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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

Mission Bay Alliance and Jennifer Wade,

Petitioners and Plaintiffs,

v.

Office of Community Investment and Infrastructure (OCII), *et al*.,

Respondents and Defendants,

GSW Arena LLC, *et al*.,

Real Parties in Interest.

Case No. CPF-16-514892

Consolidated Case No. CPF-16-514811

Petitioners' Opening Brief on the Merits

Hearing Date: June 17, 2016
Time: 9:30 a.m.
Dept: 503

Assigned for all purposes to the Honorable Garrett L. Wong

Petition filed March 11, 2016

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Glossary of Terms Used in Brief

Term	Definition
AB 32	California Global Warming Solutions Act of 2006 (Health & Saf. Code, §§38500 et seq.)
AB 900	Jobs and Economic Improvement Through Environmental Leadership Act of 2011 (Pub. Resources Code, §§21178 et seq.)
Alexandria District	Alexandria Mission Bay Life Sciences and Technology Development District
AR	Administrative Record
arena or project	Event Center and Mixed Use Development at Mission Bay Blocks 29-32
BAAQMD	Bay Area Air Quality Management District
BACT	Best Available Control Technology
BART	Bay Area Rapid Transit
BOA	San Francisco Board of Appeals
CAA	Clean Air Act (42 U.S.C., §§ 7401 et seq.)
CARB	California Air Resources Board
CEQA	California Environmental Quality Act (Pub. Resources Code, §§ 21000 et seq.)
C.F.R.	Code of Federal Regulations
City	City and County of San Francisco
CRC	Cal. Rules of Court
CSD	Combined Sewer District
CEQA	California Environmental Quality Act (Pub. Resources Code, §§21000 et seq.)
CWA	Clean Water Act (33 U.S.C., §§1251 et seq.)
DPH	San Francisco Department of Public Health
dBA	A weighted Decibels
EPA	U.S. Environmental Protection Agency
Guidelines	CEQA Guidelines (Cal. Code Regs., tit. 14, §15000 et seq.)
GHG	Greenhouse Gas
GSW	Real Party in Interest GSW Arena, LLC
HRA	Health Risk Analysis
LOS	Level of Service
LSM	Less-Than-Significant Impact with Mitigation
LTS	Less-Than-Significant Impact
MMRP	Mitigation Monitoring and Reporting Program
Muni or SFMTA	San Francisco Municipal Transit Authority
NBA	National Basketball Association
NESHAP	National Emissions Standards for Hazardous Air Pollutants
NOP/IS	2015 Notice of Preparation/Initial Study
NOx	Nitrogen Oxide
NPDES	National Pollution Discharge Elimination System
NSR	New Source Review

Glossary of Terms Used in Brief

Term	Definition
OCII	San Francisco Office of Community Investment and Infrastructure
OEHHA	California Office of Environmental Health Hazard Assessments
PCO	Parking Control Officer
PM_{10}	particulate matter with a diameter of less than 10 microns
$PM_{2.5}$	particulate matter with a diameter of less than 2.5 microns
POE	Place of Entertainment
PRC	Public Resources Code
Prop. M	Proposition M, Planning Code §§320-325
RHA	Rivers and Harbors Act, 33 U.S.C. §407
RMP	Risk Management Program
ROG	Reactive Organic Gas
RRMP	Revised Risk Management Program
RTC	Responses to Comments
RWQCB	San Francisco Regional Water Quality Control Board
SEIR	2015 Draft Subsequent Environmental Impact Report and Responses to Comments Document on the Draft Subsequent EIR on the Golden State Warriors Event Center and Mixed-Use Development at Mission Bay Blocks 29-32
SFPUC	San Francisco Public Utilities Commission
SU	Significant and Unavoidable Impact
SUM	Significant and Unavoidable Impact with Mitigation
SWRCB	State Water Resources Control Board
TAC	Toxic Air Contaminant
TMP	Transportation Management Plan
TSP	Transit Service Plan
UCSF	University of California San Francisco
USACE	U.S. Army Corps of Engineers
1990 EIR	1990 Mission Bay Draft Environmental Impact Report (Draft and Final)
1990 Plan	1990 Mission Bay Plan
1998 Plan	1998 Redevelopment Plan for the Mission Bay South Redevelopment Project
1998 SEIR	1998 Mission Bay Subsequent Environmental Impact Report Volume (Draft and Final)

Introduction

The non-profit Mission Bay Alliance and Jennifer Wade (collectively, the Alliance) bring this mandamus action in the public interest. In siting the 80,000-seat GSW sports arena in San Francisco's Mission Bay South neighborhood, the Office of Community Investment and Infrastructure ("OCII") and the City and County of San Francisco and its various commissions and boards (collectively, "the City") violated fundamental mandates of California law and their own land use plans and ordinances.

Significant environmental problems with the arena all stem from its proposed location in Mission Bay South. As a result of careful planning and the efforts of many, including members of the board of the Alliance, Mission Bay South area has transformed over the last twenty-five years. Once a blighted industrial zone, it is now a world-renowned hub of medical and biotechnical research, anchored by the UCSF Medical Center and its Benioff Children's Hospital.

The neighboring communities of Dogpatch and Potrero Hill thrive with residences, design districts, colleges, retail establishments, and restaurant uses. Only a mile from the subject arena site, the 40,000-seat AT&T ballpark in McCovey Cove hosts San Francisco Giants ballgames.

Every new development in Mission Bay South must comply with the 1998 Mission Bay South Redevelopment Plan. That plan neither anticipated nor now allows a sports arena. Further, as the Alliance will explain, the rushed environmental review process for the arena failed to adequately consider or to mitigate its myriad impacts. Despite changed conditions and new significant impacts, the arena EIR "scoped out" any analysis of key environmental issues, including the fundamental change in land use as well as biology, recreation, and hazardous materials impacts.

The proposed arena's significant transportation and traffic impacts, including those adjacent to the UCSF hospitals, were not adequately addressed in the EIR process. Among significant problems explained by the Alliance, traffic impacts impair emergency hospital access for petitioner Jennifer Wade and other parents with critically-ill children. The City also gave short shrift to major air pollution and water quality impacts, among other impacts.

While judicial review in this case has been expedited, the GSW owners' arena is subject to all of CEQA's procedural and substantive mandates, without exception, along with the mandates of local and state law. The owners' desire to quickly build the arena does not trump the City's obligation to protect the Mission Bay environment over the long term.

This Court's peremptory writ must issue in the public interest to require the environmental process for the arena to comply with all procedural and substantive protections of applicable environmental and other statutes, ordinances, and plans.

Statement of Facts

Mission Bay lies on the City's southeastern waterfront. (AR857.) For decades, it was a neglected area of warehouses and vacant industrial property. However, over 300 acres between the San Francisco Bay and I-280 were designed for redevelopment in 1990 and analyzed in an EIR. (AR11506-508, 9321.)

Eight years later, the San Francisco Planning Commission and Redevelopment Agency certified a subsequent program EIR and approved the Mission Bay South Redevelopment Plan. (AR13005-11, 15390.) Among other ongoing development, UCSF's plans to locate a new campus in Mission Bay led to the area becoming a hub for research and development "… that may include biotechnology, semiconductor, and computer work … a major UCSF site would likely be a magnet for biotechnology research ..." (AR12983.)

Since then, UCSF has constructed a state-of-the-art campus and medical center, including a world-class children's hospital focusing on cutting-edge treatments for life-threatening illnesses. (AR39549, 90282, 90286.) Medical technology companies have built research labs and office space. (AR133307.) And UCSF is still growing. (AR39493.) In November 2014, the Regents adopted a Long Range Development Plan designed to expand the UCSF campus, develop new research facilities, and construct additional student housing. (AR39493, 90279-322.)

Mission Bay South has transformed from a forgotten neighborhood into a thriving community.

The Mission Bay Arena Site. Moving the championship GSW team from Oakland to San Francisco would be lucrative, likely increasing the team's value to well over $1 billion. The GSW owners' proposed project ("the arena") is a multi-purpose event center and mixed uses, including office, retail, and structured parking on 11 acres. (AR958-62.) The arena proposes to host GSW basketball games and also serve as a year-round event center for large gatherings such as concerts and conventions. (AR981-85.) Two 11-story office and retail towers are planned. Additional retail uses are proposed in a 2-story building along 3rd Street and a 3-story food hall. (AR963-71.) About 1100 parking spaces are contemplated. (AR962.) There are to be 3.2 acres of on-site open space. (AR962.)

The arena site is 1,000 feet away from the emergency room of the new UCSF Children's Hospital. (AR1054.) The hospital provides life-saving treatment for children with cancer, birth defects,

and other severe illnesses, as well as for pregnant women. (AR22714.) Thousands of families live in Mission Bay and environs, including petitioner Jennifer Wade. (AR69624-26.) Nurses at the UCSF hospital have a shift change during rush hour that coincides with the influx of thousands of fans en route to Giants baseball games as well as future basketball games and events at the arena. (AR8220, 69645.)

Within a few blocks of the site are hundreds of UCSF research labs, classrooms, libraries, and student residences, and buildings devoted to biotechnical business and research facilities. (AR133307.)

Environmental Review and Arena Approvals. The City prepared a Subsequent EIR ("SEIR") for the proposed arena. The Alliance and other individuals and groups submitted extensive comments objecting to the inadequacies of the Draft SEIR on a wide range of environmental issues. (AR49353-51471 [Alliance comments at 50651-51124].) The Alliance also identified a potentially-feasible alternate site near Pier 80 on the waterfront. (AR53693-705.)

In late October 2015, the Planning Department published SEIR Responses to Comments ("RTC") in multiple volumes. (AR3180-5771.) Eleven days later, the OCII Commission held a public hearing. (AR4.) The Commission certified the SEIR, made CEQA findings, and approved arena permits. (AR6-11, 17-77, 81-83, 206-212, 6193.) Over the next three months, the City held hearings, rejected administrative appeals by the Alliance on environmental and zoning issues, and granted further approvals. (AR749-53, 8178-8252, 8717-21, 8697-8701, 61061-90, 64430-821, 64826-45, 65712-14, 65954-70, 65930-54, 67603-671, 67673-68206, BOS8, 13-51, 99-102,140.)

Standard of Review

In deciding whether to grant judgment and issue a peremptory writ, the Court shall decide whether OCII and the City committed any prejudicial abuses of discretion. Prejudice must be found if the agencies failed to proceed in the manner required by law, if any of their decisions are not supported by findings, or if their findings are not supported by substantial evidence. (Code Civ. Proc.,§1094.5.)

The adequacy of the arena EIR presents an issue of law. The Alliance anticipates that the Court may instead be asked to apply the deferential "substantial evidence standard" to questions of EIR adequacy and process. That would be error.

After many years of inconsistent appellate decisions interpreting CEQA's unique dual standards of review, the California Supreme Court's rulings in *Vineyard Area Citizens v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard*), and *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131, confirm that challenges to EIR adequacy are reviewed for failure to proceed in the manner required

by law, without deference to the lead agency. *Vineyard*'s set-aside of an EIR's insufficient analysis of water supply for failure to proceed in the manner required by law provided a rubric that applies to all topics of EIR adequacy. *After* a lead agency certifies an EIR, the sufficiency of its project-related CEQA findings is then reviewed for substantial supporting evidence in the record. (*Ibid*.)

Why is this so? It is because the question of EIR adequacy logically differs from project findings. CEQA's statutory and regulatory authorities and implementing case law provide a detailed road map to assess EIR adequacy as a matter of law, with legislative intent manifest in the policies of the Act. Leaving to a lead agency's discretion whether it has adequately complied with CEQA's EIR requirements is illogical—comparable to allowing any agency to judge its own compliance with the mandates of state law. Issues of statutory compliance are always subject to de novo judicial review.

Courts are to consider "whether the administrative record demonstrates any legal error by the [agency] and [then] whether it contains substantial evidence to support the [agency's] factual determinations." (*Vineyard, supra,* 40 Cal.4th 412, 417.) Again, this makes sense. By the time of its project approval findings, an agency will have considered the analysis provided by its public-process vetted EIR and can exercise well-informed discretion. Courts do not direct which experts that officials may choose to believe following certification of an adequate EIR; that is the prerogative of decision-makers empowered to make land use decisions.

In this case, both of CEQA's dual standards of review apply. The adequacy of the arena EIR process and analysis must be reviewed for the City's failure to proceed in the manner required by law, without deference its opinions. Findings relating to environmental impacts and the feasibility of mitigation and alternatives should then be deferentially reviewed for substantial supporting evidence.

Discussion

A. The Arena Use Violates the Mission Bay South Redevelopment Plan

The proposed site is not zoned for an arena use. Because the arena can only be sited in Mission Bay South if encompassed within the zoning laid out in the 1998 Plan, OCII's Executive Director made a finding that the arena is an allowable "secondary use" defined in the Plan, and made additional findings that the arena would be generally consistent with the Plan's redevelopment goals.[1](AR660-87.)

[1] The 1998 Plan outlines both primary and secondary uses. Some of the mixed uses in the arena project would fit into the Plan's primary and secondary zoning and those will not be discussed here. (AR8681.) OCII concedes that the arena was not studied in the 1998 Plan EIR (*e.g.*, AR8686-87) and would require a finding that it qualifies as an authorized secondary use. That is the issue here briefed.

