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August 20, 2007

The City of Benicia California  
Att: Mr. Damon Golubics, Senior Planner  
250 East L Street  
Benicia, CA 94510

Re: Comments on EIR Benicia Lower Arsenal

Dear Mr. Golubics:

I am writing to comment on the draft Environmental Impact Report for the Lower Arsenal- State Clearinghouse #2007062021. I am writing on behalf of the owner of various buildings in the South of Grant Zone to thank the City of Benicia Planning Department of City government for all its work on this project and to comment on an omission in the Report which I feel is significant.

The draft Plan restricts new residential uses, including live/work uses, south of Grant Street. (see pg. 48 of Draft) While the mixed-use nature of our property is retained, the banning of live/work space could have serious impacts not discussed in the draft Report.

When we bought the buildings in the early 1980's the area was run-down and derelict. The buildings were functionally obsolete for their original uses. Working with the community and the City of Benicia we preserved the historic structures and brought new uses into the area. The key to this transmogrification was the inclusion of live/work. Live/work housing has helped stimulate the artist community and has helped provide a new economic and cultural base for Benicia.

The restriction on new live/work space will have the following impacts which should be reviewed: 1. Limitation of new affordable rental housing, 2. Degrade the economic viability of historic structures, 3. Shift the cultural make-up of the Lower Arsenal area from artistic to business related.

Benicia's arts community is a valuable cultural and economic asset to the City. The proposed restrictions on live/work and residential uses in the Arsenal area could seriously affect the viability of the arts community. I believe that Benicia needs more live/work units to continue its present favorable growth. The proposed plan would change this.

Title 14 California Code of Regulations, Chapter 13 Guidelines for the Implementation of the California Environmental Quality Act, Section 15131 (c) requires that, "economic, social, and **particularly housing factors** shall be considered by public agencies...in deciding whether changes in the project are feasible to reduce or avoid significant changes in the environment..." The proposed restrictions on live/work housing should be reviewed. Thank you.

Sincerely,

  
Andrew Allen

**COMMENTOR B6**  
**Howard B. Allen Trust II**  
**Andrew Allen**  
**August 20, 2007**

B6-1: This comment, which generally pertains to the merits of the proposed project, is noted. New residential development on Jackson Street would only be prohibited west of Polk Street. It should be noted that this action is recommended in the Draft Specific Plan in order to reduce the potential for future conflicts between residential and Port-related uses. All other types of residential uses (including live/work) would generally be permitted by right or by permit in the remaining zones.

Page 111 of the Draft EIR presents a discussion of potential impacts related to the displacement of housing or people which currently exist within the Plan Area. The Draft EIR notes that while existing housing or informal live/work units could be converted to other uses with implementation of the Draft Specific Plan, the net result of development would be an increase in the number of housing units within the Plan Area. In addition, the Draft Specific Plan includes policies and actions to preserve the artists' community within the Plan Area, and would do so by *permitting* live/work uses, which are currently a *conditional* use, within the Grant Street, Adams Street, and South of Grant Street zones. The Draft Specific Plan also includes policies and actions that would encourage the development of live/work uses, including inclusionary units for lower-income households. Implementation of the Draft Specific Plan would in fact expand the availability of new affordable housing within the Plan Area. While the Draft Specific Plan would prohibit live/work development in part of the South of Grant Zone, this prohibition would not be considered a significant impact to housing in the context of other opportunities for housing development in the Plan Area.

Furthermore, *CEQA Guidelines* section 15131 states: "Economic or social effects of a project shall not be treated as significant effects on the environment. An EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes caused in turn by the economic or social changes. The intermediate economic or social changes need not be analyzed in any detail greater than necessary to trace the chain of cause and effect. The focus of the analysis shall be on the physical changes." Therefore, the Draft EIR does not include an analysis of the environmental effects of the project in the context of the viability of the existing artists' community or the relative economic feasibility of historic building preservation under different land use scenarios. However, these issues may be taken into account by the City when it considers project approval.



1063 Jefferson St., Benicia, CA., 94510

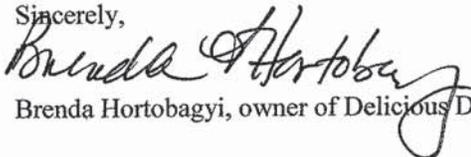
RE: DEIR for Benicia Arsenal

To Whom it may concern,

I am a local business owner doing business at 1063 Jefferson Street, also known as The Jefferson Street Mansion. I have a catering company and lunch delivery service for local businesses in Benicia and Vallejo. For this I rent the only commercial kitchen available in this area at 1063 Jefferson St.. I was at the recent meeting discussing the options for changes in the Arsenal area but, was not comfortable to speak publicly, even though I feel strongly about the proposed 'Option 3' put forward. This plan would bring in a quiet senior community that would be subjected to the noise out here- this would be a problem for them as well as all the businesses located here. The Jefferson Street Mansion offers a venue for weddings like no other, and might I add revenue for the local hotels and Inns, part of the beauty of this location is that it doesn't intrude on residential neighbors with the music that goes well in to the night. If it were to be shut down or had restrictions put upon it it would also effect my business. There are many business that would be closed or would have to be modified were 'Option 3' to go forward. I see the other options as so much more viable for the whole community of Benicia.

So, please consider removing 'Option 3' from the list of plans so as to save the existing businesses and the historic nature of the arsenal.

