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Via Email and US Mail

Craig Chalfant
Long Beach Department of Development Services
333 W. Ocean Blvd., 5th Floor
Long Beach, CA 90802

Re: Comments on Revised MND 15-09, the Purported Studebaker LB, LLC
Tank Removal Project

Dear Mr. Chalfant:

On behalf of Los Cerritos Wetlands Land Trust (LCWLT) and the University Park Estates Neighborhood Association (UPENA), we request that you prepare an Environmental Impact Report (EIR), in compliance with the California Environmental Quality Act (CEQA) before further reviewing the requested project of Studebaker LB, LLC on land that is owned by Tom Dean on the southeast corner of Loynes Drive and Studebaker Road. Although we applaud the City's decision to revise the December 2009 mitigated negative declaration prepared for the Studebaker Project (hereinafter referred to as "the Project"), we believe that the revised MND does not cure the deficiencies of the original MND. Rather, the revised MND creates a segmentation, or "piecemealing" problem that was not present in the original MND because it merely deletes a description of the post-demolition use of the property. If the City certifies the MND and approves this Project, it will do so in violation of CEQA.

The site of the proposed Project is the same site formerly proposed for a Home Depot location, a project that was pulled after the Los Angeles Superior Court invalidated its environmental impact report (EIR) and ordered its project approvals to be rescinded. As described in our letter of December 30, 2009 (herein incorporated by reference), this Project would require Studebaker LB, LLC to remove four large aboveground storage tanks (ASTs), cutter tank # 2, and conveyance pipelines. (Revised MND, p. 2 and Fig. 2.)

Despite the fact that the construction impacts of the Studebaker Project would be similar to those of the Home Depot Project, for which the prior environmental review was found to be legally deficient, the City is proposing to rely on a revised Mitigated Negative

Declaration (MND) that is even more inadequate than the environmental documentation already found deficient by the Court. If the City approves an MND, it would violate the California Environmental Quality Act (CEQA) even more clearly than it did when it approved a defective EIR for the Home Depot Project.

The proposed Studebaker Project would have potentially significant impacts on biological resources, air quality, traffic, hazardous materials, and land use regulations. It is located in a particularly sensitive location, less than a 1/2 mile from two schools, and adjacent to the Los Cerritos Wetlands. Although LCWLT and UPENA agree that the location should be cleaned up and the ASTs removed, this key parcel should be preserved as open space or developed with visitor-serving interests in mind and designed to welcome people to Long Beach, its beautiful coastline, and its wetlands. The ASTs should be replaced by wetlands restoration or a showcase project, not a vehicle storage lot.

Therefore, the City must require preparation of a legally adequate EIR before proceeding further with its consideration of the Studebaker Project. Ideally, the City should encourage the site owner to propose a revised project that is suitable for the area.

We reiterate that we have no notice that the City ever complied with the Court's order to rescind its prior approvals. We would appreciate confirmation of the City's non-compliance, or of its compliance if the City has rescinded the approvals.

I. The Revised MND Improperly Segments Review of the Tank Removal from Review of the Dry Vehicle Storage Yard.

The only significant difference between the December 2009 mitigated negative declaration and the January 2010 revised mitigated negative declaration is that the revised MND removes all references to a dry vehicle storage yard. For example, the entire paragraph at the bottom of page 2 in the original MND that stated among other things that the property would be converted "to a dry vehicle storage lot" has been deleted. Although this might lead one to believe that the dry vehicle storage yard component of the Project was being abandoned, this is not the case. Rather, we have been informed that there are two outstanding business license applications for the Project address. At least one of these applications seeks approval of dry vehicle storage operations. Thus, it appears that instead of correcting the inadequate project description contained in the December 2009 MND with the revised MND, the City has instead chosen to provide less information and thereby has segmented the demolition portion of the project from the post-demolition foreseeable use.

Pursuant to CEQA, a project encompasses “the whole of an action.” (Guidelines § 15378.) Specifically, “[a] public agency is not permitted to subdivide a single project into smaller individual subprojects in order to avoid the responsibility of considering the environmental impact of the project as a whole.” (*Orinda Assn v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1171.) In this case, the City’s improper deletion of the dry vehicle storage yard aspect of the Project from the MND removes the storage yard’s impacts from consideration by decision makers and the public, even though the entire Project remains under City consideration. The court in *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214 set out three criteria to be used to determine what constitutes the whole of a project for purposes of segmentation: relationship in time, physical location and the entity undertaking the action. (*Id.* at 1227.) All three criteria point to improper segmentation in this case. Both the tank removal and the dry vehicle storage yard were proposed by Tom Dean and Studebaker, LLC for the same 17-acre plot of land. Perhaps most telling, the dry vehicle storage lot cannot be implemented until the ASTs are cleared from the site. Therefore, these actions clearly constitute one project, and the City has improperly segmented its environmental review, in violation of CEQA.

II. The City Must Invalidate All Approvals for the Home Depot Project Formerly Planned on the Site To Comply With the Court’s Order to Do So.

The Studebaker Project is proposed for a site formerly slated for a Home Depot design center (“the Home Depot Project”). An EIR prepared for the Home Depot Project was invalidated by Superior Court Judge John A. Torribio. (*Los Cerritos Wetlands Land Trust and University Park Estates Neighborhood Association v. City of Long Beach*, Los Angeles Superior Court case no. BS105960.) A copy of the notice of the ruling is attached. (Encl. 1.) A copy of the March 25, 2008 Writ of Mandate issued by Judge Torribio is also attached. (Encl. 1.)