The Director's finding that the arena is an allowable secondary use is erroneous as a matter of law. (AR57141-51, 8658-8673.) As a result, the Director's general consistency findings are not relevant.

It is not surprising that the 1998 Plan provides *no zoning* anticipating an arena. But OCII's findings to the contrary *are* surprising: an overarching error that awaits the remedy of this Court's writ.

As the City and OCII know, there *is* a lawful way to approve a regional sports venue. In a parallel situation, OCII approved the Giants' AT&T Park with a "unique and specific designation for that ballpark use" zoning category. (AR8685, 8692-8694.) But here, OCII oddly relies on the 'Nighttime Entertainment' secondary use category in the 1998 Plan for the Commercial Industrial/Retail site:

> **Nighttime Entertainment.** An assembly and entertainment use that includes dance halls, discotheques, nightclubs, private clubs, and other similar evening-oriented entertainment activities, excluding Adult Entertainment, which require dance hall keeper police permits or place of entertainment police permits which are not limited to non-amplified live entertainment, including Restaurants and Bars which present such activities, but shall not include any arts activities or spaces as defined by this Plan, any Theater performance space which does not serve alcoholic beverages during performances, or any temporary uses permitted by this Plan.

(AR15444.) OCII concedes that nothing in the 1998 Plan or its EIR anticipated a large sports arena in Mission Bay. (E.g., AR8686-87.) Yet the OCII Director made findings that the GSW arena would be "similar" to a nightclub or bar use in the 'Nighttime Entertainment' category "because" it will serve alcohol, provide amplified live entertainment, and provide a venue for evening gatherings. (AR663.)

Beyond the plain words of the 'Nighttime Entertainment' zoning reflecting historic small-scale entertainment uses long a part of Mission Bay South, OCII's findings failed to address the core inconsistency between a regional sports arena and the intended nighttime entertainment of the 1998 Plan, which focus on commercial entertainment uses in Mission Bay North that complement the Giants' ballpark. (AR8661-8673.) The Plan provides for continued development of Mission Bay South as a walkable urban community intended to facilitate medical and biotechnology development, as depicted in the Plan Area Map laying out classic, walkable "vara blocks." (AR15434.)

Consistently, OCII's findings adopted in November 2015 implicitly acknowledge that the 'Nighttime Entertainment' secondary use category in fact does not reasonably encompass a regional arena. The findings therefore propose two alternate secondary uses. (AR 664-665.) None of the secondary use findings are reasonable interpretations of the 1998 Plan's requirements.

Recreation Building. The 1998 Plan includes 'Recreation building' within the secondary use category, but provides no definition. (AR15409.) The Plan describes 'Outdoor Recreation,'

however: "an area, not within a building, which is provided for the recreational uses of patrons of a commercial establishment." (AR15444.) 'Recreation' and 'entertainment' are different. Both involve enjoyment and leisure, but 'recreation' encompasses one's personal activities and 'entertainment' relates to events or performances for the enjoyment of others.

None of the 1998 Plan's references to 'Entertainment' include athletic activities: Adult Entertainment [bookstore/theater], Amusement Enterprise [video games], Bar [drinking/theater], Theater [movies/performance]. (AR15438-45.) Consistently, the 1998 Plan EIR's discussion of 'Recreational' land use focused on open space, bicycles, parks, and water-based activities. (AR13406-13419.)

In context, the 1998 Plan's reference to 'Recreation building' contemplates participatory recreational uses such as OCII's referenced golf driving range and in-line hockey rink. (AR665.)

The arena cannot fit into the Recreation building category.

Public Structure or Use of a Nonindustrial Character. As presented in the 1998 Plan, a 'Public structure or use of a nonindustrial character' is *one* secondary use, not two. (AR15407.) The allowed use is required to be public, and *either* a structure or a use. OCII twists this instead into two separate secondary uses: 1) a public structure and 2) a use of a nonindustrial character. (AR665.)

This contrary interpretation now offered by OCII again strains against the plain words in the 1998 Plan. (AR665-66, 8692-8594.) 'Public' is not defined in the Plan and so its common meaning is assumed. But OCII's findings interpret a 'public' use as simply requiring that the public be somehow 'served.' (AR665.) That encompasses every kind of principal and secondary use listed in the 1998 Plan, from child care to animal care to hotel, and renders the category meaningless: *i.e*., "*any use is ok*."

Instead, as the Alliance pointed out, absent a contrary definition in the Plan, a public structure or use implies control and management of an agency for the benefit of its constituency. (AR57144-51.) The 1998 Plan describes a range of public improvements such as public buildings and public uses. None include anything like a private sports arena. (AR15437.)

The GSW owners' proposed arena is a private project and is not within the scope of the secondary use category for a 'public structure or use of a nonindustrial character.' Just like AT&T Park, the arena requires zoning that fits its unique purpose. Nothing close to such zoning or use is anticipated in or described in the 1998 Plan. Respectfully, a peremptory writ should issue setting aside the arena approval, ordering that reconsideration occur only on a site *zoned to accommodate an arena use*.

B. The Subsequent Environmental Impact Report is Legally Inadequate

1. The SEIR Fails to Analyze Mandatory Environmental Impact Areas

"Once a general project impact has been analyzed in the broadest first-tier EIR," an agency may save time and money by relying on that EIR in "later, more specific environmental analysis documents, provided of course that passage of time or factors peculiar to the later project phase do not render the first-tier analysis inadequate." (*Vineyard, supra*, 40 Cal.4th at 431, n.7, citing CEQA, § 21083.3.)

Here, in its rush to approve the arena the City expanded reasonable tiering to exclude essential study of arena impacts from the SEIR, despite the early and ongoing objections of the Alliance. (*E.g.*, AR50792, 50940, 51102, 57594.) The City does not pretend that an arena project was previously contemplated or subjected to environmental review, which is why it prepared the SEIR. (*E.g.*, AR3315, 8686-87.) While the arena site in Mission Bay South was generally subject to environmental review in 1990 and 1998, the huge arena is a substantially unstudied new project that would forever change Mission Bay South. Its EIR must consider all potentially-significant environmental impacts. (AR57594.)

The City generally responded to comments objecting to the elimination of environmental review of key topics from the SEIR, referencing the CEQA Guidelines and case law. (*E.g.*, AR3308-3315.) In sum, it contends that in ten topic areas (AR3311) environmental impacts of the arena were adequately studied in the 1990 and/or 1998 EIRs. (*Ibid*.) "In many respects, … the nature of the development that occurs on the site is not relevant to the environmental consequences that will result from development of the site." (AR3315.) As discussed below, this is fiction in the current context.

"Tiering" is not permitted for a later project inconsistent with the "program, plan, policy, or ordinance for which an [EIR] has been prepared" or with "land use plans and zoning ...." (*Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156, 1173 ("*Sierra Nevada"*); *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318 ("*Sierra Club"*); CEQA, § 21094(b).) The 750,000 square foot arena is inconsistent with the 1998 Plan in multiple respects.

Further, the exclusion of resource topics from the SEIR is not, as the City presumes, governed by CEQA section 21166 and Guideline section 15162 or their standards. Pursuant to section 21151, the SEIR must analyze the arena's impacts on any environmental resource for which substantial evidence supports a fair argument of significant impact. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099 ("*Amador*") ["EIRs must "consider and resolve every fair argument that can be made about the possible significant effects of a project."]; *see also Sierra Nevada*, *supra*, 202 Cal.App.4th 1156, 1173 ["If a proposed new activity is a separate project, the 'fair argument'

test should apply to an agency's decision whether to require a tiered EIR].) *Sierra Nevada* cited the holding of *Sierra Club, supra*, 6 Cal.App.4th 1307, 1318, that under the fair argument test, "deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is *no credible evidence to the contrary*." (*Ibid*, italics added.) *Sierra Club* applied the fair argument standard to a proposed project that was not "either the same as or within the scope of" the program described in the EIR. (*Sierra Club*, *supra*, 6 Cal.App.4th 1307, 1321.)

Here, evidence relating to the excluded resource topics discussed below meets the 'fair argument' threshold. Although CEQA section 21166 does not apply here, its standards are also met. Therefore, the Alliance respectfully requests that a peremptory writ issue ordering the City to prepare and recirculate for public review a revised EIR that addresses all project-related environmental impacts. Since this is a stand-alone EIR, the title 'subsequent' is a misnomer.

To any extent that the City may choose to use still-relevant data from the 1990 or 1998 Mission Bay EIRs, that is fine, but the information must be restated in the revised EIR in a manner that results in a single, cohesive, understandable document meeting CEQA's mandates for adequacy, completeness, and a good faith effort at full disclosure. (Guidelines, § 15151.)

Land Use. Among the key topics "tiered out" of environmental review in the subject 2015 SEIR, despite the lack of analysis in either of the prior EIRs, is land use. Yet the arena would thwart the continued development of Mission Bay South for medical and biotechnical research and development, and would jeopardize access to the UCSF medical complex. The Initial Study both pronounces that an arena project can fit into the 'Nighttime Entertainment' use studied in the 1998 EIR and admits that "the size and intensity of the event center use was not previously analyzed." (AR5826.) While secondary uses were generally referenced in the arena SEIR (*e.g.*, AR951, 994, 1008, 1139), there is no discussion of which secondary uses apply, inferring acceptance of the Nighttime Entertainment category. (*Ibid*.)

A project's potentially-significant conflict with land use plans adopted for environmental protection or mitigation requires CEQA review and feasible mitigation. (Guidelines, Appendix G, §X.) A rote finding by an agency assuming compliance with such plans via the future actions of involved regulatory agencies, as promised by OCII (*e.g.*, AR3313) cannot substitute for the analysis contemplated by Appendix G. (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 938.)

In the City's misguided rush to approve the arena, its SEIR omitted analysis and mitigation of the arena's land use impacts. (AR51109-15.) Whether considered under the fair argument standard as a

new project, as the Alliance urges, or whether reviewed for substantial evidence, the failure of the SEIR to analyze the arena's impacts on land use is blatant. The SEIR must be revised to study land use.

Hazards and Hazardous Materials. The project site was contaminated over the course of many years from use for bulk fuel storage and distribution, railroad operations, a machine shop, a boiler house, a steel mill, well casing manufacturing, warehousing, shipping and receiving operations for a variety of products, fruit cannery, junk yards, vehicle parking and maintenance facilities, and a ready-mix concrete facility. (AR5908.) Site remediation occurred after approvals of the 1990 and 1998 Plan EIRs. (AR5910-11.) Yet analysis of site hazards and hazardous materials was scoped out of the SEIR.

Last year, the GSW owners' consultants discovered significant amounts of hazardous waste on the site, apparently relating to remediation activities. (AR3920, 51039-42.) The SEIR acknowledges the existence of contaminated backfill (AR3919-20) deposited on the project site ten years ago. (AR51040-42.) Samples taken from a storm drain show significantly increased levels of chromium, copper, and lead. (AR62699.) Expert studies document current contamination that poses significant hazards to the shallow water table, to construction workers exposed to site soils, to commercial workers at the planned arena, and to transport and disposal of hazardous waste off-site. (AR53837-40.) These hazards represent new significant impacts that trigger current analysis and mitigation.

The City failed to address these critical issues in the SEIR. While it points to a 2015 study that did not exist at the time of the 1998 Plan EIR (AR7082, 7086), that does not cure the problem. The SEIR was required to analyze new information regarding contamination within the prescribed CEQA process. The City's contention that analysis in the 1998 EIR was sufficient is insupportable.

While the SEIR also relies on compliance with the existing 1999 remediation plan under Regional Water Quality Control Board ("RWQCB") oversight to ensure that impacts are less-than-significant, weighing the sufficiency of mitigation must come after the duty to analyze impacts in a public process. (AR3907-13.) As it happens, RWQCB oversight has been demonstrably inadequate to effectively manage the site for the protection of construction workers and the public. (AR57624). The City does not reject the Alliance's charge that the RWQCB has insufficiently monitored the site, but claims that its own Department of Public Health ("DPH") also retains authority to do so. (AR7087.) DPH summarily concludes that semi-volatile organic compounds at the site "would not be a health concern to construction workers." (AR49032.)

The City is not entitled to rely upon compliance with the 1999 RMP to determine that impacts are less-than-significant, when that plan is outdated and RWQCB has not enforced compliance.

Project-related impacts involving hazards and hazardous materials require current EIR analysis.

Recreation. The SEIR did not address the arena project's impacts on recreational facilities.

i. Crowds and Employees may have Significant Impacts on Bayfront Park

Increased use of recreational facilities is a significant environmental impact. (Guidelines, App. G, §XV(a).) The 2014 Initial Study said that arena-related increased demand for recreation facilities was generally anticipated in the 1998 SEIR. (AR5856.) Yet that SEIR analyzed a very different plan for Mission Bay South that included just 50,000 square feet of entertainment-oriented uses. (AR15305.)

The 18,000 seat arena is proposed at 750,000 square feet to host up to 224 annual events. (AR862-63.) The event crowds will inevitably frequent Bayfront Park along with employees to be associated with 580,000 square feet of commercial use, and the employees and customers of 125,000 square feet of retail space crammed onto the 11-acre parcel. (AR862-63, 3740-41.)