Thank you.  
Sincerely,

  
Brenda Hortobagyi, owner of Delicious Delivery

Cc: Planning Director  
Planning Commission  
City Manager  
City Council

**COMMENTOR B7**  
**Delicious Delivery**  
**Brenda Hortobagyi, Owner**  
**August 27, 2007**

B7-1: This comment, which pertains to the merits of one of the proposed alternatives, and not the adequacy of the Draft EIR, is noted. The Option 3 alternative, which was included in previous versions of the Draft Specific Plan, but subsequently removed from consideration, is evaluated as the Senior Housing alternative in Chapter V. Alternatives, of the Draft EIR. It should be noted that the Option 1 alternative was identified as the environmentally superior alternative in the Draft EIR (and the Senior Housing alternative was identified as being environmentally inferior to both the Option 1 alternative and the proposed project). If an alternative is approved by the City instead of the proposed project, that alternative would undergo detailed CEQA review (likely in the form of an Addendum to the Draft EIR or a Supplemental/ Subsequent EIR).

Dana Dean  
Amber Vierling *Of Counsel*  
Venus Viloria Berdan *Associate*

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March 10, 2008

Charlie Knox  
Community Development Director  
City of Benicia  
250 East L Street  
Benicia California 94510  
*Via: Hand Delivered*

Re: Lower Arsenal Mixed Use Specific Plan  
Draft Environmental Impact Report

Dear Mr. Knox:

Thank your for the opportunity to submit supplemental comments regarding the Draft Environmental Impact Report ("DEIR") for the Lower Arsenal Mixed Use Specific Plan ("LAMUSP"). I understand from our recent conversation that the City is now preparing to move forward with a response to comments on the DEIR. Per our discussion, please find to follow under separate cover an Environmental Noise Report produced in response to the DEIR.

To follow here are additional comments on the various resource discussions within the DEIR. For the convenience of the reader, our comments are organized in the order of the resource discussions in the DEIR and each resource discussion is set out as a separate document.

In reviewing the following, please recall that this office has previously submitted detailed comments regarding the need for the DEIR to address omissions found in the Draft LAMUSP,<sup>1</sup> as well as comments regarding the DEIR's failure to meet the requirements of CEQA in the following areas (1) failure to disclose all potentially significant environmental impacts of the Project; (2) failure to provide adequate mitigation measures to avoid impacts; (3) failure to disclose and analyze cumulative impacts; and (4) failure to address important land use planning policies and considerations.<sup>2</sup> We submit the following for your consideration with our previous comments still in mind.

<sup>1</sup> See Correspondence previously submitted on behalf of our client, Amports, dated January 16, 2007, April 12, 2007, May 3, 2007, and August 9, 2007 incorporated by reference here.

<sup>2</sup> Correspondence to Planning Commission, dated August 9, 2007.

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Comments Regarding Mitigations, generally

CEQA requires that an EIR identify all potentially significant impacts and identify and impose feasible mitigation measures to reduce those impacts to less than significant.<sup>3</sup> An EIR must identify and analyze all direct and indirect potentially significant environmental impacts of a project.<sup>4</sup> A significant environmental effect is “a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.”<sup>5</sup>

CEQA also requires the lead agency to adopt feasible mitigation measures that will substantially lessen or avoid the Project’s potentially significant environmental impacts<sup>6</sup> and describe those mitigation measures in the DEIR.<sup>7</sup> Mitigation measures must be designed to minimize, reduce or avoid an identified environmental impact or to rectify or compensate for that impact.<sup>8</sup> Where several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified.<sup>9</sup>

A public agency may not rely on mitigation measures of uncertain efficacy or feasibility.<sup>10</sup> “Feasible” means capable of being accomplished in a successful manner within a reasonable period of time. Taking into account economic, environmental, legal, social and technological factors.<sup>11</sup> Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.<sup>12</sup> A lead agency may not make the required CEQA findings unless the administrative record clearly shows that all uncertainties regarding the mitigation of significant environmental impacts have been resolved.

CEQA requires that the City set forth mitigation measures for all potentially significant impacts in the EIR itself. Project modifications necessary to avoid significant impacts must be made before the lead agency issues a proposed EIR

<sup>3</sup> See *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (*Berkeley Keep Jets Over the Bay*).

<sup>4</sup> Pub. Resources Code § 21100, subd. (b)(1); CEQA Guidelines § 15126.2, subd. (a).

<sup>5</sup> CEQA Guidelines, §15382.

<sup>6</sup> Pub. Resources Code, §§ 21002, 21081, subd. (a).

<sup>7</sup> Pub. Resources Code, §21100, subd. (b)(3); CEQA Guidelines, § 15126.4.

<sup>8</sup> CEQA Guidelines, §15370.

<sup>9</sup> CEQA Guidelines, §5126.4, subd. (a)(1)(B).

<sup>10</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727-728 (*Kings County Farm Bureau*) (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available.)

<sup>11</sup> CEQA Guidelines, §15364.

<sup>12</sup> CEQA Guidelines, § 15126.4, subd. (a)(2).

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for public review.<sup>13</sup> Mitigation measures adopted after project approval cannot validate the issuance of an EIR, since this deferral denies the public the opportunity to comment on the project as modified to mitigate impacts.<sup>14</sup>

Furthermore, deferral of the formulation of mitigation measures to post-approval studies is generally impermissible.<sup>15</sup> An agency may only defer the formulation of mitigation measures when it “recognizes the significance of the potential environmental effect, commits itself to mitigating its impact, and articulates specific performance criteria for the future mitigation.”<sup>16</sup> Deferral of mitigation is impermissible if it removes the agency from its decision-making role.<sup>17</sup> The EIR must also analyze any potential impacts caused by the mitigation measures themselves<sup>18</sup>.

As detailed in previous correspondence and herein, the DEIR fails to comply with these requirements by failing to identify and mitigate potentially significant impacts associated with the Project. The City should correct these errors by re-analyzing all of the Project’s impacts in a revised DEIR that is circulated for public review. Additional mitigation measures must be included and a revised DEIR circulated for public review.

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cont.

<sup>13</sup> Pub. Resources Code §21061

<sup>14</sup> *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393 (*Gentry*); *Quail Botanical Gardens Foundation v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1604, fn. 5.

<sup>15</sup> *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309.