While Judge Torribio ordered the City to rescind its certification of the EIR in the Home Depot case within 30 days of the issuance of the Writ of Mandate on March 25, 2008, as far as we know, the City has not yet complied. We request that the City take immediate action to comply with Judge Torribio’s order by rescinding the certification of the EIR and revoking its approvals for the prior project, if it has not already done so. **The City Must Consult With Responsible and Trustee Agencies.**

It is unclear from the documents that are available for public review if the City has consulted with appropriate state and regional agencies by sending them a copy of the revised MND. CEQA *mandates* that the lead agency consult with the Department of Fish

and Game as a responsible and trustee agency. (Pub. Resources Code sections 21153 (a) [“local lead agency shall consult with, *and obtain comments from*, each responsible agency, trustee agency, any public agency that has jurisdiction by law with respect to the project. . .” emphasis added]; CEQA Guidelines § 15086(a) [“The lead agency shall consult with and request comments on the draft EIR from: (1) Responsible agencies, (2) Trustee agencies with resources affected by the project, and (3) Any other state. . . agencies which have jurisdiction by law with respect to the project or which exercise authority over resources which may be affected by the project. . .”].)

In this case, the Department of Fish and Game is both a responsible agency and a trustee agency since it has jurisdiction over impacts to threatened species and it would be required to subsequently consider issuance of a take permit pursuant to Fish & Game Code section 2081. (Encl. 3, [Fish and Game letter regarding Home Depot Project]; see CEQA Guidelines 15386(a) [definition of trustee agency]; 15381 [definition of responsible agency].)

The City also must consult with the Department of Toxic Substances Control (DTSC), as the Department has requested repeatedly in prior correspondence. (Encl. 6, p. 2 [“Insofar as your development activities are concerned, DTSC is requesting an active supporting role as a Responsible Agency in accordance with [CEQA]”].) During the administrative process for approval of the Home Depot Project, DTSC requested that it be treated as a responsible agency for future purposes of CEQA. It asserted jurisdiction in its September 15, 2005 letter (AR 8646), and reasserted jurisdiction in its October 20, 2005 letter denying the City’s request to turn over jurisdiction to the Regional Water Quality Control Board. A Corrective Action Consent Agreement was signed containing remediation requirements that would accompany the Home Depot Project, but now that project is not being advanced, and a new project has been proposed. The City must notify DTSC of this proposed new project and provide them with a copy of the revised MND if it has not done so already. Moreover, DTSC is not listed in the revised MND as a public agency whose approval is required. (Revised MND, p. 3.)

Additionally, the City must consult with AQMD about removal of the tanks. (See Encl. 5.) Significant Volatile Organic Compounds (VOCs) could be released as the tanks are taken apart, or may be released from the soils after the tanks are removed. The City also must consult with Caltrans regarding traffic impacts. (Encl. 4.) The City must consult with the California Coastal Commission as well, since it appears that the approval of this Coastal Development Permit (CDP) would raise a substantial issue of compliance with the Coastal Act. (Encl. 9.) Finally, historical maps show that the Project is proposed for a parcel that was historically public trust tidelands that were reclaimed from Alamitos Bay after 1896. (Encl. 8.) Therefore, the City should obtain approval from the State

Lands Commission before approving a use that is incompatible with the public trust since the Commission has continuing jurisdiction over public trust lands within the City.

III. AN EIR IS REQUIRED.

The revised MND and the Project must be disapproved as proposed. CEQA requires preparation of an EIR whenever a project *may* have a significant adverse impact on the environment. (Pub. Resources Code § 21151.) “If there is substantial evidence of a significant environmental impact, evidence to the contrary does not dispense with the need for an EIR when it can still be ‘fairly argued’ that the project may have a significant impact.” (*Friends of “B” Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1001.) Thus, an MND is appropriate only when, due to the nature of the project or the mitigation measures that have been accepted by the project proponent *before the CEQA review process begins*, there is not a fair argument that there may be adverse impacts.

According to Public Resources Code section 21064.5:

“Mitigated negative declaration” means a negative declaration prepared for a project when the initial study has identified potentially significant effects on the environment, but (1) revisions in the project plans or proposals made by or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.

Additionally, “the significance of an activity may vary with the setting.” (CEQA Guidelines § 15064 (b).) For example, the threshold for finding air quality impacts to be cumulatively significant will generally be lower in polluted airsheds than in cleaner ones. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718-721.)

The current project has many of the same impacts as the Home Depot Project would have had, and far fewer mitigation measures have been proposed for the Studebaker Project than for the Home Depot Project. Nevertheless, an MND, rather than an EIR has been prepared. In addition to the information provided in this letter, we incorporate the entire record in the Long Beach Home Depot case by reference, since extensive evidence existed in that case of the significant impacts that would occur from developing the site in a way that was not sensitive to its historical origin as a wetlands.