The City contends that on-site open space and other nearby parks adequately serve recreational needs. (AR3742.) Yet, especially before and after events, Bayfront Park will attract recreational use of a much larger volume of people than ever considered in prior EIRs, resulting in accelerated physical deterioration. The land use plan in the 1998 EIR designated the site as Commercial Industrial/Retail (AR12984) and did not contemplate arena-sized crowds likely to cause new significant environmental impacts, nor did the 1998 EIR consider feasible mitigation and alternatives. (AR15305.)

If the arena is built in Mission Bay South, the Bayfront Park long-planned to meet needs of the neighborhood would become a spillover area for regional events. Given the project's as-yet unstudied and potentially significant impacts on recreation, a revised SEIR must analyze recreational impacts.

ii. Development of Bayfront Park may Expose Visitors to Contaminated Soils

The arena's exacerbation of crowding at Bayfront Park increases the exposure of people to hazardous materials in the site's soils. (AR69298, 8495.) When a proposed project may exacerbate existing environmental hazards, an agency must analyze the potential impacts on future residents or users. (*CBIA v. BAAQMD* (2015) 62 Cal.4th 369, 377-78.) Specifically, "CEQA calls upon an agency to evaluate existing conditions in order to assess whether a project could exacerbate hazards that are already present." (*Id*. at 338 [upholding Guidelines, §15126.2(a) and requiring evaluation of "any potentially significant impacts of locating development in other areas susceptible to hazardous conditions"]; *see also* CEQA, §21083(b)(1).) The City must study such impacts in a revised EIR.

Biological Resources. The arena site includes a permanently-inundated wetland over ½ acre in size and a riparian zone surrounded by native vegetation. This wetland was created during earthmoving activities after 1998 (AR1705, 1767, fn. 47), and now provides habitat for native birds and other species. (AR105310, 50346-47.) Man-made wetland features may require federal or state authorization prior to fill. (AR1768, 50348.) The Initial study admits that "the deeper excavation and the surrounding depressions within the project site are features that exhibit the hydrology and vegetation characteristics of wetlands" (AR1767), and indicates that if the features are "jurisdictional" wetlands triggering federal permits they may require mitigation to achieve 'no net loss' of the function and values of the features. (AR1768.) Wetlands can have exceptional ecological value if they are one of the few remaining features in the area, as is the case here. (AR50346)

But despite the existence of new wetland and riparian areas within the site (AR105311, 43106, 50317-8, 50341, 30348-9, 58269, 58259-58282, 67073-5), the SEIR claims that there are either no new significant biologic effects, or no substantially more severe effects than analyzed in the 1998 SEIR. (AR1709.) Obviously, however, such impacts could not have been analyzed before their existence. (AR11562, 22012, 96635, 50316-8, 50353.) The SEIR's failure to consider the current biological conditions in the environmental setting baseline for the arena project allowed potentially significant impacts to habitat and species to be overlooked. (AR50306, 50313, 50318; *see Friends of the Eel River v. SCWA* (2003) 108 Cal.App.4th 859, 874 [environmental setting is critical to assessment of impacts].)

Though the Initial Study stated that the arena has no significant new or more severe biological resource impacts than previously studied, it admitted that mitigation would be necessary if wetland features are ultimately identified as regulated. (AR1768-9 [purchase of credits or in-lieu fees, or provision of off-site mitigation].) No such measures, however, were imposed in the MMRP (AR59-60) and so are not enforceable. (Guidelines, §15126.4(a)(2)).

The Initial Study also failed to identify the site's status as a native wildlife nursery and bat migration area (cf. Guidelines, App. G, §IV(d)) and characterizes impacts to migratory and resident species that use the wetland as less-than-significant with mitigation. (AR1768.) The destruction of those uses would be a significant and unstudied impact. The Initial Study denies any impact but at the same time requires new mitigation measures to reduce impacts to less-than-significance. (Compare AR1539 ["The project would not cause effects …"]" with AR1768-9,59-60 [requiring mitigation to prevent impacts to birds].) The Initial Study's determination is unsupported; revised EIR analysis is required.

The City also ignores the potential for hazardous materials to cause impacts to biological resources on- and off-site. (AR50351-2.) Such impacts include toxic Bay runoff of chemicals on the site. (AR47643, 53853 [critical habitat for steelhead trout], 58232-33.) Indeed, sampling of each of two storm drains from the site to the Bay showed exceedances of eco-risk based soil screening levels for six hazardous chemicals. (AR69298; 8495.) While the City alleges that it will comply with all stormwater requirements in order to avoid such impacts, evidence in the record demonstrates its continuous, consistent, and pervasive pattern of violating its NPDES permits. (AR 58335-58343 [summary of NPDES violations], 58344-58510 [details of violations].) Thus, it cannot point to compliance with other regulatory requirements evidence that impacts will be less than significant. (*See CAT v. DFA* (2005) 136 Cal.App.4th 1, 16 [lead agencies must review site-specific impacts].)

The EIR attempts to characterize the identified weaknesses of the Initial Study's biological resource analysis as a debate among experts. (AR3307-8, 3782-829.) This is incorrect. Regardless, a dispute among experts must be resolved in an EIR. (Guidelines, §15064 (g).) The City's "scoping out" of material environmental issues from the SEIR precluded informed decisionmaking. A revised EIR that adequately analyzes biological resources is mandated by law.

2. SEIR Analysis of Environmental Impacts was Inadequate

The EIR process allows decisionmakers to make intelligent judgments. (Guidelines, §15151.) An EIR need not be perfect, but must be an adequate, complete, and good faith effort at full disclosure of impacts. (Guidelines, §15151.) *Berkeley Keep Jets over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1367-68 thus held that an EIR using scientifically-outdated information had not provided a reasoned, good-faith effort to disclose airport noise impacts.

The purpose of an EIR is to provide "detailed information about the effect a project is likely to have on the environment, to list ways significant effects might be minimized and to indicate alternatives to the project." (CEQA, §§21061, 21100.) An EIR's analysis must be sufficient to provide information to make decisions that intelligently take account of environmental consequences. (*San Francisco Ecology Center v. City and County of San Francisco* (1975) 48 Cal.App.3d 584, 593 ; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.)

The SEIR's analysis of arena impacts failed to meet the mandates of CEQA as follows:

Transportation Impacts. The 18,000-seat arena is conceded to have significant impacts on transportation, including congestion at intersections and freeway ramps and impacts to transit services.

(AR792-98, 3966-87.) Notably, the SEIR includes two sets of measures intended to reduce significant transportation impacts as part of the arena's project description —instead of identifying them as mitigation. These are the Transportation Management Plan ("TMP") and Transit Service Plan ("TSP"). Both fail to adequately mitigate transportation impacts or to comply with the mandates of CEQA.

i. The Transit Service Plan must be Studied and Adopted as Mitigation

The arena would impact the operations of many transit services, including Muni, Caltrain, North Bay ferry and bus services, BART, AC Transit, and Samtrans. The TSP encompasses purchase of four additional Muni light rail trains, diversion of two existing Muni trains to serve arena events, construction of a larger Muni platform at the arena site to handle multiple Muni trains, and installation of crossovers and power augments. (AR987, 1077, 3217, 61399 n.3.)

The SEIR treats the TSP as a component of the arena project rather than as a set of mitigation measures designed to reduce project impacts. (AR987.) This is a primary violation of CEQA. As held in *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 655-57 (*Lotus*) an EIR cannot incorporate "the proposed mitigation measures into its description of the project and then conclude[] that any potential impacts from the project will be less than significant." *But that is just what the City did*.

The SEIR assesses Muni transit impacts after applying the TSP and without a concurrent Giants game, and finds the impacts to be less-than-significant so that no mitigation is required. (AR1167.) The SEIR also assesses the same without-Giants-game Muni transit impact—without implementation of the TSP— and finds transit impacts to be significant-and-unavoidable with mitigation. (AR1223-26.) The only difference between these different impact findings is whether they occur "with" or "without" the TSP. Thus, the TSP functions as a mitigation measure to reduce transportation impacts.

The problem with the SEIR's identification of the TSP as part of the project—rather than as a mitigation measure (AR987, 1077, 3217)—is that such a strategy "precludes both identification of potential environmental consequences arising from the project and also thoughtful analysis of the sufficiency of measures to mitigate those consequences." (*Lotus*, *supra*, 223 Cal.App.4th at 655-57.) The SEIR thus violated CEQA by avoiding analysis of the relative effectiveness of the TSP to mitigate transportation impacts or comparing it with other mitigations. As to the TSP's effectiveness, buried in a footnote of a spreadsheet is the following revelation: "The proposed plan includes purchasing 4 additional [Muni] trains and shifting 2 two cars from another route(s) at the end of the PM commute period. *This could increase crowding in other parts of the system*." (AR61399, fn.3, italics added.)

The footnote flags a still-unanswered question: should the SEIR identify a mitigation measure requiring the acquisition of six Muni trains to address the arena's impacts, so that the two existing trains need not be redirected and thereby place additional unstudied strain on the transit system? Because the TSP was considered to be a project component rather than a mitigation measure, the required EIR analysis was missing. This is just the type of error that the First District identified and struck down in *Lotus*. The TSP must be analyzed in a revised EIR as a mitigation measure.

ii. Enforceable Mitigation Achieves Public Disclosure

By mischaracterizing the TSP as a component of the project rather than assessing it as part of a mitigation plan, the City also avoided public disclosure of the TSP's lack of enforceability. Mitigation measures must be "fully enforceable." (CEQA, § 21081.6(b.) This is assured by incorporation into a Mitigation Monitoring and Reporting Plan ("MMRP'). (CEQA, § 21081.6(a)(1).) "The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." (*Federation of Hillside & Canyon v. City of Los Angeles* ("*Federation*") (2000) 83 Cal.App.4th 1252, 1261.)

Project conditions, on the other hand, are not required to be in an MMRP. Here, the TSP was not included in the body of the arena MMRP but was simply summarized in a segregated "Table D" of the MMRP. It was not adopted by the City as part of its project findings. (AR688, 747, 755.)

iii. Mitigation Lacks Funding

The TSP is unenforceable not only procedurally but also substantively. The TSP calls for the SFMTA to purchase four new light rail vehicles and to make other transportation system improvements to serve the project, at a projected cost of $55.3 million. On the other hand, the estimated one-time project-generated revenues to pay the costs are $25.4 million, "resulting in a revenue shortfall of $29.9 million." (AR62701.) Further, "[t]he estimated revenue shortfall of $29.9 million will be financed through sale of SFMTA revenue bonds or other financing source. Annual debt service is projected to be paid from tax revenues generated by the Warriors Project." (AR62701.)

The City estimated its annual expenditures to fund both the TSP and the Transportation Management Plan, and to make debt service payment on the outstanding bond, to be $10.1 million. That obligation is to be funded by an estimated $11.6 million in revenues generated by the arena, resulting in net revenues to the City of $1.5 million. (AR62701.)

But both the SFMTA and the City's Budget Analyst noted that sufficient funding for the two programs is *not* assured. (AR61396 ["The SFMTA cannot unequivocally guarantee future funding for the TSP at the levels analyzed in the Project Description in perpetuity…"]; (AR62702 [Budget Analyst: "If the Warriors Project generates insufficient General Fund tax revenues to pay for all of SFMTA's costs to provide transportation services to the Warriors Project ..."].)

When funding for a mitigation measure is not assured, the measure is not enforceable. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1189-90 ("*Anderson*").)

A peremptory writ must therefore issue requiring the revised SEIR to analyze the TSP as a mitigation measure, to incorporate it into an enforceable MMRP, and to identify assured funding.

iv. Lack of Enforceable Mitigation Precludes Overriding Considerations.

The City both failed to adopt enforceable mitigation for regional transit services and improperly found significant impacts to be "unavoidable." Figure 1 summarizes the SEIR's conclusion regarding the significance of arena impacts on Caltrain, North Bay Ferry and Bus Service, BART, and AC Transit:

With Muni Special Event Transit Service Plan				Without Muni Special Event Transit Service Plan
Transit Service	Impact TR-5: without Giants Game (AR1161-62, 1168, 794, 694-95)	Impact TR-14: With Giants Game (AR1208-09, 796, 703)	Impact C-TR-5	Impact TR-21 Without Giants Game (AR1226-27, 3982)
Caltrain	**SUM**[2]	**SUM**		**LS**
North Bay Ferry	**SUM**	**SUM**		**SUM**
North Bay Bus	**LS**	**SUM**		**SUM**
BART	**LS**	**SUM**		**LS**
AC Transit	**LS**	**LS**		**LS**

The SEIR finds the project's incremental environmental impact to be significant and unavoidable" *without* an overlapping Giants baseball game on Caltrain and North Bay Ferry services (Impact TR-5, AR1162,1168,794, 694-95) and *with* an overlapping Giants baseball game on Caltrain, North Bay Ferry and Bus, and BART services. (Impact TR-14, AR1208-09,796,703.) However, the SEIR does not analyze the relative severity of impacts, as required by CEQA. (*Santiago County Water*

[2] As noted in the Glossary, SUM = significant and unavoidable, LS=less than significant

Dist. v. County of Orange (1981) 118 Cal.App.3d at 818, 831 ("*Santiago*") ["What is needed is some information about how adverse the adverse impact will be"].)