<sup>16</sup> *Gentry, supra*, 36 Cal.App.4th at p. 1411, citing *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029.

<sup>17</sup> See *Sundstrom v. County of Mendocino, supra*, 202 Cal.App.3d at 302-308 (mitigation scheme improper because applicant, subject only to planning staff approval, would conduct the analysis and to formulate the mitigation measures.)

<sup>18</sup> *Ocean View Estates v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396.

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Land Use and Planning Policy

As we have repeatedly indicated a primary concern is the blanket failure of both the Draft Specific Plan and the DEIR to recognize the full potential for devastating long range impacts to well-established existing uses that, according to the Benicia General Plan, are to be protected and enhanced rather than threatened.

Our previous comments have detailed missing and misleading information found within these two documents. However, nowhere is this fundamental failure more clear than in the articulation of the *single* mitigation<sup>19</sup> advanced in the DEIR.

LU-1 seeks to reduce residential exposure to irritants associated with the industrial uses characteristic of the Lower Arsenal. However, the mitigation measure does not describe how to evaluate whether a use will be incompatible. To what degree must it be incompatible? Additionally, the discretionary study of air quality or acoustical analysis on a site specific basis is, again, another attempt to defer mitigation.

The problem of incompatibility is again raised, despite the use of courtyard design, with the consideration of potential conflicts between internal uses of the Lower Arsenal. The Draft recognizes that within the Adams Street Zone, the Grant Street Zone, and the South of Grant Street Zones “some residential uses could still be affected by industrial activities.”<sup>20</sup> The issue of nuisance arise in “older industrial districts that are evolving” into mixed use areas.<sup>21</sup> The report fails to explain the consequences of these nuisance actions. Moreover, it fails to describe the impact of these nuisance actions on the pre-existing industrial and commercial operations. As there is no “coming to the nuisance” doctrine in the state of California, simply providing notice (in whatever form) to residents of the industrial character of the Lower Arsenal, is insufficient to protect those industrial and commercial activities from encroachment and displacement. As such, this issue is plainly not mitigated or resolved by the proposed measure.

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<sup>19</sup> LU-2’s “mitigation measure” is to implement Mitigation Measure LU-1.

<sup>20</sup> Pg 86

<sup>21</sup> Pg 86

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Population, Employment and Housing

The Population, Employment and Housing discussion is inadequate because it does not adequately address possible hidden imbalances in forecasts and relies on *empirical* evidence from Southern California studies that may not necessarily be applicable.

First, the measurement standards used to determine whether the jobs to housing ratio is sustainable are inadequate. As the discussion mentions, “one of the shortcomings of this ratio method is that it does not account for regional in- or out-commuting due to job/labor mismatches or housing affordability issues.”<sup>22</sup> However, no additional information is provided to address this potential gap.

Second, the measurement standards used to determine whether the jobs to employed ratio is sustainable are insufficient because the ratios utilized in this assessment are necessarily bootstrapped to those discussed above, and thus reinforce and intensify the effect of erroneous assumptions used. Again, no alternative or additional information is provided to clarify or remedy this vacancy of reasoned figures.

Moreover, in assessing the likely jobs to housing imbalance (and coming to a conclusion that no significant effects would result), employment generation for each of the land categories was developed using empirical data from Southern California. No explanation is provided as to whether such Southern California trends translate or mimic the effects that would occur in Benicia. Additionally, those categories from the Southern California study are different and “the land use categories used in the study do not directly correspond to the land uses described in this EIR.”<sup>23</sup>

Additionally, the DEIR declares that “although live/work uses would be permitted in the Plan Area, the exact number of units is not known at this time,”<sup>24</sup> and then concludes that since these live/work units would have “smaller household sizes” it would not generate a substantial number of new residents. This is flawed for several reasons.

The DEIR offers no evidence, antidotal or otherwise, to support the conclusion that live/work units will have smaller household sizes. In fact, as defined here, live/work refers to dwellings whose primary purpose is residential.<sup>25</sup> Thus, the

<sup>22</sup> Pg 108 Project DEIR

<sup>23</sup> Pg 112 Project DEIR

<sup>24</sup> Pg 111 Project DEIR

<sup>25</sup> As we have previously noted the DEIR repeatedly exchanges the terms live/work with work/live though they do not mean the same thing.

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likelihood that such a dwelling involves fewer inhabitants is completely unsupported speculation. If anything the opposite could be true. If live/ work as here is intended to respect the residential character of its surroundings, why would the dwelling involve fewer inhabitants? The DEIR offers no explanation.

The second problem is the assertion that the number of dwelling units is not known at this time. This statement is in direct contrast to the previously identified assumptions in the project description and throughout the document that residential dwellings will be capped at 22 units. Both statements cannot be correct.

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Geology, Soils and Seismicity

The Project DEIR reports that there is a 62% probability that one or more Moment Magnitude 6.7 earthquakes will occur in the San Francisco Bay Area between 2002 and 2031. Yet there is not sufficient analysis provided in the DEIR to indicate how this probability affects the analysis of the project.

The DEIR indicates that there have been landslides near Lincoln and Jackson Streets<sup>26</sup>. How will the project address the inevitability of landslides occurring at these sites again? The Project DEIR fails to provide adequate information to address the potentially significant impact of landslides in the area, especially in light of climate change which predicts more precipitation and increased flooding.<sup>27</sup>

The DEIR indicates that most of the fill south of the project was placed before 1965 and that it is not compacted.<sup>28</sup> However, the DEIR fails to adequately describe how such soils will support development and construction. How will such soils be settled?

The DEIR indicates that there were former salt water marshes based on Reyes soil types.<sup>29</sup> However, the DEIR fails to adequately describe the nature of such historic wetlands. Can these areas be developed into wetlands? How will permanent loss of these wetlands be mitigated?

