (PLN2022-00487)

Dear Honorable Commissioners Liu, Zhang, Basrai, Rao, Ramamurthi, Steckler, and Yee; Mr. Hungerford, and Mr. Pullen:

We are writing on behalf of East Bay Residents for Responsible Development (“East Bay Residents” or “EBRRD”) to provide supplemental comments on our appeal of the December 12, 2023 Fremont Zoning Administrator approval of the Discretionary Design Review Permit submitted by Kimco Realty (“Applicant”) to the City of Fremont (“City”) for the Fremont Hub Mixed-Use Project (PLN 2022-00487) (“Project”) and approval of the CEQA Environmental Compliance Checklist (“CEQA Checklist”) prepared for the Project (collectively, “Appeal”). These comments also respond to the Staff Report prepared for the February 22, 2024 Planning

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Commission hearing on our Appeal,¹ and the Responses to Appeal Memorandum prepared by Lamphier-Gregory.²

We prepared these comments with the assistance of acoustics, noise, and vibration expert Jack Meighan of Wilson Ihrig³ and air quality and hazardous resources experts Matt Hagemann and Paul Rosenfeld from Soil Water Air Protection Enterprise (“SWAPE”).⁴ Their analysis demonstrates that the Project has potentially significant air quality and noise impacts which are peculiar to the Project, more than previously analyzed in the prior planning EIRs, and which are not fully mitigated by the City’s existing mitigation measures or standard development requirements.

East Bay Residents respectfully requests that the Commission uphold this appeal, vacate the Zoning Administrator’s December 12, 2023 decision to approve the Project, and require Staff to withdraw the CEQA Checklist prepare a legally adequate project-level environmental impact report (“EIR”) for the Project to address all potentially significant impacts of the Project.

I. BASIS FOR APPEAL

The basis for East Bay Residents’ appeal is set forth in these comments, and in East Bay Residents’ December 12, 2023 comments to the Zoning Administrator.⁵ The Zoning Administrator’s reliance on a streamlining exemption pursuant to CEQA Guidelines Section 15183 (“Community Plan Exemption”) and a CEQA addendum pursuant to CEQA Guidelines Sections 15162 and 15164 violated CEQA and was not supported by substantial evidence because the Project was not contemplated in the 2011 General Plan Update, and has new or more severe significant impacts than previously analyzed in the 2011 General Plan Update EIR which are peculiar to the Project site and were not known and could not have been known at the time of the EIR’s certification because the Project had not yet been proposed when the 2011 EIR was certified. These impacts include potentially significant air quality and noise impacts, which require disclosure and mitigation in a project-level EIR.

¹ Fremont Planning Commission Report (ID # 5090) Meeting of February 22, 2024, p. 2 (hereinafter, “Staff Report”).

² Memorandum from Scott Gregory, Lamphier-Gregory to Mark Hungerford, Senior Planner City of Fremont Community Development, Response to Appeal of Fremont Hub Mixed Use Project and its CEQA Document (Feb. 8, 2024), (hereinafter, “Response to Appeal”).

³ Mr. Meighan’s Comments (“Meighan Comments”) and CV are attached hereto as **Attachment A**

⁴ SWAPE’s Comments (“SWAPE Comments”), along with Mr. Hagemann and Mr. Rosenfeld’s CVs are attached hereto as **Attachment B**.

⁵ See **Attachment C**.

II. APPELLANTS' BACKGROUND

Appellants East Bay Residents is an unincorporated association of individuals and labor organizations directly affected by the Project. The association includes Fremont residents Patrick Buffy, Ray Burks, Ralph Neves, as well as the UA Plumbers and Pipefitters Local 342, International Brotherhood of Electrical Workers Local 595, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, and their members and their families who live and/or work in the City of Fremont and Alameda County. EBRRD's members would be directly affected by the Project's unmitigated impacts. Individual members may also work on the Project itself. They would therefore be first in line to be exposed to any health and safety hazards that may exist on the Project site.

The organizational members of EBRRD also have an interest in enforcing the City's planning and zoning laws and the State's 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 business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, Residents' members are concerned about projects that are built without providing opportunities to improve local recruitment, apprenticeship training, and retention of skilled workforces, and without providing lifesaving healthcare expenditures for the construction workforce.

III. OVERVIEW OF CEQA REQUIREMENTS

CEQA has two basic purposes, neither of which is satisfied by the City's decision to forego an EIR and rely on a CEQA Consistency Checklist. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.⁶ The Environmental Impact Report ("EIR") is the "heart" of this requirement.⁷ 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."⁸ To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full

⁶ 14 Cal. Code Regs. § 15002(a)(1) ("CEQA Guidelines"); *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.

⁷ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

⁸ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

disclosure.”⁹ An adequate EIR must contain facts and analysis, not just an agency’s conclusions.¹⁰ CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.¹¹

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.¹² If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.¹³ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.¹⁴ Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding instruments.¹⁵ A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.¹⁶ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”¹⁷

Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to determine whether to prepare an EIR or negative declaration, identify whether a program EIR, tiering, or other appropriate process can be used for analysis of the project’s environmental effects, or determine whether a previously prepared EIR could be

⁹ CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

¹⁰ See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

¹¹ Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

¹² CEQA Guidelines § 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass’n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

¹³ Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

¹⁴ *Id.*, §§ 21002-21002.1.

¹⁵ CEQA Guidelines § 15126.4(a)(2).

¹⁶ *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

¹⁷ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

used with the project, among other purposes.¹⁸ CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.¹⁹ Reliance on CEQA tiering or streamlining from prior EIRs is improper where a project may have significant effects that were not previously examined, are more severe than previously analyzed, or require mitigation beyond existing requirements.²⁰

CEQA streamlining under CEQA Guidelines Section 15183 (“Community Plan exemption”) allows approval of projects without an EIR only in narrow circumstances. Section 15183 provides that if an EIR was previously certified for a planning level decision of a city or county, subsequent CEQA review of consistent projects may be limited to evaluating a project’s effects on the environment that are either (A) specific to the project or to the project site and were not addressed as significant effects in the prior environmental impact report or (B) where substantial new information shows the effects will be more significant than described in the prior environmental impact report.²¹ Section 15183 allows a lead agency to forego preparation of an EIR if neither of these situations occur, or if the lead agency determines that uniformly applicable development policies or standards adopted by the agency will substantially mitigate the new effects. A lead agency’s determination pursuant to this section must be supported by substantial evidence.²²

CEQA’s subsequent review standard requires the lead agency to conduct subsequent or supplemental environmental review when one or more of the following events occur:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.²³

¹⁸ CEQA Guidelines §§ 15060, 15063(c).

¹⁹ *See, e.g.*, Pub. Resources Code § 21100.

²⁰ 14 CCR §§ 15162; 15183; 15183.3.

²¹ Pub. Res. Code § 21094.5(a); 14 Cal. Code Regs. §§ 15183, 15183.3(a), (c).

²² Pub. Res. Code § 21094.5(a).

²³ Pub. Resources Code § 21166; CEQA Guidelines § 15162.

IV. THE CITY'S DECISION NOT TO PREPARE A SUBSEQUENT EIR PURSUANT TO SECTION 15162 AND 15164 WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The CEQA Guidelines explain that the lead agency must determine, on the basis of substantial evidence in light of the whole record, whether one or more of the following events occur:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant effects or a substantial increase in the severity of previously identified effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
 - (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
 - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
 - (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
 - (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.²⁴

²⁴ CEQA Guidelines §§ 15162(a)(1)-(3).

Only where *none* of the conditions described above calling for preparation of a subsequent or supplemental EIR have occurred may the lead agency consider preparing a subsequent negative declaration, an addendum or no further documentation.²⁵

CEQA Guidelines, section 15164 states the following concerning the use of addendums:

- (a) The lead agency or a responsible agency shall prepare an addendum to a previously certified EIR if some changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.
- (b) An addendum to an adopted negative declaration may be prepared if only minor technical changes or additions are necessary or none of the conditions described in Section 15162 calling for the preparation of a subsequent EIR or negative declaration have occurred.
- (c) An addendum need not be circulated for public review but can be included in or attached to the final EIR or adopted negative declaration.
- (d) The decision-making body shall consider the addendum with the final EIR or adopted negative declaration prior to making a decision on the project.
- (e) A brief explanation of the decision not to prepare a subsequent EIR pursuant to Section 15162 should be included in an addendum to an EIR, the lead agency's required findings on the project, or elsewhere in the record. The explanation must be supported by substantial evidence.

In any case, the decision must be supported by substantial evidence.²⁶ Here, the City's decision not to prepare a subsequent CEQA document in the form of a Project-level EIR was not supported by substantial evidence and is contrary to substantial evidence from Appellants' experts demonstrating that one or more of the triggering events under CEQA Guidelines section 15162 and 15164 has occurred.

A. A Subsequent EIR Must Be Prepared Because Feasible Mitigation May Further Reduce the Project's Potentially Significant Environmental Impacts

The Response to Appeal acknowledges that "the specifics of the Fremont Hub Mixed use Project, or any other currently contemplated individual development project, was not known and could not have been known when the General Plan EIR

²⁵ CEQA Guidelines § 15162(b).

²⁶ *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).

was prepared in 2011.”²⁷ Appellants agree that the specifics of the Project were not contemplated in 2011 for the preparation of the General Plan EIR and its Mitigation Monitoring and Reporting Program (“MMRP”).

Feasible mitigation measures and alternatives which are considerably different from those analyzed in the previous EIR, and in some cases did not exist when the 2011 EIR was prepared, are presented in the SWAPE Comments which would substantially reduce one or more significant effects on the environment, but these measures have not been adopted as Project mitigation measures or alternatives.²⁸ These include Tier 4 Final Engine Tier requirements, ULSD diesel, use of an electric generator, and measures to reduce truck idling times.

B. Air Quality Mitigation Recommended by SWAPE is Considerably Different from Mitigation Previously Analyzed and Would Substantially Reduce the Project’s Significant Effects on the Environment

As demonstrated in SWAPE’s comments attached hereto, the Project may result in significant air quality impacts from reactive organic compound (“ROG”) emissions which are more severe than previously analyzed and require additional mitigation beyond that required in the General Plan MMRP.

SWAPE identified a potential error in calculations from the air quality analysis.²⁹ Specifically, they identified an unjustified change in the construction phase lengths input in the tool used to analyze air quality impacts.³⁰ They found that using appropriate construction phase lengths would have allowed the City to identify a potentially significant impact.³¹ SWAPE’s analysis indicates that *the Project’s construction-related emissions, particularly ROG emissions, exceed the applicable Bay Area Air Quality Management District (“BAAQMD”) threshold.*³² *SWAPE concludes that even with implementation of the General Plan’s mitigation measures as laid out in the MMRP, and reliance on BAAQMD’s Basic Construction Mitigation Measures, the Project would still result in a significant, unmitigated impact.*³³ Additional mitigation measures are therefore required to reduce emissions to less than significant levels.

²⁷ Response to Appeal, pg. 2.

²⁸ See CEQA Guidelines §§ 15162(a)(1)-(3).

²⁹ See generally SWAPE Comments, in reference to the LSA Air Quality and Greenhouse Gas Memo, October 31, 2023, prepared for the City of Fremont by LSA Associates

³⁰ SWAPE Comments, pp. 1-4.

³¹ SWAPE Comments, pg. 4.

³² SWAPE Comments, pg. 5.

³³ SWAPE Comments, pg. 6.

The evidence presented by SWAPE constitutes new information demonstrating that the Project has new and more severe air quality impacts than previously analyzed in the GP EIR, triggering the need for a subsequent EIR under CEQA Guidelines Section 15162.³⁴ SWAPE's comments also demonstrate that mitigation measures which are substantially different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, which the City and project proponents declined to adopt.³⁵ SWAPE recommends feasible mitigation to further reduce the Project's ROG emissions which were not available or considered when the GP EIR was adopted

First, SWAPE recommends that because the Project is within 500 feet of residences, the Project should require proponents to use Tier 4 Final equipment for all engines above 50 horsepower. According to the City, there are residences within the "immediate vicinity" of the Project.³⁶ This includes multi-family residential uses approximately 380 feet from the project site.³⁷ The General Plan's MMRP does not require the use of Tier 4 Final Engines. Tier 4 Final Engines were not contemplated because Tier 4 Final did not begin to be phased in until 2013 (2 years after the GP EIR was certified).³⁸ Tier 3 engines were manufactured between 2006 and 2011 and continued to be produced until Tier 4 engines are completely phased in.³⁹ Tier 4 engines are the newest and some incorporate hybrid electric technology. CARB began phase in of *small* Tier 4 interim engines (less than 75 horsepower) in 2008, and Tier 4 Final engines in 2013.⁴⁰ Larger tier 4 equipment began being phased in between 2012 and 2014 with an increasing percentage of equipment required to meet the new standards.⁴¹ However, unlike in 2011, Tier 4 Final equipment is readily available in the construction market nowadays.⁴² According to SWAPE, the

³⁴ 14 CCR § 15162 (a)(3).

³⁵ 14 CCR § 15162 (a)(3)(C), (D).

³⁶ CEQA Checklist, pg. 70.; *see also LSA Air Quality and Greenhouse Gas Memo* (October 31, 2023), pg.27 ("The proposed project site is located in an urban area in close proximity to existing residential uses").

³⁷ *Noise and Vibration Impact Analysis for the Fremont Hub Mixed-Use Project, Fremont, California* (October 31st, 2023), pg. 14.

