SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

East Oakland Stadium Alliance et al Plaintiff/Petitioner(s) vs. City of Oakland, a municipal corporation et al Defendant/Respondent(s)	No. 22CV009325 Date: 09/08/2022 Time: 9:15 AM Dept: 23 Judge: Brad Seligman AMENDED ORDER re: Ruling on Submitted Matter

The Court, having taken the matter under submission on 09/02/2022, now rules as follows:

Pursuant to California Rules of Court, rule 3.2228, the court issues its decision, including a written statement of the factual and legal basis therefore, as follows:

Petitioners' Petition for Writ of Mandate is GRANTED in part and DENIED in part.

BACKGROUND

This writ proceeding involves three consolidated cases: East Oakland Stadium Alliance, et al. v. City of Oakland, et al., Case No. 22CV009325 (the lead case); Capitol Corridor Joint Powers Authority v. City of Oakland, et al., Case No. 22CV009309; and Union Pacific Railroad Company v. City of Oakland, et al., Case No. 22CV009330.

Petitioners filed verified petitions for writ of mandate on April 4, 2022, challenging the Oakland City Council's adoption of Resolution No. 89045 certifying the Environmental Impact Report ("EIR") for the Oakland Waterfront Ballpark District Project (the "Project") as well as the adoption of Ordinance No. 13681, under which the Board of Port Commissioners relinquished to the City Council all jurisdictional responsibilities to approve, permit, and administer Project approvals (the "Jurisdictional Ordinance"). The City Council certified the EIR on February 17, 2022 and adopted the Jurisdictional Ordinance on March 1, 2022.

Portions of the following background information are taken from the Petitioners' Opening Brief ("OB") and Respondents' Opposition Brief ("RB").

A. The Project

The City of Oakland (the "City") has been home to the Oakland Athletics (the "Oakland A's" or the "A's") for more than 50 years. (RB, p. 13.) After recent departures by the Oakland Raiders to Las Vegas and the Golden State Warriors to San Francisco, the A's are the City's last remaining pro sports team. (AR 56724.)

The Project includes a new, state-of-the-art, open-air, 35,000-person MLB baseball stadium, creating a vibrant waterfront destination. (AR 616, 730.) The Project also includes 3,000 residential units (including below-market, affordable units); 1.5 million square feet of commercial space; 270,000-square feet of retail, a 3,500-person indoor performance venue; 400 hotel rooms; and 18.3 acres of open spaces. (AR 406, 616.)

The Project will be developed in phases on a 55-acre site composed of the Charles P. Howard Terminal ("HT" or "Howard Terminal"). (AR 616.) The Project site "is bounded by the Estuary on the south; Jack London Square, an approximately 18-square-block, pedestrian-oriented mixed-use and entertainment area, to the east; the parallel Union Pacific Railroad (UPRR) tracks and Embarcadero West roadway on the north; and the heavy metal recycling center, Schnitzer Steel, and the Oakland Seaport lands on the west. The Project site sits approximately 0.5 miles southwest of Downtown, across I-880. The north shore of the City of Alameda is directly south of the Project site, across the Estuary." (AR 718.)

The Project is sponsored by the Athletics Investment Group, LLC dba The Oakland Athletics (the "Project Sponsor"). (AR 64420.)

B. The Environmental Review and Approval Process

On November 30, 2018, the City issued a Notice of Preparation ("NOP") for the Project. (AR 411, 11229, 2239-2247.) The City provided a 45-day public review period and held sessions to get input on the scope of the EIR. (AR 411, 7451-7638, 11229, 15179-15220.)

The City issued a Notice of Availability/Notice of Completion (NOA/NOC) of the Draft EIR ("DEIR") on February 26, 2021, announcing the availability of the Draft EIR for public review and comment. The NOA/NOC noticed a 45-day public review and comment period on the Draft EIR, starting February 26, 2021, and ending April 12, 2021, and the City subsequently extended the period an additional 15 days to April 27, 2021. (AR 11229.)

On December 17, 2021, the City released the Final EIR ("FEIR"), including responses to comments received on the DEIR. (AR 88483-88485, 411-412, 11221-15178 [FEIR].) On January 19, 2022, the Planning Commission held a public hearing and recommended certifying the EIR and approving the Grade Separation Alternative. (AR 15879-15913, 16815-16816.)

On February 17, 2022, the City Council held a public hearing on the EIR and a proposed ordinance, confirming that the City would assume jurisdiction to administer Project approvals in the Port area. (AR 15939-15940.) The Council certified the EIR and adopted CEQA findings for the Project with the Grade Separation Alternative. (AR 214-398, 406-585.) On March 1, 2022, the City Council adopted Ordinance No. 13681. (AR 399-405, 16418-16626, 16849-16865.) The next day, the City filed a Notice of Determination. (AR 1-4.)

C. Petitioners' Challenge

On April 4, 2022, Petitioners—(i) East Oakland Stadium Alliance, Pacific Merchant Shipping Association, Harbor Trucking Association, California Trucking Association, Schnitzer Steel Industries, Inc., and International Longshore and Warehouse Union (collectively, "EOSA")

(Case No. 22CV009325), (ii) Union Pacific Railroad Company ("UPRR") (Case No. 22CV009330), and (iii) Capitol Corridor Joint Powers Authority ("CCJPA") (Case No. 22CV009309) (collectively, "Petitioners")—filed verified petitions for writ of mandate.

The City certified the record of proceedings to the Court on April 12, 2022. The City, the Port, and AIG filed their answers on April 18, 2022. On May 31, 2022, this Court held a Case Management Conference and set a common briefing and hearing schedule in all three cases.

Non-party Communities for a Better Environment filed an Application to File Brief as Amicus Curiae and Brief in Support of Petitioners on August 16, 2022. At an August 19, 2022 hearing, the Court granted leave to file a response to the amicus brief, which Respondents The City of Oakland and City Council of the City of Oakland ("Respondents") filed on August 24, 2022.

REQUEST FOR JUDICIAL NOTICE

Petitioners filed a RJN for three documents. The court grants the request for Exhibit A to their Request, which is a BAAQMD document relating to emergency backup generators, which is unopposed. The court denies the requests for Exhibits B and C for reasons addressed below.

LEGAL FRAMEWORK

The California Environmental Quality Act ("CEQA") is intended to, and should be interpreted to, "afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (Sierra Club v. County of Fresno (2018) 6 Cal.5th 502, 511.) Thus, with narrow exceptions, CEQA requires a public agency to prepare an environmental impact report—or EIR—whenever it proposes a project that may have significant effect on the environment. (Ibid.)

"The basic purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect [that] a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (Ibid., internal quotations marks omitted].) An EIR is "an informational document" designed to "provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (Pub. Resources Code §21061.)

The standard of review in a CEQA case is abuse of discretion, and case law has articulated "a procedural issue/factual issue dichotomy." (Sierra Club, supra, at p. 512.) "Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, scrupulously enforc[ing] all legislatively mandated CEQA requirements, we accord greater deference to the agency's substantive factual conclusions. In reviewing for substantial evidence, the reviewing court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable, for, on factual questions, our task is not to weigh conflicting evidence and determine who has the better argument." (Ibid., internal citations and quotation marks omitted; Pub. Resources Code §21158.5.)) As described below, most of the challenges to the EIR raised in this

case are challenges to factual determinations made by Respondent. As such, substantial evidence analysis applies.

In order to attack a decision subject to CEQA, the alleged grounds for noncompliance must have been presented to the public agency, and the person attacking the decision must have raised some objection during the administrative proceedings. (Pub. Resources Code §21177(a).)

In 2018, the Legislature enacted AB 734—a special statute solely for the Project—which enacted Public Resources Code section 21168.6.7, authorizing the Governor to certify the Project for expedited judicial review if certain criteria are met. A preemptive challenge to the Governor's authority to certify this project was rejected in Pacific Merchant Shipping Assn. v. Newsom (2021) 67 Cal.App.5th 711. The Governor subsequently certified the project. (AR11232.)

Under AB 734 and the Governor's certification, the Project must meet building and transportation sustainability standards, achieve greenhouse gas neutrality as determined by the California Air Resources Board ("CARB"), reduce by 20% the collective vehicle trips by "attendees, employees, visitors, and customers" as compared to vehicle trips without a traffic management program, and offer a "comprehensive package of community benefits," such as job training, open space, and affordable housing. (Pub. Resources Code, § 21168.6.7, subd. (a)(3)(A)(i)–(v).)

DISCUSSION

A. EIR Analysis of Howard Terminal Displacement Impacts [Petitioners' Section C]

Petitioners argue that the EIR fails to adequately assess air quality and transportation impacts from displacement of existing uses at Howard Terminal, and that the EIR fails to assess other significant displacement impacts.

1. Air Quality and Transportation Displacement Impact

Petitioners argue that the EIR does not comply with CEQA insofar as fails to adequately assess the impacts from the displaced activities at Howard Terminal. Petitioners argue that the EIR (1) fails to disclose the lack of sufficient capacity at the Port to absorb displaced truck parking, and (2) improperly assumes that the Roundhouse or Oakland Army Base ("OAB") could absorb overflow, neither of which have sufficient capacity. Further, Petitioners argue that the EIR fails to analyze the reasonably foreseeable air quality and transportation impacts associated with relocation of truck parking "and other ancillary activities" at Howard Terminal, which Petitioners argue are not speculative. (OB, pp. 15-18.)

"If, after thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact." (Guidelines, § 15145; Concerned Citizens of South Central L.A. v. Los Angeles Unified School District (1994) 24 Cal.App.4th 826, 839, 841 [holding SEIR did not need to analyze impacts of residents displaced by project where relocation plans were unknown "so the impact on any one part of the . . . area is speculative at this point"].)

Further, automobile delay, parking, and traffic congestion are not considered significant impacts under CEQA. (Pub. Resources Code, § 21099, subd. (b)(2); see also id., § 21099, subd. (d)(1) [aesthetic and parking impacts are not considered significant impacts on the environment]; Citizens for Positive Growth & Preservation v. City of Sacramento (2019) 43 Cal.App.5th 609, 626.)

The EIR disclosed that all activities will be completely displaced and would need to relocate "to other locations within the Seaport (including the Roundhouse parking adjacent to Howard Terminal), the City, or the region where their uses are permitted under applicable zoning and other regulations." (AR 776-778, 11341.) The EIR identifies the Roundhouse and the OAB as potential relocation sites, noting that as part of the OAB redevelopment, the City and Port are required to provide 15 acres of "truck parking and ancillary maritime services," and have identified the Roundhouse and OAB in fulfillment of this obligation. (AR 777.) Further, based upon the 2019-2050 Bay Area Seaport Forecast, these locations would provide sufficient acreage through approximately 2050. (AR 776.) The DEIR relies, in part, on Mitigation Measure 4.3-7 of the OAB EIR, also known as the West Oakland Truck Management Plan, which provides that the Port and OAB shall work together to reduce the effects of transportation trucks on local streets. (AR 777.)

The DEIR further notes the area immediately outside of the seaport (i.e., West Oakland) either restricts or prohibits truck parking, or is already occupied (where truck parking is allowed). (AR 777.) Beyond that, trucks have regional access via the freeway system such that displaced activities may relocate beyond the immediate vicinity, "although where is unknown." (AR 777.)

Petitioners assert that the Roundhouse and OAB are at capacity and cannot otherwise house the displaced activities. (OB, p. 16, citing the record only for Roundhouse, AR 11675) However, the City does not need to identify potential parking for the displaced tenants; rather, it must simply assess the impacts of the displaced activities. (AR 11341-11342.) Thus, use of the Roundhouse and OAB—even if not available—serves the purpose of allowing the EIR to analyze the local impacts to air quality of the displaced activities in the "worst case scenario" (AR 928-930; 11343.)

To the extent trucks relocate to more distant locations, the EIR concludes that it would be speculative to assume which locations would be selected. (AR 929, 11346-11349.) The EIR identifies this lack of information and discloses that it is unknown "whether VMT would increase or decrease." (AR 930.) The FEIR explains that it is not simply an analysis of where the displaced activities would relocate to, because displacement could result in decision to "eliminate [the] use of truck parking or container staging" altogether. (AR 11341.)

Petitioners claim that the City cannot conclude that an impact is too speculative to study without conducting a "thorough investigation"; however, the FEIR responded to such concerns. (AR 11340-11347.) The FEIR identifies several potential areas for relocation outside the Port area and notes that each has unique zoning districts, which supports the conclusion that the impacts would be too speculative to analyze. (AR 11341.)

