2d. Civ. No. B189630
Los Angeles Sup. Ct. Case Nos. BS 093502 (Lead Case), BS 093507 (Related Case)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION THREE

CITY OF SANTA MONICA, BALLONA WETLANDS LAND TRUST, ANTHONY MORALES; SURFRIDER FOUNDATION,
Appellants,
v.
CITY OF LOS ANGELES, a Municipal Corporation, and DOES 1 through X,
Respondents
(Los Angeles Sup. Ct. Case No. BS 093502)

BALLONA ECOSYSTEM PROJECT ("BEEP"), a non-profit corporation,
Appellant,
v.
CITY OF LOS ANGELES, a Municipal Corporation, and DOES 1 through C,
Respondents
(Los Angeles Sup. Ct. Case No. BS 093507

PLAYA CAPITAL COMPANY, LLC,
(Real Party In Interest in Both Cases)

Appeal from the Judgment of the Superior Court of the State of California
County of Los Angeles, Case Nos. BS 093502 and BS 093507
HONORABLE WILLIAM F. HIGHBERGER, JUDGE

APPELLANTS' OPENING BRIEF

MARSHA JONES MOUTRIE (69711)
City Attorney
JOSEPH LAWRENCE (99039)
Assistant City Attorney
1685 Main Street, Room 310
Santa Monica, CA 90401
Telephone: (310) 458-8336
Facsimile: (310) 395-6727

Attorneys for Appellant
CITY OF SANTA MONICA

LAW OFFICES OF SABRINA VENSKUS
SABRINA VENSKUS (219153)
171 Pier Avenue, #204
Santa Monica, CA 90405
Telephone: (213) 482-4200
Facsimile: (213) 482-4246

Attorneys for Appellants
BALLONA WETLANDS LAND TRUST, ANTHONY MORALES, SURFRIDER FOUNDATION

COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rule 14.5)

CASE No.: **B 189630**

Case Name: ***City of Santa Monica, Ballona Wetlands Land Trust, Anthony Morales, Surfrider Foundation v. City of Los Angeles, et al.***

☒ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 14.5 (d)(3).

There is no entity or person that has an ownership interest of 10 percent or more in any Petitioner/Appellant or a financial or other interest in the outcome of the proceeding that any Petitioner/Appellant reasonably believes the justices should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

☐ Interested entities or parties are listed below:

	Name of Interested Party	**Nature of Interest**
1.	_____	_____
2.	_____	_____
3.	_____	_____

MARSHA JONES MOUTRIE
City Attorney

By: _____
JOSEPH LAWRENCE
Assistant City Attorney

Attorneys for Appellant
City of Santa Monica

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

Statutes

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

Other Authorities

INTRODUCTION

This appeal presents significant California Environmental Quality Act ("CEQA")[1] issues posed by one of the most contested and controversial projects in the history of the City of Los Angeles – the Playa Vista development. In this case, the lead agency and Respondent City of Los Angeles certified an EIR for Phase II of the Playa Vista development (the "Project") which "swept under the rug" the thorniest of issues posed by the Project. Despite the fact that this was "one of the largest, most significant land use decisions" that Los Angeles would be making in the next few years (135:38005), the City's Environmental Impact Report (EIR) omits crucial information and analysis, at times reflects a cavalier attitude towards other agencies' comments, and contains significantly deficient data.

The administrative record in this case is enormous. However, as our Supreme Court said in *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283, "[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind." In this case, while much paper was generated, the record reflects that the City failed to adequately address and respond to the most significant and important issues posed by the Project regarding Native American archaeological resources, methane gas, wastewater, and traffic. As a result, the public and decision makers were misled as to the true impacts of the Project, thwarting CEQA's goal of informed decision making.

Petitioners and Appellants request this Court to enforce CEQA's mandate that project approval occur only after the lead agency sufficiently evaluates and discloses all project-producing significant environmental impacts. CEQA further

[1] Unless otherwise specified, CEQA statutory references are to the Public Resources Code or "CEQA." The state CEQA Guidelines will be cited as "Guidelines."

requires that once potentially significant impacts are identified, the lead agency is to adopt feasible alternatives or mitigation measures to avoid or reduce significant impacts. (Pub. Res. Code § 21002; Guidelines §§ 15064(f) and 15162.4.) In the process, CEQA requires the lead agency consult with other agencies and to respond to public comments that raise legitimate environmental concerns about the lack of analysis in an EIR.

The EIR failed to comply with these requirements. As a result, the Project approvals must be set aside until the City fully complies with the requirements of CEQA and revises its EIR accordingly.

STATEMENT OF APPEALABILITY

This appeal is taken from a final judgment disposing of all claims. (15 JA 3566.)[2] The Notice of Appeal was timely filed on March 5, 2006. (15 JA 3632.)

BACKGROUND AND ADMINISTRATIVE PROCEDURAL HISTORY

I. DESCRIPTION OF THE PARTIES.

Petitioner and Appellant CITY OF SANTA MONICA is a city located adjacent to the City of Los Angeles. Petitioners and Appellants BALLONA WETLANDS LAND TRUST and SURFRIDER FOUNDATION, California non-profit corporations, are environmental advocacy organizations. Petitioner and Appellant ANTHONY MORALES is an individual and Tribal Chair of the Gabrielino-Tongva, a California-recognized Native American tribe. Respondent is the CITY OF LOS ANGELES (hereinafter "City"). Real Parties in Interest and

[2] The letters "JA" shall hereinafter refer to the Joint Appendix on appeal, with volume number first, the letters JA, and page number last, e.g., (1 JA 25). The administrative record shall hereinafter be cited without the letters JA and will instead list the volume number first, a colon, and the page number, e.g., (1:25).

project proponent are PLAYA CAPITAL COMPANY, LLC, a Delaware limited liability company and Does 11-20 (hereinafter "Playa").

II. THE PROJECT

The Playa Vista Project is comprised of Phase I and Phase II, and is one of the largest residential and commercial developments ever proposed in the history of the City of Los Angeles. The entire development proposed constitutes approximately 460 acres of a mixed-use residential, office, and commercial development, on a parcel known as "Area D" (23:5853 [111 acres in Phase II]; 135:38143 [350 acres in Phase I]) and is located generally between the State-owned Ballona Wetlands (an ecological reserve) on the west,[3] the 405-freeway on the east, the Westchester Bluffs to the south, and the City of Los Angeles' Mar Vista community to the north. (2:283 and 2:277.) Phase I was previously approved by the City and is directly adjacent and bounds Phase II on the east and west. (2:277 and 2:280.)

Except for the old Howard Hughes site at the eastern-most end of Phase I, and a narrow runway through the middle of Phase II, the majority of the 460 acres was previously undeveloped open space and part of the greater Ballona Wetlands ecosystem. (3 JA 598.) Historically, some of this land was planted with water-dependent crops, while some of the land maintained freshwater wetlands and uplands which supported wildlife. (94:26175-76.) The area was originally home

[3] This land, commonly known as "Areas 'A','B' and 'C'" was originally contemplated to be part of the Phase II development, but Playa sold the land to the State in 2003. Previously, the City prepared an unpublished draft EIS/EIR for the larger Phase Two Project, but that environmental document was scrapped once Areas A, B, and C were sold to the State. A new draft EIR was released for the altered Phase II project, located now only on Area D.

to a thriving native Gabrielino-Tongva village named "Saa'angna." (27:7142; 116:32666.)

The City approved Phase I of the Playa Vista development project and certified an EIR for it in September 1993. (92:25690.)[4] In 2000, Phase I construction began, and approximately 40 percent of Phase I west has been completed as of May 19, 2004. (114:31895.) The Project at issue in this case is Phase II of the Playa Vista development, approved in September 2004. Phase II contemplates 2,600 dwelling units, 175,000 square feet of office space, 150,000 square feet of retail space and 40,000 square feet of community-serving uses on approximately 111 acres. (23:5850.) The Project as approved includes construction of a portion of a drainage channel called the "Riparian Corridor." The Playa Vista development has been subject to a number of lawsuits over the years, and continues to be controversial today. (92:25690-93.)

III. THE PHASE II ("PROJECT") EIR PROCESS

In October, 2002, Playa Capital LLC filed an application with the City for the Phase II project. The City determined the project may have a significant effect on the environment and decided it would prepare an EIR. (2:325; 2:269-96.) Beginning on August 21, 2003, the City circulated for public review the Draft EIR, for a 120-day comment period ending December 22, 2003. (91:25204.) The Final EIR was released in April, 2004. Thereafter, the City held several public hearings on the Project.

On July 8, 2004, the City Planning Commission held a hearing, denied the various appeals filed and approved the Project. (121:33990-122:34401 [Planning

[4] Phase I contemplates 3,246 dwelling units, 3,206,950 square feet of office, 35,000 square feet of retail, and 120,000 square feet of "community serving" space. (113:31729.)

Commission Determination].) On September 22, 2004, the Planning and Land Use Committee of the Los Angeles City Council ("PLUM") held a hearing on the Project and approved it, certifying the EIR, and adopting the CEQA findings, mitigation monitoring and reporting program, and statement of overriding considerations, as well as approving a development agreement, a Specific Plan amendment, and other discretionary approvals. (135:38002-121.)

On October 7, 2004, the City filed notice of these determinations. (1 JA 8). Appellants' Petition for Writ of Mandate was timely filed on November 5, 2004, pursuant to Pub. Res. Code § 21152 subd.(a). (1 JA 1.)

IV. FACTUAL BACKGROUND OF PROJECT IMPACTS

A. Archaeological Resources: Native American Graves and Cultural Objects

In the fall of 2003, during excavation and development of adjacent Phase I and during circulation of the Phase II Draft EIR for public review and comment, an unanticipated discovery was made: the Playa Vista site contained a large, intact Native American cemetery and sacred site, containing nearly 400 bodies and associated funerary objects belonging to Gabrielino-Tongva tribal ancestors. (116:32664.) When discovered, many Native Americans and others urged that the sacred site not be disturbed. (93:25959; 95:26574-8; 95:26585-6; 97:26896-7.)

The Native American Heritage Commission requested the developer stop excavating so that a potential alternative to destroying the sacred site could be explored and discussed. (131:36931.) Playa rejected this plea and proceeded to exhume all the graves and funerary objects in Phase I in order to make way for construction of the development's "riparian corridor." (*See* 130:366411)

Archaeologists believed that the Native American cemetery excavation at the Phase I site at that time was "the largest excavation…going on in the country."

(116:32666.) A UCLA anthropologist opined that the site was "one of the largest American Indian burial grounds ever found in California – or the nation." (116:32669; see also other articles/commentary at 132:37125; 37126-27; 116:32664-65.) The cemetery removal gained national attention as the *New York Times* reported in a front section news article, "The skeletons, most of them female, are being removed for the development of Playa Vista, a complex of condominiums, apartments and townhouses, some selling for more than $1 million." (116:32666.) In a joint editorial to the *Los Angeles Times*, an archaeologist (who advises the National Park Service on Native American cultural resources) and local sociology professor described the find as a "breathtaking discovery" and stated that Playa and the City's "approach to the culture of the area's first inhabitants is cavalier and indecent" and that the excavations are "in violation of the professional ethical codes of both archeologists and anthropologists." (116:32664-65.)

Playa proceeded with the controversial destruction of the burial ground, which consisted of cataloging and placing remains in buckets (116:32666) pursuant to a "data recovery plan" for archaeological sites that was adopted in the Phase I EIR and drafted under Playa's Clean Water Act permit requirements under the oversight of the U.S. Army Corps of Engineers. (116:32666-67; 131:36960, citing Archeological Treatment Plan.) Phase I's data recovery plan is the same plan relied upon for Phase II's mitigation of archeological impacts. The California Native American Heritage Commission ("NAHC")[5] sent numerous letters to the

[5] The Native American Heritage Commission was established by the California State Legislature in 1976. As is judicially recognized, the NAHC "is specifically listed in appendix B to the [CEQA] Guidelines as a public agency with specific expertise regarding places of religious significance to Native Americans, including archaeological sites and burial grounds." (*Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 626)(hereinafter "*EPIC*".)

City requesting the Phase II EIR address the likelihood that the sacred burial site uncovered in Phase I would extend under Phase II, and that the mitigation measure of data recovery as employed for Phase I was not adequate to address the potential impacts to archeological resources in Phase II. (93:25954; 108:30300-03; 116:32671-76; 128:36009-11; 130:36747-51.)

The NAHC also requested that the alternative of moving the project's stormwater drainage conduit (the "riparian corridor") a few hundred feet north of the burial ground and sacred site in order to avoid and preserve the site, be considered and analyzed. (130:36747.) The City did not consider and analyze any alternative.

B. Methane

1. Methane Hazards

The Playa Vista site overlies upwardly migrating methane gas. Development of this area "poses the potential to expose project occupants to elevated levels of methane." (25:6622.) The Playa site is especially dangerous: The City's methane expert, ETI, stated, "The safest approach would be to avoid building in this area; however, it is possible to build if it can be demonstrated that the methane is properly mitigated." (125:35220.) The risk of explosion from sub-surface methane gas is exemplified by the explosion and fire that occurred in the Fairfax area in Los Angeles in 1985. (130:36704.) Methane gas may migrate upwards, pool and collect in structures (which cap and trap the gas) and thereby create a risk of explosion. (Id.)

The California Department of Toxic Substances Control ("DTSC") noted its "primary concern is whether the development at this site would be safe for occupancy in view of the evidence of significant methane concentrations in the subsurface and the location of subsurface natural gas storage area in the vicinity of the site. There are subsurface concentrations of methane greater than 150,000

ppmv (15%) and, indeed, these concentrations exceed the Upper Explosive Limit for methane." (93:25911.)

2. History of Methane Investigation at Playa Vista

Nearly four years after Phase I was approved and before the Phase II EIR was drafted, in 1997, an engineering firm "ENSR" conducted a soil gas survey at Phase I as part of property ownership transactions. (25:6599.) The ENSR report documented methane concentrations within the western portion of the adjacent Phase I site. (25:6599.) Thereafter, Playa's consultants, Camp Dresser and McKee (hereinafter "CDM") conducted a soil gas study at the Phase I site. (25:6599.) The CDM study confirmed that thermogenic gases[6] were surfacing at the Playa Vista site. (25:6599.) In May, 1999, the Los Angeles Department of Building and Safety ("LADBS") hired an outside peer reviewer, Exploration Technologies, Inc. ("ETI"), headed by Dr. Victor Jones (125:35219; 25:6599) to assist the City in determining the extent of the hazards posed by the thermogenic gas at Playa Vista. (25:6599; 135:35219.)[7]

ETI, after reviewing Playa's CDM report, and previous studies, stated that these studies "were not adequate, nor thorough enough to assess the methane gas issue at [Playa Vista] due to limited sampling and analysis." (125:35219.) ETI noted the inadequacy of the number of soil gas samples, the method of analysis used, and the lack of consistency in sampling. (63:17222-23.)

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[6] "Thermogenic" means it is generated in a deep earth source. (130:36730.) Thermogenic gas has "more volume, more pressure, more potential, and more danger as regards safety, particularly…because earthquakes can change the rate of gas flux from what you map today." (125:35236.). Thermogenic gas includes methane, ethane, propane, and butane. (63:17224.) Methane is the main component of natural gas. (130:36730.)

[7] The CDM testing was "found to be questionable; therefore, new testing was required." (94:26186.)

As a result, LADBS directed ETI to conduct methane sampling and analysis on Phase I. (25:6599; 63:17223.) ETI then became a consultant for LADBS. (125:35219.) In April, 2000, ETI issued a 250-page report about the methane gas situation. (63:17215.) ETI explained the dangerous gas conditions and the inadequacy of Playa's testing conducted by CDM: "Concentrations of methane in the vicinity of the most anomalous soil gas sites were *several orders of magnitude higher* than those detected in previous soil gas surveys." (63:17223).

As a result, between June 2000 and May 2001, the City held a series of hearings on methane at Playa Vista that culminated in a report by the City's Chief Legislative Analyst (hereinafter "CLA Report"), evaluating thermogenic gases and related safety issues connected with developing the Phase I project. (25:6605; 60:16209-10.) During this time, both ETI and the City Building and Safety Commission stated that the City's methane code was inadequate to mitigate the Playa Vista property. The CLA Report concluded that new mitigation measures were required. (60:16217.) The City Council then passed a motion approving the CLA Report, adopting the mitigation measures described therein, and directing their enforcement. (Exhibit 1 to Appellants' Request for Judicial Notice.)

Thereafter, the City, through LADBS, began the process of developing a new City-wide methane code, which was not adopted until after the Phase II EIR was drafted. (25:6608; *See* 68:18499 et seq. [Draft of Methane Standards].) LADBS prepared guidelines for Phase II mitigation, to be superseded by any new methane code adopted after preparation of the Phase II EIR. (25:6608-09.)

3. ETI's Recommendation Regarding the Development

The City's expert, ETI, recommended that the safest approach to development would be to leave the highest gas seepage areas as open space and not build. (125:35220.) ETI stated that building in the project area should be

allowed only if it could be shown that the methane hazards could be properly mitigated:

> Without the proper mitigation of the methane present, a dangerous situation exists at the site. No further development should be allowed on this site until these mitigation issues are resolved.

(125:35221.)

ETI recommended adequate soil gas studies[8] to be performed on both Phase I and Phase II areas, requiring gas samples be taken at no less than 100 feet apart, and where high concentrations were found, further samples taken 50 feet apart ("100/50 foot grid"). (88:24384 [Recommendations 2 and 3].) ETI explained that sampling on a larger grid risks mischaracterizing the methane gas concentrations. (135:38156,[9] Exhibit A p. 2, ETI letter to City stating "A valid [EIR] requires adequate sampling, and 300 to 800 feet is not adequate for an area of known macro gas seepage and production."; 88:24377, para.2, [ETI explaining why 100/50 foot grid testing is required and providing data from testing at Phase I site in support thereof].) The City did not follow ETI's recommended testing protocol for Phase II.

4. The Phase II EIR's Treatment of Methane Hazards

The Phase II EIR did not disclose that the City's own expert disagreed with the studies used to establish baseline conditions at the Phase II site. Walter

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[8] "Soil gas testing," requires boring four feet into the soil at multiple locations and then testing the gas concentrations in the soil. (88:24376.)

[9] Administrative record volume 135, page 38156 contains a photocopy of the CD-ROM. The CD-ROM is a compilation of documents prepared by and for the City of Los Angeles. ETI saved these documents on the CD-ROM and sent the CD-ROM to the City. Petitioners obtained a copy of the CD-ROM and entered it into the administrative record during the administrative proceedings in this case. The CD ROM can be found at 4 JA 858. Appellants have printed out selected documents from the CD-ROM, attached as Exhibits to this brief. Hereinafter, all such documents will be cited to the record page and the exhibit number.