The SEIR finds the arena's cumulative impacts on Caltrain, North Bay Ferry and Bus, and BART services to be significant and unavoidable." (Impact C-TR-5, AR1250, 3970-71.) Once an impact is identified as significant, CEQA requires the agency to find, based on substantial evidence, that mitigation measures are "required in, or incorporated into, the project;" or that the measures are the responsibility of another agency and have been, or can and should be, adopted by the other agency; or that mitigation is infeasible and overriding considerations outweigh the significant environmental effects. (C*ity of Marina v. Board of Trustees of Cal. State Univ*. (2006) 39 Cal.4th 341, 350, 355-56, 360-61, 368-69 ("*City of Marina*"); CEQA, §21081; Guidelines, §15091(b).)

Without knowing the severity of impacts, it is impossible to determine the degree of mitigation required, or to weigh harm against benefits in a statement of overriding considerations. Where an agency fails to demonstrate that full mitigation of significant impacts is infeasible, it cannot find the impact unavoidable, and cannot approve the project based on overriding considerations. (*City of Marina, supra,* 39 Cal.4th at 368-369.) Here, the City finds that significant impacts [TR-5, C-TR-5b, TR-14, and TR-21] are "unavoidable" despite the implementation of mitigation measures (additional Caltrain, North Bay Ferry and Bus, and BART service) because the "provision" for obtaining additional transit service from the various third-party transit providers is "uncertain and full funding for the service has not yet been identified." (AR1170-1171, 794; 1209, 796; 1250; AR1226-27, 3982; AR3594-95.)

The City's findings are not supported by substantial evidence that it is infeasible for the highly-profitable GSW owners to pay third-party transit service providers for additional services for sports events. Caltrain even invited the City and the GSW owners to collaboratively develop additional transit service. (AR51394 ["we encourage the City and the project sponsors to engage with us directly to more formally define, analyze and identify funding for any contemplated increase in Caltrain service"].) No record reflects no such collaboration.

The SEIR also implies that additional transit service would be "within the responsibility and jurisdiction of another public agency:" "[n]either the project sponsor nor the City has the legal authority and logistical ability to provide the additional service ..." (AR3577, CEQA, §21081(a)(2).) This implication is incorrect. Courts do not allow agencies to avoid significant impacts just because other agencies may also play a role in providing mitigation services. (*City of Marina, supra*, 39 Cal.4th at 366; *County of San Diego v. Grossmont-Cuyamaca Community College Dist*. (2006) 141 Cal.App.4th 86,

97–98.) Here, the SEIR admits that "[t]he provision of additional regional transit service during special events is common in San Francisco." (AR3577.)

The record includes no substantial evidence that mitigation measures are infeasible. The City abused its discretion in finding transportation impacts of the arena project not only significant but also unavoidable. The City's approval of the arena based on a statement of overriding considerations was unlawful, and the approval should be set aside by this Court's writ. (AR832-34; *City of Marina, supra*, 39 Cal.4th at 368-69.)

v. Mitigation is Unenforceable Due to Precatory Terms and Deferral

Mitigations that are "not guaranteed to occur at any particular time or in any particular manner" are inadequate. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281; *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1119 [mitigation was rejected that identified a general goal for mitigation rather than a specific performance standard]; *Federation, supra*, 83 Cal.App.4th at 1260 [remote and speculative mitigations were held inadequate].).

Mitigation measures may not be deferred until after project approval except when a performance standard is established and it is impracticable to develop specific measures to achieve that standard before approval. Even then, deferral is not allowed if it is unknown whether mitigation is feasible. (*See CBE v. Richmond* (2010) 184 Cal.App.4th 70, 92-96) ["[T]he development of mitigation measures, as envisioned by CEQA, is not meant to be a bilateral negotiation between a project proponent and the lead agency after project approval; but rather, an open process that also involves other interested agencies and the public"]; (*Kings County, supra*, 221 Cal.App.3d at 727 [agreement that called for purchase of replacement groundwater was an inadequate mitigation measure because there was no indication that such water was available].)

Many of the arena SEIR's mitigation measures are illusory due to precatory language and unlawful deferral of specific mitigation measures.

For example, as noted above, the SEIR finds that significant impacts are unavoidable despite mitigations for additional Caltrain, North Bay Ferry and Bus, and BART service, because the "provision" for obtaining additional transit service from the various third-party transit providers is "uncertain and full funding for the service has not yet been identified." (AR1170-1171, 794, 1209, 796 1250, AR3594-95.) The reason that "provision" of these services is uncertain is that they are not actually required. The GSW owners must simply discuss the provision of additional transit services with Caltrain, Golden Gate Transit, and BART; to wit: "the project sponsor shall work with the Ballpark/

Mission Bay Transportation Coordinating Committee to coordinate with [provider] to provide additional [ ] service." (AR1171,1209.)

The SEIR defends the unenforceability of mitigation by contending that additional transit needs should be determined based on GSW-conducted surveys of attendance patterns after arena events. (AR3587). This is wrong. First, the Draft SEIR found that additional transit service is needed, but the Final SEIR questioned that finding: this is double-talk, not good-faith disclosure. Second, the SEIR's suggestion that the GSW owners may determine the need for additional service at a later date violates CEQA, because an agency may not cede to a project proponent its responsibility to assess environmental impacts. (*California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 194.)

There are many more examples of inadequate mitigation for transportation impacts:

Mitigation M-TR-2b: The GSW owners and the City itself shall work to pursue and implement, ""if feasible," additional strategies to mitigate transportation impacts. (AR1153, 692-94.) Many of the "strategies" are couched in equivocal language such as "explore," "work to identify off-site parking lot(s)," "work to include," "seek partnerships," "meet to discuss," and "encourage." (AR1153-54, 692-94.) This language is not enforceable as it does not commit the City or the project sponsor to any course of action that *must* reduce the identified environmental impacts.

M-TR-9d makes the same mistake regarding a safety issue at the UCSF helipad, and defers the development of a lighting plan— without specific performance standards or concrete mitigation measures. It merely requires consultation with SFO airport staff concerning the effects of lighting on pilots, consultations and approvals regarding firework displays and laser light shows with advance notification to UCSF, and the development of "specialized lighting guidelines." (AR1296; 696.) Mitigation TR-9a has a similar flaw. (AR1296; 695.)

M-TR-11c suffers from the same infirmity in requiring the GSW owners "to continue to work with the City to pursue additional strategies to reduce impacts during overlapping events." (AR1204, 699.) TR-11c is even worse, because there is no evidence that mitigation is feasible. (AR3569 ["due to the physical limitations of the City's street grid, land may not be available for City purchase that would allow for the expansion of street width"].) M-TR-11c adds more wiggle room, limiting the GSW owners' obligations to "avoid scheduling non-Golden State Warriors events of 12,500 or more event center attendees that start within 60 minutes of the start (respectively) of events at AT&T Park;" to "negotiate with the event promoter to stagger start times;" to "negotiate with the Port of San Francisco"

regarding parking to "commercially reasonable efforts." (AR3570.) Leaving the determination of what is "commercially reasonable" up to the GSW owners renders the measures illusory.

Importantly, "commercially reasonable efforts" is not an enforceable standard for the feasibility of deferred mitigation. "What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project" if the GSW owners are required to avoid scheduling non-basketball events of 12,500 or more attendees within the start of events at AT&T Park. (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 599.)

M-TR-11c also states that "in the event the off-site parking lots at 19th Street and the Western Pacific site are implemented, the SFMTA shall consult with Caltrans in assessing the feasibility of signalizing the intersection of Pennsylvania/I-280 southbound off-ramp. If determined feasible by the SFMTA and Caltrans, [they] shall establish the level of traffic volumes that would trigger the need for a signal, and the project sponsor shall fund its fair share…" (AR3574.) The feasibility of this measure must be assessed up front, before project approval—when the public can participate— rather than after approval without public accountability.

The SEIR failed to identify and the City failed to adopt mitigation with performance criteria that are "sufficiently definite to ensure that the potential impacts would be mitigated." (AR3595.)

For the reasons stated, a writ should issue requiring the arena's transportation impacts and mitigation measures to be analyzed in a revised EIR.

Air Quality Impacts.

i. The SEIR's Health Risk Assessment for Toxic Air Contaminants Is Invalid

The SEIR identified Toxic Air Contaminants (TACs) as a potential health risk, particularly to children, and explained that the Bay Area Air Quality Management District ("BAAQMD") therefore required a Health Risk Assessment (HRA). (AR 1362.) The Draft SEIR included an HRA (AR 2886-2893, 1400) and the Final SEIR included a revised HRA. (AR 4493-4501, 4084.) The revised HRA identified children at Hearst Tower and UCSF Children's Hospital to be the most vulnerable to TAC's from the arena (AR 4077), based on evidence of elevated excess cancer rates. (*Ibid*.)

The SEIR found the cancer risk impact on children at Hearst Tower to be significant without mitigation and the cancer risk impact on adults at Hearst and children at UCSF Hospital to be less than significant regardless of mitigation. (AR 1400, Table 5.4-11.) The SEIR revised this to find the cancer risk to children and adults at both locations less than significant with or without mitigation. (AR 4084.)

However, the SEIR's cancer risk assessment has fatal flaws.

a. The SEIR Fails to Determine the Significance of TAC Impacts

The BAAQMD provides CEQA Guidelines that establish a threshold of significance for project-level impacts of 10 excess cancers per million or an increase of PM2.5 concentrations greater than 0.3 ug/m3. (AR 28055, 28087.) Despite its adherence to the BAAQMD's thresholds for every other air quality impact, the SEIR refused to determine the significance of the arena's incremental, rather than cumulative, impact on cancer risk. (AR 1379 ["Because the project-level analysis includes health risks from all known existing sources, the project-level analysis is also a cumulative health risk analysis"].) As a result, the SEIR's only health risk thresholds for TACs are cumulative impact thresholds, as follows: (1) a cumulative risk greater than 100 excess cancers per million that would not occur but for the project, and the project contributes more than 10 excess cancers per million to the cumulative total, or (2) the project results in cumulative PM2.5 concentrations greater than 10 ug/m3, and the project contributes more than 0.3 ug/m3 to this cumulative total. (AR 1378.)

With respect to increased cancer risk, the HRAs show the cumulative risk impact to these populations when the arena's incremental impact is added to local background sources is 72 or 44 and 86 or 56 cancers per million, respectively. These figures are lower than the SEIR's cumulative threshold of 100 excess cancers per one million for cumulative impacts. But the HRAs show that, even after mitigation, the project's TACs will cause an excess cancer risk of 46 or 18.4 per one million, respectively, for children at the Hearst Tower; and 42 or 12 per one million, respectively, for children at UCSF Hospital. *These figures are higher than BAAQMD's threshold of 10 excess cancers per one million for project-level analysis of single source impacts*. Similarly, for PM2.5 concentrations from project operations, the HRAs report that the arena would increase PM2.5 concentrations by 0.32 ug/m3, higher than BAAQMD's threshold of 0.3 ug/m3. (AR 1399, 4083.)

The SEIR's stated rationales for refusing to use the BAAQMD's project level threshold are:

(1) "the HRA takes into account the cumulative contribution of localized health risks to sensitive receptors from sources included in the Citywide modeling plus the proposed project's sources;"

(2) "other future projects, whose emissions have not been incorporated into the existing Citywide health risk modeling, such as Pier 70 and Seawall Lot 337/Pier 48, would similarly be subject to CEQA requirements to analyze the health risk impact of their project;"

(3) "health risk impacts are localized, and health risks from sources decrease substantially with increasing distance. Thus cumulative impacts from the Pier 70 and Seawall Lot 337/Pier 48 would not combine with … project's emissions to substantially increase health risks ... (AR 1379.)

These rationales are wrong as a matter of law. They relate to the SEIR's analysis of the arena's cumulative impacts, not to analysis of project-level impacts. CEQA requires that an EIR assess both project-level and cumulative impacts; one cannot substitute for the other. (Guidelines, 15126.2, 15130.)

Rationale (1) is wrong because the HRAs' analysis of the project's cumulative impacts—as it is required by law to do—says nothing about whether it is lawful to dispense with determining the significance of project level impacts. Rationale (2) is wrong because whether reasonably-foreseeable future projects that would combine with an arena's impacts may have their own CEQA processes is irrelevant to whether the arena's impacts are significant in their own right. Rationale (3) is wrong because consideration of reasonably-foreseeable future projects is only relevant to analysis of a project's cumulative impacts, not analysis of project-level impacts. (Guidelines, 15130, 15355.)

The Alliance provided expert objection to the SEIR's failure to apply BAAQMD's thresholds for single source impacts. (AR 50663-50668; 50698-50700.) No new rationales were provided in the Final SEIR responses. (*See* AR 3676.) As noted, the Final SEIR included a new HRA reflecting project changes to relocate emergency diesel generators to reduce project-caused excess cancers. (AR 3678, 4493-4501.) Because the revised HRA no longer shows unmitigated cumulative TAC impacts greater than 100 excess cancers, the SEIR concluded that mitigation was not required. (AR 4084.) The Alliance again objected, noting that most California air districts use the 10 excess cancers per million thresholds for project-level analysis. (AR 57738-57740; 57746-57748; 67082-67083.)