Finally, Petitioners argue that the EIR inconsistently asserts that some relocation impacts are too speculative to study, while also taking credit for reduction in emissions from elimination of

current activities at HT. (OB, p. 18.) However, the EIR assesses impacts on a local and regional level. (AR 595-985, 11348-11349 [Impact AIR-2 considering regional impacts for the SF Bay Area Air Basin]; AR 986-1008, 11349-11350 [Impact AIR-4 considering localized impacts].) The assessment subtracts emissions from existing activities at HT in the local analysis, because the activities would be displaced by the Project, but considers them in the regional assessment insofar as the displaced activities would remain in the local area. (AR 936; 975-988, 11348-1134911348 ["Emissions from existing activities at Howard Terminal are not subtracted from the analysis despite tenant relocations because these existing activities would continue elsewhere in the region and would therefore still produce criteria air pollutant emissions within the Air Basin (see Draft EIR pp. 4.2-39 through 4.2-41)."], 11632-11633.)

Ultimately, the EIR discloses the impacts, includes a sufficient investigation of alternatives, and does not violate CEQA by not including speculative analysis of more remote relocation options.

2. Other Significant Impacts

Petitioners argue that the EIR failed to assess other impacts, such as noise, from displacement of current activities at HT such as "training facilities, offices, and truck repair.". (OB, p. 18.) Respondents contend that Petitioners have not shown exhaustion of these claims. (RB, p. 56.) Petitioners do not address this argument on reply. (Reply, p. 19.)

The DEIR discloses the existing Project site uses, including parking, training, drayage, vessel berthing, truck repair, and offices. (AR 718, 720.) It discloses that the Project will force existing tenants and users to move, and further discloses that the Port is evaluating other locations within the Seaport for longshoreman training facility. (AR 928.) The DEIR assesses emissions for these activities. (AR 1259-1260.) The DEIR also presents a noise analysis and identifies the railroad as the primary source of noise. (AR 1520.) The FEIR also responds to comments about the displacement of current uses at Howard Terminal, including training, container storage, and vessel berthing. (AR 11337-11346.)

Thus, the EIR's analysis and conclusions are reasonable and supported by substantial evidence. In any event, the court concludes that Petitioners have not demonstrated exhaustion.

B. EIR's Analysis of Transit Impacts and Grade-Separation Alternatives & Mitigation Measures for Rail-Related Impacts [Petitioners' Section D]

Petitioners argue that the EIR's analysis of transit impacts and grade-separation alternatives is inadequate and that the City failed to adopt all feasible mitigation measures for rail-related impacts.

1. EIR's Analysis of Transit Impacts: "Gate Down" Times

Petitioners' argument is two-fold. First, Petitioners argue that the EIR includes insufficient data regarding "gate down" times insofar as it analyzed only two crossings and did so for a limited period of time. (OB, p. 22, citing AR 1716-1717.) Second, Petitioners also assert that the EIR fails to describe and analyze the "nature and magnitude" of the impacts. For example, Petitioners argue that there was no effort to study how gate-down times will impact traffic circulation,

greenhouse gas emissions, or air quality. (OB, p. 23.)

As to the first argument, the EIR analyzed gate down times at Market Street and Martin Luther King Jr. Way, which are the two primary at-grade crossings that provide access to the Project site. (AR 1718-1719, 1849.) The DEIR summarizes the findings and parameters of the gate down time analysis. (AR 1716; see also AR 6875-6926 [raw data from study].)

Further, the FEIR notes that data submitted by UPRR "is consistent with the data that was used in preparing the Draft EIR and does not alter its conclusions." (AR 11363.) The EIR discloses the "variable nature of gate down times" and further acknowledges that prolonged gate down times are not "a rare occurrence." (AR 11364.)

To the extent Petitioners argue more is needed, the only other at-grade crossings do not provide direct Project access because they are south of the Project site and are not impacted by "switching." (AR 7950.) Thus, further analysis of these crossings would not provide different or additional relevant information.

The court finds the analysis sufficient and supported by substantial evidence.

As to the second argument, the court rejects Petitioner's overarching claim that the EIR fails to address the severity of the overall transportation hazards. The EIR did not merely report "raw numbers" but confirmed that there was a potential for more train crashes with vehicles and pedestrians. (AR 1910-1911.)

Petitioners broadly argued that the EIR does not contain any discussion "at all" about the impact of gate down times on greenhouse emissions and air quality. (OB 23.) They do not attempt to specify the sources of these emissions. While the EIR does disclose some of the impacts of gate down times, it is not clear that the EIR analysis considered the impact of passenger car idling during gate-down wait times.

Respondents assert the issue of automobile emissions was not raised by Petitioners. Petitioners point to comments made by others. (AR9753, 9396, 9626.) The comments refer generally to increases in emissions, but do not specifically point to increases resulting from idling at rail crossings.

The EIR notes that the Project, overall, will not result in a net increase to GHG emissions, and Respondents argue that the EIR's modeling includes vehicle idling as an input. (AR 84125-84129 [no net increase], AR 56731-56812 [Motor Vehicle Emissions Inventory].) However, the analysis considers idling "only for heavy-duty trucks." (AR 56741 ["Idle exhaust is calculated only for heavy-duty trucks."]; see also AR 3090 ["Port Truck Idling Delays"].) The EIR acknowledges that during gate down times, "the Project's employees, residents, and visitors who drove would not be able to exit." (AR 11364.) Respondent do not identify any studies or analysis in the record of the impact of passenger vehicles during gate-down periods and the EIR makes no findings whether the impact would be significant, although truck emissions are the primary source of toxic air contaminants. (AR898-899.) Nor do Petitioners offer any analysis or argument that such emissions would be significant.

Thus, it appears that the EIR could have specifically addressed the impacts from passenger car idling during gate-down wait times. However, courts do not look for "perfection but for adequacy, completeness, and a food faith effort at full disclosure." (San Franciscans for Livable Neighborhoods v. City and County of San Francisco (2018) 26 Cal.App.4th 596, 614.) Courts may not set aside an agency's approval of an EIR on the ground that an opposition conclusion would have been equally or more reasonable. (Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 564.)

The EIR's analysis and conclusions regarding the "gate down" time impacts are reasonable and supported by substantial evidence.

2. EIR's Analysis of Transit Impacts: Rail Crossings

Petitioners claim that it is "common sense" that the highest volume of people leaving the Project will be immediately after an evening or weekend ball game, but the EIR analyzes crossing volumes on weekdays between 3 and 8pm, which Petitioners argue fails to analyze departures after a weekend game or a weekday game with a 7pm start time. Moreover, Petitioners argue that the EIR fails to include information regarding at-grade crossing on Clay, Washington, Broadway, and other streets where people will enter and exit the Project. (OB, pp. 24-25.)

The EIR considers two departure scenarios: (1) full Project buildout plus a sold-out weekday evening ballgame, and (2) full Project buildout plus a sold-out weekday daytime ballgame. (AR 1910-1912; see also AR 5343 [Fehr & Peers Memorandum regarding traffic operations].) These scenarios consider all crossings, so would include departures for a weekday day game as well as arrivals for a weekday evening game. (AR 11575.) These scenarios reflect the maximum volume of drivers (i.e., the weekday commute plus the maximum increase due to the ballgame). (AR 5359, 5362-5363.)

Insofar as Petitioners argue that the EIR failed to include information regarding at-grade crossings on Clay, Washington, Broadway, and other streets, the EIR did, in fact, collect data from those streets. (AR 5360 [noting data was collected from Clay and Fourth Street, Washington at Fourth and Fifth Streets, and Broadway at Fifth and Sixth Streets]; see also AR 11367 [FEIR providing data of crossings, including vehicles and pedestrians, at Embarcadero West and Clay, Broadway, and Washington Streets].) In any event, the EIR notes that there is no direct access to the Project for vehicles crossing at Clay, Washington, and Broadway, and further explains that the City does not evaluate intersection traffic operations for CEQA. (AR 1910, 1766 [Figure 4.15-16; 5343.)

Ultimately, the analysis concludes that the volume of at-grade crossings due to the Project would have significant impact and would be unavoidable with mitigation. (AR 1910.) This conclusion is reasonable and supported by the substantial evidence discussed herein.

3. EIR's Analysis of Transit Impacts: Pedestrian and Motorist Behavior

Petitioners argue that the EIR does not consider the behavior of pedestrians (and potentially motorists) who have consumed alcohol. Petitioners claim the EIR also fails to consider the two-train "double threat" where one train blocks visibility of another oncoming train. (OB, pp. 25-

26.)

Petitioners argue that the efficacy of the purported mitigation measure is not supported by substantial evidence. Petitioners argue that the EIR's reliance on the Federal Railroad Administration's ("RFA") 2020 Accident Prediction and Severity Model ("ASP Model") conflates delays to rail operations with safety hazards posed by those delays. (OB, p. 26.) Moreover, the ASP Model focuses on vehicular collisions, and does not support the EIR's conclusions regarding pedestrian safety. (OB, p. 27.)

The FEIR responds to comments regarding "risky behavior" at Petco Park in San Diego, California. (AR 11370-11373.) The FEIR "outlines the differences between Petco Park and Howard Terminal and describes how the elements listed in Mitigation Measure TRANS-3a would further enhance pedestrian safety along the crossings," which include pedestrian gates and avoiding gapes in the fencing at vehicular crossings. (AR 11370-11371.)

Similarly, the FEIR also responded to comments regarding the "double threat." (AR 11363-11365.) The FEIR provides:

"Based on data collected for the Draft EIR, these double threats occurred in about 4 percent of all gate-down instances, about 2.5 times per day. Measures included in Mitigation Measure TRANS-3a, such as quad gates, pedestrian gates, and fencing, are intended to minimize collisions associated with double threats by discouraging all road users from crossing when the gates are down. Information regarding double threats, while informative, does not represent new information that raises a new CEQA issue not addressed in the Draft EIR and the mitigation measure addresses these situations by deterring people from crossing the railroad tracks when the gates are down."
(AR 11365.)

As to Petitioners' second argument regarding the ASP Model, the DEIR cites the FRA's Highway-Rail Grade Crossing Accident and Incident Reports (AR 1929), and the FEIR expands on the data's relevance (AR 11366). Thus, insofar as Petitioners argue the ASP Model requires recirculation of the EIR because it was absent from the DEIR, the court disagrees. (OB, p. 26, fn. 50.) The data does not change the outcome of the EIR's analysis or propose mitigation measures not previously considered.

The FEIR notes that the ASP Model was "used to quantify the additional collisions expected to occur because of the Project-related increase in volume," and that "volumes of vehicles, pedestrians, and bicycle riders were combined for purposes of evaluating the Project…" (AR 11366.) The FEIR noted the limitations in the analysis and provided that, even with those limitations, "FRA's 2020 updated APS model is the most updated and accurate tool to date to evaluate collisions at at-grade railroad crossings, and it fared better than its previous 1986 iteration when validated against observed data." (AR 11370.)

Ultimately, the FEIR provides the annual estimated expected collisions along the Embarcadero West Corridor under various scenarios (AR 11369 [Table 4.6-4]), and the EIR's conclusions are reasonable and supported by substantial evidence.

4. Mitigation Measures: Rail Related Impacts

Petitioners argue that the mitigation measures in TRANS-3a should be extended to all at-grade crossings along Embarcadero West. (OB, p. 29.)

This comment was raised in response to the DEIR (AR 7514), and the FEIR responded by extending railroad safety features—for both vehicles and pedestrians—to the at-grade crossings at Franklin, Webster, and Oak Street. (AR 11360, 11362.) Further, in response to comments, the FEIR extended fencing along the railroad tracks to Oak Street. (AR 11361.) The EIR also considered grade separation at Market Street and Brush Street but concluded that any grade separation at those streets could only serve vehicles due to the slope. (AR 87313; see also AR 87315-87317 [considering and rejecting pedestrian overpasses at Clay, Washington, and Broadway Streets because they would obstruct access to other locations].)

The FEIR concluded that even with the improved safety measures, "some travelers to and from the site would continue to use at-grade crossings at the numerous crossing locations along Embarcadero West," therefore, "the impact would remain significant and unavoidable." (AR 11362.) This conclusion is reasonable and supported by substantial evidence.

5. Mitigation Measures: Jefferson Street Overcrossing

Petitioners argue the Jefferson Street pedestrian overpass will not be effective. (OB, pp. 29-30.) Petitioners argue that there is "ample evidence that most pedestrians" will not use the Jefferson Street overcrossing. (OB, pp. 29-30.) Despite this, the EIR proposes Jefferson Street as the location for an overpass without ample consideration. For example, Petitioners argue that the EIR fails to consider pedestrians' preference for at-grade crossings, citing City of Maywood v. Los Angeles Unified School Dist. (2012) 208 Cal.App.4th 362, 394. (OB, p. 30.)