Merschat, who worked for ETI and performed all of the gas sampling at Playa Vista (125:35080-81) submitted comments on the Phase II Draft EIR ("DEIR") stating the Phase II site was undersampled. (125:35086.) The EIR's response implied that ETI approved of the EIR's gas studies. (125:35087.)

Members of the public and a state agency requested the EIR address issues related to the efficacy of the experimental methane mitigation measures proposed for Phase II but the EIR did not respond in a meaningful way. (93:25913-14; 95:26390.)

C. Wastewater Impacts

The Project will generate 1.12 million gallons per day of wastewater during peak flows. (27:7038.) The wastewater will be discharged into the Santa Monica Bay after secondary treatment in the Hyperion Treatment System, which services the City of Los Angeles. (27:7034.) As part of the Hyperion Treatment System, the Hyperion Treatment Plant is located in Playa del Rey and treats wastewater from most of the City of Los Angeles. (27:7034.) The Santa Monica Bay is currently listed as a threatened or "impaired" water body under the Clean Water Act due to the enormous amount of pollution that is discharged into the Bay from the region, especially in high rains. (24:6265.) Furthermore, "[t]he Santa Monica Bay's biological community has been identified as being imbalanced, severely stressed, or known to contain toxic substances in concentrations that are hazardous to human health." (24:6273-74.)

Because the Bay is "impaired," the City is required under the Clean Water Act to find a solution to reduce its overall loading of pollutants into the Bay. (110:30789-91.) At the time of preparing the EIR, the City was updating its wastewater facilities plan to incorporate an "integrated resources approach" for expansion of Hyperion Treatment System and as well as other "natural treatment" methods (27:7036) such as constructed wetlands on areas of open space.

The Project's sewage proposes to drain into a system of sewage pipes and then flow to the Hyperion Treatment System.[10] (27:7031). The EIR acknowledges that the Project's projected flows will overload the current system capacity. (27:7041.) The EIR acknowledges the City has not yet solved its city-wide problem of lack of treatment capacity. (27:7041.) Yet the EIR, relying on future post-approval, post-buildout application of the City's Sewer Allocation Ordinance to prevent sewer hook-up should the City not have enough sewer capacity, concludes that the Project's wastewater impacts will be avoided altogether. (27:7030; 27:7041; 7 JA 1456, lines 7-10.)

D. Traffic Impacts

Primary regional access to the Project occurs by way of the San Diego Freeway (I-405), from which is connected the Marina Freeway (State Route 90). (26:6699.) The 405 Freeway is highly congested with some segments currently operating in the "poor" to "failure" range. (23: 5926; 6719-6720.) The same is true for many of the adjacent surface streets, including portions of Lincoln Boulevard, Jefferson Boulevard, and Centinela Avenue, which surround the project. (25:6699-6718.)

The Project will generate more than 24,000 daily trips (24:5925; 26:6757). Of these, greater than 1,600 will occur during the morning peak hours while more than 2,300 will take place during the evening peak travel time period. *Id.* As revealed in the EIR, almost every street in the area of the Project will receive some of the Project's traffic. (25:6699-6718.)

The EIR acknowledged that the region's "freeway system is highly congested" (23:5948) and the Project's developer stated that "traffic is a mess."

[10] The Hyperion Treatment Plant is part of the Hyperion Treatment System and is the most likely treatment facility for the Project's wastewater. (27:7035.)

(129:36443.) Yet the EIR concludes that after 24,000 daily trips are added to the area's current and projected traffic, no significant adverse impacts will occur. (24:5945 *et seq*.)

PROCEDURAL HISTORY

Based on these alleged failures to comply with CEQA, a Petition for Writ of Mandate was filed by Appellants on November 5, 2004, in the Los Angeles County Superior Court. (1 JA 1.)

Appellants filed a Motion for Stay and, In the Alternative, Preliminary Injunction (hereinafter "Preliminary Injunction Motion") on July 1, 2005. (7 JA 1498.) Appellants presented expert evidence that the grading and surcharging in the northern portion of the Phase II site would interfere with baseline methane conditions thus impacting the City's ability to obtain accurate methane gas tests required to determine the Project's environmental impacts. (7 JA 1500.) Appellants argued that these activities were prejudicing Appellants' claims in this case. Appellants also presented evidence of dangerous failures of methane mitigation systems at the adjacent Phase I. Such evidence consisted of a declaration documenting observations in May, 2005 of combustible methane gas migrating up through the concrete in the underground garage of the Fountain Park Apartments, located in Phase I (7 JA 1511-12) and copies of May 25, 2005 and June 27, 2005 NBC Television investigative reports presenting evidence that Phase I methane mitigation measures were failing to keep the underground methane gas from seeping into the building structures, as intended. (7 JA 1513-14, [Exhibit I].)

The petition for writ of mandate was set for bench trial beginning August 1, 2005, and concluding August 5, 2005. Appellants' Preliminary Injunction Motion was argued on August 5, 2005 at the conclusion of arguments on the petition. The

trial court did not rule on the Preliminary Injunction Motion or the petition and instead took both under advisement. (14 JA 3326.) In addition, the trial court requested supplemental briefs on the petition. (14 JA 3309.)

On November 21, 2005, having not yet received the Court's decision on the petition or Preliminary Injunction Motion, and in response to Real Parties' commencement of grading in the southern-most portion of Phase II, a possible Native American burial ground area, Appellants filed an *Ex Parte* Application for a Temporary Restraining Order, or in the Alternative, a Ruling on Petitioners' Motion for Stay, or in the Alternative, for Preliminary Injunction ("TRO"). (14 JA 3312.) Without entertaining any oral argument, the trial court issued a written decision denying the TRO request, but not addressing the request for a ruling on Appellants' Preliminary Injunction Motion. (14 JA 3445.)

Thereafter, the court issued a Tentative Statement of Decision on November 28, 2005. (14 JA 3461.) The court invited further argument but Appellants declined, requesting a final judgment issue forthwith. (14 JA 3526.) The trial court issued its final Statement of Decision on January 10, 2006. (15 JA 3576.) A Notice of Entry of Judgment was filed and served on January 10, 2006. (15 JA 3569.)

SUMMARY OF ARGUMENT

The City's EIR certification and Project approval thwarted the fundamental tenets of CEQA by preventing the public and decision makers from learning the true environmental consequences of the Project in the areas of archaeological resources, methane gas, wastewater, and traffic.

I. ARCHAEOLOGICAL RESOURCES

The City's review of archaeological resources is morally objectionable from the Native American perspective, and also indefensible from an environmental review perspective. The City failed to consider or analyze *any* meaningful mitigation measures or alternatives to avoid the Project's most significant impacts to Native American archaeological resources. Most importantly, the City failed to consider, as is plainly required by the CEQA Guidelines, the most preferred method of mitigating impact to historical archaeological resources: preservation in place.

In a purported attempt to mitigate impacts, the sole measure relied upon is a "data recovery plan" that essentially allows any archaeological resources found at the project site, including human remains and cultural objects in burial grounds, to be swiftly removed, catalogued and stored so long as they are studied. As the NAHC cautioned, data recovery is "not adequate" mitigation and would do nothing to alleviate the impacts to the Native community from the loss of a sacred burial ground. (93:25956.) The City also failed to consult with the NAHC and at the same time, improperly surrendered its own CEQA role to the U.S. Army Corps of Engineers. The EIR failed to respond to comments and failed to disclose inconsistencies between the Project and the City's General Plan Conservation Element. Finally, the City failed to revise and recirculate the EIR in order to address the significant discovery of the cemetery found in the adjacent Phase I site, which could extend into Phase II.

II. METHANE

The EIR's impact findings and mitigation measures are a house of cards built upon deficient methane studies. The City failed to perform adequate testing to determine the baseline methane conditions required to determine the explosion

risks at the project site. This failure is a prejudicial abuse of discretion because it prevents the public and decision makers from making an informed decision about whether or not to approve the project based on the real methane hazards and the adequacy of mitigation measures to reduce those impacts. Because the City failed to conduct the required tests, the EIR may be misleading the public and decision makers into believing that the methane hazards created by the Project are relatively low.

Furthermore, the City failed to include in the EIR its own expert's opinion which conflicts with the EIR's implications that testing is adequate. This exclusion is a prejudicial abuse of discretion because the information withheld is directly relevant to the project's environmental impacts and the mitigation of those impacts. The EIR is misleading in this regard because it gives the public and decision makers the false impression that the City's own experts agree to the inadequate testing. The EIR also improperly defers the required testing until after project approval, thereby thwarting informed decision making. Finally, the City's reliance on the EIR's methane mitigation for a finding of no significant impact is not supported by substantial evidence in the record.

III. WASTEWATER

The EIR improperly defers the analysis of wastewater impacts by allowing the project to be built out before determining whether adequate wastewater treatment capacity will be available. CEQA requires impact analysis before project approval.

Further, the EIR violates CEQA because it lacks analysis of the environmental consequences resulting from an expanded sewage treatment system required for the Project's operation, and fails to analyze the cumulative impacts

from the Project's wastewater flows into the Santa Monica Bay, an "impaired waterbody," via the sewage treatment system.

Finally, the EIR fails to document the environmental benefits of the "No-Project" alternative.

IV. TRAFFIC

The EIR's traffic analysis is woefully outdated and worse, it is misleading. Data was used in an inconsistent and unreliable manner. Little if any effort was made to determine how Phase I was actually impacting current conditions. Even though the Project is touted as needed to provide local housing for the region's substantial job growth, the analysis concluded that the majority of car trips would travel away from known and existing job centers. Significantly, the EIR's flawed approach allowed the public and decision makers to conclude that by adding thousands of cars and passengers to an already overcrowded road and transit system, the Project nonetheless created no adverse impacts.

V. FAILURE TO ADEQUATELY RESPOND TO COMMENTS

The EIR failed to adequately respond to comments from the public and agencies regarding each impact area described above.

VI. RELIEF REQUESTED

Appellants urge this Court to reverse the judgment below, issue a writ of mandate directing the City to set aside its Project approval (Pub. Res. Code § 21168.5; Code Civ. Proc. § 1085), and issue a permanent injunction on the entire Phase II Project unless and until the City prepares and certifies a valid EIR as requested herein.

ARGUMENT

I. THE STANDARD OF APPELLATE REVIEW IS *DE NOVO*.

Appellants need not demonstrate an abuse of discretion by the trial court in order to prevail on appeal, since the standard of appellate review in CEQA cases is *de novo*: "The appellate court reviews the administrative record independently; the trial court's conclusions are not binding on it." (*Gentry v. City of Murietta* (1995) 36 Cal.App.4th 1359, 1375-76, citations omitted.) "In an administrative mandamus action where no limited trial *de novo* is authorized by law, the trial and appellate courts occupy in essence identical positions with regard to this administrative record, exercising the appellate function of determining whether the record is free from legal error. Thus, the conclusions of the superior court, and its disposition of the issue of this [CEQA] case, are not conclusive on appeal." (*Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1076, citations omitted.)

II. CEQA REQUIRES INFORMED DECISION MAKING CONCERNING PROJECTS AFFECTING THE ENVIRONMENT

CEQA is California's leading environmental law, based on statutory provisions (Pub. Res. Code § 21000 *et seq*.), and administrative regulations called the "Guidelines" (14 Cal.Code Regs. § 15000 *et seq*.) "The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (*Laurel Heights Improvement Association. v. Regents of University of Cal*. (1988) 47 Cal.3d 376, 390 (*Laurel Heights I*), *quoting Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.)

The Legislature, in enacting CEQA, declared preservation of a quality environment is a matter of statewide concern mandating all state agencies give "major consideration" to preventing environmental damage when regulating activities affecting the environment. (Pub. Res. Code § 21000, subds. (a) and (g), respectively.) CEQA requires agencies "consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and . . . consider alternatives to proposed actions affecting the environment." (Pub. Res. Code § 21001, subd. (g).) CEQA and its Guidelines outline a comprehensive scheme for evaluating potential adverse environmental effects. Once a lead agency determines that the project may have substantial adverse impacts on the environment, it must prepare an EIR, which discusses those significant impacts. (*Laurel Heights I, supra,* 47 Cal.3d at 390-391.)

Prior to approving a project, CEQA requires the lead agency to: consider the information contained in the final EIR; make findings for each significant effect identified in the EIR (Guidelines § 15091); and certify the final EIR as complete and in compliance with CEQA (Guidelines § 15090).

The lead agency's finding(s) must either (1) find the project's significant adverse environmental effects have been avoided or lessened by alternatives or mitigation measures, or (2) if it finds the alternatives or mitigation measures are infeasible, adopt a statement of overriding considerations, giving specific reasons why the project's benefits outweigh the unmitigated effects. (Pub. Res. Code §§ 21002, 21002.1, 21081; Guidelines §§ 15091-15093.)

The following basic principles regarding an EIR's adequacy are relevant to many of Appellants' arguments.

An adequate EIR must be "prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision

which intelligently takes account of environmental consequences." (Guidelines § 15151.) It "must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Laurel Heights I, supra*, 47 Cal.3d at 405.)

CEQA requires an EIR to reflect a good faith effort at full disclosure. (Guidelines § 15151.) Although disagreement among experts does not render an EIR inadequate, the report should summarize the main points of disagreement. (*Ibid*.) The absence of information in an EIR, or the failure to reflect disagreement among the experts, does not *per se* constitute a prejudicial abuse of discretion. (Pub. Res. Code § 21005.) A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process. (*Laurel Heights I, supra*, 47 Cal.3d at 403-405.)

An EIR is intended "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.) It is "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible official to environmental changes before they have reached ecological points of no return." (*County of Inyo* v. *Yorty* (1973) 32 Cal.App.3d 795, 810.) Thus, CEQA's investigatory and disclosure requirements must be carefully guarded. "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees." (*Laurel Heights I, supra*, 47 Cal.3d at 392, *citing People v. County of Kern* (1974) 39 Cal.App.3d 830, 842; Guidelines § 15003, subd. (e).) "The EIR is intended to furnish both the road map and the environmental price tag for a project, so that the decision maker and the public both know, before the

journey begins, just where the journey will lead, and how much they-and the environment-will have to give up in order to take that journey." (*Natural Resources Defense Council, Inc. v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 271.)

Consultation with other agencies and responding to comments from agencies and the public furthers the informational goals of CEQA. A number of courts have emphasized that the public comment function provides an important failsafe for the environmental review process since it is the statutory means of countering the lead agency's potential bias, errors, oversight, parochialism or, as one court put it, desire to sweep important environmental issues "under the rug." (*People v. County of Kern* (1974) 39 Cal.App.3d 830, 841, *quoting Silva v. Lynn* (1st Cir. 1973) 482 F.2d 1282, 1285.)

Responses to comments received on a draft EIR must genuinely address and respond to the issues raised by the commenter because nonspecific and conclusory responses are not legally sufficient. (*Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 355-357.) CEQA requires a lead agency to "evaluate comments on environmental issues that are received from persons who have reviewed the draft and [to] prepare a written response pursuant to subparagraph (B)." (Pub. Res. Code § 21091 subd. (d)(2)(A).) That response "shall describe the disposition of each significant environmental issue that is raised by commenters… consistent with [Guidelines] § 15088." (Pub. Res. Code § 21091 subd(d)(2)(B).) "There must be good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice." (Guidelines § 15088 subd. (c).)

CEQA recognizes the importance of other agencies' input in the environmental review process. CEQA specifically requires the agency to consult with neighboring cities. (Guidelines §15086 subd. (a).) The purposes for this are:

sharing expertise, disclosing agency analyses, checking for accuracy, detecting omissions and discovering public concerns. (Guidelines § 15200.) Further, for projects of regional significance, such as this one, CEQA imposes an additional requirement for lead agencies to consult with "public agencies which have transportation facilities within their jurisdictions which could be affected by the project." (Guidelines §15086 subd. (a)(5).)

III. THE STANDARD OF REVIEW BEFORE THE COURT IS WHETHER THE AGENCY ABUSED ITS DISCRETION

The standard of review in an action to set aside an agency determination under CEQA is governed by California Public Resources Code, Section 21168 in administrative mandamus proceedings, and Section 21168.5 in traditional mandamus actions. "In either case, the issue before the trial court is whether the agency abused its discretion. Abuse of discretion is shown if (1) the agency has not proceeded in a manner required by law, or (2) the determination is not supported by substantial evidence." (*Gentry, supra*, 36 Cal.App.4th 1359 at 1375; *see also Laurel Heights, supra*, 47 Cal.3d at 392 n.5.)

A. <u>The "Failure to Proceed in a Manner Required by Law" Standard</u>

Questions of interpretation or application of the requirements of CEQA are matters of law. (*City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 356, citing *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 118.)

Noncompliance with substantive requirements of CEQA, such as failing to address a subject required to be included in an EIR, or noncompliance with information disclosure provisions "which precludes relevant information from being presented to the public agency ... may constitute prejudicial abuse of

discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (Pub. Res. Code § 21005, subd. (a).) In other words, when an agency fails to proceed as required by CEQA, and the failure deprives the public and the decision makers of significant information, a "harmless error" analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decision making and informed public participation. Case law is clear that, in such cases, the error is prejudicial. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236-37; *Fall River Wild Trout Foundation v. County of Shasta* (1999) 70 Cal.App.4th 482, 491-93; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.)

Applying the proper standard of review is crucial to the court's analysis. Claims concerning omission of information from an EIR are to be treated as inquiries whether an agency failed to proceed in a manner required by law. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1207-1208 ("*Bakersfield Citizens*").) While an "agency's factual determinations are subject to deferential review," courts "must ensure strict compliance with the procedures and mandates of the statute." (*Save Our Peninsula Committee v. Monterey County Bd. Of Supervisors* (2001) 87 Cal.App.4th 99, 118 ("*Peninsula"*).) Therefore, such deferential review is not afforded agencies when determining whether or not omissions of information from an EIR violate CEQA's informational requirements.

Examples of challenges which are analyzed under the "required by law" standard include: inadequate responses to comments (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1371 ("*Berkeley Keep Jets"*); *People v. County of Kern*, *supra*, 39 Cal.App.3d at 842); inadequate

project description (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App. 4th 713, 723-29 ("*San Joaquin Raptor*")); failure to comply with information disclosure/omission of relevant data which precludes informed decision making (*Bakersfield Citizens, supra*, 124 Cal. App. 4th at 1198) and failure to analyze cumulative impacts (*Id.* at 1215.)

B. The "Substantial Evidence" Standard

CEQA requires an agency to adopt findings that are supported by substantial evidence. (Pub. Res. Code § 21081.5; Guidelines § 15091 subd. (b).) Thus, "[s]ubstantial evidence is the standard applied to conclusions reached in an EIR and findings that are based on such conclusions." (*Bakersfield Citizens for Local Control, supra*, 124 Cal.App.4th at 1208, citing *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390-91.)