Because there is substantial evidence to support a fair argument that there may be significant adverse impacts, even after mitigation, an EIR must be prepared, circulated, and ultimately certified, that accurately describes the Project, assesses the Project's significant impacts, identifies mitigation measures that can reduce those impacts, and describes and compares the environmental impacts of potentially feasible alternatives. Further, in light of Judge Torribio's prior ruling on the inadequacy of the EIR for the Home Depot Project, the City should prepare an EIR for the currently proposed project with more attention to detail and more complete disclosures of impacts, alternatives and mitigation measures than was previously provided. The City must not attempt to rely on a document that claims there will be no significant impacts. Ultimately, the Project may not be approved if there are significant adverse impacts unless all feasible mitigation measures or alternatives have been adopted.

A. Numerous Potentially Significant Impacts Will Likely Occur With Construction and Operation of the Studebaker Project.

1. An Accurate and Full Project Description Must Be Provided.

The Studebaker Project is misleadingly entitled "Studebaker LB, LLC Tank Removal Project," when in fact it remains a project to remove the tanks in order to build a vehicle storage lot for the retail sale of vehicles. Although the revised MND no longer refers to the vehicle storage lot discussed in the December 2009 MND and the revised MND states, "No other activity or land use is proposed for this project," (revised MND, p. 2), this claim is dubious in light of Copart Inc.'s business license application discussed below.

Since the revised MND has deleted the vehicle storage yard aspect of the Project, essentially no information is provided about the long term usage of the Project site. This must be returned to the environmental review, in the form of an EIR. When the dry vehicle storage lot was included in the MND, LCWLT and UPENA were concerned about whether storage would actually be "dry" and about other unanswered questions such as who will have access; if the vehicles will be sold for parts and/or for scrap; how the vehicles will be transported on and off the premises; if any vehicles will be operable; and the hours of operation. As these aspects of the dry vehicle storage yard component of the Project will likely have impacts, they must be disclosed and their impacts analyzed and mitigated. If another Project is proposed in place of the storage yard, it should be disclosed and its impacts analyzed in an EIR.

It is not clear that a storage yard for junk vehicles can be considered an industrial use within the meaning of section 21.33.020 of the City's zoning ordinance. Even if it is, City Zoning Ordinance 21.52.410 requires a Conditional Use Permit for some industrial uses. Which SIC Code of section 21.33.020 conforms to the proposed use? Municipal code section 21.33.070 states, "Any use or activity not identified by an SIC code included in Table 33-2, or any use or activity not interpreted by the Zoning Administrator as belonging to a listed SIC code, shall be prohibited."

It has been reported that a company called "Copart Inc." applied in November for a business license at the Project site.

(<http://www.longbeachcomber.com/story.aspx?artID=1748>; encl. 11.) Copart Inc. is a car retailer that sells used cars, many of which are salvaged or collision-damaged cars, through online sales. (<http://www.copart.com/c2/aboutCopart.html>.) Copart Inc.'s other Los Angeles-area facility is located at 8423 South Alameda in the City of Los Angeles. The City should carefully examine whether there have been problems at the Alameda location, including consulting licensing and regulatory agencies to determine if there have been any complaints about, or citations of, the Alameda Copart facility. In any case, an EIR for the Project should disclose that a retail operation is planned and analyze the impacts of that operation and mitigation measures for those impacts. This EIR must also be the same EIR that analyzes the impacts of the tank removal aspect of the Project, as described above in section I.

Depending on who has access to the site, how often, and for how long, there could be significant public safety impacts associated with creating a destination for significant numbers of people close to the AES power plant. With the Home Depot Project, the AES power plant successfully sued the City for imposing mitigation measures, including Measure 4.6.10 to review the Operating plans of the Power Plant to determine "whether additional measures/revisions are necessary based on the project implementation." (Encl. 1, p. 2.) Depending on the future use of the Studebaker Project, it will be important to deal with the public safety impacts of allowing a significant number of people in close proximity to a power plant.

2. Biological Resource Impacts Are Likely.

Impacts to biological resources are likely to occur, and such impacts were identified (albeit inadequately) in the EIR for the Home Depot Project. Evidence that is submitted in support of the revised MND does not eliminate the need for production of an EIR to address biological impacts, since prior expert evidence identified potentially significant impacts that resulted in the requirement for preparation of an EIR. "If there is disagreement among expert opinion supported by facts over the significance of an effect

on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.” (CEQA Guidelines § 15064 (g).) Thus, even if the Project proponents’ current consultants disagree with such assessments, an EIR should be prepared to resolve the disputes. (*City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 247-249 [expert disagreement about extent of a wetlands required preparation of EIR to resolve dispute]; *Friend of Old Trees v. Department of Forestry and Fire Protection* (1997) 52 Cal.App.4th 1383, 1398-1403 [expert dispute regarding project’s impacts on water supplies required further environmental review].)

The City’s own biologists have found a wide variety of wildlife *on the Project site* including the following: butterflies; mammals including rabbits, squirrels and raccoons; amphibians, including the Pacific tree frog; reptiles; and birds, including numerous birds associated with wetlands such as Osprey, the Snowy egret and Great blue herons, Black-crowned herons, and gulls. (AR 6:1239-1240.) Also, even with some of the site paved, the soil underneath the asphalt would presumably be the original marsh-bottom soil, in which case it would have salt content and soil characteristics of salt marsh soils. The revised MND states that the Los Cerritos Wetlands are located 300 feet southwest of the Project site (revised MND, p. 3). The site is adjacent to tideland waters, and wetland indicators, including water, and wetland plant species have been identified at various times on the site.

a. Impacts to the Southern Tarplant Will Occur.