The mitigation measure for Impact GEO – 1 (Seismically-induced ground shaking in the Specific Plan Area could result in damage to life and/or property at new development sites) indicates that the mitigation for this significant impact is to require a “final design-level geotechnical investigation report to determine the project site’s geotechnical conditions and address potential seismic hazards such as seismic shaking. Additionally, the Specific Plan’s development and buildings shall comply with the Building Code. This mitigation is insufficient because it defers mitigation (in the case of the future report) or it merely requires compliance with the law, which in and of itself does not actually mitigate any impacts.

The mitigation measure for Impact GEO – 2 (All Zones Seismically-induced ground shaking in the Specific Plan Area could result in damage to life and/or property in adaptively reused buildings) defers mitigation because it merely requires that a “design-level seismic upgrade report shall be submitted for

<sup>26</sup> Pg 125 Project DEIR

<sup>27</sup> Pg 133 Project DEIR

<sup>28</sup> Pg 116 Project DEIR

<sup>29</sup> Pg 117 Project DEIR

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approval. There are not performance standards associated with either deferrals of mitigation measures.

As stated above, CEQA requires that mitigation measures be enforceable. However, Mitigation Measure GEO 3b (All Zones) says that information will be provided by encouraging drought-tolerant planting. *Encouragement* is not sufficient mitigation for CEQA because the actual mitigation is not enforceable and merely providing information does not actually mitigate physical effects on the environment. Assuming drought-tolerant planting is sufficient, the mitigation would need to involve some method of enforcement such as a covenant in the deed so as to bring the impact described in GEO-3 (All Zones Damage to structures or property related to shrink-swell potential of project soils and/or settlements of non-engineered fill) to less than significant.

Impact Geo-4 (Adams Street Zone, Grant Street Zone, and South of Grant Street Zone Damage to structures or property related to liquefaction, ground displacement and ground failure could occur) is not sufficiently mitigated because Mitigation Measure GEO-4 merely requires that a design level geotechnical investigation, which only defers mitigation, but does not require sufficient performance standards.

Impact Geo-5 (Jefferson Ridge Zone: Damage to structures or property could occur at the Jefferson Ridge Zone due to existing or induced slope instability resulting in land sliding) is not sufficiently mitigated because the 2 step Mitigation Measure GEO-5 merely requires that a design level geotechnical investigation report, which only defers mitigation, but does not require sufficient performance standards. The second step of Mitigation Measure GEO-5 merely requires that a licensed professional, or the like, design all grading plans, cut and fill slopes, compaction procedures and retaining structures. However, step 2 is not really a mitigation because a licensed professional is required to design all grading plans, cut and fill slopes, compaction procedures and retaining structures. Thus this purported mitigation does not actually mitigate anything. The mitigation measure must provide sufficient performance standards.

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Hydrology and Water Quality

The Project DEIR acknowledges that “the evidence for climate change is overwhelming”<sup>30</sup>, but fails to adequately address how climate change will effect the Project in the areas of flooding and landslides as a result of flooding. For example the Project DEIR shows that Bayshore Road is expected to be under water in a 100-year flood zone, but it fails to illustrate how such flooding would affect the project – traffic flow and the like.

Moreover, the DEIR concludes without sufficient justification or information, that there are no significant groundwater supplies underlying the site.<sup>31</sup> The Project DEIR references a document, *Water Quality Control Plan (Basin Plan)*, San Francisco Bay Regional Water Quality Control Board, 2004, to support its conclusion that groundwater underlying the project site is not economically feasible.<sup>32</sup> However, that report is not part of the DEIR and cannot be relied upon in making such a conclusion. As such, the Project DEIR fails to provide adequate information to support its conclusion. Similarly, the Project DEIR discusses monitoring wells around the project site based on a report that is not a part of the DEIR, nor a part of the administrative record.<sup>33</sup> Further yet, the Project DEIR concludes that the water located 6 feet below the surface is perched water that is not expected to pose a significant flooding concern.<sup>34</sup> Yet, this report is also not been made a part of the DEIR or the Administrative Record. As such, there is insufficient information *in* the Project DEIR.

The DEIR fails to provide adequate information in relation to storm water quality, especially in light of the fact that the site has been subject to over 100 years of development and military and industrial uses.<sup>35</sup>

Because the foregoing information is inadequate, the decision makers cannot make an informed determination as to the significance of the environmental impacts, including, but not limited to how the Project would exceed the capacity of existing or planned storm water drainage systems or provide substantial additional sources of polluted runoff; otherwise substantially degrade water quality or groundwater quantity.

<sup>30</sup> Pg 133 Project DEIR

<sup>31</sup> The DEIR states that the California Department of Water Resources has no groundwater level monitoring locations in the vicinity of the project site, but fails to state reasoning or information that supports the apparent inference that there has been sufficient study to determine that there is not significant groundwater underlying the site. (Pg 137 Project DEIR.)

<sup>32</sup> *Ibid.*

<sup>33</sup> Pg 138 Project DEIR

<sup>34</sup> *Ibid.*

<sup>35</sup> Pg 138 Project DEIR

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Additionally, the DEIR provides for a series of deferred mitigations for storm water quality, where later approved individual projects would be required to meet permit terms.

The Project DEIR discusses downstream flooding, but defers mitigation by requiring Benicia Public Works Department in the future “to ensure that drainage plans for new development projects are designed such that peak flow rates from the site are not increased.”<sup>36</sup> The Project DEIR then lists components that would be implemented in the future and concludes that the Specific Plan’s contribution to downstream flooding is less than significant.<sup>37</sup> Since the actual enforceable components are deferred to a later date, there is not adequate information in the present Project DEIR to support the conclusion that the Specific Plan’s contribution to downstream flooding is less than significant. Deferring mitigation is not sufficient for CEQA. Here there are insufficient performance standards associated with the future mitigation. As a result, the City’s reliance on the conclusion that the impacts are less than significant is unfounded.