Substantial evidence challenges are resolved much as substantial evidence claims in any other setting: a reviewing court will resolve reasonable doubts in favor of the administrative decision, and will not set aside an agency's determination on the ground that the opposite conclusion would have been equally or more reasonable. (*Laurel Heights I, supra*, 47 Cal.3d at 392 -93; *San Joaquin Raptor, supra*, 27 Cal.App. 4th at 722; *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App. 4th 351, 369.) However, CEQA contains a unique definition of "substantial evidence" which expressly limits the type of evidence that an agency can rely upon:

> Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to, or are not caused by, physical impacts on the environment, is not substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

(Pub. Res. Code § 21082.2 subd. (c))(emphasis added.)

For matters where the substantial evidence test applies, an agency must do more than rely upon favorable text plucked from the administrative record. The evidence alleged to support the agency's findings must have "solid value" in light of the entire record, including contrary evidence. (*Bank of America v. State Water Resources Board* (1974) 42 Cal.App.3d 198, 213-14, *quoting Estate of Teed* (1952) 112 Cal.App.2d 638, 644.) While agency studies are generally afforded deference, a "clearly inadequate or unsupported study is entitled to no judicial deference." (*Laurel Heights I*, *supra*, 47 Cal.3d at 409, nt.12.)

Examples of challenges analyzed under the "substantial evidence" standard of review include challenges to the scope of the analysis and the methodology for determining an impact. (*Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1259.)

IV. THE EIR FAILS TO ADEQUATELY ADDRESS AND MITIGATE IMPACTS TO NATIVE AMERICAN ARCHAEOLOGICAL RESOURCES

A. The EIR Violated CEQA Because it Failed to Consider and Discuss Preserving in Place Burials and Cultural Objects.

CEQA requires that an EIR consider and discuss preservation in place as a way to mitigate significant impacts to archaeological resources. The CEQA Guidelines provide, in relevant part:

> (3) Public agencies should, whenever feasible, seek to avoid damaging effects on any historical resource of an archaeological nature. The following factors *shall be considered and discussed in an EIR* for a project involving such an archaeological site:

> (A) Preservation in place is the preferred manner of mitigating impacts to archaeological sites. Preservation in place maintains the relationship between artifacts and the archaeological context. Preservation may also avoid conflict with religious or cultural values of groups associated with the site.
>
> (B) Preservation in place may be accomplished by, but is not limited to, the following: 1. Planning construction to avoid archaeological sites; 2. Incorporation of sites within parks, greenspace, or other open space; 3. Covering the archaeological sites with a layer of chemically stable soil before building tennis courts, parking lots, or similar facilities on the site; 4. Deeding the site into a permanent conservation easement.

(Guidelines § 15126.4(b), emphasis added.)

The EIR stated that the Project's "construction-related excavation/grading activities" could "disturb or destroy archaeological sites and artifacts." (27:7153.) As a result, the EIR concluded that the Project could result in significant impacts to archaeological resources.[11] (27:7153.) Because the EIR concluded there could be significant impacts, the EIR was required to "identify potentially feasible measures to mitigate significant adverse changes in the significance of an historical resource." (Guidelines § 15064.5, subd. (b)(4).) The EIR was required to consider and discuss "[p]reservation in place [a]s the preferred manner of mitigating impacts to archaeological sites." (Guidelines § 15126.4, subd. (b)(3)(A).)

The EIR never analyzed, nor even considered, preservation in place as mitigation for significant archeological impacts. Instead, the only mitigation measure the EIR identified was a data recovery program. (27:7156-57; s*ee*

[11] Archeological sites CA-LAN-62 and CA-LAN-211/H are "historical" archeological resources pursuant to CEQA. (27:7152)

27:7154 ["The potential for loss of cultural resources and information could be significant if any archaeological or historical resources were disturbed or removed *without an analysis of their cultural significance* or *without documentation* of their context in relation to the surrounding environment."].)

1. Neither the EIR, Nor its Referenced Documents, Discuss, Analyze, or Consider Preservation in Place.

For mitigation of archaeological impacts, the Phase II EIR relies almost *exclusively* on U.S. Army Corps of Engineers' ("USACE") Clean Water Act permit documents drafted for Playa's predecessor in interest in the early 1990s. (27:7134-35.) The documents are entitled: the Programmatic Agreement (PA), the Research Design, and the Archaeological Treatment Plan(s) (ATP). (27:7134-35.) The EIR primarily cites to the PA, which in turn references the Research Design, which in turn governs the ATPs. (27:7134-35.) The ATP is entitled a "Data Recovery Plan" and outlines a methodology for answering research questions posed by Playa's archaeologist. (131:36977.)

The mitigation measures set forth in the USACE documents are outlined in the EIR on pages 27:7156-57 in the record. The relevant portions are summarized as follows:

1. Prior to the issuance of any grading/excavation or building permits, the ATPs shall be implemented.
2. A qualified archaeologist shall be retained to implement the Research Design and comply with the PA.
3. "Historic resources…shall be avoided or unavoidable disturbance be mitigated through data recovery, documentation, analysis, and curation."[12] ATPs required by the PA shall be implemented.

[12] When avoidance is mentioned, there is no mention whatsoever how or when impacts will be avoided or when they will be considered "unavoidable."

Records from implementing the PA shall be curated according to federal law.

4. Playa shall retain a Gabrielino Indian representative as monitor of excavations.
5. If "previously unknown archaeological and historical resources are discovered during construction, grading/excavation/construction shall temporarily be halted." The USACE and State Historic Preservation officer will be notified so that they may offer recommendations for treatment under the PA.
6. The project archaeologist shall monitor ground disturbing activities in areas where significant archaeological or historical materials are discovered or detected and evaluate their eligibility for listing in the National Register of Historic Places. He/she shall notify the Department of City Planning of the significant resources after grading is completed.
7. A report on the archaeological investigations shall be prepared to the City and other agencies.
8. Provisions for displays of items found in Phase II in the Phase I commemorative display center.

(footnote inserted).

Both Playa and the trial court cite to the USACE documents as providing the required mitigation for purposes of CEQA (5 JA 1124-25;15 JA 3611), but they are wrong because these documents fail to meet CEQA's requirements because *nowhere do they discuss, analyze or consider preservation in place as required by Guidelines § 15126.4.* The EIR provides no discussion or analysis as to why or how the information in these documents complies with the City's own

CEQA responsibilities. The PA was drafted in order to "take into account the effects of the project on historic properties." (131:36967.) The PA was designed to choreograph the efforts to preserve *information*, or data, about the historic cultural objects affected by the Project. In contrast, CEQA Guidelines §15126.4 subd. (b)(3)(B), requires a discussion of methods to preserve such resources in place, for instance, "[p]lanning construction to avoid archaeological sites." (Guidelines §15126.4 subd. (b)(3)(B).)

At trial, Playa argued that data recovery was not the only "mitigation measure" adopted by the City. (5 JA 1124). They cited to the eight paragraphs stated above, which reference the measures adopted through the Programmatic Agreement (PA). (*Id*.; 27:7156-57.) However, none of these "measures" qualifies as separate CEQA-recognized mitigation and instead are means to achieve the only result Playa seeks: data recovery. For instance, one of the requirements that a qualified archaeologist and a Gabrielino representative are present is not for any other purpose but to oversee the recovery of scientific data from the burials: "a professional archaeologist shall be retained…to implement the Research Design and comply with the Programmatic Agreement," both of which outline data recovery. (27:7156.) The "Archaeological Treatment Plan" (ATP) that Playa cites as mitigation is entitled, significantly enough, "Data Recovery Plan for CA-LAN-62 and CA-LAN-211, Playa Vista Archaeological Project." (131:36976.) Thus, the only mitigation Playa points to is in fact part of a "data recovery" scheme.

Furthermore, the Project's "Work Plan"[13] states plainly the bias against preservation in place: "Importantly for Playa Vista, mechanical stripping followed

[13] The work plan was drafted on September 2, 2003 by Jeff Altschul (the same professional who drafted the 1991 Data Recovery Plan) and was meant to update the 1991 plan. (131:36985.)

by feature/burial excavation ensures that there is little chance that archaeological features will impede construction." (131:36988.) This statement is in opposition to Guidelines § 15126.4(b)(3)(B) which provides for "planning construction to avoid archaeological sites." Regarding graves, the process provided by the Work Plan is simply: "[a]s discovered, all features and burials are mapped, documented, and excavated" with no regard to the option of preserving the burials in place. (131:36988.)

Assuming, *arguendo*, the City may refer to the USACE documents as sufficing for its own CEQA obligations, the City violates CEQA when those documents do not provide the information CEQA requires. (See, *e.g., Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.) The underlying purpose of CEQA is "to compel government at all levels to make decisions with environmental consequences in mind." (*Bozung, supra,* 13 Cal.3d at 283.) In this case, the EIR relies entirely upon the USACE documents, which provide no discussion of preservation in place. Therefore, the EIR fails as a matter of law. (Guidelines § 15126.4(b)(3).)

2. The EIR's Conclusion That Data Recovery is the Only Feasible Mitigation is Not Supported by Substantial Evidence.

The EIR's conclusion that data recovery is the only feasible mitigation measure must be supported by substantial evidence. (Guidelines §15091, subd. (b); *see* Guidelines §15126.4 subd. (b)(3)(A), (B) and (C).) The EIR fails this requirement. The EIR contains a single sentence, without analysis, explanation, or evidence that, "[t]he [riparian] corridor itself…cannot be placed in such a way as to avoid all portions of these archaeological sites and still function as a hydraulic feature." (27:7153.) The EIR does not explain how the City determined that changing the location of the riparian corridor is infeasible, nor explain why data

recovery is the only feasible mitigation for resources located in other portions of the project, outside of the riparian corridor. In short, the public has no way of knowing why or how the EIR arrived at the conclusion that "the only feasible mitigation measure in those portions of the significant archaeological sites that will be adversely impacted by the riparian corridor is data recovery." (27:7153.) (See *Kings County, supra,* 221 Cal.App.3d at 733 [The EIR "must reflect the analytic route the agency traveled from evidence to action"].)

"The EIR must contain facts and analysis, not just the bare conclusions of the public agency." (*Santiago County, supra*, 118 Cal.App.3d at 831.) While the law does not require every statement in an EIR to be supported by substantial evidence, the conclusions that the lead agency makes concerning mitigation is an essential element of the EIR and the agency must document how it came to that conclusion. (See *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433; *City of San Jose v. Great Oaks Water Company*, (1987) 192 Cal.App.3d 1005.) CEQA "places the burden on the approving agency to affirmatively show that it has considered the identified means of lessening or avoiding the project's significant effects and to explain its decision allowing those adverse changes to occur." (*Citizens for Quality Growth, supra,* 198 Cal.App.3d at 411.) The City has not met that burden here. The EIR must explain what facts led to the conclusion that the riparian corridor could not be moved and why the only feasible mitigation is data recovery.

B. The EIR Erroneously Concluded That Data Recovery Reduced the Effects of Destruction of Native American Burials to a Less-Than-Significant Level.

The EIR claims the Project's significant impacts to archeological resources will be mitigated by documenting the destruction through a data-recovery effort.

(27:7154.) However, data recovery in this case does not make the destruction of a sacred burial site less than significant. As the NAHC stated,

> [Data recovery] is not adequate in terms of addressing the cultural impact to affiliated Native Americans. These sites are finite resources that are disappearing daily in the face of development. No amount of documentation can compensate for the loss of these sites, nor recreate them for the Native American Community, either physically or spiritually.

(93:25956.) In addition, Appellant Anthony Morales commented that "no matter what method is used [for data recovery], the end result is still destruction." (128:36187.)

Indeed, case law regarding the destruction of historic buildings expressly rejects the conclusion that documentation reduces the loss of a historic resource to a less than significant level in all cases. (*Architectural Heritage Association v. County of* Monterey (2004) 122 Cal.App.4th 1095, 1119-20 ("*Architectural Heritage"*); *League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 909 ("*City of Oakland*").) In *Architectural Heritage*, the County of Monterey sought to demolish an old jail, which, among its other historical features, housed Cesar Chavez in 1970 when he was jailed for refusing to obey a court order to halt the United Farm Workers' lettuce boycott. (*Architectural Heritage, supra*, 122 Cal.App.4th at 1102). After finding that the jail was an historic resource, the Court of Appeal found the mitigation measures "fail[ed] to reduce the environmental detriment 'to a point where clearly no significant effect' will result." (*Id*. at1120, quoting CEQA § 21064.5). The mitigation measures proposed were: "(1) photographic documentation; (2) preparation of an historic monograph; (3) salvage of certain architectural elements; and (4) maintenance of a set of blueprints." (*Id*. at 1119.)

Similarly, in *League for Protection*, the court found that the mitigation measures adopted in connection with a planned demolition of Oakland's historic Montgomery Ward building were insufficient and did not reduce the effects of demolition to a level of insignificance. (*City of Oakland, supra*, 52 Cal.App.4th at 909.) The court stated:

> Documentation of the historical features of the building and exhibition of a plaque do not reasonably begin to alleviate the impacts of its destruction. A large historical structure, once demolished, normally cannot be adequately replaced by reports and commemorative markers…

Id. at 909.

Certainly, destruction of a sacred site containing human burials and Native American cultural objects should be accorded even more scrutiny than destruction of an historical building. Once remains are removed, their connection to their burial place cannot be recreated spiritually. (See 93:25956.) As evidenced by the NAHC's and public's comments, the case at bar is one of those cases where data recovery does not reduce the Project's impact to a level of insignificance.

C. The City's Analysis of Alternatives Is Inadequate and Its Rejection of Alternatives Which Would Preserve Archaeological Sites Is Unjustified and Unsupported.

CEQA requires the EIR consider alternative project designs that would avoid significant impacts by preserving archeological resources in place. (*See Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1183 [requiring analysis of reduced density on-site alternative].) A public agency must "deny approval of a project with significant adverse effects when feasible alternatives or feasible mitigation measures can substantially lessen such effects." (*Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 41, *disapproved on other grounds by Western States Petroleum Assn. v. Superior Court* (1995) 9

Cal.4th 559, 570, nt.2.) Discussion must focus on alternatives which avoid significant environmental harm, even if those alternatives are more costly and would impede to some degree the Project's major objectives. (Guidelines § 15126.6.)

Furthermore, an EIR must "ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official, …[and] produce information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned." (*San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 750-51, citation omitted.) As the Supreme Court held in *Laurel Heights I,* "[i]f the [lead agency] considered various alternatives and found them to be infeasible . . . those alternatives and the reasons they were rejected . . . must be discussed in the EIR in sufficient detail to enable meaningful participation and criticism by the public." (*Laurel Heights I, supra*, 47 Cal.3d 376 at 405; s*ee also, San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus,* (1994) 27 Cal.App.4th 713, 735-739 ("*San Joaquin Raptor*") [describing why an EIR must explain in meaningful detail why there are no feasible alternatives].)

The EIR failed to consider alternative project designs that would avoid the historical archeological resources. For example, there is no discussion or analysis of relocating or redesigning the riparian corridor, abandoning it, or reducing the size or location of portions of the development so as to avoid the resources.

Despite the NAHC's recommendation that Playa move the riparian corridor "no more than 200 feet to the north to protect [the ancestors' original resting place]," the only analysis in the record consists of the EIR's conclusory statement that the corridor cannot be moved and still operate as a water delivery device (27:7153), and Playa's attorney's complaint that relocating the riparian corridor would reopen Playa's USACE permit, incurring added expense**.** (116:32668.)

This is not sufficient under CEQA. The Court of Appeals, Sixth Appellate District, recently struck down a similar lack of analysis. In *Preservation Action Council v. City of San Jose,* the Court held the City's findings that a reduced-size, environmentally superior, Lowe's home hardware store alternative was infeasible was an abuse of discretion. (*Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1355-56 ["*PAC*"].) In *PAC,* there was "no evidence that the reduced-size alternative would be more expensive to build and stock or that the reduced-size alternative would be operationally infeasible." (*Ibid*.) Although Lowe's claimed it provided evidence in a form of a letter from its development manager that a smaller store "would not meet the San Jose market demand," the Court dismissed this argument finding the record lacked "facts, independent analysis or 'meaningful detail' to support Lowe's' claim" that the smaller store was infeasible. (*Id*. at 1347 and 1357.)

Similarly, Playa's lawyer's statements regarding the expense of reopening permits (116:32668; 117:32822[14]) to move the riparian corridor "cannot be determinative of" the feasibility of moving the riparian corridor. (*PAC, supra,* 141 Cal.App.4th at 1357, *quoting Kings County Farm Bureau v. City of Hanford,* 221 Cal.App.3d 692, 736 ["*Kings County*"].) "In order to approve a project that would have a significant environmental impact, the City [i]s required to *make findings* identifying (1) the '[s]pecific…considerations' that 'make infeasible the environmentally superior alternatives and (2) the 'specific…benefits of the project [which] outweigh' the environmental harm." (*Id*. at 1353, quoting Pub. Res. Code §§ 21002.1, subd. (b), 21081 and Guidelines § 15092, subd. (b), emphasis in

[14] At trial Playa argued, "the Riparian Corridor cannot be moved under existing permits, which required years of negotiation and compromise…" (5 JA 1123.) In support of this conclusion, Playa cited not to the EIR, but to its legal response to BEEP and BWLT's administrative appeal below. (117:32822.)

original) The City is obligated to "*independently* participate, review, analyze and discuss the alternatives in good faith." (*Id.* at 1352, quoting *Kings County, supra,* 221 Cal.App.3d at 736 (emphasis in original).) Furthermore, the "EIR, or some other document in the administrative record" must "'explain in meaningful detail…the basis for' the alleged infeasibility of the [adjusted riparian corridor] alternative." (*Id.* at 24, *citing Laurel Heights Improvement Assn. v. Regents of University of California, supra*, 47 Cal.3d at 405.)

The EIR does not reflect an analysis of the environmentally superior alternative of relocating the riparian corridor, and Playa's "bald claim" that the riparian corridor cannot be moved does not provide a "substitute for analysis" in the EIR of this potentially feasible alternative. (*PAC, supra*, 141 Cal.App.4th at 1356.) Therefore, the EIR fails to provide the public and the City Council with "the requisite facts that that would permit them to evaluate the feasibility of this alternative" in violation of CEQA. (*Id*. at 1355.)

D. The City Failed to Adequately Consult With the Native American Heritage Commission.

CEQA requires the City consult with NAHC, an agency with jurisdiction over archaeological sites. (*Environmental Protection Information Center, Inc. v. Johnson,* 170 Cal.App.3d 604, 625-26 [footnote omitted] (hereinafter "*EPIC*"); (Guidelines §15086 subd. (a), and Pub. Res. Code § 21153.) The City failed to fulfill this duty.