The Department of Fish and Game, in its comments on the EIR for the proposed Home Depot Project stated, “Surveys during an appropriate season, when the plants [including one endangered species - the southern tarplant] can be detected, are needed to support the conclusion that these species are not present.” (Encl. 3.) Judge Torribio noted Fish and Game’s comments in his finding that the EIR’s analysis was legally deficient. (Encl. 1, p. 3.)

The current analysis does not suffice for purposes of an MND, since it notes that “One individual southern tarplant was observed on the Project site on June 1, 2009 (LSA, 2009).” (Revised MND, p. 15.) The presence of a sensitive species on the site that would be removed requires a finding of significance, and therefore preparation of an EIR. (CEQA Guidelines 15065; *Mira Monte Homeowners Association v. Ventura County* (1985) 165 Cal.App.3d 357, 363-364.)

b. Impacts to Wetlands or Potential Wetlands Could Occur with Site Grading.

The December 2009 project required a “three-inch rock base” to be “graded, leveled, and compacted over entire Property” (MND p. 2); this will destroy any biological function that remains on-site. The same result would be expected of any material brought in to cover site contamination, even though such material is not mentioned in the revised MND. The revised MND uses the heavily-disturbed nature of the land to assume that it has no biological value, and consequently, that no biological impacts will occur. This fails for two reasons. First, as identified by Judge Torribio, the land is not nearly as disturbed as the MND asserts. Second, the disturbed condition of this land, abutting the Los Cerritos Wetlands, necessitates an analysis of the cumulative impacts that further degradation or redevelopment of this parcel may cause. That the area is merely a “stop off” for wildlife does not reduce its biological value, especially for migrating birds. Over 90% of wetlands along the Pacific Flyway have been decimated.

(<http://ceres.ca.gov/ceres/calweb/coastal/wetlands.html> [“Since the 1850's 90 per cent of California's original coastal wetland acreage has disappeared, and many of the remaining wetlands are in danger of being further degraded or destroyed due to landfill, diking, dredging, pollution, and other human disturbances.”]) As a result, each remaining wetland parcel is that much more important, regardless of its degraded condition.

Judge Torribio’s ruling in connection with the Home Depot Project makes clear that an adequate wetlands delineation must be conducted before the City may conclude that there will be no impacts from grading and graveling the entire site. The revised MND states that Glenn Lukos Associates “composed a jurisdictional delineation letter report dated March 7, 2007.” (Revised MND, p. 14.) However, Judge Torribio’s ruling of February 21, 2008 post-dated this report and shows that it is not adequate as a delineation report. Judge Torribio's ruling stated:

The need for wetlands delineation was ignored. Even degraded areas are protected because of the potential they have for returning to natural conditions. *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App. 4th 493, 506. Despite respondents’ contention that the area is totally paved and developed for 50 years, a biologist reported that “Flat unvegetated dirt in the bottom of the basins surrounds each abandoned tank.” Photographs indicate that the berms and swales are at least vegetated. 652 (views 5 and 6). Furthermore, respondents’ own biologist found wildlife on the site, further evidence that the site is not “totally paved.” Respondents have not conducted a delineation and there is no substantial evidence in the record to support their assumption

that no portion of the project site needed to be evaluated for its potential of being wetlands.

(Encl. 1, pp. 6-7.)

A biologist who had been onsite reported “*Flat, unvegetated dirt in the bottom of the basins* [within containment berms] *surrounds each abandoned tank.*” (AR 6:1234, emphasis added.) Detailed, ground-level, color photographs of the Project site confirm that there is dirt, not concrete, surrounding each abandoned tank. (AR 3:652 [especially views 1, 2, 4, 5, and 6].) In fact, concrete on-site is limited to a roadway through the middle and to some berm slopes which are “at least partially, covered with a lining and concrete.” (AR 6:1234.) Pictures of these berms reveal a significant amount of vegetation along the berms. (AR 3:652 [views 5 and 6].)

The revised MND claims that the site “does not have any federally protected wetlands.” (Revised MND, p. 17.) However federal law and state law regarding wetlands are significantly different. Whereas federal law requires the presence of three wetlands indicators, the law in California recognizes that the presence of a *single* one of the three potential wetlands indicators is sufficient to indicate the presence of a wetland.

[W]etlands must have *one or more* of the following three attributes: (1) at least periodically, the land supports predominantly hydrophytes [FN3]; (2) the substrate [FN4] is predominantly undrained hydric soil; and (3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of each year.

(*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1293-1294, citing (*Bolsa Chica Land Trust v. Superior Court, supra*, 71 Cal.App.4th at p. 506.)) In keeping with cases such as *Bolsa Chica Land Trust*, the City must conclude that portions of the Project site must be reevaluated for their potential of being wetlands under California’s criteria for wetlands, not merely federal criteria.

c. Impacts to Site and Nearby Wetlands Could Occur With Operation as a Vehicle Storage Lot.

