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1 **I. INTRODUCTION**

2 Respondent Port of Oakland (“Port”) filed an Omnibus Opposition Brief (“OB”) asserting
3 all of its decisions on how to study the Project’s impacts are entitled to deference, supported by
4 substantial evidence, and must be accepted. This misstates the law. The Port ignores clear legal
5 errors not governed by the substantial evidence standard, and ignores critical components of an
6 adequate environmental review, such as the cumulative impact of longstanding environmental
7 injustice in the East Oakland community, and the role that induced and deterred demand plays on
8 Project effects. On other issues, the Port’s discussion was conclusory, ignored new post-circulation
9 data that contradicted the Port’s unsupported assumptions, lacked adequate analysis of GHG
10 emissions, and rejected, without analysis, U.S. EPA’s attempts to help the Port mitigate its GHG
11 emissions. It also rejected feasible alternatives based on narrow project objectives. Finally, the
12 FEIR itself was incomplete, omitting significant portions of public comments.

13 **II. ARGUMENT**

14 **A. The Port Abused its Discretion by Continuing, without Explanation, to Use a**
15 **2019 Baseline for OAK Passenger Levels when New Post-Pandemic Data Showed**
16 **that Oak Passenger Behavior Had Fundamentally Changed.**

17 The Port asserts Petitioner disagrees with the Port’s factual determinations, and that those
18 determinations were supported by substantial evidence and entitled to deference. (*See* OB, 3-4, 5-6,
19 8-9.) When the question is purely one of fact, the Port needs substantial evidence supporting its
20 position. However, when a dispute concerns the adequacy of the EIR’s impact analysis, the court
21 determines whether the analysis represented a good faith effort at full disclosure, and more
22 specifically whether it provided the public with enough information to understand and meaningfully
23 consider the issue being raised. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 513, 515.)

24 When conditions have been fluctuating, like here (OB, 8), the lead agency has discretion in
25 choosing a baseline, but it must be supported by substantial evidence, *and*, the lead agency must
26 explain the analytical path between the evidence and that choice. Here, the Port fails.

27 The Port cites *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* [“*Cherry Valley*”]
28 (2010) 190 Cal.App.4th 316, which is distinguishable. There, a developer proposed a large
subdivision with a primary water supply from a limited groundwater basin, most of which had

1 previously been allocated to an egg farm. The egg farm ceased operating and was replaced by a far
2 smaller agricultural use, with a far lower water use. (*Id.* at p.189.) The court noted that the former
3 egg farm’s groundwater allocation was unchanged, and that allocation had been fully transferred to
4 the entity that would supply the subdivision. (*Id.* at pp. 337-338.) As a result, not only would there
5 be a more than adequate amount available to the subdivision, but the overall water balance for the
6 groundwater basin would be improved. Thus, the city was entitled to continue to use its prior
7 baseline for groundwater use. The situation here is quite different.

8 Stop OAK acknowledges that when the Port issued the NOP in 2021, the COVID-19
9 Pandemic was still rampant, and OAK ridership was understandably severely impacted. The EIR’s
10 consultants, however, compared the Pandemic to the drop in air travel following the 2001 attack on
11 the World Trade Center. (AR 1070-1071, 1092.) “As with other exogenous shocks and recoveries,
12 passenger demand is forecast to return to the previous trend four years following the event.” (*Id.*)
13 By that standard, passenger levels in 2024 would be expected to be near to or equal to 2019.

14 As Stop OAK and other commenters noted, however, when the 2023 OAK passenger
15 numbers became available, along with preliminary number for 2024, the rebound predicted by the
16 EIR’s consultants had not occurred. (*See*, Stop Oak’s Opening Brief at 6.) Unlike *Cherry Valley*,
17 after the drop in passengers during the pandemic, there was no evidence indicating that the
18 previously chosen baseline of 2019 OAK passengers remained valid. Instead, the evidence indicated
19 that 2023 and 2024 passenger levels remained depressed. The most likely explanation was lasting
20 behavioral changes triggered by the pandemic – e.g., replacing travel by remote meeting attendance.
21 (AR 10349 [Table P-4, compare rows for 2019 vs. 2020, which shows a dramatic reduction in
22 nationwide air travel]; *see also*, AR 1071 [DEIR Appendix C]; AR 10633, 10642, 59609; AR
23 88846-88852.)