Although there is no definition of "consult" in CEQA or the Guidelines, the plain meaning of "consult" is "to show regard for: consider; to seek the opinion or advice of; to deliberate." (*Webster's New Universal Unabridged Dictionary* (2d ed. 1983) p. 393.) To "consider", in turn, means "to think seriously, maturely, or carefully: to reflect." (*Id.* at 389.) In addition to the plain meaning of "consult,"

the 2005 Supplement to the General Plan Guidelines[15] provides a definition of "consultation" within the context of planning relating to cultural places:

> Consultation means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement.

(Gov. Code § 65352.4.)

The City failed to adequately consult with the NAHC because the City never seriously considered the NAHC's recommendations. The NAHC sent numerous letters to the City requesting the Phase II EIR adequately address the significant unanticipated discovery in Phase I so as to avoid similar impacts in Phase II. (131:36964; 108:30300-03; 111:30994-997; 116:32671-76; 128:36009-026; 130:36747-51) Rather than consider this request, the City adopted a "legal-ease" approach.

When the NAHC expressed its concern that data recovery was inadequate mitigation (131:36931-32), the City repeatedly referred to the PA and the ATP (drafted for the USACE), reminded the NAHC that it was not signatory to the PA, and provided no real answers to the NAHC's questions about mitigation sufficiency. (131: 36959-63.) For example, when the NAHC requested that a different mitigation approach be used for discovery of six or more Native American burials, the City merely responded that pre-1872 human burials were not entitled to legal protection under California's cemetery law. (131:36963.) That the cemetery law does not apply is irrelevant and immaterial to the comment, which was a request that the City consider more appropriate and sufficient CEQA mitigation measures for archeological sites containing Native American burials of

[15] These guidelines took effect on January 1, 2005, but are instructive as to what is generally expected of consultation regarding cultural places.

six or more. The NAHC also suggested adoption of a treatment plan that would consider "preservation *in situ* of the discovered burials." (131:36933). The City essentially ignored this recommendation in its response. (131:36959-63.) The City impermissibly ignored mitigation measures suggested by the NAHC when those mitigation measures were not "facially infeasible." (*Los Angeles Unified School District v. City of Los Angeles* (1997) 58 Cal.App.4th 1019 (citations omitted).)

Furthermore, "where comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. *There must be good faith, reasoned analysis in response*." (*Cleary v. County of Stanislaus, supra*, 118 Cal.App.3d at 357, original italics.)

Taken together, the City's responses make clear that it never seriously considered the NAHC's recommendations, and therefore did not "consult" with the NAHC, as required by CEQA.

E. The EIR's Failure to Respond to Comments and Failure to Provide Information About the Cemetery and Sacred Site Discovered in Phase I, Rendered the EIR Deficient As An Informational Document.

CEQA provides that responses to comments "shall describe the disposition of each significant environmental issue that is raised by commenters… consistent with [Guidelines] § 15088." (Pub. Res. Code § 21091, subd. (d)(2)(B).) "There must be good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice." (Guidelines § 15088 subd. (c).)

After hundreds of Native American burials were discovered in October, 2003 during development of Phase I, and after the DEIR was circulated for public

review, numerous written and oral requests for additional analysis of Phase II archeological impacts were lodged. In fact, as the trial court noted, "[t]he burial ground issue was…far and away the most frequently mentioned subject of comment" at both the Planning Commission meeting and the City Council meetings on the project. (15 JA 3612.)

Outraged about what was happening in Phase I, numerous Native Americans and others, including the tribal chair of the Gabrielino-Tongva Indians, Anthony Morales, and the NAHC, presented comments concerned with the mitigation proposed for Phase II. (137:38509 [UCLA Native American Law Student Association comments that these sorts of burials should be "avoided not disinterred"]; 128:36186-87 and 129:36460 [Anthony Morales' comments that desecration of burials have not been addressed, the PA (and EIR) does not address issues raised by treatment in Phase I]; 111:30994 [NAHC Comments]; 97:26896 [Leslie Purcell comments that cultural resources have not been properly addressed, the area "should be saved," and the excavation is without the consent of tribal descendants]; 129:36462-63 [Linda Samels Cabellos comments that only "isolated" human remains were anticipated by the EIR and suggests data recovery is inadequate to address sacred sites].) Robert Dorame, the Most Likely Descendant of the remains, stated that Playa disregarded his recommendation for the Phase I burials and that the consultation process between Playa and the MLD under the mitigation provided is inadequate. (129:36457-58.)

The City ignored these comments and refused to assess the adequacy of the mitigation required by the EIR and therefore failed to face the hard questions raised by the public. (See Guidelines § 15088 subd. (c).) The NAHC comments best illustrate the serious defects in its EIR's analysis of Native American archeological impacts (and the typical response from the City):

> In our September 17 letter we stated because of the extreme archaeological sensitivity of the area 'There is every reason to believe that [Phase II] will encounter a significant number of Native American burials ...' The response to that comment in the FEIR (Comment 14-2, pages 727-728) states, 'The exact location of burials and other archaeological resources is not easily predicted, and there are instances where human remains and artifacts are found during construction.' Based on what has occurred on the [Phase I development], *predicting that there will be significant discoveries of Native American human remains on the* . . . [Phase II] *Project does not seem difficult.* On numerous occasions, in our responses to the discoveries at the [Phase I development], we have stated that the discovery of a burial ground, that has now reached at least 237 burials, is a new and significant discovery not anticipated in the project's environmental planning. In the face of what has happened at the [Phase I development], not to plan for the possibility of a similar occurrence in the [Phase II Project] FEIR would not only be morally objectionable from the Native American perspective, but would also be indefensible from a planning perspective. The FEIR should not be certified until the document incorporates specific mitigation measures for significant discoveries of Native American human remains and any associated grave items.

(111:30994, emphasis added.)

In addition, the Sierra Club specifically stated in its comment letter on the Draft EIR:

> Sierra Club has learned that there may have been recent grave excavations at the Playa Vista site that are significant. Please explain these findings in detail in the Final EIR so it can be determined if all proper procedures for archaeological excavations have been followed and if further mitigation is necessary.

(95:26574.)

Rather than providing a good faith response to the Sierra Club's comment, as required by Guidelines §15088(c), the EIR simply indicated that an unspecified number of Native American burials had been uncovered in Phase I. (95:26575.) It reiterated information from the draft EIR, stating "The exact location of burials and other archaeological resources is not easily predicted . . . ." (*Id*.) In addition, the response stated that "efforts will be made to avoid human remains and other archaeological resources," but failed to explain how. (*Id.*)

CEQA provides that the EIR process must be "open to the public, premised upon a full and meaningful disclosure of the scope, purposes, and effect of a consistently described project, with flexibility to respond to unforeseen insights that emerge from the process." (Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association (1986) 42 Cal.3d 929, 936, emphasis added.) The City belittled these insights thus betraying the public's role in the CEQA process. Decision makers lacked information upon which to determine whether Phase II should be modified to avoid further disturbance to an important Native American sacred site because they were denied information assessing both the specific nature and archaeological, cultural, and historical significance of the discovery at Phase I, and its relationship to Phase II.

F. The EIR Failed to Disclose the Project's Inconsistency with the City's General Plan Conservation Element.

The Conservation Element of the City of Los Angeles General Plan, one of seven mandated elements of the General Plan (Gov. Code, § 65302 subd. (d)), has the stated goal of the City becoming "a city that preserves, protects and enhances its existing natural and related resources." (Conservation Element of the City of Los Angeles General Plan, ch.II, at p. II-1.)[16] It explains that "The city has a

[16] The Conservation Element is located at 5 JA beginning at 874.

primary responsibility in protecting significant archaeological and paleontological resources" and for "protecting its cultural and historical heritage." (*Id*., at Chapter II, p. II-1 and II-9.) To accomplish this goal and to carry out the City's primary responsibility, the Conservation Element requires that the City "protect significant archaeological and paleontological sites and/or resources known to exist or that are identified during land development, demolition or property modification activities." (*Id*., pp. II-5 -II-6.) It squarely places responsibility with "departments of Building and Safety, City Planning and Cultural Affairs and/or the lead agency responsible for project implementation." (*Id*., p. II-6.) Similar provisions govern the protection of cultural and historical resources. (*Id*., p. II-9.)

As the Conservation Element makes clear, only certain specified City departments or the lead agency has responsibility for monitoring and enforcement in the area of archeological, cultural and historical resources. For the Phase II project, there is no question that the City is the lead agency. (23:5849.) Despite the mandate for the City to protect archaeological resources, the Phase II Mitigation Monitoring and Reporting Program (92:25501-25588) surrenders City monitoring and enforcement oversight to the U.S. Army Corps of Engineers in a number of areas involving cultural resources.[17] For example, Mitigation Measure P.(2)-5 provides:

> In the event that previously unknown archeological and historical resources are discovered during construction, grading/excavation/construction shall temporarily be halted. The U.S. Army Corps of Engineers and the State Historic Preservation Officer shall immediately be notified to provide these agencies with the opportunity to assess the resources and offer

[17] Indeed, when Councilman Reyes directed planning staff to respond to NAHC concerns, the Deputy Director of Planning described the U.S. Army Corps as "the lead agency" with regard to the Programmatic Agreement. (131:36959.) This evidences the deferential mind-set of the City's planning department towards the U.S. Army Corps when it comes to archaeological resources.

> recommendations for treatment required by the Programmatic Agreement.

(92:25586.) Other data recovery measures such as P(2)-1 [implementation of Archeological Treatment Plans], P.(2).3[curation], P.(2)-7 [investigation report] are similarly impermissibly delegated to the Army Corps as the "Enforcement Agency." (92:25585-87.) In addition, the City has locked itself into the Army Corps' mitigation plan without any flexibility to require more protective measures in order to ensure that future impacts to archaeological resources will be mitigated to a less than significant level. (See 131:36927 [City is not a signatory to the Programmatic Agreement, therefore it may never request that it be amended].)

Since the City abdicated its monitoring and enforcement powers to agencies outside of City Government, the EIR was required to explicitly discuss the inconsistency between the proposed project and the General Plan's Conservation Element. (Guidelines § 15125 subd. (d).) It did not. This constitutes a failure to proceed in a manner required by law.

At trial, Playa argued that delegation of City monitoring and enforcement to USACE is not inconsistent with the General Plan (5 JA 1127-29), citing to the Conservation Element's recognition that "various federal, state and local regulations have been promulgated to protect archaeological sites and resources," (Conservation Element, p. II-3). However, the Conservation Element specifically states that its "objectives, policies and programs are those that are within the jurisdiction of the City of Los Angeles. Programs related to matters outside the authority of the city are not listed." (Conservation Element, at p.I-3.)

Had the EIR disclosed this General Plan inconsistency, decision makers and the public would be informed that for the Project, the City would relinquish its responsibility under the Conservation Element to be "a city that preserves, protects and enhances its existing natural and related resources." (Conservation Element,

at p. II-1.) In addition, it would have explained, as it must, how this lack of authority over mitigation would preclude the City from carrying out the Conservation Element's requirement to "protect" these resources, as opposed to allowing Playa to simply "document" and "remove" them. (*Id*. at p.II-4.) As such, this error is clearly prejudicial because it resulted in the exclusion of significant information from the EIR. (*Sierra Club v. State Board of Forestry, supra*, 7 Cal. 4th at 1236-37.)

G. The Discovery of the Native American Cemetery Required Revisions to, and Recirculation of, the EIR

The California Supreme Court has observed:

> CEQA compels an interactive process of assessment of environmental impacts and responsive project modifications which must be genuine. It must be open to the public, premised upon a full and meaningful disclosure of the scope, purposes, and effect of a consistently described project, with flexibility to respond to unforeseen insights that emerge from the process.

(*Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, 936.) Although the City was asked to provide information on the cemetery discovery through comments (see discussion, *supra*), no new data was added to the EIR to reflect the new discovery nor was the EIR recirculated, as CEQA requires. (Pub. Res. Code § 21092.1; Guidelines § 15088.5(a).)

Upon certification in September of 2004, the EIR, as it had stated in August of 2003 when it was first released for public review, still reported that

> "[p]revious research at [CA-]LAN-62 has demonstrated the importance of the site even though we lack certain knowledge of the site's size and integrity." (78:21422).

This statement, which remained unchanged in the revisions to the final EIR, was not only unsupported by the record, it was in fact contradicted by facts known to the City at the time the final EIR was certified.

The October 2003 excavation at CA-LAN-62 in Phase I was valid and appropriate data that should have been included in a recirculated Phase II EIR. Without that information, a large gap remained in the EIR and the omission of this information subverted the underlying policies and purposes of the EIR. (*Rural Landowners Assn. v. City Council* (1983) 143 Cal.App.3d 1013, 1023.) The dearth of information in the EIR regarding such an important discovery[18] precluded informed public participation and prevented the decision makers from considering the environmental factors necessary to make a reasoned decision. (*Berkeley Keep Jets, supra*, 91 Cal.App.4th at 1356.) As such, the failure to include the discovery in the final EIR and recirculate it rendered the EIR legally inadequate.

V. THE EIR FAILS AS AN INFORMATIONAL DOCUMENT REGARDING METHANE IMPACTS

A. The EIR Relies on Clearly Inadequate Methane Studies and Fails CEQA's Standard of "A Good Faith Effort at Full Disclosure."

Before the impacts of a project can be assessed, and mitigation measures considered, an EIR must first accurately describe the existing, or "baseline," environmental conditions. (*Save Our Peninsula Comm. v. Monterey County*,

[18] The significant new information should have been addressed in a recirculated EIR, particularly in light of the NAHC's comments and judicially recognized expertise. (*Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 626.)

(2001) 87 Cal.App.4th 99, 124.) Courts have repeatedly "underscored the 'importance of an adequate baseline description, for without such a description, analysis of impacts, mitigation measures and project alternatives becomes impossible.'" (quoting *Amador County v. El Dorado County Water Agency*, (1999) 76 Cal.App.4th 931, 953; *see also* CEQA Guideline §15125 subd. (a).)

Moreover, an EIR "must demonstrate that the significant environmental impacts of the proposed project were *adequately investigated* and discussed and it must permit the significant effects of the project to be considered in the full environmental context." (CEQA Guidelines § 15125 subd. (c)(emphasis added).) Courts interpret CEQA Guideline § 15125 "broadly in order to 'afford the fullest possible protection to the environment.' In so doing, [courts] ensure that the EIR's analysis of significant effects, which is generated from this description of the environmental context, is as accurate as possible." (*Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 874 (citing *Kings County, supra,* 221 Cal.App.3d at 720.)

An adequate description of the environmental baseline is critical to those persons who may use the project. CEQA Guidelines § 15126.2 provides:

> The EIR shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected. For example, an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there.

When assessing whether an environmental study is adequate,

> [O]ur Supreme Court has cautioned that a reviewing court is not to decide "whether the studies are irrefutable or whether they could have been better." By the same token, the reviewing court is not to

> "uncritically rely on every study or analysis presented by a project proponent in support of its position. ***A clearly inadequate or unsupported study is entitled to no judicial deference***."

(*Berkeley Keep Jets, supra,* 91 Cal.App.4th at 1355, quoting *Laurel Heights, supra*, 47 Cal.3d at 409 and nt. 12 [emphasis added, citations omitted].) Furthermore, "an agency should not be able to hide behind its own failure to gather data." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.)

1. Because the City Failed to Conduct the Required Tests, the EIR May Mislead the Public and Decision makers to Believe That the Methane Risks Are Low.

ETI, the City's expert, recommended testing on a 100/50 foot grid scheme because methane gas conditions at the Project site are such that significant sources of methane may be missed when soil gas probes are not placed on a sufficiently dense spacing grid. "This is a very important concept because soil gas anomalies don't have to occupy a large aerial extent in order to provide a significant gas source under a building." (88:24376, para.2.) ETI noted that areas with significant methane concentrations in the Phase I area were missed even on the 100-foot grid spacing regime. (88:24377, para.2.) For this reason, ETI recommended further surveying at 50-foot intervals where soil gas concentrations exceed 12,500 ppmv. (88:24384 [Recommendations 2 and 3].)

Instead of following ETI's direction to use a 100/50 foot grid testing regime for Phase II, Playa insisted on, and the City allowed, a 300 foot grid testing regime scheme. (88:24361 ["Although a 100-foot grid spacing was recommended by ETI, only the Phase 1 areas were sampled on this spacing, . . . *At the insistence of*

Playa Vista, the Phase 2 areas were sampled on a 300-foot grid spacing . . ."](emphasis added); 25:6609-6610.)

The record lacks any explanation for why ETI's recommended 100/50 foot testing grid was not used. No conflicting expert testimony refutes the City's experts' claims that Phase II is undersampled. (94:26186 [ETI's Walter Merschat stating 300 foot grid testing renders Phase II undersampled]; 88:24373 [ETI's Victor Jones stating, "the soil gas grid has been undersampled…by using 300 foot centers"].) No evidence is provided to explain the disparity between what the City's expert recommended and what the City ultimately allowed. Thus, based on the City's own expert, the *only* expert opinion in the record on this issue, the Project's methane studies used to determine baseline methane gas conditions are "clearly inadequate" and "unsupported." (*Laurel Heights I, supra*, 47 Cal.3d at 409, nt. 12.)

The EIR's error is prejudicial. Testing on the larger 300/100 foot grid produces remarkable results, rendering the EIR to conclude: "Methane concentrations within soil gas were found to be very low in the majority of the Proposed Project site." (25:6610.) Illustrating this conclusion, the EIR provides a map of the grid samples taken in Phase II and their corresponding methane concentrations. (25:6611.) The original, color version of the map shows several areas in the lower ranges (or blue colors). (*See* Exhibit 3, Appellants' Motion to Augment the Record.) When comparing the Phase I and Phase II areas, there is a dramatic difference between Phase I and Phase II's methane concentration levels. (25:6603; *see* Exhibit 4, Appellants' Motion to Augment the Record.) Phase I has numerous large orange and red colored areas (highest concentrations) compared with Phase II's concentrations, which appear mostly blue, or lower in concentration.

The dramatic disparity between Phase I and Phase II's methane concentrations provides the public and decision makers with only two alternative conclusions: either the Phase II area in fact has markedly lower concentrations of methane than the adjacent Phase I area, or Phase I's testing (100/50 foot grid) accurately portrays existing methane concentrations, while Phase II's testing (300/100 foot grid) does not. Only the latter conclusion is supported by the record. (94:26191 [insufficiency of sampling to form a baseline of methane conditions at site]; 94:26186; 88:24373.)