This issue was raised by the Capitol Corridor Joint Powers Authority. (AR 8286 [suggesting the FEIR consider pedestrian overpasses at each of the railroad crossings].)

The EIR considered pedestrian traffic during non-ballpark development for peak PM volume (AR 1848 [Figure 4.15-43]) and arrivals for ballpark weekday events (AR 1851 [Figure 4.15-46]). Both indicated that the highest volume of pedestrian traffic would access the Project from South of Jefferson Street, and that with the overpass, Jefferson Street would become the highest volume route to access the park. (AR 1848, 1851 [see image in top right corner providing the figures for travel with and without the Jefferson Street overpass].)

Further, the FEIR considered other locations for a pedestrian overpass but rejected the other possibilities for feasibility reasons. (AR 87314 [considering Clay, Washington, and Broadway Streets); 87315 [considering Clay Street as an option]; 87316-87317 [rejecting Washington and Broadway because an overpass would obstruct access to other locations].)

Thus, the FEIR scored all possible overpass locations, taking into consideration overall connectivity with the City's existing bicycle and pedestrian network (e.g., the Bay Trail), other forms of transportation (e.g., BART), and impacts to existing private and public properties. (AR 87317.)

Insofar as pedestrians prefer at-grade crossings (OB, p. 30), the EIR proposes mitigation measures aimed at encouraging pedestrians to use the overpass. For instance, MM TRANS-3b proposes to close sidewalk gaps in the vicinity of the Project, thereby removing physical barriers to the overpass. (AR 1796; 1808 [providing traffic control officers "to facilitate the safe and efficient flow of people using Jefferson Street…"] 1809 [Table 4.15-21 ["Jefferson Street and Clay Street Corridor Transportation Improvements – User Experience"]; 11645 [noting ADA measures to ensure accessibility of overpass].)

Thus, the decision to implement a pedestrian overpass at Jefferson Street (or Clay Street) is reasonable and supported by substantial evidence.

6. Mitigation Measures: Closure of At-Grade Crossings

Petitioners argue the City failed to analyze closing at-grade crossings. (OB, pp. 31-33.) Petitioners argue that the City gave "short shrift" to suggestions of closing at-grade crossings. (OB, p. 31.) Petitioners argue that given the likely presence of inebriated ballpark patrons, closure of at-grade crossings—either permanently or temporarily—is necessary to reduce the risk.

As an initial matter, Respondent argues that the issue of temporary closure of the at-grade crossings, as opposed to permanent closing—the main issue emphasized by Petitioner Capital Corridor Joint Powers Authority at the hearing—was not exhausted below. Petitioner's lengthy comment on the EIR makes one brief reference to the issue. (See AR8289: "The most effective and safest way to preclude the possible use of at-grade crossings is by closing them, whether temporarily or permanently.") The comment was in a section addressing pedestrian and bicycle overcrossing. It is arguable whether this isolated comment was sufficient for exhaustion. (see City of Sierra Club v. City of Orange (2008) 163 Cal.App.4th 523, 535-536.)

The comment doesn't elaborate as to what would be a temporary closure, but ballgame related closures would be substantial – likely 5 hours per game potentially 81 home game times a year. Whether a closure is permanent or temporary would thus likely impact local businesses and fire safety.
In response to comments, the FEIR explains why each at-grade crossing at Clay, Washington, Broadway, Franklin, Webster, and Oak Streets cannot be closed. (AR 12321-12323.) Closure at Clay Street would impact the fire station and access to the ferry terminal. (AR 12321.) Further, Washington, Broadway, and Franklin (and Clay) are cul-de-sacs after the railroad tracks, so closure of those crossing would cut off access to the businesses on those cul-de-sacs. (AR 12321-12322; see also AR 88925-88926.)

Petitioners rely upon City of Maywood v. Los Angeles Unified School Dist. (2012) 208 Cal.App.4th 362. In Maywood, the court noted an absence of information as fatal to the EIR: "In sum, it is possible that 58th Street and the incorporation of a pedestrian bridge do not raise any significant impacts to pedestrian safety.… The record, however, does not contain any evidence that the LAUSD considered or otherwise addressed these issues." (Id., at p. 395.)

Here, the City explains why closure of the at-grade crossings is infeasible due to interference

with existing structures and businesses. Further, the FEIR explains that the fencing will "extend all the way up to the vehicular gates" thereby avoiding any gaps where pedestrians could sneak through. (AR 11371.) The FEIR also proposes pedestrian gates and adequate queue space as crowd control measures. (AR 11371.) Thus, there is evidence in the record that distinguishes this EIR from the one found deficient in City of Maywood.

The finding that closure of at-grade crossings is not feasible is reasonable and supported by substantial evidence.

7. Mitigation Measures: Multiuse Path

Petitioners argue the multi-use path is false mitigation. (OB, pp. 34-35.) Petitioners argue that proposal of a path for pedestrians is not feasible because of UPRR's right-of-way. (OB, p. 34.) Petitioners argue that UPRR has been clear that it will not allow fencing or pathways on its right of way. (AR 7614.) Thus, the DEIR's proposal of a path immediately adjacent to UPRR's track is not feasible. (AR 1912.) Petitioners argue that the City acknowledged this, yet still proposes the multi-use path as a mitigation measure. (AR 392.)

First, the EIR describes the potential multiuse path and discloses UPRR's right of way. (AR 722 ["The UPRR tracks are located within the railroad right-of-way directly adjacent to and parallel between the eastbound and westbound lanes of Embarcadero West."]; AR 1762.) The EIR notes that portions of Embarcadero between Washington Street and Broadway could also accommodate a multi-use path…" (AR 1809.)

Further, the EIR discloses that the fence line of the multiuse path would be subject to UPRR approval. (AR 11741 ["As noted in the Draft EIR (4.15-93) the multi-use path could be up to 30 feet wide depending on the location of the fence line separating the railroad tracks and Embarcadero, and as noted the fence line would be determined in consultation with UPRR and CPUC and this may alter the width available for the multi-use path."].) Finally, the FEIR discloses that UPRR's right of way may prevent the multiuse path. (AR 11374.) Whether UPRR will insist on preserving its right of way in the future is unknown, but the court notes that UPRR did not contest the tentative ruling on this – or any – issue.

Ultimately, "CEQA does not expressly require a public agency to find that mitigation measures adopted for a project are feasible or that they will be implemented." (Federation of Hillside & Canyon Associations v. City of Los Angeles (2000) 83 Cal.App.4th 1252, 1260; see also Oakland Heritage Alliance v. City of Oakland (2011) 195 Cal.App.4th 884, 906 ["[T]he agency does not have to commit to any particular mitigation measure in the EIR, as long as it commits to mitigating the significant impacts of the project."].)

The multiuse path is one of several mitigation measures considered and, while there is suggestion it would not be feasible due to UPRR's right-of-way, this is disclosed and does not undermine the adequacy or certification of the EIR.

8. Mitigation Measures: Deferral

Petitioners argue the City improperly deferred mitigation measures (OB, pp. 35-37), and that

mitigation required for Alternative 3 is not included in the EIR or City approvals (OB, pp. 37-38).

Petitioners argue that the City improperly deferred mitigation measures by calling for "vague and uncertain" future measures. (OB, pp. 35-37.) Petitioners argue that mitigation measure TRANS-3a does not require specific safety features; instead, it uses "features like" and "measures like those listed" to impermissibly defer mitigation. (AR 578-581.)

Petitioners also cite the draft Transportation Management Plan ("TMP" or MM TRANS-1b), which uses the term "may," as an example of the failure to provide definite goals and enforceable standards. (OB, p. 36.) Similarly, Petitioners challenge MM TRANS-1e regarding pedestrian improvements, which calls for traffic and/or parking control officers but does not guarantee such personnel. (AR 389, 1876.)

As a general rule, "'[i]mpermissible deferral of mitigation measures occurs when an EIR puts off analysis or orders a report without either setting standards or demonstrating how the impact can be mitigated in the manner described in the EIR.'" (Center for Biological Diversity v. Dept. of Fish & Wildlife (2015) 234 Cal.App.4th 214, 240-241.) However, "'[d]eferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed, and possibly incorporated in the mitigation plan.'" (City of Hayward v. Trustees of Cal. State Univ. (2015) 242 Cal.App.4th 833, 854 [upholding TDM program to reduce proportion of single-occupancy vehicle trips].)

Mitigation Measure TRANS-3a requires "at-grade railroad crossing improvements including fencing and railroad crossing features…" (AR 578.) It further provides a menu of options to select from, including (1) fencing along both sides of the railroad corridor continuing to Oak Street; (2) upgrading the existing at-grade crossings at Market Street, MLK Jr. Way, Clay Street, Washington Street, Broadway, Franklin Street, Webster Street, and Oak Street with features like quad gates for motor vehicles and separate signals and gates from pedestrians and bicyclists; and (3) installing or upgrading traffic signals at Market Street at Embarcadero and 3rd Street as well as at MLK Jr. Way. (AR 579-580).

Similarly, Mitigation Measure TRANS-1b (the TMP) incorporates Mitigation Measure TRANS-1a, which requires several definitive measures (AR 556-567 [MM TRANS-1a]; AR 567 [MM TRANS-1b incorporates MM TRANS-1a].) Further, TRANS-1b sets forth specific and mandatory mitigation measures, including extending transit service Lines 6, 72, 72M and 72R; implementing bus priority lanes serving the 12th Street BART station; supplementing shuttle service to 12th Street BART; pedestrian and bicycle improvements along 7th Street, Market Street, MLK Jr. Way, and Washington Street, among others; and provides traffic control officers to manage pre- and post-event attendees. (AR 569-572.)

Finally, Mitigation Measure TRANS-1e requires that the following mitigation measures "be completed and in operation prior to opening day of the ballpark": (1) upgrades to the sidewalks on 7th Street and Market Street to provide either 6- or 8-foot clearance; (2) upgrades to the sidewalks on streets connecting the Project to the Lake Merritt BART station; and (3) upgrades to MLK Jr. Way sidewalks; or (4) traffic enforcement officers along Washington Street; and (5) upgrades to Broadway sidewalks; and (6) removal of the westbound turn-late on 6th Street at

Broadway. (AR 575-577.)

That these mitigation measures include alternatives does not render them impermissibly vague. (Sierra Club v. County of Fresno (2018) 6 Cal.5th 502, 524 ["The County concluded that the Project's air quality impacts will be significant, and that the 12 mitigation measures set forth in the Specific Plan should be at least partially effective in reducing the significant impacts. The substitution clause will allow for additional and presumably better mitigation measures when they become available and it should be encouraged."].)

Finally, Petitioners argue that mitigation required for "Alternative 3" is not included in the EIR or City approvals. (OB, p. 37.) As Respondents note, Alternative 3 is the Project. (RB, p. 45, citing AR 406-407 ["These findings address the Project with the Grade Separation Alternative (Alterative 3) …"].) As the CEQA Findings state:

"[T]he 'Project' or 'Alternative 3' referred to in these findings is the proposed Project with a single vehicle grade separation crossing of the railroad tracks as described in Alternative 3: the Proposed Project with Grade Separation Alternative in Chapter 6 of the Draft EIR. Therefore, to the extent the addition of the grade separation crossing results in additional impacts than those presented by the Proposed Project, those are reflected in the detailed findings for each impact area below."
(AR 416.)

The conclusion is reasonable and supported by substantial evidence.

C. EIR Analysis of Other Significant Impacts of the Project [Petitioners' Section E]

Petitioners challenge the EIR with respect to its analysis and mitigation of (1) air quality and greenhouse gas emissions, (2) hazards and hazardous materials, (3) seismic hazards, (4) hydrology and water quality impacts, (5) wind impacts, (6) land use conflicts, and (7) cumulative impacts.

1. Air Quality and GHG Emissions

Petitioners argue that the EIR's analysis regarding air quality and greenhouse gas emissions is deficient with respect to (1) fugitive dust emissions, (2) impacts from diesel-powered emergency generators, and (3) air quality impacts from HT displacement. Petitioners further argue that the EIR unlawfully defers mitigation measures and improperly takes credit for EV charging stations.

a. Fugitive Dust Emissions

Petitioners argue that the EIR fails to evaluate air quality and public health impacts related to fugitive emissions of particulate matter and toxic air containments ("TAC") during construction and remediation at the Project site. (OB, pp. 43-44.)