24 The Port had a duty to explain, whether by an addendum to the EIR or even just by
25 explanatory comments at the final public hearing, what chain of reasoning justified the Port’s
26 disregarding the recent data and sticking to the consultants’ earlier conclusions. But there was none.
27 Respect for the public’s need for an explanation required more. The existing record cannot support
28 the Port’s evident refusal to explain, or even consider, the new evidence.

1 **B. The Port’s Evaluation of Impacts Related to the Expansion of Air Service under**
2 **the Project Failed to Provide the Public with Necessary Information.**

3 **1. Ridership under the No Project Alternative was Significantly Overestimated.**

4 Stop OAK accepts that the demand modeling done in Appendix C (AR 1091-1108) may be a
5 potentially valid way to model future OAK passenger figures if the airport attempts to fully meet an
6 unconstrained demand for air travel in OAK’s catchment area (*see*, AR 1050-1053). But while the
7 Port’s consultants may have been justified in basing passenger growth with the Project’s
8 implementation on a market-based econometric model (AR 1091-1108), the EIR erred in using that
9 same model to predict future passenger growth under the No Project conditions.

10 As the EIR acknowledges, even at the present time, OAK’s current passenger load already
11 significantly exceeds its design capacity. (*See*, Section 2.5.2, AR 109 [existing airport design
12 capacity is an estimated 8-10 million annual passengers, but in 2019, more than 13 million
13 passengers used the airport.]) The EIR flatly admits, even without any further growth in passenger
14 load, OAK currently does not meet industry standards for service.

15 In the EIR’s discussion of the No Project Alternative, the EIR asserts that the airport, “could
16 accommodate the market-based demand *but not at the industry-standard levels of service.*” (AR 487
17 [emphasis added], *see* also AR 15555, 107097 [testimony of Craig Simon at 13:56].) What does this
18 mean? The Port admits it would mean congestion during peak demand periods resulting in degraded
19 levels of passenger service, including check-in, hold-rooms, baggage screening, baggage handling,
20 baggage claim, and arrival facilities. There would also be, at the level of gate and apron use,
21 “increasing inefficiencies due to gate constraints and changes in fleet mix.” (*Id.*) The result would
22 be increased congestion, confusion, delays, and customer annoyance and dissatisfaction.

23 The consultants assume that, for the No Project future conditions, their model’s
24 unconstrained demand – and hence projected OAK passenger levels – would still apply. However,
25 this is the real world, not a model, and constraints – specifically the facilities constraints presented
26 by the No Project Alternative *would* affect the results. Those effects come from changing the “cost”
27 of travel (including delay and passenger inconvenience and frustration). (*See* AR 59857 [2:00 min-
28 2:57 min].) The result would be a corresponding reduction in the number of travelers willing to

1 continue patronizing OAK. Just as decreasing the cost of travel results in increasing the amount of
2 travel; the converse is also true. (AR 59857 [Handy Presentation at 5:35 min-5:45 min.]) If the
3 “cost” of a transportation mode increases, its use will decrease. Charging higher costs during
4 congested periods is used successfully to reduce auto traffic congestion; so-called “congestion
5 pricing.” (AR 30170, 55113 [Policy CC-12]; *see also*, Stop OAK’s Request for Judicial Notice
6 [explanation of “dynamic pricing” for Express Lanes on Alameda County freeways]; *see also* M.E.
7 Ryerson & A. Woodburn, “Manage Flight Demand or Build Airport Capacity” ACCESS 46, 8-12;
8 AR 59499-59503.) The principle applies equally when facility constraints increase “costs” of travel.

9 When OAK’s facilities are overtaxed, this will increase the “cost” of travel (e.g., due to
10 increased congestion, inefficiencies, and delays), and some proportions of travelers will opt to use
11 other travel modes, other airports, or even decide to forego a trip altogether. The result is that, under
12 the No Project alternative, future OAK passenger ridership would decrease compared to ridership
13 under the Project implementation alternative. Put another way, a major future effect of the Project
14 would be significant increases on OAK passenger ridership compared to the No Project alternative.

15 **2. The FEIR Failed to Disclose the Impacts Associated with Increased OAK**
16 **Ridership Under the Project.**

17 Because the FEIR concealed the future increase in OAK ridership compared to the No
18 Project alternative, it also concealed the impacts that would be associated with the increased
19 ridership. Most obvious would be the increased GHG production from the extra flights that would
20 be needed to carry the additional passengers under the Project. However, other impacts would also
21 result from OAK’s increased ridership. These would include significantly increased surface VMT
22 by the additional passengers accessing OAK; increasing air pollutant emissions (both from air travel
23 and surface transportation) associated with transporting the additional passengers; and potentially,
24 in the long term, additional development, both residential and commercial, sparked by the
25 additional passengers OAK would be serving. (AR 59857 [Handy Presentation at 2:56 min-3:24
26 min].) These would all be potentially significant impacts that the FEIR never disclosed or discussed.
27 The failure to provide this information to the public and the Port’s decision-makers was a
28 prejudicial abuse of discretion. (*See, Sierra Club, supra*, 5 Cal.5th at p. 516.)

