

April 27, 2021

Mr. Peterson Vollmann, Planner IV
City of Oakland
Bureau of Planning
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Dear Mr. Vollmann:

Thank you for providing the California Air Resources Board (CARB) with the opportunity to provide comments to the City of Oakland (City) on the Draft Environmental Impact Report (Draft EIR) for the Waterfront Ballpark District Project (Project), State Clearinghouse No. 2018112070. The goal of the Project is to construct a new Major League Baseball (MLB) ballpark, as well as residential, entertainment, office, hotel, and retail (mixed use) development, creating a new Oakland Waterfront Ballpark District at a site currently known as the Charles P. Howard Terminal (Howard Terminal) on the Oakland waterfront from the Port of Oakland (Port). Construction of the Project would occur over at least seven years and would generate construction-related emissions and fugitive dust from off-road construction equipment and on-road vehicles such as haul trucks and vendor trucks. The Project would generate operational emissions from stationary sources (diesel emergency generators); energy sources (natural gas combustion in stoves and heating); area sources (consumer products, architectural coatings, and landscape equipment); and mobile sources (exhaust from on-road automobile and truck trips). CARB is concerned about local air quality impacts to the West Oakland Community, a community disproportionately impacted by air pollution. We believe that through strengthened mitigation measures, commitment to no net increase of any air pollutant, and collaboration with community regarding concerns and local Plans, the Project has a path forward via commitment to the greatest feasible extent of mitigation.

Recent legislation has placed additional emphasis on the need to address community-scale impacts. Assembly Bill (AB) 617 (C. Garcia, Chapter 136, Statutes of 2017)¹ established a new, community-focused framework to address air pollution disparities at the neighborhood level. Among other provisions, AB 617 requires CARB to identify communities with high cumulative exposure burdens to air pollution and select communities for community-specific emissions reduction programs and/or community air monitoring.

This Project site is located within the West Oakland community which has been designated as a disadvantaged community under AB 617 and therefore, CARB is concerned about localized

¹ Assembly Bill 617, Garcia, C., Chapter 136, Statutes of 2017, modified the California Health and Safety Code, amending § 40920.6, § 42400, and § 42402, and adding § 39607.1, § 40920.8, § 42411, § 42705.5, and § 44391.2.

air pollutant exposure at the neighborhood level. CARB is concerned about the lack of specificity and stringency in the proposed air quality mitigation measures regarding criteria and toxic air contaminants during and after the construction phase. CARB submits the following comments to strengthen the Project's mitigation measures to reduce local air quality impacts and ensure consistency and alignment with existing Plans (*Owning Our Air: The West Oakland Community Action Plan*).

Assembly Bill 617 (Garcia, 2017)

In response to AB 617, CARB established the Community Air Protection Program with the goal of reducing exposure in communities heavily impacted by air pollution. This Project falls within the boundaries of the West Oakland Community, a community chosen for inclusion in the first year of the Community Air Protection Program.

In September 2018, CARB's Governing Board selected West Oakland as one of the initial 10 communities for this community-focused action and the development of a community emissions reduction program (CERP), recognizing the cumulative exposure from air pollution sources impacting the community like freight, freeways, industry, and seaport operations. CARB's Governing Board approved the *Owning Our Air: The West Oakland Community Action Plan (WOCAP)* in December 2019, previously adopted by the Bay Area Air Quality Management District (BAAQMD) Governing Board in October 2019. The WOCAP is a plan developed by a community-based Steering Committee and serves as a blueprint for improving air quality in this community. The West Oakland Environmental Indicators Project (WOEIP) and the BAAQMD are now actively engaged in implementation of the WOCAP to reduce exposure to air pollution in West Oakland. Both BAAQMD and CARB are legally responsible for implementing their respective WOCAP emission reduction measures and for enforcing the full extent of the WOCAP, generally. (Health and Safety Code, section 44391.2, subs. (c)(6) and (c)(8))

AB 617 underscores the need for public agencies to collaborate with communities, industry, and each other to avoid further exacerbating elevated air pollution levels in communities across the State. While the Project's Draft EIR lists a number of mitigation measures to reduce air quality and health impacts, we submit the following comments for consideration:

CARB has reviewed the Air Quality chapter of the Draft EIR and believe that additional, more specified, and more stringent mitigation measures are feasible to reduce air quality and health impacts in West Oakland.