The EIR analyses fugitive dust in its air quality analysis and hazardous materials analysis. The air quality analysis notes that "fugitive dust emissions would result from site disturbance, including grading and asphalt recycling, and fugitive [reactive organic gas] emissions would

result from application of architectural coatings and paving." (AR 925.) The air quality analysis notes that fugitive dust may be produced by "demolition, excavation, grading, and other constructive activities…" (AR 950 ["Demolition, excavation, grading, and other construction activities can cause wind-blown dust that adds particulate matter to the local atmosphere. Depending on exposure, adverse health effects can occur due to this particulate matter in general as well as due to specific contaminants such as lead or asbestos that may be constituents of dust."].) The DEIR provides a table of average daily unmitigated construction emissions by year (AR 952), and mitigation measure AIR-1a thus requires implementation of "all applicable dust control measures during construction of the Project as stipulated by the [Bay Area Air Quality Management District]." (AR 950; see also AR 953.)

The hazardous materials analysis notes the "long history of industrial use that has resulted in the contamination of fill, soil, and groundwater." (AR 1336.) The DEIR notes that the Department of Toxic Substances Control ("DTSC") is overseeing investigations, proposed cleanup actions, and will continue to do so. (Ibid.) It explains that existing Land Use Covenants ("LUCs") include specific requirements to mitigate disturbance of materials beneath the cap (i.e., the existing ground coverage), and sets forth the specific measures that are expected to be carried forward and subject to DTSC approval. (AR 1384.) The hazardous materials analysis proposes a remedial action workplan ("RAW") to be prepared in compliance with EPA and DTSC guidelines. (AR 1386-1387.) After the release of the DEIR, the A's committed to prepare a RAP, rather than a RAW, which provides expanded public review. (AR87864.)

Finally, the EIR evaluates impacts of the potential fugitive dust by identifying potential receptors, exposure pathways, chemicals of potential concern, and an exposure assessment. (AR 84022-84030.) The EIR also identifies Target Cleanup Levels associated with exposure to fugitive dust. (AR 84031-84034, see also AR 12034, 89292 [responding to comments about potential dust generation].)

Thus, the analysis of fugitive dust emissions is reasonable and supported by substantial evidence.

b. Diesel-Powered Emergency Generators

Petitioners challenge the EIR's analysis of diesel-powered emergency generators as "inadequate and inconsistent with applicable BAAQMD policy regarding reasonably foreseeable operations." (OB, p. 44.) Petitioners argue the EIR assumes 50 hours per year of generator time, instead of the suggested estimate of 100 hours per year. (OB, p. 45.) Further, Petitioners argue that the EIR uses "generic" or "default" engine stack parameters, which results in an underestimation of health impacts.

The Project includes up to 17 generators to provide back-up power in an outage and notes them to be a source of air pollutant and precursor emissions. (AR 933, 959.) The EIR provides the total unmitigated average daily and annual operational emissions for the emergency generators. (AR 961.) The EIR proposes Mitigation Measure AIR-1c for mitigation of diesel particulate matter, and MM AIR-2c for the diesel backup generators specifically. (AR 964-965)

The EIR analyzes the air quality and human health impacts of the generators, and requires mitigation (i.e., MM AIR-2c). (AR 959-975; see also AR 989 [Table 4.2-10, Unmitigated Excess

Lifetime Cancer Risk, providing risk for operational generators]; AR89292.)

With respect to Petitioners' argument regarding BAAQMD policy, the FEIR responded to similar comments. (AR 12017.) The FEIR explained that the Potential to Emit ("PTE") for an emergency backup generator assumes 100 hours per year; however, "[r]equirements to calculate potential to emit are not the same as requirements to calculate generator emissions under CEQA." (AR 12017.) Thus, the EIR's analysis is based upon "reasonably foreseeable future hours of operations, not on the hypothetical maximum hours or operations used for permit regulatory purposes that is used or PTE." (AR 12018.)

While Petitioners' assert that an assumption of 50 hours per year "is not a reasonably foreseeable annual condition," because it assumes zero hours of emergency operation (OB, p. 45), the FEIR responded to this comment by noting that (1) CEQA does not require the health risk assessment to reflect actual emergency generator operations (AR 12019), and (2) neither the Project, specifically, nor West Oakland, generally, are located within the CPUC Fire-Threat Map, which PG&E uses to assess the need for Public Safety Power Shutoffs (AR 12018).

Finally, Petitioners argue that the number, size, and fuel of emergency generators is known and should have been used instead of "generic" or "default" engine stack parameters. (OB, p. 45.) The EIR discloses that there would be up to 17 generators. (AR 933.) Further, the FEIR responded to this comment by noting that the modeling parameters in the Air Quality Technical Report "are consistent with the default parameters presented in the technical memorandum" as well as the West Oakland Community Action Plan EIR. (AR 88207.) Finally, the FEIR notes that "specific generator stack parameters and exact locations are unknown," so the EIR uses default parameters pursuant to BAAQMD recommendations. (AR 88207.)

Petitioners cite AR 3187 for the proposition that the engine locations are known (OB, p. 46); however, AR 3187 identifies location by "Ballpark" and "Non-Ballpark." Thus, it is reasonable to use default parameters since this does not provide a meaningful location for the EIR to evaluate.

The EIR's analysis of the generator emissions and use of default parameters is reasonable and supported by substantial evidence. Petitioners fail to show any foreseeable health risk or impact.

c. Air Quality Impacts from HT Displacement

Petitioners cite to their argument regarding the EIR's deficient analysis of HT displacement impacts. (OB, pp. 15-18.) These arguments are addressed in Section A, supra, and Petitioners advance no new arguments here.

d. Deferral of Mitigation Measures

Petitioners argue that the Mitigation Measure GHG-1, which requires "no net additional" greenhouse gas ("GHG") emissions, unlawfully defers mitigation because it fails to establish a specific performance standard. (OB, p. 46, citing AR 521-534.) Petitioners cite Communities for a Better Environment v. City of Richmond (2010) 184 Cal.App.4th 70, for the proposition that a "generalized goal of no net increase to greenhouse gas emissions" is insufficient. (Id., p. 93.)

The DEIR included an analysis of the significance of the environmental impacts of GHG emissions. (AR 1299-1305.) The analysis included existing emissions based on the current Coliseum ballpark (AR 1299), as well as future construction and operational emissions (AR1300-1302). Based on this, the DEIR presented a table of "Annual Net Additional Emissions Over 30-Year Project Lifetime," and set forth mitigation measures (i.e., Mitigation Measure GHG-1). (AR 1304-1305.)

Mitigation Measure GHG-1 provides: "Prior to the City's approval of the first construction or grading-related permit for the Project, the Project sponsor shall retain a qualified air quality consultant to develop a Project-wide GHG Reduction Plan (Plan) for implementation over the life of the Project in accordance with the requirements of this mitigation measure." (AR 521.) The mitigation measure requires that resulting GHG emissions should be below the City's "no net additional" threshold of significance. (AR 521-522.) Further, the City shall retain "a third-party expert to assist the City's review and approval of the Plan" as well as to assist with "review and approval of updates to the GHG Reduction Plan and Annual Reports." (AR 522.)

MM GHG-1 is separation into two sections: "GHG Reduction Plan Contents and Standards" (AR 522) and "Implementation, Monitoring and Enforcement" (AR 531).

GHG Reduction Plan Contents and Standards requires the GHG Reduction Plan to estimate the projected annual and total net emissions of the Project by phase and sub-phase and requires construction-related emissions be presented for both horizontal and vertical construction emissions by year for each phase. (AR 522-523.) The Plan must also identify GHG emission reduction measures for each phase or sub-phase of the Project to achieve the "no net additional" CEQA significance threshold. (AR 523.) The measures "shall be verifiable and feasible to implement, and the Plan shall identify the person/entity responsible for each measure, each measure's reduction amount, and the person/entity responsible for mentoring that reduction. (AR 523.)

In addition to the measures listed in MM GHG-1, additional mitigation measures to be considered include in the 2030 ECAP, Pathways to Deep GHG Reductions in Oakland: Final Report (City of Oakland, 2018b), BAAQMD's latest CEQA Air Quality Guidelines (May 2017, as may be revised), the California Air Resources Board Scoping Plan (November 2017, as may be revised), the California Air Pollution Control Officers Association (CAPCOA) Quantifying Greenhouse Gas Mitigation Measures (August 2010, as may be revised), the California Attorney General's website, and Reference Guides on LEED published by the U.S. Green Building Council. (AR 523-524.)

Enumerated mitigation measures include both horizontal and vertical construction and operational emission reduction measures. (AR 524.) Horizontal measures are MM AIR-1b and purchasing carbon offset credits. (AR 524.)

Vertical measures include required measures, such as MM AIR-1b, AIR-2c, AIR-2d, AIR-2e, LEED Gold certification, MM TRANS-1a and TRANS-1b. (AR 524-525.) The Project must also comply with City Ordinance 13632, which eliminates the use of natural gas in newly constructed buildings. (AR 525.)

Vertical mitigation measures also include a "menu" of additional emissions measures, which include on-site and off-site mitigation measures targeted at reducing operational energy emissions, on-site transportation emissions, on-site solid waste emissions, on-site water and wastewater emissions, and on-site landscaping emissions. (AR 525-528; see also AR 528-529 [off-site reduction measures].)

Finally, the GHG Reduction Plan Contents and Standards includes standards for purchasing carbon offset credits, which include an order of preference prioritizing credits benefiting the West Oakland neighborhood. (AR 530-531.)

Technical reports appended to the EIR documented the efficacy of the mitigation measures. (AR 3092-3094; 3208-3211; 3217; 88215-88216; 88234-88235; 88243-88244.)

The second part of MM GHG-1—"Implementation, Mentoring and Enforcement"—also requires an updated plan for each phase of construction. (AR 531.) Physical GHG reduction measures must be implemented prior to the issuance of a temporary certificate of occupancy ("TCO") by the City. (AR 532.) Measures involving the purchase of offset credits must be verified before the City issues construction permits or TCO. (AR 532-533.)

Finally, MM GHG-1 requires submission an annual report to the City's Planning Director. (AR 534.)

The DEIR ultimately concluded that, with the implementation of MM GHG-1, "the Project would result in no net additional GHG emissions." (AR 1315.)

Ultimately, unlike the barebones analysis addressed in Communities for a Better Environment v. City of Richmond, supra, the EIR in this case undertook a complete analysis of the significance of the environmental impact and proposed mitigation measures early in the planning process. (Id., p. 95.) Further, the EIR articulates specific performance criteria that would ensure adequate mitigation, such as setting forth parameters for estimating projected emissions at the phase and sub-phase levels (AR 1305-1306); identifying third party reduction measures as well as requiring measures specific to the Project (AR 1306-1308); providing a menu of additional on-site and off-site mitigation measures (AR 1308-1311); and requiring regular updates and an annual review (AR 1312-1314). Petitioners also cite POET, LLC v. State Air Resources Board (2013) 218 Cal.App.4th 681, which rejected a performance standard of "no increase in NOx," because "it is unclear what tests will be performed and what measurements will be taken to demonstrate that biodiesel use is not increasing NOx emissions." (Id., p. 740.) The vagueness of the standard in POET contrasts with the detailed analysis offered in this case.

Therefore, the EIR does not improperly defer mitigation measures for GHG emission impacts.

e. Electric Vehicle Charging Stations

Petitioners argue that the EIR contains no evidence to support the assumption that electric vehicle ("EV") charging stations will encourage the use of electric vehicles. Petitioners also argue that the City improperly takes credit for a reduction in GHG emissions associated with

installation of state-mandated EV charging stations, and therefore underestimates the Project's GHG emissions. (OB, p. 47.)

The assumption that EV charging stations encourage use of EVs is supported by AIR-1, which relies upon a National Renewable Energy Laboratory assessment for the California Energy Commission. (AR 12038; see also AR 3086 [Air Quality, GHG, and HRA Technical Report]; AR 88403-88404 ["By committing to implement measures that will accelerate the use of EVs, above and beyond CARB and OPR reference scenarios, the Project will help the City of Oakland reach its long-term goals for reducing GHG emissions."].) The assessment determined that the "availability and accessibility of a plug at home increases a person's propensity to buy an electric vehicle." (AR 12038-12039 [also citing a 2013 study conducted by the Institute of Transportation Studies at UC Davis.)

As to the second argument, the FEIR explains that the analysis was calibrated to "subtract[] out any benefit from EVs that would be expected to already exist in the State's reference scenario," including reductions from State-mandated EV programs and initiatives, and the "DEIR takes credit only for emissions reductions that are expected to occur that are in excess of this scenario," so that "no double-counting occurs." (AR12044-12045 [citing Appendix AIR.1 (Appendix F), and EV Assumptions (Ramboll, 2021)], 88405-88411 [Ramboll, 2021].)

In this regard, the EIR's conclusions are reasonable and supported by substantial evidence.