1 **3. The Port’s Failure to Reduce Future Ridership under the No Project**
2 **Alternative Underestimated the Project’s Air Pollution.**

3 A specific impact from the FEIR’s overestimation of future ridership under the No Project
4 Alternative (See Section II.B.2 supra) is that the ridership increase due to the Project would be
5 accompanied by a proportionate increase in operational air pollutants produced by the additional
6 flights needed to carry the additional ridership. This means that the FEIR’s analysis of air quality
7 impacts was fatally flawed, including the estimate of operational toxic air contaminants – central to
8 the FEIR’s Human Health Risk Assessment (HHRA). The FEIR falsely asserted that operational
9 Toxic Air Contaminants would decrease under the Project. (AR 1260 [Table e-10].)

10 **C. The HHRA Failed by Using an Overly Narrow Definition of Cumulative Impacts.**

11 The HHRA is flawed as it underestimates the cumulative impact from exposure of
12 neighboring East Oakland residents to toxic materials – and more specifically toxic air contaminants
13 (TACs) – and the consequent cumulative negative health impacts.

14 The EIR asserts that it considered and discussed the cumulative impacts of the proposed
15 Project. (AR 495 [Section 5.4].) “The cumulative impact from several projects is the change in the
16 environment which results from the incremental impact of the project when added to other closely
17 related *past*, present, and reasonably foreseeable probable future projects.” (CEQA Guidelines §
18 15355(b) [emphasis added].) The HHRA should have considered toxic air contaminants produced
19 by past, present, and foreseeable future projects in East Oakland. But, it was too narrow.

20 The EIR stated that the cumulative impact study area was to include East Oakland, due to its
21 designation as priority community under Assembly Bill 617, passed in 2017. As explained in Stop
22 OAK’s Opening Brief, the HHRA, unlike the Health Impact Assessment requested by many
23 comments on the Draft EIR—including comments by the Alameda County Department of Public
24 Health—did not consider the long-term negative impacts associated with the history of
25 environmental injustice in the neighboring East Oakland community. It did not include the impacts
26 from *prior* TAC-producing projects in East Oakland, such as the construction and expansion of
27 Highway 880 as well as numerous past industrial projects such as East Bay MUD’s corporation
28 yard. (See, AR 60565 [Oakland General Plan; Environmental Justice and Racial Equity Baseline,

1 Figure 3-4 – Air Pollution Sources].) Instead, the EIR only considered the cumulative impact of
2 specific present, and foreseeable future projects known to or expected to produce toxic air
3 contaminants *and located within 1000 feet of the Project Area’s boundaries*. (AR 1250 [Section
4 E.2.4.5]; *see also* AR 1270 [cumulative PM_{2.5} concentrations] – *compare with* AR 60566 [2018
5 Modeled PM_{2.5} concentrations across Oakland].) Most of the sources shown in the diagram at AR
6 60565, including Highway 880, were not included under the EIR’s restrictive criteria. Yet the
7 effects of existing air pollutants (e.g., asthma) are concentrated in that broader area of East Oakland.
8 (AR 60551.) In short, the HHRA’s cumulative impact analysis did not even conform to the claimed
9 standards of the EIR, never mind the standards set by CEQA.

10 The Port’s position was that it *did* intend to address the health concerns of the East Oakland
11 community, as raised by the Alameda County Department of Public Health, but only *outside* of the
12 CEQA process and only *after* the Project had been given approval. (*See* AR 10713 [testimony of
13 Colleen Liang, Port Director of Environmental Programs and Planning].) This response is
14 analogous to the situation in *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296. “By
15 deferring environmental assessment to a future date, the conditions run counter to that policy of
16 CEQA which requires environmental review at the earliest feasible stage in the planning process.”
17 (*Id.* at p. 307.) Similarly, here, instead of revising the EIR to address cumulative impacts on East
18 Oakland residents, the Port promised to “engage with the community to address their concerns,
19 separate and apart from the proposed project.” (AR 10713.) Such future work bypasses the CEQA
20 process, and would only occur after the Port had already committed itself to the Project.