³⁸ See Tier 4 phasing timeline in See "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

³⁹ As summarized by Alameda County, see Draft Environmental Impact Report for Sand Hill Wind Project (November 2013), pg. 3.3-17, available here: https://www.acgov.org/cda/planning/landuseprojects/documents/Ch03-03_AQ_DEIR.pdf

⁴⁰ See FN 39.

⁴¹ *Id.*

⁴² U.S. Environmental Protection Agency, "FACT SHEET: Proposed Amendments to the Standards for Performance for Stationary Compression Ignition Internal Combustion Engines," available here:

use of Tier 4 Final equipment is both necessary and feasible to reduce the significant ROG impact identified.⁴³ Therefore, requiring Tier 4 Final Engines is mitigation “previously found not to be feasible” but now “would in fact be feasible.”⁴⁴ It is also “considerably different from [mitigation] analyzed in the previous EIR”⁴⁵ because the EIR did not propose any tier restrictions, much less Tier 4 Final equipment. The mitigation “would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.”⁴⁶

The GP MMRP also lacked the feasible mitigation measure recommended by SWAPE that the Project include Diesel nonroad construction equipment used on site for more than 10 total days shall have either (1) engines meeting EPA Tier 4 nonroad emissions standards or (2) emission control technology verified by EPA or CARB for use with nonroad engines to reduce PM emissions by a minimum of 85% for engines for 50 hp and greater and by a minimum of 20% for engines less than 50 hp.⁴⁷ This measure, and others recommended by SWAPE to reduce air pollution impacts, “would in fact be feasible”⁴⁸ are “considerably different from [mitigation] analyzed in the previous EIR [and] would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.”⁴⁹

The City may contend that implementation of the City’s Standard Development Requirements (“SDRs”)⁵⁰ related to construction emissions⁵¹ satisfies this requirement. That contention is misplaced because the SDRs were not in place when the 2011 EIR was certified and therefore were not considered at the time and are considerably different than the mitigation in the GP EIR. A subsequent EIR must therefore be prepared to adequately mitigate the Project’s air quality impacts.

<https://casetext.com/regulation/california-code-of-regulations/title-14-natural-resources/division-6-resources-agency/chapter-3-guidelines-for-implementation-of-the-california-environmental-quality-act/article-11-types-of-eirs/section-15162-subsequent-eirs-and-negative-declarations> (“New stationary and nonroad CI engines are equipped by the engine manufacturer with emission controls to meet the Tier 4 final emission standards, which generally began with either the 2014 or 2015 model year.”)

⁴³ SWAPE Comments, pg. 6.

⁴⁴ CEQA Guidelines §§ 15162(a)(3)(C).

⁴⁵ CEQA Guidelines §§ 15162(a)(3)(D).

⁴⁶ CEQA Guidelines §§ 15162(a)(1)-(3).

⁴⁷ SWAPE Comments, pg. 7.

⁴⁸ CEQA Guidelines §§ 15162(a)(3)(C).

⁴⁹ CEQA Guidelines §§ 15162(a)(1)-(3).

⁵⁰ FMC Chapter 18.218.

⁵¹ FMC § 18.218.050(a)(2).

V. THE CITY LACKS SUBSTANTIAL EVIDENCE TO SUPPORT APPROVAL OF THE PROJECT UNDER A COMMUNITY PLAN EXEMPTION

CEQA Guidelines Section 15183, the Community Plan exemption, provides a streamlined process for environmental review of projects that are “consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified,” authorizing agencies to avoid duplicative environmental review “except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the project or its site.”⁵² Section 15183(c) provides that an EIR must be prepared if the Project will have new or more severe significant impacts than previously analyzed: “[i]f an impact is not peculiar to the parcel or to the project, has been addressed as a significant effect in the prior EIR, or can be substantially mitigated by the imposition of uniformly applied development policies or standards. . . then an additional EIR need not be prepared for the project solely on the basis of that impact.”⁵³

As discussed above, the Project’s site-specific impacts were not analyzed in the General Plan EIR, which was relied upon for both the General Plan Update and the City Center Community Plan. The 15183 Community Plan exemption does not apply to the Project because neither the Fremont City Center Community Plan, nor any of the other planning documents relied on in the Staff Report or CEQA Checklist, actually quantified project-level air quality, health risks, noise impacts, or traffic impacts. This Project was not contemplated in the Community Plan, or General Plan because the Project Application was filed May 6, 2022, long after both plans were adopted by the City.⁵⁴ The Fremont City Center Community Plan therefore did not fully address the Project’s peculiar and more significant impacts related to construction ROG emissions and noise, and there is substantial evidence demonstrating that the standard conditions of approval would not substantially mitigate these significant impacts, or reduce them to the greatest extent feasible, as required by CEQA.⁵⁵

The Project will have new or more severe significant impacts than previously analyzed in the General Plan or Community Plan. As discussed herein and in SWAPE’s Comments, the Project could create significant ROG emissions that were

⁵² 14 C.C.R. § 15183(a).

⁵³ 14 C.C.R. § 15183(c).

⁵⁴ City of Fremont, Universal Planning Application, Fremont Hub MU, APN 501-976-12, (May 6, 2022).

⁵⁵ PRC § 21081(a).

not disclosed or analyzed under the Fremont City Center Community Plan EIR,⁵⁶ or General Plan Update EIR. Furthermore, as demonstrated by Mr. Meighan's comments, the proposed mitigation measures for vibration impacts during construction and operation are not adequately addressed and mitigated. These impacts are peculiar to the Project and require site-specific CEQA analysis.

As described below, the site-specific analysis conducted for the Project in the CEQA Checklist is legally deficient in several ways and previously adopted mitigation measures and SDRs would not reduce these impacts to less than significant levels. Therefore, the City may not rely on a Community Plan Exemption for Project approval, and must provide detailed analysis of the Project's impacts in a project-level EIR.

A. The Project May Result in New and Significant Project-Level Air Quality Impacts that Were Not Contemplated or Analyzed in the General Plan EIR that Are Peculiar to the Project Site and Not Substantially Mitigated

As SWAPE highlights in their comment letter, there are significant shortcomings in the evaluation of the Project's air quality impacts⁵⁷ that lead to an underestimation of air quality impacts. First, the air quality analysis relied on CalEEMod Version 2022.1, which lacks complete output files necessary to accurately assess the Project's emissions.⁵⁸ Without the complete output files, it is difficult to verify the accuracy of the air modeling and subsequent analysis, potentially leading to underestimation and inadequate addressing of air quality impacts.⁵⁹

Additionally, SWAPE identified unsubstantiated changes to individual construction phase lengths in the air quality analysis.⁶⁰ While the total construction duration is stated as approximately 24 months, the analysis failed to provide specific evidence justifying the length of each phase.⁶¹ This discrepancy may lead to an underestimation of peak daily emissions during certain phases of construction. Indeed, as SWAPE demonstrated, using appropriate construction phase lengths would have allowed the City to identify a potentially significant impact. SWAPE's

⁵⁶ City of Fremont, California, Fremont City Center Community Plan, (May 19, 2015), <https://www.fremont.gov/home/showpublisheddocument/1625/637752665509700000>.

⁵⁷ As demonstrated in the LSA Air Quality and Greenhouse Gas Memo, October 31, 2023, prepared for the City of Fremont by LSA Associates

⁵⁸ SWAPE Comments, pp. 1-3.

⁵⁹ *Id.*

⁶⁰ SWAPE Comments, pp. 3-4.

⁶¹ *Id.*

analysis indicates that **the Project's construction-related emissions, particularly ROG emissions, exceed the applicable BAAQMD threshold.**⁶² This suggests a potentially significant air quality impact, necessitating the consideration of feasible mitigation measures. SWAPE recommends implementing various mitigation measures that the City did not propose.⁶³

SWAPE's comments provide substantial evidence demonstrating that air quality impacts from the Project may be more severe than previously analyzed. As discussed above, SWAPE also concludes that the mitigation measures in the MMRP do not substantially mitigate these impacts. A project-level EIR must be prepared to adequately analyze and mitigate the Project's potentially significant noise impacts before the Project can lawfully be approved.

B. The Project May Result in New and Significant Project-Level Noise Quality Impacts that Were Not Contemplated or Analyzed in the General Plan EIR that Are Peculiar to the Project Site and Not Substantially Mitigated

1. Wilson Ihrig's Analysis Demonstrates Flaws in the City's Analysis of Noise Impacts, Thereby Resulting in an Underestimation of Noise Impacts

As Mr. Meighan demonstrates, noise impact analysis⁶⁴ prepared for the Project reveals various shortcomings that may result in an underestimation of noise impacts. For example, Mr. Meighan identified improper use of ground factors and usage factors in construction noise calculations.⁶⁵ These miscalculations may have resulted in missing a significant impact. Indeed, with proper implementation of Usage Factors, Mr. Meighan identified a significant increase in noise levels that is possibly significant and should be studied in an EIR.⁶⁶

Further, the mitigation measures proposed for vibration are insufficient. As Mr. Meighan points out, the construction management plan ("CMP") is not sufficient to mitigate the potentially significant vibration levels resulting from construction activities utilizing heavy equipment because it lacks explicit measures to address potential vibration damage to nearby buildings.⁶⁷ The CMP's general

⁶² SWAPE Comments, pp. 4-5.

⁶³ SWAPE Comments, pp. 5-8.

⁶⁴ *Noise and Vibration Impact Analysis for the Fremont Hub Mixed-Use Project, Fremont, California* (October 31st, 2023), prepared by LSA.

⁶⁵ Meighan Comments, pg. 3.

⁶⁶ Meighan Comments, pg. 3-4.

⁶⁷ Meighan Comments, pg. 4.

procedures do not specifically target vibration mitigation, and therefore do not adequately mitigate this impact. Therefore, Mr. Meighan recommends explicit inclusion of measures to address vibration damage within the CMP.⁶⁸

2. The Project's Construction Noise Significance Thresholds are Not Supported by Substantial Evidence

The Project's construction noise assessment violates CEQA by relying on absolute noise levels and failing to consider the magnitude of changes in noise levels as a threshold for significance. Courts have held that reliance on a maximum noise level as the sole threshold of significance for noise impacts violates CEQA because it fails to consider whether the magnitude of changes in noise levels is significant.⁶⁹

In *Keep our Mountains Quiet v. County of Santa Clara*,⁷⁰ neighbors of a wedding venue sued over the County of Santa Clara's failure to prepare an EIR for a proposed project to allow use permits for wedding and other party events at a residential property abutting an open space preserve. Neighbors and their noise expert contended that previous events at the facility had caused significant noise impacts that reverberated in neighbors' homes and disrupted the use and enjoyment of their property.⁷¹ Similar to the CEQA Checklist in this case, the City's CEQA document relied on the noise standards set forth in its noise ordinance as its thresholds for significant noise exposure from the project, deeming any increase to be insignificant so long as the absolute noise level did not exceed those standards.⁷² The Court examined a long line of CEQA cases which have uniformly held that conformity with land use regulations is not conclusive of whether or not a project has significant noise impacts⁷³ in holding that the County's reliance on the project's compliance with noise regulations did not constitute substantial evidence supporting the County's finding of no significant impacts.⁷⁴ And in *King & Gardiner Farms*, a lead agency "determined the significance of [noise] impacts based solely on

⁶⁸ Meighan Comments, pg. 4.

⁶⁹ *King & Gardiner Farms, LLC*, 45 Cal.App.5th at 865.

⁷⁰ *Keep our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714.

⁷¹ *Id.* at 724.

⁷² *Id.* at 732.

⁷³ *Id.*, citing *Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1338; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881–882; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1416 (project's effects can be significant even if "they are not greater than those deemed acceptable in a general plan"); *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354, ("CEQA nowhere calls for evaluation of the impacts of a proposed project on an existing general plan").

⁷⁴ *Id.* at 732-734; see also *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 893, as modified on denial of reh'g (Mar. 20, 2020).

whether the estimated ambient noise level with the project would exceed the 65 decibels threshold set forth in the County's general plan.... Based on prior case law, we conclude the magnitude of the noise increase must be addressed to determine the significance of change in noise levels.”⁷⁵

The CEQA Checklist makes the same error here by failing to analyze the significance of the magnitude of the noise increase. As Mr. Meighan points out, the analysis establishes only the City of Fremont’s Municipal Code Section 18.160.010 as the threshold for significant noise exposure from the noise generated by the project.⁷⁶ However, this standard only limits construction activities within 500 feet of residences to the weekday hours of 6:00 a.m. to 10:00 p.m., and weekend or holiday hours of 8:00 a.m. to 8:00 p.m.. The analysis suggests that there are no specific thresholds for significant daytime construction noise, implying that any increase in noise during daytime hours, regardless of its magnitude, is considered insignificant as long as it occurs within those hours. In doing so, the City fails to address the significance of increases in noise levels over ambient noise levels, as required by CEQA.

Further, the City's analysis provides construction noise levels at various distances and stages of construction but fails to compare these levels to any significance thresholds. The analysis simply asserts that loud construction activities would be deemed "less than significant" without offering any benchmark ambient values or analyzing what level of noise increase over ambient levels would be considered significant. The Response to Appeal also asserts that, “According to the Fremont Noise Ordinance, temporary construction noise levels generated during permitted construction hours are exempt from compliance with City noise standards.”⁷⁷ This is not accurate. As demonstrated below, construction noise is not exempt from the City’s noise ordinance where it is not for Public Health, Welfare, and Safety Activities.⁷⁸

The Municipal Code does not provide an exemption for construction noise as the Response to Appeal asserts. The Fremont Municipal Code includes only the following exemptions from the Noise Ordinance, none of which include the type of construction noise required for Project construction and operation:

- (a) Emergency Work. The provisions of this title shall not apply to the emission of sound for the purpose of alerting persons to the existence of an

⁷⁵ *King & Gardiner Farms, LLC*, 45 Cal.App.5th at 830.