Moreover, the DEIR concludes without sufficient foundation that the Draft Specific Plan would result in no significant impacts to hydrology and water quality. The Project DEIR fails to provide adequate information to support this conclusion, because it defers mitigation measures for impacts to water quality until a future date. The Project DEIR should further discuss the potential effects of exposing the various contaminants that are likely located within the Specific Plan to water, including runoff, ponding, etc.

Similarly, the Project DEIR requires various mitigations at the individual development and infrastructure project level. Again, this DEIR must encompass all of the potentially significant effects on the environment. Merely, stating that applicants will be required to comply with laws and regulations in the future is inadequate environmental impact analysis. Therefore, the Project DEIR’s conclusion that the Project would result in no significant impacts to hydrology and water quality is erroneous and not supported by substantial evidence. Given the significant history of the Project site being used in military and industrial activities, it is unreasonable to conclude that no mitigation is necessary to bring the impacts to water quality to less than significant levels.

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<sup>36</sup> Pg 142-43 Project DEIR

<sup>37</sup> Pg 143 Project DEIR

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Hazards and Hazardous Materials

This section for this particular Project is one of the most important components of proper environmental analysis and disclosure of the Project's potentially significant environmental impacts. Yet, the Project DEIR hastily concludes that the project will have less than significant impacts on construction, but later provides that "construction activities may unexpectedly encounter hazard materials or hazardous waste in soil or groundwater," which would be a significant impact.<sup>38</sup> The two different conclusions are contradictory and confusing. As such, the Project DEIR fails to provide adequate information for the analysis of hazards and hazardous materials.

Considering the historical uses of the site, the Project DEIR must survey, further analyze and provide more information as to the potentially significant environmental impacts related to hazards and hazardous materials. In conjunction with the foregoing, after a survey, disclosure and analysis are properly performed for the hazards and hazardous materials that are found on site, then specific, enforceable mitigations must be promulgated for public and agency comment.

Rather than comply with CEQA by articulating adequate and enforceable mitigation measures, the Project DEIR employs vague mitigations, such as "securing the area as necessary"<sup>39</sup> and requiring the applicant to "take all appropriate measures to protect human health and the environment."<sup>40</sup> The Project DEIR continues to list *possibilities* of what might be an appropriate measure. This action simply defers mitigation and is not sufficient for CEQA analysis of the project because it fails to provide adequate information as to the adequate mitigation measures that would lessen such potentially significant impacts to less than significant levels. Vague mitigation measures, such as the foregoing, fail to adequately inform the decision makers, the public and the agencies about the potentially significant impacts of hazards and hazardous materials.

As to the mitigations, Impact HAZ – 1 (Construction activities may unexpectedly encounter hazard materials or hazardous waste in soil or groundwater) is mitigated by Mitigation Measure HAZ – 1a which is inadequate because it is vague and has no physical component that would actually mitigate the significant impact described. The Mitigation Measure mandates that implementation if environmental media is encountered unexpectedly based on odor or visual staining. First, many toxic materials may not have an odor or staining. Second,

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<sup>38</sup> Pg 155-57 Project DEIR

<sup>39</sup> Pg 157 Project DEIR

<sup>40</sup> *Ibid.*

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the plan does not identify who will be determining whether or not hazardous materials exist.

Mitigation Measures HAZ-1b is inadequate because it does not sufficiently describe the mitigation. For example, it states that the contractor shall ensure that underground pipelines or other underground or aboveground utilities within the project site are identified and clearly marked prior to earthworking activities. However, there are no steps that are specified as to what is meant by “ensure.” Additionally, the purported mitigation measure only defers mitigation, at best. The mitigation measure states that emergency procedures *shall be developed* by the contractor and on site workers shall be trained. There is no actual mitigation in developing an emergency plan after CEQA. Additionally this mitigation measure is unenforceable because performance standards are not included and there are no reporting requirements to ensure that workers are trained to those performance standards.

**10**  
**cont.**

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Biological Resources

The Project DEIR concludes without adequate information that the “project site is located in a highly urbanized and industrialized area, and is bordered by development, [therefore] impacts to wildlife movement corridors would be less than significant. This disclosure fails to adequately discuss the effect on species that do not move through corridors, such as small amphibians, plants and the like.

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Further, the Project DEIR fails to provide adequate information as to the ecological values of the seasonal wetlands and the potentially significant environmental effects on those wetlands. Additionally, the Project DEIR fails to adequately identify wetland areas.<sup>41</sup> In any case, determining where wetlands are located for the Project site is not sufficient because this environmental review must disclose and analyze all potentially significant effects on the environment. If the wetlands are not even identified, then we cannot know where there will be potentially significant effects on the environment or what they will be. Furthermore, the mitigation measures identified in BIO – 2 (a), (b), (d), (f), and (g) defer mitigation to a future date. As such, there is insufficient information set forth in the Project DEIR.

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Similarly, the Project DEIR fails to provide adequate information about the presence of special status plants. A future survey, as identified in Mitigation Measure BIO 3a defers mitigation. As such, it fails to provide adequate disclosures in this environmental document as to potentially significant effects on the environment.

The Project DEIR also fails to provide adequate information about the presence of special status birds and bats. Future surveys, as identified in Mitigation Measure BIO 4a, BIO 5a and BIO 6a defer mitigation. As such, the DEIR fails to provide adequate disclosures in this environmental document as to potentially significant effects on the environment.

More particularly, Impact BIO – 1 (Mature trees that are protected under the City’s Tree Ordinance may be removed as part of the development on the project site) is not adequately mitigated to less than significant levels. Mitigation Measures BIO 1 requires that a tree report be prepared. Such purported mitigation is inadequate because it defers mitigation. Furthermore, the mitigation is inadequate because a mature tree is being removed, and only replaced by 2-15 gallon trees. There is no comparison. In addition to planting young trees, mature trees should be preserved off site, in the nearby areas. Otherwise the mitigation measure is simply inadequate and it defers mitigation.