I. The Project's Air Quality Mitigation Measures Improperly Defer Mitigation and Should Be Strengthened with Clear Performance Standards

The Draft EIR determined that the Project would result in significant and unavoidable impacts in the following areas, even with implementation of mitigation measures:

- a. Project-level and cumulative conditions could result in or contribute to construction related criteria pollutant emissions in excess of the City's thresholds. (*Impact AIR-1 and Impact AIR-1.CU*)
- b. Under Project-level and cumulative conditions, operation of the Project (and combined overlapping construction and operation) would result in average daily emissions of criteria pollutants in excess of the City's thresholds. (*Impact AIR-2 and Impact AIR1.CU*)
- c. The Project, combined with cumulative development, would also contribute to cumulative health risk impacts on sensitive receptors. (*Impact AIR-2.CU*)

Mitigation Measure AIR-1b would require the Project Sponsor to prepare and implement a Construction Emissions Minimization Plan (Emissions Plan) and Mitigation Measure AIR-1c would require all off-road construction equipment used during Project construction to be equipped with Tier 4 Final or equivalent engines. Once prepared, the Project Sponsor will submit the Emissions Plan to the City prior to the start of the Project's construction-related activities for each project site. Mitigation Measure AIR-2e would require the Project Sponsor to prepare a Criteria Pollutant Mitigation Plan (CPM Plan) to identify all available feasible measures to reduce total criteria pollutant emissions below the City's thresholds of significance.

Mitigation Measure AIR-2e as written, improperly defers mitigation for air quality impacts associated with the project by improperly delegating responsibility to assess impacts and mitigation to the Oakland Planning Department, in violation of CEQA (See, *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296), 307). Mitigation Measure AIR-2e requires the Project sponsor's CPM Plan to "include detailed description of the criteria pollutant emissions for all construction activities and all operational components of each Project site as shown in the final development plan or equivalent based on the best available construction and operational activity and energy use data at the time of Project approval and the latest and most up-to-date emissions modeling and estimation protocols and methods."² A study or plan, like the CPM Plan required under Mitigation Measure AIR-2e, developed after project approval to determine the extent of air pollutant emissions, and the associated air quality impacts and mitigation, that is subject to only administrative approval bypasses the public decision-making process and amounts to post hoc rationalization of the City's actions. (*Sundstrom*, 202 Cal. App. 3d at p. 307.) Notably, Mitigation Measure AIR-2e does not cite to existing criteria air pollutant data and impacts that the City, the lead agency for CEQA, has identified in the DEIR for operational and construction activities associated with the Project, but leaves it up to the applicant to determine the extent of air quality impacts from the Project. This is not consistent with CEQA because the EIR and its associated impact analyses for all resource areas must be prepared "directly by, or under contract to" the lead agency, "must reflect the independent judgment of the lead agency," and must be presented to the decision making body of the lead agency before project approval.

² Draft EIR, page 4.2-78.

(*Sundstrom*, 202 Cal. App. 3d at p. 307; Public Resources Code, section 21082.1, subd. (a); title 14 California Code of Regulations (CCR), section 15084, subd. (e).)

Mitigation Measure AIR-2e is also not enforceable and improperly defers mitigation. (Title 14 CCR sections 15126.4, subdivision (a)(1)(B) and (a)(2).) Although the applicant could potentially include measures that could reduce the Project's onsite construction and operational emissions in the CPM Plan required under Mitigation Measure AIR-2e, Mitigation Measure AIR-2e is not enforceable because it does not commit the agency to implement feasible mitigation for the Project's air quality impacts. Mitigation Measure AIR-2e states that mitigation measures may be removed from the CPM Plan if the Oakland Planning Department determines they are infeasible, "in its discretion."³ The City's decision-makers, however, are solely authorized to identify potential actions that will feasibly achieve a performance standard to mitigate air quality impacts, which must occur during environmental review; allowing the City's Planning Department to make feasibility determinations related to mitigation measures after project approval is inconsistent with CEQA because it lacks the legal authority under CEQA to do so, making Mitigation Measure AIR-2e unenforceable. (Title 14 CCR § 15126.4, subd. (a)(1)(B).)

The DEIR improperly defers mitigation for Mitigation Measure AIR-2e because it, plainly, states, "the exact amount of daily and annual emission reductions from implementation of the required CPM Plan is not currently known"⁴ which implies that there is no certainty relative to the CPM Plan's ability to mitigate the Project's air quality impacts. CEQA prohibits deferred mitigation to a future time, but allows the development of mitigation measures to a later date provided it follows the mandates of title 14 CCR section 15126.4, subdivision (a)(1)(B). This subdivision provides: "[t]he specific details of a mitigation measure, however, may be developed after a project's approval, when it is impractical or infeasible to include those details during the project's environmental review, provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the types of potential action(s) that can feasibly achieve that performance standard that will be considered, analyzed, and potentially incorporated in the mitigation measure." (Ibid.) The DEIR fails to comply with this mandate because it does not identify, with any specificity, nor does it quantify the effect any type of potential action has on the ability to mitigate air quality impacts from the Project, which is inconsistent with section 15126.4, subdivision (a)(1)(B).