⁷⁶ Meighan Comments, pg. 2.

⁷⁷ Response to Appeal, pg. 10.

⁷⁸ Fremont Municipal Code § 9.25.040.

emergency or in the performance of emergency work, and activities involving the execution of the duties of duly authorized governmental personnel and others providing emergency response to the general public, including but not limited to sworn peace officers, emergency personnel, utility personnel, and the operation of emergency response vehicles and equipment.

(b) **Entertainment Events and Operations.** The provisions of this chapter shall not apply to those reasonable sounds emanating from authorized school bands, school athletic and school entertainment events and occasional public and private outdoor or indoor gatherings, public dances, shows, bands, sporting and entertainment events conducted between the hours of 7:00 a.m. and 10:00 p.m., and special events for which a permit has been issued pursuant to Chapter 12.25. In addition, noise associated with activities that are part of urban core operations as defined in Section 18.188.020 or with places of entertainment that are in compliance with Section 5.45.130.

(c) **Federal or State Preempted Activities.** The provisions of this chapter shall not apply to any other activity the noise level of which is regulated by state or federal law.

(d) **Maintenance to Residential Property.** The provisions of this chapter shall not apply to noise sources associated with maintenance to property used for residential purposes, provided the activities take place between the hours of 7:00 a.m. and 10:00 p.m.

(e) **Garbage Removal.** The provisions of this chapter shall not apply to garbage removal services in commercial and mixed-use districts, even if the garbage services are located adjacent to residential districts.

(f) **Industrial Districts.** The provisions of this chapter shall not apply to industrial districts I-S, I-T, and G-I zones.

(g) **Public Health, Welfare and Safety Activities.** The provisions of this chapter shall not apply to construction, maintenance and repair operations conducted by public agencies, franchisees of the city and/or utility companies or their contractors which are deemed necessary to serve the best interests of the public and to protect the public health, welfare and safety, including but not limited to trash collection, street sweeping, tree removal, debris and limb removal, removal of downed wires, restoring electrical service, repairing traffic signals, unplugging sewers, vacuuming catch basins, repairing of damaged poles, removal of abandoned vehicles, repairing of water hydrants

and mains, gas lines, oil lines, sewers, storm drains, roads, sidewalks, etc. (Ord. 04-2021 § 1, 4-20-21.)

Project construction does not fall into any of these categories. The Project's construction noise is therefore not exempt from the City's Noise Ordinance. The City must prepare an EIR with adequate thresholds that can accurately measure whether a significant noise impact will occur.

In conclusion, the City should prepare an EIR that establishes clear thresholds of significance, includes correct calculation methodologies, and provides accurate mitigation measures. These revisions are crucial for conducting a comprehensive evaluation of noise impacts under CEQA.

VI. THE CITY CANNOT MAKE THE NECESSARY FINDINGS TO APPROVE THE PROJECT'S ENTITLEMENTS

In order to approve a discretionary design review permit, the Zoning Administrator must make the following findings:

- (a) The proposed project is consistent with the general plan, any applicable community or specific plan, planning and zoning regulations, and any adopted design rules and guidelines;
- (b) When a proposed project is inconsistent with an adopted design rule, the purpose and intent of the design rule is met through alternative means;
- (c) The multifamily residential¹ project's architectural, site, and landscape design will not be detrimental to the public health or safety; or a nonmultifamily project's architectural, site, and landscape design will not unreasonably interfere with the use and enjoyment of adjacent development nor be detrimental to the public health, safety, or welfare.⁷⁹

The Project's significant air quality and noise impacts from construction and operation will render the Project detrimental to the public health and safety. Therefore, the Zoning Administrator lacked the necessary basis to support approval of the discretionary design review permit.

VII. APPEAL FEE

Fremont Municipal Code § 18.300.030(a) requires appellants to pay an appeal "fee." In filing this appeal, Appellants paid the required \$1800 pursuant to the

⁷⁹ Fremont Municipal Code § 18.235.060 (emphasis added).

City's fee schedule.⁸⁰ Pursuant to the fee schedule, Appeals from staff actions to the Planning Commission based on FMC Volume II, Title 18 (Planning and Zoning) are required to pay an \$1,800 *deposit*.⁸¹ As described in the City's Land Use and Development Service Deposit Policies (Resolution 2010-23), the City collects deposits "from developers in connection with land use planning applications and development services," then requires the project applicants to replenish deposits when needed to continue processing their project application.⁸² The deposit policies clarify that services related to processing development project applications are to be "paid for by those developers and not be borne by the general public."⁸³ Accordingly, no additional fees, costs, or deposit replenishments may be charged against East Bay Residents related to its administrative appeal of the Zoning Administrator's decision.⁸⁴

When Appellants submitted the Appeal for filing on December 21, 2023, they were also forced to sign a "Reimbursement Agreement," which purports to authorize the City the charge Appellants an undefined and unlimited amount of additional money for "staff review, coordination, and processing costs based on real time expended" on the appeal.⁸⁵ City staff informed Appellants that the appeal filing would be rejected unless Appellants signed the Reimbursement Agreement.⁸⁶ Appellants were therefore required to sign the Reimbursement Agreement as a condition of filing the Appeal. The Reimbursement Agreement is both an illegal contract that is void as against public policy, and an unduly burdensome requirement which violates EBRRD's due process rights.

California Civil Code Section 1608 codifies the doctrine of contract illegality and provides that "[i]f any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void."⁸⁷ Under Civil Code Section 1667, "unlawful" is broadly defined as that which is contrary to an express provision of law; contrary to the policy of express law,

⁸⁰ City of Fremont Fee Schedule (July 1, 2023), pg. 6,
<https://www.fremont.gov/home/showpublisheddocument/13864/638300253322870000>.

⁸¹ *Id.*

⁸² Resolution No. 2010-23, A Resolution of the City Council of the City of Fremont Revising and Restating the City's Policies and Administrative Procedures Regarding Land Use and Development Service Deposits,
<https://www.fremont.gov/home/showpublisheddocument/12883/638162823284770000>.

⁸³ *Id.*, pg. 1.

⁸⁴ *California Teachers Ass'n v. State of Cal.* (1999) 20 Cal. 4th 327, 331.

⁸⁵ See City of Fremont, Universal Planning Application, Part II, *Reimbursement Agreement*.

⁸⁶ Telephone communication between C. Caro (Adams Broadwell) and M. Hungerford (Fremont planner), 12/21/23. Additionally, Appellants first attempt to file the Appeal on 12/21/23 without completing or signing the Reimbursement Agreement was rejected by planning staff at the counter.

⁸⁷ Civil Code § 1608.

though not expressly prohibited; or, otherwise contrary to good morals.⁸⁸ In determining illegality, the court considers a variety of factors, including the policy of the transgressed law, the kind of illegality and the particular facts.⁸⁹ Contracts that are against public policy, as with the City's Reimbursement Agreement, are void and unenforceable.⁹⁰

The Reimbursement Agreement is an illegal and unenforceable contract because it is contrary to express laws authorizing members of the public to petition the government for redress of public wrongs,⁹¹ contrary to law requiring Appellants to exhaust administrative appeals in order to maintain the right to file a public interest lawsuit, and is contrary to the laws and "good morals" associated with the public's statutory right to participate in public land use and environmental permitting processes. Any fees or costs which the City may ask Appellants to pay pursuant to the Reimbursement Agreement are void as against public policy and would result in a violation of Appellants' due process rights.

Agencies have the power to charge reasonable fees for filing administrative appeals of decisions.⁹² However, such a fee cannot impose a burden upon the exercise of the due process right to a hearing. "The guarantee of procedural due process - a meaningful opportunity to be heard - is an aspect of the constitutional right of access to the courts for all persons..."⁹³ A cost cannot be imposed on the exercise of a right to a hearing if it has "no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them..."⁹⁴ Imposing a substantial and/or open-ended monetary obligation on an individual exercising their due process right to a hearing is unconstitutional if it is imposed simply because an individual is obtaining the due process hearing itself since it chills the exercise of an individual's rights to demand a hearing, which places too great a burden on the exercise of the right to due process.⁹⁵

Pursuant to Municipal Code Section 18.300.030, when an appeal is filed by an interested party, the matter shall be scheduled for a hearing by the planning

⁸⁸ Civil Code § 1667.

⁸⁹ *Asdourian v. Araj* (1985) 38 Cal.3d 276, 282.

⁹⁰ Civil Code § 1667; *Yoo v. Jho* (2007) 147 Cal.App.4th 1249, 1251; see *Trumbo v. Bank of Berkeley* (1947) 77 Cal.App.2d 704, 710 ("The law does not imply a promise to pay for services illegally rendered under a contract expressly prohibited by statute.").

⁹¹ Cal. Const. Art. III.

⁹² See *Friends of Glendora v. City of Glendora* (2010) 182 Cal.App.4th 573, 579-80; see also *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 419.

⁹³ *Id.*, at 338-39.

⁹⁴ *Id.*, at 338.

⁹⁵ See *id.*, at 331, 333, 338.

commission, as applicable. Moreover, the Code states that “[u]ntil all applicable fees, charges and expenses have been paid in full, no action shall be taken on any application, appeal or other matter pertaining to this title as to which a fee, charge or payment of expense is required, nor shall the applicant be permitted to obtain a building permit or establish a use until all applicable fees, charges, and expenses have been paid in full.”⁹⁶ “Any unused portion of any deposit shall be returned to the person paying the deposit upon completion of the project.”⁹⁷ If the City were to enforce the Reimbursement Agreement, it may attempt withhold a decision on the Appeal unless and until Appellants pay the City for “staff review, coordination, and processing costs based on real time expended” on the appeal.⁹⁸ This would be a clear violation of Appellants’ due process rights.

Any party that desires to bring a lawsuit on this decision is required to exhaust its administrative remedies.⁹⁹ CEQA provides an avenue for doing this through Public Resources Code section 21151(c), allowing parties to appeal Zoning Administrator decisions to the Planning Commission and Planning Commission decisions to the City Council. Since East Bay Residents is required to appeal the Zoning Administrator’s decision to the Planning Commission (and possibly to the City Council) in order to exhaust administrative remedies, the City cannot impose a fee on the appellant that would chill its exercise of their right to appeal and right to a hearing in front of Planning Commission and City Council.

In *California Teachers Association v. State of California*,¹⁰⁰ a teacher filed a facial challenge to Education Code section 44944€ because the statute required teachers to pay the state one-half of the costs of the administrative law judge if they exercised his or her right to a hearing regarding a threatened suspension or dismissal and who did not prevail at the hearing. The costs of the plaintiff’s administrative hearing were later calculated to be over \$7,000.¹⁰¹ The plaintiff refused to pay this bill, asserting that such a fee placed an undue burden upon his due process right to a hearing intended to determine whether he should lose his property interest in continued employment.¹⁰² In finding the statute invalid on its

⁹⁶ Fremont Municipal Code § 18.310.020.

⁹⁷ *Id.* at § 18.310.030.

⁹⁸ See City of Fremont, Universal Planning Application, Part II, *Reimbursement Agreement*.

⁹⁹ See Pub. Res. Code § 21177; *Tomlinson v. County of Alameda* (2012) 54 Cal.4th. 281, 291.

¹⁰⁰ (1999) 20 Cal. 4th 327, 331.

¹⁰¹ *Id.* at 332.

¹⁰² *Id.*

face, the Court asserted that the right of access to courts extends to the constitutional right to petition administrative tribunals.¹⁰³

Similar to the statute challenged in *California Teachers Association*, the City's policy regarding fees and costs associated with appealing a Zoning Administrator decision and Planning Commission decision are open-ended and could amount to a substantial monetary obligation simply for obtaining a due process hearing for which there is no alternative. Appellants must appeal the Zoning Administrator's decision to the Planning Commission, and ultimately to the City Council, as required by the City's Zoning Code as well as CEQA, in order to exhaust administrative remedies before filing a lawsuit. Just as the statute did in *California Teachers Association*, the potentially substantial and unknown monetary obligation the City may try to impose under the Reimbursement Agreement to challenge the Zoning Administrator's decision will chill Appellants' required exercise of a due process hearing in order to exhaust administrative remedies.

The threat of substantial monetary obligations on Appellants imposed by the Reimbursement Agreement places too great a burden on the exercise of a due process right to a hearing that is required under CEQA in order to access the courts. The City's assertion that Appellants must pay an unknown fee beyond the \$1800 appeal fee associated with appealing a Zoning Administrator decision to Planning Commission is contrary to law and void as against public policy.

VIII. CONCLUSION

As discussed herein, the Zoning Administrator lacked substantial evidence to rely on a Community Plan Exemption or CEQA Addendum for Project approval. The Project results in potentially significant project-level impacts which are peculiar to the Project site and require additional mitigation, thus precluding reliance on any CEQA exemption. The Project does not conform with the General Plan, or Community Plan, and results in significant air quality and noise impacts.

For these reasons, EBRRD respectfully asks that the Planning Commission uphold this Appeal and remand the Project to staff to comply with CEQA and prepare an Initial Study and project-level EIR for the Project.

¹⁰³ *Id.* at 335; *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal. 3d 1118, 1135.

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Thank you for your attention to these comments. Please include them in the record of proceedings for the Project.