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<sup>41</sup> Pg 180 Project DEIR states that the “status of wetlands has not been determined.”

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Impact BIO – 2 (Development in the Jefferson Ridge/Officers’ Row Zone may result in the fill of jurisdictional wetlands) is purportedly mitigated by 7 different measures. Despite the numerous measures the mitigation is not adequate in accordance with CEQA. Mitigation Measure BIO 2a requires that a formal wetland delineation will be conducted and that “potential impacts to jurisdictional waters will be avoided where feasible and unavoidable impacts shall be minimized to the extent that it is feasible.” Such minimization and avoidance is vague. Furthermore, “where feasible” is an unknown and therefore unenforceable.

Mitigation Measure Bio - 2b requires that applicants for individual development projects on the site of any delineated wetland shall obtain appropriate permits and comply with the terms and conditions therein. This is not a mitigation measure because the applicants are required to get permits and comply with those permits anyways. Mitigation is not what is merely already required by law.

Mitigation Measure Bio 2c requires a minimum of a 1:1 mitigation by on or off site creation of wetlands or the purchase of credit. Mitigation must be more than a paper credit. The second mitigation is akin to a “paper credit” and its actual benefit to the environment is unidentified. When an EIR includes mitigation based on compensation for an impact, *details* about the compensation program, such as the location, nature, and extent of compensating resources must be described.<sup>42</sup> Additionally, the program must demonstrate actual compensation, not just paper credits.<sup>43</sup> There is no evidence in the record that a fee will actually be used to mitigate the impacts or that there is a specific timetable for implementation of the measures.<sup>44</sup> As a result, the Project, as proposed, falls short of CEQA requirements.

Mitigation Measure BIO 2d states that the project sponsor will implement a wetland mitigation and monitoring plan. However, submitting a plan in the future with sufficient performance standards defers mitigation, in contravention of CEQA because it defers mitigation.

Mitigation Measure 2e concerns construction activities and silt. The mitigation must become a condition in every building permit to be issued in order that it is enforceable, otherwise the mitigation will not pass muster for sufficient CEQA mitigation.

<sup>42</sup> See Manaster and Selmi, *California Environmental Law and Land Use Practice* (Lexis, September 2005), §22.04[7][a], page 22-77.

<sup>43</sup> *Ibid.* See also *Save Our Peninsula v. Monterey County Board of Supervisors* (2001) 87 Cal. App. 4th 99, 104.

<sup>44</sup> *Ibid.*

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Mitigation Measure 2f requires a conservation easement to preserve the wetlands. Mere conservation is insufficient to actually mitigate harm to wetlands. Rather, there must be *enhancement* of wetlands and at a minimum monitoring and management to ensure that the wetlands will be properly maintained for ecological functioning in the future. This mitigation should also encompass the historic wetlands that are described in the DEIR at p. 117. Just because wetlands are “historic” doesn’t mean that they should not be protected, restored and/or enhanced.

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Impact BIO 3 warns that development on the project site may impact special – status plants, which is deemed a significant impact. The purported mitigation for such a significant impact on the environment involves a three part mitigation. Mitigation Measure BIO – 3a states that “prior to construction of the project” a rare plant survey ... will be conducted and all potential habitat areas of the site determined.

First it is unknown what is meant by prior to construction of the project, because the project proposes “implementation of a specific plan” (Notice of Availability). As such, there is no construction as part of the actual project, but only as to implementation of the plan. This mitigation cannot be enforced because it inaccurately states that there will be mitigation to construction, but it characterizes it as mitigation to the project.

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Second the survey is supposed to identify all of the “potential habitat areas of the site,” but the Mitigation Measures BIO-3b states that if no special-status plant populations are identified, then the City should document the negative findings of the survey. These two mitigation measures do not comport with each other because the survey may identify several habitats that could foster native plant growth, but the second mitigation requires that actual native plants, not their habitat, be identified.

Finally Mitigation Measure BIO-3c states that a mitigation and monitoring plan shall be developed by the applicant of individual development projects to avoid and/or compensate for the loss of special-status plant population. The mitigation then provides guidance, all of which much be conditions to any construction that may be permitted in the future, so that the condition is enforceable.

Impact BIO – 4 addresses the impact of development on the project site resulting in the loss of nesting habitat for breeding birds, and may result in a direct take of special-status bird species through injury or mortality. The DEIR acknowledges that several bird species could use the site for nesting<sup>45</sup> and that the old buildings may provide particular habitat for barn owls. The DEIR proposes a two part

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<sup>45</sup> DEIR, p. 183

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mitigation. First Mitigation Measure BIO-4a states that prior to tree pruning, tree removal, ground disturbing activities or construction activities for the individual development projects, a qualified biologist shall conduct raptor and passerine nest surveys to locate active nests on or immediately adjacent to the site. However, this purported mitigation does not mitigate for the take of habitat for birds. The site serves a unique ecological niche because it is located near the ecotone between water and land.

Removal of habitat, not just actual species of birds that happen to be present at the time of year when the survey is conducted is required for mitigation. The mitigation should focus on habitat of the species rather than the actual species, especially, as here, where the species may be present and nesting at some times of the year, but not others.

Mitigation Measure 4b provides that owls will be removed prior to construction. Again, the significant effect on the environment appears to be the damage done to habitat in addition to the damage done to actual resident birds.

Impact BIO -5 addresses "Development on the project site that may result in the loss of western burrowing owl habitat and direct take of this species through injury or mortality. The DEIR acknowledges that the project site provides potential burrowing and foraging habitat for burrowing owls and could be used as habitat by wintering or breeding owls. As such the loss of nesting and foraging habitat would constitute a significant impact to burrowing owls and the DEIR proposes two mitigations for this impact. First, the DEIR proposes Mitigation Measure 5a – preconstruction surveys for burrowing owls.