The omission of a separate project-specific analysis violates both not only CEQA, but also BAAQMD's guidance. BAAQMD's Justifications Report recommends a CEQA threshold for siting a new project of 10 excess cancers per million, applicable to stationary, area, and mobile sources of TAC emissions. (AR 23002-23003.) This is a project-specific, not cumulative threshold. The Justification Report separately recommended a cumulative threshold: 100 excess cancers from all sources within 1,000 feet. (AR 20005.) Similarly, the May 2010 BAAQMD Guidelines identify separate thresholds for individual projects and for cumulative sources. Under that guidance, risk from an individual project is significant if it increases cancer risk by more than 10 in one million (AR 24192) while cumulative risk is significant if the risk from any source results in total risk exceeding 100 excess cancers per million. Further, the 2010 BAAQMD Guidelines provides that the "cumulative threshold sets a level beyond which any additional risk is significant." Contrary to the SEIR's implication, BAAQMD guidance does not permit an additional 10 excess cancers without mitigation where the cumulative risk is under 100.

Project-level and cumulative impacts analyses serve different purposes. Cumulative impact analysis is distinct from project-level analysis because a project may make a considerable contribution to a significant cumulative impact even when the project-specific impact is individually not significant, because its incremental contribution is "collectively significant." (*CBE v. Resources Agency* (2002) 103 Cal.App.4th 98, 120; *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1025-1026.) Conversely, even where cumulative impacts are not significant, the project-specific impact may be significant because (1) it causes a substantial adverse effect, *e.g.*, excess cancers, by itself (Guidelines, §15382), and/or (2) it "uses up" the environment's capacity to absorb the impact to the point where any future impact will be cumulatively significant.

Omitting a project-specific analysis is error, and fails to disclose that the project will cause a significant impact, by itself, regardless of the cumulative context. (AR3676.)

b. The SEIR Fails to Include all Sources of TACs in its Impact Assessment

The SEIR's Health Risk Assessment (again, "HRA") included certain background sources of TACs in its analysis of the arena's cumulative TAC impacts on cancer risk. (AR1400, 4084.) These background sources were created by a local-scale citywide modeling effort conducted in 2012. (AR1362-1363, 1379, 1407, 2909.) This cumulative background risk is stated as 44 excess cancers in one million for child receptors at the UCSF Hospital and 26 in one million for child and adult receptors at the Hearst Tower. (AR1400, 4084.) The SEIR also acknowledges that the prior environmental review for the Mission Bay project did not quantitatively assess TAC impacts. (AR1401 ["Mission Bay FSEIR qualitatively assessed …."].)

The Alliance objected that the cumulative analysis did not evaluate all sources of TACs that would affect sensitive receptors because it omits foreseeable future sources of TACs from adjacent development already approved as part of the Mission Bay redevelopment program. (AR57740, citing AR1379,1407.) The Alliance demonstrated that the omission was prejudicial by submitting a technical report explaining the need to include foreseeable future development in analysis of cumulative TAC health risks. (AR57748-57756.) The City's designation of Air Pollution Exposure Zones does not include TAC impacts in the arena area expected from future redevelopment, projected in the 1998 Mission Bay EIR to generate 218,549 vehicle trips and 2,684 truck trips per day. This level of additional traffic has the potential to cause excess cancers greater than the 100 cancer threshold identified by the EIR for a significant cumulative impact. (AR57755.)

Cumulative analysis must include all sources of "related impacts," including past, present, and potential future projects. (Guidelines, § 15130(a)(1), (b).) The unjustified omission of closely-related future sources of TACs is error. Without this information the public and decisionmakers cannot "determine whether such information would have revealed a more severe impact." (*Kings County*, *supra*, 221 Cal.App.3d at 724 [improper omission of distant emission sources affecting air basin]; *see also Citizens to Preserve the Ojai v. County of Ventura* (1985) 126 Cal.App.3d 421, 429-31.) The future development of the rest of the Mission Bay South Redevelopment Plan is foreseeable because it has already been approved at the program level. (AR900-926.)

The SEIR implies that impacts from future development may be ignored because "other future projects, whose emissions have not been incorporated into the existing Citywide health risk modeling ... would similarly be subject to CEQA requirements to analyze the health risk impact of their project." (AR 1379.) However, the SEIR may not tier from *future* environmental reviews: it is well-settled that "CEQA's informational purpose 'is not satisfied by simply stating information will be provided in the future.'" (*Vineyard Area Citizens, supra*, 40 Cal.4th at pp. 440-441.)

The SEIR also mentions Pier 70 and Seawall Lot 337/Pier 48 as examples of such future projects, and dismisses their impacts because they are allegedly too distant to affect the same receptors. (AR 1379.) The SEIR ignores the Mission Bay buildout adjacent to the project. (AR57754-57756.)

OCII contends that "it would be speculative to estimate impacts due to construction slated for 2025 or even within the next five years, as detailed emissions and activity inventories are not yet available." (AR6981.) This is incorrect. Future construction emissions from projects in the immediate vicinity have in fact been estimated for the year 2025. The citywide modeling effort from which the SEIR derived its background cumulative TAC cancer risks included modeling of diesel particulate matter from foreseeable construction activity. (AR69359-69360.) Indeed, this modeling effort included an estimate of emissions for major construction projects in both 2010 and 2025, including four distinct sections of the Mission Bay project buildout in the year 2025. (AR69360.) Quantification of construction risks in 2025 was and is feasible. The risk for major projects in the immediate vicinity of the arena site has already been quantified and should have been included in the health risk assessment.

OCII further takes the position that the citywide modeling "encompassed build-out of adopted plans, including the Mission Bay Redevelopment Plan. (AR6981.) This misses the point of the Alliance's objection. First, the citywide modeling did not account for localized future increases in traffic due to large, specific, foreseeable development projects like the Mission Bay South Redevelopment

Plan. (AR69357-69359.) Second, even if the TACs from future traffic generated by the Plan had been included, the citywide modeling only considered emissions from traffic on freeways and major arterials. Yet this traffic will also generate TACs affecting the project area when traveling on the surrounding roadways, and this large volume of traffic will have a foreseeable adverse effect on sensitive receptors. (AR69358-69359.) This foreseeable effect should be included in the assessment of cumulative sources.

ii. The SEIR Fails to Use Current Science in its Analysis of TAC Impacts

The SEIR totals the number of project-induced excess cancers based on the modeled concentration of TACs from project construction and operation, toxicity values for those TACs, and a number of exposure parameters. (AR2886-2893, 4493-4501.) The exposure parameters are intended to estimate excess lifetime cancer risks for all potentially-exposed populations for the construction and operation of the arena. (AR1396, 1400, 4084.) These exposure parameters include daily breathing rate, exposure time, exposure frequency, exposure duration, averaging time, and intake factor for inhalation. (AR2891, 4499.) As noted above, the SEIR's analysis of cumulative TAC sources other than the project-caused sources was based on citywide modeling in 2012. (AR 1362-1363, 1379, 1407, 4516.) The SEIR does not report the exposure parameters that were used for that 2012 modeling.

The Alliance commented that the health risk assessment failed to use the most recent OEHHA Guidelines for exposure parameters, which use differential breathing rates for each age cohort and incorporate higher breathing rates for children than those used in the SEIR. The SEIR underestimated potential excess cancer risks due to its use of out-of-date breathing rate assumptions for children. The Alliance requested recalculation of excess cancers using different breathing rates for different ages, including the more recent higher daily breathing rates for children. (AR50685-50686.)

The Final SEIR did not dispute the validity of the new OEHHA guidance; it concedes that the BAAQMD intends to use the revised guidance in the future. (AR3701.) The City declined, however, to provide a new assessment of health risks using the new OEHHA guidance for differential breathing rates, including children's breathing rates, or to discuss the likely effect of the use of updated breathing rates in the analysis. Instead, the SEIR argues that the new OEHHA guidance post-dates the SEIR's "Notice of Preparation" and need not be applied. (AR3701.)

This is incorrect. OEHHA recommended the higher children's breathing rates in guidance issued in 2012, well before the 2014 Notice of Preparation. (AR57757, 58097-58098, 58101-58102; AR 30946-30973, 57757, 5786.) OEHHA's recommendation responded to a mandate from the Children's Environmental Health Protection Act. (AR30974-30975.) And the second HRA in the Final SEIR post-

dates the OEHHA March 2015 guidance, in which OEHHA again recommended use of the higher differential breathing rates. (AR67089, 57862, 57984.) Despite this, the City disingenuously implies that because the second OEHHA guidance on this topic was issued after the Notice of Preparation of the SEIR (albeit before issuance of the Draft SEIR), that current science regarding differential children's breathing rates was not well-established. (AR3701.)

Using current breathing rates can approximately double the calculation of excess cancer risk for children for some TAC sources, compared to using out-of-date breathing rate assumptions (AR 57741, 57756-57759, 67088-67090), and applying current breathing rates to the SEIR's data for child and adult receptors at Hearst Tower and child receptors at the UCSF Hospital shows that excess cancer risk from project-specific TACs would materially increase. For example, risk for a child resident of the Hearst Tower from arena-related sources would increase 71%, from 18 to 31 excess cancers. (AR 67089.) The SEIR did not calculate the cumulative non-project background risk using current breathing rate assumptions, and so materially understates total risk that may exceed the 100 excess cancer cumulative threshold for some receptors. (AR67090.)

The SEIR also argues that air districts may not always adopt OEHHA guidance in a timely way, that the San Joaquin Valley Air Pollution Control District responded to the new breathing rates by increasing its threshold of significance to one that is less stringent than OEHHA recommends, and that because the analysis in the SEIR is consistent with the methods previously used to determine existing risks it "represents a valid conservative estimate of incremental health risk." (AR3701.) These rationales fail. That BAAQMD has not revised its guidance is irrelevant to the substantive issue raised: actual risk to children. The facts relating to children's breathing rates determine the impact, not whether or when BAAQMD incorporated these facts into a guidance document..

The Alliance's air quality expert raised a substantive issue regarding the reliability of the data on children's breathing rates used to determine TAC risks. The SEIR's response is not a good-faith reasoned analysis. The failure to respond to responsible comments from experts regarding analytic parameters with reasoned analysis, along with mischaracterizations of the currency of those parameters, result in a failures to meet CEQA's disclosure obligations. (*Berkeley Keep Jets Over the Bay Committee, supra,* 91 Cal.App.4th 1344, 1367.) A revised EIR should analyze air quality using current science.

Noise Impacts. In its analysis of noise impacts, the SEIR uses thresholds of significance that are based on legal errors, which is an error of law reviewed de novo.[3] The errors include assuming that compliance with non-CEQA regulatory standards assures impacts will be less-than-significant; failing to measure the significance of the proposed arena's incremental impacts against existing "baseline" conditions; and failing to tie the SEIR discussion to impacts on human health.

For Impact NO-1 (construction) and Impacts NO-5 and C-NO-2 (incremental and cumulative impacts, respectively, of arena operations) the SEIR uses several thresholds of significance that acoustic engineer Hubach describes as "ambient plus increment" because they determine the significance of an impact based on how much the project will cause ambient noise levels to increase. (AR50633.)

For construction noise, the "ambient plus increment" threshold of significance is whether the "increase in noise levels over existing conditions would be less than 10 dBA." (AR 1324-25, 1330.) The SEIR finds that "[p]eak cumulative construction activities would occur during a 3-month period in 2015–2016 and during this time, the increase in noise levels over existing conditions would be less than 10 dBA (without mitigation). All other periods of construction would similarly be under 10 dBA. Therefore, this impact would be less than significant." (AR 1330.) This conclusion is based on Table 5.3-8, which shows that all three receptors chosen for analysis have pre-existing ambient noise levels that are very loud already (*i.e*., Madrone Residential Tower is at 70.1 dBA (hourly Leq), Hearst Residential Tower is at 71.2 dBA (hourly Leq), and UCSF Hospital is at 67 dBA (hourly Leq).)

The SEIR finds the noise impacts of arena-related *traffic* increases to be "less-than-significant" at some locations and "significant and unavoidable with mitigation" at other locations. (AR1343.) The SEIR finds the noise impacts of arena-related *crowds* gathered at the Third Street light rail station to be "less-than-significant" at the UCSF Hospital receptor but "significant and unavoidable with mitigation" at the nearby Hearst Tower receptor. (AR1344-45, AR 3988-89.)

The SEIR uses "ambient plus increment" thresholds of significance for both operational traffic and operational crowd noise. For operational traffic noise "significance is determined by comparing the increase in noise levels (traffic contribution only) to increments recognized by Caltrans as representing a perceptible increase in noise levels" namely, where "the ambient noise level is 65 dBA DNL or less, the significance threshold applied is an increase of 5 dBA or more," and "where the ambient noise level

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

exceeds 65 dBA DNL, the significance threshold applied is an increase of 3 dBA or more." (AR 1326.) For operational crowd noise, the "ambient plus increment" thresholds are "noise increases of 8 dBA (for noise generated by commercial uses) over existing ambient levels and any applicable restrictions of the City's noise ordinance and Police Code." (AR 1326.)