Sincerely,



Ariana Abedifard

Attachments
AA:acp

ATTACHMENT A



February 21st, 2024

Ms. Ariana Abedifard
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, California 94080

SUBJECT: DRAFT: Comments on Fremont HUB Noise Analysis

Dear Ms. Abedifard,

Per your request, we have reviewed the subject matter document for the Fremont Hub Mixed-Use Project in Fremont, California, based on the document entitled *Noise and Vibration Impact Analysis for the Fremont Hub Mixed-Use Project, Fremont, California* dated October 31st, 2023, prepared by LSA. The proposed project involves the partial demolition of an existing commercial building and the construction, use and maintenance of a 13,000-square-foot commercial building, a six-story mixed-use building containing 314 apartment units and 14,157 square feet of ground floor retail-commercial space. The Project is surrounded by noise sensitive uses – commercial buildings 5 feet from the property site and multifamily residences approximately 380 feet from the western edge of the project site.

Wilson Ihrig is an acoustical consulting firm that has practiced exclusively in the field of acoustics since 1966. During our almost 58 years of operation, we have prepared hundreds of noise studies for Environmental Impact Reports and Statements. We have one of the largest technical laboratories in the acoustical consulting industry. We also utilize industry-standard acoustical programs such as Roadway Construction Noise Model (RCNM), SoundPLAN, and CadnaA. In short, we are well qualified to prepare environmental noise studies and review studies prepared by others.

Adverse Effects of Noise¹

The health effects of noise are real and, in many parts of the country, pervasive.

Noise-Induced Hearing Loss. If a person is repeatedly exposed to loud noises, he or she may experience noise-induced hearing impairment or loss. In the United States, both the Occupational Health and Safety Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH) promote standards and regulations to protect the hearing of people exposed to high levels of industrial noise.

Speech Interference. Another common problem associated with noise is speech interference. In addition to the obvious issues that may arise from conversational misunderstandings, speech

¹ More information on these and other adverse effects of noise may be found in *Guidelines for Community Noise*, eds B Berglund, T Lindvall, and D Schwela, World Health Organization, Geneva, Switzerland, 1999. (<https://www.who.int/docstore/peh/noise/Comnoise-1.pdf>)

interference also leads to internal problems with concentration fatigue, irritation, decreased working capacity, and automatic stress reactions. For complete speech intelligibility, the sound level of the speech should be 15 to 18 dBA higher than the background noise. Typical indoor speech levels are 45 to 50 dBA at 1 meter, so any noise above 30 dBA begins to interfere with speech intelligibility. The common reaction to higher background noise levels is to raise one's voice. If this is required persistently for long periods of time, stress reactions and irritation will likely result.

Sleep Disturbance. Noise can disturb sleep by making it more difficult to fall asleep, by waking someone after they are asleep, or by altering their sleep stage, e.g., reducing the amount of rapid eye movement (REM) sleep. Noise exposure for people who are sleeping has also been linked to increased blood pressure, increased heart rate, increase in body movements, and other physiological effects. Not surprisingly, people who experience sleep disturbance from noise often experience secondary effects such as increased fatigue, depressed mood, and decreased work performance.

Cardiovascular and Physiological Effects. Human's bodily reactions to noise are rooted in the "fight or flight" response that evolved when many noises signaled imminent danger. These include increased blood pressure, elevated heart rate, and vasoconstriction. Prolonged exposure to acute noises can result in permanent effects such as hypertension and heart disease.

Impaired Cognitive Performance. Studies have established that noise exposure impairs people's abilities to perform complex tasks (tasks that require attention to detail or analytical processes) and noise exposure makes reading, paying attention, solving problems, and memorizing more difficult. This is why there are standards for classroom background noise levels and why offices and libraries are designed to provide quiet work environments.

An adequate evaluation of noise impacts must correlate noise levels with impacts on human health.

Document Presents Improper Thresholds of Significance

On Page 13 of the analysis, the state CEQA guidelines are quoted indicating that a project would have a significant impact of noise if the project results in "substantial temporary or permanent increase in ambient noise levels in the vicinity of the project." The analysis establishes only the City of Fremont's Municipal Code Section 18.160.010² as the threshold for significant noise exposure from the noise generated by the project. However, this standard only limits construction activities within 500 feet of residences to the weekday hours of 6:00 a.m. to 10:00 p.m., and weekend or holiday hours of 8:00 a.m. to 8:00 p.m., and does not address the increase in noise levels over ambient noise levels, as required by CEQA.

This document's interpretation of this statute implies that there are no thresholds of significance for daytime construction noise, and any increase in noise is insignificant so long as the construction activities are conducted during daytime hours only. Hypothetically, under the logic of this document, there is no noise level – no matter how extreme – where daytime construction noise would be considered an impact, even if it substantially increases noise over ambient levels, so long as the noise increases occur during specific hours of the day. This approach is illogical and unsupported.

The City's analysis calculates the construction noise levels at various distances during the construction stages by equipment type in Table I but fails to compare these figures to any thresholds

² <https://www.codepublishing.com/CA/Fremont/#!/Fremont18/Fremont18160.html#18.160>

of significance. Instead, the report reasons that loud construction activities at the site would be “less than significant” without presenting any threshold ambient values, analysis of what would constitute a significant level of increase over ambient noise levels, or any discussion at all. Other applicable standards do exist for daytime construction noise impacts based on an increase in noise levels over ambient noise levels.. Increases of 3 dBA over the ambient double the total amount of noise, are generally audible, and can be considered as substantial increase³. As such, the City’s reliance on a “threshold” which does nothing more than limit the daytime hours for construction noise, is unsupported and does not disclose whether Project construction would result in a significant noise impact, as required by CEQA. The City should prepare an EIR with a detailed noise analysis which includes a discussion of what a daytime construction noise impact level could be, if modeled levels exceed that, and if so, whether mitigation measures adopted for the prior General Plan and Community Plan fully address those impacts, or whether additional noise measures can be implemented during Project construction to reduce construction noise to below this level. Consideration of additional feasible noise reduction measures is necessary if previously adopted mitigation would not reduce construction noise impacts below relevant levels of significance.

Impact Analyses make Incorrect Assumptions

Undocumented and Incorrect Use of Ground Effects in Construction Noise Calculations

The equations provided don’t line up with the description of construction noise calculations. Attachment D in the LSA report shows the construction noise calculations. All instances use a Ground Factor of 0.5. However, the use of ground factors is not presented in any of the construction noise equations on pages 16 and 17. Therefore, it is unclear whether a ground factor of 0.5 was used (as described in Attachment D) or no ground factor was used (as per the equations). Nevertheless, as discussed below, I confirmed through my own calculations that a ground factor of 0.5 was used, which is not recommended.

The Federal Transit Administration’s Transit (FTA) Noise and Vibration Impact Assessment Manual⁴ recommends using a ground factor of 0 when hard ground separates the source and receiver (Table 4-26), such as paved Mowry Ave. Recreating the calculations in Attachment D with a ground factor of 0, as recommended, gives a maximum noise source level of 89 dBA at 50 feet, as opposed to 88 dBA as currently exists. Using a ground factor of 0.5 would result in the 88dBA figure presented in the analysis. This shows that, despite not presenting a ground factor in the equations, the analysis did indeed use a ground factor of 0.5, which resulted in a lower total noise level calculation. The noise study should be updated in an EIR with proper and clear documentation of procedures that match calculations.

Improper Use of Usage Factors in Construction Noise Calculations

The analysis in Table I presents modeling distances used between the source location of construction equipment and the nearest receivers, along with resultant modeled construction noise levels. 800 feet is identified as the distance between the center of the construction site and the residential apartments to the west of the project. This is not an appropriate method to determine potentially

³ https://planning.lacity.gov/odocument/c9fbc13-317a-4c17-ac49-dd73c048d995/GPF_FEIR_DEIR2.20.pdf

⁴ https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/research-innovation/118131/transit-noise-and-vibration-impact-assessment-manual-fta-report-no-0123_0.pdf

significant impacts from this particular site, due to the extremely large scale, and thus using the center of the site will substantially underestimate construction noise.

The FTA Manual describes in detail an appropriate method for construction noise impact analysis. Two methods are presented in this document: a general assessment and a detailed assessment. The general assessment is appropriate for an early assessment stage and involves modeling construction equipment from the center of the construction site without Usage Factors. The detailed assessment requires modeling equipment at the worst-case location of each piece of equipment to the distance at the appropriate receiver. The current methodology uses a 'general assessment' with the inclusion of Usage Factors, which is an optimistic assumption that underestimates noise.

Using a distance attenuation from the base scenario, 89 dBA at 50 feet (which includes Usage Factors and a Ground Effect of 0), to 375 feet, the closest distance to Lakeview Apartments to the construction site, produces a new modeled level of 72 dBA. This would be 3 dBA over the ambient, and thus a potential significant impact. This represents a significant increase in noise levels when the proper implementation of Usage Factors are included, and thus noise impacts are possibly significant and should be studied in an updated EIR.

Mitigation Measures are Inadequate

The analysis on page 18 states that "construction activities utilizing heavy equipment would generate vibration levels greater than 0.2 in/sec in PPV when operating within 10 ft of the property line" and that would "result in a potentially significant impact" due to commercial buildings within 5 feet of the construction site. However, the analysis states that with the "incorporation of the CMP as required by Section 18.218.050 (c), construction would not result in any vibration damage, and impacts would be less than significant." This means that the potential exists for damage to nearby buildings due to construction activities, and the CMP is the only thing stopping this potentially severe impact.

The CMP, construction management plan, lists several typical procedures such as a site logistics plan, fire safety plan, construction phasing plan, proposed truck routes, traffic control plan, complaint management plan, construction worker parking plan, and litter/debris clean-up plan. None of these would address vibration. It is within the scope of the CMP to find a solution. However, the requirement of the CMP to address potential damage to nearby buildings should be explicitly listed as mitigation to ensure this is addressed in order to confirm compliance.

Conclusion

The analysis has several errors and omissions, including an improper construction noise model, unclear noise thresholds, and insufficient mitigation measures. Please feel free to contact me with any questions on this information.

Very truly yours,
WILSON IHRIG



Jack Meighan
Associate

comments on fremont hub noise analysis.docx



JACK MEIGHAN

Associate

Jack joined Wilson Ihrig in 2021 and is an experienced acoustics engineer with expertise in projects involving rail transit systems, highways, CEQA analysis, environmental noise reduction, mechanical drawing reviews, and construction noise and vibration mitigation. He has hands-on experience with project management, including client coordination and presentations, as well as in designing, developing, and testing MATLAB code used in acoustics applications. Additionally, his expertise includes taking field measurements, developing test plans and specifying, purchasing, setting up and repairing acoustic measurement equipment. He has experience in using Traffic Noise Model (TNM), CadnaA, EASE, Visual Basic, LabView, and CAD software.

Education

- B.S. in Mechanical Engineering, University of Southern California, Los Angeles, CA
-

Project Experience

Metro Regional Connector, Los Angeles CA

Planned, took, and processed measurements as part of a team to determine the effectiveness of floating slab trackwork for a new subway in downtown Los Angeles that travels below the Walt Disney Concert Hall and the Colburn School of Music.

Rodeo Credit Enterprise CEQA Analysis for New Construction, Palmdale, CA

Wrote an accepted proposal and executed it for a noise study project to determine noise mitigation requirements on a new housing development. Led all aspects of the project and managed the budget during all phases of project completion. Completed 5 separate projects of this type for this developer.

Blackhall Studios, Santa Clarita, CA

Led the vibration measurement effort for a new soundstage directly adjacent to an existing freight and commuter rail line. Tested equipment, processed data, and analyzed results to determine the vibration propagation through the soil to the proposed soundstage locations, and was part of the team that developed mitigation techniques for the office spaces directly next to the rail line.

Octavia Residential Condos CEQA Study, San Francisco, CA

Calculated the STC ratings for the proposed windows to meet Title 24 requirements, modeled the acoustic performance of floor and ceiling structures, researched noise codes, helped with a mechanical design review, and wrote a report summarizing the results for a new Condominium project being developed in San Francisco.

San Diego International Airport Terminal I Replacement, CA

Conducted interior noise and vibration measurements, analyzed measurement data to help determine project criteria, modeled the existing and future terminals in CadnaA, and was part of a team that did a complete HVAC analysis of the entire terminal, as part of a CEQA analysis where a new terminal for the airport is being designed.

Five Points Apartments Noise Study, Whittier, CA

Took measurements, researched sound data and solutions, and recommended mitigation for a new apartment complex that was located next to an existing car wash, as part of a CEQA review.

USC Ellison Vibration Survey, Los Angeles, CA

Conducted vibration measurements as part of a survey to determine the effectiveness of vibration isolation platforms that are used to insulate cell growth in a cancer research facility. Determined the effectiveness and presented this information to the client. Researched and recommended a permanent monitoring system so the client could view data in real time.

TEN50 Condos 'Popping' Noise Investigation, Los Angeles, CA

Was part of a team that investigated the noise source of an unwanted popping noise in luxury condos in Downtown Los Angeles. Helped isolate the noise source location with accelerometers to determine where vibrations were occurring first and used an acoustic camera to determine where in the condo the noise was coming from.

2000 University Project, Berkely, CA

Wrote a construction noise monitoring plan based on environmental noise calculations, wrote a report summarizing the results, and attending a meeting with the client to discuss options.

Bay Area Rapid Transit (BART) On-Track, CA, San Francisco Bay Area, CA*

Day to day project manager, responsible for meetings, presentations, and coordination with the client for an ongoing noise study on the BART system. Developed MATLAB code to process measurements and determine areas where high corrugation was present, contributing to excessively high in-car noise levels. Performed noise measurements inside both the right of way and the vehicle cabin, in addition to rail corrugation measurements.