Similarly, Mitigation Measure AIR-1c also improperly defers the mitigation to a future time in violation of CEQA because it does not provide adequate detail to reduce the Project's significant impact on air quality. Notably, it does not provide a performance standard for determining when the "possible exception" to the Tier 4 emission requirement applies to certain equipment. Furthermore, Mitigation Measure AIR-1c leaves it up to the applicant to decide when certain types of equipment are "not commercially available", which makes the

³ Draft EIR pages 4.2-77 and 4.2-82

⁴ Draft EIR, page 4.2-84

mitigation measure virtually unenforceable since there is no objective standard for determining what constitutes unavailability.

CARB urges the City to identify adequately the construction and operational air quality impacts of the project and to prepare adequate, enforceable and feasible mitigation measures in the Draft EIR to provide adequate disclosure to the public and the City's decision-making body before the City approves the Project, as required under CEQA. Where several feasible measures are available to mitigate an impact, CEQA requires each measure to be discussed in the EIR (see title 14 CCR § 15126.4(a)(1)(B)).

II. More Mitigation Measures Should Be Applied to Reduce the Project's Significant and Unavoidable Impact on Air Quality

Without stringent performance standards for evaluating the feasibility of mitigation measures identified in the Draft EIR, unmitigated emissions from construction equipment and project operations can contribute to increased air pollution in the West Oakland community. Although the Draft EIR identifies a set of "feasible" mitigation measures to reduce air pollutant emissions from construction and operation of the Project, CARB believes the Draft EIR does not consider the full set of feasible mitigations and urges the City to ensure the cleanest possible construction and operational practices and equipment are utilized, including zero emission vehicles, equipment, and technologies. CEQA requires that all feasible mitigation measures be incorporated into the EIR before a lead agency can determine if an impact is still significant and unavoidable (see California Public Resources Code § 21081; title 14 CCR §§ 15092, 15126.2(b)). To meet these requirements, CARB urges the City to include the following mitigation measures in the Final Environmental Impact Report (FEIR).

1. Include contractual language in tenant lease agreements that requires all loading/unloading docks and trailer spaces be equipped with electrical hookups for trucks with transport refrigeration units (TRU) or auxiliary power units.
2. Include contractual language in tenant lease agreements that requires all TRUs entering the project site be plug-in capable.
3. Include contractual language in tenant lease agreements that requires future tenants to exclusively use zero-emission light and medium-duty delivery truck and vans.
4. Include contractual language in tenant lease agreements that requires all service equipment (e.g., yard hostlers, yard equipment, forklifts, and pallet jacks) used within the project site to be zero-emission. This equipment is widely available.
5. Include contractual language in tenant lease agreements that requires all heavy-duty trucks entering or on the project site to be model year 2014 or later, expedite a transition to zero-emission vehicles, and be fully zero-emission beginning in 2030.
6. Prohibit the use of diesel fuel on-site, consistent with the Bay Area Air Quality Management District's Diesel Free By '33 initiative (<http://dieselfree33.baagmd.gov/>).

CARB staff are available to further discuss technology availability and potential construction and operations mitigation measures with the City.

CARB is in agreement with the statement in the Bay Area Air Quality Management District's comment letter submitted during the Notice of Preparation of the Draft EIR recommending the Project use a no net increase of any air pollutant as the significance threshold to base impacts and mitigation measures in West Oakland – a community already facing high cumulative exposure burdens to air pollution. Onsite mitigations (including those listed above) should be prioritized, followed by offsite mitigation measures within the West Oakland Community and near the Project site.

III. The City and Project Sponsor Should Do More to Ensure Tenant Relocation Does Not Negatively Impact the Community

The Draft EIR states that "truck drivers or businesses currently parking at Howard Terminal should find sufficient overnight parking in the Seaport or the former OAB."⁵ Both truck operators and community members on the West Oakland Steering Committee continue to voice concerns over insufficient parking availability that causes neighborhood impacts.

The 1998 City of Oakland General Plan, Land Use and Transportation Element, recognized that illegal truck parking, loading, and driving on neighborhood streets was a cause for concern requiring truck re-routing and enforcement. To this end, the implementation section identified the need for targeted improvements in West Oakland.