21 In *Sierra Club, supra*, the court addressed a similar situation involving an EIR, where air
22 quality impacts *would* be partially mitigated, but would be strengthened by future studies:

23 . . . an EIR is required to provide the information needed to alert the public and the
24 decision makers of the significant problems a project would create and to discuss
25 currently feasible mitigation measures. Mitigation measures need not include precise
26 quantitative performance standards, but they must be at least partially effective, even
if they cannot mitigate significant impacts to less than significant levels.

27 (*Id.* at 6 Cal.5th 523.) Here, unlike in *Sierra Club*, the EIR disclaimed any significant impact on
28 East Oakland. The only significant impact, and only mitigation measures, involved on-site

1 employees. Yet, Ms. Liang’s statement on behalf of the Port not only admitted potentially
2 significant cumulative impacts on East Oakland but promised that the Port would address such
3 impacts “separate and apart from the proposed project.” A vague promise of future mitigation does
4 not substitute for full disclosure and enforceable mitigation within the EIR process.

5 **D. Respondent Has Not Overcome the FEIR’s Failure to Adequately Consider or**
6 **Mitigate the Project’s GHG Emissions.**

7 Respondent’s brief leaves unclear which arguments respond to each Petitioner, improperly
8 forcing Stop OAK to analyze and reply to a 70-page brief in just 15 reply pages, and putting the
9 onus on Petitioners to decide which of the dozens of arguments to respond to. For instance,
10 Respondent’s Section D heading states: “Substantial Evidence Supports the EIR’s Greenhouse Gas
11 (GHG) Analysis. [Advocates Br. § IV.A-D.; CBE Br. § II.A.2; Stop OAK Br. § I.D.1-2],” spanning
12 pages 30 to 42. However, Section D only mentions Stop OAK’s brief in two half-page passages:
13 page 38, lines 3 through 19; and page 41 line 19 through page 42 line 3. Stop OAK should only be
14 required to respond to these Section D passages, and urges the court not to rely on any other of
15 Respondent’s arguments in Section D when ruling upon Stop OAK’s claims.

16 **1. CEQA Does Not Permit Piecemealing Impacts.**

17 Stop OAK’s argument that Respondent impermissibly piecemeals the GHG emissions
18 impact analysis is reviewed de novo. (*Anderson v. County of Santa Barbara* (2023) 94 Cal.App.5th
19 554, 573 [“[w]e review piecemealing claims de novo”].) CEQA prohibits piecemeal review of a
20 project’s environmental effects. (*Anderson, supra*, 94 Cal.App.5th 554, 573 [citing *McCann v. City*
21 *of San Diego* (2021) 70 Cal.App.5th 51, 84 [285 Cal. Rptr. 3d 175]; *Communities for a Better*
22 *Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 98].) Respondent claims “[t]here was
23 no ‘chopping up’ of the Project—emissions from initiation of construction through the operational
24 timeframe of 2038 are all clearly disclosed.” (OB, 38:9-11.) But, contradicting this, Respondent
25 admits “[t]he EIR separately quantified the Project’s...construction emissions and...operational
26 emissions.” (37:19-20; *see*, AR 14883 [Final EIR at pg. ES-21].)

27 Respondent rationalizes that “[c]onsideration of the Project’s one-time construction
28 emissions with its ongoing operational emissions would not have changed the EIR’s conclusion that

1 the Project will have a significant and unavoidable impact under the “fair share” threshold.” (OB,
2 38:17-19.) This fails for two reasons. First, had Respondent considered construction and operational
3 impacts together, the impacts analysis and mitigation measures would be different because it would
4 consider mitigation measures based on the impacts of the Project as a whole. Second, GHG
5 emissions are cumulative, and by separating the analysis of GHG impacts, Respondent minimizes
6 the environmental harm. (*Anderson, supra*, 94 Cal.App.5th 554, 573 [“[e]nvironmental review
7 under CEQA cannot be avoided by chopping up a large or cumulative project that has significant
8 environmental effects into ‘bite-size pieces’ that have insignificant effects individually.”]) Worse,
9 the EIR identified conflicting significance determinations without explanation—finding GHG
10 emissions from operation to be [potentially] significant and unavoidable and from construction to be
11 less than significant. (AR 14883 [Final EIR at pg. ES-21]; AR 83 [Draft EIR at pg. 21; *see, Sierra*
12 *Club, supra*, 6 Cal.5th at 519 [a “sufficient discussion of significant impacts requires not merely a
13 determination of whether an impact is significant, but some effort to explain the nature and
14 magnitude of the impact”]; *Cleveland National Forest Foundation v. San Diego Assn. of*
15 *Governments* (2017) 3 Cal.5th 497, 514 [explaining that in order “to inform the critical discussion
16 of mitigation measures and project alternatives at the core of the EIR” more is needed than just
17 labeling an effect “significant,” including “reasonably describing the nature and magnitude of the
18 adverse effect”].) Only by considering the Project’s effects, as a whole, could the public understand
19 the Project’s impacts, or could the Port consider all mitigations needed to address the Projects’
20 GHG effects.