2. Hazards and Hazardous Material Impacts

Petitioners argue that (a) the EIR fails to completely identify site conditions and contaminants, (b) the Human Health and Ecological Risk Assessment is inadequate, and (c) the EIR unlawfully defers mitigation of the Project's hazardous materials impacts.

a. Site Conditions and Contaminants

Petitioners argue the EIR improperly lists only the various categories of contaminants present at the site, which deprives the public from properly evaluating the impacts. Petitioners cite the failure to discuss benzo[a]pyrene, arsenic, cyanide, and lead, which Petitioners contend pose significant risks at very low concentrations, as examples of the EIR's failures. (OB, p. 49.)

Petitioners further argue that the EIR is based upon outdated reports and ignores the entire category of hydrocarbon oxidation products ("HOPs"). Petitioners cite to a study by ENGEO, which determined that HOPs existed at concentrations that exceeded the SF Bay Regional Water Quality Control Board's ("RWQCB") screening levels.

Petitioners claim the City's response that HOPs are evaluated along with total petroleum hydrocarbons ("TPH") as cursory, "scientifically inaccurate and fundamentally incorrect." (OB, p. 50.) Petitioners assert that HOPs are petroleum hydrocarbon degradation products, not hydrocarbons. (AR 89136 [2022 Montrose Environmental Technical Memorandum].)

First, the EIR contains 62 pages on the history of Howard Terminal, which includes a description of chemicals of concern ("COCs") present in the soil and groundwater. (AR 1336-1397.) The

description identifies COCs, including total petroleum hydrocarbons as well as lead and cyanide. (AR 1344-1345.) Further, the EIR describes the Site Investigation Report, which compared the chemical concentrations found on the Project site to a range of preliminary screening levels as agreed to by DTSC, and identified COCs above screening levels for soil, gas, and groundwater. (AR 1345-1346.) With regard to soil levels, the Site Investigation Report notes that TPHs include arsenic, lead, naphthalene, and benzo[a]pyrene. (AR 1346.)

The Hazards and Hazardous Materials analysis relies upon several site-specific technical reports, including reports prepared by ENGEO in 2018, 2019, and 2020, and further notes that there are three currently active cleanup cases in HT that are overseen by DTSC. (AR 1336; see also AR 79271 [ENGEO 2019 Report, updated 4/2020].)

The description of the existing conditions complies with CEQA requirements. (Guideline § 15125 ["The description of the environmental setting shall be no longer than is necessary to provide an understanding of the significant effects of the proposed project and its alternatives."].) It includes images of areal maps of areas above commercial and residential screening limits, and areas above residential but below commercial screening levels for soil, soil gas, and groundwater, which along with the description, is sufficient to "give the public and decision makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts." (Ibid.; see also AR 1347-1349.)

With respect to the EIRs evaluation of groundwater HOPs, the FEIR explained that "potential exposure from hydrocarbon oxidation products (petroleum metabolites) is evaluated by the inclusion of total petroleum hydrocarbons (TPH)-gasoline-range, diesel-range, motor oil range, and constituents of these mixtures, including benzene and naphthalene, in the HHERA." (AR 12084.) ENGEO also prepared a memorandum in response to this concern. (AR 87390 ["Potential exposure from hydrocarbon oxidation products ("HOPs") is evaluated by the inclusion of TPH-gasoline-range, diesel-range, motor oil-range, and constituents of these mixtures, including benzene and naphthalene, in the HHERA. Therefore, no significant COPCs have been omitted from the HEERA."].)

To the extent Petitioners claim the City's response "is scientifically inaccurate and fundamentally incorrect," they misunderstand the Court's task in a CEQA analysis. (Oakland Heritage Alliance v. City of Oakland (2011) 195 Cal.App.4th 884, 900, quoting Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376 ["A court's task is not to weigh conflicting evidence and determine who has the better argument… We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so."].) In any event, as the FEIR stated in response to the same comment, there is no information to support the claim that "the extent of 'HOPS' (hydrocarbon oxidation products or petroleum metabolites) 'is far greater than the extent of total estimated impacted groundwater.'" (AR 12088.)

b. Human Health and Ecological Risk Assessment ("HHERA")

Petitioners argue the 2020 Human Health and Ecological Risk Assessment ("HHERA" or "Risk Assessment") is fundamentally deficient, because it fails to provide a proper risk characterization for each of the receptors and receptor-specific exposure scenarios. (OB, p. 51.)

Petitioners further argue that Department of Toxic Substances Control ("DTSC") approval does not save the deficient report, which was developed without public comment, and that DTSC noted deficiencies in the HHERA regarding contaminant-specific or cumulative estimate of the magnitude of potential risk/harm. (OB, p. 51, citing AR 884096.) Petitioners argue the HHERA omits calculation and presentation of cumulative cancer and noncancer risks for each exposure scenario, and a comparison of these risk estimates to the regulatory risk management threshold. (OB, p. 51.)

Specifically, Petitioners argue that the HHERA improperly uses "soil-gas-to-indoor air attenuation factors" that are less conservative that the attenuation factors recommended by DTSC and Regional Water Quality Control Board ("RWQCB"). Petitioners argue this results in a "significant underestimation of risk from exposure to indoor air." (OB, p. 52.)

Moreover, Petitioners argue that the HHERA ecological assessment is based on an outdated 2002 risk assessment. (OB, p. 52, citing AR 11457-58.) Petitioners claim the EIR's conclusion that there is no ecological risk at the site, and thus no need for groundwater remediation, is not supported by substantial evidence.

Petitioners cite other deficiencies pointed out in the comments: (i) adequate sampling has not been performed to support a risk assessment for a site of this size and complexity which would typically be characterized by thousands of samples, not hundreds; (ii) estimates of the lateral extent and mass of impacted soil presented in the DEIR are approximately 30% lower than what was estimated in ENGEO's 2019 Consideration of Remedial and Mitigation Alternatives, leading to a significant underestimation of risk; (iii) the HHERA is missing human toxicity values necessary to quantify the dose-response and risk of exposure for several chemicals; and (iv) potential exposure to lead was not evaluated using blood-lead levels as an index of exposure, consistent with standard practice. (OB, p. 52, citing AR 9485-9487.)

First, as to Petitioners' argument regarding public comment, as Respondents note, there is no requirement that the public be involved in preparing the HHERA, which was provided to the public at the same time as the DEIR. (RB, p. 66, citing PRC §§ 21092, subd. (b)(1) and 21168.6.7, subd. (g)(2) ["No later than three business days following the date of the release of the draft environmental impact report, the lead agency shall make available to the public in a readily accessible electronic format the draft environmental impact report and all other documents submitted to or relied on by the lead agency in the preparation of the draft environmental impact report."].) This is sufficient to satisfy CEQA requirements regarding public access. Insofar as the DTSC identified deficiencies, the FEIR notes that ENGEO submitted a revised risk assessment and DTSC responded with an approval letter confirming their prior comments had been addressed. (AR 11462.)

Regarding Petitioners' argument concerning cumulative cancer and noncancer risks, the FEIR explains that the Risk Assessment focused on toxicity data for those chemicals with a "complete and significant exposure scenario." (AR 11462.) That is, a scenario that includes "a source (i.e., the contaminated material), a receptor (i.e., a person), and a complete exposure pathway (i.e., a way for the contaminated material to reach and expose a person to hazardous levels of the contamination)." (AR 11462.) The FEIR provides the example of barium, which is unlikely to

have inhalation exposure from groundwater. "Therefore, the inhalation toxicity value, such as the chronic inhalation reference concentration, is not needed for barium," and thus excluded from the Risk Assessment. (AR 11462.)

Further, the Risk Assessment relies on default attenuation factors as a screening tool to determine whether further evaluation is needed, not as a measure of risk from exposure to indoor air. (AR 84027 ["This default AF will be used to screen areas for additional evaluation."].) In response to comments, the FEIR explained that DTSC recommends the use of default attenuation factors followed by an evaluation using site-specific parameters if the screening evaluation using defaults attenuation factors reveals a potential risk. (AR 11464.) Further, the site-specific considerations were approved by DTSC. (AR 11465.) Petitioners offer no support for their claim that "this error in the HHERA results in a significant underestimation of risk from exposure to indoor air." (OB, p. 52.)

Petitioners argue that the HHERA relies on an outdated ecological risk assessment, however, the HHERA incorporated the 2002 results into the 2020 HHERA (AR 11458), along with other more recent site investigations. (AR 60421 [2013 and 2016 groundwater samples], AR 12085-12086 [noting PG&E testing of the Project site], AR 12435 [noting samples from "the estuary side of the quay wall verify that contamination is not detected"].)

As the Risk Assessment notes, "results of an [environmental risk assessment] conducted by Baseline (2002) and reiterated in the third 5-year review (Baseline, 2018) indicated that groundwater concentrations of chemicals of potential ecological concern ('COPECs') do not pose a risk to aquatic receptors." (AR 84028.) Ultimately, Petitioners do not identify any deficiency with the 2002 assessment; rather, they argue that the screening levels have changed; however, they do not argue that the more recent assessments suffer from this deficiency. (OB, p. 52.)

In closing, Petitioners point to, without discussion, four "deficiencies" raised a technical memorandum submitted in response to the DEIR by Terraphase Engineering. (AR 9485-9487.) The FEIR responds. (AR12084-12087 [responding to Terraphase Memo], 11459-11466 [citing support for response].)

The HHERA is reasonable and supported by substantial evidence.

c. Deferral of Mitigation Measures

Petitioners argue that the EIR unlawfully defers mitigation and provides only a "cursory discussion" of potential remediation efforts, which fails to adequately inform the public of the risks. (OB, p. 53.) Petitioners challenge MM HAZ-1a and argue that it requires non-quantifiable mitigation measures. (OB, p. 54.) Petitioners also challenge MM HAZ-1b, which relies upon Remedial Action Plans, Operation and Maintenance Agreements ("O&M Agreements"), and Land Use Covenants ("LUCs"), but does not provide information regarding these documents and otherwise fails to provide any quantifiable mitigation measures. (OB, pp. 54-55.) Finally, Petitioners argue that the Target Cleanup Levels ("TCLs") do not provide sufficient performance criterion "when virtually all other aspects of the site cleanup are left unaddressed." (OB, p. 56.)

Investigation, cleanup, monitoring, and maintenance at Howard Terminal have been ongoing for decades and the risks at the site are well understood. (AR 60396 [2018 Five-Year Review].) The 2018 Five-Year Review details the fill history at the Project site, the sources of contamination, the current conditions, and the initial response. (AR 60400-60408.) It concludes that the measures in place are "effective and ensure on-going protection of human health." (AR 60420.)

The FEIR explains the sequencing of the remediation process, which includes a remedial action plan ("RAP") prepared by the Project sponsor and reviewed by DTSC, and a public participation process. (AR 11458, 11468.) Further, the EIR notes that existing LUCs and O&M Agreements are in place and would be updated to ensure that the Project site is operated and maintained to avoid exposure to any encapsulated contaminated materials. (AR 11458, 14609 ["The substantive requirements of these replacement documents would be similar to those in the existing governing documents…"].)

The EIR discloses that contaminated soil "has been observed to the maximum explored depths of 10 feet during the 2019 investigation." (AR 1377.) Thus, the EIR proposes that placement of clean overlay fill would provide a protective barrier and prevent exposure to the underlying contaminated materials. (AR 1377.) "[S]oil materials not meeting the criteria for onsite reconsolidation would be removed from the Project site and disposed of at an offsite licensed disposal facility permitted to accept the waste." (AR 1377.) The DEIR estimates a total of 200,000 cubic yards of soil removal during remediation actions. (AR 1378.)

While initially the EIR required a RAW, in the FEIR, Mitigation Measure HAZ-1a requires a RAP, which must identify known areas with soil, soil gas, and/or groundwater with COCs concentrations above the TCLs; describe procedures for exaction, treatment, stockpiling, containerization, transportation, and disposal of contaminated media; describe sampling and analytical methods to verify that contaminated materials have been removed; describe inhalation protection measures; and describe cap restoration for required areas. (AR 14613-14614.) Petitioners argue that the Respondent should have delayed issuing the FEIR for consideration of the RAP. Petitioners ask for judicial notice of the draft RAP, issued after the FEIR apparently not yet approved by the DTSC (Exh. B to Petitioner's RJN.) Petitioner argues that the draft RAP is very detailed, and arguably conflicts with the proposed mitigation in regard to soil removal. The court declines to consider this document, both because it is outside of (and post-dates) the administrative record and because it is not an official act or record of an administrative agency. (Evidence Code §452(c).) Rather, it is a draft submitted on behalf of the Oakland As.