Although the Howard Terminal currently has at least 23 acres allocated to truck operations such as parking and container depot, the West Oakland Community Steering Committee members have expressed concerns about truck parking and idling in their neighborhoods. The long-standing issue of illegal truck operational activity in West Oakland neighborhoods therefore causes CARB acute concern about the potential overflow of displaced truck parking tenants into the West Oakland community due to space and availability constraints both during and after Project construction.

CARB believes that the Draft EIR provides insufficient evidence that displaced Howard Terminal tenants will find parking availability that does not negatively impact the West Oakland community and therefore requests that the Project Sponsor provide additional evidence beyond speculation to ensure tenant relocation does not negatively impact the community.

IV. The City Should Ensure Consistency and Alignment with the West Oakland Community Action Plan (WOCAP)

CEQA also requires a lead agency to discuss any inconsistencies between a proposed project and applicable regional plans, such as the WOCAP. (Title 14, CCR section 15125, subdivision (d)) The WOCAP lays out a series of strategies to be implemented to reduce pollution in the community. The City has authority for implementing many of the strategies identified in the

⁵ Project Draft EIR page 4.2-39

WOCAP. As described on the City's website: "The work to explore land use tools to address emissions, as well as the research and existing conditions assessment of poor health, air pollution and industrial lands will serve a bridge to the General Plan Update, estimated to kick-off in June 2021."⁶ Activities related to or as a consequence of the Project have the potential to delay or interrupt the implementation of multiple strategies in the WOCAP – an adopted local Plan. We urge the City to ensure, through well-defined mitigation or design measures in the FEIR, that no WOCAP strategies are adversely affected and that the Project will not conflict with the already adopted WOCAP, with emphasis on the following strategies within the City's jurisdiction:

- Strategy #9: The City of Oakland develops a plan to limit the hours that trucks can operate in the community.
- Strategy #22: The City of Oakland adopts more stringent air quality construction and operations requirements.
- Strategy #40: The City of Oakland, consistent with the West Oakland Truck Management Plan, implements, in consultation with West Oakland residents, traffic calming measures to keep truck traffic off residential streets (see Section III above).
- Strategy #42: The City and Port of Oakland award long-term leases to vendors that will deliver trucker services (including mini-market and convenience stores, fast food, and fast casual restaurants), and parking to keep trucks off West Oakland streets.

V. **Commitment to Community Benefits Agreement (CBA)**

We applaud the City for working closely with the CBA Steering Committee on the equity-centered Howard Terminal proposal Community Benefits Agreement (CBA). CARB supports a fully enforceable and legally binding CBA that is developed with and benefits the air quality of the local community.

The Project will have significant impacts on the West Oakland community which is already overburdened with air pollution; therefore, it is critical to work collaboratively with community members to ensure equitable outcomes and improved local air quality. CARB supports relevant community-driven air quality measures as listed on pages 20-22 of the August 20, 2020 Howard Terminal Steering Committee Initial CBA recommendations, provided the City establish the requisite substantial evidence that they would mitigate air quality impacts identified in the DEIR.⁷

CARB urges the City and Project Sponsor to adopt relevant air quality and health recommendations put forth by the CBA Steering Committee.

⁶ <https://www.oaklandca.gov/topics/west-oakland-community-action-plan-ab-617>

⁷ West Oakland Recommendation Letter <https://cao-94612.s3.amazonaws.com/documents/CBA-Topic-Cohort-Initial-Recommendations-August-14-DRAFT.pdf>

VI. Conclusion

CARB believes that additional, more specified, and more stringent mitigation measures are feasible to reduce air quality and health impacts in West Oakland. Through strengthened mitigation and tenant relocation measures, consistency and alignment with the WOCAP, and commitment to the CBA, the Project is capable of showing environmental leadership and commitment to the greatest feasible extent of mitigation.

Given the breadth and scope of projects subject to CEQA review throughout California that have air quality impacts coupled with CARB's limited staff resources to substantively respond to all issues associated with a project, CARB must prioritize its substantive comments here based on staff time, resources, and its assessment of impacts. CARB's deliberate decision to substantively comment on some issues does not constitute an admission or concession that it substantively agrees with the lead agency's findings and conclusions on any issues on which CARB does not substantively submit comments.

CARB appreciates the opportunity to comment on the Draft EIR for the Project and can provide assistance on zero-emission technologies and emission reduction strategies, as needed. If you have any questions, please contact Dr. Julia Luongo, Air Pollution Specialist, via email at julia.luongo@arb.ca.gov.

Sincerely,



Deldi Reyes, Director of the Office of Community Air Protection

cc: See next page.

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