California I-605/SR-60 Interchange Improvement, Los Angeles, CA*

Developed a noise model of the area that predicted sound levels for abatement design, in addition to conducting noise measurements and analysis. Led the Team in use of the FHWA Traffic Noise Model Software for the project, involving three major highways and two busy interchanges extending over 17 miles in southern California.

Sound Transit On-Track, Seattle, WA*

Took measurements, fixed equipment, and developed software in MATLAB to process Corrugation Analysis Trolley measurements as part of an ongoing noise study on the Sound Transit Link system. Tested vibration data to determine the best measurement and processing techniques to store the data in an online database for in-car measurements.

LA Metro CRRC Railcar Testing, Los Angeles, CA*

Led the effort to plan the measurements, determine measurement locations and finalize the test plan. Formulated a method to capture speed data directly from legacy train vehicles. Executed noise and vibration specification measurements for new rail cars delivered by CRRC.

City of Los Angeles, Pershing Square Station Rehabilitation Noise Monitoring, CA*

Built noise models, wrote a construction noise plan, and assisted in on-site construction noise issues as they arose for a renovation of the Pershing Square metro station in downtown Los

Angeles. Trained construction personnel in techniques for noise reduction and how to conduct noise monitoring measurements to meet project specifications.

City of Orange Metrolink Parking Garage Construction Monitoring, CA*

Wrote an adaptive management vibration monitoring plan, set up equipment to monitor live vibration levels, and generated weekly reports as part of an effort to build a new parking garage. Designed, planned, and completed measurements to predict and mitigate pile driving construction impacts at three historic building locations adjacent to the construction site. Coordinated with the client whenever an on-site problem arose.

LA Metro Westside Subway Construction, Los Angeles, CA*

Planned, organized, and processed noise measurements for the Purple Line extension construction. Implemented both long term microphones to measure noise levels and accelerometers to measure vibration levels in existing subway tunnels. Oversaw noise monitoring at sensitive construction sites for the project and worked with the contractor to find ways to reduce construction noise levels by approximately 10dB.

Montreal Réseau Express Métropolitain, Canada*

Conducted vibration propagation measurements used to create models to predict operational vibration levels for an under-construction transit line. Managed equipment, solved problems in the field, and wrote parts of the report summarizing the findings of the acoustic study.

NHCRP Barrier*

Took on-highway measurements and wrote, designed, developed, and tested MATLAB code to identify specific spectrograms to use for analyses for a project evaluating barrier reflected highway traffic noise differences in the presence of a single absorptive or reflective noise barrier.

Siemens Railcar Testing for Sound Transit, Seattle, WA*

Measured in-car noise and vibration for new rail cars delivered by Siemens. Developed new internal techniques for measurements based on the written specifications. Contributed to the team that helped identify issues that new cars had in meeting the Sound Transit specifications for noise and vibration. Participated in developing the test plan and specified then acquired new equipment for the measurement.

Toronto/Ontario Eglinton Crosstown Light Rail, Final Design, Canada*

Assisted in vibration propagation measurements, analysis, and recommendations for mitigation for a 12-mile light-rail line both on and under Eglinton Avenue. Set up and ran equipment for at-grade measurements with an impact hammer for underground measurements with an impact load cell that was used during pre-construction borehole drilling.

ATTACHMENT B



Technical Consultation, Data Analysis and
Litigation Support for the Environment

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February 20, 2024

Ariana Abedifard
Adams Broadwell Joseph & Cardozo
601 Gateway Blvd #1000
South San Francisco, CA 94080

Subject: Comments on the Fremont Hub Mixed-Use Project

Dear Ms. Abedifard,

We have reviewed the February 2024 Staff Report, the February 2024 Response to Appeal (“RTC”), and the October 2023 Memorandum (“Memo”) for the Fremont Hub Mixed-Use Project (“Project”) located in the City of Fremont (“City”). The Project proposes to demolish 68,000-square-feet (“SF”) of existing commercial space and construct 14,157-SF of commercial space, 16,430-SF of amenity space, as well as 314 apartment units and 442 parking spaces on a 52-acre site.

Our review concludes that the Staff Report, RTC, and Memo fail to adequately evaluate the Project’s air quality impacts. As a result, emissions and health risk impacts associated with construction and operation of the proposed Project may be underestimated and inadequately addressed. An updated CEQA analysis should be prepared to adequately assess and mitigate the potential air quality impacts that the project may have on the environment.

Air Quality

Failure to Provide Complete CalEEMod Output Files

Land use development projects under the California Environmental Quality Act (“CEQA”) typically evaluate air quality impacts and calculate potential criteria air pollutant emissions using the California Emissions Estimator Model (“CalEEMod”).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 type. If more specific project information is known, the user

¹ “CalEEMod User’s Guide.” California Air Pollution Control Officers Association (CAPCOA), May 2021, *available at:* <https://www.aqmd.gov/caleemod/user's-guide>.

can change the default values and input project-specific values, but 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 used in calculating the Project’s air pollutant emissions and demonstrate which default values are changed. Justifications are provided for the selected values.

According to the Memo, CalEEMod Version 2022.1 is relied upon to estimate Project emissions (p. 5-16). However, this poses a problem as the version of CalEEMod 2022.1 currently available is described as a “soft release” which fails to provide complete output files.² Specifically, the “User Changes to Default Data” table no longer provides the quantitative counterparts to the changes to the default values (see excerpt below) (Attachment A, pp. 127):

Screen	Justification
Land Use	The project would construct a 13,000-square-foot freestanding retail-pharmacy building with a drive-thru (Phase 1A) and a six-story mixed-use building containing 314 apartment units, 14,157 square feet of ground floor retail-commercial space, and 442 parking spaces in parking garage (Phase 1B)
Construction: Construction Phases	Construction is expected to commence early 2025 and occur for approximately 2 years, ending 2027.
Construction: Off-Road Equipment	Assuming the use of Tier 2 construction equipment.
Operations: Vehicle Data	Based on the trip generation prepared for the proposed project, which estimated that the project would generate 2,158 external trips.

However, previous CalEEMod Versions, such as 2020.4.0, include the specific numeric changes to the model’s default values (see example excerpt below):

Table Name	Column Name	Default Value	New Value
tblConstructionPhase	NumDays	230.00	167.00
tblConstructionPhase	PhaseEndDate	11/22/2023	8/25/2023
tblConstructionPhase	PhaseEndDate	9/27/2023	6/30/2023
tblConstructionPhase	PhaseEndDate	10/25/2023	7/28/2023
tblConstructionPhase	PhaseStartDate	10/26/2023	7/29/2023
tblConstructionPhase	PhaseStartDate	9/28/2023	7/1/2023
tblLandUse	LandUseSquareFeet	160,000.00	160,371.00
tblLandUse	LandUseSquareFeet	119,000.00	41,155.00
tblLandUse	LotAcreage	3.67	3.68
tblLandUse	LotAcreage	2.73	2.74

The output files associated with CalEEMod Version 2022.1 fail to present the exact parameters used to calculate Project emissions. To remedy this issue, the Memo should have provided access to the model’s “.JSON” output files, which allow third parties to review the model’s revised input parameters.³ Without access to the complete output files, including the specific numeric changes to the default values, we cannot verify that the Memo’s air modeling and subsequent analysis is an accurate reflection of the proposed Project. As a result, an updated CEQA analysis should be prepared to include an updated air

² “CalEEMod California Emissions Estimator Model Soft Release.” California Air Pollution Control Officers Association (CAPCOA), 2022, available at: <https://caleemod.com/>.

³ “Video Tutorials for CalEEMod Version 2022.1.” California Air Pollution Control Officers Association (CAPCOA), May 2022, available at: <https://www.caleemod.com/tutorials>.

quality analysis that correctly provides the complete output files for CalEEMod Version 2022.1, or includes an updated air model using an older release of CalEEMod.⁴

Unsubstantiated Changes to Individual Construction Phase Lengths

Review of the CalEEMod output files demonstrates that the “Fremont Hub Mixed Use Project Custom Report” model includes changes to the default construction schedule (see excerpt below) (Attachment A, pp. 127).

Screen	Justification
Land Use	The project would construct a 13,000-square-foot freestanding retail-pharmacy building with a drive-thru (Phase 1A) and a six-story mixed-use building containing 314 apartment units, 14,157 square feet of ground floor retail-commercial space, and 442 parking spaces in parking garage (Phase 1B)
Construction: Construction Phases	Construction is expected to commence early 2025 and occur for approximately 2 years, ending 2027.
Construction: Off-Road Equipment	Assuming the use of Tier 2 construction equipment.
Operations: Vehicle Data	Based on the trip generation prepared for the proposed project, which estimated that the project would generate 2,158 external trips.

As a result of these changes, the model includes the following construction schedule (see excerpt below) (Attachment A, pp. 113):

Phase Name	Phase Type	Start Date	End Date	Days Per Week	Work Days per Phase
Demolition	Demolition	1/8/2025	2/14/2025	5.00	30.0
Site Preparation	Site Preparation	2/17/2025	2/28/2025	5.00	10.0
Grading	Grading	3/3/2025	4/11/2025	5.00	30.0
Building Construction	Building Construction	4/14/2025	10/23/2026	5.00	400
Paving	Paving	10/26/2026	12/4/2026	5.00	30.0
Architectural Coating	Architectural Coating	12/7/2026	1/15/2027	5.00	30.0

The CalEEMod User’s Guide requires any changes to model defaults be justified.⁵ As demonstrated above in the “User Changes to Default Data” table, the justification provided for these changes is:

“Construction is expected to commence early 2025 and occur for approximately 2 years, ending 2027” (Attachment A, pp. 127).

Regarding the Project’s anticipated construction duration, the Memo states:

“Construction activities for the project would begin in 2025 and occur for 24 months ending in 2027” (p. 2)

The changes to the individual construction phase lengths remain unsubstantiated. While the Memo’s CalEEMod output files demonstrate that the total length of Project construction would be approximately 24 months, the Memo fails to substantiate the *individual* construction phase lengths. Until specific

⁴ “CalEEMod Version 2020.4.0.” California Air Pollution Control Officers Association (CAPCOA), May 2021, available at: <http://www.aqmd.gov/caleemod/download-model>.

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.

evidence is provided, the model should have included proportionately altered individual phase lengths to match the proposed construction duration of approximately 24 months.⁶

The construction schedule included in the model presents an issue, as the construction emissions are improperly spread out over a longer period of time for some phases, but not for others. According to the CalEEMod User's Guide, each construction phase is associated with different emissions activities (see excerpt below).⁷

Demolition involves removing buildings or structures.

Site Preparation involves clearing vegetation (grubbing and tree/stump removal) and removing stones and other unwanted material or debris prior to grading.

Grading involves the cut and fill of land to ensure that the proper base and slope is created for the foundation.

Building Construction involves the construction of the foundation, structures and buildings.

Architectural Coating involves the application of coatings to both the interior and exterior of buildings or structures, the painting of parking lot or parking garage striping, associated signage and curbs, and the painting of the walls or other components such as stair railings inside parking structures.

Paving involves the laying of concrete or asphalt such as in parking lots, roads, driveways, or sidewalks.

By disproportionately altering and extending some of the individual construction phase lengths without proper justification, the model assumes there are a greater number of days to complete the construction activities required by the prolonged phases. As a result, there will be less construction activities required per day and, consequently, less pollutants emitted per day. Until we are able to verify the revised construction schedule, the model may underestimate the peak daily emissions associated with some phases of construction and should not be relied upon to determine Project significance.

SWAPE's Analysis Indicates a Potentially Significant Impact

As a result of the City's failure to use proportionate construction phase lengths, the City's CEQA analysis did not identify a potentially significant impact. In an effort to quantitatively estimate the Project's construction-related emissions, we utilized the California Emissions Estimator Model ("CalEEMod") Version 2020.4.0,⁸ as well as Project-specific information provided by the Memo and associated documents. 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 type.

⁶ See Attachment A for SWAPE's Updated Construction Schedule, where we demonstrate calculations with revised, proportionate construction phase lengths.

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. 32.

⁸ "CalEEMod Version 2020.4.0." California Air Pollution Control Officers Association (CAPCOA), March 2022, available at: <http://www.aqmd.gov/caleemod/download-model>. We use the 2020 version of CalEEMod because it provides a complete numerical changes table, whereas, as stated above, the 2022 version that the Project's analysis used does not.

In our model, we included 314 dwelling units of “Mid-Rise Apartments” land use, 13,000-SF of “Pharmacy/Drugstore with Drive Thru” land use, 14,157-SF of “Strip mall” land use, and 442 parking spaces (p. 1). We also assumed that the Project would be located within Climate Zone 5 and the Project’s utilities would be provided by Pacific Gas and Electric Company.^{9, 10} We adjusted our vehicle trip rates and off-road equipment parameters to match the changes in the Memo’s CalEEMod models. Similarly, we proportionately altered the individual construction phase lengths to match the proposed length of 24 months.¹¹ All other values were left as default.

Our analysis estimates that the reactive organic gases (“ROG”) emissions associated with Project construction exceeds the applicable Bay Area Air Quality Management District (“BAAQMD”) threshold of 54 pounds per day (“lbs/day”) (see table below).¹²

Model	Construction ROG (lbs/day)
SWAPE	158.8
BAAQMD Threshold	54
<i>Exceeds?</i>	Yes

As demonstrated in the table above, construction-related ROG emissions, as estimated by SWAPE, exceed the applicable BAAQMD significance threshold. Consequently, our analysis demonstrates that the Project would result in a potentially significant air quality impact. An updated CEQA analysis, one that uses proportionate construction phase lengths, should be prepared to adequately assess and mitigate the potential air quality impacts that the Project may have on the environment.