Instead of addressing this deficiency, the EIR perfunctorily responded without "any contrary analysis" to support its position that the methane studies were adequate. (*Berkeley Keep Jets*, *supra*, 91 Cal.App.4th at 1367.) The EIR's reliance upon data from 300/100 foot grid testing, combined with the lack of response to experts' comments challenging the adequacy of that testing, does not meet the standard of "'a good faith effort at full disclosure' required by CEQA" (citing CEQA Guidelines § 15151). The lack of information regarding the actual methane concentrations at the project site makes any "meaningful assessment" of the methane risks and "the development of site-specific mitigation measures impossible." (*Sierra Club v. State Board of Forestry*, *supra,* 7 Cal.4th at 1237.) In this case, "prejudice is presumed." (*Id*.)

Furthermore, when the testing regime was criticized in a comment by Walter Merschat, a "responsible expert," the EIR did not provide a "good-faith, reasoned analysis supported by factual information" explaining why the testing regime is appropriate. (Guidelines § 15088 subd. (c); *see* e.g. 94:26192 [The response did not explain the adequacy of the grid employed and obscured the issue by stating that the soil gas surveys were "designed and completed, or overseen, by ETI."]) This is not allowed. (*Cleary v County of Stanislaus*, *supra*, 118 Cal.App.3d at 357.)

In conclusion, the EIR's failure to obtain an accurate baseline using adequate methane gas studies is a significant violation of CEQA. (Guidelines § 15125.) Furthermore, the EIR did not acknowledge the concerns of the City's own experts, which renders the EIR inadequate as an informational document. (125:35082.) Finally, by using information derived from scientifically discredited methodologies, and by ignoring the sound advice from its experts, the EIR was not "a good faith effort at full disclosure" to inform decision makers and the public about health and safety risks and environmental impacts posed by the Project. (*Berkeley Keep Jets*, *supra*, 91 Cal.App.4th at 1367.) (CEQA Guideline §15151.)

2. The EIR Fails to Reveal Conflicting Evidence on a Key Environmental Point.

The disclosures in an EIR must allow the public and decision makers to "gain[] a true understanding of…the most important environmental consequences" of the project (*Berkeley Keep Jets, supra*, 91 Cal.App.4th at 1366-67), by thoroughly investigating environmental conditions (Guidelines § 15144) and revealing conflicting evidence on key environmental points.

While the EIR presented to the public a rosy picture of low methane concentrations at Phase II, the City had in its possession documents from its own expert, ETI, denouncing the methane testing used to establish the environmental baseline for the Phase II EIR. (135:38156.) The EIR did not disclose those documents or their contents. In fact, they came to light only through the efforts of the environmental group, Grassroots Coalition's (hereinafter "Grassroots") President Patricia McPherson,[19] who submitted a public records request to the City

[19] "Grassroots Coalition was the Organization to disclose the underground gas migration hazards and to have worked with the city in…forcing the developers to start undergoing soil gas studies at the site." (6:1413.)

requesting the documents (which the City denied it had), then obtained documents from the State Lands Commission, and subsequently submitted them into the record during the EIR process. (See 112:31419-21 [testimony of Patricia McPherson].)

Here, the EIR's omission of documents from the City's own expert calling into question the City's approval of testing and mitigation for Phase II demonstrates bad faith. (*Berkeley Keep Jets, supra*, 91 Cal.App.4th at 1367; CEQA Guideline §15151.) The EIR states that Phase II methane sampling surveys were done "in coordination with ETI." (25:6609.) However, the excluded ETI documents state, *inter alia*, that "the proposed testing protocol for the soil gas analysis proposed by Playa Vista for their Phase II EIS/EIR…does not meet the minimum due diligence requirements for determining the true distribution and potential danger posed by methane sources under these properties." (135:38156, Exhibit A; *see also* 88:24362, second para.) This is hardly "coordination with" ETI, as the EIR alleges. (25:6609, last para; see also 94:26192 [Response 30-39 states that surveys were "designed and completed, or overseen, by ETI"].) Thus the EIR presents the false impression that ETI approved the gas studies conducted for the Phase II EIR baseline conditions when ETI did not so approve. The EIR fails to reveal conflicting evidence on a key environmental point – whether the methane gas studies were sufficient.

The EIR's failure in this regard precluded the public and decision makers from being fully informed and able to pass judgment on the Project because the City withheld from view its own experts' true opinions and characterized them as something they were not. This failure is prejudicial. (CEQA Guideline §15151 [CEQA requires a lead agency to explain its reasons for accepting one set of judgments instead of another]; *Greenbaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391.)

This case is analogous to *Berkeley Keep Jets*, where, "in reply to public criticism that the EIR failed to use the most recent CARB [California Air Resources Board] speciation profile in estimating TAC emissions from jet aircraft, the Port [the lead agency] created the misleading impression that a CARB official had discouraged the Port from utilizing [the newest, most accurate profile under CARB's standards]." (*Berkeley Keep Jets*, *supra*, 91 Cal.App.4th at 1366.) The Port gave the impression that CARB officials "had questions about the accuracy of [the newest profile's] methodology," and omitted from the record the CARB official's opinion that the older profile should not be used and that the newer one was "'the most accurate characterization of jet exhaust available.'" (*Id*., quoting a letter from chief of CARB's emission inventory branch.) Similarly, the City's omission of the pertinent expert opinion coupled with the EIR's misleading statements prevents the public and decision makers from "gaining a true understanding of one of the most important environmental consequences" of the project. (*Id*. at 1366-67.) Thus, the City's attempt to obscure from public view those City's expert opinions which directly conflict with the EIR's unsupported conclusions renders the EIR fatally flawed. (*Id*. at 1371.)

B. The EIR Impermissibly Defers Analysis of Significant Impacts and Mitigation Until After Project Approval.

1. The EIR Impermissibly Defers Analysis of Methane Impacts.

Despite the recommendation from the City's experts for adequate methane studies before Project approval (63:17243 [recommendation 8]; 125:35239-40), the EIR suggests that adequate methane studies will be done after project approval, before building permits are issued. (94:26192 [Response 30-39, "prior to issuance of building permits, prospective builders will complete additional soil gas assessments…Data from these investigations will be used to define

appropriate mitigation measures for the particular buildings."].) However, at the building permit stage, such studies would not be subject to public evaluation and criticism. "[A] study conducted after approval of a project will inevitably have a diminished influence on decision making. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." (*Sundstrom, supra,* 202 Cal.App.3d at 307, *citing Mount Sutro Defense Committee* v. *Regents of University of California* (1978) 77 Cal.App.3d 20, 35.) As the Second District Court of Appeal has stated: "A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding *whether* to approve a proposed project, not inform them of the environmental effects of projects that they have already approved." (*Natural Resources Defense Council, supra,* 103 Cal.App.4th at 284-85.)

Deferring analysis of methane gas concentrations until after the project is approved is especially dangerous in this case. Once approved, the developer has the right to go forward with development of the project, which includes grading, surcharging and paving of soil that attends development up until the building stage. As ETI's Dr. Jones stated, "[o]nce the construction starts the ability to map the natural seepage and relate it to the natural sources has been reduced. If we're going to build on this area, then it's very important that it be mapped properly before we cover it up." (125:35239-40.) In other words, if the soil is graded prior to obtaining accurate methane concentrations, it is likely that artificially low readings of methane concentrations will result. Indeed, this is what happened in Phase I, where the EIR had been approved and grading commenced before complete and adequate testing could be performed. (See 94:26191 [Walter Merschat comment 30-39 regarding Phase I sampling in disturbed soils rendered artificially low readings of methane gas concentrations].)

Therefore, because the EIR's post-approval studies will have a decidedly "diminished influence on decision making," the studies must be conducted before project approval to allow decision makers to balance the project's benefits against its true environmental costs. (*Sundstrom*, *supra,* 202 Cal.App.3d at 307, citation omitted.)

2. The EIR Impermissibly Allows Adoption of Mitigation Measures Based on Post-Approval Studies that Will Dictate the Level of Mitigation Required.

An agency may rely on a mitigation measure that "defers some amount of environmental problem-solving until after project approval" only when "the adopted mitigation measure (i) commits the agency to a realistic performance standard or criterion that will ensure the mitigation of the significant effect, and (ii) disallows the occurrence of physical changes to the environment unless the performance standard is or will be satisfied." (Remy, et. al, *Guide to the California Environmental Quality Act (CEQA)* (10th ed. 1999), page 425, citing CEQA Guideline §15126.4 subd. (a)(1)(B).) Here, neither condition is met. First, the City has not relied upon realistic performance standards because Phase II performance relies on Phase I performance, but Phase I performance has not been demonstrated. (See 130:36686 [Grassroots Coalition's comments which state evidence of Phase I mitigation system failure was presented to the City during the methane code proceedings]; *see also* 7 JA 1514 [video of methane bubbling up into the Phase I buildings.]; JA 1511 [declaration].) Second, the project approval will allow physical changes to the environment before the mitigation performance standards are or will be satisfied.

Obtaining adequate methane studies before project approval is key to ensuring that the level of mitigation required will actually reduce the Project's impacts to a level of insignificance and protect future residents and workers.

Methane testing results inform what level of mitigation will be required based on the risk assessed. (92:25686 [EIR stating post-approval methane studies will be used to define appropriate mitigation measures]; 92:25626 [table showing different level of mitigation measures required for different methane concentrations found].) Therefore, as Dr. Jones stated:

> Adding detail soil gas at the time of building is *far too late* in the decision process. The potential danger to the constructed buildings and the economic considerations controlling the methane mitigation should be determined before the building process is allowed to be carried to that extent. A valid EIS/EIR requires adequate sampling, and 300 to 800 feet is not adequate for an area of known macro gas seepage and production.

(135:38156, Exhibit A, p.2.)

CEQA's mandate to evaluate environmental harm before project approval is most pertinent here, where the risks to human health and safety are great. (*Laurel Heights I, supra*, 47 Cal.3d at 378.) Nothing in the EIR provides a reason why the City did not follow its own expert recommendations that appropriate methane gas studies dictate the level of mitigation required *before* Project approval. Therefore, the EIR fails as a matter of law.

C. The EIR is Inadequate as an Informational Document Because Mitigation Data From Phase I Was Excluded.

An EIR is "an informational document," the purpose of which is "to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment." (*Laurel Heights I, supra*, 47 Cal.3d at 391, *quoting* Pub. Res. Code §21061.) The City, by failing to disclose Phase I's mitigation performance data during the Phase II EIR process, despite numerous requests to do so, thwarted CEQA's fundamental goal

of ensuring that decision-makers, as well as the public, are fully informed of the environmental consequences of the City's decisions before they are made.

Phase II mitigation is based on Phase I's mitigation measures. (*See* 25:6606 [EIR's description of Phase I mitigation measures]; 60:16224-5 [table of mitigation measures required in Phase I]; 25:6608 [EIR's description of Phase II methane mitigation measures; 68:18499 and 18531 [table of mitigation measures required in Phase II].) Phase I mitigation measures are comprised of below-building measures ("sub-slab" venting) and permanent, deep vent wells placed into the 50-foot aquifer ("sub-surface" venting), as well as other components. (60:16222-16223.)

1. Effectiveness of Phase I Mitigation Measures is a Significant Yet Unknown Issue.

Several factors in this case mandate disclosure of data relating to mitigation effectiveness. First, human health and safety is at risk. (25:6622.) The City's expert described how critical mitigation is to the safety of Playa's residents: "The safest approach would be to avoid building in [the proposed project area]; however, it is possible to build *if it can be demonstrated that the methane is properly mitigated*." (125:35220, emphasis added.) Jones stated that, if the mitigation measures do not work, then "a dangerous situation exists at the site" and "No further development should be allowed . . . until these mitigation issues are resolved" (125:35221.)

Second, the mitigation measures proposed are heretofore of unknown efficacy. The most important of the mitigation measures, the sub-surface venting, (a.k.a. "deep vent wells") are recognized as experimental measures. (135:38156, Exhibit B) [ETI stating that the sub-surface venting measure is "in the research and design stages"]; 135:38156, Exhibit C [LADBS characterizing same].)

Further, ETI stated, and the City agreed, that Phase I mitigation measures, including the sub-slab venting systems, must be tested and monitored to ensure they reduce the methane impacts to a less than significant level. (88:24383 ["[t]hese mitigation systems require extensive field-testing to determine their effectiveness in handling the gases venting naturally at Playa Vista before [Phase I] initial occupancy."].) Dr. Jones described the testing required,

> "Gas samples must be collected from the sampling ports located both above and below the [buildings'] membrane and analyzed in a laboratory for their methane through butane contents. Simultaneous sample collection must be performed in the [buildings'] vent risers in order to determine how closely the vent monitoring system meets the requirements of monitoring the gas concentrations under the slab and in reducing the methane gas concentrations below the membrane to below 3.75% If these testing and reporting procedures are not followed, then a hazardous condition could result."

(88:24384 [Recommendation 7].)

The purpose of mitigation monitoring such as that imposed on Phase I methane mitigation systems is to "require careful implementation to assure compliance" with mitigation requirements. (Guidelines §15097(e).)

Finally, disclosure of testing and monitoring data is "reasonably feasible." (Guidelines §15151) because the City in fact required Phase I testing and monitoring data be collected and reported on annually. (60:16224; Exhibit 1, Appellants' Request for Judicial Notice [City Council approval of CLA Report which adopted Phase I methane mitigation system requiring "continuous methane sampling and data collection" and "annual testing" of the methane systems, and mitigation monitoring required]; s*ee also*, 132:37130 ["the [Phase I] methane concentration data is accessible over a secure internet connection by …[LADBS],

and the property owner's association"].) The City should not be unduly inconvenienced with the task of providing this information in the EIR because monitoring and annual reporting to the City is required for Phase I mitigation systems and should already be in the City's possession.

Given all the factors in this case, the City abused its discretion in certifying an EIR which fails to disclose actual data demonstrating the efficacy of the mitigation measures upon which the Phase II EIR relies for its finding of insignificant impact. In the case at bar, without this information, and without an explanation as to why it should not be disclosed, the public and decision makers were left in the dark about the inconclusive nature of the proposed Phase II methane mitigation. Failure to include this information was a failure to proceed in a manner required by law.

2. The EIR Failed to Provide an Adequate Response to Public Comments About Methane Mitigation Measures

Numerous comments were lodged requesting information on the efficacy of the Phase I mitigation measures to determine whether Phase II methane mitigation measures would actually reduce the Project's significant impact to a level of insignificance. The EIR did not adequately respond to these comments.

For example, the California Department of Toxic Substances Control (DTSC) specifically requested performance data on methane mitigation systems already installed and operational in the adjacent Phase I. (93:25913 [comment 12-5].) DTSC notes that "The EIR does not provide specific information on the methane controls actually installed in the [Phase I] Fountain Park Apartments. If monitoring has been installed it would be useful to provide data on the monitoring results." (93:25913.) The City's response fails to respond to DTSC's comment: it neither provides the requested information nor explains why the requested information should not be provided. In fact, the EIR ignores DTSC's comment

concerning the need for monitoring data for methane systems similarly proposed for Phase II. Instead, the EIR response merely states that individual building methane mitigation systems at Phase II will be tested after approval of the Project. (93:25914.) DTSC notes in a subsequent letter to the City in reply to the EIR's response:

> Response 12-5: The comment asked for specific information on the controls actually installed at the [Phase I] Fountain Park Apts. The response detailed in the Letter No. 12 *does not provide the information at all. [DTSC] considers the response inadequate.*...

(137:38551)(emphasis added.)

The EIR's response to DTSC is wholly inadequate and violates CEQA. (*Berkeley Keep Jets, supra*, 91 Cal.App.4th at 1367; 1370).

Similarly, Grassroots Coalition commented that in order to properly determine whether or not the Phase II mitigation would effectively reduce impacts of methane hazards to a level of insignificance, the EIR must provide information about whether Phase I mitigation measures are "functioning in a manner that protects the environment and the public." (95:26390 [comment 35-13].) In response, the Final EIR ignores the request for information about the efficacy of Phase I mitigation measures and states merely that the Phase II mitigation measures will be tested in the future. (95:26391 [response 3-13].) This response is non-responsive and renders the EIR fatally deficient.

The importance of responding to substantive comments made during the EIR process was succinctly articulated by the court in *Association of Irritated Residents*:

> An EIR is an educational tool not just for the decision maker, but for the public as well. It is a document of accountability, "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.' " It is for this reason that CEQA's investigatory and disclosure requirements must be carefully guarded. "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. [Citations.] The EIR process protects not only the environment but also informed self-government."

(*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392, citing *Laurel Heights Improvements Ass'n v. Regents of the University of California* (1988) 47 Cal. 3d 376, 392.) The EIR's failure to provide meaningful responses to public and agency comments concerning the feasibility and effectiveness of the methane mitigation measures violated CEQA.

D. The EIR's Conclusion that the Mitigation Measures Will Reduce the Project's Impacts to a Level of Insignificance is not Supported by Substantial Evidence

An agency's findings that a significant impact is reduced to less-than-significant through mitigation must be supported by substantial evidence. (Guidelines §15091, subd. (b).) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. (Pub. Res. Code § 21082.2 subd. (c).)

1. Critical Deep Vent Wells Required in Phase I, But Not Required in Phase II, Belies the EIR's Finding that Methane Mitigation Measures Will Reduce the Project's Significant Impacts

The record contains evidence that the sub-surface venting is the most important component of methane mitigation in high gas areas at Playa Vista. For

example, in a January 31, 2001 letter from ETI to LADBS, the City's expert explained the subsurface venting system, which primarily targets the 50-foot gravel aquifer underneath the Playa Vista site, provides a necessary level of protection, in addition to building systems. (Exhibit B) LADBS, agreeing with ETI, conditioned Phase I building on implementation of subsurface venting system in high gas areas. (Exhibit C; *see also* Exhibit D ["mitigation of the 50-foot gravel aquifer will require removal of any free gas from the aquifer. It is the presence of free gas that creates the most dangerous situation."]; Exhibit E [explaining why "it is absolutely essential to have a mitigation system for the 50-foot aquifer."]; Exhibit F.)

ETI stated, "in the interest of safety, *no variances* in these methane mitigation requirements should be allowed." (88:24383, para.5, emphasis added.) But, as the record indicates, variances are allowed in the mitigation requirements because the critical sub-surface venting ("deep vent wells") are not required in Phase II.[20] In order to sustain itself under the substantial evidence standard, the EIR must provide at least some evidence that the Project's impacts will be reduced to a level of insignificance despite the fact the critical deep vent wells are not required. The EIR fails to do so. Therefore, the City abused its discretion.

[20] The EIR does not readily disclose the fact the critical sub-surface venting is not required in Phase II. (68:18531.) The only information in the record disclosing the deep vent wells are not required in Phase II is found in footnote in the draft methane code which is mislabeled as "note 9" (see 68:18533, "note 6"), which allows more building vent risers in lieu of deep vent wells. The EIR misleads the public into believing the critical component of the methane mitigation system, the sub-surface venting, is required. The public and decision makers must engage in detective work to discover this is indeed not the case.