The segmented Project itself will have impacts on biological resources. Although the revised MND does not mention the vehicle storage lot component, it appears from the existing business license applications that such a storage lot is still under consideration. These comments address this concern. The December 2009 MND states that fluids will be drained from vehicles, residue from contaminated parts, leaching of metals and other

contaminants from vehicles as vehicles rust and corrode would likely create fluids that may then be transported to nearby waterways. Heavy metals and other toxins bioaccumulate and move up the food chain as birds consume contaminated shellfish and other invertebrates. Heavy metals including lead, cadmium, chromium, copper, nickel, aluminum, arsenic, and mercury are predictable in a dry vehicle storage area. Suspended solids from stored vehicles and their movement can reduce clarity and availability of oxygen to aquatic environments. See, for example, G.S. Bilotta and R.E. Brazier, Understanding the influence of suspended solids on water quality and aquatic biota, Water Research, Volume 42, Issue 12, June 2008, Pages 2849-2861, available at http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6V73-4S7BDC1-1&_user=10&_rdoc=1&_fint=&_orig=search&_sort=d&_docanchor=&view=c&_searchStrId=1149423327&_rerunOrigin=google&_acct=C000050221&_version=1&_urlVersion=0&_userid=10&md5=9c6980db9eb528b0a89bc4389e3465a0. If solids from vehicles reach the estuary, they can effectively smother plants and invertebrates.

3. Toxic Substances Impacts Are Likely.

The December 2009 MND essentially neglected to analyze the actual tank removal and soil remediation processes and focused instead on the operational impacts of a vehicle storage facility. The revised MND suffers the same flaw. Consequently, the revised MND has given short shrift to hazardous materials, even though the Project involves the removal of four, four-story petroleum storage tanks, and one of these tanks still holds 235,000 gallons of fuel. The revised MND even admits to subsurface soil contamination by petroleum hydrocarbons and arsenic. (Revised MND, p. 24.) When the proponent of the Home Depot Project analyzed hazardous material issues in an EIR, the DTSC commented that the EIR analysis had significant shortcomings that required correction. The analysis of the MND for the proposed Studebaker Project falls far short even of the inadequate level of analysis that was evident in the Home Depot EIR.

The storage tanks subject to removal by the Project are single-hulled and sit directly on dirt. Due to the passage of time and the interaction between the metal and the dirt, and especially due to the saltwater influence in this area, tank bottoms may be completely rusted out. We have been informed by people with relevant engineering background that leaching from the compromised tank bottoms could have produced a 20 to 30-foot deep “punch bowl” plume beneath each tank. Given that the diameter of the tanks varies between 160 to 200 feet (revised MND, p. 1), the likely amount of contaminated soil underneath each tank may be conservatively estimated as at least 98,125 cubic yards. Half the volume of a sphere of diameter of 150 feet is 98,125 cubic yards; the formula for calculating the volume of a sphere is $\frac{4}{3} \pi r^3$, which is then divided in half to reflect the “punchbowl” effect, resulting in a calculation of $\frac{4}{3} *$ (where “*”)

means “times” to reflect multiplication) $3.14 * 75 * 75 * 75 * \frac{1}{2} = 883,125$ cubic feet, or 98,125 cubic yards of contaminated soil. A single 10-wheeled diesel truck can move about 10 cubic yards of dirt per trip. Therefore, approximately 9,813 roundtrips would be required to remove the soil from under a single one of the four ASTs, with associated diesel emissions and air quality impacts. The revised MND does not attempt to quantify, analyze, or mitigate these potential future emissions associated with removal of contaminated soil, as is foreseeably necessary. Please provide analysis that either confirms these calculations or provides a basis for the City’s conclusion that there will not be any significant impacts.

If contaminated soil is left in place, as seems to be assumed by the revised MND, VOCs will be released because there will be no cap. The experience of the Carousel Tract in Carson on the site of an oil tank farm, where soil beneath removed above ground storage tanks continues to emit methane and benzene, should not be repeated. (Encl.7 [newspaper article describing problems of housing tract built on former tank farm site].) Solvents in the soil are also likely to be a problem, given the prior industrial use of the area. The revised MND does not attempt to quantify, analyze, or mitigate potential future emissions of such hazardous materials as methane, benzene, or solvents.

Given the high water table in the wetland area, contaminants leaking from the tanks have likely migrated, possibly into the nearby Los Cerritos Channel and the San Gabriel River, which is a water of the United States. The San Gabriel River is already listed as an impaired water body on the State’s 303(d) list, so additional impacts to the river should be analyzed as cumulative impacts.

Such probable scenarios as removal of contaminated soil, emission of pollutants from soil if it is not removed, and migration of contaminants into nearby waters should be assessed in an EIR.

Despite the corrective action plan in place and DTSC’s prior comments on the Project, the revised MND assumes soil remediation will not be necessary. The revised MND assumes soil samples taken in the future will come back clean because it asserts no subsurface disturbance will occur. As stated in the Geology and Soils discussion, “the potential soil loss is minimal as the project does not involve subsurface disturbance.” (Revised MND, p. 22.) Accordingly, the MND fails to analyze the impact that soil remediation activities will have on air quality, water quality, noise, or traffic. Instead, the MND anticipates sample testing and provides that, “in the event remediation is necessary, the DTSC will determine what remediation is required of the project owner.” (Revised MND p. 25.) Such testing and remediation will only occur if future development is planned. (*Ibid.*) Since such future development, in the form of a dry vehicle storage

yard, is planned, this testing must occur now, and the impacts of remediation should be assessed in an EIR. The revised MND's assumption of no contamination is problematic for several reasons, the most important of which is that remediation will likely be required so it must be analyzed before the Project is approved. Segmenting a foreseeable component of, or mitigation measure for, a project from the environmental analysis of the project is impermissible project segmentation.