Both the construction and operational "ambient plus increment" measurements ignore the severity of existing noise levels and only look to the "de minimis" nature of the arena's own effects. As a result, these thresholds fail to measure the arena's incremental impact against existing baseline conditions and discount the severity of pre-existing noise levels, treating them as irrelevant to whether the incremental change caused by the arena is "significant." This analytic approach violates CEQA.[4] Using "ambient plus increment" thresholds where existing noise levels are already high "disregards the fact the project will make severe conditions worse" and "results in an unsustainable gradual increase in ambient noise. It is a formula for ever-increasing noise levels because each new project establishes a new, higher, baseline; then when the next project is approved, the incremental change will be added to the new baseline." (AR4222.)

The incoherence of this methodology is shown by its results, as shown in Table 5.3-9. (AR 1341). For example, Third Street between South Street and China Basin Street at Weekday Peak Hour the existing ambient noise for traffic is 69.1 dBA and the increment added by project related traffic is 0.7 dBA, resulting in operational noise of 69.8 dBA. The SEIR finds this less-than-significant. But at Illinois Street between Mariposa Street and 20th Street on Saturday evenings, the existing ambient noise for traffic is 54.7 dBA and the increment added by project related traffic is 7.2 dBA, resulting in operational noise of 61.9 dBA. The SEIR finds this impact to be "significant," even though it is 7.9 dBA less than the purportedly "less-than-significant" impact on Third Street! The reason for this illogic is the "ambient-plus-increment" threshold is based on whether and how "perceptible" the increase is, rather than whether the resulting noise level is harmful to human health and welfare. It may be easier to hear the increase from 54.67 to 61.9 dBA, but the increase from 69.1 to 69.8 dBA results in more overall harm to human health and welfare.

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[4] *CBE v. Resources Agency, supra,* 103 Cal.App.4th 98, 120 ["The relevant question ... is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether 'any additional amount' of effect should be considered significant in the context of the existing cumulative effect. In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant;"] *Kings County, supra*, 221 Cal.App.3d at 721.)

The prejudicial effect of these thresholds where they result in *less-than*-significant findings is obvious—there is no "alarm bell" and no mitigation occurs. The prejudicial effect of these thresholds where they result in "significant and unavoidable with mitigation" findings is less obvious, but just as important. While these findings concede that impacts are significant in certain locations, they understate the severity of the significant impact. For example, at Illinois Street between Mariposa Street and 20th Street on Saturday evenings, the existing ambient noise for traffic is 54.7 dBA and the increment added by arena-related traffic is 7.2 dBA, resulting in operational noise of 61.9 dBA. (AR1341.) Since no information is provided as to how severe this significant impact is in terms of human health and welfare, the SEIR implies to decision-makers and the public that the only portion of this noise that is "significantly adverse" is the 2.2 dBA portion, *i.e.*, the portion of the increase above the 5 dBA threshold. This is misleading. As a result, the SEIR fails to provide essential information for decision-makers to use in deciding whether to accept this harm by approving the project based on overriding social and economic benefits.

As noted, the SEIR uses ambient-plus-increment thresholds borrowed from the Federal Transit Administration and Caltrans.[5] But an EIR may not simply assume that compliance with regulatory standards ensure that impacts are less-than-significant; agencies must conduct their own analysis of whether an impact is significant. (*See, e.g., Ebbetts Pass Forest Watch v. California Department of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 957 [error to conclude that compliance with pesticide restrictions precludes significant impact]; *Amador, supra*, 116 Cal.App.4th 1099, 1109 ["in preparing the EIR, ... the fact that a particular environmental effect meets a particular threshold cannot be used as an automatic determinant that the effect is or is not significant"]; *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342 ["A threshold of significance is not conclusive."].)_

Moreover, the SEIR's ambient-plus increment thresholds are not tied to effects on human health and welfare, also in violation of CEQA.[6] The SEIR refers to the World Health Organization (WHO) as "perhaps the best source of current knowledge regarding the health effects of noise impacts." (AR1311.) The DSEIR also cites WHO's *Guidelines for Community Noise* and its thresholds for adverse effects of

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[5]The SEIR implies, but does not directly assert, that this "10 Dba above ambient standard" is used by the Federal Transit Administration. (AR1325.)

[6] *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219 (*Bakersfield Citizens for Local Control*) ["Guidelines section 15126.2, subdivision (a) requires an EIR to discuss, inter alia, "health and safety problems caused by the physical changes" that the proposed project will precipitate"].

noise on people, as follows: "In contrast to many other environmental problems, noise pollution continues to grow and it is accompanied by an increasing number of complaints from people exposed to the noise. The growth in noise pollution is unsustainable because it involves direct, as well as cumulative, adverse health effects." (AR16906, 16908.)

As discussed by acoustical consultant Frank Hubach:

> WHO's night-time standard for sleep disturbance inside bedrooms is 30 dBA, and outside bedrooms with 'window open (outdoor values)' is 45 dBA. WHO's night-time and daytime standard for 'speech intelligibility and moderate annoyance' for inside dwellings is 35 dBA. For outdoor living areas, WHO's daytime and evening standard for moderate annoyance is 50 dBA and for serious annoyance is 55 dBA.

(AR4221.) Yet, despite citing the WHO Guidelines, the SEIR fails to use these standards as its thresholds of significance, and finds that "ambient plus project" noise levels much higher than the WHO's standards for harmful noise are less than significant.

Another human health and welfare based standard is provided by the State of California; which sets "an interior performance standard of 45 dBA from exterior noise sources." (AR1317.) The SEIR does not tell us which buildings in the area meet this standard. (AR1315-1316.) However, the Alliance pointed out that "Table 5.3-8 shows that all three receptors chosen for analysis will add construction noise to pre-existing ambient noise levels that already exceed the health and welfare based standards…" (AR4222.) Since the arena's noise will exceed health and welfare standards when added to background or ambient noise, the impact is significant even if it does not violate the Police Code.

Even the San Francisco ordinance provides noise standards that are tied to effects on human health and welfare. The ordinance limits noise levels on nearby residents to less than 45 dBA at night and 55 dBA during the day. But this provision of the ordinance only applies these regulatory limits to "fixed" noise sources (*e.g.*, permanent back-up power generators), and does not apply them to project construction or operational activities where the noise sources are mobile and temporary—assuming the 26-month construction period is considered temporary. (AR1320.).

The SEIR unlawfully failed to use thresholds of significance tied to human health impacts, and its conclusions as to the significance of noise impacts is not supported by substantial evidence.

Water Quality Impacts.

i. The SEIR Fails to Assess Wastewater Treatment Infrastructure

The SEIR concedes that the arena's cumulative wastewater flow, in combination with other approved projects, will exceed the Mariposa Pump Station's capacity. Therefore, the arena will have a significant and unavoidable impact caused by "the construction of new wastewater treatment facilities or expansion of existing facilities, the construction of which could cause significant environmental effects." (AR1458-1465.) But the SEIR's analysis of impacts is inadequate because it fails to disclose the nature and severity of the potentially significant impacts of building these new wastewater treatment facilities. (*Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 396 (*Laurel Heights 1*).

The SEIR generally describes the new wastewater facilities that might be built, but explains the resulting significant impacts in the only the vaguest possible terms:

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

(AR1459.) The SEIR then vaguely suggests that these impacts could be mitigated to less than significant levels by with "typical" mitigation measures:

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

(AR1459.) CEQA requires that the SEIR fully describe the arena project, including its "reasonably foreseeable consequence" of building additional wastewater treatment facilities, and include an "analysis of the environmental effects" and mitigation to reduce them. (*Laurel Heights I, supra*, 47 Cal.3d at 396.)

The SEIR makes a legal argument that it would be unreasonable to require more detail regarding the environmental impacts of building new infrastructure because "where future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation

as to future environmental consequences," citing case law such as *Lake County Energy Council v. County of Lake* (1977) 70 Cal.App.3d 851, 856 (*Lake County*). (AR3756.)

But *Lake County* and similar cases declining to require more detailed analysis of the impact of future activities involve facts where it was impossible to gather enough information to do so until the initial activities were completed, and where the lack of information was not the result of deliberate inaction by the lead agency. In Lake County, the drilling of exploratory geothermal wells was a prelude to commercial development of geothermal power. Whether commercial development would occur at all was "contingent" on the outcome of the test wells. The instant case is distinguishable on all three grounds. Here, the need for new infrastructure is certain, not contingent. Also, the reasons the sponsor did not have specific future plans in *Lake County* was because it needed the information to be developed by the test wells to create future plans. Here, building the arena will not generate any information necessary to develop wastewater infrastructure plans. In addition, the lack of specific plans for building wastewater is the result of inaction by the lead agencies.

The SEIR's contention that "[f]uture improvements in the SFPUC's wastewater system are beyond the project sponsor's control" (AR3756-57) is inadequate because the City and GSW are partners in this endeavor. Where it is advantageous, the SEIR assumes the City will support the arena by actions over which the GSW owners have no control, e.g., comply with its NPDES permit, provide transportation infrastructure to handle the crowds, etc. Indeed, City agencies, including OCII, are named as responsible parties in dozens of mitigation measures identified in the proposed Mitigation Monitoring and Reporting Program. (AR692-696, 698-700, 702-703, 710-713, 718-721, etc.) But here, the SEIR takes an inconsistent position, implying that the City has no control over expansion of the sewer system. "A finding by a lead agency under Public Resources Code §21081(a)(2), disclaiming the responsibility to mitigate environmental effects is permissible only when the other agency said to have responsibility has exclusive responsibility." (*City of Marina, supra*, 39 Cal.4th at 366.)

The Responses to Comments in the SEIR also argues that the arena is not solely responsible for the need for new infrastructure. (AR3756-57.) This is immaterial because it is well settled that if a CEQA project will partially contribute to a significant impact, the agency may mitigate the impact by requiring all contributors to pay their own "fair share" into a fund dedicated to mitigating the impact. (Anderson, supra, 130 Cal.App.4th at 1187.)

ii. The SEIR Fails to Assess the Interim Water Quality Impacts of Exceedance of Wastewater Treatment Capacity

The absence of a plan to handle increased wastewater flows associated with the project also affects water quality in the Bay, but the SEIR fails to assess this impact. The SEIR concedes that future wastewater flows could "exceed the pump station capacities before the needed wastewater system improvements could be completed" but it dismisses the water quality implications because "it is assumed that the SFPUC would make internal operational or piping changes to accommodate the additional flows in the interim in order to remain in compliance with RWQCB permit requirements" and "approval by the RWQCB would ensure that water quality of the Bay would be protected during the interim period." (AR1460.) This remarkable passage indicates the City will approve construction of the arena without ensuring the construction of the additional, adequate, sewage treatment capacity it needs. This is the opposite of responsible planning.

Moreover, the City is apparently poised to take this action based on several unsupported assumptions. First, the SEIR assumes, without discussion or evidentiary support, that interim modifications will not have a significant effect on the environment. Second, the SEIR assumes that the project's wastewater impacts on the Bay will only be interim until the SFPUC builds or expands permanent new wastewater treatment facilities; and that in this period, the RWQCB will mitigate any interim impacts to less than significant.

But there is no evidence supporting the assumption that arena wastewater can be treated to avoid significant adverse effects on Bay water quality before the SFPUC builds or expands permanent wastewater treatment facilities. Nor is there evidence that RWQCB regulation during any purported interim period would avoid significant adverse effects on Bay water quality. Nor is there evidence as to how long this period will last, or how many other projects that will cumulatively exceed the Mariposa Pump Station's capacity will commence operations during the same time period. By this approach, the City abdicates its legal responsibility under CEQA to identify significant project effects, to identify mitigation measures that would substantially reduce those effects, and to adopt all feasible mitigation measures that would substantially reduce those effects. (See Guidelines, §§15126.2, 15126.4.)

The Alliance commented that the SEIR's heavy reliance on City compliance with its NPDES permit to ensure the arena's combined stormwater and sewage impacts are less than significant is an unsupported assumption, and requested that the City support this assumption with evidence. (AR50326.) The SEIR simply repeats this unsupported assumption many times (AR1518, 3874, 3876), and fails to

support it with evidence. Therefore, the Alliance gathered that evidence, and it shows the City has a continuous, consistent, and pervasive pattern of violating its NPDES permits. (AR58335-58343 [summary of NPDES violations], 58344-58510 [details of violations].) Therefore, the SEIR's assumed basis for finding water quality impacts less-than-significant is false.

iii. The SEIR Fails to Assess the Long-Term Water Quality Impacts of Exceedance of Wastewater Treatment Capacity

The DSEIR evaluates the impact of Combined Sewage Discharges ("CSDs" or "CSOs") to the Bay that exceed treatment capacity of the Mariposa Pump Station due to the combination of increased stormwater flows combined with sewage wastewater flows. The DSEIR uses two thresholds of significance, one for "wet weather flows" and one for "effluent discharges." (AR1515.) Both thresholds of significance assume that compliance with the City's NPDES permits will avoid significant impacts and that the City will in fact comply with its NPDES permits. As discussed above, both assumptions are unsupported; the first assumption is a legal error and the second assumption is rebutted by evidence.

The SEIR discloses that incompletely treated "overflow" CSD's occur periodically because of lack of capacity at the Mariposa treatment plant, and that the City's NPDES permits allow up to 10 such discharges per year. (AR1452) The threshold of significance for "wet weather flows" only looks at "frequency of combined sewer discharges above the long-term average" and ignores increases in quantity and duration of overflows. (AR1519-1521.)