Mitigation

Feasible Mitigation Measures Available to Reduce Emissions

Our analysis demonstrates that the Project would result in potentially significant air quality impacts that should be mitigated further. As such, in an effort to reduce the Project’s emissions, we identified several mitigation measures that are applicable to the proposed Project. We recognize that the City relies on implementation of the BAAQMD’s Basic Construction Mitigation Measures.¹³ We also have reviewed the City’s Findings and Conditions of Approval for this Project, along with the General Plan’s Mitigation

⁹ “Appendix F – Climate Zones Lookup.” CAPCOA, September 2016, *available at:*

<http://www.aqmd.gov/caleemod/user's-guide>.

¹⁰ “Electric Service Area Maps.” Pacific Gas and Electric Company, December 2014, *available at:* https://www.pge.com/tariffs/assets/pdf/tariffbook/ELEC_MAPS_Service%20Area%20Map.pdf, p. 3.

¹¹ See Attachment A for SWAPE’s Updated Construction Schedule

¹² “California Environmental Quality Act Air Quality Guidelines.” BAAQMD, May 2017, *available at:* https://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa_guidelines_may2017-pdf.pdf?la=en&rev=0d2d971e661d41f28a56953f1776bdde, p. 2-2.

¹³ CEQA Checklist, pg. 25.

Monitoring and Reporting Program.^{14, 15} However, we found that even with the implementation of these measures, the Project still may result in a potentially significant construction-related air quality impact.¹⁶

To reduce the Project’s emissions, we recommend consideration of SCAG’s 2020 RTP/SCS PEIR’s Air Quality Project Level Mitigation Measures (“PMM-AQ-1”), a more comprehensive list of effective mitigation measures, as described below.¹⁷ All proposed mitigation, including use of Tier 4 Final equipment, is both necessary and feasible to reduce the significant ROG impact identified.

SCAG RTP/SCS 2020-2045
Air Quality Project Level Mitigation Measures – PMM-AQ-1:
In accordance with provisions of sections 15091(a)(2) and 15126.4(a)(1)(B) of the <i>State CEQA Guidelines</i> , a Lead Agency for a project can and should consider mitigation measures to reduce substantial adverse effects related to violating air quality standards. Such measures may include the following or other comparable measures identified by the Lead Agency:
a) Minimize land disturbance.
d) Stabilize the surface of dirt piles if not removed immediately.
e) Limit vehicular paths on unpaved surfaces and stabilize any temporary roads.
f) Minimize unnecessary vehicular and machinery activities.
n) Utilize existing power sources (e.g., power poles) or clean fuel generators rather than temporary power generators.
p) As appropriate require that portable engines and portable engine-driven equipment units used at the project work site, with the exception of on-road and off-road motor vehicles, obtain CARB Portable Equipment Registration with the state or a local district permit. Arrange appropriate consultations with the CARB or the District to determine registration and permitting requirements prior to equipment operation at the site.
q) Require projects within 500 feet of residences, hospitals, or schools to use Tier 4 equipment for all engines above 50 horsepower (hp) unless the individual project can demonstrate that Tier 4 engines would not be required to mitigate emissions below significance thresholds.
r) Projects located within the South Coast Air Basin should consider applying for South Coast AQMD “SOON” funds which provides funds to applicable fleets for the purchase of commercially available low-emission heavy-duty engines to achieve near-term reduction of NOx emissions from in-use off-road diesel vehicles.
s) Projects located within AB 617 communities should review the applicable Community Emissions Reduction Plan (CERP) for additional mitigation that can be applied to individual projects.

¹⁴ “Exhibit ‘B’ Findings and Conditions of Approval.” Fremont Hub Mixed-Use Discretionary Design Review Permit, available at: <https://www.fremont.gov/home/showdocument?id=14529&t=638375590570438371>

¹⁵ “Resolution No. 2011-68.” Fremont General Plan Update, available at: <https://www.fremont.gov/home/showpublisheddocument/837/637750631772530000>

¹⁶ See Attachment B for SWAPE’s Updated CalEEMod Output Files, where we demonstrate a significant construction-related VOC impact.

¹⁷ “4.0 Mitigation Measures.” Connect SoCal Program Environmental Impact Report Addendum #1, September 2020, available at: https://scag.ca.gov/sites/main/files/file-attachments/fpeir_connectsocial_addendum_4_mitigationmeasures.pdf?1606004420, p. 4.0-2 – 4.0-10; 4.0-19 – 4.0-23; See also: “Certified Final Connect SoCal Program Environmental Impact Report.” Southern California Association of Governments (SCAG), May 2020, available at: <https://scag.ca.gov/peir>.

t) Where applicable, projects should provide information about air quality related programs to schools, including the Environmental Justice Community Partnerships (EJCP), Clean Air Ranger Education (CARE), and Why Air Quality Matters programs.

u) Projects should work with local cities and counties to install adequate signage that prohibits truck idling in certain locations (e.g., near schools and sensitive receptors).

y) Projects that will introduce sensitive receptors within 500 feet of freeways and other sources should consider installing high efficiency of enhanced filtration units, such as Minimum Efficiency Reporting Value (MERV) 13 or better. Installation of enhanced filtration units can be verified during occupancy inspection prior to the issuance of an occupancy permit.

z) Develop an ongoing monitoring, inspection, and maintenance program for the MERV filters.

aa) Consult the SCAG Environmental Justice Toolbox for potential measures to address impacts to low-income and/or minority communities.

bb) The following criteria related to diesel emissions shall be implemented on by individual project sponsors as appropriate and feasible:

- Diesel nonroad vehicles on site for more than 10 total days shall have either (1) engines that meet EPA on road emissions standards or (2) emission control technology verified by EPA or CARB to reduce PM emissions by a minimum of 85%
- Diesel generators on site for more than 10 total days shall be equipped with emission control technology verified by EPA or CARB to reduce PM emissions by a minimum of 85%.
- Nonroad diesel engines on site shall be Tier 2 or higher.
- Diesel nonroad construction equipment on site for more than 10 total days shall have either (1) engines meeting EPA Tier 4 nonroad emissions standards or (2) emission control technology verified by EPA or CARB for use with nonroad engines to reduce PM emissions by a minimum of 85% for engines for 50 hp and greater and by a minimum of 20% for engines less than 50 hp.
- Emission control technology shall be operated, maintained, and serviced as recommended by the emission control technology manufacturer.
- Diesel vehicles, construction equipment, and generators on site shall be fueled with ultra-low sulfur diesel fuel (ULSD) or a biodiesel blend approved by the original engine manufacturer with sulfur content of 15 ppm or less.
- The construction contractor shall maintain a list of all diesel vehicles, construction equipment, and generators to be used on site. The list shall include the following:
 - i. Contractor and subcontractor name and address, plus contact person responsible for the vehicles or equipment.
 - ii. Equipment type, equipment manufacturer, equipment serial number, engine manufacturer, engine model year, engine certification (Tier rating), horsepower, engine serial number, and expected fuel usage and hours of operation.
 - iii. For the emission control technology installed: technology type, serial number, make, model, manufacturer, EPA/CARB verification number/level, and installation date and hour-meter reading on installation date.
- The contractor shall establish generator sites and truck-staging zones for vehicles waiting to load or unload material on site. Such zones shall be located where diesel emissions have the least impact on abutters, the general public, and especially sensitive receptors such as hospitals, schools, daycare facilities, elderly housing, and convalescent facilities.
- The contractor shall maintain a monthly report that, for each on road diesel vehicle, nonroad construction equipment, or generator onsite, includes:
 - i. Hour-meter readings on arrival on-site, the first and last day of every month, and on off-site date.
 - ii. Any problems with the equipment or emission controls.
 - iii. Certified copies of fuel deliveries for the time period that identify:
 - 1. Source of supply
 - 2. Quantity of fuel
 - 3. Quantity of fuel, including sulfur content (percent by weight)

cc) Project should exceed Title-24 Building Envelope Energy Efficiency Standards (California Building Standards Code). The following measures can be used to increase energy efficiency:

- Provide pedestrian network improvements, such as interconnected street network, narrower roadways and shorter block lengths, sidewalks, accessibility to transit and transit shelters, traffic calming measures, parks and public spaces, minimize pedestrian barriers.
- Provide traffic calming measures, such as:
 - i. Marked crosswalks
 - ii. Count-down signal timers
 - iii. Curb extensions
 - iv. Speed tables
 - iv. Raised crosswalks
 - v. Raised intersections
 - vi. Median islands
 - vii. Tight corner radii
 - viii. Roundabouts or mini-circles
 - ix. On-street parking
 - x. Chicanes/chokers
- Create urban non-motorized zones
- Provide bike parking in non-residential and multi-unit residential projects
- Dedicate land for bike trails
- Limit parking supply through:
 - i. Elimination (or reduction) of minimum parking requirements
 - ii. Creation of maximum parking requirements
 - iii. Provision of shared parking
- Require residential area parking permit.
- Provide ride-sharing programs
 - i. Designate a certain percentage of parking spacing for ride sharing vehicles
 - ii. Designating adequate passenger loading and unloading and waiting areas for ride-sharing vehicles
 - iii. Providing a web site or messaging board for coordinating rides
 - iv. Permanent transportation management association membership and finding requirement.

These measures offer a cost-effective, feasible way to incorporate lower-emitting design features into the proposed Project, which subsequently, reduce emissions released during Project construction and operation.

An updated CEQA analysis should be prepared to include all feasible mitigation measures, as well as include updated air quality analyses to ensure that the necessary mitigation measures are implemented to reduce emissions to below thresholds. The updated CEQA analysis should also demonstrate a commitment to the implementation of these measures prior to Project approval, to ensure that the Project's significant emissions are reduced to the maximum extent possible.

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,

A handwritten signature in blue ink that reads "Matt Hagemann". The signature is fluid and cursive, with a long horizontal stroke at the end.

Matt Hagemann, P.G., C.Hg.

A handwritten signature in blue ink that reads "Paul Rosenfeld". The signature is cursive and clearly legible.

Paul E. Rosenfeld, Ph.D.



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**Geologic and Hydrogeologic Characterization
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CEQA Review**

Education:

M.S. Degree, Geology, California State University Los Angeles, Los Angeles, CA, 1984.

B.A. Degree, Geology, Humboldt State University, Arcata, CA, 1982.

Professional Certifications:

California Professional Geologist

California Certified Hydrogeologist

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 – 2014, 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 nationwide 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, Colorado.

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 representatives, 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., Fukunaga, 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 Clean up 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.



Technical Consultation, Data Analysis and
Litigation Support for the Environment

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Paul Rosenfeld, Ph.D.

Principal Environmental Chemist

Chemical Fate and Transport & Air Dispersion Modeling

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 H₂O 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 Aermოდ 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., Sellev, 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). Perfluorooctanoic Acid (PFOA) and Perfluorooctane 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 Conference*. 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. 019-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 Gilbert, 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 NO. 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
Jaeonette 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

ATTACHMENT C

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December 12, 2023

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Re: Agenda Item 1: Fremont Hub Mixed-Use Project (PLN 2022-00487)

On behalf of East Bay Residents for Responsible Development (“East Bay Residents” or “EBRRD”), we submit these comments on the Agenda¹ and Staff Report² prepared for Public Hearing Agenda Item 1, the Application for Discretionary Design Review Permit for the Kimco Realty Fremont Hub Mixed-Use Project (PLN 2022-00487) (“Project”) proposed by Kimco Realty (“Applicant”), as well as the CEQA Environmental Compliance Checklist (“CEQA Checklist”) prepared by the City of Fremont (“City”) for the Project.³ The Project is proposed to be located at 39150 Argonaut Way, in the City of Fremont in Alameda County (APN: 501-976-12). The Project site is located in the Central Community Plan Area with a General Plan designation of City Center – Commercial, within the City Center Urban Neighborhood (CC-UN) Zone.

¹ City of Fremont, Agenda, Zoning Administrator Public Hearing, City of Fremont California, 39550 Liberty Street, 3:00 P.M., Niles Conference Room (Dec. 12, 2023).

² City of Fremont, Zoning Administrator Permit Staff Report (Dec. 12, 2023), <https://www.fremont.gov/home/showdocument?id=14533&t=638375592918312380> [“Staff Report”].

³ Informational Item No. 1, PLN2022-00487, Zoning Administrator Hearing (Dec. 12, 2023), <https://www.fremont.gov/home/showdocument?id=14531&t=638375590576689126> [“CEQA Checklist”].

The Project proposes a two-phase development on 5.86 acres of City Center - Urban Neighborhood zoned land consisting of a new freestanding retail-pharmacy building (Phase 1A) and a six-story mixed-use building (Phase 1B). Phase 1A includes construction of a 13,000 SF retail-pharmacy building along the site's Mowry Avenue frontage. Phase 1B includes construction of a six-story mixed-use building containing 314 market-rate apartment units and 14,157 square feet of ground floor retail-commercial space. The Project would demolish 69,308 square feet of existing retail-commercial floor area and 426 surface parking spaces. Construction activities for the project are anticipated to begin in 2025 and continue for 24 months ending in 2027.