4. Deferral Of Mitigation for Toxic Substance Impacts is Inappropriate.

Not only has the revised MND failed to adequately disclose the Project's potential impacts to the public and to decision makers, but it has deferred any mitigation of the Project's impacts in violation of CEQA. Soil remediation would certainly result in significant impacts to the environment. CEQA requires discussion of any mitigation measures, and their impacts, in the environmental document being reviewed by decision makers. Since this MND does not contemplate removal of dirt, it fails to analyze the impacts removal would have on air quality (dust and diesel from trucks), traffic, noise, and other areas.

Courts have held it is a violation of CEQA to approve a project based on a negative declaration without first resolving how adverse impacts will be mitigated. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296.) The court in *Sundstrom* found that the development and implementation of mitigation measures after project approval was a violation of CEQA. (*Id.* at 306-308; see also *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1396.) Courts have prohibited the deferral of mitigation because "[t]here cannot be meaningful scrutiny of a mitigated negative declaration when the mitigation measures are not set forth at the time of project approval." (*Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 884.)

The mitigation measures for numerous potentially significant effects of this Project are mitigated only by statements that future plans would provide mitigation, without specifying the mitigation measures or requiring that the plans be submitted prior to Project approval. Plans and mitigation measures need to be completed and submitted as part of the CEQA review process, and prior to the approval of any environmental review document. (Pub. Resources Code § 21080(c)(2).)

5. Traffic Impacts May be Significant.

The revised MND claims that no soil will be moved on or off of the project site; however, it also states, “DTSC will determine what remediation is required of the project owner.” (Revised MND, p. 25.) If, after adequate surveys are taken, DTSC determines that contaminated soils must be removed from the Project site, a significant number of vehicle trips will be required to remove that soil and import new fill. Additionally, due to the revised MND’s segmentation of the dry vehicle storage yard, the MND fails to calculate the number of vehicle trips that will be required to bring enough gravel to the site to create a three inch rock base for the vehicle storage lot. There is no disclosure of the traffic impacts of operation of the storage facility, both in terms of bringing vehicles in and taking them out, or by potential customers for vehicles.

6. Land Use Impacts Would be Significant.

CEQA requires an analysis of a project’s consistency with applicable land use plans. (CEQA Guidelines section 15125.) The proposed project, including the reasonably foreseeable dry vehicle storage yard, would be inconsistent with the City’s Municipal Code, the Coastal Act, and California’s public trust doctrine. These inconsistencies must be addressed in an EIR.

a. The Municipal Code Open Space Requirement Would be Violated.

The revised MND does not address the Project’s failure to meet the LCP’s open space requirements. The City’s LCP for the area requires “A minimum of thirty percent of the site shall be developed and maintained as useable open space.” (Encl. 9, p. 15.) However, there is no provision for open space in the proposed Project because the dry vehicle storage has been deleted from the MND.

b. A Coastal Development Permit Would be Required But Coastal Act Impacts Prevent Such Issuance.

Any development in the Coastal Zone requires a Coastal Development Permit, pursuant to the California Coastal Act. Removal of ASTs and replacing them with the Studebaker Project is clearly “development” within the meaning of the Coastal Act. The revised MND states that such a permit would be approved. (Revised MND, p.3.) However, the Coastal Commission’s staff has recommended against approval of a LCDP for development on this site for the Home Depot Project for reasons that are also applicable to the Project proposal. (Encl. 9, October 10, 2007 Staff Report.) The

Commission found substantial issues and overturned the City's approval of a permit on the following grounds, among others: (1) approval of a land use that is not consistent with the certified LCP could result in unanticipated and cumulative impacts to the adjacent area and may prejudice future decisions of the area as the LCP is currently being updated; (2) the development did not meet the LCP opens space requirements; (3) the development could adversely affect wildlife, wetlands, and the adjacent tidal waters; and (4) the traffic generated by the commercial development may adversely impact coastal access. (Encl. 9, p. 1.)

Along with its other discussion of impacts, the Coastal Commission staff stated:

A major legal obstacle exists to approving any development on the project site as the parcel where the current development is proposed was created through an unpermitted lot line adjustment in 1997 (Exhibit # 5). . . . Since the underlying lot is not considered to be a "legal" parcel, a coastal development permit cannot be approved to develop the lot with the proposed commercial development, particularly when the proposed development includes a further subdivision of the parcel that was not legally created.

(Encl. 9, p. 4.) Since the Coastal Commission staff has stated that a coastal development permit cannot legally be granted for development on the site, this issue should be resolved before the City pursues any further processing of the requested permit.

c. Public Trust Restrictions on the Property would be Violated by Approval of A Dry Vehicle Storage Lot.

The public trust doctrine prohibits the type of land use proposed by Studebaker LB, LLC in the December 2009 MND and apparently still sought, though not disclosed in the MND. Since the Los Cerritos Wetlands Land Trust and the University Park Estates Neighborhood Association commented on the EIR for the Home Depot Project, they have discovered historical photographs and mapping of the area that depict the Project site as part of Alamitos Bay as recently as 1896, and as wetlands as recently as 1951. (Encl. 8.) Any land that was wetlands or seaward of the mean high tide line when California's constitution was adopted in 1879 is subject to the public trust. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 479.) The public trust doctrine restricts the uses to which land may be put to those which promote ocean-related commerce, navigation, and fisheries.