The SEIR found that the discharge of "average flows from the proposed project in combination with the existing average flows in the drainage area" would not increase "the frequency of CSDs" but the volume of the CSDs would increase from 5.34 to 5.63 million gallons and the duration would increase from 17.2 to 17.3 hours. (AR1520.) The SEIR concluded that this impact is less than significant because it defines "significance" solely in terms of the number of CSD events and compliance with the City's NPDES permit, regardless of the quantity of sewage discharged, stating: "Because average and peak wastewater flows from the project site would not increase the frequency of CSD events from the Mariposa sub-basin and would be consistent with the requirements of the NPDES permit, project level water quality impacts related to contributions to an increase in CSD frequency would be less than significant." (AR1520, 1521.) The SEIR makes the same finding for the project's cumulative impact based on the same evidence and rationale. (AR1520, 1521.)

Bu the SEIR cannot merely reference a project's compliance with another agency's regulations; lead agencies must conduct their own fact-based analysis of project impacts. The starting point for

assessing whether the project's contribution of additional CSD's is "cumulatively considerable," is the existing condition of San Francisco Bay. The SEIR says very little on this topic. The almost 20-year old 1998 Mission Bay FSEIR provides some information. (AR13307, 13312-13.) These pages of the 1998 EIR show the existing environmental harm (or "preexisting cumulative effect") is severe. The arena project would make it worse.

In sum, the SEIR's finding that cumulative CSD impacts on Bay water quality are less-than-significant is based on two legal errors: (1) the exclusion of CSD quantity from its threshold of significance, which reflects the "de minimis" and "ratio" rationales rejected in *Kings County, supra*, 221 Cal.App.3d at 721; and (2) the Draft SEIR's reliance on another agency's regulatory standards (i.e., the NPDES permit) to determine significance under CEQA.

The Alliance commented that the SEIR's threshold of significance for the effect of untreated wastewater discharges to the Bay, which consists of limiting such discharges to 10 per year, ignores the quantity and duration of such discharges. (AR50309.) The Final SEIR merely outlines the work the City must do under its own Combined Sewer Overflow Control Policy to prevent wastewater from degrading Bay water quality. (See AR3883). This is good work, but it is non-responsive to the Alliance's comment. The fact that these measures are the best the City can, or is legally required, to do is not relevant to whether the impact is significant. It may be relevant to whether further mitigation of the impact is feasible or effective, but these considerations do not affect the impact's status as significant.

The City appears to reject the Alliance's comment that the SEIR ignores duration and quantity, not just frequency, of the 10 discharges per year on grounds the NPDES permit does not address the duration and quantity of these discharges. (AR3882-83.) But the issue here is whether impacts on Bay water quality are significant. CEQA does not allow the use of the NPDES permit terms as an absolute proxy for that determination. The SEIR also asserts that all wastewater is treated. (AR3884.) This is beside the point because the City anticipates and is allowed by its NPDES permit up to 10 discharges per year of wastewater subject to only primary, rather than secondary, treatment. (AR3883.)

A peremptory writ should issue requiring that the revised EIR address water quality impacts.

Greenhouse Gases. The arena project would result in hundreds of thousands of tons of greenhouse gas ("GHG') emissions from the construction and operation of the massive arena and two 11-story office buildings. (AR8477.) Yet the SEIR fails to attempt to quantify GHG emissions. (AR1418-21.) Instead, the City claims that the project's compliance with a local GHG reduction plan results in a less-than-significant impact. (AR3727.) In addition, the SEIR characterizes its insufficient

GHG reduction mitigation measure as part of the project description. (AR3729.) As a result of these failures, the GHG analysis for the project is incomplete and must be revised.

Projects certified under AB 900 as "Leadership Projects" must demonstrate that they will not increase net GHG emissions. (CEQA, §21183(c).) Over the next 30 years, the GSW owners have admitted that the arena would emit at least 200,000 tons of carbon dioxide (CO_2), equivalent to putting an additional 42,000 cars on the road. (AR8477; 79390 [EPA estimates re car emissions]; *see also* AR51468 [Sierra Club comments re flawed GHG accounting].) The GSW owners' Leadership application commits to the purchase of GHG emissions offsets to attain GHG emissions neutrality but does not commit to any minimum standard for the offsets. (AR78072; 8569-70.) For as little as $1 per ton of GHG emissions offsets —approximately $200,000—the GSW owners could call this 80,000-seat sports arena "GHG neutral." (*See* AR8477, 78014, 78071.)

That, however, is irrelevant to compliance with the mandates of CEQA.

i. Compliance with San Francisco's GHG Checklist is Insufficient

CEQA directs agencies to "make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate, or estimate the amount of greenhouse gas emissions resulting from a project." (Guidelines, §15064.4(a).) The City did not attempt to measure the arena's GHG emissions in the SEIR, contending that its compliance with the "SF GHG Checklist" sufficed. (AR3727 ["If the project is consistent with the City's Greenhouse Gas Reduction Strategy, then the project's impacts related to GHG emissions would be considered less than significant"].) The City is mistaken.

While agencies have discretion to choose the appropriate methodology to quantify GHG emissions, they must make a good faith effort to measure them. (*CBD v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 217 (*CBD*); *see also* Guidelines §15064.4(a).) Agencies may rely on geographically-specific GHG emission reduction plans to simplify the evaluation of project-specific contributions to cumulative GHG emissions, if the plans are both "sufficiently detailed and adequately supported." (*CBD, supra*, 62 Cal.4th at 230; Guidelines §15183.) The City's GHG Checklist is neither.

First, while the City claims that projects complying with the GHG Checklist will not significantly contribute to GHG emissions, neither the GHG Checklist's source document "Strategies to Address Greenhouse Gas Emissions" ("*Strategies*") nor the Checklist itself explain how many measures must be adopted to be compliant. (AR25313-28.) Next, while *Strategies* details all applicable measures, it does not quantify the anticipated reduction in GHG emissions from each. (*See, e.g.* AR25167-25175 [describing 10 individual measures within the category "Trans-C" but providing only one estimate of a

cumulative reduction of 10,000 tons per year of CO_2 emissions from *all* "Trans-C" measures].) Although the City indicated which measures the project would implement (AR47527-42), the GHG Checklist provided no indication of the GHG emissions that could be avoided by implementing those measures. In addition, nothing in the GHG Checklist or *Strategies* provides data or calculations that document or quantify the GHG emission reductions to be achieved.

The City claims that *CBD* does not apply because, unlike the plan relied upon in *CBD*, the GHG Checklist is intended for use at the project level to ensure that the City complies with the statewide GHG reduction mandates of AB 32. (AR6396-97.) Assuming that is accurate, the City misses the point that a project may only rely on plan compliance as mitigation when that plan is "sufficiently detailed and adequately supported." (*CBD, supra*, 62 Cal.4th at 230.) Because the GHG Checklist provides insufficient detail to extrapolate even a rough estimate or range of GHG emissions that the project could avoid by complying, the City could not rely upon it to find that cumulative impacts on GHG emissions were less-than-significant. (*Ibid.*)

iii. The GHG Checklist must be adopted as a Mitigation Measure

Despite the City's attempt to characterize compliance with the GHG Checklist as a project component (AR67), it is actually a mitigation measure. Where an EIR compresses the analysis of impacts and mitigation measures, it violates CEQA. (*Lotus*, *supra*, 223 Cal.App.4th at 655-56; see discussion *ante* at 13.) Similarly, as discussed above, the SEIR fails to estimate the GHG emissions of the arena. The City simply pronounced that GHG impacts would be less-than-significant "based on the project's consistency with the City's [GHG] Reduction Strategy"—and required no mitigation. (AR3729.) *Lotus* recognized that this type of shortcut is "not merely a harmless procedural failing…[it] subverts the purposes of CEQA by omitting material necessary to informed decisionmaking and informed public participation." (*Id*. at 658.)

Environmental impacts must be analyzed independently of mitigation measures, to allow the agency and the public to consider what mitigations will be the most effective. (*Ibid*.) Here, the City skirted that process by summarily declaring that the Checklist measures would be sufficient to limit GHG emissions to a less-than-significant level. (AR1418, 6679.) Measures in the GHG Checklist require that the project provide bicycle parking, ensure that fireplaces comply with the Housing Code, plant 79 trees, and impose on-site composting. (AR47546.) While these measures may be beneficial, without an estimate of the project's GHG emissions and a calculation of the reduction in emissions

expected from implementing the GHG Checklist on this site, the City's determination that GHG emissions from the project are in fact reduced to a less-than-significant level is unsupported.

There has been no quantification of the arena project's GHG emissions, or of the mitigation provided by the GHG Checklist. As a matter of law the SEIR fails to adequately inform the public, and its less-than-significant determination for GHG emissions is not supported by substantial record evidence. The revised EIR must assess impacts and identify feasible mitigation.

Wind Impacts. The SEIR determined that increased wind caused by the large arena buildings would be significant if substantially affecting public areas. (AR427.) The SEIR then recharacterized public areas on the project site as private and classified wind impacts as insignificant. Due to this mistaken characterization, no mitigation for wind impacts was identified or imposed.

The SEIR measured wind effects both on- and off-site. (AR1428-42.) Although testing revealed that project buildings would result in substantial wind effects at three on-site locations, they were discounted as "publicly accessible but private recreational areas." (AR3734.)

The SEIR explained that on-site open space should count toward the 1998 Plan's requirement to ensure 0.46 acres of open space for each acre of development area, and "directly serves the project's demand for recreational facilities." (AR3742) When proposing the project, GSW had described its goals "to connect new public spaces to the larger neighborhood, and to serve as a local and regional amenity," with landscape design "maximizing the quality of public space amenities for visitors and community members…" (AR513.) The project application described the proposed Third Street Gardens and Plazas as "independent public space" and the Main Plaza as "a quality public space for the local neighborhood." (AR513.)

The SEIR thus inconsistently characterized project open space as private vis-à-vis assessing wind impacts, while "public" for other purposes. This is self-serving and unlawful.

Testing reveals that the arena would cause significant wind impacts in on-site areas described as public. The City attempted to characterize the on-site wind impacts as less-than-significant despite exceeding the SEIR's chosen significance threshold. (AR3734) This conclusion is thus unsupported by the record. Because of the significance of wind impacts, the SEIR was required to identify mitigation measures and assess their feasibility. That did not occur during the EIR process, and an agency may not defer identification and adoption of mitigation measures. (*Communities for a Better Environment v. City of Richmond, supra,*184 Cal.App.4th 70, 94.) The SEIR must be revised to address wind mitigation.

3. The SEIR Failed to Analyze a Range of Reasonable Alternatives

Because the arena has significant impacts, it cannot be approved if feasible alternatives could reduce impacts and still accomplish most objectives. (CEQA, §§ 21002, 21081.) The California Supreme Court reiterated this substantive mandate of CEQA in *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105. The Supreme Court held that "[u]nder CEQA, a public agency must also consider measures that might mitigate a project's adverse environmental impact, and adopt them if feasible," due to "CEQA's substantive mandate that public agencies refrain from approving projects for which there are feasible alternatives or mitigation measures …" (*Id*. at 123-34.)

Appropriately, EIRs explore ways for a project to meet as many applicant goals as possible while protecting the environment to the greatest extent feasible. EIRs must evaluate project alternatives that accomplish most basic project objectives. (Guidelines, §15126.6 (a).) The courts and the Guidelines require that EIRs analyze a "range of *reasonable alternatives* to the project, or to the location of the project" sufficient "to permit a reasoned choice" of alternatives "that would avoid or substantially lessen" any of the project's environmental impacts. (Guidelines, §15126.6 (a), (c), (f), italics added.)

In considering whether an EIR's range of project alternatives complies with the "rule of reason," CEQA anticipates consideration of an off-site alternative: "The key question and first step in analysis is whether any of the significant effects of the project would be avoided or substantially lessened by putting the project in another location. Only locations that would avoid or substantially lessen any of the significant effects of the project need be considered for inclusion in the EIR." (Guidelines, §15126.6 (f)(2)(A).) In light of the admitted and wide-ranging significant impacts of the proposed arena, it is particularly critical that the EIR consider a potentially-feasible alternate site or sites "… capable of avoiding or substantially lessening significant impacts of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly. …" (Guidelines, §15126.6 (b).) Indeed, an alternate location should be an important focus of EIR analysis.

Instead, the EIR's Alternatives Analysis (AR1543-1657, 3952-3963) proposed just one off-site alternative, Alternative C, at Piers 30-32 and Seawall Lot 330 — already known to be infeasible. (AR1609.) The GSW owners pursued and after considerable investment abandoned their earlier plan to site the arena at this location. OCII knows that this is not a feasible site and its selection as the sole off-site alternative location fails to meet the rule of reason required for EIR alternatives. CEQA is not a game; the EIR must select and study another location for the Event Center in order to fulfill its duty to provide good-faith analysis of a range of potentially-feasible alternatives, including an alternate location.

The Alliance suggested one site farther removed from AT&T Park that would avoid the overlapping Giants game traffic, along with providing a number of other environmental advantages. (AR6266-6287.) As discussed in correspondence and reports, the site is large enough to be configured away from environmental problems via flexible design, and no fatal flaws have been identified. The Pier 80 site has some environmental impacts comparable to the Mission Bay South site, but also provides significant environmental advantages due to the lack of occupied habitat, wetland and water features, and the lack of documented hazardous waste in the soils. The Pier 80 site — or another potentially--feasible alternate site — must be thoroughly vetted in a revised EIR in order to comply with CEQA.