Pursuant to the California Environmental Quality Act ("CEQA"), the City prepared a "CEQA Environmental Consistency Checklist" ("CEQA Checklist") for the Project. The CEQA Checklist was prepared pursuant to CEQA Guidelines Section 15183, which allows a streamlined environmental review process for projects that are consistent with the densities established by existing zoning, community plan or general plan policies for which an EIR was certified and for which project-specific effects which are peculiar to the project have been previously analyzed. The CEQA Checklist and Staff Report claim that the Project would be consistent with the development density established in the City of Fremont's 2011 General Plan Update, for which the 2011 General Plan Update Environmental Impact Report ("EIR") was prepared, and assert that no project-level EIR is required. The City also relies on CEQA Guidelines Sections 15162 and 15164 to conclude that no subsequent EIR is required based on proposed findings that "[the CEQA Checklist] and other evidence in the record supports the use of the certified General Plan Update EIR for the project pursuant to CEQA Guidelines Sections 15162 and 15164, finding that the mitigation measures from the EIR are applied to and adequate for the proposed project, which is within the scope of the EIR, and that no further CEQA documentation is required."⁴

The City's conclusions are incorrect. As will be shown in these preliminary comments, the City's reliance on CEQA Guidelines Sections 15183, 15162, and 15164 is misplaced because the Project was not contemplated in the 2011 General Plan Update and the Project has new or more severe significant impacts than previously analyzed in the 2011 General Plan Update EIR which are peculiar to the Project and were not known and could not have been known at the time of the EIR's certification, because the Project had not yet been proposed when the 2011 EIR was certified. As a result, the Zoning Administrator ("ZA") lacks substantial evidence to approve the Project, the CEQA Checklist, or the Discretionary Design Review Permit at this time because the City has not complied with CEQA.

⁴ Staff Report, pg. 14.

There is also substantial evidence in the record demonstrating that the proposed Project is likely to result in potentially significant impacts to air quality and public health, and from hazardous materials, which are peculiar to the Project, are new or more severe than previously analyzed, or were not disclosed, analyzed or mitigated in the 2011 General Plan Update EIR. The City therefore cannot rely on a CEQA Checklist per CEQA Guidelines Sections 15183 and must prepare a project-level EIR to disclose and mitigate project-specific impacts. For the same reasons, a subsequent EIR is required pursuant to Public Resources Code Section 21166 and CEQA Guidelines Sections 15162 and 15164.

Further, as a result of the Project's inadequate environmental review, the Project fails to demonstrate consistency with the General Plan and Community Plan. The record before the ZA does not contain substantial evidence demonstrating that the Project will "not be detrimental to the public health or safety [or] unreasonably interfere with the use and enjoyment of adjacent development nor be detrimental to the public health, safety, or welfare" as required for approval of the discretionary design review permit.⁵

The ZA cannot recommend approval of the Project until the errors in the CEQA Checklist are remedied and substantial evidence supporting its conclusions is provided in an EIR. East Bay Residents urges the ZA to continue today's hearing and fulfill its responsibilities under CEQA and the Fremont Municipal Code by withdrawing the CEQA Checklist and preparing a project-level EIR to address the issues raised in these comments.

We reserve the right to supplement these comments with additional comments, issues, and evidence at later hearings and proceedings related to the Project.

I. STATEMENT OF INTEREST

East Bay Residents for Responsible Development ("East Bay Residents") is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. The association includes the UA Plumbers and Pipefitters Local 342, International Brotherhood of Electrical Workers Local 595, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, and their members and their families who live and/or work in the City of Fremont and Alameda County.

⁵ Fremont Municipal Code § 18.235.060(c).

The individual members of East Bay Residents live, work, and raise their families in the City and in Alameda County. They would be directly affected by the Project's unmitigated impacts. Individual members may also work on the Project itself. They would therefore be first in line to be exposed to any health and safety hazards that may exist on the Project site.

The organizational members of East Bay Residents also have an interest in enforcing the City's planning and zoning laws and the State's 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 business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, East Bay Residents' members are concerned about projects that are built without providing opportunities to improve local recruitment, apprenticeship training, and retention of skilled workforces, and without providing lifesaving healthcare expenditures for the construction workforce.

II. LEGAL BACKGROUND

CEQA has two basic purposes, neither of which the City has satisfied in this case. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.⁶ The Environmental Impact Report ("EIR") is the "heart" of this requirement.⁷ 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."⁸ To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."⁹ An adequate EIR must contain facts and analysis, not just an agency's conclusions.¹⁰ CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.¹¹

⁶ 14 Cal. Code Regs. § 15002(a)(1) ("CEQA Guidelines"); *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.

⁷ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

⁸ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁹ CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

¹⁰ *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

¹¹ Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.¹² If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.¹³ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.¹⁴ Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding instruments.¹⁵ A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.¹⁶ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”¹⁷

Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to determine whether to prepare an EIR or negative declaration, identify whether a program EIR, tiering, or other appropriate process can be used for analysis of the project’s environmental effects, or determine whether a previously prepared EIR could be used with the project, among other purposes.¹⁸ CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.¹⁹ A negative declaration may be prepared instead of an EIR when, after preparing an initial study, a lead agency determines that a project “would not have a significant effect on the environment.”²⁰

¹² CEQA Guidelines § 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass’n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

¹³ Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

¹⁴ *Id.*, §§ 21002-21002.1.

¹⁵ CEQA Guidelines § 15126.4(a)(2).

¹⁶ *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

¹⁷ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

¹⁸ CEQA Guidelines §§ 15060, 15063(c).

¹⁹ *See, e.g.*, Pub. Resources Code § 21100.

²⁰ *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

CEQA streamlining under CEQA Guidelines Section 15183 (“Community Plan exemption) allows approval of projects without an EIR only in narrow circumstances. Section 15183 provides that if an EIR was previously certified for a planning level decision of a city or county, subsequent CEQA review of consistent projects may be limited to evaluating a project’s effects on the environment that are either (A) specific to the project or to the project site and were not addressed as significant effects in the prior environmental impact report or (B) where substantial new information shows the effects will be more significant than described in the prior environmental impact report.²¹ Section 15183 allows a lead agency to forego preparation of an EIR if neither of these situations occur, or if the lead agency determines that uniformly applicable development policies or standards adopted by the agency will substantially mitigate the new effects. A lead agency’s determination pursuant to this section must be supported by substantial evidence.²²

CEQA’s subsequent review standard requires the lead agency to conduct subsequent or supplemental environmental review when one or more of the following events occur:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.²³

III. THE CITY LACKS SUBSTANTIAL EVIDENCE TO SUPPORT APPROVAL OF THE PROJECT UNDER A COMMUNITY PLAN EXEMPTION

CEQA Guidelines Section 15183, the Community Plan exemption, provides a streamlined process for environmental review of projects that are “consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified,” authorizing agencies to avoid duplicative environmental review “except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the

²¹ Pub. Res. Code § 21094.5(a); 14 Cal. Code Regs. §§ 15183, 15183.3(a), (c).

²² Pub. Res. Code § 21094.5(a).

²³ Pub. Resources Code § 21166; CEQA Guidelines § 15162.

project or its site.”²⁴ Section 15183(c) provides that an EIR must be prepared if the Project will have new or more severe significant impacts than previously analyzed: “[i]f an impact is not peculiar to the parcel or to the project, has been addressed as a significant effect in the prior EIR, or can be substantially mitigated by the imposition of uniformly applied development policies or standards. . . then an additional EIR need not be prepared for the project solely on the basis of that impact.”²⁵

Here, the City has failed to demonstrate that the Project can be lawfully approved based on the CEQA Checklist provided. The Community Plan exemption is inapplicable because this Project was not contemplated in the 2011 General Plan because the Project Application was filed May 6, 2022.²⁶ Further, the Project has new or more severe significant impacts than previously analyzed in the 2011 General Plan EIR which are peculiar to the Project site. These include health risk, air quality, and contamination from hazardous materials. As a result, reliance on the Community Plan exemption is misplaced, and an EIR must be prepared.

A. The Project Was Not Analyzed by the 2011 General Plan Update EIR and City Center Community Plan

On December 13, 2011, the Fremont City Council adopted the General Plan Update²⁷ and certified the General Plan Update EIR.²⁸ The Staff Report asserts that the “[t]he programmatic mitigation measures from the General Plan Update EIR and/or the standard development requirements contained within FMC Chapter 18.218 adequately address the potential environmental effects of the project.”²⁹ And the CEQA Checklist finds that “there are no new significant effects peculiar to this Project or this Project’s site other than those previously identified in the General Plan Update EIR.”³⁰ However, the 2011 General Plan Update did not contemplate the Project, as the Project did not exist in December 2011. Rather, the Project was proposed over a decade later, in May 2022. Therefore, it was impossible

²⁴ 14 C.C.R. § 15183(a).

²⁵ 14 C.C.R. § 15183(c).

²⁶ City of Fremont, Universal Planning Application, Fremont Hub MU, APN 501-976-12, (May 6, 2022),

[https://www.dropbox.com/scl/fo/5cq7cn32isgad117hfk6k/h/Web%20References/App Universal Application %28Executed%29.pdf?rlkey=s1bh4fmu8pca4y37pq3zkdpxn&dl=0](https://www.dropbox.com/scl/fo/5cq7cn32isgad117hfk6k/h/Web%20References/App%20Universal%20Application%28Executed%29.pdf?rlkey=s1bh4fmu8pca4y37pq3zkdpxn&dl=0).

²⁷ City of Fremont, General Plan, <https://www.fremont.gov/government/departments/community-development/planning-building-permit-services/plans-maps-guidelines/general-plan>.

²⁸ City of Fremont, Resolution No. 2011-67,

<https://www.fremont.gov/home/showpublisheddocument/835/637750631768300000>.

²⁹ Staff Report, pg. 12.

³⁰ CEQA Checklist, pg. 3.

for the General Plan Update EIR to have contemplated the impacts of this Project. In fact, as demonstrated below and supported by substantial evidence, the Project is likely to result in significant impacts to air quality and public health—impacts that are specific to Project development – that were not contemplated or analyzed by the General Plan Update EIR.

In relying on the Community Plan exemption, the City also references the City Center Community Plan.³¹ However, the City cannot rely on the City Center Community Plan for this exemption because there was no EIR certified for the City Center Community Plan.³² Instead, as the City explains:

“When the City of Fremont adopted the 2015 City Center Community Plan, the City concluded that the environmental effect attributed to the City Center Community Plan had been fully anticipated under the General Plan Update EIR ... The Community Development Director was directed to file a Notice of Determination with the Alameda County Clerk’s office, acknowledging that the City Center Community Plan relied on the general Plan Update EIR for its CEQA review.”³³

As explained above, the General Plan Update EIR does not adequately address this Project. Thus, because the City Center Community Plan relies on the same General Plan Update EIR, rather than having its own EIR, the City Center Community Plan is also insufficient as it still does not address this Project. In fact, while the City Center Community Plan provides a general directive for the Hub—particularly, Policy 16.8 states that “[a] variety of uses — including large format retail, commercial, residential, or a mix of all of these – may occur in the Hub”—the City Center Community Plan did provide any consideration of the extent of demolition and construction that this Project proposes.

Since the General Plan Update EIR does not adequately address this Project, and the City Center Community Plan is based on that EIR rather than having its own, both the General Plan Update EIR and the City Center Community Plan are insufficient for addressing this Project's site-specific impacts. Consequently, an EIR must be prepared to fully assess the environmental implications of the Project.

³¹ CEQA Checklist, pg. 1.

³² See 14 C.C.R. § 15183(a) (“CEQA mandates that projects which are consistent with the development density established by existing zoning, community plan, or general plan policies *for which an EIR was certified* shall not require additional environmental review...”).

³³ CEQA Checklist, pg. 3.

B. The Project May Result in New and Significant Project-Level Hazards Impacts that Were Not Contemplated or Analyzed in the General Plan EIR

1. Soil and Groundwater Contamination

The Project site has unmitigated soil and groundwater contamination that is peculiar to the Project site and was not analyzed or mitigated in the General Plan Update EIR. This contamination results in potentially significant hazardous materials impacts from Project development which require project-level analysis and mitigation in an EIR.

The Project site is bounded on both sides by gas stations, and the Project is immediately adjacent to a site listed on the Cortese list.³⁴ In particular, the former Texaco gas station at 4004 Mowry Avenue encountered a release of Petroleum hydrocarbons from underground storage tanks (“USTs”) and associated piping at the former Texaco gas station. As a result of this historical use as a gas station, petroleum hydrocarbons are present in groundwater, and groundwater sampling has indicated concentrations of TPH-g as high as 350,000 ppb.³⁵ The Phase I Report prepared for the Project determined that the site is a recognized environmental condition (“REC”) because of “the presence of and likely continued migration of petroleum hydrocarbons onto the Property.”³⁶ The migration of petroleum hydrocarbons onto the Property through groundwater may result in a significant hazards impact that was not contemplated or addressed in the 2011 General Plan Update EIR.

The Phase I Report also fails to provide substantial evidence that the Project will not result in significant contaminant migration on nearby drinking water wells. In fact, the Phase I Report indicates that the Project will require mitigation to reduce significant hazards and water quality impacts:

According to the results from previous soil investigations, no exceedances of the San Francisco Bay Regional Water Quality Control Board (RWQCB) Environmental Screening Levels (ESLs) for commercial shallow soil exposure were observed in the soil; however, PCE was detected at concentrations above the respective RWQCB ESLs in both groundwater and soil vapor (RWQCB, 2016).

³⁴ https://geotracker.waterboards.ca.gov/profile_report.asp?global_id=T0600101349.

³⁵ Roux Associates, Inc. Environmental Consulting & Management, Phase I Environmental Site Assessment, Fremont Hub Shopping Center, Fremont, California. (January 2, 2018), pg. iv.