(http://www.slc.ca.gov/policy_statements/public_trust/public_trust_doctrine.pdf, p. 7.)

Under California law, the Studebaker Project site is subject to the public trust doctrine because it was composed of historical tidelands in 1879, though they were filled in subsequently. “The tide lands are, and from the beginning of our government have been, dedicated to public use for purposes of navigation and fishery.” (*People v. California Fish* (1913) 166 Cal.576, 596.) Public trust lands may be conveyed to municipalities, but the lands remain “subject to the public trust” and “are not placed entirely beyond the supervision of the state. . .” even after conveyance to a municipality. (*Atwood v. Hammond* (1935) 4 Cal.2d 31, 38-39.) The California Supreme Court stated “The common law public trust . . . insures that when such lands [tidelands] are subject to the trust . . . they remain so subject even after alienation.” (*City of Long Beach v. Mansell, supra*, 3 Cal.3d at 482.) The term tidelands “denotes lands which were seaward of the mean high tide line when the provision [former Article XV, section 3 of the California Constitution prohibiting alienation of tidelands, currently section 3, Article X] was adopted in 1879.” (*Mansell, supra*, 3 Cal.3d at 479, emphasis added.) Therefore, the entire Studebaker LB, LLC parcel retains the legal status of “tidelands” because the land was seaward of the mean high tide line in 1879. Their subsequent fill after 1896 is irrelevant. Even though uses on these public trust lands may change and evolve as lands are filled and separated from the water, the lands remain subject to the public trust. (*People v. California Fish, supra*, 166 Cal. at 600 [Fixing a bulkhead line, erecting a seawall, or filling land “does not contemplate the discontinuance or vacation of the public use of all the land” inside the line or wall because space is still required “for wharves, landings, and approaches”].)

Although the existing tank farm is compatible with the public trust because it is related to coastal-dependent commerce, a dry vehicle storage lot such as proposed by the December 2009 MND is inconsistent with the public trust restrictions on land use in the area, since it is neither public-serving and nor coastal- dependent. The State Lands Commission’s policy document regarding the public trust states the following:

Nevertheless, the essential trust purposes have always been, and remain, water related, and the essential obligation of the state is to manage the tidelands in order to implement and facilitate those trust purposes for all of the people of the state. [Footnote omitted] Therefore, uses that do not accommodate, promote, foster or enhance the statewide public’s need for essential commercial services or their enjoyment tidelands are not appropriate uses for public trust lands. These would include commercial installations that could as easily be sited on uplands and strictly local or “neighborhood-serving” uses that confer no significant benefit to Californians statewide.

In determining what would be an appropriate public trust use, we note that Public Resources Code section 30222 and 30255 place a priority on visitor-serving commercial recreational facilities or coastal-dependent development over other types of development in the Coastal Zone.

7. Direct and Cumulative Air Quality Impacts could be Significant.

When the possible effects of a project are “individually limited but cumulatively considerable,” a finding that the project may have a significant effect on the environment must be made. (Pub. Res. Code § 21083.) When an unmitigated cumulatively considerable impact is found, an EIR *must* be prepared. (CEQA Guidelines, § 15065.) The revised MND states that with mitigation included for Project level impacts, cumulative impacts would be reduced to a less than significant level. As set forth in this letter, the Project’s many impacts have not included adequate mitigation.

The revised MND also fails to disclose, analyze, and mitigate potentially significant air quality impacts of the Project on sensitive receptors, even though the Los Cerritos Wetlands and two schools are located within one-half mile of the Project and single-family residences are sited only 700 feet northwest. (Revised MND, p. 13.) Rosie the Riveter Charter High School abuts the Project site to the north (*ibid*), and Charles F. Kettering Classical Elementary School sits less than one-half mile northwest, across the channel. Site disturbance from tank removal, soil extraction, and gravel compaction will degrade local air quality by increasing the amount of dust and other particulate matter breathed by the students attending these schools, the many residents of University Park Estates, and the wildlife in the Los Cerritos Wetlands. The potential health impacts of this toxic dust must be analyzed in a full EIR.

Particulate matter is associated not only with increases in the severity of asthma and other respiratory illnesses, but with decreased cardiovascular function, cancer, and premature death. (EPA website: <http://www.epa.gov/air/particlepollution/health.html>; 2005 Research Highlights: Health Effects of Particulate Matter and Ozone Air Pollution American Lung Association, 2006, <http://www.northeastdiesel.org/pdf/ALA-05-health-studies-biblio.pdf>; “Recent Research Findings: Health Effects of Particulate Matter and Ozone Air Pollution,” November 2007, California Air Resources Board and American Lung Association of California, http://www.arb.ca.gov/research/health/fs/pm_ozone-fs.pdf.) Particulate matter is a pollutant of primary concern for which the South Coast Air Basin is in nonattainment. Since children living in Long Beach are already exposed to high levels of particulate matter by virtue of living in the basin and near the Ports of Los Angeles and Long Beach, any additional degradation in air quality is likely cumulatively

significant and must be analyzed in an EIR. Further, the soils released during the tank removal process have been exposed to petroleum components and industrial solvents that have likely leached from the single-hull tanks and associated equipment. Consequently, the dust generated by the Project will contain petroleum components, industrial solvents, and heavy metals including lead, cadmium, copper, mercury and arsenic, chemicals that have been associated with neurological and developmental disabilities and cancer. Between the potential for particulate matter and toxic chemical exposure, a fair argument exists that the Project could have significant impacts on sensitive receptors, and an EIR, containing a proper Health Risk Assessment, should be prepared.