However, whereas the impact addresses the significant nature of taking habitat, this mitigation only provides for impact to actual species that are found on site. As such, the mitigation is inadequate because it fails to comprehensively address the actual mitigation. Mitigation Measure 5b provides that as an alternative to purchasing land, the project sponsor may purchase credits. Again the DEIR confuses the project from the later implementation of the project by requiring the project sponsor to purchase credits. The ambiguous explanation as to who is actually charged with this mitigation is not sufficiently described. Furthermore, the mitigation and monitoring plan that the "project sponsor" shall submit to the City defers mitigation without sufficient performance standards, in contravention of CEQA.

Impact BIO – 6 addresses development on the Project site that may result in the loss of foraging and roosting habitat for the pallid bat, Townsend's western big-eared bat, and other bat species, and may result in direct take of these species through injury or mortality. The significant impact pertains to the numerous old buildings that may provide habitat to these special status species. In mitigation,

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**cont.**

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the DEIR proposes 5 parts<sup>46</sup> - surveys, encouragement for the bats to leave, salvage of material roost sites when feasible, artificial roosts constructed (with 5 year funding) and not demolishing maternity roosting sites until the young are old enough to fly. In a similar fashion to the other failed mitigations, this mitigation provides for mitigation *only if* the survey actually locates the species of concern. However it also include loss of habitat, not only loss of species. As such, this mitigation measure is inadequate.

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<sup>46</sup> DEIR p.185

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Air Quality

CEQA requires that an EIR must not only identify impacts, but must also provide “information about how adverse the impacts will be.”<sup>47</sup> The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding.<sup>48</sup> The DEIR does not include substantial evidence to support the conclusion that short-term air quality impacts are less than significant. Given the scope of the Project, construction-related air quality impacts are potentially significant, and cannot be mitigated to less than significant levels, as the DEIR claims.

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The DEIR discussion on air relies on speculation that the winds will blow out of the north. It is unrealistic to rely on the winds blowing only from the north. The project must be considered as a whole – all of the development components therein to assess the true environmental impacts. The matter should not be analyzed in pieces – the effect of the plan and then the effect of the actual development.

Additionally, the Project DEIR fails to adequately discuss the potentially significant environmental effects of the Project in light of its past uses in military and industrial areas.

More specifically, Impact AIR - 1 pertains to the “Demolition and construction period activities could generate significant dust exhaust, and organic emissions.” The DEIR acknowledges that “the excavation and grading of soil are construction activities with a high potential for creating air pollutants...both from construction activities and loading trucks”<sup>49</sup> To mitigate this significant effect Mitigation Measure AIR-1 has a list of requirements for individual projects. The impact and the mitigation fails to address the foreseeable contingency that harmful constituents may be present in the soil. Excavation of soils that are likely to have contaminants in the ground requires more mitigation – it should require survey and analysis before any construction is commenced or before a plan is approved.

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The DEIR does not quantify the construction-generated air pollution associated with the Project, yet concludes that the impact is less than significant.<sup>50</sup> The DEIR inexplicably concludes that compliance with the guidance from the BAAQMD will mitigate construction impacts to less than significant levels. The guidelines are not sufficient to mitigate because the document does not make the guidelines enforceable conditions to future projects.

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<sup>47</sup> *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.

<sup>48</sup> *Kings County Farm, supra*, 221 Cal.App.3d at p. 728; see also CEQA Guidelines, §15151.

<sup>49</sup> DEIR p. 240

<sup>50</sup> DEIR p. 245

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Noise

As we have previously noted, the DEIR noise analysis is inadequate for several reasons. Chief among them is the fact that the limited noise analysis included in the DEIR fails to address the real world circumstances involved in placing residential properties within earshot of a 24 hour a day, 365 day a year port facility. Rather the DEIR indicates that acoustical studies were only done to measure the ambient noise between 11:30 a.m. and 4:15 p.m.<sup>51</sup> This insufficient because as has been repeatedly stated, often the noise generated by the Port occurs at night.

In order to facilitate a better understanding of the potential for significant if not unavoidable impacts associated with noise from the Port, to follow under separate cover, I enclose an Environmental Noise Report, prepared by Rosen, Goldberg, Der & Lewitz, Inc, acoustical and audiovisual consultants, which details more particularly the type and amount of noise generated by the Lower Arsenal industrial facilities, including port operations. In general the report indicates the potential for extremely significant if not unavoidable impacts that could result from the placement of residential properties within the plan area.

The DEIR does not include actual measures to mitigate these effects, but instead repeatedly suggests that studies “should be performed”.<sup>52</sup> In fact, the proposed “mitigation measures” are simply further indication that studies should be performed. See Mitigation Measures NOI-3a & 3b, both of which go no further than to recommend “project specific acoustical standards”.<sup>53</sup> Of course, this type of deferred mitigation is unacceptable in any case. Here however, the problem is greater still. As indicated in the Rosen Goldberg study, noise impacts could well overtake any possible residential acoustical standards in given areas within the area plan. As such even if performance standards were included, in the noise mitigations would be insufficient under CEQA to protect against noise impacts on residents, especially at night.

Taken to its logical conclusion, the reality of noise in the Arsenal plainly leads to the conclusion that single family residential is not appropriate for the Specific Plan Area.

<sup>51</sup> Pg 252 Project DEIR

<sup>52</sup> Paragraph 2 of Pg 264.

<sup>53</sup> Pg 265 Project DEIR, Mitigation Measures NOI-3a & 3b

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Visual Resources

The Visual Resources Discussion is inadequate because it does not address all of the view corridors, “viewsheds” and visual characteristics of the surrounding areas.

The discussion attempts to breeze over the fact that one of the significant and “unobstructed” viewsheds is that of the Port of Benicia, except to say that it is dominated by ships unloading at the Port to the South, and industrial facilities associated with the Port to the East.<sup>54</sup> However, the DEIR makes no mention of the likelihood of development within the Port which would decrease the views in the future. It further makes no mention of the security issues of views of the Port area as referenced in Goal 2.1 of the General Plan.