Mitigation Measure HAZ-1b requires that prior to the issuance of any grading, building, or construction permit, the Project sponsor must provide evidence to the DTSC that the proposed action is consistent with the RAP, LUCs, and ensures protections "appropriate for the type of anticipated construction activity." (AR 14614.) Further, prior to the issuance of any TCO, the Project sponsor must provide DTSC with evidence of successful implementation of the protective measures. (AR 14614.)

Together, HAZ-1a and HAZ-1b would require that remediation activities apply the TCLs developed in the HHERA to identify contaminated materials that require removal or encapsulation. (AR 14616.) Once removed, LUCs and O&M Agreements would ensure that encapsulated areas are maintained and not disturbed. (AR 14616.)

As noted above, such measures have been historically successful. (AR 60420.)

The EIR did not improperly defer mitigation measures.

3. Seismic Hazards

Petitioners argue that the EIR fails to sufficiently analyze and mitigate the risks and related impacts from liquefaction at the Project site. (OB, pp. 56-57.)

Further, Petitioners argue that the EIR recognizes that the Project is in a seismically active area but "contains no discussion of subsurface conditions for the lands that immediately surrounding the Project Site," which risks "creating an island without safe transport corridors" and "broken utilities." (OB, p. 57.)

Additionally, Petitioners argue that the EIR improperly defers mitigation regarding seismic activity by failing to provide any specific performance criteria. (OB, pp. 58-59.) Petitioners assert that "presumed compliance with regulatory requirements is not sufficient." (OB, p. 59.)

a. Adequacy of EIR

With respect to Petitioners' first augment, the DEIR contains an analysis of geologic and seismic hazards, which includes a liquefaction analysis supported by a computer-based liquefaction potential assessment for the Project site. (AR 1227-1230, 4773-4776 [liquefaction analysis], 4913-4938 [technical data].) The DEIR notes that the Project is not on a fault line but is located between to known active fault zones, and notes that the region is subject to "seismically induced ground failures (e.g., liquefaction)." (AR 1227.) Thus, the Project site is classified as a Site Class F in accordance with the American Society of Civil Engineers, thus requiring a site response analysis. (AR 1228.)

The DEIR specifically discusses liquefaction, noting that the "Project site is underlain by potentially liquefiable materials," resulting in "a very high potential for liquefaction at the Project site." (AR 1229.) The supporting ENGEO study (AR 4758-4952) assesses liquefaction risks on the Project site and presents potential liquefaction mitigation techniques for each "zone" on the Project site. (AR 4774-4776.) The EIR concludes that with mitigation, the seismic hazards, such as liquefaction and differential settlement, would be less than significant. (AR 1237.)

A further ENGEO memorandum specifically addresses the surrounding areas. (AR 87294-87296.) It maps the land immediately east, west, and north of the Project site for liquefaction risk, and concludes that the "land to the north should experience minor, if any, liquefaction effects," while the adjacent property to the east and west of the site could be subject to liquefaction. (AR 87294.) The memorandum explains that since access to the Project site occurred primarily from the north, the Project site would not risk loss of access or utility service, and it would "remain safe and functional" in a liquefaction event. (AR 87294.) The memo continues to explain that the risk to surrounding "transportation and utility disruptions" due to liquefaction are "regional in nature" and "cannot be mitigated on site." (AR 87294-87295; see

also AR 11928 ["Measurable settlement or liquefaction would not occur off-site with these ground improvement methods."]; AR 11715 [addressing comments regarding elevation differential].)

b. Mitigation Measures

As for Petitioners' second argument, the preliminary investigation concludes that seismic and liquefaction risks can be feasibly mitigated. (AR 4759 ["Based on the results of our exploration, the planned development at the site is feasible from a geotechnical standpoint provided the preliminary recommendations and guidelines provided in this report are implemented during project planning."].) Further, the EIR requires that the Project comply with the California Building Code and the City of Oakland Building Code and Grading Regulations regarding seismic-related ground shaking and seismic induced ground failures (i.e., liquefaction, lateral spreading, and settlement). (AR 1238.)

Mitigation Measure GEO-1, which incorporates the building code compliance requirement, mandates a site-specific final geotechnical investigation and report, which must be prepared by a registered geotechnical engineer for City review and approval. (AR 1238.) The report must include, at a minimum, "a description of the geological and geotechnical conditions at the site, evaluation of site-specific seismic hazards based on geological and geotechnical conditions, and recommended measures to reduce potential impacts related to seismic shaking, liquefaction, corrosion, and all other ground stability hazards." (AR 1238.)

This is sufficient under Oakland Heritage Alliance v. City of Oakland (2011) 195 Cal.App.4th 884. The City has conducted a detailed geotechnical investigation (AR 4758-4952), requires compliance with applicable building codes (AR1238), and requires preparation of a site-specific geotechnical report (AR 1238).

4. Hydrology /Water Quality Impacts

Petitioners argue that the EIR fails to adequately address the impacts of short- and long-term dewatering at the Project, and specifically the quantifiable impacts to local groundwater dynamics, recharge rates, and water quality (e.g., contamination). (OB, p. 60.) Petitioners claim the EIR and ENGEO memorandum discuss the need for evaluation of the effects but do not actually evaluate the effects. (OB, p. 61.)

The DEIR explains that due to shallow groundwater throughout the Project site, dewatering would be likely and would be subject to Regional Water Quality Control Board conditions. (AR 771, 1408.) Construction dewatering would be temporary and short term. (AR 1423.) "[T]he required compliance with the numerous laws and regulations discussed previously that govern groundwater would limit the potential impacts from construction to less than significant." (AR 1423.)

As for the ballpark, the DEIR proposes a cutoff wall around the boundaries of the ballpark to control groundwater inflow into the ballpark area. (AR 768.) The DEIR notes that "[g]roundwater within the cutoff wall area would be physically separated from the surrounding groundwater. The dewatering within this area during construction would not affect the

surrounding groundwater levels." (AR 1423.) To the extent groundwater seeps through or under the cutoff wall, it would be tested to assess the appropriate treatment and disposal method. (AR 768.)

The DEIR explains that "[a]ll dewatered groundwater will be contained (e.g., Baker tanks)" and "transported off site for disposal or treated and disposed with approval from overseeing agencies." (AR 1370.) "In the event short- or long-term groundwater extraction operations are required for the ballpark or elsewhere at the Project site, groundwater treatment would be required due to TPH and available cyanide. These materials can be treated and removed with common dewatering treatment technologies, including sand filtration and GAC prior to discharge." (AR 1379.)

The EIR also discusses groundwater dynamics and flow. (AR 1350.) The EIR explains that the "historical depth to groundwater has ranged from about 5 to 12 feet below grade and is subject to tidal fluctuation of several feet daily (ENGEO, 2018a)." (AR 1350.) Thus, there is an existing groundwater monitoring well network at the site in addition to four new groundwater monitoring wells constructed on the harbor site of the quay and bulkhead walls. (AR 1346, 1350.) "Groundwater flow is diverted by the concrete quay wall toward the wood bulkhead, resulting in a general flow direction southwest toward the wells on the harbor side of the wood bulkhead." (AR 1350.)

Mitigation Measure HYD-1a requires compliance with Oakland's Creek Protection Ordinance and preparation of a Creek Protection Plan. (AR 1385.) Mitigation Measure HAZ-1a requires a DTSC approved plan for "excavation, treatment, stockpiling, containerization, transportation, and disposal of contaminated media, including soil and dewatering effluent." (AR 1386.)

Insofar as Petitioners claim the EIR does not address groundwater dynamics, recharge rates, and impacts on neighboring properties, the FEIR responds to these issues. The FEIR explained: "Temporary dewatering may be necessary to construct and install subsurface utilities. However, this temporary activity would pull groundwater in toward the locations of the excavations being dewatered, which would be in the interior of the Project site. The temporary result would be a short-term, localized change in groundwater flow direction toward the interior of the Project site, and not to adjacent properties. Therefore, dewatering activities would not affect adjacent off-site properties." (AR 11613, see also AR 11714 ["Because the proposed Project would not result in hydrologic changes to neighboring sites, the Project's mitigation measure is sufficient as currently stated."], 11932 ["The effects of groundwater dewatering during and after construction of the proposed Project were found to be less than significant with mitigation on groundwater quantity and quality, as documented on Draft EIR pp. 4.8-48 through 4.8-53 related to dewatering of contaminated groundwater for construction and remediation purposes. The effects of groundwater dewatering on an as needed basis during construction or operation would not result in a net deficit in the groundwater aquifer, as described on Draft EIR pp. 4.9-25 through 4.9-27 and 4.9-37."].)

5. Deferral of Wind Impacts

Petitioners claim that the EIR unlawfully defers mitigation measures for the wind generated by the new buildings on the Project site. (OB, p. 61.) Petitioners assert that the EIR acknowledges

that wind generated by the new buildings at the Project will create a significant impact at the Project level and cumulatively, but MM AES-1 does not provide any specific performance standards; it merely requires a future wind analysis for buildings 100 feet or higher.

The EIR considers the Project to create a significant adverse impact if it creates winds that exceed 36 mph for more than one hour during daylight hours. (AR 824; see also AR 52603-52605 [setting forth significance criteria for wind impact analysis].)

The EIR conducted a wind tunnel test using a 1:300 scale model of the proposed Project and surrounding buildings within approximately a 1,500-foot radius of the Project site. (AR 827.) The model was based on "simple massing plan of the proposed Project and not on actual designs because detailed building plans are not yet available." (AR 827.) Thus, the analysis presented a "conservative evaluation" of potential wind speeds, because it did not consider features like setbacks, which "would reduce pedestrian-level wind speeds." (AR 827; see also AR 2979-3040 [AES.2 Pedestrian Wind Study].)

The EIR concludes that the interim hazardous wind conditions would be significant and unavoidable even with mitigation, but notes that several factors could alter the analysis, such as a partial buildout for an extended period or surrounding buildings providing "effective wind shelter" once completed. (AR 874.) Thus, "it cannot be stated with certainty whether Mitigation Measure AES-1 would reduce impacts to a less-than-significant level." (AR 874.)

Mitigation Measure AES-1 requires a wind analysis for buildings at least 100 feet in height. (AR 874.)

"If the wind analysis determines that the building's design would increase the hours of wind hazard or the number of test points subject to hazardous winds, compared to then-existing conditions, the wind consultant shall notify the City and the Project sponsor. The Project sponsor shall work with the wind consultant to identify feasible mitigation strategies, including design changes (e.g., setbacks, rounded/chamfered building corners, or stepped facades), to eliminate or reduce wind hazards to the maximum feasible extent without unduly restricting development potential. Wind reduction strategies could also include features such as landscaping and/or installation of canopies along building frontages, and the like."
(AR 875.)

The EIR engaged a detailed preliminary report using a scale model of the proposed Project, disclosed the significant and unavoidable impacts as well as the unknown conditions, and committed to mitigating the impacts through a future study. While Petitioners do not dispute that the true magnitude of future wind impacts cannot be determined until there are specific building plans (RB at pp. 29-30), they argue that the proposed mitigation is impermissibly vague and open ended and lacks any performance standard. It requires a wind expert to demonstrate to "the satisfaction" of the City that there is no impact or if so, to demonstrate "feasible mitigation strategies" including a laundry list of potential modifications. (See AR 874-875.) What the mitigation measure lacks, however, is any performance standard. (CEQA Guidelines §15126.4(a)(1)(B); Endangered Habitats League, Inc. v. County of Orange (2005) 131 Cal.App.4th 777,794.)

Respondent argues that a different deferred mitigation standard applies where mitigation cannot fully reduce impacts. The argument was not included in Respondent's brief, where Respondent stated the correct rule that mitigation may be deferred if "impractical or infeasible" so long as the agency "adopts specific performance standards and identifies types of actions that can feasibly achieve that standard." (RB at p.77, citing Guidelines §15126.4(a)(1)(B).) "The general rule is that an EIR is required to provide the information needed to alert the public and the decision makers of the significant problems a project would create and to discuss currently feasible mitigation measures. Mitigation measures need not include precise quantitative performance standards, but they must be at least partially effective, even if they cannot mitigate significant impacts to less than significant levels." (Sierra Club v. County of Fresno (2018) 6 Cal.5th 502, 523.)

At the hearing on this matter, Respondents suggested that there is a performance standard, and cited the first sentence of the mitigation measure: "With the goal of preventing to the extent feasible a net increase in the number of hazardous wind exceedance locations, compared to existing conditions, prior to obtaining a building permit for any building within the Project site proposed to be at least 100 feet in height, the Project sponsor (including any subsequent developer) shall undertake a wind analysis for such proposed building." (AR874.). This argument was likewise not included in Respondent's papers. In any event, this language does not describe a performance standard; rather it is a vague generalized goal which itself lacks any meaningful standard.

Thus the EIR improperly defers mitigation measures for wind impacts.