Although the revised MND acknowledges the nearby locations of these schools and homes, it declares that the Project will have no significant impacts, without providing any support whatsoever. Thus, the MND's conclusions are not supported by substantial evidence. For example, the MND admits:

Certain population groups are considered particularly sensitive to air pollution. Sensitive receptors consist of land uses that are more likely to be used by these population groups. Sensitive receptors include health care facilities, retirement homes, school and playground facilities, and residential areas. The sensitive receptors nearest to the project activities are the single family residences located approximately 700 feet northwest of the project site across Los Cerritos Channel.

(Revised MND, p. 13.) Instead of disclosing the Project's potential air quality and health impacts to these sensitive receptors, the MND finds that the Project will not have any construction-derived air quality impacts because the estimated number of truck trips will not exceed a SCAQMD threshold. (Revised MND, pp. 11-12.) This determination also underestimates the number of truck trips required because it does not quantify the truck trips necessary to deliver gravel that will be used to cover the site after grading, an aspect of the Project that is concealed by segmentation of the dry vehicle storage yard analysis. Cumulative impacts are not addressed either, in violation of CEQA.

Since the revised MND fails to disclose the likely significant impacts that this Project will have on the health of schoolchildren, it does not ensure that they are fully mitigated, as required. Effective dust control measures and other mitigation for all impacts must be included in a comprehensive EIR.

IV. Documents Have Not Been Made Available as Required by the Public Records Act.

The Los Cerritos Wetlands Land Trust sent a Public Records dated September 25, 2009, requesting documents that included GIS Data for the historical extent of the Los Cerritos Wetlands and adjacent areas. (Encl. 10.) The City Attorney responded that it anticipated answering the request “on or before 10/22/2009.” (Encl. 10.) Unfortunately, there has been no further response. This failure to respond violates the Public Records Act. We request an immediate response. We note that the City’s failure to provide required documents was one of the legal violations identified by Judge Torribio in his ruling. (Encl. 1, [“Some of the documents relied on by respondents were not made available to the public for review”].)

In addition to the City’s failure to produce requested documents in response to the LCWLT’s Public Records Act requests, public participation in the environmental process for the Tank Removal Project has been curtailed by the City’s decision to schedule the comment period during the holiday season, from December 1-31, 2009. The Second District Court of Appeal has recognized that “Environmental review derives its vitality from public participation.” (*Ocean View Estates HOA v. Montecito Water District* (2004) 116 Cal.App.4th 396, 400.) Not only are potential commenters among the public and among staff at public agencies such as Fish and Game, Caltrans, and DTSC often out of town during the month of December, but City employees are more likely to be out of the office and unable to assist potential commenters.

Use of the minimum statutorily-required comment period, without accommodations for vacation time during the holiday seasons thwarts public participation and violates the spirit of CEQA. Members of the public hold a “privileged position in the CEQA process; such status reflects both “a belief that citizens can make important contributions to environmental protection and...notions of democratic decision-making.” (*Concerned Citizens of Costa Mesa, Inc v. 32nd Ag Assn* (1986) 42 Cal.3d 929, 936.)

Conclusion

The Project proposed by Studebaker LB, LLC is inappropriate for its location. It is neither coastal-dependent nor the highest and best use of this key parcel in the Coastal Zone. Although the applicant’s true intentions are somewhat concealed by its segmentation of future uses from its application for a permit to demolish and remove the tanks, the Project as it was described in the prior MND appears to be a retail project in an Industrial zone, and is thus noncompliant with the City’s own Municipal Code and plans, as well as the applicable laws protecting the coast and the environment of California.

Clearing the site of the ASTs that are currently there is a laudable goal, and is legally-mandated, but such site clearance must be conducted in a way that is sensitive to the environment surrounding the Project site, including the two schools and the nearby Los Cerritos Wetlands. Once the ASTs are removed, any further use of the site must be compatible with the area, and the impacts of that development must be fully analyzed and mitigated through an EIR review process. This EIR should include both the tank removal and the end use aspects of the long-term Project before the City may consider approval.

Sincerely,



Douglas P. Carstens
Michelle Black

Enclosures:

1. Superior Court of California, County of Los Angeles Order dated February 21, 2008 and Writ of Mandate.
2. DTSC Letter dated June 15, 2005 to Ms. Angela Reynolds
3. Department of Fish and Game Letter dated June 15, 2005 to Ms. Angela Reynolds
4. Caltrans letters dated June 15, 2005 and August 1, 2005.
5. AQMD Comment letter dated June 16, 2005.
6. DTSC Letter dated September 15, 2005
7. December 20, 2009 Daily Breeze article "A Carson neighborhood's future is on hold"
8. Map of Historical Extent of Alamitos Bay and wetlands in Long Beach
9. September 20, 2007 California Coastal Commission staff report re Appeal Number A-5-LOB-06-400 of applicants Studebaker LB, LLC (Tom Dean) & Home Depot-SSC-West Coast
10. Public Records Act Response Letter dated October 14, 2009 and Request Form dated September 25, 2009
11. "From Home Depot to a Vehicle Depot", Sean Belk, Beachcomber, December 18, 2009