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Moreover, the Draft notes that the view locations discussed “are not the only points in the project site where significant views are found...”<sup>55</sup> Nowhere in the DEIR is there any further discussion as to what other significant views exist. This is problematic because the assessment only relates to those designated view corridors and view points. Thus, those views that are not specifically identified may be lost without appropriately protective mitigations.

Unfortunately, Mitigation Measure VIS -1 is insufficient because it only requires studies and mitigation for those “projects that are located within view corridors as identified on the ‘Historic Guidelines Overlay Plan’ figure in the Draft Specific Plan.”<sup>56</sup> Therefore, those that are conceded to not have been identified<sup>57</sup> will not be protected because they are not identified in the ‘Historic Guidelines Overlay Plan’ figure in the Draft Specific Plan.

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<sup>54</sup> Pg 271 Project DEIR  
<sup>55</sup> Pg 270 Project DEIR  
<sup>56</sup> Pg 280 Project DEIR  
<sup>57</sup> Pg 270 Project DEIR

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Cultural and Paleontological Resources

The Draft states that in its attempts to contact potentially interested parties, the Benicia Historical Society did not respond to repeated requests for comments.<sup>58</sup> As such, a significant resource of information has yet to weigh in on the Specific Plan. It is likely that the Benicia Historical Society will provide additional information that may reduce the potential for mitigation. However, as is noted, that remains to be seen.

The Draft notes that there are likely numerous significant archeological resources within the plan area, but little information is available as to the existence of those culturally and historically significant resources. There have been no studies<sup>59</sup> or surveys<sup>60</sup> of prehistoric archeology within the Benicia Arsenal. Similarly, no studies have been conducted of historical archeology in the Plan Area.<sup>61</sup> Instead of conducting the studies as part of the Specific Plan, the Draft suggests deferring these studies for project specific assessment. As is noted, “further project-specific environmental review may be necessary for specific development activities. Policy actions proposed by the Draft Specific Plan are only generally defined; specific plans for their implementation have not been finalized. Detailed project descriptions for each specific action do not yet exist...”<sup>62</sup> Apparently, much work remains to be done. However, such deferred mitigation is will not satisfy CEQA requirements where the Specific Plan is not adequately detailed to reduce impacts to less than significant.

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Impacts CULT- 2, 8, 10 and 12 relating to specific structures within the Plan Area all summarily state “while these resources may not have been considered significant resources in 1993 by the Conservation Plan, they now may be eligible for the California or National Register individually as properties or as contributors to the California and National Register Districts.”<sup>63</sup> The Mitigation Measure CULT 2a & 2b are then referenced, which would require a historical review and possible addenda to the Specific Plan or CEQA review. Insofar as all of these buildings will need to be assessed at some point in the near future for mitigation purposes, it would be more appropriate for such review to occur during the Draft process to create one cohesive study, while concurrently avoiding deferred mitigation which may be loose and inconsistent.

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<sup>58</sup> Pg 282 Project DEIR  
<sup>59</sup> Pg 286 Project DEIR  
<sup>60</sup> Pg 287 Project DEIR  
<sup>61</sup> Pg 287 Project DEIR  
<sup>62</sup> Pg 292 Project DEIR  
<sup>63</sup> See Pg 295, 300, 301 Project DEIR

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Utilities and Infrastructure

The DEIR indicates that, according to the Public Works Department, “the maintenance and operations divisions and the Corporate Yard are currently operating at *capacity* (i.e., current staff cannot assume additional workloads, and there is *no additional space* at the Corporate Yard to store new equipment/staff that would be required for expanded operations.”<sup>64</sup> However, no information is provided as to how many additional workers or equipment would be necessary, nor does it indicate whether expansion of the Corporate Yard is possible.

Such analysis is insufficient because General Plan Growth Management Goal 2.4 A specifically requires that development not “overburden the City’s infrastructure.”<sup>65</sup> Similarly, Infrastructure Actions 6.1.1 & 6.1.2 relating to prohibitions on development absent adequate assurances that all public facilities are available and financed ahead of time, does not seem to be satisfied absent additional mitigation measures.<sup>66</sup>

The Draft concludes that there will be a less than significant impact despite the fact that “construction of new streets and water, wastewater, storm drainage infrastructure within the Plan Area would increase the demand for maintenance services within the Plan Area...the City’s maintenance and operations division and Corporate Yard are currently operating at capacity.”<sup>67</sup> While each developer would be required to pay the fair share of its impact, either for improvements to the corporate yard or for acquisition of a second corporate yard, no further information is provided as to whether *improvements* to the Corporate Yard would make any difference as to impact. Similarly, no information is provided as to whether a second corporate yard space has been identified or would be available.

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<sup>64</sup> Pg 314, emphasis added.

<sup>65</sup> Pg 316

<sup>66</sup> Pg 317

<sup>67</sup> Pg 319, emphasis added.

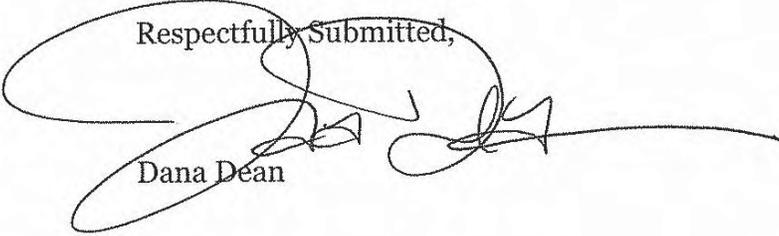
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Conclusion

Due to the inadequacies detailed in this and previous correspondence, the DEIR must be revised and recirculated.

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Respectfully Submitted,



Dana Dean