21 2. **Respondent’s Response to EPA’s Comment Letter is a Not Good Faith,**
22 **Reasoned Analysis.**

23 Respondent’s Opposition Brief does not overcome the FEIR’s deficient response to the
24 EPA’s Comment Letter. (OB, 41:18-42:3.) CEQA requires that “[w]hen a comment raises a
25 significant environmental issue”—like the EPA does here raising the issue of GHG emissions from
26 solid waste and recommending mitigation measures for the same—“the lead agency must address
27 the comment ‘in detail giving reasons why’ the comment was ‘not accepted,’” including a “...good
28 faith, reasoned analysis in response. Conclusory statements unsupported by factual information” are

1 not sufficient. (*The Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603,
2 615 [quoting CEQA Guidelines, § 15088, subd. (c) and citing *Laurel Heights Improvement Assn. v.*
3 *Regents of University of California* (1993) 6 Cal.4th 1112, 1124].) Here, Respondent does not
4 include a reasoned analysis that addresses the EPA’s four recommended mitigation measures for
5 GHG emissions related to solid waste. (AR 12658 [EPA Comment Letter at pg. 8]; AR 10611-
6 10612 [Section 8]; AR 10611-10612 [Section 9].) Instead, Respondent states in a single sentence
7 that the Port would need to test materials to see what is appropriate for reuse without any additional
8 details or analysis. (*Id.*) Respondent also references undefined goals and measures it may use to
9 reduce waste without identification of any specific objective standards or binding procedures. (*Id.*)
10 Respondent’s Response to the EPA’s Comment Letter makes no mention of the Project’s impact
11 under the “fair share” threshold. (AR10601- 10612 [Response to EPA Comment Letter].) And, the
12 FEIR fails to impose binding effective mitigation measures that would feasibly reduce the Project’s
13 solid waste GHG emissions. (AR 10611-10612 [Section 9].) There is nothing reasoned about this
14 vague response, and it does not comply with CEQA.

15 **3. Respondent Fails to Address Its Failure to Analyze and Impose Feasible**
16 **Mitigation Related to GHG Emissions from Solid Waste.**

17 Respondent’s OB did not address Stop OAK’s argument that the Port failed to implement
18 feasible mitigation measures related to solid waste GHG emissions. Besides its brief discussion of
19 its inadequate response to the EPA’s comment letter (OB, 41:18-42:3.), the only instance in which
20 Respondent’s Brief references “solid waste” is on page 36. (OB, 36:26-27 [asserting “Alameda
21 County, City and Port requirements to divert construction, demolition and postconsumer waste from
22 landfill disposal through recycling and reuse”... “will result in a minimum of 65% of demolition
23 and construction solid waste being diverted from landfill disposal to reuse or recycling.
24 (AR15119.)”].) Respondent has a duty to reduce impacts from GHG emissions and analyze
25 mitigation measures to minimize the significant effects of the Project, yet it did not. (Pub. Res.
26 Code, § 21002.1(b) [“[e]ach public agency shall mitigate or avoid the significant effects on the
27 environment of projects that it carries out or approves whenever it is feasible to do so”]; Guidelines,
28 § 15126(e) “[t]he subjects listed below shall be discussed,” including “[t]he Mitigation Measures

1 Proposed to Minimize the Significant Effects”]; Guidelines, § 15126.4(a)(2) [measures must be
2 “fully enforceable through permit conditions, agreements, or other legally-binding instruments”]; §
3 15126.4(a)(1)(B) [“[w]here several measures are available to mitigate an impact, each should be
4 discussed and the basis for selecting a particular measure should be identified”].)

5 Respondent claims “the EIR quantifies all sources of Project greenhouse emissions” (OB,
6 40:6-11), but fails to acknowledge and analyze mitigation measures for solid waste. (AR 10612
7 [Final EIR, Appendix P, at pg. P-303 [Section 8-9].) The FEIR did not analyze any of the EPA’s
8 recommended mitigation measures in any detail, or adopt binding commitments to implement them.
9 (*Id.*) Respondent does not list any specific reasons for not including the EPA’s proposed mitigation
10 measures in the FEIR. (*See* AR10601-10612 [Port’s Response to EPA’s Comment].)