6. Land Use Conflicts

Petitioners argue that the EIR identifies several Project-related and cumulative land use impacts that conflict with Port uses, industrial-related uses, and water-based uses of the area. (OB, p. 62, citing AR 437-439 [LUP-2 & LUP-1.CU].) Petitioners argue that Seaport operations are sensitive to transportation delays; recreational boating activity could result in conflicts with water-based uses, such as maritime navigation and ferry transit; and cumulative residential development in proximity the Project site could conflict with water-based and industrial-related uses.

Petitioners assert that the EIR proposes five mitigation measures, which Petitioners argue the measures will not fully mitigate impacts. (OB, pp. 63-65.) Petitioners argue these measures lack sufficient performance standards, do not consider the burden on regional public transit systems (e.g., BART and AC Transit), and are unreasonably deferential to the Project Sponsor (i.e., the Oakland A's) regarding light and glare levels.

a. MM LUP-1a: Boating and Recreational Water Safety Protocol

Petitioners argue that MM LUP-1a is a "plan to plan" that aims to mitigate recreational boating conflicts associated with large events only but does not include any mitigation measures for conflicts unrelated to large events. (OB, p. 63.) Petitioners also argue that there is no indication that the mitigation measures will be feasible.

The EIR explains that the Project does not propose to add facilities for recreational watercraft or direct water access, however, it includes mitigation measures based upon the recreational water use at McCovey Cove during baseball games at Oracle Park in San Francisco. (AR 1474.) The EIR notes, however, that the Project would not generate the same activity because (1) the proposed ballpark outfield walls would not be adjacent to the Bay, which is the case with Oracle Park, and (2) would not generate the same number of "splash hits," because the distance from home plate to the Estuary is approximately 700 feet, which is "substantially greater that the longest modern-day home run" (505 feet). (AR 1474-1475.)

The EIR continues that the ballpark is placed as far away as possible from the Turning Basin, "which reduces, but does not eliminate, the potential for conflicts with recreational users in the area." (AR 1475.)

Recreational watercraft (including motorized and nonmotorized watercraft) in the Inner Harbor are subject to the U.S. Coast Guard's Inland Navigation Rules and Regulations, and thus required "to keep as near to the outer limit of the channel as is safe and practicable, to not cross the channel if there is a container ship or other large vessel moving towards them, and to avoid and allow the safe passage of container ships and other large vessels using the Inner Harbor Channel and Turning Basin." (AR 1475.)

Against this backdrop, the EIR notes that the potential for conflicts still exists and proposed Mitigation Measure LUP-1a, which requires signs along the wharf informing those in the water that anchoring is prohibited and providing for regular enforcement by the U.S. Coast Guard and/or Oakland Police Department. (AR 544, 1476.) Further, MM LUP-1a requires dissemination of safe boating regulations for areas adjected to the Project site and public boat launches in the vicinity. (AR 544, 1476.)

Thus, the EIR concludes that, with the implementation of MM LUP-1a, "the Project would not result in a fundamental conflict with maritime navigation or water-based uses, and impacts would be less than significant with mitigation incorporated." (AR 1477.)

The use of qualitative standards for identifying significant impacts is permissible. (Guidelines, § 15064.7, subd. (a); Mission Bay Alliance, supra, 6 Cal.App.5th at p. 192.) In response to public comments, the FEIR explained that a land use conflict is defined by degree of impairment, thus MM LUP-1a reduces conflicts to a permissible level, but it need not eliminate the conflicts altogether. (AR 11326-11327.)

Further, Petitioners' argument regarding feasibility was also responded to in the FEIR, which explained that the U.S. Coast Guard "conducts patrols of the entire San Francisco Bay and issues violations to ensure marine safety and security" and the Oakland Police Department "assigns one officer from the OPD Marine Unit to patrol the Port and the Estuary via water." (AR 11329 [noting also that the Alameda County Sherriff's Office Marine Unit can be dispatched to assist as needed].)

The FEIR also responds to Petitioners' argument regarding large events, explaining that "those are the [events] that could attract recreational water users." (AR 11329.) Further, MM LUP-1a requires the City, Port, and Oakland A's to regularly meet and review the effectiveness of the

measure, and to revise as necessary. (AR 11328-11329.) This is reasonable and supported by substantial evidence.

At the hearing on this matter, Petitioners argued that the proposed mitigation measures only applied during the baseball season. LUP-1a does not by its terms appear to be so limited. Moreover, Petitioners' counsel conceded the issue had not been briefed by them and could not provide a citation to the administrative record to establish exhaustion. The court accordingly rejects this assertion as unsupported and unexhausted.

b. MM LUP-1b: Lighting Feature Design

Petitioners argue that MM LUP-1b is excessively deferential to the Project sponsor (i.e., the Oakland A's) and does not provide a performance standard for reduction of light and glare navigation hazards. (OB, p. 65.)

The EIR acknowledges that "the City received comments requesting that the EIR analyze the potential effects of light and glare on maritime navigation." (AR 1478.) The EIR explains that the lighting inside the ballpark will be "based on requirements for spectators, game play, MLB standards, and television broadcast requirements." (AR 762.) The EIR also analyzes lighting impacts from digital signage, exterior lighting, and streetscape lighting. (AR 762, 764.)

The EIR considers the impacts of field of play lighting 20% above the MLB requirements to create a "worst case scenario" and uses receptors in three different locations and elevations to assess the impact. (AR 2475, 1478.) The EIR uses three comparative methods to determine the potential glare impacts on navigation and concludes that the anticipated glare "is not anticipated to exceed recommended limits under all three methods." (AR 1479-1481.) This conclusion is reasonable and supported by substantial evidence.

Nonetheless, the EIR proposes MM LUP-1b to reduce the potential effects. (AR 1482.)

c. MM LUP-1c: Land Use Sitting and Buffers

Petitioners identify MM LUP-1c as one of the five mitigation measures which they claim are deficient, but Petitioners offer no argument regarding why MM LUP-1c is deficient. (OB, p. 63, fn. 91.)

d. MM TRANS-1a & 1b: TPDMP & TMP

Petitioners argue that MM TRANS-1a requires a Transportation and Parking Demand Management Plan ("TPDMP" or "TDM") but does not specify the scope of such plan, which could cover the ballpark or additional development in Jack London and potentially downtown Oakland. (OB, p. 64.)

Petitioners argue that MM TRANS-1b and Transportation Management Plan ("TMP") have a "vague goal" of "minimizing" conflicts with Seaport operations, including freight movements by roadway, do not establish adequate performance standards. (OB, p. 64.)

The EIR acknowledges that the "Project would generate increased vehicular, bike, and pedestrian activity in the Project vicinity that would mix with Seaport traffic by road or rail." (AR 1472.) The EIR contains several studies analyzing the effect of the Project on Port-related traffic, including (1) a traffic analysis showing that "Port-related traffic would not be substantially affected by trips to and from the Project site" (AR 11323-11324 [citing Draft EIR Appendix TRA]); (2) a "sensitivity analysis" on certain intersections that some Port truck drivers may use, which demonstrates that all intersections but one operate at acceptable levels of service (AR 1831-1832, 6467-6674 [TRA.7 Port of Oakland Intersection Sensitivity Analysis]); and (3) a study of a potential increase in non-Port vehicles cutting through the Seaport, demonstrating that the cut-through would be limited and not affect intersection operations. (AR 1832-1834 [noting the TMP includes a performance standard for cut-through traffic].)

Based upon these studies, the EIR concludes that "with implementation of Mitigation Measures TRANS-1a and TRANS-1b, the Project would not result in a fundamental land use conflict with Seaport road operations and rail access, and impacts would be less than significant with mitigation incorporated." (AR 1474.)

Thus, the "Project includes various roadway improvements, such as lane configuration on Adeline Street, to promote truck movement in and out of the Seaport on Adeline Street" as well as a Transportation and Parking Demand Management Plan "for non-ballpark development to reduce vehicle traffic generated by the Project by 20 percent." (AR 1472-1473; 1860 [requiring a 20 % reduction in vehicles trip reduction].) The Project sponsor would also be required to establish a TDM Plan for the performance venue that incorporates traffic management strategies to minimize its traffic impacts on neighboring communities, including the Seaport…" (AR 1473.)

MM TRANS-1a requires a Traffic Management Plan, which incorporates MM TRANS-1a, and must be approved by the City. (AR 1870.) The TMP further requires baseline calculations of ballpark development vehicle trips, which would reflect the ballpark at the Project site absent the TMP, which will be used to measure the TMP's effectiveness. (AR 1871.) The TMP must include a Parking Management Plan for the ballpark as well as several other elements, "including modal strategies addressing transit, pedestrians, bicycles, automobiles, parking, and ride sourcing, i.e., Lyft, Uber, and taxis." (AR 1871.) Like the TDM, the TMP must also achieve a 20% reduction in vehicle trips (within one year after completion of the first baseball season) as compared to operations absent the plan. (AR 1871-1872.)

The DEIR includes a comprehensive draft TMP, which includes an appendix of maps with off-site improvement recommendations (AR 5141-5284), as well as a Transportation and Parking Demand Management Effectiveness Analyses (AR 5285-5340). The DEIR Appendix also includes mandatory and optional TDM strategies. (AR 5294-5305.)

Thus, the TDM and TMP provide specific performance standards that are reasonable and supported by substantial evidence.

Finally, insofar as Petitioners claim that AC Transit and BART commented on feasibility and operation costs, the FEIR responded. (AR 11500-11510 [regarding AC Transit congestion impacts], 11488-11499 [providing BART capacity analysis], 11555-11561 [noting at AR 11560

that public financing is not a CEQA issue], 11751-11761 [responding to BART]; 88928-88938 [noting that funding-related comments not directly related to implementation of mitigation measures are not a CEQA concern and providing information on TMP and TDM funding].)

Further, the congestion impact on public transportation is not necessarily a CEQA concern. (Saltonstall v. City of Sacramento (2015) 234 Cal.App.4th 549, 586-587 [finding challenge did not meet the burden of demonstrating that "crowd safety" constitutes a matter for CEQA review].)

The EIR's analysis and conclusions regarding land use conflicts are reasonable and supported by substantial evidence.

7. Cumulative Impacts

Petitioners argue that the City failed to consider a separate project—the Turning Basins Widening project ("TBP"), which will affect portions of the HT Project site. (OB, p. 65.) Petitioners argue that the EIR cannot avoid analyzing the potential cumulative impacts of the TBP merely because an environmental and feasibility analysis was not complete.

"CEQA does not require that an EIR consider the potential cumulative impacts of every proposed future project; it requires only that an EIR consider the cumulative impacts of 'probable future projects.'" (City of Maywood, supra, 208 Cal.App.4th at p. 398.) Courts have found that projects undergoing an environmental review are reasonably probable future projects. (Gray v. County of Madera (2008) 167 Cal.App.4th 1099, 1127.) To prevail on a challenge based upon the failure to consider cumulative impacts, the petitioner bears the burden of proving that the proposed future project qualifies as a "probable future project." (Ibid.; Sierra Club v. City of Orange (2008) 163 Cal.App.4th 523, 530 ["Where an EIR is challenged as being legally inadequate, a court presumes a public agency's decision to certify the EIR is correct, thereby imposing on a party challenging it the burden of establishing otherwise. [Citations.]"].)

Here, Petitioners submit the NOP for the TBP, which indicates that the NOP was issued May 31, 2022. (Petitioners' RJN, Ex. C.) The Project's DEIR was issued February 2021 and the FEIR was issued December 2021, approximately a year-and-a-half and six months, respectively, before the TBP NOP. (AR 11221.) The court accordingly does not consider Petitioners' RJN Exh. C as it post-dates the EIR and FEIR in this case and is not part of the administrative record.

Further, as the EIR explains—in both the DEIR and FEIR—it did not include the TBP as a future project because, at the time of the Project's NOP, the TBP was undergoing a feasibility study by the U.S. Army Corps of Engineers and the Port to be completed by the end of 2023. (AR 755; see also AR 11333-11334 [explaining that the TBP is a separate project that will be addressed in a separate CEQA document, if determined to be feasible].) While Petitioners assert that the feasibility study was well underway during the EIR process for this case, they cite only a reference in the record that there was a feasibility study cost share agreement. (AR11333.) In its reply brief, Petitioners cite a weblink to a feasibility report. The court declines to review this document, cited for the first time in the reply brief and not part of the administrative record.

Insofar as Petitioners argue that the TBP might result in the loss of 10 acres of the Project site,

the EIR considered that scenario as part of the Maritime Reservation Scenario. (AR 752-755, 783-793, 800.)

Ultimately, Petitioners have not met their burden of establishing that the TBP was a "probable future project."