2. The Record Contains No Substantial Evidence that Methane Mitigation Measures are Feasible.

A lead agency may not rely on a mitigation measure of unknown efficacy to conclude significant impacts are mitigated to an insignificant level. (Kings County Farm Bureau v. Hanford (1990) 221 Cal.App.3d 692, 729-30.)

The EIR concludes the Project's significant impacts are reduced to a level of insignificance through implementation of appropriate mitigation measures. (25:6622.) The only evidence offered to support this conclusion is an ambiguous statement in the methane ordinance which states that "modern construction standards were successfully used as methane mitigation systems for many projects in Playa Vista." (92:25616.)

While the EIR states that "components of the methane mitigation systems… have been used at other sites throughout Southern California" (92:25688), no information is provided as to whether the "other sites throughout Southern California" are similar to Playa Vista in terms of the extraordinary volume and concentrations of methane gas or whether similar methane mitigation system components are functioning properly in Phase I, as required. Indeed, no monitoring or testing data from Phase I mitigation is provided.

Rather than point to evidence in the record supporting the EIR's conclusions that the methane mitigation measures are feasible and will reduce impacts, Playa argued at trial Petitioners failed to meet their "burden" to show the mitigation measures are ineffective. This argument is a red herring. A lead agency cannot "place the burden of producing relevant environmental data on the public rather than the agency," and cannot evade its CEQA duties "by excluding such information." (Barthelemy v. Chino Basin Mun. Water Dist. (1995) 38 Cal.App.4th 1609, 1618.)

A lead agency must instead consider, discuss, and fully analyze all potential environmental impacts of a project and mitigation measures which effectively reduce significant impacts to a level of insignificance. It cannot merely rely on its own bare conclusions or opinions. (CEQA Guidelines § 15126; see, e.g., *Goleta, supra*, 52 Cal.3d at 568.) Here, the City failed to comply with CEQA.

E. The Trial Court Erred In Finding that Baird v. County of Contra Costa Precludes Environmental Review of Methane Impacts.

The trial court improperly relied upon *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, for its finding that "it is likely no EIR was even necessary as to the methane issue." (15 JA 3616.) The trial court's finding is flat wrong and contrary to CEQA. (See Guidelines § 15126.2 [requiring an analysis of the effects a Project might cause on the Project's residents].)

The court erroneously concluded the Project would not alter the environment with regard to methane (15 JA 3614), lack of the project's physical alteration of the environment being the key factor in the *Baird* court's decision not to require an EIR. (*Baird, supra,* 32 Cal.App.4th at 1465.) In the present case, development over the methane seeps at Playa Vista may cause the gas to pool and concentrate under buildings resulting in an explosion risk, among other effects. (130:36704, 2d para.; *see also* 135:38156, Exhibit A, p. 1 [methane concentrations increase significantly when "capped by a building foundation"]; 62:16881 [diagram showing effect of building on soil gas migration and concentrations]; 94:26187 [Merschat comment 30-35, demonstrating explosive nature of methane].) The EIR acknowledges, as Playa itself cites (5 JA 1130), that "Development in such areas [with high methane concentrations] poses the potential to expose project occupants to elevated levels of methane. *This is considered to be a potentially significant impact*; . . . ." (25:6622, emphasis

added.) The EIR also acknowledges that proposed grading and construction activities "could pose a potential for soil gas build-up, resulting in a possible safety/risk of upset impact." (122:34263.)

Thus, the case at hand is very different from *Baird*, where the proposed project would not adversely impact or exacerbate existing environmental conditions.

Assuming, arguendo, that *Baird* is applicable, its holding is inconsistent with Guidelines §15126.2 and the principles of CEQA. (*See* Pub. Res. Code § 21001, subds. (b) and (d); *see also*, CEQA Guideline §15021 [discussing CEQA's goal of providing a "satisfying living environment for every Californian"]; and Governor's Office of Planning and Research, Memorandum Re: Addressing Naturally Occurring Asbestos in CEQA Documents, October 26, 2000, discussing CEQA analysis required of Project impacts to public health from existing, naturally occurring asbestos, found at: http://www.opr.ca.gov/clearinghouse/asbestos.html)

Courts are to uphold the Guidelines unless they are in conflict with CEQA or are "clearly unauthorized or erroneous." (*See Laurel Heights, supra*, 47 Cal.3d at 391, fn. 2.) Here, *Baird's* holding, as interpreted by the trial court, is contrary to CEQA's express purpose to protect the environment and, by extension, people existing in the environment. Section 15126.2 of the Guidelines, on the other hand, is in alignment with those principles.

VI. THE EIR FAILS TO ANALYZE THE PROJECT'S WASTEWATER IMPACTS

A. The EIR Fails to Identify a Per Se Significant Impact Required by the City's Threshold of Significance Guidelines

The City has adopted "thresholds of significance" for determining the significance of environmental effects from projects subject to its approval. (Guidelines § 15064.7, subd. (a).) A threshold of significance is "an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant." (Guidelines § 15064.7, subd. (a).) The City's Threshold Guidelines delineate how significance is determined with respect to wastewater impacts:

> A project would normally have a significant wastewater impact if: [T]he project's additional wastewater flows would substantially or incrementally exceed the future scheduled capacity of any one treatment plant by generating flows greater than those anticipated in the Wastewater Facilities Plan or General Plan and its elements.[21] (27:7037)

The EIR explains: "[d]uring peak months, the current available treatment capacity to serve the Proposed Project is projected to be exceeded by 20 [million gallons per day]." (27:7042.) The EIR thus determines that there are "potentially significant impacts" from the project's wastewater. With regard to cumulative impacts, the EIR concludes: "the additional wastewater flows from the Proposed Project, related projects, and other background growth during peak months would

[21] An agency's reliance on other planning documents for CEQA compliance is consistent with CEQA's policy not to require duplicate documentation of existing analyses, in certain circumstances. (Guidelines § 15130 subd.(d).)

incrementally exceed the future scheduled capacity of the [Hyperion Treatment Plant] by generating flows greater than those anticipated in the City's Wastewater Facilities Plan." (27:7048.) As to individual impacts from the project itself, the EIR states,

> [p]roposed [treatment capacity] expansion is projected by 2020 and the Proposed Project is expected to be built before 2020. This impact would be considered potentially significant because the [regional wastewater planning] process is still underway and a specific strategy for addressing future wastewater treatment needs has not yet been determined and the planned expansions have not occurred. (27:7041.)

The EIR's conclusion that the project's wastewater will exceed sewage treatment capacity mandates falls squarely within the plain language of the City's Threshold of Significance Guideline mandating a finding of significant environmental impact. Nonetheless, the EIR concludes that such impacts will be "avoided" through future compliance with the City's Sewer Allocation Ordinance (hereinafter "Sewer Ordinance.") (27:7048, 7041.) This conclusion is legally and factually unsupportable.

The EIR states, "adherence to the City's Sewer Allocation Ordinance would limit the amount of cumulative development that could proceed within the City of Los Angeles prior to such additional treatment capacity being secured." (27:7048.) Likewise, the EIR concludes that significant impacts "would be avoided by the existing City requirement that prior to issuance of building permits, adequate wastewater collection and treatment capacity must be demonstrated to be available to serve the Proposed Project, pursuant to the City's Sewer Allocation Ordinance." [22] (27:7041.)

[22] The City acknowledged at trial that occupancy permits are withheld, not building permits, as the EIR erroneously states. This is a significant fact for CEQA purposes, since occupancy permits are applied for after building. The City acknowledges

The EIR's conclusion that the Project's significant individual and cumulative impacts are avoided violates CEQA because, according to the plain language of the City's Threshold Guidelines, wastewater impacts are *per se* significant in this case. (*See Sierra Club v. State Board of Forestry, supra, 7* Cal.4th at 1233.) The Threshold Guidelines require the determination of significant impacts to be based on an analysis of the "scheduled" capacity of the treatment system. (27:7037.) Since "scheduled" treatment capacity will be exceeded, as the EIR itself recognized, the wastewater impacts are *per se* significant. (27:7048.)

The City essentially argues that no project will ever meet the significance threshold because the City will not allow sewer hook-up under the Sewer Allocation Ordinance unless and until there is treatment capacity. (27:7041.) The EIR's interpretation of the threshold is incorrect and undermines the very purpose of the threshold. If the City were allowed to proceed under CEQA in this manner, the threshold guidelines would become meaningless because no project would ever be considered to create a "significant wastewater impact" because every project requires a sewer permit and compliance with the Sewer Ordinance. This is nonsensical.[23] The threshold cannot mean by "future scheduled capacity" that so long as a project applicant abides by the Sewer Ordinance and waits until

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that build out will be allowed despite the EIR's internal inconsistencies regarding whether building permits or occupancy permits will be withheld until treatment capacity is available. (7 JA 1456; *see* 27:7041 and 7030 [describing the process of allowing building plan approval despite inadequate sewage treatment capacity].) For this reason alone, the EIR fails as an informational document.

[23]For example, the City could find that although a Project would destroy wetlands, potential significant impacts are avoided because the developer will not be able to destroy wetlands until it obtains a permit to do so. Such circular reasoning turns CEQA on its head and subverts the environmental review process required before project approval.

capacity is available, the threshold will never be reached. If that is what the threshold meant, it would explicitly say so. Rather, the threshold requires a determination of whether there is future scheduled capacity *at the time of preparing the EIR* and if the project's wastewater flows exceed that schedule, identify a *per se* significant impact and propose mitigation to reduce that impact. (Guidelines § 15064(1).) Because the EIR failed to comply with these requirements, it must be invalidated.

B. The EIR Fails to Analyze Project Impacts Arising from Required Wastewater Treatment Facility Expansion and Defers that Analysis Until After Project Approval.

The EIR reports that the City's wastewater treatment system, Hyperion, will have a capacity deficit of 20 million gallons per day ("mgd") by the year 2010, the date by which the Proposed Project is expected to begin operation. (27:7041.) The City expects to expand its treatment system, but not until 2020. (*Ibid*.) Thus, the proposed project will be built out 10 years before Hyperion is expanded.

The project cannot perform its objective of a residential and retail center without treatment expansion. The project will necessitate expansion, but the EIR does not disclose this fact, nor does it identify the environmental impacts resulting from such expansion. This violates CEQA. (See *San Joaquin Raptor, supra,* 27 Cal.App.4th at 732.)

When Surfrider Foundation pointed out the EIR's deficiency in this regard the EIR replied:

> Section IV.N(2) of the Draft EIR provides that the proposed project may have a significant impact on wastewater treatment facilities, however, under the City's Sewer Allocation Ordinance, the City will not issue a sewer connection permit unless the City

> determines that there is adequate capacity. (110: 30796 [comment and response 235-21].)

By relying solely on the future enforcement of the Sewer Ordinance to defer EIR analysis of treatment capacity expansion and the impacts arising therefrom, the EIR "evaded its duty to engage in comprehensive environmental review." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309, citation omitted.)

CEQA requires the EIR discuss potential environmental impacts resulting from the increased sewage treatment capacity required for this Project's operation. (*Santiago County, supra,* 118 Cal.App.3d at 830; *San Joaquin Raptor, supra,* 27 Cal.App.4th at 732.) In *San Joaquin Raptor,* the court found the EIR's failure to analyze a public sewer capacity expansion constituted a failure to proceed in a manner required by law: "Since the sewer expansion was treated as a separate project and was not considered as part of the development project, none of [the possible] environmental impacts was identified, much less considered, in connection with the impacts of the development project identified in the FEIR." (*San Joaquin Raptor, supra,* 27 Cal.App.4th at 732) Thus, the omission caused "some important ramifications of the proposed project remained hidden from view at the time the project was being discussed and approved." (*Id.* at 732, quoting *Santiago County, supra,* 118 Cal.App.3d at 829-830.)

Omission of relevant information regarding future wastewater facility expansion impacts to water quality, air quality and wildlife habitat, "…frustrates one of the core goals of CEQA." (*Id.,* citing *Santiago County, supra,* 118 Cal.App.3d at 830.) Similar to the EIR in *San Joaquin Raptor,* the EIR here documented the Project's need for additional sewage treatment capacity beyond that which would be available, but failed to identify or discuss, in even general

terms, the environmental impacts resulting from expanding sewage treatment capacity to meet the needs of the Project.

Santa Monica Baykeeper and Surfrider Foundation, two organizations with expertise on Santa Monica Bay's water quality issues (*see* 110:30775), requested "a thorough analysis of the impacts on nearshore marine life and human health from the increased discharge…caused by increasing sewage treatment capacity of the [Hyperion] plant." (110:30800.) They also pointed out the EIR's deficiency in failing to analyze "any other foreseeable impacts from increasing the capacity of the treatment facility…(e.g., increased air emissions, land use, etc.)." (*Id*.) Instead of providing a good-faith, reasoned response, the EIR merely refers back to the Sewer Ordinance to justify its dismissal of the comment. (110:30800.)

The EIR cannot defer environmental review of treatment capacity expansion until after project approval, as it attempts to do here. CEQA demands documentation of a Project's significant impacts prior to the certification of the EIR and project approval. (See *Natural Resources Defense Council, supra,* 103 Cal.App.4th at 284 ["If postapproval environmental review were allowed, EIR's would likely become nothing more than *post hoc* rationalizations to support the action already taken"].) The EIR must propose and describe mitigation measures that will minimize the significant environmental effects identified. (Pub. Res. Code § 21100, subd. (b)(3); Guidelines § 15126, subd. (e).) Waiting until building permits are issued to identify significant impacts and their mitigation is too late to satisfy CEQA's requirements. (*Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 199-200 ("*Stanislaus*").)

Appellants are not arguing that the EIR must identify the ultimate source of wastewater treatment for the Project. As stated by the court in *Stanislaus*: "We are not concluding respondent must first find a source of water for the 'project' before an EIR will be adequate. We are concluding that an EIR for this project

must address the impact of supplying water for the project. ... [T]he decision to approve the EIR of this project does require recognition that water must be supplied, that it will come from a specific source or one of several possible sources, *of what the impact will be if supplied from a particular source or possible sources and if that impact is adverse how it will be addressed*. ..." (*Stanislaus, supra*, 48 Cal.App.4th at 205-206**,** emphasis added).

1. The Trial Court Misapplied and Misinterpreted Wastewater Impact-Related CEQA Case Law

In finding that the City did not prejudicially abuse its discretion, the trial court primarily relies on cases which are distinguishable from the present case.

The trial court's heavy reliance on dicta in *Napa Citizens for Honest Gov't v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342 (hereinafter "*Napa*") is grievously misplaced. In *Napa*, the court set aside the EIR for failing to provide sufficient information about the project's potential impacts on the region's water supply and the project's needs for wastewater treatment. (*Id*. at 373-74.) In finding that the EIR was inadequate in failing to identify and analyze appropriate mitigation measures, the *Napa* court suggested, "[i]n theory, at least, the [EIR] also could state a mitigation measure that would *prevent development* if the identified sources fail to materialize." (*Id.* at 374, emphasis added.) The trial court in the present case seized upon this quote and stated, "[this is] exactly the mitigation measure which has been employed" here. (15 JA 3617.) The trial court is wrong. The EIR does not *prevent development* because the Sewer Ordinance provision is only applied *after development* and before occupancy permits are granted. (27:7030; 27:7041; 110:30796; 7 JA 1456, lines 7-10.) In addition, the Sewer Ordinance is not enforceable "mitigation." [24]

[24] The EIR does not identify the Sewer Allocation Ordinance as mitigation, nor does the EIR provide any wastewater impact mitigation measures because the EIR

The City and the trial court asserted that the Sewer Ordinance is mitigation for wastewater impacts because it avoids those impacts to the sewer treatment system by preventing sewer hook-up until treatment capacity is determined. (7 JA 1456; 15 JA 3617.) However, the sewer ordinance, by its own language, does not prevent hook-up. (6 JA 1263-1286.) Therefore, the EIR cannot rely upon the sewer ordinance as mitigation nor "to avoid" analysis of impacts. As such, the EIR should be invalidated. (Guidelines §15126.4 subd. (a)(1).)

Furthermore, *Napa* actually supports Appellants. In this case as in *Napa*, the provision for treatment of wastewater is "uncertain,"[25] a key factor for finding the EIR inadequate:

> Because of the uncertainty surrounding the anticipated sources for water and wastewater treatment, however, the FSEIR also cannot simply label the possibility that they will not materialize as "speculative," and decline to address it. The County should be informed if other sources exist, and be informed, in at least general terms, of the environmental consequences of tapping such resources. Without either such information or a guarantee that the resources now identified in the FSEIR will be available, the County simply cannot make a meaningful assessment of the potentially

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concludes significant impacts would be avoided, thereby precluding any need for mitigation measures. (See e.g., 27:7045 [stating no mitigation measures needed because impact would be avoided by reliance upon Sewer Allocation Ordinance]; 110:30796 [EIR's section on mitigation mentions nothing related to preventing development if wastewater treatment capacity is exceeded].) The City requires no condition of approval prohibiting the Proposed Project from sending its waste to Hyperion if capacity is exceeded. The EIR also provides no mitigation measure citing the Sewer Allocation Ordinance or any other prohibition on the Proposed Project from disposing its waste to the Hyperion Treatment System. Assuming, arguendo, the Sewer Allocation Ordinance is considered mitigation, it is inadequate mitigation under CEQA because it is not enforceable nor is it clearly defined in the EIR. (Guidelines §15126.4, subd.(a)(2).)

[25] The EIR documents this uncertainty: "The City of Los Angeles is currently evaluating various means and options for providing additional treatment capacity to meet future needs." (27:7048.) As stated in EIR, there is no current "plan" to use any plant for the expected overload. Instead, the EIR admits that the City is looking into different "options" for treating the excess sewage. (27:7048.)

> significant environmental impacts of the Project. (*See Sierra Club v. State Board of Forestry, supra*, 7 Cal.4th at 1237 [citations omitted].)

(*Napa, supra*, 91 Cal.App.4th at 373-74.) Contrary to the trial court's assertion, *Napa* requires that the EIR discuss environmental consequences of wastewater treatment options, including treatment plant expansion, something this EIR fails to do.

The trial court also misapplied another wastewater case, *Towards Responsibility in Planning v. City Council* (1988) 200 Cal.App.3d 671 ("*TRIP*") which is distinguishable from this case in significant ways. The court in *TRIP* held an EIR was not required to analyze the effects resulting from the construction of a sewage treatment facility, when (1) all indications suggested that the facility would *never be needed*, and (2) the facility- if it was constructed- would be subjected to its own environmental review. (*Napa, supra*, 91 Cal.App.4th at 373, interpreting *TRIP, supra*, 200 Cal.App.3d at 681, emphasis added.) Here, facility expansion will be needed to accommodate the Project; treatment capacity overload is documented in the EIR. (27:7041.)