11 At best, Respondent impermissibly defers analysis of mitigation measures. (AR 10612
12 [Final EIR, Appendix P, at pg. P-303 [Section 8-9, which states that “[c]onsistent with existing
13 features and amenities at OAK facilities, the proposed facilities would include energy saving and
14 waste reduction features/amenities,” without reference to what those energy saving and waste
15 reduction features/amenities would be].) The Port also asserts that it is “preparing a waste
16 management plan that will incorporate goals and specific measures to reduce waste” without
17 reference to what those goals or specific measures to reduce waste will be, nor how they would
18 mitigate GHG effects. (*Id.*) Such vague and tentative plans do not comply with CEQA. (*POET, LLC*
19 *v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 738 [“tentative plans for future mitigation
20 after completion of the CEQA process,” without any “specific performance criteria for evaluating
21 the efficacy of the measures” violate CEQA]; *see also* Guidelines, § 15121(a).) The FEIR explicitly
22 documents that the Airport is not even in compliance with its current waste diversion goals. (AR
23 456 [Draft EIR at 3.14-26 (“[t]he Port is *on its way* to achieve its goal” for solid waste diversion
24 [emphasis added]).)

25 Respondent asserts in a conclusory manner that the “EIR’s GHG analysis conforms with
26 Guidelines Section 15064.4.” (OB, 32:9-14 [asserting the regulatory context is discussed].)
27 However, Respondent does not discuss how compliance with such regulations, targets, plans,
28 strategies, and ordinances is actually going to reduce GHG emissions as it relates to the Project.

1 (AR00015101-AR00015112 [FEIR discussing federal state, regional, and local regulations as well
2 as significance thresholds and methodologies without analyzing how they will reduce GHG
3 emissions related to the Project and its solid waste].) The FEIR provides no discussion about the
4 purpose and intent of each regulation, target, plan, strategy, and ordinance and whether they were
5 enacted/created specifically to reduce GHG emissions related to solid waste. (*Id.*) Moreover, the
6 regulations, targets, plans, strategies, and ordinances don't deal with the specific recommendations
7 the EPA made in its comment letter. (Compare AR00015101-AR00015112 [regulatory context]
8 *with* AR 12658 [EPA recommended mitigation measures].)

9 Respondent's use of the "fair share" threshold misses the mark. The "fair share" threshold is
10 a nonbinding recommendation from the Bay Area Air Quality Management District's 2022 CEQA
11 Guidelines.¹ The "fair share" threshold is appropriate for typical residential or commercial projects.
12 (AR00015111 [the FEIR acknowledges that the "fair share" threshold "may not be appropriate for
13 other types of projects that do not fit into the mold of a typical residential or commercial project"].)
14 However, the Project is not a residential or commercial project—but rather a municipal public
15 infrastructure project. Moreover, the FEIR does not identify what "fair share" would mean in the
16 context of a municipal public infrastructure project—like here—nor does it discuss how it is an
17 appropriate threshold to use for mitigating GHG emissions for such a Project; it merely concludes
18 that the "fair share" threshold is met. (AR00015111, AR00015119, AR00015121, AR00015121;
19 *Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, 227 ["[t]he
20 analytical gap left by the EIR's failure to establish, through substantial evidence and reasoned
21 explanation, a quantitative equivalence between the Scoping Plan's statewide comparison and the
22 EIR's own project-level comparison deprived the EIR of its 'sufficiency as an informative
23 document.' [citations omitted]"].)

24 **E. The Project's Objective's May Not Be Impermissibly Narrow So as to Preclude**
25 **Consideration of Feasible Alternatives.**

26 _____
27 ¹ Bay Area Air Quality Management District, *2022 CEQA Guidelines: Chapter 3 — Thresholds of Significance* (Apr.
28 20, 2022), available at https://www.baaqmd.gov/~/media/files/planning-and-research/ceqa/ceqa-guidelines-2022/ceqa-guidelines-chapter-3-thresholds_final_v2-pdf.pdf.

1 Contrary to Respondent’s assertion (OB: 45:20-22), whether the Project’s objectives are
2 impermissibly narrow so as to prevent an adequate alternatives analysis is a question of law that
3 should be reviewed under the de novo standard. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th
4 502, 512 [courts determine “de novo whether [an] agency has employed the correct procedures”
5 (citation omitted)]; *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 663.)