C. The Arena Approval Failed to Comply with Proposition M

In 1985, San Francisco adopted Planning Code section 320 *et seq.* to limit office development. In 1986, City voters adopted an initiative that is still referred to as Prop M, which amended and strengthened this ordinance. (BOA594.) The voters' avowed purpose was to close "loopholes" allowing run-away office development and the "Manhattanization" of San Francisco. (BOA595-97.) As amended, the Planning Code controls growth by limiting approvals of new office space to 950,000 new square feet per year. Any unallocated space in a given year rolls over to the next year. (RJN, § 321(a)(1).)

In 1998, the Planning Commission observed that build-out under the 1998 Plan would add a total of about 6 million leasable square feet in Mission Bay South for "mixed office, research and development and light manufacturing uses." (BOA0398, ¶ 6.) The Commission subsequently allocated about 1.1 million square feet of office space for projects in the 1998 Plan area. (BOA0407 Table 1.)

What is now the GSW owners' site was acquired by Salesforce.com in November 2010 with an allocation of 677,000 square feet of office space. (BOA0469.) Five years later, to accommodate the arena, the Commission confirmed the 2010 Prop M allocation of 577,000 square feet of office space for the project's two office towers. However, the Commission did not account for an additional 25,000 square feet of office space to be located in the arena building. (BOA0151; BOA0164; BOA0345-6.)

The Alliance objected to the Commission's approval of the office space allocation for the 25,000 square feet of office space approved in the arena building without Prop M compliance. (BOA0353, BOA0204-06.) The City disagreed on multiple grounds.

First, the City contends that it does not need a Prop M allocation for the arena office space because the arena building is not an "office development." (BOA1406.) "Office development" is defined in the codification of Prop M as "construction, modification or conversion of any structure or structures *or portion of any structure or structures*, with the effect of creating additional office

space…." (Section 320(g), italics added.) The arena offices fall under that definition. Even without the arena offices, the project—in its entirety—is also an "office development" because it involves the "construction" of "structures" that create "additional office space." Here, the Commission determined that "the South Street Building and the 16th Street Building are part of the Event Center Project." (BOA0149.) The project as a whole is inarguably subject to Prop M.

The City also argues that "management office space within and supporting the 750,000 square foot event center use is a minor accessory use to the event center use and not a separate office component ..." (BOA0149.) That argument fails for the same reason as the City's first argument: the arena offices are to be located in a "portion" of a "structure." (Section 320(g).) Further, the City can point to nothing in the 1998 Plan or Planning Code that provides for any exemption from Prop M for a "minor accessory use" even if the arena offices could qualify as such an undefined use.

The City then contends that office space in the arena building is exempt from regulation under Prop M because the principal use of the building—*i.e.*, for professional basketball games, conventions, and concerts—is "retail" and is excluded from the definition of office space in section 320. The City argues that 25,000 square feet of office space in the arena building is exempt as "accessory" to the retail use of professional basketball games, conventions, and concerts. (BOA1404.)

Assuming, arguendo, that the arena building's principal uses could be considered "retail," which they are not, exclusion of the office space from regulation under section 321 as "accessory" to that retail use is erroneous as a matter of law—because Prop M does not provide any such exclusion. "Where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed." (*Wildlife Alive v. Chickering* (1976) 17 Cal.3d 190, 195; *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011, 1023.) Prop M provides a number of exclusions from the definition of office space that are exempt from regulation, such as actual retail use, repair, wholesale shipping, receiving and storage, medical services, and design showcases. (Section 320(f).) Uses "accessory to retail" are not on the list. (*Ibid*.)

The peremptory writ should issue set aside the approval of 25,000 square feet of arena offices.

D. The Place of Entertainment Permit Fails to Comply with the Police Code

The City abused its discretion in approving the place of entertainment ("POE") permit because the arena project does not adequately accommodate vehicle traffic, pedestrian traffic, and noise. The Police Code prohibits issuance of a permit absent substantial evidence in the security and noise plans submitted by GSW that the arena can accommodate vehicle and pedestrian traffic and provide for

orderly dispersal, the safety of persons and property, and prevent "emissions of noise… that would substantially interfere with the public health, safety and welfare or the peaceful enjoyment of neighboring property." (Police Code, §§1060.5(f)(2), (3), (4).) Here, the SEIR and CEQA findings confirm that the project cannot comply with the Code.

As a threshold matter, the Entertainment Commission failed to make independent factual findings of compliance with the Police Code, and instead bootstrapped the project's environmental analysis and findings as an apparent proxy. (AR65712-65714.) This was noted by BOA Commissioner Frank Fung in the appeal hearing:

> I'm, I'm trying to understand how your Commission made the determination of adequacy, all right, in, in response to these criteria, and it wasn't quite clear to me even when I read the transcript.

(BOA49.) Commissioner Fung further explained that the "environmental documentation is very extensive" but that the City's analysis of the Police Code requirements was "very weak." (BOA51.) Commissioner Fung voted against issuing the POE permit. (BOA19.)

The Entertainment Commission relied on the SEIR to determine compliance with the Police Code, and the CEQA review process established that the arena *would be unable to accommodate* the anticipated type and volume of pedestrian traffic. Resolution 15-154 found that the project would result in no less than ten significant and unavoidable impacts to roadway facilities (*i.e.*, "vehicle" traffic) and transit systems (*i.e.,* "pedestrian" traffic). (AR63510.) Such wide-ranging vehicle and pedestrian impacts provide *prima facie* evidence that the arena site cannot adequately accommodate the anticipated type and volume of vehicle and pedestrian traffic to meet the mandates of Police Code section 1060.5(f)(2).

The GSW owners' four-page Security Plan fails to ensure the safety of persons and orderly dismissal in the expected congestion and challenging conditions. The Security Plan does not address anticipated significant traffic and transit impacts at all, much less "provide[] for the orderly dispersal of individuals and traffic." For example, Impact TR-20 acknowledges the significant and unavoidable impact to the T Third line expected from the predicted 3,000 people who would be using the northbound line approximately 105 days per year. (AR3236). However, the Security Plan lacks information about security at the Muni T-Line platform transit stop and how orderly dispersal of these 3,000 people will be addressed. By failing to address this acknowledged significant impact, the record fails to support a finding that the Security Plan will provide for the orderly dispersal of individuals and traffic.

The same is true for noise. The SEIR shows that arena events would cause significant and unavoidable noise impacts. More specifically: "Noise levels generated by crowds prior to, during, and after events could result in a substantial increase in noise levels at the receptor adjacent to the northbound Muni T-Line transit platform, particularly during nighttime egress hours of 9 p.m. to 11 p.m., and this impact would be significant and unavoidable." (AR63510.) This finding and its supporting factual analysis (AR1320, 1344-1345) prove that the project lacks adequate safeguards to control noise. There is no evidence in the record establishing how this significant and unavoidable noise impact under CEQA is, as a factual matter, in compliance with the mandates of the Police Code to prevent "emissions of noise… that would substantially interfere with the public health, safety and welfare or the peaceful enjoyment of neighboring property." This is particularly true where, as here, the CEQA analysis specifically addresses the Entertainment Commission's authority to review, analyze and approve the project. (AR1344-1345.) Issuance of the POE permit is precluded under these facts.

While the BOA upheld the Entertainment Commission's approval of the POE permit on the Alliance's administrative appeal (BOA14), it is telling that the BOA felt compelled to issue extensive new factual findings to support its decision. (BOA14-16.) The additional findings, however, contain conclusory assertions and recite the various documents purporting to analyze issues without addressing the relevant facts noted above. (BOA14-16.) For example, the BOA finds that mitigation measures "regarding dust and noise … are imposed as conditions of approval." (BOA16.) This finding does not address the crowd noise conceded to be significant and unavoidable after implementation of all feasible mitigation measures. (AR63510.) The same is true for the balance of the BOA's findings. (BOA16.) While the BOA finds that the POE permit adequately addressed noise impacts because "[t]he Noise Control Plan and the Good Neighbor Policy are both imposed" (BOA16), there is no analysis in either document—both of which are a single page in length and substantively identical in content—to address how the crowd noise identified in the SEIR is minimized to a level that satisfies the Police Code standard. (Compare AR65793 [Good Neighbor Policy] with 65795 [Noise Plan].)

Reliance on the EIR's findings of significant impact does not conflate the standards of CEQA with those of the Police Code. Even if not dispositive as to ultimate findings under the City's Police Code, "an environmental document is an informational document." (*Guinnane v. San Francisco City Planning Commission* (1989) 209 Cal.App.3d 732, 742.) The SEIR reveals

significant project impacts to vehicle traffic, pedestrian traffic, and noise. The Entertainment Commission chose to rely on that factual analysis in considering the project's consistency with the Police Code. The Commission has not lawfully discharged its duty to prepare findings that "bridge the analytic gap between the raw evidence and ultimate decision or order" because it failed to explain how the arena met Police Code requirements when the SEIR's disclosure of significant, unavoidable transportation and noise impacts indicates otherwise. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.)

The Entertainment Commission violated *Topanga* by ignoring, rather than analyzing, "raw evidence" in the SEIR when it approved the POE permit. Substantial evidence does not support issuance of the permit and it must be set aside.

E. The Tentative Subdivision Map Approval was Unlawful

City Subdivision Code section 1432, subdivision (b), provides that "[t]he Director shall disapprove the proposed subdivision when the proposed subdivision is not consistent with the ... General Plan, subject to any decision on appeal by the Board of Supervisors." The arena subdivision map is not consistent with the General Plan because it violates City Planning Code section 321 and is inconsistent with the 1998 Plan zoning.

F. The Arena Public Subsidy Violates the Government Code

The City failed to comply with the mandates of Government Code. Section 53083 requires a noticed public hearing for any economic development subsidy, along with information about the subsidy's purpose, amount, start and end dates, estimated number of jobs created, the projected local tax revenue resulting from the subsidy, and a "description of the economic development subsidy, including the estimated total amount of the expenditure of public funds by, or of revenue lost to, the local agency." A "subsidy" is defined as "an expenditure of public funds or loss of revenue to a local agency" as well as loans or loan guarantees of $100,000 or more. (Gov. Code, §53083(g)(1).)

The arena's project description includes both a Transportation Management Plan (again, "TMP") and Transit Service Plan ("TSP"). (AR6139, 6150.) These plans qualify as public subsidies under section 53083 because they involve expenditures of City funds and loss of City revenue. The TSP includes an initial loss of General Fund revenue in the amount of $7,955,799 (AR61398 ("General Fund Capital Sources") and annual General Fund losses of $2,158,132 thereafter (AR61399 ("Total General Fund Sources"). The City also proposes to issue a bond in the amount of approximately $34.5 million to

cover additional initial capital construction costs specifically allocated to the arena (AR61396, 61398 ["Allocation to Project"]), which constitutes a "loan" to the GSW owners under Section 53083(g).

The City failed to comply with section 53083 for these massive subsidies. First, the City held no noticed public hearing for the subsidy as required by subdivision (b). The SFMTA's approval of the TSP never mentioned "economic development subsidy" nor Government Code section 53083, and did not provide the information required under that provision. (AR6134-6168.) Although the City purported to cure that defect after the fact, on November 6, 2015, that effort violated Section 53083(a) because it was not released "before approval" of the subsidy on November 3, 2015. (AR62466-62469.)

Second, the City refused to acknowledge that it was providing a subsidy to the GSW owners. (AR62466-62469 ["The Fund is not an economic development subsidy under the Statute"].) The City disingenuously claims that the TMP and TSP are not subsidies under Section 53083 because the expenditures "pay for certain public improvements and services in the vicinity of the Project that are intended to benefit the community at large." (AR62467-62468.)

To the contrary, the TMP and TSP are defined components of the project with the purpose and intent of mitigating project-related transportation impacts. (AR1167, 61395, 143711.) The City has a legal obligation to mitigate the impacts of the impactful arena project if feasible and proportional to the impact. (CEQA §§ 21002, 21002.1(a), 21004; Guidelines, § 15091.)

While the City may choose share the expense of the GSW owners' project mitigations, that public expenditure is still a subsidy. Acknowledgement of that fact is especially important to inform the public in light of Mayor Lee's public pronouncement that "… they are the only sports team in America doing all this with private funds, on private land, with *no public subsidy*." (AR53265.)

Conclusion

The Alliance respectfully requests that this Court grant judgment and issue a peremptory writ on all of the grounds here presented. While the arena project's judicial review is being expedited, the California Legislature granted the GSW owners' no exemption from meeting every mandate of CEQA and all other relevant legal protections.

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The peremptory writ should issue in the public interest, requiring a new revised EIR and compliance with all City ordinances, the Planning Code, Government Code, and Subdivision Map Act.

April 29, 2016

Respectfully submitted,

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PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to this action. My business address is P.O. Box 1659, Glen Ellen, California 95442.

On April 29, 2016, I served one true copy of:

Petitioners' Opening Brief

✓ By emailing a copy to counsel as listed below.

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I declare under penalty of perjury that the foregoing is true and correct and is executed on April 29, 2016, at Glen Ellen, California.

Susan Brandt-Hawley