In addition, the court stated, "[t]he EIR addressed the environmental concerns posed by the expansion of the [treatment capacity] and provided information to the extent it was available at the time." (*TRIP*, *supra*, 200 Cal.App.3d at 681.) Here, the EIR altogether ignored the environmental concerns posed by the expansion. Furthermore, unlike *TRIP*, the EIR does not prohibit development if treatment plant capacity is unavailable. (See *id.* at 680 ["City [of San Jose] ordinances prohibit any development approvals in excess of [treatment plant] capacity…].) Here, the EIR allows development approval and *full project build-out* before ensuring treatment capacity. (27:7030; 110:30796; 7 JA 1456, lines 7-10.) Therefore, the City's EIR must be set aside.

C. The EIR is Inadequate Because it Fails to Document the Project's Wastewater Impacts on Santa Monica Bay

An EIR must identify and disclose significant individual and cumulative impacts to air and water. (Pub. Res. Code § 21001, subd. (b); Guidelines § 15126.2.) A "cumulative impact" is one "which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts." (Guidelines § 15130 subd. (a)(1).) Such impacts can result from "individually minor, but collectively significant projects taking place over a period of time." (Guidelines § 15355 (a).) CEQA recognizes that part of its "vital information function is performed by a cumulative impact analysis." (*Bakersfield Citizens*, *supra*, 124 Cal.App.4th at 1214.)

The EIR discusses existing water quality impairments in the Santa Monica Bay and states that wastewater treatment plant discharge is one of several pollutant sources, "[a]ll of which contribute to pollutant loading in the Bay." (24:6273-74) Water quality impacts from the sewage treatment plant discharge are exacerbated by the need to create additional sewage treatment capacity to accommodate the Project's direct and cumulative demand documented in the EIR. (89:24517).

The EIR focuses solely on the question of the Project's discharge to the treatment *system* itself, but fails to discuss the end effect on the Santa Monica Bay. (27:7039-7048.)

Santa Monica Baykeeper and Surfrider Foundation commented on the manner in which Hyperion discharge contributes to Santa Monica Bay's pollution loading:

> For example, currently the majority of the effluent that is discharged to the ocean is conveyed through the '5-mile' discharge conduit. However, when there are extreme loads and the '5-mile' pipe is under-capacity, overflow is discharged through the nearshore conduit. It is reasonable to foresee that any additional load,

> especially after increasing the treatment capacity, will require discharging effluent through the nearshore conduit more often than in the absence of this project. Furthermore, increased sewage treatment will inevitably lead to more consistent discharge volume through the '5-mile' conduit – as well as increased energy consumption, air pollutant emissions, land use, etc. (110:30799-800, comment 235-236)

Instead of responding to these concerns, the EIR exempts itself from this environmental review by impermissibly disconnecting the project from the treatment expansion. (110:30800; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713.)

1. The City's Ratio Theory Has Been Struck Down

At trial, the City defended the EIR's failure to discuss wastewater impacts to Santa Monica Bay by arguing the Project's contribution to sewage treatment capacity at Hyperion was "miniscule" and thus not cumulatively significant. (7 JA 1456.) This ratio-theory is not allowed. (*Communities for Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 118-119; *Los Angeles Unified School District v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1027; *Kings County, supra,* 221 Cal.App.3d 692.) In *Kings County*, the court rejected an identical argument. (221 Cal.App.3d 692 at 718.) In that case, the EIR concluded "the project's contributions to ozone levels in the area would be immeasurable and, therefore, insignificant because the plant would emit relatively minor amounts of precursors compared to the total volume of precursors emitted in Kings County." (*Id*. at 718.) The court found that this reasoning violated CEQA because the "relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be

considered significant in light of the serious nature of the ozone problems in this air basin." (*Id*.)

Similarly, the Bay's water quality problems are especially serious. The City lacks treatment capacity and the system overflow affects discharges into the Santa Monica Bay. (110:30799-800.) Given that Santa Monica Bay is an "impaired water body,"[26] "any additional pollutant load, – no matter how small, must be considered significant and the effects thereby addressed." (*Kings County, supra*, 221 Cal.App.3d at 720.)

Thus the public and decision makers were denied the opportunity to weigh the benefits of approving the project against the environmental costs of the project because the entire scope of environmental costs were not analyzed in the EIR. Therefore, the EIR should be invalidated.

D. The EIR failed to Adequately Analyze the "No Project" Alternative

Surfrider Foundation commented the EIR's "No Project Alternative" discussion was inadequate because it failed to document and analyze the environmental benefits of using all or some of the property as a treatment wetland in order to assist the City in meeting the goals of the City's Integrated Resources Plan ("IRP")[27], and requested that the EIR remedy this deficiency. (110:30797-

[26] Under Section 303 (d) of the Federal Clean Water Act, the State of California identifies Santa Monica Bay as a water-quality limited or "impaired" waterbody, not in compliance with applicable water quality standards despite the implementation of technology-based effluent limits. (24: 6265.)

[27] (See 117:32797.) The IRP is a framework for integrating plans to collectively address polluted urban runoff, sewage treatment capacity, and fresh water supplies. (See:http//online2.cdm.com/cityofla/IRP.) Implementation of the IRP may include the creation of "constructed wetlands" to divert polluted runoff and store the water for future beneficial uses. (See: "summary of the Steering Group Process and their Recommendations for Integrated Resources Planning Policy Development," p.17). The Board recognized the value of this integrated approach and, in response to requests from the City, granted an extension for the compliance deadlines for several water quality regulations, including the Santa Monica Bay Dry and Wet Weather Bacteria Total

98; see also 129:36435, 36467-68, 36493 [transcript of comments raising issue of treatment wetland options].) The City responded to this comment as follows:

> The request for the City to consider condemnation of the Proposed Project for the purpose of creating a 111-acre wetland in order to treat surface runoff is noted and will be included in the Final EIR for review and consideration of decision-makers. Such a scenario does not represent a feasible alternative and would not meet the basic objectives of the Proposed Project….(110:30798.)

1. The EIR's Response Is Non-Responsive Because Surfrider Did Not Ask For a "Feasible Alternatives" Analysis, But Rather a "No Project Alternative" Analysis

The EIR's response misrepresented the comment by suggesting that a "created wetland" is not a "feasible alternative," as opposed to an environmental benefit of the "No Project" alternative – as suggested in the comment. For this reason alone, the EIR's response was non-responsive. Had the comment requested the EIR consider the "treatment wetland" in its feasible alternatives analysis, the response was inadequate. An EIR must explain *why* a suggested alternative is rejected as infeasible. (*Laurel Heights I, supra*, 47 Cal.3d 376 at 405; see also, *San Joaquin Raptor, supra*, 27 Cal.App.4th at 735-739.) The EIR did not explain why the treatment wetland alternative was rejected as infeasible. Most importantly, the EIR failed to respond to the comment altogether because it mischaracterized Surfrider's comment and instead responded to a "straw man."

Maximum Daily Loads (TMDLs). Importantly, the determination of the amount of additional sewage treatment capacity needed is a function of the amount of stormwater that will potentially be diverted to the sewage treatment system. By definition, these two goals are "integrated" into one plan.

2. The EIR ignored the "No Project" Alternative's Environmental Benefits of Using the Land to Comply With the City's Clean Water Act obligations, as Suggested by Environmental Groups.

Guidelines § 15126.6, subd. (e) provides the following direction with respect to the formulation of the "No Project" alternative required in an EIR:

> (3) A discussion of the "no project" alternative will usually proceed along one of two lines:
>
> (B) If the project is other than a land use or regulatory plan, for example a development project on identifiable property, the "no project" alternative is the circumstance under which the project does not proceed. Here the discussion would compare the environmental effects of the property remaining in its existing state against environmental effects which would occur if the project is approved. *If disapproval of the project under consideration would result in predictable actions by others, such as the proposal of some other project, this "no project" consequence should be discussed…"*

(emphasis added).

Here, the record supports the conclusion that "disapproval of the project under consideration would result in predictable actions by others, such as the proposal of some other project" (Guidelines § 15126.6, subd. (e)(3)(b)). First, the Los Angeles Regional Water Quality Control Board (the "Board") is under a federal consent decree to promulgate TMDLs which will create severe burdens on the City of Los Angeles to implement stormwater pollution clean-up. (117:32795.) In response to the Board's demands, the City has proposed an Integrated Resources Plan ("IRP"). (110:30797 [comment 235-23]; 125:35201). Second, the City endorses, and the Board concurs, that implementing "natural treatment" methods to reduce stormwater pollution into waters of the U.S., is

superior to traditional mechanical treatment methods, due to the potential for significant cost-savings and increased environmental benefits. (See e.g., 117:32797 [Board resolution]; 132:37098 [environmental organization summary cost-comparison].) Third, the Phase II land is the only significant undeveloped parcel in the lower Ballona Watershed adjacent to Ballona and Centinela Creeks that could fulfill the dual goals of the IRP. (120:33760-63 [Surfrider Foundation's Joe Geever explaining why this land is uniquely situated to meet the IRP's dual goals of treating stormwater pollution and storing fresh water]; Exhibit 2, Appellants' Request for Judicial Notice, "Initial Findings for Santa Monica Bay Beaches" dated February 26, 2004, excerpt from document.)

Given the evidence in the record, the EIR violated CEQA when it failed discuss treatment wetlands as a possible "no project" consequence. (Guidelines § 15126.6, subd. (e)(3)(b).) Without this information, decision-makers were denied the opportunity to fully weigh the economic and environmental benefits of IRP compliance against the economic and environmental benefits of development. Indeed, after agreeing to the legitimacy of Surfrider's comment by noting it "for review and consideration of decision-makers" (110:30798), the EIR failed to provide the requested analysis.

VII. THE CITY FAILED TO PROCEED IN A MANNER REQUIRED BY LAW IN ANALYZING THE PROJECT'S TRAFFIC IMPACTS

A. Introduction

"Traffic is a mess in Los Angeles". (129:36443; see also 23:5948 ["freeway system is highly congested."].) And that observation comes from the "proud president of Playa Vista" (129:36441) and well before the thousands of car trips generated by the Project even materialize. The sentiment is echoed by the

hundreds of people who signed petitions opposing the Project because it would cause "tens of thousands of additional vehicles [to] pass [] through our community." (133:37217 *et seq.*)

In many ways when it comes to the study of traffic the EIR is a model of misdirection and the imposition of zero sum accounting. The EIR sends traffic flows to areas east and south of Project, where there is some current and projected street capacity or at least no Project protest, but not in appropriate volumes or on appropriate roads to areas north, where the opposite is true. This occurs even though the Project's developers recognize that the Project will create housing for those working on the "Westside", that is areas to the north of the Project (129: 36439-36440), where they acknowledge there already exists a "job housing imbalance" of some "3 jobs for every place to live". (129:36446.) The result is an EIR that did not provide an adequate assessment of the traffic impacts of the Project. It was not a good faith effort at full disclosure. (*Berkeley Keep Jets, supra*, 9 Cal.App.4th at 1367.)

The fallout from this inadequacy is predictable. For every car claimed to travel east and south, one or more fewer cars need to be accounted or analyzed for northbound travel, making it appear that the Project's impacts are less. Moreover, in doing so the EIR claims that its approach is reasonable because, in essence, east and south are where jobs may be in future years. Trouble is this is not where the jobs are now and scant if any evidence exists that establishes that significant numbers of the Project's residents commute east or south now or will in the future. And in any event when it comes to this particular project, not all jobs are equal, or more precisely, no evidence exists that all jobs can support a home within the Project, which consists dominantly of "moderate and luxury" housing. (129:36448.)

What is known is that jobs "on the Westside", that is largely to the north, both currently exist and proliferate that the Project is marketing itself to those workers. Thus the EIR fails to properly account for what the Project actually is and how it residents will likely and reasonably interact with their surrounding environment. *Laurel Heights I, supra*, 47 Cal.3d at 390-391.

One of the primary purposes for public review and comment of an EIR is to "'demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.'" (*Schoen v. Dept. of Forestry & Fire Protection* (1997) 58 Cal.App.4th 556, 573-574; see also *No Oil Inc. v. City of Los Angeles, supra*, 13 Cal.3d at 86.) Here the public was not merely justifiably apprehensive but properly dumbfounded and incredulous that a project of this scale would be claimed to have the minimal effects attributed to it. (*Berkeley Keep Jets, supra*, 91 Cal.App.4th at 1374-1375.)

B. The EIR's Trip Distribution Was Misleading and Understated Project Impacts.

1. EIR Failed to Disclose Methodology and/or Mischaracterized Data

The traffic analysis in the EIR was based on faulty assumptions and conclusions: that only 24% of the external trips from the Project would be northbound and that only 9% of those trips would use the Lincoln Boulevard corridor. (26:6761.) These conclusions were based on a so-called "gravity model" of traffic modeling which automatically distributed trips "in proportion to the size of the attracting zones and inversely proportional to the distance or travel time between the zones." (70:19098.) As explained in the EIR "[f]or example, if the project produced 100 trips destined for a regional shopping center, the gravity model would assign many more trips to the Fox Hills Mall than to Santa Monica

Place, because, although they are approximately the same size, the Fox Hills Mall is much closer." (70:19098.)

This example is itself telling and speaks much to overall traffic misjudgments and over simplifications without verification from actual local data. The model may make life easier for traffic analysis, and here allow for traffic volume to appear less intense to the north and into the City of Santa Monica, but as any shopper knows, same size or not, and even adjusting for distance, not all malls generate the same consumer interest and therefore traffic. Without more there is no reason to actually believe that many more consumers really consider Fox Hills Mall and Santa Monica Place to be comparable shopping destinations. There is nothing to suggest that the residents sought by the Project would follow the model's suggested path of travel. As noted above, "clearly inadequate or unsupported study is entitled to no judicial deference." (*Laurel Heights I*, *supra*, 47 Cal.3d at 409, n.12.)

The City of Los Angeles claimed that it verified the model by using employment growth statistics projected by the Southern California Association of Governments ("SCAG")(92:25658); however, the City misapplied these projections and their significance to this Project. For instance, the traffic study admitted that the majority of the external morning and evening peak hour trips assigned to the surrounding roadway network are home-to-work trips originating because of the residential uses within the Project. (92:25658.) According to the analysis, the area north of the Project (City of Santa Monica, Marina del Rey, Westwood and Century City), i.e. "the Westside", projected a growth of approximately 14,000 employees through the year 2010, while the area south of the Project (LAX, Century Boulevard office corridor, El Segundo and other South Bay Cities) showed an increase of approximately 30,500. (92:25658.) The areas east of the Project (along the Slauson Avenue to Manchester Boulevard corridor,

all the way to approximately a mile east of the I-110 freeway) showed a much more modest growth of 6,000 employees. (92:25658.)

Driven by these projections, the EIR veered from common sense. The EIR concluded that the bulk of the traffic would travel south (36%), not to the north "Westside" with its already 3-1 housing imbalance. Despite there being the lowest job growth in the east and there being almost two and one-half times greater job growth projection in the already job heavy north, the model nevertheless assigned 35% of the external trips to the east and only 24% trips to the north, nearly a 50% difference. Of the 24% northbound trips the model assigned only 9% of trips to travel on Lincoln Boulevard, the largest and closest surface street corridor to the project; 9% on Centinela Avenue and merely 6% on the I-405 Freeway, by far the dominant road in the area and one of the most heavily used highways in the region, if not the state and country. (70:19099.)

The EIR's assignment of only 24% of the Phase II traffic northbound and 36% of the trips eastbound was inconsistent with SCAG's modest projection of job growth to the east. (92:25658.) Since home to work trips and the reverse are the dominant peak forms of travel (92.25658), it simply is fanciful at best and a misuse of data and not a good faith effort at full disclosure at worst to assert that this data substantiated that more travel will occur to the east, where there are fewer jobs than to the north, where there are now more jobs and where there will be even more jobs in the future. (*Berkeley Keep Jets, supra*, 91 Cal.App.4th at 1367.)

Equally important, with respect to this particular Project, some realistic analysis should have been made of where its residents currently work and where they were likely to work. Since a good deal of the Project consists of high priced "luxury" residential development, a major factor in assessing home to work travel distribution logically would be the location of job centers capable of providing incomes for such housing. Here it would not have been difficult to determine

where Phase 1 residents were working and use that data to project where Phase 2 residents would likely work. This wasn't done even though CEQA requires the use of actual hard date where available. (Guidelines § 15144; see also *Berkeley Keep Jets, supra*, 91 Cal.App. 4th at 1381-1383; *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 93; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692.)

"The firsthand observations of individual commentators should not casually be dismissed as immaterial because 'relevant personal observations are evidence.'" (*Bakersfield Citizens, supra*, 124 Cal. App. 4th at 1211.) Playa Vista Phase 1 was already approved and the residential portion largely built out when the EIR was distributed. Thus, as many residents suggested (e.g. 120:33805; 119:33654; 92:25789), the City of Los Angeles could and should have studied the actual trips made by current Playa Vista residents to validate the model's assumptions.[28] As one commentator aptly stated even while noting that Phase 1 is not totally complete: "Speaking as a mathematician, layering assumptions upon assumptions, it is unlikely to produce accurate results about the traffic that will ultimately result." (112:31483.) CEQA frowns on speculation when alternatives grounded in reality exist. Guidelines §15144; *Berkeley Keep Jets, supra*, 91 Cal.App.4th at 1381-1383.

Further, the SCAG job data heavily relied upon in the EIR was adopted in June 1994, with the current version adopted in 2004 (25:6639), and the 1994 data failed to take into account the major socio-economic shift in employment on the Westside in the past ten years. Indeed, this trend was noted by Los Angeles itself

[28] This omission is especially egregious in light of earlier assurances that Playa Vista II would not be approved until the actual built-out impacts of Phase I could be analyzed. (*See* 135:38020; 135:38036; 118:33092-94.) *See also* Comment 7-25 referring to Condition 116 of Vesting Tentative Tract Map. (93:25854.)

during the hearing process: 26 of the 96 related projects for the EIR were located in Santa Monica and an additional 2 ½ million square feet of commercial space was in the development pipeline in Santa Monica. (120:33661.)

Thus the EIR's conclusion that its distribution was based on SCAG's future growth statistics was demonstrably misleading, was not a good faith effort at full disclosure and is not entitled to any deference. (*Berkeley Keep Jets, supra*, 91 Cal.App.4th at 1367.) The EIR clearly struggled to make sure that traffic would not seem to travel north even though the data would suggest otherwise. The data was no longer reliable and the City of Los Angeles knew it. (*Berkeley Keep Jets, supra*, 91 Cal.App.4th at 1368.)