6 **1. Respondent’s Project Objectives are Impermissibly Narrow**

7 Respondent cites several cases describing the process for drafting project objectives (OB,
8 43:14-21), but Respondent fails to recognize that CEQA does not permit a project’s description to
9 be so narrow that it precludes analysis of reasonable alternatives. (*Kawamura, supra*, 243
10 Cal.App.4th at pg. 654.) And that is exactly what the Port does. (AR 108, 14940.) Specifically,
11 Project Objectives 2 and 4 are unduly restrictive. (*Id.*) Between the Proposed Project and the
12 alternatives, the Proposed Project is the only option that will achieve all the objectives, including
13 the overly narrow objectives supporting growth-demand goals. Respondent relies on the objectives
14 as a basis to reject otherwise reasonable alternatives. (AR 487 [rejecting various alternatives
15 because they failed to meet all the project objectives].) The only project Respondent was willing to
16 consider was the Project itself, because only modernizing the airport could increase ridership.

17 **2. The Project’s Narrow Objectives Precluded Analysis of Feasible Alternatives.**

18 Respondent asserts it considered seven alternatives with specific findings for not adopting
19 each alternative. (OB, 45:12-17.) However, such an assertion in no way addresses the fact that some
20 alternatives weren’t considered further based on their failure to meet the Project’s narrow
21 objectives. (AR 475-490 and 15323-15340 [Draft and Final EIR, Chapter 4 (Alternatives)].) In *We*
22 *Advocate Thorough Environmental Review v. County of Siskiyou* (2022) 78 Cal.App.5th 683, 692
23 the Court found narrow objectives don’t comply with CEQA when they are

24 ‘so narrow[] as to preclude any alternative other than the Project.’ . . . [I]f the
25 principal project objective is simply pursuing the proposed project, then no
26 alternative other than the proposed project would do. All competing reasonable
alternatives would simply be defined out of consideration.

27 Similarly, here, the Project’s objectives specify that the Project, in addition to modernizing
28 existing terminal facilities, will provide additional terminal facilities sized to accommodate an

1 expected “market- based” projected increase in travel demand at this airport without regard to
2 whether that demand will actually materialize. (AR 108, 14940, 12679-12681.) Again, the Port’s
3 clear goal was to build the proposed Project to increase travelers using the Airport. (*See We*
4 *Advocate Thorough Environmental Review, supra*, 78 Cal.App.5th at p. 692 [“[i]n taking this
5 artificially narrow approach for describing the project objectives, the County ensured that the results
6 of its alternatives analysis would be a foregone conclusion”].)

7 Respondent tries to distinguish *Kawamura* to no avail, highlighting that in *Kawamura* the
8 EIR did not study the alternative that was ultimately approved. (OB, 45:4-8.) Irrelevant. In
9 *Kawamura* the agency failed to analyze alternatives related to pest “control” because the project
10 objectives called for pest “eradication.” Here, Respondent failed to consider alternatives that would
11 have avoided or lessened the Project’s significant impacts because the project’s objectives called for
12 modernization and sufficient expansion to fully meet unconstrained demand. (AR15330.)

13 Respondent argues its approach is supported by substantial evidence of the “outdated
14 conditions” of the airport, expert demand forecast, seismic and fire safety needs, and various
15 industry documents suggesting adequate levels of service. (OB, 44:21-26 [citing AR14939-42,
16 15325-28].) However, each of these factors (except for the seismic and fire safety standards) relate
17 to the Port’s use of an improper baseline and the Project’s creation of induced demand. Those
18 factors are circular and self-serving to Respondent’s desired Proposed Project and impermissibly
19 exclude other alternatives. Looking at the only valid factor from the list above (the need to meet
20 seismic and fire safety standards), the Port does not need to implement the Proposed Project just to
21 update seismic fire safety standards. Moreover, the Use of Hardstands Alternative would meet the
22 seismic and fire safety standards, but it was rejected because it did not meet *all* the project
23 objectives, including the impermissibly narrow ones. (AR15334-5 [“...this alternative would not
24 meet Factor 1 or Factor 2...because it would not provide new and modernized facilities that are
25 sized to accommodate market based passenger demand at industry standard levels of service and
26 would have an adverse effect on airfield operational functionality”].) Thus, the only project the Port
27 would accept was one that would increase airport passengers.