D. City's Analysis of Alternatives [Petitioners' Section F & Section D.3.f]

The parties make several arguments regarding the City's consideration of alternatives. The number of these arguments, and placement in the briefing, differs between the parties.

The court considers the following arguments to encompass all arguments made in the briefing regarding consideration of alternatives: (1) the EIR used an "artificially narrow set of Project objectives" to precluded anything but the Howard Terminal site (OB, p. 66); (2) the evaluation of the Coliseum Alternative was inadequate (OB, p. 67-69); (3) the City's analysis, mitigation and adoption of the Grade Separation Alternative as the proposed project was improper (OB, pp. 37, 40-42, 69-72); and (4) the City's rejection of multiple grade separation alternatives was not supported by substantial evidence (OB, 38-43).

1. The EIR's Project Objectives and Alternatives

Petitioners argue that the City did not adequately consider the Coliseum Alternative. (OB, pp. 66-67.) Petitioners assert that the EIR used an "artificially narrow set of Project objectives designed to preclude anything but a 'waterfront-only' location at Howard Terminal," which resulted in an inadequate evaluation of the Coliseum as a potential alternative and "a cursory analysis of Alternative 3 (Single Grade Separation) that the City ultimately adopted." (OB, p. 66.)

CEQA requires an EIR to "describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (Guidelines, § 15126.6, subd. (a).) The lead agency is responsible for selecting a range of alternatives and must disclose its reasoning. (Ibid.)

An EIR need not consider "every conceivable alternative," but it must consider a "reasonable range" of potentially feasible alternatives; an EIR is not required to consider alternatives which are infeasible. (Ibid.; Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 574.)

"[A] lead agency may not give a project's purpose an artificially narrow definition." (North Coast Rivers Alliance v. Kawamura (2015) 243 Cal.App.4th 647, 668-669 [finding a project's purpose that "could become unattainable at any time" artificially narrow].)

The City considered four alternatives: (1) No Project Alterative, (2) the Coliseum Area Alternative, (3) the Proposed Project with Grade Separation Alternative, and (4) the Reduced Project Alternative. (AR 221, 2138-2172.) The EIR also identified other alternatives considered—such as Laney College and a series of privately owned properties referred to as

Victory Court—and explained why the other alternatives were eliminated from detailed analysis. (AR 2188-2191.) The EIR explained that Laney College and Victory Court were not feasible "due to the lack of site control by the City or the A's, and the inability to reasonably acquire or otherwise obtain control of either site." (AR 2188.) Further, the EIR explained that the City could not identify other sites that were large enough and over which the City or Oakland A's had control, among other reasons. (AR 2189.)

While the Project Objectives did incorporate the waterfront as an objective (AR 2133), the EIR explained that other non-waterfront locations were considered and eliminated for feasibility reasons. Thus, the selection of the four alternatives and the elimination of others was reasonable and supported by substantial evidence.

2. The Coliseum Alternative

Petitioners argue that the DEIR "summarily concluded" that the impacts for the Coliseum Alternative would be "similar" to the Howard Terminal site without analyzing or comparing potential impacts. (OB, p. 67.) Petitioners claim the Coliseum Alternative was rejected due to the Coliseum not being "a viable location for a new MLK ballpark," which is not supported by the record. (OB, p. 69.)

Petitioners also challenge the City's rejection of the Coliseum Alternative, based on "late-submitted new information lacking public review." (OB, p. 68, citing AR 88950-88958.) Petitioners claim this "after-the-fact claim that the Coliseum site is infeasible preclude meaningful evaluation." (OB, p. 69.)

The Coliseum Alternative would remove the existing Coliseum building and replace it with a new ballpark, retain the existing Oakland Arena, and develop a similar mix and density of uses that the Project proposes. (AR 2142.) No physical changes would occur at Howard Terminal. (AR 2142.) The analysis draws on information from the 2015 Coliseum Area Specific Plan ("CASP") but noted that a CASP amendment would be required due to the variation in mix and density of the proposed Coliseum Alternative. (AR 2142, 2144.)

The DEIR analyzed the wind impact, the air quality impacts, the greenhouse gas impacts, the land use impacts, and other impacts. (AR 2145-2152.) The DEIR presented tables comparing the impacts of the various alternatives. (AR 2174-2187.)

The FEIR further explained how the Coliseum Alternative was evaluated against the Project's impacts. (AR 11408-11412, 11414-11415.)

Ultimately, it was determined the Coliseum Alternative was "infeasible and less desirable than the Project." (AR 472-475.) The Coliseum Alternative was rejected because it could "not feasibly attain most of the basic objectives of the project, and in particular, fails entirely to achieve those objectives related to location near the waterfront, Jack London Square and Downtown, increasing use of the waterfront, and providing a feasible location for a MLB stadium with a mixed use project." (AR 473.)

The Coliseum Alternative "is surrounded largely by industrial uses and does not have a

waterfront or any natural features that would enhance the aesthetics and experience at the ballpark or allow for public access to such features. For this reason, it is less likely City residents and tourists will visit the site when the ballpark is not in use as there are no features to attract visitors, even with a mix of use and open space for public use. Current conditions at the Alternative 2 site, vacant when no events are at the Coliseum or Arena, support this conclusion." (AR 473.) Further, the "project sponsor also does not have control over the site and it is uncertain whether the project sponsor can reasonably acquire the site for the Project in order to build a new ballpark within a reasonable time period and consistent with MLB's requirements." (AR 473.)

The rejection of the Coliseum Alternative is reasonable and supported by substantial evidence.

3. The Single Grade Separation Alternative (Alternative 3)

First, Petitioners argue that the City failed to account for, and mitigate, "the unique impacts associated with Alternative 3," which is the single grade-separated crossing option ultimately adopted. (OB, p. 37 ["Mitigation required for Alternative 3 is not included in EIR or City approvals"]; see also OB, pp. 40-42, 67-72.)

Moreover, Petitioners challenge the City's selection of Alternative 3, because the EIR does not provide evidence that a single grade-separated crossing is a feasible option. (OB, p. 69.)

The EIR analyzed the impacts and feasibility of a single grade-separated crossing. (AR 2152-2165.) The DEIR provided a comparative analysis of the alternatives, including matrices comparing the impacts of the various alternatives, generally and specific to air quality. (AR 2172-2187.) The DEIR concluded that a single grade-separated crossing "would reduce but not eliminate the significant and unavoidable impacts associated with at-grade railroad crossings under the proposed Project." (AR 2165.)

The FEIR responded to comments regarding Alternative 3, including the comment that it should be a mitigation measure instead of an alternative. (AR 11393.) It explained that the single grade alternative would reduce traffic congestion when freight trains pass through and would reduce unavoidable safety risks associated with at-grade railroad crossings. (AR 11403.)

The EIR also considered an alternative with no at-grade railroad crossings and deemed it infeasible "given the length of time it would take to design, get approval for, and construct a new grade-separated crossing and the stated Project objective to complete construction of the new ballpark, together with any infrastructure required within a desirable timeframe and to maintain the Oakland Athletics' competitive position within MLB." (AR 2189-2190.)

As discussed in more detail below ("Multiple Grade Separation Alternatives"), the EIR concluded that more than one grade separated crossing would not be feasible. (AR 11395 [explaining two grade separations would be infeasible "because of the need for extensive property acquisitions…, associated costs, and because a meaningful percentage of the Project site would become less accessible/useable due to the elevated or depressed roadway connections needed to access the grade separations.)"].) "By extension, grade-separating more than two crossings would also be infeasible." (AR 11358.)

Therefore, Alternative 3, the proposed Project with single grade separation alternative, was selected as the Project. (AR 406-407.) This selection is reasonable and supported by substantial evidence.

4. Multiple Grade Separation Alternatives

Petitioners argue that the City's rejection of multiple grade-separated crossings alternatives is not supported by substantial evidence. (OB, pp. 38-43.) Petitioners assert that the public safety risk at rail crossings could be mitigated with additional grade-separated crossings but "the record contains scant evidence that these options were meaningfully considered before they were deemed infeasible." (OB, p. 38.) Petitioners argue the City provided no reasons for eliminating at-grade crossings in the Jack London Square area. (OB, p. 40.)

The EIR explained that the Project site is currently accessed by two at-grade crossings: Martin Luther King Jr. Way and Market Street. (AR 721-722 [also identifying Clay Street for vehicular access], 2243.) The Project does not propose to add any new at-grade railroad crossings. (AR 1759.) The DEIR concluded that the Project would generate additional multimodal traffic crossing the at-grade railroad crossings, which would result in a significant and unavoidable risk. (AR 1910.)

The EIR considered an alternative with no at-grade railroad crossings. (AR 2189-2190.) The City studied grade-separated crossings at MLK Jr. Way, Chestnut Street, Linden Street, Myrtle Street, Jefferson Street, Clay Street, and Castro Street. (AR 2189.) The EIR explains that these options were rejected because they would "significantly limit the ability to develop the site for ballpark and non-ballpark uses," "conflict with the existing Peaker Power Plant," and "result in poor connections to the City's existing street grid." (AR 2189.)

The EIR explained that raising the roadway on Market or Brush Streets would impact existing utilities, including storm drains, sanitary sewers, domestic water, gas, electric, and communications utilities. (AR75962 [2019 BKF Engineers and Fehr & Peers Memorandum].) Similarly, Market and Brush streets provide driveway access to adjacent properties and a grade separated crossing on Brush Street would eliminate access for 11 driveways. (AR 75962; AR 11399.)

The FEIR responded to comments regarding grade separated crossings and included a further study on the issue. (AR 11356-11358 [citing 2021 BKF Study]; 11400 ["Rejection of Alternatives"].) The further investigation considered nine grade-separated alignments and found Brush and Market to be the most feasible options. (AR 11357.) The Study further concluded that two grade-separated structures would not be feasible "given the property access constraints, right-of-way impacts, and compounding effects of the costs on the Project. By extension, grade-separating more than two crossings would also be infeasible." (AR 11358; see also AR 11395 [explaining two grade separations would be infeasible "because of the need for extensive property acquisitions (multiple properties along both streets would lose access and need to be acquired), associated costs, and because a meaningful percentage of the Project site would become less accessible/useable due to the elevated or depressed roadway connections needed to access the grade separations."].)

The EIR also studied the possibility of an undercrossing (AR 2190) and "undergrounding" or "depressing" the rail tracks (AR 11395) to create a grade separated crossing but determined them to be unfeasible options.

The EIR's analysis and conclusions regarding alternatives are reasonable and supported by substantial evidence.

E. Additions to the EIR [Petitioners' Section G]

"A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification." (Guidelines, § 15088.5, subd. (a).) Recirculation is not required where the new information added merely clarifies or amplifies or makes insignificant modifications to an otherwise adequate EIR. (Id., § 15088.5, subd. (b).)

An agency's determination not to recirculate is given "substantial deference" and is presumed "to be correct." (Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer (2006) 144 Cal.App.4th 890, 903.) The challenger "bears the burden of proving substantial evidence does not support the [agency's] decision not to revise and recirculate the [EIR]." (Ibid.)

"An express finding is not required on whether new information is significant; it is implied from the agency's decision to certify the EIR without recirculating it." (South County Citizens for Smart Growth v. County of Nevada (2013) 221 Cal.App.4th 316, 328.) "CEQA [does] not require the [agency] to delay the project further in order to evaluate the new project's reduced impacts on the environment." (Western Placer Citizens, supra, 144 Cal.App.4th at p. 906.)

Here, Petitioners cite the volume of new information added, but Petitioners do not identify any meaningful changes resulting from the new information. Petitioners do not argue that the information reveals a new significant impact, alternative, or mitigation measure that had not been previously considered. (Guidelines, § 15088.5, subd. (a)(1)-(4).)

Further, based upon the Court's review, the new materials merely support the conclusions of the EIR; they do change or alter the EIR's analysis or present any new alternatives or mitigation measures not previously considered. For example, the 2021 ENGEO memorandum regarding liquefaction supplements the EIR's conclusions and responses to comments. (AR 87294-87296.) Similarly, the 2021 ENGEO HHERA Information memorandum supports the HHERA's analysis of HOPs. (AR 87387-87390.)

The new material did not require recirculation or revision of the EIR.

FURTHER PROCEEDINGS

The parties are ordered to meet and confer as to a form of the writ(s)/judgment(s) to implement this ruling. If they do not agree, they shall submit a joint statement, with attached redlined

writ/judgments, stating their positions. The proposed writ/judgment and any joint statement shall be submitted to the court (and emailed to the department clerk in WORD form) by 9/16/2022. The court will hold a Case Management Conference on 9/20/2022 at 3 pm.

Dated: 09/08/2022

Brad Seligman / Judge