Ultimately the EIR underestimated and did not account for the prevalence of jobs on the Westside and the existing commuting patterns. (*See e.g.* 95:26238 ["significantly more than ¼ of the traffic leaving the Venice/Marina area in the morning heads in a northerly direction".]) These deficiencies not only impacted the Phase II traffic assignment, but also served to underestimate the cumulative traffic impacts, as the same methodology was applied to all 96 related projects, as well. (70:19039.) Assessment of a project's cumulative impact on the environment is a critical aspect of the EIR. "A cumulative impact analysis which understates information concerning impacts impedes meaningful public discussion and sews the decision-maker's perspective concerning the environmental consequences of the project, the necessity for mitigation measures, and the appropriateness of project approval." (*Citizens to Preserve the Ojai v. Ventura County* (1985) 176 Cal.App.3d 421, 431, citations omitted.) Thus the EIR fails as an "environmental full disclosure" document. (*Rural Landowners Assn. v. City Council* (1983) 143 Cal.App.3d 1013, 1020.)

C. The EIR Did Not Use Current Caltrans Data

A project's impacts are measured from a designated baseline, which generally corresponds to the date of the Notice of Preparation. (Guidelines §§15125(a); 15126.2(a).) However, "[i]n some cases, conditions closer to the date the project is approved are more relevant to a determination whether the project's impacts will be significant." (*Berkeley Keep Jets, supra*, 91 Cal.App.4th at 1383; *Save Our Peninsula Comm. v. Monterey County Bd. of Sups*., 87 Cal.App.4th at 125.) This is especially the case where, as here, the EIR process is protracted and the baseline data runs the risk of becoming stale.[29] Further, when analyzing cumulative impacts a future baseline is traditionally used to capture projects expected to go online at the time of projected project buildout. Here, the EIR selected a 2010 future baseline. (26:6740.)

Caltrans commented that the freeway traffic volumes used in the Playa Vista model to project the 2010 baseline conditions were outdated and that Los Angeles should re-run its model using current data. Further, Caltrans commented that the 2003 projections which, in turn, served as the basis for the 2010 baseline condition were lower by approximately 2,000 cars than even the existing 2002 conditions collected by Caltrans in at least two segments. (93:25946.) Despite CEQA's requirement that lead agencies consult with affected agencies, Los Angeles instead chose to essentially ignore Caltrans' requests to update the model and reconcile the reported discrepancies. (93:25946.) As one member of the public stated, the I-405 "is a metaphor in today's Southern California for gridlock"

[29] CEQA requires an EIR be completed within one year (Guidelines § 15108) of deeming a project application complete, although Los Angeles took considerably longer than permitted by law, thus casting doubt on the reliability of the data collected in 2003.

(6:1334) and it is simply not credible that under accounting for 2,000 daily cars would not make a difference.[30]

Further, even the EIR recognized the common sense notion that the addition of merely a few Project trips to a gridlocked system could result in the re-routing of freeway traffic to either Lincoln or Centinela, which is why "a very limited number of project trips" were assigned to the I-405. (92:25798.) Thus, the EIR's failure to adequately address Caltrans' conflicting data with its impact on traffic patterns and utilize updated data renders the EIR inadequate. "[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response." (*Cleary v. County of Stanislaus supra,* 118 Cal.App.3d at 357.) Using outdated information "is not a reasoned and good faith effort to inform decision makers and the public." (*Berkeley Keep Jets, supra*, 91 Cal.App.4th at 1368.)

D. The EIR Did Not Analyze Impacts on Individual Bus Lines Servicing Project.

For projects of regional significance, such as this one, CEQA specifically requires the lead agency to consult with transportation planning agencies and agencies that have transportation facilities that could be affected by the project (Pub. Res. Code §21092.4), but the City of Los Angles fell short of its obligations.

The City of Santa Monica operates three bus lines which service Phase II: Line 3, 8 and Line 14. (26:6723.) As for Line 3 (Lincoln Blvd.), which is most directly impacted by Phase II, the EIR admitted that several segments along this

[30] Nor is it credible to conclude that adding more cars to an already failed system makes no difference. Yet this is what was concluded. (23:5926-5927; see also 26:6770.)

route are currently experiencing overcrowding. (26:6724.) While the EIR indicated that the Playa Vista Phase I will add four additional buses (plus one spare bus) to improve bus frequencies along this corridor, the EIR failed to analyze whether the additional buses will alleviate any impacts caused by Phase II Project trips or whether there will continue to be overcrowding. "A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding whether to approve a proposed project, not inform them of the environmental effects of projects that they already approved." (*Natural Resources Defense Council, supra,* 103 Cal.App.4th at 284-285.)

As for Line 8 (Broadway and 4th to UCLA), while the EIR listed Line 8 as one of the transit lines serving the area surrounding Phase II (26:6723), it failed to address current ridership (26:6724) and further failed to analyze Phase II impacts on this route. Finally, as for Line 14 (Sunset and Barrington to Culver and Washington), the EIR showed that 59.5% of the patrons riding Line 14 board in the vicinity of Phase II (26:6724), yet the EIR does not analyze whether Phase II would have an impact on this line.

These omissions are especially significant in light of the EIR's strong reliance on public transit as a mitigation measure and its assumption that such improvements will encourage use of such transit. (26:6785 *et seq*.) Impacts to sister agencies' cannot be brushed aside because they are inconvenient. (*Cleary*, *supra*, 118 Cal.App.3d at 357.)

Finally, the EIR appears to have intentionally and improperly dismissed the project's impact on mass transit. This is not a good faith effort at full disclosure. (*Berkeley Keep Jets*, 91 Cal.App.4th at 137.) For instance the analysis claims that "although impacts on these individual bus lines may be considered potentially significant, the bus transit system within the study area as a whole will continue to have excess capacity and operate satisfactorily." (26:6778.) This conclusion is

diversionary at best. It matters little "as a whole" if a bus system has open southbound seats if a passenger's destination is northbound.

E. EIR's Analysis of Neighborhood "Cut-Through" Traffic Did Not Comply with the City's Own Guidelines.

Santa Monica repeatedly commented on the inadequacy of the EIR's analysis of neighborhood street impacts on it, yet the EIR not only ignored Santa Monica's comments while stating the contrary, but employed an analysis which was illogical. An EIR cannot ignore a sister city and then mischaracterize what it has done. (*Berkeley Keep Jets, supra,* 91 Cal.App.4th at 1366; *see also Cleary v. County of Stanislaus, supra,* 118 Cal.App.3d at 357.)

Santa Monica employs a different methodology than Los Angeles in analyzing both arterial intersection capacity and neighborhood street intrusion. While the EIR used Santa Monica's methodology in analyzing the capacity of arterial intersections located in Santa Monica (26:6739 fn. 367), it did not use Santa Monica's methodology, as requested by Santa Monica, to analyze impacts to neighborhood streets located in Santa Monica. Had the EIR done so, it may likely have found impacts. But that it did not do so is hardly evidence that no impacts will occur. This error was especially egregious given the overwhelming public concern about cut-through traffic in neighborhood streets, the significant impact such cut-through traffic would have, the stricter standard employed by Santa Monica and the EIR's questionable trip distribution on surface streets which resulted in a significant undercounting (*See* e.g. 133:37217 et seq. ["the traffic created by tens of thousands of additional vehicles passing through our community, jamming the 405 Freeway, Lincoln Blvd., and Centinela Ave. shall cause a significant increase in new traffic cutting through our neighborhoods on smaller streets."].)

In addition to failing to disclose that Santa Monica's neighborhood street methodology had not been followed, the analysis of neighborhood street impacts within the City of Los Angeles was also misleading and deficient. The DEIR stated that the Project's traffic, as analyzed using the City of Los Angeles' Draft CEQA Thresholds Guide (1998) "Guide", would trigger an impact if project traffic increased the average daily traffic (ADT) on a local residential street by 20 trips on a low volume street. (26:6731.) Later the DEIR contradicted itself and stated that the number of trips needed to trigger an impact was 120. (26:6732.) Later still the EIR proclaimed that required neighborhood street impacts should be determined on a "case-by-case" basis, but that the published "trigger" of 120 trips was a "recommended" threshold in the Guide. (26:6770.) Later yet, the DEIR contorted itself again and stated its "analysis ha[d] used the most conservative level of 120 daily Project trips as the screening criteria for identifying neighborhoods with potentially serious impacts." (*Id*.)

At best this analysis was internally inconsistent and confusing. Were 20 or 120 trips used as a "trigger" to begin an impact analysis or was each street analyzed on a "case by case" basis regardless of this floor and trigger? But at worst the EIR was misleading and wrong. The EIR appears to have applied a threshold of 120 trips. This was not the "most conservative" threshold and is 6 times greater than 20 trips. Most likely actual conditions, as revealed "on a case by case" basis, may generate "the most conservative trigger." For instance, is it reasonable to conclude that there would be no traffic impact if residential side streets experienced 19 but not 20 additional trips or 119 but not 120 additional trips? Compare *Berkeley Keep Jets* (using decibel threshold of 65 not logical when lower levels can also be significant).

As with other traffic issues, the more traffic volume that was wrongly assigned to or presumed as absorbed by residential streets, the less significant the

Project's likely traffic impacts appear in other potentially impacted areas. Commentators noted that this approach essentially renounced the City of Los Angeles' General Plan traffic framework, which does not support the re-assignment of traffic from major thoroughfares, such as Lincoln Boulevard, to local residential collector streets. Collector streets are for local residential traffic to flow to major roadways. (113:31790-92; 120:33767.)[31] Collector streets do not exist for major developments to offload their traffic impacts onto them.

But this approach has other flaws as well. The EIR did not take into account the existing gridlock on the I-405 freeway and the tendency of drivers to avoid that freeway and to already seek alternate routes on these very same side streets. (92:25796.) Almost whimsically the EIR concluded that since existing freeway segments already are operating at LOS E or F (poor or failure) adding yet more traffic creates no additional problems. (23:5926.) But it does. Going from bad to worse or from worse to despair still matters. (*Berkeley Keep Jets, supra,* 91 Cal.App.4th at 1372-1383.) However viewed, the EIR's discussion on one of the EIR's most significant and more controversial impacts fails to satisfy the most fundamental disclosure requirements of CEQA and thus renders the EIR invalid.[32] *Berkely Keep Jets*, *supra*, 91 Cal.App.4th at 1371.

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[31] This assignment on to residual streets is in direct conflict with the City's General Plan policy. (13:31791; 93:25839.)

[32] To compound the misleading analysis, when numerous public members raised the issue of neighborhood cut-through traffic, Playa Vista's attorney represented to the Los Angeles City Council: "The traffic study [in the FEIR] also looked at the issue of neighborhood traffic impact, neighborhood traffic intrusions and has provided a program to identify possible future impacts to neighborhoods which might be impacted." (129:36450; see also 120:33844 ["[T]here was a lot of work done to assess potential cut-through traffic to residential areas"].) In fact, as to Santa Monica, the EIR failed to analyze a single neighborhood street located in Santa Monica.

Finally, the EIR also failed to analyze the significance of neighborhood intrusion impacts relating to vehicle delay (as opposed to volume). The Guide requires that these delays be determined on a "case-by-case" basis (26:6732) and, despite the vociferous concerns raised by the public (s*ee e.g.* 92:25847-25877; 135:38021; 112:31384-85; 112:31397; 6:1410; 6:1411; 112:31379-80; 112:31485; 120:33659; 120:33835; 120:33843-44), the EIR altogether failed to address this crucial issue.

VIII. REQUESTED RELIEF

A. This Court Should Reverse the Trial Court's Decision and Direct a Writ of Mandate Issue Vacating All Approvals of the Project

For the reasons stated above, Appellants are entitled to a writ of mandate vacating all approvals of the Project including:

1. Certification of the Phase II EIR;
2. Adoption of Findings and a Statement of Overriding Considerations;
3. Adoption of a resolution to amend the Westchester-Playa del Rey Community Plan;
4. Approval of an ordinance adopting zone changes;
5. Approval of an ordinance adopting Playa Vista Area D Specific Plan amendments;
6. Approval of and adoption of a Development Agreement between the City of Los Angeles and Playa Capital Company;
7. Approval of an ordinance authorizing the Mayor to execute the Development Agreement; and
8. Approval of Vesting Tentative Tract Map No. 60110.

This Court Should Stay the Project Until the City Prepares, Circulates and Certifies a Valid EIR in Accordance With CEQA.

CEQA authorizes courts to fashion injunctive relief preventing project activities that "will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project," if those activities "could result in an adverse change or alteration to the physical environment," before the lead agency brings itself into compliance with CEQA. (Cal. Pub. Res. Code, §21168.9(a)(2).) In addition, so long as court orders are not in conflict with CEQA's statutory commands, courts are endowed with the equitable power to shape relief in ways that enforce CEQA's strong public policy requiring environmental review before project approval. (Pub. Res. Code § 21168.9(c); *see Laurel Heights Improvement Ass'n v. Regents of University of California*, (1988) 47 Cal. 3d 376, 422-23 ("*Laurel Heights I*") [Supreme Court enjoined some project activities in order to maintain the integrity of the environmental review and decision making processes, as well as to protect the environment, allowing some present activities to continue, such as medical research that could "save lives" while an adequate EIR was being prepared]; *Ultramar, Inc. v. South Coast Air Quality Management District* (2nd Dist.1993) 17 Cal.App.4th 698, 705 ("*Ultramar*") [court upheld trial court's decision to stop implementation of a new air quality rule pending a new 30-day comment period, because of the importance of the public review process]; *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (2d Dist.1991) 233 Cal.App.3d 577, 595-96 [Court of Appeal held that lower court had not abused its discretion by dismissing an eminent domain action rather than letting it proceed while the respondent agency attempted to comply with CEQA].)

Moreover, courts may enjoin activities in order to prevent "irreversible momentum" behind a project that would jeopardize the integrity of the CEQA

review process. (*San Joaquin* Raptor, 27 Cal. App.4th at 741-742; see also *Laurel Heights I, supra*, 47 Cal.3d at 423; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306-08 [denouncing deferral of environmental assessment until after project approval because it violated CEQA's policy that impacts must be identified before project momentum reduces or eliminates the agency's flexibility to subsequently change its course of action]; *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1333 [unless cumulative impacts are analyzed, agencies tend to commit resources to a course of action before understanding its long-term impacts; thus, a proper cumulative impacts analysis must be prepared "before a project gains irreversible momentum"].)

Appellants seek injunctive relief to prevent irreversible adverse alteration of the environment prior to full and accurate environmental review. In *San Joaquin Raptor*, the Court of Appeals, after finding that the EIR violated CEQA, interpreted Public Resources Code § 21168.9(a)(2) to authorize an order enjoining the county from approving the project and staying "all activity which could result in any change or alteration of the physical environment" at the project site while the lead agency fully complied with CEQA. (*San Joaquin Raptor, supra,* 27 Cal. App.4th at 741-743.) The court determined that injunctive relief was necessary "to protect the site from adverse and possibly irreparable alteration prior to full and accurate assessment and disclosure of the scope and environmental impacts of the development project and to ensure adequate considerations of alternative sites and additional mitigation measures which may be identified in the revised EIR." (*Id.* at 741 [footnote omitted].)

If an injunction or stay is not issued in this case, the City's full and accurate assessment of the environmental impacts and consideration of alternatives or additional or different mitigation measures, such as higher levels of methane mitigation under buildings at the site and reconfiguration of the riparian corridor to

avoid archaeological sites, will be severely prejudiced. (*San Joaquin Raptor, supra*, 27 Cal. App.4th at 742.) This prejudice is brought about by the development proceeding "well beyond the planning stages," and making it "more difficult to effect [change to the project] and less likely to occur." (*Id.*)

Therefore, the Court should stay the project until the City prepares, circulates and certifies a valid EIR in accordance with CEQA.

DATED: October _____, 2006

MARSHA JONES MOUTRIE
City Attorney

By: _____
JOSEPH LAWRENCE
Assistant City Attorney

Attorneys for Appellant
CITY OF SANTA MONICA

DATED: October _____, 2006

LAW OFFICES OF
SABRINA VENSKUS

By: _____
SABRINA VENSKUS

Attorneys for Appellants
BALLONA WETLANDS LAND
TRUST, ANTHONY MORALES,
SURFRIDER FOUNDATION

CERTIFICATE OF WORD COUNT
(California Rule of Court 14(c)(1).)

Pursuant to California Rules of Court Rule 14(c)(1), the text of Appellant City of Santa Monica's Brief contains 25,583 words.

I certify under penalty of perjury that the foregoing is true and correct.

Executed this _____ day of October, 2006, in Santa Monica, California.

MARSHA JONES MOUTRIE
City Attorney

By: _____
JOSEPH LAWRENCE
Assistant City Attorney

Attorneys for Appellant
City of Santa Monica

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Bradley C. Michaud, declare:

I am employed in the County of Los Angeles, State of California. My business address is 1685 Main Street, Santa Monica, California 90401. I am over the age of eighteen years and not a party to the action in which this service is made.

On **October _____, 2006** I served the document(s) described as **APPELLANTS' OPENING BRIEF** on the interested parties in this action by enclosing the document(s) in sealed boxes addressed as follows:

[SEE ATTACHED SERVICE LIST]

☒ I caused such envelopes to be delivered by hand to the below address(es).

☒ BY MAIL: I am "readily familiar" with this firm's practice for the collection and the processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, the correspondence would be deposited with the United States Postal Service at 1685 Main Street, Santa Monica, California 90401, with postage thereon fully prepaid the same day on which the correspondence was placed for collection and mailing at the firm. Following ordinary business practices, I placed for collection and mailing with the United States Postal Service such envelope at 1685 Main Street, Santa Monica, California 90401.

☒ [State] I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ [Federal] I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on **October ____, 2006**, at Santa Monica, California.

Bradley C. Michaud

SERVICE LIST

Counsel for Respondent

Susan D. Pfann, Assistant City Attorney
Mary J. Decker, Deputy City Attorney
Office of the City Attorney
200 N. Main Street
7th Floor, City Hall East
Los Angeles, California 90012-4131
Fax: (213) 978-8090
(via messenger)

Counsel for Real Party in Interest

Robert D. Crockett, Esq.
Damon Mamalakis, Esq.
Latham & Watkins
633 West Fifth Street, Suite 4000
Los Angeles, California 90071-2007
Fax (213) 891-8763
(via messenger)

Appellants' Counsel

Sabrina Venskus, Esq.
Law Office of Sabrina Venskus
171 Pier Avenue, #204
Santa Monica, California 90405
Fax: (213) 482-4246
(via messenger)

Brian Acree
Law Offices of Brian Acree
370 Grand Avenue, Suite 5
Oakland, California 94610
(510) 271-0829
(via federal express)

Superior Court

Honorable William F. Highberger
Department 32
Superior Court of the State of California
County of Los Angeles
111 North Hill Street
Los Angeles, CA 90012-3014
(via messenger)