28

1 **3. CEQA does not allow the Project to constitute the “Environmentally Superior**
2 **Alternative”.**

3 Respondent asserts that its selection of the Project itself as the environmentally superior
4 alternative was proper. (OB, 50:1-15.) However, CEQA Guidelines, section 15126.6(e)(2) explicitly
5 states that if the “No Project” alternative is the environmentally superior alternative (as here), then
6 the agency is “supposed to identify an environmentally superior alternative among *the other*
7 *alternatives.*” Under CEQA, alternatives and the Project itself are distinct from one another. (*See*
8 *Washoe Meadows Community v. Department of Parks & Recreation* (2017) 17 Cal.App.5th 277,
9 288 [project must be distinct from the alternatives].)

10 Respondent cites *Save Our Access etc. v. Watershed Conservation Authority* (2021) 68
11 Cal.App.5th 8, 18 to support its argument that the Project itself can be the environmentally superior
12 alternative. (OB, 50:14-15.) In *Save Our Access*, the court briefly mentioned in passing one-time
13 that the project was the environmentally superior alternative; it was merely a background fact, not
14 adjudicated. (*Kim v. Reins Int'l Cal., Inc.* (2020) 9 Cal.5th 73, 85 fn.4 “[c]ases are not authority for
15 propositions that are not considered.”) Here, Respondent compounded its failure to consider
16 alternatives that would meet most project objectives by also declining to designate one alternative
17 as “environmentally superior.”

18 **F. The FEIR Failed to Include Documents Linked and Incorporated in Letters.**

19 Respondent argues *Consolidated Irrigation District v. Superior Court* (2012) 205
20 Cal.App.4th 697, does not require linked documents be included in the FEIR. (OB 68-70.)
21 *Consolidated Irrigation* did not address this question, but rather, considered whether such
22 documents needed to be included in the administrative record – to which it answered: yes. (*Kim,*
23 *supra*, 9 Cal.5th at 85 fn.4 “[c]ases are not authority for propositions that are not considered.”) The
24 specific question raised by this case is whether documents directly linked to a comment submitted
25 on the Draft EIR, sometimes incorporated by reference into the comment letter, are required to be
26 included in the Final EIR. No published California decisions address this issue.

27 While *Consolidated Irrigation Dist., supra*, distinguishes between comments on a draft EIR
28 and evidence submitted in support of those comments, that distinction can only be presumed to

1 apply to the specific documents whose inclusion in the administrative record was at issue in that
2 case. And indeed, those documents did appear to consist of evidence submitted in support of the
3 comment letters involved. (*Id.* at pp. 724-725.) The opinion considered all these documents
4 evidence supporting the submitted comments, rather than comments in and of themselves. It is
5 obvious from the descriptions given, the distinction is accurate *as to the documents referenced*.
6 However, it does not appear any of the submitted linked documents were, in fact, integral to the
7 comment letters. Rather they appeared to be evidentiary documents submitted in support of
8 comments. Further, the distinction between comments and evidence is made in reference to Public
9 Resources Code §21167.6, which concerns itself solely with the contents of the administrative
10 record in a case filed under §21166. In short, the question involved in *Consolidated Irrigation*
11 *District* is distinct from the question of what needs to be included in a FEIR.

12 CEQA Guidelines section 15132 states that the Final EIR shall include, “[c]omments and
13 recommendations received on the draft EIR either verbatim or in summary.” This leaves open the
14 question of whether attached documents are integral to the comment letter or “merely” supporting
15 evidence. Arguably even supporting evidence can be important enough to require inclusion in the
16 Final EIR if that evidence consists of the substantial evidence needed to make the comment more
17 than mere speculation or unsupported opinion. (*See* CEQA Guidelines §15384.) In the documents at
18 issue here, some might be considered supporting evidence for submitted comments, but others, such
19 as the YouTube video presentation by Prof. Handy (AR 59857) and articles discussing the
20 application of induced demand to airport expansion projects (e.g., AR 59498-59503) are integral to
21 the arguments being made in the comment letters. Such documents need to be treated as part of the
22 comment being submitted and certainly should have been made available prior to the Port’s
23 considering Project approval. The failure to do so prevented the public from receiving information
24 needed for informed consideration of issues, and was a prejudicial abuse of discretion. (*Sierra Club*,
25 *supra*, 5 Cal.5th at 516.)

26 **III. CONCLUSION**

27 For these reasons, the Port’s certification of the FEIR and approval of the Project abused its
28 discretion under CEQA, which should be set aside unless and until brought into CEQA compliance.

1 DATED: March 2, 2026



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STOP OAK EXPANSION COALITION

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