³⁶ *Id.*

In December 2006, Bureau Veritas conducted ERD remedial injections, using Hydrogen Release Compound (HRC®) to address PCE in groundwater at the Site (Bureau Veritas, 2007). Following ERD remedial injections, Bureau Veritas conducted performance monitoring to assess the effectiveness of the ERD activities at the Site. The performance monitoring results indicated that HRC® injections were effective at reducing PCE concentrations in groundwater; however, PCE concentrations were still detected above the ESLs. **Therefore, additional groundwater remediation would be necessary to further reduce PCE concentrations and subsequent daughter compounds below the RWQCB ESLs.**

The CEQA Checklist also references this remediation, finding that:

[O]ngoing remediation strategies to remove free product at the gas station site could be implemented solely within the gas station site, and that proposed project buildings would not interfere or impede the implementation of potential remediation. The existing monitoring wells within the proposed building footprints will be appropriately abandoned and replaced in suitable locations under ACWD oversight and guidance. It can therefore be conservatively concluded that the proposed project would not result in any significant impacts related to the upset and accident release of hazardous materials into the environment.

Project construction would result in excavation of soil and potential groundwater disturbance or dewatering which can lead to chemical releases. These impacts, which are peculiar to the Project, were not analyzed in a prior project-level CEQA document, and could not have been analyzed in the prior General Plan EIR because the Project had not yet been proposed, and it was therefore unknown that construction of the Fremont HUB Project could result in potentially significant releases of contaminants. The City's own evidence demonstrates that these impacts may be significant and that remediation may be required to reduce potentially significant hazards impacts. As such, the City may not rely on Section 15183 streamlining. An EIR must be prepared to address these issues.

C. The Project May Result in New and Significant Construction and Operational Impacts That Were Not Contemplated in the 2011 General Plan Update EIR and Are More Severe Than Previously Analyzed

1. The Project May Result in Significant Operational Impacts to Air Quality Not Previously Analyzed

The CEQA Checklist also fails to adequately analyze the Project’s air quality impacts. The Air Quality, Energy, and Greenhouse Gas Emissions Analysis (“Air Quality Analysis”) prepared for the Project, provides, absent substantial evidence, that “construction of the proposed project would not exceed BAAQMD thresholds and would not expose nearby sensitive receptors to substantial pollutant concentrations.”³⁷ The CEQA Checklist incorporates this analysis to find that “nearby sensitive receptors are not expected to be exposed to substantial pollutant concentrations during project construction or operation.”³⁸ But the Air Quality Analysis omits key sources of emissions, including failing to analyze the back-up generator that will be required for the elevator that is required as part of the Project. The Air Quality Analysis analyzed only construction back-up generators, even though an emergency generator is legally required for the elevator system at the Project.

California Building Code Title 24, Part 2 § 2702.2.2 requires that “Standby power shall be provided for elevators and platform lifts.”³⁹ Where, as here, a building has an accessible floor four or more stories above an emergency exit, the building must have an elevator with a standby power for the elevator equipment.⁴⁰ The Project is required to have standby power in the form of a back-up generator for the elevator onsite. But the Air Quality Analysis fails to analyze the emissions associated with the Project’s required back-up generator. The record omits critical information regarding air quality and GHG impacts on nearby sensitive receptors. Given the proximity to nearby sensitive receptors, the air quality and health risk impacts of the back-up generator may be significant, but are insufficiently analyzed and mitigated. The City cannot rely on the Community Plan exemption because the Project may result in significant impacts to operational air quality that were not contemplated in the General Plan Update EIR.

2. The Project May Result in Significant Construction and Traffic Noise Impacts That Were Not Previously Analyzed

The General Plan Update EIR determined that “Noise increases related to traffic, and noise conflicts of incompatible uses and construction noise” are

³⁷ Air Quality, Energy, and Greenhouse Gas Emissions Analysis for the Fremont Hub Mixed-Use Project, Fremont, California, (October 31, 2023), pg. 29.

³⁸ CEQA Checklist, pg. 27.

³⁹ California Building Code Title 24, Part 2 § 2702.2.2.

⁴⁰ *Id.* § 1009.4.1; 3008.8.

significant and unavoidable, and that no feasible mitigation was found capable of fully reducing these impacts.⁴¹

Here, the City concludes, absent substantial evidence, that noise impacts can be reduced to less than significant levels through implementation of Standard Development Requirements (“SDRs”) as part of the Fremont Municipal Code Chapter 18.218.⁴² However, compliance with existing noise regulations does provide substantial evidence foreclosing the possibility of significant impacts.⁴³ The City’s noise analysis lacks substantial evidence to conclude that the Project would not expose nearby sensitive receptors to excessive construction and traffic noise from the Project. An exemption may be improper and an EIR must be prepared to adequately analyze the Project’s potentially significant noise impacts to nearby sensitive receptors.

3. The Project May Result in Significant Cumulative GHG Impacts

An EIR must be prepared and an exemption is improper, where, as here, the Project and successive projects of the same type in the same place will result in cumulative impacts.⁴⁴ The CEQA Checklist provides that, concurrent with adoption of the 2011 General Plan Update, the City also prepared and certified a General Plan Update EIR (SCH#2010082060). The 2011 General Plan EIR identified potentially significant environmental impacts in the topics of Transportation and Circulation, Cultural and Archaeological Resources, Air Quality, Agricultural Resources, Noise, Utilities and Service Systems, Hydrology and Water Quality, and Global Climate Change. Mitigation were identified to reduce all potentially significant effects to a less-than-significant level, except for the following:

- Unacceptable levels of service at specified intersections and on specified roadway segments
- Air quality emissions and Clean Air Plan consistency
- Noise increases related to traffic, and noise conflicts of incompatible uses and construction noise
- Potential demolition of cultural and historic resources
- Loss or conversion of prime or unique farmland to urban uses, and

⁴¹ Staff Report, pg. 3.

⁴² Staff Report, pg. 3; 64.

⁴³ *Keep our Mountains Quiet v. Santa Clara* (2015) 236 Cal.App.4th 714, 733; *CBE v. CRA* (2002) 103 Cal.App.4th 98, 115-16.

⁴⁴ 14 CCR § 15300.2.

- Cumulative greenhouse gas emissions⁴⁵

The Project will contribute to and exacerbate these impacts. The CEQA Checklist fails to meaningfully address the Project's cumulative impacts and instead states that “[n]o feasible mitigation was found capable of fully reducing these impacts.”⁴⁶ The 2011 General Plan results in potentially significant, unmitigated cumulative greenhouse gas emissions, for which no mitigation would fully reduce the significant impacts.⁴⁷ Here, the Project's increased contribution to the General Plan's significant exceedances of cumulative greenhouse gas emissions is a project-level impact that is peculiar to the Project site, was not analyzed in the General Plan Update EIR, and will result in more severe GHG impacts than previously contemplated. These project-specific impacts must be analyzed in a project-level EIR.

The CEQA Checklist states “the proposed project would still contribute to the significant and unavoidable impacts identified in the General Plan FEIR but would not result in any operational GHG impacts that are new or more significant than those analyzed in the General Plan FEIR.”⁴⁸ This conclusion is unsupported given that the CEQA Checklist omits project-specific sources of GHG emissions which were not known at the time the General Plan Update EIR was prepared. For example, the Project may result in operational GHG impacts that are new and more significant than those analyzed in the General Plan Update EIR because the Project may utilize an onsite diesel backup generator, as discussed herein, which may result in significant GHG emission impacts. An EIR must be prepared to adequately analyze the Project's potentially significant GHG emissions impacts before the Project can lawfully be approved.

IV. THE CITY MUST PREPARE A SUBSEQUENT OR SUPPLEMENTAL EIR WHICH DISCLOSES, ANALYZES, AND MITIGATES THE PROJECT'S POTENTIALLY SIGNIFICANT IMPACTS TO AIR QUALITY, PUBLIC HEALTH, HAZARDOUS MATERIALS, NOISE, AND GREENHOUSE GAS EMISSIONS.

When an EIR has previously been prepared that could apply to the Project, CEQA requires the lead agency to conduct subsequent or supplemental environmental review if the lead agency determines, *on the basis of substantial*

⁴⁵ CEQA Checklist, pg. 3.

⁴⁶ *Id.*

⁴⁷ CEQA Checklist, pg. 3.

⁴⁸ CEQA Checklist, pg. 49.

evidence in the light of the whole record, one or more of the following:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant effects or a substantial increase in the severity of previously identified effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
 - (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
 - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
 - (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
 - (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.⁴⁹

Only where *none* of the conditions described above calling for preparation of a subsequent or supplemental EIR have occurred may the lead agency consider preparing a subsequent negative declaration, an Addendum or no further documentation.⁵⁰

The Public Resources Code does not provide for addendums, but they are discussed briefly in the CEQA Guidelines Section 15164. The Natural Resources

⁴⁹ CEQA Guidelines § 15162(a)(1)-(3).

⁵⁰ CEQA Guidelines § 15162(b).

Agency, which drafts the CEQA Guidelines, has described the purpose of an addendum as a method for making “minor changes” to an EIR:

The concept of an addendum to an EIR is new in the CEQA [G]uidelines, although such a device has been used by many agencies previously. This section is designed to provide clear authority for the practice and to encourage other agencies to use the device as a way of making minor corrections in EIRs without recirculating the EIR. The addendum is the other side of the coin from the supplement to an EIR. This section provides an interpretation with a label and an explanation of the kind of document that does not need additional public review.⁵¹

CEQA Guidelines, section 15164 states the following concerning the use of addendums:

- (a) The lead agency or a responsible agency shall prepare an addendum to a previously certified EIR if some changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.
- (b) An addendum to an adopted negative declaration may be prepared if only minor technical changes or additions are necessary or none of the conditions described in Section 15162 calling for the preparation of a subsequent EIR or negative declaration have occurred.
- (c) An addendum need not be circulated for public review but can be included in or attached to the final EIR or adopted negative declaration.
- (d) The decision-making body shall consider the addendum with the final EIR or adopted negative declaration prior to making a decision on the project.
- (e) A brief explanation of the decision not to prepare a subsequent EIR pursuant to Section 15162 should be included in an addendum to an EIR, the lead agency's required findings on the project, or elsewhere in the record. The explanation must be supported by substantial evidence.

The lead agency's significance determination for each impact must be supported by substantial evidence, including accurate scientific and factual data.⁵² Under CEQA, an agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁵³ Moreover, the failure to provide information required by CEQA is a

⁵¹ *Save Our Heritage Organization v. City of San Diego*, 28 Cal.App.5th 656, 664–65, 239 Cal. Rptr. 3d 231, 237, review denied (Jan. 16, 2019) (“SOHO”) (citing the Natural Resources Agency.)

⁵² 14 C.C.R. § 15064(b).

⁵³ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

failure to proceed in the manner required by CEQA.⁵⁴ 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.⁵⁵ 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."⁵⁶ In this case, the City's decision not to prepare a subsequent or supplemental EIR for the Project is not supported by substantial evidence because of these unanalyzed and/or unmitigated impacts.

Here, the City has failed to demonstrate that the Project can be lawfully approved based on the CEQA Checklist provided. The CEQA Checklist does not simply provide "some changes or additions are necessary" to the EIR as is allowed under the Addendum provision.⁵⁷ Rather, as explained above, it includes a new substantive analysis for a large development project which was not specifically analyzed in the General Plan Update EIR. Because the Project and its predicted impacts was not borne until May 2022, these impacts qualify as "new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified."⁵⁸ Thus, for the reasons explained above, the City's decision not to prepare a subsequent or supplemental EIR for the project is not supported by substantial evidence.⁵⁹

V. THE CITY CANNOT MAKE THE NECESSARY FINDINGS TO APPROVE THE PROJECT'S ENTITLEMENTS UNDER THE MUNICIPAL CODE

In order to approve a discretionary design review permit, the Zoning Administrator must make the following findings:

- (a) *The proposed project is consistent with the general plan, any applicable community or specific plan, planning and zoning regulations, and any adopted design rules and guidelines;*

⁵⁴ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

⁵⁵ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁵⁶ *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

⁵⁷ CEQA Guidelines § 15164(a).

⁵⁸ CEQA Guidelines § 15162(a)(3).

⁵⁹ CEQA Guidelines §§ 15162 (a), 15164(e), and 15168(c)(4).

- (b) When a proposed project is inconsistent with an adopted design rule, the purpose and intent of the design rule is met through alternative means;
- (c) The multifamily residential¹ project's architectural, site, and landscape design *will not be detrimental to the public health or safety*; or a nonmultifamily project's architectural, site, and landscape design will not unreasonably interfere with the use and enjoyment of adjacent development nor be detrimental to the public health, safety, or welfare.⁶⁰

As shown herein, the Project is inconsistent with the General Plan because, as detailed above, the Project may result in impacts detrimental to public health and safety due to the potentially significant air quality, health risk, hazards impacts, and noise impacts discussed herein.

VI. CONCLUSION

As discussed herein, the City lacks substantial evidence to rely the Community Plan Exemption and CEQA Guidelines Sections 15162 and 15164 for Project approval. The Project does not conform with the General Plan, and results in significant impacts to air quality, greenhouse gas emissions, noise and hazards that are specific to the Project, more severe than previously analyzed, and were not known or analyzed in the General Plan Update EIR because the Project had not been proposed at the time the EIR was certified. As a result, the Project cannot be approved until the City complies with CEQA and prepares a project-level EIR for the Project.

Thank you for your attention to these comments. Please include them in the record of proceedings for the Project.

Sincerely,



Ariana Abedifard

AA:acp

⁶⁰ Fremont Municipal Code § 18.235.060 (emphases added).